“Special 301 Report” is prepared every year by the Office of the United States Trade Representative (the “USTR”) under Section 301 of the Trade Act of 1974. The report identifies trade barriers to U.S. companies and products due to the intellectual property laws of other countries. The USTR is also required to identify "Priority Foreign Countries" ("PFCs"), which are those countries deemed to have inadequate intellectual property laws. Being designated a PFC may subject a country to U.S. trade sanctions. In the Spring of 2014, the USTR came under pressure from American trade lobbies to designate India as a Priority Foreign Country. The USTR acknowledged problems in India with respect to securing and enforcing patents, protecting trade secrets, counterfeiting trademarked goods, IP piracy, and localization rules. Localization rules favor a domestic industry or service provider, or domestic IP, vis-à-vis foreign competitors.

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President Obama’s landmark visit to India in January 2015 – the first time an American leader has visited India twice during his presidency – was highly symbolic of the growing relationship between the United States and India and also an acknowledgement of India’s role as an important trading partner and global leader.

There is no doubt that U.S.-India trade has grown substantially in recent history. In 2000, bilateral trade between U.S. and India was only $19 billion. By 2013, it had increased by five times, to almost $100 billion. President Obama and Prime Minister Modi built upon that momentum during the January 2015 visit by announcing progress on issues ranging from the nuclear deal to defense cooperation, and commitments to generate more than $4 billion in trade and investment over the next couple years. The U.S. and India also reached an agreement at the end of 2014 on food security programs said to pave the way for implementation of the WTO’s Trade Facilitation Agreement, the first multilateral trade agreement to be concluded in the history of the WTO, which could unlock as much as $1 trillion for both developing and developed countries and create as many as 21 million jobs worldwide.

However, despite these positive developments, 2014 also reflected several of the long-term challenges in the relationship as well. In December 2014, the U.S. International Trade Commission issued a lengthy report requested by U.S. lawmakers, finding that “a wide range of restrictive Indian policies. . . have adversely affected U.S. companies doing business in India.” Earlier in the year, the United States determined that it would not downgrade India’s status in the U.S. Trade Representative’s Special 301 report, despite urging by the U.S. industry that India be termed a “priority foreign country,” due to concerns over its intellectual property (“IP”) laws, a designation that would have invited trade sanctions.

The authors featured in the special focus portion of this issue of India Law News have explored some of the bilateral and multilateral trade issues relating to both countries. The issue begins with Raj Bhala’s article entitled “Is India Special Enough for the 301 List?” Bhala provides an insightful analysis of the key IP issues relating to U.S.-India trade including compulsory licensing, patent evergreening, and generic pharmaceutical imports, and explores both the U.S. and Indian perspectives on these issues. Next, J.K. Dadoo and D.P. Mohapatra address anti-dumping duty laws in India. In recent years, India has emerged as one of the most frequent users of these trade remedy tools, bringing cases against other countries including the United States. Dadoo and Mohapatra examine some of the key issues in the Indian investigatory process. Abhijit Das then explores the question of whether exports of food grains from the Food Corporation of India distorts global trade, an issue that has been the subject of international scrutiny. Das analyzes this question in the context of the WTO Agreement on Subsidies and Countervailing Measures and concludes that the export of food grains do not distort global markets.

Next, an article by Iain MacVay, Christina Markus, and Michael Taylor provides an overview of Good Manufacturing Practice standards and how they fit within the
framework of the WTO Agreement on Technical Barriers to Trade. MacVay, Markus, and Taylor conclude that India and the United States should take leading roles in encouraging the trend toward international convergence in international regulatory practice.

The special focus portion of this issue closes with a look by Anirudh Shinghal at the European Union and India in his article on “The Services Sector in EU-India Trade Negotiations.” The EU and India launched negotiations towards a free trade agreement in 2007. Shinghal examines the negotiations relating to the services sector. He contends that the benefits to both economies from services liberalization would be larger than those from goods trade liberalization. The negotiations may also have even further reaching implication. As Shinghal concludes, the removal or reduction of many regulatory barriers in certain sectors would result in not just preferential liberalization for the EU but would be applicable to everybody.

We have two general interest articles as well. The first, by Vivek Kohli and Anu Chowdhry discusses recent changes in the Foreign Direct Investment regime in India, and the second, by Sunil Tyagi looks at efforts to introduce a separate regulatory framework for medical devices.

We hope you find the articles in this issue of India Law News to be informative and interesting.

Sincerely,

Kavita Mohan
Sanjay Notani
Guest Editors

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President Obama’s state visit to India in January represents the first time a sitting U.S. President has visited India twice and the first time a U.S. President was the guest of honor at India’s Republic Day celebrations. In addition to the talks between President Obama and Prime Minister Modi, the visit offered millions of Indians watching the televised Republic Day parade another glance at a U.S. President who is already popular in India. The ABA India Committee marked the occasion with an afternoon tea and discussion entitled “Forward Together We Go – Chalein Saath Saath: Shaping Policy and Sharing Best Practices for a Shared Future.” Spearheaded by Asma Chandani and Anurag Bana, co-chairs of the India Committee’s Rule of Law and Policy subcommittee, the program afforded a hard look at the policy changes that will be required to incentivize greater cross-border business between the two countries.

A month later, the promise of easing of doing business in India appeared to be on the way to fulfillment in the Union Budget announced by India’s Finance Minister, Mr. Arun Jaitley, on February 28. With concrete deadlines for indirect tax reforms, and postponement of subjective and unpopular tax anti-avoidance regulations, the budget has been greeted as positive step for trade and investment in India. The India Committee remained busy during this period by co-sponsoring a teleconference called “Mission Intractable? Protecting Trade Secrets And Confidential Information In Cross-Border Deals In Asia,” which was held on February 26, 2015. With this backdrop, it is topical that this issue of the India Law News is on trade.

One topic under the umbrella of trade that has been debated has been that of opening up of the legal profession in India to foreign law firms. With some apparent thawing of the position of the Indian government on this front, the ABA India Committee is pleased to be sponsoring a panel at the ABA Section of International Law’s spring meeting in April in Washington D.C. entitled “The Legal Landscape in India is Changing for Foreign Lawyers: What is Coming and When.” With panelists consisting of highly regarded practitioners and academia from both India and the U.S., this session promises to be of the highest interest to attorneys on both sides.

Moving from the hot button topic in the international practice of law to international politics, the India Committee will also be sponsoring a panel at the Section’s spring meeting on “Reckoning with Iran: Transacting Amidst the Tightening or Unwinding of Sanctions.” This panel is particularly timely in light of U.S. negotiations with Iran over its nuclear program.
However, it is not all business law and politics with the India Committee. Led by the Committee’s co-chair of the subcommittee on Human Trafficking, Hanishi Ali, the India Committee co-sponsored a teleconference at the end of January on “Emerging Issues in Human Trafficking & Confidentiality,” which addressed how to legally protect subpoenaed confidential information of human trafficking victims while advocating for their safety. We are also in the process of organizing a teleconference on the legal issues involved in the banning in India of the documentary “India’s Daughter,” and co-sponsoring a teleconference to explore the implications of the infamous attack on a school in Peshawar, Pakistan in December of last year.

Terrorism, human trafficking, the nuclear capabilities of Iran, the topics being discussed within the India Committee, could as well serve as a microcosm of some of the most pressing issues of the day: issues that the U.S. and India, being global democracies, have a responsibility to address.

Richa Naujoks
James P. Duffy, III
Shikhil Suri
While localization rules serve a legitimate purpose, such as protecting data privacy or national security, others are overtly protectionist and implemented largely to enhance the strength of domestic industry. Unsurprisingly, the reaction in India was anger. To Indians, the action was an American bullying tactic and unjustified legally.

In a speech delivered in March 2014 in Chicago, the Indian Ambassador to the United States, S. Jaishankar stated that “it would be a mistake [for the U.S.] to pile up public pressure, especially through a misrepresentation of the facts.” Indrani Bagchi, India’s Fresh Attack in U.S. Trade War, THE TIMES OF INDIA, at 19 (Mar. 4, 2014). Did the ambassador have a point?

First, India pointed out that the U.S. was displeased by its stands on an array of non-IP matters. For example, in January 2014, the Indian government had reacted strongly against what it claimed was abusive treatment by U.S. federal agents of one of its consular officers in New York while she was in detention on felony charges of having made fraudulent statements in a visa application for her maid. In addition, several American multinational corporations have recently been embroiled in income tax disputes with Indian revenue authorities.

Yet another instance was India’s import prohibition on American solar panels using thin-film technology. India claimed the panels contained environmentally unfriendly components, such as cadmium telluride, which Japan and other WTO Members have banned, in contrast to the domestically produced variation, which uses crystalline technology. The Indian product was also more efficient than its American counterpart (using 4.5 acres to generate a megawatt of power compared to the 6-7 acres needed by the American version to generate the same), reached stabilized output levels more quickly, degraded more slowly, was more durable, and was cheaper to manufacture. India also required American imports to meet central-government level domestic content requirements. This dispute itself triggered an American WTO complaint against India in February 2014, with India arguing that its local sourcing rules were GATT-WTO compliant, partly because India had not joined the WTO Government Procurement Agreement.

These non-IP issues should be irrelevant to a decision about Section 301 blacklisting, but to India, they were not. Instead, they only reinforced the view that the USTR was determined to punish India. Nevertheless, there is a persuasive argument to be made that not even the IP issues gave the USTR a sound basis for putting India on the Priority List and that the U.S. was legally incorrect with respect to each of the three issues.

(1) Compulsory Licensing

In March 2012, India granted its first compulsory license to a domestic generic pharmaceutical company, Natco, for the medication, Nexavar (used to treat kidney and lung cancer) over the objections of the Swiss patent holder, Bayer. The U.S. worried about a slippery slope on which Indian authorities would grant compulsory licenses on a range of medications unconnected with public health emergencies like HIV-AIDS, malaria, or tuberculosis. The U.S. had reason to fear a slippery slope. For example, India’s November 2011 National Manufacturing Policy promotes compulsory licensing of patented products as a way to

India viewed the USTR Special 301 action as unveiled pressure to restrict its grants of compulsory licenses. India noted Nexavar had been the only instance of it granting such a license, and argued that its procedures for doing so were more “nuanced and balanced” than their American counterparts, which permit compulsory licensing by “executive fiat.” Madhur Singh, *U.S. Concerned Over Indian Drug Licenses, State Department Official Says*, 31 International Trade Reporter (BNA), 508 (Mar.13, 2014). India also cited the fact that it has to attend to the public health concerns a population four times that of the U.S., living on one-third the land mass.

(2) Patent Evergreening

In 2005, the Indian legislature amended India’s patent laws to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). The amendments specifically allowed for product patents on chemicals, food, and pharmaceuticals. See September 2014 CRS Report at 4. Nevertheless, starting in 2012, India denied or revoked patents on certain foreign medicines, explaining that they failed to satisfy its patent laws. Most notably, in April 2013, the Supreme Court of India rejected an evergreening patent application of Novartis AG. *Novartis AG v Union of India & Others*, (2013) 6 SCC. Under Section 3(d) of The Patents Act 1970 (India), novelty is construed to exclude patent evergreening. Specifically, Section 3 states:

3. What are not inventions. – The following are not inventions within the meaning of this Act, –

(a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;

(b) an invention the primary or intended use or commercial exploitation of which could be contrary public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;

(c) the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substance occurring in nature;

(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

Explanation. – For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy;

(e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of
the components thereof or a process for producing such substance;

(f) the mere arrangement or rearrangement or duplication of known devices each functioning independently of one another in a known way;

(g) Omitted by the Patents (Amendment) Act, 2002;

(h) a method of agriculture or horticulture;

(i) any process for the medicinal, surgical, curative, prophylactic diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products;

(j) plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals;

(k) a mathematical or business method or a computer program per se or algorithms;

(l) a literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television productions;

(m) a mere scheme or rule or method of performing mental act or method of playing game;

(n) a presentation of information;

(o) topography of integrated circuits;

(p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.


The essence of the Novartis decision was that India takes seriously its requirement of “enhanced efficiency.” That is, even if a pharmaceutical company satisfies international standards for patentability, it also must meet India’s requirement of “enhanced efficiency,” which means that a company may not make minor modifications of its patented product merely to extend the life of that patent – i.e., it cannot engage in evergreening. See September 2014 CRS Report at 4.

From the U.S. perspective, India was restricting the patentability of potentially innovative and useful drugs. From the Indian standpoint, the U.S. was applying pressure via Special 301 on India to alter Section 3(d) to create a “TRIPS plus” obligation to allowing evergreening—an obligation to which India had not agreed. The dispute involved tricky issues as to whether better delivery systems, for instance decreased toxicity, fewer side effects, or greater storage and temperature stability, were significant enough modifications to a patented drug to justify a new or extended patent.
(3) Generic Pharmaceutical Importation

For years, leading Indian generic pharmaceutical producers like Ranbaxy Laboratories, Ltd. (“Ranbaxy”) and Wockhardt, Ltd. (“Wockhardt”) shipped medicines from their factories in India to the U.S. Overall (as of May 2014), the Indian generic pharmaceutical industry accounts for $34 billion in output, and India is the second largest exporter of over-the-counter generic drugs to the U.S., second only to Canada. In February 2014, the U.S. Food and Drug Administration (the “FDA”) barred the importation of medications produced in the fourth of four Ranbaxy factories, having previously banned shipments from the other facilities. The FDA alleged that Ranbaxy employees improperly re-tested ingredients that had failed to pass initial testing, and then certified those ingredients and the generics that incorporated them as safe. Likewise, the FDA also banned imports from Wockhardt.

Ranbaxy responded that it was doing nothing different in its facilities than it had done over the previous decade, and that a reputable Japanese company had acquired it, which surely enhanced its reputation for scrupulous adherence to quality conformity assessment procedures. Besides, India and the U.S. had a shared interest in safe generics, and India had no desire to cultivate the negative reputation for quality that American consumers may often associate with Chinese goods.

