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DOING BUSINESS IN INDIA 2008

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FOREWARD

The robust growth of India's economy coupled with the significant rise in the number of Indians in dominant positions in the global corporate world, further with the Indian entrepreneurs making their mark in the international arena, clearly indicate that India and Indians will in the coming years be at the core of the global economy. Another indicator of India's success is the reverse migration of NRIs or PIOs who are coming back to their country after working with the globally admired companies. Also encouraging is the fact that a vast number of foreign nationals are coming to India for employment since an "India experience" is considered important for their future career growth.

We at Paras Kuhad & Associates, Advocates decided to bring out this publication to assist several foreign businesses who await opportunities to invest in India. I am sure that this publication will assist such foreign investors and accelerate foreign investment in India. I congratulate the Editorial Team of our Mumbai Office for making this publication possible and for a job well done.

January 01, 2008

Paras Kuhad
Managing Partner

FOREWARD

The India story has just begun! Looking back, just about 13 years ago, thanks to the vision of the then Finance Minister Dr. Manmohan Singh who is now the Prime Minister, India freed itself from the clutches of cumbersome government controls and since then has not looked back. The new millennium multiplied the growing confidence of the foreign investors in India and investments across sectors began to pour. India continued to march ahead of several growing economies and now competes with China for the top position of the most preferred investment destination worldwide.

I congratulate our Editorial Team for their efforts for this publication and for the good job. We will publish further updates on significant change in policies, regulations and guidelines on foreign direct investment.

January 01, 2008

Manish Desai
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PREFACE

2007 has been a very successful year for India in terms of foreign direct investment. The economy has grown at the rate of 9% and has continued to attract investments in nearly every sphere of industrial and commercial activity from all over the globe. Recent reports reflect that India, amongst the BRIC[2] nations, is the top grocer of private equity deals. What is most encouraging is that the Government of India continues with its commitment to open the Indian markets to foreign investors.

The Editorial Team of Paras Kuhad & Associates, Advocates, Mumbai has prepared this book to provide investors, particularly foreign investors an overview of the legal, business, employment, regulatory and investment environment of India. The information provided in this publication is not exhaustive and is meant only to serve as a guide. Readers are advised to seek specific advice before acting on the information provided. The main purpose of this book is to help the readers to navigate with ease through myriads of issues of law and business relating to investments in the India. The information provided in this book states the position as on December 31, 2007.

For any further information regarding this publication, please direct your queries to us or to the contacts listed at the end of this publication.

January 01, 2008

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[2] Brazil, Russia, India and China

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POLITICAL MAP OF INDIA

1. INDIA – AN INTRODUCTION

1.	Capital	New Delhi
2.	Land area	3.3 million square kilometers (7th largest country in size)
3.	Population	World's 2nd most populous country with over 1.25 billion people.
4.	Languages spoken	Eighteen principal languages including Hindi which is the major language. English widely accepted as business language.
5.	Literacy	65%.
6.	Religions practiced	Hinduism, Islam, Christianity, Sikhism, Buddhism, Jainism, etc.
7.	International Airports	Mumbai, Delhi, Kolkata, Chennai, Bangalore, Hyderabad, Goa, Nagpur, Thiruananthpuram, Kochi, Ahmedabad, Amritsar, Dambolin, Srinagar, Guwahati.
8.	Major Seaports	Mumbai, Chennai, Kolkata, Vishakhapatnam, Enore, Haldia, Kandla, Marmagao, New Mangalore, Manglore, Paradip and Tuticorin.
9.	Time Zone	India is 5½ hours ahead of Greenwich Mean Time.
10.	Currency	Indian Rupees, which is divided into 100 paise. The present denomination of the currency notes and coins is Rs. 1,000, 500, 100, 50, 20, 10, 5, 2, 1 and 50 paise.
11.	Travel	Most areas of India are well connected by air, rail and road transport. There are several domestic airlines in India which provide regular and low cost air travel. Most of the international airlines operate flights to and from India. The government owned Indian Railways offer good railway services throughout India. There are several bus operators, car rental agencies and public taxies available for road transport throughout India.
12.	Hospitality	Apart from being a sought after business destination, India is also a very famous tourist destination. There are several budget as well as

luxury hotels in most cities and places of tourist interest.

13.	Cost of living	Compared to USA and the Europe, the cost of living is quite low in India and varies from location to location.
14.	Education	India has a number of world renowned universities and educational institutions including the Indian Institute of Technology, Indian Institute of Management, Jawaharlal Nehru University. There are a number of public as well as private educational institutions. Most big cities also have international schools.
15.	Business Hours	Most cities observe normal business hours from 9:00 AM to 6:00 PM, Monday through Friday and some even on Saturday, which is mostly a half day.
16.	Public Holidays	The Central and each State Government announces its public holidays for each year. The three national holidays of India are Republic Day (26th January), Independence Day (15th August) and Gandhi Jayanti (2nd October). Additionally, there are several festival holidays, which change from year to year.

2. LEGAL AND REGULATORY ENVIRONMENT

India is a sovereign, socialist, secular, democratic republic[3]. India, the country, is divided into 28 (twenty eight) Federal States and 7 (seven) Union Territories. Each state has its own government and is subordinate to the central government, which is in-charge of the overall governance of the country. The union territories are administered by the central government through nominated representatives. Fundamental Rights are guaranteed to every citizen of India by the constitution of India.

India is a multi-party parliamentary democracy where the President is the head of the republic but the real power vests in the Prime Minister, the elected representative of the people. The 3 (three) organs of the government are the legislature, the executive and the judiciary.

The Legislature

India has a bicameral legislature at the central government level. There are 2 (two) houses of parliament; the Lok Sabha, the lower house where representatives are directly elected by the people and the Rajya Sabha, the upper house where representatives are elected by the elected representatives from the states and the union territories.

At the State level, while some states have a unicameral legislature in the form of Legislative Assembly, where members are directly elected by the people, others have a bicameral legislature; Legislative Assembly and the Legislative Council.

All government elections in India both at the central and the state level are conducted under the aegis of the autonomous body; the Election Commission.

The Executive

The elected government is headed by the leader of the majority party of Lok Sabha. Usually, such leader is sworn in as the Prime Minister of the nation. The Union Cabinet comprises of the Prime Minister and the Council of Ministers and is vested with the responsibility of running and managing the day-to-day affairs of the Central Government. Likewise, at the State level, the leader of the majority party of the Legislative Assembly is sworn in as the Chief Minister of the State together with the Cabinet Ministers who are responsible for affairs of the State Government.

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[3] Mentioned in the preamble of the Constitution of India

The Judiciary

In India, the judicial system functions independent of the Legislature and the Executive. The Supreme Court is the highest judicial court of India below which are High Courts, the highest courts in the State. There is a hierarchy of subordinate courts below the High Court.

Important Legislations of India

Some of the important laws of India are listed on the following page:

Sl.	Name of the Legislation	Governs Law Relating to
1.	Arbitration and Conciliation Act, 1996	Alternate Dispute Resolution.
2.	Central Excise Act, 1944	Government levy on manufacturing.
3.	Companies Act, 1956	All Corporate Bodies.
4.	Competition Act, 2002	Free and fair market competition and anti-trust.
5.	Consumer Protection Act, 1986	Protection of Consumers from unscrupulous traders & manufacturers.
6.	Central Sales Tax Act, 1956	The levy of tax on sale of goods.
7.	Customs Act, 1962	Import Regulations.
8.	Customs Tariff Act, 1975	To establish a uniform commodity classification code based on globally adopted nomenclature system for use is every trade-related transaction.
9.	Environment Protection Act, 1986	Laying down framework for seeking environmental clearances.
10.	Factories Act, 1948	Regulation of labour in factories.
11.	Foreign Exchange Management Act, 1999	Foreign Exchange & Foreign Investment transactions.
12.	Income Tax Act, 1961	Direct Taxes on income.

Sl.	Name of the Legislation	Governs Law Relating to
13.	Indian Contract Act, 1872	Contracts between parties.
14.	Industrial Disputes & Workmen Compensation Act, 1951	Labour law disputes.
15.	Industries (Development and Regulation) Act, 1951	The development and regulation of certain industries.
16.	Information Technology Act, 2000	E-Commerce Transactions.
17.	Prevention of Money Laundering Act, 2002	Prevention of money laundering & provides for confiscation of property derived from or involved in, money laundering.
18.	Copyright Act, 1957, Designs Act, 2000, Geographical Indication of Goods Act, 1999, Indian Patents Act, 1970 and Trademarks Act, 1999,	Protecting Intellectual Property Rights.
19.	Maternity Benefit Act, 1961	Maternity benefits to female employees.
20.	Minimum Wages Act, 1948	Payment of minimum wages.
21.	Payment of Bonus Act, 1965	Payment of bonus.
22.	Special Economic Zones Act, 2005	The establishment, development And management of the SEZs for the promotion of Exports and matters connected therewith and also provides for fiscal and economic incentives for developer of units in SEZ.
23.	Right to Information Act, 2005	The right of every citizen to access information under the control of public authorities and to promote transparency and accountability in the working of each public authority.

Regulatory Authorities of India

Listed below are some of the regulatory bodies which are important from the point of view of foreign investors since such bodies are the first point of contact between the foreign investors and the Indian Government.

Sl.	Name of the Regulator	Function of the Regulator
1.	Secretariat for Industrial Assistance ("SIA")	The SIA functions within the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry and acts as a gateway to industrial investments in India. SIA provides a single window clearance for Entrepreneurial Assistance and facilitates the processing of applications of investors who require government approval.
2.	Foreign Investment Promotion Board ("FIPB")	The FIPB is the nodal agency for all matters pertaining to foreign direct investment and its main functions include ensuring expeditious clearance of foreign investment proposals, periodic review of the implementation of the proposals cleared by the Board, review of the general and sectoral policy guidelines and incorporation of transparent rules for each sector, etc. The Board meets once every week to ensure speedy disposal of applications.
3.	Foreign Investment Implementation Authority ("FIIA")	The FIIA also functions within the DIPP, MCI and acts as a facilitator for quick translation of FDI approvals into implementation, helps the foreign investors in obtaining the necessary approvals and also sorts out their operational problems and resolves the same in consultation with the concerned ministries/ state departments.

Sl.	Name of the Regulator	Function of the Regulator
4.	Reserve Bank of India ("RBI")	RBI, the Central Bank of India, was established on April 01, 1935 and with the passing of the Banking Regulation Act, 1949, RBI came under government control. RBI's chief purpose is to secure monetary stability and developing India's financial structure in line with national socio-economic objectives and policies. The RBI acts as a banker of Central/ State Governments, commercial banks, state co-operative banks and some financial institutions. RBI plays a potent role in maintaining the exchange value of the rupee and acts as an agent of the government in respect of India's membership of the International Monetary Fund.
5.	Registrar of Companies ("RoC")	The RoC plays a pivotal role in governance and implementation of the Companies Act, the law regulating companies doing business in India.
6.	Securities and Exchange Board of India ("SEBI")	The SEBI was established to protect the interest of investors in securities and to promote, develop and regulate the securities market and matters connected thereto. Primary functions of SEBI include promoting fair dealing in issue of securities, to ensure efficient, transparent, economic functioning of capital markets, to safeguard interest of investors from unethical practices and co-coordinating and monitoring working of stock exchanges in India, intermediation with stock brokers and to act as a watchdog in primary and secondary securities market primarily for investor protection.

Sl.	Name of the Regulator	Function of the Regulator
7.	Central Board of Excise and Customs ("CBEC")	The CBEC functions under the Ministry of Finance and is responsible for formulating policy concerning levy and collection of customs and central excise duties and service tax and for the administration of matters relation thereto.
8.	Central Board of Direct Taxes ("CBDT")	CBDT originates from the Central Board of Revenue Act, 1963 and governs matters pertaining to the levy and collection of direct taxes and formulates the policy concerning administrative reforms and changes for the effective functioning of Income Tax Department.
9.	Authority of Advance Rulings ("AAR")	AAR constituted under the IT Act, 1963, assists tax payers to plan their income tax matters in advance and to avoid cumbersome and expensive litigation. AAR allows a non-resident to seek an advance ruling on any question of law or fact pertaining to a transaction, which has been or proposed to be undertaken by such non-resident applicant.
10.	Investment Commission	In 2004, Indian Government set-up an IC to engage, discuss and invite foreign businesses to invest in India.

3. INDUSTRIAL POLICY

The Industrial Policy, 1991 ("Policy"), was announced by the Government of India on July 25, 1991 and it lead to the liberalization of the laws governing the domestic industry and promoted foreign investment in India to ease the business environment and to make the Indian economy more dynamic. The Policy paved the way in establishing a free market-oriented economic system. The salient features of the Policy initiatives are:

1. Licensing

The Government abolished and removed licensing in the following sectors:

a. Atomic Energy and Railways – both sectors reserved for public sector;

b. Sectors with compulsory licensing that is:

   i. Distillation and Brewing of alcoholic drinks;

   ii. Cigars and Cigarettes containing tobacco;

   iii. Electronic Aerospace and Defense Equipment;

   iv. Industrial Explosives; and

   v. Hazardous Chemicals.

c. Manufacturing of items reserved for Small Scale Sector;

d. Proposals that attract locational restrictions.

Licensing exemptions also applied to substantial expansion of existing units.

2. Location

i) No requirements of Industrial Approvals from the Central Government (excepting industries still subject to compulsory licensing) if not located in 23 urban areas with a population (as per the census of 1991) of more than one million.

ii) Polluting industries may be located 25 km outside the periphery of urban areas with population of more than one million, or in pre designated industrial areas. Local zoning

and land use regulations together with environmental regulations apply to such industries.

iii) Industries like Electronic, Computer Software and Printing are exempted from such locational restrictions.

3. Small Scale Industries

An SSI unit is an industrial undertaking having an investment of less than Rs. 10 Million in plant and machinery.

As on March 13, 2007, there are only 114 items reserved for the small-scale sector including products ranging from food and allied industry to wood and wood products to paper and plastic products, etc. It's noteworthy that in 2007 itself, the Government has de-regulated 212 products from the SSI list.

An industrial license is required for the manufacturing of items reserved in for the small-scale industry sector.

FDI / corporate equity upto 24% is permitted in the small-scale industry sector. If an SSI exceeds this cap on investment, it loses its SSI status. However upon undertaking an export obligation of 50%, it can manufacture SSI reserved items.

SSI unit, which is an Export Oriented Unit or a unit in Free Trade Zone or in Export Processing Zone or in a Software Technology Park or in an Electronic Hardware Technology Park, are allowed to issue shares/ convertible debentures/ preference shares exceeding 24% of their paid-up capital up to the sectoral caps notified by the GoI.

SSI units are allowed the benefit of a number of concessions, privileges and preferences including excise duty exemption / concession up to specified limits on turnover, non applicability of some labour laws, concessional finance from scheduled banks.

4. INVESTMENT VEHICLES & FUNDING OPTIONS

The choice of investment vehicle for doing business in India depends on the business needs of the foreign company. The investment vehicles for doing business in India are as under:

1. Partnerships or Sole Proprietorship – this vehicle is presently available only to resident Indians;
2. Liaison Office;
3. Branch Office or Project Office; and
4. Private and Public Limited Companies.

Features of Investment Vehicles

1. Partnership

Partnerships in India are governed and regulated by the Partnership Act, 1932. Under this Act, partners of a firm are jointly and severally liable, which means they are entitled to all the profits and are also jointly responsible for all the liabilities arising out of the business. However foreign investment is not directly permitted in partnership firms.

2. Liaison Office

Foreign companies who want to first gauge the Indian markets scenario and obtain relevant information before they expand their operations in India establish a LO. Some foreign companies prefer to establish a LO as first step before entering into a Joint Venture or establishing a Wholly Owned Subsidiary.

The establishment of LOs in India is governed by the rules and regulation framed by RBI. A LO in India acts only as a communication channel for the parent company in order to supply the parent company with market information. A LO cannot carry on any business activity in India. As a result, the LO cannot generate any revenue in India and therefore all expenses of running and maintaining an office in India have to be met out of the foreign exchange remitted from abroad through normal banking channels.

Permitted activities for a LO in India

i) Representing in India the parent company/group companies.

ii) Promoting export import from/to India.

iii) Promoting technical/financial collaborations between parent/group companies and companies in India.

iv) Acting as a communication channel between the parent company and Indian companies.

Procedure on Setting-up a LO in India

Foreign companies intending to set up a LO in India for undertaking liaison activities on behalf of the parent company or foreign trading companies intending to set up LOs in India for promotion of exports from India must submit their application in Form FNC 1 to the Central office of RBI, Mumbai (Foreign Investment Division). In approved cases, permission is granted initially for a period of 3 (three) years.

Conditions Imposed by RBI while Granting Permission to LO

The conditions precedents for setting a LO in India are as follows:

1. No commission/ fee will be charged or any other remuneration received by the Indian office of the foreign company for its liaison activities in India.
2. Except for liaison work, the office will not undertake any activity of a trading, commercial or industrial nature without the prior permission of RBI.
3. The entire expenses of the Indian LO will be met exclusively by remittance from abroad through normal banking channels.

LO Tax Liability

Since a LO is not allowed to earn any income hence there is no tax liability on the operations of a LO or its parent company for its LO.

Maintenance of Bank Accounts

A LO in India is permitted to maintain and operate bank accounts in India but only with authorized dealers.

3. Branch Office

A BO in relation to a company means the following:

a) Any establishment described as a branch by the company; or

b) Any establishment carrying on either the same or substantially the same activity as that carried on by the head office of the company; or

c) Any establishment engaged in the production, processing or manufacture; but does not include any establishment specified in any order made by the Central Government.

Permitted Activities of India BO of a Company Incorporated outside India

i) Export/Import of goods;

ii) Rendering professional or consultancy services;

iii) Carrying out research work, in which the parent company is engaged;

iv) Promoting technical or financial collaborations between Indian companies and its parent company or overseas group company;

v) Representing the parent company in India and acting as buying/selling agent in India;

vi) Rendering services in IT and development of software in India;

vii) Rendering technical support to the products supplied by parent/group companies; and

viii) Foreign airline/ shipping company.

Restrictions on Operations of the BO

The RBI usually imposes the following conditions while granting permission to establish a BO:

1. The BO will not expand its activities or undertake any new trading, commercial or industrial activity other than that what is expressly approved by the RBI.
2. The entire expenses of the BO in India will be met either out of the funds received from abroad through normal banking channels or through income generated by it in India.
3. The BO will not accept any deposits in India.
4. The commission earned by the BO from parties abroad for any agency business will be repatriated to India through normal banking channels.

Repatriation of Profits

A BO is allowed to repatriate profits to the head office of its parent company. For further details, please refer to the Chapter of repatriation of foreign exchange.

4. *Project Office*

PO means a place of business to represent the interest of the foreign company executing a project in India but excludes a LO. To open such an office an application has to be made to the RBI with details of the project to be executed and the details of the PO to be set up. RBI will accord approvals specific to the project. A PO cannot operate after the completion of the specified project.

Site Office - means a sub-office of the PO established at the site of a project but does not include a LO.

5. *Private and Public Limited Companies*

Foreign investors may either setup a wholly owned private limited/ public limited company in India or enter into a joint venture with an Indian partner. The company so formed (wholly owned or JV) shall be a resident Indian company and shall be subject to the Laws of India. Some key points to be remembered are:

a) Funding may be via debt/equity (foreign and domestic).
b) In case the company is a wholly owned subsidiary of a foreign company then the Indian transfer pricing regulations apply to WOS.
c) No regulatory approval is required for repatriation of dividends.

A company in India may be incorporated as a public limited or a private limited company and their salient features are as under:

Features of a Private Limited Company:

a) Low paid up capital requirement (further details discussed below).
b) The minimum shareholder requirement is 2 (two) and the maximum limit is 50 (fifty).
c) The right to transfer shares is restricted.
d) No offer can be made to the public to subscribe to the equity/debt of such company and such company cannot invite deposits from persons other than members, directors or relatives of the members or directors.

Features of a Public Limited Company:

a) Low paid up capital requirement (further details discussed below).

b) The minimum shareholder requirement is 7 (seven) and there is no restriction on the maximum number of shareholders.

c) The Shares are freely transferable.

d) Such a company is allowed to raise funds through the public through open invitation.

Procedure for Incorporation of a Company in India

Companies in India are governed and regulated by the Companies Act, 1956 and the RoC is the government regulatory body setup for regulating companies and their branches in India.

1) The first step for incorporating a company is the name reservation approval by the RoC in the State/ Union Territory in which the company proposes to maintain its Registered Office.

2) Once the RoC approves the desired name, which approval is valid for 6 (six) months, within which time the draft Memorandum of Association and Articles of Association or the Company's Charter which is the most important document, together with miscellaneous documents and forms should be filed with the RoC.

3) The appropriate stamp duty must be affixed on the draft MoA & AoA and at the time of filing with the RoC, all forms must be accompanied by the applicable RoC filing fee.

4) At the time of the aforementioned filings, the directors of the proposed company have to obtain a Director Identification Number from the RoC.

5) Once the name of the proposed company is approved and upon receipt of the same, the subsequent steps for company incorporation involve filing of Forms 1 (application and declaration for incorporation of new company), 18 (notice of situation of registered office) and 32 (particulars of directors) together with the charter documents of the company have to be filed with the concerned RoC.

6) The RoC scrutinizes the documents and, if necessary, instructs the authorised person to make necessary corrections. Thereafter, the RoC issues a Certificate of Incorporation, from which date the company comes into existence/ is incorporated.

A private company can commence its business immediately after receiving the CoI but a public company cannot do so until it obtains a Certificate of Commencement of Business from the RoC.

Charter Documents

The MoA sets out the objects and scope of activity of the company whereas the AoA set out the rules and regulations of the company in respect of the management and the rights of the members/shareholders inter-se and vis à vis the company.

Pursuant to RoC approval of the charter documents, a CoI evidencing the existence of the company is issued by the RoC.

Non-Profit Making Companies

A company established for charitable purpose may be incorporated under Section 25 of the Companies Act, 1956. The income that such a company generates from its activities is not allowed to be distributed to the shareholders and must be used to further the purpose for which the company is incorporated.

E-filing Initiatives of the GoI

On September 16, 2006, the Ministry of Corporate Affairs, GoI introduced the MCA21 e-Governance programme with a view to providing all services relating to RoC offices on-line in e-Governance mode.

All filings from September 16, 2006 can be done only under the Digital Signatures of the authorised person (MD/ Director/ Company Secretary as the case may be). There are various channels available to stakeholders to enable them to do the statutory filing with RoC offices across the country.

MCA21 replaces the erstwhile practices broadly consisting of physical filing of documents, incorporation of companies and inspection of documents with the RoC. This project is intended to create a healthy business eco system conducive to foreign investment.

Features of a Private and a Public Limited Company

Please see the chart below.

Statutory Requirements for Formation of Companies

Particulars	Private Company	Public Company
Minimum number of shareholders	2	7
Maximum number of shareholders	50	Unlimited
Minimum number of Directors	2	3
Maximum number of Directors	7	12 (can be increased with Govt. approval)
Minimum paid-up capital	INR. 100,000	INR. 500,000

FUNDING OPTIONS

With the liberalization of the policy on foreign investment in India in place, a foreign investor intending to invest in an India may do so in the following manner:

a) Equity Capital route whereby, a foreign investor may subscribe to or purchase equity in an existing Indian Company.

b) FDI routes wherein FDI may be brought in the target sector via the automatic or the approval route.

Preference Shares

Other than by issue of ordinary shares, Indian companies can also mobilize foreign investment through the issue of preference shares.

Under the Companies Act, 1956 all preference shares have to be compulsorily redeemable within a period of 20 years from issue. However by virtue of a circular issued by the RBI on June 8, 2007, preference shares not convertible or partially convertible shall be not be treated as equity and shall be treated as ECB (Foreign Currency Debt) and the policy applicable to ECB shall apply.

External Commercial Borrowing (Foreign Currency Debt)

External Commercial Borrowings refer to commercial loans availed from non-resident lenders with minimum average maturity of 3 (three) years.

ECB can be accessed under two routes, viz., the automatic and the approval route.

Borrowers can raise ECB from internationally recognized sources such as international banks, international capital markets, multilateral financial institutions, export credit agencies, suppliers of equipment, foreign collaborators and foreign equity holders upto US$ 500 Million per financial year under the automatic route. However by virtue of the August 7, 2007 RBI circular restricting the raising of ECB, ECB more than US$ 20 Million per financial year would be permitted only for foreign currency expenditure for permissible end-uses of ECB. Accordingly, borrowers raising ECB more than US$ 20 Million will have to park the ECB proceeds overseas for use as foreign currency expenditures for permissible end-uses only and shall not remit the funds to India. Under the ECB policy Borrowers can raise ECB upto US$ 500 Million per financial year.

The prevailing ECB policy specifies certain end-uses such as import of capital goods, new projects, modernization/ expansion in real sector – industrial sector and infrastructure sector – in India, for acquisition of overseas companies by Indian companies and for first stage acquisition of shares in disinvestment process and in public offer stage under the Government's disinvestment program. However ECB is not allowed to be utilized as working capital, on-lending, investment in capital markets and in real estate (excluding integrated townships).

The average minimum maturity period for ECB upto US$ 20 Million is 3 (three) years and for ECB greater than US$ 20 Million is 5 (five) years.

GDRs/ ADRs & FCCBs

Foreign investment through GDRs/ADRs/FCCBs is treated as FDI and is governed by the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993 ("Depository Receipt Scheme"). Indian companies intending to raise capital in the international market can do so through the issue of GDRs/ADRs/FCCBs, subject to certain restrictions.

Issue of GDRs/ADRs does not require any prior approval of the GoI except where the proposed FDI breaches the sectoral cap, in which case prior approval of the FIPB shall be required.

The issue of FCCBs in addition to the Depository Receipt Scheme is also governed by the ECB Policy. Prior to the August 7, 2007 RBI circular restricting the raising of ECB, Indian companies proposing to raise capital by issuing FCCBs could do so upto US$ 500 Million in a financial year under the automatic route. However any Indian company intending to issue FCCBs now have to seek prior approval of the RBI.

5. FOREIGN DIRECT INVESTMENT IN INDIA

Who can invest in India?

Any person resident outside India (excluding the citizen of Pakistan) or an entity incorporated outside India, (excluding an entity incorporated in Pakistan) can invest in India, subject to the FDI Policy of the GoI[4].

