Law Relating to International Trade

Paper IV

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Introduction to International trade Law
Formation of International Contracts
International Sales Law
Carriage of Goods by Land, Water and Air

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# UNIT-I

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1.1. International trade law: Meaning and importance:

International trade law includes the appropriate rules and customs for handling trade between countries or between private companies across borders. Over the past twenty years, it has become one of the fastest growing areas of international law. There is some debate, however, over whether "international trade law" can truly be considered "law."

International trade law should be distinguished from the broader field of international economic law. The latter could be said to encompass not only WTO law, but also law governing the international monetary system and currency regulation, as well as the law of international development.

The body of rules for transnational trade in the 21st century derives from medieval commercial laws called the *lex mercatoria* and *lex maritima* — respectively, "the law for merchants on land" and "the law for merchants on sea." Modern trade law (extending beyond bilateral treaties) began shortly after the Second World War, with the negotiation of a multilateral treaty to deal with trade in goods: the General Agreement on Tariffs and Trade (GATT).

International trade law is based on theories of economic liberalism developed in Europe and later the United States from the 18th century onwards.

World Trade Organization

In 1995, the World Trade Organization, a formal international organization to regulate trade, was established. It is the most important development in the history of international trade law.

The purposes and structure of the organization is governed by the *Agreement Establishing the World Trade Organization*, also known as the "Marrakesh Agreement". It does not specify the actual rules that govern international trade in specific areas. These are found in separate treaties, annexed to the Marrakesh Agreement.

Trade in goods

The GATT has been the backbone of international trade law throughout most of the twentieth century. It contains rules relating to "unfair" trading practices — dumping and subsidies.

Trade and Human Rights
The World Trade Organisation Trade Related Intellectual Property Rights (TRIPS) agreement required signatory nations to raise intellectual property rights (also known as intellectual monopoly privileges). This arguably has had a negative impact on access to essential medicines in some nations.

Dispute settlement

Since there are no international governing judges (2004) the means of dispute resolution is determined by jurisdiction. Each individual country hears cases that are brought before them. Governments choose to be party to a dispute. And private citizens determine jurisdiction by the Forum Clause in their contract.

Besides forum, another factor in international disputes is the rate of exchange. With currency fluctuation ascending and descending over years, a lack of Commerce Clause can jeopardize trade between parties when one party becomes unjustly enriched through natural market fluctuations. By listing the rate of exchange expected over the contract life, parties can provide for changes in the market through reassessment of contract or division of exchange rate fluctuations.

Mandate of UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) (established in 1966) is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade. UNCITRAL has since prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL meets once a year, typically in summer, alternatively in New York and in Vienna.

"Harmonization" and "unification" of the law of international trade

"Harmonization" and "unification" of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.

"Harmonization" may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. "Unification" may be seen as the adoption by States for a common legal standard governing
particular aspect of international business transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws, legal guides, legislative guides, rules, and practice notes. In practice, the two concepts are closely related.

Drafting of UNCITRAL texts

UNCITRAL texts are initiated, drafted, and adopted by the United Nations Commission on International Trade Law, a body made up of 60 elected member States representing different geographic regions. Participants in the drafting process include the member States of the Commission and other States (referred to as "observer States"), as well as interested international inter-governmental organizations ("IGO's") and non-governmental organizations ("NGO's").

Members of the Commission

As is the case with most subsidiary bodies of the General Assembly, which is composed of all States members of the United Nations, membership in UNCITRAL is limited to a smaller number of States, so as to facilitate the deliberations. UNCITRAL was originally composed of 29 States; its membership was expanded in 1973 to 36 States and again in 2004 to 60 States. The membership is representative of the various geographic regions and the principal economic and legal systems of the world. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

What are the regional groups represented within the Commission?

There are five regional groups represented within the Commission: African States; Asian States; Eastern European States; Latin American and Caribbean States; Western European and Other States.

How are the interests of developing countries taken into consideration by UNCITRAL?

In accordance with its mandate, (Para. 9 of General Assembly resolution 2205 (XXI) of 17 December 1966, UNCITRAL takes into account in its work “the interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade”). Members of the Commission represent different geographic areas, and are elected by the General Assembly "having due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries." (Id., para. 1).
Developing countries play an active role in both drafting and adoption UNCITRAL texts. The commitment of the Commission and the Secretariat to provide training and technical assistance to those countries is also long-standing and constant. Similarly, the General Assembly has expressed strong support for this work. For example, General Assembly resolution 55/151 of 12 December 2000 entitled "Report of the United Nations Commission on International Trade Law" ... reaffirms the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission.

Is UNCITRAL part of the World Trade Organization (WTO)?

No. UNCITRAL is a subsidiary body of the General Assembly of the United Nations. The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat. In contrast, the World Trade Organization (WTO) is an intergovernmental organization independent from the United Nations.

The issues dealt with by the WTO and UNCITRAL are different. The WTO deals with trade policy issues, such as trade liberalization, abolition of trade barriers, unfair trade practices or other similar issues usually related to public law, whereas UNCITRAL deals with the laws applicable to private parties in international transactions. As a consequence, UNCITRAL is not involved with "state-to-state" issues such as anti-dumping, countervailing duties, or import quotas.

2. International Sales Law

2.1 History

The historical development of international sales law has often been reported and there is no need for another full account. Thus only the most important milestones need to be mentioned.

On September 3, 1926, the International Institute for the Unification of Private Law (UNIDROIT) was founded in Rome; it was inaugurated on May 30, 1928. In the same year, Ernst Rabel proposed to work towards a unification of international sales law. On February 21, 1929, Rabel submitted his preliminary report on the possibilities of sales law unification. On April 29, 1930, a committee consisting of representatives from different legal systems was founded. The first draft of a uniform sales law was published in 1935. In 1936, Rabel published the first volume of his seminal work "Das Recht des Warenkaufs" providing an
analysis, the status quo of sales law on a broad comparative basis. In 1937, however, Rabel was forced to emigrate from Berlin to the United States, and in the next couple of years, World War II interrupted any further unification efforts. These efforts were resumed in January 1951 when the Dutch government held a diplomatic conference on the unification of sales law in The Hague. The conference established a special commission to make further progress in the unification process. This commission met several times during the 1950s and presented a first draft on substantive sales law in 1956. In the same year, efforts to create a law applicable to the formation of international sales contracts were revived by UNIDROIT and a first draft was presented in 1958. Both drafts were distributed among governments. Their comments and suggestions concerning the 1958 draft were considered in the revised draft of 1963. The 1956 draft could not be revised in time before the 1964 Conference in The Hague.

In 1964, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were drafted and finalized at The Hague. However, these first uniform sales laws did not fulfill the high hopes and expectations widely shared at the time. Although their practical relevance should not be underestimated, only nine countries became member states while important economies like France and the United States did not participate. Furthermore, socialist and developing countries perceived these uniform laws as favoring sellers from industrialized Western economies and thus stayed away from them as well.

On December 17, 1966, the United Nations Commission on International Trade Law (UNCITRAL) was established. UNCITRAL continued the work on the unification of sales law from 1968 onwards, using the Hague Conventions as a basis. The first draft of a uniform law was finalized in January 1976. In 1978, UNCITRAL circulated a subsequent draft containing rules on contract formation as well as the substantive sales law among the governments of the UN members.\(^n12\)

Between March 10 and April 5, 1980, delegates from sixty-two nations deliberated the CISG at the now famous Vienna Conference. At its end, forty-two countries voted in favor of the Convention. On December 11, 1986, the necessary number of ten ratifications (Art. 99 CISG) was reached and the Convention entered into force on January 1, 1988. The official
languages are Arabic, Chinese, French, English, Russian, and Spanish. Austria, Germany, and Switzerland agreed on a German translation in 1982 but could not, however, agree on the terminology in all respects.

2.1. CISG and Member States

Today the CISG has seventy-two member states. This number has to be appreciated in light of some additional facts. Nine out of the ten leading trade nations in 2006 are member states, with the United Kingdom being the sole exception. Similarly, in July 2008, eight out of the ten major trading partners of the United States were member states. Within the ever increasing market of the European Union, twenty-three out of the twenty-seven members are also member states of the CISG.

Having regard to the development of international trade, these figures become all the more impressive. In 2006, the worldwide merchandise export trade amounted to USD 11.783 billion and the import trade to USD 12.113 billion, about ten times as much as when the Convention was drafted. This is not least due to the containerization that has revolutionized cargo shipping. As of 2005, some 18 million containers made over 200 million trips per year. There are ships that can carry 15,000 20-foot equivalent units. It has been reported that today, it is cheaper to ship a bottle of wine from Australia to Hamburg than to bring it from Hamburg to Munich.

2.1.2 CISG as Role Model

It is well known today that the CISG has exerted significant influence on an international as well as a domestic level. When the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG not only in its systematic approach but also with respect to the mechanism of remedies. The same holds true for the Principles of European Contract Law (PECL) published in 1999. Furthermore, the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees must be mentioned in this context, because it took its definition of conformity of goods from Article 35 CISG and thus introduced this concept into the domestic sales laws of the EU member states. In Africa, the sixteen member states of the Organisation for the Harmonisation of Business Law in Africa, or in French,
l'Organisation pour l'harmonisation en Afrique du Droit des Affaires (OHADA) have adopted the Acte uniforme sur le droit commercial general (AUDCG) which is also primarily based on the CISG. Finally, the Draft Common Frame of Reference published in the beginning of 2008 is a continuation of all these different unification efforts which are heavily indebted to the CISG. It uses the general concepts of the CISG in all aspects relevant to sales contracts, i.e., the obligations of the parties and the remedies available.

Three main features of the CISG have influenced all of these instruments. First, the drafters of the CISG endeavored to depart from domestic legal terms and concepts, instead seeking to employ an independent legal language. They succeeded to a large extent. Likewise, the systems inherent in traditional domestic approaches have been discarded. Instead, the Convention features a transparent structure unfettered by any historical path dependencies. Thus, for example, the sections on the obligations of the seller are followed by the section on remedies for breach of contract by the seller. The feature most influential on a substantive level, however, is the CISG's remedy mechanism. The Convention does not adopt the cause oriented approach of Roman heritage and prevalent in civil law countries but rather follows the breach of contract approach of common law descent. In addition, peculiar features of the various systems have been put aside, making the CISG truly suitable for the international context.

Over the last two decades, the CISG has also proven to be a decisive role model not just on an international level but also for domestic legislators. Finland, Norway, and Sweden took the coming into force of the CISG in their countries on January 1, 1989 as an opportunity to enact new domestic sale of goods acts which rely heavily on the CISG, albeit without its Part II (i.e., the provisions on formation of contracts). With the end of the cold war and the collapse of the former Soviet Union, the young Eastern European states also looked to the CISG when formulating their new civil codes. This holds true not only with regard to the Commonwealth of Independent States (CIS) but also for the Baltic states among which Estonia is the most prominent example. Nowadays, China is of course hugely important for international trade, and the contract law of the People's Republic of China of March 15, 1999, also follows the CISG closely. Finally, the modernization of the German Law of Obligations was strongly influenced by the CISG from its very beginnings in the
1980s. Although the final legislation that entered into force on January 1, 2002 had lost much of that initial spirit, it still betrays the influences of the basic concepts of the CISG.

2.1.3. The CISG in Practice

It certainly is clear that today, the existence of the CISG is generally known among lawyers working in international trade. Yet, there still seems to be a tendency to recommend the exclusion of the Convention, especially in the commodities trade. Three main reasons are usually given for this strategy. First, even though the CISG is commonly known, the degree of familiarity with its application and functioning in practice is still very low. Lawyers continue to prefer their own domestic law and seem to stick to the saying "you can't teach an old dog new tricks." The second reason follows from the first: whenever the position of a party in the market allows that party to retain its own domestic law in a contract, it prefers to do so. Third, the parties are not yet convinced of the advantages of the CISG compared to domestic sales laws. Finally, the witness clause holding all six official languages equally authoritative has given rise to criticism. These arguments, however, are unconvincing for several reasons.

Although it is now generally accepted in western, industrialized countries that at least business parties are free to choose the law applicable to their contract, this is not true in all parts of the world. The fear of giving western businesses too many advantages still leads many developing and transition countries to refuse the recognition of choice of law clauses. The most prominent example is Brazil where the validity of choice of law clauses is highly controversial. Thus, an American buyer acquiring goods from a Brazilian seller and having confidently contracted on the basis of the Uniform Commercial Code, may find itself in a very precarious position when trying to sue the seller in Brazilian courts applying domestic Brazilian law to the sales contract. This may very well lead to a situation where a party is confronted with a law that was hardly foreseeable and is not really understandable or even truly accessible.
But even if a choice of law clause is recognized, a party insisting on its own domestic law may still encounter serious difficulties when litigating before the courts of a foreign country. First of all, the respective law has to be proven in court. This implies not only the need to translate statutes as well as other legal texts, such as court decisions and scholarly writings, into the language of the court but usually also requires the procurement of expert opinions. In some countries the experts may be appointed by the court, in others each party will have to present its own, and often several experts may be needed. Needless to say, all this can be very expensive. The consequences may be particularly harsh in a procedural system where each party bears its own costs regardless of the outcome of the litigation, as is the case particularly under the so-called "American Rule." To make matters worse, even if a party is willing to bear all these costs to prove a foreign law in court, it will still face a high degree of unpredictability regarding the interpretation and application of this law by the foreign court and a disconcertingly high margin of error.

It is true, of course, that today, more and more international sales law disputes are not litigated before national courts but are rather resolved by international commercial arbitration. Still, the problem of proving domestic law remains and translations are still necessary where this law is not accessible in English. Furthermore, it often remains uncertain, even in this context, how arbitrators, who often come from different legal backgrounds, will apply domestic law.

In many cases, parties seek to solve these problems by resorting to what they believe is a "neutral law," although they often confuse political neutrality with suitability of the chosen law for international transactions. This seems to be particularly true for Swiss law. If the parties choose such a third (neutral) law, they may be even worse off than if they had chosen one of their home laws. To begin with, they have to investigate this foreign law. Furthermore, the trouble and costs in proving it are even more burdensome. Last, but not least, especially Swiss domestic sales law can be unpredictable and not suitable to international contracts in some core regards. Two examples illustrate this problem. First, if the seller does not deliver goods in conformity with the contract, the Swiss Supreme Court distinguishes between peius (inferior goods) and aliud (different goods). In case of the former, the buyer must give prompt notice to the seller (according to Article 201 of the Swiss Code of Obligations (CO)) to preserve any remedies for breach of contract with a one
year limitation period (Art. 210 CO); in case of the latter, the buyer can demand performance for ten years after the conclusion of the contract regardless whether it gave notice of nonperformance or not. And it can be extremely difficult to predict where the line between peius and aliud will be drawn in a particular case. The second example is the compensation for consequential losses. According to Art. 208(2) CO upon unwinding the contract the seller is liable for damages directly incurred by the buyer due to the defective goods. In this respect, fault is not required. However, whether "direct loss" also encompasses consequential loss is made dependent on the number of links in the chain of causation. Extremely short periods for giving notice of defects as well as a limitation period of one year in case of a peius also militate against choosing domestic Swiss law for the international context.

All these shortcomings of domestic laws are avoided by applying the CISG. The text of the CISG is not only available in six authoritative languages, it also has been translated into numerous others. Court decisions, arbitral awards as well as scholarly writings, are either written or at least translated into today's lingua franca of international trade, namely English. They are readily accessible not only in various books and journals but also on several websites. The abundant number of legal materials available makes it reasonable to expect that judges and arbitrators have access to the requisite information and will be able to apply the CISG in a predictable fashion.

This last argument is not undermined by the fact that the CISG has been adopted in six official languages which - according to the witness clause - are of equal authority. First of all, the rich body of court decisions in German speaking countries, which was mainly developed using the non-authoritative German translation of the CISG, so far has not revealed any serious problems in court practice. Where inconsistencies were detected, these were easily resolved by interpretation of the relevant provision in light of the authoritative versions as well as the drafting history and the purpose of the provision.

Moreover, the legal position of parties is not weakened by the different versions of the CISG. As all language versions are to be treated equally and thus are directly applicable in court, American lawyers may, e.g., always rely on the English version. Furthermore, today it seems universally accepted that in case of doubt the English version of the CISG is to be
given prevalence as English - together with French - had been the language of the preparatory works on the CISG as well as at the 1980 Vienna Conference.

In summary, better accessibility of the CISG saves time and costs, and it makes the outcome of cases more predictable. These are the main advantages of the CISG when compared to the application of domestic law.

2.1.4. Criticism

Although the overall advantages of the CISG are now undisputable, criticism regarding the application of the CISG to international commercial transactions remains, and it seems to nourish a strongly adverse view on the Convention in certain legal systems. Having a closer look at this criticism, however, reveals that it is in part unfounded because it results from general misunderstandings; even where it has some merit, appropriate solutions can be developed.

A. General Problems in the Application of Uniform Law

The first set of arguments relate to the general problems one faces with uniform law - namely questions of uniform interpretation as well as the relationship between the application of uniform law and possibly concurrent domestic law remedies.

1. Uniform Interpretation

One of the first and main criticisms has always been the problem of uniform interpretation of the CISG. In particular, the CISG is blamed for its imprecision and vague terms such as "reasonable" and for the use of general clauses such as the provision on fundamental [*468] breach (Article 25). This criticism is especially advanced by lawyers with a common law background. For centuries, they have been accustomed to extremely detailed
This is in part due to the delicate relationship between the judiciary and the legislature. In order to restrict the room for interpretation, extensive catalogues of definitions as well as meticulous instructions for the construction and interpretation of contracts are often provided. Admittedly, in this respect the CISG indeed does not follow common law tradition but has instead been greatly inspired by the continental civil codes. It may, however, also draw on the continental experience with the interpretation of legal text. Given that the UCC contains terms similar to those of the CISG, American lawyers are also, at least to some extent, familiar with this approach.

