The Changing Phase of Indian Legal and Legislative Systems to Compete With Developed Countries and Emerge As a Global Player in International Business- Recent Developments

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ABSRACT

India, being the largest and tested democracy in the world has freed itself from the clutches of a regulated and subsidized economy wherein government sponsored institutions or PSUs as they are known had an upperhand. It is slowly moving into a Laissez faire, albeit with proper checks and controls. There has been an unprecedented growth in the Indian economy since the economic reforms initiated as a consequence of the liberalization policies since 1991. India's economic reforms launched the said year were well planned and ushered in a new era of economic liberalization and economic freedom. The beauty of the fact is that inspite of successive change in governments which ruled India, the reforms gathered momentum. It did not stop. Since then, the nation has emerged as a new player in the global forum of trade and business, a force to reckon with. This study not only focuses on elucidating the various legislative and regulatory reforms in the Indian economic and financial sector which has paved the way for the expansion in liberalized trade and opened up new avenues for investment plans but also seeks to understand and examine those reforms in a broader global perspective. Besides, latest trends and developments in business relating to the study have been discussed wherever possible so that a fair idea about the practical aspect can be suitably achieved. The paper concludes with the prospect of extending strategic co-operation and strengthening trade and investment links between the Asian countries which can build strong business ties that will reduce the probability of conflict and lead to the participation in each other's growth and development.

Key Words: India, Economic Development, Legal, Legislative and Regulatory Reforms, Asia

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Introduction

The growth of Indian economy from an underdeveloped one to a developing one is now an unquestioned success story. The world's largest and tested democracy has emerged as a new player in the international arena of business and as a favorable destination to invest. Such fast paced development cannot occur without appropriate changes, including bringing in new legislation and regulatory framework to meet the challenges of a global economy. Indeed, mainstream attention has tended focus primarily on China, which is due to the sheer size of the country and its population. However it can be safely said that both the countries, in many respects are quite complimentary. For while China's growth has been driven by the government, and controlled by government India's growth spurt has tended solely due to the policies of the government which allows a fair level playing field and is not controlled or owned by government or government owned subsidies. India is the largest democratic nation in the world, with its administrative system patterned after the British system and follows common law as prevailing in the United Kingdom. The rule of law prevails in India. It has an independent judiciary, an impartial election commission, and a responsible central bank. The three pillars of Indian Constitution are the Executive, the Legislature and the Judiciary and it does not allow one to step in the functions of the other, whereas it has the power to correct the disharmony created by the action of the others. For instance, a bad piece of legislation is always challenged as *ultra vires* and can be quashed by the judiciary but it does not itself allow judiciary to enact law. An overzealous Executive is always checked by both judicial actions and legislative enactments. Dr. Manmohan Singh said in his speech at the India Economic Summit, November, 2005:

> In 1991, when were given the opportunity to carry forward the programme of change, there were many skeptics in our midst, and in the audience here. I recall the concerns expressed by the 'Bombay Club' about the pace of change that we tried to pursue. The concerns were about increased competition, the concerns were about exposure to global market forces, about our capacity to deal with change and about

> the impact on our industry and our economy. Some of the concerns were products of old mindsets, some of them were ignorance of our own capabilities.

There has been an unprecedented growth in the Indian economy since the liberalization reforms initiated as a consequence of the policies since 1991. India's economic reforms launched the said year were well planned and ushered in an new era of economic liberalization and economic freedom. Such reforms were instrumental in setting up world class institutions in order to make India a safe and favorable place to invest. A well researched paper by two leading international economists, T N Srinivasan and Jagdish Bhagwati provided the platform for the reforms dealing with macroeconomic stabilization, industrial deregulation by dismantling myriad industrial controls, allowing foreign direct and portfolio investment, and opening up various sectors for private participation, financial sector reforms and trade liberalization. (Sivakumar, 2009). Presently, an Indian company may raise funds from abroad by various means like making a public issue abroad or through FDI window as per Government guidelines or through 'External Commercial Borrowings' route as per the Government norms or through the issue of American Depository Receipt/ Global Depository Receipt. The Economic Intelligence Unit (EIU)[2] evaluating the business environment in 60 countries for the period of 2002-06 has ranked India at 41. More importantly, India has moved upto 5 notches from the ranking for the earlier period (1997-2001). As far as India's present position is concerned, it ranks 133rd in the World Bank Group's survey of 'Ease of Doing Business' out of 183 countries as per the reports published in 2010.