Previous Overseas Corporate Bodies, who have converted themselves into companies incorporate outside India, can make fresh investments in India under the FDI Scheme provided they are not under the adverse notice of the RBI and/or SEBI.

Entry Routes for Investments in India

FDI can be brought under 2 (two) routes that is automatic route and the government approval route. Under the automatic route, the foreign investor or the Indian company does not require any approval from the RBI or the GoI for making such investment. However, under the approval route, prior approval of the GoI, MoF, FIPB is required. The Entry routes for foreign investors as well as sector specific investment limits in India are given in the following Chart:

Automatic Approval Route Permitted Sectors[5]	FDI Cap	Prior Approval Route Permitted Sectors[6]	FDI Cap	FDI Prohibited Sectors
Airports Greenfield Existing	 100% 74%	New Investment by a foreign investor in a field in which that investor already has an existing JV or collaboration with another Indian partner.		Retail Trading (except retail of single brand product)
Air Transport Services NRIs Others	 100% 49%	Any new investment sought to be made in manufacture of items reserved for SSIs.		Atomic Energy

[4] On December 17, 2007, the GoI allowed citizens and entities incorporated in Bangladesh to invest in India through the approval route.

[5] Subject to the sectoral cap and terms and conditions, if any.

[6] Prior-approval of the FIPB is a pre-requisite to invest in some sectors, for sectors where investment over and above the sectoral cap is proposed to be infused and also for new investment in same field.

Automatic Approval Route Permitted Sectors[7]	FDI Cap	Prior Approval Route Permitted Sectors[8]	FDI Cap	FDI Prohibited Sectors
Alcohol Distillation & Brewing	100%	Existing Airports	75 to 100%	Lottery Business
Banking (private sector)	74%	Asset Construction Companies	49%	Gambling & Betting
Coal & Lignite Mining (specified)	100%	Atomic Minerals	74%	Chit Fund Business
Coffee, Rubber Processing & Warehousing	100%	Broadcasting FM Radio Cable Network Direct-to-Home (DTH) Setting up Hardware Facilities Uplinking News and Current Affairs Uplinking Non-News, Current Affairs TV Channel	 20% 49% 49% 49% 26% 100%	Agricultural or Plantation Activities[9]
Construction & Development (specified projects)	100%	Cigar & Cigarette Manufacturing	100%	Real Estate Business[10] or Farm House Construction
Floriculture, Horticulture & Animal Husbandry	100%	Courier Services other than those under the ambit of Indian Post Office Act, 1898	100%	Trading in Transferable Development

[7] Subject to the sectoral cap and terms and conditions, if any.

[8] Prior-approval of the FIPB is a pre-requisite to invest in some sectors, for sectors where investment over and above the sectoral cap is proposed to be infused and also for new investment in same field.

[9] Agriculture excludes Floriculture, Horticulture, Development of Seeds, Animal Husbandry, Pisiculture & Cultivation of Vegetables, Mushrooms, etc. under controlled conditions and services related to agro and allied sectors and Plantations other that Tea Plantation.

[10] Real Estate business does not include development of Townships, Construction of Residential/ Commercial Premises, Roads or Bridges.

				Rights
Automatic Approval Route Permitted Sectors[11]	**FDI Cap**	**Prior Approval Route Permitted Sectors**[12]	**FDI Cap**	**FDI Prohibited Sectors**
Specified Hazardous Chemicals	100%	Defense Production	26%	
Industrial Explosives Manufacturing	100%	Investment Companies in Infrastructure/ Service Sector (except telecom)	49%	
Insurance	26%	Petroleum & Natural Gas Refining (Public Sector Undertaking)	26%	
Mining (diamonds, precious metals & stones)	100%	Tea Sector including Tea Plantation	100%	
Non Banking Finance Companies (Conditional)	100%	Trading Items sourced from Small Scale Sector	100%	
Petroleum & Natural Gas Refining (pvt. companies) Other Areas	 100% 100%	Test Marketing for equipment for which company has approval for manufacturing	100%	
Power Generation, Transmission & Distribution	100%	Single Brand Product Retailing	51%	
Trading Wholesale Cash & Carry Trading of exports	 100% 100%	Satellite Establishment & Operation	74%	
SEZs & Free Trade Warehousing Zones	100%	Print Media[13] Newspapers & Periodicals dealing with news & current affairs Publishing of Scientific	 26% 100%	

[11] Subject to the sectoral cap and terms and conditions, if any.

[12] Prior-approval of the FIPB is a pre-requisite to invest in some sectors, for sectors where investment over and above the sectoral cap is proposed to be infused and also for new investment in same field.

		Magazines/ Specialty Journals & Periodicals		
Automatic Approval Route Permitted Sectors[14]	**FDI Cap**	**Prior Approval Route Permitted Sectors[15]**	**FDI Cap**	**FDI Prohibited Sectors**
Housing and Real Estate in development of townships, construction of residential & commercial premises, roads or bridges.	100%			
Telecommunication Basic & Cellular Services ISP with gateways, radio paging, end to end bandwidth ISP without gateway (specified) Manufacture of telecom equipment	 49% 49% 49% 100%	Telecommunication Basic & Unified Access Services ISP with gateways, radio paging, end-to-end bandwidth ISP without gateway (specified)	 50 to 74% 50 to 74% 49 to 100%	

[13] Partnership Firms/ Proprietorship concerns having investments as per FEMA Regulations are not allowed to engage in the print media sector.

[14] Subject to the sectoral cap and terms and conditions, if any.

[15] Prior-approval of the FIPB is a pre-requisite to invest in some sectors, for sectors where investment over and above the sectoral cap is proposed to be infused and also for new investment in same field.

6. OVERVIEW OF SOME IMPORTANT SECTORS

Considering the fact that India is a developing economy, in this chapter, we have highlighted investment opportunities available in some sectors which are considered important from the point of view of economic development and to cater to the needs of industrialization and modernization.

1. OIL AND GAS

The GoI now permits 100% FDI in different activities in the petroleum sector. The GoI has adopted a gradual decontrol over the pricing and distribution mechanism. JV companies are encouraged for the development of infrastructure, for marketing and refining activities. The GoI now permits up to 100% FDI in the petroleum and natural gas sector, under the automatic route. The FDI allowed in oil and gas sector is as under:

a) FDI up to 100% is permitted on the automatic route on petroleum product marketing. FDI for this sector would be permissible subject to the existing sectoral policy and regulatory framework in the oil-marketing sector.

b) FDI up to 100% is allowed on the automatic route in oil exploration in both small and medium-sized fields, subject to and under the policy of the government on private participation in: (i) exploration of oil and (ii) the discovered fields of national oil companies.

c) FDI up to 100% is permitted on the automatic route for petroleum product pipelines subject to and under the GoI policy and regulations thereof.

d) FDI up to 100% is permitted for natural gas/ liquefied natural gas pipelines through the approval route.

e) FDI up to 100% is permitted in, other than refining and including market study and formulation; investment/financing, setting up infrastructure for marketing in petroleum and natural gas sector subject to sectoral regulations, issued by the Ministry of Petroleum & Natural Gas, and in the case of actual trading and marketing of petroleum products, divestment of 26% equity in favour of Indian partner/public within 5 (five) years.

f) FDI up to 26% is permitted in the refining sector in case of public sector undertakings, through the approval route and up to 100% in case of private companies under the automatic route.

2. CIVIL AVIATION

The GoI has been quite active in evolving a policy framework for development of the civil aviation sector in the country. Some of the most significant developments undertaken by the GoI include deregulation of the domestic airline markets, inviting private participation in the development of airport infrastructure and modernization of the air traffic system.

The Planning Commission has floated a new proposal to scrap the bar on foreign carriers from investing in this sector. The GoI has adopted a limited open sky policy under which designated private airlines can operate additional services to and from India subject to the existing terms of commercial agreement with the public sector airline, Air India/Indian Airlines.

In addition, the GoI has allowed new points of call for foreign airlines and agreed to the utilization of the Indian landing entitlement in other countries by foreign carriers on mutually beneficial terms. India has an open-skies policy for cargo operations. All foreign airlines are allowed to operate cargo services without any restrictions. For chartered flights, the GoI has been gradually liberalizing the conditions for allowing such flights at a larger number of airports. The FDI allowed in the aviation sector is as under:

a) 49% FDI is permitted in domestic airlines but foreign airline companies are barred from investing in this segment.

b) At present, all aviation-related services like charter flights, ground handling and helicopter services are grouped as ‘ATS’ and are subject to a FDI cap of 49%.

c) NRIs are allowed to hold up to 100% equity in domestic airlines.

d) In greenfield airports 100% FDI is allowed through automatic route, while in existing projects foreign holding beyond 74% may be allowed through the approval route.

DIPP is likely to approve an increase in the FDI ceiling to 74% in helicopter services, chartered service operators and regional airlines.

3. INFRASTRUCTURE

Infrastructure assets are vital physical structures and networks that provide essential services to a society and the nation at large. Infrastructure services support many aspects of a country’s economic and social activities and are crucial for business development. These tangible assets, and the businesses set up to manage them, can be viewed as the backbone of an economy. India has seen

years of booming economic growth and her rapid economic development has placed intense demands on its physical infrastructure. The GoI anticipates a major role for Public Private Partnership in the infrastructure development plans across all major sectors and strongly encourages the involvement of the private sector. PPP project are based on a contract or concession agreement, between a government or statutory entity on one side and a private sector company on the other, for providing an infrastructure service. In 2005, India passed a groundbreaking law permitting officials to tap PPPs for infrastructure initiatives. The GoI had awarded 86 (eighty six) PPP contracts, mainly for roads, ports and airports, and more are in the pipeline. Broadly speaking, infrastructure can be split into 2 (two) categories:

Economic Infrastructure			**Social Infrastructure**
Transport Toll roads Bridges Tunnels Sea ports Airports Rail Ferries	Energy and utility Gas - Distribution - Storage - Electricity - Distribution - Generation works - Treatment	Communications Cable networks Satellite systems	Healthcare facilities Education facilities Social housing Judicial and Correctional facilities

The Indian infrastructure sector envelops includes the following areas:

a) Highways

All National Highway Development Plans are implemented by the apex Government body which is National Highway Authority of India. At present this area is witnessed with high private sector participation through construction contacts, Build, Operate and Transfer contracts.

The Policy and Incentives to investors in this area include:

i) 100% FDI under the automatic route is permitted for all road development projects;
ii) A 100% income tax holiday is granted for a 10 (ten) year period;
iii) NHAI is empowered to grant gap funding for marginal projects.

b) Ports

GoI dominated maritime activity in the past. The present policy directs to encouraging the private sector to take the lead in port development activities and operations. Many major ports now operate largely as landlord ports wherein international port operators are invited to bid for BOT terminals on a revenue share basis.

The Policy and Incentives to investors in this area include:

i) 100% FDI under the automatic route is permitted for port development projects;
ii) A 100% income tax holiday is available for a 10 (ten) year period;
iii) the ceiling for tariffs charged by major ports/ port operators is regulated by the Tariff Authority for Major Ports; and
iv) A comprehensive National Maritime Policy is being formulated to lay down the vision and strategy for development of the sector till 2025.

c) Airports

The GoI has initiated 'Open Sky' Policy to encourage growth in this sector. Rapid air traffic growth has resulted in the entry of several new privately owned airlines and increased frequency/ flights for international airlines.

The Policy and Incentives to investors in this area include:

i) FDI of 100% is permissible for existing airports;
ii) FIPB approval required for FDI beyond 74%;
iii) A 100% FDI under automatic route is permissible for Greenfield airports;
iv) 49% FDI is permissible in domestic airlines under the automatic route, except by foreign airline companies;
v) 100% income tax holiday for airport projects for a period 10 (ten) year period;
vi) NRIs are permitted 100% equity ownership; and
vii) The Airports Authority of India Act, 1994 amended to provide legal framework for airport privatization.

d) Telecom

The Telecom Policy in India aims to encourage both private and foreign investment. The following are some of the highlights of the policy:

i) The Telecom Regulatory Authority of India is this sector's independent regulator;
ii) The GoI issues revenue-share model for licenses for telecom services in India;
iii) Unified access licenses are available for providing telecom services on a pan-India basis; and
iv) Planned opening up of National Long Distance, International Long Distance and other value added services.

The Policy and Incentives to investors in this area include:

i) 74% to 100% FDI is permitted in various telecom services;
ii) 100% FDI is permitted in telecom equipment manufacturing; and
iii) Foreign investment exceeding 49% in all telecom services only shall require FIPB approval.

e) Power

In India, the various State Electricity Boards or PSUs, control majority of the power generation, transmission and distribution capacity. Private sector participation is encouraged especially in generation and distribution of power. The GoI is also keen to draw private investment into the sector. This sector is regulated by the Electricity Act, 2003 and the National Electricity Policy, 2005. Distribution licenses for several cities are already with the private sector and many large generation projects have also been planned in the private sector.

The Policy and Incentives to investors in this area include:

i) 100% FDI is permitted in power generation, transmission and distribution.
ii) 100% income tax holiday is granted for a block of 10 (ten) years in the first 15 (fifteen) years of operation; and
iii) Waiver of import duties on capital goods on mega power projects (above 1,000 MW generation capacity) is granted.

f) Railways

The GoI is yet to open up this sector for FDI investment. However, the GoI has envisaged PPP in new railway routes, stations, logistics parks, cargo aggregation and warehouses, etc. Foreign Investors partnering with Indian companies may derive indirect advantage via the PPP route.

4. RENEWABLE ENERGY

Renewable Energy sources are an important element for India's Power Policy aimed to meet the power needs of remote areas in an environmentally friendly way. Certain forms of RE sources such as

wind energy, small-hydro and biomass have taken off. Strong private participation is seen in sectors like wind power, in response to the policy and initiatives. Today, India has among the world's largest programme for deployment of RE products and systems. It is also the only country in the world to have a separate Ministry for Non-conventional Energy Sources. The Indian Renewable Energy Development Agency is a one of its kind agency in the world to finance RE projects. India is now finalising a Renewable Energy Policy Statement, which is a major step toward establishing a favourable policy framework, and will have implications for all Indian states.

a) Prospects in Energy Sectors

i) **Wind -** India exhibits a huge potential in wind energy and stands 4th largest in the world. Given the strength in the manufacturing sector India is expected to be the hub for turbine component manufacturing.

ii) **Solar** - Solar Energy is another promising space. Globally, electricity generated by solar photo voltic has been falling. India is set to become a huge market for solar energy due to high solar incidence and the need to electrify vast remote off-grid areas.

iii) **Bio Mass** - The vast agricultural base holds out a huge potential for biomass based power generation. This would depend on innovations in fuel supply chain, in sourcing of agricultural residues and wastes and optimizing the logistics cost.

iv) **Small and Mini Hydel** - Potential for small and mini-hydel (defined as less than 25 MW) is also large and is mainly confined to the hilly states of the north and north-east part of India.

v) **Bio Fuels** - To encourage bio-diesel and ethanol, the GoI has already laid down standards for ethanol blending and has announced fiscal benefits. In order to promote bio-diesel plantations various State governments have announced land at discounted rates. In view of the policy measures, several oil majors have already announced intentions to enter this space.

b) Policies and Legal Framework

The policy for development of RE is implemented by the GoI and the various state governments and is as under:

i) GoI Policy for Renewable Energy Development

The spread of various RE technologies have been aided by a variety of policy and support measures by GoI. Major policy initiatives taken to encourage private investment/ FDI to tap energy from RE sources include provision of fiscal and financial incentives under a wide range of programmes being

implemented by the Ministry and simplification of procedures for private investment, including FBI, in RE projects. The policy is clearly directed towards a greater thrust on over all development and promotion of RE technologies and applications. The recent policy measures provide excellent opportunities for increased investment in this sector, technology up-gradation, induction of new technologies, market-development and export promotion. A Comprehensive RE Policy for all round development of the sector is under preparation.

ii) Fiscal Incentives

In order to encourage investments in the RE sphere in the country, the GoI has brought about subsidies and fiscal incentives which are available to enterprises such as concessional tax rates, along with soft loans. A host of fiscal incentives and facilities are made available to both manufacturers and users of RE systems, including:

a) 100% depreciation for tax purposes in the first year of the installation of projects;
b) Manufactured finished products are not chargeable to excise duty;
c) Capital equipment, materials and components are chargeable with low import tariffs;
d) Availability of soft loans to manufacturers and users for commercial and near commercial technologies;
e) 5 (five) year tax holiday for power generation projects;
f) Power generated through RE systems, fed to the grid by private sector is entitled to remunerative price under alternate power purchase policy by State Government;
g) Facility for banking and wheeling of power;
h) Facility for third party sale of RE power;
i) Financial Incentives/Subsidies for devices with high initial cost;
j) Involvement of women not only as beneficiaries but also for their active contribution in implementation of RE programmes;
k) Special thrust for renewable energy in North-Eastern region of the country. 10% of Plan funds earmarked for North-East towards enhanced and special subsidies;
l) Allotment of land on long term basis at token lease rent and supply of garbage free of cost at project site by State Governments, in respect of projects on energy recovery from municipal waste.

iii) Industrial Policy for RE Development in India

The MNES is promoting medium, small, mini and micro enterprises for manufacturing and servicing of various types of RE systems and devices. Industrial policy measures include:

a) No industrial clearance is required for setting-up RE industry;

b) No clearance is required for power generation projects upto Rs. 100 Crores from Central Electricity Authority;
c) 5 (five) year tax holiday is allowed for RE power generation projects;
d) Soft loan is made available through IREDA for RE equipment manufacturing;
e) Facilities for promotion of EOUs are available for RE industry also;
f) Financial support is available to RE industries for taking up R&D projects in association with technology institutions;
g) Power project import allowed;
h) Private Sector Companies can set up enterprises to operate as licensee or generating companies;
i) Customs duty concession is available for RE parts/equipment, including for machinery required for renovation and modernization of power plants; and
j) Lower excise duty on a number of capital goods and instruments required in RE sector is reduced/ exempted.

iv) FDI Policy

In order to encourage foreign investors to set up RE based projects the GoI has further liberalized FDI in this sector. Foreign investors are permitted to setup projects on Built, Own and Operate basis. Major features of the FDI policy are as under:

1. Foreign Investors can enter into a JV with an Indian partner for financial and/or technical collaboration and also for setting up of RE based Power Generation Projects.
2. Liberalized foreign investment approval regime to facilitate foreign investment and transfer of technology through JVs.
3. JV up to 74% foreign equity participation shall qualify for automatic approval.
4. 100% foreign investment as equity is permissible with the approval of FIPB.
5. Various Chambers of Commerce and Industry Associations in India can be approached for providing guidance to the investors in finding appropriate partners.
6. Foreign Investors can also set up a LO in India.

5. HEALTHCARE

The Drug Controller General of India is the regulator of the pharmaceutical industry being responsible for the approval of new drugs and clinical trials and for setting drug quality standards. The Drugs and Cosmetics Act, 1940 legislation is the most important legislation and it regulates the State Drug Control Authorities. The Healthcare industry is expected to increase in size from its current US$ 17.2 billion to US$ 40 billion by 2012. The FDI allowed in the healthcare sector is as under:

a) FDI upto 74% in the case of bulk drugs, their intermediate Pharmaceuticals and Formulations (except those produced by the use of recombinant DNA technology) would be covered under the automatic route.

b) FDI above 74% for manufacture of bulk drugs will be considered by the GoI on a case to case basis for manufacture of bulk drugs from basic stages and their intermediates and bulk drugs produced by the use of recombinant DNA technology as well as the specific cell/tissue targeted formulations provided it involves manufacturing from basic stage.

c) FDI of 100% is permitted under the automatic route in pharmaceuticals, biotechnology, research services and health services.

FDI proposals for the manufacture of licensable drugs and pharmaceuticals and bulk drugs produced by recombinant DNA technology, and specific cell / tissue targeted formulations require prior approval of the GoI.

6. MEDIA AND ENTERTAINMENT

The entertainment industry is one of the fastest growing sectors in India. India has been hailed as the fastest growing market in the world for spends in entertainment and media in the next 5 (five) years. India will be one of the key drivers in pushing the global entertainment and media industry to US$ 2 trillion by 2011.

The Ministry of Information and Broadcasting, GoI is responsible for laws, rules and regulations relating to information, broadcasting the press and the films. The Cinematographic Act, 1952 and the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 regulates the functioning of films, national films and national radio. TRAI is the regulator for the Broadcasting and Cable Services. The FDI allowed in media and entertainment is as under:

a) 100% FDI is allowed in the film industry on the automatic route in the advertising sector;

b) Film sector (film production, exhibition and distribution including related services/products) FDI up to 100% allowed on the automatic route with no entry level condition;

c) 49% in the television broadcasting, but the government is all set to allow 74% FDI in cable TV services and Head-end in the Sky — a satellite-based system to distribute television signal via cable — while also permitting 100% FDI in downlinking general and entertainment channels uplinked from abroad;

d) 26% under the automatic route in FM broadcasting; and

e) 26% under the automatic route in publishing newspaper.

In case of Terrestrial TV, no private operator is allowed in terrestrial TV transmission and in case of Terrestrial Broadcasting FM the licensee shall be a company registered in India under the Companies Act, 1956. All share holding should be held by Indians except for the limited portfolio investment by FII/NRI/PIO/OCB subject to such ceiling as may be decided from time to time. Company shall have no direct investment by foreign entities and NRIs. As of now, the foreign investment is permissible to the extent of 20% portfolio investment. In case of cable network foreign investment allowed up to 49% (inclusive of both FDI and portfolio investment) of paid up share capital. Companies with minimum 51% of paid up share capital held by Indian citizens are eligible under the Cable Television Network Rules, 1994 to provide cable TV services.

7. FINANCIAL SERVICES

India has a rapidly growing Banking and Financial Services Sector based on sound fundamentals. The foreign investment opportunities in the financial services sector are enumerated below.

a) FDI in Banking Business

The GoI permits FDI up to 74% under the automatic route subject to compliance with guidelines issued by the RBI. The RBI has recently issued a regulatory roadmap for a gradual enhancement of the presence of foreign banks in India in a synchronized manner. The roadmap sets out the following:

i) The roadmap for presence of foreign banks in India along with the annex for setting up of WOS; and
ii) The guidelines on ownership and governance in private sector banks (the “Guidelines”).

The roadmap divides the process of subsidiarisation into 2 (two) phases. Phase I covers the time period between March 2005 and March 2009, during which period foreign banks were permitted to establish a presence by way of setting up a WOS or conversion of the existing branches into a WOS. During Phase I, foreign banks were allowed to only acquire a share holding in Indian Private Sector Banks identified by the RBI for restructuring. The phase II commenced in April 2009 after a review of the experience gained and after due consultation with all the stakeholders in the banking sector.

In relation to shareholding of PSBs, the Guidelines lay emphasis on diversified ownership. No single entity or group of related entities shall have shareholding or control, directly or indirectly, in any bank in excess of 10%. Any higher level of acquisition would require RBI approval. The Guidelines also provide that banks (including foreign banks having a branch presence in India)/ Financial Institutions should not acquire any fresh stake in a bank’s equity shares, if by such acquisition, the investing

bank's/financial institution's holding exceeds 5% of the investee bank's capital. The Guidelines require any existing shareholding of any individual entity/ group of related entities in excess of 10% be reduced to 'permissible' levels in a phased manner.

b) FDI in Non Banking Finance Companies

FDI/NRI investments are allowed in the following 19 NBFC activities as per levels indicated below:

i. Merchant banking companies;
ii. Underwriting;
iii. Portfolio Management Services;
iv. Investment Advisory Services;
v. Financial Consultancy;
vi. Stock Broking
vii. Asset Management;
viii. Venture Capital;
ix. Custodial Services;
x. Factoring;
xi. Credit Reference Agencies;
xii. Credit Rating Agencies;
xiii. Leasing & Finance;
xiv. Housing Finance;
xv. Forex Broking;
xvi. Credit Card Business;
xvii. Money Changing Business;
xviii. Micro Credit;
xix. Rural Credit.

The following minimum capitalisation norms are applicable for fund based NBFCs:

a) For FDI up to 51% - US$ 0.5 Million to be brought upfront;
b) For FDI above 51% and up to 75% - US$ 5 Million to be brought upfront;
c) For FDI above 75% and up to 100% - US$ 50 Million out of which US$ 7.5 Million to be brought upfront and the balance in 24 (twenty four) months.

A minimum capitalisation norm of US$ 0.5 Million is applicable in respect of all permitted non-fund based NBFCs with foreign investment. Further, foreign investors can set up 100% operating subsidiaries without the condition to disinvest a minimum of 25% of its equity to Indian entities, subject to bringing in US$ 50 Million as at (iii) above (without any restriction on number of operating subsidiaries without bringing in additional capital).

JV operating NBFC's that have 75% or less than 75% foreign investment will also be allowed to set up subsidiaries for undertaking other NBFC activities, subject to the subsidiaries also complying with the applicable minimum capital inflow i.e. (i) and (ii) above.

FDI in the NBFC sector is on automatic route subject to compliance with guidelines issued by the RBI.

8. WHOLESALE & RETAIL TRADING

India's retail sector is at the peak of its appeal for international as well as Indian players. The structure of retailing is going to develop rapidly with malls becoming increasingly common in large as well as small cities. The organized retail sector is slated to grow more than 30% annually and cross US$ 20 billion by 2010.

FDI in Trading

The GoI allows FDI in the retails sector as under:

a) 100% FDI is permitted under the automatic route for wholesale cash and carry trading and also trading for exports.

b) 100% FDI permitted through the approval route for –

   i) Trading of items sourced from the SSI sector; and
   ii) Test marketing of such items for which a company has approval for manufacture.

c) 51% FDI is permitted through the approval route for Single Brand product retailing subject to the following conditions:

   i) Products to be sold should be of a 'Single Brand' only;
   ii) Products should be sold under the same brand internationally; and
   iii) 'Single Brand' product-retailing would cover only products which are branded during manufacturing.

9. FOOD PROCESSING

The Food Processing Industry has been witnessing exceptional growth and interest due to the opportunities it volunteers in terms of production, consumption, export and growth. This sector ranks 5th and has attained recognition as "sunrise industry" in India having huge potential for uplifting agricultural economy, creation of large scale processed food manufacturing chain facilities. It is also included as one of the priority-lending sector. Various industries have been exempted from the provisions of industrial licensing under Industries (Development and Regulation) Act, 1951 with the exception of beer and alcoholic drinks and items reserved for SSI[16].