Unlike the European Communities or OHADA, the CISG member states have no common supreme court guarding the interpretation of uniform or harmonized law; this may be regarded as a severe deficit. Yet, there are other means to safeguard uniformity. It is now common ground that uniform law has to be interpreted autonomously and regard is to be had to its international character. In this respect the comparative legal method has proven most adequate and successful. Part of this method involves giving due consideration to foreign court decisions and arbitral awards which are therefore becoming more and more important on the international level. Whatever the situation in a domestic legal system may be, there can be no doubt that foreign decisions do not have a binding effect upon national courts. Still, their potential persuasive authority is widely and justly recognized today.

Naturally, this method presupposes the accessibility and availability of foreign legal materials. Luckily, today this goal has been widely achieved, thanks to the endeavors of UNCITRAL and other extensive international databases and to English translation programs of foreign decisions and awards. The international development of the CISG is closely followed and analyzed by a rich variety of commentaries stemming from the German legal tradition, but published in English. Finally, the CISG Advisory Council issues opinions and provides guidelines for uniform interpretation of the Convention in crucial areas of possibly diverging approaches.

Realistically speaking, every uniform law has to rely on a certain imprecision. If a law is intended to be flexible enough to adapt to new factual and legal developments in
decades to come, it has to leave room for interpretation. Unlike domestic law which may be changed and adapted rather easily by the legislator, it would be illusionary to believe it possible to bring seventy-two nations together on a regular basis in order to make adjustments to the wording of the CISG.

The problems and possible solutions addressed here may be illustrated by the debate revolving around the interpretation of Articles 38 and 39 CISG. These are the provisions on examination of the goods and notification of the seller in case of non-conforming goods. Most domestic legal systems do not recognize any such obligation of the buyer at all. Thus, it does not come as a great surprise that periods of more than a month were held to be still reasonable by courts from some countries. In contrast, especially German speaking courts, viewing the issue against their own historical background, have required notice to be given in a few days. Prompted by comparative scholarly writings, the different, formerly irreconcilable, attitudes are finally converging. A rule requiring an average period of one month for giving notice is now gaining ground in most legal systems.

2. Concurrent Remedies

Another urgent problem jeopardizing uniformity may arise in the field of concurring remedies. The CISG is exclusively concerned with the contractual relationship between the seller and the buyer. However, under most legal systems the mere existence of contractual remedies does not preclude a party from relying on other remedies, particularly those based on tort. The crucial question then arises whether a party under a CISG sales contract can assert concurring remedies pursuant to domestic law, even though they may result in outcomes contrary to those reached under the CISG.

This is a problem particularly with regard to remedies for non-conformity of goods. Can a buyer rely on domestic concepts such as culpa in contrahendo, mistake or negligent misrepresentation? Can it recover purely economic loss caused by a defective product or property damages, especially in legal systems that recognize a tort claim for damage
to the chattel itself? Can the buyer rely on these claims in cases where it is precluded from relying on the non-conformity of the goods under the CISG; if damages were not within the contemplation of the parties; or if avoidance under the CISG is not possible because the breach does not amount to a fundamental one?

The answers to these questions are highly controversial with civil lawyers favoring a pro-convention approach whereas Anglo-American scholars seem to adopt a different stance. If one seeks to achieve the greatest level of uniformity, it cannot be left to individual states to apply their domestic laws, whether contractual or based on tort. Therefore, the need to promote uniformity as it is laid down in Article 7(1) CISG requires that, as the late John Honnold put it, the CISG displaces any domestic rules if the facts that invoke such rules are the same that invoke the Convention. In other words, wherever concurring domestic remedies are only concerned with the non-conformity of the goods - such as negligence in delivering non-conforming goods, negligent misrepresentation of their qualities, or mistake as to their substance - such remedies must be pre-empted by the CISG. The CISG, however, does not deal with fraud or safety requirements under a product liability approach, thus leaving room for national concepts such as fraudulent misrepresentation or product liability in case of damage to property other than the goods sold.

Similar problems arise in the borderland of substantive and procedural law. Procedural questions are not addressed by the CISG. Thus, one may ask whether issues such as the burden and standard of proof, which may often determine the outcome of a case, are to be decided autonomously. In this context, compensation for legal costs has recently enjoyed great attention.

Today it is more and more accepted that national conceptions of line-drawing between procedural and substantive law cannot be decisive. Relying upon such a categorical distinction is outdated and unproductive. Instead, the analysis should focus on the general principles of the Convention, such as the principle of full compensation on the one hand and the equality between the parties on the other. As a result, the burden and standard of proof are to be derived from the Convention itself while the question of
compensation for legal costs is to be decided by the respective domestic procedural law.

3. Formation of International Commercial Contracts:

Chapter two of the international commercial contracts are dealt in the convention on Principles of International Commercial Contracts, 1994 – UNIDROIT. "...The objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied... In offering the UNIDROIT Principles to the international legal and business communities, the Governing Council is fully conscious of the fact that the Principles, which do not involve the endorsement of Governments, are not a binding instrument and that in consequence their acceptance will depend upon their persuasive authority. There are a number of significant ways in which the UNIDROIT Principles may find practical application, the most important of which are amply explained in the Preamble. ..."

3.1 Chapter 2 - Formation

Article 2.1 - Manner of Formation

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

Article 2.2 - Definition of Offer

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

Article 2.3 - Withdrawal of Offer

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.
Article 2.4 - Revocation of Offer

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance of the offer.

Article 2.5 - Rejection of Offer

An offer is terminated when a rejection reaches the offeror.

Article 2.6 - Mode of Acceptance

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

Article 2.7 - Time of Acceptance

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
Article 2.8 - Acceptance Within a Fixed Period of Time

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by means of instantaneous communication begins to run from the moment that offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 2.9 - Late Acceptance. Delay in Transmission

(1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance, unless without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

Article 2.10 - Withdrawal of Acceptance

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 2.11 - Modified Acceptance

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
**Article 2.12 - Writings in Confirmation**

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

**Article 2.13 - Conclusion of Contract Dependent on Agreement on Specific Matters or in a Specific Form**

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a specific form, no contract is concluded before agreement is reached on those matters or in that form.

**Article 2.14 - Contract with Terms Deliberately Left Open**

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the terms; or

(b) the third person does not determine the term, provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

**Article 2.15 - Negotiations in Bad Faith**

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

**Article 2.16 - Duty of Confidentiality**
Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

**Article 2.17 - Merger Clause**

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

**Article 2.18 - Written Modification Clause**

A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.

**Article 2.19 - Contracting Under Standard Terms**

(1) Where one party or both parties use standard terms in concluding a contract, the general rules of formation apply, subject to Articles 2.20 - 2.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

**Article 2.20 - Surprising Terms**

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard is to be had to its content, language and presentation.

**Article 2.21 - Conflict between Standard Terms and Non-Standard Terms**
In case of conflict between standard terms which is not a standard term the latter prevails.

**Article 2.22 - Battle of Forms**

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

**Chapter 3 - Validity**

**Article 3.1 - Matters Not Covered**

These Principles do not deal with invalidity arising from

(a) lack of capacity;

(b) lack of authority;

(c) immorality or illegality.

**Article 3.2 - Validity of Mere Agreement**

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements.

**Article 3.3 - Initial Impossibility**

(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.

(2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

**Article 3.4 - Definition of Mistake**

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.
Article 3.5 - Relevant Mistake

(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance acted in reliance on the contract

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

Article 3.6 - Error in Expression or Transmission

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.

Article 3.7 - Remedies for Non-Performance

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.

Article 3.8 - Fraud

A party may avoid the contract when it has been led to conclude the contract by the other party’s fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

Article 3.9 - Threat

A party may avoid the contract when it has been led to conclude the contract by the other party’s unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is
unjustified if the act or omission with which a party has been threatened is wrongful in itself, or is wrong to use it as a means to obtain the conclusion of the contract.

Article 3.10 - Gross Disparity

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) The fact that the other party has taken unfair advantage of the first party’s dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and

(b) The nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

Article 3.11 - Third Persons

(1) Where fraud, threat, gross disparity or a party’s mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.

(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance acted in reliance on the contract.

Article 3.12 - Confirmation

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of contract is excluded.
Article 3.13 - Loss of Right to Avoid

(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has acted in reliance on a notice of avoidance.

(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

Article 3.14 - Notice of Avoidance

The right of a party to avoid the contract is exercised by notice to the other party.

Article 3.15 - Time Limits

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2) Where an individual term of the contract may be avoided by a party under Article 3.10, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

Article 3.16 - Partial Avoidance

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

Article 3.17 - Retroactive Effect of Avoidance

(1) Avoidance takes effect retroactively.

(2) On avoidance either party may claim restitution of whatever is supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.
Article 3.18 - Damages

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

Article 3.19 - Mandatory Character of the Provision

The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake.

Article 3.20 - Unilateral Declarations

The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

4. Carriage of Goods by Air, Water and Land:

In law, the transportation of goods may be by land, sea, or air. The relevant law governs the rights, responsibilities, liabilities, and immunities of the carrier and of the persons employing the services of the carrier.

4.1 Historical development

Until the development of railroads, the most prominent mode of transport was by water. Overland transportation of goods was relatively slow, costly, and perilous. For this reason, the law governing carriage of goods by sea developed much earlier than that governing inland transportation. The pre-classical Greek city-states had well-developed laws dealing with the carriage of goods by sea, along with specialized commercial courts to settle disputes among carriers, shippers, and consignees. The sea laws of the island of Rhodes achieved such prominence that a part of them was carried, many centuries later, into the legislation of Justinian.
In Roman law the contract of carriage did not achieve the status of a distinct contractual form; jurisconsults (legal advisers) dealt with it in the framework of the contractual forms known to them, such as deposit and hire of services or of goods. There was special regulation only insofar as the responsibility of the carrier was concerned: ship-owners (nautae), along with innkeepers and stable keepers, were liable without fault for destruction of or damage to the goods of passengers. Nevertheless, they could be relieved of responsibility by proving that the loss was attributable to irresistible force.

In English common law the principles applying to the relationship between the carrier and his customers go back to a time when neither railways nor canals existed. Whether influenced by Roman law or derived quite independently, early English decisions imposed on carriers the obligation not only to carry goods but to carry them safely and to deliver them in good condition to the owner or his agent. The carrier was always liable for the loss of the goods and also liable for any damage to the goods, unless he could prove that the loss or damage had resulted from an excepted cause. This duty of the carrier to deliver the goods safely was considered to exist without regard to obligations arising under any contract between the parties. It was imposed upon him by the law because he had been put in possession of another’s goods. In legal language, this meant that the carrier was considered to be a bailee, who, in certain circumstances, was liable to the bailor if he failed to deliver the goods intact. This law of bailment developed in England long before the law of contract. The contractual element of bailment was not stressed until after the 17th century. Today, in common-law countries, the rights and liabilities of shippers, consignees, and carriers are in the large majority of cases based on a contract of carriage, whether express or tacit. The mere fact that, in the ordinary course of his business, a carrier accepts goods for carriage and delivery implies the making of a contract of carriage. The right of the carrier to claim the freight depends on this contract, and this contract is also the foundation of his duty to carry the goods safely to their destination. But there remain vestiges of bailment in the law of carriage of goods. Thus, the owner of the goods, though not a party to the contract of carriage between the shipper and the carrier, may sue the carrier for loss of or damage to his goods.

In civil-law countries, the contract of carriage first achieved distinct form in the early 19th century. The French Civil Code of 1804, following the Romanist tradition, still dealt with the contract of carriage as a species of the contract for the hire of services and further subjected
carriers to the same obligations as depositaries; but the French Commercial Code of 1807 established a special legal regime for professional carriers, making the contract of carriage a distinct contractual form. Subsequent civil and commercial legislation in civil-law countries gave expression to the same idea. Today, in the civil-law world, the contract of carriage may be regarded as a variation of the contract for the hire of services, namely, a contract whereby one of the parties engages to do something for the other party in consideration of a price agreed upon between them. Specifically, the contract of carriage of goods may be defined as the contract whereby a professional carrier engages to carry goods in accordance with a determined mode of transport and within a reasonable time, with the understanding that the carriage of the goods is the principal object of the contract.

In France and in a great number of countries following the French system, a contract of carriage requires the presence of three indispensable elements: carriage, control of the operation by the carrier, and a professional carrier. If any of these elements is missing, the contract is one for the hire of services rather than a special contract of carriage. The classification of a contract as a contract of carriage involves significant legal consequences. Exculpatory clauses in a contract of carriage are ordinarily null and void; receipt of the goods by the consignee and payment of the freight without protest within a designated period of time exclude all actions against the carrier; actions that may be brought against the carrier are subject to a short period of limitation, that is, one year; the carrier has a privilege, which corresponds to a common-law lien, on the things carried for the payment of the freight; and, finally, either party to a contract of carriage may demand that experts determine the condition of the things carried or intended to be carried.

4.1.2 Characteristics of carriage

Common-law common carrier

In English and American law, common carriers are distinguished from other carriers. A common carrier is one who holds himself out as being ready to carry goods for the public at large for hire or reward. In England carriers of goods by land that are not classified as common carriers are termed private carriers; carriers of goods by sea or by inland water that are not classified as common carriers may be public carriers, namely, professional carriers who do not hold
themselves out as ready to serve the general public or persons who carry goods incidentally to their main business or for one consignor only. In the United States distinction is made among common carriers, contract carriers, and private carriers. A person who engages to carry the goods of particular individuals rather than of the general public is a contract carrier; a person who carries his own goods is a private carrier. Both a common carrier and a contract carrier are engaged in transportation as a business. The basic difference between them is that a common carrier holds himself out to the general public to engage in transportation, whereas a contract carrier does not hold himself out to serve the general public. The exact boundary between common carriage and contract carriage is not always clear.

A person may be a common carrier although he limits the kinds of goods that he is ready to carry, the mode of transport, or the route over which he is prepared to carry. He is a common carrier only to the extent that he holds himself out as ready to carry goods for the public. It is indispensable for the classification that he accepts reward for the carriage and that his principal undertaking is the carriage of goods. Ancillary carriage for purposes of warehousing does not make one a common carrier. Unless the law provides otherwise, a carrier may cease at any time to be a common carrier by giving notice that he is no longer ready to carry goods for the public at large.

The distinction between common carriers and carriers that are not classified as common carriers, such as private carriers or contract carriers, involves significant legal consequences in the light of both common law and legislation. Common carriers are everywhere subject to strict economic regulation. Thus, a common carrier is forbidden in the United States to charge unreasonably high rates or to engage in unjust discrimination, whereas a contract carrier may charge rates as high as he pleases and may discriminate among his customers, provided that none of his discriminatory rates in motor and domestic water transportation is unreasonably low. In both England and the United States, a common carrier must serve everyone who makes a lawful request for the services he offers, but a private or contract carrier may select his customers; a common carrier is liable for any loss or damage to the goods during carriage, unless the damage or loss is attributable to certain excepted causes, whereas a contract carrier or private carrier is only liable for damage or loss through his negligence; contractual clauses relieving the carrier from liability may have different effects depending on the status of the carrier as common carrier or private carrier; and, finally, the common carrier has a common-law
lien on the goods, whereas other carriers may have none in the absence of contractual provision or may have a less extensive lien than that of the common carrier.

**Civil-law public carrier**

The concept of common carrier has no exact equivalent in civil-law systems. But, if one looks to substance rather than form or terminology, one may conclude that the concept of public carrier in civil-law systems is a functional equivalent of the concept of common carrier. A public carrier is a professional carrier of goods or passengers; he is distinguished from a private carrier who either carries his own goods exclusively or carries goods incidentally to his other business. Generally, the scope of private carriage is narrowly defined so that most carriage operations fall under the rubric of public carriage; this ensures maximum application of rules designed to safeguard the public interest in the carriage of goods. Public carriers, like common carriers in common-law countries, are subject to strict economic regulation and are under the supervision and control of administrative agencies. When a public carrier is also a professional merchant, normally an individual or a private corporation, he assumes all the duties, obligations, and liabilities attaching to merchants under applicable commercial codes or special legislation. Like a common carrier, a public carrier must accept the goods lawfully delivered to him for carriage, either because he is held to a permanent offer made to the public or because he is under obligation to carry by virtue of public legislation or administrative regulations. Unlike common carriers, public carriers are not liable for loss or damage to the goods without fault; this difference is more apparent than real, because carriers in civil-law systems are presumed to be liable, unless they prove that the loss or damage occurred without their fault.

**4.1.2 Duties and liabilities of carriage**

Common carriers and public carriers are under duty to carry goods lawfully delivered to them for carriage. The duty to carry does not prevent carriers from refusing to transport goods that they do not purport to carry generally. Carriers may indeed restrict the commodities that they will carry. Further, everywhere, carriers may refuse to carry dangerous goods, improperly packed goods, and goods that they are unable to carry on account of size, legal prohibition, or lack of facilities.