To that end, in May 2014, G.N. Singh, the Drug Controller General of India, pledged to boost the number of inspectors for India’s 10,000 generic factories from 1,500 to 5,000 by 2017-2018. See Ketaki Gokhale, India To Double Drug Regulators Staffing, Test Drugs at Ports, 31 International Trade Reporter (BNA) 993 (May 29, 2014); Amrit Dhillon, India Steps Up to Improve Image of Generic Drug Industry, 31 International Trade Reporter (BNA) 867 (May 8, 2014). Also that month, the Indian Commerce Ministry announced a “zero tolerance” policy and the expenditure of ₹30 billion over three years to: (1) double, to 1,000, its drug inspectors at the central government level; (2) hire 3,000 inspectors at state agencies; and (3) set up new testing labs at ports to ensure the quality of pharmaceuticals exported from India. For its part, the FDA said it would expand its offices in India, help train Indian inspectors, and increase its inspections in India and other countries.

Similarly, on a fourth issue—data exclusivity via a patent linkage system—what the U.S sought from India was merely a policy preference, not a multilateral IP obligation. The U.S. wanted India to ensure that holders of branded patented biologic medicines would not have to compete with generic pharmaceuticals during the lifetime of the patent. That protection could occur through a non-patent form of IP, data exclusivity, whereby generic manufacturers cannot, for purposes of getting regulatory authorizations, use clinical trial data generated by the original patent holders to obtain their patents. See Yu-Tzu Chu, Taiwan to Create Patent Linkage System For Drugs in Quest for TPP Membership, 31 International Trade Reporter (BNA), 1530 (Aug. 21, 2014). How long that prohibition would exist or last would be a matter for negotiation, but from the perspective of original patent holders, the longer the better. As its name suggests, a “patent linkage” system connects the introduction of a generic drug to the expiration of a patent, plus any data exclusivity period. Free trade partners with the U.S., such as Australia, Canada, Korea, and Singapore, have them, so, argued the U.S., why not India, assuming that India wants to upgrade its bilateral trade relationship?

With respect to all such disputes, India viewed the underlying problem to be the increasingly protectionist tendencies of U.S. pharmaceutical manufacturers, coupled with corporatization of a U.S. trade policy that lacked empathy for poor countries.

India argued (1) that U.S. pharmaceutical companies are uncompetitive globally without ever-longer and more draconian patent monopolies; (2) that these behemoth companies are saddled with large overhead expenses thanks to bloated bureaucracies, on top of the roughly $1 billion in costs they incur to secure approval for a medication from the FDA; (3) that Wall Street investment banks are generally unwilling to
finance promising, but unproven, technologies, despite the need for transformative drugs to treat dreaded diseases, preferring typically instead to provide more funding for cosmetics research for products like Botox or wrinkle creams because they are perceived as less risky (see David Shaywitz, *Addiction to Deals Reveals the Depth of Pharma’s Ills*, FINANCIAL TIMES, at 7 [May 2, 2014]); (4) that “PhRMA” companies are no longer the source of innovation—rather, in the U.S., promising new medications increasingly come out of university laboratories or innovative research companies like Steve Jobs-like garages and basements, which explains why those “dinosaur” companies seek to acquire entrepreneurial ventures and their patents—this also highlights the fact that these companies try to survive by extending patents through evergreening as they approach the patent cliff (the end of the 20 year protection period); and (6) and unreasonably demand TRIPS Plus treatment in bilateral trade talks with India, as well as in Free Trade Agreement negotiations (e.g., through 12-year data exclusivity periods in Trans Pacific Partnership negotiations.

The Indian Commerce Minister Anand Sharma resisted U.S. insistence (which was perceived in India as bullying) to make TRIPS Plus commitments, and the Federation of Indian Chambers of Commerce and Industry stated:

India has a well-established legislative, administrative, and judicial framework to safeguard IPRs [Intellectual Property Rights] which meets its obligations under . . . [TRIPS].... The two Trade Policy Reviews conducted by [the] WTO in respect of India in 2007 and 2011 have found the Indian IPR regime to be adequate. India has an independent authority and appellate board and courts to decide on due processes.... There has been no concerted effort by the Indian system discriminating [against] foreign companies, and there have been a number of Indian patents also being invalidated.


Further, India listed the demands that, it argued, the U.S. had failed to satisfy. For instance, Indian Ambassador to the U.S., Mr. Jaishankar, expressed India’s concerns: “[o]ur concerns include immigration reform provisions that attack our service industry’s viability in the U.S., [tax] revenues [from American multinational corporations doing business in India] forfeited by the absence of progress on a totalization agreement, and restricted market access. India also cited localization [i.e., local content rules], where advocating against it abroad does not include practicing it at home [as 16 American states, but no Indian state, has sourcing requirements].” Indrani Bagchi, *India’s Fresh Attack in U.S. Trade War*, THE TIMES OF INDIA, 19 (Mar. 4, 2014). For example, the November 2011 National Manufacturing Policy seeks to boost employment in India’s industrial sector. It calls for government procurement in certain sectors, such as clean energy and Information and Communications Technology, to follow greater local content rules—in effect, to use more Indian inputs, intermediate goods, and finished products. In another example, effective July 2014, all telecommunication equipment vendors had to test their products in a laboratory in India. Pursuant to this Policy, India issued a Preferential Market Access Mandate, which sets local content rules for government procurement of electronic goods. These examples, as well as Indian local content rules and government subsidies for solar panel products, were a source of Indo-American trade friction and WTO litigation. See September 2014 CRS Report at 5. Notwithstanding the presentation of its list, Indian trade officials said “discussions with U.S. trade officials are like a ‘dialogue of the deaf.’” *Id.*

Much was at stake for both sides. The U.S. threatened India with loss benefits under the Generalized System of Preferences. India, in turn, could even further limit the access of American exporters and investors to Indian markets. In April 2014, however, the
USTR opted not to designate India a PFC, although it kept India on the Priority Watch List, and stated that it would subject India to an out-of-cycle review of its IP rules. See September 2014 CRS Report at 3-4.

Five months later, following the overwhelming victory of Narendra Modi and his Bharatiya Janata Party in India’s 16th general election held in April-May 2014, the new Prime Minister met President Barack Obama in September 2014. The two leaders agreed to create an IP Working Group within the framework of the existing Indo-American Trade Policy Forum. The group was to meet annually, host frequent technical discussions, and was given “appropriate decision-making” authority. See Stephanie Cohen, Obama, Modi Agree to High-Level IP Working Group, Financing, Infrastructure Initiative, 31 International Trade Reporter (BNA), 1748 (Oct. 2, 2014). However, the ambiguity surrounding the group’s structure and goals warrants concern given the broad range of IP issues in dispute between the two countries. The two leaders also expressed their desire – manifested in an “Indo-U.S. Investment Initiative” – to boost capital markets and flows to finance Indian infrastructure projects under an “Infrastructure Collaboration Platform” that would ensure participation of American companies in those projects. Whether legal uncertainty over intellectual property rights will dampen enthusiasm to participate remains to be seen.

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The cardinal principle of the World Trade Organization ("WTO") is trade promotion through the facilitation of the free flow of goods and services among member states with minimal tariff barriers and without non-tariff barriers. In a world where tariff and non-tariff barriers are decreasing rapidly, unfair trade practices like dumping, subsidization and sudden surges in exports, continue to occur regularly. Thus, anti-dumping, anti-subsidy and safeguard measures are increasingly becoming major tools in the hands of member nations to protect their domestic industries against unfair trading practices. Such measures create a level playing field for domestic industries to compete more effectively in their domestic markets. Among these trade remedial measures, an Anti-dumping Duty is the most frequently used tool for the protection of the domestic industry from "dumping", i.e. export of an article into the market of another country at a lesser price (normal value) than the price at which it is sold in the domestic market of the exporting country.

India has emerged as one of the frequent users of anti-dumping measures in recent years. The anti-dumping journey of India began in the year 1995. Over the years, India has experienced dumping of various products such as chemicals and petrochemicals, pharmaceuticals, textiles/fibers/yarns, steel and other metals, consumer goods, automotive components, plastics and plasticizers, electrical, and electronic items. Various countries, especially China, were found to be participating in these dumping practices. The anti-dumping investigations conducted by India were predominantly against China, EU member nations, Korea, and Taiwan; even though a large number of other countries were also found to be dumping goods in the Indian market.

Challenges

An anti-dumping investigation calls for a strict scrutiny of information provided by various stakeholders such as domestic producers, exporters, importers, users and involves onsite verification of information to the extent necessary. Being a quasi-judicial authority, the Designated Authority at the Directorate General of Anti-dumping and Allied Duties (DGAD) under the Ministry of Commerce, also hears the parties orally, as per the framework prescribed in the anti-dumping rules. Investigations by the Designated Authority involve fresh as well as review investigations. Fresh investigations are those investigations which pertain to cases in which there is no earlier anti-dumping duty in force whereas review investigations are either mid-term reviews under Article 11.2 of the WTO Anti-dumping Agreement or sunset review under Article 11.3 of the WTO Anti-dumping Agreement and pertain to cases in which an earlier anti-dumping duty is in force. The anti-dumping duties once imposed may remain in force for the period of five years and are extendable for another period of five years through sunset reviews.

Recommendation of any anti-dumping duties by the Designated Authority requires confirmation and imposition by the Central Government to have an effect on dumped imports. The legal framework also provide Appeal provisions which enable the aggrieved party in an investigation to approach the Customs, Excise, and Service Tax Appellate Tribunal (CESTAT) upon imposition of duties by the Central Government. Apart from Appeal provisions, interested parties frequently challenge the anti-dumping investigation process under the aegis of Article 226 of the Constitution, wherein the legality of various aspects of an investigation has been a subject matter of litigation; even before the conclusion of investigation and
imposition of any applicable anti-dumping duties by the Central Government. (Article 226 empowers the High Courts of India to issue to the government writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari.)

In recent times, the dumping of newer and wider range of products, newer business models involved in supply of subject goods, technological changes, and changes in market dynamics have added complexities to anti-dumping investigations, requiring more comprehensive and in-depth examination to address various issues.

The areas which have seen significant levels of complexity are:

a) Determination of “Product Under Consideration” and “Like Article,”

b) Determination of “Domestic Industry” and “Standing,”

c) Determination of “Individual Margins for Exporters/Producers,”

d) Confidentiality Aspect

e) Circumvention of Duties by modifying the goods or changing the country of production/export.

A detailed examination of the above issues in the context of various investigations can be elaborated as follows:

a) Determination of Product Under Consideration and Like Article

Determination of Product Under Consideration (“PUC”) and like article in an anti-dumping investigation holds the key to establishing dumping and any fallacies in the same could make the entire investigation void. Intricacies generally arise when the PUC involves multiple types/grades/varieties, multiple technologies, multiple processes, or different raw materials. These aspects make the determination of PUC and like article highly technical; rendering the investigation itself very complex. The product complexities can delay and frustrate due remedies to domestic industry, irrespective of the magnitude of dumping and injury. Perhaps the most important issue involving PUC is establishing technical and commercial substitutability. Two products may look different in terms of technology of production or design or style or quality, but they are “like article” as long as they are functionally substitutable and replaceable in the market, due to similar end use and comparable cost and price.

b) Determination of Domestic Industry and Standing

The anti-dumping investigation to determine the existence, degree and effect of any alleged dumping can be initiated upon receipt of a well substantiated and written application by, or on behalf of, the “domestic industry.” The applicant can comprise of a single or a group of domestic producers or an association representing such domestic producers. Defining the “domestic industry” often involves difficulties when the applicant or applicants, have imported the subject goods from a subject country or are related to an exporter in a subject country or to the importers of the subject goods from a subject country. In such a situation, such an applicant should not qualify to be treated as domestic industry. In situations where the applicant domestic producer is a casual importer, the Designated Authority needs to examine the relationship between the magnitude of imports and the circumstances under which the applicant industry has taken recourse to importing the subject goods from the subject country. In such cases, the authority also examines whether the applicant domestic producer is directly or indirectly related to the concerned producer or exporter in the subject country. As settled by the Madras High Court in *Nirma Limited vs. Saint Gobain Glass India Limited, 2012 (281) ELT 321 (Mad)* (the “Soda Ash case”), the Designated Authority has full discretion and power to decide whether, despite such
odds, the applicant can be included in the scope of domestic industry under the AD Rules. Further complexities in defining domestic industry arise when Export Oriented Units or companies located in Special Economic Zones approach the Designated Authority seeking protection under the anti-dumping schemes. Such developments have made the definition of domestic industry more complex and technical.

c) Determination of individual margins for exporters/producers

It is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the “normal value”) and the appropriate price at which the goods are exported by the exporting country (known as the “export price”) so as to be able to undertake an appropriate comparison. Of late, the instances of issues around determination of individual margins for exporters/producers cooperating with the Designated Authority have increased, as companies often seek individual margins without providing information about complete channels involved in the production and export of subject goods to India. The determination of individual margin has serious implications and any error can render the entire duty meaningless. A comprehensive and consistent approach to such issues must be an area of focus.

d) Confidentiality

Confidentiality remains an issue between stakeholders involved in an investigation. Availability of adequate non-confidential information is critical in providing adequate rebuttals in an investigation by the stake-holders, which improves the overall quality of an investigation. Hence, a balance between the commercial interests of the interested parties, safeguarding their confidential information and fair and adequate disclosure to interested parties to ensure compliance with the principles of natural justice is a thorough challenge to the Designated Authority. The Designated Authority is required to scrutinize all the claims of confidentiality made by every interested party and allow the cases in which the claim of confidentiality is justified.

c) Circumvention of duties

Circumvention of duties remains an area of concern as the complaints of measures to circumvent the applicable anti-dumping duties often arise from the domestic industry. India is yet to initiate any investigation into this aspect.

Other lesser stumbling blocks are determination of the type of anti-dumping duty as a fixed reference price based or ad-valorem duty. There are associated problems with each type and generally, the Directorate of Anti-Dumping in India feels that a fixed duty is appropriate in most circumstances.

Transfer pricing policies with respect to domestic industry and the exporter also bring several challenges before the costing data can be accepted. This is because some companies adopt cost of production of the PUC as the transfer value for captive production, while other companies adopt its market value.

