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## WHITE PAPER on REGULATORY ISSUES AFFECTING INDO-ITALIAN BUSINESS, TRADE, AND INVESTMENTS

*DTAA – Double Taxation Avoidance Agreement,  
BIPA – Bilateral Investments Protection Agreement  
and Trade Barriers*

November 2022

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## INTRODUCTION

The Indian regulatory framework defining the modalities in which business, trade and investments by Italian companies in India presents a set of critical points which undermine and limit their growth.

The IICCI - Indo-Italian Chamber of Commerce and Industry, following inputs by both its members and the Embassy of Italy in India, has identified three areas where these critical points are particularly urgent:

1. the DTAA – Double Taxation Avoidance Agreement between Italy and India
2. the BIPA – Bilateral Investment Protection Agreement between Italy and India and
3. the overall regulatory framework for Trade Barriers (tariff and non-tariff), for goods and services

For the preparation of the white paper, the IICCI has availed of the support and knowledge provided by three eminent Indian and Italian law firms:

- Gianni & Origoni (Mr. Rosario Zaccà, Partner and Mr. Vittorio Zucchelli, Partner) developed the contents of the DTAA's section.
- SKAA - Satinder Kapur & Associates (Mr. Satinder Kapur, Lead Partner & Founder), developed the contents of the BIPA's section.
- Titus & Co (Mr. Diljeet Titus, Partner & Founder and Mr. Baljit Kalha, Senior Partner) developed the contents of the Trade Barriers section.

## DTAA – DOUBLE TAXATION AVOIDANCE AGREEMENT

This paper summarizes some of the provisions contained in the Double Taxation Avoidance Agreement/treaty (“DTAA”) between government of the Republic of India and the Government of the Republic of Italy in force since 1995, on which we would like to raise your attention and evaluate the possibility of amendment, in a way to facilitate and boost the economic transactions among our two Countries.

### Article 7 – Business profits and Force of Attraction

Existing DTAA between India and Italy has, in Article 7(1), a force of attraction clause. It provides that if there is a Permanent Establishment, then activities of “same or similar” kind performed by an Italian entity or goods of the “same or similar” kind sold by Italian entity within the Indian territory will also be taxable in India.

Article 7(1) states that *“The profits of an enterprise of a Contracting State (Italy) shall be taxable only in that State (Italy) unless the enterprise carries on business in the other Contracting State (India) through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State (India) but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State (India) of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State (India) of the same or similar kind as those effected through that permanent establishment”*.

The Indian Tax Authorities may raise an issue that the profits of an Italian Entity will be taxable. In India even though generated and managed from Italy. Force of Attraction clause can cause difficulties.

Other countries such as UK do not contain the “force of attraction rule” therefore it would be beneficial if wording similar to the one adopted with UK is included in the Indo Italian Protocol.

### Article 12 - Interest

As a general rule, interest arising in the Republic of India and paid to a resident of Italy may be taxed in both States.

Should this be the case, the tax chargeable on interest arising in India and paid to a resident of the other Contracting State in respect of loans or debts shall not exceed 15 per cent of the gross amount of such interest.

The existing DTAA between India and Italy contains an exemption from the application of the 15% withholding tax when:

- a) the payer of the interest is the Government of that Contracting State or a local authority thereof, or
- b) the interest is paid to any agency or instrumentality (including a financial institution) which may be agreed upon in this behalf by the two Contracting States.

The above provision, unfortunately, is rather vague, requires a specific agreement and does not allow Italian banks or State owned financial institutions doing business with Indian clients

to benefit from any automatic exemption from withholding tax, such as, by way of example, the DTAA between India and Germany, the United Kingdom or the Netherlands .

Provisions similar to that in the above treaties, if included in the Indo Italian Protocol and notified by Indian government, would definitely support Italian banks and other financial institution to boost the financial transactions between the two Countries and not be penalized with respect to other European competitors.

### **Article 13 – Royalties and Fees for Technical Services**

The article on Fees of Technical Services provides for a tax @ 20%. The definition of technical services contained in Art. 13(4) is very broad as it addresses “services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel.”

According to the above definition, any services having some technical, managerial or consultancy implication can be considered as taxable in India, and this would also include the assistance of whatsoever nature when linked to technical services.

Other countries such as UK contain a much more detailed description of the services falling within the scope of this article and we believe this would be beneficial also for all the Italian companies operating in India, and try to limit, to the extent possible, the application of the withholding tax.

### **Article 14 - Capital Gains**

As a general rule, India levies Capital Gain tax on sale of Indian company’s shares.

Existing DTAA between India and Italy covers taxability aspect of Dividend in Article 13(5) stating that gains from the alienation of shares of Indian Companies may be taxed in India. This position is not consistent with the majority of the DTAA signed by Italy where the right of taxation is given only to the Country of Residence of the seller.

This same principle is also acknowledged by India in, by way of example, the DTAA with The Netherlands.

Wordings similar to that in Dutch treaty, if included in the Indo Italian Protocol and notified by Indian government will support Italian companies to avoid an Indian taxation on capital gain, in consistency with the majority of the DTAA signed by Italy.

# BIPA - BILATERAL INVESTMENT PROTECTION AGREEMENT BETWEEN INDIA AND ITALY

This paper traces the historical background of Bilateral Investment Promotion and Protection Agreement with special reference to the Agreement signed between the Republic of India and the Italian Republic (A); the termination of the Agreement (B); the protection given by the sunset clause (C); the changes brought in by India in their treaty (D); and what the future holds for the investors of both countries (E).

## Background

Till the year 1991, India's economic doors were shut for the entire world, however after that the Indian economy underwent major structural changes and opened its doors to welcome the world. For the very first time, countries all around the world were encouraged to invest in India and the Indian economy saw liberalisation reach new heights. It was then that India started signing Bilateral Investment Treaties (BIT) or Bilateral Investment Promotion and Protection Agreement (BIPA) as they are called in India. The primary objective was to attract foreign investment and boost the economy of the country.<sup>1</sup>

BITs are the most important source of international investment law.<sup>2</sup> They are agreements signed between two countries to protect investments made in either country by investors. BITs protect investments by imposing conditions on the regulatory behaviour of the country in which investment is being made i.e. the host state, and thus, prevent undue interference with the rights of the foreign investor. BITs includes restriction conditions such as the host state from expropriating investments; imposing obligations on the host state to accord fair and equitable treatment (FET) to foreign investments and refrain from discriminating against any foreign investment; allowing for repatriation of profits subject to conditions agreed to between the two countries; and most importantly, allowing individual investors to bring cases against host states if the latter's sovereign regulatory measures are not consistent with the BIT, for monetary compensation. This is known as investor-state dispute settlement (ISDS).

Starting in 1994, India signed 84 BITs with counterparties such as the UK, France, Germany, Australia, China, Malaysia, Thailand, Mexico, Russia, Egypt, Saudi Arabia, the UAE, Turkey and others. This step followed the gradual opening up of the Indian economy to overseas investment and vice versa.<sup>3</sup>

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<sup>1</sup> Indian Journal of International Law, Most favoured nation provision in Indian bilateral investment treaties: A case for reform, [https://www.researchgate.net/publication/277966893\\_Most\\_favoured\\_nation\\_provision\\_in\\_Indian\\_bilateral\\_investment\\_treaties\\_A\\_case\\_for\\_reform](https://www.researchgate.net/publication/277966893_Most_favoured_nation_provision_in_Indian_bilateral_investment_treaties_A_case_for_reform)

<sup>2</sup> R Dolzer and C Schreuer, Principles of International Investment Law (Oxford University Press, Oxford/New York, 2012), 13; Jeswald W Salacuse, 'The Treatification of International Investment Law', Law and Business Review of the Americas, vol. 13 (2007),

<sup>3</sup> <https://hsfnotes.com/publicinternationallaw/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/>

The BIT between India and Italy was signed on 23 November 1995 but it was put in force on 26 March 1998.<sup>4</sup> It was entered into by both countries for the desire to create conditions to foster increased investment by the citizens and corporations of in both countries and recognising that reciprocal protection of such investments under the BIPA will subserve the aforesaid objective and will be conducive to the stimulation of individual business initiative and will increase prosperity in both countries.<sup>5</sup>

Italy is among India's top 5 trading partners in the European Union. The balance of trade has been in India's favour since the early eighties. Post the enforcement of the BIPA between India and Italy, the bilateral trade and investment was at an incline till 2007, before the world-wide recession of 2008 that led to a marked slowdown in the Italian economy. In 2011-12, the bilateral trade stood at €8.52 billion registering an increase of 18% vis-à-vis 2010-11 and owing primarily to the global economic recovery. However, in 2012-13 the total bilateral trade decreased to €7.09 billion due to the onset of a severe economic recession in Italy coupled with the economic austerity and reform programme initiated by the Italian government in 2012. In 2014-15, the total trade was of US\$9 billion with a negative growth of 1.12%. Due to Covid pandemic the trade declined last year.