**LIABILITY FOR SAFETY OF THE GOODS**
Everywhere, carriers incur a measure of liability for the safety of the goods. In common-law countries carriers are liable for any damage or for the loss of the goods that are in their possession as carriers, unless they prove that the damage or loss is attributable to certain excepted causes. The excepted causes at common law include acts of God, acts of enemies of the crown, fault of the shipper, inherent vices of the goods, and fraud of the shipper. In maritime carriage perils of the sea and particularly jettison are added to the list of excepted causes. All these terms have technical meanings. An act of God is an operation of natural forces so unexpected that no human foresight or skill may be reasonably expected to anticipate it. Acts of enemies of the crown are acts of enemy soldiers in time of war or acts of rebels against the crown in civil war; violent acts of strikers or rioters are not an excepted cause. Fault of the shipper as an excepted cause is any negligent act or omission that has caused damage or loss—for example, faulty packing. Inherent vice is some default or defect latent in the thing itself, which, by its development, tends to the injury or destruction of the thing carried. Fraud of the shipper is an untrue statement as to the nature or value of the goods. And jettison in maritime transport is an intentional sacrifice of goods to preserve the safety of the ship and cargo.

When goods are damaged or lost as a result of an excepted cause, the carrier is still liable if he has contributed to the loss by his negligence or intentional misconduct. In this case, however, the burden of proof of the carrier’s fault rests on the plaintiff.

In civil-law countries the carrier under a contract of carriage is ordinarily bound as a warrantor for any damage to or loss of the goods carried, unless he proves that the damage or loss has resulted from irresistible force (force majeure), the inherent vice of the goods, or from the fault of the shipper or of the consignee. This contractual liability of the carrier under the general law is frequently modified by special legislation or by international conventions. In addition to his contractual liability, the carrier may, of course, incur liabilities that arise without contract. The carrier’s contractual liability is often termed an “obligation of result,” because the carrier, or a warrantor, is bound to make full restitution, unless he manages to exculpate himself in part or in whole.

LIMITATIONS OF LIABILITY
In the absence of contrary legislation or decisions, carriers in common-law jurisdictions have been traditionally free to exclude or limit their liabilities by contract. In civil-law jurisdictions, as a rule, contractual clauses tending to limit liability for negligence or for willful misconduct have been considered null and void. Today, in most countries, municipal legislation and international conventions ordinarily limit the liability of certain carriers to a specified amount per weight, package, or unit of the goods carried. In this way, the liability of certain carriers has largely become standardized, at least in international carriage of goods.

Parties are free to stipulate that the carrier shall be liable in excess of any statutory limitation, but clauses that are designed to reduce the liability of the carrier below statutory limits are ordinarily null and void. Statutory limitations cover both direct and indirect losses incurred by shippers or consignees. In most legal systems, the benefit of statutory limitation of liability is unavailable if the goods have been delivered to the wrong individual or if the carrier is guilty of either intentional misconduct or gross negligence.

The liability of a maritime carrier for loss or damage to goods carried under a bill of lading is limited in most countries to a specified amount per package or unit by application of the provisions of the Brussels Convention of 1924 or by municipal legislation containing rules similar to those of the convention. The liability of air carriers for loss or damage to goods carried in international trade is almost everywhere controlled by the provisions of the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955. Air carriage in domestic trade is subject either to the rules of the international convention or to municipal legislation patterned after the model of the convention. In most countries the liability of railroad carriers is limited by legislation or administrative regulations that regularly become part of the contract of carriage. International carriage of goods by railroad is largely subject to the various Berne Conventions, the first of which was adopted in 1890. Most European nations have adhered to these conventions.

4.1.3 Delay and mis-delivery

In all legal systems, carriers incur liability for delay in delivering the goods to the consignee. Statutes, international conventions, administrative regulations, or even contractual agreements may fix the period of transportation with reference to the applicable means of carriage and
determine the consequences of the delay. Under the law of contracts, failure of the carrier to deliver the goods within the prescribed period of time will be treated as a breach of contract.

In common-law jurisdictions, if the delay is caused by a deviation, the carrier is ordinarily answerable for damages. A deviation takes place when the carrier leaves the route that he has expressly or impliedly agreed to follow or when he goes past his destination. In civil-law jurisdictions, carriers are not bound to follow any particular route in the absence of special legislation or contractual agreement. Thus, a deviation from the normal route does not itself constitute a fault of the carrier; if the deviation causes a delay, the carrier will be liable only if he is at fault.

Like delay, misdelivery engages the responsibility of the carrier. Misdelivery is the delivery of the goods by the carrier to the wrong person or to the wrong place.

**Diversion and reconsignment; stoppage in transit**

The terms diversion and reconsignment are used interchangeably to refer to a change in the destination or billing of a shipment before or after it reaches its original destination. Reconsignment is of considerable importance to the commercial world because goods may be shipped from a distant source of supply toward a certain destination and then diverted to the most favourable market. Carriers are generally permitted to make a charge for the exercise of a diversion or reconsignment privilege. The number of diversions is generally limited in order to prevent the use of means of transport as places of storage.

The owner of the goods may, in all legal systems, change the carrier’s instructions as to the place of destination or as to the person entitled to take delivery. The carrier must comply with this order, provided that he has satisfied himself that the person designating a new place of delivery or a new recipient is the owner of the goods at the time the order is given. In civil-law jurisdictions, the person in possession of the title of transport, be it a bill of lading or other document, is ordinarily entitled to change the destination of the goods. This rule has been largely followed in international conventions, including the Warsaw Convention of 1929. At common law, in the absence of other provision, the consignee is regarded as the owner of the goods while they are in transit; therefore, it is ordinarily the consignee who is entitled to change the destination of the shipment.
Stoppage in transit is technically the right of an unpaid seller of goods to change their destination before they are delivered to the consignee. The seller has this right by virtue of directly applicable legislation even if he has not reserved the ownership of the goods in his transaction with the buyer. Indicatively, the British Sale of Goods Act of 1893, which codified the common-law rules, declares that the unpaid vendor may resume possession of the goods as long as they are in the course of transit and may retain them until payment or tender of the price. There are analogous provisions in civil-law jurisdiction.

4.2 Dangerous goods

Dangerous goods are those that, from their nature, are liable to cause damage to persons, to means of transport, or to other goods. In all legal systems, the carriage of dangerous goods has given rise to distinct problems and to the development of special rules.

In civil-law countries, legislation or administrative regulations define categories of goods considered to be dangerous and either exclude their shipment by public carriers or determine the conditions under which they may be shipped. In common-law jurisdictions, the shipper is liable to the carrier for all damage caused by dangerous goods delivered for shipment, unless he has declared the dangerous nature of the goods at the time of delivery, and the carrier has accepted them with knowledge of their nature.

4.3 Carriage by two or more carriers

Goods frequently reach their destination after they have passed through the hands of two or more carriers. This may happen when the shipper has contracted with several carriers, when the shipper has authorized one of the carriers to act as his agent with other carriers, or when the carrier, without authority, delivers the goods to another carrier.

If the carrier, without authority, delivers the goods to another carrier, he is liable to the shipper for any misdelivery by the second carrier and for any loss or damage suffered by the owner of the goods during the time in which the goods were in the possession of the second carrier. This means that the carrier cannot relieve himself from liability by performing the contract through the services of an agent. Moreover, delivery of the goods to another carrier may be a breach of
contract by virtue of an implied or express condition that the carriage shall be effected by the vehicles of the carrier. Such a condition is implied in maritime transports.

4.4. Carrier’s liens

The law strives everywhere to secure payment of the freight to a carrier who has carried the goods to their destination. In common-law jurisdictions, the carrier may have to this effect a common-law lien, a statutory lien, or even a contractual lien. In civil-law jurisdictions, the carrier has, ordinarily, a privilege on the things carried.

A common carrier in common-law jurisdictions has a common-law lien under which he is entitled to retain possession of the goods until earned freight is paid to him. The carrier is not entitled to sell the goods or to use them; parties, however, may agree that the carrier shall have an active lien—namely, that he shall have the right to sell the goods. Thus, in maritime carriage in the United States, the ship owner is clearly entitled to seize and sell the goods carried by him in case of nonpayment of the freight. Parties may agree that the carrier shall have no lien at all or that he shall have a general lien on the goods carried, namely, a lien covering debts other than the pending freight. After the lien is exercised, the carrier has the rights and duties of a bailee. He may thus be liable for loss or damage occasioned by his negligence, and he may be entitled to recover expenses that were reasonably necessary for the preservation of the goods.

Carriers in civil-law jurisdictions ordinarily have a privilege on the goods carried by them for the payment of the freight and of incidental expenses. In France and in systems following the French model, this privilege is available only to professional carriers who carry goods by contract of carriage. The civil-law privilege differs from a common-law lien in that it confers on the carrier power and authority to sell the goods for the satisfaction of his claims. The privilege covers the whole shipment as determined by the documents of transport and is extinguished upon delivery of the goods to the consignee. Quite apart from the privilege, the carrier in civil-law jurisdictions may be entitled, under the general law of obligations, to refuse delivery of the goods until payment of the freight; moreover, he may secure payment of the freight by a variety of contractual arrangements.

Carrier’s role as warehouseman and bailee
In all legal systems, the peculiar liabilities imposed on carriers extend only for the duration of the carriage, that is, from the time the goods are delivered to the carrier for shipment until the carrier has taken all reasonable steps to deliver them to the consignee. This means that the carrier is not under his liability as a carrier for the whole time during which the goods may be in his possession. Indeed, goods may be delivered to a carrier for safekeeping before the carriage begins or after it terminates in accordance with the terms of a special contract that may qualify as bailment in common-law jurisdictions and as a deposit in civil-law countries. Further, goods may be in the possession of the carrier because the consignee has unjustifiably refused to take delivery, in which case the carrier may occupy the position of an involuntary bailee or depositary.

Generally, a carrier who is in possession of the goods before the beginning or after the end of the carriage is a warehouseman, and he is liable accordingly. In common-law jurisdictions the liability of a warehouseman is that of an ordinary bailee. In most cases a bailee, namely, a person entrusted with the goods of another, is not liable for the loss of or damage to the goods in his possession, unless the prejudice was caused by his intentional misconduct or negligence. In civil-law jurisdictions, if the parties agree that the carrier shall be in possession of the goods as a warehouseman before the beginning or after the end of the carriage, they form in effect a contract of deposit for reward, which is distinguishable from a contract of carriage. The elements of the contract of deposit and the rights and liabilities of the parties are dealt with in civil codes; exoneration clauses are valid under the conditions of the general law, and the period of limitation of actions is longer than one year. The depositary for reward is generally liable for intentional misconduct and negligence.

4.4. Measure of damages

Damages for the breach or nonperformance of a contract of carriage ordinarily are determined by application of the general rules of the law of contracts. Exceptional provisions applicable in case of breach of a contract of carriage are rare; they are mostly encountered in international conventions.

Bills of lading
Many shipments are made under bills of lading, issued by the carrier to the shipper upon delivery of the goods for shipment. The shipper is entitled to demand issuance of a bill of lading, unless his right is excluded by the contract of carriage. The bill of lading is, in the first place, an acknowledgment by a carrier that he has received the goods for shipment. Secondly, the bill of lading is either a contract of carriage or evidence of a contract of carriage. Thirdly, if the bill of lading is negotiable, as usually happens in carriage by sea, it controls possession of the goods and is one of the indispensable documents in financing the movement of commodities and merchandise throughout the world.

The bill of lading usually states the quantity, weight, measurements, and other pertinent information concerning the goods shipped. It frequently contains the statement that the goods have been shipped in apparent good order and condition. In this case, the carrier is not allowed to contradict the statement as to defects that were reasonably ascertainable at the time of delivery against an endorsee of the bill who relied on the statement. The bill of lading may be signed by the master or by a broker as agent of the carrier. As a receipt, the bill of lading is prima facie evidence that the goods have been delivered to the carrier; the burden of proof of non-delivery thus rests on the carrier.

In some jurisdictions the bill of lading is regarded as the contract of carriage itself. In other jurisdictions it is regarded merely as evidence of the contract of carriage; hence, oral testimony may be admissible to vary the terms of the contract evidenced by the bill of lading. When goods are shipped under a charter party or other document and a bill of lading is issued to cover the same goods, the bill of lading may ordinarily be regarded as a mere receipt. The terms of the contract are embodied in the charter party or other document, unless the parties intended to vary the terms of the agreement by the issuance of a bill of lading. A bill of lading that has been endorsed is ordinarily considered to contain the terms of the contract between the carrier and the endorsee.

At common law, a bill of lading functions as a semi-negotiable instrument. Delivery of the bill of lading to a transferee for valuable consideration transfers the ownership of the goods to the transferee, but the transferee cannot acquire a better title than that of the transferor. Under statutes, however, and under international conventions, bills of lading are in all legal systems fully negotiable instruments, unless they show on their face that they are not negotiable. When
a bill of lading is negotiable, it confers a privileged status on the **good faith** purchaser, known as the holder in due course. A carrier who has issued a nonnegotiable bill of lading normally discharges his duty by delivering the goods to the named consignee; the consignee need not produce the bill or even be in possession of it. But a carrier who has issued a negotiable bill of lading will be discharged only by delivery to the holder of the bill, because, in a way, the goods are locked up in the bill of lading. The carrier who delivers goods without the bill of lading remains liable in common-law jurisdictions to anyone who has purchased the bill for value and in good faith, before or after the improper delivery. In civil-law jurisdictions, in case of an improper delivery, the carrier may remain liable to the endorsee of the bill of lading, even if the endorsee is himself not the legal owner of the bill but merely a finder or a thief.

**Freight or forwarding agents**

Shippers frequently engage the services of freight or forwarding agents, namely, persons who undertake for a reward to have the goods carried and delivered at their destination. The services of these persons are ordinarily engaged when the carriage of the goods involves successive carriers or use of successive means of transport.

A forwarding **agent** makes contracts of carriage for his principal. He may be a carrier or he may be merely a **forwarding agent**. When a carrier enters into a contract with the shipper by which he undertakes to carry goods in circumstances that involve an obligation on his part to hand over the goods to another carrier, he may be regarded as acting to some extent in the capacity of a forwarding agent. Conversely, when a forwarding agent carries the goods himself, he is to that extent a carrier and incurs the liabilities of a carrier.

In common-law jurisdictions a forwarding agent who is not a carrier is not responsible for what happens to the goods once they are handed over to a carrier with whom the forwarding agent has made a contract for his principal. By his transaction with the carrier, the forwarding agent establishes a direct contractual relationship between his principal and the carrier. Under the principles of the law of agency, the forwarding agent is under obligation toward his principal to conclude the contract on the usual terms. He is under no obligations, in the absence of an express contractual provision, to insure the goods. If, exceptionally, a forwarding agent acts as a carrier throughout the journey and uses other carriers on his own account, he is liable to the
owner for any loss or damage to the goods during carriage. The extent of his liability depends on whether he is a common carrier or a contract carrier. If he is a common carrier, his liability to the owner of the goods may be heavier than the liabilities he can enforce against the carriers he has engaged.

In civil-law jurisdictions forwarding agents are clearly distinguished from carriers, and the contracts they make are clearly distinguishable from contracts of carriage. The profession of a forwarding agent, however, is not exclusive; thus, most frequently, carriers qualify as forwarding agents and vice versa. A forwarding agent has ordinarily a privilege on the goods under his control that is much broader and more effective than the privilege of the carrier. He has, in the absence of contrary contractual provision, freedom of choice of the means of transport and of particular carriers. His main obligation is to have the goods carried to their destination and delivered to the consignee. In the discharge of this obligation, he is generally entitled to engage the services of another forwarding agent. The forwarding agent is liable to his principal for any violation of his obligations resulting from negligence or intentional misconduct. He is relieved from liability if he proves that the loss or damage was occasioned by irresistible force. The liability of the forwarding agent for negligence may be excluded by contractual stipulations but not his liability for grave fault and intentional misconduct. A forwarding agent is considered as a carrier to the extent that he carries the goods himself, and to that extent he incurs the liabilities of a carrier. In contrast with the rule in common-law jurisdictions, the forwarding agent in civil-law countries is fully responsible for loss or damage suffered by the goods in the hands of carriers that the forwarding agent has engaged for the performance of the contract with his principal, unless the services of the particular carrier were requested by the principal. The liability of the forwarding agent does not exceed that of the carrier he has engaged, and, if the carrier is exonerated by virtue of an excepted cause, so is the forwarding agent.

4.5 Mixed-carrier transportation

The expression mixed-carrier transportation refers to situations in which goods are carried to their final destination by two or more means of transport, such as road and sea or rail, sea, and air. There are at least two possibilities. The successive carriers may have no common juridical link, as when the shipper has contracted with each carrier independently or when the shipper has contracted with a forwarding agent. In these cases, each carrier is subject to his own regime
and has his own rights and duties toward the shipper or forwarding agent. A second possibility is that the successive carriers may be bound by a common juridical link toward the shipper or owner of the goods by virtue of directly applicable legal or contractual provisions or by virtue of the fact that the goods travel under a single document of transport, as a through bill of lading. In these cases, municipal laws in civil-law jurisdictions tend toward the irreconcilable aims of subjecting each carrier to his own regime and, at the same time, holding all carriers solidarily liable. In domestic carriage in common-law jurisdictions, the liability of each carrier is ordinarily determined by application of the rules governing carriage by two or more carriers.

