

WORKING WITH INDIA

The Law Firm's Role in Facilitating Full and Effective Participation

- Part 1: Overview of Existing Framework for Investment in India and Regulatory Challenges

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Why India?

- 1.32 billion people, 65% of population under 35 years
- Annual GDP growth rate – 7~8%
- Number of Japanese Companies registered in India

Year	2008	2009	2010	2011	2012	2013	2014	2015	2016
Number	550	627	725	812	926	1038	1156	1229	1305

By Embassy of Japan in India

http://www.in.emb-japan.go.jp/Japan-India-Relations/Japanese_Business_Establishments.html

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Our India Practice 1

- History:
 - In 1984, Kojima Law Offices was founded
 - In 1994, Our India practice was launched, and an India seminar was organized
- Clients:
 - Mainly Japanese manufacturers (automobile parts, medical equipment, office equipment, chemical), advertising companies, cosmetic retailers, etc.

Our India Practice 2

- Strategic advice:
 - M&A, Negotiation with JV partners, etc.
- Access to reliable Indian counsels:
 - Receiving young Indian lawyers and sending our lawyers to India
 - Having developed connections with Indian law firms for more than 2 decades
- For more details (only in Japanese):
 - Outbound investment: <http://www.kojimalaw.jp/inquiries/index.html>
 - Investment to India: <http://www.kojimalaw.jp/inquiries/india.html>

Lawyers in India

- More than 1 million lawyers in India (40,000 lawyers in Japan)
 - Good corporate/business lawyers emerged after economic liberalization in 1991
- Large law firms in India

	Firm	Total No. of lawyers	Partners
1	Cyril Amarchand Mangaldas	601	88
2	Khaitan & Co	485	104
3	Shardul Amarchand Mangaldas & Co	430	84
4	AZB & Partners	375	65
5	Luthra & Luthra	336	61
6	J. Sagar Associates	302	84

2016 25 biggest Indian law firms (Legally India)

<http://www.legallyindia.com/law-firms/india-25-largest-law-firms-by-headcount-00011130-8166>

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Challenges

- Too many laws, sometimes not so clear
- Liberalized, but still peculiar regulations are remaining
- Time-consuming governmental process
- Strict labor law, Anti-corruption, Slow dispute resolution, etc.

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Existing Framework for Investment

- Foreign Exchange Management Act, 1999 (FEMA) and press notes/circulars issued under FEMA
- Consolidated FDI Policy
 - Consolidated FDI Policy has been updated every year since 2010
 - Capture and keep pace with the regulatory changes
- Consolidated FDI Policy, 2016 (effective from June 7, 2016)
 - Captures regulatory changes brought by press notes/circulars up to June 7, 2016
 - http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf

Consolidated FDI Policy, 2016

- Prohibited Sectors (Section 5.1)
 - Lottery Business, Real Estate Business, etc.
- Permitted Sectors (Section 5.2)
 - Automatic Route – a notice (Form FC-GPR/FC-TRS) to Reserve Bank of India (RBI) after the investment
 - Government Route – a prior approval from Indian government
- Government Route
 - On May 24, 2017, Indian government decided to abolish the Foreign Investment Promotion Board (FIPB), a 25-year-old inter-ministerial body
 - FIPB stopped considering FDI applications
 - Department/Ministry relevant to each sector will now handle FDI applications
- Features
 - Negative list (Section 5.2 (a))
 - Sectoral caps

Consolidated FDI Policy, 2016

- Resolved Issues
 - No Objection Certificate (abolished in 2011)
 - Regulations on technical assistance agreement (abolished in 2009)
- Unresolved Issues
 - Retail Trading: Single Brand (Section 5.2.15.3) & Multi Brand (Section 5.15.4)

Retail Trading

- Single Brand Retail Trading (Section 5.2.15.3)
 - ~49%: Automatic Route
 - 49%~: Government Route
 - Conditions:
 - In respect of foreign investment beyond 51%, sourcing of 30% of goods purchased will be done from Indian, preferably from micro, small, or medium enterprises
- Multi Brand Retail Trading (Section 5.2.15.4)
 - ~51%: Government Route
 - 51%~: Not permitted
 - Conditions:
 - Minimum amount to be brought by the foreign investor would be USD 100 million
 - At least 50% of the first tranche of USD 100 million shall be invested in 'back-end infrastructure' (manufacturing, distribution, design improvement, etc.)

Forms of Entering into India

- Representative Office
 - Channel of communication
 - Cannot undertake any commercial activity
- Project Office
 - Temporary office to execute specific projects
- Branch
- Subsidiary (limited liability company)
 - Private Company
 - Public Company

Private Company or Public Company

- Private Company: by its articles restricts the right to transfer its shares (Section 2.68 of the Companies Act)
- Public Company: not a private company (Section 2.71 of the Companies Act)
- Private Company is more popular
 - More flexible organization and procedures
 - Independent directors, audit committee, and nomination and remuneration committee are not required

Pricing Guidelines

- Non-resident (outside) sells to Non-resident (outside)
 - No regulation
- Non-resident (outside) sells to Resident (inside)
 - Fair value or below
- Resident (inside) sells to Non-resident (outside)
 - Fair value or above

ECB Regulation

- The government regulates the minimum average maturity, eligible borrowers, recognized lenders, and permitted end use of external commercial borrowing (ECB)
- General Corporate Purpose
 - Originally not allowed
 - “ECB proceeds can be used for general corporate purpose (including working capital) provided the ECB is raised from the direct/indirect equity holder or from a group company for a minimum average maturity of 5 years”
- Master Direction by Reserve Bank of India (updated as of February, 2017)
 - https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10204#C10

Labor and Employment

- Workman/Non-workman
 - Section 2(s) of the Industrial Disputes Act defines “workman” as any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward...
 - It excludes a person working in purely managerial and/or supervisory capacity from the definition of “workman”
- Workman
 - Protected by the labor laws
 - Disputes before labor tribunal
- Non-workman
 - Employment contract controls
 - Disputes before civil court

Corruption

- Corruption Perception Index 2016 ranks India as 79th out of 176 countries
 - Brazil and China are also ranked as 79th in the same research
https://www.transparency.org/news/feature/corruption_perceptions_index_2016
- Some local enterprises do not have sufficient measures to prevent corruption, while India is in transition to introduce and develop anti-corruption legislations
 - Conduct a through due diligence and implement necessary measures

Disputes

- Avoid litigation in Indian courts
 - Still time consuming process, although commercial courts/divisions are being introduced
- Have a clear arbitration clause that provides a neutral venue for arbitrations

Recent Developments

- Goods and Services Tax (GST)
 - The government intends to unify various indirect taxes to GST, a single indirect tax
 - The government intends to roll out GST in July, 2017
- Insolvency and Bankruptcy Code, 2016
 - The government intends to consolidate the framework by creating a single bankruptcy law to speed up the bankruptcy proceeding
 - Expects to be enforced in 2017 or later