The purpose of this study is to bring forth the message that the slow and steady process of economic, regulatory and legal reforms since July 1991 in India has unleashed a new dynamics, a hitherto unknown confidence among Indian companies and professionals that they can excel, compete globally and become world class. The global investor base also needs to understand India, as it offers exciting possibilities for Fortune 500 companies for lowering the cost of innovation and operations, by outsourcing to India.

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2 The Economist Intelligence Unit is the world's foremost provider of country, industry and management analysis.

This study not only focuses on elucidating the various legislative and regulatory reforms in the Indian economic and financial sector which has paved the way for the expansion in liberalized trade and opened up new avenues for investment plans but also seeks to understand and examine those reforms in a broader global perspective and further delves into the latest overseas acquisitions by Indian corporates. Besides, latest trends and developments in business relating to the study have been discussed wherever possible so that a fair idea about the practical aspect can be suitably achieved. This paper deals with the subject from a bird's eye view to capture the growth path and most recent movements in the diverse areas as discussed below.

Foreign Direct Investment (FDI) Policy: From the License Raj to the Era of Economic Liberalization- Recent Trends

The second five year plan (1956-1961), the product of P.C. Mahalanobis' work, implemented some elements of British socialism and combined them with the tenets of Mahatma Gandhi. (Thayer Watkins, 1995) It sought to eliminate the importation of consumer goods, particularly luxuries, by means of high tariffs and low quotas or banning some items altogether. Licenses were required for starting new companies, for producing new products or expanding production capacities. This is when India got its *License Raj*, the bureaucratic control over the economy. India's insulation from world markets until the reforms of 1991 stemmed from a longstanding distrust of markets and international trade in general and the fear that greater involvement in foreign trade would inevitably retard India' s industrialization. (Srinivasan, 2000)

After decades of lackluster performance under the all pervasive interventionist policy regime espoused after independence, India embarked on a major economic liberalization program in 1991. This liberalization is also instrumental to spur technological upgrading, due to the competitive pressure and learning and technological externalities from FDIs. (Emran et al., 2003)

The economic liberalization in 1991 was an epochal event as it ushered in a new era. The liberalization programme was initiated in July 1991, under the new Industrial Policy Resolution. The industrial policy reforms have substantially reduced the industrial licensing requirements, removed restrictions on expansion and facilitated easy access to foreign technology and foreign direct investment.

The Parliament has enacted the Foreign Exchange Management Act, 1999 to replace the Foreign Exchange Regulation Act, 1973 (FERA). This Act came into force on the 1st day of June 2000. The object of the Act is to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. This Act extends to the whole of India and will also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India. It will also be applicable to any contravention committed outside India by any person to whom this Act is applicable. The earlier FERA with its draconian face and threat of prosecution and jail was thus replaced with the mild yet strong FEMA which allows compounding of offences.

India has since become a magnet for foreign investment. The FDI Policy is formulated by the Government of India and the policy and procedures in respect of FDI in India is available in *"the Manual on Investing in India - Foreign Direct Investment, Policy & Procedures".* Foreign Direct Investment is freely permitted in almost all sectors. Under the Foreign Direct Investments (FDI) Scheme, investments can be made by non-residents in the shares / convertible debentures / preference shares[1] of an Indian company, through two routes; the Automatic Route and the Government Route. Under the Automatic Route, the foreign investor or the Indian company does not require any approval from the Reserve Bank of India (RBI) or Government of India for the investment. Under the Government Route, prior approval of the Government of India, Ministry of Finance, Foreign Investment Promotion Board (FIPB) is required.[3] The newly created Foreign Investment Promotion Board cleared the projects of Suzuki, Ford, Kellogg, IBM, and others. A noteworthy feature is the dramatic speed of approvals.

To mention some of the latest trends in policy and procedures, the Government has allowed 100% Foreign Direct Investment under the automatic route in townships, housing, built-up infrastructure and construction-development projects vide Press Note no. 2(2005), Ministry of Commerce and Industry, Department of Industrial Policy and Promotion. With a view to further liberalize the FDI regime, the Press Note No,.2 was modified to include the following changes:

i. FDI upto 100% is permitted in airports, with FDI above 7% requiring the prior approval of the Government.

ii. FDI upto 100% is permitted for development of integrated townships, including housing, commercial premises, hotels, resorts, city and regional level urban infrastructure facilities and manufacture of building materials.

iii. FDI upto 100% is permitted on the automatic route in hotel and tourism sector

iv. FDI upto 100% is permitted on the automatic route for Mass Rapid Transport Systems in all metropolitan cities, including associated commercial development of real estate

v. NRI investment in foreign exchange is made fully repatriable whereas investments made in Indian rupees through rupee accounts shall remain nonrepatriable.

