GUIDE FOR INVESTMENT IN INDIA

FICCI

amarchand mangaldas

TABLE OF CONTENTS

INTRODUCTION.....9

I. GENERAL.....12

II. COMPANIES.....15

III. FOREIGN INVESTMENT.....20

IV. ACQUISITION OF SHARES.....25

V. COMPETITION LAW.....26

VI. INTELLECTUAL PROPERTY.....32

VII. EMPLOYEES.....38

VIII. TAXES.....41

IX. MISCELLANEOUS.....56

ANNEXURE- I - GLOSSARY.....58

ANNEXURE-II - THE COMPANIES ACT, 2013 – A PRIMER.....62

ANNEXURE-III - INFRASTRUCTURE SECTOR.....72

ANNEXURE- IV- AUTOMOBILE INDUSTRY.....77

ANNEXURE-V- FOOD PROCESSING SECTOR.....80

ANNEXURE-VI- TEXTILE INDUSTRY.....82

ANNEXURE-VII- INFORMATION TECHNOLOGY AND INFORMATION TECHNOLOGY ENABLED SERVICES.....84

ANNEXURE-VIII- LEGAL AND REGULATORY LANDSCAPE GOVERNING PHARMACEUTICAL SECTOR IN INDIA.....86

ABOUT FICCI.....88

ABOUT AMARCHAND & MANGALDAS.....89



Dear Readers,

Japan was the first country to have the institutional arrangement of Joint Business Council with FICCI. When Japan was cruising on one of the most rapid growth trajectories in the Japanese economic history in the 1960s surpassing Germany to become the second largest economy in the world, FICCI was the first business chamber to set up a bilateral mechanism, the India-Japan Business Cooperation Committee (IJBCC) in 1966, for engagement between our two countries.

Since 1966, 37 India-Japan Joint Business Cooperation Committee meetings have been organized and fructified to stimulate bilateral trade, investments and technological transfers. The next i.e 38th India Japan JBC meeting is scheduled on 4th -6th September 2013, in Tokyo.

This report, "Guide for Investment in India", a joint endeavour of FICCI and Amarchand Mangaldas, comes at an opportune time against the backdrop of a solid foundation of relations that India and Japan have laid, seeking mutually rewarding ties in the field of economic development, trade, investment, culture, science and technology, politics, and security. This strong edifice of relations has culminated in the presence of 926 Japanese companies in India, in sectors such as automobiles, pharmaceuticals, infrastructure and electronics among others.

As the two Asian partners look to deepening the parameters of the "Japan-India Strategic and Global Partnership," we realize that there is a need to highlight India's strong fundamentals such as a growing middle class population, cost competitiveness and strong domestic consumption that have made it a preferred destination for MNCs from across the world. This report goes a step further to highlight India's potential as an investment destination courtesy the recent reforms in FDI laws, changes in corporate governance regime and amendments in tax laws.

Japanese companies which have already established their presence in India are also steadily expanding their business in the country. Often this intent needs to be backed with intimate knowledge of the country's commercial climate and recognition of the fact that this climate is continuously evolving. The report provides an exhaustive coverage of the mergers and acquisitions space, modus operandi of setting up business in India, investor friendly policies, takeover code, competition law and intellectual property regime in the country.

As a part of our efforts to strengthen relations with Japan, FICCI has been proactively engaged in creating better understanding of the areas of cooperation which Japanese companies will be willing to explore India and vice versa. This report in is sync with this objective and the purpose of taking Indo-Japanese collaboration to a new high.

I wish the JBC and deliberations all the success.

Yours Sincerely,

Onkar S Kanwar
Chairman, India Japan Business Cooperation Committee (IJBCC) & Chairman
Apollo Tyres Ltd



Dear Readers,

The Guide for Investment in India (the "Guide") is aimed at providing a broad overview of the legal and regulatory framework in India, with particular regard for the needs of foreign investors looking to participate in the India growth story.

While Asian countries take steps to synergize regional strengths and formulate a new development framework which is sustainable, efficient, and responsible, the role of the two fastest growing economies in the region, India and Japan, in addressing global investor concerns, cannot be stressed enough. Our nations have much in common in the way we have built growth around technology, developed domestic and explored international markets, and evolved in areas of public policy and governance. We also maintain a shared ideal in the way we persevere for a developmental framework which is sustainable and a growth model which is inclusive.

Culturally, India and Japan both have a rich and distinct historical narrative. They also have in common, a shared pre-independence struggle and post-independence growth trajectory. This sense of a common past, and the measures we have taken historically to build consensus and homogenize diversity, is reflected in the way we are interacting with the world.

While India is undergoing a second phase of liberalization and deregulation with the opening up of new industries and increasing participation of the private sector, including participation of Japanese companies in Delhi-Mumbai Industrial Corridor (DMIC) and water desalination projects in India, Japan is also undertaking transformative change under the leadership of the Hon'ble Prime Minister, Mr. Shinzu Abe. In the current financial climate which is witnessing global investments move increasingly to emerging economies, the role of India and Japan in shaping the Asian success story is predominant.

The Guide for Investment in India succinctly captures significant recent legal developments such as the 'Companies Act, 2013'*(the new company law in india)*, which will replace the Companies Act, and the implications for foreign investors contained therein, including aspects relating to incorporation, listing, shareholders' rights, corporate governance and corporate social responsibility. The Ministry of Corporate Affairs, the Government of India will notify the date(s), on which the Companies Act, 2013 *(including the 'rules' under the Companies Act, 2013)* will be effective and will replace the Companies Act and rules made thereunder. The Companies Act, 2013 and its rules are likely to be made effective soon. The Guide also covers foreign institutional and private party investment regulations and guidelines, and external commercial borrowing norms.

Furthermore, the Guide covers the legal aspects of cross-border mergers & acquisitions, domestic Competition Law, Intellectual Property Law (including Trademarks and Copyrights), domestic tax regulations, disinvestment, winding up, and bankruptcy norms. Finally, the Guide contains a brief insights on the infrastructure sector, automobile industry, food processing sector, textile industry, IT and IT Enabled Services sector and pharma sector.

take this opportunity to thank Federation of Indian Chambers of Commerce and Industry (FICCI), one of India's apex business associations, for giving us the opportunity to collaborate with them for the Guide for Investment in India. With our unified efforts, we have endeavored to put together a primer which we hope shall be able to answer the most pertinent questions raised by Japanese Companies and other global investors, who are looking to invest in India or Indian companies.

Yours Sincerely,
Shardul S. Shroff
Managing Partner
Amarchand & Mangaldas & Suresh A. Shroff & Co.

INTRODUCTION

India has the distinction of being one of the fastest growing economies in the world. In the past two decades, liberalization has transformed India from being an inward looking state-based economy, into a globalized market-based economy, now identified as one of the most attractive investment locations globally. With Gross Domestic Product (GDP) growth of about 5% (five percent) in the last financial year and a sustained 7-8% average growth for the past decade, the Indian economy has shown itself to be robust and remarkably resilient during the global economic slowdown. The success of Indian economic reforms is evidenced by high GDP growth, high growth rate in manufacturing sector, comfortable foreign exchange reserves, improved short-term debt profile and buoyant exports.

India's potential as a prospective investment destination has been attributed to a variety of reasons such as:

- Stable democratic environment over the 60+ years of its independence;
- Progressive and stable governments, at both the Central and State levels;
- Robust and resilient economy;
- Large market size with increasing purchasing power;
- Access to international markets through membership in regional councils;
- Large and diversified infrastructure spread across the country;
- Well-developed R&D, infrastructure, technical and marketing services;
- Skilled human resources and cost effective production facilities;
- Developed banking system, commercial banking network of over 71,000 branches operated by both Indian and foreign banks; supported by a number of national and state-level financial institutions;
- Vibrant capital markets comprising approximately 22 stock exchanges with over 8000+ listed companies;
- Investor friendly policies with conducive foreign investment environment that provides freedom of entry in most sectors, investment, location, choice of technology, import and export;
- Current account convertibility;
- Established, independent judiciary with a hierarchy of courts;
- Statutory and legal protection for intellectual property rights; and
- Common Law based legal system.

Since 1991, the industrial sectors have seen positive structural changes, improvements in productivity, modernization and infusion of new technology. Companies have consolidated around their areas of core competence, within India and overseas, by opting for foreign tie-ups and infusing new technology, management expertise and access to foreign markets. In the technology sector, almost all the major global players have established operations in India. Others procure services from Indian third-party service providers.

The far-reaching and sweeping economic changes that have taken shape since 1991 have unleashed the growth potential of the Indian economy. The Government of India's current policies offer a more transparent economic environment and are geared towards promoting domestic and foreign investment. Over the past two decades, except for a small list of prohibited sectors, foreign investment is permitted in all sectors. Furthermore, subject to the certain conditions, the all-important 'Single Brand Retail' sector has been fully opened for foreign investment, and the "Multi Brand Retail" sector has been opened up to 51%, which are seen as welcome signs of the Central Government's intent to liberalize further. In August 2013, the Central Government further liberalized the FDI policy by permitting (i) 100% FDI (up to 49% under the Automatic Route (i.e. without any prior government approval) and between 49% to 100% under the Government Route (i.e. with prior government) in the Telecom sector; (ii) 49% FDI under the Automatic Route in petroleum & natural gas, commodity exchanges, power exchanges, stock exchanges; (iii) 100% FDI (up to 49% Automatic and between 49% to 100% with government approval) in the asset reconstruction companies; (iv) 74% FDI under the Automatic Route in credit information companies; (v) 100% FDI under the Automatic Route in the courier services; and (vi) 100% FDI (up to 49% under the Automatic Route and between 49% to 100% under the Government Route) in the Single-Brand Retail trade. With respect to the Defence Sector, the Government has proposed that any FDI beyond the existing limit of 26% shall be considered by the Cabinet Committee on Security on a case to case basis. The proposed Changes to the FDI rules in the insurance and banking sectors are also on the Government's radar.

From a policy perspective, it is clear that the Government of India continues to view foreign investment and private enterprise as a key driver of economic growth in India and the policy measures and changes have been tailored in keeping with this objective.

The Indian M&A Sphere

India's integration into the global economy has accelerated inbound and outbound M&A, making international headlines and creating domestic valuations of dizzying multiples. The total value of M&A and PE deals in 2012 was about US$ 48.7 billion. 2012 also saw some big ticket deals such as ONGC's acquisition of an 8.4% stake in the Kashagan oilfield in Kazakhstan for US$ 5 billion.

While a number of factors may be attributed to this outcome, the two significant ones are: (i) India has emerged as a player on the global stage, and has acquired the confidence of entrepreneurs and investors alike, both at home and abroad; and (ii) coupled with the ongoing economic transformation and liberalization, as discussed above, this trend is expected to continue in the years ahead.

There are many economic and cultural reasons for the rapid growth of M&A activity in India. The economic factors include India's rapidly growing economy, rising corporate earnings and valuations, cost efficiency of outsourcing and the availability of highly skilled human resources. The cultural factors driving the M&A boom include the Indian entrepreneurial spirit, language skills, comfort with western culture and concepts, comfort of non-Indians with India's business and legal ethos, democracy and rule of law, and the changing attitude of Indian promoters seeking global partnerships. All these economic and cultural factors have largely contributed to and supported the surging M&A activity that we are currently witnessing.

Additionally, liberalized economic policies and timely regulatory review have facilitated an increasing number of inbound and outbound acquisitions. The regulations however, continue to be extensive and vary depending upon the

sector of the target company, the mode of acquisition, the instrument proposed to be used, the nature of the acquirer and the nature of the target company.

The M&A laws in India are still evolving and the regulators are still 'catching up' with the global M&A wave into and out of India. This effort to 'catch up' however often results in the regulators applying varying 'interpretations' of a stated law which has created substantial confusion and an upheaval of settled market practice. Further, the core tenets of Indian law, especially those involved in M&A transactions, are in the process of undergoing modernization. For instance, the recent approval of the Parliament to the banking bill has paved the way for foreign investments in the sector and establishment of new private banks, a key reform. At the time of going to press for publication of this guide, many major reform bills were pending parliamentary approval. Such major bills include Goods and Service Tax, the Direct Tax Code, new company law and financial sector reforms on banking and insurance. Recently the Companies Bill, 2012, which was approved by the Lok Sabha, the Lower House and the Rajya Sabha, the Upper House of the Indian Parliament on December 18, 2012 and August 8, 2013, respectively, received the assent of the President of India on August 29, 2013 to become the Companies Act, 2013, with effect from August 30, 2013 in terms of a notification of the MCA (the "New Companies Act"). The New Companies Act will replace the existing Companies Act on the date(s) as may be notified by the MCA. A majority of the provisions of the New Companies Act are subject to subordinate legislation wherein the MCA has been empowered to prescribe necessary rules, which are currently in the process of being finalized. Several new concepts and changes have been introduced under the New comapanies Act, including on corporate restructurings, mergers and acquisitions. A detailed primer on the New Companies Act (highlighting the key /new provisions) has been provided in Annexure II.

We now present this handbook to enable readers to have an overview of the systems and legal rules and regulations that are essential while making investment and having business operations in India.

This booklet has been updated till August 30, 2013. Some of the policy changes are not yet effective and could vary.

IMPORTANT NOTE: All information given in this handbook has been compiled from credible, reliable sources. Although reasonable care has been taken to ensure that the information in this handbook is true and accurate, such information is provided 'as is', without any warranty, express or implied as to the accuracy or completeness of any such information. Amarchand & Mangaldas & Suresh A. Shroff & Co. shall not be liable for any losses incurred by any person from any use of this publication or its contents. This handbook has been prepared for informational purposes only and nothing contained in this handbook constitutes legal or any other form of advice from Amarchand & Mangaldas & Suresh A. Shroff & Co. Readers should consult their legal, tax and other advisors before making any investment or other decision with regard to any business in India.

I. GENERAL

1. What are the business related laws in India?

   India has codified and uniform commercial laws that include legislations relating to contracts, corporations, exchange control, competition, taxation and the like. Statutes are supplemented by policy pronouncements, press notes, notifications and regulations by Governmental departments and regulators.

   The key business related legislations in India are:

   - the Companies Act (which governs the incorporation management, restructuring and dissolution of companies);

   - the Indian Contracts Act (which lays down the general principles relating to the formation and enforceability of contracts, consideration, the various types of contracts including those of indemnity and guarantee, bailment and pledge, agency and breach of a contract);

   - the FEMA (which provides for India's foreign exchange management regime and regulates the inflow and outflow of foreign exchange and investment into/from India) and the regulations issued thereunder, together with the rules/circulars/press notes/guidelines issued by the Government of India setting out the foreign investment policy (including sector-specific requirements);

   - the SEBI Act (which governs the functions and powers of SEBI, India's securities market regulator) and the regulations issued thereunder, including, in particular, the SEBI ICDR Regulations (which govern the public offers of securities and offers of securities by listed companies); the SEBI Takeover Regulations (which govern the terms of mandatory and voluntary tender offers for shares of listed companies), the SEBI Insider Trading Regulations (which prohibit dealing in securities when in possession of unpublished price sensitive information), and the SEBI Delisting Regulations (which set out the process for delisting of a listed company);

   - the SCRA (which governs listing and trading of securities on stock exchanges in India) and the Listing Agreement with stock exchanges;

   - the Competition Act (which regulates combinations (merger control) and anti-competitive behavior); and

   - the Income Tax Act (which prescribes the tax treatment of dividend, capital gains, mergers, demergers and slump sales).

   In addition, there are several sector specific legislations (e.g. the Indian Telegraph Act, Drugs and Cosmetics Act, Press Council Act, the Banking Regulation Act, the Insurance Act, and various labour legislations (Industrial Disputes Act etc.) that must also be considered depending on the nature and type of the transaction.

2. What are the types of business entities that can be set up in India? What is the process, time and cost for setting up each?

   Business ventures can be carried on in India through sole proprietorships, partnerships (including LLPs) or through companies incorporated in India. Additionally, non-residents can carry on certain limited business activities through a branch office, liaison office or a project office.

Sole Proprietorship

This is the simplest form of business. No business registration is required under Indian law. The owner of a sole proprietorship is personally entitled to all the profits and responsible for all the losses arising from the business.

Partnership

Partnerships in India are regulated under the Partnership Act. Partners of a firm are jointly entitled to all the profits and are also jointly and severally responsible for all the liabilities arising from the business. While it is not mandatory to have a partnership deed, most partners do enter into a partnership deed to govern their inter-se relationship as partners. A partnership does not have a corporate character distinct from its members. A partnership may even have corporations as its members.

LLPs are a new form of a hybrid corporate entity with characteristics of both a limited liability company and a partnership. The nature of an LLP is that of a body corporate with perpetual succession and which has a legal entity separate from that of its partners. An LLP can sue and be sued in its own name. Two or more persons (including a body corporate) can incorporate an entity as a LLP under the LLP Act and there is no maximum limit on the number of partners a LLP may have. FDI is permitted in an LLP, under the Government Route, and only, in those sectors/activities where 100% (hundred percent) FDI is allowed, under the Automatic Route and there are no FDI linked performance related conditions. However, there are certain restrictions on the activities of LLPs with FDI.

Company

A company may be incorporated in India either as a private company or a public company.

The minimum paid-up capital for a private company is Rs. 0.1 million and that of a public company is Rs. 0.5 million. However, foreign investment in certain sectors such as NBFCs and permitted real estate activities are subject to minimum capitalization requirements.

Branch / Liaison / Project Offices

Setting up branch offices and liaison offices requires prior approval of the Reserve Bank. The activities which may be undertaken by the branch offices and liaison offices have been set out in response to question 3 below. General permission has been given by the Reserve Bank for the establishment of project offices that meet specified conditions. Foreign companies i.e. companies incorporated outside India, which establish a place of business in India through a branch office must be registered with the RoC. No approval of the Reserve Bank is required for foreign companies to establish branch offices/units in SEZs to undertake manufacturing and service activities, subject to satisfaction of certain conditions.

3. Are there any fetters on the business activities that can be carried on by business organizations in India?

A branch office may enter into contracts on behalf of the non-resident parent and may generate income. However, the activities that can be undertaken by a branch office are restricted to representing the parent company/group companies, exporting/importing goods, rendering professional or consultancy services, carrying on research work in which the parent company

is engaged, promoting technical or financial collaborations between Indian companies and the parent or overseas group company, representing the parent company in India and acting as buying/selling agent in India, rendering services in information technology and development of software in India, rendering technical support to the products supplied by parent/group companies and foreign airlines/ shipping companies. The scope of the activities may be further curtailed by conditions in the approval granted by the Reserve Bank.

A liaison office, on the other hand, is not permitted to carry on business in India. Its activities are restricted to representing the parent company/group companies, promoting export from/to India, promoting technical/financial collaborations between parent/group companies and companies in India, gathering information for the parent company and acting as a communication channel between the parent company and Indian companies. The expenses of liaison offices are to be met by way of inward remittance from the non-resident.

A project office is usually set up for execution of large projects such as major construction, civil engineering and infrastructure projects.

An Indian company (even if wholly foreign owned) has no similar fetters on its ability to carry on business that is specified in its Memorandum of Association, except that the foreign holdings in such company may be limited if it is engaged in a sector for which the Government of India has prescribed threshold(s) for foreign shareholding under the extant FDI Policy.

II. COMPANIES

1. Overview of the corporate law regime in India and proposed legal changes

The Companies Act is a central/federal legislation and applies to companies incorporated throughout India. The Companies Act, 2013 i.e. the New Act (which will replace the Companies Act from the date(s) as may be notified by the MCA) has inter-alia, introduced enhanced corporate governance standards particularly in relation to the independent directors, audit, corporate social responsibility (CSR), mandatory valuation, private placement of securities, cross-border mergers including merger of Indian companies into foreign companies and class action suits. A majority of the provisions of the New Companies Act are subject to subordinate legislation wherein the MCA has been empowered to prescribe necessary rules, which are currently in the process of being finalized. A primer on the New Companies Act has been set out in Annexure II.

2. What are the different types of companies that can be incorporated in India?

Companies may be incorporated as private companies or public companies. Companies may be limited by shares, limited by guarantee (which may or may not have share capital) or unlimited (i.e. no limit on the liability of the members). The most commonly used form is a company limited by shares. Private companies must have a minimum paid up capital of Rs. 0.1 million. The Articles of Association of private companies must restrict the transferability of shares and the number of members to 50 (fifty) (not including employees), prohibit the company from making any invitation to the public to subscribe for shares or debentures and any invitation or acceptance of deposits except from members, directors or their relatives. Under the New Companies Act, a private company can have a maximum of 200 (two hundred) members. A private company is required to have a minimum of 2 (two) members and 2 (two) directors.

Private companies have greater flexibility and less stringent rules in respect of various matters including holding of members' meetings, issue of further capital, commencement of business, number of directors, determination of kinds of share capital and voting rights, determination of managerial remuneration, inter-corporate loans and investments, etc. Under the New Companies Act, a subsidiary of a public company which is a private company shall be deemed to be a public company, even if such a subsidiary continues to be a private company in its articles.

The shares of a public company are freely transferable and there is no limit on the number of members that it may have. The minimum paid-up capital for a public company is Rs. 0.5 million. A public company in required to have a minimum of 7 (seven) members and 3 (three) directors. A private company, which is a subsidiary of a public company, is also considered to be a public company.

Under the Companies Act, a private company, which is a subsidiary of a foreign company, which if incorporated in India would be a public company for the purposes of Indian law, would also be deemed to be a subsidiary of a public company, except where such private company is 100% (hundred percent) held by foreign companies outside India. There is no similar provision under the New Companies Act.

Further, the New Companies Act has also introduced the concept of 'One Person Company'. A One Person Company will be registered as a private company. This will benefit small entrepreneurs as under the NewCompanies Act, such a company will be exempt from various filing requirement and meetings etc. The details regarding the process, time and cost of setting up such a company is awaited and will be subject to rules as may be notified by the Government in this regard.

3. What is the incorporation process?

Indian companies (whether private or public, limited or unlimited) are incorporated by registration with the appropriate RoC of the State in which the registered office of the company is to be located. The documents filed are available for public inspection.

The first step towards incorporation is the approval of the name of the company by the RoC. An application for name approval is made in Form 1A, wherein various details regarding the proposed new company, viz., alternative choice of names, information regarding first directors, details of the promoters etc. need to be disclosed. Following the receipt of such name approval, Forms 1 (application and declaration for incorporation of new company), 18 (notice of situation of registered office) and 32 (particulars of directors) along with the Constitutional Documents of the proposed company need to be filed. It may be noted that before any of the aforesaid filings are made, each of the proposed directors will need to obtain a DIN. Further to the initiation of e-filing of forms by the RoC in India, digital signature certificates will also have to be obtained from certain designated authorities.

