



# Q&A on Indian Companies Establishing and Acquiring Businesses in the United States





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## INTRODUCTION

Indian companies are expected to be active overseas investors in the coming months and years. India is now the fourth largest (by purchasing power parity; 12th overall) and the second fastest growing economy in the world.<sup>1</sup> Indian companies have generally withstood the global economic crisis and are well positioned to take advantage of opportunities as economic conditions improve. The motivation for these companies is strong to address global competition and to acquire natural resources, distribution networks, brands, technology and management abroad.

Indian companies have mostly focused overseas investments in the pharmaceuticals, financial services, information technology, manufacturing, mobile communications, natural resources, automotive components, beverages, cosmetics and industrial goods sectors.<sup>2</sup> One of the most important future target markets for investments in these sectors is expected to be the United States. How should Indian companies expand into the United States? This guidebook is intended to provide Indian companies with a primer on the key legal issues with respect to investing into the United States.

## OVERVIEW OF RELEVANT INDIAN LAW AND POLICY REGARDING OUTBOUND INVESTMENT

### 1. What is the current outbound investment policy/framework of India?

Outbound mergers and acquisitions by Indian companies entail exchange control implications and are regulated by the Reserve Bank of India (the “**RBI**”). The RBI Master Circular on “Direct Investment by Residents in Joint Venture (JV)/Wholly Owned Subsidiary (WOS) Abroad” contains regulations on outbound investments, subsequent disinvestment, methods of funding of outbound investments, consequent obligations of the investor parties and sector-specific restrictions while consolidating existing RBI circulars and notifications on outbound investment.<sup>3</sup>

#### 1.1 What types of outbound investments require RBI approval?

An Indian company requires prior RBI approval to make an outbound investment which exceeds its net worth by 400%.<sup>4</sup> “Net worth” is defined as the sum of paid up capital and free reserves of a company.<sup>5</sup> An investment made with RBI approval is said to be made under the “approval route.”

Applications for approval need to be made in prescribed form to the Overseas Investment Division of the Foreign Exchange Department (“**ODI**”) at the RBI.<sup>6</sup> The RBI, when considering applications for approval, takes into account the “**prima facie viability**” of the outbound investment target and its “contribution to external trade and other benefits which will accrue to India,” the “financial position and business track record” of the parties and the “expertise and experience” of the Indian company in the line of activity.<sup>7</sup> The timeframe for approval is uncertain, and it depends on the nature and complexity of the transaction. The period for review may take six to eight weeks at the least. Obtaining RBI approval may therefore become a delaying factor or even an impediment to a transaction. The RBI may refuse to give its approval, which would lead to the transaction failing if it cannot be restructured. For this reason, the parties should attempt to structure a transaction in a manner where no RBI approvals are required.<sup>8</sup>



### 1.2 What types of outbound investments are made without RBI approval?

An investment made without RBI approval is said to be made under the “automatic route.” Outbound investments with an aggregate value below the investment ceiling of 400% of the net worth of the investing company can be made, either directly or through an offshore special purpose vehicle (“**SPV**”), without approval from the RBI.<sup>9</sup> This ceiling will not apply to cases where the investment is made out of balances held in Exchange Earners’ Foreign Currency account of the investor or out of funds raised through the issue of American Depository Receipts (“**ADRs**”) or Global Depository Receipts (“**GDRs**”).<sup>10</sup>

### 1.3 Are any filings or other steps required even if RBI approval is not required?

Even if an investment does not require RBI approval, an Indian company is required to file, within 30 days from the date of closing the transaction, with the ODI, the same form that is used to seek approval from the RBI. This filing is mainly for informational purposes and the RBI will not conduct a substantive review of the filing.

### 1.4 How can Indian investors finance outbound investments?

Outbound investments may be financed through a variety of sources including, among others, foreign exchange purchased from authorized dealer banks in India, external commercial borrowings (“**ECBs**”), foreign currency convertible bonds (“**FCCBs**”), ADRs and GDRs, capitalization of exports and share swaps.<sup>11</sup>

ECBs include loans for overseas investments raised by Indian borrowers from foreign banks.<sup>12</sup> The maximum permissible borrowing under the applicable RBI guidelines is US\$500 million (US\$100 million for companies in the services sector, including hotels, hospitals and software).<sup>13</sup> In the event that an Indian entity wishes to borrow more than the maximum permissible amount, investments may be made through an SPV, incorporated outside India, which may borrow from other sources as well, as these limits apply only to Indian borrowers.

Recently, Indian companies have often relied upon public issuances of equity or debt, such as FCCBs, or foreign currency denominated bonds convertible into equity, for financing of foreign investment.<sup>14</sup> Time-critical acquisitions may be funded through bridge financing from banks, followed by public issuances to repay them. Tata Motors’ acquisition of Jaguar and Land Rover from Ford Motors in June 2008 was financed by a bridge loan of US\$3 billion from a consortium of banks, and it was repaid following a rights issue and the issuance of non-convertible rupee-denominated debentures.

ADRs and GDRs are securities issued to a resident outside India against shares of an Indian company. Indian investors are also permitted to acquire shares of an overseas target company in exchange for newly issued ADRs/GDRs issued to the acquisition target.<sup>15</sup> However, the total holding in the Indian investor by persons not resident in India, after the new ADR/GDR issue, must not exceed the sectoral caps prescribed under India’s Foreign Direct Investment (**FDI**) policy and the valuation must be in accordance with the guidelines prescribed in the RBI Master Circular. The ADR/GDR issue must also be backed by underlying new equity shares issued by the Indian entity.<sup>16</sup>

Investments may also be financed by way of capitalization of payments due from exports to the target company<sup>17</sup> or out of the investor's Exchange Earners' Foreign Currency account maintained with authorized bank dealers.<sup>18</sup>

A share swap is a permissible acquisition type in which the acquiring company uses its own shares as consideration for acquiring shares of the target company. In a share swap, each shareholder of the target company receives a certain number of shares of the investor company for each share they previously held in the target company. The share swap results in a foreign holding of shares of the Indian company and, accordingly, the foreign holdings in an Indian company is subject to the FDI policy, including approval of the Foreign Investment Promotion Board ("**FIPB**").<sup>19</sup> In the event the Indian company is listed on a stock exchange in India, a swap of shares resulting in either a change of control or 15% or greater shareholding in the company will trigger the Securities Exchange Board of India, Substantial Acquisition of Shares and Takeovers Regulations, 1997 (the "**Takeover Code**"). The Takeover Code requires an acquirer of 15% or more shares, or voting rights, in a listed target company (including shares or voting rights already held by the acquirer) to make a public offer for a minimum of 20% of the shares of the target company.<sup>20</sup> To avoid the requirements of the Takeover Code, a share swap may be structured as an arrangement under the Companies Act, which is exempt from the public offer requirements under the Takeover Code. However, a scheme of arrangement requires court approval and is a time consuming process.

### 1.5 Does the RBI also regulate disinvestment?

The RBI imposes approval requirements for disinvestment of the overseas investments of Indian investors. Indian investors may disinvest from an overseas investment without RBI approval in the following cases - (i) the company for disinvestment is listed on an overseas stock exchange, or (ii) the disinvestment would occur when the Indian investor is listed on an Indian stock exchange and has a net worth of not less than INR100 crore (approx. US\$22 million), or (iii) the disinvestment would occur when the Indian investor is not listed on an Indian stock exchange but the outbound investment does not exceed US\$10 million.<sup>21</sup>

Such disinvestment is also subject to other restrictions – the overseas concern must have been in operation for at least one year on the date of disinvestment, the sale is made through the stock exchange where the shares of the overseas concern are listed and the share price should not be less than a certified fair valuation of the shares.<sup>22</sup> The Indian entity is required to submit details of the disinvestment within 30 days from the date of disinvestment.<sup>23</sup>

### 1.6 Do Indian laws impose sector-specific restrictions applicable to outbound investments from India?

Presently, the only sector-specific regulation under Indian law relates to outbound investment from India into the financial services sector. An investing company seeking to invest in an overseas company engaged in the financial sector needs regulatory approval for the investment, from authorities in India as well as abroad.<sup>24</sup> Additionally, it must be registered in India for conducting the financial services activities in question.<sup>25</sup> Under applicable Indian regulations, the investing company must have earned net profit during the preceding three financial years from financial services activities<sup>26</sup> and fulfilled capital adequacy norms.<sup>27</sup> The Indian company must also satisfy these conditions at any time the acquired overseas company (or its subsidiary) invests in the financial services sector.<sup>28</sup>

## 2. What are the forms of transactions that may be pursued by Indian investors in the United States?

An Indian company may purchase a company in the United States either by purchasing all or a portion of its shares or by buying its assets. Alternatively, the Indian company may merge the target company into itself or its subsidiary, by using a triangular merger.

The simplest transaction form is the share purchase. Asset purchase and merger transactions entail meeting more stringent regulatory requirements.

### 2.1 What is the framework governing an asset purchase transaction?

The purchase of assets in the United States is subject to exchange controls relating to the acquisition and transfer of immovable property outside of India. An acquisition of immovable property may only be undertaken with prior RBI approval, unless the acquisition is financed with foreign exchange held in resident foreign currency accounts in India or if it is directed at business and residential use of staff for the overseas offices of the Indian company.<sup>29</sup> In order to avoid these regulatory requirements, an Indian company seeking to acquire assets in the United States will often setup a subsidiary in the United States that will purchase the assets of the U.S. target company.<sup>30</sup>

### 2.2 What is the framework governing a merger transaction?

The Companies Act of 1956 (the “**Companies Act**”) sets forth the requirements relating to mergers in India.<sup>31</sup> Currently, under this framework, the resulting merged company must be an Indian company.<sup>32</sup>

Both the investor and the overseas target company are required to comply with the provisions of the Companies Act, including, petitioning and receiving the approval of the relevant court and the central government.<sup>33</sup> The court may order a meeting of the creditors and shareholders of such companies. If the majority in number representing  $\frac{3}{4}$ <sup>th</sup> in value of the creditors and shareholders present and voting at such meeting agree to the merger, then the merger, if sanctioned by the court, is binding on all creditors and shareholders of the companies.