Further, the FEMA Regulations prescribe the mode of investments i.e. manner of receipt of funds, issue of shares / convertible debentures and preference shares and reporting of the investments to the Reserve Bank. It can be said that if a foreigner or a foreign company or a person resident outside India wants to invest in India, either in the manufacturing sector or service sector including housing sector, insurance, banking, telecommunication etc., the foreigner, foreign company or the person resident outside

[3] Source: RBI's Master Circular No.2/2009-10 dated July 1, 2009.

India as the case may be, has to pay due attention to the conditions, regulations and the procedure which are laid down in different notifications by the RBI issued in terms of the Section 6 of the FEMA like the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000. (Krishnan, 2009) An in-depth study of the relevant guidelines would reveal that equity participation by international financial institutions in domestic companies is permitted through the automatic route. Also, foreign investment through preference shares is treated as foreign direct investment. Such proposals are processed either through the automatic route or FIPB as the case may be.[4] Further, it is pertinent to note that the general policy and facilities for foreign direct investment as available to foreign investors/companies apply to Non Resident Indians (NRIs) as well. In addition to these, the government has extended special concessions to NRIs in the real estate and housing and domestic airlines sector.[5]

Some of the latest developments in the banking sector are discussed as under:

Reserve Bank of India has already drawn out a road map for the presence of foreign banks in India. In the first stage, from 2005 to 2009, foreign banks were being allowed to set up wholly-owned subsidiaries as well as get greater freedom to set up new branches. They are allowed 74 per cent stake in a private bank that has been identified by the RBI as a candidate for restructuring. After 2009, the local subsidiaries of foreign banks will be treated on par with domestic banks, though they will have to sell at least 26 per cent of their equity to the Indian public. And they will have greater freedom to acquire private sector banks in India. FDI limit in private sector banks is currently capped at 74 per cent. There is still debate in banking circles on whether there will be a full-scale invasion by foreign banks after 2009. Or, will it merely mean that the foreign banks that are already in will expand more aggressively than in the past? It is too soon to tell. But a few things can be taken for granted: foreign banks will step up their presence in India within a few years. They will challenge the local biggies with their global reach, skills,

4 As per the guidelines notified vide A.P (DIR Series) Circular No. 73 dated 8.6.2007.
5 Gazette Notification dated 2.11.2004 issued by the Ministry of Civil Aviation, Govt of India available at *www.civilaviation.nic.in*

technology and products. They will also drive down margins, which are currently among the highest in the world.

On a different front, India allows foreigners to own 100% in companies carrying out wholesale trade but prohibits FDI in retailers selling to consumers. Foreign-owned wholesale traders can sell to shops and restaurants or other retailers but not to individual buyers. The new rules, issued by the industry ministry on March 31, 2010, say sales to 'group companies' should not exceed 25% of a cash & carry company's turnover and should only be for 'internal use' . Further the norms state that foreign companies carrying out wholesale trading will require approval from an 'appropriate' authority, central or state or local, and can only to sell to entities that have VAT, service tax or excise duty registration.

Revival in the Law of Competition: MRTP Act[6] vs. Competition Act, 2002 and the Introduction of the Competition Commission.-

India enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act), and made it an integral part of the economic life of the country. Finding the ambit of MRTP Act inadequate for fostering competition in the market and eliminating anti-competitive practices in the national and international trade, the Government of India in October 1999 appointed a high level committee on Competition Policy and Law (the Raghavan Committee) to advise on the competition law consonant with the international developments. Acting on the report of the committee, the government enacted the new Competition Act, 2002 which has replaced the earlier MRTP Act, 1969

The MRTP Act was a grim reminder of the *"license-quota- permit-raj"* of 1970's and 1980's. The Act had become redundant post July 1991 when the new economic policy was announced and

[6] Monopolies and Restrictive Trade Practices Act, 1969

Chapter III of the MRTP Act dealing with restrictions on Merger & Acquisition (M & A) activities was made inoperative. The Competition Act has been designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies. Its objects are lofty, and include the promotion and sustenance of competition in markets, protection of consumer interests and ensuring freedom of trade of other participants in the market, all against the backdrop of the economic development of the country. The raison detre of the Competition Act is to create an environment conducive to competition and to set aside any act which kills the spirit of competition.

The apex body under the Competition Act which has been vested with the responsibility of eliminating practices having adverse effect on competition, promoting and sustaining competition, protecting the interest of the consumers, and ensuring freedom of trade carried on by other participants in India, is known as the Competition Commission of India (CCI).