Once the Constitutional Documents are approved by the RoC and a certificate of incorporation is issued, a private company can commence business activities. In addition to the said certificate of incorporation, a public company is required to obtain a certificate of commencement of business from the RoC prior to commencing its business activities.

The Constitutional Documents of a company comprise of the Memorandum of Association and the Articles of Association. The Memorandum of Association sets out the objects and scope of activity of the company and the authorized share capital of the company. The Articles of Association set out the rules and regulations of the company in respect of its management and the rights of the members/shareholders inter se and vis-à-vis the company.

4. How are minority shareholders protected under Indian law?

Certain limited rights are available to a shareholder owning at least 10% (ten percent) of the voting capital, such as the right to requisition an extra-ordinary general meeting of the company.

Remedy is also available to a shareholder holding 10% (ten percent) or more of the voting capital to approach the CLB for remedy against oppression of the minority and for mismanagement of the company by the persons in control of the company or the majority shareholders. However, the burden of proving oppression or mismanagement would be on the shareholder alleging the same and the process may take several years.

Shareholders holding more than 25% (twenty five percent) of the voting capital may block resolutions on matters requiring a Special Resolution. Matters required to be passed by Special Resolution include amendments to the Constitutional Documents, reduction of the share capital, winding up, etc. Under the New Act, an acquirer or a person acting in concert with the acquirer holding 90% of the issued equity share capital of a company shall offer to buy the shares held by the minority shareholders at a price to be determined on the basis of valuation conducted by a registered valuer. The valuation shall be conducted on the basis of the rules prescribed by the Central Government.

5. How does one fund a subsidiary in India?

A subsidiary may be funded by:

- subscribing to equity or compulsorily convertible preference share capital or compulsorily convertible debentures;

- extending an ECB, or a foreign currency loan, including through subscription to partially or optionally convertible preference shares, OCDs and NCDs (subject to having the minimum equity contribution and maintaining the debt equity ratio stipulated under the extant regulations) and which would require compliance with the permitted end-use requirements;

- providing advance against services to be rendered (in case of a captive IT/ITES unit). However, the parties must be mindful of transfer pricing restrictions and take care that the advance does not extend beyond specified periods so as to constitute an ECB.

6. What types of shares can a company issue?

Shares can only be of two kinds:

- equity-shares These shares have voting rights or differential rights as t dividend, voting or otherwise, and

- preference shares-such shares do not carry voting rights, except in certain circumstances. Preference shareholders have a preferential right over the equity shareholders to dividends and to assets of the company in case of a winding up. These shares may be redeemable or convertible into equity shares.

7. Who can be appointed as a director of a company in India? Can a non-resident be appointed as a director of an Indian company?

The Companies Act provides that no body corporate, association or firm can be appointed as a director of a company, and only an individual can be so appointed. The Companies Act, clarifies that no company can appoint or re-appoint any individual as director of the company unless he has been allotted a DIN.

The New Companies Act has made certain changes to the aforementioned requirements. For an analysis of the changes, please refer to Annexure II

8. What are the liabilities/obligations of a director under Indian law?

A director who commits a breach may be liable for both civil and criminal consequences, depending upon the nature of the breach and the statutory provisions. The liabilities can be summarized as follows:

(a) Directors will be liable for civil consequences by way of monetary penalties and/or claim for damages for breaches of fiduciary duties.

(b) In respect of breach of certain statutory provisions, directors would be liable for monetary penalties and/or imprisonment. However, in such case, usually a director will not be liable if he can prove that the breach was committed without his knowledge and/or that he had exercised all due diligence to prevent the commission of the breach.

A director is required to act with reasonable diligence and care in the best interest of the company, and has a fiduciary duty to the company and the shareholders of the company as a whole.

The duties of a director include attending the board meetings, disclosing any conflicting interest and acting in accordance with the Articles of Association of the company. The New Companies Act has specifically provided for the duties of directors. Please refer to Annexure II for the same.

9. Are there any corporate social responsibility norms in India?

The New Companies Act has for the first time introduced the concept of corporate social responsibility. It requires every company having a net worth of Rs 5000 million or more or a turnover of Rs 10,000 million or more or a net profit of Rs 50 million or more to spend least 2 % of the average net profits of the company made during three immediately preceding financial years as part of the corporate social responsibility. For a more detailed analysis of the provisions, please refer to Annexure II.

Further the MCA has released the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011 which provides companies with a comprehensive framework for responsible business action that encompasses social, environmental and economic responsibilities of business. Further, the guidelines provide direction for Indian MNCs planning to invest or already operating in other parts of the world. The guidelines are a refinement over the Corporate Social Responsibility Voluntary Guidelines 2009. The guidelines are not mandatory.

10. Are there any corporate governance norms?

Yes. These have been introduced over the last few years by way of amendments made to the Companies Act and the Listing Agreement. For instance, the Companies Act requires every public company with a paid up share capital of more than Rs. 50 million to set up an audit committee and enables every public company with a share capital of more than Rs. 50 million and more than 1000 small shareholders to appoint a director elected by such small shareholders.

The Listing Agreements require public listed companies to appoint a specified number of independent non-executive directors and constitute separate sub-committees of the board of directors for functions like audit and remuneration.

Recently, the MCA has released the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, 2011 which provide a set of corporate governance practices. The guidelines are not mandatory. Further, the New Act has specifically introduced the concept of 'Independent Directors' which until now was only provided under the Listing Agreement. For a detailed analysis of the provisions, please refer to Annexure II.

11. Are there any insolvency laws applicable to companies established in India?

Courts in India can order a company to be wound up in certain cases such as if the company is unable to pay its debts, or the number of shareholders falls below two, in case of a private company and seven in case of a public company or if the court believes that it is just and equitable to do so. Separately, under SICA, if a company with one or more industrial undertakings, were to become sick (its accumulated losses are equal to or exceed its net worth), the BIFR could order for the winding up of the sick company. Recently, the obligations of the BIFR have been vested with the National Company Law Tribunal and courts with equivalent powers. The New Companies Act provides framework for revival and rehabilitation of all sick companies (and not only certain scheduled industries). Under the New Companies Act, 'Sickness' of a company is now determined by the inability of a company to repay its debts within 30 days of receipt of a demand from secured creditors of the company representing 50% or more of the outstanding debt. A company whose financial assets have been acquired by a securitization company or reconstruction company can also approach the National Company Law Tribunal for determination of revival measures subject to the securitization company/asset reconstruction company granting its consent for the same.

12. Can voting rights be exercised by proxy?

A member of a company who is entitled to attend and vote at a meeting of the company can appoint another person (whether or not a member) as his / her proxy to attend and vote at a meeting instead of him / her, subject to certain compliances. However, such a proxy is not entitled to speak at the meeting and unless the articles of association of a company provide otherwise, a proxy is not entitled to vote except on a poll.

13. Can statutory meetings be held through electronic means?

Yes, the MCA has in 2011 permitted meetings of board of directors as well as meetings of shareholders to be held by electronic mode, i.e. video conferencing, subject to conditions specified therein. However, a director is required to attend at least one board meeting personally in a financial year. The New Companies Act specifically permits the directors to participate in a meeting of a board of directors either through video conferencing or through other audio visual means as may be prescribed by the government.

III. FOREIGN INVESTMENT

1. How is foreign investment regulated in India?

   Foreign investment in India is primarily regulated by: (i) the industrial policy; (ii) FEMA and rules promulgated thereunder; (iii) the regulations and notifications issued by the Reserve Bank; and (iv) the FDI Policy issued by the DIPP.

2. Who are the key regulators that monitor foreign investment in India?

   The FIPB, a department of the Ministry of Finance, is the regulatory body responsible for regulating foreign investment in accordance with the Industrial Policy. In addition, the Reserve Bank also regulates foreign investment for the purposes of exchange control in accordance with the provisions of the FEMA.

3. What are the different routes through which a foreign investor (other than NRI or PIO) may invest in India?

   A foreign investor may invest in India through four routes, namely:

   (a) FDI, either under the Automatic Route or the Approval Route; under Automatic Route, the foreign investor or the Indian company does not require any approval from the Government of India and under Approval Route, prior approval of the Government of India is required. Under both routes foreign investors do not require any prior registration with a regulatory authority in India;

   (b) Investment under the Portfolio Investment Scheme as an FII or an FII sub-account, subject to prior registration with SEBI;

   (c) Investment as an foreign venture capital investors, subject to prior registration with SEBI; and

   (d) Investment as a QFI through SEBI registered depository participants only in specified securities.

4. What are the different instruments available for investment in India under the FDI Policy?

   A foreign investor should consider the applicable FDI regime before selecting instruments as the treatment accorded to each of the instruments is different under the current FDI Policy.

   - As per the FDI Policy, a foreign investor can invest in equity shares; fully, compulsorily and mandatorily convertible preference shares; fully, compulsorily and mandatorily convertible debentures. Further, the price/ conversion formula of convertible instruments should be determined upfront at the time of issue of the instruments.

   - Investment in warrants and partly paid shares will require prior approval under the Approval Route.

   - Issuance of preference shares which are non-convertible, optionally convertible or partially convertible would be subject to compliance with extant regulations pertaining to ECB.

5. Is FDI prohibited in any sector/business?

FDI is prohibited in the following sectors:

(a) Lottery business including Government /private lottery, online lotteries, etc.;

(b) Gambling and betting including casinos, etc.;

(c) Chit funds;

(d) Nidhi company;

(e) Trading in transferable development rights;

(f) Real estate business or construction of farm houses;

(g) Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes; and\

(h) Activities / sectors not open to private sector investment atomic energy and railway transport (other than mass rapid transport systems).

Additionally, other than specified agriculture related activities, FDI is not permitted in Agriculture sector/activity.

6. Are there any pricing guidelines that a foreign investor has to comply with while investing into any of the instruments of an Indian entity?

The Reserve Bank has prescribed pricing guidelines for both the subscription to, and the acquisition of, shares by non- residents.

Issue of Shares

(a) Where shares of the Indian company are listed on a recognized stock exchange in India, the price of shares issued to a non-resident shall not be less than the price at which a preferential allotment of shares can be made in accordance with the SEBI guidelines.

(b) Where shares of the Indian company are not listed on a recognized stock exchange in India, the price of shares issued to a non-resident shall not be less than the fair value of shares to be determined by a merchant banker (registered with SEBI) or a chartered accountant as per the discounted free cash flow method.

(c) Where the issue of shares is pursuant to a rights issue, the issue price shall subject to SEBI ICDR Regulations be at a price determined by the company (where the investee company is listed) and where the investee company is not listed, the issue price shall not be less than the price at which shares are issued to resident shareholders.

However, where non-residents (including NRIs) are making investments in an Indian company by way of subscription to its memorandum of association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

Transfer by Resident to Non-resident

(a) Where shares of the Indian company are listed on a recognized stock exchange in India, the price of shares transferred, by way of sale under a private arrangement, shall not be less than the price at which a preferential allotment of shares can be made under the SEBI guidelines.

The price per share arrived at should be certified by a SEBI registered merchant banker or a chartered accountant.

(b) Where shares of the Indian company are not listed on a recognized stock exchange in India, the price of shares transferred, by way of sale, shall not be less than the fair value of the shares to be determined by a merchant banker (registered with SEBI) or a chartered accountant as per the discounted free cash flow method.

7. What are the ways for a foreign investor to invest in an Indian company?

FDI in India can be done through the following modes:

Issuance of fresh shares by a company: Subject to compliance with the FDI Policy and FEMA, an Indian company may issue permissible instruments under the FDI Policy to a non-resident investor.

Acquisition by way of transfer of existing shares: Non- resident investors can also invest in Indian companies by purchasing/acquiring existing instruments permissible under the FDI Policy from Indian shareholders or from other non-resident shareholders in the following manner:

(a) Non-resident to Non-resident: A person resident outside India (other than an NRI or OCB) can transfer, by way of sale or gift, the shares or convertible debentures of an Indian company to any person resident outside India.

(b) Resident to Non-resident: A person resident in India can transfer, by way of sale, permissible instruments under private arrangement to a person resident outside India, subject to compliance with the sectoral caps, pricing guidelines, reporting requirements, etc. Gift of such instruments by a resident to a person resident outside India will require the prior approval of the Reserve Bank.

(c) Non-resident on the Stock Exchange: No person resident outside India except FIIs/NRIs (under the Portfolio Investment Scheme) or Qualified Foreign Investors is permitted to invest/trade in the shares of an Indian company on the stock exchange directly, i.e., through brokers.

8. Are there any instances of transfer by way of sale, which require prior approval from the Reserve Bank/FIPB?

The prior permission of the Reserve Bank is required in the following instances of transfer, by way of sale, of shares/convertible debentures from residents to non- residents:

(a) Transfer of shares/convertible debentures of an Indian company engaged in the financial services sector.

(b) The transfer is to take place at a price that is not determined in accordance with the pricing guidelines prescribed by the Reserve Bank.

(c) The non-resident investor proposes deferment of payment of the amount of consideration.

The following instances of transfer of shares from residents to non-residents, by way of sale or otherwise, requires prior permission of the FIPB or DIPP, followed by permission from the Reserve Bank:

(a) The transfer of shares of companies engaged in sectors falling under the Government Route; and

(b) The transfer of shares resulting in foreign investments in the Indian company, breaching the applicable sectoral cap.

(c) Transfer of shares by way of a gift from a resident to a non resident.

9. What are the ECB norms in India?

Foreign investment in partially or optionally or non-convertible preference shares/bonds/ debentures, is construed as an ECB and would be subject to the ECB norms. At present ECB is governed by the Master Circular on External Commercial Borrowings and Trade Credits issued by the Reserve Bank on July 1, 2013. The Master Circular consolidates all the existing instructions on the subject of 'External Commercial Borrowings and Trade Credits' in one place and is updated on a year on year basis in intervening circulars.

As per the Master Circular, ECBs may be accessed under two routes: (a) automatic route; and (b) approval route. If any of the prescribed conditions are not complied with, the automatic route is not available, and prior approval of the Reserve Bank is required for the ECB under the approval route.

Corporates, including those in the hotel, hospital, software sectors (registered under the Companies Act) and infrastructure finance companies except financial intermediaries, such as banks, financial institutions, housing finance companies and NBFCs , NGOs and SEZs are eligible to raise ECB under the automatic route. On July 8, 2013, the RBI permitted NBFCs categorized as Asset Finance Companies to avail of ECB under the automatic subject to certain conditions stipulated in the guidelines.

These borrowers can raise ECB from internationally recognized sources such as (i) international banks, (ii) international capital markets, (iii) multilateral financial institutions (such as IFC, ADB, CDC, etc.) / regional financial institutions and Government owned development financial institutions, (iv) export credit agencies, (v) suppliers of equipment, (vi) foreign collaborators and (vii) foreign equity holders (other than erstwhile OCBs).

An ECB, irrespective of whether it is obtained through the automatic or approval route, cannot be obtained at a cost that exceeds the all-in-cost ceilings prescribed by the Reserve Bank. This ceiling includes the rate of interest, other fees and expenses in foreign currency (except commitment fee), pre-payment fee and fees payable in Indian Rupees. These ceilings are reviewed from time to time, and presently stand at 350 (three hundred and fifty) basis points over the 6 (six) month LIBOR for ECBs with an average maturity period of between 3 (three) and 5 (five) years, and 500 (five hundred) basis points over the 6 (six) month LIBOR for ECBs with an average maturity period of more than 5 (five) years.

The Reserve Bank prescribes minimum average maturity periods over which the borrower must repay the facility. Depending on the value of the facility, the minimum average maturity ranges from 3 (three) to 5 (five) years. ECBs of a shorter maturity period require the prior approval of the Reserve Bank. An ECB cannot be refinanced or prepaid before the expiry of the minimum average maturity period applicable to it.

The Master Circular also specifies end-use restrictions on the amounts received as an ECB. The permitted uses include, inter alia, the import of capital goods (as classified by the Directorate General of Foreign Trade in the Foreign Trade Policy), payment for acquisition of 3G and 2G spectrum, acquisition of shares in the disinvestment process by the Government, ODI in JVs / WOS and the implementation of new projects and modernization/expansion of existing

production units in the real sector - industrial sector including small and medium enterprises, infrastructure sector and specific service sectors, namely hotel, hospital and software in India. ECBs are not permitted to be raised for (i) on-lending or investment in capital markets or acquiring a company (or a part thereof) in India by a corporate; or (ii) use in real estate (as defined and qualified by the ECB Guidelines); or (iii) working capital, general corporate purposes and repayment of existing Indian rupee loans (except loans taken by infrastructure companies, whereby these companies can use 25% (twenty five percent) of the ECB proceeds to pay off their rupee loans).

10. Are there any limitations on repatriation of royalty/dividend/ consultancy fees?

There are no restrictions specific to non-residents on the remittance of dividends. However, as noted above, restrictions do exist on the ability of a company to declare a dividend under the Companies Act. The dividend payable on compulsorily convertible preference shares or bonds (which are treated as FDI) is restricted to 300 basis points over the prime lending rate of the State Bank of India as on the date of the Board meeting approving the issue of such shares. Non-convertible or optionally convertible preference shares and bonds are treated as an ECB and the rate of interest has to be within the limits provided in the ECB policy.

The law relating to royalty payments have been recently liberalized and currently all remittances for royalty fall under the Automatic Route.

Remittances of consultancy fees exceeding US$ 1 million for any consultancy services procured by an Indian entity from outside India (other than consultancy services rendered in respect of infrastructure projects, where the limit is US$ 10 million) requires the prior approval of the Reserve Bank. However, this rule does not apply if payments are made out of funds held in an RFC account of the remitter.

IV. ACQUISITION OF SHARES

1. What are the various modes of acquisition of shares of an existing company?

   Shares or instruments convertible into shares, of an existing company may be acquired by way of a preferential allotment of newly issued shares made by the company or a secondary sale of existing shares from a shareholder of the company. Where the company is listed on a stock exchange, the preferential allotment of new issued shares should be in accordance with the Companies Act and the SEBI ICDR Regulations, and the existing (listed) shares may also be acquired through open market purchases from the stock exchange, subject to SEBI Takeover Regulations.

2. Are there pricing restrictions applicable to the subscription / acquisition of shares? Are there special restrictions applicable to foreign investors?

   Please refer to our response to question 6 under chapter "Foreign Investments in India". Additionally, in case of both listed and unlisted companies, the price of shares transferred, by way of sale, by a non-resident to a resident, shall not be more than the minimum price at which the transfer of shares can be made from a resident to a nonresident (as provided in our response to question 6 under chapter "Foreign Investments in India".)

3. Can parties enter into put and call options for the sale and purchase of shares?

   Put and call options for the sale and purchase of shares are subject to the SCRA and SEBI notifications and whilst there are several arguments in support of the enforceability of such contracts, the final position in law is yet to be judicially settled. The provisions relating to "Prohibition on forward dealings in securities of company by director or key managerial personnel" under the New Act need to be examined.

4. Can the acquirer enter into an agreement with the other shareholders of the company on governance and transfer related aspects?

   Typically an acquirer would enter into a contractual agreement with the shareholders of the company under a shareholders' agreement, to record and set out the mutual rights and obligations inter se the parties and to record and set out the manner in which the company shall be managed and governed including matters concerning the right to appoint directors, affirmative voting rights and transfer restrictions on the shares held by the parties to the agreement. Such rights would only be enforceable if the same have been incorporated into the Constitutional Documents of the company. The issue of enforceability of transfer restrictions in case of a public company is currently the subject matter of judicial scrutiny. There have been conflicting judgments delivered by different High Courts on this issue. The Companies Act provides that there can be no restriction on the right to transfer shares in a public company. In a recent judgment, the Bombay High Court (which is pending before the Supreme Court of India in appeal) has interpreted this to mean that the restriction contained in the Act does not affect private arrangements between shareholders (and that shareholders can contractually agree to such restrictions) and transfer restrictions are enforceable inter se shareholders. The New Act specifically provides that that the contracts / arrangements between two or more persons regarding transfer of securities are enforceable.

V. COMPETITION LAW

1. What are the laws governing competition/ anti-trust in India?

   Competition law in India is governed by the Competition Act, 2002 (the Competition Act) and the rules and regulations made there under. The Competition Act aims to prevent anti competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets. The

   Competition Act provides for inter alia the establishment of the Competition Commission of India (CCI), the nodal authority for monitoring, enforcement and implementation of competition law in India and the Competition Appellate Tribunal (COMPAT). Orders passed by the CCI may be appealed to the COMPAT and thereafter, the orders passed by the COMPAT may be appealed to the Supreme Court of India within 60 (sixty) days of the order passed by COMPAT.

2. What is the scope of the Competition Act?

   The Competition Act prohibits anti competitive practices, which cause or are likely to cause "an appreciable adverse effect on competition in India" (AAEC). It primarily seeks to regulate the following:

   (a) anti-competitive agreements (Section 3);

   (b) abuse of dominance (Section 4); and

   (c) combinations (Sections 5 and 6).

3. What is meant by "relevant market" under the Competition Act?

   The Competition Act defines the "relevant market" as the market which may be determined by the CCI with reference to the 'relevant product market' or the 'relevant geographic market' or both. "Relevant geographic market" is defined as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas. "Relevant product market" is defined as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

4. What are 'anti-competitive agreements'?

   Section 3 of the Competition Act prohibits and renders void, agreements entered into between enterprises or persons or associations of persons with respect to the production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an AAEC in India. Under the Competition Act, horizontal agreements (i.e. any agreement between enterprises or persons, or associations thereof, which are engaged in identical or similar trade of provision of goods or services), including cartels, are presumed to have an AAEC. Further, such vertical agreements (i.e. agreements between enterprises or persons, or associations thereof, which are engaged at different levels of the production or supply chain) that cause or are likely to cause AAEC in India are prohibited.

   The CCI may order the enterprises to discontinue and/or modify the agreement and/or impose a penalty which may be up to 10% (ten percent) of the average turnover for the last 3 (three) financial years. However, in case of cartels, the CCI may impose upon each enterprise or person which is included in the cartel, a penalty of up to 3 (three) times of its profit for each year of continuance of such agreement or 10% (ten percent) of its turnover for each year of the continuance of such agreement, whichever is higher.