In multi-product companies, allocation of expenses poses difficulties as certified output is not used only by PUC, but other products produced by the domestic industry, which are not subject to investigation. In such circumstances, domestic producers tend to allocate the common cost of utilities, overheads and common raw materials more to the PUC, and less to the non-PUC, which distorts the data. As a result, DGAD Officers have to scrutinize in detail the methodology of values adopted by the exporters/domestic industry, so as to ensure that the methodology of values adopted by them is reasonable and consistent. If there are variations in this methodology, it is discarded and instead, a more appropriate and reasonable methodology is adopted in determining the cost of production of the PUC.

Lastly, sometimes, the FOB/CIF price claimed by the exporter does not match with the data of the Indian Customs Authorities. In such cases, scrutiny of data
becomes necessary to check whether payment for the invoice has been received by Indian importers through normal banking channels. If the answer is negative, these export prices are rejected and officials have to call for data from the concerned importer, cross check the figures reported by the exporters and the importers, and then make a final decision in the matter.

Thus, DGAD Officers are faced with a myriad set of challenges in each case, ranging from accurate technical and commercial understanding of the product under consideration and “like article,” to determination of the “domestic industry.” The comprehensive nature of the data that is required to be examined for correctly determining individual margins and verifying the same within the limited time available in the course of the investigation for complete trade channels is a major challenge. The issue of determination of product under consideration and “like article” is also closely related to the possibility of circumvention of duties and hence, the Designated Authority is faced with an additional challenge to ensure that no abuse of the anti-dumping process is facilitated wherein the remedial effects of the anti-dumping duties are easily eroded.

In conclusion, although, the earliest sign of anti-dumping legislation emerged in United States, various developing countries like India and Brazil became the prominent users of the trade remedial measure. Such transformation was noticed since the formation of WTO and the reason is quite clear. The Uruguay round of negotiation revised an Anti-dumping code to form an Anti-Dumping Agreement. The Anti-dumping Agreement has dealt with the various complexities of Article VI of GATT in detail, which has benefitted various developing countries with respect to their rights under the WTO.

Anti-dumping investigations are intricate, demanding and time consuming. The increasing complexities of current transactions, technological advancement and globalization of production and conducting intricate anti-dumping investigations within prescribed timelines are challenges before the Anti-dumping Authorities in all countries, including India. Therefore, capacity building of the human resources involved in anti-dumping investigations is the key requirement for all WTO member countries.

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INDIA’S PUBLIC STOCKHOLDING OF AGRICULTURAL PRODUCTS: WILL EXPORTS OF PROCURED FOOD GRAINS CAUSE TRADE DISTORTION?

By Abhijit Das

Introduction

India’s concern for securing sufficient flexibility for maintaining public stockholding of agricultural products has received significant international attention in the last few months. In the context of public stockholding for food security purposes, some countries have raised an apprehension that exports of food grains from the Food Corporation of India (FCI) stocks distort global trade (See Raul Montemayor, “Public Stockholding for Food Security Purposes - Scenarios and Options for a Permanent Solution”, June 2014, ICTSD Programme on Agricultural Trade and Sustainable Development, Issue Paper No. 51). Exports from a country can be said to distort global markets under two circumstances. First, when the exports benefit from specific subsidies; and second, when the export price is lower than the price at which the product is sold in the home market of the exporting country, i.e. the product is dumped. The mere fact that the export price is lower than the prevailing prices in international markets, including the prices in the importing country, cannot be the basis for concluding that low priced exports are distorting global markets. In order to conclude that low priced exports are distorting global markets, it is necessary to establish factually that the exports are either dumped or benefit from subsidies. It is essential to bear these two considerations in mind while examining whether exports of food stuff from FCI stocks are distorting global markets.

In the above context, this article will explore the question of whether the export of food grains from the FCI stocks could distort trade?

Analysis under the Subsidies Agreement

In any analysis of exports distorting global markets, it is relevant to keep two concepts in mind: (i) assessing benefit of a financial contribution; and (ii) pass through of subsidies. Under the WTO Agreement on Subsidies and Countervailing Measures (“Subsidies Agreement”), for a subsidy to exist there must be a financial contribution and benefit must be conferred. There has been considerable debate whether benefit arising from a subsidy (or more specifically the benefit arising from a financial contribution) is to be assessed from the perspective of “cost to the government” or from the perspective of “benefit to the recipient”. Out of these two approaches, Subsidies Agreement suggests that the “benefit to the recipient” approach is the preferred approach under Article 14 (d) of the Subsidies Agreement.”See also WTO Panel Report, Canada- Measures Affecting the export of Civilian Aircraft, WT/DS 70, adopted August 20, 1999, para. 9.2. Under the provisions of Article 14 (d), benefit to the recipient is determined keeping the following guideline in mind:

[T]he provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability,
marketability, transportation and other conditions of purchase or sale).

Thus if food stocks are disposed for exports at prices higher than the prevailing market price, then no benefit will accrue to the eventual exporter from price support under Minimum Support Price (MSP).

It is quite possible that subsidies granted by the government to one entity pass through to another entity when the subsidised products are sold by the first entity to the second entity. The terms and conditions of the sale will generally determine whether the subsidy has passed through from the seller to the buyer. In case the sale is at arms-length between unrelated parties, unless there is evidence to the contrary, it can be presumed that there is no pass through of the subsidy from the seller to the buyer. In other words, the effects of subsidies seem to be extinguished in an arm’s length transaction.

Based on the reasons given below, it can be concluded that exports of foodstuff originating in FCI stocks cannot distort global markets.

1. Exports of foodstuff are not undertaken directly by the government or the procuring agency. Whenever the Central government allows exports of rice / wheat from FCI stocks, it calls for tenders. FCI stocks are sold to the highest bidders, who are generally private players. (See Policy & FCI, “Procurement Policy”, Department of Food & Public Distribution, http://dfpd.nic.in/?q=node/9 (last visited Nov 24, 2014). Successful bidders acquire possession of the appropriate quantity of FCI stocks, which are subsequently exported. The prices at which the successful bidders finally export are not determined by the government, but by the exporters themselves. Being rational economic operators, the exporters are likely to undertake profit maximising activities. They are, therefore, not likely to export at prices that are lower than the prices at which they acquired the stocks for export from FCI.

2. FCI does not export the stocks of food stuff from public stockholdings. Instead, the stocks are sold to the eventual exporters through a process of competitive bidding. Consequently, such sales are at arms-length. Hence, it cannot be argued that the subsidies on account of government procurement of food stuff pass through to the eventual exporters. It is clear that food stuff exported from stocks originating in FCI stocks do not benefit from subsidies on account of the procurement at administered prices and therefore do not distort trade.

3. Under provisions of Article 9.1 (b) of the Agreement on Agriculture (AoA) “the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market” is treated as an export subsidy subject to reduction commitments. Over the past 10 years very small quantities of rice and wheat have been exported from FCI stocks. During the past decade, the year with highest exports of wheat from FCI stock was 2012-13. FCI stocks were disposed for exports through a process of international competitive bidding at an average price which was around 30% higher than the MSP for wheat during 2012-13. Taking MSP as a proxy for the comparable market price, it is clear that wheat exports from FCI stocks in recent years do not violate Article 9.1 (b) of the AoA.

4. Another allegation that has been made by some countries is that due to procurement by the government of food stuff at high administered price, farmers garner windfall profits. It has further been argued by these countries that the windfall profits enable the farmers to export at low prices, resulting in dumping. This argument is incorrect. First, the assumption of windfall profits for farmers is without any basis. Second, the eventual exports from FCI
stocks are generally not made by farmers from whom the government procures food stuff, but by grain traders through a process of competitive bidding. Thus, beneficiaries of government procurement at administered prices and the eventual exporters are entirely separate entities, with the latter not benefitting from the so-called windfall profits of the former. Hence, the possibility of so-called windfall profits enabling the exporters to dump in the international market at low prices is unfounded.

5. There is another reason why the supposed windfall profits on account of administered prices for procurement of food stuff from farmers for public stockholding cannot lead to dumping. Manufacturers and exporters have an incentive and propensity to dump, if they are unable to sell their output at remunerative prices in the domestic market. However, the reality is different for farmers whose produce is eligible for procurement under administered prices. All the produce of eligible products of a farmer can be potentially procured by the government for public stockholding.

6. In the alternative, a farmer can sell his produce to private traders, who in turn can export. But the price at which the farmer sells to the private trader/ exporter will generally be higher than the administered price (if the private trader offers a lower price, the farmer would prefer to sell for government stockholding programme). As the private trader is likely to maximise his profits, it is unlikely that he will export at a price that is below the administered price.

7. An allegation made by some countries is that India distorts global markets as the price at which FCI stocks are sold to the eventual exporters is lower than the economic cost of the FCI in procuring and holding food stocks. However, the economic cost to the FCI is not the relevant consideration while examining whether exports of rice and wheat from FCI stocks are subsidised. As stated earlier, cost to the government is not the correct approach for determining whether a financial contribution confers a benefit. Article 14 of the Subsidies Agreement follows the “benefit to the recipient” approach and not the “cost to the government” approach. Thus, economic cost of holding food stocks by FCI is not relevant for determining whether exports from FCI stocks are subsidised and hence distort trade.

8. As MSP generally determines the market price prevailing in a particular year, this should be an appropriate benchmark for determining adequacy of remuneration. As stated earlier, the price at which FCI stocks are disposed for exports was substantially higher than the MSP. Thus, based on the “benefit to the recipient” approach, it is difficult to accept that exports of food stocks from FCI distort international trade.

9. During the past decade, the year with highest exports of wheat from FCI stock was 2012-13. However, even during this year wheat exports from FCI stock constituted less than 0.1 % of global wheat exports. It is unlikely that such a small quantity can distort global markets.

Conclusion

It can be seen from the data that the FCI stocks are sold for exports at substantially higher prices than the MSP. As discussed above, based on the test of “benefit to the recipient”, the exporters of grains do not receive any advantage of benefit because the stocks are disposed of at competitive prices. In light of the above fact, the exports of such food grains do not constitute market distortion in the importing countries. Further research is required to identify the circumstances under which exports from FCI stocks could distort global trade.

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I. Introduction

The Agreement on Technical Barriers to Trade (“TBT Agreement”), as agreed to by the members of the World Trade Organization (“WTO”) in 1994, expresses the desire that countries’ “technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade.” TBT Agreement at Preamble. At the same time, the WTO Members recognized when implementing the TBT Agreement that “no country should be prevented from taking measures necessary . . . for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries.” Id.

Fundamentally, there is no inherent conflict between the goals of promoting unencumbered, nondiscriminatory trade in goods and ensuring countries’ ability to implement legitimate health and safety standards. In reality, however, tension exists when trading partners apply their own domestic standards to goods in international commerce. One area where this tension recently has been playing itself out is in the context of Good Manufacturing Practice (“GMP”) standards. Using pharmaceuticals as an example industry, this article provides an overview of GMPs, discusses how they fit within the framework of the TBT Agreement, and briefly addresses the “conflicts” that can arise when GMPs affect trade.

II. Good Manufacturing Practices – What They Are And How They Are Applied

Good Manufacturing Practices are part of a quality assurance system to generate products that consistently meet specifications for potency, purity, and stability of characteristics over time. Commonly, GMPs include controls over personnel, ingredients, facilities and equipment, manufacturing process steps, analytical testing, ongoing review for anomalies (out-of-specification results, signals from complaints or adverse event reports), restriction of changes, and processes for corrective and preventive actions.

Because GMP laws and regulations are intended to govern a wide range of products and businesses (and also to accommodate scientific and technical advances over time), they often are written in general terms and elaborated upon in related guidance documents. Often regulators’ expectations and interpretations of GMP laws are revealed through inspection interactions and comments or reports that are shared with individual companies concerning their facilities and individual products. A country’s GMP provisions are thus established not only through codified laws and regulations, but also effectively are developed through less formalized procedures and day-to-day administrative actions.

III. Overview Of The WTO Agreement On Technical Barriers To Trade

The TBT Agreement defines “technical regulations,” which are covered by rules in the Agreement, as documents laying down “product characteristics or their related process and production

THE RISE OF THE REGULATORY STATE: HOW GOOD MANUFACTURING PRACTICE REQUIREMENTS CAN COLLIDE WITH OBLIGATIONS UNDER THE WTO AGREEMENT ON TECHNICAL BARRIERS TO TRADE
By Iain MacVay, Christina Markus, and Michael Taylor
methods, including the applicable administrative provisions, with which compliance is mandatory.” TBT Agreement at Annex 1, Paragraph I (also providing that the technical regulation may “include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process or production method”). National GMP provisions, as implemented by administrative agencies, clearly fall within this definition.

The essential aspect of the provisions of the TBT Agreement is that covered technical regulations should not have the effect of creating discriminatory or unnecessary obstacles to trade. TBT Agreement at Art. 2.2 (emphasis added). While regulations for the protection of human health or life are clearly appropriate in an abstract sense, the TBT Agreement explains that “technical regulations shall not be more trade-restrictive than necessary” to fulfill that legitimate objective. Id.

The TBT Agreement encourages, but does not require, mutual recognition of technical regulations such as GMP provisions, and it also encourages involvement in international standardization and harmonization exercises. TBT Agreement at Art. 2.6 and 2.7. A country’s obligation to eliminate technical barriers to trade, however, is not dependent on those efforts. Stated differently, the obligation to eliminate technical barriers to trade is not dependent on mutual recognition by countries of the underlying technical standards that implement GMP provisions. This creates room for international conflict, when countries implement their own laws and regulations in a manner that differs from the GMP expectations of their trading partners.

Notably, the TBT Agreement has rules specifically applicable to conformity assessment that require acceptance of results of procedures undertaken in other WTO Member states “whenever possible” and as long as Member states “are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures.” TBT Agreement at Art. 6.1. This obligation also is conditioned on “adequate and enduring technical competence of the relevant conformity assessment bodies.” Id. at Art. 6.1.1.

IV. Conflict And Potential Recourse

WTO Members’ GMP regimes must avoid being more trade restrictive than necessary. This obligation could result in a country’s GMP practices coming under scrutiny where it denies approvals for importation of products that have been approved by reputable regulatory bodies in other jurisdictions, such as the European Union, the USA, or Canada. Unwelcome scrutiny of GMP regimes could also arise from slow processing of GMP applications where technically trained inspectors are in short supply and mutual recognition is not in place. Such problems in application of GMP regimes can result in serious delays in getting medicines to patients.