[16] Please refer to the Chapter on Industrial Policy.

a) **Sub-Sectors under FPI**

The Indian FPI is an extensive though highly fragmented industry and a large number of players in this industry are small sized companies, who are largely concentrated in the unorganised segment. Food processing involves primary processing like grading, sorting, cutting, seeding, shelling, packaging, etc. or any value addition at the post harvest stage. The FPI is further segregated into sub-sectors, such as:

i) Fruit & Vegetable Processing to include beverages, juices, concentrates, pulps, slices, frozen and dehydrated products, wine potato chips, etc.;
ii) Fish-processing to products such as fresh form frozen and canned products;
iii) Milk Processing to products such as whole milk powder, skimmed milk powder, condensed milk, ice-cream, butter and ghee (clarified butter), etc.;
iv) Meat & Poultry Processing of products such as fresh form frozen and packed products, egg powder;
v) Packaged/Convenience Foods;
vi) Alcoholic Beverages & Soft Drinks; and
vii) Grain processing to products such as flour, bakeries, biscuits, starch, glucose, cornflakes, malted foods, vermicelli, pasta foods, bear and malt extracts, grain based alcohol, etc.

b) **Applicable Regulation**

At present the FPI is governed by several different legislations. Food laws are enforced by the Director General of Health Services, Ministry of Health and Family Welfare, GoI. These laws prescribe the customary standards required for food additives, contaminants, food colors, preservative and labeling. The various legislations applicable to the FPI in India are as under -

1. Prevention of Food Adulteration Act (PFA), 1954 and Rules (Ministry of Health & Family Welfare);
2. The Standards of Weights and Measures Act, 1976, and Standards of Weights and Measures (Packaged Commodities) Rules, 1977;
3. Agriculture Produce (Grading & Marking) Act, 1937 (Ministry of Rural Development);
4. Essential Commodities Act, 1955(Ministry of Food & Consumer Affairs);
5. Fruit Products Order, 1995;
6. Meat Food Products Order, 1973;
7. Milk and Milk Products Order, 1992;
8. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 and Rules 1993;

9. The Insecticide Act, 1968;
10. Export (Quality Control and Inspection) Act, 1963;
11. The Environment Protection Act, 1986;
12. The BIS Act, 1986;
13. The Vegetables Oils Products (Control) Order, 1947;
14. The Solvent Extracted Oil, De-Oiled Meal And Edible Flour (Control) Order, 1967; and
15. Edible Oils Packaging (Regulation) Order, 1998

c) **Food Policy and Regulations**

Food processing and agro industries are accorded high priority with reliefs and incentives. At present, industrial license is not required for most of the food and agro processing industries except for items reserved for exclusive manufacture in the SSI sector, beer, potable alcohol & wines, cane sugar, hydrogenated animal fats & oils etc. Items reserved for SSI include pickles & chutneys, bread, confectionery (excluding chocolate, toffees and chewing-gum etc.), rapeseed, mustard, sesame & groundnut oils (except solvent extracted), ground and processed spices other than spice oil and olioresins, sweetened cashew nut products, tapioca sago and tapioca flour.

d) **Fiscal Benefits**

To further boost the food processing sector, certain benefits[17] have been granted to the FPI sector as provided below:

i) A 100% income tax deduction of profit for 5 (five) years and 25% of profit in the next 5 (five) years in case of new agro processing industries set up to package and preserve fruits and vegetables.
ii) Full waiver of excise duty on dairy machinery.
iii) Waiver of excise duty of dairy machinery to promote dairy processing industries.
iv) Excise duty on meat, poultry and fish has been reduced to 8%.
v) Excise duty on food grade hexane used in edible oil industry has been reduced to 16%.
vi) Customs duty is fixed on refined palm oil at 75% and for crude palm oil at 65%.
vii) Excise duty on refined edible oil and Vanaspati is abolished.
viii) Customs duty on refrigerated vans is reduced to 10%.
ix) Custom duty on packaging machines is reduced to 5%.
x) Excise duty is fully exempted on condensed milk, ice cream, preparations of meat, fish and poultry, pectins, pasta and yeast.

[17] The benefits have been provided in the Budget of 2005, 2006, 2007

xi) Excise duty on ready-to-eat packaged foods and instant food mixes, like dosa and idli mixes reduced to 8%.

xii) Excise duty on packaging paper has been reduced to 12%.

e) Export Promotion

i) FPI is one of the key areas identified for exports. FTZs and EPZs have been set up with all necessary infrastructure. Also, setting up of 100% EOUs is encouraged in other areas. They may import free of duty all types of goods, including capital foods.

ii) Capital goods, including spares upto 20% of the Cost Insurance Freight value of the capital goods may be imported at a concessional rate of customs duty subject to certain export obligations under the Export Promotion and Credit Guarantee Scheme. Export linked duty free imports are also allowed.

iii) EPZ/FTZ units and 100% EOU can retain 50% of foreign exchange receipts in foreign currency accounts.

iv) 50% of EPZ/FTZ and 100% EOU units production are permitted for sale in domestic tariff area.

v) Profits from export sales are exempted from corporate taxes and MAT.

f) FDI in Food Processing Sector

Please refer to the Chapter of FDI above.

g) GoI Initiative

The GoI has a Vision Plan of Growth for the FPI sector to increase the processing level of perishables from 6% to 20% and enhance value addition from the present level of 20% to 34%. India's share in global trade will be up from 1% to 3%, tripling the size of the processed food industry by 2015.

h) Other Initiatives

1. In order to boost the FPI sector the GoI has introduced Agri Zones and the concept of mega food parks. Such mega parks are intended to attract FDI and twenty parks are to be developed across the country in various cities. The ministry has already approved 50 (fifty) food parks and released assistance for the implementation of the Food Parks Scheme. The Centre also plans Rs. 100 Crore (US$ 22 Billion) subsidy for mega food processing parks.
2. Ministry of FPI has proposed to setup a National Food Technology and Management.
3. Quality labs in the 4 (four) zones of the country are to be set up.

4. In order to promote the wine industry the Maharashtra Government has initiated the setting up of the wine boards at Nasik and Sangli.
5. The Karnataka Government has initiated the development of Agri Export Zones. Such zones will be established at Chitradurga, Kolar, Bangalore, Tumkur & Bijapur to tap the export potential in Mango, Grapes, Pomegranate, Acid Lime, Gherkins and Bangalore Rose Onion.
6. 6 (six) comprehensive Agro Food Technology Parks shall be developed in the locations identified at Malur, Bagalkot, Belgaum, Maddur, Jewargi and Chitradurga. The parks shall be equipped with all necessary infrastructure and common facilities including R&D, warehousing, cold storage, quality assurance laboratory, common effluent treatment plant etc.

7. SPECIAL ECONOMIC ZONES

SEZs are geographical regions that have economic laws different from a country's typical economic laws. These zones are chosen duty-free enclaves, and are deemed foreign territories for the purpose of trade operations, duties and tariffs. The key inference of being deemed foreign territory is that units are permitted substantial operational freedom in routine operations. The endeavor of introducing SEZs is to increase and attract foreign investment in the country by providing access to a global business environment, advanced infrastructure and fewer bureaucratic hurdles.

SEZs not only create a conducive environment to promote foreign investment and exports but also attract technology and promote greenfield investment. Hence, many developing countries are developing SEZs with the expectation that they will provide the engines of growth for their economies to achieve industrialization.

The SEZ Policy, declared by the GoI facilitates the establishment of SEZs in India, with a view to provide a globally competitive and undisturbed milieu for exports. The Policy introduced in the Export-Import Policy with effect from April 1, 2000, is the GoI's most aggressive and comprehensive initiative to date intended to attract foreign investment to India.

The SEZ Act, 2005 came into effect in February 2006 and ever since, the GoI has cleared several projects for setting up SEZs across India. Several SEZ projects are dedicated to the IT Sector mainly because the tax benefits provided by the GoI under the STPI and EHTPI schemes are due for expiry in March 2009.

Minimum Area Requirements for Various Categories of SEZs

- **For Multi-product SEZs:** 1,000 hectares or more.
- **For Services-sector SEZs**: 100 hectares or more.
- **For sector-specific SEZs** such as Gems & Jewellery, IT, Biotech: 10 hectares or more.
- **For all other sectors**: At least 100 hectares.
- Due to the difficulty in finding large tracts of contiguous land in the states of Assam, Meghalaya, Nagaland, Arunachal Pradesh, Mizoram, Manipur, Tripura Himachal Pradesh, Uttaranchal, Sikkim, Jammu & Kashmir, Goa and all the Union Territories, the area requirement for multi-product SEZs have been relaxed to 200 hectares and for sector-specific SEZs to 50 hectares in these States and all the UTs.

FDI in SEZ

In SEZ, FDI is permitted in the development of the following:

a) Integrated Townships including housing;
b) Commercial Premises;
c) Hotels & Resorts; and
d) Regional-level Urban Infrastructure Facilities such as roads & bridges and mass transit systems.

In an SEZ, FDI up to 100% is permitted under the automatic route in the manufacturing sector except for segments that require industrial licensing. Similarly, in an SEZ, 100% FDI is permitted for items reserved for the SSI units.

Infrastructural Benefits

The land allotment by the concerned Government to the SEZ developer/agency is at concessional rates.

Indirect Tax Benefits for Authorised Operations[18]

a) Custom Duty exemption on import of capital goods, raw materials, and components;
b) Custom Duty exemption on import of second hand capital goods;
c) Import of goods in the restricted item's list of the Foreign Trade Policy;
d) Domestic sourcing of capital goods, raw materials, and components without payment of CENVAT (central excise duty);
e) Domestic purchase of goods (raw material, packing material, consumables) and capital goods without payment of CST;
f) Service Tax Exemption on procurement of taxable services[19];
g) Exemption from the Securities Transaction Tax in case the taxable securities transactions are entered into by a non-resident through International Financial Services Centre;
h) Exemption from specific cess payable under various legislations on goods purchased from India or imported from outside India including R&D cess;

[18] The GoI has prescribed the manner, terms and conditions subject to which the following exemptions/ concessions may be available.

[19] There is no specific service tax exemption on services provided by a SEZ Developer or a SEZ Unit. Exemption, if any, would be as per the service tax legislation

i) Value Added Tax/ Local Sales Tax exemption or concession on supply of goods to an SEZ Developer or Unit or sale of goods by an SEZ Developer or Unit[20];

j) Import and indigenous procurement of capital goods under lease financing.

Direct Tax Benefits available to Developers

a) Income Tax Holiday under Section 80-IAB of the IT Act, 1961, whereby a 100% deduction on profits derived from the business of developing an SEZ (notified on or after April 1, 2005) would be available to developer of an SEZ for any 10 (ten) consecutive years out of 15 (fifteen) years beginning from the year in which SEZ has been notified.

b) Where an SEZ developer transfers the operation and maintenance of the zone to another developer, the deduction mentioned above would be transferred for the unexpired period of 10 (ten) consecutive years.

c) Exemption to an SEZ developer from the payment of Dividend Distribution Tax on dividend declared, distributed or paid on or after April 1, 2005 out of current income with respect to profits arising from the SEZ.

d) Exemption from MAT under Section 115 JB of the Act on income earned on or after April 1, 2005 by an SEZ developer from the business of developing SEZ.

Direct Tax Benefits for SEZ Units

a) Tax Holiday for SEZ units engaged in manufacture or providing services that is SEZ units which started manufacturing or producing articles/ things or started providing services on or after April 1, 2005 are eligible for a deduction of 100% of the export profits for the first 5 (five) years from the year in which such manufacture/ provision of services commenced/ commences.

b) In addition, the said SEZ Units also get 50% of the export profits for the next 5 (five) years.

c) Further, for the next 5 (five) years a deduction shall be allowed of up to 50% of the profit as is debited to the profit and loss account and credited to the Special Economic Zone Reinvestment Reserve Account (subject to conditions).

d) Income Tax Holiday for Offshore Banking units in SEZ, wherein a deduction in respect of certain incomes would be allowed under the Section 80LA of the IT Act, to scheduled banks or foreign banks having an Offshore Banking unit in SEZ or to a unit of IFSC. The deduction shall be for 100% of income for 5 (five) consecutive years beginning from the year in which

[20] Subject to the respective sales tax/ VAT legislation of the States/ UTs in which the SEZ is set up.

permission/ registration has been obtained under the Banking Regulation Act or the SEBI Act or any other relevant law and 50% percent of income for next 5 (five) years.

e) Interest received by non-residents and not ordinary residents on deposits made with an Offshore Banking Unit on or after April 1, 2005 shall be exempt from tax.

f) Eligible profits of the SEZ units are also exempt from MAT.

g) Exemption from Capital Gains arising on transfer of assets (machinery, plant, building, land or any rights in buildings or land) on shifting of the industrial undertaking from an urban area to any SEZ would be exempt from capital gains tax.

Impact of the Scheme

The overwhelming response to the SEZ scheme is evident from the flow of investment and creation of additional employment in the country. The SEZ scheme has generated tremendous response amongst the investors, both in India and abroad, which is evident from the list of developers who have set up SEZs in the Country.

A list of some of the SEZs being set up is given herein below:

- Nokia SEZ in Tamil Nadu ("TN");
- Quark City SEZ in Chandigarh;
- Flextronics SEZ in TN;
- Mahindra World City in TN;
- Motorola, DELL and Foxconn;
- Apache SEZ (Adidas Group) in Andhra Pradesh ("AP");
- Divvy's Laboratories, AP;
- Rajiv Gandhi Technology Park, Chandigarh
- ETL Infrastructure IT SEZ, Chennai
- Hyderabad Gems Limited, Hyderabad

The GoI also plans to promote the setting up of Special Economic Regions, which would focus on providing superior operating infrastructure but would not have tax sops available to SEZs. Further details of the same may be provided on request.

Exit Route Policy for SEZ Business

Pursuant to the approval of the Development Commissioner, SEZ units may opt out of the scheme, which exit shall be subject to payment of applicable Customs and Excise duties on the imported and indigenous capital goods, raw materials etc. and finished goods in stock. In case the unit has not achieved positive net foreign exchange, the exit shall be subject to penalty, which may be imposed by the adjudicating authority under Foreign Trade (Development and Regulation) Act, 1992.

8. ACQUISITION OF REAL ESTATE BY FOREIGNERS & FDI IN REAL ESTATE

The acquisition of real estate by NRIs, PIOs, Foreign Embassy/ Consulates as well as Diplomatic personnel, Foreigners and Foreign Entities[21] in India is regulated by FEMA Regulations as well as by the regulations contained in the Notifications issued by RBI, which are subject to change/ amendment from time to time.

There are 3 (three) categories of natural persons covered under FEMA Regulations and RBI Notifications, namely (a) persons resident outside India who are categorized as NRIs; (b) a foreign national who is a Person of Indian Origin; and (c) a foreign national of non-Indian origin ("Foreigner"). Further, Foreign Embassy/ Consulates as well as Diplomatic personnel in India are, subject to prior approval of the Ministry of External Affairs of the GoI, allowed to purchase and sell residential and commercial property excluding agricultural land/ plantation property and farmhouse[22].

General Permission to purchase and sell residential and commercial property excluding agricultural land/ plantation property and farmhouse in India is only available to NRIs and PIOs.

How can Foreigners/ Foreign Entities Acquire Real Estate in India?

Presently Foreigners are not permitted to purchase or sell any immovable property in India. However, Foreigners of most countries, who are resident in India may take residential accommodation on lease provided such lease does not exceed 5 (five) years. In such cases, there is no requirement of taking any permission of or reporting to the RBI. However, all citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan require prior permission of the RBI to acquire or transfer real estate in India.

A foreign company's India LO is restricted from acquiring Real Estate in India. However, such LOs are permitted to take lease of immovable property for a term not exceeding 5 (five) years. A foreign company's BO or other place of business[23] in India are permitted to acquire such Real Estate in India, which is necessary for or incidental to carrying on the activity of such BO provided:

a) all applicable laws, rules, regulations or directions for the time being in force are complied with;

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[21] Foreign Entities means foreign companies, branch and liaison/ project offices of foreign companies.

[22] This is subject to the mandatory condition that funds for payment of any such real estate acquisition shall be remitted from abroad through normal banking channels

[23] Excluding entities that had/ intend to set up BOs in India and are incorporated in Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan. In their case, to acquire any Real Estate, prior approval of RBI is required.

b) the declaration in the Form IPI, is filed with the RBI within 90 (ninety) days from the date of such real estate was acquired; and
c) the consideration for acquiring such real estate shall be made by way of foreign inward remittance through proper banking channel.
d) on winding up of the business, the sale proceeds of such real estate can be repatriated only with the prior approval of RBI.

FDI in Real Estate

The GoI has over a period of time opened up the real estate sector for foreign investment. In this Chapter, we discuss the opportunities for foreign investment in this sector.

A. Housing & Real Estate

The GoI has allowed only allowed NRIs to make 100% investment through the approval route in the following areas of the housing and real estate sector:

1) Development of serviced plots and construction of built-up residential premises;
2) Investment in real estate covering construction of residential and commercial premises including business centres and offices;
3) Development of townships[24], including housing and commercial premises, hotels, resorts. This is subject to guidelines mentioned below;
4) City and regional level urban infrastructure facilities including roads and bridges, mass rapid transit systems;
5) Investment in manufacture of building materials;
6) Investment in participatory ventures in a) and b) above; and
7) Investment in housing finance institutions which is also open to FDI as an NBFC.

B. Townships, Housing, Built-up Infrastructure & Construction-Development Projects

The GoI, with a view to catalyzing investment in townships, housing, built-up infrastructure and construction-development projects as an instrument to generate economic activity, create new employment opportunities and add to the available housing stock and built-up infrastructure, has also allowed 100% FDI through the automatic route which is subject to guidelines mentioned below, in:

1) Township;

[24] Development of land and providing allied infrastructure will form an integrated part of township's development which is subject to the necessary guidelines/ norms pertaining to minimum capitalisation, minimum land area, etc.

2) Housing;
3) Built-up infrastructure; and
4) Construction-development projects.

The above include but are not limited to housing, commercial premises, hotels, resorts, hospitals, educational institutions, recreational facilities, city and region level infrastructure.

Guidelines for FDI in Real Estate for Development of Integrated Townships

FDI in real estate for development of integrated townships is subject to the following guidelines including:

a) Minimum Area Requirement for each project as under:
   i) Land area of 10 (ten) hectare for development of services housing plots;
   ii) Built-up area of 50,000 (fifty thousand) sq. mts. For a construction-development project;
   iii) Satisfying any one of the above 2 (two) conditions for a combination project.
b) The Investment Conditions as under:
   i) Minimum Capitalisation of US$ 10 (ten) Million for a WOS and US$ 5 (five) Million for a JV with Indian partner/s;
   ii) Funds should be brought in within 6 (six) months of commencement of the Company's business;
   iii) Lock-in Period for repatriation of original investment is 3 (three) years from completion of minimum capitalisation. However, the investor may, upon prior application to the FIPB fro exit, be permitted to exit earlier.
c) At least 50% of the project must be developed within a period of 5 (five) years from the date of obtaining all statutory clearances. The investor shall not be permitted to sell undeveloped plots[25]. It will be necessary that the investor provide this infrastructure and obtains the completion certificate from the concerned local body/service agency before he would be allowed to dispose of services housing plots.

The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, byelaws, rules, and other regulations of the State Government/Municipal/Local Body concerned.

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[25] Undeveloped plots in this case means, where roads, water supply, street lighting, drainage, sewerage, and other conveniences, as applicable under prescribed regulations, have not been made available

9. LICENSES AND PERMITS

Any undertaking intending to establish/ set-up business in India, depending on the nature of the entity, is required to obtain the licenses and permits mentioned below. For the purposes of understanding it has been divided into two stages:-

a) Pre-incorporation; and
b) Post-incorporation.

a) Pre-Incorporation Stage

Procedure for incorporation/ registration of a company – Please refer to the chapter on Investment Vehicles for Doing Business in India above.

b) Post Incorporation Stage

1) All businesses must obtain a Tax Identification Card and a Permanent Account Number from the Revenue Department. In addition to this, businesses liable to deduct withholding tax must obtain a Tax Deduction Account Number.

2) Other Statutory Permits:

a) Registration under Shops and Establishment Act – An application needs to be made to the Senior Inspector (Shops & Establishment) of his respective Municipal Corporation of respective city in respective states in a prescribed form with requisite fees. Same must be accompanied by the authentic documentary proof as regards rightful and exclusive possession.

b) Allotment of electricity connection for construction/ industrial use – An application in the prescribed form accompanied by the prescribed fee needs to be made to the concerned State Electricity Board for sanction of electricity connection.

c) For Allotment of a plot/ shed, Clearance for commencement of construction, Execution of lease deed, other matters connected with infrastructural assistance – An application in the prescribed form accompanied by the prescribed fee needs to be made to the respective State Industrial Development Corporation for its approval in this regard.

d) For Location clearance and advice on effluent treatment disposals and for getting a NOC, an application in the prescribed form accompanied by the prescribed fee is required to be made to the concerned State Pollution Control Board for a consent letter under the provisions of the Water (Prevention and Control of Pollution) Act, 1974.

e) For assistance in getting Letter of Intent / Industrial License, Location clearance for setting up an industrial unit, Clearance from different Government Departments, Assistance in getting allocation of alcohol, coal, etc., an application in the prescribed form accompanied by the prescribed fee needs to be made to the Directorate of Industries.

3) Some Business Specific Permits

a) **CST Registration** – An application accompanied by the applicable application fee for registration should be made in the prescribed Form 'A' as per CST rules within 30 (thirty) days from the date when the dealer becomes liable to CST. Application has to be signed by the proprietor of the business, director or the principal officer of the company. Where an entity has more than one places of business in different state, separate registration is required for each state.

b) **Central Excise Registration** – Every manufacturer who is liable for payment of Central Excise duty is required to get registered with the Central Excise Department under whose jurisdiction his place of manufacture falls. The application for registration, on Form 'R-1', is required to be sanctioned within 30 (thirty) days of application. Separate applications are required to be made in respect of each premise in which excisable goods are manufactured /stored.

c) **State specific VAT Registration** – This registration depends on the category of the dealer. An application for registration in the particular State is required to be made on the prescribed Form together with the prescribed fee and necessary documents. The biggest benefit of VAT registration is the availment of input tax credit.

d) **Import-Export Code Registration** – The application for IEC Number should be submitted by the Registered office / Head Office of the applicant exporter to the Licensing Authority under whose authority the Registered office / Head office falls. The application form that is the Ayaat Niryaat (import-export) form should be accompanied by the applicable application fee and the necessary documents and the declaration. It is processed and the IEC Number is allotted on the basis of merit, after clarifications, if any, required by the Licensing Authority are provided by the Exporter.

4. Sector Specific Licenses

In order to carry on business, different activities require sector specific licenses and permits from the applicable regulatory authority which shall be valid for singular period. The following licenses are required for the doing business in the specific sectors in India:

a) *Broadcasting* - An application for registration as a Cable Television Network in India has to be made in Form 1 provided under the Cable Television Network (Regulation) Act, 1995 and is renewable every 12 (twelve) months. For the purposes of providing Direct-To-Home Services an application to the Secretary, Ministry of Information & Broadcasting, in triplicate, in Form-A has to be made. If the applicant is found eligible, the applicant is required to deposit non-refundable entry-fee of Rs. 100 Million, subject to any revisions, to the MIB. Such licenses are issued for a period of 10 (ten) years.

b) *Insurance Services* - An applicant desiring to carry on insurance business in India has to make a requisition for registration application in Form 'IRDA/R1' under the Insurance Regulatory and Development Authority (Registration of Indian Insurance Companies) Regulations, 2000.

c) *Drug and Pharmaceutical* - Following table entails the category of drugs along with the Forms for making application as specified in the Drugs and Cosmetics Rules, 1945. Same has to be made before the Central License Approving Authority.

Category of Drugs	Application Form	License for Retail Sale	License for Wholesale
Other than those specified in Schedule C, C (1) and X	Form 19	Form 20	Form 20-B
Schedule C & C (1)	Form 19	Form 21	Form 21-B
Schedule X	Form 19 C	Form 20-F	Form 20-G
`Homeopathic Drugs	Form 19-B	Form 20-C	Form 20-D

Entrepreneurs are required to obtain statutory clearances relating to Pollution Control and Environment for setting up an industrial project if at all the project is a bulk drugs and pharmaceutical one. An application to be moved by means of Form 'A' of Schedule-II of the Environmental Impact Assessment NOTIFICATION S.0.60 (E), dated 27/01/1994 accompanied by a project report which should include an Environmental Impact Assessment Report, Environment Management Plan and details of public hearing before the State Department of Environment. If investment in the project is less than Rs. 1 Billion (appox. US$ 22.2 million), such Environmental clearance is not necessary.

10. INTELLECTUAL PROPERTY RIGHTS

India provides protection to IPR in accordance with its obligations under the TRIPS Agreement of the WTO. The importance of intellectual property in India is well established at all levels- statutory, administrative and judicial.

India has well-established administrative mechanism for enforcement of IPRs. Police officers are empowered to take action against the infringement of IPRs in case of pirated and counterfeit products. Cases of infringement of IPRs are tried in the judicial courts. Indian IPR laws also provide for appeals in the judicial courts of the administrative decisions relating to IPRs.

The IPRs protected under various statues in India are as follows:-

a) Patents;
b) Copyrights and related rights;
c) Trademarks;
d) Geographical Indications;
e) Plant Varieties;
f) Designs;
g) Lay-out Designs of Integrated Circuits; and
h) Protection of Undisclosed Information.

a) Patents

The Patents Act, 1970 provides for the grant, revocation, registration, license, assignment and infringement of patents in India. The term 'patent' is defined as a monopoly right which is granted to a person who has invented a new and useful article, or an improvement of existing article, or a new process of making an article. It consists of an exclusive right to manufacture the new invented article or manufacture an article according to the invented process for a limited period. Inventions that consist of products or new alloy are called product invention and the corresponding patent to this is referred to as 'product patent'. Whereas, inventions that consists of process or processes of making a known or new alloy is called a process invention and the patent for this is referred to as 'process patent'. The following are the essential ingredients of a patent:

i. Novelty;
ii. Inventiveness; and
iii. Industrial Application.