Mixed-carrier transportation in international commerce under a through bill of lading or similar document has been dealt with in international conventions. A through bill of lading covers carriage of goods by two or more successive carriers or by two or more means of transport. It is issued by the first carrier and constitutes a single title to the goods. Under a purely maritime through bill of lading, successive carriers are equally bound, unless the contrary has been stipulated. Solutions differ, however, when carriage is effected by two or more means of transport. Under the Berne Railroad Conventions for the carriage of goods, carriage by rail and sea may be subject to the rules governing railroad carriage at the option of the contracting states, unless reservation has been made by them for application of certain rules of maritime law to the portion of sea carriage. Since these conventions may be entirely inapplicable to the portion of sea carriage, interested carriers and international organizations have concluded agreements for a uniform, legal regime of rail and sea carriage. In fact, accords have been concluded among United States and Canadian railway and ocean-shipping companies for application of the rules of the Brussels Convention of 1924 to goods carried under through bills of lading by rail and sea. The rules of the Warsaw Convention for carriage of goods by air apply always to the portion of air carriage and to that portion only, but the International Air Transport Association and the International Union of Railways have concluded agreements for carriage by rail and air under a single document. Only the Geneva Convention of 1956 has undertaken to establish rules applicable to all means of transport under a single document. The convention provides, however, that, if damage has been incurred in a portion of the journey other than road carriage, the carrier shall be subject to his proper law. This convention may conflict with the Berne Conventions and does conflict with the Warsaw Convention to the extent that carriage by air is subjected to the Brussels rather than the Warsaw Convention.
In the Western world, the transport of goods is divided between public and private enterprise. The basis of the legal relationship between a carrier and his customer is the same whether the carrier is a public corporation, a local authority, or a private corporation or individual. The law of carriage of goods governs the rights and duties of the shipper, carrier, and consignee.

### 4.6 NATIONAL AND INTERNATIONAL REGULATION

In all legal systems the law of carriage has been influenced by the idea that carriers enjoy a factual monopoly. The services that a customer may demand and the remuneration that a carrier may exact are generally regulated by legislation or administrative regulations. The growth of competition among carriers and means of transport in the Western world has led to a reduction in the scope of municipal legislation in a number of countries, but international conventions and administrative regulations have proliferated. The right to carry on a transport business is still everywhere regulated through elaborate licensing systems, and the operations of transport are subject to continuous supervision and control by appropriate agencies. The legal relation between the carrier and his customer is affected by this intervention of the public authorities, and public as well as private laws form the body of the law of carriage.

**Roads, railways, and inland waterways**

Since the 19th century legislation has been enacted in most countries to safeguard the public interest in the movement of goods by road, railway, and inland waterway. In the United States a decisive step toward regulation of transportation was taken with the Act to Regulate Commerce of 1887. This act was made applicable to all common carriers by railroads engaged in interstate or foreign commerce and to common carriers transporting goods in part by railroad and in part by inland water when both were used under a common control, management, or arrangement for a continuous carriage. The act created the Interstate Commerce Commission, which today has wide powers to hear complaints against carriers concerning alleged violations of law, to investigate matters in dispute, to order carriers to cease and desist from unlawful practices, and to determine the amount of damages suffered as a result of violations. The commission also possesses rate-making power.

Since the time the 1887 act was adopted, new forms of transport have arisen, and older ones have been improved. The Interstate Commerce Commission now has jurisdiction over railroads,
pipelines, motor carriers, and certain carriers by water. Other federal agencies that have been charged with regulation of transportation are the Civil Aeronautics Board and the Federal Maritime Commission.

In England the Carriers Act of 1830 was the first legislative intervention in the field of carriage of goods. The act originally applied to all common carriers by land, including both road and railway carriage. The Railways Act of 1921, however, made special provisions with regard to the railways, and the Transport Act of 1962 enacted that the Railways Board shall not be regarded as a common carrier. Consequently, carriage by railways is now regulated by the contract between the Railway Board and the shipper or other contracting party, as laid down in the Book of the Rules of British Railways. The Carriers Act has never been applicable to private carriers and to common carriers by sea or by inland waterway. If part of the carriage is by sea or inland water and part by road, the act applies to the land part only.

For many decades the law governing the international carriage of goods by railway has been codified in a number of international conventions. These are frequently referred to as the Berne Conventions. The first international convention concerning the carriage of goods by rail was concluded in Berne in 1890 and came into operation in 1893; after World War I it was replaced by a new convention concluded in 1924, which was again amended by a convention signed in Rome in 1933. This in turn was replaced after World War II by the Berne Convention of 1952. A new convention was signed in Berne in 1961 and came into operation in 1965. The conventions apply whenever goods have been consigned under a through consignment note for carriage over the territories of at least two of the contracting states and on certain specified lines. They regulate mostly the form and conditions of the contract of carriage; its performance, including delivery and payment of the charges; its modifications; the liability of the carrier for delay, loss, or damage; and the enforcement of the contract by actions. Further, the conventions establish the obligation of the railways to carry goods and the rights and obligations of the various railway authorities of the contracting states. Most contracting states have incorporated into their municipal laws rules similar to those of the conventions for the regulation of the domestic carriage of goods by railway.

The Treaty of Rome of March 25, 1957, which created the European Economic Community, contains a number of provisions concerning matters of transport. Members of the Community
are specifically bound to develop a common policy in matters of transport. The provisions of the treaty have been largely implemented by a number of international agreements. Since all members of the Common Market are members of the Berne Conventions, the mandate for uniformity of rules governing carriage of goods has been largely achieved as to carriage by railway.

**Sea carriage**

Until the emergence of modern national states, the law governing maritime commerce had been largely uniform in the Western world. In the 18th and 19th centuries, however, legislative enactments and judicial decisions in pursuit of narrowly conceived national interests gradually displaced in various countries the venerable and uniform law of the sea and gave rise to sharp conflicts of laws. The movement of goods from country to country was thus hampered at a time when advancing technology and the spreading Industrial Revolution were about to lead to an expansion of maritime commerce on a world scale. Beginning with the last decades of the 19th century, it has become increasingly apparent that these conflicts of laws might be overcome by means of international conventions. The law of merchant shipping was quite naturally one of the first branches of private law to attract attention for possible international regulation.

The movement for uniformity culminated in the signing in 1924 of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. The convention was merely intended to unify certain rules of law relating to bills of lading and only with regard to damages occurring to hull cargo other than live animals. All bills of lading covered by the convention are subject to certain standard clauses defining the risks assumed by the carrier, which are absolute and cannot be altered by contrary agreement, and the immunities the carrier can enjoy, unless the parties agree otherwise. In general, clauses relieving the carrier from liability for negligence in loading, handling, stowing, keeping, carrying, and discharging the goods or that diminish his obligation to furnish a seaworthy vessel are declared null and void. The carrier, however, is relieved from liability for negligence in navigation or in the management of the vessel and from the absolute warranty of seaworthiness. The convention was originally intended to apply to all bills of lading issued in any one of the contracting states.
Most maritime nations have ratified or adhered to the convention, and others, such as Greece and Indonesia, have enacted domestic legislation incorporating the rules agreed upon in Brussels. Some adhering nations, including Germany, Belgium, Turkey, and The Netherlands, have incorporated the rules of the convention into their commercial codes. Others, including the United States, Japan, Great Britain, and most members of the British Commonwealth, have enacted the rules in the form of special statutes known as Carriage of Goods by Sea Acts. Still others, including France, Italy, Egypt, and Switzerland, have given the convention itself the force of law and, in addition, have enacted domestic legislation modelled on the convention. The substantive standards governing bills of lading in maritime carriage have become largely uniform in most of the Western world.

**Air carriage**

The Warsaw Convention of 1929, as amended by the Hague Protocol of 1955, exemplifies still another legislative approach to problems raised by the carriage of goods. It constitutes a major step toward international unification of the rules governing carriage of goods by air. The convention applies to international carriage of persons, luggage, and goods for reward, as well as to gratuitous carriage performed by an air-transport undertaking. It applies whether the aircraft is owned by private persons or by public bodies; but, as to aircraft owned by a state directly, application of the convention may be excluded by appropriate reservation. According to the convention, there is an international carriage when the points of departure and destination are located within different contracting states or within the same contracting state but stopping has been agreed upon in another state, even if that state is not a member of the convention. The convention applies during the time the goods are in the charge of the carrier in any aircraft, airfield, or other facility. It does not apply when goods are carried by a land, sea, or inland-water carrier. Most nations, including the United States and Great Britain, are members of the convention. Only a few nations in South and Central America and in the Middle East have remained outside the convention. Although the convention applies to international carriage only, a great number of contracting states, including France and Great Britain, have made its rules applicable to domestic carriage of goods as well.

The air carrier is liable under the convention for delay and for the loss of or damage to the goods, provided that the occurrence that caused the prejudice took place during the carriage by
air. The carrier is relieved from liability if he proves that he had taken all the necessary measures to avoid the damage or that it was impossible for him to take such measures. Unlike carriers by land and by water, the air carrier is not bound to prove the actual cause of the damage and that the damage was not attributable to his fault. If the cause of the damage remains unknown, there is no recovery. Contractual provisions tending to relieve the carrier from liability are null and void, except those concerning limitation of liability for loss or damage attributed to the inherent vice of the goods. Provisions tending to increase the liability of the carrier, however, are valid.

The convention contains provisions as to the jurisdiction of courts in case action is brought against the carrier and establishes a two-year period of limitation for the bringing of actions. No provision is made for liability of the carrier in case of deviation, for a carrier’s lien, or for stoppage in transit, as this term is understood at common law. Accordingly, these matters are governed by the municipal law of the contracting states.

**Other international agreements**

The international movement of goods may be regulated in certain countries by international agreements other than the Berne Conventions, the Brussels Convention on Limitation of Liability (1923), or the Warsaw Convention of 1929. During the Cold War, the countries of eastern Europe established a uniform regime for the movement of goods by railway that was comparable to that of the Berne Conventions.

Other agreements in the field include the Geneva Convention of 1956 for the carriage of goods by road. The convention became operative in 1961, and its original membership included France, Austria, Italy, The Netherlands, and Yugoslavia. It applies to international carriage of goods by road for reward, with the exception of certain items, such as mail. Carriage is international if it involves two countries, one of which is a member of the convention. An original feature of the Geneva Convention is that it covers mixed-carrier transportation. It applies for the whole journey, even if the road vehicle has been carried, without being unloaded, by another means of transport, unless there is proof that the damage occurred in a portion of the journey.
5. Sum up:

- It is understood that the International Trade Law is an inclusive definition and also combination of various treaties law. International Trade Law promotes trade and development among nations.
- We have also discussed the convention on international sale of goods (CISG), its application, areas covered under the convention and also its criticism.
- We have also analyzed and studied the provisions on convention on International Commercial Contracts, 1994. Formation of contracts.

Development and importance of trade through carriage of goods in Air, Water and Land also explained elaborately in the above said discussion. It also explained various issues in relating to the carriage of goods in different modes.
Unit-II

International commercial Arbitration

Regulation of International Trade- Custom and Central Excise Clearance

• INTRODUCTION
• HISTORICAL BACKGROUND
• TYPES OF ARBITRATION
• CONCEPTS ASSOCIATED WITH ‘COMMERCIAL ARBITRATION’
• ROLE OF THE COURT
• CONVENTIONS & LAWS GOVERNING ARBITRATION IN INDIA
• ADVANTAGES AND DISADVANTAGES

INTRODUCTION

Settlement of disputes through reference to third party is a part of the volkgiest of India since time immemorial. The Indian epics and folklore abound with examples of consensual procedures for the settlement of disputes at the grassroots level. The third party settlement ethos cannot be imposed from above and they can thrive only in soils and climes that are conducive to that culture. We owe it to the British that for more than a century settlement of disputes through judicial institutions by way of adversarial system has struck roots in India and proved to be successful to a great extent. All these years settlement of disputes between the subjects has been the State monopoly and it has virtually elbowed out the pre-existing unofficial and non-formal settlement procedures. The Indian Parliament passed the Arbitration and Conciliation Act of 1996 mainly to implement the UNCITRAL Model Law on International Commercial Arbitration of 1985 and UNCITRAL Rules on Conciliation of 1980 and to improve upon the Arbitration Act of 1940 to make the arbitration law more in conformity with the changed global
investment and commercial climate. While the 1996 Act was not intended to replace the tried and tested judicial system with the non-formal private arbitration or the purely consensual conciliation mechanisms, the new law certainly ushered in an era of privatization of the hitherto State monopoly over dispute settlement procedures and institutions in conformity with the global rend of liberalization of economic policies, privatization of industry and globalization of markets. This shift offers both an opportunity and a challenge to the judiciary ---an opportunity to utilize the Alternative Dispute Resolution (ADR) methods to lessen the stress of docket explosion and a challenge to improve its age-old dilatory procedures and sustain the people’s faith in itself as an institution. Fortunately, the emergence of the ADR mechanisms is not viewed by the judiciary at the highest level in India as leading to any institutional conflict between the Courts and the ADR. On the other hand, the successive Chief Justices and the judges have commended and welcomed the new development as necessary and desirable. As was observed in Mediterranean and Eastern Export Co. Ltd. V. Fortress Fabrics Ltd. (1948) 2 All E R 186, “the day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators.” In fact the recent amendments to the Indian Civil Procedure Code (Section 89) clearly signal a readiness to integrate the ADR methods into the existing court system by authorizing the Courts to have recourse to arbitration and conciliation in appropriate cases. This amalgamation of judicial system with arbitration and conciliation processes is indeed a historic and momentous development.

HISTORICAL BACKGROUND:

In India, international commercial arbitration as a mode of resolution of disputes came to be adopted from medieval times when trade and commerce between traders in India and outside started growing. The law of arbitration in India relating to domestic arbitration was governed by the Indian Arbitration Act, 1940 and relating to international arbitration, was governed by the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 till the commencement of the Arbitration and Conciliation Ordinance, 1996. The current law of arbitration covers the
entire field of domestic and international arbitration. It has now been replaced by The Arbitration and Conciliation Act, 1996.

On August 14, 1995, the Supreme Court of India handed down a judgment which was the funeral oration on the 1940 Act\(^1\). It reiterated what was observed by it in M/s Guru Nanak Foundation v. M/s. Rattan Singh and Sons (1981)\(^2\):

*Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the Arbitration Act, 1940. However, the way in which proceedings is conducted and without exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical, accompanied by unending prolixity, at every stage providing a legal trap to the unwary.*

II. TYPES OF ARBITRATION

**Ad hoc arbitration**

Ad hoc arbitration is arbitration agreed to and arranged by the parties themselves without recourse to an Institution. The proceedings are conducted by the arbitrator(s) as per the agreement between the ‘parties’ or with concurrence of the parties. It can be domestic, international or foreign arbitration. In this arbitration, the parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, procedure for conducting the arbitration, etc. It is a proceeding that is not administered by others and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an

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administered proceeding. The absence of administrative fees alone makes this a popular choice.

When selecting arbitration provisions at the time of contract, the parties may, of course, choose not to proceed under the auspices of any arbitral institution and opt instead for an "ad hoc" arbitration but the parties can agree to designate an institutional provider as the appointing authority and the parties can at any time in the course of an ad hoc proceeding decide to engage an institutional provider to administer the arbitration. The ad hoc proceeding need not be entirely diverted from its institutional counterpart.

Parties wishing to include an ad hoc arbitration clause in the underlying contract between them, or seeking to arrive at terms of arbitration after a dispute has arisen, have the option of negotiating a complete set of rules, establishing procedures which fit precisely in their particular needs. Experience has shown that this approach can require considerable time, attention and expense without providing assurance that the terms agreed will address all eventualities.

Properly structured, ad hoc arbitration should be less expensive than institutional arbitration and, thus, better suit smaller claims and less affluent parties. Ad hoc arbitration places more of a burden on the arbitrator(s), and to a lesser extent upon the parties, to organize and administer the arbitration in an effective manner. A distinct disadvantage of the ad hoc approach is that its effectiveness may be dependent upon the willingness of the parties to agree upon procedures at a time when they are already in dispute. Failure of one or both of the parties to cooperate in facilitating the arbitration can result in an undue expenditure of time in resolving the issues. The savings contemplated by use of the ad hoc arbitral process may be somewhat illusory if delays precipitated by a recalcitrant party necessitate repeated recourse to the courts in the course of the proceedings.

**Institutional arbitration**

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these
institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply.

In institutional arbitration, the first issue arising for agreement of the parties is choice of the institution, appropriate for the resolution of disputes, arising out of their contract. Whilst selecting the institution, there are following factors which should to be considered:

- Nature & commercial value of the dispute,
- Rules of the institution, as these rules of various institutions differ,
- Past record and reputation of the institution,
- The institutional rules which should be in tune with the latest developments in international commercial arbitration practice.

There are many institutional arbitration administrators, some of which are associated with a trade association and many of which are independent. The London Court of International Arbitration (LCIA), The Chartered Institute of Arbitrators (UK), The National Arbitration Forum (USA) and The International Court of Arbitration (Paris) are four among the many other institutions.

**III. Concepts associated with ‘commercial arbitration’**

1. **Arbitration:**

   The term ‘arbitration’ as defined by the Act means any arbitration whether or not administered by permanent arbitral.

   Since this definition does not elaborate on the concept of arbitration, it would be useful to refer to *Halsbury’s Law of England* which defines arbitration as: ‘the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction’. ³

   **‘Arbitration’ under the UNCITRAL rules:**

A reference in a dispute settlement clause to the UNCITRAL Arbitration Rules or (in a frequent, but inaccurate formulation) to "UNCITRAL arbitration" or any other provision to the same effect means that the parties agree that an existing or a future dispute should be settled in arbitral proceedings conducted in accordance with the UNCITRAL Arbitration Rules.

Although UNCITRAL and its Secretariat have prepared legislative and contractual provisions and rules relating to international commercial arbitration and conciliation, it is not within UNCITRAL's mandate, as set out by the General Assembly, to become involved in individual cases. UNCITRAL and its Secretariat do not act as an arbitral tribunal, administer arbitration proceedings, or otherwise perform any function related to individual arbitration proceedings, or any other system of public or private dispute settlement.

2. Arbitrators and their appointment:

The parties are free to determine the number of arbitrators, provided that such numbers shall not be an even number. Feeling the determination referred to by the parties, the Arbitral Tribunal shall consist of a sole Arbitrator. If the procedure for appointment of Arbitrator or Arbitrators is not agreed, in arbitration with three arbitrators each party shall appoint an arbitrator and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding Arbitrator.