It is widely recognized that WTO Members have a right, even a duty, to ensure that medicines and other products covered by GMP requirements are safe for use. There is, however, considerable scope for disagreement over the application of GMP provisions, such as, for example, if Indian regulators were to reject a production facility or its medicines, contrary to the views of other leading jurisdictions.

With respect to exports, the implementation of non-harmonized GMP standards creates the risk for India, for example, that Indian-origin products may lose access to certain markets if trading partners do not accept the GMPs of Indian manufacturers. There are additional internationally-recognized pathways toward cooperation and harmonization of GMP provisions. First, there is the Pharmaceutical Inspection Convention and the Pharmaceutical Inspection Co-operation Scheme (jointly referred to as “PIC/S”). Forty-six government authorities, including the U.S. Food and Drug Administration (“FDA”), currently are Participating Authorities in PIC/S. See Pharmaceutical Inspection Co-operation Scheme; Members and Partners, available at

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India is not currently a member, although PIC/S has identified India as one of the “key players” in terms of the pharmaceutical industry and GMP inspections that is being targeted for PIC/S membership. See PIC/S Blueprint, PS/W 8/2005 at para. 39 (Dec. 23, 2005), available at http://www.picscheme.org/documents/PSW082005PICSBueprint.pdf. The main conditions for membership are to have a law on medicinal products, a GMP Guide equivalent to that of PIC/S, a GMP inspectorate that fulfils PIC/S quality system requirements, and experienced GMP inspectors. PIC/S helps membership candidates to bring their GMP systems up to international standards and the process of membership can be accomplished in two to three years. See http://www.picscheme.org/accession.php. Risk for disagreement about the application of GMP standards is currently greater than it might be if India were a PIC/S member. While PIC/S standards are not a requirement under TBT, the application of GMPs without active international relationships contributes to the potential for the inconsistent interpretations and application of GMPs among India and its trading partners.

Presumably with this context in mind, India has begun to consider the possibility of joining PIC/S, in part to support access to export markets for Indian manufacturers. Media reports confirm that in 2013, India’s Commerce Ministry “began discussions with officials of the Drugs Controller General of India (DCGI) and the health ministry to examine the likely impact of joining the [PIC/S].” See India Is Considering Joining the Pharmaceutical Inspection Convention and Pharmaceutical Inspection Co-operation Scheme to Safeguard its Drug Exports, BioSpectrum, available at http://www.biospectrumasia.com/biospectrum/news/194893/india-join-pic-s-safeguard-drug-exports (Sept. 5, 2013). Although Prime Minister Modi is reportedly developing policies to enhance pharmaceutical exports (particularly in the area of bulk drug ingredients), it is currently unclear whether, or how, participation in PIC/S may be involved. See DoP Declares 2015 as “Year of Active Pharmaceutical Ingredients,” available at http://www.financialexpress.com/article/pharma/latest-updates/dop-declares-2015-as-year-of-active-pharmaceutical-ingredients/35328/.

Perhaps just as relevant, the WTO TBT Committee increasingly is engaging in detailed discussions of specific trade restrictions. This Committee process, which has no relationship to dispute settlement and should not be considered a first step toward dispute settlement, has the virtue of raising the profile of an issue in a technical context and bringing international pressure to bear.

The TBT Committee is one of the great success stories of the WTO, at a time when success stories are strangers to most parts of that institution other than the dispute settlement system. The TBT Committee is increasingly engaging in detailed discussion of regulatory issues that affect trade. This discussion is conducted with technical experts through diplomatic channels and largely outside public view, but the discussions are recorded in the published minutes of the Committee.

Through the use of the TBT Committee process, India can engage in detailed technical debate over its application of GMPs and other TBT measures. This technical debate also can result in pressure being placed on India by its international trading partners to come into line with international norms. The detailed scrutiny of regulatory methods in the TBT Committee is a very important element in the process of encouraging reasoned, evidence-based regulation in all areas, including GMP. It also can be a path for close and sometimes uncomfortable scrutiny of regulatory measures implemented unilaterally without consultation and cooperation with international trading partners.

Notably, the TBT Committee could be one of the most effective avenues for addressing systemic GMP issues that present significant problems for exporters, created to some degree by variation in GMP regulation and enforcement. There are some limitations, however, to use of the TBT avenue. First, because only WTO
Members have standing before the TBT Committee it is not readily suited for an individual company’s challenge that a regulatory agency has inappropriately applied the law to its case unless there is a systemic issue raised by that individual case. Second, there may be difficulty invoking the legal obligations of the TBT Agreement when national standards applied by WTO Members are informal or written vaguely (if written, at all) with detailed application left to the discretion of regulators. In such cases, marshalling evidence of a WTO Member’s informal or unwritten national “standard” can require the development (through documentation) of patterns of practice in order to demonstrate the WTO Member is acting inconsistently with the TBT Agreement. Finally, the TBT Committee cannot deploy the levels of technical expertise that PIC/S can deploy consistently as a specialized body, but the TBT Committee can highlight specific problems with application of a WTO Member’s GMP regime without resort to formal dispute settlement proceedings.

Ultimately, the TBT Agreement calls for recognition of “relevant international standards” (Art. 2.4), and where a WTO Member’s measures are taken in accordance with relevant international standards, the measures are presumed to be in compliance with TBT under Art. 2.5. Thus, irrespective of whether a given standard, such as PIC/S, would actually meet the requirement of being a “relevant international standard” under Arts. 2.4 and 2.5, the soft power of the WTO norms, combined with the scrutiny in the TBT Committee by peers from technical bodies around the world, increasingly may encourage WTO Members to cooperate with international standard setting efforts such as PIC/S. Although membership of PIC/S is not a guarantee against challenges to Indian GMP decisions, cooperation through the PIC/S body and positive engagement at the TBT Committee make it much less likely that any issue will become the subject of a dispute settlement proceeding.

V. Conclusion

As a growing source of influence in the international trading community, and as major exporters of pharmaceuticals and other products covered by technical regulations, India and the United States should take leading roles in encouraging the trend toward international coherence, even convergence, in international regulatory practice. The WTO is not only about legal disputes but also is a very important source of good regulatory practice that encourages international dialogue and cooperation in setting and implementing regulations in the interests of all countries. India and the United States, therefore, should continue to take a leading role in developing this alternative vocation of the WTO through the TBT Committee. Finally, engagement by India with PIC/S on GMP issues would be a helpful step in this direction.

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Significant changes have recently been made to the Foreign Direct Investment (FDI) regime governing India’s cash-starved realty sector, which has been witnessing declining FDI inflows. The declining amounts are $2.94 billion in 2009-10, $1.23 billion in 2010-11, $0.73 billion in 2011-12, $0.13 billion in 2012-13, and $.12 billion in 2013-14, according to data compiled by Department of Industrial Policy and Promotion (DIPP), Government of India. In its Cabinet Note in October, 2014, the Government of India proposed numerous amendments to the Consolidated FDI Policy, 2014 (FDI Policy), aimed at increasing inflows and opportunities for growth and employment. With the release of DIPP’s Press Note No.10 on December 3, 2014, the final amendments to the FDI Policy have come into effect, and are analyzed in this article.

Permissible Activities

With the inclusion of roads and bridges, Press Note 10 has expanded the scope of construction development activities that are eligible to receive 100% FDI under the “Automatic” entry route in the real estate sector. Further, by doing away with the erstwhile open-ended description of construction development activities (which had included but were “not restricted” to residential and commercial premises, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure), Press Note 10 provides greater clarity on the kinds of projects that are eligible to receive 100% FDI. Importantly, FDI continues to be prohibited in “real estate business” (that is, dealing in land and immovable property with a view to earning profit or income therefrom), construction of farmhouses and trading of transferable development rights. In September 2014, the Securities and Exchange Board of India notified the regulatory framework for setting up Real Estate Investment Trusts (REITs) in India. As the nature of activities and investments in yield-generating immovable assets undertaken by REITs would be tantamount to “real estate business,” an exception must be carved out in the FDI Policy so as to achieve the objective of promoting REITs as an alternative investment vehicle for foreign investors.

Capitalization Norms

With a view to encourage FDI inflows in smaller real estate projects, Press Note 10 sets the minimum capitalization requirement as $5 million, irrespective of whether the foreign investor participates through a Wholly Owned Subsidiary or a Joint Venture with domestic partners. This is a significant change from the earlier position where a foreign investor was required to commit a minimum capital of $10 million or $5 million, depending on whether it entered the market through its Wholly Owned Subsidiary or through a Joint Venture with domestic partners, respectively. As per DIPP’s Clarification to Press Note 10 released in March, 2015 (“DIPP Clarification”), whether a foreign investor has fulfilled its mandate of minimum capitalization of $5 million is to be assessed on a project-specific basis, and not on a company-specific basis. Where minimum capital brought by a foreign investor into an Indian investee is allocated across more than one real estate project, such infusion shall not be construed as valid fulfilment of minimum capitalization norms.

Earlier, such minimum capital had to be invested within six months from commencement of business of the company. However, the previous FDI Policy had failed to clarify whether this period was to be calculated from the date of incorporation of the Company, or date of commencement of business.
operations of a company, or from the date of commencement of the real estate project being undertaken by a new/existing company. Precise calculation of this timeframe was vital as contravention of FDI Regulations is liable to a steep penalty of up to thrice the sum involved (where the amount is quantifiable). To address this lacuna, Press Note 10 clarifies that at least $5 million must be invested within six months from the date of “commencement of the project,” which in turn shall mean from the date of approval of the building plan for construction projects or layout plan for townships, as the case may be. The reckoning date for commencement of a project shall be the date of “first” approval of building plans/layout plans, as any further approvals would only be modifications/addendums to such first approval. Subsequent tranches can be brought in till ten years from commencement of the project or before completion of the project, whichever expires earlier.

However, infusion of large sums is not always or immediately required in the early stages of a real estate project. Conducting due diligence of land parcels, financial due diligence, project feasibility reports etc. is often a lengthy process. Therefore, mandating that minimum capital of USD 5 million be invested in a project within six months of its commencement may be counterproductive to attracting FDI in the long-term - foreign investors are justifiably wary of losing interest on funds lying idle, which in turn would drive up construction costs for projects. Additionally, this condition of requiring minimum capital investment within six months of “commencement of a project” is silent on whether and how it would operate in the scenario where a foreign investor seeks to infuse funds at a later stage in a project (i.e. when building plan/layout plan was issued more than six months ago).

**Construction Milestones and Timelines**

FDI in the construction development sector is permissible subject to fulfilment of rigorous performance-linked conditions in the FDI Policy. Earlier, the FDI Policy set out the minimum level of construction that was to be achieved for three categories of projects, namely, construction-development projects, serviced housing plots and combination projects. Press Note 10 introduces relaxations for all three categories. For construction-development projects, the minimum area to be developed was 50,000 square meters measured in terms of “built-up area” – this now stands reduced to 20,000 square meters, and is to be measured in terms of “floor area,” instead. Floor area shall be defined according local laws or regulations of the respective State or Union Territory. Although widely used in industry parlance, the terms “built-up area,” “super area” and “carpet area” are not yet defined in State legislation or municipal regulations. Hence, replacing “built-up area” with “floor area” is a positive step. The Indian investee is also now required to procure a certificate to the effect that the minimum floor area requirement has been fulfilled – this should help foreign investors monitor construction compliances.

Previously, FDI was permissible only in serviced housing plots (i.e. housing plots equipped with basic civic infrastructure) but not in non-residential plots. For serviced housing plots, the minimum land area that was required to be developed was earlier 10 hectares (approximately 24.7 acres). Press Note 10 has made two important changes here – firstly, it has omitted the word “housing”. Thus, FDI will now be permissible even in plots meant for non-residential use, provided other conditions of FDI Policy are complied with. Secondly, the condition of minimum area required for development of serviced plots has been removed.

Regarding the third category of combination projects, the FDI Policy earlier stipulated that either of the two conditions (i.e. developing minimum 50,000 square meters of built-up area OR developing minimum 10 hectares of land area) would suffice. With removal of the condition of minimum level of construction for serviced-plot projects, having a condition in place for combination projects became redundant. Although this redundant condition was present in the Cabinet Note, the error has been rectified in Press Note 10.

In addition to the requirement of minimum level of construction described above, the FDI Policy had also prescribed stringent timelines for development of a project. Previously, at least 50% of a construction project was required to be developed within five years
from the date of having obtained “all” statutory clearances. For this purpose, undeveloped plots were described as lacking certain vital civic amenities. There were many problems with this provision. Ascertaining the 50% milestone, especially for large-scale projects, could only be determined on a case-to-case basis and left room for arbitrary evaluation. Moreover, prescribing a uniform time period of five years without regard to the scale of each project and penalizing investors for delayed completion due to unforeseen circumstances or force majeure conditions was a harsh measure. Given these problems, this condition has been eliminated in Press Note 10.

**Development of Infrastructure**

Press Note 10 has ushered in positive changes on the aspect of “trunk infrastructure”. Under the previous as well as present FDI Policy, plots are permitted to be sold only after trunk infrastructure has been made available in the project. Hence, knowing what civic amenities constitute trunk infrastructure is important. While the erstwhile definition included the contentious phrase “other conveniences as applicable under prescribed regulations,” Press Note 10 limits trunk infrastructure to mean roads, water supply, street lighting, drainage and sewage. To prove completion of development of trunk infrastructure, a certificate from a registered architect is required to be obtained.

Further, a foreign investor is no longer obligated to develop such trunk infrastructure itself. The absence of a single-window project clearance mechanism and computerized land records coupled with multiplicity of land laws that differ from State to State had made it cumbersome for foreign investors to obtain and comply with requisite permissions, approvals and licenses for construction and development of a project. Now, Press Note 10 places the responsibility of obtaining and complying with requisite permissions, along with payment of development charges and other charges, as well as the onus of developing internal and peripheral areas and other infrastructure facilities in a project, solely and entirely on the Indian investee. These measures shall greatly encourage the participation of foreign investors.

