



REGULATION OF THE IMPORT, CULTIVATION, AND SALE OF GENETICALLY MODIFIED FOOD CROPS IN INDIA

By Anand S. Dayal

Modern biotechnology, involving the use of recombinant DNA (“rDNA”) technologies, has emerged as a powerful tool with applications in healthcare and agriculture. New plant varieties developed using rDNA techniques, commonly referred to as genetically engineered (“GE”), genetically modified (“GM”) or transgenic plants, have and are being developed to enhance productivity, reduce dependence on agricultural chemicals, modify the inherent properties of crops, and enhance the nutritional value of foods and livestock feeds.

Genetically modified food crops are key to increasing agricultural production and enhancing food security in India. Such crops are not new to India. Genetically modified cotton is commercially cultivated in India, and according to currently available information, twelve crops (of which eleven are food crops) are under various stages of development. While genetically modified crops have been successfully used in India -- accounting for about 85% of the cotton

grown -- their use for food crops is controversial. This article describes the governmental approval requirements in India for the introduction of genetically modified food crops; how the process is expected to unfold in practice, based on experiences in other recent cases; and suggests strategic steps that an applicant should consider in applying for regulatory approval.

REGULATORY REQUIREMENTS AND APPROVAL PROCESS

Several governmental authorities regulate the manufacture, import, use, research, and release of genetically modified organisms (“GMOs”) in India. These authorities operate at the central (federal), state, and local (district) level. The approvals required from these authorities often are interdependent and one approval may be a pre-requisite for others.

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ABOUT THIS ISSUE

We are pleased to present this issue of India Law News, a quarterly electronic publication of the ABA International's India Committee. India Law News is committed to providing a forum for discussion on important legal issues facing lawyers in the rapidly developing relationship between India and the United States, and beyond. The goal of this newsletter is to provide practitioners, academics, and judges with news and scholarship on emerging issues of mutual interest.

This issue covers topics of general interest. We begin with an article by Anand Dayal on the regulation of genetically modified food crops in India, a matter of substantial controversy. Mohit Saraf and Sanjay Mullick then discuss how to navigate the legal terrain in the Indian defense and homeland security market. Next, Ajit Sharma and Vardaan Ahluwalia discuss the new public shareholding requirements for Indian companies.

Legislation has been enacted in both India and the United States addressing withholding tax on service fees. H. Jayesh and Freddy Daruwala write about withholding tax on services fees remitted to the United States, while Timothy D. Richards and Alonso E. Sanchez discuss the new tax withholding regime in the United States. Continuing on the tax front, Aseem Chawla and Surabhi Singh write about the pros and cons of taxation as a response to the global economic downturn.

Rina Pal next writes about the Indian pharmaceutical industry and the new relationship between big pharma and producers of generic drugs in India, with the recent deal between Abbott and Piramal as a backdrop. Continuing to closely monitor the Doha round of trade negotiations, Kavita Mohan discusses the slow progress of the talks and what lies ahead for India, the United States, and other countries.

Finally, Anand Dayal and Jonathan Wolff write a thought provoking article and commentary on the controversial suspended sentences imposed recently in the Bhopal gas tragedy case. They argue, among other things, that Indian laws need to be updated to provide for adequate compensation for victims of future mass tragedies.

Special thanks to Committee Vice Chair and co-editor Poorvi Chothani and her firm, LawQuest, for undertaking the desktop publishing tasks for this issue. Finally, and most importantly, we thank the contributors to this issue.

We welcome your comments and suggestions.

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Welcome to the India Committee!

Thanks to you, the volunteers who have contributed so significantly to our efforts, our India Committee quarterly publication - India Law News -- continues to be exemplary in its quality and diversity of topics. Under the steady hand of our editorial board, led by the Honorable Sanjay Tailor and assisted by co-editors Poorvi Chothani, Kavita Mohan, and B. C. Thiruvengadam ("Thiru"), our quarterly publication continues to excel! We have so far covered a broad range of timely and relevant topics, including enforcement of foreign judgments and arbitral awards in India, the changing landscape of foreign investment in India, and civil and human rights in India. Future issues will continue to cover a wide variety of topics, such as the opportunities and challenges of legal education in India on which Professor Jay Krishnan will serve as guest editor.

What we achieve in the India Committee is a function of what you -- our India Committee members -- make of it. Your contributions have been exemplary and we encourage you to continue to participate in every way possible. We are eager to hear your ideas about India Law News topics, our webinars, topics for committee sponsored programs at ABA International seasonal meetings, ABA publications, etc. We encourage you to share information, ask questions and discuss relevant matters on our India Committee list serv -- we have had very active exchanges of views and indeed sometimes heated debates on our list serv. Also, please feel free to participate in our monthly steering group calls -- this is where many of the great ideas for the committee germinate and where you can become most actively involved in our committee's activities.

As much as we seek to discuss matters of interest to practitioners interested in India, we are also seeking to provide relevant and interesting information for practitioners in India about the U.S. and other jurisdictions. Hence, our next webinar to be held on September 9th will address immigration issues in India and the U.S. Save the date, and be sure to sign up when the official announcements are circulated! Our webinar committee, led by Rita Roy, has arranged a stellar line up of speakers who will undoubtedly be able to share a wealth of information about the nuts and bolts of our comings and goings, as our two nations interact more and more.

Again, welcome to our committee and make the best use of it by actively participating!

Sincerely Yours,

Lalit Bhasin, Vandana Shroff & Erik Wulff



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SUBMISSION DEADLINES

Fall Issue	September 1st
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Potential authors should review the Author Guidelines and send manuscripts via email to the Editorial Board.

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REGULATION OF THE IMPORT, CULTIVATION, AND SALE OF GENETICALLY MODIFIED FOOD CROPS IN INDIA

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The apex authority is the Genetic Engineering Approval Committee (“GEAC”), a multi-ministerial body located in the Ministry of Environment and Forests (“MOEF”). The GEAC has the authority to permit the use of GMOs and its byproducts for commercial application, including their large-scale production and release into the environment. GEAC approval is based in part on the clearance given by the Review Committee on Genetic Manipulation (“RCGM”) in the Department of Bio-Technology (“DBT”). In addition, a new regulatory body, the Food Safety and Standards Authority of India (“FSSAI”), has been empowered to regulate the safety aspects and approval process for GM foods and is in the process of framing rules for this purpose.

The regulatory requirements for cultivation of GM crops are set forth in the Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-Organisms, Genetically Engineered Organisms or Cells, notified on December 5, 1989 (“1989 Rules”). The 1989 Rules define the competent authorities (and their composition) charged with administering the 1989 Rules.

Besides the 1989 Rules, the regulatory framework is supplemented by guidelines and notifications issued by the other governmental authorities having jurisdiction over activities addressed under the 1989 Rules. These effectively add another layer of regulation. The steps in the regulatory approval process are as follows:

- Import of GMOs and/or GM seeds
- Testing and research in contained conditions, depending on the following risk categories:

- Category-I Risk (routine rDNA laboratory experiments in a contained environment)
- Category-II Risk (laboratory and green house or net house experiments in a contained environment)
- Category-III Risk (green house or net house and limited field trials in open field conditions)
- Confined field trials (controlled introduction) at bio-safety research level-I (BRL-I) and BRL-II, as defined in bio-safety guidelines for field trials issued by the RCGM
- Food safety assessment
- Commercial cultivation of GM crops
- Production and sale of GMOs

REGULATORY PROCESS IN PRACTICE

Despite the guidelines provided in the 1989 Rules and related regulations, in practice, there is significant risk and uncertainty. Key risk areas are outlined below. These are based largely on the challenges faced since 2000 for the introduction of a genetically modified egg plant called Bt Brinjal.

Proceedings continue in the Supreme Court in the Public Interest Litigation (“PIL”) filed in early 2005 seeking to establish a comprehensive, stringent, scientifically rigorous, and transparent bio-safety protocol in the public domain for GMOs, and for every GMO before it is released into the environment. *Aruna Rodrigues v. Union of India*, Writ Petition (Civil) No. 260 of 2005 (“Bt Brinjal Case”). So far the Court has issued six orders addressing the role and function of the GEAC. The PIL is yet to be ultimately determined, with the most recent order of January 19, 2010 requiring the government to respond in four weeks to the question of what steps the government has taken to protect traditional crops. Details of the government’s reply are not available as of this writing.

Such litigation is primarily brought by non-governmental organizations. Often they are brought *ex parte*, as a matter of urgency and without notifying the other concerned parties. The obvious immediate consequence of such litigation is delay and uncertainty. Typically, the court initially issues an interim order to maintain the *status quo* while the parties can be heard. For example, in the Bt Brinjal Case, the Supreme Court initially ordered that the GEAC “withhold approvals until further instructions to be issued by this court on hearing of all concerned.” Bt Brinjal Case, Order dated 22 September 2006. This order had the effect of suspending the grant by GEAC of approvals on all applications pending before it, not just the Bt Brinjal application. The Order was subsequently modified by the court (on an application filed by the government) to allow the continuation of field trials subject to conditions stipulated by the court. Bt Brinjal Case, Order dated 8 May 2007.

The other consequence of such litigation could be the imposition by the court of additional conditions on confined trials in response to concerns expressed by the petitioner and other concerned parties. These additional conditions could adversely affect the overall economics of the GM crop and the timing for its introduction.

Although the GEAC is the designated permitting authority, its decision can be suspended or held in abeyance by the government. Given the past controversy surrounding GM crops, the GEAC is expected as a matter of practice to refer its recommendation to the government (Ministry of Environment and Forests) for a final decision. The outcome of this may be to confirm, suspend or modify the GEAC approval. See MOEF, Report of Minister Shri Jairam Ramesh, 9 February 2010 (“Report of Environment Minister”) (declaring an indefinite moratorium on the release of Bt Brinjal). In view of the public nature of the controversy, the government’s stand in this matter is likely to be dictated by politics as much as scientific considerations.

The regulatory framework for GM crops is evolving. Recent developments are expected to alter existing regulatory requirements. These will most certainly apply to pending applications, but may also affect existing approvals.

- First, the GEAC has been directed by the MOEF to draft a new protocol for the specific tests that will be conducted on GMOs in order to generate public confidence in GM food crops. The Environment Minister has directed that “under no circumstances should there be any hurry or rush” to complete the aforesaid. Report of Environment Minister, paragraph 30. Therefore until such new protocols are issued, there is substantial uncertainty as to the regulatory requirements.
- Second, the Food Safety and Standards Authority of India, a regulatory body constituted under the Food Safety and Standards Act, 2006 will henceforth regulate the safety assessment and approval process for GM foods. The FSSAI will regulate “food stuff, ingredients in food stuffs and additives including processing aids derived from living modified organisms where the end product is not a living modified organism.” MOEF, Notification No. S.O. 1519(E) dated 23 August 2007. The FSSAI has released for public comment draft rules on “Operationalizing the Regulation of Genetically Modified Foods in India.” The comment period ended on July 14, 2010. The draft clarifies that the research and development, environmental release, and commercialization of GMOs will continue to be governed by the 1989 Rules, and thus will continue to be regulated by the GEAC at MOEF and RCGM in the DBT.