India ranks 19th as country of origin of Italian imports, accounting for 1.2% of Italian imports. Indian companies present in Italy are in sectors such as IT, electronics, pharmaceuticals, automobile, textile and engineering. Top sectors attracting FDI inflows from Italy are Automobile Industry/Transportation, Food Processing, Metallurgical Industry, Textiles, Electrical Equipment and Others.<sup>6</sup>

## Termination of the BIPA

A review process launched in 2012 by the government of India which ultimately led to the adoption of the Model BIT on January 14, 2016.<sup>7</sup> Subsequently, In 2016, India sent official notices to unilaterally terminate BITs with over 60 countries<sup>8</sup>, including the BIT it had signed with Italy, as the initial term of the BIT with these countries had already expired or was due to expire in the near future.<sup>9</sup> After being in force for almost 9 years, the BIPA between India and Italy was terminated on 23 March 2017.

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<sup>4</sup> <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1920/india---italy-bit-1995->

<sup>5</sup> Preamble of the India-Italy BIPA, <https://dea.gov.in/sites/default/files/Italy.pdf>

<sup>6</sup> [https://mea.gov.in/Portal/ForeignRelation/India\\_italy\\_brief\\_2021.pdf](https://mea.gov.in/Portal/ForeignRelation/India_italy_brief_2021.pdf)

<sup>7</sup> Model Text for the Indian Bilateral Investment Treaty 2016, [http://mof.gov.in/reports/ModelTextIndia\\_BIT.pdf](http://mof.gov.in/reports/ModelTextIndia_BIT.pdf) [hereinafter, 2016 Indian Model BIT] Important to keep in mind that the Indian Model BIT contains two dates – 28 December 2015 given in the letter accompanying the text; and 14 January 2016 on the website of the Ministry of Finance, Government of India (<http://mof.gov.in/>) as the date of adoption of the Model BIT. In this paper, we use the 14 January 2016 date, and thus call the Model BIT as 2016 Indian Model BIT and not 2015 Indian Model BIT.

<sup>8</sup> UNCTAD Investment Policy Hub. (n.d.). India bilateral investment treaties. <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>

<sup>9</sup> IISD Investment Treaty News. (2016). India takes steps to reform its investment policy framework after approving new model BIT. <https://www.iisd.org/itn/2016/08/10/india-takes-steps-to-reform-its-investment-policy-frameworkafter-approving-new-model-bit/>

This move by the Indian government was a result of the sudden exposure of ISDS claims against India by foreign investors under the BITs post 2011. The stepping stone for these claims was when India was worse hit by the unfavourable award it received in the *White Industries Australia Ltd. v. The Republic of India*<sup>10</sup> case under the India-Australia BIT. White Industries invoked the India-Australia BIT in 2011 and taking advantage of the Most Favoured Nation (MFN) provision in it, took the benefit of a favourable provision in the India-Kuwait BIT<sup>11</sup>, finally receiving an award in its favour in 2012. After this award, a number of foreign corporations slapped ISDS notices against India, challenging a wide array of regulatory measures.

Another reason behind terminating these treaties was to negotiate new BITs based on the 2016 Model BIT.<sup>12</sup> India's modus operandi to renegotiate its existing BITs seems to be to first terminate the existing BITs, and then launch negotiation for new BITs based on the 2016 Model BIT.<sup>13</sup> Therefore, India's approach with Italy was the same. After the termination of the BIPA, the negotiations to enter into the Model BIT have taken place but they have been to no avail. Hence, presently, India and Italy have not signed the new Model BIT or any other bilateral trade and investment agreement.

### Sunset Clause

The BIPAs that India entered into, including the one with Italy, contain a 'sunset clause' or a 'survival clause'. This unique clause in BITs allow the continuation of the protection of investments made prior to the termination of the BIT. Effectively, it means that investors can use the provisions of a terminated BIT to initiate legal recourse or international arbitration against the country during this 'sunset' or 'survival' period. However, it does not grant any rights to the other party's investors that establish in the host country after the BIT is terminated. The India-Italy BIPA<sup>14</sup> contains the following 'sunset clause' under Article 14:

*"(2) In case of investments effected prior to the date of termination under this Article, the provisions of this Agreement shall remain effective for a further period of 15 years from the date of such termination."*

**This basically grants both countries and its investors the right to initiate international arbitration till 23 March 2032 i.e. 15 years from the date of termination.** This sunset clause also ensures that current investors can continue to rely on the investment protection and dispute settlement provisions contained in a BIT . This makes both countries and the investors vulnerable and prone to investment claims under the terminated BIPA. For example, in November 2019, a subsidiary of a Korean state-run power company brought a US\$400 million

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<sup>10</sup> *White Industries Australia Ltd. v. The Republic of India*, Final Award, <<https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>>

<sup>11</sup> [https://www.gatewayhouse.in/balanced-bits/#\\_ftn9](https://www.gatewayhouse.in/balanced-bits/#_ftn9)

<sup>12</sup> Asit Ranjan Mishra, India to Trade Partners: Sign new bilateral investment treaties by 31 March, <http://www.livemint.com/Politics/8IRq2uiGhDAXjyiO2IEJ3K/India-asks-trade-partners-to-sign-new-BIT-pact.html>.

<sup>13</sup> Pramit Pal Chaudhary, India's Bilateral Investment Treaties: Once BIT ten 57 times More Shy, <http://www.hindustantimes.com/analysis/india-s-bilateral-investment-treatiesonce-bitten-57-times-more-shy/story-2d0VyByBuCC55TYz0zDzNK.html>

<sup>14</sup> <https://dea.gov.in/sites/default/files/Italy.pdf>



investment treaty claim against India under the terminated India–South Korea BIT, alleging breaches of, inter alia, fair and equitable treatment.<sup>15</sup>

The governments of India and Italy also did not agree to remove the sunset clause before terminating the BIT. It would have resulted in the existing investors being left in a lurch without any recourse.. However, presently, India and Italy are bound by this sunset clause giving the protection to existing investors for their investments made before the termination of the BIPA and also to the contracting countries.

### Changes in the New BIT by India

The White Industries case woke up India to the realities of investment treaty arbitrations. Today, India has a quite a few investment treaty arbitrations claims pending against it. The Government of India felt the need to have a new Model BIT to renegotiate existing treaties and to use it as a basis to sign new ones. India moved away from an overly investor-friendly approach to a somewhat protectionist approach concerning foreign investments in its new Model BIT. The starkest change in the revised BIT is the removal of almost all its innovative social protections. Under the Model BIT, the investor’s enjoyment of rights under the BIT, and the ability to bring an investor-state dispute, were conditional on compliance with certain ‘fundamental’ obligations of social responsibility.<sup>16</sup>

The major changes in the Model BIT are as follows:

<p><b>Scope</b></p>	<p>Like the earlier BIT, the Model BIT does not extend to the pre-investment activities including the terms and conditions applicable to them post-investment. The Model BIT states that measures/compliances introduced by the local/state governments will be outside the purview of the BIT, and so will be the taxation measures. The Model BIT explains this as, <i>“For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be nonjusticiable and it shall not be open to any arbitration tribunal to review such decision.”</i><sup>17</sup></p> <p>This is a result of recent investment treaty arbitration claims initiated by companies such as the Vodafone case and Cairn Energy case. The Government desires to limit taxation related matters to the Double Taxation Avoidance Agreements (DTAAs).<sup>18</sup> This appears to be a change included due to the experience India had with the White Industries case.</p>
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<sup>15</sup> Global Arbitration Review, Investment Treaty Arbitration: India, <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/india>

<sup>16</sup> Articles 9 to 12, draft BIT

<sup>17</sup> Article 2.4(ii) of the Model BIT

<sup>18</sup> <http://arbitrationblog.kluwarbitration.com/2016/01/18/unveiled-indian-model-bit/>