**Affordable Housing**

The Ministry of Housing and Urban Poverty Alleviation, Government of India, estimates that the domestic housing shortage is 18.78 million units out of which 96% pertains to households in the Economically Weaker Sections (EWS) and Low Income Group (LIG) segments. Press Note 10 introduces a novel measure to address this scarcity - an investee/joint venture which commits at least 30% of its total project cost for affordable housing shall not be required to fulfil the performance-linked conditions of minimum capitalization and minimum floor area to be developed.

In order to avail this benefit and qualify as an “affordable housing” project under the new FDI Policy, (a) a project should use at least 40% of its Floor-Area Ratio (FAR)/Floor Space Index (FSI) for dwelling units having floor area not more than 140 square meters; and (b) Out of FAR/FSI reserved for affordable housing, at least one-fourth should be for dwelling units having a floor area not more than 60 square meters. This is significantly different from what was proposed in the Cabinet Note, where to qualify as an “affordable housing” project (a) at least 60% of the FAR/FSI was to be used for dwelling units having a carpet area not more than 60 square meters; (b) 35% of total dwelling units constructed were to have a carpet area of 21-27 square meters for EWS; and (c) Servant’s quarter appurtenant to a dwelling unit would not be counted as dwelling units for EWS/LIG. Comparing the proposed and final provisions reveals that more projects would now potentially fall within the ambit of “affordable housing” for the purpose of FDI Policy.

**Repatriation and Exit**

Previously, foreign investors were prohibited from repatriating their original investment (i.e. the entire amount brought in as FDI) before a period of three years from the date of completion of minimum capitalization or from the date of receipt of each tranche of FDI, whichever was later. Also, a foreign investor wanting to exit a project before expiry of such lock-in period was required to obtain prior approval of the Foreign Investment Promotion Board (FIPB). The Cabinet Note had proposed that a foreign investor be permitted to exit on completion of a project or after
three years from the date of final investment, subject to development of trunk infrastructure. To ease this process, Press Note 10 has done away with the concept of lock-in period of three years. There is a concern that easier exit norms may lead to an increase in both speculative activity and property prices, especially given the absence of a central real estate regulatory authority and the Real Estate (Regulation and Development) Bill, 2013 pending enactment.

Under the new FDI Policy, there are three distinct stages at which an investor may exit – (i) before completion of the trunk infrastructure; (ii) on completion of trunk infrastructure but before completion of the project; and (iii) on completion of the project. To exit at the first stage, a foreign investor requires prior approval of FIPB where proposals would be considered on a case-to-case basis. At the third stage, a foreign investor can exit freely without prior FIPB approval. The confusion arose at the second stage where Press Note 10 contains seemingly contradictory directions on the requirement of prior FIPB approval. This issue is now resolved by the DIPP Clarification which states that a foreign investor is permitted an automatic exit on completion of trunk infrastructure.

It is hoped the concerns critiqued above are suitably addressed by DIPP for the upcoming FDI Policy, 2015. Along with the introduction of separate regulatory frameworks in September, 2014 for setting up Real Estate Investment Trusts and Infrastructure Investment Trusts as new funding avenues, Press Note 10 is overall a welcome step in a series of recent measures to bring more FDI in India and give the required boost to the real estate sector, nearly a decade after 100% FDI first became permissible in this sector.

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INTRODUCTION OF SEPARATE REGULATORY FRAMEWORK FOR MEDICAL DEVICES

By Sunil Tyagi and Anu Chowdhry

In the Indo-U.S. Joint Statement released for the January 2015 visit of the U.S. President to India, bilateral collaboration in medical devices, pharmaceuticals, biotechnology and health-related information technology occupies prime position. Other healthcare agendas in the Joint Statement include completion of a Memorandum of Understanding among the Indian Ministry of Health & Family Welfare, the Indian Department of Biotechnology, the Indian Council of Medical Research, the All India Institute of Medical Sciences, the U.S National Institute of Health and National Cancer Institute and the upcoming completion of an Environmental Health, Occupational Health and Injury Prevention as well as a Control MoU between the U.S. Centers for Disease Control and Prevention and the Indian Council for Medical Research.

India’s total revenue potential for electronic medical devices is estimated at $6.4 billion for 2020. In an Executive Briefing in June, 2010, the United States International Trade Commission (USITC) noted that India’s market for orthopaedic devices alone is expected to touch $600 million by 2015, attributable to an increasing elderly population that is projected to reach nearly 200 million by 2025. Healthcare companies in the U.S. have begun to tap into this market by forming strategic alliances with Indian entities. For instance in October 2013, Minneapolis-based Medtronic, the world’s largest maker of heart rhythm devices, announced its entry in the kidney dialysis business in collaboration with India’s Apollo Hospitals Enterprise Limited, and dedicated an investment of $24 million towards research, development and manufacturing in India. GE Healthcare (healthcare division of American conglomerate General Electric) has set up three manufacturing plants in the State of Karnataka, invested $500 million towards R&D in these facilities and has plans to introduce low-cost portable ultrasound machines in India. Predominant factors attracting such large-scale investment include focus on health insurance coverage and preventive care, rising demand for better medical infrastructure and specialized facilities, as well as growth of medical tourism. Despite the favorable outlook for India’s medical device industry and the U.S. being considered a world leader in medical device innovation, foreign investors are yet to leverage these opportunities – a key reason being that although previous Foreign Direct Investment (FDI) policies permitted FDI in medical devices, separate norms for the sector had not been explicitly provided for.

Under the National Industrial Classification (NIC) 2008 (the industrial classification system for economic activities in India), pharmaceuticals and medical devices have been categorized as distinct industrial activities. The sector codes for “Manufacture of pharmaceuticals, medicinal, chemical, and botanical products” and “Manufacture of medical and dental instruments and supplies” are 2100 and 3250 respectively, where medical devices fall under “medical and dental instruments and supplies.” Despite this distinct categorization and vast differences in nature and function between these two classes of goods, medical devices and pharmaceuticals were being treated as the same under the previous FDI regulations. A main reason was the Ministry of Health and Family Welfare, Government of India had classified 14 categories of medical devices as “drugs” under Section 3(b)(iv) of the Drugs and Cosmetics Act, 1940 (“Act”). As there is no separate legislation for regulating medical devices in India, their import, manufacture, distribution and sale is currently regulated under this
Act read with the Drugs and Cosmetics Rules, 1945. (Non-notified [i.e. not specifically listed or categorized by the government] medical devices do not require registration, license, permission or No-Objection Certificates for import, manufacture, distribution and sale. This was clarified in an Order dated July 9, 2014 by Central Drug Standard Control Organization, Government of India). Notified medical devices were listed as being “drugs” and were hence considered a sub-set of pharmaceuticals by virtue of this legal fiction. In the absence of explicit FDI norms, medical devices (whether notified or non-notified) were subject to regulations that were in place for pharmaceuticals.

Shortly after the Government of India proposed amendments to the Consolidated Foreign Direct Investment Policy, 2014 (“FDI Policy”) in its Cabinet Note in December, 2014, the Department of Industrial Policy and Promotion (DIPP) released Press Note No.2 (2015 Series) on January 6, 2015 ("Press Note 2"), thereby addressing the domestic industry’s long-standing need of an FDI framework for medical devices which is independent of that governing pharmaceuticals. With effect from January 21, 2015, up to 100% FDI under the Automatic route is permissible in the medical device industry for both greenfield and brownfield projects. FDI in this sector has been restricted to manufacturing activities to boost local production, given that nearly 75% of the domestic market is presently dominated by imported medical devices. For the pharmaceutical industry, the present FDI Policy continues to permit up to 100% FDI under the Automatic route in greenfield projects and under the Government route (i.e. with prior approval of Foreign Investment Promotion Board) in brownfield projects, subject to sector-specific conditions. An important sector-specific condition for pharmaceuticals - brought into effect by Press Note 1 (2014 Series) dated January 8, 2014 - prohibits foreign companies from imposing non-compete clauses on Indian entities. To increase competition and access to low-cost drugs in the domestic market, non-compete clauses are permitted to be imposed only under “special circumstances” and with prior approval of FIPB. As pharmaceuticals and medical devices, which were clubbed together under the previous FDI Policy, the ban on non-compete clauses applied to both industries. Press Note 2 has altered the investment landscape by stipulating that sectoral conditions applicable to pharmaceuticals shall not be applicable to manufacturing of medical devices. As a result, foreign investors may now acquire up to 100% stake in existing manufacturing units under the Automatic route, as well as validly impose non-compete clauses on domestic targets without having to seek prior permission from FIPB. The American Chamber of Commerce has hailed the recent amendments to India’s FDI Policy as conducive for American multinational corporations to undertake the manufacture of medical devices.

DIPP has sought to further ease the doing of business in India by linking sectors and activities in the FDI Policy to their corresponding codes under NIC–2008. Though NIC-2008 codes for the pharmaceutical sector have been incorporated in the FDI Policy through Press Note 1 (2015 Series) dated January 5, 2015, codes for medical devices are yet to be incorporated but likely to be soon included in the upcoming Consolidated FDI Policy of April, 2015.

The U.S. medical device trade association “AdvaMed” had stressed the need for separate legislative provisions for medical devices for sustaining long-term innovation and investment. The Medical Devices Regulation Bill, 2006 was an attempt in this direction but had been shelved. In parallel to the amendments in the FDI regime, the Department of Health and Family Welfare has now proposed a regulatory overhaul for medical devices, to be introduced as the Drugs and Cosmetics (Amendment) Bill, 2015 (“Bill”) in the upcoming Budget Session of Parliament. The Bill proposes a separate Chapter IIA for regulating import, manufacture, sale and distribution of notified medical devices including penal provisions for contravention – thereby delineating legislative provisions on medical devices from drugs. Essential aspects including classification, standards, manufacturing, testing, distribution, labelling, packaging, essential requirements for quality, safety and performance, adverse events, post-marketing surveillance, exemptions, conditions of licenses, etc. shall be as prescribed. In comparison to the definition of medical devices contained in Press Note 2 (which is subject to a corresponding amendment to the Act),
Section 3(v) of the Bill proposes a broader definition as including a wide range of instruments, whether used alone or in combination, for the purposes specified therein. To bring clarity as to what constitutes a medical device, both these definitions require to be aligned.

The absence of a clear description of “manufacturing” activities in the context of medical devices is a glaring omission in the present Act. Though Press Note 2 has not specified the scope of activities that qualify as “manufacturing” of medical devices, Section 3(t)(iii) of the Bill reveals the legislature’s intention as including any process for designing, making, assembling, configuring, finishing, packing, sterilizing, labelling, refurbishing, or adapting of medical devices with a view to sell, stock or distribute or market them. This proposed definition excludes the assembling or adapting of a medical device (already approved for use for an individual patient) by registered medical practitioners from the purview of “manufacturing.” Other salient features of the Bill include separate definitions for “investigational new medical device” (i.e. new device which is an object of clinical investigation or research or development involving one or more human participants to determine its safety and the effectiveness) as well as “new medical device” (i.e. a device which has not been approved by the Central Licensing Authority), and the establishment of a new Medical Devices Technical Advisory Board whose role would be to advise the Central and State Governments.

A series of other welcome measures have been introduced by the Central Drug Standard Control Organization (CDSCO), Ministry of Health and Family Welfare, Government of India, to regulate the quality, safety and efficacy of medical devices, especially as it declared 2015 as the “Year for streamlining regulatory procedures without compromising patient safety.” Regulations governing clinical trials in healthcare had long been a grey area for India. As per CDSCO’s Order dated July 3, 2014, clinical trial procedures for medical devices shall be similar to the stringent provisions applicable to clinical trials of drugs/vaccines. The Drugs and Cosmetics (Fourth Amendment) Rules, notified in September, 2014, prescribe exhaustive labelling requirements and a five-year shelf-life rule for medical devices. The Rules also permit an extension of shelf-life subject to provision of satisfactory evidence justifying such extension. In December, 2014, CDSCO proposed comprehensive draft rules on good manufacturing practices and requirements of premises, plant and equipment for medical devices, in-vitro diagnostic kits and reagents, aimed at replacing Schedule M-III of the existing Rules. As FDI in manufacturing of medical devices is expected to increase, standardization of best practices is the need of the hour.

Incentives have also been provided under the direct tax regime to encourage scientific research and development (R&D), especially for businesses engaged in manufacturing activities. In May 2014, the Department of Scientific & Industrial Research (DSIR), Ministry of Science and Technology, issued new guidelines for approval of in-house R&D centers under Section 35(2AB) of the Income-Tax Act, 1961. Under this Section, where a company engaged in the business of bio-technology or in any business of manufacture or production of any defined article incurs any expenditure on scientific research on in-house R&D facilities approved by the prescribed authority (DSIR), it is allowed a deduction of a sum equal to two times the expenditure so incurred. This 200% deduction benefit is available subject to fulfilment of specific conditions and the assessee entering into an agreement with DSIR for cooperation in R&D. Nevertheless, it seems that the industry feels more fiscal incentives are required to position India as a global manufacturing hub for medical devices and generate cash flows for R&D. In this respect, the Federation of Indian Chambers of Commerce and Industry (FICCI) has proposed that the weighted deduction benefit be increased to 250% of approved expenditure incurred towards R&D for indigenous medical technology, and that manufacturers of indigenous medical devices be completely exempted from levy of Minimum Alternate Tax (MAT). Under Section 115(JB) of the IT Act, if the tax payable by any company (including a foreign company taxable in India) is less than 18.5% of its book profits, it is currently required to pay MAT which would be deemed as 18.5% of its book profits.
Indian industry has largely been biased towards importing finished medical devices due to these being chargeable with lesser import duty in many cases, as compared to import duty leviable on certain raw materials required for manufacturing medical devices. For example, importing titanium sheet/rod used for manufacturing implantable pacemakers attracts total import duty of 22.853% but importing the finished pacemaker itself attracts import duty of 12.034%. To address this imbalance, FICCI has called for no excise duty on medical devices that are manufactured in India (where imported raw material content is limited up to 50% of complete equipment cost) and no customs duty on raw materials imported by manufacturers of medical devices (where imported raw material content is limited up to 50% of complete equipment cost). Although the existing duty structure requires rationalization, relying on tariff barriers alone to promote local manufacturing may delay the entry of advanced medical technology and prove counter-productive for attracting foreign investment. Exempting or minimizing the service tax burden (currently levied at the rate of 12.36% on gross basis) for maintenance services with respect to medical devices has also been suggested by the industry. A recent news report summarized India’s strengths in the medical device industry as having “the right minds to produce low-cost gadgets, highly qualified doctors for advice, an ideal market that has a demand for these products and the capability to manufacture these products here.” Though multinationals already produce medical devices in India, these legislative measures will create a favorable investment climate and make manufacturing a profitable enterprise.