The court process takes a minimum of six to twelve months and may take longer. The court process is public, providing various parties with a forum to air their grievances, and this may result in further delays. The court may modify the scheme of merger as proposed by the merging companies, which may not be commercially feasible. The merging companies, however, may withdraw at any stage, and are not obliged to implement the scheme if such modifications are not acceptable.

The complex court-driven merger process provided for by the Companies Act may be avoided by structuring the merger as a triangular merger. In a triangular merger, the investor sets up a subsidiary in the United States which, in turn, either merges into the target company, with the target company surviving (reverse triangular merger) or the target company merges into the subsidiary, with the subsidiary surviving (forward triangular merger). As a result of the merger, the target company, directly or indirectly, becomes the subsidiary of the investor and the shareholders of the target company receive cash or shares of the acquirer as consideration.<sup>34</sup> The advantage of structuring the merger as one between a U.S. target company and a U.S. subsidiary, with the shareholders of the target



company becoming shareholders of the U.S. subsidiary, is that the transaction can be carried out under the authority of U.S. state merger statutes.

### 3. What is the competition law framework of India?

The Competition Act, 2002 (the “**Competition Act**”) has been passed by the Parliament of India, although it is not yet fully in effect. Once the Competition Act is fully enforced, it will present additional requirements for mergers and acquisitions. The Competition Act creates a Competition Commission of India (the “**CCI**”) which is charged with the regulation of business combination transactions in the interest of maintaining competition and prohibiting monopolistic practices.

As currently contemplated, the Competition Act will regulate business “combinations” in which the investor and target companies are of significant size, even if the target company is based overseas.<sup>35</sup> Such investor will have to provide timely notice to the CCI and the transaction will be subject to review by the CCI.<sup>36</sup> A transaction not expected to have a material effect on competition within India will also be open for review by the CCI if the parties to the business exceed the combined size thresholds. The review process may take up to 210 days. This is a significant extension to the transaction time frame.<sup>37</sup> If after the review, the CCI determines that the business combination would have an appreciable adverse effect on competition within the ‘relevant market’ in India are not consistent with a policy of encouraging competition, the CCI may block or modify the combination.<sup>38</sup>

## SETTING UP A BUSINESS IN THE UNITED STATES

### 4. What are the basic forms of business entities in the United States?

Probably the first step you will take after deciding to do business in the United States is to choose a form of business entity for your investment vehicle. There are many factors to consider in choosing a business form - from the extent of liability exposure to owners and managers, to the cost, ease and difficulty of formation and governance, to management structure and tax treatment. In the United States, there are usually three primary forms of business entities available to foreign investors: Corporations, Partnerships and Limited Liability Companies. A U.S. business may also be a joint venture with one or more third parties. In addition, a foreign investor may operate its U.S. business through a sole proprietorship (in the case of an individual) or a Branch of a foreign company. Each approach has advantages and disadvantages.

#### 4.1 Corporation.

The Corporation, a legal entity created under and governed by state corporation statutes, is by far the most common business form used by foreign investors. This form may be attractive because it allows the creation of a business with an entirely separate legal existence from its shareholders and managers. As separate legal “persons,” corporations may enter into contracts, hold and acquire property, sue and be sued and be taxed separately from its shareholders and officers. As a result, the liability of owners/shareholders is limited only to their respective equity investments in the corporation.



### 4.1.1 How are corporations and their Indian shareholders taxed?

A corporation is generally a taxpayer, separate and distinct from its shareholders. Thus, the taxable income of a corporation is taxed at graduated rates at the entity level and not taxed to its shareholders until distributed to them. The corporation must file its own tax returns with the applicable federal, state and local government tax authorities.<sup>39</sup>

Distributions to Indian shareholders are generally subject to 30% withholding tax under U.S. domestic tax law unless reduced under an applicable income tax treaty. Under the current Indo-U.S. income tax treaty (“**Indo-U.S. Tax Treaty**”), the rate of withholding on dividends paid to eligible Indian investors is generally 25%.

### 4.1.2 How is a corporation formed?

A corporation is formed by filing a charter document specifying its name, purpose, capitalization and registered agent for service of process with the relevant state government office, usually, the Secretary of State. State statutes will also require the adoption of bylaws and the appointment of a board of directors which, in turn, can appoint officers, sell capital stock, authorize the opening of bank accounts and handle other corporate matters. Corporations are also required to observe several formalities, which may result in expenses, in order to retain corporate status - such as holding regular meetings of shareholders and directors and maintaining minutes and stock records. Unless otherwise specified in the incorporation documents, a corporation may exist indefinitely.


## 4.2 Partnership.

A partnership is an unincorporated business entity created under state partnership statutes. It is formed by either an oral or written contract - a “partnership agreement” - between two or more legal persons, each known as a “partner.” There are two primary forms of partnerships: general partnerships and limited partnerships. A key difference between partnerships and corporations is that all general partners of a limited partnership have unlimited personal liability for the debts, taxes and other liabilities of the business. Finally, unless otherwise specified in the partnership agreement, a partnership is of limited duration and will ordinarily terminate upon the death, disability or withdrawal, and in some cases, the bankruptcy of any one of its partners.

### 4.2.1 How are a partnership and its Indian partners taxed?

Unlike corporations, partnerships are generally not separate taxpayers and are therefore not subject to tax at the entity level (unless they elect to be taxed as corporations). Their items of income, gain, loss, deduction and credit generally are “passed through” to their partners. Each partner reports its share of those items on its own tax returns and is subject to tax, whether or not there are any cash distributions made to the partner.

Although a partnership must file annual tax returns, these returns are generally for informational purposes only. An Indian partner in a partnership that engages in trade or business in the United States (and has not elected to be treated as a corporation)<sup>40</sup> will be required to file annual tax returns and will generally be taxed on its share of the income of the partnership, more or less as though it were a U.S. person. In addition, the partnership will generally be required to withhold periodically at the highest appropriate tax rate (currently 35% for ordinary income) on the Indian partner’s share of the partnership’s income that is effectively connected with the partnership’s U.S. trade or business.



The United States imposes a second level of tax known as the “branch profits” tax on foreign partners that are corporations, generally at 30% unless reduced under an applicable income tax treaty. Under the India-U.S. Tax Treaty, the “branch profits” tax on eligible Indian corporations is generally 15%.<sup>41</sup>

#### 4.2.2 Are there ways to limit liability in the partnership form?

Yes. Instead of a general partnership, some businesses may choose the limited partnership form. In a general partnership, the general partners have unlimited personal liability to the creditors of the partnership. However, in a limited partnership, limited partners’ liabilities are capped at the amount of their respective capital contributions to the partnership. A limited partnership must have at least one general partner who oversees the operation of the business and one limited partner, who, in exchange for limited liability, may not actively participate in the operation of the business. In addition, the general partners of a general partnership or limited partnership may be corporations with limited assets and with liability limited to those assets.

#### 4.3 Limited Liability Company.

In many ways, a limited liability company is a hybrid between a corporation and a partnership. Like a partnership, a limited liability company is a business entity created under state law. Like a corporation, a limited liability company enjoys a legal existence separate from its owners, known as “members,” managers and operators. The members have the protection of limited liability and thus, they are generally only liable up to their capital contributions regardless of the extent of their management participation. All members must enter into a limited liability company agreement describing each member’s respective contribution, distribution of profits and losses among the members, the members’ ownership interests, management structure, transfer of membership interest, tax treatment and mode of dispute resolution. Limited liability companies formed in the United States are generally taxed in the same way as described above for partnerships (and their Indian members generally in the same manner as described above for Indian partners in a partnership). Like partnerships, limited liability companies may elect to be taxed as though they were corporations.

##### 4.3.1 How is a limited liability company formed?

A limited liability company is formed by filing a Certificate of Formation, also known as the “Articles of Formation,” with the relevant government agency and executing an operating agreement. The Certificate of Formation usually specifies the company’s name, its purpose and other information required under the relevant state laws.

#### 4.4 Joint Venture.

A joint venture is a business venture established by two or more non-affiliates joining forces. Joint ventures are often organized as partnerships, but they may also take the form of either corporations or limited liability companies. Depending on the form of the joint venture, it will be governed by the appropriate state laws. The form of joint venture will also influence the way in which foreign investors will be taxed. Typically, there is a joint venture agreement which outlines the respective contribution of assets by each party, distribution of profits and losses among the parties, the joint venture’s purpose, management, transferability of ownership, termination and mode of dispute resolution. Sometimes joint ventures are not embodied in a separate legal entity, but are instead created and governed by contracts.

#### 4.5 Sole Proprietorship or Branch.

An Indian individual may operate a U.S. business as a sole proprietor and an Indian corporation as a branch, either directly (in which case there is unlimited liability for the debts and other liabilities of the business) or through a limited partnership or limited liability company that has not elected to be taxed as a corporation (in which case, the Indian owner of the business will generally be able to limit its liability to the capital contributed to the business). In each case, the Indian owner of the U.S. business will be required to file annual tax returns and will generally be taxed on its share of the income of the sole proprietorship/branch on a net income basis, more or less as though it were a U.S. taxpayer. The United States imposes a branch profits tax on foreign owners that are corporations, generally at 30% unless reduced under an applicable income tax treaty. As stated above, under the India-U.S. Tax Treaty, the “branch profits” tax on eligible Indian corporations is generally 15%.