<b>Definition of Investment</b>	The Model BIT adopts an enterprise-based approach which means that an investor would have to be an incorporated legal entity in compliance with the domestic law for it to qualify as an investment. It also contains a negative list of investments which further limits its overall scope. The earlier BIT had an asset-based definition of investment, which had a broad ambit and could include an array of assets. The purpose of having an enterprise-based approach now is to narrow the scope of investments and likewise reduce ISDS claims against India.
<b>Change of 'Fair and Equitable Treatment' to 'Treatment of Investments'</b>	The Model BIT has done away with the 'Fair and Equitable Treatment' clause and has included a detailed 'Treatment of Investments' clause. This clause includes an undertaking that neither party shall subject investments to measures that are abusive, against norms of customary international law and to un-remedied and egregious violations of due process. While this appears to have been designed keeping investors' fears in mind, in the backdrop of the exhaustion of domestic remedy clause.
<b>National Treatment</b>	The Model BIT has a broader scope of National Treatment as compared to the earlier BIT. It includes the decisions of the State Governments individually which was earlier not included.
<b>Arbitration Proceedings</b>	The Model BIT requires that all regulatory procedures and orders in a arbitral proceeding are available publicly, hence making the process transparent. <sup>19</sup> Also, the Model BIT makes it mandatory that all local remedies that an investor is entitled to are exhausted before initiating any arbitration proceeding.
<b>Investor Obligations</b>	One of the investor-friendly clauses in the Model BIT is the narrower set of obligations for the investor than the earlier BIT. This is one of the only clauses that makes the Model BIT less stringent on compliances and obligations.
<b>Sunset Clause</b>	It has reduced the period of sunset clause from 10-15 years to 5 years.

Since 2016, India has signed just two treaties based on the Model BIT, and only one is in force yet. This clearly shows that no country has shown an inclination to re-negotiate with India based on the Model BIT.

While the Model BIT introduces a number of progressive provisions like the transparency of arbitration proceedings and fewer investor obligations, it severely limits the standard of protection afforded to investors and the mandate regarding the exhaustion of local remedies unnecessarily makes the whole procedure lengthy and cumbersome. The Model BIT may not be as generous as its predecessor but is far more balanced. To a large extent it has managed to strike a balance between the interests of the nation as well as that of investors, both inbound and outbound.

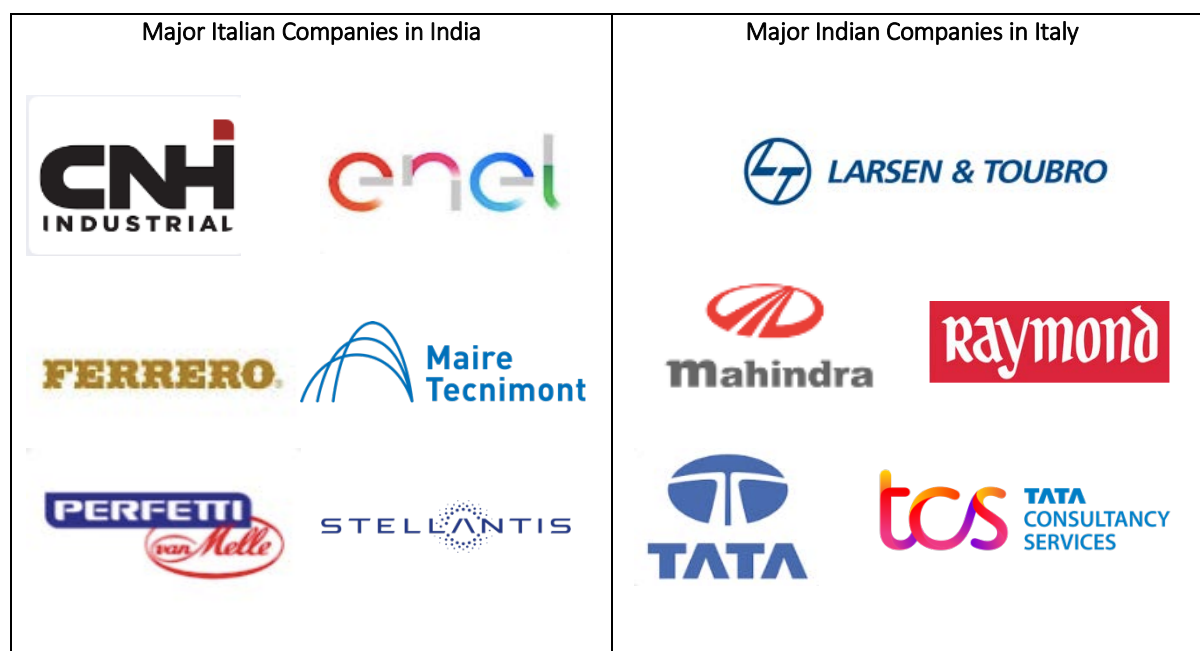
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<sup>19</sup> Supra note 18

## Way Forward

India is one of the fastest growing economies in the world, and the third most attractive destination for Foreign Direct Investment (FDI), after China and the United States,<sup>20</sup> which clearly shows that a large number of foreign investors are interested in investing in India. In fact, total FDI flows to India, which increased from \$4,029 million in 2000-2001 to \$43,478 million in 2016- 17,<sup>21</sup> show that large numbers of foreign investors are already present in India. Consequently, any change in India's BIT practice is bound to impact a large number of foreign investors and their home states.<sup>22</sup>

Italy is the 18th largest FDI contributor to India; Italian FDI was projected to reach the US\$2 billion mark by 2020 end. There are more than 600 Italian companies in India, with an estimated employment of about 24,000 units and forms of presence ranging from: 100% owned subsidiaries, Joint Ventures or representative commercial offices.<sup>23</sup> Between India and Italy there is a solid and wide-ranging economic partnership.



Now, with the newly defined objectives of global governance in the post-COVID-19 world, driven by the agenda to bring public goods and global commons at the center stage, both India and Italy have recognized the opportunity to deepen their collaboration and cooperation. Mr. Narendra Modi, Prime Minister of India and Mr. Giuseppe Conte, Prime Minister of Republic

<sup>20</sup> UNCTAD, WORLD INVESTMENT REPORT – INVESTOR NATIONALITY: POLICY CHALLENGES 101 (2017)

<sup>21</sup> Quarterly Fact Sheet, Fact Sheet on Foreign Direct Investment from April 2000 to March 2017, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, [http://dipp.nic.in/sites/default/files/FDI\\_FactSheet\\_January\\_March2017.pdf](http://dipp.nic.in/sites/default/files/FDI_FactSheet_January_March2017.pdf)

<sup>22</sup> Nayanima Basu & Amiti Sen, Absence of BIT may bite Swedish investments to India: Ann Linde, THE HINDU (May 18, 2017), <http://www.thehindubusinessline.com/economy/absence-of-bit-may-bite-swedish-investments-to-india-ann-linde/article9707250.ece>; Prabhash Ranjan, Turning the Clock Back, THE HINDU (Mar. 28, 2017), <http://www.thehindu.com/opinion/op-ed/turning-the-clock-back/article17684494.ece>.

<sup>23</sup> [https://ambnewdelhi.esteri.it/ambasciata\\_newdelhi/en/i\\_rapporti\\_bilaterali/cooperazione\\_economica](https://ambnewdelhi.esteri.it/ambasciata_newdelhi/en/i_rapporti_bilaterali/cooperazione_economica)

of Italy co-chaired a Virtual Summit between India and Italy on 6 November 2020. Italy signed 15 documents which include memorandum of understanding, agreements etc covering trade and investment, shipbuilding and energy, and sealed a broad-based Plan of Action 2020-24 to enhance their economic partnership by collaborating in high technology, clean energy and energy sector development, infrastructure, and food processing. The contents of these signed documents are not publicly available. The Ministry of External Affairs, India confirmed in the Joint Statement that, **“India and Italy will strengthen bilateral cooperation with a view to facilitating reciprocal market access and to providing adequate protection to intellectual property rights and geographical indications”**.<sup>24</sup> This, however, means that both countries are adopting new instruments and streamlining existing frameworks to boost bilateral trade and investment relations between them.