5. What is abuse of dominant position?

Section 4 of the Competition Act prohibits abuse of dominant position by an enterprise or a group. A 'dominant position' is defined to mean a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favor. A group or an enterprise is presumed to be abusing its dominant position if it imposes unfair prices (including predatory pricing) or unfair conditions on sale or purchase, limits or restricts production/technical development so as to detrimentally affect consumers or deny market access to its competitors.

The CCI may order the enterprise to discontinue such an abuse and/or impose a penalty which may be up to 10% (ten percent) of the average turnover for the last 3 (three) financial years and/or may order division of an enterprise enjoying a dominant position to ensure that such enterprise does not abuse its dominant position.

6. What are the factors that the CCI may take into consideration while determining the AAEC in cases involving anti competitive agreements and abuse of dominant position?

Section 19(3) of the Competition Act sets out certain factors that the CCI shall consider, while determining whether an agreement has an AAEC under section 3, including inter alia creation of entry barriers, foreclosure of competition/removal of competitors, accrual of benefits to consumers, improvements in production or distribution of goods or services, promotion of technical, scientific and economic development.

Section 19(4) of the Competition Act sets out certain factors that the CCI shall consider, while determining whether an enterprise enjoys a dominant position under section 4, including inter alia market share, size and resources of the enterprise, economic power including commercial advantages over competitors, extent of vertical integration, dependence of consumers, entry barriers (regulatory and otherwise), countervailing buyer power, market structure and size, social obligations and social costs, relative advantage by way of contribution to economic development by the dominant enterprise. The CCI may also consider other factors that it may consider relevant for the inquiry.

7. What are the factors that the CCI may take into consideration while determining the AAEC of a combination in India?

Section 20 of the Competition Act sets out certain factors that the CCI shall consider, while determining if a combination causes or is likely to cause an AAEC in the 'relevant market' in India, including inter alia, the actual and potential level of competition through imports in the market, entry barriers to the market (regulatory and otherwise), degree of countervailing power in the market, availability of substitutes in the market, market shares of each of the parties to the combination (individual and combined), likelihood of foreclosure/removal of competitors, extent of vertical integration in the market, etc. The CCI is also required to consider three positive effects that a combination could potentially give rise to, i.e. possibility of a failing business, nature and extent of innovation and relative advantage through contribution to economic development brought about by any combination having or likely to have an AAEC in India.

8. What is the merger control regime in India?

From 1 June 2011, any merger and acquisition (M & A) transaction resulting in the acquisition of one or more enterprises, where the acquirer and target have assets or turnover over certain assets or turnover thresholds, needs to comply with the merger control provisions contained in sections 5 and 6 of the Competition Act.

9. What is a 'combination' and how is a 'combination' regulated?

Sections 5 and 6 of the Competition Act prohibit a combination which causes or is likely to cause an AAEC in the relevant market in India and treats such combinations as void. Section 5 of the Competition Act provides that an acquisition of enterprise(s) by one or more persons or a merger or an amalgamation exceeding the prescribed thresholds under the Competition Act (provided below) read with the Notification, notified by the MCA would require a prior filing to and an approval from the CCI.

Section 6 of the Competition Act inter alia provides that 'combinations' have to be mandatorily notified by the parties to the CCI. The procedure in relation to notification of combinations to CCI is set out in the final regulations governing merger control in India issued by the CCI dated 11 May 2011 (the Combination Regulations). The CCI on February 23, 2011 issued amendments to the Combination Regulations (Amendment Regulations), widening the scope of certain exemptions and effecting changes to the filing requirements, including the filing fees.

The revised jurisdictional thresholds for the purposes of merger control filing before the CCI as follows:

(a) The Government of India, by way of the Notification, has exempted combinations which would not require a prior notification to, and an approval from, the CCI, if the target enterprise, including its divisions, units and subsidiaries, whose assets, control, voting rights, or shares are being acquired, has either assets of the value of not exceeding Rs. 250 crores in India or turnover not exceeding Rs. 750 crores in India (Target Exemption). However the Amendment Regulations have effectively diluted the Target Exemption as it provides that if as part of a series of steps in a proposed transaction, particular assets of an enterprise are moved to another enterprise (i.e., a separate legal entity), which is then acquired by a third party, the entire assets and turnover of the selling enterprise (from which these assets were hived off) will also be considered when calculating thresholds for the purposes of section 5 of the Competition Act.

(b) If the combination cannot avail of the Target Exemption, then if either of the tests provided below are met, then the combination would require a prior filing to, and an approval from, the CCI:

	FOR THE PARTIES (COMBINED)					FOR THE GROUP (COMBINED)			
		(Crore INR)	(Million USD [1])	(Million Euro[2])			(Crore INR)	(Million USD)	(Million Euro)
IN INDIA	Assets	1500	286.90	221.49		Assets	6000	1147.58	885.95
					OR				
	Turnover	4500	860.69	664.46		Turnover	18000	3442.75	2657.86
					OR				
WORLD WIDE	Assets	3921.28	750	579.01		Assets	15685.14	3000	2316.05
	INCLUDING IN INDIA								
	Assets	750	143.45	110.74		Assets	750	143.45	110.74
					OR				
	Turnover	11763.85	2250	1737.03		Turnover	47055.41	9000	6948.14
	INCLUDING IN INDIA								
	Turnover	2250	430.34	332.23		Turnover	2250	430.34	332.23
	AND								
	FOR THE TARGET								
IN INDIA	Assets	250	47.82	36.91	AND	Turnover	750	143.45	110.74

10. What are the transactions that require notification to the CCI?

With effect from June 1, 2011, all acquisitions, mergers or amalgamations, which meet the prescribed thresholds (see table above), have to be mandatorily notified to the CCI.

11. What is the trigger event that requires a filing?

Under the Competition Act, the trigger event for the notification of a proposed transaction to the CCI is:

(a) final approval of the proposed merger or amalgamation by the boards of directors of the enterprises concerned; or

(b) execution of any agreement or other document for acquisition or acquiring of control.

1. The conversion rate used throughout this chapter is USD 1 = Rs. 52.2837843.
2. The conversion rate used throughout this chapter is Euro 1 = Rs. 67.72377107.
3. The Combination Regulations clarify that "other document" referred above shall mean any binding document, by whatever name called, conveying an agreement/decision to acquire control, shares, voting rights or assets. However, in the event of a hostile acquisition, "other document" would mean any document executed by the acquirer conveying a decision to acquire, or where such document has not been executed but the intention to acquire is communicated to the Central Government or State Government or a statutory authority, the date of such communication will be deemed to be the date of execution of the other document for acquisition.

12. Is there any time period within which the CCI is required to be notified?

The Competition Act requires the parties to notify the CCI of a proposed transaction within 30 (thirty) calendar days of a 'trigger event'.

13. Are internal restructurings notifiable?

All intra-group acquisitions are exempt by virtue of the Combination Regulations. The Amendment Regulations have further exempted intra-group mergers or amalgamations between a parent and a subsidiary that is wholly owned by enterprises belonging to the same group, or between subsidiaries that are wholly owned by enterprises belonging to the same group.

14. What is the process of merger filing?

The Combination Regulations as amended by the Amendment Regulations, prescribe three forms for filing a merger notification:

(a) Form I (i.e. short form) – All notifications are ordinarily required to be filed in Form I. The parties are required to provide basic information pertaining to the combination, with a filing fee of Rs. 1 million (approximately USD 20,000). Regulation 5 of the Combination Regulations sets out a non-exhaustive list of instances which require a Form I filing.

(b) Form II (i.e. long form) The parties are free to file the merger notification on Form II along with a filing fee of 4 million (approx. USD 80,000). The Amendment Regulations however recommend that Form II be filed for transactions where:

a. the parties to the combination are competitors and have a combined market share in the same market of more than 15%; or

b. where the parties to the combination are active in vertically linked markets and the combined or individual market share in any of these markets is greater than 25%.

Further in cases where parties have filed Form I, if the CCI believes that it requires information in Form II, it may require parties to file notice in Form II. The Amendment Regulations clarify that the time periods mentioned in Section 6 (2A) and Section 31 (11) of the Competition Act and Regulation 19 of the Combination Regulations would restart if CCI required Form II to be filed where the parti-I filed Form I.

(c) Form III - is a post-completion application form, which must be filed within 7 (seven) days of an acquisition, share subscription or financing facility entered into by a public financial institution, registered FII, bank or registered Venture Capital Funds, under a covenant in a loan agreement or an investment agreement.

(d) The obligation to notify the CCI lies with the acquiring company in case of an acquisition and jointly with the parties, in case of a merger or amalgamation.

15. How long will the CCI review process take?

Phase I Investigation

The CCI is required to form a prima facie opinion on whether a combination is likely to cause an AAEC within the relevant market in India within a period of 30 (thirty) days from the receipt of the notification. At this stage the parties are free to propose "modifications" to the combination up front in order to satisfy the CCI that the combination will not cause an AAEC in the relevant market in India. In such a scenario the CCI will get an additional 15 (fifteen) days to evaluate the proposed modification.

Phase II Investigation

If the CCI forms a prima facie opinion that a combination is likely to cause an AAEC, a detailed investigation will follow and the parties cannot complete the transaction until the earlier of:

(a) final decision by the CCI; or

(b) lapse of 210 (two hundred and ten) days from the date of notification to CCI.

During the Phase II Investigation, if the CCI is of the opinion that the combination has or is likely to have an AAEC, but such adverse effect can be eliminated by suitable modification(s) to the combination, it may propose appropriate modification(s) to address such concerns.

The CCI has stated in the Regulations that it shall endeavor to clear combinations within 180 (one hundred and eighty) calendar days of filing a notice.

16. Are there any exemptions from mandatory pre-notification?

In addition to the transactions that can avail of the Target Exemption (as provided in query 9 above), the transactions falling under following 2 categories are exempt from making a notification under the Competition Act:

(a) Transactions expressly exempt under the Competition Act: Acquisitions, share subscriptions or financing facilities entered into by public financial institutions, registered FIIs, banks or registered VCFs, under a covenant in a loan agreement or an investment agreement, are exempted from obtaining prior clearance from the CCI; and a post facto filing in Form III within 7 (seven) days of completion of acquisition is contemplated.

(b) Transactions that are 'ordinarily' exempt under Combination Regulations : Transactions set out in Schedule I of the Combination Regulations are presumed not to cause AAEC in India and 'normally' do not require a notification as per Regulation 4 of the Combination Regulations. Such transactions include transactions such as acquisition of not more than 25% (twenty five percent) of shares or voting rights of a target company, made solely for investment purposes or in the ordinary course of business, not leading to control; acquisition of current assets in the ordinary course of business; intra-group acquisitions, intra – group mergers or amalgamations between a parent and a subsidiary or qua subsidiaries that are wholly owned by enterprises belonging to the same group; and combinations taking place entirely outside India with insignificant local nexus and effect on markets in India etc.

17. Is it possible to have pre-notification discussions with the CCI?

It is possible to have pre – notification consultations with the CCI. However such consultations are oral, non binding and are typically limited to procedural issues.

18. What orders can be passed by the CCI in case of merger control?

The CCI can pass an order approving the combination if the combination does not cause an AAEC in the relevant market in India. In the event that the CCI is of the view that the combination results in an AAEC, it may disapprove such a combination and/or it can propose suitable modifications to the same, which are required to be carried out within a prescribed time period. The parties to the combination also have the option of submitting amendments to the modifications proposed by the CCI, which may be approved or disapproved by the CCI. The CCI may also issue interim order (by way of a temporary injunction) restraining any party from carrying on any act which is or is likely to be in contravention of Section 3, 4 or 6 of the Competition Act.

19. What are the recent amendments in the merger control regime?

The Amendment Regulations have amended the Combination Regulations. The Amendment Regulations provide guidance on the types of transactions that are to be notifiable, set out the relevant forms in which filings are to be made, and establish the procedure relating to the filing and scrutiny of applications.

20. What are the penalties imposed in the event of non-compliance with the provisions of the Competition Act?

In case of failure to intimate the proposed combination which exceeds the prescribed thresholds, the CCI can impose a penalty up to 1% (one percent) of the total turnover or assets of a combination, whichever is higher. Further, a failure to furnish information or providing of false information will attract a monetary penalty of a minimum of Rs. 5 million upto a maximum of Rs. 10 million. The Competition Act also imposes a personal liability on the responsible officers of a company, in case of a contravention by a company.

21. How is the procedure of CCI and the COMPAT regulated?

The CCI and the COMPAT while discharging their respective functions are guided by the principles of natural justice, subject to the provisions of the Competition Act and the relevant rules made by the Central Government, and have the power to regulate their own procedure. Both have the same powers as vested in a civil court under the Code of Civil Procedure while trying a suit with respect to matters such as summoning and enforcing attendance of any person and examining him on oath, receiving evidenceon affidavit, etc.

VI. INTELLECTUAL PROPERTY

1. What is the law relating to protection of intellectual property rights in India?

India has a robust intellectual property regime with legislations in place to protect copyright, designs, patents, trademarks, topographies of integrated circuits and semiconductors (mask works), geographical indications, and plant varieties and farmers rights. Legislations relating to integrated circuits and semiconductors have not yet been enforced. India being a common law jurisdiction, Indian Courts have protected the goodwill and reputation of a business usually represented by a mark, name or get-up under the common law remedy of passing off.

As a signatory to the TRIPs Agreement and keeping in line with India's obligations, amendments have been made in the existing legislations for compliance. Copyright protection for computer programs and protection for service marks are a few examples of such new provisions since signing of the TRIPs Agreement. The Patents (Amendment) Act, 2005 and Patents (Amendment) Rules, 2006 introduced product patents from January 1, 2005 in line with India's obligations under the TRIPs Agreement.

2. How are computer software and programs protected in India?

India recognizes and protects computer programmes, tables and compilations including computer databases as 'literary works' under the Copyright Act. Both the object and source codes can be protected as literary works under the said act and the term of protection extends to 60 (sixty) years.

Under the Copyright Act, the owner of a copyright work is entitled to protect his copyright against unauthorized use and/ or misappropriation of his work or a substantial part thereof and obtain relief from a court of law including injunction, damages and accounts of profits.

Patent law also provides protection for computer implemented inventions. The Patents Act prohibits patentability of "computer programs per se", which the Patent Office in most cases treats as an absolute preclusion on computer implemented method claims. System claims on the other hand are routinely allowed, subject to meeting the requirements for novelty and inventiveness. Indian intellectual property laws are largely TRIPS compliant and the rights provided by patent law bestow on the patentee the exclusive right to prevent third parties from the acts of using, offering for sale, selling or importing for those purposes, the patented article.

3. What patent protection is available to a biotechnology company?

With the Patents (Amendment) Act, 2005 in place and notification of the Patents (Amendment) Rules, 2005 and Patents (Amendment) Rules, 2006, inventions in the field of biotechnology would be subject to the same criteria as any other invention relating to product and process. Patents may not however be secured in respect of plants and animals in whole or any part thereof, including seeds, varieties and species and essentially biological processes for production or propogation of plants and animals (some of which are presently protectable under the legislation addressing plant varieties and farmer's rights.) The preclusion in patentability of plants and animals does not however extend to microorganisms. Further, while the inventions in the field of biotechnology would be governed by the criteria applicable to any other invention relating to product and process, certain exceptions to the rule, however, may be noteworthy, for e.g. an invention, the primary or intended

use whereof would be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment, or forms part of traditional knowledge.

4. How are trademarks and service marks protected in India?

Under the Trade Marks Act, trade mark is defined as a mark that is capable of both: a) a graphical representation and b) distinguishing the goods or services of one undertaking from another. Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

Registration under the Trade Marks Act confers exclusive rights to use the mark, subject to any conditions imposed, and if these rights are infringed to restain unauthorised users.

Apart from and/or in addition to registration, a person can also obtain rights in an unregistered mark. By virtue of use of a trademark, a proprietor acquires valuable goodwill which is protectable at common law by way of a passing off action. Indian law also recognizes transborder reputation of a trader and there are a number of judicial precedents wherein foreign proprietors and their trade marks have been protected on the basis of their world wide business goodwill even in the absence of direct business presence in India. The protection also tends to prevent unauthorized use in relation to trade names or domain names.

The civil remedies/reliefs available to trade mark owners, among others, include:

Injunction against infringement (this is available only for a registered trade mark) and/or passing off (available for registered as well as unregistered trade marks, trade names and so on).

- Damages.
- Rendition of account of profits.
- Appointment of local commissioners to seize the Infringing goods.
- Order for delivery up and destruction of the infringing goods, labels and marks.
- Interlocutory orders, including interim injunctions.

5. How does one protect confidential information and trade secrets in India?

Under common law principles, to obtain relief from a court of law, the burden is upon the plaintiff to:-

(a) identify what information he was relying on;

(b) show that it was handed over in circumstan of confidence;

(c) show that it was information of the type which could be treated as confidential;

(d) show that it was used without license or there was a threat to use it.

The protection of confidential information is governed by common law principles and contract law. The manner and extent to which information may be treated confidential may be covenanted.

6. Can the employees of an Indian company be required to sign confidentiality agreements?

   Yes. Confidentiality provisions including requirements for personnel to return all confidential information and material to their employer at the time of termination of their employment are standard provisions enforceable under Indian law. Additionally, requirements preventing such personnel from utilizing such confidential information in their new job may also be imposed.

7. What is the protection available in case of infringement of intellectual property rights?

   The owner of the intellectual property is entitled to civil remedies in the nature of injunctions, damages or accounts. In addition to civil remedies, the owner is also, in some cases, entitled to criminal remedies for infringement of copyright. Under the Copyright Act, infringement of a copyright is an offence and is punishable with imprisonment and fine.

   In addition, contractual remedies providing for indemnity against intellectual property infringement, replacement of infringing portion of software or other material with non- infringing material, etc. are common practice in India.

8. Does Indian law recognize transactions carried out electronically?

   The IT Act grants legal recognition to electronic records if (a) the electronic records are made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference as well as electronic signatures (which includes a digital signature).

   The IT Act further provides that in case of contracts, wherein the communication, acceptance, revocation etc of proposals are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used. Thus, as per the IT Act, contracts will not be denied validity merely because they are in form of electronic records.

9. How can a company outsourcing its activities to India safeguard intellectual property; which is created in the course of performance of an outsourcing contract?

   Under the Copyright Act, the author of a work is the first owner of the work subject to certain exceptions, inter alia:

   (a) In case of a work made in the course of the author's employment under a contract of service or apprenticeship, the employer is deemed to be the first owner of copyright, in the absence of any agreement to the contrary;

   (b) a photograph, painting, drawing or engraving or cinematographic film made, for valuable consideration at the instance of any person, such person is deemed to be the first owner of copyright, in the absence of any agreement to the contrary. Further, copyright ownership in any work (except a photograph, painting, portrait, engraving or cinematograph film) created for valuable consideration at the instance of another person under a "contract for service" vest with the author only.

   Generally, an author can assign all or any of his rights in the works to a third party and make the third party the owner thereof. However, a recent change to the Copyright Act suggests that in case of cinematograph films and sound recordings, authors of underlying works remain entitled to 50% of all revenues (except for revenues arising from screening of the film in a theatre).

Therefore given the above, when a company outsources its work through a third party contractor/vendor, it is advisable for them to ensure that the third party contractor has entered into employee contracts stating that intellectual property rights created on the job will vest with the third party contractor; and thereafter ensure that the third party contractor/vendor assigns such works to the company. Under the Copyright Act, the moral rights of the author cannot be assigned.

10. What are the relevant data protection laws in India?

The IT Act contains provisions relating to data protection to a certain extent; Section 43A, which imposes civil liability for negligent handling of "sensitive personal information" and Section 72A, which imposes criminal liability and provides for punishment in cases of disclosure of information in breach of a lawful contract.

Section 43A therefore imposes a liability on a body corporate in the event such body corporate is negligent in implementing and maintaining reasonable security practices and procedures, thereby causing wrongful loss or wrongful gain of such sensitive personal data, to pay damages by way of compensation to the person who is affected. In connection with Section 43A, the Central Government has recently notified the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. These rules lay down directions to be followed by a body corporate for the protection of personal information including sensitive personal information/ data, procedure to be followed for collection of such data and further disclosure of such collected data.

Section 72A imposes a penalty on any person irrespective of whether it is a private intermediary or a government entity for the disclosure of personal information. For the penalty to become applicable, a service provider has to (i) obtain personal information while providing services under a lawful contract (ii) disclose it without the consent of the person (iii) with the intent to cause, or having the knowledge that it is likely to cause wrongful gain or wrongful loss. Such unauthorized disclosure is punishable with imprisonment up to 3 (three) years and a fine upto Rupees 500,000 or both.

Case note – Novartis AG vs Union of India

The recent decision of the Supreme Court of India in Nmovartis AG vs UOI (C.A. Nos. 2706-2716 of 2013) has significant consequences for innovative drug companies with business interests in India.

The decision concerns Novartis's appeal against rejection of its patent application seeking to protect cancer drug Glivec. The Supreme Court decision closes out a series of litigation proceedings surrounding patentability of the drug, in view of Section 3(d) of the Indian Patents Act – which proceedings separately included an appeal before the Intellectual Property Appellate Board and a writ petition before the Madras High Court challenging constitutionality of the statutory provision. While the decision of the Supreme Court is not surprising, some of the issue specific rulings are significant for pharmaceutical companies and their patent strategies.

Section 3(d) of the Patents Act removes from the scope of patentable subject matter, a mere discovery of a new form of a known substance, which does not result in enhancement of the known efficacy of that substance. The provision goes on to provide an exemplary list of derivatives that would fall within the preclusion of Section 3(d) – including salts, esters, ethers, polymorphs, metabolites, pure forms, particle sizes, isomers, mixtures of isomers, complexes combinations and other derivatives.

Typically, as a pre-condition to patentability in a patent application claiming a new form of a new substance, the Indian Patent Office requires submission of experimental or clinical data demonstrating an enhancement of efficacy over previously known forms of the same substance.

A determination under Section 3(d) essentially requires the adjudicating authority to establish whether: (i) the claimed substance is a new form of a previously known substance; and (ii) whether such new form demonstrates enhanced efficacy over the earlier known form.

In the Novartis matter, with regard to the first of the above issues, the Supreme Court made a finding of fact, to the effect that the claimed substance is a beta crystalline form of a previously known substance (Imatinib Mesylate) and therefore fell within the Section 3(d) preclusion on patentability.