#### 5. How do entities go about naming their business?

Most states require a business to have an official, legal name that is unique from any other business name already registered with the state. After you have chosen a name, your lawyers can make sure that the proposed name for your business is still available by contacting the appropriate government office in your state, usually the Office of the Secretary of State, and reserving it before you file your official papers. Your legal name will be the name you list on your formation documents filed with the Secretary of State. However, if your state has a fictitious name statute, you may also do business under a name that is different from your legal name so long as you file a certificate, usually known as a “doing business” or d/b/a certificate, indicating both your legal and trade name.

#### 6. Does it matter where investors form their business entity and must they register in other states as well?

Since the organization, management and operation of a business entity is largely governed by the laws of the state of formation, it is important to review and compare the relevant state statutes. Delaware, New York, and California are the three states most favored by foreign investors for establishing a U.S. corporation. This is because of the flexibility offered by their corporation statutes and the relative clarity of the statutes due to many court decisions interpreting them. The incorporation of a corporation in a particular state allows the corporation to do business in that state alone. If the corporation desires to do business in other states, it must apply or “qualify,” usually by filing a certificate, to do business in each of those states.

#### 7. Once the business entity is formed, are there any formalities that it must follow on a regular basis so as to continue the business entity?

Most state laws governing the conduct of business entities have specific formalities that must be followed in order to preserve the legal integrity of the business entity. Some of these formalities include holding regular board of directors and shareholder meetings, filing periodic reports with government offices and filing tax returns. The failure to abide by these statutory formalities may lead to possible penalties and, in some cases, loss of limited liability protection.



## 8. Business Permits: What governmental licenses and permits are necessary to operate a U.S. business?

There is no general federal licensing requirement for foreign investors to open and operate businesses in the United States, except for investors from certain countries subject to special licensing from the U.S. Department of Treasury. India is currently not among these countries. You may need an industry-specific license or permit from a relevant federal agency if you plan to invest and operate in certain sensitive or regulated areas, such as banking, radio and TV broadcasting. Also, the state where your business is located may require specific licenses or permits in connection with your business operation.

## 9. Real Estate: How do business entities rent or purchase office or factory space?

Purchasing or leasing real estate in the United States is a contractual process, often involving extensive negotiation, due diligence and legal drafting.

### 9.1 Purchase.

When negotiating a purchase, you should begin by putting the basic deal terms in writing - in a non-binding term sheet or letter of intent. That term sheet should clearly identify the parties, property to be purchased, purchase price, amount of earnest money deposit, closing date, allocation of closing costs and related taxes, assignment rights and any buyer extension rights to the closing date, buyer's title review, due diligence and inspection period (during which time buyer should be able to terminate the purchase agreement and receive a refund of its earnest money deposit). The term sheet or letter of intent should also include certain representations (primarily from the seller) and conditions. A buyer should seek certain representations and warranties from the seller, including, among other items, as to matters involving third-party rights, litigation, the property's condition, environmental matters, leases, contracts, bankruptcy and the property's compliance with law and local zoning requirements. The buyer's conditions to closing should include, among other items, the issuance of an owner's title policy of insurance in a form approved by buyer (and a lender's title policy, if applicable, in a form approved by lender), tenant estoppel certificates from tenants, if applicable, and evidence of all necessary consents (including other parties to reciprocal easement agreements and the like). These basic items in the term sheet form the basis of the purchase agreement, which should then be negotiated more fully. It is important to note that during the due diligence period, you should conduct an independent investigation of title, other due diligence matters and the property with the assistance of environmental consultants, appraisers and other professionals. Be careful to ensure that federal, state and local environmental regulations and local zoning rules have not been violated, and will not be violated, by your intended use of the property.

### 9.2 Lease.

The lease negotiation process is similar to the purchase process because a basic, non-binding term sheet should first be entered into by the parties. However, the structure and forms of leases are often more diverse and complicated than those in purchase agreements. Most commercial leases in the United States last for a period of years and are usually structured according to monthly, quarterly or annual payment schedules. Leases of retail space may also be based on a percentage of retail income. Leases commonly include options that allow tenants to extend the lease term subject



to a re-calculation of the rent at a predetermined rate or based upon a formula or appraisal. You should carefully negotiate the cost allocation for construction and renovation of tenant improvements, if applicable, maintenance and repair, payment of real property taxes and insurance, as well as the tenant's right to assign or sublease the space. The allocation of these rights and duties may substantially impact the economic value of a lease.

### 10. Tax Matters: Which key categories of U.S. taxes will business entities be subject to?

Taxation in the United States can be extremely complicated and affect matters as diverse as trade, real estate and hiring. In the United States, federal, state and local governments may each impose taxes on businesses. Federal taxes are legislated by Congress and administered by the Internal Revenue Service ("IRS"), an office of the U.S. Department of Treasury. The federal government taxes income, payroll, estates and gifts, among other things. State and local government taxes can vary widely but generally apply to income, payroll, property, sales and transactions.

#### 10.1 How do you determine the federal income tax liability of the corporation?

Domestic corporations (that is, corporations organized under U.S. law) are subject to U.S. federal income tax on their net income at graduated income tax rates. The current federal corporate income tax rates range from 15% to 35%. Domestic corporations are also typically subject to franchise or income taxes in states in which they do business. When organizing a corporation to operate a U.S. business, foreign investors should consult with U.S. tax advisers to determine how to plan to minimize the taxes that will be imposed on the corporation. For example, capitalizing the corporation with a mix of equity and debt capital may be useful in this regard.

#### 10.2 What if an investor engages in business in the United States through a branch?

The U.S. branch of a foreign corporation (which, as stated above, may be in the form of a partnership or limited liability company, or may be operated directly by the foreign corporation) is usually taxed with respect to the income that is attributable to its U.S. business, more or less as though it were a domestic corporation. However, as noted above, under the India-U.S. Tax Treaty, the United States imposes a second-level "branch profits" tax on an Indian corporation.

#### 10.3 When are corporate taxes due?

Corporate income tax returns are due on the 15th day of the third month following the close of the corporation's taxable year. Corporations are also required to make quarterly payments of their estimated taxes for each taxable year.

#### 10.4 How do you determine personal federal income tax liability?

Your federal income tax liability depends on how the IRS views you and your income. First, you have to determine if you are a resident or non-resident alien. Non-U.S. citizens are considered non-resident aliens unless they hold green cards or spend a certain minimum number of days in the United States. An Indian individual who is a non-resident alien is generally exempt from U.S. federal income taxes except for certain U.S. source investment income (e.g., dividends paid by a U.S. company) and income that is effectively connected

with a trade or business conducted within the United States. A resident alien's income is generally subject to tax in the same manner as a U.S. citizen.

## 10.5 How is personal or U.S. business' state and local income tax liability determined?

State and local taxes may vary widely. For instance, in California, corporations are taxed on net income if they incorporate or qualify to do business in the state. In addition, there is a yearly minimum franchise tax for any corporation "doing business" in California. "Doing business" includes even just making deliveries; a corporation does not have to have an office or a place of business in California to become subject to the franchise tax. In 2009, the minimum franchise tax was \$800. Finally, if your corporation derives income from sources within and outside California, the business income attributable to California is determined by an apportionment formula. Please note that the provisions of the India-U.S. Tax Treaty have no impact on how states and local governments may tax your U.S. business. Given the variation between states, you will need to consult with U.S. tax advisers with respect to you and your U.S. business' state and local tax obligations and liabilities.

## 11. How might employment and labor law affect an entity's business?

The United States has a robust labor and employment regulatory regime. The success and harmony of your business will in many ways depend on your compliance with U.S. labor law.

### 11.1 What restrictions on hiring must a U.S. business follow?

Most employees in the United States are hired on an "at-will" basis, that is, no written agreement is required and either the employer or the employee may terminate the employment relationship at any time for any or no reason. You may consider having any offer letters, employee handbooks and other internal personnel policies reviewed by a lawyer to ensure that no employment agreement is formed by these documents. Some employees, such as senior officers of a company, may require written employment agreements. In such case, the employment is governed by the terms of the agreement, which usually provide for the term, position, compensation, termination and other terms and conditions of their employment with the employer.

### 11.2 Are there any limitations on firing employees?

At-will employees may generally be fired at any time for any reason, so long as it is not on the basis of gender, race, national origin, age, color, religion, disability or other immutable characteristics protected by applicable law, or in retaliation for complaining about unlawful conduct. Employers are not required to follow any particular procedures to terminate at-will employees. However, most employers will provide prior termination notices and severance pay to terminated employees in exchange for a general release of claims.

### 11.3 What is the minimum wage in the United States?

Under U.S. federal law, employers are required to pay employees a minimum wage of \$7.25 per hour. Several states, including New York and California, have set even higher minimum wage rates. Various cities (including Los Angeles, San Jose and San Francisco) also have living wage ordinances that require an even higher hourly wage for employees who perform work for employers that maintain contracts with municipal entities.

#### 11.4 What are the rules regarding overtime pay?

Employees aged 16 years and older have no restriction on the number of hours per day or per week they are allowed to work. However, if an employee has worked more than 40 hours in one week, employers must pay overtime at a rate of not less than one and one-half times an employee's regular rate of pay. Certain states (such as California) require employers to pay employees overtime at a rate of one and one-half times an employee's regular rate of pay for time worked in excess of eight hours in a day, and two times the regular rate of pay for hours worked in excess of 12 hours in a day. Some employees are exempt from the overtime pay requirement, including commissioned sales employees of retail or service establishments; auto, truck, trailer, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers; taxi drivers and local delivery employees paid on approved trip rate plans; and domestic service workers who reside in their employer's residences. Other employees are exempt from both the minimum wage and overtime pay requirements, such as executive, administrative and professional employees and certain skilled computer professionals. Generally, except as noted above, there is no regulatory requirement with respect to extra pay for working weekends or nights and payment for vacation, sick leave or holidays. In many states, if employers contractually agree to provide paid vacation, employers are required to pay any accrued but unused vacation to an employee upon termination of employment.