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The European Union and India launched negotiations towards a free trade agreement (a “FTA”) in June 2007. After several rounds, these negotiations entered an intense phase following the February 2012 EU-India Summit. Both partners would like the negotiations to conclude by the next summit. One of the important issues in this agreement, officially called the Bilateral Trade and Investment Agreement (the “BTIA”), is the overall ambition of the services package.

The services sector is extremely important for the EU and India in the on-going trade negotiations. Both the EU and India are predominantly service economies with more than 70% and 50% of their respective GDPs emanating from services. Thus, any trade agreement between the two that excludes services would ipso facto exclude the most important sectors for both partners. Moreover, there are significant barriers to services trade between the two, so that substantial coverage of services in a likely agreement could help to deliver improved access to both markets and also lead to more rapid liberalization of India’s services than can arguably be accomplished unilaterally. While services liberalization offers direct benefits, much like goods liberalization, the research literature suggests the presence of more comprehensive systemic benefits via the positive impact of services liberalization on manufacturing productivity. See, e.g., Arnold et. al, 2006a, b, 2007. Thus, the benefits to both economies from services liberalization will almost certainly be larger than those from goods trade liberalization.

**Stylized Facts**

The services sector accounts for more than half of India’s GDP and its importance as an employer has been growing over time, rising from 20% of total employment in 1995 to one-third of the total at present. For the EU as well, the sector contributes more than 70% of GDP and two-thirds of total employment. The same holds true of trade in services, which has also witnessed rapid growth in both economies. Services trade accounts for a fifth of all trade for the EU, while for India this share is even higher. See Table 1, taken from a study done for the Commonwealth Secretariat (2009), summarizes these data. The table demonstrates the importance of the services sector from the perspective of the BTIA between the EU and India.

### Table 1: Summary Data on the Significance of Services

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture, value added (% of GDP)</td>
<td>2.9</td>
<td>1.9</td>
<td>28.2</td>
<td>20.9</td>
</tr>
<tr>
<td>Industry, value added (% of GDP)</td>
<td>29.2</td>
<td>26.4</td>
<td>28.1</td>
<td>26.2</td>
</tr>
<tr>
<td>Services, value added (% of GDP)</td>
<td>67.9</td>
<td>71.7</td>
<td>43.6</td>
<td>52.9</td>
</tr>
<tr>
<td>Employment in agriculture (% of total employment)</td>
<td>6.3</td>
<td>4.2</td>
<td>66.7</td>
<td>55.7</td>
</tr>
<tr>
<td>Employment in industry (% of total employment)</td>
<td>32.2</td>
<td>28.7</td>
<td>12.9</td>
<td>12.2</td>
</tr>
<tr>
<td>Employment in services (% of total employment)</td>
<td>61.2</td>
<td>66.8</td>
<td>20.3</td>
<td>32.1</td>
</tr>
<tr>
<td>Services exports (% of total exports)</td>
<td>20.5</td>
<td>21.8</td>
<td>17.8</td>
<td>28.3</td>
</tr>
<tr>
<td>Services imports (% of total imports)</td>
<td>21.8</td>
<td>21.8</td>
<td>21.3</td>
<td>27.4</td>
</tr>
</tbody>
</table>

**Source:** Commonwealth Secretariat, Innocent Bystanders: Implications of an EU-India Free-Trade Agreement for Excluded Countries, Commonwealth Secretariat, London (Feb, 2009).

Examining services trade more closely, India witnessed the second fastest growth in services trade over 1996-2006 amongst the top twenty services traders in 2006, with a growth rate of 24% per annum for services exports and 17.4% per annum for services imports (see
Figure 1 below). With the exception of Ireland, which tops the list in both cases, India’s growth rate, especially of services exports, is considerably higher than that of other EU Member States as well as the rest of the “Quad” (US, Canada and Japan) and China.

Figure 1: Growth rate of services trade over 1996-2006 for the top twenty services traders in 2006

Source:
World Bank, Sustaining India’s Services Revolution: Access to Foreign Markets, Domestic Reforms and International Negotiations (2004); author’s own calculations.

Considering next the composition of services trade in these two economies, computer-related (“CRS”) and other business services (“OBS”) dominated India’s services trade in 2010, followed by transportation and travel services (see Figure 2). In the case of the EU, the most traded services in 2011 consisted of OBS, transportation, and travel (see Figure 3).
India’s services exports also changed dramatically over the last decade, both in terms of value (more than a six-fold increase from US$16.3 to US$124.3 billion) and structure (see Table 2). Significant changes in export structure occurred in the share of travel services, down from 21.5% in 2000 to 11.4% in 2010; communication services, down from 7% to 1.1%; CRS, up from 39% to 45.8%; and OBS, up from 2% to 17.4%. In terms of growth...
rates, OBS showed a whopping 64 times rise in services exports over 2000-2010, followed by financial services where exports grew nearly 16 times.

Table 2: Evolution of India’s Service Exports 2000, 2010 (USD millions)

<table>
<thead>
<tr>
<th>Sector</th>
<th>2000</th>
<th>2010</th>
<th>Growth over 2000-10</th>
<th>Percentage shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transportation</td>
<td>2046</td>
<td>13248</td>
<td>5.5</td>
<td>12.6</td>
</tr>
<tr>
<td>Travel</td>
<td>3497</td>
<td>14160</td>
<td>3.0</td>
<td>21.5</td>
</tr>
<tr>
<td>Communication</td>
<td>1138</td>
<td>1412</td>
<td>0.2</td>
<td>7.0</td>
</tr>
<tr>
<td>Construction</td>
<td>536</td>
<td>525</td>
<td>0.0</td>
<td>3.3</td>
</tr>
<tr>
<td>Insurance</td>
<td>270</td>
<td>1782</td>
<td>5.6</td>
<td>1.7</td>
</tr>
<tr>
<td>Financial</td>
<td>347</td>
<td>5834</td>
<td>15.8</td>
<td>2.1</td>
</tr>
<tr>
<td>CRS</td>
<td>6341</td>
<td>56878</td>
<td>8.0</td>
<td>39.0</td>
</tr>
<tr>
<td>Royalties and license fees</td>
<td>60</td>
<td>128</td>
<td>1.1</td>
<td>0.4</td>
</tr>
<tr>
<td>OBS</td>
<td>334</td>
<td>21667</td>
<td>63.9</td>
<td>2.1</td>
</tr>
<tr>
<td>GNIE</td>
<td>651</td>
<td>485</td>
<td>-0.3</td>
<td>4.0</td>
</tr>
<tr>
<td>Others</td>
<td>1048</td>
<td>8190</td>
<td>6.8</td>
<td>6.4</td>
</tr>
<tr>
<td>TOTAL</td>
<td>16268</td>
<td>124309</td>
<td>6.6</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: UN Services Trade Database; own calculations

Changes in EU27 services exports, on the other hand, have not been comparable to those of India (see Table 3). In terms of value, services exports increased by 10.5% from €524.3 to €579.2 billion over 2008-2011. The structure has also remained fairly stable over time (see below), although some sectors witnessed considerable growth in exports - personal, cultural and recreational services (“PCR”), communication services, CRS, and royalty and license fees.

Table 2: Composition of EU27 service exports 2008, 2011 (€billions)

<table>
<thead>
<tr>
<th>Sector</th>
<th>2008</th>
<th>2011</th>
<th>Growth (%)</th>
<th>Percentage shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transport</td>
<td>135.9</td>
<td>134.5</td>
<td>-1.0</td>
<td>25.9</td>
</tr>
<tr>
<td>Travel</td>
<td>74.1</td>
<td>85.0</td>
<td>14.7</td>
<td>14.1</td>
</tr>
<tr>
<td>Communication</td>
<td>12.4</td>
<td>17.8</td>
<td>43.2</td>
<td>2.4</td>
</tr>
<tr>
<td>Construction</td>
<td>17.6</td>
<td>17.1</td>
<td>-2.8</td>
<td>3.4</td>
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<tr>
<td>Insurance</td>
<td>13.1</td>
<td>12.6</td>
<td>-3.7</td>
<td>2.5</td>
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<tr>
<td>Financial</td>
<td>50.5</td>
<td>47.7</td>
<td>-5.6</td>
<td>9.6</td>
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<tr>
<td>CRS</td>
<td>30.5</td>
<td>41.1</td>
<td>34.7</td>
<td>5.8</td>
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<tr>
<td>Royalties &amp; license fees</td>
<td>27.3</td>
<td>35.7</td>
<td>30.9</td>
<td>5.2</td>
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<td>OBS</td>
<td>150.4</td>
<td>173.0</td>
<td>15.0</td>
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<td>PCR</td>
<td>4.9</td>
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<td>7.6</td>
<td>7.1</td>
<td>-6.8</td>
<td>1.4</td>
</tr>
<tr>
<td>TOTAL</td>
<td>524.3</td>
<td>579.2</td>
<td>10.5</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Eurostat
In order to compare the global competitiveness of these two economies in the export of these various services, analysts consider indices of Revealed Comparative Advantage ("RCA") from the Commonwealth Secretariat (2009) reported in Tables 4 and 5 below. The RCA index for a given services sector in country A is calculated by taking the share of the sector’s exports in A’s total exports of services, and dividing this by the ratio of a comparator’s exports in this sector to the total services exports of the comparator. An RCA index exceeding unity indicates a comparative advantage in the sector, while a value less than one indicates a comparative disadvantage. The Report used the OCED and India as a comparator instead of the rest of the world because of data constraints - the combined services exports of the OECD and India made up more than 75% of global services exports in the last decade.

Table 4 shows India’s massive comparative advantage in the export of IT services as well as a significant RCA in exporting communication services, the latter primarily comprising telecom exports. Private enterprise operating on relatively competitive markets primarily drive these subsectors. They are also amongst the most-liberalized sectors of the Indian economy in terms of market access to foreign investment. However, the interesting difference emanates from the extent of state intervention, government policy, and regulation in these services. Indian IT is said to have flourished primarily on account of the sector being “forgotten” by Indian policy makers and continues to operate without a regulator even now. See Joseph, K.J. and K.N. Harilal, Structure and Growth of India’s IT Exports: Implications of an Export-Oriented Growth Strategy, Economic and Political Weekly (Aug. 2001); Joseph, K.J., Growth of ICT and ICT for Development: Realities of the Myths of the Indian Experience, Discussion Paper No. 2002/78, UNU/WIDER Conference, Helsinki (May 10-11, 2002). On the other hand, India has always had a National Telecom Policy especially in the aftermath of the New Industrial Policy 1992, and this sector also has an independent regulator in the form of the Telecom Regulatory Authority of India. The EU15, on the other hand, shows an RCA in several sectors - communication, construction, financial, CRS, and OBS (see Table 5).

Table 4: India’s Revealed Comparative Advantage in Services

<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Transport</td>
<td>0.9</td>
<td>0.7</td>
<td>0.5</td>
<td>0.6</td>
<td>0.6</td>
<td>0.6</td>
<td>0.6</td>
<td>0.5</td>
<td>0.5</td>
</tr>
<tr>
<td>Travel</td>
<td>1.0</td>
<td>0.7</td>
<td>0.6</td>
<td>0.7</td>
<td>0.6</td>
<td>0.6</td>
<td>0.7</td>
<td>0.6</td>
<td>0.5</td>
</tr>
<tr>
<td>Communication</td>
<td>1.0</td>
<td>2.2</td>
<td>3.3</td>
<td>3.5</td>
<td>2.0</td>
<td>1.8</td>
<td>1.7</td>
<td>1.5</td>
<td>1.3</td>
</tr>
<tr>
<td>Construction</td>
<td>0.3</td>
<td>0.4</td>
<td>1.0</td>
<td>1.7</td>
<td>0.4</td>
<td>0.5</td>
<td>0.9</td>
<td>0.6</td>
<td>0.2</td>
</tr>
<tr>
<td>Insurance</td>
<td>1.3</td>
<td>0.9</td>
<td>0.7</td>
<td>0.9</td>
<td>0.8</td>
<td>0.6</td>
<td>0.5</td>
<td>0.7</td>
<td>0.8</td>
</tr>
<tr>
<td>Financial</td>
<td>0.7</td>
<td>0.4</td>
<td>0.4</td>
<td>0.4</td>
<td>0.4</td>
<td>0.5</td>
<td>0.2</td>
<td>0.2</td>
<td>0.3</td>
</tr>
<tr>
<td>IT</td>
<td>10.0</td>
<td>9.1</td>
<td>8.3</td>
<td>11.7</td>
<td>11.0</td>
<td>11.0</td>
<td>10.0</td>
<td>8.2</td>
<td>8.2</td>
</tr>
<tr>
<td>Royalties</td>
<td>0.0</td>
<td>0.0</td>
<td>0.1</td>
<td>0.1</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.1</td>
</tr>
<tr>
<td>OBS</td>
<td>0.4</td>
<td>0.3</td>
<td>0.3</td>
<td>0.1</td>
<td>0.1</td>
<td>0.2</td>
<td>0.2</td>
<td>0.6</td>
<td>0.7</td>
</tr>
<tr>
<td>Personal etc.</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.2</td>
<td>0.2</td>
</tr>
<tr>
<td>Govt.</td>
<td>0.8</td>
<td>1.3</td>
<td>1.2</td>
<td>1.4</td>
<td>1.1</td>
<td>0.5</td>
<td>0.3</td>
<td>0.3</td>
<td>0.2</td>
</tr>
</tbody>
</table>

Finally, looking at EU27-India bilateral trade in services in Table 6, the reported value of this trade increased from €17 billion in 2008 to €19.6 billion in 2010. Putting things in perspective, this bilateral services trade accounted for 12 percent of India’s global services trade in 2010 but only 2% of extra-EU27 services trade. The major bilateral trading services sectors include OBS (28% of total bilateral services trade in 2010), transportation (share of 27%), CRS and travel services (together making up for 32% of total bilateral services trade), with the EU showing a surplus in most sectors except travel, OBS, and PCR services.