In case a party fails to appoint his Arbitrator within 30 days from the receipt of the request to do so from the other party or the two appointed Arbitrators fail to agree on the third Arbitrator within 30 days from the date of their appointment, the appointment shall be made upon request of a party, by the Chief Justice or any person or institution designated by him.

In arbitration with a sole Arbitrator if the party fails to agree on the Arbitrator within 30 days from receipt of request by one party from the other party to so agree, the appointment shall be made upon request of the party by the Chief Justice or any person or institution designated by him. This applies in cases where the agreement on the
appointment procedure does not provide other means for securing their appointments. The appointment made by the Chief Justice is final.

3. **Arbitration Agreement:**

Section 7 of Arbitration & Conciliation Act, 1996 says that it means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in the form of a clause in a contract or in the form of a separate agreement and should be in writing. Agreement shall be considered in writing if it is contained in a document signed by the parties or an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

In theory, arbitration is a consensual process; a party cannot be forced to arbitrate a dispute unless he agrees to do so. In practice, however, many fine-print arbitration agreements are inserted in situations in which consumers and employees have no bargaining power. Moreover, arbitration clauses are frequently placed within sealed users' manuals within products, within lengthy click-through agreements on websites, and in other contexts in which meaningful consent is not realistic. Such agreements are generally divided into two types:

- agreements which provide that, if a dispute should arise, it will be resolved by arbitration. These will generally be normal contracts, but they contain an arbitration clause
- agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration (sometimes called a "submission agreement")

The former is the far more prevalent type of arbitration agreement. Sometimes, legal significance attaches to the type of arbitration agreement. For example, in certain
Commonwealth countries, it is possible to provide that each party should bear their own costs in a conventional arbitration clause, but not in a submission agreement.

Agreements to refer disputes to arbitration generally have a special status in the eyes of the law. For example, in disputes on a contract, a common defence is to plead the contract is void and thus any claim based upon it fails. It follows that if a party successfully claims that a contract is void, then each clause contained within the contract, including the arbitration clause, would be void. However, in most countries, the courts have accepted that:

1. a contract can only be declared void by a court or other tribunal; and
2. if the contract (valid or otherwise) contains an arbitration clause, then the proper forum to determine whether the contract is void or not, is the arbitration tribunal.

4. Arbitration award:

An arbitration award (or arbitral award) is a determination on the merits by an arbitration tribunal in arbitration, and is analogous to a judgment in a court of law.

Section 2 (c) purports to define an ‘arbitral award’ by including in it ‘an interim award’. From this definition, no denotation of the term ‘award’ or ‘interim award’ is discernible.

Mustill and Boyd have defined ‘award’ as a document embodying a decision and have suggested two essential characteristics of such an ‘award’:

1. An award is the discharge, either in whole or part, of the mandate entrusted to the tribunal by the parties; namely to decide the dispute which the parties have referred to them. That is, the award is concerned to resolve the substance of the dispute.
2. Since the parties have, by their agreement to arbitrate, promised to be bound by the arbitrators’ decision of their dispute, they are for all purposes bound by it between themselves, although others are not so bound.4

5. Seat of the arbitration:

Most legal systems recognise the concept of a "seat" of the arbitration, which is a geographical and legal jurisdiction to which the arbitration is tied. The seat will normally determine the procedural rules (lex arbitri) which the arbitration follows, and the courts which exercise jurisdiction over the seat will have a supervisory role over the conduct of the arbitration.

Parties to the arbitration are free to choose the seat of arbitration and often do so in practice. If they do not, the arbitral tribunal will do it for them. Whereas it is possible to detach procedural law from the seat of arbitration (e.g. seat in Switzerland, English procedural law) this creates confusion as it subjects the arbitration to two controlling and possibly conflicting laws. The procedural law of arbitration, normally determined by the seat, ought to be distinguished from the procedure that the arbitration panel will follow. The latter refers to daily operation of the arbitration and is normally determined either by the institution in question (if arbitration is institutional, e.g. ICC Rules) or by reference to a ready-made procedure (such as the UNCITRAL Rules).

The seat of arbitration might not be the same as the place where proceedings are actually happening. Thus, for instance, ICC arbitration may have its seat in London (and therefore be governed by the English lex arbitri and ICC procedural rules) and most sessions may take place outside the UK.

4 Mustill and Boyd, Commercial Arbitration, Companion volume to the second edn, 2001, pp 106-08, Caption- ‘What is an award?’.
6. Subject matter of arbitration:

Any commercial matter including an action in tort if it arises out of or relates to a contract can be referred to arbitration. However, public policy would not permit matrimonial matters, criminal proceedings, insolvency matters anti-competition matters or commercial court matters to be referred to arbitration. Employment contracts also cannot be referred to arbitration but director - company disputes are arbitrable (as there is no master servant relationship here). Generally, matters covered by statutory reliefs through statutory tribunals would be non-arbitrable.

IV. ROLE OF THE COURT:

One of the fundamental features of the Act is that the role of the court has been minimized. Accordingly, it is provided that any matter before a judicial authority containing an arbitration agreement shall be referred to arbitration. Further, no judicial authority shall interfere, except as provided for under the Act (Section 5).

In relation to arbitration proceedings, parties can approach the Court only for two purposes: (a) for any interim measure of protection or injunction or for any appointment of receiver etc.; or (b) for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator. In such an event, in the case of domestic arbitration, the Chief Justice of a High Court may appoint an arbitrator, and in the case of international commercial arbitration, the Chief Justice of the Supreme Court of India may carry out the appointment. A court of law can also be approached if there is any controversy as to whether an arbitrator has been unable to perform his functions or has failed to act without undue delay or there is a dispute on the same. In such an event, the court may decide to terminate the mandate of the arbitrator and appoint a substitute arbitrator.

Setting aside of awards:
The grounds for setting aside an award rendered in India (in a domestic or international arbitration) are provided for under Section 34 of the Act. These are materially the same as in Article 34 of the Model Law for challenging an enforcement application. An award can be set aside if:

a. a party was under some incapacity; or  
b. the arbitration agreement was not valid under the governing law; or  
c. a party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or  
d. the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or  
e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or  
f. the subject matter of the dispute is not capable of settlement by arbitration; or  
g. the arbitral award is in conflict with the public policy of India.

A challenge to an award is to be made within three months from the date of receipt of the same. The courts may, however, condone a delay of maximum 30 days on evidence of sufficient cause. Subject to any challenge to an award, the same is final and binding on the parties and enforceable as a decree of the Court.

Considerable controversy has been generated as to whether an award is liable to be challenged under Section 34 on merits. The earlier view, as expounded by the Supreme Court in *Renu Sagar Power Co. Ltd. v. General Electric Co.* was that an award could be set aside if it is contrary to the public policy of India or the interests of India or to justice or morality – but not on the grounds that it is based on an error of law or fact. The Supreme Court in that case was faced with the issue to determine the scope of public policy in relation to proceedings for enforcement of a foreign award under the Foreign Awards (Recognition and Enforcement) Act, 1961. The Court also held that in proceedings for enforcement of a foreign award the scope of enquiry before the court in
which the award is sought to be enforced would not entitle a party to the said proceedings to impeach the award on merits.

However, in a later Supreme Court of India decision in *Oil and Natural Gas Corporation vs. Saw Pipe*\(^2\) the Court added an additional ground of "patent illegality", thereby considerably widening the scope of judicial review on the merits of the decision. In *Saw Pipes* case the court accepted that the scheme of Section 34 which dealt with setting aside the domestic arbitral award and Section 48 which dealt with enforcement of foreign award were not identical. The court also accepted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in domestic arbitration the only recourse is to Section 34. The Supreme Court observed:

"But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside.

.......... Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'."

The court in *Saw Pipes* case although adopted the wider meaning to the term 'public policy' but limited its application to domestic awards alone. The *Saw Pipes* case has generated some controversy, and it remains to be seen if it will stand the test of time.
V. CONVENTIONS & LAWS GOVERNING ARBITRATION IN INDIA

India is a party to the following conventions:

- the Geneva Protocol on Arbitration Clauses of 1923
- the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and

Further,


VI. ADVANTAGES AND DISADVANTAGES

Parties often seek to resolve their disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

- when the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed (as one cannot "choose the judge" in litigation)
- arbitration is often faster than litigation in court
- arbitration can be cheaper and more flexible for businesses
- arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
- because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court judgments
- in most legal systems, there are very limited avenues for appeal of an arbitral award
However, some of the disadvantages of arbitration can be that:

- arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees sometimes do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job,
- if the arbitration is mandatory and binding, the parties waive their rights to access the courts and have a judge or jury decide the case,
- in some arbitration agreements, the parties are required to pay for the arbitrators, which adds an additional layer of legal cost that can be prohibitive, especially in small consumer disputes,
- if the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee,
- there are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned,
- although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays,
- in some legal systems, arbitral awards have fewer enforcement remedies than judgments; although in the United States, arbitration awards are enforced in the same manner as court judgments and have the same effect
- rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law.
- unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award,
- although grounds for attacking an arbitration award in court are limited, efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the perceived economic incentive to arbitrate the dispute in the first place,
CASE LAW:

Importance of Arbitration and Conciliation

General Provisions (sections 2-6) - Definitions, waiver of right of object, extent of judicial intervention in arbitration matters

Arbitration Agreement (sections 7-9) - power to refer parties to arbitration where there is an arbitration agreement; interim measures, etc. by court:

5. Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. AIR 1999 SC 2354

Recourse against Arbitral award; and validity of Arbitral ward (section 34); Finality and enforcement of arbitral awards (sections 35-36); Appeals (section 37)

4. New India Civil Erectors (P) Ltd.. v. ONGC, (1997) 11 SCC 75 181
5. Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., 2003 (4) SCALE 92

Background to arbitration legislation:

The Indian law of arbitration is contained in the *Arbitration and Conciliation Act 1996* (Act). The Act is based on the 1985 UNICITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976. The Statement of Objects and Reasons of the Act recognises that India's economic reforms will become effective only if the nation's dispute resolution provisions are in tune with international
regime. The Statement of Objects and Reasons set forth the main objectives of the Act as follows:

i. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

ii. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

iii. to provide that the arbitral tribunal gives reasons for its arbitral award;

iv. to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

v. to minimise the supervisory role of courts in the arbitral process;

vi. to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

vii. to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

viii. to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

ix. to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

**Scheme of the Act:**

The Act is a composite piece of legislation. It provides for domestic arbitration; international commercial arbitration; enforcement of foreign award and conciliation (the latter being based on the UNCITRAL Conciliation Rules of 1980).

The more significant provisions of the Act are to be found in Part I and Part II thereof. Part I contains the provisions for domestic and international commercial arbitration in
India. All arbitration conducted in India would be governed by Part I, irrespective of the nationalities of the parties. Part II provides for enforcement of foreign awards.

**Part I** is more comprehensive and contains extensive provisions based on the Model Law. It provides, *inter alia*, for arbitrability of disputes; non-intervention by courts; composition of the arbitral tribunal; jurisdiction of arbitral tribunal; conduct of the arbitration proceedings; recourse against arbitral awards and enforcement. **Part II** on the other hand, is largely restricted to enforcement of foreign awards governed by the New York Convention or the Geneva Convention. Part II is thus, (by its very nature) not a complete code. This led to judicial innovation by the Supreme Court in the case of *Bhatia International v. Bulk Trading*. Here the Indian courts jurisdiction was invoked by a party seeking interim measures of protection in relation to an arbitration under the ICC Rules to be conducted in Paris. The provision for interim measure (section 9) was to be found in Part I alone (which applies only to domestic arbitration). Hence the Court was faced with a situation that there was no *proprio vigore* legal provision under which it could grant interim measure of protection. Creatively interpreting the Act, the Supreme Court held that the "general provisions" of Part I would apply also to offshore arbitrations, unless the parties expressly or impliedly exclude applicability of the same. Hence by judicial innovation, the Supreme Court extended applicability of the general provisions of Part I to off-shore arbitrations as well.

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of India?

No particular form is required by law. The agreement however, must be in writing. The arbitration agreement shall be deemed to be in writing if it is contained in an exchange of letters or other means of communication which provide a record of the agreement. Further, the agreement need not be signed and an unsigned agreement affirmed by the parties conduct would be valid as an arbitration agreement. An arbitration agreement would also be considered to be in writing if there is an exchange of a statement of claim
and defense in which the existence of the agreement is alleged by one party and not denied by the other. [Section 7 of the Arbitration and Conciliation Act, 1996 - (Act).]

1.2 What other elements ought to be incorporated in an arbitration agreement?

From an Indian point of view the most significant element would be the seat of arbitration for that would determine as to which part of the Act would apply to the proceedings. Domestic arbitrations are governed by Part I of the Act, while off-shore arbitrations are governed by Part II of the Act. In the controversial and currently under review judgment Venture Global Engineering v. Satyam Computer Services Ltd⁵, the Supreme Court has held that Part I of the Act would apply to foreign arbitrations also unless there is specific or implied exclusion of its applicability. Hence in the case of foreign arbitrations, it is advisable to expressly exclude the applicability of Part I of the Act to the arbitration. Otherwise (as per current law) a foreign award can also be challenged in India, whether or not it is sought to be enforced here.

Further, as is well known, the place of arbitration would largely determine the procedural law of the arbitration.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Section 8 of the Act states that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement, shall refer the parties to arbitration - the only condition being that the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meantime, the arbitration proceedings may commence and continue and an award can be rendered. The Supreme Court of India has held in Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.⁶ that once the conditions of the Sections are satisfied, the judicial authority is "statutorily mandated" to refer the matter to arbitration. Section 5 supplements this and provides, through a non-obstante clause, that in matters governed by the Act, no judicial

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⁵ (2008) 4 SCC 190
⁶ (2006) 7 SCC 275
authority shall interfere except where so provided for. Thus, a judicial authority seized of a matter which contains an arbitration agreement, must refer the parties to arbitration and it is up to the arbitral tribunal to determine any issue as to its jurisdiction including objections in relation to the existence or validity of the arbitration agreement. However, this provision (Section 8) applies only to arbitrations where the seat is in India. Agreements for off-shore arbitrations are governed by Section 45 of the Act which is some what differently worded. Here it is provided that a judicial authority, when seized of any matter where there is an arbitration agreement, shall refer the parties to arbitration - "unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The latter part is borrowed from Article 8 of the Model Law. Thus, India has retained court intervention (to the extent permitted by the Model Law) only in relation to foreign arbitrations. An issue arose in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.\(^7\), as to whether a ruling by court (in relation to off-shore arbitrations) on the validity or otherwise of an arbitration agreement is to be on a \textit{prima facie} basis or is it to be a final decision. If it were to be a final decision, it would involve a full dress trial and consequently years and years of judicial proceedings which would frustrate the arbitration agreement. Keeping this and the object of the Act in mind, the Supreme Court by a 2:1 decision held that a challenge to the arbitration agreement under Section 45 on the ground that it is "null and void, inoperative or incapable of being performed" is to be determined on a \textit{prima facie} basis.

At the same time an issue would remain as to what is to be done in cases where the court does in fact come to a conclusion that the arbitral agreement is null and void, inoperative or incapable of being performed. A decision to this effect is appealable under Section 50 of the Act. Thus, a ruling on a \textit{prima facie} view alone would not be satisfactory. One of the judges addressed this and held that if the court were to arrive at a \textit{prima facie} conclusion that the agreement is in fact null and void, it would have to go ahead and hold a full trial and enter a final verdict (in order that it can be appealed if need be). In such situation therefore, a foreign arbitration may well come to a halt pending final decision.

\(^7\) (2005) 7 SCC 234
from an Indian court, but otherwise Section 45 proceedings would not have any significant impeding effect on progress of a foreign arbitration.

1.4 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

India has a composite piece of legislation governing both domestic and international arbitration. The Act has two main parts. **Part I** deals with any arbitration (domestic as well as international) so long as the seat of arbitration is in India. **Part II** deals mostly with enforcement of foreign awards.

"International commercial arbitration" is defined as an arbitration where at least one of the parties is a national or habitual resident in any country other than India or a body corporate which is incorporated in any country other than India or a company or association of an individual whose "central management and control" is exercised in any country other than India (Section 2(f) of the Act). However the Supreme Court of India in *TDM Infrastructure Private Limited v. UE Development India Private Limited*,\(^8\) has held that if both parties are incorporated in India, then even if the control and management is from outside India, the arbitration would be "domestic" and not "international". The difference between domestic and international arbitration (conducted in India) is minimal and discussed below.

The first difference is that if there is a failure of the parties' envisaged mechanism for constitution of the arbitral tribunal, the appointment shall be made, in the case of a domestic arbitration by the Chief Justice of the relevant High Court and in the case of international arbitration by the Chief Justice of the Supreme Court of India.

The second difference is in relation to governing law. In international commercial arbitration the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute and failing any such designation, the rules of law the tribunal considers appropriate given all the

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\(^8\) 2008 (2) Arb LR 439 (SC)
circumstances. In domestic arbitration (arbitration between Indian parties) however, the tribunal can only apply the substantive law for the time being in force in India.

2. Jurisdiction

2.1 Are there any subject matters that may not be referred to arbitration under the governing law of India? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The Act states that the relationship between the parties need not be contractual. Hence, disputes in tort (relating to the contract) can also be referred to arbitration. However, matters of public interest such as: dissolution and winding up of incorporated companies; family relationships; workers rights; anti-trust matters; rent control laws etc. may not be arbitrable.