On the second issue, the Supreme Court examined various efficacy related positions advanced by Novartis in connection with its invention and concluded that the enhanced efficacy identified by Novartis was only an enhancement of physical properties – i.e. improved flow properties, thermodynamic stability and hygroscopicity. The Court acknowledged that while these properties could confer improved processing and storage, by themselves such properties would not satisfy the statutory requirement for "enhancement of efficacy" under Section 3(d).

In arriving at this finding the Court examined the meaning of "efficacy" and ruled that the test of efficacy could change from case to case depending upon the result that a product under consideration is intended to produce. Stated differently, the test of efficacy would depend upon function, utility or purpose of the product under consideration. Accordingly, for a product developed with the intention to cure a disease, the Court ruled that the test of efficacy must necessarily involve "therapeutic efficacy" (as opposed to manufacturing efficacy). So, when considering the issue of efficacy under Section 3(d), not all advantages or beneficial properties are relevant – and for medicines, the test of efficacy would be limited to therapeutic efficacy.

In addition to the above, in considering Novartis' submission that the crystalline form in question resulted in increased bioavailability, – the Court ruled on the longer question whether enhancement in bioavailability of a drug or active ingredient would satisfy the test of efficacy under Section 3(d). Responsive thereto, the Court found that simply increasing bioavailability does not necessarily lead to an enhancement of therapeutic efficacy and the question whether an increase in bioavailability would lead to enhancement of therapeutic efficacy must be specifically answered on the basis of clinical or research data. In the present case, the Court found that Novartis had not presented such data.

The Court therefore concluded that the invention claimed by Novartis did not satisfy the test of enhanced efficacy under Section 3(d) of the Patents Act. Interestingly however, in one of the concluding paragraphs, the Supreme Court sought to limit any sweeping interpretation of its remarks in connection with Section 3(d), by stating that the provision does not bar protection of all incremental inventions involving chemical or pharmaceutical substances – thereby re-emphasizing the statutory position that new forms of known substances would be patentable provided they satisfy the requirement for enhancement of therapeutic efficacy.

The findings of the Supreme Court are unsurprising given the facts and positions agitated in the case. The immediate consequence for innovative pharmaceutical companies seeking protection in India for new forms of known substances, is the requirement to focus on establishing therapeutic

efficacy (as opposed to non-therapeutic efficacies that have been relied on from time to time in submissions under Section 3(d) before the Indian Patent Office). A focused approach to highlighting therapeutic efficacy while drafting the patent application, or subsequently during prosecution, (including by relying on clinical data and expert testimony) may continue to allow innovative companies to overcome the threshold bar to patentability set out under Section 3(d) of the Patents Act.

VII. EMPLOYEES

1. What is the general frame work of employment laws in India?

The Indian parliament as well as the legislature of the relevant State has power to concurrently legislate on the subject of labour. Broadly, the key labour legislations in India can be grouped as follows:

Group I
Laws to provide basic protection to industrial workers:

(a) Factories Act;

(b) Payment of Wages Act;

(c) Minimum Wages Act;

(d) Contract Labour Act;

(e) Employees' Compensation Act; and

(f) Fatal Accidents Act.

Group II
Laws for promoting industrial peace, harmony, conciliation and adjudication of industrial disputes:

(a) Industrial Disputes Act;

(b) Industrial Employment (Standing Orders) Act; and

(c) Trade Unions Act.

Group III
Laws providing social security and welfare of employees:

(a) Employees' Provident Funds and Miscellaneous Provisions Act;

(b) Employees' State Insurance Act;

(c) Payment of Gratuity Act;

(d) Payment of Bonus Act; and

(e) Maternity Benefits Act.

Group IV
General Law:

(a) Constitutional provisions relating to fundamental rights enshrined in the Constitution of India; and

(b) Indian Contracts Act.

Group V
State Laws:

(a) Shops and Establishments Acts in force in various States; and

(b) State amendments to Central laws.

2. Are there any restrictions on employment of foreign nationals in India?

Employment of foreign nationals is permitted in India subject to possession of a valid employment visa by such foreign national.

Employment visas cannot be issued for routine, ordinary, secretarial or clerical jobs. It can be issued to skilled/ qualified professionals or to persons engaged or appointed on contractual or employment basis and not otherwise.

The salary threshold limit for grant of employment visa is currently, USD 25,000 per annum.

3. What are the statutory working hours prescribed under Indian labour laws and is there a requirement to pay overtime wages?

Indian employment laws typically provide for a maximum of 9 (nine) hours of working hours a day and 48 (forty eight) hours a week.

It may be noted that employment of women employees is restricted during night.

Employees who work in excess of the normal working hours are entitled to over-time wages typically, at the rate of twice the ordinary rate of wages.

4. Are there statutory requirements for grant of leave or public holidays?

The Factories Act and the relevant shops and establishments legislations provide for annual leave with wages to employees.

In addition to the weekly holidays and compensatory holidays prescribed under Indian statutes, the employees are also entitled to national holidays such as Republic Day (26th January), Independence Day (15th August) and Gandhi Jayanthi (2nd October) and 5 (five) to 7 (seven) holidays from amongst a list of holidays specified by the relevant State legislations.

5. Are employees entitled to maternity/paternity leave?

Women employees are entitled to 12 (twelve) weeks of paid maternity leave, if they have worked for at least 80 (eighty) days in the 12 (twelve) months preceding the expected delivery date.

Paternity leave although, not statutorily recognized in India, may be granted in accordance with the policies of the company.

6. Can employees of the Indian company be granted employee stock options in a foreign company?

A foreign company can issue employee stock options to employees of (i) its office or branch in India; (ii) its subsidiary in India; and (iii) an Indian company in which it has equity, direct or indirect (through a SPV or step-down subsidiary), irrespective of the percentage of the direct or indirect equity stake

in the Indian company, provided that the shares under the ESOP scheme are offered (a) globally on a uniform basis; and (b) an annual return in the prescribed format, is submitted by the Indian company to the Reserve Bank giving details of remittances and beneficiaries.

Indian employees are permitted to subscribe to equity shares of a foreign company under a cashless employee stock option scheme subject to the condition that it does not involve remittance from India.

Earlier, under the Liberalized Remittance Scheme of the Reserve Bank, resident individuals were allowed make remittances through ADs up to USD 200,000 per financial year for investment in foreign securities. However, on August 14, 2013, RBI has reduced the existing limit of USD 200,000 per financial year to USD 75,000 per financial year (April - March) with immediate effect.

7. Can employment contracts contain restrictive covenants like non-compete?

Any agreement in restraint of trade is void under the provisions of the Indian Contracts Act. However, the Supreme Court of India has held that agreements restraining an employee from carrying on the activities that are similar to that of his/her employer upon the termination of such employment would be void and unenforceable, whereas agreements that impose a restraint during the course of employment could be enforceable.

8. How can the services of an employee be terminated?

The services of an employee can be terminated in accordance with the terms of his employment contract. However, if such employee is covered under the relevant State's shops and establishment act or if such an employee is a 'workman' under the Industrial Disputes Act, then the termination will have to also be in accordance with such statue, which prescribes the minimum notice period, payment in lieu of notice and severance payments.

9. Are severance payments statutorily required to be paid in India?

Termination of employees and the associated severance payments would depend on whether such employees are classified as workmen or non-workmen. Under the provisions of the Industrial Disputes Act, a workman with at least 1 (one) year of continuous service is entitled to compensation equal to 15 (fifteen) days average pay for every completed year of continuous service or part thereof in excess of 6 (six) months, if his/her services are terminated for any reason, except on account of disciplinary proceedings, voluntary retirement, superannuation, non- renewal of employment contracts or on the ground of continued ill health. Statutory compensation is also payable to workmen in the event of lay off/closure of an undertaking. The shops and establishments legislation in certain states also provide for payment of severance compensation to employees covered under the legislation on termination of their employment.

VIII. TAXES

1. What is the law relating to taxation in India?



The Constitution of India empowers the Central, State and Local Governments to levy taxes over specified subject matters. The Central Government levies direct taxes – personal income tax, wealth tax, corporate tax and indirect taxes – customs duty, central excise duty, central sales tax and service tax. The States are empowered to levy value added tax, entry tax, and professional tax etc. Some local authorities are also empowered to levy municipal taxes e.g., octroi etc.

The Central Government and the State Governments enact their respective Finance Acts annually to establish modified tax rates for the particular fiscal year. At the Central Government level, taxes are administered through the Ministry of Finance, Government of India ('MOF') and at the state and local levels, taxes are administered by the state or local authorities comprising of State Tax Commissions, Revenue Departments.

A. DIRECT TAXES[4]

1. What are the direct tax legislations, which are applicable in India?

The following legislations govern direct taxes in India:

(a) Income-tax Act, 1961

The law relating to income tax is incorporated under the Income Tax Act, 1961 ('IT Act'). The IT Act undergoes changes every year with amendments brought out through an annual Finance Act passed by the Parliament.

It is proposed to introduce the Direct Taxes Code Bill, 2010 ('DTC'), which consolidates the law relating to direct taxes.

The Indian financial year runs from April 1 to March 31. The said period is commonly referred to as 'Fiscal Year' or 'Previous Year'. The year following the Previous Year is known as 'Assessment Year' ('AY').

[4] *The Direct Taxes portion incorporates the proposals made vide Finance Bill, 2013 on February 28, 2013. However, please note that the said proposals would become a law only when passed by both Houses of Parliament and it receives presidential assent.*

(b) Wealth Tax Act, 1957

Wealth tax is a direct tax, which is charged on the net wealth of the assessee as on the valuation date viz. 31st March of the relevant fiscal year.

Under the Wealth Tax Act, tax is charged in respect of the wealth held during the relevant financial year by the following persons viz. Individual, Hindu Undivided Family (HUF) and Company.

Net wealth means the value of all specified assets on the valuation date as reduced by the debt incurred to acquire those assets. The net wealth so arrived at is charged to tax at the specified rates. Wealth tax is charged @ 1% of the amount by which the net wealth exceeds INR 3 million

2. What are the income tax rates in force for Individuals in India?

Taxability in India is governed by tax residency of an individual during a fiscal year, which is based on the number of days an individual is physically present in India in a fiscal year. Tax Residency can be categorized as Ordinarily Resident ('ROR'), Not Ordinarily Resident ('NOR') and Non Resident ('NR'). Subject any tax treaty benefits, NOR and NR are generally taxed on India sourced income. ROR are taxed on their worldwide income in India.

The following table provides the income tax rates applicable for individuals in relation to assessment year 2013-2014. The effective tax rates in case of individual(s) are as under:-

Total Income	Tax Rate	Effective Tax Rate*
Upto Rs. 2,00,000**	Nil	Nil
Rs. 2,00,000 to Rs. 500,000	10%	10.30%
Rs. 500,001 to Rs. 10,00,000	20%	20.60%
Rs. 10,00,001 and above	30%	30.90%

Note:

*The rates are inclusive of applicable education cess and secondary & higher education cess, which is 3%. A surcharge at the rate of 10 per cent of income-tax will be levied, in case total income of an individual exceeds INR 10 Million. An Indian resident whose total income does not exceed INR 500,000 eligible for a rebate of 100 percent of income tax, subject to a maximum amount of INR 2000

** The exemption limit for resident senior citizens above 60 years of age and below 80 years is Rs. 250,000. In case of a resident individual of age of 80 years or above, the basic exemption limit is Rs. 500,000

3. How are Corporations taxed in India?

A Corporation is regarded as a resident in India if:

- It is incorporated in India under the Companies Act, or
- It is not an Indian corporation but the control and management of its affairs are situated wholly in India.

A non-resident corporation is one, whose control and management is situated wholly or partially outside India.

Corporations resident in India are taxed on their worldwide income arising from all sources.

Moreover, Finance Act, 2013 has imposed an additional tax of 20 per cent on a domestic company buying back its shares (not being listed company shares) from its shareholders. . Such tax will be payable on the difference between the

buy back price and the issue price of shares. Furthermore, income in respect of such buy back by the company would be exempted in the hands of shareholders

Dividend Distribution Tax ('DDT') is imposed on an Indian company, which declares, distributes or pays any dividend in India. The IT Act provides for the removal of the cascading effect of DDT in multi-tiered corporate structures, subject to certain conditions.

Non–resident corporations are essentially taxed on the income earned from a business connection in India or from other Indian sources. If a tax treaty exists between India and the country of residence of the taxpayer, the provisions of the IT Act or the tax treaty, whichever is more beneficial, will apply. Accordingly, the taxability of non-residents in India may be restricted or modified and lower tax rates may apply.

In general, India's tax treaties provide that residents of other countries are subject to Indian tax on business profits derived from a business in India only if the non-resident has a taxable presence i.e. a Permanent Establishment ('PE') in India.

4. What are the income tax rates in force for Corporations in India?

The effective tax rates applicable to Corporations have been summarized below:

Particulars Corporate Tax Rate	Tax Rate	Effective Tax Rate[5]
Domestic Company (a) Taxable income up to INR 10 million (b) Taxable income above I0 million but below INR 100 million (c) Taxable income above INR 100 million	30% in all cases	30.90% 32.445% 33.99%
Foreign Company (a) Taxable income up to INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	40% in all cases	41.20% 42.024% 43.26%
DDT		
Domestic Company	15%	16.99%
Minimum Alternative Tax ('MAT')*		
Domestic Company (a) Taxable income upto INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	18.5% in all cases	19.05% of the book profits 20.01 % of the book profits 20.96% of the book profits
Foreign Company (a) Taxable income upto INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	18.5% in all cases	19.05% of the book profits 19.44% of the book profits 20.01% of the book profits

[5] *Including applicable surcharge and education cess.*

Domestic companies are with total income in excess of INR 100 million are subject to a surcharge at the rate of 10 per cent of income tax. In case the total income of the domestic company is in excess of INR 10 million but less than INR 100 million, a surcharge of 5 per cent of the income tax is levied. However, a surcharge of 10 per cent is imposed on DDT in case of all dosmestic companies. Moreover, in all cases, domestic companies are subject to an education cess of 3 per cent on the amount of income tax as increased by the surcharge payable by such company.

In case of a foreign company with total income in excess of 100 million rupees, a surcharge at the rate of 5 per cent of income-tax will be levied. A surcharge of 2 per cent will continue to be levied on foreign companies with total income in excess of 10 million rupees but which does not exceed 100 million rupees. In all cases, education cess is levied at the rate of 3 per cent.

Note:

* Under the MAT regime, corporations are subject to a presumptive tax on their book profits (i.e. profits shown in their financial statements), if the tax payable as per the regular provisions is less than 18.5 % of the corporation's book profits.

5. What are the withholding tax rates applicable to non-resident corporations in India?

Non-residents are taxed on interest, royalties and fee for technical services ('FTS') sourced in India on a gross basis, at specified rates where the same are not attributable to the non-resident's PE in India.

However, where such royalties and FTSare attributable to the non-resident's PE in India, the same are subject to tax as business profits on a net basis under India's domestic tax laws.

The applicable withholding tax rates for foreign companies are as follows. The tax rates are subject to the rates under the applicable tax treaty, where the same is more beneficial to the taxpayer.

Particulars	Tax Rate	Effective Tax Rate[2]
Dividends*	Nil	Nil
Interest (a) Taxable income up to INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	40%/ 20%/ 5%** in all cases	41.2%/ 20.6%/ 5.15% 42.02%/21.01%/5.25% 43.26%/21.63%/ 5.41%
Royalties and FTS*** (a) Taxable income up to INR 1illion (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	25% in all cases	25.75% 26.27% 27.04%

Note:

* Presently, there is no incidence of withholding tax on the payment of dividends, where DDT is paid.

**Non residents are subject to income tax on interest income at the rate of 40 per cent (plus applicable surcharge and cess). However, non residents may avail of special rates applicable to interest income under the IT Act in inter-alia the following cases:

a) A concessional rate of 20 per cent (plus applicable surcharge and cess) on the gross payment will apply, in respect of interest received from an Indian concern on monies borrowed or debt incurred in foreign currency.

b) A concessional rate of 5 per cent (plus applicable surcharge and cess) on the gross payment will apply in respect of interest payments by an Indian company to a non-resident in respect of monies borrowed after July 01, 2012 but before July 01, 2015 in foreign currency, under a loan agreement in compliance with the ECB Guidelines

c) Any interest income (described below) paid to a Foreign Institutional Investor or a Qualified Foreign Investor, will be subject to tax at the rate 5 per cent (plus applicable surcharge and cess).However, such interest should be payable on or after the 1st day of June, 2013 but before the 1st day of June, 2015 in respect of investment made by the payee in—

(i) a rupee denominated bond of an Indian company; or

(ii) A Government security:

Provided that the rate of interest in respect of bond referred to in point (i) above, shall not exceed the rate as maybe notified by the Central Government in this behalf.

*** Subject rates apply in case of royalty/FTS being received by a foreign company in pursuance of an agreement made on or after June 1, 2005.

Royalties and FTS, which are not received from the Government of India or Indian organizations, are taxed on a net income basis at the normal rates applicable to foreign corporations. So also are royalties and FTS payable under agreements that are not approved by the Government of India or under arrangements that are not in accordance with India's Industrial policy. These are taxed on a net basis at the normal rates applicable to foreign corporations.

6. How are Capital Gains taxed in India?

Capital gains earned by the seller of a capital asset (being the sale consideration less the cost of acquisition, cost of improvement and sale-related expenses), are subject to capital gains tax. The capital gains can be classified into (a) short term or (b) long term, depending on the period of holding In certain situations, the period of holding of a previous owner of the asset is counted towards ascertaining whether the capital asset is short term/ long term.

Nature of Gains	Period of Holding (shares, listed securities or mutual fund units)	Period of Holding (all other assets)
Long Term	>1 year	> 3 years
Short Term	⩽ 1 year	⩽ 3 years

Further, in case of long-term capital gains, the cost of acquisition and cost of improvement is subject to indexation, subject to the residential status of the seller and the nature of asset being alienated.

Tax incidence is generally higher in the case of short-term capital gains as compared to long term capital gains. Detailed below are the present long term and short term effective tax rates on capital gains (including applicable surcharge and education cess) for resident and non-resident companies.

Resident Company:

Particulars	Listed Securities		Unlisted Securities & assets other than Securities
	On Market#	Off market	
Long Term Capital gains			
(a) Taxable income up to INR 10 million	Exempt in all cases	20.06%	20.06%
(b) Taxable income above INR 10 million		21.63%	21.63%
(c) Taxable income above INR 100 million		22.66%	22.66%
Short term capital gains			
(a) Taxable income up to INR 10 million	15.45%	30.9%	30.9%
(b) Taxable income aboveINR 10 million	16.22%	32.45%	32.45%
(c) Taxable income above INR 100 million	16.99%	33.99%	33.99%

Note:

Where securities transaction tax has been paid

Non-Resident Company*:

Particulars	Listed Securities		Unlisted Securities & assets other than Securities
	On Market#	Off market	
Long Term capital gains			
(a) Taxable income upl INR 10 million	Exempt in all cases	20.6% / 10.3%**	20.6% / 10.3%**
(b) Taxable income above INR 10 million		21.01% / 10.51%**	21.01% / 10.51%**
(c) Taxable income above INR 100 million		21.63% / 10.82%**	21.63% / 10.82%**
Short Term capital gains			
(a) Taxable incomel to INR 10 million	15.45%	41.2%	41.2%
(b) Taxable income above INR 10 million	15.76%	42.02%	42.02%
(c) Taxable income above INR 100 million	16.22%	43.26%	43.26%

Note:

#Where Securities Transaction Tax is paid

*The stated tax rates are subject to rates provided under the relevant tax treaty, to the extent that the tax treaty is more beneficial. ** In case of unlisted securities of public companies, the lower rate of 10.3 % /10.51% / 10.81%, as the case may be, will apply where the benefit of neutralization of foreign exchange fluctuation is foregone by the taxpayer

7. Are there transfer pricing restrictions in India? What are precautions to be taken to avoid transfer pricing disputes in India?

Under India's transfer pricing regulations, any international transaction and/ or a specified domestic transaction between two or more associated enterprises (including PEs) must be at arm's length price. Transfer pricing regulations require the application of the most appropriate amongst the following prescribed methods:

- Comparable uncontrolled price method.
- Resale price method
- Cost plus method
- Profit split method
- Transactional and net margin method

Taxpayers, who enter into international transactions and / or specified domestic transactions, are required to maintain prescribed documents and furnish an accountant's report, which includes prescribed details.

8. What are some direct tax incentives available in India?

To give an impetus to India's economy, the IT Act provides tax incentives such as, tax holidays, deductions and rebates to the industry. These incentives are aimed at encouraging exports and research activities, setting up of new

industrial undertakings, development of infrastructural facilities, software industry, research activities and development of backward areas.

Tax Holidays for Special Economic Zones ('SEZ')[6]

Nature of business undertaken	Quantum of Deduction
Undertaking located in SEZ and engaged in manufacture or production of articles or things or provision of service	100% deduction in respect of export profits for a period of five years. For subsequent 10 years, deduction of 50% profits is allowed (for last 5 years, deduction subject to transfer of profits to investment reserve)
SEZ developers	100% deduction of its business profits for 10 years (out of 15 years) beginning from the year in which SEZ is notified by Central Government
Offshore Banking Units and International Financial Services centers located in SEZ	100% deduction of its income for 5 years and 50% for the next 5 years

Profit Linked Incentives Incentives for infrastructure Sector	
Developing/developing and maintaining/ developing, operating and maintaining infrastructure facilities such as a roads, bridges, rail system, highway project, water supply project, water treatment system, a port, airport, inland waterway, inland port or navigational channel in the sea, etc.	100% of profits and gains- 10 years (out of 20 years)
Operating and maintaining a specified hospital	100% for 5 years
Hotel in the specified district having a World Heritage Site	100% for 5 years

Incentives for Power Sector	
Generation or generation and distribution of Powers Transmission or distribution of power by laying a network of new transmission or distribution lines. Substantial renovation and modernization of the existing network of transmission or distribution lines.	100% of profits and gains for 10 years (out of 15 years)
Incentives for Oil & Gas Sector	
Commercial production of mineral oil	100% for 7 years
Refining of mineral oil	
Commercial Production of natural gas in licensed blocks	
Incentives for Undertaking in specified geographical locations	
Manufacture/production of article or thing or operation of cold storage plant by undertaking in Jammu & Kashmir	First 5 years- 100% Next 5 Years- 30%
Manufacture or production of specified article or thing or substantial expansion in Himachal Pradesh/Uttaranchal	First 5 years- 100% Next 5 years- 30%
Undertaking 'permitted activities' as in North Eastern states 'permitted activities'	100% for 10 years

[6] *SEZs are especially delineated duty free enclaves deemed to be foreign territory for the limited purposes of trade operations and duties and tariffs. With SEZs scheme, Government of India aims to promote export-led growth of the economy, supported by integrated infrastructure for export production and a package if incentives to attract foreign and domestic investment.*

Though tax holiday is enjoyed by units in SEZ, they are required to pay MAT on book profits and DDT on income distributed as dividend.