The functions of CCI are enlisted as under:

- CCI shall prohibit anti-competitive agreements and abuse of dominance, and regulate combinations (merger or amalgamation or acquisition) through a process of enquiry.

- It shall give opinion on competition issues on a reference received from an authority established under any law (statutory authority)/Central Government.

- CCI is also mandated to undertake competition advocacy, create public awareness and impart training on competition issues.

Professor A Bhattacharjea, in his recent study on the law of competition in India has critically examined the new Competition Act. The author has pointed out in his paper that most of the cases under the MRTP Act involved consumer complaints and contractual disputes unrelated to competition. Very few cartels were prosecuted, the development of a rule of reason for vertical agreements was hamstrung by the legislature, and merger review was terminated in 1991. Thereafter, judgments increasingly tried to enforce "fair" business conduct "in the public interest," often protecting competitors rather than competition. India thus has little relevant experience for the many technical economic criteria in the Competition Act. Although the new Act has several positive features, it is riddled with loopholes that might condone hard-core cartels, predatory pricing, and potentially anticompetitive cross-border mergers, while it also perpetuates the earlier tendency to penalize "unfair" behavior with no bearing on competition. (Bhattacharjea, 2008)

To delve further, it should also be clarified however that the provisions relating to M&A transactions (Sections 5 & 6 of the new Competition Act dealing with regulation of combinations) are yet to be notified. As of now, there is no clarity as to when these provisions would be made effective. It is also not clear whether these new provisions will be applicable in cases where definitive agreements have been signed before the notification but closing of the transaction has not happened.

The efficacy of the act will be seen in its implementation. But is the Competition Act truly reflective of the changing economic milieu of our country? In an economic situation, which can be best described as a mixed economy; only time will tell whether the Competition Act addresses the ground realities that exist today. However, the new Act is definitely a step in the right direction by harmonizing the competition policy with international trade and policy.

Reforms in Taxation Law: Advent of Taxation Advance Rulings

The tax system in India mainly, is a three tier system which is based between the Central, State Governments and the local government organizations. India has a well-developed tax structure with clearly separated authority between Central and State Governments and local bodies. Central Government levies taxes on income, customs duties, central excise and service tax.

The wave of tax reforms that started across the world in the second half of 1980's found its way into India. As part of its policy of liberalization, India introduced tax reforms in the 1990's.The reforms introduced in the Indian tax structure are various in comparison to other countries. But the tax reforms took place in such a way as to ensure its concurrence with the prevailing international trends.

Foreign nationals working in India are generally taxed only on their Indian income. Income received from sources outside India is not taxable unless it is received in India. The Indian tax laws provide for exemption of tax on certain kinds of income earned for services rendered in India. Further, foreign nationals have the option of being taxed under the tax treaties that India may have signed with their country of residence. Apart from the aforesaid one of the most important reforms is the introduction of the Authority for Advance Rulings which is discussed herein.

In order to provide the facility of ascertaining the Income-tax liability of a non-resident, to plan their Income-tax affairs well in advance and to avoid long drawn and expensive litigation, a scheme of Advance Rulings has been introduced under the Income-tax Act, 1961 and an Authority for Advance Rulings has been constituted. A non-resident or certain categories of resident can obtain binding rulings from the Authority on question of law or fact arising out of any transaction/proposed transactions which are relevant for the determination of his tax liability. The AAR (Procedure) Rules, 1996 provide detailed procedure for obtaining advance rulings.

What are the benefits of Advance Rulings?

- Helps the applicant in planning his income-tax affairs well in advance.
- Brings certainty in determining the tax liability.
- Helps avoiding long drawn and expensive litigation.
- It is inexpensive, expeditious and binding.

Questions on which Advance Rulings can be sought?

The advance ruling can be sought on any question of law or fact specified in the application in relation to a transaction which has been undertaken, or is proposed to be undertaken, by the non-resident applicant.

However, an advance ruling cannot be sought where the question

- is already pending in the case of the Non-resident applicant before any income-tax authority, the Appellate Tribunal or any court;
- involves determination of fair market value of any property; or
- relates to a transaction which is designed prima facie for avoidance of income-tax

The question whether the new reforms can stand test of time and boost the confidence of the foreign investor is yet to be answered. The system has to work out in all practical purposes before any conclusion can be reached. Nevertheless a positive step ahead in the proper direction is always the right move.