Additionally, in order to monitor this Plan of Action 2020-24, the countries have inculcated a Follow-up Mechanism that will be presided by the Minister of Foreign Affairs and International Cooperation of Italy and the External Affairs Minister of India and will convene alternatively in India and Italy on a yearly basis.<sup>25</sup> This makes its implementation more solid and trustworthy.

To safeguard their investment options, both countries can choose to adopt the route taken by India and United Arab Emirates (UAE) in the BIT signed by them. In December 2013, despite an ongoing official review of its existing agreements, the Indian government signed a BIT with the United Arab Emirates. It eventually came in force on 13 September 2014.<sup>26</sup> This BIT is somewhat different from the old BIT and also from the Model BIT.

The India–UAE BIT defines investment in the broadest terms possible. The definition goes ahead and includes ‘every kind of asset’ — from moveable and immovable property, shares and other interests in companies to monetary claims, contractual rights, intellectual property rights, know-how and goodwill — without any reference to certain limitations or exceptions. Many countries are now opting for a narrow definition of investment in treaties including India’s Model BIT which has completely let go of the asset-approach and shifter to an enterprise-approach.

The India–UAE BIT includes now done away provisions in the Model BIT such as most favoured nation, national treatment and fair and equitable treatment in the treaty. For investor–state disputes settlements, the BIT provides an explicit choice to foreign investors to use domestic courts or international arbitration. A foreign investor cannot bring a claim against a host state to an international arbitrator if it has already brought it to domestic courts. This is a major departure from earlier BITs which provide recourse to both international arbitration and domestic courts. The treaty includes a renegotiation option in the duration clause but that has

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<sup>24</sup> India-Italy Joint Statement and Plan of Action 2020-2024, [https://mea.gov.in/bilateral-documents.htm?dtl/33171/Indialtaly\\_Joint\\_Statement\\_and\\_Plan\\_of\\_Action\\_20202024](https://mea.gov.in/bilateral-documents.htm?dtl/33171/Indialtaly_Joint_Statement_and_Plan_of_Action_20202024), 06 November 2020

<sup>25</sup> *Id*

<sup>26</sup> <https://dea.gov.in/bipa?page=8>

not happened. There is also no mention of umbrella or sunset clauses which was included in the earlier BITs and is there in the Model BIT too.<sup>27</sup>

Structurally, the Model BIT is more detailed compared to the India-UAE BIT. The key areas of comparison have been enlisted below:

	INDIA-UAE BIT	MODEL BIT
<b>Definition of 'investment'</b>	Asset-based approach	Enterprise-based approach
<b>Treatment of investments</b>	Fair and Equitable treatment to investments	The investments shall not be subjected to measures that are against norms of customary international law.
<b>Favourability of investments</b>	Most-favoured nation clause included	No most-favoured nation clause.
<b>National Treatment</b>	Narrower scope of National Treatment	Broader scope of National Treatment and includes State Governments individually which was earlier not included.
<b>Corporate Social Responsibility</b>	No such responsibility has been included.	Parties to the BIT shall voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies.
<b>Arbitration Proceedings</b>	Gives a basic procedure for arbitration proceedings. Publication of documents is not mandatory.	Gives a detailed step-by-step procedure of arbitration including the arbitration rules that will be followed. It makes it mandatory to put certain documents in the public domain.
<b>Renegotiation</b>	Includes a renegotiation clause.	Renegotiation clause not included.
<b>Sunset clause</b>	No sunset clause	It includes a period 5 years as sunset clause.

Therefore, if India and Italy could negotiate a bespoke investment treaty rather than completely relying on the Model BIT; this would provide an open field to both countries to put across clauses beneficial to them and come to a logical compromise. The looming economic recession triggered by the Covid pandemic has made attracting FDI an urgent imperative for improving economic outcomes. Additionally, global companies are contemplating moving their investments away from China, it is an opportune time to review and revise the Model BIT from the present inward-looking protectionist approach, to a more pragmatic one and enter into bespoke bilateral agreements to attract foreign investments and boost trade.

<sup>27</sup> [https://dea.gov.in/sites/default/files/India-UAE%20BIT\\_0.pdf](https://dea.gov.in/sites/default/files/India-UAE%20BIT_0.pdf)

## The European Community Approach: an Alternative Scenario

Given the present scenario, one cannot overlook the alternative approach of negotiating an Indo-EU Bilateral Investment Protection Agreement under which all EU Countries shall be granted the same protection terms rather than having different terms country wise. It is telling to state that in a recent judgement of far reaching consequence<sup>28</sup> the Court of Justice of the European Union found that arbitration clauses included in intra-EU BITs are incompatible with EU law. Following this most of the intra EU BIT were terminated. In a sense this is an example of vindication of the alternative approach of dealing with the EU as a supra body also with respect to international economic treaties, in application of the provisions included in European Union treaties in this respect.

Indeed, according to the **Treaty on the Functioning of the European Union (TFEU)** European Union is entitled to enter into BITs with third countries, meaning extra EU countries. In particular, article 207 of the TFEU, states that *"The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade, including those to be taken in cases of dumping and subsidies. The common commercial policy shall be conducted within the framework of the principles and objectives of the Union's external action"*. The Member States have therefore intended to devolve commercial matters, and in particular that of foreign direct investments, to the European Union, thus sacrificing a portion of their own state sovereignty in favour of the European Union itself. In the following paragraph 3, it is stated that *"Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations."*

History shows that European Union is a great utilizer of direct economic, investment and free trade treaties with third countries (42 active agreements with 73 countries)<sup>29</sup>, the most eminent examples of which are the EU-South Korea free trade agreement (FTA) (since 2011), the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (since 2016), the EU

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28 Case C-284/16 (Slowakische Republik v. Achmea BV (the "**Achmea Judgment**" or "**CJEU Judgement**"))

29 [https://www.confindustria.it/home/centro-studi/temi-di-ricerca/scenari-geo-economici/tutti/dettaglio/accordi-commerciali-UE-antidoto-protezionismo-USA-e-volano-per-export-italiano?\\_\\_cf\\_chl\\_jschl\\_tk\\_\\_=utqEXVDgqxGeeLq8sJzs1riBrn7uHo79MH8tsWQzbqs-1643049375-0-gaNycGzNF70](https://www.confindustria.it/home/centro-studi/temi-di-ricerca/scenari-geo-economici/tutti/dettaglio/accordi-commerciali-UE-antidoto-protezionismo-USA-e-volano-per-export-italiano?__cf_chl_jschl_tk__=utqEXVDgqxGeeLq8sJzs1riBrn7uHo79MH8tsWQzbqs-1643049375-0-gaNycGzNF70)

and Japan's Economic Partnership Agreement (since 2019), EU-UK Trade and Cooperation Agreement (since 2021) and the EU-China Comprehensive Agreement on Investment under negotiation. EU trend is therefore very clear, and it is likely that in future, further BITs between EU and third countries will be negotiated and entered into.

With specific reference to EU-India trade relations, as stated in a June 2017 report of the European Parliament, it is the intention of the European Union to reach a free trade agreement with India. Indeed, the European Parliament has reiterated its support for a comprehensive and ambitious free trade agreement between the EU and India, the negotiations of which should be conducted in a spirit of reciprocity and mutual benefit. This agreement should be economically, socially and politically viable for both parties and respect the international standards established in the framework of the WTO and the International Labour Organization (ILO), as well as the principle of corporate social responsibility. Members stressed that such an agreement should benefit both European and Indian citizens, including by combating poverty and promoting respect for human rights.<sup>30</sup>

In this scenario, that clearly depicts a preference of European Union to negotiate and enter into economic treaties, including BITs, as a whole entity, thus ensuring the homogeneity with EU law and with EU trade policy, there's a residual possibility for single Member States negotiate and enter into BITs individually. Such possibility, however, envisages EU involvement, namely the control mechanisms by EU Commission, and requires that the conditions set out in EU Regulation No. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries are met.

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30 [https://www.europarl.europa.eu/doceo/document/A-8-2017-0242\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/A-8-2017-0242_EN.html?redirect)

## TRADE BARRIERS

### IMPORT POLICIES

Exporters continue to encounter significant tariff and non-tariff barriers that impede imports of products into India. While the Indian Government has pursued ongoing economic reform efforts, it also continues to promote programs such as “Make in India” that favor domestic production over importation. Additionally, in May 2020, Prime Minister Narendra Modi announced the “Self-Reliant India” (Atmanirbhar Bharat) initiative to increase self-sufficiency by promoting domestic industry and reducing reliance on foreign suppliers.