Investment-linked incentives for 'specified businesses'

Investment-linked tax incentives are provided by way of allowing deductions in respect of the any expenditure of capital nature incurred wholly and exclusively, for the purposes of certain "specified business" during the previous year in which such expenditure is incurred.

Specified Business	Permissible Deduction
Laying operating a cross-country natural gas pipeline network for distribution including storage facilities being integral part of such network. Building and operating a new hotel of two-star or above category as classified by the Central Government. Developing and building a housing project under a scheme for slum redevelopment or rehabilitation framed by the Central Government or State Government and which is notified by the board in this behalf in accordance with the guidelines prescribed. Setting up and operating an inland container depot or a container freight station notified or approved under the Customs Act, 1962 Bee-keeping and production of honey and beeswax; and Setting up and operating a warehousing facility for storage of sugar.	100 % deduction for capital expenditure incurred
Setting up and operating a cold chain facility. Setting up and operating a warehousing facility for storage of agricultural produce. Building and operating a new hospital (with at least 100 beds Production of fertilizers Developing and building a housing project under a scheme for affordable housing framed by the Central Government or State Government and which is notified by the board on this behalf in accordance with the guidelines prescribed.	150 % deduction for capital expenditure incurred

Investment linked Incentives for Research & Development

Investment-linked tax incentives are provided by way of allowing deductions in respect of any expenditure of capital nature incurred wholly and exclusively, for the purposes of certain "specified business" during the previous year in which such expenditure is incurred.

Nature of Expenses	Quantum of Deduction
Revenue expenditure incurred on payment of salary to an employee engaged in scientific research or on purchase of materials used in such scientific research during 3 years preceding the commencement of business.	100%
Payment to a research association/university, college or other institution for scientific research.	175%
Payment to an India company to be used for scientific research and development that fulfills certain conditions	125%
Payment to a research association/university or college or other institution for research in social science or statistical research (notified by Central Government)	125%
Capital expenditure incurred in any previous year and within the 3 years immediately preceding the previous year (other than on acquisition of land)	100%

By way of Finance Act, 2013, companies engaged in the business of manufacturing have been granted an investment allowance (in addition to depreciation) on investing more than INR 1000 million in new assets (plant or machinery) during the period April 01, 2013 to March 31, 2015 .Investment allowance to be first claimed during the year in which the cumulative investment in new assets (plant or machinery) exceeds INR 1000 million. Suitable safeguards are provided to restrict the transfer of new assets for a period of 5 years, except in cases of amalgamation or demerger.

9. What are the key significant changes in Direct Tax Codes Bill, 2010?

The Government of India is proposing an overhaul of the existing income tax law with a view to rationalize and simplify it. Accordingly, a new DTC if enacted is set to come into force in the future. Some of the significant changes envisaged in the DTC include:

(a) A uniform corporate income tax rate of 30% (thirty percent) for both resident and foreign companies. However, foreign companies having a PE will be required to pay an additional branch profit tax of 15% (fifteen percent); resident companies will continue to pay the DDT;

There will be no difference in the rate of tax as regards short term and long term capital gains;

(b) Benefits of indexation will be available for investment assets (other than listed equity shares /units of an equity oriented fund on which STT has been paid and an undertaking/business division) transferred after a year from the end of the financial year in which they were acquired;

(c) A foreign company will be treated as a tax resident of India, if its 'place of effective management' is situated in India;

(d) Income arising on the sale and purchase of securities by a FII will be taxed as 'capital gains' and not as business income;

(e) Interest accrued from any non-resident will be treated as income accruing in India, if such interest is in respect of any debt incurred which is used for the purposes of:

(i) a business carried on by the non-resident in India; or

(ii) earning any income from any source in India. However, such interest will not be deemed to accrue in India, if it is not claimed as a deduction by the non-resident from the income chargeable to tax in India;

(f) Controlled Foreign Corporation ('CFC') regulations will be introduced, under which the total income of a resident taxpayer will include income attributed to a CFC, which has not been distributed by such CFC;

(g) DTAAs will not have preferential status over than prevailing DTC in the following circumstances:

(i) When GAAR provisions are invoked ; or

(ii) When CFC provisions are invoked; or

(iii) When branch profit tax is levied.

(h) In the case of SEZ developers, grandfathering of profit-linked incentives under the Income Tax Act will continue as regards SEZs notifies on or before March 31, 2012. However, SEZ developers will be liable to pay MAT and DDT;

(i) SEZ's notified after March 31, 2012 and units commencing their operations before March 31. 2014 will be eligible for investment linked deductions.

INDIRECT TAXES

1. What are the indirect tax legislations applicable in India?

Customs Duty

Customs duty is imposed on the import of goods into and export of goods outside, India. Customs Duty is levied in terms of the Customs Act, 1962 and Customs Tariff Act, 1975 on the transaction value of goods. Currently, the effective rate of customs duty on import of most non agricultural products in India is 28.85% (approx).

Every person proposing to engage in import of goods in or export of goods from India is required to obtain an Importer Exporter Code.

(a) Customs Duty on Import of Goods

Customs duty on imports comprises the following components:

Basic Customs Duty ('BCD'): The rates of basic customs duty for each item are specified under the Customs Tariff Act, 1975, for each item and are dependent on the classification of the goods determined under the Customs Tariff Act, which is aligned with the Harmonized System of Nomenclature ("HSN") provided by the World Customs Organization. The median rate of basic customs duty on most non-agricultural products is 10%.

Additional Duty of Customs in lieu of Central Excise Duty ('CVD'): All imports are chargeable to an additional duty of customs at the rate of 12% in lieu of Central Excise Duty, with a few exceptions.

However, on most of the consumer goods intended for retail sale, duty is calculated based on the Maximum Retail Price ('MRP') printed on their packs.

The CVD paid is allowed as an input credit to the importer in order to offset their output excise duty or service tax liability, if any subject to fulfillment of other conditions prescribed in this regard.

Additional Duty of Customs in lieu of Sales Tax/VAT ('ACD'): All imports are chargeable to an additional duty of customs at the rate of 4% in lieu of sales tax/VAT, with a few exceptions. However, where the importation takes place for the purpose of further sale in India, ADC paid is allowed as an exemption by way of refund, subject to fulfillment of procedural conditions prescribed in this regard.

Education Cess: An additional levy of 2% in the form of education cess is levied on the aggregate of customs duties on imported goods.

Secondary and Higher Education Cess: An additional levy of 1% in the form of Secondary and Higher education cess is levied on the aggregate of customs duties on imported goods.

(b) Customs Duty on Export of Goods

In order to encourage exports, export duty is levied on very few items, mentioned under the Second Schedule of the Customs Tariff Act, 1975.

Excise Duty

Excise duty is imposed on the manufacture of goods in India. The power to levy excise duty primarily remains with the Central Government, though the power to levy excise duty on alcoholic products has been conferred upon State Governments.

(a) Central Excise Duty

Central Excise duty is levied on the goods manufactured in India under the provisions of Central Excise Act, 1944 and the Central Excise Tariff Act, 1985.

Every person who produces or manufactures dutiable excisable goods or is a first stage or second stage dealer intending to issue excisable invoice or persons holding warehouses for storing non-duty paid goods etc. are required to register under the Central Excise Rules, 2002. Every such person is required to obtain separate registration for separate premises. Such registration is valid for as long as production activity continues and no renewal is necessary.

Most non-agricultural products attract a uniform rate of 12.36 % (inclusive of education cess @ 2% and secondary & higher education cess @ 1%). However, the Central Government is empowered to exempt products from levy of excise duty wholly or partially. Further, the Central Government has levied a Clean Energy cess on certain specified goods with effect from July 1, 2010.

Central excise duty is a modified VAT (also known as Cenvat) wherein a manufacturer is allowed to take credit of the following:

1) Excise duty paid on locally sourced goods;

2) CVD and ADC paid on imported goods;

3) Service tax paid on input services.

The Cenvat credit so availed can be utilized for payment of excise duty on the clearance of dutiable final products manufactured in India or output service tax liability, if any applicable in accordance with the Cenvat Credit Rules, 2004.

(b) State Excise Duty

The power to regulate movement of liquor and to levy tax on liquor is conferred on State Governments by virtue of the Constitution of India. As a result, movement and sale of liquor is dependent upon the excise policy of the respective states, which are revised annually.

The scope of State excise policy and Regulations inter alia include requirements for import, export, transport, possession and sale of liquor within their State. State excise legislations also empower the state governments to issue licenses by way of tender, auction, tender-cum-auction or by any other prescribed mechanism.

Rules governing filing of returns vary from state to state. State excise policies often contain the rules governing filing of statutory returns and other compliances.

Service Tax

The Service Tax regime in India is governed by Finance Act, 1994. The Finance Act, 2012 has introduced a paradigm shift in the taxation of services in India. Presently all services provided in the Taxable Territory (whole of India except Jammu and Kashmir) except those specified in the negative list or otherwise specifically exempt are subject to the levy of service tax.

Generally, the liability to pay service tax is that of the service provider. However, in certain specified circumstances such a 'import of services' or with respect to certain specified services such as manpower supply services, works contract services etc., the whole or part of the service tax liability has been

shifted on the service recipient under the reverse charge mechanism.

Currently, service tax is levied at an effective rate of @12.36% (inclusive of education cess and secondary & higher education cess).

In cases of cross-border transactions, the taxability of such services in India is determined on the basis of the place of provision of such services\. All services for which the place of provision is outside the Taxable Territory of India would not chargeable to Service Tax in India. The place of provision of a service is required to be determined in terms of statutory principles as laid down in the Place of Provision of Service Rules, 2012.
Service Tax also operates on the principle of value addition and taxes paid on input services/capital goods are available as credit for set off purposes in accordance with the provisions of Cenvat Credit Rules, 2004.

Every service provider person engaged in providing taxable service over a specified limit, or a recipient of service tax statutorily required to pay service tax under reverse charge etc. is required to obtain service tax registration.

Sales Tax

Sale of almost all movable goods in India is chargeable to a levy of VAT/CST. Under the federal structure of India, tax on sale of goods may be imposed by the Central Government or the State Government depending upon the situs of the sale. However, import of goods into/export of goods outside India or sale in the course of import/export of goods is not exigible to sales tax.

(i) Intra-State Sales Tax/ Value Added Tax ("VAT")

The power to levy sales tax on intra-state sale is conferred upon State Governments under the Constitution of India. In the event the sale takes place within a particular State of India, the same would qualify as a local sale or Intra-State Sale, and would be chargeable to VAT at the applicable rates under the relevant State VAT legislation.

Under the VAT regime, the VAT paid on goods purchased from within the State is eligible for input VAT credit. The input VAT credit can be utilized against the VAT/ Central Sales Tax ('CST') payable on the sale of goods subject to fulfillment of conditions in this regard. It is, thus, ensured that cascading effect of taxes is avoided and value addition alone is taxed.

VAT rates are dependent on the relevant State VAT Legislation. However, they are usually classified into four broad slabs depending upon the nature of the products. These are generally nil, 4/5%, 12.5-15.5% and 20%.

Every dealer engaged in sale or purchase of goods over and above the specified threshold limit in a particular State is required to obtain VAT/CST registration in each of such States and undertake necessary compliances in this regard.

Rules concerning filing of VAT returns vary from state to state. Statutory returns are normally filed on a yearly/ quarterly/ monthly basis (depending upon the taxable turnover of the dealer).. These returns are filed with the jurisdictional VAT officer.

(ii) Central Sales Tax ("CST")

CST is levied on inter-state sales. Where goods move from one State to another pursuant to a contract of sale, or a sale is affected by the transfer of documents

of title during the movement of goods from one state to another, such a sale is known as an inter-state sale.

The power to levy CST is conferred on the Central Government by the Constitution of India. The levy of CST is governed by Central Sales Tax Act, 1957 ('CST Act').

Currently, CST is chargeable at the concessional rate of 2% on submission of requisite statutory form (Form C), prescribed in this regard.

The power to collect CST is in the hands of the State governments. Further, Section 9 of the CST Act provides that the provisions inter-alia including provisions relating to returns, provisional assessment, advance payment of tax, registration and penalties etc. under the local VAT law in a particular state shall also be applicable for the compliances under the CST Act.

Octroi / Entry Tax

a. Entry Tax

Entry tax is levied on the entry of goods in a particular State jurisdiction for use, consumption or sale of goods within such jurisdiction.

The rate of entry tax is contingent on the nature of goods brought within the state territory.

Once again, the rate of tax and the rules governing the filing of returns vary from state to state. Generally, returns are filed on a monthly/ yearly basis, depending upon each State. Such returns are filed with the jurisdictional VAT officers.

b. Octroi

Currently, entry of specified goods in certain Municipal jurisdictions of Maharashtra, for use, consumption or sale therein, also attracts a levy of Octroi. The rate of Octroi varies from municipality to municipality and is dependent on the goods sought to be brought in.

Every person causing to bring such specified goods in the specified municipalities are required to obtain registration and undertake necessary compliances in this regard.

The rules governing the filing of returns vary within each municipality. Normally, the rules governing levy of Octroi stipulate for filing of requisite declaration at the time of bringing the goods within municipal limits.

Research and Development Cess

Research & Development Cess Act, 1986 levies cess on all payments made by an industrial concern for import of technology. At present, cess is levied at 5 per cent on payment towards technology imports. The R&D cess has to be deposited before the payment for technology import can be made and proof of deposit in respect of R&D cess may be submitted with the bank through whom the technology related payment is being made.

R&D cess can be deposited with any designated bank. Credit for R&D cess is available against the service tax payable on services related to intellectual property rights and technology transfers.

Luxury Tax

Luxury tax is levied on the goods and services 'for enjoyment over and above the necessities of life'. State Governments have been empowered to levy taxes on luxuries at rates specified in the State (Luxury Tax) Acts.

Rules governing filing of returns vary from state to state. Generally, statutory returns are filed on a monthly basis. Such returns are filed with the jurisdictional Excise, Entertainment and Luxury Tax Department or with jurisdictional Commercial Tax Department of the relevant State.

Professional Tax

Certain States in India also levy a tax on every company engaged in any profession, trade, calling or employment in the said State. Every company liable to pay professional tax is required to obtain an enrollment certificate under the professional tax laws and undertake necessary compliance in this regard.

Further, every company is also required to withhold professional tax on behalf of its employees and deposit the same with the Government exchequer. The rate of withholding tax is dependent on the number of employees and their monthly salaries. Further, every such company is also required to obtain a registration certificate in its capacity as employer.

The rate slabs of professional tax vary from state to state but usually is at the rate of Rs 2500 per annum .

2. Are there any restrictions under the indirect taxes in relation to related party transactions in India?

Customs- Special Valuation Branch

Import and export transactions between related parties are generally reviewed by the Special Valuation Branch ("SVB"). The SVB is a division of the Customs Department, specializing in investigation of transactions between related parties in order to determine whether the transaction value of imported or exported goods has been affected by the relationship between the parties.

The correct valuation of transactions between the related parties is required to be determined in terms of the specific Customs Valuation Rules prescribed in this regard which are in line with the General Agreement on Tariffs and Trade (GATT) Valuation Rules.

Excise

In cases where a manufacturer is engaged in selling manufactured goods exclusively to a related person, such transactions are subject to the scrutiny of the valuation officer who would determine the correct valuation of such transactions in terms of special valuation rules. These rules are made to ensure that the value of goods sold is not affected by the relationship between the parties.

VAT

Certain states have incorporated special provisions under the local VAT legislations to govern related party transactions.

These provisions are made to ensure that transaction value on which the tax liability is discharged is not affected by the relationship between the parties and in cases the officer has a reason to believe that the transaction value is less than the fair market value, he may require the tax to paid on the fair market value.

IX. MISCELLANEOUS

1. Are there any restrictions on foreign ownership of land?

   A non-resident is not permitted to acquire immoveable property in India (other than through a lease for a term of less than 5 (five) years) without the prior permission of the Reserve Bank. However, a person who has established a branch office or other place of business (other than a liaison office) for carrying on any activity in India can acquire immoveable property in India which is necessary for or incidental to the carrying on of such activity. A declaration in the prescribed form has to be filed with the Reserve Bank. An Indian subsidiary set up by a company resident outside India would be an Indian resident and is permitted to acquire movable and immoveable property incidental to its business. Similarly an LLP set up by a company resident outside India with the permission of the FIPB would be an Indian resident and is permitted to acquire movable and immoveable property incidental to its business.

2. What are the anti-money laundering standards applicable in India?

   Pursuant to the Prevention of Money Laundering Act (which was brought into effect on July 1, 2005), SEBI and the Reserve Bank have issued detailed guidelines on Anti-Money Laundering Standards which apply to every banking company, financial institution and other intermediaries (including merchant bankers, underwriters, portfolio managers, trustees and other such entities registered with SEBI). The detailed guidelines are in line with international requirements in relation to prevention of anti-money laundering. The requirements include maintaining detailed records of all cash transactions of the value of more than Rs. 1 million or the equivalent in foreign currency. All suspicious transactions (whether or not in cash and including non-monetary transactions) have to be recorded and reported.

3. Does India have anti-corruption laws?

   Yes. India has anti-corruption legislations. The Prevention of Corruption Act is the principal anti-corruption legislation in India. This, together with the Indian Penal Code, which is a substantive criminal code, deals with bribery/corruption related offences in India. There also exist special statutes like the Representation of People Act (which regulates the conduct of elections) and a vast body of subordinate legislation formulated as service rules which are applicable to various categories of public servants. These rules, inter alia, amongst other issues, seek to regulate the giving and the acceptance of gifts and hospitality by public servants (including elected representatives).

4. What are the visa and registration requirements for foreign nationals working in India?

   The Foreign Registration Office is the primary agency to regulate the registration, movement, stay, departure and also for recommending the extension of stay in India. These offices are located in New Delhi, Mumbai, Kolkata, Amritsar, Chennai, Bengaluru, Hyderabad, Calicut, Cochin, Goa and Trivandrum and Chief Immigration Office in Ahmedabad. In other places, the Superintendents of Police of the district are registration officers for foreigners.

   All foreigners including foreigners of Indian origin visiting India on long term (more than 180 (one hundred and eighty) days) basis under: (i) Student visa (including those coming for study of Yoga, vedic culture, Indian system of dance and music), (ii) Research visa, (iii) Employment visa, (iv) Medical visa and (iv) Missionary visa will be required to get themselves registered with concerned Registration Officer within 14 (fourteen) days of his/her first arrival, irrespective of the duration of their stay.

Foreigners visiting India on other categories of long term visa including business/entry visa would not require registration with the concerned Foreign Registration Office if, duration of his/her stay does not exceed 180 (one hundred and eighty) days on a single visit. In case a foreigner intends to stay for more than 180 (one hundred and eighty) days on a single visit he should get himself registered well before the expiry of 180 (one hundred and eighty) days.

The Ministry of Home Affairs has further set out another condition that for the purpose of issuing Employment Visas to foreign nationals, the employee should draw a salary of a minimum of USD 25,000 per annum. For the purpose of calculating this USD 25000 limit, the salary and all other allowances paid to the foreign national in cash and perquisites such as rent free accommodation etc. will be taken into consideration.

5. Do companies require an industrial license?

Except for the industries falling within the following categories, all industrial undertakings are exempt from obtaining an industrial license:

- industries reserved for the public sector. These are limited to atomic energy and railway transport;
- industries retained under compulsory licensing. These include distillation and brewing of alcohol, hazardous chemicals, etc;
- items reserved for the small-scale sector (currently there is a list of 20 (twenty) items reserved for manufacturing by the small scale sector); and

6. Are there any industry-specific licenses that are necessary?

Yes. Examples of industry-specific licenses are:

- license from the Department of Telecommunications for telecom (basic and cellular) operating companies;
- license from the Insurance Regulatory Development Authority for insurance companies;
- registration from the Reserve Bank for banks and NBFC;
- registration with SEBI for mutual funds and venture capital funds.

7. Are there any registrations required for activities not falling under the industries specified above?

These would be regular business related registrations, some of which are common to all industries and some would be specific to certain activities proposed to be carried on and the location of the industry.

Illustratively, some of the standard registrations for an establishment proposing to undertake business activities would include:

(a) Income Tax registration;

(b) VAT / Sales Tax registration; and

(c) license under the Shops and Establishment Act of the relevant State in which the establishment is located.

A manufacturing unit would ordinarily also require registration / license / consents under the Factories Act, the different environmental protection legislations, etc. depending on the nature and location of the unit.