Financial Reforms in the Capital Markets

The Indian capital market has undergone a sea change in the recent times due to several structural changes brought about by the reformist regime post 1991 as well due to the deepening of the securities market. The advent of the Securities and Exchange Board of India (SEBI) has metamorphosised the role of capital market in the economy and the Indian capital market now stands comparable to the developed markets of the world. The Indian markets are now more investor friendly and technology-oriented thereby becoming transparent and responsive. SEBI, the capital market regulator constantly monitors the affairs of the stock exchanges and all related issues with regard to capital markets. This has given the global investor a sense of safety and security. The advent of the foreign institutional investors in the Indian capital market has been a landmark development as well. (Subramanyam 2005) The Indian securities markets are expanding as more new companies are getting listed and the number of and type of institutional investor participation is constantly increasing. The market regulator has brought in the best practices to be followed by the companies. Corporate governance is of utmost importance. The Listing

Agreement ensures that more than two thirds of the directors of a company shall be independent of the promoters.

Sivakumar (2009) in his book titled “Investing in India’s Emerging Resilience” has discussed the liberalization of a regime of administered interest rates in money and credit markets. Some of the key reforms were reduction in the CRR and SLR, phased liberalization of interest rates, elimination of direct credit controls, development of money and financial markets and activating of open market operations by the Reserve Bank of India (RBI) to influence liquidity.

The Indian Government has issued a detailed Notification[7] titled ‘Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme. Such issues are also known as Euro Issues. SEBI and RBI have been periodically giving clarifications under the scheme and also have been regularly revising the norms to keep in pace with economic needs and reforms. Further, Guidelines for Overseas Business Acquisition by specified Indian software companies and also for the ADR/GDR linked Employees’ Stock Option Scheme have also been issued by the government.

The Foreign Institutional Investors (FIIs) have been active in India for over 15 years. India’s emerging markets require the FIIs to register with the securities regulator i.e, the Securities and Exchange Board of India (SEBI). The RBI has given permission to SEBI registered FIIs to invest under the Portfolio Investment Scheme (PIS). FIIs are allowed to trade in all exchange traded derivative contracts on recognized stock Exchanges in India subject to the position limits prescribed by SEBI from time to time. Further, SEBI registered FIIs and sub-accounts of FIIs are permitted to short sell, lend and borrow equity shares of Indian companies subject to the regulations prescribed by the RBI and the SEBI and other regulatory agencies.[8] In India, foreign portfolio flows have been resilient. Interestingly, in 2001 when global portfolio flows reached single digits, India still maintained its share of flows. On a positive

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[7] Notification dated 12.11.1993

[8] RBI’s Master Circular No. 2/2009-10 dated July 1, 2009.

note, the long term investors can be rest assured that foreign investors will remain as large players in the Indian capital market.

India’s financial markets are certainly well positioned to intermediate savings, allocate it efficiently and ensure a handsome return on investment to capital providers. Though modernization of the country’s financial sector is a work in progress, in its current form it is certainly capable of supporting India’s quest for rapid economic growth. The presence of liquid and functional financial markets is the bedrock for our long term investment argument.

Role of the Reserve Bank of India

For any economy to grow, the nation should have a central bank, independent and autonomous of the government and India has one of the best in the world. The Reserve Bank of India is the central bank of India and is established under the provisions of the Reserve Bank of India Act, 1934. In this context reference is drawn to the Banking Regulation Act, 1949 which is the bible for the bankers in India especially with respect to the businesses they can undertake. About two decades ago, banking was also limited to certain transactions which include mainly those transactions defined under Section 6 (a) to (m) of the Banking Regulation Act. With the changing scenario and the economy opening up, the Reserve Bank of India, in its capacity as the controller and regulator of the Indian banking system allowed or in fact explored the possibility of looking into business, which can be fitted into Section 6 (n) and (o) of the Banking Regulation Act, 1949, when the said two sections were interpreted by the reserve Bank in a liberal manner, it had opened a floodgate of opportunities for the banking sector. Thereafter irrespective of the fact that whether it is a bank established under a private sector or a public sector, the bank saw this golden opportunity to earn fee income and started transacting and walking through the virgin paths which were hitherto unknown in banking industry. This also threw up an opportunity for the banking sector as a whole to look ino or examine the legal risk involved in such virgin transactions as allowed by the regulator. However it is pertinent to note that that the regulator at all times examined the potential risk involved in these transactions and had given the guidelines which banks were to strictly follow while doing business in these new products which were allowed because of economic liberalization.

In the last two years the world the changing dynamics of legal risk was borne by the fall of many mighty banking and financial institutions like a pack of cards, while the Indian financial industry stood the storm. There is always a tendency to assume or even copy certain best practices which are practice abroad on the assumption that they are the best in the industry. Such has not been the case with India, where the Reserve Bank has played a major role in sustaining the banking system and ensuring its smooth functioning amidst all uncertainties. Dr. Y. V Reddy[9] said *"I cannot define God, but I can recognize the devil, and whenever I see the devil, I take precautionary measures to avoid being affected*."