### TARIFFS AND TAXES

#### Tariffs

India’s average Most-Favored-Nation (MFN) applied tariff rate was 17.6 percent in 2019 (latest data available). India’s average MFN applied tariff rate was 38.8 percent for agricultural products and 14.1 percent for non-agricultural products in 2019 (latest data available).

In addition to tariffs, India, in 2018, implemented a 10 percent social welfare surcharge on imports, except certain products exempted pursuant to an official customs notification. A landing fee of one percent is included in the valuation of all imported products unless exempted through separate notification.

India’s average MFN applied tariff rate of 17.6 percent remains the highest of any major world economy.

Since 2014, the Indian Government has promoted the “Make in India” campaign, a drive to build the country’s manufacturing capacity in part by cutting barriers to foreign investment and introducing regulatory reforms. As part of the campaign, India has raised duties on two broad groups of products to encourage domestic production: (1) an assortment of labor-intensive products; and, (2) electronics and communication devices, including mobile phones, televisions, and associated parts and components.

India’s tariff regime is also characterized by large disparities between WTO bound rates and MFN applied rates. India’s bound tariff rates on agricultural products are among the highest in the world, averaging 113.1 percent and ranging as high as 300 percent. Applied agricultural tariff rates are also high, averaging 38.8 percent. While India’s applied tariff rates for certain agricultural products are lower, the rates still present a significant barrier to trade in agricultural goods and processed foods (e.g., poultry, potatoes, citrus, almonds, apples, grapes, canned peaches, chocolate, cookies, frozen French fries and other prepared foods used in quick-service restaurants). In addition, while India has bound all agricultural tariff lines in the WTO, nearly 30 percent of India’s non-agricultural tariffs remain unbound.

Given this large disparity between WTO bound and applied rates, India has considerable flexibility to change tariff rates at any time, creating tremendous uncertainty for Italian exporters. The Indian Government took advantage of this tariff flexibility in both the 2019/2020



and 2020/2021 budgets, when it increased tariffs in each budget on approximately 70 product categories, including key imports in the agricultural, information and communications technology, medical device, paper products, chemicals, and automotive parts sectors, with no warning or public consultation process.

India maintains high applied tariffs on a wide range of goods, including: vegetable oils (as high as 45 percent); apples, corn, and motorcycles (50 percent); automobiles and flowers (60 percent); natural rubber (70 percent); coffee, raisins, and walnuts (100 percent); and, alcoholic beverages (150 percent). India also operates a number of complicated duty drawback, duty exemption, and duty remission schemes for imports. In addition, India maintains very high basic customs duties, in some cases exceeding 20 percent, on drug formulations, including life-saving drugs and finished medicines listed on the World Health Organization's list of essential medicines.

### **Non-Tariff Barriers**

India maintains various forms of non-tariff regulations on three categories of products: banned or prohibited items, which are denied entry into India (e.g., tallow, fat, and oils of animal origin); restricted items that require an import license (e.g., livestock products and certain chemicals); and, "canalized" items (e.g., some pharmaceuticals and corn under a tariff-rate quota) importable only by government trading monopolies and subject to cabinet approval regarding import timing and quantity. While the official website of the Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce and Industry (MOCI) maintains a list of restricted items, India often fails to observe other transparency requirements, such as publication of timing and quantity restrictions in the Gazette of India and notification to relevant WTO committees.

#### **Import Restrictions**

In August 2017, the Indian Government announced quantitative restrictions on all pesticides and insecticides. While India later rescinded the restrictions because of its inability to deploy the relevant software to support the action, uncertainty remains regarding the future implementation of these restrictions.

In order to manage domestic oversupply, the Indian Government began imposing restrictions on imports of various pulses in 2017. In August 2017, India imposed import quotas on pigeon peas, black matpe beans (Urd or *Vigna radiate*), mung beans (Moong or *Vigna mungo*), and moong and urad lentils. In April 2018, the Indian Government extended these quantitative restrictions to include peas. India's MOCI again notified quantitative restrictions for the Indian fiscal year 2020/2021 of 150,000 metric tons (MT) for peas and mung beans as well as 400,000 MT for black matpe and pigeon peas. Imports of peas are restricted to the port of Kolkata and are subject to a minimum import price.

#### **Import Licensing**

India distinguishes between goods that are new, and those that are secondhand, remanufactured, refurbished, or reconditioned, when assessing whether licenses are required.

India allows imports of secondhand capital goods by the end users without an import license, provided the goods have a residual life of five years. India requires import licenses for all remanufactured goods because India does not recognize that remanufactured goods have typically been restored to original working condition and meet the technical and safety specifications applied to products made from new materials. Therefore, stakeholders report that obtaining an import license for remanufactured goods has been onerous. Problems that stakeholders report include excessive details required in the license application, quantity limitations set on specific part numbers, and long delays between application and grant of the license. A Chartered Engineer's Certificate is also required to import both refurbished and used manufactured goods. Used items must be no more than five years old, while refurbished items must be no more than seven years old and have a remaining life span of at least five years.

### **Customs Barriers and Trade Facilitation**

In addition to being announced with the annual budget, India's tariff rates are modified on an ad hoc basis through notifications in the Gazette of India and are subject to numerous exemptions that vary according to the product, user, intended use, or specific export promotion program, rendering India's customs system complex to decipher and open to administrative discretion.

Exporters have raised concerns regarding India's application of customs valuation criteria to import transactions. Indian customs officials may reject the declared transaction value of an import if it is deemed to be lower than the ordinary competitive price, potentially raising the cost of exporting to India beyond the cost of applied tariff rates. Foreign companies have also faced extensive investigations related to their use of certain valuation methodologies when importing computer equipment. Companies have also reported being subject to excessive searches and seizures of imports.

Through Notification No. 91/2017-Customs (N.T.) dated September 26, 2017, India amended Rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, to allow for the actual cost of transportation and insurance to be included when determining the customs value of imported products. However, India continues to allow for the use of costs that appear fictitious in cases where the actual cost of transportation or insurance is not ascertainable. For example, if Indian customs officials determine they cannot ascertain transportation costs, a cost of a 20 percent Free On Board (FOB) value will be used as the cost of transportation in determining the total customs value of the imported product for the purpose of assessing tariffs.

India's customs authority generally requires extensive clearance documentation, which leads to frequent and lengthy processing delays. India's complex tariff structure—including the provision of multiple exemptions that vary according to product, user, or intended use—also creates uncertainty and contributes to delays in customs approvals.

## Medical Device Price Controls

As of April 1, 2020, India requires all medical devices to be registered and regulated as “drugs” under the provisions of the Drugs (Prices Control) Order, 2013. Four devices—cardiac stents, drug eluting stents, condoms, and intra-uterine devices—continue to be included in the National List of Essential Medicines, which provides India’s Department of Pharmaceuticals and National Pharmaceutical Pricing Authority (NPPA) the authority to implement price ceilings. In June 2018, the Indian Government released the National Policy on Biofuels 2018, in which it set a target of 20 percent blending of ethanol with gasoline and a target of five percent blending with biodiesel by 2030. In 2020, the average ethanol blending rate in gasoline was expected to reach 5.2 percent, up from 4.5 percent in 2019.

## TECHNICAL BARRIERS TO TRADE / SANITARY AND PHYTOSANITARY BARRIERS

### Toys – Quality Control Order

On January 30, 2020, India notified the “Toys (Quality Control) Order, 2019” (QCO) to the WTO (IND/131). On February 27, 2020 the Gazette of India published the Ministry of Commerce and Industry’s Order noting a September 1, 2020 implementation date. The six-month transition period did not provide enough time for manufacturers to meet the QCO requirements given the disruptions in global trade and manufacturing due to the COVID-19 pandemic. The QCO requires toys to conform to Indian Standard (IS) 9873 (based on the ISO toy standard) and IS 15644 and bear the Standard Mark under a license from the Bureau of Indian Standards (BIS), among other requirements including factory audits and numerous new fees. On September 16, India published an Order in the Gazette which postponed the implementation of the Toy QCO from September 1, 2020 to January 1, 2021. In January 2021, the industry reported that foreign manufacturers continue to lack certification because pandemic related travel restrictions have prevented Indian officials from conducting factory audits. Until India provides a solution to the requirement for foreign manufacturing audits, toy manufacturers are unable to comply with the QCO and therefore cannot export toys to India.