Patent system in India is administered under the superintendence of the Controller General of Patents, Designs, Trademarks and Geographical Indications. The Office of the Controller General functions under the DIPP, MCI. The Controller General directs and supervises the functioning of the Patent Office and the Patent Information System. The Patent Office performs the statutory duties in connection with the grant of patents for new inventions under the Patent's Act. The duration of a patent is 20 (twenty) years. The Head Office of Patents is at Kolkata with branches at Mumbai, Chennai and Delhi. The branches deal with the applications for patents originating within their respective territorial jurisdiction.

Since 1999, India has undertaken 3 (three) exhaustive amendment of the Patents Act 1970. This Act has been amended by the Patents (Amendment) Act, 2002 and the Patents (Amendment) Act, 2005 (came into effect on January 01, 2005) to take care of India's obligations under the TRIPS Agreement. After the amendments, product patent (instead of process patent) is being granted for food, pharmaceutical and chemical products. Also, along with post grant opposition to patents, pre-grant opposition is also permissible. The first product patent in India was granted to Roche India Private Limited for Biotech drug Pagasys (Peinterferon apha – 2a).

b) Copyrights and Related Rights

India's Copyright law, laid down in the Indian Copyright Act, 1957 as amended by Copyright (Amendment) Act, 1999 defines the term 'copyright' as the exclusive right to do or authorise the doing of a 'work' or a substantial part of it. The term 'work' used here means:-

- **Literary Work –** includes computer programmes, tables, compilations and computer databases. Copyright subsists in these works till the life time of the author.
- **Dramatic Work –** includes any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, whose form is fixed in writing or otherwise. Copyright subsists in these works till the life time of the author.
- **Musical Work –** includes works of music, any graphical notation of such work but does not include any words or action intended to be sung, spoken or performed with the music. Copyright subsists in these works till the life time of the author.
- **Artistic Work –** means a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not they possess artistic quality. It also includes a work of architecture and any other work of artistic craftsmanship. Copyright subsists in these works till the life time of the author.
- **Cinematographic Film –** means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means.

- **Sound Recording –** means recording of sounds from which sounds may be produced regardless of the medium by which sounds are produced. Copyright subsists in these works for 60 (sixty) years starting from the next year in which the film was made.

'Related rights' are the rights of performers (that is actors, singers and musicians), producers of phonograms (sound recordings) and broadcasting organizations.

Copyright subsists in any literary, dramatic, musical or artistic work (other than a photograph) for a maximum period of 60 (sixty) years starting from the next year in which the same was published.

The Copyright Act, 1957 is administered by the Department of Higher Education in the Ministry of Human Resource Development. A Copyright Board is established under the Act. The Board is entrusted with the task of adjudication of disputes pertaining to copyright registration, assignment of copyright, grant of licenses in respect of works withheld from public, unpublished Indian works, production and publication of translations and works for certain specified purposes. The Copyright Act, 1957 set up a Copyright Office under the control of Registrar of Copyrights, for the registration of Copyrights.

India's Copyright law fully reflects the Berne Convention on Copyrights, to which India is a party. Additionally, India is party to the Geneva Convention for the Protection of Rights of Producers of phonograms and to the Universal Copyright Convention.

The Copyright law has been amended periodically to keep pace with changing requirements. The recent amendment to the Copyright law, which came into force in May 1995, has ushered in comprehensive changes and brought the Copyright law in line with the developments in satellite broadcasting, computer software and digital technology. The amended law has made provisions for the first time, to protect performer's rights as envisaged in the Rome Convention.

Several measures have been adopted to strengthen and streamline the enforcement of copyrights. These include the setting up of a Copyright Enforcement Advisory Council, training programmes for enforcement officers and setting up special policy cells to deal with cases relating to infringement of copyrights.

c) **Trade Marks**

The Trade Marks Act, 1999 ("Act") was enacted to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for

the prevention of the use of fraudulent marks. The Act grants protection to trademarks, service marks and shape marks. The Act repealed the earlier Trade & Merchandise Marks Act, 1958. The Trademarks Rules were notified in 2002. According to the Act, the term 'trade mark' means "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours".

The Act provides for registration of trademarks for services and goods, including collective marks, and for the assignment and transmission of trademarks. There is provision for an appellate board for speedy disposal of appeals, rectification of applications and simplification of procedures for the registration of the registered user and for enlarging the scope of the permitted trademarks and prohibition on the use of someone else's trademarks as part of corporate names or names of business concerns.

Under the Act, the Controller-General of Patents, Designs and Trade Marks under DIPP, Ministry of Commerce and Industry, is the 'Registrar of Trade Marks'. The Controller General of Patents, Designs & Trade Marks directs and supervises the functioning of the Trade Marks Registry. The Trade Marks Registry administers the Act and the Rules there under. Application for registration of a trademark should be filed with the trademark registry. Trademark is registered after publication in the trademarks journal to invite opposition and after further examination.

Registration is not essential for protection of a trade mark; however, it is mandatory for taking action against infringement. In case of unregistered trademarks/ service marks, common law remedies by way of a passing off action, injunction and damages are available. Registration is valid for an initial period of 10 (ten) years and can be renewed for further period of 10 (ten) years.

Police officers are empowered and seized without warrant the counterfeit goods and machinery used to commit the offence. Penalties ranging from 6 (six) months to 3 (three) years and fines have been prescribed in the Act for Trademarks violations.

d) **Geographical Indications (Appellation of Origin)**

The Geographical Indication of Goods (Registration and Protection) Act, 1999 ("Act") was enacted to provide for registration and better protection of geographical indications relating to goods. According to the Act, the term 'geographical indication' (in relation to goods) means "an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or

manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods, one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be".

Under the Act, the Controller-General of Patents, Designs and Trade Marks under DIPP, Ministry of Commerce and Industry is the 'Registrar of Geographical indications'. The Controller General of Patents, Designs & Trade Marks directs and supervises the functioning of the Geographical Indications Registry. In this case the registration is valid for an initial period of 10 (ten) years and can be renewed for further period of 10 (ten) years. A geographical indication may be registered with the Controller General of Patents, Designs and Trademarks for all goods originating in a definite territory of a country, or a region or locality in that territory. The Act provides for additional protection of higher level to goods notified by the Central Government. Registration of a geographical indication is for 10 (ten) years with possible renewal for further 10 (ten) year periods.

e) **Protection of Plant Varieties**

Protection to Plant Varieties is provided by the Protection of Plant Varieties and Farmers' Rights Act 2001 ("Act"). The Act provides an effective system for protection of plant varieties and farmers' rights to stimulate investments for R&D both in public and private sectors for the development of new plant varieties by ensuring appropriate returns on such investment. The Act complies with India's obligations under Article 27.3 (b) of the TRIPS Agreement of the WTO by providing an effective sui generis system for protection of plant varieties.

New plant varieties could be registered under this Act for Plant Breeder Rights based on the international criteria of newness, distinctiveness, uniformity and stability. The essentially derived varieties are also registered under this Act based on internationally accepted criteria. The certificate of registration in the case of trees and vines, 18 (eighteen) years from the date of registration of the variety; in the case of extant varieties, 15 (fifteen) years from the date of the notification of that variety by the Central Government under Section 5 of the Seed Act, 1996, and in the other case, 15 (fifteen) years from the date of registration of the variety. The Act also has some unique features like benefit sharing, community rights, gene funds, compulsory licensing etc. Penal provisions are also provided in this Act against infringement of Plant Breeder Rights.

A Protection of Plant Varieties and Farmers' Rights Authority has been constituted to administer this Act. The Protection of Plant Varieties and Farmers' Rights rules have also been framed under this Act. Applications for plant varieties should be filed with the Authority. Department of Agriculture and Cooperation, Ministry of Agriculture, GoI is the administrative department for implementation of this Act.

f) Industrial Designs

The Designs Act, 2000 ("Act") was enacted to consolidate and amend the law relating to registration and protection of new and original industrial designs. Independently created designs that are new or original are protected under this Act. According to the Act, the term 'design' means "only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in the Trade and Merchandise Marks Act, 1958 or property mark as defined in the Indian Penal Code or any artistic work as defined in the Copyright Act, 1957".

The Act provides a right to the owner of the registered industrial design to prevent third parties not having his consent from making, selling or importing articles being or embodying a design, which is a copy or substantially a copy of the protected design when such acts are undertaken for commercial purposes. The duration of the protection is 10 (ten) years.

Under the Act, the Controller-General of Patents, Designs and Trade Marks under DIPP, Ministry of Commerce and Industry is the Controller of Designs. The Controller General of Patents, Designs & Trade Marks directs and supervises the functioning of 'Industrial Designs Wing'. The 'Industrial Designs Wing' of the Head Office of Patents located at Kolkata does the registration of industrial designs under the Designs Act.

g) Lay Out Designs of Integrated Circuits

The Semiconductor Integrated Circuits Layout Design Act, 2000 ("Act") provides protection to semiconductor integrated circuits layout designs in accordance with the provisions of the TRIPS Agreement. The Act provides for exclusive rights to the registered proprietor of a layout design and

also to the registered users. In this case the registration is valid for an initial period of ten years. Applications for registration of layout designs could be filed with the Registrar. Appeals against the orders of the Registrar could be filed with the Appellate Board. The Act also provides for criminal prosecution for infringement of layout designs.

The administration department for implementation of the Act is Department of ITech., Ministry of Communications and Information Technology, GoI.

h) **Protection of Undisclosed Information**

Knowhow is another important form of intellectual property generated by R&D institutions that does not have the benefit of patent or copyright protection. Such know-how is kept undisclosed as trade secrets. A Trade Secret or Undisclosed Information is any information that has been intentionally treated as secret and is capable of commercial application with an economic interest. It protects information that confers a competitive advantage to those who possess such information, provided such information is not readily available with or discernible by the competitors. They include technical data, internal processes, methodologies, survey methods ,a new invention for which a patent application has not yet been filed, list of customers, process of manufacture, techniques, formulae, drawings, training material, source code, etc. It therefore becomes imperative to strengthen the confidentiality around the trade secret by ensuring that contractual obligations are enforced on persons who are allowed to use the trade secret, especially, when it is licensed to a third party.

Since there is no documentary evidence such as a Letters Patent or a Copyright registration or a Trademark Registration to prove that the trade secret was originally created by the proprietor, it is essential to maintain proof of creation of trade secret either by mailing the information to oneself and retaining postmarked and sealed envelope or by depositing a copy of the information with a third party that would maintain a dated copy.

Trade secret remains confidential for indefinite period of time as per the will of the proprietor provided the security and its confidentiality are not breached. There is no specific legislation regulating the protection of trade secrets in India. India follows common law approach of protection and all matters relating to it are generally covered under the Contract Act, 1872 and the common law principles. So, if the information constituting trade secret is leaked, legal action can be brought against the parties who have leaked it under the Law of Contracts. However, in such a case the protection of trade secret will be lost and it becomes available in public domain.

Protection of Computer Software & Programmes

In India computer software and programmes, tables and compilations including computer databases are recognized as literary works under the Copyright law. The object as well as the source codes are protected as literary works and the protection extends to 60 (sixty) years.

The amended Patent law provides for another level of protection to computed programmes provided the invention is of such a nature that it combines novel as well as non-obvious features of hardware or configuration and computer programmes, and provided that such invention is claimed as a machine, apparatus or device, protection may become available to the computer programme claimed as a part of the machine.

11. INFORMATION TECHNOLOGY AND DATA PROTECITION

India was one of the first few countries in the world to pass e-commerce enabling legislation, the Information Technology Act, 2000 ("ITech. Act"), with its formal notification on October 17, 2000. The Act facilitates e-commerce and the use of technology in the conduct of web based transactions.

The ITech Act has legalised "Electronic Commerce" in India and provides for "Electronic Governance". The ITech Act deals with the contractual aspects of use of electronic records, such as attribution, acknowledgement, time and place of dispatch and receipt. However, the ITech Act is only an enabling statute, and therefore is to be read in conjunction with the Indian Contract Act, 1872. Looking from commercial contracts point of view when contracts are entered online and documents are sent via e-mail, it may not be possible for parties to actually “sign” the contract or document. Therefore, it is difficult to identify the originator of an online document and to verify its authenticity. The concept of digital signatures has been devised to overcome this limitation and the ITech Act has been enacted to give legal sanctity to such digital signatures and regulate them.

The ITech Act stipulates that digital signatures should be used for the purposes of authenticating an e-contract. This acts as a limitation on the use of any other technology for authentication purposes.

Data Protection Laws

India is fast emerging as one of the most preferred destinations for offshore business outsourcing and with each passing day more and more services including banking, financial, telecom, marketing, healthcare, educational and even legal services are being outsourced to India. This has catapulted India into one of the global hotspots for offshore outsourcing. With this mammoth growth in offshore outsourcing has come the clarion call for enacting a law for protecting data against piracy/ theft. Many countries have enacted well framed and established laws, exclusively for the data protection. Let us look at the protection accorded to data by the United Kingdom and the United States of America.

Data Protection in the UK – In the U.K., the parliament framed the Data Protection Act in 1984, which was subsequently repealed by the Data Protection Act of 1998 (“DPA”). DPA is instituted for the purpose of providing protection and privacy of the personal data of the individuals in the UK. DPA covers data which can be used to identify a living person and includes names, birthday, anniversary dates, addresses, telephone numbers, fax numbers, e-mail addresses, etc. DPA only applies to data which is held or intended to be held, on computers or other equipments operating automatically in response to instructions given for that purpose or held in a relevant filing system.

As per the DPA, all persons and organizations which store personal data are required to register with the Information Commissioner, appointed as the government official to oversee the DPA. The DPA puts restrictions on collection of data and personal data can be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or purposes.

Data Protection in USA – Despite of the fact that US and the European Union focus on enhancing privacy protection for their citizens, the US has taken a different approach to privacy from that of the EU. The US has adopted the sectoral approach which relies on a mix of legislation, regulation, and self regulation. In the US, based on its utility and importance, data is grouped into many classes due to which different degree of protection is awarded to different classes of data. USA has passed several acts to stabilize the data protection laws in its territory including:

a) The Privacy Act, 1974 provides for establishing standards for when it is reasonable, ethical and justifiable for government agencies to compare data in different databases.

b) The Electronic Communications Privacy Act which was passed to restricting the interception of electronic communications and prohibiting the access to stored data without the consent of the user or the communication service.

c) The Children's Online Privacy Protection Act, 1998 requires website operators to obtain parental consent before obtaining personal information from children; and

d) The Consumer Internet Privacy Protection Act which requires an ISP to get permission of the subscriber before disclosing his personal information to third parties.

However and despite the above-mentioned enactments, the existing US federal laws are not sufficient to cover the broad range of issues and circumstances that make the new digital environment a threat to personal privacy. Furthermore, the US Government has been reluctant to impose a regulatory burden on Electronic Commerce activities that could hamper its development and has looked for an answer in self regulation.

Data Protection Law in India

Although per-se India does not presently have any data protection laws, but, the ITech Act itself addresses the major issues which the data protection law is ideally expected to do and thereby supports the cause of Data Protection.

Under the ITech Act, the word "Data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer. Please note that the definition of Data includes even printouts, punched cards, etc. and is quite wide and covers most requirements of the ITech industry.

Further, under the ITech Act, "Computer Database" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network. The protection accorded to data under the ITech Act can be gauged from the following examples:

a) Unauthorised access of data is a criminal offence under the ITech Act which imposes both criminal and civil penalties on any attack on Data. Provision of the ITech Act states that whoever affects any information residing in a computer resource injuriously by any means, is liable to be punished with imprisonment up to 3 (three) years, or with fine which may extend up to 2 (two) hundred thousand rupees, or with both. This provision may be invoked even when the action is without intention to cause loss to any person, provided he had knowledge that his action could cause such loss.

   The provisions enabling civil penalties of the ITech Act states that if any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network accesses or secures access to such computer, computer system or computer network he shall be liable to pay damages by way of compensation not exceeding 10 (ten) Million rupees to the person so affected.

   Indian law recognizes civil liability upto Rs. 10 (ten) Million for the mere “Access of Data without permission” or for any form of "assistance" in this regard which may (perhaps) include unuthorised custody of password, user terminal, or access token which is used to commit the offence.

b) The ITech Act also addresses the issue of technical facilitation of data protection and also provides for a system of grievance redressal by Fast Track Courts.

c) The ITech Act provides for the accountability and protection to data during storage or transit facilitated in a legally approved manner.

d) The definition of data extends to all forms of digital documents including database, audio and video files, digital data stored on credit cards etc.

e) The term "affecting injuriously" may cover loss of confidentiality as well as alteration, deletion, etc.

Data Protection and Accountability during Storage or Transit

The ITech Act recognizes the terms "Digital Signatures" which include a "Hashing Mechanism to protect data integrity" and "Public Key encryption to ensure authentication". If every data transmitted is digitally signed, there is non-repudiable accountability. If encryption is used with originator's public key, data confidentiality is protected from everybody else. If it is encrypted with the recipient's public key data confidentiality is ensured against every one other than the intended recipient. Additionally, innovative use of "Hashing" and use of a "Enterprise level Data Storage Private Key" can ensure that data in storage is protected and made available on "Need to Know Basis" as mandated by EU Data protection principles.

Finally, based on the footprints of the foreign laws, India has also introduced the *Personal Data Protection Bill, 2006* ("Bill") in the Rajya Sabha, which seeks to provide protection of personal data and information of an individual collected for a particular purpose by one organization, and to prevent its usage by other organization for commercial or other purposes and entitle the individual to claim compensation or damages due to disclosure of personal data or information of any individual without his consent.

12. EMPLOYMENT LAWS

India provides for core labour standards of International Labour Organisation for welfare of workers and to protect their interests. India has numerous labour laws to address various issues such as resolution of industrial disputes, working conditions, labour compensation, insurance, child labour, maternity benefits, equal remuneration etc. Labour forms part of the concurrent list of the Constitution of India and therefore both central and state governments can legislate on the same. Both central and state governments have enacted laws on labour issues. Central laws grant powers to officers under central government in some cases and to the officers of the state governments in some cases.

The main central labor legislations which may be of relevance to a foreign investor are mentioned below. Apart from these, a particular State may have its own laws/ rules with which an establishment would need to comply.

a) The Workmen's Compensation Act, 1923;
b) The Minimum Wages Act, 1948;
c) The Payment of Wages Act, 1936;
d) The Industrial Disputes Act, 1947;
e) The Employees Provident Fund and Miscellaneous Provisions Act, 1952;
f) The Payment of Bonus Act, 1965;
g) The Payment of Gratuity Act, 1972;
h) The Maternity Benefit Act, 1961; and
i) The Industrial Employment (Standing orders) Act, 1946.

The Workmen's Compensation Act, 1923

This Act provides that compensation shall be provided to a workman for any injury suffered during the course of his employment or to his dependents in the case of his death. The Act provides for the rate at which compensation shall be paid to an employee.

This Act makes it obligatory for the employers brought within the ambit of the Act to furnish to the State Governments/Union Territory Administrations annual returns containing statistics relating to the average number of workers covered under the Act, number of compensated accidents and the amount of compensation paid.

The Minimum Wages Act, 1948

This Act prescribes minimum wages for all employees in all establishments or working at home in certain employments specified in the schedule of the Act. Central and State Governments revise minimum wages specified in the schedule.

The Central Government is responsible for the administration of the Act in railways, mines, oilfields and ATS, while State Governments are responsible in factories and other industrial establishments. In respect of major ports, State Governments have appointed officers of the Central Industrial Machinery as Inspector for enforcing the Act.

The Payment of Wages Act, 1936

This Act regulates issues relating to timely payment of wages to the workers and that no deductions other than those authorized by the law are made by the employers.

The salary in factories/establishments employing less than 1000 (one thousand) workers is required to be paid by 7th of every month and in other cases by 10th day of every month.

A worker, who either has not been paid wages in time or an unauthorized deductions have been made from his/her wages, can file a Claim either directly or through a Trade Union or through an Inspector under this Act, before with the Authority appointed under the Payment of Wages Act. The power for hearing and deciding Claims under this Act has been vested at present with the Presiding Officer of a Labour Court.

The Industrial Disputes Act, 1947

This Act provides for the investigation and settlement of industrial disputes in an industrial establishment relating to lockouts, layoffs, retrenchment etc. It provides the machinery for the reconciliation and adjudication of disputes or differences between the employees and the employers. Industrial undertaking includes an undertaking carrying any business, trade, manufacture etc.

The Act lays down the conditions that shall be complied before the termination/retrenchment or layoff of a workman who has been in continuous service for not less than 1 (one) year under an employer. The workman shall be given one month's notice in writing, indicating the reasons for retrenchment and the period of the notice that has expired or the workman has been paid, in lieu of such notice,

wages for the period of the notice. The workman shall also be paid compensation equivalent to 15 (fifteen) days' average pay for each completed year of continuous service. A notice shall also be served on the appropriate government.

The Employees Provident Fund and Miscellaneous Provisions Act, 1952

This Act seeks to ensure the financial security of the employees in an establishment by providing for a system of compulsory savings. The act applies to every factory engaged in any industry specified in Schedule 1 in which 20 (twenty) or more persons are employed; every other establishment employing 20 (twenty) or more persons or class of such establishments which the Central Govt. may notify; any other establishment so notified by the Central Government even if employing less than 20 (twenty) persons.

The Act provides for establishments of a contributory PF in which employees' contribution shall be at least equal to the contribution payable by the employer. Minimum contribution by the employees shall be 10-12% of the wages. This amount is payable to the employee after retirement and could also be withdrawn partly for certain specified purposes.

The Act and the Schemes framed there under provides for three types of benefits - contributory PF, pension benefits to the employees/ family members and the insurance cover to the members of the PF.

The Payment of Bonus Act, 1965

This Act provides for the payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity. The Act is applicable to establishments employing 20 (twenty) or more persons. The minimum bonus, which an employer is required to pay even if he suffers losses during the accounting year is 8.33% of the salary.

The Payment of Gratuity Act, 1972

This Act provides for a scheme for the payment of gratuity to an employee on termination of his employment after 5 (five) years of continuous service either on his superannuation, retirement or resignation. The condition of 5 (five) years of continuous service is not applicable in cases where termination of employment takes place due to death or disablement due to accident or disease.

The quantum of gratuity is to be computed at the rate of 15 (fifteen) days remuneration based on remuneration last drawn by the employee concerned for every completed year of service. The Act prescribes that the total amount of gratuity payable shall not exceed the prescribed limit of Rs. 350,000. In practice, however, Indian companies pay gratuity for each completed year of service which may in aggregate far exceed Rs. 350,000. The Act merely limits the statutory obligation of a company to Rs. 350,000.

The Act requires a company to obtain compulsory insurance for its liability for payment towards gratuity from Life Insurance Corporation of India. Upon obtaining such insurance the company must intimate the controlling authorities under the Act in the prescribed form, for registration within 30 (thirty) days of commencement of business.

The Maternity Benefit Act, 1961

This Act regulates the employment of the women in certain establishments for a prescribed period before and after child birth and provides certain other benefits. The Act does not apply to any factory or other establishment to which the Employees State Insurance Act, 1948 is applicable. Every women employee who has actually worked in an establishment for a period of at least 80 (eighty) days during the 12 (twelve) months immediately proceeding the date of her expected delivery, is entitled to receive maternity benefits under the Act. The employer is thus required to pay maternity benefits and/or medical bonus and allow maternity leave and nursing breaks.

The Industrial Employment (Standing Orders) Act, 1946

This Act requires employers in industrial establishments to clearly define the conditions of employment by issuing standing orders duly certified. Model standing orders issued under the Act deal with classification of workmen, holidays, shifts, payment of wages, leaves, termination etc. Standing orders come into operation on the expiry of 30 (thirty) days from the date on which authenticated copies thereof are sent by the Certifying Officer to the employer. Such standing orders must be displayed prominently in the office premises in English and in a language understood by most employees.

Most of the labour legislations are applicable only to industrial employees earning wages which do not exceed the salary scale mentioned in any particular statute. The employment relationship of managerial personnel with the company is contractually governed. Certain legislations relating to PF, gratuity and maternity benefit are applicable universally to all employees.

Employment Contracts

The relationship between a company and its managerial employees and other employees who earn a salary which is higher than the salary caps provided under the various labour statutes, is governed by the employment contract which in India is variously known as 'offer letter', 'employment letter', 'letter of appointment', etc.

Confidentiality, non-compete, ownership of IPR are some of the clauses which are universally found in all employment contracts. It is pertinent to note here that in India a covenant of non-compete beyond the term of the employment contract is void since the Indian Contract Act, 1872 (which governs contractual relationships between parties in India) stipulates that an agreement, which restrains anyone from carrying on a lawful profession, trade or business, is void to that extent. The courts in India have also held the same position.

One significant difference between the employment relations prevalent in the US and other developed countries and those of India, is the absence of the concept of "At-will" employment. At-will employment which means that the both the employee and the company may terminate the employment at any time without ascribing any reason is a concept which is not followed in India. Employment contracts in India are long term agreements and termination of employment must be according to the terms provided in the agreement subject also to any applicable statute(s).

13. REMITTANCE OF FOREIGN EXCHANGE FROM INDIA

FEMA, the legislation regulating Foreign Exchange ("Forex") in India, forms the statutory basis for exchange control management in India. Such exchange control mechanism is administered by the RBI through regulations. India has yet to achieve full capital account convertibility but several relaxations pertaining to drawal of Forex have been introduced in current account as well as capital account transactions. A payment in relation to the services procured in the ordinary course of business is regarded as current account transaction provided no such payment alters payee's assets and liability outside the country. Such drawal of Forex for current account transactions is regulated as under:

a) Transactions mentioned in Schedule I are prohibited;
b) Transaction mentioned in Schedule II requires prior approval of the concerned ministry/ department of GoI if such transaction exceeds the prescribed limits;
c) Transactions mentioned in Schedule III also require prior approval of the concerned ministry/ department of the GoI it such transaction exceeds the prescribed limits; and
d) All other no limit current account transactions do not require any approval.

The only exceptions to the above-mentioned are transactions that are listed in Schedule II and III, where prior approval is dispensed with if the payment is made out of funds held in the EEFC Account of the remitter. Discussed below are some of the current account payments.

Remittances of Profits & Dividends

Dividend and profits are now allowed to be remitted with much lesser controls. Prior approval of the RBI in some cases is required before profits from the foreign subsidiaries are remitted to their head offices outside India. Taxes must be paid prior to remittance of such profits. Profits retained for more than 1 (one) year are considered re-invested and their remittance requires special approval.