#### 11.5 What employee records will a U.S. business entity be required to keep?

Federal law requires employers to keep records of employees' names, addresses, birth dates, wages, hours, pay roll records, work-related injuries, I-9 and Employment Eligibility Verification Forms showing each employee's right to work in the U.S., W-4 Forms and other employment tax records and other information.

#### 11.6 How will U.S. anti-discrimination laws affect the business' hiring and firing practices?

Discrimination on the basis of race, color, national origin, religion, sex, disability or age is prohibited in almost every aspect of employment - from job advertisements to recruitment, hiring, payment of wages or benefits, promotion, training and firing. Not only intentional discrimination but also practices and policies that result in discrimination are illegal. In addition, employers have an obligation to prevent sexual harassment, as well as harassment based on race, color, national origin, religion, sex, disability or age, with respect to employees, independent contractors and vendors.

#### 11.7 Does a U.S. business entity have to recognize labor unions formed by its employees?

Under federal law, U.S. employees have the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other activities for purposes of collective bargaining, mutual aid or protection. Employers may not interfere with, restrain or intimidate employees in the exercise of these rights. For instance, employers may not threaten employees with the loss of their jobs or benefits if they join or vote to unionize nor may they question employees about their union activities or membership. At the same time, however, employers may



educate employees on the reasons for voting against a union representing them in the workplace and, indeed, many employers do not have union employees.

### 11.8 Is a U.S. business entity allowed to prevent its employees from competing with its business following the termination of their employment?

Covenants not to compete and covenants not to solicit employees/customers are governed by state law (as opposed to federal law). Various states (such as New York, Massachusetts and Washington) will enforce post-employment covenants not to compete that are reasonable in geographic reach, duration and scope of activity. Other states (such as California, Georgia and Alabama) prohibit covenants not to compete unless they are entered into by an owner of a business in connection with the sale of equity. Most states will enforce one-year post-employment covenants not to solicit employees and some states will enforce no-hire provisions.

## 12. Operational Logistics: What are some basic aspects of setting up operations in the United States?

### 12.1 How do you open a bank account?

U.S. bank accounts range from checking accounts for operations, payroll and special projects, to savings accounts for capital reserves and certificates of deposit. Before setting up an account with a bank, you must complete all the formalities of incorporation or partnership formation under the relevant state laws and obtain a federal “Employer Identification Number,” or “EIN,” from the IRS. If your new business is a corporation, the board of directors should pass a resolution authorizing one or more employees to open and manage the company’s bank account(s). The board of directors should also select the number of signatories, usually two, required to issue checks on behalf of the corporation. Once the corporation selects and authorizes its signatories, the bank will ask each authorized signatory to sign the bank’s own check signature card form. The bank will keep this card for use when clearing the corporation’s checks in the future.

### 12.2 How do you obtain a loan from a U.S. bank and navigate the obstacles to obtaining loans?

Similar to banks in India, U.S. commercial banks are an important source of capital for businesses. The forms and terms of bank financings vary depending on the creditworthiness of the borrower, size of the financing and other factors. Generally, the borrower and the bank will negotiate and execute a loan agreement, pursuant to which the borrower will issue a note promising to repay the loan on a specified date (or dates) at a defined interest rate. Usually the borrower has to provide some collateral to secure the loan. Short-term loans range from one to a few years, usually at variable interest rates and issued on a secured basis. Long-term loans are available to more mature businesses with predictable cash flow. Long-term loans may have either floating or fixed rates of interest and are generally unsecured. Banks rely heavily on extensive affirmative and negative covenants in the loan agreements, including financial ratios intended to guide the conduct of the borrower’s business.

U.S. subsidiaries of mid-size to larger foreign companies may obtain credit lines from U.S. banks, much like companies do in India. However, unless the U.S. operation is substantial and financially



robust, most U.S. banks and other lenders will usually require your parent entity in India to guarantee the loan. This may not be a significant hurdle if your parent entity is incorporated in India, since under current Indian law no RBI approval is required prior to giving such a guarantee if certain conditions are met, including the requirement not to commit in excess of 400% of the parent's net worth (whether in the form of equity or a guarantee) to its overseas wholly owned subsidiary or joint venture.<sup>42</sup>

### 12.3 How do you set up payroll processing?

As an employer, you are required to fulfill certain payroll responsibilities under federal, state and local law. You must report and pay all payroll taxes to the appropriate agencies. Late or inaccurate payments may result in penalties and interest.

The first task is to determine whether a person who works or provides service for you should be classified as an employee or an independent contractor. If a worker is an employee, you must deduct and withhold from his or her paycheck federal income tax, social security tax, Medicare contributions and other payments. If the worker is an independent contractor, you will not have to withhold taxes, but you will still need to report his or her earnings to the applicable tax authorities, including the IRS. You may engage an accountant or an outside payroll service provider to help you set up and complete the payroll processing, but it remains your ultimate responsibility to accurately and timely report and pay all payroll taxes.

### 12.4 Does a U.S. business need to keep its books according to U.S. generally accepted accounting principles?

Yes. Generally, your U.S. business will need to conform to U.S. accounting principles. Among other reasons, this will enable your business to properly report its taxable income. You should also comply with the laws governing the maintenance of accounting books and records in the states in which you incorporate your U.S. operation and conduct business.

U.S. accounting principles are composed of official announcements from the Financial Accounting Standards Board and other government authorities, such as the Securities Exchange Commission. It is important to note that U.S. accounting principles differ in several respects from Indian accounting rules and international accounting principles promulgated by the International Accounting Standards Board.

## 13. Repatriating Money: How do you convey your profits back to India?

Since the United States does not impose exchange controls, a foreign investor can freely repatriate capital, loans and income. However, cash payments of more than \$10,000 received in a trade or business must be reported to the IRS on Form 8300 within 15 days after receipt. This form is used by the IRS and the Financial Crimes Enforcement Network to combat money laundering. Finally, dividends, interest, royalties and service income may be subject to a withholding tax (possibly at reduced rates where the India-U.S. Treaty is applicable) although double taxation relief may be available under Indian law.

## 14. Immigration: What type of visa will you or your employees need to obtain to enter the United States?

All Indian citizens must obtain a visa from a U.S. Embassy or Consulate to enter the United States. The type of visa you will need depends on whether you intend to make a temporary visit for business purposes or whether you intend to work in the United States on a longer-term basis.

### 14.1 Visas for Short-Term Business Travel.

Especially at the initial stages of starting your business in the United States, you will most likely rely on a “B-1” visa, which allows foreign citizens to enter the United States for business purposes. Such business purposes include negotiating contracts, consulting with suppliers and customers or attending business meetings or conferences. B-1 business visitors are allowed entry into the United States for a limited time only, and the visa is not valid for employment in the United States.

Since the United States requires visa applicants to attend in-person interviews at an embassy or consulate, and the wait time to schedule such an interview could take several weeks, be sure to make your visa application well in advance of your planned travel dates. The presumption under U.S. law is that every visitor visa applicant intends to immigrate (and immigrants are not entitled to business visas). Therefore, you should be prepared to provide documentation supporting the business purpose of your travel and your intention to stay in the United States for only a specific, limited period. Frequently, visa officers expect to see evidence of compelling social and economic ties in India which will ensure an applicant’s return to India at the end of the visit.

### 14.2 Visas to Work in the United States.

Once your business is established, there are several types of visas that can be obtained to allow you and your employees to work in the United States. These visa categories allow foreign nationals to work in the United States for a number of years and, ultimately, may allow for individuals to obtain permanent residence in the United States.

#### 14.2.1 L-1 Intra-Company Transfer Visa.

The L-1 visa allows executive, managerial or “specialized knowledge” professional employees of an Indian company that has a U.S. parent, branch or subsidiary to transfer to the United States for employment. L-1A executives and managers can work in the United States for up to seven years. L-1 executives and managers with permanent job offers to work in the United States may also qualify for permanent residence. L-1B “specialized knowledge” professionals can work in the United States for up to five years. To qualify for an L-1 visa, an employee must have worked as an executive, manager or “specialized knowledge” professional for the U.S. company (or its parent, branch or subsidiary) in India for at least one year within the three-year period prior to the time that the L-1 petition is filed. The L-1 petition requires documentation verifying the corporate relationship between the Indian and U.S. companies; the employment of the L-1 executive, manager or professional for one year or longer in the past three years and information regarding the job that the L-1 executive, manager or professional will perform in the United States and the employee’s educational and professional background.

## 14.2.2 H-1B Professional Work Visa.

The H-1B visa allows foreign workers with education at the Bachelor's degree level or higher who will fill positions that require a four-year college degree to work in the United States temporarily. The H-1B visa is issued the first time for a period of three years and can be extended for an additional three years. If an H-1B worker is in certain stages of the United States permanent residence application process at the end of six years, it may be possible for the worker to receive additional extensions of H-1B stay in the United States. H-1B visas are subject to an annual quota of 65,000 general visas, and 20,000 H-1B visas for individuals who hold advanced degrees (Master's degrees or higher) from a U.S. college or university.<sup>43</sup> In recent years, the H-1B visa has become increasingly difficult to obtain. The H-1B quota has been filled within one day of the date (April 1) when applications start to be accepted for processing.

## 15. How is intellectual property registered and how are these rights enforced in the United States?

Often the most valuable asset possessed by a company may be its intellectual property. In the United States, intellectual property can be protected as patents, trademarks, copyrights and trade secrets. Holders of intellectual property rights may enforce their rights in federal court, state court or both, depending on the right involved.