Cosmetics – Registration Requirements. In November 2018, India’s Ministry of Health and Family Welfare invited comments on a new draft of the Cosmetics Rules. Stakeholders provided comments encouraging a risk-based regulatory framework without unnecessary pre-approval requirements, which aligns with international standards and industry best practices, with a reasonable timeframe for implementation. In December 2018, India increased registration fees for importers of cosmetics. As a result, the registration fee is \$2,000 for each cosmetic brand. India also added a new \$50 fee for each product variant. Companies have raised concerns that these fees disadvantage imported products by raising costs. Separately, India banned imports of animal-tested cosmetics in February 2015, as a result of Rule 135-B of the Drug and Cosmetics (Fifth Amendment) Rules, 2014, announced through the Central Drugs Standard Control Organization (Office of Drugs Controller General India) Circular. India, in May 2014, had banned domestic cosmetic testing on animals through a Ministry of Health and Family Welfare notification in the Gazette of India, dated May 21, 2014. Foreign exporters have

reported difficulties proving that their cosmetics products comply with the animal testing ban and have yet to receive guidelines from the Indian Government on how to do so.

On July 1, 2020, the Food and Safety Standards Authority of India (FSSAI) placed temporary holds on consignments of a wide range of food and agricultural products, including almonds and apples, questioning the validity of the Country of Origin (COO) certificates accompanying those products. If FSSAI formally implements a policy that does not accept COO certificates from chambers of commerce or does not recognize documents issued by freight forwarders and shippers, a significant portion of agricultural exports could be prevented from entering the Indian market.

### **Labelling Requirements**

On October 2, 2020, FSSAI notified to the WTO an amendment to the Food Safety and Standards (Packaging and Labelling) Regulations, 2011, which modifies labelling requirements for packaged foods containing sweeteners. The amendment requires warning labels for various kinds of sweeteners stating “Not recommended for children, pregnant and lactating mothers,” and “Contains non-caloric sweetener and for calorie conscious.” In July 2019, the FSSAI notified to the WTO a revised version of its 2018 Labelling and Display Regulation, requiring mandatory front-of-pack nutrition labelling of added sugar and saturated fat, and requiring red coloured nutrient labels stating “High in Fat, Sugar and Salt” based on thresholds established by the Indian Government. The 2019 amendment also introduced a warning statement requirement for alcoholic beverages to state that “consumption of alcohol is injurious to health.” India is currently considering further revisions to its regulation.

### **Food Safety Standards (Alcoholic Beverages) Amendment Regulations, 2019**

In July 2019, FSSAI published its Food Safety Standards (Alcoholic Beverages) Amendment Regulations, 2019, and notified to the WTO. The 2019 amendment revised FSSAI’s 2018 mandatory alcoholic beverage standards, which entered into force in April 2019. In June 2020, FSSAI issued a directive to operationalize certain provisions of the standards, including the addition of non-alcoholic beer as a separate product category and permitting the use of new colors and additives in distilled spirituous beverages. FSSAI has not clarified the timeline for enforcement of its amended regulations. Several concerns remain, including: (1) the establishment of analytical parameters for a range of naturally occurring components in distilled spirits; (2) minimum and maximum requirements for ethyl alcohol.

### **Livestock Genetics**

The Department of Animal Husbandry, Dairying, and Fisheries (DAHDF) of the MAFW imposes restrictions on imports of livestock genetics and establishes quality standards. The entire procedure for obtaining import permission generally takes four months or longer. Importation of animal genetics requires a NOC from the state government, import permission from the DGFT, and an import permit from the DAHDF. However, domestic producers of animal genetics are not required to obtain a NOC.

## **Dairy Products**

India imposes onerous requirements on dairy imports. India continues to insist that dairy products intended for food be derived from animals that have never consumed any feeds containing internal organs, blood meal, or tissues of ruminant origin, and that exporting countries certify to these conditions. India has explained that its position is based on religious and cultural grounds. This requirement, along with high tariff rates, continues to prevent market access for milk and dairy product exports to India, one of the largest dairy markets in the world.

## **Food – Product Testing**

On April 1, 2016, the Indian Central Board of Indirect Taxes and Customs (CBIC) launched its Single Window Interface for Facilitating Trade (SWIFT) system. This is an initiative by the Indian Government to streamline clearances for inbound consignments and to improve the ease of doing business. Along with SWIFT, the CBIC also introduced an Integrated Risk Management facility for partner government agencies. The facility is designed to ensure that consignments are selected for testing based on the principle of risk management – ensuring that foods that present actual food safety risks are tested while goods that pose little to no risk can avoid becoming subject to unnecessary procedures by inspection agencies. In the modified Food Import Regulations, published September 2, 2016, FSSAI stated that samples would be drawn randomly based on the risk factor and compliance history of the importer identified by the newly introduced SWIFT system software. Indian officials have noted that they are actively working to develop and implement a risk-based inspection system.

## **FSSAI Order on Non-Genetically Modified (Non-GM) and GM-Free Certificates**

On August 21, 2020, the FSSAI released an order requiring a non-GM origin and “GM free” certificate from the competent authority in the exporting country to be included with imported food shipments that contain any of 24 listed products, effective March 1, 2021. India has not provided any scientific or risk based justification for the requirement. According to FSSAI, the order is to ensure that only non-GM products are imported, pending new testing protocols and forthcoming regulations in genetically engineered (GE) food products.

## **Foods Derived from Biotechnology Crops**

Biotechnology products must be approved by the Genetic Engineering Appraisal Committee (GEAC) before importation or domestic cultivation. The Food Safety and Standards Act of 2006 includes specific provisions for regulating food products derived from GE products. However, the FSSAI began drafting the regulations in 2018, and it may take several years to implement the regulations on GE foods. India’s biotechnology approval processes are also slow, opaque, subject to political influences, and for the last several years, essentially non-functional. For example, GEAC’s recent progress toward approving a public sector, domestically developed GE mustard plant variety for commercial cultivation, was further delayed pending additional

government review. The Indian Government has yet to decide whether to allow its sale. Consequently, soybean oil and canola oil derived from GE soybeans and canola remain the only biotechnology food or agricultural products currently approved for import into the Indian market, and biotechnology cotton is the only biotechnology crop approved for commercial cultivation in India. The slow and uncertain approval process continues to hamper product registrations needed to facilitate trade in biotechnology products. Without enhanced capacity for science-based decision making, India's acceptance and approval of additional agricultural biotechnology products will remain limited. In addition, India's labeling requirements for packages containing GE foods remains unclear.

### **Pork**

In November 2015, India released a revised universal veterinary health certificate for import of pork and pork products detailing requirements for processing facilities, veterinary drug residues, and animal disease restrictions.

### **Poultry**

In 2012, certain countries commenced WTO dispute settlement proceedings against India due to India maintaining import prohibitions on various agricultural products, including poultry and poultry products, ostensibly due to concerns regarding avian influenza. In 2014, the WTO panel issued its report finding in against India. The Appellate Body affirmed these findings, concluding that India's restrictions: (1) are not based on international standards or a risk assessment that takes into account available scientific evidence; (2) arbitrarily discriminate; (3) are more trade restrictive than necessary; and, (4) fail to recognize the concept of disease-free areas and are not adapted to the characteristics of the areas from which products originate and to which they are destined.

### **Distillers' Dried Grains with Solubles**

India's regulatory requirements on distiller's dried grains with solubles (DDGS) remain unclear. In July 2018, the GEAC formed the Sub Committee on Guidelines for Imports of Animal Feed (SCGIAF) to establish procedures for applications related to the imports of animal feeds, including DDGS and soybean meal. The Sub Committee submitted recommendations for comment and approval to the GEAC in November 2019. To date, GEAC has not officially confirmed that it will not regulate DDGS as living modified organisms.

In addition, unclear jurisdiction for the approval process for DDGS continues to complicate the process. For example, in December 2019, FSSAI published Direction 1-95, announcing new requirements for commercial animal feeds and feed materials that are manufactured, imported, or distributed in India. Prior to the publication of Direction 1-95, however, FSSAI had not regulated the manufacture, import, or distribution of either commercial animal feeds or feed ingredients in India.

## Plant Health Issues

India maintains zero-tolerance standards for certain plant quarantine pests, such as weed seeds and ergot, that do not appear to be based on risk assessments.