ANNEXURE I - GLOSSARY

AAEC	Appreciable Adverse Effect on Competition
ADs	Authorised Dealer(s)
ADRs	American Depository Receipts
ALP	Arms Length Price
Approval Route	FDI which requires approval of the FIPB, the Reserve Bank or such other regulator, as per the FDI Policy and the FEMA
Automatic Route/ Government Route	FDI which does not require approval of the FIPB and/or the Reserve Bank
Banking Regulation Act	Banking Regulation Act, 1949
BIFR	Board for Industrial and Financial Reconstruction
CAT	Competition Appellate Tribunal
CCI	Competition Commission of India
Central Excise Act	Central Excise Act, 1944
Central Excise Tariff Act	Central Excise Tariff Act, 1985
Central Government	Government of India, including all its Ministries/Departments (as relevant)
Central Sales Tax Act	Central Sales Tax Act, 1957
CFC	Controlled Foreign Corporation
CIBIL	Credit Information Bureau (India) Limited
CLB	Company Law Board
Code of Civil Procedure	Code of Civil Procedure, 1908
Companies Act	Companies Act, 1956
Competition Act	Competition Act, 2002 as amended by Competition (Amendment) Act, 2007
Combination Regulations	CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
Constitutional Documents	Memorandum of Association and Articles of Association
Contract Labour Act	The Contract Labour (Regulation and Abolition Act), 1970
Copyright Act	Copyright Act, 1957
CST	Central Sales Tax
Customs Act	Customs Act, 1962
Customs Tariff Act	Customs Tariff Act, 1975
DIPP	Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India
Direct Tax Code	Direct Tax Code, 2010
DDT	Dividend distribution tax
DR	Depository Receipts
Drugs and Cosmetic Act	Drugs and Cosmetics Act, 1940

DTAA	Double Taxation Avoidance Agreements
ECB	External Commercial Borrowings
ECB Guidelines / ECB Policy	Master Circular on External Commercial Borrowings and Trade Credits dated July 1, 2011
ED	Enforcement Directorate
EEFC Accounts	Exchange Earner's Foreign Currency Accounts
Employees' Compensation Act	Employees' Compensation Act, 1923
Employees' State Insurance Act	Employees' State Insurance Act, 1948
Employees'Provident Funds and Miscellaneous Provisions Act	Employees' Provident Funds and Miscellaneous Provisions Act, 1952
ESOP	Employees Stock Option
Factories Act	Factories Act, 1976
Fatal Accidents Act	Fatal Accidents Act, 1855
FCCB	Foreign Currency Convertible Bond
FDI	Foreign Direct Investment
FDI Policy	Foreign Direct Investment Policy issued by the DIPP, Ministry of Commerce and Industry, Government of India. Please refer to the below link. http://dipp.nic.in/English/investor/FDI_Policies/FDI_policy.aspx http: //www.investindia.gov.in/
FEMA	Foreign Exchange Management Act, 1999 Please refer to the below link. http://www.rbi.org.in/scripts/Fema.aspx
FEMA 20	Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000
FII	Foreign Institutional Investor
Finance Act	Finance Act, 1994
FIPB	Foreign Investment Promotion Board
Foreign Trade Policy	Foreign Trade Policy 2009 – 2014
GAAR	General Anti Avoidance Rules
GST	Goods and Service Tax
Income Tax Act	Income Tax Act, 1961
Indian Contracts Act	Contracts Act, 1872
Indian Partnership Act	Indian Partnership Act, 1932
Indian Penal Code	Indian Penal Code, 1908
Indian Telegraph Act	Indian Telegraph Act, 1885
Industrial Development and Regulation Act	Industrial (Development and Regulation) Act, 1951

Industrial Disputes Act	Industrial Disputes Act, 1947
Industrial Employment (Standing Orders) Act	Industrial Employment (Standing Orders) Act, 1946
Insurance Act	Insurance Act, 1938
Insurance Regulatory And Development Authority Act	Insurance Regulatory And Development Authority Act, 1999
IT Act	Information Technology Act, 2000
ITES	Information Technology Enabled Product and Services
JV	Joint Venture
Listing Agreement	An agreement entered into by a listed company with the relevant stock exchanges for the listing of its shares
LLP	Limited Liability Partnership
LLP Act	Limited Liability Partnership Act, 2008
LLP Agreement	Limited Liability Partnership Agreement
Maternity Benefits Act	Maternity Benefits Act, 1961
MAT	Minimum Alternate Tax
Minimum Wages Act	Minimum Wages Act, 1948
M&A	Mergers & Acquisitions
MCA	Ministry of Corporate Affairs
NBFC	Non-Banking Financial Company
New Companies Act	The Companies Act, 2013
Notification	Notification S. O. 480 (E) dated March 4, 2011
NRI	Non Resident Indian
OCB	Overseas Corporate Body
OCD	Optionally Convertible Debentures
ODI	Overseas Direct Investment
PAN	Permanent Account Number
Partnership Act	Indian Partnership Act, 1932
Payment of Bonus Act	Payment of Bonus Act, 1965
Payment of Gratuity Act	Payment of Gratuity Act, 1972
Payment of Wages Act	Payment of Wages Act, 1936
PIO	Person of Indian Origin
Portfolio Investment Scheme	Published as Schedule 2 to FEMA 20
Press Council Act	Press Council Act, 1978
Prevention of Corruption Act	Prevention of Corruption Act, 1988

Prevention of Money Act	Prevention of Money Laundering Laundering Act, 2002
QIB	Qualified Institutional Buyer
R&D	Research and Development
RD	Regional Director
RFC account	Resident Foreign Currency Account
Representation of People Act	Representation of People Act, 1951
Research and Development Cess Act	Research & Development Cess Act, 1986
Reserve Bank	Reserve Bank of India
ROC	Registrar of Companies
SCRA	Securities Contracts (Regulation) Act, 1956
SEBI or Board	Securities and Exchange Board of India
SEBI Act	Securities And Exchange Board of India Act, 1992
SEBI Delisting Regulations	Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
SEBI ICDR	RegulationsSecurities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009
SEBI Insider Trading Regulations	Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992
SEBI Takeover Regulations	Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
SEZ	Special Economic Zone
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SPV	Special Purpose Vehicle
STP	Software Technology Park
STT	Securities Transaction Tax
TRIPS	Trade Related Intellectual Property Rights
Trade Marks Act	Trademarks Act, 1999
Trade Unions Act	Trade Unions Act, 1926
UNCITRAL	United Nations Commission on International Trade Law
VAT	Value Added Tax
VC	Venture Capital
VCF	Venture Capital Fund
WOS	Wholly Owned Subsidiary

ANNEXURE-II THE COMPANIES ACT, 2013 – (A PRIMER)

1. Introduction

The Companies Bill, 2012, which was approved by the Lok Sabha, the Lower House and the Rajya Sabha, the Upper House of the Indian Parliament on December 18, 2012 and August 8, 2013, respectively, received the assent of the President of India on August 29, 2013 to become the Companies Act, 2013, with effect from August 30, 2013 in terms of a notification of the MCA (the "New Companies Act"). The New Companies Act will replace the existing Companies Act on the such date(s) as may be notified by MCA . A majority of the provisions of the New Companies Act are subject to subordinate legislation wherein the MCA has been empowered to prescribe necessary rules, which are currently in the process of being finalized. These rules will have substantial consequences on the interpretation and application of various provisions of the New Companies Act.

The New Companies Act is divided into 29 chapters and contains 470 clauses and 7 schedules and has endeavored to achieve modernization and compactness by deleting redundant provisions, regrouping related provisions and modifying various provisions of the Companies Act, to enable easy interpretation, delink procedural aspects from substantive law and provide greater flexibility in rule making. The New Companies Act has inter-alia, introduced enhanced corporate governance standards particularly in relation to the independent directors, audit, CSR, mandatory valuation, private placement of securities, cross-border mergers including merger of Indian companies into foreign companies and class action suits.

We have attempted to enumerate herein, some of the key provisions of the New Companies Act with our brief commentary on the said provisions, indicating the possible implications emerging from the same.

1. Provisions impacting the basic structure of Companies

A. Corporate Structure

(i) A private company which is a subsidiary of a public company shall be regarded as a public company irrespective of its status as private company in its articles. In this regard, the existing exception to foreign body corporates to set up 100% foreign owned private limited subsidiaries in India has been done away with under the Act.

(ii) While theNew Companies Act maintains the basic definition of 'subsidiary companies', i.e. a company is recognized to be a subsidiary of another if the latter is inter alia, holding more that 50% of the total share capital of the former, it provides a broader definition of 'total share capital' to include preference share capital as well. Under the Companies Act, only the equity share capital is considered while calculating the 'total share capital'. The expansion of the definition may have material consequences on many existing joint ventures.

(iii) Companies belonging to certain classes (as may be prescribed) have been prohibited from having layers of subsidiaries beyond such numbers as may be prescribed. This shall have direct impact on the structuring of various transactions.

(iv) The New Companies Act expressly permits "entrenched" provisions to be embedded in the articles with a stipulation that alteration of such

provisions may require stricter conditions or procedures to be met and complied with than what is applicable to special resolutions. Provisions for entrenchment shall either be made for formation of a company or by an amendment in the articles agreed to by all the members of the company, in case of a private company, and by special resolution, in case of a public company. Notice shall be required to be given to the Registrar of Companies. This will have a significant impact on joint venture and private equity transactions.

(v) Incorporation of a One Person Company has also been permitted under the New Companies Act.

B. Management Structure

(i) Board of Directors

(a) Maximum number of directors on the board of a company ("Board") has been increased from twelve to fifteen, which limit can be increased subject to a prior approval from the shareholders vide a special resolution.

(b) It is mandatory for a Board to appoint at least one resident director, i.e. a director who has stayed in India for at least 182 days in the previous calendar year.

(c) Appointment of at least one woman director (executive director, non-executive director or ID) on the Board of such classes of companies (as may be prescribed) has been made mandatory.

(d) Maximum number of directorships that an individual can hold in public companies (including private companies which are either holding or subsidiaries of public company) has been brought down to ten from fifteen under the Companies Act.

(e) Provisions in relation to resignation of directors (including the manner of tendering the resignation), have been specifically provided, which include, inter alia, the timing and manner for the resignation to become effective.

ii. Independent Directors ("IDs"):

(a) The Act has for the first time recognized and introduced the concept of IDs for public companies. It mandates that at least 1/3rd of the Board of a listed company to comprise of IDs. In order to ensure better corporate governance, the Central Government has been empowered to identify such other class(es) of unlisted companies which may be required to appoint such minimum number of IDs (as may be prescribed). It appears that private limited companies have been excluded from this obligation, except as discussed in section below relating to Corporate Social Responsibility.

(b) In order to be appointed as an ID, a person is required to satisfy certain prerequisites including those relating to such person possessing relevant expertise & experience, having no present or past pecuniary relationship except as specifically provided in the New Companies Act (as against the 'material' pecuniary relationship under Clause 49 of the listing agreement ("Clause 49")) with the company, its holding, subsidiary etc.

(c) A nominee director[7] can no longer be regarded as an ID under the New Companies Act, which is different from the provisions of Clause 49, as it stands today.

(d) Schedule IV of the New Companies Act requires the appointment of IDs to be formalized through a letter of appointment with specific conditions setting out, inter alia, the expectations of the Board, Board level committees in which such ID is expected to serve, the fiduciary duties along with the accompanying liabilities, the code of business ethics, the list of activities a director shall not do while functioning in a company.

(e) remuneration, periodic fee, reimbursement of expenses by any member for participation in the Board and profit related commissions, which conditions are also required to be placed on the company's website.

If this is expected of IDs, then the same principles as 'best governance practice' will extend to non-executive directors who may not be IDs. Executive directors, in any event, are required to have a written contract. Whether a promoter director should also be bound by a code of ethics in listed companies is a matter which will evolve.

(f) Performance evaluation of IDs is now required.

(g) Maximum term of an ID has been restricted to five years at once, subject to a maximum of 2 such consecutive terms on a non-rotational basis. Such ID shall be eligible for re-appointment after the expiry of a cooling period of 3 years, provided that during the said period of 3 years, such person should not be associated with the company in any capacity. Under the New Companies Act, the term of existing/serving IDs shall be computed from the date of the New Companies Act coming into force, irrespective of the tenure already served by such person as an ID on a Board.

(iii) Key Managerial Personnel ("KMP")[8]

(a) Mandatory requirement for prescribed classes of companies to appoint certain whole time KMP, which includes Managing Director or Chief Executive Officer, or Manager (and in their absence, a whole-time director), Company Secretary and Chief Financial Officer, has now been prescribed under the New Companies Act. The New Companies Act further provides that such KMP are included within the category of "officer in default" in the event of default by the company.

(b) The Act seeks to separate the offices of the Chairman and Managing Director/Chief Executive Officer in a company. Exceptions have been carved out wherein the same person can hold both such offices, if the articles of association provide otherwise, or if the company is engaged in multiple lines of business.

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[7] *"Nominee Director" has been defined to mean a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests. Presently, a Nominee Director appointed by an institution which has invested in/or lent to the company is deemed as an independent director under Clause 49 of the Listing Agreement.*

[8] *KMP, in relation to a company, has been defined to mean the following: (i) the Chief Executive Officer or the managing director or the manager; (ii) the company secretary; (iii) the whole-time director; (iv) the Chief Financial Officer if the Board of Directors appoints him; and (v) such other officer as may be prescribed.*

(iv) Board Committees

(a) Audit Committee ("AC"): All listed and other class of companies as may be prescribed (as against the public companies with minimum paid up share capital of Rs. 5 Crore under Section 292A of the Companies Act) shall constitute an AC, which shall comprise of minimum of three directors with independent directors forming the majority. The scope of functions to be performed by AC has also been enhanced and the terms of reference shall include, inter alia, approval of related party transactions (including subsequent modification thereof), valuation of undertaking and assets, scrutiny of inter-corporate loans and monitoring end-use etc.

(b) Nomination and Remuneration Committee ("NRC"): The Board of listed companies and such other companies as may be prescribed shall constitute NRCs, which shall comprise of three or more non-executive directors out of which not less than one half shall be IDs. Further, the Chairperson of the company (whether executive or non-executive) may be appointed only as a member of NRC (and not as Chairman). NRC shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board, a policy relating to the remuneration for the directors and KMP.

(c) Stakeholders Relationship Committee ("SRC"): Companies with more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at anytime during a financial year to constitute a SRC for considering and resolving the grievances of security holders. SRC shall comprise of a non-executive chairperson and such other members as the Board may decide.

(d) Corporate Social Responsibility Committee ("CSRC"): Every company (hence both public and private) exceeding the thresholds provided, and therefore being required to observe CSR obligations, will be required to constitute a CSRC consisting of three or more directors, out of which at least one director shall be an independent director. The CSRC shall formulate and recommend to the Board, a Corporate Social Responsibility Policy ("CSRP") indicating the prescribed corporate social activities to be undertaken (as provided under the New Companies Act). The CSRC's role also includes recommending to the Board, the amount of expenditure to be incurred towards CSRC and monitoring the same from time to time.

2. Management & Corporate Governance

A. Duties & Liabilities

(i) The duties of directors (irrespective of the types/designation of such directors) have been specifically provided under the New Companies Act to include, inter alia, a responsibility to act in good faith and in the best interest of the company, a duty to not have any direct/indirect conflict of interest with that of the company, and a responsibility to exercise independent judgment and exercise all duties with due and reasonable care, skill and diligence.

(ii) The New Companies Act specifically provides for IDs and non-executive directors (not being promoters or key managerial personnel) to be liable only in respect of such acts of omission/commission by the company

which had occurred with their knowledge, attributable through Board processes, and with their consent or connivance, or where they had not acted diligently. Such statutory exclusion from liability have not been made available to executive, promoter non-executive directors and key managerial personnel.

B. Managerial Remuneration

(i) Companies having adequate profits, may with the prior approval of the company in a general meeting pay remuneration to their managing directors, whole time directors or manager exceeding the prescribed cap of 5% of net profits, subject to overall remuneration remaining within 11% of net profits.

(ii) Stock options granted to directors, if any, are now required to be included within the calculation of their remuneration package. The stock options shall be valued as 'perquisites' defined under the Income Tax Act, 1961. Companies will be prohibited from granting stock options to IDs under the New Companies Act.

(iii) Remuneration to directors who are not managing directors or whole time directors shall not exceed: (a) one percent of the net profits of the company, if there is a managing director or a manager or a whole time director; or (b) three percent of the net profits in any other case.

C. Inter-corporate Loans and Investments

(i) Existing exemptions relating to investments/ loans/ guarantees/ securities (under Section 372A of the Companies Act) allowed to holding companies (in relation to wholly owned subsidiaries) and private companies, stand withdrawn under the New Companies Act. Further, applicability of provisions relating to loans by companies has now been extended to companies giving loans to 'any person'. The corresponding provision in the Companies Act was only limited to loans to 'body corporates'.

(ii) The New Companies Act prescribes a general restriction on companies (unless otherwise prescribed) from making investments through more than two layers of investment companies. An exception has been carved out for acquisition of multi-layered offshore companies or where any law requires or enables it.

D. Related Party Transactions

(i) As per the New Companies Act, a company requires the consent of its Board (after the compliance of certain conditions which shall be prescribed by the Central Government) for entering into certain (prescribed) contracts or arrangements with a related party[9]. In this regard, the restrictions on interested directors to not vote or take part in discussions have also been made applicable to private companies.

[9] *Related party, has been define to mean:-*
(i) a director or his relative;
(ii) a key managerial personnel or his relative;
(iii) a firm, in which a director, manager or his relative is a partner;
(iv) a private company in which a director or manager is a member or director;

(ii) Approval of the shareholders (through a special resolution) is required in case of companies having a paid up share capital over a prescribed threshold and/or the contract or transaction exceeding a prescribed amount. Interestingly, the related party shareholders are not permitted to exercise their voting rights in cases where a special resolution is required.

(iii) None of the aforementioned approvals are required for transactions or contracts entered into/proposed to be entered into by the company in the ordinary course of business on arm's length basis[10].

(iv) Furthermore, all related party transactions (along with a justification for entering into the same) are required to be disclosed in the Board's report to the shareholders.

(v) Existing exemption to private companies and holding companies for making loan or providing guarantee to directors and persons connected to directors, has been deleted. An exception has been provided for the following: (i) where the company is giving the loan to the managing director or a whole time director where the loan is given as part of the service condition; or (b) for Non-Banking Financial Companies.

(vi) The Act places a complete prohibition on companies making such loans or providing guarantees, which is currently permissible under Section 295 of the Existing Act (albeit with prior approval of the Central Government).

E. Whistleblower Mechanism

The New Companies Act sets out the need for listed and other prescribed categories of companies to establish a vigil mechanism for directors and employees to report genuine concerns regarding the company.

F. Corporate Social Responsibility ("CSR")

(i) CSR has been made mandatory for companies exceeding the prescribed net worth/turnover/net profit criteria during any financial year. The New Companies Act prescribes a requirement for such companies to spend, in every financial year, at least 2% of the average net profits made during three immediately preceding financial years, towards the activities set out in the CSRP.

(ii) In case of any failure on the part of the company in spending the aforesaid amount, the reason(s) (for such failure) are required to be provided in the Board's report to the shareholders.

(v) a public company in which a director or manager is a director or holds, along with his relatives, more than two per cent. of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act: Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is:- (A) a holding, subsidiary or an associate company of such company; or (B) a subsidiary of a holding company to which it is also a subsidiary;

(ix) such other person as may be prescribed.

[10] *Arm's length transaction means a transaction between two related parties that is conducted as if they are unrelated, so that there is no conflict of interest.*

(iii) It is the Board's responsibility to ensure that activities set out in the CRSP are undertaken and the CSRC has the responsibility to monitor the implementation.

(iv) Section 135(3)(a) requires the CSRC to indicate activities to be undertaken by the company as specified in Schedule VII and no rule or regulation can hence enable a third party to fulfill the obligation; as in the cases of charity to charitable trusts(Section 181). Taking assistance or services to execute CSR activity, does not mean that the NGO activity is CSR activity of the company.

G. Mandatory valuation

(i) Appointment of registered valuer for carrying out the valuation of company's property e.g. shares, stocks, debentures, securities or goodwill or net worth of a company or its liabilities, has been made mandatory.

(ii) Mandatory valuation by registered valuer is required in certain cases, including inter alia:

(a) allotment of shares for consideration other than cash;

(b) acquisition of minority shareholding by an acquirer already holding 90% of issued equity share capital of a company;

(c) exit opportunity to the dissenting shareholders of transferor company/listed company being merged with an unlisted company;

(d) submission of valuation report by liquidator in the event where tribunal has made a winding up order; and

(e) declaration of solvency by the Board in the event of voluntary winding up.

H. Secretarial & Internal Audit

(i) Secretarial audit is made mandatory for all listed companies and companies belonging to prescribed classes.

(ii) Certain classes of companies (as may be prescribed) shall be required to appoint internal auditors. The audit shall be conducted and reported to the Board in accordance with the rules to be prescribed.

3. Auditors & Accounts

(i) The New Companies Act requires mandatory rotation of auditors every five years and ratification of appointment of auditors, by the members at every annual general meeting of the company. The shareholders are at liberty to decide (by passing resolution) that audit partner and the audit team, be rotated at such intervals as may be so resolved by the shareholders.

(ii) Auditors have been prohibited from rendering specified services to the company and/or its holding company/subsidiary company, including, inter alia:

(a) internal audit;

(b) investment banking services;

(c) outsourced financial services;

(d) actuarial services;

(e) investment advisory services;

(f) management services; and

(g) any other kind of services as may be prescribed.

(iii) Obligations have been placed on the company's auditor to report all matters involving the offence of fraud[11] to the Central Government.

(iv) Consolidated financial statements of companies to include financial statements of associates companies (including joint venture companies).

(v) The Central Government is empowered to constitute, by notification, the National Financial Reporting Authority ("NFRA") to provide for matters relating to accounting and auditing standards. NFRA shall perform functions as specified, including monitoring the compliance and overseeing the quality of service of professionals associated with ensuring the compliance with such standards.

(vi) The New Companies Act provides the directors with a right to seek approval of the National Company Law Tribunal ("NCLT") to reopen and revise the financial statements/Board report if the same do not appear to them as being compliant with the relevant provisions prescribed under the New Companies Act.

4. Compromises, Arrangements & Amalgamations

(i) Merger of Indian companies with foreign companies incorporated in such countries as may be notified, has now been permitted.

(ii) Creating of treasury shares pursuant to a scheme of arrangement has now been prohibited.

(iii) Any objection to a scheme can be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt.

(iv) In case of merger of a listed company with an unlisted company, the listed company is required to provide exit opportunity to its shareholders to opt out of the unlisted transferee company.

(v) An acquirer or a person acting in concert with the acquirer or a person/group of persons holding 90% or more of the issued equity share capital of a company by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, may now purchase the minority shareholding of the company at a price determined by a registered valuer in accordance with the rules to be prescribed. Furthermore, minority shareholders have been granted the right to cause the majority to purchase the shares held by the former at a price determined by a registered valuer in accordance with the rules to be prescribed.

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[11] *'Fraud' in relation to affairs of a company or any body corporate, has been defined to include any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.*

(vi) Merger between small companies[12] or between a holding company and its wholly-owned subsidiary or such other classes of companies as may be prescribed, shall be approved by the Registrar of Companies and Official Liquidator without the requirement of obtaining NCLT's approval, subject to fulfillment of prescribed conditions.

(vii) Mandatory notification of the scheme to multiple regulatory authorities including the Central Government, income tax authorities, Reserve Bank of India, SEBI, stock exchanges, Competition Commission of India and other relevant sectoral regulators. Such authorities shall make their representations on the proposed scheme within 30 days of receipt of notice, failing which it shall be presumed that they do not have any representations.