### 15.1 Patents.

The U.S. Patent and Trademark Office of the Department of Commerce ("USPTO") grants three types of patents - utility, design and plant patents. Before the USPTO grants a patent, the applicant must prove that the invention is "useful," "novel" and "non-obvious." In contrast to many other jurisdictions, the United States uses a first-to-invent system rather than a first-to-file system. Once a patent is issued, the patent holder will have the right to exclude others from making, using, offering for sale, selling the invention in the United States or importing the invention into the United States for a limited number of years. For patent applications filed prior to June 8, 1995, this period of exclusivity lasts for 17 years from the date when the associated patent is issued. For applications filed on or after this date, the period of exclusivity lasts for 20 years from the priority filing date. Patent holders may seek remedies for patent infringement in federal court, including injunctions against further infringement and monetary damages.

### 15.2 Trademarks.

Unlike patents, registration is not a prerequisite for trademark protection. The United States uses a first-to-use system rather than a first-to-file system. As a result, a party may prove its trademark rights under common law by showing that it was the first to use the mark in commerce and that it has become publicly associated with that mark. However, registration at the USPTO at the federal level or at a relevant state office may provide certain advantages, such as a constructive notice, a legal presumption of ownership and validity of the registered mark and the potential for increased damages. Federal registration initially lasts for ten years and is renewable at the registrant's option for additional ten-year terms.



### 15.3 Copyrights.

Copyright protection is available for “original” works of authorship, such as literary, musical, dramatic and architectural works, as well as computer software, movies and other audiovisual creations. Copyright is established automatically once a work is “fixed” in a tangible medium of expression. Although copyright registration is not required for copyright protection, it has advantages such as establishing a legal presumption of a copyright’s validity and is usually a prerequisite to bringing suit for infringement and the availability of certain remedies. The copyright in a work initially belongs to the work’s author. In cases where a work is a “work made for hire,” that is, the work is created by an employee within the scope of his or her employment or falls within certain categories of commissioned works as defined by the copyright statute, the employer is considered the author and will own the copyright. The U.S. Copyright Office reviews applications for copyright registration, and infringement claims must be brought in a federal court.

### 15.4 Trade Secrets.

Trade secrets are primarily protected under state law. Over 40 states have adopted the Uniform Trade Secrets Act (“UTSA”). Under the UTSA, a trade secret is defined as information that derives independent economic value from not being generally known or readily ascertainable by other persons, and is the subject of reasonable efforts to maintain its secrecy. If another party makes an unauthorized disclosure or use of a trade secret, the trade secret holder may bring a civil action in state courts against the misappropriating party. Criminal penalties may also be available in certain circumstances.

## 16. How does environmental regulation and enforcement work in the United States?

Environmental regulations exist at the federal, state and local levels and are enforced by a variety of agencies and boards. Navigating these regulations can be very difficult and often involves high stakes - since many environmental violations are strict liability violations. In other words, a company will not be excused from clean-up liabilities just because it is not at fault for the pollution. We strongly recommend that you seek the advice of environmental counsel if your business affects the environment in any way - from the use of hazardous materials, to the emission of pollutants into the air or waterways, to the purchase of potentially contaminated property.

## 17. Import Laws: What is the process for importing into the United States?

All goods entering the United States must clear customs and are potentially subject to customs duties. The average most-favored-nation U.S. tariff rate is less than 5%; some categories of goods, such as textiles, are subject to higher tariffs, while many others are duty-free. There are very few import quotas.

For each import entry, there must be an “importer of record” that is responsible for payment of duties and compliance with all applicable regulations. The U.S. Bureau of Customs and Border Protection does not require an importer to have a license or permit. Most commercial importers employ the services of customs brokers to assist with the entry process, but an importer may also choose to handle the process without a broker.



In the entry process, importers must ensure that the products are properly classified, marked for country of origin, and valued, and that they comply with all other applicable laws and regulations. There may be product-specific restrictions or requirements. Goods originating from countries targeted by the U.S. economic sanctions are prohibited or significantly restricted. Such import restrictions currently apply to goods originating from Burma, Cuba, Iran, North Korea and Sudan.

### 18. Export: Are there any restrictions on exporting from the United States?

The U.S. export control laws require licenses for the export and re-export of any U.S. origin items or services that are specifically designed for military use. U.S. export control laws also may restrict the export of “dual-use” items from the United States. Dual-use items are those that have a primarily civilian end use, but can also be used for military purposes or for chemical, biological or nuclear weapons proliferation. Dual-use items include commodities (e.g., computers and chemicals), software (including encryption software) and technology (e.g., blueprints, plans and/or know-how). Depending upon the nature of the exported items, destination, end use and end user, an export license may be required.

Companies operating in the United States must be particularly vigilant about restrictions on the export of U.S.-origin technology. Technology developed in the United States is considered to be of U.S. origin, even where the intellectual property is owned by a non-U.S. entity. Accordingly, licenses may be required to export that technology, even to an affiliate outside the United States. In addition, there are potential restrictions on the disclosure of technology to “foreign nationals” (individuals who are not U.S. citizens or permanent residents). Disclosure of technology to foreign nationals is considered a “deemed export” to that individual’s home country. An export license may be required to transfer technology to a foreign national, depending upon that individual’s nationality and the nature of the technology in question.

Finally, the U.S. Government maintains economic sanctions against certain countries. These regulations prohibit transactions between U.S. persons (which include any entity or person physically present in the United States) and individuals and governments of those sanctioned countries, including export transactions. Companies in the United States are accordingly restricted from participating in transactions that may not be prohibited as to their non-U.S. affiliates. Countries currently subject to broad United States economic sanctions include Cuba, Iran, North Korea, Sudan and Syria.

### 19. Are there any limitations on promoting a business in the United States?

While foreign-owned businesses are as free to engage in advertising or marketing as any domestic business, if a foreign-owned company engages in such activities aimed at influencing government policy or actions, then it may need to register and file reports as a “foreign agent” under the Foreign Agents Registration Act. This act, as well as the Lobbying Disclosure Act and many state laws, may also require registration and reporting if the company engages in lobbying activities.

## ACQUIRING A BUSINESS IN THE UNITED STATES

### 20. A Mergers and Acquisitions Primer: What are some key aspects of buying and selling business in the United States?

A typical acquisition in the United States can be divided into several stages. First, a buyer and a seller need to find each other. Often, buyers have internal personnel responsible for identifying potential acquisition targets. In other situations, buyers may retain investment bankers or specialized agents to help them locate potential targets. The same is true for sellers, who may rely on internal personnel or investment bankers to identify potential acquirers. In fact, sellers are increasingly using investment bankers to help solicit bids from multiple potential acquirers through a process referred to as an “auction.” In general, it is believed that auctions serve to increase the leverage of the seller and therefore the sale price. Once a buyer and a seller have found each other, there will be several distinct processes commenced at the same time or in sequence: due diligence, negotiating a letter of intent, structuring the transaction, drafting the deal documents, obtaining third party consents (if any) and closing the transaction. These are discussed in more detail below.


#### 20.1 Conducting Due Diligence.

Due diligence means the thorough review of the target company’s business in order to evaluate the risks and benefits of a transaction. Consequently, it is a crucial part of any acquisition or sale of a business in the United States. Since different transactions may have different risks and benefits, it is particularly important that the goals and objectives of the due diligence investigation are determined from the outset. Due diligence for cross-border transactions is especially critical and needs to cover unknown market landscapes as well as other factors like governance, legislative and regulatory rule and process. For example, the extent to which environmental laws are adhered to in India varies from state to state, but many countries, including the United States, have stringent penalties for even minor contraventions, including facility closures.<sup>44</sup>

The diligence process can be broken down into several different areas, with different people performing different aspects of the due diligence. Legal due diligence may include, for example, a review of the target’s organizational documents, permits and licenses, contracts, pending litigation and other disputes, and intellectual property. Accounting and tax due diligence are usually performed by outside accounting firms. Business, operational and financial due diligence are done by the company itself, along with its financial advisors (including investment bankers, if any). In certain situations where manufacturing is involved, it may also be appropriate to retain an environmental consulting firm to conduct environmental due diligence, an insurance agent to review the insurance policies and an employee benefits consultant to review the employee benefit plans and related matters. Because of the number of parties involved, it is critical that a due diligence plan is created so that the results of the investigation reach the appropriate decision makers.

#### 20.2 Letter of Intent.

Early in the process, sometimes after some preliminary due diligence, if the buyer has reached a basic understanding of the target company, both the buyer and seller often create an outline of the proposed material terms and conditions of the acquisition. This document, known as a letter of intent, term sheet or memorandum of understanding, is usually not binding except for certain terms such as exclusivity and confidentiality, but will usually be negotiated by the business principals with



the advice of lawyers on both sides and will serve to resolve some of the most important elements of the deal, such as the purchase price.

### 20.3 Structuring the Transaction.

There are two primary methods to structure the purchase of a U.S. company, either by purchasing all or a portion of its shares or by buying its assets. Either method may be done directly or via a special acquisition vehicle. Because of the potential political difficulties associated with foreign acquisition of domestic companies stated below, foreign acquirers may want to consider using alternative acquisition structures in addition to direct methods. Some possibilities include acquiring the domestic company in partnership with a U.S. company, using a U.S. acquisition vehicle or taking a minority position initially with a right to increase to a majority over time. It is critically important to consider U.S. and foreign tax issues and confer with outside tax advisors early in the deal process. Foreign acquirers in particular will want to structure the transaction so that taxes are minimized, particularly withholding taxes on dividends as they cross borders. One way that this can be done is by using a subsidiary in a country with favorable tax laws or treaties.

### 20.4 Drafting the Deal Documents.

As due diligence continues, lawyers for the buyer and the seller will begin negotiating the contracts for the transaction. If the letter of intent is detailed enough, it will serve as a helpful guide to reduce the time and money spent in negotiating the contracts. The most important contract will be the purchase agreement itself. This agreement will typically be signed by the buyer and the seller once the due diligence has been concluded or is near completion. In addition, there may be a variety of other agreements that are important to the process, such as transition support agreements, employment agreements and, if the acquisition is financed with borrowings, various loan and credit agreements with lenders.