SUGGESTED STRATEGIC APPROACH

Given the risks described above, an applicant should consider including the following elements in its strategic approach to complying with the regulatory requirements in India. First, due to the uncertainty in the regulatory process and questions as to finality of the GEAC approval, it would be prudent to enter into an “implementation agreement” with the MOEF. Because the financial investment and effort required to commercialize GM crops is substantial, an up-front understanding with the government will help reduce the degree of arbitrariness involved in the application of the regulatory requirements. Implementation agreements are the norm in sectors where a long

gestation period is involved and where successful implementation depends on governmental actions and support, such as hydropower projects.

Second, the applicant should consider applying for “in-principle” approval from the GEAC as early in the process as possible. Such approval, although not final or binding, would typically set forth the conditions to be met by the applicant for grant of final approval. MOEF approvals for infrastructure projects are structured in the foregoing manner.

Third, because most public interest litigation is filed by non-governmental organizations (“NGO”), it is prudent for the applicant to be pro-active and manage its relationships with the concerned NGOs.

Navigating the regulatory process for commercialization of GM food crops in India is not for the faint hearted. The road to commercialization has had, and will likely continue to have, many twists and turns. While the government has decided to embrace

food produced through bio-technology to feed its citizens, the regulatory decision making process is often influenced more by political pressure from those opposed to bio-technology than by critical and balanced scientific and technological judgment. To help mitigate the resulting delay and uncertainty, it is helpful for businesses entering this sector to approach the government early on and develop a high-level road map for tackling the approval process.

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NAVIGATING INDIAN DEFENSE OPPORTUNITIES

By Mohit Saraf and Sanjay Mullick

India is embarking on an ambitious defense and homeland security expansion plan, expecting to spend \$30 billion over the next five years and upwards of \$100 billion over the next decade. Considered one of the world's fastest-growing defense markets, recently India was ranked as the world's fastest-growing homeland security market. This growth presents tremendous opportunities for U.S. defense and technology companies in aerospace, government contracting, and homeland security. But to meaningfully participate in the India defense opportunity, one must understand and be prepared to navigate through some nuanced and complex terrains.

UNDERSTANDING PROCUREMENT CATEGORIES

First, a prospective bidder needs to understand the different procurement categories. The defense procurement categories are established in the Defence Procurement Procedure (DPP), which governs procurement by the Indian Ministry of Defence (MOD). The DPP sets out the Government of India's (GOI) policies for every step in the procurement process, from acquisition planning to preparing requests for proposal (RFPs). Compliance with the DPP is essential to competing effectively for Indian defense contracts.

Before it was revised in 2009, the DPP provided three categories of defense procurement:

- Buy: Outright purchase of defense equipment from foreign or Indian vendors. Programs where the purchase is made from an Indian integrator of foreign equipment must include at least 30 percent Indian content.

- Make: Purchase of equipment from Indian vendors using indigenous development and production.
- Buy & Make: Purchase from a foreign vendor with provisions for Indian co-production or licensed manufacturing.

In November 2009, the MOD amended the DPP and added an important fourth procurement category called "Buy & Make (Indian)." Under Buy & Make (Indian), the RFP will be issued only to Indian vendors, who in turn can decide what foreign suppliers to involve. This is intended to more effectively incentivize technology transfer and co-development in India.

Specifically, under Buy & Make (Indian), Indian firms must submit the project proposal, outline the development and production roadmap, either alone or in a production arrangement with a foreign partner, and provide details of the transfer of technology to the Indian partner. There must be at least 50 percent local content, and the Defence Production Board is responsible for monitoring implementation of the production arrangement, including absorption of technology by the Indian partner.

Buy & Make (Indian) is aimed at helping promote indigenous capabilities by driving technology transfer, joint ventures, licensed production and in-country manufacture. The MOD has not yet publicly indicated which projects will be designated Buy & Make (Indian), but for those which are so designated, Indian bidders will be in control of the process. Thus, non-Indian companies that wish to participate in this category of procurement should think ahead about identifying

prospective Indian partners and crafting collaborative arrangements that can satisfy these requirements.

COMPLYING WITH AGENCY RESTRICTIONS

There are a variety of reasons why agents may be necessary in defense and homeland security bidding. Bidders without an institutional presence in-country may believe it is particularly necessary to have third parties acting on their behalf. But one needs to proceed with caution under the Indian defense procurement rules on agency. The Indian government is particularly sensitive to the role of agents in defense procurement given prior controversies, most notably the Bofors scandal, which is considered "India's Watergate." As a result, there are a variety of restrictions governing the use of third party agents. Penalties for non-compliance can include disqualification from the procurement, cancellation of the contract, and debarment from future bidding.

Under the DPP 2005, parties bidding on procurements exceeding approximately \$45 million are required to execute a "Pre-Contract Integrity Pact," the express purpose of which is to ensure that, in competing for a defense contract, bidders take all measures necessary to "prevent corrupt practices, unfair means and illegal activities." The Pre-Contract Integrity Pact requires bidders to agree to be bound by the "Agency Clause," which provides:

Bidder confirms and declares that it... has not engaged any individual or firm, whether Indian or foreign whatsoever, to intercede, facilitate, or in any way to recommend to the Government of India or any of its functionaries, whether officially or unofficially, to the award of the Contract...

(emphasis added).

As indicated above, the Pre-Contract Integrity Pact essentially requires bidders to affirm that they have not engaged an agent. Although engaging an agent technically is not prohibited, it requires separate

registration under rigorous requirements and the MOD reserves the right to reject any agent. As a result, no one has registered as an agent since the requirement was imposed in 2001. Thus, as a practical matter, for foreign companies interested in bidding for defense contracts in India, the prudent course is to ensure they do not engage any person or entity that performs any functions the nature of which require registration as an agent.

The exact meaning of the terms in the agency clause themselves are not entirely clear, and the Indian courts have not ruled on them. Nonetheless, there are some useful "do's/dont's" that may provide general guidance for foreign companies bidding on defense contracts in India. For example, rather than engage an entity to act as a consultant for any particular procurement program, consulting relationships should be for advice and assistance in connection with business opportunities in India generally.

MEETING OFFSET REQUIREMENTS

Perhaps the most important issue in accessing Indian defense procurement opportunities is offsets, that is, the requirement to return to India a percentage of the value of the goods and services awarded in a defense procurement. Offsets are seen as a means to use foreign participation to foster and enhance an indigenous defense industrial base in India. It is important to know what offset requirement attaches to each procurement.

Under the DPP, procurements from foreign vendors over approximately \$65 million must generally be offset by purchases or investments by the foreign vendor in Indian defense products, services, industries or research and development worth at least 30 percent of the procurement value. Offset requirements involve local purchasing, indigenous content, use of inputs, and co-production. This can be accomplished by (i) buying India defense items; (ii) buying India-defense related services; (iii) investing in an Indian defense joint venture; or (iv) investing in Indian defense research & development. Proposals are evaluated by the Defence Offset Facilitation Agency (DOFA).

Several policy issues are at the heart of the offsets discussion today. One concerns how closely offsets

need to be related to the corresponding defense procurement. Currently, India's system only credits "direct" offsets, i.e., those that are directly related to the product or service being sold. Some contend that India should also credit "indirect" offsets applied in industries outside defense, such as in commercial aerospace or homeland security. This approach would not only make it easier to meet offset requirements (and thus reduce the foreign bidder's costs in India), but could also enable development in other areas of interest to India, such as infrastructure.

Another policy issue concerns the level of foreign direct investment, which currently is capped at 26%. Those who advocate foreign investment to at least 49% argue that providing foreign parties a greater ownership stake in Indian entities would stimulate offsets and collaboration. Specifically, in their view it would (i) incentivize foreign bidders to become more fully engaged in their India joint ventures and partnerships; (ii) spur investment as well as joint development and co-production; and (iii) motivate foreign bidders to locate strategic defense related R&D and manufacturing operations in India.

Other offset policy issues concern whether wholly-owned subsidiaries in India may qualify and whether transfer of technology can count. The India defense opportunity is not just a chance for foreign players to serve the Indian market, but is also an opportunity for Indian companies to become a key part of the global defense supply chain. So, as stakeholders focus on how to implement an effective framework for defense procurement and collaboration, both the GOI and domestic and foreign players are deliberating on what system of offsets can best serve the interests of both sides.

MANAGING TECHNOLOGY TRANSFER CONTROLS

Finally, perhaps no issue appears more vexing than U.S. export controls. If not managed effectively, it can be a deal-stopper that prevents transfer of sought after technologies. Upon arriving in Washington for their State visit and tour of duty, respectively, both Prime Minister Singh and Ambassador Shankar expressly mentioned U.S. export controls in their first remarks,

underscoring the significance of this issue to U.S.-India defense trade.

India's push for technology transfer raises significant export control compliance issues both for U.S. companies and foreign companies involved with U.S.-origin goods, software, technology and services. Specifically, the International Traffic in Arms Regulations (ITAR) restricts the transfer from the U.S. to foreign persons of defense-related technology, such as combat aircraft technology. The Export Administration Regulations (EAR) restrict the transfer of dual-use technology, i.e., that considered military useful, such as that for certain airport baggage screening systems. The ITAR and EAR often require export licenses before U.S.-origin technology may be shared with foreign persons. Those licenses can also impose ongoing export reporting and technology transfer compliance requirements. Even having meetings or making sales presentations where technical information is exchanged may constitute technology subject to U.S. export controls and require prior government approval.

In July 2009, the U.S. and India reached a milestone by agreeing on uniform language for End-Use Monitoring (EUM) arrangements that permits the United States Government to inspect on-site certain U.S. defense articles transferred to India, as required by U.S. law. The EUM expands the permissible range of defense-related trade with India, but it does not remove ITAR and EAR licensing requirements. Rather, prospective U.S. and Indian bidders and partners in defense trade need to be thinking about issues such as, what technologies will require licensing; what technologies are likely to receive licenses; what procedural safeguards are likely to be imposed on technology exports; and how should programs be structured to avoid export control problems.

Because compliance with U.S. export controls is critical to the process, early assessment of these issues is recommended, e.g., when companies identify prospective partners for bids. Certainly, U.S. companies cannot proceed without assurances that export control requirements will be met. Also, Indian companies need export counsel to help their U.S. partners deliver on their technology transfer proposals. These issues are complicated but can be managed.

NEED FOR ADVANCE PLANNING

The U.S. and India are natural allies because they are the oldest and largest democracies, respectively, and share a legal system based on common law. Now, the shared experiences of 9/11 and 26/11 underscore the great potential of the emerging U.S.-India strategic partnership. There are many issues to sort through as India embarks on high-stakes, big-ticket defense procurement, most importantly sensitive national security issues for both countries. By anticipating and

addressing these issues in advance, however, private defense bidders can position themselves to participate in this important opportunity.

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NEW MINIMUM PUBLIC SHAREHOLDING REQUIREMENTS FOR INDIAN COMPANIES

By Ajit Sharma and Vardaan Ahluwalia

On 4 June 2010, the Indian government revised the minimum public shareholding requirements applicable to listed Indian companies through an amendment to the Securities Contracts (Regulations) Rules, 1957 ("Amendment"). Henceforth, all listed companies are required to have a minimum public shareholding of 25%. The amendment also makes it mandatory for all companies intending to get listed on Indian stock exchanges to offer at least 25% of their paid up capital in an initial public offering ("IPO"), except for companies with a post issue paid up capital of over Rs. 4,000 crores (approximately USD 900 million), which may offer at least 10% of their paid up capital in an IPO and increase public shareholding to 25% over a three year period. Prior to the Amendment, while most Indian companies offered 25% of their share capital in an IPO, some companies benefitted from an exemption in the Securities Contracts (Regulations) Rules, 1957 ("the Rules"), which allowed them to issue (and maintain on a continuous basis post listing) 10% of their share capital subject to compliance with certain conditions. This exemption is no longer available.