India, without prior notification, changed its inspection policy and practices for weed seeds, resulting in a rejection of an international shipment on October 18, 2019, for the presence of two weed seeds that were not previously on India's published quarantine pest list of 31 weed seeds. On October 25, 2019, India published in the Gazette of India an updated quarantine pest list that included an additional 26 quarantine weed seeds, bringing the total number of quarantined pests to 57.

India's requirement of methyl bromide (MB) fumigation at the port of origin as a condition for the import of pulses is not feasible. India has granted a series of extensions allowing MB fumigation on arrival, but has offered no permanent solution.

## Government Procurement

India lacks an overarching government procurement policy and, as a result, its government procurement practices and procedures vary among the states, between the states and the central government, and among different ministries within the central government. Multiple procurement rules, guidelines, and procedures issued by multiple bodies have resulted in problems with transparency, accountability, competition, and efficiency in public procurement. A recent World Bank report stated that the state-owned Public Sector Undertakings uses over 150 different contract formats, each with different qualification criteria, selection processes, and financial requirements. India also provides preferences to Indian micro, small, and medium enterprises and to state-owned enterprises. Moreover, in defense procurements, India's offset program requires companies to invest 30 percent or more of the acquisition cost of contracts above the threshold value in Indian-produced parts, equipment, or services, a requirement that continues to prove challenging for manufacturers of high-technology equipment.

In September 2020, the Indian Ministry of Defense announced the final Defense Acquisition Procedures (DAP) 2020, which replaces the Defense Procurement Procedure of 2016 and is effective from October 1, 2020 until September 30, 2025. Under the DAP 2020, acquisition categories of "Buy (Indian)," "Buy (Indian – Indigenously Designed Developed and Manufactured)" (also referred to as "Buy (Indian IDDM)"), and "Buy and Make (Indian)" have an indigenous content requirement.

India's National Manufacturing Policy calls for increased use of local content requirements in government procurement in certain sectors (e.g., information communications technology and clean energy). Consistent with this approach, India issued the Preferential Market Access notification, which requires government entities to meet their needs for electronic products in part by purchasing domestically manufactured goods. Subsequently, in June 2017, the Department of Industry Policy and Promotion issued two notifications under the Public Procurement "Preferential Electronics Order" and "Cyber Notification" to state governments and central agencies mandating preferences for domestically manufactured electronic goods,



which include hardware, for the purpose of government procurement as well as, more recently, cyber security software products. The notification indicates that this requirement will apply to procurement by government, government companies, and other procuring entities. This notification is the culmination of similar Indian policy proposals that have outlined discriminatory government procurement policies as a means to stimulate domestic manufacturing of electronics and telecommunications equipment at the expense of foreign companies that have invested heavily in India.

On June 4, 2020, the Department of Promotion of Industry and Internal Trade (DPIIT) issued a revision to its 2017 procurement order, titled Public Procurement (Preference to Make in India) Order 2020. The rule was updated again on September 19, 2020. The Order took immediate effect and instructs each nodal ministry or department to draft a follow-on procurement order that favors domestic suppliers. Though the new Order does not appear to impact tenders or procurements announced prior to June 4, 2020, it will hinder the Foreign industry's ability to participate in central government tenders.

Moreover, the August 2020 changes to General Financial Rules section 161 state that global tender enquiries may not be accepted under \$31 million. Any reductions of the minimum local content requirement cannot be implemented without permission of an appropriate authority. Furthermore, companies must use a third-party or internal auditor to certify the amount of local content that will be used if the value is equal to or greater than 10 Crore (\$1.36 million). In addition, in the September 19, 2020 update, the minimum local content requirement was expanded, permitting Ministries and Departments to mandate higher local content percentages that could be used to benefit Indian suppliers and prevent Italian companies from participating in government tenders.

On September 23, 2020, the Ministry of New and Renewable Energy released an order reserving a list of 80 products, including solar cells, modules, wind turbines, and electrical equipment for hydro and biogas for bidding only by "Class 1 local suppliers" irrespective of the purchase value. The Ministry of Power also reserved 86 products for local procurement through a similar order published on September 17, 2020.

On April 29, 2020, the MEITY issued a notification that entities must procure cellular mobile phones only from local suppliers meeting the local content requirement of 50 percent, irrespective of purchase value. A September 7, 2020 MEITY notification specifies the mechanism for calculation of local content for: (1) Desktop PCs; (2) Thin clients; (3) Computer monitors; (4) Laptop PCs; (5) Tablets; (6) Dot Matrix Printers; (7) Contact and Contactless Smart Cards; (8) LED Products; (9) Biometric Access Control/Authentication Devices; (10) Biometric Finger Print sensors; (11) Biometric Iris Sensors; (12) Servers; and, (13) Cellular mobile phones. India is not a party to the WTO Agreement on Government Procurement, but it has been an observer to the WTO Committee on Government Procurement since February 2010.

### **Intellectual Property Protection**

India remained on the Priority Watch List in the Special 301 Report due to concerns over weak intellectual property (IP) protection and enforcement. The 2020 Review of Notorious Markets



for Counterfeiting and Piracy includes physical and online marketplaces located in or connected to India.

Developments over the past year include India's continued efforts to reduce delays and backlogs of patent and trademark applications, the Cell for IPR Promotion and Management's (CIPAM) promotion of IP awareness and commercialization throughout India, and ongoing efforts to improve IP enforcement, particularly at the state level. However, state-level IP enforcement remains uneven in India, with some states conducting enforcement activities and others falling short in this regard.

In the field of copyright, procedural hurdles, problematic policies, and effective enforcement remain concerns. In February 2019, the Cinematograph (Amendment) Bill, which would criminalize illicit camcording of films, was tabled in Parliament. The bill still awaits approval by Parliament. The expansive granting of licenses under Chapter VI of the Indian Copyright Act and overly broad exceptions for certain uses have raised concerns regarding the strength of copyright protection and complicated the market for music licensing. In June 2020, the Copyright Board was merged with the Intellectual Property Appellate Board and became fully functional. The lack of a functional copyright board had previously created uncertainty regarding how IP royalties were collected and distributed.

In 2019, the DPIIT proposed draft Copyright Amendment Rules that would broaden the scope of statutory licensing to encompass not only radio and television broadcasting but also online broadcasting, despite a high court ruling earlier in 2019 that held that statutory broadcast licensing does not include online broadcasts. If implemented, the Amendment Rules would have severe implications for Internet content related right holders.

In the area of patents, a number of factors negatively affect stakeholders' perception of India's overall IP regime, investment climate, and innovation goals. Patent applications continue to face expensive and time consuming pre- and post-grant oppositions and excessive reporting requirements. In October 2020, India issued a revised "Statement of Working of Patents" (Form 27). While certain administrative decisions in past years have upheld patent rights, and specific tools and remedies do exist in India to support the rights of a patent holder, concerns remain over revocations and other challenges to patents, especially patents for agriculture biotechnology and pharmaceutical products. Moreover, the Indian Supreme Court's 2013 decision that India's Patent Law created a second tier of requirements for patenting certain technologies, such as pharmaceuticals, continues to be of concern as it may limit the patentability in India for an array of potentially beneficial innovations. In terms of progress in patent examination, India issued a revised Manual of Patent Office Practice and Procedure in November 2019 that requires patent examiners to look to the World Intellectual Property Organization's Centralized Access to Search and Examination (CASE) system and Digital Access Service (DAS) to find prior art and other information filed by patent applicants in other jurisdictions.

India currently lacks an effective system for protecting against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical and agricultural products.

In 2016, India's National Intellectual Property Rights (IPR) Policy called for trade secrets to serve as an "important area of study for future policy development," but India has not yet prioritized this work.

## **SERVICES BARRIERS**

The Indian Government has a strong ownership presence in major services industries such as banking and insurance. Foreign investment in businesses in certain major services sectors, including financial services and retail, is subject to limitations on foreign equity. Foreign participation in professional services is significantly restricted and, in the case of legal services, prohibited entirely. In addition, barriers to digital trade and electronic commerce, such as those recently imposed on electronic payment providers, have knock-on effects on a wide variety of services.

### **Distribution Services**

India imposes certain restrictions on FDI in the retail industry. With respect to single-brand retail, foreign investments exceeding 51 percent are contingent on, among other things, a requirement to source at least 30 percent of the value of products sold from Indian sources, preferably from small and medium-sized enterprises. India has modified the requirements in recent years, including by allowing firms to offset the local sourcing requirement by sourcing products from India for global supply chains.