### 20.5 Obtaining Third-Party Consents and Regulatory Approvals.

There may be any number of consents that are required to complete the transaction, including the approval of the target's shareholders, the consent of counterparties to various contracts of the target and governmental and regulatory approvals (such as antitrust review). For example, the United Steelworkers Union ("**USW**") initially pledged to block Essar Steel Holdings Ltd.'s US\$1.1 billion offer for United States based steel maker Esmark Inc. The USW pointed to its collective bargaining agreement with Esmark Inc., which gave USW the right to reject any deal that results in a "Change of Control."<sup>45</sup> Foreign investors may also be subject to additional requirements. For example, as discussed below, the Committee on Foreign Investment in the United States ("**CFIUS**") may review acquisitions of U.S. businesses by foreign entities for national security reasons.

### 20.6 Negotiation Considerations.

Negotiations in the United States often start with each side backing a set of favorable positions and then bargaining toward the middle. However, negotiation is more of an art than a science, and negotiations in the United States are conducted very differently than in India. It is therefore critical to obtain experienced U.S. financial and legal advisors to guide foreign parties through the process. It is also important to have strong English speakers on the negotiation team, if possible. Even the best translators may lose meaning during translation because they often do not understand the commercial



concepts. Documents will be in English, and it would be highly unusual for the U.S. parties to agree to have Hindi or other local language versions of the documents. It is also highly recommended that someone on the negotiating team be familiar with mergers and acquisitions transactions, since there are many technical and specialized issues which may require immediate analysis.

## 21. Special Restrictions Applicable to Foreign Investment: Does U.S. law restrict foreign investors from investing in, owning, or operating any types of business?

U.S. laws limit foreign investment in U.S. companies in certain limited circumstances. There are specific foreign ownership rules for certain industries. In addition, the President of the United States may block particular foreign investments on national security grounds.

### 21.1 Specific Industry Restrictions.

- **Commercial Aviation:** Foreign investors may not own more than 25% of a U.S. domestic direct air carrier or otherwise have control of the carrier. Less stringent restrictions exist with respect to foreign investors providing aircraft for use by third parties or other goods or services used in aviation. Broader investment opportunities also exist with respect to foreign indirect air carriers, which are entities that market air transportation but do not operate the means of travel (such as tour operators and air freight forwarders).
- **Wireless and Wired Communications:** Licensing restrictions are imposed on foreign ownership of broadcast, common carrier, commercial mobile radio, and aeronautical fixed and en route services. These restrictions prohibit direct or indirect foreign ownership greater than 20-25%, or control otherwise exercised by foreign governments, foreign companies or their representatives. Foreign investments in cable television or business radio licenses are generally not subject to these restrictions.
- **Energy and Mining:** Foreign investment is limited or precluded in certain types of energy resources. These include particularly stringent rules with regard to nuclear fuel materials. Generally, leases to develop deposits of coal, oil, oil shale, gas and other non-fuel materials may not be awarded to foreign corporations. U.S. corporations owned by foreign investors, however, may participate in such leases subject to certain reciprocity and control analyses, and many foreign companies obtain U.S. mineral leases in this way.
- **Shipping:** Documentation and ownership requirements for vessels operating under a U.S. flag depend upon the type of business entity and the intended use of the vessel (such as registry, recreational, coastwise trade and fisheries). Typically, some percentage of the equity holders or certain members of management must be U.S. citizens. U.S. subsidiaries of foreign companies are not eligible unless citizenship requirements are met by each upstream entity in the chain of ownership. Once a vessel is documented under the U.S. flag, it becomes subject to restrictions on transfer to any “noncitizen.”
- **Commercial Fisheries:** Significant restrictions on commercial fishing exist for non-U.S. flag vessels; additional restrictions exist on foreign investment in non-vessel assets and foreign lending through vessel mortgages.



- **Banking:** A foreign bank may establish a branch or agency in the United States under federal law only if either it is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country, or the Board of Governors of the Federal Reserve System determines that the appropriate authorities in the home country of the foreign bank are actively working to establish arrangements for the consolidated supervision of such bank. A foreign bank may acquire a U.S. bank only if the foreign bank is subject to comprehensive home country supervision; accordingly, an Indian bank could not acquire a U.S. bank until the Board of Governors makes that determination. ICICI Bank, the largest bank by assets and the largest private sector bank in India formally opened a U.S. branch following recent approval by the Board of Governors to commence operation in New York.<sup>46</sup> Foreign acquisitions of U.S. banks by non-banks are permitted on the same terms as acquisitions by U.S. persons, but foreign acquisitions are usually subject to more intense scrutiny. Some states have statutes that prohibit foreign ownership of banks organized under such state's laws, but those rules would not restrict a foreign acquisition of a nationally chartered bank located in that state.
- **Defense Industry:** U.S. companies under foreign ownership, control or influence must adopt security measures satisfactory to the U.S. Department of Defense or other national defense-related agencies in order to participate in contracts involving classified information, or the provision of certain microelectronics components. Depending on the level of foreign investment, nature of the contracts, and other factors, these security measures may include voting trusts, proxy agreements, Special Security Arrangements, Security Control Agreement or other agreements that are designed to mitigate the potential foreign influence.

### 21.2 Regulation of Particular Investments for National Security Reasons.

In addition to specific limitations on foreign investment in certain industrial sectors, the President of the United States is authorized to prohibit or suspend any controlling investment by a foreign person in a U.S. business if he determines that (i) the transaction presents a threat to the U.S. national security, and (ii) there are no adequate alternative measures to address that threat. While it is extremely rare for the President to take action regarding a covered transaction, transactions have been voluntarily modified or withdrawn by the parties during the CFIUS review process.

#### 21.2.1 What transactions are reviewed by CFIUS?

CFIUS is authorized to review any foreign acquisition of an existing U.S. business and any minority foreign investment in a U.S. business where the investor acquires a measure of control over the business. CFIUS does not review start-up investments, portfolio investments, or other investments that do not result in foreign control of an existing U.S. business.

#### 21.2.2 What is CFIUS and how does it review a proposed transaction?

The President has delegated his power to review foreign acquisitions to CFIUS, which consists of representatives of several U.S. agencies. These agencies include the Departments of State, Treasury, Defense, Homeland Security, Commerce, Justice, and Energy, as well as various White House offices and other agencies. Notification of covered transactions to CFIUS is not required, but parties are

generally expected to notify CFIUS concerning covered transactions that potentially implicate national security. CFIUS also may self-initiate a review. Voluntary notifications ordinarily are filed jointly by the parties, and must contain a substantial amount of specific information about the parties and the transaction. Once CFIUS has initiated a review of a transaction, it has 30 days to decide whether to conduct an investigation. Most cases are completed during this initial stage. If CFIUS initiates an investigation, then it must complete work within another 45 days. If the case still is not resolved at the end of this second stage, then the President has 15 days to decide whether or not to take action based on the CFIUS report.

Almost all cases are resolved by CFIUS without Presidential involvement. In some cases the investor enters into a “mitigation agreement” under which it commits to certain actions to address national security concerns raised by CFIUS. In other cases, the parties withdraw or modify the proposed transaction after CFIUS raises concerns. If CFIUS concludes action by determining there are no unresolved national security issues, or if the President otherwise does not block the transaction within the 90-day period, then the transaction enters a “safe harbor” and the President cannot later block the transaction except in extraordinary circumstances. Because of this “safe harbor,” as well as the fact that the CFIUS review process is confidential, it may be in a foreign investor’s best interest to notify CFIUS of a deal with potential national security implications, even if those implications do not appear to be significant. If the parties do not notify CFIUS of a covered transaction and CFIUS does not review it, then the President retains his authority and may exercise it even after closing, forcing the foreign party to divest its interest.

### 21.2.3 How do you determine whether your proposed transaction implicates national security?

“National security” is a broad term that is not specifically defined in law. In general, when a target company provides products, services or technologies to national defense or security agencies, or the target possesses advanced technologies or “critical infrastructure”, then the parties should consider notifying CFIUS.

In reviewing a transaction, CFIUS considers a broad range of factors - from the proposed deal’s impact on the United States’ capability to meet the production requirements of national defense, to whether the target company holds a security clearance and classified contracts with the U.S. government, to the foreign buyer’s home country’s record on non-proliferation and counterterrorism. Transactions involving a foreign government-owned entity, or “critical infrastructure” (for example, major energy assets, communications, transportation systems and facilities), generally must undergo the mandatory 45-day investigation by CFIUS, although senior CFIUS representatives may determine that a full investigation is not warranted. Indian state-owned enterprises and other companies with significant investment from the Indian government would most likely fall under this requirement.

### 21.2.4 Our proposed transaction clearly has no national security implications. Does it still need to be reported to the government?

Even if a transaction clearly does not implicate the U.S. national security and the parties choose not to notify CFIUS, all foreign investments in a U.S. business that result in 10% or greater foreign ownership must be reported to the Department of Commerce within 45 days. This reporting is for statistical purposes only. Under federal law, reporting requirements also apply with respect to the following:

- ***Agricultural Land:*** Foreign investments in U.S. agricultural land must be reported to the Department of Agriculture.
- ***Foreign Direct Investment in the United States:*** Following the initial report noted above, three other types of reports to the Commerce Department may be required regarding foreign direct investment (including the acquisition of real estate). These reports include an annual survey, a benchmark survey, and a quarterly report of transactions with a foreign parent.

## RESOLVING DISPUTES IN THE UNITED STATES

### 22. What if you have a business-related dispute with another party?

When a dispute cannot be resolved through discussion and negotiation, there are two types of third-party adjudication in the United States: litigation and arbitration.