The root cause of all the bankruptcy proceedings was due to the fact that the legal systems failed to recognize the legality, enforceability and the legal risk involved in the contracts or exotic contracts which were entered into by these falling financial institutions. To quote from the judgment passed by the Hon'ble Madras High Court in M/S Rajshree Sugars and Chemicals Ltd. v. M/S Axis Bank Ltd[10]:

> "$ 700 Billion bail out plan" "Wall Street vanished", "Lehman Brothers went belly up", "Bear Sterns consumed", "US National Debt Clock runs out of digits" and "AIG gone up in smoke" are some of the captions which have hit the headlines in recent times. All of those news items have a common denominator, called derivatives

Equally in India also the fall of these mighty financial institutions, the legality or legal risk involved with the transactions of similar nature were put to test or being tested even today. Since the matter is subjudice and considering the fact that even though the Banks have won the first round, and since the proceedings have not come to finality it is wise not to comment on the legality of these issues at this stage.

Laws relating to Intellectual Property Rights.

9 Former Governor of Reserve Bank of India
10 Madras High Court Judgment dated 14th October, 2008

India is a signatory to the agreement concluding the Uruguay Round of GATT negotiations. This Agreement, inter-alia, contains an Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which came into force from 1st January 1995. It lays down minimum standards for protection and enforcement of Intellectual Property Rights in member countries, which are required to promote effective and adequate protection of Intellectual Property Rights with a view to reducing distortions and impediments to international trade. The obligations under the TRIPS Agreement relate to provision of minimum standards of protection within the member country's legal systems and practices.

As regards the status of various Intellectual Property laws in India and standards in respect of various areas of intellectual property, a law on Trade Marks has been passed by the Indian Parliament, called the Trademarks Act, 1999 and notified in the official gazette in 1999. This law repeals and replaces the earlier Trade & Merchandise Act, 1958. A new law for the protection of Geographical Indications, viz., the Geographical Indications of Goods (Registration and the Protection) Act, 1999 has also been passed by the Parliament and notified in the same year. A law called the Designs Act,2000 relating to Industrial Designs which repeals and replaces the earlier Designs Act, 1911 has also been passed by Parliament in its Budget Session, 2000. The Act has been brought into force from 2001. India showed signs of resistance to quick enforcement of international intellectual property right (IPR) protection laws as demanded by the developed countries, particularly the US. It must be acknowledged that there has been remarkable progress in IPR protection the field of software and cinema products.

However, under pressure from its own domestic industry and the United States, India strengthened its copyright law in May 1994, placing it at par with international practice. The law, which entered into force in May, 1995, fully reflects the provisions of the Berne Convention on copyrights, to which India is a party.

The new law on trademarks is the Trade Marks Act, 1999 along with the Trade Marks Rules (2002) which became effective in 2003. Under the new law, the definition of “trademark” has been expanded to include services as well, making service mark registrable in India.[11] The statute now recognizes “well known” trademarks in relation to goods and services. Further, for a foreign company to register a trademark in India, it is not mandatory that the applicant must have business presence in India. Foreign companies can take a step towards avoiding counterfeiting of their goods and marks and protecting them by registering the same in India, thereby providing added protection to the cores of their businesses.

The Government of India in May 2006 brought amendment in the existing Patent rules with a view to bring in more transparency, relaxing rigid time frames for compliance, time bound processing and simplify various procedures associated with processing of Patent applications in India. As per the changes notified under the Patents (Amendment) Rules, 2006, official fees can now also be paid through Electronic means. Further, to ensure time bound disposal of patent applications, definitive timeframes have been prescribed. For ushering transparency in grant of patent no patent shall be granted prior to six months from date of publication of application. (Aswal, 2006)

The bottomline is that India considers itself a responsible member of the WTO which suggests that international class IPR protection. Besides, given India's determination to emerge as a power in the global software industry, it is most likely that better IPR protection laws will be instituted and enforced. It may be noted that Bill Gates, the chief executive officer of Microsoft Corporation, has distinguished India as a most promising base for software development. If such an IPR-conscious business leader like Gates is of this opinion, one can only conclude that India's IPR scene is no deterrent to foreign companies.