Royalty Payment under Technical Collaboration

Prior approval of the GoI, Ministry of Commerce and Industry is required for remittance under technical collaboration agreements wherein:

a) The royalty payment exceeds 5% of the local sales and 8% on exports; or
b) The lump-sum payment exceeds US$ 2 Million.

No approval of the GoI is required for the above-mentioned if the remittance is made out of the EEFC Account of the remitter.

The FDI guidelines also enable an Indian company to pay, brand royalty on use of trademark and brand name of the foreign collaborator without technology transfer under the automatic route to the extent of 2% on exports and 1% on domestic sales. Additional brand royalty is not allowed to be paid to the foreign collaborator in case of technology transfer since the payment for the use of the trademark and brand name is included into the technical know-how royalty.

Repatriation of Capital Invested In India

Repatriation of investments made in India in accordance with the Forex Laws is permissible (except where investment was permitted on specific condition that it will not be eligible for repatriation), provided the disinvestment has also been made with the approval of GoI/ RBI. Actual remittances will be permitted subject to fulfillment of such conditions as to quantum and installments of repatriation, etc., if any, as may be applicable from time to time. Capital which is generally repatriated is as under:

a) Winding-up of a company in India; and
b) Sale of shares of the company to a third party.

Advance Remittance - Import of Services

Remittance for providing services under current account transaction for which the release of Forex is admissible is now permitted in India. However, where the amount exceeds US$ 100,000 or its equivalent, a guarantee from a bank of International repute situated outside India or a guarantee from an authorized dealer in India, if such a guarantee is issued against the counter-guarantee of a bank of International repute situated outside India, should be obtained from the overseas beneficiary.

Repatriation of Winding-up Proceeds of Project, Branch & LO

The repatriation of winding-up proceeds is allowed as under:

a. A PO of a foreign company is allowed to remit its winding up proceeds under the automatic route subject to the fulfillment of all the necessary compliances.

b. Prior approval of the RBI is required for repatriation of winding up proceeds of a BO and LO.

Other Remittances

1) Payments to Foreign Technicians

Payment to foreign technicians may be made from EEFC Accounts or free foreign exchange according to the guidelines set forth by the RBI. Release of such payments under EEFC Account is not subject to the RBI's restrictions of per diem rates and duration of agreement.

2) Remittance of Royalty & Payment of Lump-Sum Fee

Earlier RBI's prior approval was required if the agreement for technical collaboration had not been registered with RBI. Now banks may allow remittances for royalty and payment of lump-sum fee provided the royalty does not exceed 5% on local sales and 8% on exports and lump-sum payment does not exceed USD 2 (two) Million.

3) Remittance for Use and/or Purchase of Trademark/ Franchise in India

Banks can now freely allow remittances for use of trademark/franchise in India. However, prior approval of the RBI's is required for remittance towards purchase of trademark/franchise.

4) Remittance by Individual Foreigners

Foreign nationals temporarily resident in India are permitted to transfer to their own countries, at the time of their departure from India, their current assets such as savings from salary, dividend, commission, PF balance, sale-proceeds from personal effects, etc. in full. In addition, they will also be allowed to repatriate the sale proceeds of their investments in India subject to Forex laws.

14. PRIVATE EQUITY

India is fast becoming the preferred Venture Capital /Private Equity investment destination and has already overtaken the VC/PE investment in China. Since 2002, India has witnessed the prevalent evolution of PE funds into “growth stage’ and “late stage” investors. Observers began to take note of private equity's growing presence in India when in late 2002, Oak Hill Capital and Financial Technology Ventures resorted to a buyout deal by backing a management bid to acquire Conseco's stake in Delhi-based EXL Services.

Corporates are able to raise PE funds more easily and in far less time than traditional sources such as getting listed or raising a loan. Apart from providing capital, PE firms also bring expertise and networking contacts to the table. According to Emerging Markets Private Equity (“EMPEA”), there are approximately 160 (one hundred sixty) Private Equity firms operating in India on date. About 120 (one hundred twenty) of these India-focused firms are either those outside India or are subsidiaries of non-Indian VC/ PE firms. As a result of the substantial VC/PE investment, Indian entrepreneurial activity is on the rise especially in the Small and Medium Enterprise and the ITech/ITech Enabled Services sector. In addition sectors such as manufacturing, logistics, financial services, realty, healthcare and infrastructure have in recent times successfully tapped into the PE goldmine. In the quantum of VC/PE inflow of investment in 2007 was approximately US$ 13.5 billion.

Regulatory Framework

Unlike the USA, in India there are no specific PE Regulations. PE funds are regulated by The SEBI (Venture Capital Funds) Regulations, 1996 (“VCF Regulations”) and the SEBI (Foreign Venture Capital Investor) Regulations, 2000 (“FVCI Regulations”). Thus the classic Silicon Valley definitions of VCFs and private equity funds do not hold well in the Indian context.

Under the VCF Regulations a fund can be organized either in the form of a trust or a company. VCFs can only invest in Venture Capital Undertakings. VCUs have to be a domestic company whose shares are not listed.

FVCI Regulations

Foreign PE investors can either invest directly under the FDI route or may invest under the FVCI regime. To register under the latter the investor is required to register with SEBI as a FVCI for which the SEBI would consider inter alia, the applicants track record, professional competence, financial soundness, experience, whether the applicant is regulated by an appropriate foreign regulatory

authority etc. The fund shall have to appoint a domestic custodian and have to enter into an agreement with the designated bank for opening a special non-resident Indian rupee or foreign currency account.

Structuring the VC/PE Fund

Offshore funds participating in Indian VC/PE Investment can do so in two ways, they can use either an 'offshore structure' or a 'unified structure'.

Offshore Structure

Under this structure the Offshore Fund can either be a Limited Liability Company or a Limited Liability Partnership organized outside India to invest in Indian portfolio companies. There would generally be an offshore fund manager and an Indian Fund Advisor in India for identifying deals and to carry out the preliminary due- diligence on prospective investment opportunities.

Unified Structure

This structure is generally adopted where the Indian investors are expected to partake in the fund. Under this structure a company or trust is setup in India. The domestic investors directly contribute directly to the company or the trust whereas the overseas investors pool their investment in an offshore investment vehicle and this offshore vehicle invests in the domestic trust or company. The portfolio investments are made by the trust or the company. There is generally a domestic investment advisor or fund manager.

Benefits of FVCI Registration

It is not mandatory for a FVCI to register with the SEBI. However, SEBI and the RBI provide certain benefits to SEBI registered FVCIs, which makes it beneficial to register with the SEBI. The benefits are as follows:

a) The GoI has exempted FVCIs from taking prior Governmental approval even if the FVCI seeks to invest in the same field as one in which it has already invested.

b) As per the December 2000 notification issued by the RBI, FVCIs shall benefit from free entry and exit pricing and thus investments or exits by FVCIs involving the transfer of shares between residents and non-residents shall not be subject to restrictive pricing guidelines issued by the RBI otherwise applicable to foreign investors under the FDI route.

c) FVCIs registered with the SEBI have been awarded the Qualified Institutional Buyer status and can accordingly participate in the IPO of the VCU through the book building process.

d) As per the SEBI's Disclosure and Investor Protection Guidelines, 2000, investments made by VCFs and FVCIs in the share capital of VCUs pre IPO would not be subject to lock-in requirements.

Exit Mechanism

A key factor in driving investments by PE firms is how successful they would be in finding profitable exit routes. The most popular exit mechanism is a sale to another VC/PE Fund ("Strategic Sale") or an offer for sale at the time of Initial Public Offer. 2004 was a great year in this respect with PE firms exiting their investments in as many as 30 (thirty) Indian companies across all sectors, six of them via IPOs. The biggest media sector exit during the year was New Delhi Television's $24.5 million April IPO which provided an exit route for its PE investors including Goldman Sachs, Saffron Fund, JF India Fund, JP Morgan and SBI Capital Markets. Another popular exit route for VC/PE investment is by way of buy back of shares by the investee company.

The growing size of deals and multiple exit routes used indicate that India is fast gaining credibility for returning value to investors well for future fund-raising for this market.

15. MERGERS AND ACQUISITIONS

In India, Merger and Acquisitions and Amalgamations of large corporations are effected through the Companies Act, 1956, where court sanction is a pre-requisite. Other types of M&A transactions include asset purchase deals, share purchase deals, takeovers of listed companies under the SEBI's Takeover Regulations, and management buyout transactions.

Modes of M&A

The primary modes of M&A under Indian law may broadly be classified as:

a) Acquisitions by private arrangement; and
b) Court based restructurings.

Acquisitions by private arrangement would be contractual agreements between the parties and would be in the form of:

1. Share Acquisitions;
2. Asset Transfers; or
3. Spin/ Hive off or Slump Sale.

Court based restructurings would involve the formulation of a scheme of restructuring primarily for the purpose of merger or amalgamation, demerger or slump sale.

M&A Procedure

a) Structuring the Acquisition: The first step towards an M&A would be to advise on various structuring issues involved in M&A deals, including determining the type of Special Purpose Vehicle, jurisdiction of SPV, type of instruments etc.

b) Domestic Tax Planning: Tax plays a very important part in an M&A transaction. The transaction would have to be structured in the most tax efficient manner with the tax structure being optimum.

c) Advice on Corporate and Securities Law Issues: The next step would involve advise on legal and compliance issues related to:

   i. Corporate Law requirements;

ii. Takeover Code and other Securities Laws issues;

iii. Listing and Regulatory requirements;

iv. Government Approvals; and

v. Statutory filings.

d) Undertaking Legal Due Diligence: A detailed legal due diligence exercise with an industry-specific focus in several sectors like telecom, satellite, IT etc., to name a few would have to be carried out.

e) Negotiation and preparation of term sheet.

f) Documentation: The last step involves drafting and review of definitive agreement, non-compete agreement such as the shareholder's agreement, share purchase/ share subscription agreement, trademark license agreement, non-disclosure agreement, escrow agreement, stock swap agreement, employment agreement etc.

Criteria for Determining a Method Most Suited to a Particular Case

Various factors need to be kept in mind while determining the mode that is most appropriate, including:

a). Transaction costs and taxes (such as stamp duty, income tax, sales tax, continuance of various benefits/ subsidies/ exemptions which may be available to one of the entities);

b). Whether the companies are listed or unlisted and the applicable regulations, merger control issues (presently, whether the acquisition results in the creation of a "dominant" undertaking);

c). The time frame within which the transaction is proposed to be undertaken and the process simplicity which is desired. For example, an asset transfer, as compared to a slump sale, may result in higher income tax (for the seller) and sales tax (for the buyer) liability. Restructuring through the court route often entails benefits under the IT Act though it takes longer from a timing standpoint than a restructuring by private arrangement.

Requirements for Restructuring of a Listed Company

A Listed Indian Company regulated by the SEBI and is subject to regulatory requirements and disclosure norms. If a listed company is involved in a restructuring/acquisition transaction, such listed company is required to be compliant with the regulations made by SEBI and the stock exchange(s)

where it is listed. Additionally, a listed company desirous of share acquisition is required to comply with the requirements of the Insider Trading Regulations as well as the SEBI Takeover Code ("Takeover Code").

Further, in case an acquisition of shares by a listed company results in public shareholding in the listed company falling below the particular threshold specified by the stock exchange(s) where such company is listed, the provisions of the Delisting Guidelines, prescribing the procedure for providing an exit option to the remaining public shareholders, should be complied with.

Requirement under the Takeover Regulations

Apart from the Companies Act, which restricts a transfer of shares in dominant undertakings, the Takeover Code also imposes certain obligations on an acquirer of shares of a public listed company. Specified threshold limits for acquisition of shares/voting rights and the gaining of control over a listed company by an acquirer (together with persons acting in concert with the acquirer) may trigger various disclosure and open offer requirements under the Takeover Code.

Upon the acquisition of 15% or more of shares or voting rights of a listed company, an acquirer is required under the Takeover Code to make an open offer to the remaining shareholders to purchase at least 20% of all the outstanding shares of the company at a minimum offer price as determined.

Similar obligations arise in the case of an acquirer already holding between 15% and 55% and an acquirer already holding 55% or more of the shares or voting rights of a company. In the former case, an additional acquisition of 5% or more of the shares or voting rights of the company in a financial year, triggers such obligations while, in the case of the latter, the obligations for an open offer of 20% arise upon the acquisition of any additional shares or voting rights by the acquirer and the acquirer is required to ensure that the listing requirements of minimum public shareholding would have to be met within a period of 24 (twenty four) months by way of delisting or divestment (which may be extended by an additional period of 12 (twelve) months by discretion of the relevant stock exchanges).

Additionally, irrespective of any acquisition of shares, no acquirer can take control of a target company unless he has first made an open offer to acquire a specified percentage of the shares in such company in accordance with the Takeover Code. Further, in cases where an acquisition results in the public shareholding in the target company being reduced to below the limits specified in the listing agreement entered into with the stock exchanges by the company at the time of listing, any further

acquisition of shares of such company must necessarily be in accordance with the Delisting Guidelines.

However, in case the acquisition is by virtue of a global arrangement, which results in indirect acquisition of shares or voting rights or control of the target company, this requirement has been waived. Depending on the level of acquisition of securities of a listed company, certain continuing disclosure and reporting requirements are required to be complied with.

Availability of above Forms of Restructuring to Foreign Companies

Whilst a foreign company may enter into a restructuring or acquisition transaction in India, various regulatory approvals, consents and waivers would be required for this purpose including in many cases the approval of the RBI and the FIPB. Further, in the case of a court based restructuring, whilst the transferor company may be foreign company, it is not clear whether such a restructuring would be permitted if the transferee company is a foreign company and an Indian company, the transferor. The foreign law requirements of such a transaction would also require compliance.

Requirements under the Competition Laws

Prior permission of the GoI is required for the acquisition of shares constituting more than 25% of the total paid up equity share capital of an Indian company where such company is a “dominant undertaking” or the acquisition would result in the formation or increase in “dominance” of a “dominant undertaking”. In addition, a person holding 10% or more of the equity shares of a “dominant undertaking” is required to inform the GoI before transferring any of its shares.

A “dominant undertaking” is defined in the Monopolies and Restrictive Trade Practices Act, 1969, as an undertaking (public or a private company) that has 25% or more market share in the goods or services that it provides. The GoI has the power to direct companies not to give effect to the transfer of shares in a “dominant undertaking” if such transfer results in a change in management which the GoI may believe to be prejudicial to the interests of the company and/or the public.

However, whilst guidelines for the classification of goods have been provided, the GoI has not specified any source of market information/data which can be utilized to determine the market share of an undertaking. The Competition Act, 2002 (which borrows liberally from the EU competition law) provides that any acquirer of shares of an Indian company will be required to notify the Competition Commission of India (which will have the right to examine any acquisition) in the event:

(i) where the parties to the acquisition (i.e. the acquirer and the company whose shares, voting rights or assets are being acquired) jointly have worldwide assets exceeding Rs. 5,000 Million or worldwide turnover exceeding Rs. 15,000 Million; or

(ii) the group to which the entity in which the shares, assets or voting rights (as the case may be) are being acquired belongs, will have in India, assets in excess of Rs. 20,000 Million or turnover in excess of Rs 60,000 Million; or worldwide, assets in excess of Rs. 40 Billion or turnover in excess of Rs. 120 Billion. However, the above provisions of the Competition Act, 2002 are not in force as yet and remain to be notified by the Central Government.

16. CAPITAL MARKETS

India, by the virtue of its size probably, has one of the largest investor bases in the world. India has a well-developed capital market acting as an important source of finance to public as well as private sector enterprises. There are 23 (twenty three) recognized stock exchanges in India. However predominant business is done at the Bombay Stock Exchange and National Stock Exchange. Among the premier and the oldest in Asia is the BSE, which was established way back in 1875. The BSE was the first stock exchange in India to obtain permanent recognition from the GoI. The BSE has evolved over the years into its present status as the premier stock exchange of India, and its index, Sensex is tracked worldwide. BSE has a countrywide reach and has presence in 417 cities and towns within India.

During the past years, trading volumes on BSE have showed a robust growth. BSE provides an efficient and transparent market for trading in equity, debt instruments and derivatives and the On Line Trading System is a proprietary system of BSE. As of 31 March 2007, there were 4,821 listed companies trading on the BSE and the estimated market capitalization of stocks trading on the BSE was Rs. 37,22,292 Crores (US$ 886.26 Billion). During May 2007, the average daily turnover on the BSE was Rs. 4,956 Crores (US$ 1.18 Billion).

The NSE is the first electronic exchange of India set up in November 1992 and serves as a national exchange, providing nationwide trading facilities with an electronic order-based trading system, and electronic clearing and settlement for securities, including government securities, debentures, public sector bonds and units. As of 30 April 2007, the NSE had 1,009 trading members. The market capitalization of the NSE was approximately Rs. 39.4 Trillion, as at 26 June 2007.

The BSE and the NSE have also introduced derivative products such as Futures and Options with a view of bringing the Indian stock markets in tune with international markets and practices. 'Over the Counter Exchange of India' is another feature of Indian capital markets, which was set up as India's first national electronic stock exchange. It basically serves the need of small and medium size companies having limited access to capital markets. With a view to regulate and oversee the development of Indian capital markets, SEBI has been set up. SEBI also looks after the interest of small and household investors investing in capital markets.

Some of the important developments in the Indian capital market include:

a) Free-market pricing of share issues and the introduction of the concepts of "Book-Building and Market-Making".

b) Foreign Institutional Investors can make investments up to 49%. Recently, this limit of 49% has been increased to the limit of sectoral cap for FDI with the approval of the Board of Directors and the shareholders.

c) A new takeover code is in place to protect the interests of small investors and to strengthen the regulatory framework for takeovers to promote efficiency, transparency and fairness. Under the new code, any proposed acquisition of more than 15% of the voting capital of a listed company requires the acquiring company to make a public offer to the remaining shareholders for the acquisition of a stake of at least 20% in the target company. The new code also applies when a change in control of the target company occurs.

d) The National Securities Depository has been established to facilitate scriptless trading of shares.

e) Tax incentives, including lower tax rates, encourage foreign institutional investments in India.

f) The government has drawn up plans to offer up to 49% shares of many public sector companies to private investors.

A. Indian Depository Receipts

Pursuant to the amendment of the Companies Act, 1956 and Disclosure of Investor Protection Guidelines of the SEBI and subject to the rules prescribed by the GoI, companies incorporated outside India are allowed to issue IDRs. IDRs are instruments denominated in Indian Rupees and represented by underlying securities of the foreign company, which are listed on an international stock exchange. Foreign companies raising funds from the Indian stock market by way of IDR are regulated and governed by the SEBI Guidelines and IDR Rules. A foreign company issues the securities underlying the IDRs to an overseas custodian bank, which will in turn authorize the domestic depositary bank in India to issue IDRs to Indian investors. As part of the IDR process, the foreign company is also required to appoint a merchant banker and file a due diligence report with the SEBI and the RoC.

1. Eligibility for IDR Issue

Foreign Companies, without any prejudice to the SEBI guidelines, are permitted to issue IDR's only if they satisfy the following criteria:

a) The pre-issue paid-up capital and free reserves is at least US$ 50 Million and shall have during the last 3 (three) years a minimum average market capitalization in its parent country of at least US$ 100 Million.
b) A continuous trading record for at least 3 (three) immediately preceding years to the issue.
c) A track record of at least 3 (three) out of immediately preceding 5 (five) years for distributable profits as provided under the Companies Act, 1956.
d) The issuing company must follow networth and market capitalization ceilings instead of earlier networth and turnover based ceilings for such issue.
e) The issuing company is required to obtain in-principle listing permission from 1 (one) or more stock exchanges having nationwide trading terminals in India;
f) The number of underlying equity shares offered in a financial year through IDR offerings shall not exceed 25% of the post issue number of equity shares of the company.
g) The quarterly audited results or unaudited results subjected to limited review by the auditors of the company, as the case may be, and approved by the Board of Directors of the issuing company must be prepared and published in the manner specified in the listing conditions.
h) Further, such company must also fulfill any other eligibility criteria laid down by the SEBI.

2. Procedure For Making IDR Issue

A foreign company issuing IDR must follow the procedures as provided for such issue:

a) Must obtained permission from the SEBI prior to raising funds in India by issuing IDRs.
b) Should furnish details in the prescribed form with a non-refundable fee of US$ 10,000 (US Dollars ten thousand) seeking permission and shall be made to the SEBI minimum 90 (ninety) days prior to the opening date of the issue.
c) Upon receipt of the permission, the applicant must pay an issue fee of 0.5% (half a percent) of the issue value subject to a minimum of Rs. 1 (one) Million where the issue is upto Rs. 1 (one) Billion. However, where the issue value exceeds Rs. 1 (one) Billion, every additional value of issue shall be subject to a fee of 0.25% (point two five percent) of the issue value.
d) The SEBI on receipt of an application calls for such further information, and explanations, as may be necessary, for disposal of such application.
e) Must obtain necessary approvals or exemption for issue of capital from appropriate authorities, where required.
f) Must appoint an Overseas Custodian Bank, a Domestic Depository and a MB for the purpose of issue of IDRs.
g) Must deliver the underlying equity shares to an Overseas Custodian Bank after which the said bank authorizes the DD to issue IDRs.

h) Must file a DDR in the specified form through a MB or the DD with the RoC and the SEBI.
i) Must file a prospectus or letter of offer through a MB which shall be certified by 2 (two) authorized signatories of the issuing company, 1 (one) of whom shall be a whole-time director and other the Chief Accounts Officer, with the SEBI and RoC, New Delhi, prior to such issue.
j) Must file the draft prospectus or draft letter of offer with the SEBI, through the MB, at least 21 (twenty one) days prior to the filing. Finally, if the SEBI suggests changes, only after the incorporation of such changes, the prospectus is filed with the SEBI/ RoC.
k) Must appoint the SEBI registered underwriters to underwrite the IDR issue.

3. Other Conditions for the Issue of IDRs

a) The repatriation of the IDR proceeds shall be in accordance to law relating export of foreign exchange.
b) Until the expiry of 1 (one) year from the date of issue, no IDR shall be redeemable into the underlying equity shares
c) No IDR issue shall exceed 15% of the paid-up capital and free reserves of the issuing company in any financial year.
d) Regardless of the denomination of securities of an issuing company, IDRs issued by it shall be denominated in Indian Rupees.

4. Registration of Documents

The appointed MB to the issue must deliver the following documents to the SEBI and the RoC, New Delhi:

a) Documents constituting or defining the constitution of the company.
b) Attested copy of the provisions or enactments under which the issuing company is incorporated
c) If the issuing company has no principal place of business in India, then an address in India where such certified provision or enactment can be made available for public inspection. Such documents must be translated and certified, if not in English.
d) Certified copy of incorporation certificate where issuing company is incorporated.
e) Copies of agreements affecting the issue of IDR between the company and the overseas custodian bank, the DD.
f) Certified translations of any documents that are to be filed with SEBI or RoC, if not in English.

g) The prospectus to be filed with the SEBI and the RoC must be signed by whole time directors and CAOs of the issuing company.

5. Listing of IDRs

The issued IDRs shall be listed on the recognized Stock Exchange in India. IDR's shall be purchased, possessed and freely transferred by a person resident in India, in accordance with the provisions of the FEMA which shall also apply to transfer and redemption of IDRs.

B. Listing of Securities in India

Securities transactions in India are mainly governed by the Securities Contracts (Regulation) Act, 1956 ("SCRA") and the Securities and Exchange Board of India ("SEBI") Act, 1992.

1. Legal Framework

Any company intending to have its securities listed on the BSE/NSE has to comply with the requirements of the following legislations in their current form:

a) Securities Contracts (Regulation) Act, 1956 and Rules thereunder;
b) Companies Act, 1956 and rules thereunder including Companies (Issue of Indian Depository Receipts) Rules, 2004 (IDR Rules) and the mandatory filings with the RoC ("RoC");
c) Guidelines of the SEBI Act, 1992 including the SEBI (Disclosure and Investor Protection) Guidelines, 2000;
d) The Depositories Act, 1996; and
e) Bye-laws and Regulations of the BSE/NSE.

2. Eligibility Criteria for IPOs/FPOs

Companies listing on the BSE/ NSE are required to comply with the listing requirements of the BSE/NSE, including the Minimum Listing Requirement for new companies (the revised eligibility criteria) for listing of companies on BSE/NSE, which came into effect from August 1, 2006. Companies are classified as large cap and small cap companies and their eligibility criteria are as follows:

a) For Large Cap Companies

i. Minimum post-issue paid-up capital of the applicant company should be Rs. 3 Crores (Rs. 30 Million);

ii. Minimum issue size should be Rs. 10 Crores (Rupees 100 Million); and
iii. Minimum market capitalization of such company should be Rs. 25 Crores (Rupees 250 Million).

b) For Small Cap Companies

i. Minimum post-issue paid-up capital of the applicant company should be Rs. 3 Crores (Rs. 30 Million);
ii. Minimum issue size should be Rs. 3 Crores (Rupees 30 Million);
iii. Minimum market capitalization of such company should be Rs. 5 Crores (Rupees 50 Million);
iv. Minimum income/turnover of such company should be Rs. 3 Crores (Rupees 30 Million) in each of the preceding 3 (three) 12-months period;
v. Minimum number of public shareholders after the issue should be 1,000; and
vi. A due diligence study may be conducted by an independent team of Chartered Accountants or MBs appointed by the BSE, the cost of which shall be borne by such company.

c) For all Companies

i. For paid-up capital and market capitalization requirement, the issuers shall be required to include in the disclaimer clause forming a part of the offer document that if the market capitalisation requirement of BSE is not met, the securities of the issuer would not be listed on the BSE.
ii. The applicant, promoters and/or group companies, should not be in default in compliance of the listing agreement.
iii. The above eligibility criteria would be in addition to the conditions prescribed under SEBI (Disclosure and Investor Protection) Guidelines, 2000.

3. Minimum Listing Requirement for Companies Listed on the Other Stock Exchanges

The direct listing norms requirements for companies listed on other Stock Exchange(s) and seeking listing at BSE include as under:

i. The company should have a minimum issued and a paid-up equity capital of Rs. 3 Crores (Rupees 30 Million);
ii. The company should have a profit making track record for last 3 (three) years. The revenues/profits arising out of extra ordinary items or income from any source of non-recurring nature should be excluded while calculating distributable profits;
iii. Minimum net worth of Rs. 20 Crores (Rupees 200 Million);

iv. Minimum market capitalization of the listed capital should be at least 2 (two) times of the paid up capital;
v. The company should have a dividend paying track record for the last 3 (three) consecutive years and the minimum dividend should be at least 10% (ten percent);
vi. As per the Listing Agreement, minimum 25% (twenty five percent) of the company's issued capital should be with Non-Promoters shareholders. Out of above Non-Promoter holding, no single shareholder should hold more than 0.5% (point five percent) of the paid-up capital of the company individually or jointly with others except in case of Banks/Financial Institutions/FIIs/Overseas Corporate Bodies and Non-Resident Indians;
vii. The company is required to have at least 2 (two) years listing record with any of the regional stock exchange;
viii. The company should sign an agreement with the relevant authorities for dematerialized trading.