#### 22.1 What is arbitration and how is a dispute arbitrated in the United States?

Arbitration is a private forum for dispute resolution where the parties to a contract refer their dispute to one or more impartial persons for a final and binding decision. Arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions. Parties enter into arbitration agreements because of the potential advantages over litigation, including the parties' ability to determine the place of arbitration, to select the arbitrators, including arbitrators with substantive expertise directly applicable to the dispute at hand, and to determine the procedures governing the arbitration. In addition, arbitration is often faster and less expensive than litigation, and arbitral proceedings are generally private and confidential. Finally, arbitration awards are generally easier to enforce abroad than court judgments, and the avenues for appeal of arbitral awards are much more limited than court judgments. Both India and the United States are signatories to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, which provides for reciprocal enforcement of arbitral awards.

Arbitration occurs after parties to a dispute enter into an agreement to do so. These agreements generally fall into two categories: (1) general agreements, signed before a dispute has arisen, which contain an arbitration clause and provide for the resolution of any potential disputes through arbitration; and (2) submission agreements, signed after a dispute has arisen, which provide that the dispute shall be resolved through arbitration. In most circumstances, the parties' arbitration agreement determines the number of arbitrators, place of arbitration, substantive law and procedural rules governing the arbitration, and whether the arbitration is to be administered by an arbitration institution, such as the International Chamber of Commerce (ICC) International Court of Arbitration or ad hoc.

Arbitration normally culminates in a hearing before the arbitral tribunal, which consists of one or three arbitrators. At the hearing, witnesses testify and are subject to cross-examination, and counsel for the parties otherwise present their parties' case through oral argument. After the hearing, the arbitral tribunal issues an award that determines the claims in the case. The award is final and binding on the parties and subject to challenge in courts on only limited and very narrow grounds.



## 22.2 How do you litigate a dispute in the United States?

There are two court systems in the United States: federal and state. The jurisdiction of a particular court depends on whether the court exercises power over the parties and the issues. Federal courts settle disputes between citizens of different states of the United States or different countries if the amount in controversy is sufficiently great. They also hear cases regarding matters of national or federal importance. State courts settle questions related to actions that occur within state boundaries. Foreign businesses may bring suit and be sued in U.S. courts; even minimal contact by a foreign business with a particular location may give a court the necessary jurisdiction. A foreign business' subsidiary in the United States may also subject the foreign parent company to a U.S. forum if the subsidiary is considered to be an agent or alter ego of the foreign parent.

Each court system has particular rules relating to court procedures. But, generally, the party bringing a suit is called a plaintiff. To bring a suit, the plaintiff must serve a summons and complaint on a defendant. A complaint states the relief sought by the plaintiff while the summons presents the defendant's options of answering the complaint or taking other legal action.

As a lawsuit proceeds, it will include a discovery stage during which each party attempts to find out as much information as possible about the other party and its claims. In discovery, a party may request paper and electronic documents, the opportunity to question certain people and answers to written questions. Discovery is frequently a burdensome and expensive process. Although you may not eventually have to provide all documents requested, once you reasonably anticipate litigation, you have a duty to preserve all relevant documents, including both written and electronic documents. If care is not taken to preserve these documents (even before a lawsuit has actually been filed), a company's claim or defense can be seriously compromised.

If a case does not settle during the pre-trial phase, a trial will eventually be held; a judge will preside over the trial and either a judge or a jury of citizens selected from the local community will decide the facts of the case. A jury trial may be challenging for a foreign business whose witnesses may not speak English fluently or may have difficulty understanding a U.S. litigator's tactics. U.S. courts place great weight on the oral testimony of live witnesses and have a far more complex set of rules regarding the admissibility of evidence than Indian courts. A trial can last several days or several months, and decisions are final, although they can be appealed to higher-level courts.

## 22.3 What sort of litigation do Indian companies pursue or encounter in the United States?

The increase in trade between India and the United States and the relative efficiency and sophistication of the U.S. legal system means that Indian companies are more often bringing suit in the United States. Current trade patterns between India and the United States mean that Indian companies are usually the seller in business transactions, meaning that they are more likely to sue to enforce the payment provisions of their trade contracts. At the same time, Indian companies doing business in the United States are subject to the full range of commercial suits that can be brought against businesses in U.S. courts. The following is a sampling of possible litigation that Indian companies may encounter.



### 22.3.1 Commercial Contract disputes.

The most common and familiar type of dispute involving Indian companies in U.S. courts concerns the interpretation or performance of a contract. Those disputes may involve claims of non-payment or late payment, failure to deliver goods according to agreed-upon specifications, violation of a specific warranty or promise, breach of a confidentiality provision or disagreement over any other aspect of the parties' relationship. These disputes may also contain allegations of fraud or other intentional wrongdoing against the Indian company's officers, directors or business principals.

### 22.3.2 Intellectual Property Infringements.

Cases alleging intellectual property infringements are also common and may be brought by or against Indian companies before a U.S. court even if the alleged activities primarily occurred in India. For example, Medicis Pharma Corporation has recently filed a suit against Ranbaxy Laboratories Ltd's Delaware subsidiary, alleging patent infringement of its acne product.<sup>47</sup> Earlier, Ranbaxy had settled a patent infringement lawsuit with AstraZeneca in 2008 and a worldwide litigation with Pfizer in 2007.<sup>48</sup> In 2006, Eli Lilly filed a patent infringement lawsuit against Sun Pharmaceutical, claiming that Sun Pharmaceutical infringed on its patent for a cancer drug. In 2001, Micro Data Base Systems Inc. sued the State Bank of India for breach of contract and copyright infringement.<sup>49</sup> Trade secret theft is also a common allegation in civil lawsuits and, although more rarely, in criminal investigations. These types of lawsuits can be particularly threatening to an Indian company given the scope of damages involved, the large-scale nature of the litigation and the assault on a key product or service.

### 22.3.3 Product Liability.

Claims can be made against Indian companies involved in the design, manufacturing or distribution of products that the products are defective because of faulty design, manufacture or warning labels. These suits can be maintained against any person or corporation involved at any level in the manufacture or sale of the product.

### 22.3.4 Securities Fraud.

As Indian companies seek to be listed on U.S. stock exchanges, they also expose themselves to securities actions.

### 22.3.5 Shareholder Actions.

Shareholders may aggregate their common claims against a corporation and prosecute those claims against the corporation as a group. Although this could mean decreased litigation cost, because the corporation only has to defend against one suit instead of many, it also has the potential to involve a greater number of shareholders in the litigation.

### 22.3.6 Antitrust.

Antitrust laws aim to protect businesses or consumers from anti-competitive behavior such as price fixing or market allocation. Antitrust suits can be brought both civilly and criminally and by federal, state or private parties. For instance, Chinese manufacturers supply a large majority of the vitamin C used in the United States, so when the four largest producers allegedly came to an agreement resulting in price increases, U.S. courts claimed jurisdiction and about half a dozen civil antitrust suits

were filed. In a similar suit against European vitamin manufacturers, U.S. businesses won \$1.2 billion in a settlement.

### 22.3.7 Foreign Corrupt Practices Act.

In general, the Foreign Corrupt Practices Act (“**FCPA**”) prohibits corrupt payments to foreign officials to obtain or keep business. This law is enforced by the Department of Justice and applies to certain foreign issuers of U.S. securities as well as U.S. corporations. After certain amendments in 1988, the law also applies to foreign nationals and companies if they cause, directly or through agents, an act in furtherance of a corrupt payment to take place within U.S. territory. In recent years, the Department of Justice has stepped up its enforcement of the law. In 2009 and 2008, action was taken against forty and thirty-three companies, respectively, up from just five in 2004.<sup>50</sup> Siemens AG, in 2008, paid US\$800 million for bribes paid in other countries - the biggest fine ever levied for FCPA violation.<sup>51</sup> There have been several cases of FCPA violations in India.<sup>52</sup>

### 22.3.8 Section 337 Intellectual Property Cases.


Section 337 refers to Section 337 of the Tariff Act of 1930. Under this law, the International Trade Commission (“**ITC**”) investigates certain “unfair trade practices” in import trade. Cases ordinarily involve disputes over intellectual property, including patent infringement, trademark and trade dress infringement, copyright infringement, misappropriation of trade secrets and passing off or false advertising. Section 337 investigations involve litigation before an ITC administrative law judge (“**ALJ**”) in response to a private party’s complaint. The ALJ makes a recommended determination to the Commission, which makes a final decision. If the ITC finds for the complainant, the usual remedies are an order excluding offending products from entry into the United States, and/or an order to “cease and desist” from the violations. The President has an opportunity to review such orders and to overturn them before they become effective, although this is rare. Section 337 cases are conducted at a fast pace, and are usually completed in about 15 months.

### 22.3.9 To enter an order, the ITC must find three elements:

The importation, sale for importation or sale after importation of goods; unfair acts or methods of competition (e.g., violations of valid patent rights) in relation to those imported goods; and the complaining party’s participation in a U.S. industry in the relevant goods. An adverse finding can be enforced even against foreign or unknown companies and can result in infringing products, and even “downstream” products manufactured using an infringing product, being barred from the U.S. market.

### 22.3.10 Trade Remedy Investigations.

U.S. trade remedy laws authorize “antidumping duties” or “countervailing duties” to offset the effects of certain trading practices that are found to cause or threaten material injury to competing domestic industries. These practices include “dumping” - selling goods into the United States at prices less than “normal value” - and certain government subsidies for exported products. The Department of Commerce and the ITC administer these trade remedy laws; the Commerce Department determines whether there is dumping or subsidization, while the ITC determines whether the competing domestic industry is injured by the imports. Separately, “safeguard” measures may be imposed to cushion the injurious effects of unanticipated import surges. The ITC investigates and makes recommendations regarding relief in safeguards cases, while the US. Trade Representative makes the final determination.