The proposal to increase the minimum public shareholding requirement to 25% was first circulated by the Ministry of Finance in February 2008. The Amendment is expected to bring greater liquidity in the Indian stock markets, particularly benefiting small investors. The Amendment also is expected to check price manipulation by entities a holding majority stake in a company with low public shareholding. The greater the number of shares and shareholders, the less the opportunity for price manipulation. Lastly, reducing the concentration of ownership in listed Indian companies is expected to result in ancillary

benefits, such as enhanced corporate governance the increased presence of minority shareholders.

"Public" is defined in the Amendment to mean persons other than promoters, promoter group, subsidiaries, or associates of the company. The terms 'promoter' and 'promoter group' are in turn defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations"). "Promoter Group" is defined in the ICDR Regulations to include promoters of the company, immediate relatives of the promoters, any subsidiary or holding company of the promoter, and any company in which the promoter holds more than 10% of the equity share capital or any company that holds 10% of the equity share capital of the promoter, provided that any financial institution or foreign institutional investor would not be deemed to be a promoter merely because such investor holds ten percent or more of the company.

"Public Shareholding" is defined in the Amendment to mean equity shares of the company held by the "public" and excludes shares held by a domestic custodian against depositary receipts issued overseas. Thus, shares issued by listed Indian companies to depositories in connection with the issue of global depositary receipts ("GDRs") or American depositary receipts ("ADRs") will not be taken into account while computing the total public shareholding in a company. The rationale for this appears to be management control over voting rights on shares issued to depositories. A recent working paper issued by the Securities and Exchange Board of India ("SEBI") shows that several Indian companies that issued GDRs/ADRs to foreign investors have retained voting rights on shares issued to depositories.

THE IMPACT ON INDIAN COMPANIES

The Amendment impacts Indian companies, listed and unlisted, as follows:

Companies intending to list on Indian stock exchanges

The Amendment requires companies planning to list on Indian stock exchanges to offer at least 25% of each class or kind of equity shares or debentures convertible into equity shares in an IPO to the public. However, where the post issue share capital of the company (calculated at the IPO price) is more than Rs. 4,000 crores (approximately USD 900 million), the company may offer at least 10% of its share capital to the public in an IPO provided that the company increases its public shareholding to 25% within three years from the date of listing the shares on a stock exchange by offering at least 5% share capital to the public per annum. Further, such annual increase in public shareholding may be for less than 5% if it brings its public shareholding to 25% in the relevant year.

Companies that have filed a draft offer document with SEBI

In an Indian IPO, a company is required to file a draft red herring prospectus ("DRHP") with SEBI, for comment. Typically SEBI takes between one to three months to provide its observations on the DRHP. Once all SEBI observations have been incorporated into the DRHP, the company can file the red herring prospectus with SEBI and the Registrar of Companies and open the IPO. The Amendment allows unlisted companies, which have filed the DRHP with SEBI on or before the date of the Amendment, to offer at least 10% of their share capital in an IPO provided (i) a minimum of two million securities are offered to the public (excluding reservations and promoter contribution); (ii) the minimum issue size is Rs. 100 crores (approximately USD 22 million); and (iii) the issue is made through the book building method with 60% of the issue size allocated to qualified institutional buyers (i.e., mutual funds, scheduled commercial banks, foreign institutional investors). Again, such companies are required to increase the minimum public shareholding

to 25% within three years from the date of listing of such shares on a stock exchange by offering at least 5% share capital to the public per annum, provided that such annual increase in public shareholding may be for less than 5% if it brings its public shareholding to 25% in the relevant year.

Listed companies

Post Amendment, all listed companies are required to maintain a minimum public shareholding of 25% of their share capital. Listed companies with less than 25% public shareholding are required to increase the public shareholding to 25% by offering at least 5% share capital to the public per annum, provided that such annual increase in public shareholding may be for less than 5% if it brings its public shareholding to 25% in the relevant year. Press reports indicate that there are about 180 listed Indian companies with less than 25% public shareholding.

INCREASING PUBLIC SHAREHOLDING

Listed companies may increase minimum public shareholding to 25% in several different ways, including any of the following:

- (a) Further public offer ("FPO") – a further public offer is defined in ICDR Regulations to mean an offer of shares or securities convertible into equity shares by a listed company to the public. FPOs include a rights issue made under the ICDR Regulations. In order to comply with the revised minimum public shareholding norms, listed companies may opt to issue fresh shares to the public through a further public offer under the ICDR Regulations.
- (b) Qualified institutional placement ("QIP") – listed companies may allot shares or securities convertible into equity shares to qualified institutional buyers on a private placement basis pursuant to ICDR Regulations. Allotments through the QIP

route can be made to less than 50 qualified institutional buyers only. Listed companies may make a fresh issue of equity shares to public shareholders to increase the minimum public shareholding to 25%.

- (c) Direct sale by promoters to public – promoters may sell their shares in a listed company to public shareholders either (i) on a stock exchange through a block deal (minimum sale of 500,000 shares or shares worth approximately USD 1.1 million through a single transaction) or a bulk deal (sale of more than 0.5% of the number of equity shares of a company in one or more transactions executed during the day), or (ii) through negotiated off-market sale. A sale by promoters may trigger disclosure requirements for the purchaser/ acquirer under the SEBI (Prohibition of Insider Trading) Regulations, 1992, and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Code”), if the acquirer’s shareholding crosses specified thresholds. Purchase of shares from promoters may also trigger open offer requirements under the Takeover Code if an acquirer exercises more than 15% voting rights in the company. Promoters also may opt to make an offer for sale of their shareholding to the public in accordance with the ICDR Regulations.

CONCLUSION

While the proposal for revising minimum public shareholding norms was first suggested in 2008, the Amendment came as a surprise to many listed companies. It is expected that as a result of the Amendment several further public offers may be launched in the coming years by listed companies in order to increase the minimum public shareholding to 25% of their share capital, even though markets may not have the appetite to absorb additional offers. A glut of public offers also may adversely impact valuations because companies may be required to issue more shares at lower prices. Lastly, shares issued to a custodian of depositary receipts are excluded from the definition of “public shareholding.” Thus, listed companies that do not comply with the 25% public shareholding norms have little incentive to issue ADRs/ GDRs. Any such issuance will only increase non-public shareholding in the company.

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WITHHOLDING TAX ON SERVICE FEES REMITTED TO THE U.S.

By H. Jayesh and Freddy Daruwala

After 14 years of protracted negotiations, evocative of the duels between Errol Flynn and Basil Rathbone in old Hollywood swashbucklers, India and the United States have finally reached agreement on avoiding double taxation. The last obstacle to the USA Double Tax Avoidance Agreement (the "Agreement") was over taxation of fees for technical services ("FTS") in India. The Agreement sets forth a test to determine whether these service fees are subject to taxation in India. Under the Agreement, taxes must be withheld on service fees paid to a taxpayer who does not have an address or assets in India, or is generally located outside the territorial jurisdiction of India. In the event that the Agreement conflicts with the Income Tax Act 1961 ("Act"), the Agreement controls and the taxpayer may seek the more beneficial treatment of the two.

FTS has been addressed differently in various Indian double tax avoidance treaties. For example, reference is made to Fee for Included Services ("FIS") in the Agreement, as in the agreements between India and Singapore and India and the United Kingdom. In the agreement between India and Japan the Act's definition of FTS is employed. In the agreements between India and France and India and Germany, the Act's definition of FTS is also employed, but is subject to a most favored nation ("MFN") clause to modify its scope in line with other more beneficial, future Indian double tax treaties. Some agreements, such as the one between India and Mauritius, do not contain an FTS clause.

This article focuses only on FIS. Article 12(4) of the Agreement provides:

For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or
- (b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

Thus, FIS has two basic components: (a) fee for technical services made available; and (b) the transfer of knowledge, etc.

A fair amount of controversy has been generated over the meaning and scope of the "make available" clause. The technical explanation which accompanies the Agreement attempts to clarify the concept of make available by providing examples. In simplistic terms, if A renders services to B to repair B's car, such services do not "make available" knowledge unless by virtue of such services B is able to repair a third party's car. More close to home, if a U.S. law firm provides a legal opinion to an Indian client the services rendered do not "make available" technical knowledge unless the client

is an Indian law firm who will then be able to render an informed opinion on a similar issue to its clients. In that case, outbound service fees remitted from India to the U.S. will be taxable in India and taxes must be withheld on any such remittance.

The phrase “make available” has also been construed by the courts. Although the case involving the Federation of Indian Chambers of Commerce and Industry (“FICCI”) (AAR 811 and 812 of 2009), does not constitute binding precedent on future cases involving different parties due advance ruling limitations, it is instructive because it provides an insight into the current judicial thinking on the meaning of “make available.” FICCI entered into a set of agreements with an Indian technology company and the University of Texas (“UT”) to provide an integrated service comprising of technology, assessment, training, programme management, and business development for a consolidated service fee. The individual components of the contract were not severable. The main questions before the Authority for Advance Rulings (“AAR”) were: (a) whether UT, as a tax exempt entity in the U.S., may claim benefits under the Agreement; (b) whether payments by FICCI to UT constituted FIS; and (c) whether taxes had to be withheld on such payments. The AAR ruled in the affirmative on the first question and in the negative on the second and third questions. It stated that while integrated services have some component of training that may fall under the FIS category, it did not amount to FIS as a whole. Thus, the service fee was not subject to taxation or the requirement to withhold taxes. It also ruled that a non-profit entity under U.S. law is entitled to claim benefits of the Agreement. Another recent decision was given by the Chennai special bench of the Income Tax Appellate tribunal in the case of Prasad Productions. The court analyzed whether the payer had a bona fide belief that the income remitted to the payee was not taxable in India. It also discussed whether funds could be paid suo-motu without withholding taxes and not following the procedure of applying to the payer’s assessing officer to determine the issue of taxability when the payer had such a bona fide belief. These two decisions have clarified the meaning of the law to a large extent.

If the recipient of a service fee is deemed to constitute a permanent establishment (“PE”) in India,

the service fee will not be taxed as FIS or FTS income but will be taxed as business income of the PE. In addition, if the fees are paid to an “associate enterprise,” under the Act, the “arms length” nature of the transaction must be examined, similar to the requirements of Section 482 of the U.S. Internal Revenue Code.