4. Permission to use the name of BSE/NSE in an Issuer Company's Prospectus

The BSE/NSE follows a procedure under which companies desiring to list their securities offered through public issues are required to obtain its prior permission to use the name of BSE/NSE in their prospectus or offer for sale documents before filing the same with the concerned office of the RoC.

5. Submission of Letter of Application

Under the provisions of the Companies Act, 1956, a company seeking listing of its securities on BSE/NSE is required to submit a letter of application to all the Stock Exchanges where it proposes to have its securities listed before the final filing of the prospectus with the RoC.

6. Allotment of Securities

In compliance of the listing agreement, a company is required to complete allotment of securities offered to the public within 30 (thirty) days of the date of closure of the subscription list and approach the RSE, i.e. Stock Exchange nearest to its Registered Office for approval of the basis of allotment. In case of Book Building issue, Allotment shall be made not later than 15 (fifteen) days from the closure of the issue failing which interest at the rate of 15% shall be paid to the investors.

7. Trading Permission

In line with the SEBI Guidelines, the issuer company should complete the formalities for trading at all the Stock Exchanges where the securities are to be listed within 7 (seven) working days of finalisation of Basis of Allotment. A company should scrupulously adhere to the time limit for

allotment of all securities and dispatch of Allotment Letters/Share Certificates and Refund Orders and for obtaining the listing permissions of all the Exchanges whose names are stated in its prospectus or offer documents. In the event of listing permission to a company being denied by any Stock Exchange where it had applied for listing of its securities, it cannot proceed with the allotment of shares. However, the company may file an appeal before the SEBI under the provisions of SCRA.

8. Requirement of 1% Security

The companies making public/rights issues are required to deposit 1% of issue amount with the RSE before the issue opens. This amount is liable to be forfeited in the event of the company not resolving the complaints of investors regarding delay in sending refund orders/share certificates, non-payment of commission to underwriters, brokers, etc.

9. Payment of Listing Fees

All companies listed on the Exchange have to pay Annual Listing Fees by the 30th April of each financial year to the Exchange as per the Schedule of Listing Fees prescribed from time to time.

10. Compliance with Listing Agreement

Companies desirous of getting their securities listed are required to enter into an agreement with the BSE called the "Listing Agreement" and are required to make certain disclosures and perform certain acts. The Listing Agreement is of great importance and is executed under the common seal of a company. Under the Listing Agreement, a company undertakes, amongst other things is required to:

i. provide facilities for prompt transfer, registration, sub-division and consolidation of securities;
ii. give proper notice of closure of transfer books and record dates;
iii. forward copies of unabridged Annual Reports and Balance Sheets to the shareholders;
iv. file Distribution Schedule with the Exchange annually;
v. furnish financial results on a quarterly basis;
vi. intimate promptly to BSE/NSE the happenings which are likely to materially affect the financial performance of the Company and its stock prices; and
vii. comply with the conditions of Corporate Governance, etc.

The Listing Department of BSE/NSE monitors the compliance of the companies with the provisions of the Listing Agreement, especially with regard to timely payment of annual listing

fees, submission of quarterly results, requirement of minimum number of shareholders, etc. and takes penal action against the defaulting companies.

11. Collection of Listing Fee

For the payment of Listing Fees, cheques drawn in favour of "Bombay Stock Exchange Limited" and/or "National Stock Exchange of India Limited" and payable, locally are accepted by designated Banks. Companies are required to mention in the deposit slip, the financial year(s) for which listing fees is being paid. Payment made through any other slips would not be considered. The above slips will have to be filled in quadruplicate. One acknowledged copy would be provided to the depositor by the Bank.

C. FOREIGN INSTITUTIONAL INVESTORS

FII may be referred to as an entity established or incorporated outside India which proposes to make investment in India and include Asset Management Companies, Pension Funds, Mutual Funds, and Investment Trusts as Nominee Companies, Incorporated / Institutional Portfolio Managers or their Power of Attorney holders, University Funds, Endowment Foundations, Charitable Trusts and Charitable Societies. Investments by FIIs in India are regulated by FII Regulations under the SEBI Act, 1992 and the Notification under FEMA, 1999.

FIIs are allowed to invest FDI limit permitted under various sectors with the approval of the Board of Directors and the shareholders of the investee company. Earlier, FIIs could make investment upto 49% only but now the investment limit for FII investment in Indian companies has been brought on par with the FDI limit applicable to various sectors. FII investment in sectors like hotels and tourism, petroleum, airports, roads, highways, ports, et al. can be upto 100%.

1. FII Registration in India

FIIs are required to register with SEBI and all such registrations are based upon the parameters laid down by the SEBI, which acts as the nodal point in the registration of FIIs in India. The pre-requisite of FII registration with SEBI are as under:

a) The applicant should be in existence for a minimum of 1 (one) year preceding the FII registration application.
b) The additional parameters taken into consideration include track record of the entity; professional competence; financial soundness; experience and general reputation of fairness and integrity.

c) The applicant is registered with and regulated by an appropriate Foreign Regulatory Authority in the same capacity in which the application is filed with SEBI.
d) The applicant is a fit and proper person.

The applicant seeking registration is required to make an application to SEBI on the prescribed Form 'A'.

Documentary Requirement

The following additional documents are required to be annexed with Form A:

a) Certified copy of relevant clauses of MoA, Article of Association or Article of Incorporation (major emphasis on clauses permitting the stated activities); and
b) Audited financial statements and annual report for the last one year (period covered should not be less than 12 (twelve) months.
c) If the applicant is a bank or its subsidiary, then the application form and all relevant documents is required to be submitted in duplicate.

Registration Fees - The applicable registration fee, which at present is US$ 5,000 (US Dollars five thousand) is required to be paid by the applicant at the time of submitting the application for registration. By way of a demand draft payable at New York in favor of "Securities and Exchange Board of India".

Validity of Registration – FII registration is valid for a term of 5 (five) years and upon the expiry of the tenure, the registration needs to be renewed.

Process of Renewal - Similar to registration process under Form A with all relevant documents and is accompanied by a renewal fee of US$ 5,000. An application for renewal is required to be submitted by the applicant, 3 (three) months prior to expiry of FII registration.

Further, a SEBI registered FII can also obtain registration of their sub-account[26] with SEBI. Pursuant to such sub-account being registered, the concerned FII is allowed to invest on behalf of such sub-account. An entity already registered as a sub-account of an FII registered with the SEBI cannot seek registration as a sub-account of another FII registered with the SEBI. The RBI has granted general permission to the SEBI Registered FIIs to invest in India under the Portfolio Investment Scheme.

[26] Sub-account includes those foreign corporate, foreign individuals, and institutions, funds or portfolios established or incorporated outside India on whose behalf investments are proposed to be made in India by a FII.

2. Modes of FII Investment

FIIs are allowed to invest in the primary and secondary capital markets in India through PIS under which, FIIs can acquire shares/debentures of Indian companies through the stock exchanges in Indian subject to the limits mentioned below. FIIs can also invest on behalf of their sub-accounts which investment is also limited to the limit mentioned below.

3. Limits of FII Investment

FII investment in the investee company is limited to the following:

a) The maximum limit of individual FIIs investment in an investee company is 10% (ten percent) of paid up capital of such investee company.
b) Investment by each FII sub account in an investee company is limited to 5% (five percent) of paid up capital of such investee company.
c) The maximum investment limit by an FII and its sub-accounts taken together in an investee company is 24% (twenty four) of the paid up capital of such investee company.[27]

4. Other FII Benefits

FIIs are also permitted, as a part of their registration, to open a bank account in India. Furthermore, it is mandatory for FIIs registered with the SEBI to appoint a custodian in India. FIIs can purchase and sell securities of Indian Companies only through its custodian and the deals should be routed only via the stock exchange.

Prior to October 25, 2007, investments through the Offshore Derivative Instruments in the form of Participatory Notes (“PNs”) were available to investors/clients of FIIs but ever since, SEBI has barred further issue of PNs.

Venture Capital Funds

A Foreign VC Investor means an investor incorporated and established outside India and proposes to make investment in Indian establishments. FVCI intending to make investments in India have to comply with the registration requirements provided under the SEBI’s FVCI Regulations and require to be registered with the SEBI. The said regulations further provide the criteria for investment by such

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[27] However, by passing a resolution by its Board of Directors followed by passing a Special Resolution to that effect by their General Body, an investee company can raise this limit/ sectoral cap / statutory ceiling.

FVCIs; their general obligations and responsibilities; inspection/ investigation of their conduct and affairs; as well as procedure for action in case of any default.

Investment Qualifying Pass through Tax Benefits

A registered VCF shall be permitted to make investments in the following sectors and are further eligible to receive pass through tax benefits i.e. no capital gains or withholding tax on dividends. The areas of investments under which VCF can obtain pass through benefits are:

a. Biotechnology;
b. IT relating to hardware and software development;
c. Nanotechnology;
d. Seed research and development Research and development of new chemical entities in the pharmaceutical sector;
e. Dairy industry;
f. Poultry industry;
g. Production of bio fuels; and
h. Hotels/convention centers of a certain description and size.

FVCI Registration in India

An FVCI is required to register with the SEBI and obtain a certificate of registration. The SEBI consider the following conditions for granting certificate of registration to an applicant as a FVCI:

a) If the establishment has been incorporated outside India as an asset management company, investment manager or investment management company or any other investment vehicle; or
b) it is an investment company, investment trust, investment partnership, pension fund, mutual fund, endowment fund, university fund, charitable institution or any other entity incorporated outside India;
c) The applicants track record, professional competence, financial soundness, experience, general reputation of fairness and integrity;
d) Whether the RBI has granted necessary approval for making investments in India;
e) Permissibility to invest in VCF or carry on activity as a FVCI;
f) Whether it is regulated by an appropriate foreign regulatory authority or is an income tax payer; or submits a certificate from its banker of its or its promoter's track record where the applicant is neither a regulated entity nor an income tax payer;
g) It has not been refused a certificate by the Board;

h) Whether it is a fit and proper person, as per the provisions of the SEBI Regulations in this regard.

For obtaining registration the applicant shall, along with the prescribed fees make an application to SEBI in Form 'A'.

Documentary Requirements

At the time of registration the following documents shall be annexed with Form 'A'.

a) Copy of Memorandum and AoA in case the applicant is set up in the form of a Company; or Copy of Registered Trust Deed in case the applicant is set up in the form of a trust; or Copy of Main objective of constitution in case the applicant is set up in the form of a body corporate.

b) If applicable, copy of Investment Management Agreement

c) In addition, the applicant would require to provide details with respect to the sponsor, trustee/ Trustee Company, Investment Manager/ Advisor/ Asset management company.

d) Disclose details of the investment strategy of the fund.

Conditions for Grant of Certificate

Upon payment of VC registration fees, this is currently Rs. 10,000, and fulfillment of the above mentioned registration requirements, SEBI grants the applicant a VCF registration certificate. The certificate granted to the FVCI is subject to the following conditions, namely:-

a) It shall shoulder provisions of the SEBI Act and regulations;
b) Appoint a domestic custodian for the purpose of custody of securities;
c) Open a special non-resident rupee or foreign currency account, such account shall only be setup with designated bank
d) Promptly inform the SEBI in writing of particulars previously furnished to the SEBI and which are found to be erroneous in any material particular or if there is any change in the information already furnished.
e) No VCF shall be entitled to listing until the expiry of 3 (three) years from issuance of units of the fund.

Conditions for Investments

FVCI must fulfill the following requirements to make any VC investment:

a. Disclosure of its investment strategy to SEBI;
b. Disclosure of investment of its total funds committed in one VCF;
c. Investment of the prescribed percentage of the investible funds in unlisted equity shares or equity linked instruments of VC undertaking;
d. Disclosure of the duration of life cycle of the fund, etc.

Investment Restrictions on VCF

VCF are permitted to make investment with the permissible limits as under:

a) Such VCF shall be permitted to invest a maximum of 25% in one VC undertaking,
b) Investment in securities of foreign companies is permitted subject to conditions and guidelines from the SEBI and the RBI.
c) No investment are allowed in associate companies,
d) VCF shall invest minimum 66.67% in unlisted equity shares or equity linked instruments of the VC undertaking.
e) A maximum investment of 33.33% is permitted to be invested in by way of an initial public offer in debt instrument of undertakings whose equity is already held by the VCF.
f) Investments by way of preferential allotment of equity of listed company shall be made with a 1 (one) year lock-in period.
g) No investment is permitted in sick industrial or financially weak company or a SPVs setup by a VCF.

17. TAXATION IN INDIA

The law relating to Income Tax is contained in the Income Tax Act, 1961. There are specific statutes for other taxes. Central tax statutes are passed by the Parliament and state tax statutes by the State Assemblies. Tax rates and duties are reviewed annually when budgets are presented. Amendments to the statutes are made through the annual Finance Acts or specific Amendment Acts every year. The tax year/ financial year in India runs from April 1, to March 31, of the following calendar year for all taxpayers.

Generally, the global income of domestic companies, partnerships and local authorities are subject to tax at flat rates, whereas individuals and other specified taxpayers are subject to progressive tax rates. Foreign companies and nonresident individuals are also subject to tax at varying rates on specified incomes which are received/ accrued or deemed to be received/ accrued in India. Agricultural income is exempt from income-tax at the central level but is taken into account for rate purposes. Income earned by specified organisations e.g., trusts, hospitals, universities, mutual funds etc., is exempt from income-tax, subject to the fulfillment of certain conditions.

Residential Status

India follows a residence based taxation system. Broadly, taxpayers may be classified as residents or non-residents.

Individual

Depending upon the period of stay in India during a given financial year, an individual may be classified as a resident or a non-resident in India or a ‘not ordinarily resident’ in India.

Company

A resident company is a company formed and registered under the Companies Act, 1956 or one whose control and management is situated wholly in India. An Indian company is always an Indian resident. Consequently, an Indian company that is wholly owned by a foreign entity and managed from India by foreign individuals/ companies is also considered a resident Indian company. A nonresident company is one, whose control and management is situated wholly outside India.

DIRECT TAXES

Corporate Tax Rates

Corporate Tax in India differentiates between Foreign and Domestic Company and is as under:

Sl.	Type of Company	Income	Tax Rate[28]
1.	Domestic	Less than Rs. 10,000,000	30.90%
2.	Foreign	Less than Rs. 10,000,000	41.20%
3.	Domestic	More than Rs. 10,00,000	33.99%
4.	Foreign	More than Rs. 10,00,000	42.23%

Effective from the assessment year 2008-09, an additional surcharge of 10% on total tax will be payable when income exceeds Rs. 10 Million.

Individual Tax Rates

Personal income tax is levied by Central Government and is administered by Central Board of Direct Taxes under MoF in accordance with the provisions of the IT Act.

The slabs are marked differently for different income slots, which for the Financial Year 2007-2008, are as follows:

Sl.	Senior Citizens	Women	Others	Tax Rate
1.	Rs. 1 - 195,000	Rs. 1 – 145,000	Rs. 1 – 110,000	Nil
2.	-	Rs. 145,000 – 150,000	Rs. 110,000 – 150,000	10%
3.	Rs. 195,000 – 250,000	Rs. 150,000 – 250,000	Rs. 150,000 – 250,000	20%
4.	Rs. 250,000 and above	Rs. 250,000 and above	Rs. 250,000 and above	30%

An additional surcharge of 10% on total tax will be payable when income exceeds Rs. 1 Million.[29]

[28] including Education Cess and applicable surcharge

[29] This amendment shall be effective from the assessment year 2008-09.

The tax regime in India also provides relaxations for various sections, which keeps changing and gets amended with each Union Budget. Further, an additional education cess of 3% is levied on income tax plus surcharge.

Dividend Tax

DDT of 16.995% (15% plus 10% surcharge, and education cess of 3%) is levied on companies declaring dividend. Dividend income is exempt in the hands of the shareholders.

Minimum Alternate Tax

With a view to bring zero tax paying companies having book profits under the tax net, MAT at the rate of 10% of book profits is levied on companies whose tax payable under normal income tax provisions is lower than the MAT.

For a domestic company whose taxable income exceeds Rs. 10 Million has to pay MAT at the rate of 11.33%, for a foreign company the same stands at 10.557 %. If the income is less than Rs. 10 Million then a domestic company needs to pay MAT at the rate of 10.3%, for foreign companies also it is the same. However, MAT is not applicable to:

a) Income exempt from tax (excluding exempt long term capital gain from tax year ending March 31, 2007);
b) Income from units in specified zones including SEZs or specified backward districts; and
c) Income of certain sick industrial companies.

A tax credit, being the difference of the tax liability under MAT provisions and regular provisions, can be carried forward for set off in the year in which tax is payable under the regular provisions. Such set off shall be allowed on the difference of tax as per regular provisions and as per MAT provisions. However, no carry forward shall be allowed beyond the seventh assessment year (proposed) succeeding the assessment year in which the tax credit becomes allowable.

Capital Gains

Capital gain is the name of the income derived from the sale of an investment. A capital investment can be a home, a farm, a family business, work of art, etc. Capital gain is the difference between the money received from selling the asset and the price paid for it. Capital Gains can be classified as Long Term Capital Gains and Short Term Capital Gains. The rates of taxation for are as follows:-

a) LTCG on unlisted shares attracts a 20% tax, but does not attract any tax in case of shares of a listed company.
b) STCG on unlisted shares attracts 30% tax for residents and 40% for Non-residents. However, listed company shares attract STCG tax of 10%. Other long term capital assets are taxed at the rate of 20%.

The above rates are exclusive of the currently applicable surcharge on tax and education cess.

Notes:

1. LTCG means gains on sale of shares held for a period of more than 12 (twelve) months.
2. STCG means gains on sale of shares held for a period of 12 (twelve) months or less.
3. Sale on the stock exchange shall attract Securities Transaction Tax at applicable rates.
4. Indexation of cost of acquisition and improvement of a long term capital asset of any nature (other than debentures) is available to residents. However, the benefit of indexation is available to non-residents only on long-term capital asset other than shares/debentures acquired in foreign currency.
5. The transfer of personal assets such as archaeological collections and works of art attract capital gains tax.

Withholding Tax or Tax Deduction at Source

Tax is deducted at source from payments made to non-residents and foreign companies at appropriate rates, as specified under the domestic law or tax treaty, whichever is lower. Where the whole of the sum paid is not income, withholding tax is charged on estimated income, as approved by tax authorities. Current rates for TDS for payments to non-residents are as follows:

Sl.	Nature of Payments	Rate
a.	Interest	20%
b.	Dividends of domestic companies	Nil
c.	Royalties	20%
d.	Technical Services	10%
e.	Any Other Service: On income of Individuals; On net income of Companies.	 30% 40%

The above rates are general and are applicable in respect of countries with which India does not have a Double Taxation Avoidance Agreement.

Computation of Total Income – General

a) All incomes accruing or arising in India are taxable in India subject to DTAA with the country of residence of the taxpayer.
b) Taxable income is computed for uniform accounting year, i.e. the fiscal year from 1st April to 31st March.
c) The taxable income is called "Total Income" which is computed after adding certain disallowances, such as loss on sale of asset and miscellaneous expenditure written off, and reducing certain allowances/benefits from the book profits.

Depreciation

Depreciation is allowed separately at following rates for computing taxable income:

Sl.	Items	Rate
a.	Factory Building	10%
b.	Furniture & Fittings	10%
c.	Plant & Machinery (general)	15%
d.	Computers	60%
e.	Motorcars, other than those used in a business of running them on hire	15%
f.	Intangible assets (such as know-how, patents, copyrights, trademarks, licenses, franchises or any other similar business or commercial rights)	25%

Taxation of Royalties/ Technical Fee

Under domestic law, royalties/ technical fee payable to non-residents having a permanent establishment in India are taxed on net basis. On the other hand, the royalties/ technical fee payable to non residents not having a permanent establishment in India are taxed on gross basis. Concessional tax rates, as given below, apply if the agreement relates to a matter included in industrial policy or the agreement has been approved by the GoI:

a) For contracts entered on or after 1st June 2005 – 10%.
b) For contracts entered into after 31st May 1997 but before 1st June 2005 – 20%.
c) For contracts entered into on or before 31st May 1997 – 30%.

Surcharge and education cess, as applicable would additionally be levied.

Fringe Benefit Tax

The FBT is payable by an employer who is a company; a firm; an association of persons excluding trusts/a body of individuals; a local authority; a sole trader, or an artificial juridical person. This tax is payable even where employer does not otherwise have taxable income. Fringe Benefits are defined as any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees (including former employees) by reason of their employment and includes expenses or payments on certain specified heads.

FBT provides for levy of an additional tax at the rate of 30% (plus applicable surcharge and education cess) in the hands of the employer on the value of fringe benefits provided to the employees other than perquisites on which tax is paid / payable by the employee. The Finance Act, 2007 has also brought Employee Stock Option Plans also under the purview of FBT.

Banking Cash Transaction Tax

Banking cash transaction tax is leviable at the rate of 0.1% on the following:

a) Amount of cash withdrawn from a schedule bank (by whatever mode) on a single day from an account (except savings account) exceeding:

   – Rs. 50,000 in case of individual (w.e.f. June 1, 2007)

   – Rs. 100,000 in other cases

b) Amount of cash received on encashment of term deposit(s) on a single day from a scheduled bank exceeding:

   – Rs. 50,000 in case of individual (w.e.f. June 1, 2007)

   – Rs. 100,000 in other cases

Wealth Tax

Wealth tax is charged in respect of the net wealth as on March 31st every year (referred to as 'valuation date'). Wealth tax is charged both on individuals and companies at the rate of 1% of the amount by which the 'net wealth' exceeds Rs. 1.5 million. The term 'net wealth' broadly represents excess of prescribed assets over the concerned debts. Prescribed Assets include guest house & residential house, motor cars, jewellery-bullion-utensils of gold & silver etc., yachts, boats, aircraft,

urban land and cash in hand. A debt is an obligation to pay liquidated or certain sum of money incurred in relation to those assets, which are included in the 'net wealth'.

Transfer Pricing

Transfer Pricing is the process of adjusting the prices of cross-border transactions between related / associated parties. Detailed provisions relating to transfer pricing were introduced by the Finance Act, 2001 in order to facilitate the computation of reasonable, fair and equitable profits and tax in India in the case of businesses carried on by multinational companies.

The transfer pricing provisions generally follow the OECD guidelines relating to the same. However, there are certain fundamental differences in that the Indian provisions require the computation of an "arms length price" as against the internationally accepted norm of arms length range. Further the arms length price is to be computed as the "arithmetic mean" of comparable results. A variance of around 5% of the mean may be opted for. The Section 92 of the IT Act provides that the price of any transaction between associated enterprises, either or both of whom are non resident for tax purposes ('international transaction'), shall be computed having regard to the arm's length principle.

Two enterprises are considered to be associated if there is direct/indirect participation in the management or control or capital of an enterprise by another enterprise or by same persons in both the enterprises.

In determining whether there is participation in management or control, various factors are taken into consideration including:

a) Direct / indirect shareholding having 26% or more of voting power,
b) Advancing of loans of 51% or more of total assets,
c) Appointment of more than 50% of the board of directors,
d) Goods manufactured are sold under influenced prices.
e) Dependence on IPRs owned by either party

Determination of "Arms Length Price"

A very important aspect of the concept of Transfer Pricing is the process of determining the arm's length price. The CBDT has prescribed 5 (five) methods for determining the arm's length price:

a) Comparable Uncontrolled Price Method;

b) Resale Price Method;
c) Cost plus method;
d) Profit Split Method; and
e) Transactional Net Margin Method.

The choice of the appropriate method is determined with respect to the nature and class of transaction, the classes of associated persons, the functions performed by them and other relevant factors.

Double Tax Avoidance Agreements

Please refer to the next chapter on DTAA.

INDIRECT TAXES

The MoF, Department of Revenue, GoI through the CBEC, an apex indirect tax authority, implements and administers excise (central excise), customs and service tax laws. Circulars, notifications and clarifications issued by the CBEC supplement these indirect tax laws. Issues involving interpretation of tax laws are decided by the judiciary, which is independent of the legislature.

Customs Duty

Customs duties are levied on import of goods into India at the rates specified in the Customs Tariff Act, 1975. The effective rates of customs duties may vary pursuant to general and/ or specific exemption or concession notifications issued by the government in this regard.

Customs duties currently comprise the following:

a) Basic customs duty - Current general peak rate is 12.5%.
b) Countervailing Duty - This duty is equivalent to central excise duty leviable on a like product manufactured in India. Current rate applicable to majority of the industrial products is 16% plus 2% education cess, taking the effective rate to 16.32%. This duty is calculated on the value of product + basic customs duty.
c) Additional duty of customs - This duty is levied in lieu of the sales tax, value-added tax, local taxes and other charges leviable on the like goods on their sale or purchase or transportation in India.

Presently, this duty is levied at 4% on most items, except a few exceptions. This duty is levied on value of product + basic customs duty + countervailing duty. Education cess – This cess is levied at 2% on the amount of BCD + CVD. In addition, government also levies anti-dumping and safeguard duties on specified products to protect the domestic manufacturers. These duties are levied for specified period. Value for the purpose of levy of customs duty is transaction which is an arm's length price between unrelated parties plus freight and landing charges.

Import-Export Policy

Import of goods into and export from India is regulated by the FTP (the Policy) issued from time to time by GoI. The Policy remains in force for five years and is amended from time to time. The Policy currently in force is for tax year 2004-09. Majority of goods are now freely importable.

Central Excise Duty

Central Excise Duty is levied on goods manufactured and produced in India. It is generally on advalorem basis at the rate of 16.32% (basic rate of 16%, plus education cess of 2% and secondary higher education cess of 1% on the basic rate). The rate at which excise duty is leviable on the goods depends on the classification of the goods under the Excise Tariff. The effective rates may be lower pursuant to general/ specific notifications issued by the government granting whole or partial exemption from duty. The excise duty on most of the consumer goods, which are intended for retail sale is payable on the basis of the maximum retail price printed on the goods. The other goods are generally chargeable to duty on the 'transaction value' of the goods sold to an independent buyer.