**Table 6: EU-India Bilateral trade in Services (€ millions)**

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>8,938</td>
<td>9,137</td>
<td>10,862</td>
<td>8,129</td>
<td>7,390</td>
<td>8,692</td>
<td>809</td>
<td>1,747</td>
<td>2,170</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transportation</td>
<td>2,850</td>
<td>2,391</td>
<td>3,577</td>
<td>1,821</td>
<td>1,488</td>
<td>1,835</td>
<td>1,029</td>
<td>903</td>
<td>1,742</td>
</tr>
<tr>
<td>Travel</td>
<td>1,018</td>
<td>874</td>
<td>1,230</td>
<td>2,017</td>
<td>1,470</td>
<td>1,660</td>
<td>-999</td>
<td>-597</td>
<td>-430</td>
</tr>
<tr>
<td>Other services</td>
<td>5,069</td>
<td>5,868</td>
<td>6,052</td>
<td>4,282</td>
<td>4,426</td>
<td>5,182</td>
<td>788</td>
<td>1,442</td>
<td>870</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Communications services</td>
<td>278</td>
<td>261</td>
<td>230</td>
<td>267</td>
<td>207</td>
<td>187</td>
<td>10</td>
<td>55</td>
<td>43</td>
</tr>
<tr>
<td>Construction services</td>
<td>322</td>
<td>487</td>
<td>481</td>
<td>132</td>
<td>224</td>
<td>204</td>
<td>190</td>
<td>263</td>
<td>277</td>
</tr>
<tr>
<td>Insurance services</td>
<td>73</td>
<td>70</td>
<td>81</td>
<td>54</td>
<td>55</td>
<td>89</td>
<td>18</td>
<td>15</td>
<td>-8</td>
</tr>
<tr>
<td>Financial services</td>
<td>350</td>
<td>322</td>
<td>310</td>
<td>80</td>
<td>133</td>
<td>187</td>
<td>270</td>
<td>189</td>
<td>123</td>
</tr>
<tr>
<td>Computer and information services</td>
<td>1,356</td>
<td>1,732</td>
<td>1,811</td>
<td>1,125</td>
<td>1,288</td>
<td>1,530</td>
<td>230</td>
<td>444</td>
<td>281</td>
</tr>
<tr>
<td>Royalties and license fees</td>
<td>212</td>
<td>247</td>
<td>268</td>
<td>50</td>
<td>29</td>
<td>49</td>
<td>162</td>
<td>218</td>
<td>219</td>
</tr>
<tr>
<td>Other business services</td>
<td>2,243</td>
<td>2,548</td>
<td>2,693</td>
<td>2,472</td>
<td>2,333</td>
<td>2,835</td>
<td>-239</td>
<td>215</td>
<td>-141</td>
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<tr>
<td>Personal cultural and recreational</td>
<td>28</td>
<td>21</td>
<td>32</td>
<td>30</td>
<td>69</td>
<td>33</td>
<td>-2</td>
<td>-48</td>
<td>-0.2</td>
</tr>
<tr>
<td>Government services other</td>
<td>208</td>
<td>181</td>
<td>146</td>
<td>71</td>
<td>89</td>
<td>69</td>
<td>137</td>
<td>91</td>
<td>77</td>
</tr>
<tr>
<td>Total extra-EU27</td>
<td>525</td>
<td>304</td>
<td>483</td>
<td>454</td>
<td>405</td>
<td>416</td>
<td>453</td>
<td>604</td>
<td>854</td>
</tr>
<tr>
<td>India / total extra-EU27</td>
<td>1.70%</td>
<td>1.90%</td>
<td>2.00%</td>
<td>1.80%</td>
<td>1.80%</td>
<td>1.90%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Source:** Eurostat
Barriers to services trade between EU-India

Despite the importance of the services sector and its growing share in bilateral trade between these two partners, there are significant barriers to services trade between the two. According to the World Bank’s recently released services trade restrictiveness index (“STRI”), India has an overall value of 65.7 which places it amongst economies with the most restrictive policies on services trade. Most EU economies, on the other hand, are far less restrictive. Overall STRI value averages around nineteen for EU-15 and around sixteen for the “new” member states.

In general, India’s services suffer from simultaneously excessive and inadequate regulation. Many explicit and implicit restrictions - tax incentives and labor laws for instance - favor small scale units and discriminate against larger firms. Weaknesses in the institutional and regulatory regimes have resulted in disparities in the quality of services and the abilities of professionals. Legitimate universal access goals are pursued not based on the most efficient means but through elaborate restrictions involving efficiency losses without any commensurate gain in equity and access. These policies result in domestic firms that are sub-optimal in size, operate in a weakened regulatory environment, and are burdened with the legacy of pursuing equity goals. See, e.g., World Bank, Sustaining India’s Services Revolution: Access to Foreign Markets, Domestic Reforms and International Negotiations (2004).

“Imports of services to India suffer from a range of horizontal barriers such as archaic laws, multiplicity of rules and regulations, inconsistent practices across states and multiplicity of contact points at different levels of bureaucracy, regulatory gaps, public sector bias, and limits on foreign investment and ownership.” Commonwealth Secretariat, Innocent Bystanders: Implications of an EU-India Free-Trade Agreement for Excluded Countries, Commonwealth Secretariat, London (Feb, 2009). Some of these issues, such as inconsistent practices across states, different levels of bureaucracy, and restrictions on the movement of services providers, are also concerns on the part of the Indian services exporter in the EU market. India’s services sector-specific FDI policy is listed in Table below.
### Table 7: India’s FDI policy in services

<table>
<thead>
<tr>
<th>SERVICE SECTOR</th>
<th>ISSUES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountancy</td>
<td>FDI not allowed; Foreign Services Providers (FSP) not allowed to undertake statutory audit of companies. Only partnership firms allowed with number of partners limited to 20.</td>
<td></td>
</tr>
<tr>
<td>Architecture</td>
<td>No cap on FDI. Foreign architects need to be registered by the Council of Architecture as individuals. Appointment of foreign architects as consultants to Indian architects subject to case-by-case approval by GoI.</td>
<td></td>
</tr>
<tr>
<td>Legal</td>
<td>FDI not allowed. International law firms not allowed presence. Indian advocates cannot enter into profit-sharing arrangements with non-Indian advocates.</td>
<td></td>
</tr>
<tr>
<td>Computer-related or software services</td>
<td>No cap on FDI. No explicit barriers on commercial presence of foreign firms.</td>
<td></td>
</tr>
<tr>
<td>Management and Consultancy</td>
<td>No cap on FDI. Foreign firms must be incorporated in India.</td>
<td></td>
</tr>
<tr>
<td>Postal</td>
<td>FDI not allowed.</td>
<td></td>
</tr>
<tr>
<td>Courier</td>
<td>No cap on FDI</td>
<td></td>
</tr>
<tr>
<td>Telecommunications</td>
<td>Up to 74% FDI allowed.</td>
<td></td>
</tr>
<tr>
<td>Audio-visual Services</td>
<td>No cap on FDI in motion picture.</td>
<td></td>
</tr>
<tr>
<td>Construction and related engineering</td>
<td>No cap on FDI.</td>
<td></td>
</tr>
<tr>
<td>Distribution</td>
<td>No cap on non-retail segments, 51% limit on FDI in multi-brand retail subject to state implementation, up to 100 percent FDI in single-brand retail.</td>
<td></td>
</tr>
<tr>
<td>Education</td>
<td>FDI permitted without cap through the automatic route.</td>
<td></td>
</tr>
<tr>
<td>Environmental</td>
<td>FDI permitted without cap through the automatic route.</td>
<td></td>
</tr>
<tr>
<td>Financial services (Insurance)</td>
<td>Foreign equity limit of 26% in most segments. Minimum capitalization norms.</td>
<td></td>
</tr>
<tr>
<td>Financial services (Banking)</td>
<td>Private domestic equity limited to 49% and foreign equity limited to 74% with 10% voting rights. FDI and portfolio investment in nationalized banks subject to overall statutory limits of 20%.</td>
<td></td>
</tr>
<tr>
<td>Health and Social Services</td>
<td>No cap on FDI. Movement of FSP subject to registration by the Medical/Dental/Nursing Council of India.</td>
<td></td>
</tr>
<tr>
<td>Tourism</td>
<td>No cap on FDI.</td>
<td></td>
</tr>
<tr>
<td>Recreational, Cultural and Sporting</td>
<td>FDI is permitted in entertainment services (including theatre, live bands and cultural services), libraries, archives and museums. Up to 74% FDI allowed in broadcasting services, 26% FDI allowed in print media. Lottery, betting and gambling are not allowed.</td>
<td></td>
</tr>
<tr>
<td>Transport</td>
<td>One hundred percent FDI in maritime and road transport, 49% FDI in aviation.</td>
<td></td>
</tr>
</tbody>
</table>

**Source:** India’s FDI Policy (2012)
Information from the EU’s Market Access Database suggests that limitations on the operation of foreign banks and a relatively closed insurance sector continue to be issues of concern. In general, the EU has key strategic interests in the Indian market in banking, finance, insurance, retail, accountancy, legal, telecom, and maritime services. Sectors like IT and telecom are already significantly liberalized in India while others such as construction, health, banking, insurance, education, retail, and courier are moderately liberalized. Legal, accountancy and postal services, on the other hand, are completely closed. From the perspective of the BTIA, the EU would like to consolidate their market access in Indian IT and telecom services to significantly improve market access in the moderately liberalized services and to open up the closed sectors.

The WTO’s General Agreement on Trade in Services classifies four “modes” of services delivery; these are the different ways in which services can be traded across borders. Mode One is the cross-border supply of services. An illustration of this is business process outsourcing units in India doing online medical transcriptions. Mode Two is consumption of services abroad, such as Indian students going abroad to study. Mode Three is commercial presence, such as foreign banks setting up operations in India. Finally, Mode Four is the movement of natural persons across borders to deliver services, such as Indian software professionals delivering and testing a system in London. The important issues for India are market access for cross-border services (Mode One) and service professionals (Mode Four including contractual service providers and service professionals related to Mode Three) and increasingly foreign investment in services abroad (Mode Three).

The Ministry of Commerce and Industry maintains that the focus subsectors are likely to include computer and related services, financial services, and energy services. In Mode One, India would like to increase the coverage of subsectors to research and development, dental and health related sectors, and telephone-based services. In Mode Three, issues relate to the need for huge minimum capital requirements imposed by the EU, residency requirements, restrictions on legal entity, and the absence of national treatment. In Mode Four, India would like to press for the mutual recognition of qualifications to make effective market access possible.

Other issues relate to the avoidance of double taxation on social security benefits of Indian services professionals abroad; visa issues and labor market and economic need tests for Indian services providers abroad; and EU domestic regulation being more burdensome than necessary. In addition to specific modal interests, general issues of priority for India are transparency in EU policies and their implementation and the need for harmonization of EU policies across member states. “As an illustration from the financial services sector, India will argue that banking sector licenses granted by any one EU Member be acceptable across the EU as the need to apply for separate licenses in each EU Member state has been pointed to as one of the cumbersome elements of trade in banking services with the EU by Indian government officials.” Commonwealth Secretariat, Innocent Bystanders: Implications of an EU-India Free-Trade Agreement for Excluded Countries, Commonwealth Secretariat, London (Feb, 2009).

From India’s perspective, it may be easier to negotiate provisions on Modes One and Three into the BTIA and also examine regulatory issues vis-a-vis Mode Four. It may, however, be more difficult to negotiate mutual recognition agreements across services between these two trading partners. From the EU’s perspective, it may be much easier to consolidate market access in India’s liberal sectors and increase access in the moderately liberalized ones. Opening up completely closed sectors, on the other hand, is likely to be the most difficult to achieve.

**Conclusion**

Services trade is likely to be a major component of the EU-India BTIA. Both parties have a strong interest in the service sector and in mitigating the many barriers to mutual trade. The BTIA, therefore, provides a useful opportunity to both partners to address these barriers. This said, there are two notable caveats to preferential services liberalization.
First, the sequence of liberalization matters more in services trade than in the case of goods trade because location-specific sunk costs of production are important, so even temporary privileged access for an inferior supplier can translate into a long-term market advantage. Mattoo, A. & C. Fink, Regional Agreements and Trade in Services: Policy Issues, World Bank Policy Research Working Paper 2852 (June 2002). First-mover advantages for an inferior supplier would have durable adverse welfare consequences relative to a more even-handed liberalization, and the country could be stuck permanently with weaker providers even when it subsequently liberalizes on an MFN basis. Such incumbency-advantages are likely to be particularly important in services with network externalities.

Second, it may be difficult, if not impossible, to open up some sectors on a preferential basis. While market access and national treatment restrictions may be relaxed on a preferential basis, the removal or reduction of most regulatory barriers has more or less to be on an MFN basis. For instance, the number of partners in Indian accountancy firms is restricted to twenty. If Indian regulatory authorities relaxed this rule, it would be extremely difficult to limit this regulation to preferential suppliers. Similarly, improved prudential regulation of the financial sector would be applicable to everybody, not just to the EU and Indian firms. In such cases, de jure preferential liberalization becomes de facto MFN liberalization. Sauvé, P. & A. Shingal, Reflections on the Preferential Liberalization of Services Trade, Journal of World Trade 45:5, (2002).