(viii) Postal ballot has been added as a mode of voting on the scheme of compromise or arrangement.

5. Joint Ventures

(i) A company's incorporation is subject to the regulator's oversight on grounds of fraud. Therefore, a certificate of incorporation is no longer conclusive. This may be a pertinent aspect for prospective joint venture partners to keep in mind at the due diligence stage.

(ii) A specific provision has now been added stipulating that the articles of company may contain entrenchment provisions whereby specified provisions may be altered only if conditions or procedures that are more restrictive than those applicable to a special resolution, are complied with.

(iii) Any contract or arrangement between two or more persons in respect of limited transfer of right of shares has now specifically been made enforceable, for example, Right of First Refusal, drag along rights and tag along right. Therefore removing the ambiguity in relation to enforceability of the contracts imposing restrictions on transfer of shares in case of public companies. (Section 58 (2) of the New Companies Act)

(iv) Existing joint ventures will be required to reassess their inter-shareholder arrangements in view of the proposed amendments to the regulatory provisions (especially those relating to management and corporate governance) and make necessary amendments. (Section 5 (2) of the New Companies Act).

6. Investor Action Rights

(i) A new remedy of class action suit has been introduced. In case of oppression and/or mismanagement, specified number of members/depositors of a company are entitled to file a class action suit before the NCLT on behalf of the members/depositors, for seeking all or any of the prescribed relief. The concerned members/depositors may also claim damages or compensation for unlawful or wrongful acts from or against the company, its directors, auditors (firms and partner thereof) or against experts, advisors or consultant for any incorrect or

[12] *'Small Company' has been defined to mean a company, other than a public company, and (a) whose paid-up share capital does not exceed Rs. 50 lakh or such higher amount as may be prescribed which shall not be more than Rs. 5 crore; or (b) whose turnover does not exceed Rs. 2 crore or such higher amount as may be prescribed which shall not be more than Rs. 20 crores.*

misleading statement made to the company. The order passed by the NCLT shall be binding on the company and all its members and depositors, and auditors including audit firm or expert or consultant or advisors or any other person associated with the company.

(ii) Serious Fraud Investigation Office ("SFIO")

a. Central Government shall establish an office called the SFIO to investigate frauds relating to a company

b. Statutory status has been conferred upon SFIO. Report of SFIO filed with the relevant court for framing charges shall be treated as a report filed by a police officer.

c. SFIO is empowered to arrest in respect of certain offences involving fraud.

d. The offences shall be cognizable and the accused person shall be released on bail only upon fulfilling the stipulated conditions.

(iii) The provisions in respect composition and constitution of NCLT and National Company Law Appellate Tribunal ("NCLAT") have been redefined in view of the Supreme Court's judgment dated May 11, 2010. However, the procedures of establishing multiple NCLTs benches across the country and of transferring the cases pending before other courts/tribunals/special courts to the NCLT is yet to be established. The transition period will be fettering the corporate process.

(iv) For the speedy trial of offences, Central Government has been empowered to establish Special Courts in consultation with the Chief Justice of High Courts. Special Courts have liberty to try summary proceedings for offences punishable with imprisonment for a term not exceeding three years.

(v) Central Government shall also maintain the Mediation and Conciliation panel, which shall consist of such number of experts having such qualifications as may be prescribed. Such panel shall facilitate necessary arbitration between the parties during the pendency of any proceedings before the Central Government or NCLT or NCLAT.

(vi) A secured creditor is entitled to make an application to the NCLT to declare a company as sick company, if the said company, upon demand of the secured creditors representing 50% or more of its outstanding debt, either fails to pay the debt within 30 days of the date said notice or fails to compound it to the reasonable satisfaction of the creditors.

ANNEXURE-III - INFRASTRUCTURE SECTOR

A. INTRODUCTION

B. REGULATORY FRAMEWORK

1. POWER SECTOR

Electricity being a Concurrent subject under the Constitution of India, both the Central and State Government have jurisdiction. The electricity or power sector in India is primarily regulated by the Electricity Act which is the major legislation covering the generation, transmission, distribution and trading of electricity in India.

The primary regulatory authority under the Electricity Act is the Central Electricity Regulatory Commission (CERC), which has jurisdiction over generating companies owned or controlled by Central Government and those generating companies who have entered into or otherwise have a composite scheme for generation and sale in more than one state. The State Electricity Regulatory Commissions (SERCs) have jurisdiction over generating stations within the state boundaries, except those under the CERC's jurisdiction.

FDI up to 100% is permitted under the Automatic Route in operating companies, carrying out generation, transmission, distribution and trading.

The Central Government announced the National Electricity Policy, 2006 to, inter alia, provide access to electricity for all households in the next five years and meet the power demand by 2012. The Central Government also notified the Tariff Policy on January 6, 2006 in continuation of the National Electricity Policy pursuant to which various parameters with respect to tariff-fixation, such as adequate return on investment to the power generator and supplier and ensuring reasonable user charges for the consumer were set out. Additionally, the New Hydro Power Policy was approved by the Cabinet on January 3, 2008 which seeks to create a level playing field for private and public hydro power producers. The Renewable Energy sector has received considerable policy backing as well under the National Rural Electrification Policies, 2006, Tariff Policy 2006, National Electricity Policy 2005 and the National Policy on Biofuels 2009.

The Central Government introduced the Mega Power Policy in 1995 for providing impetus to development of large size power projects (above 700 MW for thermal power plants and above 350 MW for hydel power plants) in the country, which was subsequently revised in 2009 to bring it in consonance with the National Electricity Policy 2005 and Tariff Policy 2006.

Tariffs to be charged to end users are subject to the Tariff Policy, as notified by the Ministry of Power under the Electricity Act. The Tariff Policy requires all future requirements of power of distribution licensees after the date of the Tariff Policy to be procured only through a competitive bidding process. Furthermore, the Electricity Act allows the SERCs to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State subject to the guidance from the National Electricity Policy, National Electricity Plan and the tariff policy.

2. ROADS

Highways fall within the Union list under the Constitution of India and hence the Central Government has jurisdiction. The Department of Road Transport and

Highways under the Ministry of Shipping, Road Transport and Highways has the overall responsibility for development of roads and highways in India.

The National Highway Authority of India (NHAI), a statutory body set up under the NHAI Act, has the responsibility to inter alia, develop, maintain, regulate and manage highways and collect fees on behalf of the Central Government for services or benefits and such other fees on behalf of the State Governments on such terms and conditions as may be specified by such State Governments. There is no regulator for the roads sector. NHAI acts as the regulator as and as operator. Separate State Governments have set up their own corporations and agencies for overseeing the development of roads.

FDI up to 100% is permitted under the Automatic Route.

Pursuant to the NHAI Act, NHAI has the right to collect user fees on behalf of the Central Government/State Government and such right is delegated to the concessionaire. Under the Model Concession Agreement provided by NHAI for projects Rs. 100 Crores (approx. USD 23 Million) and above such right has been granted to the Concessionaire who is entitled to collect the Fees from the users of the Project Highway at the rates notified by the Central Government. The Central Government may, by notification in the Official Gazette, specify the rates of the fees for services or benefits rendered in relation to the use of highways.

To fund highway development, the Central Government has also set up a Central Road Fund under the Central Road Fund Act, 2000 pursuant to which a cess is levied on sale of fuel such as diesel and petrol and the money thus collected was to be spent on development and maintenance of National Highways, construction of railway over-or under-bridges and for development and maintenance of roads other than national highways or roads of economic importance.

NHAI has drawn up detailed plans for highway development as part of the National Highway Development Project (NHDP). NHDP has been divided into seven phases of which Phase I and II are almost complete.

3. PORTS

Major ports are under the jurisdiction of the Central Government (the Department of Shipping, under the Ministry of Shipping, Road Transport and Highways), while minor ports are under the jurisdiction of the respective State Governments. Major ports in India are governed by the Major Port Trusts Act, 1963 and minor ports in India are governed by the Indian Ports Act, 1908. A new Indian Ports Bill, 2011 has been proposed which seeks to merge the existing two statutes, the Indian Ports Act, 1908, as well as the Major Port Trusts Act, 1963, governing the sector into a single piece of legislation.

Additionally, some states have set up statutory authorities (for example the Gujarat Maritime Board (established under the Gujarat Maritime Board Act, 1981) and the Maharashtra Maritime Board (established under the Maharashtra Maritime Board Act, 1996)), which play a key role in policy determination and setting up a regulatory framework in the specific States in this regard.

FDI up to 100% is permitted under the Automatic Route.

The Tariff Authority for Major Ports (TAMP) was constituted in April 1997 to provide for an independent Authority to regulate all tariffs, both vessel related and cargo related, and rates for lease of properties in respect of Major Port Trusts and the private operators located therein. The Major Ports Trust Act, 1963 was amended by

the Port Laws (Amendment) Act 1997 to constitute the TAMP. The TAMP has jurisdiction only over major port trusts and private terminals and is responsible for prescribing the rates for services provided and facilities extended by them, and also rates for lease of port trust properties. It is empowered not only to set the rates, but also the conditions governing application of the rates.

Minor ports are governed by the IPA and are under the jurisdiction of the respective State Governments and governed by policy and directives of respective State Government's nodal departments/ agencies. Minor ports do not come under the purview of TAMP and are thus free to set their own tariffs.

The Government of India formulated the National Maritime Development Programme (NMDP) in 2005, to facilitate private investment, improve service quality and promote competitiveness in the ports sector. The NMDP envisages various port capacity improvements and hinterland connectivity projects across the 12 major ports over a 10-year time frame. Under the NMDP, focused and accelerated investment in specific infrastructure, tonnage acquisition and institutional capacity building projects/schemes have been proposed, involving a total investment of Rs. 55,804 crores (approx. USD 12,646 Million). Public investments will be primarily for common user infrastructure facilities in the ports like deepening and maintenance of port channels, construction of breakwaters, internal circulation systems for cargo within the ports and rail and road connectivity from ports to hinterland. It is estimated that, NMDP will require investment of around USD 12.3 billion by 2012, and it will seek significant investment from the private sector. Minor ports fall in the Concurrent List of the Constitution of India and are governed in terms of the respective policies of the State Governments. Certain states have established State Maritime Boards which would set policies in relation to the same.

4. AIRPORTS

The Constitution of India includes aerodromes in item 29 of the Union List, pursuant to which the Central Government alone has the legislative and executive powers relating to airports. The Aircraft Act and the Rules made thereunder by the Central Government govern the development, maintenance and operation of all airports, including Greenfield airports. Under the Aircraft Act, the Central Government has the sole right to grant a license for setting an airport, and the operations of the airport would be subject to its licensing conditions (Rule 78 of the Aircraft Rules, 1937).

The Airports Authority of India (AAI) Act provides the legal framework for airports in India. As per the AAI Act it shall be the function of the AAI to manage the airports, the civil enclaves and the aeronautical communication stations efficiently. It shall also be the duty of AAI to provide air traffic service and air transport service at any airport and civil enclaves. The AAI Act enables AAI to grant a concession to a private entity for financing, development, operation and maintenance of an airport being managed by AAI.

Airports other than those managed by AAI are governed by the provisions of the Aircraft Act and the Rules made thereunder. An entity other than AAI (an "Airport Company") can set up an airport. The Airport Company must function under a license from DGCA to be issued under the Aircraft Act, 1934.

Airports Economic Regulatory Authority (AERA), established in May, 2009, is an autonomous body and has the authority to fix, review and approve tariff structure for the aeronautical services and users' fees which may be levied by the service providers for airport development and monitoring prescribed performance standards relating to quality, continuity and reliability of service.

The AAI has the responsibility of managing the airports, the civil enclaves and the aeronautical communication stations while the AERA's functions include fixing, reviewing and approving tariff structure for the aeronautical services and users' fees.

At present, 100% FDI is permitted under the Automatic Route for Greenfield airport projects, maintenance, repair and overhaul (MRO) organizations. For existing airports, FDI up to 74% is permitted under the Automatic Route and thereafter, FIPB approval is required for FDI beyond 74%.

Under the Greenfield Airports Policy, Greenfield airports to be set up by AAI would be preferably constructed through PPP and such airports would be financed substantially through PPP concessions. Financing and development of any other airport would be the responsibility of the Airport Company seeking the license. Land for this purpose may be acquired by the Airport Company either through direct purchase or through acquisition by the State Government as per extant policy.

5. RAILWAYS

The current legal framework under the Railways Act, 1989 allows private railway systems in all forms. However, the government policy enunciated under Industrial Policy Resolution of 1991 as amended from time to time, reserves railway transportation for the public sector. It means that train operations can only be done by the public sector, while all other activities of design, construction, financing, and maintenance can be undertaken through private participation through award of concessions by Government of India. In the container business, the Indian government has announced a policy for permitting private operators to operate private container trains, which involves acquisition of rolling stock and construction and operation of key-side and Inland Container Depots.

Ministerial, commercial, and regulatory powers are vested with a single entity: the Railway Board. The Railway Board is also the railway regulator, dealing with a large number of issues including tariff regulation. Railway Board and the Commissioner of Railway Safety, work as the safety regulator.

FDI of up to 100% is permitted under the Automatic Route in railway infrastructure as long as railway transport is not involved (other than Mass Rapid Transport System). Similarly, 100% FDI is allowed in rail track construction.

6. TELECOMMUNICATIONS

In India, the use of telegraphs, phones, communications and other telecom services is governed by the Indian Telegraph Act, 1885 (ITA) and Indian Wireless Telegraphy Act, 1993 (IWA) and the rules made under the ITA and the IWA from time to time. Under ITA, the Government has the exclusive right to establish, maintain and operate telegraphs, and it can also grant licenses to private parties for the same.

Telecom Regulatory Authority of India (TRAI), set up under the Telecom Regulatory Authority of India Act, 1997, has the primary responsibility for regulating the telecommunications sector. It has been granted the authority to regulate service providers and review the licenses, ensure inter-compatibility between service providers, regulate arrangements among service providers etc. It is also the supervisory body to prevent anticompetitive practices, promote efficiency and competition in the telecom sector and protect the consumer's interests. TRAI also has the authority to settle disputes between service providers.

FDI up to 100% is permitted in the Telecom sector, wherein FDI upto 49% is allowed under the Automatic Rout and FDI between 49% to 100% is under the Government Route

The National Telecom Policy, 1999 aims to encourage private and foreign investment and has provided for a revenue-share model for licenses issued by the Government for telecom services in India. The main objectives of the Telecom Policy, 1999 include enhancing the reach of telecommunication in India, creating modern telecommunication infrastructure, strengthening research and development and efficient spectrum management. A New Telecom Policy is under consideration which seeks to lay down policy on important issues such as licensing, research & development, manufacturing and spectrum availability.

TRAI is empowered to fix tariffs for telecommunication services under Section 11 (2) of TRAI Act, 1997, as amended by TRAI (Amendment) Act, 2000. Keeping in view the intensity of competition in access market in general and in the mobile segment in particular, TRAI has deregulated the tariff regime during the last few years. However, the tariffs offered by the service providers in this sector have to be consistent with the principles laid down in the TTO, in this regard which include the principle of Non-Discrimination, Non-Predation, IUC compliance etc.

7. SPECIAL ECONOMIC ZONES

By enacting the SEZ Act, the Government of India has consolidated the granting of approvals and setting up of SEZs in India, which were initially being set up under different state policies. The units set up in an SEZ enjoy several benefits including exemption of customs duty, central excise and income tax. The SEZ Act provides for a single window clearance for all State Government/ Central Government consents for the project.

FDI up to 100% is permitted under the Automatic Route.

Under the SEZ Act, special economic zones can be set up by private sector or in joint venture with the Government (Central and State). The functioning of the SEZs is governed by a three tier administrative setup. The Board of Approval is the apex body and is headed by the Secretary, Department of Commerce.

Once a SEZ has been approved by the Board of Approval and the Central Government has notified the area of the SEZ, units are allowed to be set up in the SEZ. All the proposals for setting up of units in the SEZ are approved at the Zone level by the Approval Committee consisting of Development Commissioner, Customs Authorities and representatives of State Government. All post-approval clearances including grant of importer-exporter code number, change in the name of the company or implementing agency, etc. are given at the Zone level by the Development Commissioner. The performance of the SEZ units is periodically monitored by the Approval Committee and units are liable for penal action under the provision of Foreign Trade (Development and Regulation) Act, 1992 in case of violation of the conditions of the approval.

Private sector participation is also permitted in the development of infrastructure facility in the existing SEZs. State-specific policies have also been issued for providing fiscal and other economic benefits to the SEZ sector to the private sector.

ANNEXURE- IV AUTOMOBILE INDUSTRY

India is the second largest producer of two wheelers, fifth largest producer of commercial vehicles and sixth largest passenger vehicle producer in the world with a production of 3.234 million units in 2012-2013[13] . In 2009, India became 2nd largest exporter of small cars, behind only Japan[14]. The automobile industry currently accounts for nearly 4% of the GNP and 17% 0f the indirect tax revenue of the country[15]. It encompasses commercial vehicles, multi-utility vehicles, passenger cars, two wheelers, three wheelers, tractors and auto components. The strong sales have made India the second fastest growing market after China[16]. In India, there are 15 manufacturers of cars and multi utility vehicles, 9 manufacturers of commercial vehicles, 14 manufacturers of Two/Three Wheelers and 10 manufacturers of Tractors besides 5 manufacturers of engines. These manufacturers about 38,00,000 2-wheelers, 5,70,000 passenger cars, 1,25,000 Multi Utility Vehicles, 1,70,000 Commercial Vehicles and 2,60,000 tractors annually[17]. The automobile production and auto component manufacturing industry employs directly and indirectly 4,50,000 people and 100,00,000 people, respectively. India's automotive component industry manufactures the entire range of parts required by the domestic automobile industry and currently employs about 250,000 persons[18]. Over the years, the component industry has maintained a 10% - 12% share of exports in the total production.

During April-March 2012, the industry exported 2,910,055 automobiles registering a growth of 25.44 percent. Passenger Vehicles registered growth at 14.18 % in this period. Commercial Vehicles, Three Wheelers and Two Wheelers segments recorded growth of 25.15 %, 34.41 % and 27.13 % respectively during April-March 2012[19]. In March 2012 compared to March 2011, overall automobile exports registered a growth of 17.81%[20] .

Policy framework for the automobile industry

The Government of India has allows for 100 percent FDI in the Indian Automobile Industry through Automatic Route. Furthermore, in 2001, the quantitative restriction in automotive sector was removed. As per the data published by the "DIPP", Ministry of Commerce and Industry, the Government of India, the amount of cumulative FDI inflow into the Indian automobile industry during April 2000 to April 2013 was equivalent to US$ 8.32 million, amounting to 4 per cent of the total FDI inflows (in terms of US$). India majorly attracted FDI inflow for automobile industries (2000-2010) from Japan, USA, Netherlands, Italy, Mauritius, etc[21].

Automotive Mission Plan 2006 – 2016

The Automotive Mission Plan 2006 – 2016, a mission for development of Indian automotive industry was introduced by the Department of Heavy Industry and Public Enterprises government of India. The Automotive Mission Plan 2006 – 2016 has been introduced to maintain a high rate of growth, retain the attractiveness of Indian market and enhance competitiveness of Indian companies.

[13] *http://acma.in/pdf/Auto-Industry.pdf*
[14] *http://www.icra.in/Files/ticker/PV-Industry-201103.pdf*
[15] *http://dhi.nic.in/autopolicy.aspx*
[16] *http://www.thehindubusinessline.com/todays-paper/india-second-fastest-growing-auto-market-after-china/article988689.ece?ref=archive*
[17] *Ibid at 4.*
[18] *Ibid.*
[19] *http://www.siamindia.com/scripts/industrystatistics.aspx*
[20] *Ibid.*
[21] *http://dipp.nic.in/English/Publications/SIA_NewsLetter/AnnualReport2010/Chapter6.2.vi.pdf*

Automotive Mission Plan, 2006-2016, is launched with an objective to make India to emerge as a destination of choice in the design and manufacture of automobiles and auto components. The said Plan targets exports worth USD 40–45 billion in 2016 and includes component exports worth USD 20–25 billion and outsourced engineering services worth USD 2–2.5 billion. The said Plan targets a total turnover of USD 145 billion by 2016. The Government of India is envisaging in the 11th five year plan to create a National Level Specialized Education and Training Institute for the Automotive Sector and to enhance transportation, communication and export infrastructure facilities. Extension of 150% weighted deduction on R&D expenditure to the automotive sector. Increased budgetary allocation for R&D activities in the sector. Establishment of 'National Automotive Testing and R&D Infrastructure Project (NATRIP). Establishment of Auto Design Centre at NID, Ahmedabad.

Some of the specific policies, that have been requested for consideration includes:

- Tax holiday for Automotive Industry for investment exceeding Rs. 500 crore (as given to power projects, firms engaged in exports, EOUs, infrastructure projects, etc.)
- Single window clearance for FDI proposal in automotive sector including the local clearances required for setting up manufacturing facilities.
- Tax deductions of 100 % of export profits.
- Deduction of 30 % of net (total) income for 10 year for new industrial undertakings.
- Concession of Import duty on machinery for setting up of new plant or capacity expansion.
- Deduction of 50 % on foreign exchange earnings by automotive companies (like Construction companies, hotels, etc.)

State Government to be urged to offer

- Preferential allotment of land to automotive plants as is given to IT sector.
- Ensuring continuous uninterrupted power supply.
- Captive generation in the sector could be promoted, for instance, by exemption of Electricity duty for 5 years as is done for biotech industry in some states.

Measures to accomplish the Mission

- Develop a supply base in terms of technical and human capabilities, achieving economies of scale and lowering manufacturing costs, overcoming infrastructural hindrance.
- Stimulate domestic demand and export and international business opportunity by introducing better technology, acquisition of faster product design; enhancing cost competitiveness, providing fiscal incentive for innovation of low cost products; simplification of taxation and documentation; considering elimination of embedded taxes/levies that do not get off-set under VAT.
- There are two key players to the plan namely the Government and the industry. While Government would facilitate infrastructure, promote investment and R&D, the Industry's role will be focused on designing and manufacturing products of international standard.
- Increase competitiveness by introducing manufacturing strategies (recommended by the National Manufacturing Competitiveness Commission's National Manufacturing Strategy).
- Appropriate infrastructure should be developed in terms of road, rail and port in order to enhance movements, develop transportation system and encourage

export. Further, infrastructure for power and fuel should be invested in as it accounts for 6% of manufacturing cost and is an important factor with regard to manufacturing competitiveness.