Withholding taxes on payments to non residents are generally covered by Section 195 of the Act. Taxes must be withheld on all payments to a non resident which are taxable in India before remittance. A failure to withhold taxes may have serious consequences, such as penalties, interest, disallowance of a deduction for the amount paid, and prosecution. Therefore if the remittance is deemed to be taxable in India, taxes should be withheld using the following procedure:

- a) The payee first applies for an identifying permanent account number (“PAN”). This is to ensure that taxes are withheld at the prescribed rate. In absence of a PAN, taxes must be withheld at a minimum of 20% (or at a higher rate if applicable).
- b) The payer then deducts the tax and issues a withholding taxes certificate in the prescribed format (Form 16A) identifying the payee and the payer’s PAN.
- c) The payer then uploads the information onto the Income Tax website. The payer will receive an acknowledgement on the website. This hard copy will have to be certified by a practicing chartered accountant and transmitted to the remitting bank. Only upon receipt of this document may the remitting bank in India transmit the funds to the overseas recipient.

If there is any doubt as to the taxability of the remittance or the remitter believes that the amount of tax to be withheld should be less than the prescribed rate, then the remitter should apply to its Assessing Officer for an adjudication on the taxability of the amount or for permission to withhold less taxes, respectively. The tax authorities generally take an aggressive stance. An alternative is to upload the information regarding the remittance on the revenue website and obtain a certification by a practicing

chartered accountant that the payment is not taxable in India and that the remittance may be made without withholding taxes. This certification may then be transmitted to the remitting bank, which in turn would remit the funds without withholding taxes. To avoid litigation with revenue authorities at a later date, the accountant certification option should be resorted to where the service fee is clearly not taxable.

The tax landscape in India is expected to be considerably altered when the impending Direct Taxes Code (a revised discussion paper on which was released on 15th June 2010) becomes effective. Nevertheless, the Agreement provides much needed relief and guidance to the remitter of service fees to the U.S.

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NEW LEGISLATION MODIFIES U.S. TAX WITHHOLDING REGIME

By Timothy D. Richards and Alonso E. Sanchez

On March 18, 2010, President Obama signed into law the Hiring Incentives to Restore Employment Act (the “HIRE Act” or “Act”). The Act incorporated the provisions of the Foreign Account Tax Compliance Act of 2009 (“FATCA”). The FATCA provisions of the Act impose significant reporting and information gathering obligations on individuals and third parties, and will expand the current U.S. withholding regime. The Act will have a substantial impact on foreign investment in the U.S.

Foreign persons are generally subject to a flat tax rate of 30% on their U.S. source fixed, determinable annual or periodic (“FDAP”) income. In brief, income is *fixed* when it is paid in amounts known ahead of time and *determinable* whenever there is a basis for calculating the amount to be paid. Common examples of FDAP income include compensation for personal services, dividends, interest, pensions, alimony, real property income (such as rents other than gains from the sale of real property), royalties and commissions.

The current 30% withholding regulations, set forth in Chapter 3 of the U.S. Internal Revenue Code, have been in place for many years and impose a withholding requirement on payments to foreign persons of U.S. source FDAP income, unless the FDAP income is effectively connected with a U.S. trade or business, or the withholding is reduced or eliminated by operation of a tax treaty. As a result, taxes on FDAP income to foreign persons must generally be withheld by the U.S. payer (otherwise known as *withholding agent*) and remitted to the IRS.

The Act creates a new withholding tax, added as Chapter 4 of the U.S. Internal Revenue Code, that expands the current U.S. withholding regime by imposing a 30% withholding tax on any *withholdable payments* made to *foreign financial institutions*

(regardless of whether such institutions have U.S. account holders), unless the foreign financial institution enters into a reporting agreement with the IRS. A *withholdable payment* is defined as any U.S. source FDAP income, and gross proceeds from the sale or disposition of any property which produces U.S. source interest or dividends. The Act’s withholding provisions will greatly expand existing law because gross proceeds from the sale of stock or debt instruments are currently not taxable to foreign persons and are not subject to withholding. Furthermore, the Act defines *foreign financial institutions* (“FFI”) so broadly that it includes virtually every type of foreign bank and foreign investment vehicle, including foreign private equity funds and foreign mutual funds. The reporting agreement requires FFIs to disclose the full details of non-exempt account holders to the IRS in order to avoid the 30% withholding tax. For these reasons, foreign investors should not be surprised if their local investment bank or brokerage firm soon refuses to invest, directly or indirectly, in U.S. securities in order to avoid a withholding tax on FDAP income or, alternatively, enter into the reporting agreement with the IRS.

Additionally, an FFI that has entered into a reporting agreement with the IRS will be required to deduct and withhold a 30% tax on any pass-through payment made by the institution to an FFI that fails to enter into an agreement with the IRS. For this reason, foreign persons that receive FDAP income may potentially face a “double” withholding. As mentioned above, the current tax regime already requires that U.S. payers withhold 30% of U.S. source FDAP income to foreign recipients. Because of the provisions set forth in the Act, a foreign recipient may be subject to a prohibitive additional withholding on the same payment stream if one or more of its banks has not entered into the proscribed information agreement

with the IRS. Although the Act authorizes the Secretary of the Treasury to provide rules to prevent double withholding on the same payment stream, there is no explicit provision within the bill that would limit withholding to one level. This is important because prior versions of the bill contained explicit provisions that would seemingly have prevented a double withholding scenario.

To illustrate, suppose the following set of circumstances: USCO, a U.S. firm, makes a royalty payment for the use of certain intellectual property to IndiaCo, an Indian software firm. Assume that the payment qualifies as U.S. source FDAP which is not effectively connected with IndiaCo's U.S. trade or business, and therefore subject to a 30% withholding. USCO withholds 30% of the royalty payment and remits the remainder to IndiaCo's foreign account. However the payment does not travel directly from USCO's local bank account to IndiaCo's local Indian bank. Instead, the funds are routed through a network of correspondent and intermediary banks, one of which has failed to enter into a reporting agreement with the IRS as required by the Act. Without additional clarification from the Secretary of the Treasury, it would appear that the royalty payment would be subject to an additional Chapter 4 withholding of 30%. While beneficial owners of withholdable payments will be eligible to claim a refund or credit for any withholding in excess of their tax liabilities, this will require the beneficial owner to file a U.S. tax return.

Significantly, the payment of foreign source FDAP income is not a *withholdable payment* under Chapter 3 or Chapter 4 of the Internal Revenue Code. The payment of foreign source income to a foreign person is not subject to U.S. withholding or reporting requirements. Except for certain limitations, wages and any other compensation for services performed by a non-resident outside the U.S. are considered to be foreign source income. The place where the services are performed determines the source of the income, regardless of where the contract was formed, the place of payment, or the residence of the payer. Other examples of foreign sourced FDAP payments include: interest payments by a foreign debtor is foreign, royalty payments for property used abroad, and rental payments for property located outside the U.S. Consequently, US firms may continue to make

payments to foreign companies for services performed abroad without withholding taxes.

The withholding rules are not just relevant to the foreign recipient but the U.S. payer as well. The IRS has designated the obligation of a U.S. withholding agent to report and withhold on U.S. source FDAP income as a Tier 1 compliance issue. Tier 1 compliance issues are generally considered the highest compliance priorities within the IRS. A withholding agent is defined as any person, U.S. or foreign, that has control, receipt, or custody of, or the ability to dispose or pay, any item of income of a foreign person that is subject to withholding. The withholding agent is required to remit the withheld amount to the IRS, generally, on Form 1042 called, Annual Withholding Tax Return for US Source Income of Foreign Persons, and Form 1042-S, called Foreign Person's US Source Income Subject to Withholding. The withholding agent is personally liable for any tax required to be withheld. If the withholding agent fails to withhold and the foreign taxpayers fails to pay its tax liability, both the withholding agent and taxpayer will be liable for the tax, interest, and penalty on the outstanding balances due.

Since its recent passage, the Act has generated a great deal of commentary within the legal and financial communities. The withholding provisions set forth in the Act are scheduled to apply to payments made after December 31, 2012. However, many observers believe that this date will be pushed back to account for the significant issues involved with the Act's implementation, and for the Treasury to provide sufficient guidance to financial institutions to properly implement the new reporting procedures.

In conclusion, U.S. payers of FDAP income to foreign recipients should keep in mind the IRS's increased scrutiny of FDAP reporting and withholding requirements. While payments to foreign persons for services performed abroad (and other payments of *foreign source* FDAP income) should not be affected by the new law, we recommend that U.S. payers nonetheless keep a watchful eye on the changing landscape of the U.S. withholding regime and maintain careful records of their transactions. Likewise, foreign recipients should note that their payments will soon be subject to an expanded withholding tax, which may

make potential future investments in U.S. securities markets less attractive.

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TOWARDS A GLOBAL FINANCIAL RECOUP—THE TAXING PATH

By Aseem Chawla and Surabhi Singhi

The repose of nations cannot be secure without arms. Armies cannot be maintained without pay, nor can the pay be produced without taxes.” - Publius Cornelius Tacitus, a Roman historian

The word “tax” draws its earliest reference in a decree by Caesar Augustus, the first ruler of the Roman Empire, nearly 2000 years ago mandating taxation in all spheres of the world. The origin of the word “tax” stems from the Latin expression, “taxo” meaning, imposition of a financial charge or other levy upon a taxpayer. India has had a system of taxation since ancient times, as is evident from references in early treatises such as Manusmriti (between 200 BCE and 200 CE) and Arthashastra (4th Century BCE). The conventional criteria of economic neutrality, equity, simplicity, and transparency have been regarded as the foundations of most tax systems. However, with the power of taxation in modern times shifting from the domain of a monarch to that of every sovereign, the regime of taxation has come to be associated with the four “R”s -- revenue, redistribution, repricing, and representation. Moreover, for every benefit that mankind receives today, a tax is imposed, thereby redistributing the underlying burden.

The adoption of a flat tax has been debated by various countries in Eastern Europe over the last decade. A flat tax regime is a tax system with a constant tax rate and is usually referred to as a tax in rem, meaning “against the thing.” In 1994, Estonia became the pioneer in instituting the flat tax regime, levying a tax rate of 26% on all personal and corporate income with no deductions or exemptions. The success of the Estonian example led to the adoption of a flat tax regime by various European countries, such as Latvia,

Lithuania, Bulgaria, and many others. Nevertheless, the debate continues in Western Europe and the United States.

The dawn of the global financial crisis in 2008 diverted attention to new tax regimes around the world. Rising government debt levels, reduction in bank lending, and instability in the financial markets have cast a shadow over the nascent economic recovery. Though the experiences of different countries vary, as do their priorities as they emerge from the economic crisis, none can claim to be immune from the risk of a future, and inevitably, global financial crisis.

In this respect, a universal policy cannot be imposed across various jurisdictions and each nation’s response to the crisis must be fine tuned in accordance with the assessment of their respective challenges. For example, Sweden has introduced a levy on banks that goes into a ring-fenced fund, created to protect against future bailouts. Germany and Britain are also contemplating a similar measure, and the Obama administration has proposed a levy to recoup \$90 billion of public money used so far to shore up banks. However, while there is support in Europe and the United States for some form of levy, other western economies are against the concept of imposing an additional burden on their banks because they did not require rescuing.

There seems to be global recognition of the need for new taxes. The International Monetary Fund has proposed two new taxes on banks—a Financial Stability Contribution (FSC), and a Financial Activities Tax (FAT). The FSC is essentially linked to a resolution mechanism to pay for the fiscal cost of any future

government support to the banking sector. Any further contribution, if desired, will be facilitated via the FAT, which would be levied on the profits and remuneration of financial institutions.