The general approach of the court to determine whether or not a dispute is arbitrable is to see whether the parties can make the settlement thereof a subject matter of private contract. This was indicated by the Supreme Court in the case of Olympus Superstructures v. Meena Khetan, (1999) 5 SCC 651, where the court relied on Halsbury's Laws of England stating that the differences or disputes which may be referred must consist of "....... a justiciable issue, triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction".9

2.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

An arbitrator is permitted to rule on his or her own jurisdiction. This is provided for in Section 16 of the Act which corresponds to Article 16 of the Model Law. (See question 2.3 above.)

2.3 Under what, if any, circumstances does the national law of India allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

This is not permitted. Indeed the Supreme Court of India in *Sukanya Holdings v. Jayesh Pandya*, (2003) 5 SCC 531, refused to stay a court action when some of the parties had an arbitration agreement, on the ground that the parties to the arbitration agreement and to the court action were not the same.

### 3. Choice of Law Rules

#### 3.1 How is the law applicable to the substance of a dispute determined?

If the parties have an Indian nationality (and in the case of companies if they are incorporated in India) the tribunal can only apply Indian law to the substance of the dispute. In other cases, the parties may either make an express choice of law or the proper law may be inferred from the terms of the contract and surrounding circumstances. It is the law with which the contract is most closely connected with. Factors such as the nationality of the parties, the place of performance of the contract, place of entering into of the contract, place of payment under the contract etc. can be looked at to ascertain the intention of the parties.

The proper law of the arbitration agreement is normally the same as the proper law of the contract. Where, however, there is no express choice of the law governing the contract as a whole, of the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But this is only a rebuttable presumption. (*NTPC v. Singer Co.* (1992) 3 SCC 551.)

#### 3.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In respect of procedural matters relating to the arbitration proceedings the laws of the seat of jurisdiction shall prevail. The Court may, invoking the principle of comity of nations, apply the mandatory laws of another jurisdiction if the contract is in breach of that law.
3.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The proper law of arbitration (i.e., the substantive law governing arbitration) determines the formation, and legality of arbitration agreements. Please see question 4.1.

4. Selection of Arbitral Tribunal

4.1 Are there any limits to the parties' autonomy to select arbitrators?

The law does not impose any limits on the parties' autonomy to select arbitrators. An arbitrator need not have any special qualification or training or be a member of the bar. Persons, known to or in the employment of one or more of the parties may be appointed so long as full disclosure is made (and not objected to).

4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

There is a default provision provided for vide Section 11 of the Act. The Act's default provisions governing the appointment of arbitrators are triggered if:

- The parties cannot agree on the appointment of an arbitrator within 30 days of receipt of a request to do so.
- Two appointed arbitrators fail to agree on the third arbitrator within 30 days of the date of their appointment.
- The arbitration is to be heard by one arbitrator and the parties fail to agree on that arbitrator within 30 days of receipt of a request to agree on the appointment.
- The parties' mechanism for appointment of an arbitrator fails.

If the default is in relation to an international commercial arbitration, the appointment shall be made by the Chief Justice of India. In other cases, the appointment shall be made by the Chief Justice of the High Court having jurisdiction in relation to the matter.

4.3 Can a court intervene in the selection of arbitrators? If so, how?
After the arbitral tribunal is constituted the jurisdiction of the court can be invoked only if an arbitrator has become *de jure* or *de facto* unable to perform his functions or fails to act without undue delay. If there is any controversy as to these circumstances a party may apply to court for a decision on the same.

5. Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in India? If so, do those laws or rules apply to all arbitral proceedings sited in India?

The arbitrators are masters of their own procedure and subject to the parties' agreement, may conduct the proceedings "in the manner they consider appropriate" (Section 19). This power includes - "the power to determine the admissibility, relevance, materiality and weight of any evidence" (Section 19). The only restrain on them is that they shall treat the parties with equality and each party shall be given a full opportunity to present its case, which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure, 1908 nor the Indian Evidence Act, 1872 (Evidence Act) applies to arbitrations. Unless the parties agree otherwise, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for arguments or whether to conduct the proceedings on the basis of documents or other material alone. However, the arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held).

The arbitrators have power to proceed *ex parte* where the respondent, without sufficient cause fails to communicate his statement of defense or appear for an oral hearing or produce evidence. However, such failure shall not be treated as an admission of the allegations and the tribunal shall determine the matter on evidence, if any, before it. If the claimant fails to communicate his statement of claim, the tribunal shall be entitled to terminate the proceedings.

5.2 In arbitration proceedings conducted in India, are there any particular procedural steps that are required by law?
See question 6.1 above. The other procedural steps are mostly as envisaged under the Model law and UNCITRAL Rules 1976.

5.3 What powers and duties does the national law of India impose upon arbitrators?

Apart from the provisions envisaged under the Act, the arbitrators are bound by the fundamental principles of natural justice and public policy in conducting the arbitration proceedings.

5.4 Do the national courts have jurisdiction to deal with procedural issues arising during arbitration?

No, the courts have no such jurisdiction. The parties can with the approval of the arbitral tribunal or otherwise, seek the court's assistance in taking evidence. The court may issue summons to witnesses or order that evidence be provided directly to the arbitral tribunal (Section 27).

6. Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

This is provided for vide Section 17 of the Act (corresponding to Article 17 of Model Law). An arbitral tribunal may order interim measures of protection as may be considered necessary in respect of the subject matter of the dispute. The order is appealable and not enforceable without recourse to a separate court proceeding.

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Section 9 of the Act enables a party to approach a competent court before or during the arbitral proceedings or even after the award is pronounced, but before it is enforced for
any interim relief. The Model Law in fact has a more restrictive provision - it does not contemplate recourse to a court for an interim measure after the award is pronounced (Article 9).

The Supreme Court in the case of *Sundaram Finance v. NEPC*, (1999) 2 SCC 479, held that if a court is approached before the arbitral proceedings are commenced, the applicant must issue a notice to the opposite party invoking the arbitration clause or alternatively the court would have to be first satisfied that the applicant shall indeed take effective steps to commence the arbitral proceedings without delay. Further, the Court would have to be satisfied that there exists a valid arbitration agreement between the parties. The court has power to grant interim relief even in proceedings outside India where parties have neither expressly nor impliedly excluded the applicability of section 9 of the Act (*Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105).

This provision is independent of the arbitrator's power to grant interim relief (see question 7.1 above).

6.3 **In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?**

Indian courts have very wide powers to grant interim relief. Usually a three-fold approach is followed: (i) existence of *prima facie* case in favour of the applicant; (ii) irreparable hardship to the applicant if the interim relief is not granted; and (iii) balance of convenience.

Indian courts are perceived to be liberal in granting interim relief and rarely put an applicant to terms as to security or costs (should they ultimately not succeed in their action).

6.4 **Does the national law allow for the national court and/or arbitral tribunal to order security for costs?**
Yes. Section 9 and section 17 of the 1996 Act envisages the power of the national court and/or the arbitral tribunal respectively, by way of an interim measure to order security for costs.

7. Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in India?

Section 19 of the Act states that the arbitral tribunal shall not be bound by the provisions of the Evidence Act. However, decided cases have held that certain provisions of the Evidence Act which are founded on fundamental principles of justice and fair play shall apply to arbitrations.


8. Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

An arbitral award must be in writing and signed by the arbitrators (or a majority of them) and state the date and place of arbitration. It shall state reasons upon which it is based, unless the parties have agreed otherwise.

9. Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

A challenge to an arbitration award would lie under Section 34 of the Act corresponding to Article 34 of the Model law. To paraphrase, an award can be set aside if:

a. the party making the application was under some incapacity;

b. the arbitration agreement was not valid under the law agreed to by the parties (or applicable law);
c. the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
d. the award deals with a dispute not contemplated by or falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions to arbitration;
e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
f. the subject matter of the dispute was not capable of settlement by arbitration; or
g. the arbitral award is in conflict with the public policy of India.

In addition to the above grounds, the Supreme Court in *ONGC v. Saw Pipes*, (2003) 5 SCC 705, has held that a domestic award can be set aside if it is patently erroneous i.e., if the award is contrary to the terms of the contract entered into between the parties or the substantive law.

**9.2 What is the procedure for appealing an arbitral award in India?**

An application for setting aside a domestic award can be filed under section 34 of the Act. Such application must be made within three months from the date of receiving of the award. The court if satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months may condone delay of a further period of 30 days but not thereafter. No such similar application for setting aside a foreign award is contemplated under Part II of the Act. It is only when an application for enforcement of a foreign award is filed, can objections be taken against the same on the New York Convention Grounds. However a recent controversial judgment in the case of *Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190 (which is currently under review) has held that it is permissible to set aside a foreign award also even though a party may not seek to enforce it in India.
Application in both cases must be made before the Court having jurisdiction and this would, *inter alia*, depend on the place of residence or business of the defendant or the place where the assets of the defendant are located.

10 Enforcement of an Award

10.1 Has India signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. The relevant legislation is the Arbitration and Conciliation Act, 1996. India has entered the 'reciprocity' and 'commercial' reservations under Article I of the New York Convention. As a result the Central Government of India must further notify the foreign territory as a territory to which the New York Convention applies in order for the foreign award to be enforced. Till date 43 countries have been notified and only award rendered in these territories would be enforceable in India.

However, an award made in Ukraine after the break up of the USSR was held to be an enforceable foreign award even in absence of a separate notification recognising the new political entity as a reciprocating territory (*Trans Ocean Shipping Agency (P) Ltd. v. Black Sea Shipping*, (1998) 2 SCC 281).

10.2 What is the approach of the national courts in India towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The general approach is to support the arbitral award - see *Bijendra Nath v. Mayank*, (1994) 6 SCC 117. The Supreme Court has held that, "the court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal".

In case of a foreign award, a party seeking enforcement would have to file an application before the court where the defendant resides or has assets along with the original award.
or a copy duly authenticated, original arbitration agreement or a duly certified copy and such evidence as may be necessary to prove that the award is a foreign award (Section 47(1)).

11. Confidentiality

11.1 Are arbitral proceedings sited in India confidential? What, if any, law governs confidentiality?

The law does not require the arbitral proceedings to be confidential. Confidentiality would thus, have to be based on general principles of Common Law or the parties’ agreement.

12 General

12.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in India? Are certain disputes commonly being referred to arbitration?

Civil courts in India are typically bogged down with delays. Arbitrations are thus becoming increasingly popular - nay necessary. Traditionally, they are more common in shipping and construction.

The Indian Council of Arbitration (promoted by the Central Government) is the leading arbitration institution in India but a good part of arbitration continues to be ad hoc. The London Court of International Arbitration has recently set up an institutional arbitration forum in India. The Delhi High Court is contemplating setting up of an arbitration centre with the aim to encourage arbitration and cut down the work load of the Courts. It has already set up a designated arbitration court which would deal with all arbitration matters. The Supreme Court in *Union of India v. Singh Builders Syndicate*, 2009 (2) Arb. LR 1 (SC) acknowledged that cost of arbitration in India can be high if the Arbitral Tribunal consists of retired Judge/s and viewed institutional arbitration as a solution to bring down the arbitration cost.
Generally retired Judges of the High Court or Supreme Court are nominated as arbitrators. India does not have a distinct arbitration bar. Thus, arbitrations tend to carry the baggage of litigation practices. There is a great emphasis on oral hearings and a typical arbitration ends up with a large number of hearings even for procedural directions and interlocutory matters.

Regulation of International Trade-Custom and Central Excise Clearance

In this part we will be analyzing the provisions of Customs and central excise act in relation to international trade regulation.

Customs Act, 1962 (52 of 1962)

CHAPTER III

APPOINTMENT OF CUSTOMS PORTS, AIRPORTS, WAREHOUSING STATIONS, ETC.

Section.7 Appointment of customs ports, airports, etc. - [(1)] The [Board] may, by notification in the Official Gazette, appoint -

(a) the ports and airports which alone shall be customs ports or customs airports for the unloading of imported goods and the loading of export goods or any class of such goods;

[(aa) the places which alone shall be inland container depots for the unloading of imported goods and the loading of export goods or any class of such goods:]

(b) the places which alone shall be land customs stations for the clearance of goods imported or to be exported by land or inland water or any class of such goods;

(c) the routes by which alone goods or any class of goods specified in the notification may pass by land or inland water into or out of India, or to or from any land customs station from or to any land frontier;

(d) the ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India.
[(2) Every notification issued under this section and in force immediately before the commencement of the Finance Act, 2003 shall, on such commencement, be deemed to have been issued under the provisions of this section as amended by section 105 of the Finance Act, 2003 and shall continue to have the same force and effect after such commencement until it is amended, rescinded or superseded under the provisions of this section.]

Section 8 Power to approve landing places and specify limits of customs area. – The [Commissioner of Customs] may, —

(a) approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods;

(b) specify the limits of any customs area.

Section 9 Power to declare places to be warehousing stations. – The Board may, by notification in the Official Gazette, declare places to be warehousing stations at which alone public warehouses may be appointed and private warehouses may be licensed.

Section 10. Appointment of boarding stations. – The [Commissioner of Customs] may, by notification in the Official Gazette, appoint, in or near any customs port, a boarding station for the purpose of boarding of, or disembarkation from, vessels by officers of customs.

CHAPTER IVA

DETECTION OF ILLEGALLY IMPORTED GOODS AND PREVENTION OF THE DISPOSAL THEREOF

Sec.11 A: Definitions. – In this Chapter, unless the context otherwise requires,—

(a) “illegal import” means the import of any goods in contravention of the provisions of this Act or any other law for the time being in force;

(b) “intimated place” means a place intimated under sub-section (1), sub-section (2) or sub-section (3), as the case may be, of section 11C;

(c) “notified date”, in relation to goods of any description, means the date on which the notification in relation to such goods is issued under section 11B;

(d) “notified goods” means goods specified in the notification issued under section 11B.

Sec 11B. Power of Central Government to notify goods. – If, having regard to the magnitude of the illegal import of goods of any class or description, the Central
Government is satisfied that it is expedient in the public interest to take special measures for the purpose of checking the illegal import, circulation or disposal of such goods, or facilitating the detection of such goods, it may, by notification in the Official Gazette, specify goods of such class or description.

Sec 11 C Persons possessing notified goods to intimate the place of storage, etc. – (1) Every person who owns, possesses or controls, on the notified date, any notified goods, shall, within seven days from that date, deliver to the proper officer a statement (in such form, in such manner and containing such particulars as may be specified by rules made in this behalf) in relation to the notified goods owned, possessed or controlled by him and the place where such goods are kept or stored.

(2) Every person who acquires, after the notified date, any notified goods, shall, before making such acquisition, deliver to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored after such acquisition and shall, immediately on such acquisition, deliver to the proper officer a statement (in such form, in such manner and containing such particulars as may be specified by rules made in this behalf) in relation to the notified goods acquired by him:

Provided that a person who has delivered a statement, whether under sub-section (1) or sub-section (2), in relation to any notified goods, owned, possessed, controlled or acquired by him, shall not be required to deliver any further statement in relation to any notified goods acquired by him, after the date of delivery of the said statement, so long as the notified goods so acquired are kept or stored at the intimated place.

(3) If any person intends to shift any notified goods to any place other than the intimated place, he shall, before taking out such goods from the intimated place, deliver to the proper officer an intimation containing the particulars of the place to which such goods are proposed to be shifted.

(4) No person shall, after the expiry of seven days from the notified date, keep or store any notified goods at any place other than the intimated place.

(5) Where any notified goods have been sold or transferred, such goods shall not be taken from one place to another unless they are accompanied by the voucher referred to in section 11F.

(6) No notified goods (other than those which have been sold or transferred) shall be taken from one place to another unless they are accompanied by a transport voucher (in such form and containing such particulars as may be specified by rules made in this behalf) prepared by the persons owning, possessing or controlling such goods.

Sec.11D. Precautions to be taken by persons acquiring notified goods. – No person shall acquire (except by gift or succession, from any other individual in India), after the notified date, any notified goods -
(i) unless such goods are accompanied by, -

(a) the voucher referred to in section 11F or the memorandum referred to in sub-section (2) of section 11G, as the case may be, or

(b) in the case of a person who has himself imported any goods, any evidence showing clearance of such goods by the Customs Authorities; and

(ii) unless he has taken, before acquiring such goods from a person other than a dealer having a fixed place of business, such reasonable steps as may be specified by rules made in this behalf, to ensure that the goods so acquired by him are not goods which have been illegally imported.

Sec.11E Persons possessing notified goods to maintain accounts. – (1) Every person who, on or after the notified date, owns, possesses, controls or acquires any notified goods shall maintain (in such form and in such manner as may be specified by rules made in this behalf) a true and complete account of such goods and shall, as often as he acquires or parts with any notified goods, make an entry in the said account in relation to such acquisition or parting with, and shall also state therein the particulars of the person from whom such goods have been acquired or in whose favour such goods have been parted with, as the case may be, and such account shall be kept, along with the goods, at the place of storage of the notified goods to which such accounts relate:

Provided that it shall not be necessary to maintain separately accounts in the form and manner specified by rules made in this behalf in the case of a person who is already maintaining accounts which contain the particulars specified by the said rules.

(2) Every person who owns, possesses or controls any notified goods and who uses any such goods for the manufacture of any other goods, shall maintain (in such form, in such manner and containing such particulars as may be specified by rules made in this behalf) a true and complete account of the notified goods so used by him and shall keep such account at the intimated place.

Section 11F Sale, etc., of notified goods to be evidenced by vouchers. – On and from the notified date, no person shall sell or otherwise transfer any notified goods, unless every transaction in relation to the sale or transfer of such goods is evidenced by a voucher in such form and containing such particulars as may be specified by rules made in this behalf.