- International brand image should be established.
- Promote Export in the small car segment as Indian companies have gained expertise in the said segment and thereby, enjoy an advantage over other low cost countries.
- Tariff policies and conditions of import of vehicles should be reviewed to attract investment.
- Manpower training should be encouraged. A National Automotive Institute would be set up to provide and coordinate training in the automotive sector. This goes in consonance with the AMP, 2016 as it will ensure availability of human recourse for the proposed 25 million jobs to be generated as an outcome of the said Mission Plan.
- Indian safety standards for auto components are regulated by the Center Motor Vehicle Rules, 1989. Since 2000 ECE safety standards are to be complied with by the automotive industry. However, there is still need for setting up an empowering body to coordinate and monitor the regulations and harmonize the safety standards and road safety regulations.
- Encouragement will be given to fuel efficient vehicles appropriate for Indian market. Similarly, innovative and expedient R&D project will be encouraged. The National Hydrogen Energy Board under MNES will acts as a regulatory body for the same.

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ANNEXURE-V FOOD PROCESSING SECTOR

India is the world's second largest producer and the third largest producer of fruits. The Indian Food Industry is expected to grow at a Compounded Annual Growth Rate ("CAGR") of 10% to reach USD 200 billion by 2015[22]. Food processing involves any type of value addition to the agricultural produce. It comprises of fruits and vegetables, meat & poultry, dairy products and grains and cereals. The industry provides direct employment to 1.6 million Indians and constitutes 9-10% of the overall manufacturing output[23]. The food processing industry in India is also a big employer of people from the unorganized sector. It employs about 13 million directly and about 35 million people indirectly. In 2011, an estimated 15 private equity and venture capital deals with a total value of USD 285 million were executed in this sector

Even though the Indian food processing sector is a large one, it is still at a nascent stage. The processing level of food produce is very low in India compared to other countries. Value addition to the raw produce in the country is only 7% compared to as much as 23% in china, 45% in the Philippines and 188% in the U.K[24].

Policy Framework in the Food Processing Industry

The Government has accorded the sector a high priority and has undertaken several policy measures and initiatives. Some of them are:- (i) Most of the processed food items have been exempted from the purview of licensing under the Industries (Development & Regulation) Act, 1951, except items reserved for small-scale sector and alcoholic beverages; (ii) In 1999, the food processing industries was included in the list of priority sector for bank lending in order to ensure easy availability of credit to them; (iii) Automatic approval for foreign equity upto 100% is available for most of the processed food items, excepting alcohol and beer and those reserved for small scale sector (subject to certain conditions[25]).

Food Safety and Standards Act, 2006 aims to achieve a high degree of consumer confidence in the quality and safety of produced, processed, sold or exported food. It seeks to overcome problems like multiplicity of food laws and standard setting and enforcement agencies which creates confusion in the minds of consumers, traders, investors and manufacturers.

Foreign direct investment

The Government of India allows 100% FDI under the Automatic Route in the food processing sector, in agricultural products, milk and milk products, and marine and meat products, except in the case of the proposals that require an industrial license and cases where foreign investment exceeds 24% equity in units that manufacture items reserved for small-scale industries. These items include bread, pastries, confectioneries, rapeseed oil, mustard oil, sesame oil, groundnut oil, sweetened cashewnut products, ground and processed spices other than spice oil and oleo resin spice, tapioca sago and tapioca flour. Automatic approvals are provided for foreign investment and technology transfer in most cases. Units based on agricultural products that are 100% export-oriented are allowed to sell up to 50% in the domestic market. There is no import duty on capital goods and raw material for 100% export-oriented units[26].

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[22] *See 'Indian Food Processing Industry: Brewing Exciting Opportunities', technopak, food and agriculture outlook*
[23] *See note 1*
[24] *See National Food Processing Policy, 2012*
[25] *http://business.gov.in/Industry_services/food_processing.php*
[26] *http://www.investindia.gov.in/?q=food-processing-sector*

The following table shows the amount of foreign direct investment in the food processing industry between the period 2000-01 and 2012-13.

Table 1: Total FDI inflows into the Food Processing Industry

FINANCIAL YEAR WISE FDI EQUITY INFLOWS
FROM APRIL 2000 TO MARCH 2013
Sector: FOOD PROCESSING INDUSTRIES

Sl No	Year (Apr-Mar)	FOOD PROCESSING INDUSTRIES		Total FDI in India		Share of FPI in Total FDI (Annual)	Cumulative Total (in Million $)	
		FDI (Rs crore)	FDI (US$ million)	FDI (Rs crore)	FDI (US$ million)		FDI in FPI	Total FDI
1	2000-01	198.13	45.75	10,733	2,463	1.86	45.75	2,463
2	2001-02	1,036.12	219.39	18,654	4,065	5.40	265.14	6,528
3	2002-03	176.53	36.88	12,871	2,705	1.36	302.02	9,233
4	2003-04	502.39	109.22	10,064	2,188	4.99	411.24	11,421
5	2004-05	201.32	43.98	14,653	3,219	1.37	455.22	14,640
6	2005-06	182.93	41.74	24,584	5,540	0.75	496.96	20,180
7	2006-07	457.28	102	56,390	12,492	0.82	598.96	32,672
8	2007-08	279.01	70.17	98,642	24,575	0.29	669.13	57,247
9	2008-09	455.59	102.71	142,829	31,396	0.33	771.84	88,643
10	2009-10	1,314.23	278.89	123,120	25,834	1.08	1050.73	114,477
11	2010-11	858.03	188.67	97,320	21,383	0.88	1239.4	135,860
12	2011-12	826.16	170.21	165,146	35,121	0.48	1409.61	170,981
13	2012-13	2,193.65	401.46	121,907	22,423	1.79	1811.07	193,404

Source: DIPP, Min. of Commerce.

(Source: Ministry of food processing industries)

Mega Food Parks Scheme

The Mega Food Park Scheme aims at providing a mechanism to link agricultural production to the market by bringing together farmers, processors and retailers so as to ensure maximizing value addition, minimizing wastages, increasing farmers' income and creating employment opportunities particularly in rural sector[27].

The National Mission on Food Processing

The National Mission envisages establishment of a National Mission as well as corresponding Missions in the State and District level. Its basic objective is decentralization of implementation of food processing related schemes for ensuring substantial participation of State Governments/UTs. The mission is expected to improve the Ministry's outreach significantly in terms of planning, supervision, monitoring of various schemes apart from playing a more meaningful role in policy formation.

Agri-Export Zones

Agri-Export Zones ("AEZ") were floated with the objective of promoting agricultural exports. These zones have been set up for end to end development for the export of specific products from a geographically contiguous area. The AEZ's are to be identified by the state governments and they are required to provide certain services such as plant protection, storage, processing and packaging etc. The corporate sector is encouraged to sponsor new-AEZ's or take over already notified AEZ's for encouraging exports from that zone.

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[27] *Ministry of food processing and industries*

ANNEXURE- VI TEXTILE INDUSTRY

India is the second largest producer of cotton and silk in the world. It contributes to about 18% of the total world raw silk production[28]. The Indian Textiles contributes 12% to the industrial production, 2% to the GDP at total manufacturing exports and directly employs about 45 million people. The textile sector is the second largest producer of employment after agriculture. The Indian textiles industry contributes substantially to India's exports earnings. Exports of textiles & clothing grew from USD 21.22 billion in 2008-09 to USD 22.41 billion in 2009-10 and have touched USD 26.83 billion in 2010-11[29].

The export basket contains a wide range of items such as cotton yarn and fabrics, man-made yarn and fabrics, wool and silk fabrics, made-ups and variety of garments. India's textile products, including handlooms and handicrafts, are exported to more than a hundred countries. However, the United States of America and the European Union, account for about two-thirds of India's textiles exports. The other major export destinations are United Arab of Emirates, Bangladesh, China and Turkey[30].

Policy framework for the textile industry

Foreign direct investment (FDI) of up to 100% is allowed in the textiles sector through the Automatic Route. Between 2000-2011, the total amount of FDI in this sector amounted to USD 959 million. The Table below shows the % of FDI in textile as compared to the total FDI in the country during 2005-2012[31].

Table 1: Inflow of FDI in the textile sector (As on September 7, 2012)

Calendar Year	FDI in textiles (USD)	Total FDI(USD)	% of FDI in textile
2005	0.08	4.36	1.81
2006	0.12	11.12	1.06
2007	0.10	15.92	0.64
2008	0.20	37.09	0.55
2009	0.21	27.04	0.77
2010	0.08	21.01	0.40
2011	0.15	27.58	0.54

*all figures are in billion Source: Ministry of Textiles

As can be seen from the table above, the amount of FDI inflow as a percentage of the total FDI inflows into the country has been miniscule. FDI in this sector has been at an average of 1% of the total FDI in the country.

The Government of India has taken various initiatives to promote the growth of textiles industry in India. Some of these are: (i) Technology Up-gradation Fund Scheme (TUFS), (ii) The Scheme for Integrated Textile Park (SITP) and (iii) Integrated Skill Development Scheme.

Technology Up-gradation Fund Scheme

TUFS is a flagship scheme of Ministry of Textiles to leverage investments in technology up-gradation in the textiles industry. It provides for support for modernization of textiles industry by the central government in the form of interest reimbursement and capital

[28] *See 'Indian Textile Overview', Confederation of Indian Textile Industry*
[29] *See ' Outcome Budget 2012-13' Ministry of Textiles*
[30] *See Note 1*
[31] *http://www.investindia.gov.in/?q=textiles-sector*

subsidy. The sectors benefited under TUFS are spinning, weaving, processing, technical textiles, jute, silk, garmenting, cotton ginning, wool and powerlooms[32].

The Scheme for Integrated Textile Parks (SITP)

The SITP was approved in the 10th Five Year Plan to provide the industry with world-class infrastructure facilities for setting up their textile units by merging the erstwhile 'Apparel Parks for Exports Scheme and Textile Centre Infrastructure Development Scheme. It targets industrial clusters/locations with high growth potential, which require strategic interventions by way of providing world-class infrastructure support. SITP is implemented through Special Purpose Vehicles (SPVs), where industry associations/group of entrepreneurs are the main promoters of the Integrated Textiles Park (ITP).At each, ITP, there is a separate SPV formed with the representatives of local Industry, Financial Institutions, State and Central Government.

Integrated Skill Development Scheme

It was launched by the Government in 2010 to address the trained manpower needs of textiles and related segments. The Scheme targeted to train approximately 256,000 persons during 2010-11 and 2011-12. The textile industry is also being supported with an extensive skill development programme to train 3 million persons over a period of five years, by leveraging the strength of existing institutions under the textile ministry.

In 2012, the government introduced the National Manufacturing Policy 2012 ("Policy"). The Policy has identified certain priority sectors which require specific policy intervention. One of the sectors identified is the textile and garments sector. According to the Policy, adequate support will be given to the textile industry to promote and strengthen employment and create jobs as the textile industry is highly employment intensive.

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[32] *'Salient Features of the Technology Up-gradation Fund Scheme'; Press Information Bureau, August 8, 2011*

ANNEXURE-VII INFORMATION TECHNOLOGY AND INFORMATION TECHNOLOGY ENABLED SERVICES

India is regarded as the premier destination for global Information Technology ("IT") and Information Technology Enables Services ("ITES") outsourcing, accounting for almost 55% of the global sourcing market in 2010. As a proportion of national GDP, the sector revenues have grown from 1.2 per cent in 1997-1998 to an estimated 6.4 per cent in 2010-2011. Its share of total Indian exports has increased from less than 4 % in 1997-1998 to 26 % in 2010-2011[33]. This sector accounts for over 5% of India's GDP, and employs 2.5 million professionals directly and another 8.3 million people indirectly. From April 2000 to May 2013, the total FDI inflow in the computer hardware and software was USD 11.73 million which constitutes 5.73% of the total FDI inflows in the country[34].

Policies and law governing the Information Technology Sector

The main law governing this sector is the Indian Technology Act, 2000 (as amended). The IT Act sets out the legislative framework for a wide range of e-commerce legislation including (i) give legal recognition to electronic transactions ; (ii) to facilitate electronic filing of documents with the Government agencies; and (iii) recognising cyber offenses as criminal offenses; and (iv) setting out the liability of the intermediaries. Additionally, certain other laws such as the Special Economic Zone Act, 2005, the Income Tax Act, 1961 and the Semiconductor Integrated Circuits Layout Design Act, 2000 are also applicable to this sector.

Some of the relevant policies governing this sector are as follows:

Software Technology Park ("STPs"): STPs were set up as autonomous societies under the Department of Electronics and Information Technology in 1991 to promote software exports from the country. The objectives of STPs include (i) to promote the development and export of software and software services; (b) providing statutory and other promotional services to the exporters; and (iii) promoting micro, small and medium entrepreneurs. STPs enjoy a number of benefits that include exemptions from service tax, excise duty and rebate for payment of Central sales tax. The most important incentive available is 100% exemption from income tax of export profits. As on March 31, 2012, there were 5235 operational STP units[35].

National Policy on Information Technology, 2012: In September 2012, the central government approved the National Policy on Information Technology. The Policy aims to: (i) increase revenues of IT and ITES Industry from USD 100 Billion currently to USD 300 Billion by 2020 and expand exports from USD 69 Billion currently to USD 200 Billion by 2020.; (ii) gain significant global market-share in emerging technologies and services;(iii)promote innovation and R&D in areas like localization, location based services, mobile value added services, cloud computing, social media; and (iv) provide fiscal benefits to SMEs and startups for adoption of IT in value creation; (vi) create a pool of 10 million additional skilled manpower in ICT[36].

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[33] *'Report of the Working Group on Information Technology Sector-Twelfth Five Year Plan 2012-2017', Planning Commission*

[34] *Statement on Sector-Wise FDI Equity Inflows from April 2000 to May 2013, Department of Industrial Policy and Promotion*

[35] *Annual Report 2011-12, Software Technology Parks of India.*

[36] *'Cabinet Approves National Policy on Information Technology, 2012: Policy aims to leverage ICT to address nation's developmental challenges'; Press Information Bureau, September 20, 2012 .*

Special Economic Zones ("SEZ"): The Special Economic Zone Act, 2005 ("SEZ Act") was enacted by the Government of India in 2005 with an objective of providing an internationally competitive and hassle-free environment for exports. The SEZ Units have been granted the following incentives and facilities: (i) 100% exemption of export profits from income tax for the first five years, 50% for the next five years and 50% for next five years subject to transfer of profits to special reserves; (ii) exemption from central sales tax or service tax; (iii) single window clearance for state and central government approvals; and (iv) External Commercial Borrowing of up to USD 500 million in a year without any maturity restrictions, through recognised banking channels.
According to the SEZ Approval Board of India, the maximum number of SEZs has been approved for the IT-ITES sector. According to the Ministry of Commerce and Industry,the Government of India, out of the total formal approvals given to 588 SEZ's, the IT/ITES sector has been granted 353 approvals, out of which 235 SEZ's have been notified.

[37] In 2006, the central government also enacted the Special Economic Zones Rules, 2006 ("SEZ Rules"). The SEZ Rules provide for certain infrastructure requirements relating to the IT Sector. These include: (a) 24 hours uninterrupted power supply at a stable frequency; (b) reliable connectivity for uninterrupted and secure data transmission; (c) provision for central air conditioning system; and (d) a ready to use, furnished plug and play facility for end-users. The SEZ Rules were amended in 2013 ("Amendment Rules"). Prior to the Amendment Rules, a SEZ set up for electronic, hardware, software or ITES services required a minimum land area of 10 hectares with a minimum built up processing area of 1 lakh square metres. Under the amendments, the requirement of minimum land area has been done away with, while retaining the requirement of minimum built up processing area. The Amendment Rules has also made certain other amendments relating to issues on vacancy of land, exit policy for SEZ units and sector broad banding.

Information Technology Investment Regions ("IITRs"): In 2008, the Government of India approved the creation of IITRs to encourage growth of the IT/ITES sector and the Electronic Hardware Manufacturing Units. The IITRs include new integrated townships, SEZs, industrial parks etc. In the ITIR, there is supposed to be a clear delineation between the IT/ITES areas and Electronic Hardware Manufacturing areas.. Each ITIR is expected to be a specifically notified investment region with minimum area of 40 sq.kms planned for IT/ITES and EHM Units.

[37] *'Policy for Information Technology Investment Regions'; Cabinet Committee on Economic Affairs, April 3, 2008.*

ANNEXURE-VIII LEGAL AND REGULATORY LANDSCAPE GOVERNING PHARMACEUTICAL SECTOR IN INDIA

1. CURRENT FDI AND REGULATORY REGIME IN INDIA

As per the Consolidated FDI Policy issued by the Department of Industrial Policy & Promotion dated April 5, 2013 read with the Master Circular on Foreign Investment issued by the Reserve Bank of India dated July 1, 2013 and the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, as amended, foreign investment limits in companies engaged in the pharmaceuticals sector is as follows: (a) up to 100% in greenfield companies under the Automatic Route; and (b) up to 100% in brown-field companies under the approval route.

India had opened its pharmaceutical sector to 100 per cent FDI via the automatic approval route in 2002 but in 2012 the government had made a distinction between greenfield projects and brownfield projects following fears that Indians will be denied cheap medicines if multinational continued to buy big companies. FDI in an existing pharmaceuticals company now requires FIPB approval.

Since April 2000, nearly INR 50,000 crore FDI has come into the pharmaceutical sector, nearly 5 per cent of the total, making it one of the top five sectors preferred by foreign investors.

The government of India has decided to introduce safeguards to ensure that MNCs acquiring domestic firms did not stop producing essential drugs. This proposal was approved in December 2012 after the Government of India ensured that production of essential drugs are not disrupted by Indian pharmaceutical companies post their acquisition by MNCs. Though these safeguards are not yet mentioned in FDI policy. As per DIPP's latest view (as set out in May and June, 2013) FDI in existing pharmaceutical companies in India may have to continue producing essential drugs and invest in R&D activity for five years after acquiring the company and such R&D spend for the next five years should the highest amount that the company to be acquired had made in the last three years.

The current policy stipulates that the 'government may incorporate appropriate conditions for FDI in brownfield cases, at the time of granting approval' giving the FIPB powers to build these safeguards when it approves an investment proposal. Since these conditions apply to all brown-field investments, even small investment in an existing firm have to meet these norms. The lack of definitive clarity on the conditions that such investments have to follow has also caused concern to MNCs investing in Indian pharmaceutical sector.

2. PRICING AND QUALITY OF DRUGS IN INDIA

The National Pharmaceutical Pricing Authority, a government of India concern, governs the pricing of some of essential drugs being sold in India by pharmaceutical companies. The object is to make available and replace existing medicines with newly-priced medicines. This object is aided new Drug Price Control Order, 2013. The National Pharmaceutical Pricing Authority, the pricing regulator, notifies the prices of essential medicines to be sold in India, according to the New Drug Price Control Order. The National Pharmaceutical Pricing Authority also plays a role of a vigilant body where it inspects and ensures that a particular drug is sold out in India with the capped price notifies by it.

Drug Technical Advisory Board (DTAB), is the Government of India's top advisory body on medicines and takes decision and recommendation on quality of drugs manufactured in India and looks into scientific and clinical trials before it

recommends a suspension or banning a drug in India and also guided by its safety, efficacy and context of its usages permitted in the country.
The Drugs Controller General of India, a high level appointment made by Government of India is the highest regulator and overall looks after the safety, pricing and other areas related to drugs.

3. REGULATORY REGIME IN JAPAN

Japan represents, world's second largest pharmaceutical pharmaceuticals market –However Japan is yet to see major penetration from Indian pharmaceutical majors, especially in area of generic drugs. Except a few Indian players, none of the Indian drug makers are able to establish their presence in the USD 90-billion pharma market.

Japan, where the government-funded National Health Insurance scheme cover every citizen, had launched a series of reforms in 2010, with the intention of expanding generic drug penetration to 30 per cent of the drug market by 2013, from 18 per cent in 2010. In Japan, genericization has happened only to the extent of around 50 per cent while in the US, around 95 per cent of the market is generisized. So a large chunk of the market in Japan still comprises of patented products.

It is easier to enter into Japanese pharma sector through acquisition route as it is the easiest way of entering into Japanese market as setting up a subsidiary is not easy. As per the Japanese regulations, the outside player needs to partner with a local company and form a subsidiary where the local firm needs to have majority stake. This makes operations difficult as most global companies would not like to operate as a minority stake holder as the decision making power will not be entirely in their hands. Comparatively speaking, the regulations in Japan (PMDA) are not very clear. Unlike USFDA, which is transparent about its regulations, there is bit of non transparency in Japanese regulations. This could be a major challenge.

What makes Japan still an attractive generic market is the price realisations - which are significantly higher than in most of the western economics. Based on the new target proposed by Japanese government, the generic market is likely to grow by about 30-35 per cent in volume terms by 2017 from current levels which would create an additional $7 billion opportunity for generic players over the next 3 years.

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Established in 1927, FICCI is one of the largest and oldest apex business organizations in India. FICCI's history is closely interwoven with India's struggle for independence, industrialization and emergence as one of the most rapidly growing global economies. FICCI has contributed to this historical process by encouraging debate, articulating the private sector's views and influencing policy.

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To be the thought leader for industry, its voice for policy change and its guardian for effective implementation.

OUR MISSION

To carry forward our initiatives in support of rapid, inclusive and sustainable growth that encompasses health, education, livelihood, governance and skill development.

To enhance the efficiency and global competitiveness of the Indian industry and to expand business opportunities both in domestic and foreign markets through a range of specialized services and global linkages.

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Key practice areas: Mergers and acquisitions; joint ventures; private equity; investment funds; capital markets; insolvency and corporate restructuring; banking and finance (including structured finance and debt capital markets); insurance; projects (including infrastructure, telecommunications and energy); project finance; real estate; information technology and intellectual property; taxation; litigation, arbitration and dispute resolution; trade and competition law; employment law and policy and regulatory advice.

Our services: Amarchand Mangaldas & Suresh A Shroff & Co (AMSS) is one of India's leading full service law firms. With over 600 lawyers, including 86 partners, the firm employs its legal resources across all major practice areas and focuses on several core areas of commercial activity. Often viewed as "the firm of preference" in respect of foreign direct investment in India, the firm helps its clients achieve their goals by combining global standards with local expertise.

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