Value, for this purpose, with effect from July 1, 2000 is the transaction value:

a) Which is for delivery at the time and place of removal;
b) Where buyer is not a related person; and
c) Where price is the sole consideration.

CENVAT is payable by the manufacturer but is, ordinarily, recovered from the buyer as a part of consideration for sale of goods. Under the CENVAT Scheme, a manufacturer can avail of the credit of the central excise duties or additional duties of customs (i.e. CVD) paid on specified inputs and capital goods used in the manufacture of excisable goods and also service tax paid on eligible input services and utilize it in discharging central excise duty on finished excisable goods.

Sales Tax/ VAT

Sales tax is levied on the sale of virtually all movable goods in India. Indian regulatory framework has granted power to State Legislature to levy sales tax on goods sold within that State. The levy of sales tax and the rates applicable thereto, therefore, varies according to the sales tax law of the relevant State. All goods sold in the course of interstate trade are subject to CST and the rates vary between 3%, 10% or the State sales tax rate, whichever is higher.

From April 1, 2005, 21 states of India have replaced local sales tax with VAT. All the remaining states, except some states have also introduced VAT w.e.f. April 1, 2006. VAT is not much different from local sales tax regime except that it captures value addition at each level of distribution network. The State VAT, continues to be a tax on sale of goods and does not include taxation of services.

The standard rate of VAT is 12.5% and there is reduced rate of 4%. Besides that, there are exemptions and rate of 1% and 20% for specified products. Sate VAT is levied on movement of goods within a state. If the sale transaction involves movement of goods from one state to another (inter-state), the tax is levied under the CST Act ("CSTA"), 1956. This Act also covers transactions of import of goods into or export of goods out of India. Sales Tax/ VAT is not imposed on import of goods into the country or export of goods out of the country. The CSTA is administered by the state governments and the tax is levied at the origination of transaction (origin based levy). The revenue collected under CSTA is retained by the state governments.

The rates of tax under CSTA depend upon VAT rate applicable in the originating state. The standard rate of CST is 4% or the lower rate applicable in the state of the seller if the purchaser is purchasing the same for resale or for use in manufacturing goods for sale or for specified purposes and both the seller and buyer are registered dealers. Otherwise, the rate is higher of 10% or the rate applicable in the state of the seller.

States also levy tax on transactions which are "deemed sales" like works contracts and leases. A works contract essentially is a contract for carrying out work involving supply of labor and material where the property in the materials passes during the course of execution of the contract. Lease is a transaction involving transfer of right to use goods. In addition to sales tax, some states also levy additional tax/ surcharge, turnover tax or entry tax. Sales tax/ state VAT is payable by the seller to the government. Ordinarily, sales tax/ state VAT is recovered from the buyer as a part of consideration for sale of goods.

Service Tax

Service tax is levied on the notified services by the central government. The rate of service tax is currently 12.36% including education cess of 2% and secondary higher education cess of 1%. Service tax is charged on the gross value of services and is generally payable on receipt basis. It is an indirect tax – it is payable by the service provider but it is ordinarily recovered from the recipient of services. The law requires separate mention of service tax amount in the invoices. Ordinarily, every person liable to pay service tax is required to register it with service tax authorities and comply with procedural requirements like paying taxes, filing returns, etc. However, in case of non-resident service providers who do not have any office in India this burden is shifted to the recipient of service with effect from August 16, 2002. Further, w.e.f. June 16, 2005, where any taxable service is provided by a non resident even from outside India and received by a resident having a place of business in India, such service is also deemed to be a taxable service and liable to be taxed in the hands of the recipient.

Octroi Duty

Octroi Duty is a local authority levy, which is levied on entry of goods into a municipal/ local area for use, consumption or sale. This is only applicable in few states.

Entry Tax

Some of the states levy entry tax on entry of goods within the state limits for use, consumption or sale. Again, the rates vary from state to state. Generally entry tax paid in a state is eligible for claiming as input tax credit against state VAT/ CST liability of that state.

R&D Cess

A R&D cess is a special levy at the rate of 5% on all payment made for the purchase of technology from abroad, including royalty payments, payments for technicians, lump sum payments, and payments for design and drawings. The cess is required to be paid by the importer before remitting any money towards payment of such imports.

Customs Duty

Customs or import duties are levied by the GoI on the goods imported into India. The rate at which customs duty is leviable on the goods depends on the classification of the goods determined under the

Customs Tariff. The Customs Tariff is aligned with the HSN provided by the World Customs Organisation. The Finance Act, 2007 has reduced the peak customs duty to 10% for all goods other than agricultural and other specified products. The customs duties are levied on the transaction value of the imported goods. General principles adopted for valuation of the goods under the Customs Act are in conformity with the WTO agreement on customs valuation.

Education Cess at the rate of 3% is also levied on the aggregate of duties of customs (except safeguard duty, countervailing duty and antidumping duty). Goods attracting customs duties at bound rates under international commitments (for example, IT Agreement, Indo-US Textile Agreement) have been exempted from this cess).

18. DOUBLE TAX AVOIDANCE AGREEMENTS

DTAAs are essentially bilateral agreements entered into between two countries, as between India and another country. DTAAs override the provisions of the IT Act, 1961 to the extent they are more beneficial to the Assessee (concessional tax rates applicable under certain double tax avoidance conventions which India has signed with various countries is given in tabular form below). Relief is granted in respect of income chargeable to tax, both under the IT Act and the Income Tax laws in that other country, in order to promote mutual economic relations, trade and investment and avoid double taxation. Following advantages accrue from DTAAs:

1. Lower withholding tax;
2. Complete exemption of income from taxes;
3. Underlying tax credits;
4. Tax sparing credits; and
5. Determination of residence status.

It is now well established rule that in India the provisions of the DTAA override the provisions of the domestic status. Moreover, with the insertion of Section 90 (2) in the IT Act, it is clear that assesses have an option of choosing to be governed either by the provisions of the IT Act, whichever are more beneficial. NRIs can take the advantage of the provisions of the DTAA entered into between India and the country in which they reside, more particularly in respect of Interest Income from NRO account, Government Securities, Loans, Fixed Deposits with Companies and Dividends etc.

In case of countries with which India has DTAA, the tax rates in percentage are as per the agreed terms stated in the agreements and are indicated for various countries as under:

Sl.	Country	Dividend %	Interest %	Royalty %	Technical Fee %
1.	Armenia	10	10	10	10
2.	Austria	10	10	10	Exempt, except on amounts (net) attributable to activities performed in the state
3.	Australia	15	15	10-20	No separate provision
4.	Bangladesh	10, 15	10	10	-

Sl.	Country	Dividend %	Interest %	Royalty %	Technical Fee %
5.	Brazil	15	15	25/15	No separate provision
6.	Belarus	25/ 15	10	15	No separate provision
7.	Belgium	15	10/15	10	No separate provision
8.	Bulgaria	15	15	20/15	No separate provision
9.	Canada	15, 25	15	20/15	No separate provision
10.	China	10	10	10	No separate provision
11.	Cyprus	10/ 15	10	15	10
12.	Czech Republic	10	10	10	No separate provision
13.	Denmark	15, 25	10,15	20	No separate provision
14.	Egypt	5/ 15	5/12.5	10	-
15.	Finland	15	10	10/15	No separate Provision
16.	France	10	10	10	No separate Provision
17.	Germany	10	10	10	No separate Provision
18.	Greece	Taxed in the country where arises	Taxed in the country where arises	Taxed in the country where arises	No separate provision
19.	Hashemite Kingdom of Jordan	10	10	20	No separate provision
20.	Hungary	10	10	10	No separate provision
21.	Indonesia	10, 15	10	15	No separate provision

Sl.	Country	Dividend %	Interest %	Royalty %	Technical Fee %
22.	Ireland	10	10	10	10
23.	Israel	10	10	10	10
24.	Italy	15/ 25	15	20	No separate provision
25.	Japan	15	10,15	20	20
26.	Kazakstan	10	10	10	No separate provision
27.	Kenya	15	15	20	17
28.	Korea	15, 20	10,15	15	No separate provision
29.	Kyrgyz Republic	10	10	15	No separate provision
30.	Libya	Taxed in the country where arises	Taxed in the country where arises	Taxed in the country where arises	-
31.	Malaysia	10	10/ and subject to exemptions	10	10
32.	Malta	10/ 15	10	15	10
33.	Mauritius	5, 15	Taxed in country where paid subject to certain exemptions	15	No separate provision
34.	Mongolia	15	15	15	No separate provision
35.	Morocco	10	10	10	No Separate provision

Sl.	Country	Dividend %	Interest %	Royalty %	Technical Fee %
36.	Namibia	10	10	10	10
37.	Nepal	10, 15	10,15	15	No separate provision
38.	Netherlands	10	10 subject to exemption	10	No separate provision
39.	New Zealand	15	10 subject to exemption	10	No separate provision
40.	Norway	15/ 25	15 subject to exemption	20	No separate provision
41.	Oman	10/ 12	10	15	15
42.	Philippines	15/ 20	10/15	15	-
43.	Poland	15	15 subject to exemption	22.5	No separate provision
44.	Portuguese Republic	10/ 15	10	10	No separate provision
45.	Qatar	5/ 10	10	10	No separate provision
46.	Russia	10	10	10	No separate provision
47.	Romania	15, 20	15	22.5	No separate provision
50.	Saudi Arabia	5	-	10	-
51.	Singapore	10/ 15	10/15	10	No separate provision
52.	Slovenia	5/ 15	10	10	No separate provision
53.	South Africa	10	10	10	No separate provision

Sl.	Country	Dividend %	Interest %	Royalty %	Technical Fee %
54.	Spain	15	15	10/20	No separate provision
55.	Sri Lanka	15	10	10	-
56.	Sudan	10	10	10	No separate provision
57.	Syria	Not Mentioned Taxed in country where paid	7.5	10	-
58.	Sweden	10 subject to any lower rate agreed in other agreement	10 subject to any lower rate agreed in other agreement	10 subject to any lower rate agreed in other agreement	No separate provision
59.	Swiss Confederation	10	10	10	No separate provision
60.	Tanzania	10/ 15	12.5	20	20
61.	Thailand	15, 20	10,25	15	-
62.	Trinidad and Tobago	10	10	10	No separate provision
63.	Turkey	15	10/15	15	No separate provision
64.	Turkmenistan	10	10	10	No separate provision
65.	United Arab Republic	5/ 15	Not Mentioned	Not Mentioned	No separate provision
66.	USA	15, 25	10,15	20,15	20,15
67.	Uganda	10	10	10	No separate provision

Sl.	Country	Dividend %	Interest %	Royalty %	Technical Fee %
68.	UK	15	15	10/15/20	No separate provision
69.	Ukraine	10/ 15	10	10	No separate provision
70.	Uzbekistan	15	15	15	15
71.	UAE	5/ 15	5/12.5	10	-
72.	Vietnam	10	10	10	10
73.	Zambia	5/ 15	10	10	No separate provision

Withholding Tax for NRIs & Foreign Companies

Withholding Tax Rates for payments made to Non-Residents are determined by the Finance Act passed by the Parliament for various years. The current rates are:

1. Interest - 20% of Gross Amount;
2. Dividends - 10%;
3. Royalties - 20%;
4. Technical Services - 20%;
5. Any other Services - Individuals - 30% of net income; and
6. Companies/ Corporates - 40% of net income.

The above rates are general and in respect of the countries with which India does not have a DTAA.

Comparative Table of the Limited DTAAs

Sl.	Country	Subject – matter	Benefits Accruing from the Agreement
1.	Afghanistan	DTAA on income of enterprises operating aircraft	a.) Income derived by airlines from aircraft operation shall be exempt from the tax in Contracting State. b.) Income derived from participation in pools of any kind relating to air transport.
2.	Bulgaria	DTAA on income	Exemption from income tax on cargo freight earnings by

		from carriage of cargo on merchant shipping	vessels to ports of Contracting States.
Sl.	**Country**	**Subject – matter**	**Benefits Accruing from the Agreement**
3.	Czechoslovak Socialist Republic	DTAA on Co-operation in Shipping	No income-tax by authorities on freight-earnings of vessels on the basis of reciprocity.
4.	Ethiopia	DTAA on income of enterprises operating aircraft	a.) Exemption from tax on income and interest thereon derived from the operation of aircraft in international traffic on the principle of reciprocity in the other Contracting State. b.) Income derived from participations in a pool, a JV or in any other similar arrangement regarding air transport.
5.	Iran	DTAA on income of enterprises operating aircraft	Income derived by airline from aircraft operation in international traffic in contracting state, on the basis of reciprocity.
6.	Kuwait	DTAA on income derived from international air transport	a.) Exemption from tax on income and interest thereon derived from the operation of aircraft in international traffic in the other Contracting State. b.) Income derived from operation of aircraft in international traffic through participations in a pooled service, in a joint air transport operation or in an international operating agency by enterprise in Contracting State.
7.	Lebanon	DTAA on income of enterprises operating aircraft	a.) Exemption from tax on income derived from the operation of aircraft in international traffic in the other Contracting State. b.) Income from participations in pools of any kind by enterprises engaged in air transport.
8.	Oman	DTAA on income derived from international air transport	a) Exemption from tax and interest thereon on income derived from the operation of aircraft in international traffic in the other Contracting State. b) Income from the participation in a pool, a joint business or an international operating agency.
9.	Pakistan	DTAA on income	a.) Exemption from tax on income thereon derived from the

Sl.	Country	Subject – matter	Benefits Accruing from the Agreement
		from international air transport	operation of aircraft in international traffic in the other Contracting State. b.) Income from the participation in a pool, a joint business or an international operating agency.
10.	People's Democratic Republic of Yemen	DTAA on income from international air transport	a.) Exemption from tax on income derived from the operation of aircraft in international traffic in the other Contracting State. b.) Income from the participation in a pool, a joint business or an international operating agency.
11.	Russian Federation	DTAA on income derived from carriage of cargo on merchant shipping	a) Income of shipping companies is exempt from tax on the income derived from the carriage of cargo between ports of the contracting state. b) Levy of tax on income of shipping companies by each contracting party from the carriage of cargo to ports of third countries subject that such tax is reduced to two thirds thereof.
12.	Saudi Arabia	DTAA on income on the activities of air transport enterprises	a.) Exemption from tax on income and profits derived from the operation of air transport in international traffic in the other Contracting State. Interest or earnings on funds directly connected with operation of aircraft in international traffic shall be regarded as income from operation of aircraft. b.) Income and profits derived from participation in a pool or a joint air transport operation by an air transport enterprise of a Contracting State. c.) Profits from the operation of air transport in international traffic also include income derived from: i. Rental or lease of aircraft or ground equipment to the enterprise of the other Contracting State; ii. Training schemes, management and other services rendered to enterprise of other Contracting State.
13.	Switzerland	DTAA on income of enterprises operating aircraft	a.) Exemption from tax on income derived from air transport by enterprise of contracting state. This clause is not applicable to income arising as a result of internal

			traffic of the contracting parties. b.) It also includes the income derived from participation in a pooled service, in a joint air transport operating organization or international operating agency.
Sl.	**Country**	**Subject – matter**	**Benefits Accruing from the Agreement**
14.	United Arab Emirates	DTAA on income derived from International Air Transport	a.) Exemption from tax on income and interest thereon derived from the operation of aircraft in international traffic in the other Contracting State. b.) Income from participation in a pool, joint business or an international operating agency. c.) The gains derived on alienation of aircraft or spares are taxable in the state of the enterprise.
15.	Yemen Arab Republic	DTAA on income derived from international air transport	a.) Exemption from tax on income and interest thereon derived from the operation of aircraft in international traffic in the other Contracting State. b.) Income from participation in a pool, joint business or an international operating agency.

19. PREFERRED ROUTES OF INBOUND INVESTMENT

India attracts lots of foreign investment for the routes mentioned below. The below routes and their benefits are discussed below:

Mauritius

The primary benefit under the India-Mauritius Tax Treaty is that there is no capital gains tax in either India or Mauritius on the sale of the shares of the Indian company by a Mauritius company. Otherwise, the proceeds of a sale of shares in an Indian company are taxed in India even if the seller is not a tax resident of India.

The Mauritius approach to investing in India is most applicable when the Indian company is the primary exit vehicle for investor liquidity. This approach can also provide a tax benefit when an acquisition might occur at the Indian subsidiary level rather than at the US parent level. In this case, the US parent company establishes an intermediate Mauritius subsidiary between itself and the India subsidiary. In some cases, an investor may want the flexibility of both approaches. The alternatives available for direct investment into India are:

a) Invest directly from the US without establishing a permanent establishment for tax purposes in India;
b) Invest via Mauritius without establishing a permanent establishment for tax purposes in India;
c) Invest through a VCF in India registered with the SEBI.

Under the Mauritius approach, an offshore company regulated by the Mauritius Offshore Business Activities Act 1992 ("MOBAA") is formed to make the investment(s). Certain requirements must be met in order to receive a Mauritius tax residency certificate for purposes of the Treaty including:

a) Two local directors approved by the MOBAA authority;
b) Bank account in Mauritius; and
c) Compliance with Mauritius corporate formalities.

While there is a lower tax rate on dividends for Mauritius tax residents under the Treaty, corporate dividends declared by an Indian company are presently not taxed in the hands of the recipient upon payment of a dividend tax (presently 12.5%) by the Indian company that declares the dividend. The primary benefit under the treaty is that there is no capital gains tax in India or Mauritius on the sale of shares in an Indian company.

The effective management of the Mauritius company must not be from India in order to have the benefit of the Treaty. Whether the effective management of a company is in India or Mauritius or elsewhere is a question of fact.

Business income is taxed in India if the or Mauritius company has a "permanent establishment" in India which generates income. Having an India subsidiary is necessary but not sufficient condition to avoid permanent establishment status.

Cyprus

Another alternative would be to route investments into India through Cyprus. India and Cyprus are also parties to a tax treaty. The tax treatment for capital gains from the sale of shares in an Indian company held by a Cyprus holding company is the same as through Mauritius as long as the Cyprus company does not have a permanent establishment in India. There is no capital gains tax in either India or Cyprus on the sale of shares. Cyprus has a slight economic advantage over Mauritius when an investment is by way of a mix of equity and debt.

The interest payable to the Cyprus company is subject to a withholding tax of 10% instead of the normal rate of 20% for interest paid out of India. The withholding tax in India on interest payable to a Mauritius company is payable is 15% so there is a slight economic advantage to using Cyprus if there is a major debt component of the investment. The disadvantage of using a Cyprus holding company is there is less precedent on the requirements for tax residency.

A Cyprus company is deemed to be a tax resident only if its management and control is in Cyprus. Companies managed and controlled from outside of Cyprus do not receive any benefits under the Cyprus India tax treaty. Whether the effective management of a company is in India or Cyprus or elsewhere is a question of fact.

Singapore

The primary benefit under the India Singapore DTAA, which became effective on August 1, 2005, is no capital gains tax in either India or Singapore on the sale of the shares of the Indian company by a Singapore company so long as the Singapore Company does not have a “permanent establishment” in India. The requirement for Singapore Company must satisfy expenditure requirements and should have sustainable and continuous business operations in Singapore. Annual expenditure on operations in Singapore must be at least US$ 200,000 in the 24 (twenty four) months immediately prior to when the gains are realized.

United Arab Emirates

The India UAE DTAA provides benefits in relation to income from immovable property, capital gains, personal services, dividends, interest, royalties, etc. Beneficiary of this agreement are the persons who are resident of one or both of the Countries. The term 'resident' has been abundantly defined in the agreement itself which states that the same has to be determined on the basis of domicile, place of management, place of incorporation, centre of vital interests, etc.

The original agreement provided that no capital gains tax in either India or UAE on the sale of the shares of the Indian company by a UAE company if it fall within the definition of resident. But after the amendment of November, 2007 the UAE investors will have to pay capital gains tax of 10% from April 01, 2008. Clarifying the resident status, the amendment states that an 'individual' who resides for a period of 183 (one hundred eighty three) days will be resident of that country. As far as companies are concerned, they are to be incorporated, controlled and managed wholly in contracting states.

20. CORPORATE GOVERNANCE

In the overall corporate paradigm, we are witnessing today an expanded reach of globalisation and global ambitions. To achieve global dimensions, corporations pool capital from a large investor base both in the domestic and international markets. The growing investment expects the board of directors and the management of companies to act as trustees and not only ensure the safety of the capital but also returns higher than the cost of capital. All this could be possible when companies are fair to their stakeholders and transparent in all transactions. Organizations across the globe are thus navigating a proliferation of new standards and stakeholder expectations, and are challenged to do so in a way that supports performance objectives, sustains value and protects the organization's brand. To that end, countries across the globe have formulated certain principles of 'corporate governance'.

The United Kingdom

In the United Kingdom the Cadbury Report was published in 1992 to address the financial aspects of corporate governance. Turnbull Guidelines published in 1999 laid down the principles of internal control to be followed by companies in the UK. Finally, in June 2003, UK adopted the 'Combined Code on Corporate Governance'.

The United States of America

Congress passed the Sarbanes-Oxley law in 2002 ("SOX Act") in reaction to a spate of financial scandals, notably Enron and WorldCom, that shook public confidence in corporate America. The Final Corporate Governance Rules of New York Stock Exchange was approved by the Securities Exchange Commission on 4 November 2003. These final rules will be codified in Section 303A of the NYSE's Listed Company Manual.

The European Union

The fundamentals of corporate governance were set forth in the Millstein Report to the Organisation for Economic Co-operation and Development ("OECD") in 1998 and were then expanded upon in the OECD Principles of Corporate Governance in 1999. These principles focus on providing assurances that the assets provided by investors are being used appropriately and efficiently.

India

The SEBI, which has been actively engaged in evolving, setting and enforcing the standards of good corporate governance, has taken steps towards benchmarking governance norms with those of

international standards by introducing Clause 49 in the Listing Agreement in the year 2000 and introducing further amendments in Clause 49 in 2006. The requirements laid down by Clause 49 are as follows:

a) Composition of board of directors of a public listed company including requirement of 'Independent Director', mandatory disclosures by the board and code of conduct to be adopted by the board.

b) A company must also constitute a qualified and independent audit committee including the power and role of the audit committee.

c) With regard to non-listed company which is subsidiary of a listed company, Clause 49 prescribes that at least one independent director on the board of the holding listed company shall be director on the board of such non-listed subsidiary company.

d) Clause 49 requires a company to make certain disclosures relating to

   i) Basis of related party transactions;
   ii) Disclosure of accounting treatment;
   iii) Board disclosures relating to risk management;
   iv) Proceeds from public issues, rights issues, preferential issues etc.;
   v) Remuneration of Directors;
   vi) Disclosure relating to management including disclosures to be made by senior management to the board; and
   vii) Information to be provided to the shareholders of the company

e) The CEO, i.e. the Managing Director or Manager appointed in terms of the Companies Act, 1956 and the CFO i.e. the whole-time Finance Director or any other person heading the finance function discharging that function shall certify to the Board that the company is compliant with all corporate governance requirements.

f) The company must obtain a certificate from either the auditors or practicing company secretaries regarding compliance of conditions of corporate governance as stipulated in this clause and annex the certificate with the directors' report, which is sent annually to all the shareholders of the company. The same certificate shall also be sent to the Stock Exchanges along with the annual report filed by the company. Independent professional certification required under Clause 49 has enabled SEBI to inculcate new culture of good governance in Indian companies.

g) A company must submit a Quarterly Compliance Report on Corporate Governance to the stock exchanges in prescribed format.

h) Clause 49 also lays down certain non-mandatory requirements which companies must strive to implement in order to achieve and maintain high standards of corporate governance practices. Some of the non-mandatory requirements are remuneration committee, Training of Board Members, Mechanism for evaluating non-executive Board Members and Whistle Blower Policy.

The stock exchanges ensure that all provisions of the revised Clause 49 have been complied with by a company seeking listing for the first time, before granting the in-principle approval for such listing. For this purpose, it will be considered satisfactory compliance if such a company has set up its Board and constituted committees such as Audit Committee, Shareholders/ Investors Grievances Committee etc. in accordance with the revised clause before seeking in-principle approval for listing.

The Stock Exchanges have set up a separate monitoring cell with identified personnel to monitor the compliance with the provisions of the revised Clause 49 on corporate governance.

21. BUSINESS IMMIGRATION TO INDIA

The Indian Government issues several types of visas through its Missions located worldwide. These visas include business and employment visas which are discussed below.

Employment Visa

Employment visa is granted on a case to case basis to foreign nationals desirous of taking employment in India. Business visas are normally multi entry and are issued for a period of 6 (six) months to 1 (one) year. However, employment visa may also be issued for longer periods depending on the terms of the period specified in the contract of employment of the foreign national. Foreign Nationals visiting India for employment must hold a valid employment visa.

Pre-arrival Requirements

The Indian Missions located in various countries issue visas. An applicant for a visa must present as under:

1. *Visa Application Form* – Visa application form should be filled in legibly and clearly, in bold (capital) letters in black ink only. The name and other relevant particulars should be filled in as per details in the passport.

2. *Passport* – At the time of submission of application, the passport should be valid for at least six (6) months beyond the date of intended departure from India and must have at least 2 (two) blank pages.

3. *Photographs* – Recent passport size photographs depicting front pose against light background must be submitted.

4. *Visa Fee* – Visa application should be accompanied by the prescribed fee. Please note that visa fee schedule varies according to the type of visa issued and varies from one country to another and can be revised at short notice and is usually non-refundable. Processing time for visa applications also varies in a similar manner.

5. *Supporting Documents*

   For employment visa, below mentioned supporting documents must also be enclosed:

   a) Letter of recommendation of the Indian Company employing the foreigner;

b) Terms and Condition of the employment;
c) The prescribed undertaking on the letterhead of the Indian Company; and
d) Proof of registration of the employer's organisation in India.

Post-arrival Requirements

Foreigners entering India on Employment visa, valid for more than 180 days, are required to register, within 14 (fourteen) days of first arrival in India, with the Foreigners Regional Registration Officer ("FRRO") under whose jurisdiction they propose to stay.