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His research on trade in services, government procurement and preferential trade agreements has been published in peer-reviewed journals as well as by the World Bank, the European Commission and the Commonwealth Secretariat. Anirudh is also affiliated with the Centre for the Analysis of Regional Integration at Sussex (CARIS) and has also worked with the World Bank, WTO and the private sector. Anirudh graduated summa cum laude on the MILE Program at the WTI and also holds a Masters degree in Economics from the Delhi School of Economics. His undergraduate degree was in Economics (Honours) from St. Stephen's College, Delhi University. He can be reached at anirudh.shingal@wti.org.
By Aseem Chawla, Shamik Saha, Pranshu Goel

Bombay High Court Holds That The Issuance Of Shares At Premium Does Not Per Se Yield “Income”

Vodafone India Services Private Limited (“Company” or “taxpayer” or “Vodafone”), a wholly owned subsidiary of Vodafone Tele-Services (India) Holdings Ltd. (“Holding Company”), issued 289,224 equity shares of face value of ₹10 at a premium of ₹8,509 per share. The taxpayer received a total consideration of ₹2,463,800,000 at a fair market value of ₹8,519 per share computed in accordance with the methodology prescribed by the Government of India under the Capital Issues (Control) Act, 1946.

The subject transaction of allotment of equity shares along with the Arm’s Length Price (ALP) of ₹8,519 per share was reported by the taxpayer in the Accountants Report (Form 3CEB) as an international transaction. However, the taxpayer had placed his contention in FORM 3CEB by way of a note that the said international transaction was being reported only as a matter of abundant caution and would by no means affect the income of the Company.

During the course of regular assessment proceedings the Assessing Officer (AO) referred the transactions mentioned in Form 3CEB to the Transfer Pricing Officer (TPO) for calculation of the Arm’s Length Price of the reported transactions.

The TPO, in his order, stated that the transaction was an international Transaction governed by the provisions of Chapter X of the Act and rejected the price at which the shares were issued and determined the ALP at ₹53,775 per share. The TPO also stated that the amount of deficit caused by issuance of shares at the lower premium will be considered as a deemed loan advanced by the taxpayer to its holding company and the interest on such loan would therefore have a bearing on the profits of the taxpayer. Thus, the TPO made a total adjustment of ₹13,972,600,000 encapsulating the adjustment on account of the difference in the ALP of the equity shares and a secondary adjustment on account of interest on the deemed loan. However, the TPO only determined the ALP and left it on the AO to decide whether any Income has arisen to Vodafone or not on account of the subject transaction.

In response to the impugned draft assessment order, Vodafone filed its objection with the Dispute Resolution Panel (DRP), however limiting its objection to the computation/valuation and quantification of the ALP. Meanwhile, the company also filed for a writ before the Bombay High Court challenging the jurisdiction of the tax authorities to tax the issue of equity shares to its holding company under Chapter X of the Act.

The High Court, examined the matter placed before it and quashed the order of the AO, TPO and the Impugned directions of the DRP, and held in favor of Vodafone. Vodafone India Services Private Limited v. Union of India (2014) 368 ITR 1 (Bom). The High Court in its judgment dated October 10, 2014, held that “income” arising from an International transaction is a condition precedent for application of Chapter X of the Act. While interpreting the word “Income” the Bombay High Court held that the word income has a well understood meaning and is duly defined under the Act. Income in its normal meaning as defined under Section 2(24) of the Act does not include Capital receipts. The amount received on issue of share capital including the premium is undoubtedly on capital account.

Considering, what was being sought to be taxed is the amount of the alleged shortfall in the capital not received from the holding company, the Court held that in the absence of express provisions, neither the capital receipt by the company nor the alleged shortfall between the so called Fair Market Value and issue price of equity shares can be considered as income within the meaning of the expression “Income” as defined under the Act. The High Court further held that the transaction on capital account or on account of restructuring would become taxable to
the extent it impacts income or expenditure. It is that income which is to be determined having regard to the ALP and not the total capital receipt. The entire consideration received would not be a subject matter of tax.

**Supreme Court Holds Electronic Records Inadmissible By Way Of Secondary Evidence**

The Supreme Court of India in *Anvar P.V. v. P.K. Basheer* [2014 (10) SCC 473], has ruled that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B, Evidence Act, 1872 are satisfied.

The respondent had been elected from Eranad Constituency to the Kerala Legislative Assembly during the general election held on April 13, 2011. The Appellant, the loser in that election, sought to have the Kerala High Court set aside the election under Section 100(1)(b) read with Section 123(2)(ii) and (4) of The Representation of the People Act, 1951 (the RP Act), on the ground that the winner have engaged in certain corrupt practices.

The Kerala High Court dismissed the Appellant’s contention by holding that the election petition was not maintainable under Section 123(2)(a)(ii), RP Act and corrupt practices pleaded in the petition were also not proven. Hence, the election could not be set aside under Section 100(1)(b) of the RP Act. Aggrieved by the decision of the Kerala High Court, the Appellant appealed to the Supreme Court of India.

The evidence consisted compact discs depicting the respondent’s speeches in which he alluded to the corrupt practices. The three justice bench of the Supreme Court overruled an earlier decision of a two justice bench of the same court in *State (NCT of Delhi) v. Naajot Sandhu alias Afsan Guru* [(2005) 11 SCC 6000] (the “Parliament attack Case”) which had held a print out of cell phone calls to be admissible without the underlying digital data. These copies were held admissible as secondary documentary evidence under Evidence Act, Section 63. The court in *Anvar vs. Basheer*, held that a compact disc of songs and speeches which the Appellant claimed contained statements of the admission of corrupt practices was not admissible as secondary documentary evidence without satisfying the added requirement of Section 65B of an affidavit or certification authenticating that the CD was generated from the original media, including information on the computer on which the copy was made. The Court held that the trial court must take note of Evidence Act, Section 65B, which is a special provision dealing with admissibility of copies of electronic records.

Applying the principle of *generalia specialibus non derogant* (special law will always prevail over the general law), the Supreme Court in *Anvar vs. Basheer*, held that evidence relating to electronic records being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act must yield to the specific provision requiring authentication set forth in Section 65B. In *Anvar*, the Supreme Court held that an electronic record by way of secondary evidence (i.e, a CD) was inadmissible without the authentication required by Section 65B of the Evidence Act. Since, the Appellant admittedly did not produce any certificate of authentication as required under Section 65B with respect to the CDs, this evidence was held inadmissible and the Appellant was unable to support his allegation that his political adversary had engaged in corrupt practices alluded to in his speeches as recorded on such CDs, and his appeal was dismissed.

**Supreme Court Holds That An Objection To Jurisdiction Of An Arbitral Tribunal Must Be Taken At The Stage When The Statement Of Defense Is Submitted**

In *MSP Infrastructure Ltd. vs. M.P. Road Devl. Corp. Ltd.* [2014 (13) SCALE 601], the Supreme Court held that a party to an arbitration proceeding may not object (under Section 34 of the Arbitration and Conciliation Act, 1996) to the arbitral tribunal’s jurisdiction after it submits the defense’s written statement.

The appellant and the respondent had entered into a contract for improving a road in the State of Madhya Pradesh (M.P.).
Due to a dispute, the respondent terminated the said contract and cashed the bank-guarantee. The Appellant challenged the termination and cashing before the Calcutta High Court. After recording the “Terms of Settlement” between the parties, the Calcutta High Court disposed of the suit and referred the dispute to arbitration.

The arbitration tribunal awarded the appellant approximately ₹69 million. The respondent filed a petition before the Additional District & Sessions Judge, Bhopal (M.P.), for setting aside the award under Section 34 of the Arbitration Act, 1996. Later, the respondent also moved to amend the original petition under Section 34 to add additional grounds of objection. The Additional District & Sessions Judge noted that after respondent’s application was being filed two years after the filing of the petition and rejected the application as being prejudicial to the appellant.

Respondent appealed the order denying leave to amend to the Madhya Pradesh High Court. Without addressing its merits High Court allowed the amendment holding that the Indian Council of Arbitration, New Delhi had no jurisdiction to entertain or decide the said dispute and the impugned award was a total nullity and non-est in the eye of law.

Appellant then appealed before the Supreme Court arguing that the amendment allowed by the Madhya Pradesh High Court is contrary to Section 16, Arbitration Act, 1996 and the tribunal under the Arbitration Act, 1996 was fully empowered to enter into and decide the said dispute, since the dispute was referred in pursuance of an arbitration clause contained in the Concession Agreement. Also, on two occasions, the parties asserted and consented that the dispute between them would be resolved by Arbitration under the provisions of the Arbitration Act, 1996. Therefore, according to the Appellant, there was no merit whatsoever in the ground introduced by the amendment application.

The Supreme Court held that 16(2) bars a party from challenging a tribunal’s jurisdiction belatedly, if it submits to the jurisdiction of the tribunal by filing the statement of defense and presenting evidence.

Aseem Chawla is the founding partner of MPC Legal in New Delhi and leads the firm’s tax practice group. He is currently Vice Chair of India Committee & Asia Pacific Committee of the ABA Section of International Law. He is the Co-Chairman of the Direct Taxes Committee of PHD Chamber of Commerce and Industry. He can be reached at aseem.chawla@mpclegal.in.

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Please join us that the **ABA Section of International Law Spring 2015** Meeting at the Hyatt Regency on Capitol Hill in Washington, D.C. April 28 - May 2, 2015

The India Committee is co-sponsoring or involved in three panel sessions. Committee senior advisor **Eric Wulff** will moderate the first panel and will be accompanied on the panel by SILF President **Lalit Bhasin**. Committee Co-Chair, **Shikhil Suri** will speak at the second panel, and committee member **Roland Trope** will be a speaker on the third panel:

**Friday, May 1, 2015**  
8:00 AM - 8:50 AM

**THE LEGAL LANDSCAPE IN INDIA IS CHANGING FOR FOREIGN LAWYERS: WHAT IS COMING AND WHEN**

The recent change in government in India has produced an official softening of the attitudes towards foreign lawyers establishing in India. Recently, prominent members of the Indian Bar have started to discuss in important legal and business publications the opening of the Indian Legal system to foreign lawyers and the possible consequences to the Indian Bar. While it appears likely that change is in the works, the nature and extent of the coming changes is still very much an open question. Also, the pace of that change still needs to be resolved. This panel will include speakers from the Indian Bar, the ABA, and academia to discuss these issues and try to put them into perspective for both the Indian Bar and foreign lawyers interested in establishing in India.

**MODERATOR:**  
**Erik Wulff**, *DLA Piper LLP*, Washington, DC

**SPEAKERS:**

- **Lalit Bhasin**, *Bhasin & Co*, and President SILF, New Delhi India  

**Friday, May 1, 2015**  
9:00 AM – 10:30 AM

**THE CHALLENGING JOB OF MANAGING LABOR ISSUES IN ASIA’S MOSAIC OF CULTURES AND JURISDICTIONS**

In today’s multipolar world, companies hire employees to work in locations worldwide, with many being faraway outposts. Even in a world where laws often tend to converge, nations continue to cultivate their idiosyncrasies. This is true in particular for labor and employment matters, thus making managing employees globally a headache. Oftentimes, labor and employment law is the reflection of a nation’s identity, its philosophy of labor and, more broadly, social relations. A single uniform employment policy for employees working for an international employer in various jurisdictions, without taking into account national specificities, remains an elusive objective. The discussion will include an introduction to the employment and labor issues in the U.S., China, India, Japan and Korea. It will compare and contrast employment at will vs. term relationships, restrictive covenants and implementing them, wage and hour requirements, employment discrimination and unfair treatment, unions and collective action, labor dispute resolution and practical tips for avoiding or minimizing risks.

**MODERATOR:**  
**Philippe Shin**, *Shin & Kim*, Seoul, Republic of Korea

**SPEAKERS:**

- **Shikhil Suri**, *Suri & Suri Law Offices*, Washington, DC  
- **Hideki Thurgood Kano**, *Anderson Mori & Tomotsune*, Tokyo, Japan  
- **Robin Kaptzan**, *Haworth & Lexon*, Shanghai, China  
- **Baba M. Zipkin**, *IBM*, Washington, DC
RECKONING WITH IRAN: TRANSACTIONS AMIDST THE TIGHTENING OR UNWINDING OF SANCTIONS

On November 24, 2013, the P5+1 countries (Germany, China, France, Russia, U.K. and the U.S. plus the EU) and Iran agreed to the Joint Plan of Action – an interim pact on a short term freeze by Iran of its nuclear enrichment program in exchange for a concurrent limited relaxation of economic sanctions on Iran. Even if the parties reach a comprehensive agreement, sanctions will probably not abruptly cease, but be unwound in stages. Our panel of experts will discuss the status of sanctions that target Iran, compliance issues that any change in the sanctions might create for U.S., companies and overseas counterparties, stresses that enforcement of sanctions generates for countries, like India, that have significant trade with Iran, scenarios that highlight the need for careful legal advice for U.S. and overseas companies seeking to engage in transactions without contravening the applicable regulations, and challenges for parties seeking access to blocked funds.

MODERATOR:

Harold Burman, U.S. Department of State, Washington, DC

SPEAKERS

David J. Brummond, DLA Piper, LLP, Washington, DC

Sarah Jane Hughes, Indiana University Maurer School of Law, Bloomington, IN

Roland Trope, Trope and Schramm LLP, New York NY
Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee’s jurisdiction. These submissions are then compiled as respective committee’s Year-in-Review articles and typically published in the Spring Issue of the Section’s award-winning quarterly scholarly journal, The International Lawyer. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee’s Year-in-Review by emailing the Co-Chairs and requesting submission guidelines.

India Law News

*India Law News* is accepting articles and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Summer 2015 issue of India Law News will carry a special focus on Entertainment Law, including Bollywood. Please read the Author Guidelines available on the India Committee website. Note that, India Law News does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the Editorial Board.
The India Committee is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-U.S. relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the U.S., as well as other countries, in an effort to support the global Rule of Law.

**BECOME A MEMBER!**

Membership in the India Committee is free to all members of ABA International. If you are not an ABA International member, you may become one by signing up on the ABA website. We encourage active participation in the Committee’s activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the Co-Chairs. You may also participate by volunteering for any of the Committee’s projects, including editing a future issue of the India Law News.

Membership in the India Committee will enable you to participate in an online “members only” listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

**FOLLOW LATEST INDIA COMMITTEE NEWS AND DEVELOPMENTS ON THE COMMITTEE’S ABA WEBPAGE!**

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