Mergers and Acquisitions

Mergers and takeovers were prevalent in India right from the fifties. However the Government of India’s policies of balancing economic growth and curbing the concentration of economic power through

[11] Clauses 35-42, IVth Schedule, Trade Marks Rules, 2002

the introduction of the Industrial Development and regulation Act, 1951, the MRTP Act and the Foreign exchange regulation Act made hostile takeovers impossible with only very few mergers and takeovers in India prior to the 1990s. But the policy of decontrol and liberalization coupled with globalization of the economy post 1991 exposed the corporate sector to severe domestic and global competition. Companies started to consolidate themselves in areas of their core competence and divest those businesses in which they did not enjoy any competitive advantage. This led to an era of corporate restructuring through mergers and acquisitions.

As per the FEMA, if the target company is a non-resident, direct investment in Joint Ventures/ Wholly Owned Subsidiaries outside India (other than financial services) requires no approval subject to the conditions as contained in Act and the related regulations from time to time. Further, automatic route is available where non residents have to be issued shares in a merger of Indian companies. Mergers and amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/amalgamation. Once the scheme of merger or amalgamation of two or more Indian companies has been approved by a Court in India, the transferee company or new company is allowed to issue shares to the shareholders of the transferor company resident outside India, subject to the conditions that:

(i) the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap, and

(ii) the transferor company or the transferee or the new company is not engaged in activities which are prohibited under the FDI policy.

The new Indian law of competition uses the word ‘combinations’ to cover acquisition of control, shares, voting rights and assets, and mergers and amalgamations. The Competition Commission of India (CCI) (discussed above) established under the Competition Act, 2002 has power to inquire about combinations taking place outside India but having an effect on competition in India[12].

The appetite of Indian companies to go for global acquisitions has intensified. In 2006-06, as many as 144 M & A deals were signed across various sectors, involving 34 overseas deals by domestic companies. The ratio of Indian companies' outbound deals to foreign companies acquiring domestic firms has risen sharply according to a study. (Eiteman et al., 2008) While sectors such as media, telecom, automobile and hotels have started featuring in the M& A charts, IT, banking and insurance, pharma still remain on top of the charts.

India Inc goes global: Some of the conquests of Indian corporates are enlisted below

- Tata Steel acquired UK based Corus for $ 8 billion.
- Suzlon Energy Ltd acquired German firm Repower Systems AG for $ 1.7 billion.
- United Spirits bought Scotch whisky distiller Whyte & Mackay for US$ 1.11 billion
- Hindalco acquired Novelis for $ 6 billion TATA Chemical acquires US based Soda Ash Maker General Industrial Products for $ 1 billion
- Indian shipping company Great Offshore acquires UK based Sea Dragon for US$ 1.4 billion
- Essar Energy acquires 50% stake in Kenya Petroleum refineries ltd.
- Banswara Syntex to acquire France firm Carreman Michel Thierry for around US$ 125 million

Some Case Studies:

Foreign Direct Investment by ONGC Videsh

ONGC Videsh Ltd. (OVL) is a wholly owned subsidiary of ONGC Ltd[13], India's largest corporate by market capitalization. ONGC Videsh's efforts have been supported wholeheartedly by the

12 Section 32 of the Competition Act, 2002.
13 Oil and Natural Gas Corporation Ltd., India

Government of India, which has allowed the company exclusive empowerment, which provides OVL *single window clearance* for overseas upstream projects irrespective of investments involved. The company has been designated as the "Indian Nodal Agency" for overseas petroleum business and is maintained as a permanent participant in all concerned bilateral interactions and Joint working Groups of the Government of India. OVL has invested in over 15 countries through oil equity investment. Only 30 per cent of India's crude oil demand is met by domestic resources and 70 per cent is imported. The company has stakes in Russia, Sudan, Angola, Iran, Myanmar, Libya, Syria and Iraq and is one of the largest foreign direct investor in the Russian Federation.

Tata Motors' acquisition of Jaguar and LandRover

Tata Motors was interested in acquiring JLR as it would reduce the company's dependence on the Indian market. The company was of the view that the acquisition would provide it with the opportunity to spread its business across different geographies and across different customer segments

In June 2008, India-based Tata Motors Ltd. announced that it had completed the acquisition of the two iconic British brands - Jaguar and Land Rover (JLR) from the US-based Ford Motors for US$ 2.3 billion. Tata Motors stood to gain on several fronts from the deal. One, the acquisition would help the company acquire a global footprint and enter the high-end premier segment of the global automobile market. After the acquisition, Tata Motors would own the world's cheapest car - the US$ 2,500 Nano, and luxury marquees like the Jaguar and Land Rover. Though there was initial skepticism over an Indian company owning the luxury brands, ownership was not considered a major issue at all.