However, during the June 2010 G-20 meeting of Finance Ministers in Seoul, the proposal for a global bank tax to protect the public and ensure economic stability was rejected. A bank tax was viewed as increasing costs to consumers and requiring strict consumer and competition regulations for effective enforcement. Rather, emphasis was put on pressuring countries to adopt more passive economic measures to recoup public funds used to protect against bank failures. Individual countries still may impose the levy in their own jurisdictions, despite the G-20's collective recommendation. The Indian stand on additional taxation of financial institutions is similar to the G-20's recommendation. Instead of a fiscal stimulus or additional taxation, India places greater emphasis on financial sector regulation.

Though there seems to be little support for the imposition of new taxes on banks while the economies of countries are still recovering from the global financial crisis, other new taxes are being considered in certain jurisdictions. Australia, for example, has proposed a resource tax, *i.e.*, a tax to be levied on the "additional" profits on account of the use of limited natural resources through 2012. Moreover, the United States has proposed to levy an "excise tax" on U.S. companies that use an offshore call centres.

The levy of new taxes, apart from being viewed as a reactive measure to the global meltdown, forces one to revisit the purpose of a taxation regime. The existing regime is premised on Adam Smith's core canons of taxation—equity, certainty, economy, and convenience. Today's economic realities necessitate the addition of two additional principles, restitution and avoidance of double taxation. In this regard, it may be argued that the evolution of novel axes embodies, to a certain extent, the manifestation of the principle of restitution.

Ian T. G. Lambert's treatise, *Modern Principles of Taxation*, is founded on the principle of restitution. He argues that one cannot take the benefits of government expenditure without taking the burden. That view would justify the imposition of a bank tax or resource tax, effectively widening the scope of the existing four "R"s associated with taxes to include the principle of restitution.

India has been debating the levy of a "Tobin" Tax. The Tobin Tax derives its origin from Nobel Prize-winning economist James Tobin's proposal to levy a tax on short-term capital currency transactions. Chile, Colombia, Brazil, and Malaysia have experimented with variations of the Tobin Tax. Various jurisdictions view this tax as compensation for the billions of dollars spent by governments to bail out banks.

India, until now, has been silent on the question of additional taxation. As the governments of various countries impose new taxes, the question is whether India will follow the same course. However, before taking this kind of leap, India must exercise caution to ensure that it does not fall prey to the dangers of an evolving short-term tax, susceptible to rapid fluctuations, and ensure that any proposed levy serves long-term stability by avoiding significant wholesale economic restructuring and facilitating the growth of business.

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RE-EVALUATING INDIAN PHARMA IN LIGHT OF THE ABBOTT - PIRAMAL DEAL

By Rina Pal

Traditional markets for big pharma, including North America, Europe, and Japan, are under pressure from slowed growth, patent expirations, and policy changes promoting the use of more affordable generic drugs. While big pharma and makers of generic have long been rivals in emerging markets, a new appreciation for affordable drugs is now bringing these two together in cost-conscious markets like India. In 2008, Japan's Daiichi Sankyo paid \$4.2 billion for a majority stake in India's Ranbaxy Laboratories. GlaxoSmithKline acquired exclusive rights to the pipeline of India's Dr. Reddy's Laboratories, which sells over 100 generics in emerging markets. The most recent example of the emerging relationship between big pharma and generics makers is Abbott Laboratories' recent acquisition of the domestic healthcare business of India's Piramal Healthcare Ltd., a leading branded generics company, for \$3.72 billion.

India became a leader in generics after Prime Minister Indira Gandhi decided in 1972 not to recognize patents on drug products. This allowed Indian companies to copy expensive branded drugs as soon as they came to market, so long as the drugs were manufactured in a novel way. India eventually ended its copycat generics market edge in 2005, when it adopted a World Trade Organization condition to guarantee twenty-year patents on new drugs, except for exceptional cases. This provision brought India's patent laws in compliance with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which sets the minimum criteria for its signatory countries. The recognition of product patents has provided global companies with better intellectual property rights and, as a result, has opened up a new segment for the Indian pharmaceutical industry in contract research and

manufacturing services. Today, India continues to produce roughly one-fifth of the world's generics.

THE ABBOTT - PIRAMAL DEAL

Abbott, based in North Chicago, Illinois, has been operating in India for 100 of its 122 years, and has popular pharmaceutical brands including the antacid Digene and painkiller Brufen. Piramal's pharmaceutical products span dermatology, anti-infectives, and nutritional drugs, while Abbott India is focused on gastroenterology, pain, neurosciences, and metabolic disorders. A McKinsey study predicts that drugs for diabetes and cardiovascular disease will see the fastest growth among all therapeutics in India during the next two years.

Abbott will pay \$2.12 billion up front, plus \$400 million annually for four years, for Piramal's domestic healthcare business. Abbott said it plans to fund the Piramal acquisition with cash from its balance sheet and does not expect it to impact earnings. The deal will put Abbott ahead of market leaders Cipla and Ranbaxy, giving it a 7% market share in India's fast growing market. Abbott expects pharma sales in India, which are on track to hit \$8 billion this year industry-wide, to more than double by 2015. "With this deal, the combined Healthcare Solutions and Abbott businesses will become the clear market leader in India," said Piramal Group Chairman, Ajay Piramal.

WHAT LIES AHEAD

Previous pharmaceutical acquisitions have been targeted at buying Indian generics to serve Western markets, but the Abbott-Piramal deal is primarily focused on the domestic market, according to *Business*

India. “Big pharma will stay big only by selling its wares in India and China.” India offers a large and growing market with rising incomes and increasing health insurance coverage, although the potential to expand to very high priced specialty products is seriously limited.

“Emerging markets represent one of the greatest opportunities in health care,” Abbott chief executive Miles White said in a statement. “It’s a race,” he stated in a conference call after announcing the deal. One appeal of emerging markets is that individuals, and not governments, pay for a big portion of health-care costs. Because 70% of the Indian market is self-pay, Abbott’s business there won’t be as vulnerable to the budget restraints seen in European health programs.

In fact, 10 days before the Piramal acquisition, Abbott announced a licensing and supply deal with Indian pharmaceutical company Zydus Cadila. It allows Abbott to commercialize Zydus Cadila drugs in emerging markets. The Piramal and Zydus Cadila deals are consistent with Abbott’s purchase in September 2009 of Belgian drug company Solvay, for roughly \$7 billion. Abbott bought Solvay in its quest to enter emerging markets in Asia and Eastern Europe.

Abbott is not alone in pursuing growth in places that large pharmaceutical companies once feared to tread. Almost all big pharma companies have predicted that emerging markets will constitute 30-40% of growth in the next decade.

Indian companies can only hope to become truly global pharmaceutical companies through drug discovery, says Piramal, and, “No Indian company has done that in the last 60 years. Now, Piramal has that opportunity.” There are a limited number of countries with the required capabilities for the development of new pharmaceuticals, namely, the United States and a few western European nations. Still, Piramal already has 400 scientists working on 14 molecules in cancer, diabetes, inflammation, and infectious disease research. In addition, the cost of clinical trials in India is cheap. “It takes globally about a billion and a half dollars, they say, to develop a new drug, in India you could do it probably at one-tenth the cost,” Piramal says. India offers global pharma companies both quality and cost advantages. Already, India has the largest number of

U.S. Food and Drug Administration-approved plants outside the U.S., with over 100 facilities. The key domestic players are Biocon, Serum Institute of India, Intas Biopharmaceuticals, Bharat Serums, Orchid Pharmaceuticals, Panacea Biotech, and Torrent Pharmaceuticals. Apart from these, there are five government-owned companies in the Indian public sector, including, Indian Drugs and Pharmaceuticals, Hindustan Antibiotics Limited, Bengal Chemicals and Pharmaceuticals Limited, Bengal Immunity Limited, and Smith Stanistreet Pharmaceuticals Limited.

PROTECTING INTELLECTUAL PROPERTY AND OTHER RIGHTS

The Piramal Group has agreed not to enter the generic pharma products business in India or other emerging markets for eight years. Instead, it will continue research in new drugs through an affiliate, Piramal Healthcare. Big pharma companies are facing intense competition from generic players, and many existing top-selling drugs are facing patent challenges and thus competition from generic players. In order for the Abbott’s acquisition of Piramal and future pharma acquisitions to be successful, key intellectual property matters must be addressed at the outset. Intellectual property assets that are currently active must be evaluated and trade secrets must be studied to see if the seller has an active and documented program. Unregistered intellectual property assets must also be analyzed. Of course, the acquirer should confirm in its due diligence that it has a complete accounting of all intellectual property assets from the target. The acquirer also needs to confirm if there are any non-disclosure and non-competition agreements in place with current officers and employees. While transactional attorneys need to be aware of regulations unique to India, it is especially important to follow the Department of Chemicals & Petro-Chemicals’ Pharmaceutical Policy, which updates priorities for pharmaceuticals in India.

The pharmaceutical industry today faces challenges worldwide. Alliances between big pharma and generics in India appear to be part of the new business plan to address these challenges. While this will change access and prices in emerging markets, it remains to be seen how this will affect the model for how drugs are sold in the U.S.

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NO CONCLUSION TO DOHA IN 2010

By Kavita Mohan

World Trade Organization members committed last year to concluding the Doha Development Round in 2010. Although senior trade officials have engaged in discussions several times during the first half of the year, the only consensus that appears to have emerged is that a conclusion this year is not feasible.

The primary impasse continues to be between the United States on one hand, and India, Brazil, and China on the other, with each side blaming the other for not being fully committed to the negotiations. India has stated that it is ready to complete a deal based on the draft texts currently on the table. However, the United States argues that current proposals require it to make cuts in agricultural subsidies and manufacturing tariffs without receiving any substantial market access concessions from India and other major emerging markets, especially in industrial goods, agriculture, and services. The United States particularly insists that Brazil, India, and China accept sectoral agreements on chemical products, electronic goods, and industrial machinery. U.S. Trade Representative Ronald Kirk also has rejected the notion that it must “prepay” additional concessions in order to engage in negotiations on industrial tariffs, services or antidumping and subsidy rules.

In March of this year, WTO members participated in a week long “stocktaking” meeting to assess the progress on Doha. Expectations for the meeting were high, as the meeting was mandated during the G-20 meeting in Pittsburgh in September 2009. However, officials left the meeting largely frustrated by the lack of progress, abandoning hopes for a 2010 conclusion. WTO Director-General Pascal Lamy stated in his March 26, 2010 remarks to the Trade Negotiations Committee that the “stocktaking” week resulted in a “clear catalogue of gaps” but what was less clear was the size

of the gaps. He noted that the gaps were clear in the reports on agriculture and trade facilitation, but less clear in areas such as non-agricultural market access (“NAMA”) and fishery subsidies. He further noted that where the gaps were clear, political decisions needed to be made and where the gaps were less defined, more technical work needed to be done before a political consensus could be achieved. Lamy stated that delegations agreed upon the following principles:

- The multilateral nature of the negotiations should not be diminished. However, other avenues for making progress should not be discouraged.
- There is general agreement among the membership to build on what is already on the table.
- The development dimension remains central to the outcome of the Round.