Registration Procedure

A Resident Foreign National is required to make an application to the Registration Officer ("RO") at the place where the foreigner resides and registers his/her name. The following documents are required to be submitted:

(i) Properly filled application form;
(ii) Photocopy of the main pages of the passport;
(iii) Recent photographs of the applicant; and
(iv) Details of Proof of residence of the applicant in India.
(v) Prescribed undertaking.

BUSINESS VISAS

Business visa is required by persons visiting India for business purposes. A business visa is normally multi entry and may be granted for a period 6 (six) months to 5 (five) years. Please note that certain restrictions exist on business visa.

Pre-arrival Requirements

Please refer to Points 1 to 4 under the sub head, pre arrival requirements mentioned on the first two pages of this chapter.

Supporting Documents

For business visa, below mentioned supporting documents must also be enclosed:

a) Letter from the applicant's overseas employer;
b) Letter of invitation from the Indian Company;
c) Prescribed undertaking by the overseas Company;

d) Copy of the approval from the GoI in case of a JV or Collaboration; and

e) Copy of permission from the RBI in case of business/JV, etc.

Post-arrival Requirements

i) Foreigners entering India on a business visa, valid for more than 180 days, are not required to register with the FRRO if they do not intend to stay in India for more than 180 days during a particular visit.

ii) Foreigners are exempted from registering with the FRRO, if their visas state that registration is not required.

Registration Procedure

A Resident Foreign National is required to make an application in quadruplicate to the Registration Officer at the place where the foreigner resides and registers his/her name for which similar documents as mentioned for employment visa above are required.

Additional Information

i) Registration fee is charged by the FRRO for application of foreign nationals.

ii) Registration facilities are not provided at the airport.

iii) Personal presence of the foreigner is required for registration.

Contravention of the Act and the Rules

In the event there is a contravention of the Registration of Foreigners Rules, 1992 ("the Rules") by a foreign national who has entered India on a business visa, the foreign national would be held to be individually liable for such contravention. Since the visa is always issued to an individual after examining the merits of the said individual, the company employing such individual would rarely, if ever, is held to be a defaulter.

Penalties for Non-compliance

Any violation makes a person liable for prosecution under the Registration of Foreigners Act, 1939 and if found guilty, the punishment may be an imprisonment for a term which may extend to one (1) year, and/or a fine.

Late Registration – In cases of late registration a late fee is charged.

Certificate of Registration – Upon satisfactory scrutiny of the application, the FRRO's registration officers would issue a Certificate of registration and a residential permit upto the validity of the visa period.

Conversion/Extension of Visa

In the event a foreign national holding a visa valid for a period of less than 1 (one) year desires to convert it into a visa valid for a period of more than 1 (one) year, then he/she would be required to approach the Ministry of Home Affairs, Director (F), Lok Nayak Bhavan (1st floor), Khan Market, New Delhi- 110003.

The change of visa status from one category to another category is normally not allowed. It can be considered by MHA only in extraordinary circumstances. For this purpose, the foreigner should normally come in person to the office. In exceptional cases and where allowed, a duly authenticated representative may be sent.

Tax Clearance Certificate

If a person, not domiciled in India, intends to stay in the country for more than 120 (one hundred twenty days) days, an Income Tax Clearance Certificate is required in order to leave the country. This document will prove that the person's stay in India was financed by his own money and not by working or selling his goods. These certificates are issued by the foreign section of the Income Tax Department at Delhi, Kolkata, Chennai and Mumbai on being shown the person's passport, visa extension form and the currency exchange receipts, which have been used by the person.

Departure from India

All visitors holding Registration Certificate have to obtain, before departure, exit endorsement from the Registration Officer of the district in which they were registered.

Every foreigner who is about to depart finally from India shall surrender his Certificate of Registration either to the Registration Officer of the place where he is registered or of the place from where he intends to depart or to the Immigration Officer at the Port/Check post of exit from India. If the certificate is surrendered to other than the immigration officer at the port/check post of exit, the foreigners should produce the receipt indicating such surrender of the document to the immigration officer at the port/check post of exit.

The final departure of all the foreign nationals holding residential permit shall be intimated by the Indian Company to the FRRO, by a letter on the Company's letterhead.

22. CLOSING A BUSINESS

Closing a business means to shut down various functional as well as non-functional areas of the business vehicle in India. A foreigner or a foreign company may choose to exit its business in India due to the following:-

1. Economic recession in the economy;
2. Intense competition making business unviable;
3. Deployment of obsolete techniques of production;
4. Lack of requisite infrastructure;
5. Management and Labour problems;
6. Completion of purpose;
7. Exiting a representative business vehicle to an operational business vehicle;
8. Problem within the Parent Entity;
9. Management decision of migrating to a newer business; and
10. Financial crunch, lack of resources.

Closure of LO /BO

For winding up of the LOs, a company is required to make an application to the concerned Regional Office of the RBI. Following documents must accompany such application for closure:

a) A copy of the RBI's permission for establishing such Office in India;

b) Auditor's Certificate —

   i. indicating the manner in which the remittable amount has been arrived and supported by a statement of assets and liabilities of the applicant company, and indicating the manner of disposal of assets;

   ii. confirming that all liabilities in India including arrears of gratuity and other benefits to employees etc. of the branch/office have been either fully met or adequately provided for;

   iii. confirming that no income accruing from sources outside India (including proceeds of exports) has remained unrepatriated to India;

c) No-objection or tax clearance certificate from the Income Tax Authority for remittance; and

d) Confirmation from the applicant company that no legal proceedings in any Court in India are pending and there is no legal impediment to the remittance.

Pursuant to the RBI permission the Authorised Dealers can process the remittance of surplus. At the time of closure of a BO, the entities have to approach the Central Office of the RBI for approval, with the same set of documents as mentioned above.

Winding Up of a Company

Winding up of a company is the process by which the legal existence of a company is brought to an end and its property administered for the benefit of its members and creditors. In India, a company can be wound up in any one of the following 3 (three) ways:

a) Winding up by the Court;
b) By passing of an appropriate resolution for voluntary winding up at the general meeting of members;
c) By a voluntary winding up which the Court orders to be continued subject to the supervision of the Court.

An administrator, who is called the liquidator, is appointed and he takes control of the company, collects its assets, pays debts and finally distributes any surplus among the members in accordance with their rights. At the end of winding up, the company does not have any assets or liabilities. Once the affairs of a company are completely wound up, the dissolution of such company takes place. Upon dissolution, the company's name is struck off from the register of companies and its legal personality as a corporation comes to an end.

The procedure for winding up differs depending upon whether the company is registered or unregistered. A company formed by registration under the Companies Act, 1956 is known as a registered company. It also includes an existing company, which had been formed and registered under any of the earlier Companies Act. The process by which a company is wound up by the members or the creditors without the intervention of Tribunal is called as Voluntary Winding Up and the same may take place as under:-

a) By passing an ordinary resolution in the general meeting if (i) the period fixed for the duration of the company by the articles has expired; or (ii) some event on the happening of which company is to be dissolved, has happened.

b) By passing a special resolution to wind up voluntarily for any reason whatsoever.

Within 14 (fourteen) days of passing of the resolution, either ordinary or special, such resolution must be advertised in the Official Gazette and also in some important newspapers, both vernacular as well as English language, circulating in the district of the registered office of the company.

As soon as the affairs of the company are wound up, the liquidator must call a final meeting of the company as well as that of the creditors through an advertisement in local newspapers as well as in the Official Gazette at least 1 (one) month before the meeting and place the accounts before it. Within 1 (one) week of meeting, liquidator shall send to Registrar a copy of accounts and a return of resolutions.

23. ALTERNATIVE DISPUTE RESOLUTION

Contrary to global perception, Arbitration and Mediation are not new methods of Alternative Dispute Resolution in India. Arbitration has been prevalent in India for the last several decades and the first enactment governing arbitration was the Arbitration Act, 1940, which is locally known as the Old Act and was replaced by the Arbitration and Conciliation Act, 1996 ("the Act").

Mediation too is not new to India and bears a striking resemblance in some respects to the ancient ADR process *viz* the Panchayati Raj System wherein respected village elders assisted the resolution of community disputes. This system continues to be practiced in India even today and in fact the Government encourages this system of resolving disputes.

Why ADR?

As is known to the world, litigation in India is a very time and cost consuming method of dispute resolution. There is a huge backlog of cases and delays are routine. This effects the business environment and in such a situation, ADR affords parties the hope of avoiding the judicial system. Many other reasons including a Himalayan increase in international transactions support the recourse to arbitration, a popular ADR method.

Arbitration

In early 1990, the GoI decided to move away from an apparent mixed economy stance towards adopting market-oriented reforms with the aim of globalisation, and thus to play an increasingly active role in the international economic world. This required strategies for swifter resolution of disputes by lessening the burden on the courts and providing means for expeditious resolution of disputes.

The Act was legislated to make the Indian arbitration law more responsive to contemporary requirements and is based on and largely a reproduction of the United Nations Commission on International Trade Law ("UNCITRAL Model Law"). The earlier arbitration law was not considered to be as effective as it should have been mainly because it covered only dispute settlements of a domestic nature when compared with the Act. The Act seeks to provide an effective mode of settlement for domestic as well as international commercial arbitration. In addition, it also introduced methods of conciliation since the earlier law did not provide any mode of conciliation between the parties.

Arbitration has over the years developed into an alternative process to litigation and since then has been an important element of India's commercial life. ADR thus offers an alternative route for resolution of disputes. The emphasis in the ADR, which is informal and flexible, is on "helping the parties to help themselves".

Arbitration is a process used by the agreement of the parties to resolve disputes. In arbitration, disputes are resolved with binding effect by a person or persons acting in a judicial manner in private, rather than by the regular court of law, that would have jurisdiction to adjudicate, but for the agreement of the parties to exclude it.

India is a party to the following Conventions:

a) the Geneva Protocol on Arbitration Clauses of 1923;
b) the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and
c) the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards. India became a party to the Convention on June 10, 1958 and ratified it on July 13, 1961.

An Arbitrator is created by a contract between the parties and obtains jurisdiction under the terms of contract. An Arbitrator is expected to interpret and apply provisions of the contract and pass an award accordingly. While passing the award he has to bear in mind the provisions of Section 28 of the Act, which clearly provides that in case of domestic arbitration in India the Arbitral Tribunal shall decide the dispute in accordance with substantive law for the time in force in India. If the Arbitrator ignores the substantive law in force in India and passes an award, it is bound to cause injustice and is liable to be set aside.

Legal Framework of Arbitration in India

Part I of the Act pertains to Arbitration. The General provisions are found in Chapter I (Sections 2 to 6) of the Act. Section 2(*b*) defines “arbitration agreement” as referred to in Section 7. “Arbitral Tribunal” means a sole arbitrator or a panel of arbitrators — Section 2(*d*). Clause (*h*) defines “party” as a party to arbitration agreement. Section 5 restricts judicial intervention. The said section is material and reads thus:

Chapter II of the Act deals with “arbitration agreement”. Section 7 declares that by an arbitration agreement, the parties may submit to arbitration all or certain disputes between them. Such agreement must be in writing. Section 8 confers power on a judicial authority to refer the dispute to arbitration in certain cases. Section 9 enables the court to make interim orders.

Chapter III of the Act provides for composition of Arbitral Tribunal. Section 10 allows parties to determine the number of arbitrators but declares that "such number shall not be an even number". Section 11 relates to appointment of arbitrators.

Chapter IV of the Act relates to jurisdiction of Arbitral Tribunals. Section 16 is another important provision and confers power on the Arbitral Tribunal to rule on its own jurisdiction.

Chapters V and VI of the Act relate to "Conduct of Arbitral Proceedings" and "Making of Arbitral Award and Termination of Proceedings". Chapters VII, VIII and IX provide for "Recourse against Arbitral Award", "Finality and Enforcement of Arbitral Awards" and "Appeals" respectively. "Miscellaneous" matters get covered in Chapter X of the Act.

To facilitate ADR, a mechanism by way of an amendment of the Civil Procedure Court, 1908 was introduced in 1999 through which disputed pending before courts may also be settled through ADR. In fact, where it appears to the Court that there is scope of settlement of a dispute through ADR, the Court is empowered to refer such a matter to ADR.

The world over, there is a growing shift to Mediation/ Conciliation, which unlike arbitration and litigation does not involve determination of issues by a third party. A Mediator/Conciliator is a neutral third party appointed with the mutual consent of the disputants to facilitate a negotiated settlement of the dispute. Conciliation/Mediation by definition is non binding and encourages the parties to voluntary reach an agreement which satisfies the needs of the parties and is being actively utilised in almost every conceivable type of dispute resolution and comes in various forms. The process has also been effectively adapted for multiple party dispute resolution with tremendous success.

Part III of the Act deals with Conciliation/ Mediation. Under the Act, a Settlement Agreement arrived at among the disputants has the same status and effect as if it is an arbitral award on agreed terms and it is final and binding on them.

Implementing Foreign Awards

Please refer to the next chapter.

Court's Interference in Arbitration

The courts in India offer full support and encouragement to arbitration and at the request of a party, the Courts:

a) Stop a court case from being carried on in breach of an arbitration agreement;
b) Enforce foreign arbitral awards made in New York Convention countries;
c) Enforce awards made in international arbitrations taking place in India; and
d) Issue a wide range of interim measures of protection, including:

i. Preservation and interim custody of subject matter of dispute and interim injunctions to preserve status quo;
ii. Appointment of receiver;
iii. Securing the amount in dispute,
iv. Securing costs of the arbitration; and
v. They issue processes to compel witnesses to attend arbitral proceedings.

Indian courts do not review the merits of an award in arbitration, unless it is at the request of a party and only under restricted grounds of challenge laid down in the Act. A foreign award may also only be reviewed according to a similarly limited set of criteria.

Benefits of Arbitration

Arbitration is a procedure in which a dispute is submitted to one or more arbitrators, for adjudication, who resolve the dispute. The decision is given in the form of an award. The main objects of arbitration are speed, economy, convenience and simplicity of procedures. Such modes of dispute resolution have several advantages over a law suit:-

(i) since arbitration are less costly than a suit in a court of law;
(ii) they are very simple and more expeditious, saving the parties from waste of time;
(iii) as the proceedings are conducted in closed doors, the dispute is not publicised ensuring confidentiality; and
(iv) the award/decision is generally final because the appeal is permitted only in certain cases.

24. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND JUDGEMENTS

How can Foreign Arbitral Awards be Enforcement in India?

Part II of the Arbitration and Conciliation Act, 1996 ("the Act") deals with the enforcement of foreign awards in India. The Act, lays down the complete procedure for the enforcement of a foreign award in India.

In order to mitigate hardship and inconvenience to the person against whom the award was made, Section 48 of the Act suggests the conditions for enforcement of foreign awards and at the same time grants liberty to the person against whom the award has been published to contest the enforcement of the said award by pointing out that the conditions embodied in Section 48 have not been fulfilled. Sub section 3 of Section 48 of the Act also entitles the person against whom the award is made seek adjournment on the ground that the setting aside application or application for suspension of award has been made to a competent authority. However, Section 49 of the Act prescribes that if the conditions of Section 48 are fulfilled the award shall be deemed to be a decree of the Indian Court.

What is a Foreign Award?

A foreign award is as an arbitral award on differences between persons arising out of legal relationships whether contractual or not, considered as commercial under the law in force in India in pursuance of which either the Geneva Convention or the New York Convention applies and which is made in one of such territories where reciprocal provisions have been made for enforcement of award.

Pre-requisites for Enforcement of Foreign Awards

Following conditions are necessary for the enforcement of Foreign Awards:

(i) The award must be an award on difference arising out of legal relationships considered as commercial under the law in force in India;
(ii) The award must have been made in pursuance of an agreement in writing for arbitration to which the convention set forth in the First Schedule (New York Convention) applies; and
(iii) The award must have been made in one of the reciprocating contracting states notified by the GoI.

The Procedure for Enforcement of Foreign Award

The procedure for enforcement of arbitral awards under the Act remains pretty much the same as under the erstwhile Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration

(Protocol and Convention), Act 1937. The reason that there are no qualitative differences is because the New York Convention and the Geneva Convention themselves provide for the procedure for enforcement which are merely given statutory recognition by way of an enabling legislation and the same continues under the Act.

The enforcement of a 'foreign award' is a 3 (three) phase process as under:

a) Firstly, the party seeking to enforce the award is required to make an application to the court along with the evidence under the provisions of the Act.

b) Secondly, the party against whom the award is invoked, desiring to resist the enforcement, is required to furnish proof to the court of the existence of one or more of the defenses set forth in the Act.

c) Finally, if on the basis of the evidence before it, the court is satisfied that the award is enforceable, it may enforce the award as a decree of the court under the Act.

A person who intends to enforce a foreign arbitral award should apply to the court and produce the following documents:

a) Original award or a duly authenticated copy;
b) Original agreement for arbitration or a duly authenticated copy;
c) Such evidence as may be necessary to prove that the award is a foreign award; and
d) Furnish translations, if necessary to be furnished.

The court is bound to enforce an arbitral award unless enforcement is refused owing to the following reasons:

a) Parties to the agreement were under some incapacity.
b) The said agreement is not valid under the law to which the parties have subjected themselves or is invalid under the law of the country where the award was made.
c) No proper notice was given to the party against whom the award is sought to be enforced.
d) Award deals with a difference outside the scope of reference.
e) Composition of Arbitral Tribunal was not in accord with the agreement between the parties.
f) Award has not become binding on the parties, or has been set aside.
g) Subject-matter of the difference is not capable of settlement by arbitration under law in India.
h) Enforcement is contrary to the Public Policy of India.

Can Foreign Judgments be enforced in India?

Yes, under the provision Code of Civil Procedure, 1908 ("CPC") which governs the procedure relating to enforcement of foreign and domestic decrees, foreign judgments may be enforced in India. The provisions of CPC give shape to the theory of Comity of Nations which says that certain rules to be recognized as common to civilized jurisdictions.

CPC Provisions on Enforcement of Foreign Judgement

Sections 13[30] and 14[31] of the CPC legislates the rule of res judicata in case of judgments pronounced by foreign courts. These provisions embody the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as res judicata between the parties thereto except in the cases mentioned in Section 13. At the same time Section 44A[32] of the CPC also deals with the issues of enforcement of foreign decrees passed by the Courts in the Reciprocating Territories.

Procedure for Enforcement of Foreign Judgments

Under Sections 13 and 44A of the CPC, Foreign Judgments can be enforced in 2 (two) different ways, depending on whether the country in which the Foreign Judgment is passed is located is a 'Reciprocal Country' or not. While an order passed by a court in a reciprocal country can be straightway enforced in India as if the same is a decree passed by a court in India; filing a fresh suit on the basis of such order can only enforce an order passed by a court in a non-reciprocating country. Irrespective of the means one adopts for enforcement of a foreign judgment, the same should stand the scrutiny of Section 13.

Section 13 of the CPC provides for the exceptional circumstances wherein the foreign judgment cannot be enforced and Section 14 creates a presumption in favour of enforceability of such judgments, unless proved to the contrary. However, this presumption would stand vitiated only and only on the ground of jurisdiction of the foreign court giving the impugned judgment.

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[30] When Foreign Judgment not conclusive.

[31] Presumption as to foreign judgments.

[32] Execution of decrees passed by Courts in Reciprocating Territory.

Section 13 sets out 6 (six) grounds on the presence of any of which, conclusiveness and enforceability of a foreign judgment can be assailed. They are:

a) Where it has not been pronounced by court of competent jurisdiction;
b) Where it has not been given on the merits of the case;
c) Where it appears on the face of the proceeding to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
d) Where the proceeding in which the judgment was obtained or opposed to natural justice;
e) Where it has been obtained by fraud;
f) Where it sustains a claim founded on a breach of any law in force in India

Section 44-A provides that where a certified copy of a decree if any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

When a foreign judgment is sought to be executed under Section 44-A, it will be open to the respondent to rake all objections, which would have been open to him under Section 13 of the CPC if a suit had been filed on such judgment. The fact that out of 6 (six) exceptions there has been due compliance with some of the exceptions is of no avail. The decree can be executed under Section 44-A only if all the conditions of Section 13 (a) to (f) are satisfied.

Once the decree of foreign superior court is sought to be executed under this section as if it were the decree of the Indian court executing the same, no further questions would survive regarding the competence of the court executing such decree.

25. MISCELLANEOUS

Asset Reconstruction

Restructuring is the corporate management term for the act of partially dismantling and reorganizing a company for the purpose of making it more efficient and generally, more profitable. It is often done as part of a bankruptcy or takeover by another firm, particularly a leveraged buyout by a private equity firm. Selling off portions of a company, such as divisions, which are no longer profitable or which has distracted the management from its core business, can greatly improve the company's balance sheet.

The reform of corporate restructuring and debt restructuring practices in the Asian region following the 1997 economic crisis may well be described as a restructuring revolution. There has been a dramatic improvement in most jurisdictions in insolvency systems and credit risk management. Following the economic crisis, many Asian countries began to reform their corporate insolvency, restructuring and debt recovery laws and procedures as part of a strategy to remedy legislative and institutional weaknesses and strengthen their financial and corporate sectors. In large part, the focus has also been on establishing limited-life, specialized bodies such as asset management companies ("AMCs") and creating special legislative environments to facilitate investments in distressed assets and bulk sales of non-performing loans by financial institutions.

The Indian Scenario

The Companies Act, 1956, was largely amended in 2002, to overhaul the restructuring and insolvency regime. The amended Act envisaged combining the powers of the Courts, the Board of Industrial and Financial Reconstruction and the Company Law Board in one specialized tribunal – National Company Law Tribunal ("NCLT"). However, the tribunal is yet to be constituted. The Government is now working on a revised concept paper in response to public comments and recommendations of the Irani Committee Report (2005) to include provisions for transparent and globally acceptable insolvency and restructuring procedures.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the Act"), also provides for establishment of asset reconstruction companies ("ARC"), which would undertake the management/realization of Non Performing Loans ("NPL") acquired from secured creditors. The Act allows ARC to take over, change the management of and restructure companies in the course of NPL management process. The Act envisages a competitive private sector

ARC model, with no direct government support. Presently, there are only 3 (three) ARCs in India that is ARCIL, Asrec (I) Ltd. and Pegasus. The GoI permits foreign investment in ARCs.

Foreign Investment in ARC

a) Prior approval of FIPB is required for FDI in an ARC.

b) FDI in an ARC is limited to a maximum foreign investment of 49% of the paid-up equity capital of such ARC. Further, where investment in an ARC by any individual entity exceeds 10% of such paid-up equity capital, such ARC is required to comply with Section 3(3)(f) of the Act. In other words, the foreign investor should not have a controlling interest in the securitisation company.

c) Financial Institutions ("FI") registered with SEBI can invest upto 49% in each tranche of the scheme of SRS subject to the condition that investment of a single FI in each tranche does not exceed 10% of the issue.

GLOSSERY OF TERMS USED

AAR	Authority of Advance Rulings
ADR	Alternate Dispute Resolution
AoA	Articles of Association
ATS	Air Transport Services
BCD	Basic Customs Duty
BO	Branch Office
BOT	Built Operate Transfer
BSE	Bombay Stock Exchange
CAO	Chief Accounts Officer
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CENVAT	Central Value Added Tax
CER	Central Excise Registration
CGP	Controller General of Patents
CoI	Certificate of Incorporation
CSTA	Central Sales Tax Act, 1956
CVD	Countervailing Duty
DD	Domestic Depository
DDR	Due Diligence Report
DDT	Dividend Distribution Tax
DIPP	Department of Industrial Policy and Promotion
DTAA	Double Taxation Avoidance Agreement
ECB	External Commercial Borrowing

EEFC	Exchange Earner's Foreign Currency
EOU	Export Oriented Unit
EPZ	Export Processing Zone
EU	European Union
FBT	Fringe Benefit Tax
FCCB	Foreign Currency Convertible Bonds
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FERRO	Foreigners Regional Registration Officer
FII	Foreign Institutional Investor
FIIA	Foreign Investment Implementation Authority
FIPB	Foreign Investment Promotion Board
FM	Finance Ministry
FPI	Food Processing Industries
FTP	Foreign Trade Policy
FTZ	Free Trade Zone
FVCI	Foreign Venture Capital Investor
GDR	Global Depository Receipts
GoI	Government of India
IC	Investment Commission
IDR	Indian Depositories Receipts

IEC	Import Export Code
IFSC	International Financial Services Center
IPR	Intellectual Property Rights
IRDA	Insurance Regulatory Development Authority
IREDA	Indian Renewable Energy Development Agency
IT	Income Tax Act,1961
ITech	Information Technology
JV	Joint Venture
LO	Liaison Office
LTCG	Long Term Capital Gains
M&A	Merger and Acquisition
MAT	Minimum Alternate Tax
MB	Merchant Banker
MIB	Ministry of Information and Broadcasting
MNES	Ministry of Non Conventional Energy Sources
MoA	Memorandum of Association
MOBAA	Mauritius Offshore Business Activities Act, 1992
MoEF	Ministry of External Affairs
MoF	Ministry of Finance
NBFC	Non-banking Financial Company
NHAI	National Highway Authority of India
NOC	No objection Certificate
NRI	Non-Resident Indian

NSE	National Stock Exchange
OCB	Overseas Corporate Body
PAN	Permanent Account Number
PC	Planning Commission
PCB	Private Sector Banks
PE	Private Equity
PF	Provident Fund
PIO	Person of Indian Origin
PN	Participatory Notes
PO	Project Office
PPP	Public Private Partnerships
PSU	Public Sector Undertaking
R&D	Research and Development
RBI	Reserve Bank of India
RE	Renewable Energy
RoC	Registrar of Companies
SEBI	Securities and Exchange Board of India
SEC	Securities Exchange Commission
SEZ	Special Economic Zone
SIA	Secretariat for Industrial Assistance
SOX	Sarbanes Oxley Act
SPV	Special Purpose Vehicle
SSIs	Small Scale Industries
STCG	Short Term Capital Gains
STPI	Software Technology Park of India

STT	Securities Transaction Tax
TAN	Tax deduction Account Number
TDS	Tax Deducted at Source
TMR	Trade Marks Registry
TRAI	Telecom Regulatory Authority of India
TRIPS	Trade Related Aspects of Intellectual Property
UAE	United Arab Emirates
UK	United Kingdom

USA	United States of America
UT	Union Territories
VAT	Value Added Tax
VC	Venture Capital
VCF	Venture Capital Fund
VCU	Venture Capital Undertaking
WOS	Wholly Owned Subsidy
WTO	World Trade Organization

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