According to industry analysts, some of the issues that could trouble Tata Motors were economic slowdown in European and American markets, funding risks, currency risks etc. The deal, which followed months of protracted negotiations and is seen as yet another sign of Indian industry's growing global ambitions, is the latest in a string of foreign acquisitions by Tatas, including the Anglo- Dutch steel company Corus and Tetley Tea.

One of the country's leading dailies[14] wrote (2008):

> Ratan N. Tata, chairman of Tata Sons and Tata Motors, who has led his company's aggressive acquisition spree abroad, promised to "preserve" the iconic identities of Jaguar and Land Rover as analysts wondered whether they were really the right "fit" for a company which is known more for its hardy trucks and cheap cars.

Extensive studies and researches have been conducted in India and abroad on this deal being the hallmark of the venture of Indian biggies in the world markets. A latest study has emphasized on financial implications of the deal on the balance sheet of TML and opportunities and challenges for it, post acquisition (Shah and Thadamalla, 2008)

Bharti Airtel's acquisition of Zain, Africa

The board of Kuwait-based Zain Telecom has approved the offer by India's Bharti Airtel to purchase Zain's African assets and assume debt of Zain.

Over the last few years, the company had failed twice to gain a foothold in the emerging African market through South Africa's MTN Group. Indian operator Bharti, which closed financing for the deal to the tune of $8.3bn, would be transformed into a major global operating group becoming the world's fifth largest operator by customer footprint. This agreement is a landmark for the global telecom industry and a game changer for Bharti. More importantly, this transaction is a pioneering step towards the strengthening of ties between India and Africa. With this acquisition, Bharti Airtel is expected to be transformed into a truly global telecom company and this is probably the first time when an Indian telecom firm has gone ahead and acquired a global major.

One usual question that might come up in the minds of many- Can Airtel really grow from where it is now**?** History tells us that Mittal[15] and his team are capable of coming with newer business models to ensure growth, but not without cut throat challenges.

[14] The Hindu, March 27, 2008

Conclusion:

> The significant problems we face cannot be solved at the same level of thinking we were when we created them.
>
> Albert Einstein

India has arrived only recently in the world stage. India has done so simply by growing its economy through effective policy-making and sound economic and legislative reforms. Even then, India today is where China used to be in the 1990s. The base of this paper has been to trace the growth path of the India' emerging markets since 1991 and identify the factors which have catalyzed the process of development of the Indian economy and its integration with the global business platform with a focus on the changes in the legal and regulatory framework of the country.

The world economy has gained immensely from a broad commitment by nations to free trade over the last six decades. In India, though substantial progress has been made, the problems of large fiscal deficit, low employment generation and poor infrastructure continue to deter India's high growth prospects. Professor Douglass North in his classic book *The Rise of the Western World: A New Economic History* (1999) puts forth that unless India gets tough with the enforcements of contracts, its quest for sustained progress will fall short of expectations. Better use of technology, appropriate staffing of courts, linking salaries and service conditions of judges to efficient disposal of pending cases and limiting the time for lawyers to prepare the case by standardizing formats can create some impetus for change.

Undoubtedly, the economic liberalization of 1991 has progressively put the private sector at the centre and the public sector at the periphery and allowed the market forces to decide optimal outcomes. Foreign investors have been able to identify the structural changes in India's corporate sector in terms of global aspirations and have renewed their commitment with large scale investments in India. It is undoubtedly true that India has not been able to attract foreign direct investment as much as it should have done so but the scene is ripe that eventually foreign direct investment will also replicate the success

[15] CEO of Bharti Airtel

of portfolio inflows wherein the trickle has become a torrent. The troika of deregularization, globalization and infrastructure will unleash sustained development on an economy-wide basis over the forseeable future. Further another aspect that needs to be thrown light on is that the dynamics of legal risk in the ever changing financial markets cannot be placid. It has to create ripples. Therefore it cannot be measured in terms of set tools and yardsticks nor can one lay down certain set patterns to measure a fathom the legal risk in the transactions at all times. What can be done is to take proactive legal risk management system for this purpose.

In the global arena of business and trade, Asia is integrating rapidly in economic terms. China is the growth dynamo of Asia. By extending strategic co-operation and strengthening trade and investment links the Asian countries can build strong business ties that will reduce the probability of conflict. Participating in each other's growth and development would enable the nations to gain a larger market and a vast potential to increase trade and thereby fostering the spirit of co-operation and peaceful co-existence. It is time to lay the foundation for long-term mutually beneficial relationship between Asia's major economies and to prepare for the new Asian century. To conclude with the sayings of Mahatma Gandhi[16], "*It is unwise to be too sure of one's own wisdom. It is healthy to be reminded that the strongest might weaken and the wisest might err.*"

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