Section 11G Sections 11C, 11E and 11F not to apply to goods in personal use. – (1) Nothing in sections 11C, 11E and 11F shall apply to any notified goods which are-

(a) in personal use of the person by whom they are owned, possessed or controlled, or

(b) kept in the residential premises of a person for his personal use.
(2) If any person, who is in possession of any notified goods referred to in sub-section (1), sells, or otherwise transfers for a valuable consideration, any such goods, he shall issue to the purchaser or transferee, as the case may be, a memorandum containing such particulars as may be specified by rules made in this behalf and no such goods shall be taken from one place to another unless they are accompanied by the said memorandum.

CHAPTER IVB

PREVENTION OR DETECTION OF ILLEGAL EXPORT OF GOODS

Section 11H Definitions. – In this Chapter, unless the context otherwise requires, -

(a) “illegal export” means the export of any goods in contravention of the provisions of this Act or any other law for the time being in force;

(b) “intimated place” means a place intimated under sub-section (1), sub-section (2) or sub-section (3), as the case may be, of section 11J;

(c) “specified area” includes the Indian customs waters, and such inland area, not exceeding one hundred kilometers in width from any coast or other border of India, as the Central Government may, having regard to the vulnerability of that area to smuggling, by notification in the Official Gazette, specify in this behalf:

Provided that where a part of any village, town or city falls within a specified area, the whole of such village, town or city shall, notwithstanding that the whole of it is not within one hundred kilometers from any coast or other border of India, be deemed to be included in such specified area;

(d) “specified date”, in relation to specified goods, means the date on which any notification is issued under section 11-I in relation to those goods in any specified area;

(e) “specified goods” means goods of any description specified in the notification issued under section 11-I in relation to a specified area.

Sec 11I Power of Central Government to specify goods. – If, having regard to the magnitude of the illegal export of goods of any class or description, the Central Government is satisfied that it is expedient in the public interest to take special measures for the purpose of checking the illegal export or facilitating the detection of goods which are likely to be illegally exported, it may, by notification in the Official Gazette, specify goods of such class or description.

sec.11J Persons possessing specified goods to intimate the place of storage, etc. – (1) Every person who owns, possesses or controls, on the specified date, any specified goods, the market price of which exceeds fifteen thousand rupees shall, within seven days from that date, deliver to the proper officer an intimation containing the particulars of the place where such goods are kept or stored within the specified area.
(2) Every person who acquires (within the specified area), after the specified date, any specified goods, –

(i) the market price of which, or

(ii) the market price of which together with the market price of any specified goods of the same class or description, if any, owned, possessed or controlled by him on the date of such acquisition,

exceeds fifteen thousand rupees shall, before making such acquisition, deliver to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored after such acquisition:

Provided that a person who has delivered intimation, whether under sub-section (1) or sub-section (2), in relation to any specified goods, owned, possessed, controlled or acquired by him, shall not be required to deliver any further intimation so long as the specified goods are kept or stored at the intimated place.

(3) If any person intends to shift any specified goods to which sub-section (1) or sub-section (2) applies, to any place other than the intimated place, he shall, before taking out such goods from the intimated place, deliver to the proper officer an intimation containing the particulars of the place to which such goods are proposed to be shifted.

(4) No person shall, after the expiry of seven days from the specified date, keep or store any specified goods to which sub-section (1) or sub-section (2) applies, at any place other than the intimated place.

Sec 11K Transport of specified goods to be covered by vouchers. – (1) No specified goods shall be transported from, into or within any specified area or loaded on any animal or conveyance in such area, unless they are accompanied by a transport voucher (in such form and containing such particulars as may be specified by rules made in this behalf) prepared by the person owning, possessing, controlling or selling such goods:

Provided that no transport voucher shall be necessary for the transport, within a village, town or city, of any specified goods the market price of which, on the date of transport, does not exceed one thousand rupees.

(2) Notwithstanding anything contained in sub-section (1), where the Central Government, after considering the nature of any specified goods, the time, mode, route and the market price of the goods intended to be transported, the purpose of the transportation and the vulnerability of the specified area with regard to the illegal export of such goods, is satisfied that it is expedient in the public interest so to do, it may, —

(i) by notification in the Official Gazette, specify goods of such class or description and of a market price exceeding such sum as that Government may notify; and different sums in relation to the specified goods of the same class or description, or different classes of
descriptions, may be notified for the same specified area or for different specified areas, and

(ii) direct that no person shall transport any goods so specified unless the transport voucher in relation to them has been countersigned by the proper officer.

Sec 11L Persons possessing specified goods to maintain accounts. – (1) Every person who, on or after the specified date, owns, possesses or controls, within a specified area, any specified goods of a market price exceeding fifteen thousand rupees, shall maintain (in such form and in such manner as may be specified by rules made in this behalf) a true and complete account of such goods and shall, as often as he acquires or parts with any specified goods, make an entry in the said account in relation to such acquisition or parting with, and shall also state therein the particulars of the person from whom such goods have been acquired or in whose favour such goods have been parted with, as the case may be, and such account shall be kept, along with the goods, at the place of storage of the specified goods to which such accounts relate:

Provided that it shall not be necessary to maintain separately accounts in the form and manner specified by rules made in this behalf in the case of a person who is already maintaining accounts which contain the particulars specified by the said rules.

(2) Every person who owns, possesses or controls any specified goods to which the provisions of sub-section (1) apply, and who uses any such goods for the manufacture of any other goods, shall maintain (in such form, in such manner and containing such particulars as may be specified by rules made in this behalf) a true and complete account of the specified goods so used by him and shall keep such account at the intimated place.

(3) If at any time, on a verification made by a proper officer, it is found that any specified goods owned, possessed or controlled by a person are lesser in quantity than the stock of such goods as shown, at the time of such verification, in the accounts referred to in sub-section (1), read with the accounts referred to in sub-section (2), it shall be presumed, unless the contrary is proved, that such goods, to the extent that they are lesser than the stock shown in the said accounts, have been illegally exported and that the person owning, possessing or controlling such goods has been concerned with the illegal export thereof.

Sec 11M Steps to be taken by persons selling or transferring any specified goods. – Except where he receives payment by cheque drawn by the purchaser, every person who sells or otherwise transfers within any specified area, any specified goods, shall obtain, on his copy of the sale or transfer voucher, the signature and full postal address of the person to whom such sale or transfer is made and shall also take such other reasonable steps as may be specified by rules made in this behalf to satisfy himself as to the identity of the purchaser or the transferee, as the case may be, and if after an inquiry made by a proper officer, it is found that the purchaser or the transferee, as the case may be, is not either readily traceable or is a fictitious person, it shall be presumed, unless the contrary
is proved, that such goods have been illegally exported and the person who had sold or otherwise transferred such goods had been concerned in such illegal export:

Provided that nothing in this section shall apply to petty sales of any specified goods if the aggregate market price obtained by such petty sales, made in the course of a day, does not exceed two thousand and five hundred rupees.

Explanation. - In this section “petty sale” means a sale at a price which does not exceed one thousand rupees.

THE CENTRAL EXCISE ACT, 1944

[Act No. 1 of 1944]

CHAPTER II

LEVY AND COLLECTION OF DUTY

SECTION 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. —

(1) There shall be levied and collected in such manner as may be prescribed,

(a) a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods [(excluding goods produced or manufactured in special economic zones)] specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -

(ii) by a hundred per cent export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of
such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).

**Explanation 1.** — Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable at the highest of those rates.

**Explanation 2.** — In this proviso, -

(i) “hundred per cent export-oriented undertaking” means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act;

(ii) “Special Economic Zone” has the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005).

provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government, as they apply in respect of goods which are not produced or manufactured by Government.

(1A) The

(2) The Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed -

(a) for different classes or descriptions of the same excisable goods; or

(b) for excisable goods of the same class or description -

(i) produced or manufactured by different classes of producers or manufacturers; or

(ii) sold to different classes of buyers:

Provided that in fixing different tariff values in respect of excisable goods falling under sub-clause (i) or sub-clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods.
SECTION 4. Excisable goods for purposes of charging of duty of excise. Valuation of -

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation. - For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,-

(a) “assessee” means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be “related” if -

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor;

or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

Explanation. — In this clause -

shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and (i) “inter-connected undertakings”
shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956); (ii) “relative”

means - (c) “place of removal”

(i) factory or any other place or premises of production or manufacture of the excisable goods;

(ii) warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without [payment of duty;]

(iii) depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed;

(cc) “time of removal”, in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), shall be deemed to be the time at which such goods are cleared from the factory;

(d) “transaction value” means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

SECTION 4A. Valuation of excisable goods with reference to retail sale price.

(1) The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply.

(2) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.
(3) The Central Government may, for the purpose of allowing any abatement under sub-section (2), take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

(4) Where any goods specified under sub-section (1) are excisable goods and the manufacturer-

(a) removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in sub-section (1); or

(b) tampers with, obliterates or alters the retail sale price declared on the package of such goods after their removal from the place of manufacture,

then, such goods shall be liable to confiscation and the retail sale price of such goods shall be ascertained in the prescribed manner and such price shall be deemed to be the retail sale price for the purposes of this section.

**Explanation 1.** — For the purposes of this section, “retail sale price” means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like and the price is the sole consideration for such sale:

Provided that in case the provisions of the Act, rules or other law as referred to in sub-section (1) require to declare on the package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.

**Explanation 2.** — For the purposes of this section,

(a) where on the package of any excisable goods more than one retail sale price is declared, the maximum of such retail sale prices shall be deemed to be the retail sale price;

(b) where the retail sale price, declared on the package of any excisable goods at the time of its clearance from the place of manufacture, is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price;

(c) where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail sale price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates.

**SECTION 5. Duty on goods found deficient in quantity.** — **Remission of**
(1) The Central Government may, by rules made under this section, provide for remission of duty of excise leviable on any excisable goods which due to any natural cause are found to be deficient in quantity.

to the nature of the excisable goods or of processing or of curing thereof, the period of their storage or transit and other relevant considerations, fix the limit or limits of percentage beyond which no such remission shall be allowed: (2) Any rules made under sub-section (1) may, having regard

Provided that different limit or limits of percentage may be fixed for different varieties of the same excisable goods or for different areas or for different seasons.

SECTION 5A. Power to grant exemption from duty of excise. —

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured —

(i) brought to any other place in India; or in a free trade zone or a special economic zone]] and

(ii) [brought to any place in India. by a hundred per cent export-oriented undertaking and

Explanation. — In this proviso, “free trade zone”, “special economic zone” and “hundred per cent export-oriented undertaking” shall have the same meanings as in Explanation 2 to sub-section (1) of section 3.

(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable.
(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.

Explanation. — “Form or method”, in relation to a rate of duty of excise means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable:

(4) Every notification issued under sub-rule (1), and every order made under sub-rule (2), of rule 8 of the Central Excise Rules, 1944, and in force immediately before the commencement of the Customs and Central Excises Laws (Amendment) Act, 1988 (29 of 1988) shall be deemed to have been issued or made under the provisions of this section and shall continue to have the same force and effect after such commencement until it is amended, varied, rescinded or superseded under the provisions of this section.

(5) Every notification issued under sub-section (1) or sub-section 2(A) shall, —

(a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations, Customs and Central Excise, New Delhi, under the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963).

(6) Notwithstanding anything contained in sub-section (5), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said notification comes into force.

SECTION 5B. Non-reversal of CENVAT credit. —
Where an assessee has paid duty of excise on a final product and has been allowed credit of the duty or tax or cess paid on inputs, capital goods and input services used in making of the said product, but subsequently the process of making the said product is held by the court as not chargeable to excise duty, the Central Government may, by notification, order for non-reversal of such credit allowed to the assessee subject to such conditions as may be specified in the said notification:

Provided that the order for non-reversal of credit shall not apply where an assessee has preferred a claim for refund of excise duty paid by him:

Provided further that the Central Government may also specify in the notification referred to above for non-reversal of credit, if any, taken by the buyer of the said product.

SECTION 6. Any prescribed person who is engaged in - Registration of certain persons. —

(a) the production or manufacture or any process of production or manufacture of any specified goods included in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), or

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any specified goods included in [the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986),

shall get himself registered with the proper officer in such manner as may be prescribed.

SECTION 7. *   *   *   *

SECTION 8. — Restriction on possession of excisable goods.

From such date as may be specified in this behalf by the Central Government by notification in the Official Gazette, no person shall, except as provided by rules made under this Act, have in his possession [any goods specified in the Second Schedule] in excess of such quantity as may be prescribed for the purposes of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any one time by such a person.

SECTION 9. Offences and penalties. —

(1) Whoever commits any of the following offences, namely:

(a) contravenes any of the provisions of section 8 or of a rule made under clause
(iii) or clause (xxvii) of sub-section (2) of section 37;

(b) evades the payment of any duty payable under this Act;

(bb) removes any excisable goods in contravention of any of the provisions of this Act or any rules made thereunder or in any way concerns himself with such removal;

(bbb) transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder;

(bbbb) the provisions of this Act or the rules made thereunder in relation to credit of any duty allowed to be utilised towards payment of excise duty on final products;

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section;

shall be punishable, -

the duty leviable thereon under this Act exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine: (i) in the case of an offence relating to any excisable goods,

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months;

(ii) extend to three years or with fine or with both. in any other case, with imprisonment for a term which may

(2) If any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:
Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months.

(3) For the purposes of sub-sections (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than six months, namely :-

(i) time for an offence under this Act; the fact that the accused has been convicted for the first
(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;
(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence;
(iv) the age of the accused.]

SECTION 9A. Certain offences to be non-cognizable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under section 9 shall be deemed to be non-cognizable within the meaning of that Code.

(2) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of such compounding amount as may be prescribed.

SECTION 9AA. Offences by companies. —

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. — For the purposes of this section, -

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director” in relation to a firm means a partner in the firm.

SECTION 9B. Power of Court to publish name, place of business, etc., of persons convicted under the Act. —

(1) Where any person is convicted under this Act for contravention of any of the provisions thereof, it shall be competent for the Court convicting the person to cause the name and place of business or residence of such person, nature of the contravention, the fact that the person has been so convicted and such other particulars as the Court may consider to be appropriate in the circumstances of the case, to be published at the expense of such person, in such newspapers or in such manner as the Court may direct.

(2) No publication under sub-section (1) shall be made until the period for preferring an appeal against the orders of the Court has expired without any appeal having been preferred, or such an appeal, having been preferred, has been disposed of.

(3) The expenses of any publication under sub-section (1) shall be recoverable from the convicted person as if it were a fine imposed by the Court.

SECTION 9C. Presumption of culpable mental state. —

(1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. — In this section, “culpable mental state” includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact.
(2) For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

SECTION 9D. Relevancy of statements under certain circumstances. —

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court. The provisions of sub-section (1) shall, so far as may

SECTION 9E. section 562 of the Code of Criminal Procedure, 1898, and of the Probation of Offenders Act, 1958. — Application of

(1) Nothing contained in section 562 of the Code of Criminal Procedure, 1898 (5 of 1898), or in the Probation of Offenders Act, 1958 (20 of 1958), shall apply to a person convicted of an offence under this Act unless that person is under eighteen years of age.

(2) The provisions of sub-section (1) shall have effect notwithstanding anything contained in sub-section (3) of section 9.

SECTION 10. Power of Courts to order forfeiture. —

Any Court trying an offence under this Chapter may order the forfeiture to Government of any goods in respect of which the Court is satisfied that an offence under this Chapter has been committed, and may also order the forfeiture of any receptacles, packages or coverings in which such goods are contained and the animals, vehicles, vessels or other
SECTION 11.  Recovery of sums due to Government. —

In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder including the amount required to be paid to the credit of the Central Government under Section 11D, the officer empowered by the [Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.

11A. SECTION  Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. —

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any
approval, acceptance or assessment relating to the rate of duty on or valuation of 
extisable goods under any other provisions of this Act or the rules made thereunder, a 
Central Excise Officer may, within [one year] from the relevant date, serve notice on the 
person chargeable with the duty which has not been levied or paid or which has been 
short-levied or short-paid or to whom the refund has erroneously been made, requiring 
him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-
levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful 
mis-statement or suppression of facts, or contravention of any of the provisions of this 
Act or of the rules made there under with intent to evade payment of duty, by such 
person or his agent, the provisions of this sub-section shall have effect, [as if, [***]] for 
the words [one year], the words “five years” were substituted:

*       []       *       *       *

Explanation. — Where the service of the notice is stayed by an order of a court, the 
period of such stay shall be excluded in computing the aforesaid period of [one year] or 
five years, as the case may be.

(1A) When any duty of excise has not been levied or paid or has been short-levied or 
short paid or erroneously refunded, by reason of fraud, collusion or any willful mis-
statement or suppression of facts, or contravention of any of the provisions of this Act or 
the rules made there under with intent to evade payment of duty, by such person or his 
agent, to whom a notice is served under the proviso to sub-section (1) by the Central 
Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest 
payable thereon under section 11AB and penalty equal to twenty-five per cent of the duty 
specified in the notice or the duty so accepted by such person within thirty days of the 
receipt of the notice.

the representation, if any, made by the person on whom notice is served under sub-
section (1), determine the amount of duty of excise due from such person (not being in 
excess of the amount specified in the notice) and thereupon such person shall pay the 
amount so determined. (2) The [Central Excise Officer] shall, after considering 

Provided that if such person has paid the duty in full together with, interest and penalty 
under sub-section (1A), the proceedings in respect of such person and other persons to 
whom notice are served under sub-section (1) shall, without prejudice to the provisions of 
section 9, 9A and 9AA, be deemed to be conclusive as to the matters stated therein:

Provided further that, if such person has paid duty in part, interest and penalty under sub-
section (1A), the Central Excise Officers, shall determine the amount of duty or interest 
not being in excess of the amount partly due from such person.