Lamy further noted that the process of the negotiations would be a “cocktail” of the following approaches:

- Chair-led discussions within the negotiating groups.
- Meetings led by Lamy to ensure that the negotiations are transparent and inclusive.
- Small groups and bilateral meetings.

Senior officials from the United States, Brazil, China, and India met in Paris on April 27-28 for an initial round of meetings. No consensus was achieved, however, and several countries complained at being excluded from the discussions. On May 27, 2010, trade

ministers and senior officials from 20 countries and the European Union met on the sidelines of the Organization for Economic Cooperation and Development's ministerial meeting in Paris, and trade ministers from the Asian-Pacific Economic Cooperation ("APEC") forum engaged in informal discussions again on June 6, 2010 in Sapporo, Japan. Lamy noted in his remarks to the Trade Negotiations Committee on June 11, 2010 that work was underway in all of the negotiating groups, under the "cocktail" method agreed by members in March. Despite the differences between India and the United States, the two countries issued a Joint Statement on June 4, 2010 following the U.S.-India Strategic Dialogue, calling for a balanced and ambitious conclusion to the Doha Development Round. A similar commitment was expressed in the Framework for Cooperation on Trade and Investment signed on March 17, 2010.

U.S. and India sign the Framework for Cooperation on Trade and Investment

USTR Kirk and India's Minister of Commerce and Industry Anand Sharma signed a "Framework for Cooperation on Trade and Investment" on March 17, 2010. The Framework affirmed the U.S. - India Trade Policy Forum as the primary bilateral mechanism to pursue shared trade and investment objectives of India and the United States. The Trade Policy Forum is co-chaired by the U.S. Trade Representative and India's Minister of Commerce, while the Deputy U.S. Trade Representative and India's Secretary of Commerce serve as deputy chairs overseeing the work of the Trade Policy Forum's Focus Groups on Agriculture, Innovation and Creativity, Investment, Services, and Tariff and Non-Tariff Barriers.

Specifically, India and the United States agreed to use the Trade Policy Forum to achieve the following goals:

- Increase opportunities for small and medium-sized enterprises in India and the United States to expand ties, enhance participation in global value-chains, and export to and invest in each other's economies.
- Promote inclusive economic growth that includes the empowerment of women and

disadvantaged groups, and the observance of labor rights.

- Create opportunities for private sector cooperation in the development and deployment of clean energy and environmental technologies and services.
- Improve understanding on each country's approaches to government procurement.
- Engage with the respective private sectors of each country on a regular basis and to accomplish the objectives set forth by the U.S.-India Private Sector Advisory Group and CEO Forum.
- Accomplish a balanced and ambitious outcome in the Doha Development Round.

Ron Kirk and Anand Sharma also announced on March 17 the launch of an initiative to integrate U.S. and Indian small and medium-sized businesses into the global supply chain, directly in support of President Obama's National Export Initiative and Prime Minister Singh's budget objectives.

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CASE NOTES

By B.C. Thiruvengadam

Thiru & Thiru, Advocates

A technical member of the National Company Law Tribunal and National Company Appellate Tribunal should have expertise in company law.

A constitutional bench of the Supreme Court of India in *Union of India vs. R. Gandhi, President, Madras Bar Association*, 2010 (5) SCALE 514, upheld the creation of the National Company Law Tribunal (NCLT) and the National Company Appellate Tribunal (NCLAT), and held that the vesting in them of the powers and jurisdiction exercised by the High Court with regard to company matters was not unconstitutional. However, the Court held that members of these tribunals should be persons of rank, capacity and status as nearly equal as possible to the rank, capacity, and status of High Court judges. While deciding this case, the Supreme Court endorsed the view of the Eradi Committee that company law jurisdiction should be transferred from High Courts to tribunals on account of inordinate delay in the disposal of cases by the High Courts. The Eradi Committee, a high level committee on law relating to insolvency of companies under the chairmanship of Justice V. Balakrishna Eradi, a retired Judge of the Supreme Court, was formed to examine the existing corporate laws and suggest reforms to expedite corporate insolvency proceedings. Based on the recommendations of the Eradi Committee, the Companies (Second Amendment) Act, 2002 was passed, providing for establishment of the NCLT and NCLAT to take over the functions that are being performed by the High Courts and other tribunals under the Companies Act, 1956, and the Sick Industrial Companies (Special Provisions) Act, 1985.

The Companies (Second Amendment) Act, 2002, had provided for appointment of members from the bureaucracy as technical members of the tribunal. The Supreme Court held that merely because a person has served in the cadre of the Indian Company Law Service, he cannot be considered an expert qualified to be appointed as a technical member, unless he has expertise in corporate law. The Supreme Court emphasized that persons having ability, integrity, standing, special knowledge and

professional experience in industrial finance, industrial reconstruction, investment, and accountancy may be considered as persons having expertise and may be appointed as technical members. The Supreme Court further stated that the selection committee should be comprised of the Chief Justice of India or his nominee as its chairperson, a senior judge of the Supreme Court or a Chief Justice of a High Court as member, and a secretary from the Ministry of Finance and Company Affairs, or Ministry of Law and Justice as members. The Supreme Court noted that, to function effectively, tribunals should appoint younger members who have a reasonable period of service rather than persons who have retired. The Supreme Court mandates that every bench shall have a judicial member. The Government of India has agreed before the Supreme Court to implement the order effecting the necessary amendments.



May a member of the public, on the basis of a letter of authorization, appear on behalf of a party before the National Tax Tribunal?

The Supreme Court of India addressed this question in *Madras Bar Association vs. Union of India*, [2010] 324 ITR 166 (SC). The Madras Bar Association had challenged the constitutional validity of the National Tax Tribunal Act, 2005 (Act) before the Supreme Court of India on the basis that:

- (i) Section 13 of the Act permitted “any person” duly authorized to appear before the National Tax Tribunal. The Bar Association claimed that the right to appear should be exclusively restricted to advocates.
- (ii) Section 5(5) of the Act provides for the Central Government to transfer a member (the presiding officer of the tribunal) from one bench in one state to another bench in another state. This was challenged on the ground that it would restrict the independence of the tribunal.

(iii) Section 7 of the Act provides for a selection committee comprised of the Chief Justice of India, or a judge of the Supreme Court nominated by him, a Secretary from the Ministry of Law and Justice, and a Secretary from the Ministry of Finance, and that the secretaries forming the majority may override the selection of the Chief Justice or of his nominee.

Initially, this matter had come up before a three judge bench, wherein the Government of India agreed to implement amendments that would ensure that only lawyers, chartered accountants, and the parties themselves would be permitted to appear before the National Tax Tribunal, and that the opinion of the Chief Justice or his nominee would prevail in the selection of members to the tribunal or the transfer of members from one state to another. However, the case was referred to a constitutional bench, which was hearing the constitutional validity of the creation of the National Company Law Tribunal. However, the constitutional bench determined that the matter should be addressed separately because the petitioner had also challenged Article 323B of the Constitution of India and raised other issues that were more fundamental than the ones before it in the NCLT matter.

Art. 323B was added to the Indian Constitution under the Constitution (75th Amendment) Act, 1963. It authorizes the legislature to create and constitute tribunals, and supplements Art. 323A, which empowers the parliament to create tribunals for matters relating to the Union list (List I of Seventh Schedule of the Constitution of India) which enumerates the matters with respect to which the Parliament has exclusive powers to make laws.

By this case, which is now before a separate constitutional bench, the court will determine whether the exclusivity granted to advocates to appear before any courts prevails over legislation diluting such right.



May the Central Government seek the removal of managerial personnel of a company who conduct the affairs of the company in a manner prejudicial to the interest of the members, creditors, the company and the general public?

In *Union of India vs. Design Auto Systems Ltd.*, [2010] 156 Comp cas 272 (CLB), the Principal Bench of the Company Law Board ruled that the power of the Board to remove managerial personnel of a company under Sec. 408 of the Companies Act was wide enough to cover present and past acts of mismanagement. In this petition by the Central Government against the Company and its managerial personnel under Sections 388B, 397, 398 (relating to oppression of the minority shareholders by the majority shareholders and mismanagement of the affairs of the company), along with Sections 401, 406 and 408 of the Companies Act, 1956, which vest the central government with the power to make a reference to the Company Law Board/ NCLT for appointing directors to prevent the affairs of the company being conducted either in a manner which is oppressive to any members of the company or in a manner which is prejudicial to the interests of the company or public interest, the Company Law Board held that the language “being conducted” in Section 408 of the Act, cannot be interpreted so as to restrict its scope to the present acts of mismanagement by the managerial personnel. Rather the expression is wide enough to cover enquiries related to past conduct whose impact continued or would reasonably be assumed to continue to operate in a manner prejudicial to the interest of the company or the public interest. The Court further observed that the power of the Central Government under Section 408 is preventive in nature, exercised to ensure that the affairs of the Company are conducted in a manner that is not prejudicial to the interests of the company, its members, or to the public interest.



May the court curtail the national government's power in favor of protecting natural resources held in trust for the people?

The Supreme Court in *Reliance Natural Resources Ltd. vs. Reliance Industries Ltd.*, 2010 (5) SCALE 223, ruled on the validity of family settlements and Memoranda of Understanding (MOUs) between individuals in control of corporate entities entering into the agreements under Sections 391-394 of the Companies Act, 1956 (Act). The dispute was over price fixing of natural gas by the Respondent, Reliance Industries. The Respondent had entered into agreements with the Government of India to explore,

develop and produce petroleum gas. The Appellant contended that the Respondent Company was bound by the family agreement that it had entered with the Appellant to fix the price of natural gas. The family agreement had been entered between the Ambani brothers, Mukesh and Anil Ambani, ending a bitter battle of succession to their father Dhirubhai Ambani's estate, comprising of "Reliance Industries," one of the largest companies in India, and covered various contentious issues including supply of natural gas to the Appellant and its price. The gas extraction was granted by the Government of India, which questioned the validity of a private arrangement (family settlement) and claimed that it cannot be binding upon the government, even though the agreement has been approved by the Bombay High Court as part of a scheme under the Companies Act.

The Supreme Court observed that while it did not have the power to extend its jurisdiction under Sections 391-394 of the Act to re-write the agreement in any manner, it could change it so long as it did not change the essence of the agreement, and could entertain an application under Sec. 392 of the Act, as it did not become *functus officio* after sanctioning the Scheme under Sections 391-394 of the Act.

On the issue of the MOU being binding on the companies controlled by the parties to the MOU, *i.e.*, the Appellant and the Respondent companies, the Supreme Court rejected aside the Appellant's argument based on the Doctrine of Identification, under which a company is 'identified' by the key personnel through whom it works. The Bombay High Court had held that such personnel are the very alter ego of the company and their actions are deemed to be the actions of the company itself, and hence the Company RIL (the Respondent) is deemed to be aware of and fully bound by the actions of its Managing Director, including signing of the MOU. The Supreme Court held that such a MOU could not bind large companies such as the parties to this Appeal as the companies' personalities cannot be the same as that of the persons signing the MOU.

On the authority of the MOU in deciding the dispute between the two companies, the Supreme Court held that it could only be a means of construing the suitability of the arrangement between the parties,

not the sole means. The intention of the parties could be made clear through the MOU. However, there was no specific requirement that any Agreement entered by the Respondent, particularly the Gas Supply Master Agreement (GSMA), must confirm completely with the MOU, as the MOU did not fall under the corporate domain, as it was neither approved by the shareholders nor attached to the scheme.