India caps foreign ownership in the multi-brand retail sector at 51 percent, and leaves to each Indian state the final decision on whether to authorize such FDI in its territory. In addition, where FDI is allowed, it is subject to conditions, including: (1) a minimum investment of approximately \$100 million, at least 50 percent of which must be in "back-end infrastructure" (e.g., processing, distribution, quality control, packaging, logistics, storage, and warehouses); (2) a requirement to operate only in cities that have been identified by the relevant state government; and (3) a requirement to source at least 30 percent of the value of products sold from "small" Indian enterprises whose total investments in plant and machinery are under \$2 million each. The local sourcing requirements and other conditions on foreign investment diminish the commercial incentive for multi-brand retailers seeking to invest in India's retail sector. India permits 100 percent FDI in business-to-business (or "marketplace-based") electronic commerce, but prohibits foreign investment in business-to-consumer (or "inventory-based") electronic commerce. In February 2019, India implemented new regulations that expressly prohibit subsidiaries of foreign-owned marketplace-based electronic commerce sites from selling products on their parent companies' sites. The new rules also prohibit exclusivity arrangements by which electronic commerce retailers can offer a product on an exclusive basis. The only exceptions for FDI in inventory-based electronic commerce are for food product retailing and single-brand retailers that meet certain conditions, including the operation of physical stores in India. This narrow exception limits the ability of many electronic commerce service suppliers to serve the Indian market.

Indian states have periodically challenged the activity of direct selling (i.e., the marketing and selling of products to consumers away from fixed locations) as violations of the Prize Chits and Money Circulation Schemes (Banning) Act of 1978 (Prize Chits Act), creating uncertainty for companies operating in this sector. This central government legislation contains no clear distinction between fraudulent activities and legitimate direct-selling operations. Enforcement of the Prize Chits Act is reserved to the states, which have adopted varying implementation guidelines and taken unexpected enforcement actions on the basis of the ambiguous provisions of the Act, including the arrest of a chief operating officer of a direct-selling company. In 2016, after extensive advocacy by private industry, India approved new guidelines governing direct selling that established clear legal definitions of direct selling, but enforcement and application of the new guidelines is still left to state authorities.

## FINANCIAL SERVICES

### *Banking Services*

Although India allows privately held banks to operate in the country, the banking system is dominated by state-owned banks, which account for approximately 72 percent of total market share and 84 percent of all Indian bank branches. Most privately owned banks are Indian-owned, with foreign banks constituting less than 0.5 percent of the total bank branches in India. Under India's branch authorization policy, foreign banks are required to submit their internal branch expansion plans on an annual basis, and their ability to expand is hindered by non-transparent limitations on branch office expansion.

Foreign banks also face restrictions on direct investment in Indian private banks. Unlike domestic banks, foreign banks are not authorized to own more than five percent of an Indian private bank without approval by the Reserve Bank of India (RBI). Total foreign ownership of any private bank from all sources (foreign direct investment, foreign institutional investors, and non-resident Indians) cannot exceed 74 percent.

In August 2020, the RBI issued a notification that limits the ability of banks to work with current accounts by prohibiting offering such accounts to customers who have availed themselves of overdraft or cash credit and restricting debits to the overdraft or cash credit account of a borrower to whom the bank's exposure is less than 10 percent of the entire banking system's exposure to that borrower. Foreign banks operating in India have expressed concerns that the measure will adversely affect their ability to conduct business not only with current accounts but also in related areas such as trade finance. The RBI's new rule requires customers to maintain their current accounts only at banks from which they have sourced loans, but foreign banks hold a much smaller share of India's loan market. While the RBI's stated goal is to improve financial transparency and reduce the scope for fraud and bad loans, foreign banks are concerned that the new rule will disadvantage them, as it could incentivize customers to migrate their working capital accounts to India's public sector banks.

### *Insurance Services*

Under India's Insurance Laws (Amendment) Act, 2015, foreign investment in Indian insurance companies is capped at 49 percent. The law further requires that all insurance companies be Indian "controlled." The Insurance Regulatory and Development Authority of India (IRDAI) promulgated guidelines on this "Indian control" requirement in October 2015, which include: (1) a mandatory requirement that a majority of directors be nominated by Indian investors; (2) limitations on the rights of foreign-nominated board members; (3) requirements for how "key management persons" are to be appointed; and, (4) requirements on the manner in which control over "significant policies" of the enterprise must be exercised. Foreign investors have expressed concern that the requirements create a rigid structure that ignores operational realities and will dilute the rights of foreign investors in Indian insurance companies, making additional FDI in the sector unattractive.

In December 2015, the IRDAI issued a revision to its regulations governing the provision of reinsurance services in India that affords Indian reinsurers a mandatory first order of preference (or right of first refusal) for reinsurance business in India. Such a requirement severely restricts the business for which foreign reinsurers can compete and decreases the interest of foreign reinsurers in establishing branches in India, resulting in negative impacts to the supply and cost of reinsurance services in the Indian market. In December 2018, IRDAI reaffirmed that the state-owned General Insurance Corporation of India maintained the right of first refusal for all reinsurance contracts.

Most recently, on November 5, 2020, the National Payments Corporation of India (NPCI), a state-owned company, announced a market share limitation of 30 percent for foreign electronic payment service suppliers processing online payments made through India's United Payment Interface, which is owned and operated by NPCI.

## **PROFESSIONAL SERVICES**

### *Legal Services*

Membership in the Bar Council of India (BCI), the governing body for the legal profession, is mandatory "to practice law" in India and is limited to Indian citizens. Foreign law firms are not allowed to open offices in India. The Advocates Act, which is administered by BCI, provides for foreign lawyers or law firms to visit India on a reciprocal basis for temporary periods to advise their clients on foreign and international legal issues.

### *Accounting Services*

Foreign accounting firms face obstacles to entering the Indian accounting services sector. Only accounting firms structured as partnerships under Indian law may supply financial auditing services, and only Indian licensed accountants may be equity partners in an Indian accounting firm.

### *Architecture Services*

Although Indian companies continue to demand high-quality Italian design for new buildings and infrastructure development, foreign architecture firms find it difficult to do business in India due to the legal environment. Court cases against foreign design firms seeking to perform work in India and harassment of their potential clients have created uncertainty and business losses for foreign providers of architectural and related services.

### *Digital Taxation*

In 2017, India began assessing a six percent “equalization levy,” a withholding tax on foreign online advertising platforms, with the ostensible goal of “equalizing the playing field” between resident service suppliers and non-resident service suppliers. However, its provisions do not provide credit for tax paid in other countries for the service supplied in India. The current structure of the equalization levy represents a shift from internationally accepted tax principles, which generally provide those mechanisms should be developed to prevent double taxation. This levy may impede foreign trade and increase the risk of retaliation from other countries where Indian companies are doing business.

The Fiscal Year 2020-2021 budget, announced in March 2020, included an expansion of the equalization levy, adding a two percent digital services tax on foreign electronic commerce and digital services providers. Neither the original level nor the 2020 expansion applies to firms that are established in India. The change was enacted without prior notification or opportunity for public comment. Technology firms have raised concerns that the definitions of “e-commerce operator” and “e-commerce supply or services” are broad in scope and are likely to cover many digital transactions, including the sale of data.

## **INVESTMENTS BARRIERS**

### **Local Content Requirements**

In 2010, India initiated the Jawaharlal Nehru National Solar Mission (JNNSM), which currently aims to bring 100,000 megawatts of solar-based power generation online by 2022, as well as to promote solar module manufacturing in India. Under the JNNSM, India imposes certain local content requirements (LCRs) for solar cells and modules, and requires participating solar power developers to use solar cells and modules made in India in order to enter into long-term power supply contracts and receive other benefits from the Indian Government.

## **OTHER BARRIERS**

### **Export Duties**

India applies export duties on numerous raw materials used in the production of metals, in particular steel and aluminium. These include a 30-percent duty on exports of iron ore and concentrate with iron content above 58 percent; a 15-percent duty on exports of aluminium

ore; and, a 30-percent duty on exports of chromium ore. These various duties, along with other export measures, provide cost advantages to India's domestic metals producers, while distorting international markets for key raw materials used in steel and aluminium production.