U.S. trade remedy measures must comply with relevant WTO rules. Trade remedy investigations are generally complex and resource-intensive. Indian companies planning to invest in the United States should consider the potential trade remedy implications of their business strategies. For example, acquiring a U.S. manufacturing facility to serve the U.S. market may avoid U.S. antidumping duties, while the establishment of an affiliated importer or distributor within the United States may reduce or exacerbate potential liabilities, depending on the circumstances.

There are more than 20 antidumping and countervailing duty orders currently in effect that apply to imports of various Indian products. Sometimes the orders may impose very high duties that act as a bar to the U.S. market. For example, in 1991, the ITC and Department of Commerce (“**DOC**”) made preliminary affirmative determinations in antidumping and countervailing duty cases involving Cheminor Drugs, Ltd.<sup>53</sup> Before final determinations were made, Cheminor withdrew from the U.S. market.

#### 22.4 Why is it important to respond promptly to U.S. litigation?

U.S. “long-arm” statutes allow state courts to exercise jurisdiction over foreign defendants as long as the prospective defendant has sufficient “minimum contacts” with the state. Additionally, federal courts can hear cases regarding federal claims if a foreign defendant has “minimum contacts” with the United States as a whole - even if the defendant does not have “minimum contacts” with any particular state. As long as a court has jurisdiction, your failure to respond promptly to a U.S. lawsuit can be interpreted by the courts as your acceptance of the opposite party’s presentation of the facts of the case. If those facts are conclusive, a judgment could be entered against you. Such a judgment not only has a direct impact on the issue or transaction in that piece of litigation, but may have collateral preclusive effect on future litigation as well. This is similar to the position in Indian law, where a plaintiff may seek a default judgment upon defendant’s failure to respond to a lawsuit.

A U.S. court judgment can be enforced against many kinds of assets with a U.S. nexus, but U.S. court judgments are hard to enforce offshore because there is no mutual enforcement of court judgment treaties (arbitrations are different). Even if you do not have U.S. assets, if you receive an adverse decision on a trade case, your goods could be shut out of the U.S. market.

It is equally important to respond promptly to trade cases initiated by agencies, such as antidumping, countervailing duty, and Section 337 cases. Those investigations move quickly and parties may be barred from participating, and suffer from adverse factual findings, if they fail to respond promptly after a case is initiated.



## ENDNOTES:

1. International Monetary Fund, "Global Growth Estimates Trimmed After PPP Revisions," (Jan. 2008), pg. 4.
2. Reserve Bank of India, Monthly Bulletin (Oct. 2008).
3. Master Circular No. 01/2009-10 ("RBI Master Circular"). The RBI Master Circular includes the exchange controls regulations prescribed in the FEMA 120/RB-2004, Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004 ("FEMA 120"). The RBI Master Circular will be withdrawn effective July 1, 2010 and replaced by an updated master circular.
4. See Section B.1(1), RBI Master Circular.
5. See Regulation 2(o), FEMA 120. The "net worth" of the Indian investor is calculated as on the date of its last audited balance sheet (Section B.1(1), RBI Master Circular).
6. Form ODI (Annex A to the RBI Master Circular) is the form prescribed by RBI for approval applications as provided for in Section B.1(2), RBI Master Circular.
7. Section B.7(2)(a)–(d), RBI Master Circular.
8. Sonali Sharma and Anahita Irani, "Acquisition Financing in India," Global Securitisation and Structured Finance (2008), pg. 4.
9. Section B.1(3)(g)(ii), RBI Master Circular. See Regulation 6, FEMA 120, for calculation of the financial commitment and the net worth of the Indian investor.
10. Section B.1(2), RBI Master Circular.
11. Section B.3(1), RBI Master Circular.
12. ECBs are borrowings raised in India from institutions outside of India and include bank loans, suppliers' and buyers' credits, fixed and floating rate bonds (without convertibility) and borrowings from private sector windows of multilateral financial institutions such as the International Finance Corporation.
13. Section I(A)(iii), Master Circular on External Commercial Borrowings and Trade Credits, No. 7/2009-10. This Master Circular will be withdrawn effective from July 1, 2010 and replaced with an updated circular.
14. Price Waterhouse Coopers, "Overseas Acquisitions Ride on New Financing Options," The Financial Express (May 1, 2008).
15. See Section B.3, RBI Master Circular. ADRs/GDRs to be issued to the overseas target company in accordance with the scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993.
16. Section B.1(3)(h)(i)–(iv), RBI Master Circular.
17. See Section B.3, RBI Master Circular and Regulation 11, FEMA 120: Indian investor is permitted to capitalize the payments due from an overseas target entity towards "export of plant, machinery, equipment and other goods/software" besides fees, royalties or any other dues from an overseas target entity for "supply of technical know-how, consultancy, managerial and other services" within the ceilings available.
18. Section B.3 (1)(vi), RBI Master Circular.
19. Section B.1(3)(e), RBI Master Circular. The FIPB is a national agency of India to consider and recommend foreign direct investment proposals into the country.
20. Regulation 10, Takeover Code.
21. Section B.14(1), RBI Master Circular.
22. Section B.14(2)(i)–(iv), RBI Master Circular.
23. Section B.14, RBI Master Circular.
24. Section B.5(1)(iii), RBI Master Circular.
25. Section B.5(1)(i), RBI Master Circular.
26. Section B.5(1)(ii), RBI Master Circular.



## Q&A on Indian Companies Establishing and Acquiring Businesses in the United States

27. Section B.5(1)(iv), RBI Master Circular.
28. Section B.5(2), RBI Master Circular.
29. Regulations 3, 5, Foreign Exchange Management Act (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2000, FEMA 7/2000 – RB, GSR 390 (E), dated May 3, 2005.
30. See issues in relation to asset sale of a U.S. company to the SPV in section 21.3 (*Structuring the Transaction*) below.
31. Sections 390 to 394 of the Companies Act govern a merger transaction. These sections provide for and regulate corporate restructurings such as mergers, amalgamations, demergers, spin-offs/hive offs, and every other compromise, settlement, agreement or arrangement between a company and its members and/or its creditors.
32. See Section 394(4)(b), Companies Act. The Companies Bill, 2009, under Section 205, has proposed amendment of the Companies Act to permit merger of Indian company into a foreign company. The Bill has not been passed yet.
33. The relevant court is generally the High Court in whose jurisdiction the registered office of the petitioning company is located. In India, High Courts are state courts. There are currently 21 High Courts in India. Court approval must come from the High Court of the respective state in which the registered offices of the companies are situated. Corporate Counsel's Guide to Doing Business in India §§ 6:7, 4:13. (Current as of Aug. 2008).
34. The transaction may require FIPB approval if it results in the shareholders of the target company holding shares of the Indian investor. Foreign shareholders will become subject to FEMA 120 as well as Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.
35. See Section 5 (a), Competition Act, 2002: the acquirer and the target jointly have assets of \$500 million of which at least approximately \$100 million are in India, or turnover of \$1.50 billion of which at least approximately \$300 million arises in India. In addition, the group to which the target belongs must jointly have assets of at least \$2 billion of which at least approximately \$100 million are in India, or turnover of at least \$6 billion of which at least approximately \$300 million arises in India
36. Section 6 (2), Competition Act, 2002.
37. Section 6 (2A), Competition Act, 2002.
38. Competition Act, 2002: Section 2(r) defines 'relevant market' to mean the market which may be determined by the CCI with reference to the relevant product market or the relevant geographic market or with reference to both the markets; Section 2(s) defines 'relevant geographic market' to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas; Section 2(t) defines 'relevant product market' to mean a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.
39. See Indo-U.S. Tax Treaty. The withholding tax rate is reduced to 15% if the recipient is a company that owns 10% or more of the voting power of the company paying the dividends.
40. A partnership can elect to be treated as a corporation for U.S. tax purposes. If it is a U.S. entity and it does so elect, taxation would follow the pattern set forth in section 4.1.1 above. If it is a non-U.S. entity and it does so elect, taxation would follow the patterns set forth in section 4.5 below.
41. See Indo-U.S. Tax Treaty.
42. Acquisition Financing in India (2008).
43. U.S. Citizenship and Immigration Services (<http://www.uscis.gov/portal/site/uscis/>) (October 9, 2009)
44. Accenture, "India Goes Global: How cross-border acquisitions are powering growth" (2006).
45. Mint, "US Steel Workers Union Tries to Block Essar's Bid for Esmark" (May 19, 2008).
46. United News of India, "ICICI Bank inaugurates its U.S. office in New York" (Mar. 1, 2008).
47. "Medicis files suit against Ranbaxy" Business Line (June 13, 2009).

48. <http://fdanews.com/newsletter/article?issueld=11514&articleld=106036> (October 9, 2009)
49. *Eli Lilly and Co. v. Sun Pharmaceutical*, 06-CV-1721 (S.D. Ind. 2006); *Astra Akitiebolag v. Andrx Pharms., Inc.*, 222 F. Supp. 2d 423 (2002); *Micro Data Base Sys., Inc. v. State Bank of India*, 177 F. Supp. 2d 881 (2001).
50. Suman Layak, "Warning for the Bribe Tribe," *Business Today* (August 6, 2009) and see <http://www.complianceweek.com/blog/aguilar/2010/01/07/2009-another-record-year-for-fcpa-actions/>
51. *Id.*
52. *See Id.* Xerox Corporation was charged for improper payments to Indian government officials by its Indian affiliate, Xerox ModiCorp. Dow Chemical Company was penalized US\$325,000 in 2007 for violating book-keeping norms in relation to improper payments made to Indian government officials. Westinghouse Air Brake Technologies Corporation and AT Kearney have also been charged in the past. No Indian company has so far been held guilty of FCPA violations.
53. Department of Commerce, International Trade Administration, 57 FR 7567

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