Regarding the role and power of the government in deciding the value and price of gas, the Supreme Court held that it was not feasible to restrict the power of the government against broader national and public interest in such matters of national importance, as the national assets belong to the people and the government holds such natural resources in trust. The Supreme Court disposed the appeal by holding that, though the Respondent had marketing freedom under a contract with the government of India to sell the gas to other consumers, such freedom was not absolute and was subject to the government's approval. It further held that the parties shall abide by the policy of the government. As the court was not empowered to re-write the scheme under Sections 391-394 of the Act, the Court directed the Respondent to renegotiate with the Appellant and finalise a suitable arrangement that would take the shareholders' interests, government policy, and the terms of the MOU into account. The court reiterated and made it clear that such negotiations shall be confined to the conditions of the government policy, as reflected *inter alia* by the Gas Utilisation Policy and EGOM decisions, and that the Production Sharing Contract (PSC) would override all other arrangements that the parties would arrive at in the event of any conflict.

ADDITIONAL CASE NOTES

By Ranjan Jha, Bhasin & Co., Advocates

Arbitration Agreement Not Enforceable By Party Where It Was Not Incorporated At Time Agreement Executed.

In *Andhra Pradesh Tourism Development Corporation vs. Pampa Hotels Ltd.*, the Supreme Court held that an arbitration agreement executed before a company is formally registered under the Companies Act, 1956 may not be enforced by the company. Andhra Pradesh Tourism Development Corpn. (APTDC) and Pampa Hotels Ltd (Pampa) entered into two agreements, a Lease Agreement and a Development & Management Agreement on 30 March, 2002. Both agreements contained arbitration clauses. Pampa was incorporated under the Companies Act, 1956 on 9 April, 2003. In April 2004, disputes arose between the parties and APTDC terminated the agreement and took possession of the property that formed the subject of the transaction. Pampa filed an application before the Andhra Pradesh High Court under the Arbitration and Conciliation Act, 1996 ("Act") for appointment of arbitrators. APTDC objected asserting, *inter alia*, on the ground that there was no contract, and therefore no arbitration agreement, between the parties because Pampa had not come into existence as of the date of the two agreements. The Chief Justice of the Andhra Pradesh High Court appointed an arbitrator to the case, referring all disputes between the parties, including the existence of the agreement, under Section 11 of the Act.

Shortly thereafter, the Supreme Court, in *SBP & Co. v. Patel Engineering*, held that issues regarding the validity of an arbitration agreement raised in an application for appointment of arbitrator under Section 11 are to be decided by the Chief Justice, or his designee, under Section 11 of the Act. Accordingly, APTDC filed a Special Leave Petition challenging the decision of the appointment of the arbitrator. The main questions before the Supreme Court were whether: (a) an arbitration agreement is enforceable where the party seeking arbitration was a not a company in existence at the time the contract containing the arbitration agreement was executed, and (b) the question of the enforceability of the arbitration agreement must be

decided by the Chief Justice or his designee, or by the Arbitrator.

The Supreme Court concluded that if one of the two parties to the arbitration agreement was not in existence when the contract was made, then there was no valid contract. If the agreements had been entered into by the promoters of the company, stating that the agreements were entered into by the promoters on behalf of a company to be incorporated, and that the terms of the incorporation authorized such action, the agreements would have been valid, and the arbitration clause would have been enforceable. On the second issue, the Court held that whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act is a party to such an agreement, is an issue that must be decided by the Chief Justice or his Designate under Section 11 of the Act before appointing an arbitrator. However, because the arbitral tribunal already had been appointed in this case, the Court did not interfere with the appointment of the arbitral tribunal, and left the issue for the arbitrator to decide.

This judgment has a wide range of implications for companies that enter into pre-incorporation contracts - in particular, contracts providing for arbitration. In light of this judgment, a pre-incorporation contract must be entered into by the promoters of a company on behalf of the company proposed to be incorporated and such contract should be specifically provided for in the terms of the company's incorporation to fall within the ambit of Section 15(h) of Specific Relief Act, 1963. The contract entered into by the promoter must also be duly ratified by the company upon its incorporation to avoid ambiguity and legal scrutiny in the future.



Delhi High Court Comes to the Rescue of Low Priced Books

The Delhi High Court analyzed issues of infringement of copyright and the applicability of the first sale doctrine in *John Wiley & Sons Inc. & Ors v. Prabhat Chander & Ors*. The court had to decide whether exporting books whose sale and distribution was subject to territorial restrictions could amount to

copyright infringement. The Delhi High Court answered in the affirmative, and rejected an application by the defendants to set aside an earlier ex-parte injunction operating in favour of the copyright owner. The court held that India follows the principle of national exhaustion and not international exhaustion.

The plaintiffs, international publishing houses, published special low price editions of text books for school and college students in India. These low price editions (LPEs) were published with the rider that they were meant for sale/re-sale only in the Indian sub-continent and not in any other parts of the world. The plaintiffs contended that they published LPEs so that the same international level books that otherwise are quite costly might be made available to Indian and other Asian students at prices befitting the Asian markets. The defendants, a company and its directors, were engaged in the business of selling books online. The defendants were offering LPEs for sale worldwide in breach of the territorial notice. The plaintiffs filed suit before the Delhi High Court to restrain the defendants from infringing the copyright of the plaintiffs by exporting the books of the plaintiffs to the countries outside of prescribed territories. The plaintiffs also filed an application seeking temporary injunction against the defendants, which came up for hearing with the main suit when the court entered an ex parte order against defendants.

Arguing that the earlier ex-parte injunction was erroneous, the defendants contended that the nature of its activities, *i.e.*, export of the books outside the Indian sub-continent, was not tantamount to infringement of copyright. The defendants invoked the first sale doctrine as a defense, arguing that once the plaintiffs sold a particular copy of the LPE, they could not control its further re-sale. The defendants also submitted that their act of exporting LPE's was not prohibited by the Indian Copyright Act, 1957 (the Act). They submitted that the Act only prohibited the import of infringing articles into India, the Act was silent about exports, and the court should not add words to the legislation.

The Delhi High Court, examining various provisions of the Act, stated that the Act gives a copyright owner the right to exploit his copyright by assignment and licensing. Such an assignment or

license could be limited by way of time period or territory, and could be exclusive or non-exclusive. Therefore, a copyright owner could exhaust its rights in some territories while protecting its right in others. Accordingly, the plaintiffs could prevent the defendants from re-selling and exporting their LPEs to territories where their right of distribution and sale had not been exhausted. The court held that the defendants' acts were *prima facie* infringing in nature and the defenses put forth by the defendants to defend their usage were not tenable. Thus, a temporary injunction was warranted until the case was resolved.

The importance of this decision arises from the fact that the Indian courts have now begun to recognize and protect the right of copyright owners to control the distribution channels of their copyrighted articles in order to obtain maximum royalties. The courts are respecting the divisions of rights along territorial lines by publishers – a form of division which is supported by Sections 19(2), 19(6) and 30A of the Act – and have held that as far as literary works are concerned, the exhaustion of rights occurs on the first legal sale of a copy of a work only within the territory in which the copyright owner intended the work to be sold. Thus, the copyright owner would continue to enjoy the right of resale in all other territories.



ICICI Bank Ordered to Pay Rs. 13 Lakh to NRI in Phishing Scam

Believed to be India's first legal adjudication of a dispute raised by a victim of a cyber crime in phishing case, the adjudicating officer at Chennai, Govt. of Tamil Nadu ("TN"), in *Umashankar Sivasubramanian vs. Branch Manager, ICICI Bank and others*, recently directed ICICI Bank to pay Rs 12.85 lakh to an Abu Dhabi-based non-resident Indian ("NRI") within 60 days for the loss suffered by him due to a phishing fraud. Phishing is a form of internet fraud through which sensitive information such as usernames, passwords, and credit card details are obtained by masquerading as a trustworthy entity.

The ruling was passed under the Cyber Regulations Appellate Tribunal Rules, 2000, with TN IT

secretary PWC Davidar acting as the adjudicator under the Information Technology Act, 2000. The application was filed before Adjudication Officer for the State for adjudication under Section 43 read along with section 46 of the Information Technology Act, 2000. Sivasubramanian, an NRI employed in Abu Dhabi, maintained a bank account with ICICI Bank, and had Internet banking access for his savings bank account. The Bank sent him periodic statements. In September 2007, Sivasubramanian received an email from "customercare@icicibank.com" asking him to reply with his internet banking username and password or else his account would become non-existent. Assuming it to be a routine mail, he complied with the request. Later, he found that Rs 6.46 lakh were transferred from his account to Uday Enterprises, an account holder in the same bank in Mumbai, which withdrew Rs 4.6 lakh by self cheque from an ICICI branch in Mumbai and retained the balance in its account. When ICICI Bank tried to contact the firm, it found that Uday Enterprises had moved on from the address it had provided two years earlier.

Sivasubramanian contended that the bank had violated the "know your customer" (KYC) norms. When he didn't get his money back, Sivasubramanian filed a criminal complaint and also appealed to the State Government's IT Secretary, Mr. P.W.C. Davidar, the Adjudicating Officer under the IT Act. The bank claimed that Sivasubramanian had negligently disclosed his confidential information, such as his password, and as a result became a victim of phishing fraud.

Mr. Davidar stated in his order that a list of instructions the bank had put up on its Web site and which it sends to customers were of a "routine nature" and did not help a customer distinguish between an e-mail from the bank and an e-mail sent by a fraudster. He observed that the bank had not provided additional layers of safeguard such as due diligence, KYC norms, and automatic SMS alerts. He rejected the bank's effort to take shelter behind routine instructions on phishing and stated that the bank failed to take steps to prevent unauthorized access to its customers' accounts. Mr. Davidar also observed that the bank's actions indicated it had "washed its hands" of the customer and that the bank's branch had been indifferent to the customer's plight.

The judgment, though likely to be appealed, is significant as it is apparently the first verdict in a case filed under the IT Act awarding damages in a phishing case.

SUBMISSION REQUESTS

Annual Year-in-Review

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

India Law News

India Law News is looking for articles and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Fall 2010 issue of *India Law News* will carry a special focus on legal education in India. Please read the Author Guidelines available on the [India Committee website](#). Note that, *India Law News* does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the [Editorial Board](#).

THE INDIA COMMITTEE PRESENTS:
***Immigration Compliance Issues and Strategies for Expatriates,
A Perspective from India and the U.S.***

The area of immigration law has become increasingly relevant to individuals traveling and working abroad. Transnational businesses are becoming increasingly more common as more and more people move across the globe for career opportunities.

As individuals decide to take up career opportunities, their green card status is often pivotal. Whether they remain abroad on a short-term basis or return to their home countries after a few years, it is important to be aware of the law surrounding one's lawful permanent resident (LPR) status (i.e. determinations on the abandonment of LPR status).

In addition to green card holders working or living abroad, changes in immigration law also directly affect global transactional business practice. As a result, the mobility of human resources between jurisdictions has also increased. Companies must have a clear understanding of how and when people can be deployed to postings abroad.

An expert panel will discuss the following:

A. Permanent residence status in the U.S. including:

- i) the requirements of maintaining lawful permanent residence (LPR)
- ii) issues surrounding abandonment of LPR status
- iii) guidance for the preservation of LPR status

B. Transactional business immigration including:

- i) recent changes in Indian and US immigration and visa laws
- ii) whether a pro-national regime for both nations may be achieved if India and the U.S. could negotiate a free trade agreement that provides for a fixed number of temporary work visas for nationals to work in each other's jurisdictions (on the lines of agreements with Singapore and Chile) and facilitates business as accorded to nationals of certain countries with which the U.S. has a treaty (the E visas)

C. Learning objectives will include:

- i) US/Canada Immigration
 - Issues with the H-1B Visa - the recent Neufeld Memo
 - The H-1B Cap and the Limited Filing Period;
 - Issues with the L Visas
 - Increased Scrutiny of L visas; and
 - Increased Scrutiny of Labor Certification applications and delays due to visa Unavailability I-9 Compliance
- ii) Indian Immigration:
 - New Employment Visa Norms
 - Cap on number of foreign national employees
 - Qualifying jobs and skills
 - Salary Standards
 - Restricted Activities on Business Visas
 - Restrictions on Entries on Tourist Visas
 - Employing foreign Nationals who are eligible or registered as PIOs or OCIs

- iii) A potential treaty between India and the US that will facilitate Treaty Trader and Treaty Investor Visas.

Speakers: To Be Announced

Date: September 9, 2010 @ 10AM – 11:30AM Eastern/ 8:30PM – 10PM IST



REVISITING THE LAW AFTER SUSPENDED SENTENCES IMPOSED IN THE BHOPAL GAS TRAGEDY

By Anand S. Dayal and Jonathan Wolff

In the recent hyperbole surrounding the failure to bring to justice the persons responsible for the Bhopal gas tragedy, scant attention has been paid to the legal requirements to convict corporate executives of criminal conduct. On June 7 of this year, the Magistrate Court in Bhopal imposed suspended sentences of two years jail time and modest monetary penalties to eight former directors of Union Carbide India Limited (“UCIL”). Given the enormity of the tragedy, the sentences were met with widespread national outrage. The court did not rule on the liability of Warren Anderson, the chairman of Union Carbide Corporation (“UCC”) at the time of the incident, and the focal point of public outrage in India. Absent from the discourse is any discussion of the legal doctrines that underlie corporate and individual culpability for the tragic events of that December night twenty six years ago. An appreciation of this is essential for meaningful discussion of the legal reform required to prevent what is perhaps the real tragedy - the failure to adequately compensate the poor and powerless victims of the Bhopal incident.

First, to put things in context, some facts which are not in dispute. The Bhopal plant was owned by UCIL, an Indian company, publicly listed on the Calcutta Stock Exchange. Its shares were held 50.9% by UCC, a New York corporation, another 22% was held by Indian public financial institutions, and the rest by roughly 23,000 small shareholders. At the time of the Bhopal incident, UCIL was celebrating its 50th anniversary in India. Following the incident, the Government of India (“GOI”) enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, appointing itself as the sole representative of the people injured by the gas leak. Two days after the incident Warren Anderson accepted moral responsibility for the Bhopal incident. But the question of his and UCC’s

legal (civil and criminal) liability was left open, and to this day has yet to be established by a court of law.

Bringing Warren Anderson and UCC “to justice” requires an examination of substantive legal doctrines, as well as the requirements of due process of law. Substantive law makes clear that:

- Officers and directors of a corporation may be held criminally liable for offenses by the corporation only in very narrow circumstance, and that any criminal action against Warren Anderson, a U.S. citizen, must be in accordance with international law, including the US India Treaty on Mutual Legal Assistance in Criminal Matters;
- As separate legal entities, UCC may not be held liable for UCIL’s malfeasance unless the court “pierces the corporate veil” or adopts some other theory of enterprise liability to make UCC liable.

In addition, in any future man-made mass disaster it will be essential that the courts and investigative agencies in India function in an expeditious and thorough manner, so that there is no doubt that justice will be served. Doubts had previously been expressed including by none other than the GOI itself, regarding adequacy of the court system in India.

IMPOSING CRIMINAL LIABILITY ON DIRECTORS IS NOT STRAIGHTFORWARD

In much of the popular discourse, the criminal liability of Warren Anderson, chairman of UCC at the time of the Bhopal incident, has been taken as a given. Scant attention has been paid to the legal requirements for imposing such liability.

Officers and directors, such as Warren Anderson, are liable for the criminal offenses of a company in very narrow circumstances; certainly not as a matter of course. Their liability rests on the principles of vicarious liability, which itself is based on principles of agency law or imposed by statute. In India, to support a finding of vicarious liability in a criminal matter, there must be a provision in the underlying statute fixing liability on the directors. In the absence of such a provision, criminal liability can be imposed on a director only if he aided and abetted the violation by the corporation through specific conduct or if it is proved that he at the time of the violation was “in charge of” and responsible to the corporation for the conduct of its business. The Supreme Court of India has interpreted these words to require that the accused be in overall control of the day to day business of the entity. This requirement is not met merely by the accused having a right to participate in the business of the entity.

Accordingly, the criminal liability of Warren Anderson as a director of UCC will be founded on painstakingly making a case that he is vicariously liable and proving that he engaged in conduct that establishes beyond a reasonable doubt his culpability for the acts and omissions of that fateful night. This is a monumental prosecutorial challenge.

UCC'S (PARENT COMPANY) LIABILITY CANNOT BE TAKEN FOR GRANTED

In holding UCC liable, one basic question is whether and to what extent the separate existence of UCIL should be ignored. The separate existence of a corporation is a fundamental assumption that underlies global commercial transactions, and there must be compelling reasons for a court to ignore that assumption. Generally the existence of a corporation is sought to be disregarded when it has no assets. UCIL was a “going concern” with substantial assets, and there is nothing to suggest that it was undercapitalized.

PIERCING THE CORPORATE VEIL OF UCIL

Generally corporate veil piercing is appropriate only when recognition of the separate corporate existence will lead to injustice or an unfair or inequitable result. This is a necessary but not a sufficient condition for imposing liability on

shareholders, such as UCC in this case. While piercing is rare, two factors in the present case favor it: (a) liability is sought to be imposed on another corporate entity rather than an individual; and (b) liability arises in the first instance from tort rather than contract.

Many cases in which shareholder liability has been found concern shareholders that are themselves corporations, as is the case here. Often in such cases a parent corporation is being held liable for the debts of the subsidiary. These cases have a somewhat different flavor than cases in which the shareholder defendant is an individual, and there is a general feeling that disregarding the separate corporate existence of the subsidiary may be easier where another corporate entity is held liable.

Beyond that, the general standards applied in determining whether the shareholders (or parent company) of a corporation should be held liable are quite different in contract cases as compared to tort cases. In a contract case, the third party has usually dealt in some way with the subsidiary and is aware that it lacks substance. In a tort case, on the other hand, there is no element of voluntary dealing. The question in these cases is whether it is reasonable for owners of a business to transfer a risk of loss or injury to members of the general public through the device of a corporation which has limited assets.

Generally corporate shareholders, such as UCC, have been held liable for subsidiary obligations in a number of situations:

- i. When the subsidiary is being operated in an “unfair manner,” e.g., the terms of transactions between parent and subsidiary are set so that profits accumulate in the parent and losses in the subsidiary;
- ii. When the subsidiary is consistently represented as being a part of the parent, e.g., as a “division” or “local office” rather than as a subsidiary;
- iii. When the separate corporate formalities of the subsidiary are not followed;
- iv. When the subsidiary and parent are operating essentially as parts of the same

integrated business, and the subsidiary is undercapitalized; and

- v. When there is no consistent clear delineation of which transactions are the parent's and which are the subsidiary's.

ENTERPRISE LIABILITY

Besides the doctrine of piercing the veil, the enterprise theory of liability, although not widely accepted, could be a basis for imposing liability on UCC. Enterprise theory views the corporate group as a singular unit, rather than viewing each subsidiary or affiliated corporation as a separate legal entity. Since subsidiaries (especially wholly-owned subsidiaries) at least theoretically act for the benefit of the corporation as a whole, enterprise theory follows the profit and holds the various corporate actors in a given web accountable for the actions of other actors. Enterprise principles thus apply liability according to the patterns of the economic enterprise instead of stopping at the contours of the legal fiction. Adopting this theory would allow claimants of UCIL, one actor in a corporate group, to recover from UCC, another member of the group under ordinary tort circumstances. However, because the Indian courts have not opined on the enterprise theory of liability, this will be new ground.

ABSENCE OF MASS TORT LEGISLATION

India has no mass tort legislation that broadens the responsibility for compensation and remediation of harm caused by hazardous activities that may affect the general public and establishes a mechanism to compensate the injured. For example, there is no legislation in India such as the US Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) under which a parent corporation might be liable as an "operator" of the site if it was involved in the operation of the site itself. In the absence of specific legislation, a court will have to rely on common law doctrines to disregard the existence of UCIL (pierce the corporate veil) and hold UCC liable. There is also the separate question of law as to what extent Dow Chemicals, as successor to UCC, could be liable.

ADEQUACY OF LEGAL INFRASTRUCTURE IN INDIA

It is often said that perception is reality. This is all the more true in this case, where the functioning of the Indian legal system will be critically examined internationally. To be credible, judicial proceedings and criminal investigations in this matter will not only have to meet the highest standards of law, but should also be so perceived by all observers. The GOI itself had serious misgivings on this account at the time of the Bhopal incident. In 1986, the Union of India acting on behalf of the victims of the Bhopal incident is reported to have argued before the federal district court in New York that "the courts of India are not up to the task of conducting the Bhopal litigation . . .", "that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British colonial rulers who shaped the Indian legal system to meet their own ends" . . . and "that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people." Dismissing the case on forum non conveniens grounds, federal district judge John F. Keenan wrote:

The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary

created there since the Independence of 1947.

In re *Union Carbide Corporation Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842, 867 (S.D.N.Y. 1986). That was then. We do not know if the GOI still holds the same view. Leading members of the Indian bar, including senior advocate N.A. Palkhivala and J.B. Dadachanji, had disagreed and took a contrary view before the court.

Has history disproven Judge Keenan's determination that the Indian courts are up to the task? We think not. To blame solely the Indian courts for the delay would assume that the parties involved, the GOI and UCC, moved expeditiously in litigating this case. As the parties and not the court alone set the legal "pace" of a trial in India, the saga of this twenty six year old case cannot be entirely attributed to the court alone.

CONCLUSION

Justice requires that specific legal criteria be satisfied for the imposition of criminal liability upon the officers and directors of UCC. To impose criminal liability without evaluating whether the facts of Bhopal fall into the limited circumstances under which criminal liability may be imposed would itself be a denial of justice. To prevent what happened in the aftermath of the Bhopal incident, we as lawyers must press the government to pass comprehensive legislation providing for proper compensation to victims of mass torts and for criminal liability if the circumstances allow. The disaster of Bhopal "gnaws at the conscience" of the Indian people according to Prime Minister Manmohan Singh and represents a true human tragedy. There are many legal lessons to be learned in the wake of the Bhopal tragedy. Perhaps the most important is that the law and courts must be better equipped to address any future Bhopal-like mass tragedy.

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