(2A) Where any notice has been served on a person under sub-section (1), the Central 
Excise Officer, -
been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, where it is possible to do so, shall determine the amount of such duty, within a period of one year; and (a) in case any duty of excise has not been levied or paid or has determined the amount of duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section (1). (b) in any other case, where it is possible to do so, shall

(2B) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of “one year” referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. - Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.

Explanation 2. - For the removal of doubts, it is hereby declared that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.

(2C) The provisions of sub-section (2B) shall not apply to any case where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

(3) For the purposes of this section,
(i) “refund” includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) “relevant date” means,

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

(A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

under this Act or the rules made thereunder; (C) in any other case, the date on which the duty is to be paid

under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof; (b) in a case where duty of excise is provisionally assessed

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

 SECTION 11AA. Interest on delayed payment of duty. —

(1) Subject to the provisions contained in section 11AB, where a person chargeable with duty determined under sub-section (2) of section 11A, fails to pay such duty within three months from the date of such determination, he shall pay, in addition to the duty, interest [at such rate not below [ten per cent.] and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette], on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty:

Provided that where a person chargeable with duty determined under sub-section (2) of section 11A before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal [, National Tax Tribunal] or, as the case
may be, the court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.

*Explanation 2.* - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal [, National Tax Tribunal] or, as the case may be, the court, the date of such determination shall be, -

(a) for the amount of duty first determined to be payable, the date on which the duty is so determined;
(b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;
(c) for the amount of further increase of duty, the date of order on which the duty is so further increased.]

(2) The provisions of sub-section (1) shall not apply to cases where the duty becomes payable on and after the date on which the Finance Bill, 2001 receives the assent of the President.

**SECTION 11AB. Interest on delayed payment of duty. -**

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below [ten per cent.] and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 11A till the date of payment of such duty:

Provided that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid.].

(2) The provisions of sub-section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.
Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal [, National Tax Tribunal] or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal [, National Tax Tribunal] or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.

SECTION 11AC. Penalty for short-levy or non-levy of duty in certain cases. —

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:

Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the duty so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent. of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation. - For the removal of doubts, it is hereby declared that -
which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;  
(1) the provisions of this section shall also apply to cases in

to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

(2) any amount paid to the credit of the Central Government prior

SECTION 11B. Claim for refund of duty. —

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act:]

[Provided further that] the limitation of [one year] shall not apply where any duty has been paid under protest.

*   *   *   *   *

(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -
(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant’s account current maintained with the [Commissioner of Central Excise];

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(3) Notwithstanding anything to the contrary contained in

proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease (4) Every notification under clause (f) of the first proviso to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

(5) For the removal of doubts, it is hereby declared that

[Explanation. — For the purposes of this section, -]
(A) “refund” includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) “relevant date” means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

[e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]

in the case of goods which are exempt from payment of duty

[eb this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

[ec in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]

[f in any other case, the date of payment of duty.]
SECTION 11BB. — Interest on delayed refunds.

If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, [not below five per cent] and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by Notification in the Official Gazette], on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation. - Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal [, National Tax Tribunal] or any court against an order of the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise], under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.]

SECTION 11C.  Power not to recover duty of excise not levied or short-levied as a result of general practice. —

(1) Notwithstanding anything contained in this Act, if the Central Government is satisfied -

(a) that a practice was, or is, generally prevalent regarding levy of duty of excise (including non-levy thereof) on any excisable goods;

(b) and that such goods were, or are, liable -

(i) to duty of excise, in cases where according to the said practice the duty was not, or is not being, levied, or

being, levied, according to the said practice, (ii) to a higher amount of duty of excise than what was, or is

then, the Central Government may, by notification in the Official Gazette, direct that the whole of the duty of excise payable on such goods, or as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be
required to be paid in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.

(2) Where any notification under sub-section (1) in respect of any goods has been issued, the whole of the duty of excise paid on such goods or, as the case may be, the duty of excise paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 11B:

Provided that the person claiming the refund of such duty or, as the case may be, excess duty, makes an application in this behalf to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise], in the form referred to in sub-section (1) of section 11B, before the expiry of six months from the date of issue of the said notification.

SECTION 11D. Duties of excise collected from the buyer to be deposited with the Central Government. -

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

of the Central Government under sub-section (1) and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government. (2) Where any amount is required to be paid to the credit representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined. (3) The Central Excise Officer shall, after considering the

under sub-section (1) or sub-section (3) shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in sub-section (1). (4) The amount paid to the credit of the Central Government

sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in
accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount. (5) Where any surplus is left after the adjustment under

SECTION 11DD. Interest on the amounts collected in excess of the duty. -

(1) Where an amount has been collected in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods, the person who is liable to pay such amount as determined under sub-section (3) of section 11D, shall, in addition to the amount, be liable to pay interest at such rate not below ten per cent., and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the amount ought to have been paid under this Act, but for the provisions contained in sub-section (3) of section 11D, till the date of payment of such amount:

Provided that in such cases where the amount becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole amount, including the amount already paid.

(2) The provisions of sub-section (1) shall not apply to cases where the amount had become payable or ought to have been paid before the day on which the Finance Bill, 2003 receives the assent of the President.

Explanation 1. - Where the amount determined under sub-section (3) of section 11D is reduced by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest payable thereon under sub-section (1) shall be on such reduced amount.

Explanation 2. - Where the amount determined under sub-section (3) of section 11D is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest payable thereon under sub-section (1) shall be on such increased amount.]

SECTION 11DDA. Provisional attachment to protect revenue in certain cases. -

(1) Where, during the pendency of any proceedings under section 11A or section 11D, the Central Excise Officer is of the opinion that for the purpose of protecting the interest
of revenue, it is necessary so to do, he may, with the previous approval of the Commissioner of Central Excise, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 11A or sub-section (2) of section 11D, as the case may be, in accordance with the rules made in this behalf under section 142 of the Customs Act, 1962 (52 of 1962).

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):

Provided that the Chief Commissioner of Central Excise may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years:

Provided further that where an application for settlement of case under section 32E is made to the Settlement Commission, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of section 32F is made shall be excluded from the period specified in the preceding proviso.

SECTION 12. to Central Excise Duties. — Application of the provisions of [Act No. 52 of 1962]

The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Customs Act, 1962 (52 of 1962), relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by section 3.

CHAPTER V

SETTLEMENT OF CASES

SECTION 31. Definitions. — In this Chapter, unless the context otherwise requires,

(a) “assessee” means any person who is liable for payment of excise duty assessed under this Act or any other Act and includes any producer or manufacturer of excisable
goods or a registered person under the rules made under this Act, of a private warehouse in which excisable goods are stored;

“Bench” means a Bench of the Settlement Commission;  (b)

“case” means any proceeding under this Act or any other Act for the levy, assessment and collection of excise duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 32E is made : [(c)

Provided that when any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause;]

“Chairman” means the Chairman of the Settlement Commission;  (d)

“Commissioner (Investigation)” means an officer of the Customs or a Central Excise Officer appointed as such Commissioner to conduct inquiry or investigation for the purposes of this Chapter;  (e)

“Member” means a Member of the Settlement Commission and includes the Chairman and the Vice-Chairman;  (f)

“Settlement Commission” means the Customs and Central Excise Settlement Commission constituted under section 32; and (g)

“Vice-Chairman” means a Vice-Chairman of the Settlement Commission.  (h)

**SECTION 32. Customs and Central Excise Settlement Commission.** —

(1) The Central Government shall, by notification in the Official Gazette, constitute a Commission to be called the Customs and Central Excise Settlement Commission for the settlement of cases under this Chapter and Chapter XIVA of the Customs Act, 1962 (52 of 1962).

The Settlement Commission shall consist of a Chairman and as many Vice-Chairmen and other Members as the Central Government thinks fit and shall function within the Department of the Central Government dealing with Customs and Central Excise matters.  

(2)

The Chairman, Vice-Chairman and other Members of the Settlement Commission shall be appointed by the Central Government from amongst persons of integrity and outstanding ability, having special knowledge of, and experience in, administration of customs and central excise laws :  (3)
Provided that, where a member of the Board is appointed as the Chairman, Vice-Chairman or as a Member of the Settlement Commission, he shall cease to be a member of the said Board.

SECTION 32A. Jurisdiction and powers of Settlement Commission.

(1) Subject to the other provisions of this Chapter, the jurisdiction, powers and authority of the Settlement Commission may be exercised by Benches thereof.

Subject to the other provisions of this section, a Bench shall be presided over by the Chairman or a Vice-Chairman and shall consist of two other Members. (2)

The Bench for which the Chairman is the presiding officer shall be the principal Bench and other Benches shall be known as additional Benches. (3)

Notwithstanding anything contained in sub-section (1) and sub-section (2), the Chairman may authorise the Vice-Chairman or other Member appointed to one Bench to discharge also the functions of the Vice-Chairman or, as the case may be, other Member of another Bench. (4)

The principal Bench shall sit at Delhi and the Central Government shall, by notification in the Official Gazette, establish additional Benches at such places as it considers necessary.

Notwithstanding anything contained in the foregoing provisions of this section, and subject to any rules that may be made in this behalf, when one of the persons constituting a Bench (whether such person be the presiding officer or other Member of the Bench) is unable to discharge his functions owing to absence, illness or any other cause or in the event of the occurrence of any vacancy either in the office of the presiding officer or in the office of one or the other Members of the Bench, the remaining Members may function as the Bench and if the presiding officer of the Bench is not one of the remaining Members, the senior among the remaining Members shall act as the presiding officer of the Bench: (6)

Provided that if at any stage of the hearing of any such case or matter, it appears to the presiding officer that the case or matter is of such a nature that it ought to be heard of by a Bench consisting of three Members, the case or matter may be referred by the presiding officer of such Bench to the Chairman for transfer to such Bench as the Chairman may deem fit.

[Provided further that at any stage of the hearing of any such case or matter, referred to in the first proviso, the Chairman may, if he thinks that the case or matter is of such a nature that it ought to be heard by a Bench consisting of three Members, constitute such Bench and if Vice-Chairman is not one of the Members, the senior among the Members shall act as the presiding officer of such Bench.]
Notwithstanding anything contained in the foregoing provisions of this section, the Chairman may, for the disposal of any particular case, constitute a special Bench consisting of more than three Members. (7)

Subject to the other provisions of this Chapter, the special Bench shall sit at a place to be fixed by the Chairman. (8)

SECTION 32B. Vice-Chairman to act as Chairman or to discharge his functions in certain circumstances. —

(1) In the event of the occurrence of any vacancy in the office of the Chairman by reason of his death, resignation or otherwise, the Vice-Chairman or, as the case may be, such one of the Vice-Chairmen as the Central Government may, by notification in the Official Gazette, authorise in this behalf, shall act as the Chairman until the date on which a new Chairman, appointed in accordance with the provisions of this Chapter to fill such vacancy, enters upon his office.

When the Chairman is unable to discharge his functions owing to absence, illness or any other cause, the Vice-Chairman or, as the case may be, such one of the Vice-Chairmen as the Central Government may, by notification in the Official Gazette, authorise in this behalf, shall discharge the functions of the Chairman until the date on which the Chairman resumes his duties. (2)

SECTION 32C. Power of Chairman to transfer cases from one Bench to another. —

On the application of the assessee or the Chief Commissioner or Commissioner of Central Excise and after giving notice to them, and after hearing such of them as he may desire to be heard, or on his own motion without such notice, the Chairman may transfer any case pending before one Bench, for disposal, to another Bench.

SECTION 32D. Decision to be by majority. — If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Settlement Commission and such point or points shall be decided according to the opinion of the majority of the Members of the Settlement Commission who have heard the case, including those who first heard it.

SECTION 32E. Application for settlement of cases. — [(1) An assessee may, in respect of a case relating to him, make an application, before adjudication, to the Settlement Commission to have the case settled, in such form and in such manner as may
be prescribed and containing a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction, the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by him and such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification, under-valuation, inapplicability of exemption notification or Cenvat credit but excluding the goods in respect of which no proper record has been maintained by the assessee in his daily stock register and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless,—

(a) the applicant has filed returns showing production, clearance and Central excise duty paid in the prescribed manner;

(b) a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant;

(c) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and

(d) the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AB:

Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending with the Appellate Tribunal or any court:

Provided also that no application under this sub-section shall be made for the interpretation of the classification of excisable goods under the Central Excise Tariff Act, 1985 (5 of 1986).

Notwithstanding anything contained in sub-section (1), where an application was made under sub-section (1), before the 1st day of June, 2007 but an order under sub-section (1) of section 32F has not been made before the said date or payment of amount so ordered by the Settlement Commission under sub-section (1) of section 32F has not been made, the applicant shall within a period of thirty days from the 1st day of June, 2007, pay the accepted duty liability failing which his application shall be liable to be rejected.] (1A)

Where any excisable goods, books of accounts, other documents have been seized under the provisions of this Act or rules made thereunder, the assessee shall not be entitled to make an application under sub-section (1), before the expiry of one hundred and eighty days from the date of the seizure. (2)

Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed. (3)
An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant. (4)

**SECTION 32F. Procedure on receipt of an application under section 32E.** — (1) On receipt of an application under sub-section (1) of section 32E, the Settlement Commission shall, within seven days from the date of receipt of the application, issue a notice to the applicant to explain in writing as to why the application made by him should be allowed to be proceeded with, and after taking into consideration the explanation provided by the applicant, the Settlement Commission, shall, within a period of fourteen days from the date of the notice, by an order, allow the application to be proceeded with, or reject the application as the case may be, and the proceedings before the Settlement Commission shall abate on the date of rejection:

Provided that where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

(2) A copy of every order under sub-section (1), shall be sent to the applicant and to the Commissioner of Central Excise having jurisdiction.

(3) Where an application is allowed or deemed to have been allowed to be proceeded with under sub-section (1), the Settlement Commission shall, within seven days from the date of order under sub-section (1), call for a report along with the relevant records from the Commissioner of Central Excise having jurisdiction and the Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission:

Provided that where the Commissioner does not furnish the report within the aforesaid period of thirty days, the Settlement Commission shall proceed further in the matter without the report of the Commissioner.

(4) Where a report of the Commissioner called for under sub-section (3) has been furnished within the period specified in that sub-section, the Settlement Commission may, after examination of such report, if it is of the opinion that any further enquiry or investigation in the matter is necessary, direct, for reasons to be recorded in writing, the Commissioner (Investigation) within fifteen days of the receipt of the report, to make or cause to be made such further enquiry or investigation and furnish a report within a period of ninety days of the receipt of the communication from the Settlement Commission, on the matters covered by the application and any other matter relating to the case:

Provided that where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under sub-section (5) without such report.
(5) After examination of the records and the report of the Commissioner of Central Excise received under sub-section (3), and the report, if any, of the Commissioner (Investigation) of the Settlement Commission under sub-section (4), and after giving an opportunity to the applicant and to the Commissioner of Central Excise having jurisdiction to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner of Central Excise and Commissioner (Investigation) under sub-section (3) or sub-section (4).

(6) An order under sub-section (5) shall not be passed in respect of an application filed on or before the 31st day of May, 2007, later than the 29th day of February, 2008 and in respect of an application made on or after the 1st day of June, 2007, after nine months from the last day of the month in which the application was made, failing which the settlement proceedings shall abate, and the adjudicating authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

(7) Subject to the provisions of section 32A, the materials brought on record before the Settlement Commission shall be considered by the Members of the concerned Bench before passing any order under sub-section (5) and, in relation to the passing of such order, the provisions of section 32D shall apply.

(8) The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective and in case of rejection contain the reasons therefor and it shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts:

Provided that the amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant under section 32E.

(9) Where any duty, interest, fine and penalty payable in pursuance of an order under sub-section (5) is not paid by the assessee within thirty days of receipt of a copy of the order by him, the amount which remains unpaid, shall be recovered along with interest due thereon, as the sums due to the Central Government by the Central Excise Officer having jurisdiction over the assessee in accordance with the provisions of section 11.

Where a settlement becomes void as provided under sub-section (8), the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the Central Excise Officer having jurisdiction may,
notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the date of the receipt of communication that the settlement became void. (10)

SECTION 32G. Power of Settlement Commission to order provisional attachment to protect revenue. — Where, during the pendency of any proceeding before it, the Settlement Commission is of the opinion that for the purpose of protecting the interests of revenue it is necessary so to do, it may, by order, attach provisionally any property belonging to the applicant in the manner as may be prescribed. (1)

Every provisional attachment made by the Settlement Commission under sub-section (1) shall cease to have effect from the date, the sums due to the Central Government for which such attachment is made are discharged by the applicant and evidence to that effect is submitted to the Settlement Commission. (2)

SECTION 32H. Power of Settlement Commission to reopen completed proceedings. — If the Settlement Commission is of the opinion (the reasons for such opinion to be recorded by it in writing) that, for the proper disposal of the case pending before it, it is necessary or expedient to reopen any proceeding connected with the case but which has been completed under this Act before application for settlement under section 32E was made, it may, with the concurrence of the applicant, reopen such proceeding and pass such order thereon as it thinks fit, as if the case in relation to which the application for settlement had been made by the applicant under that section covered such proceeding also:

Provided that no proceeding shall be reopened by the Settlement Commission under this section after the expiry of five years from the date of application.

Provided further that no proceeding shall be reopened by the Settlement Commission under this section in a case where an application under section 32E is made on or after the 1st day of June, 2007.

SECTION 32-I. Powers and procedure of Settlement Commissions. In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in a Central Excise Officer under this Act or the rules made thereunder. — (1)

Where an application made under section 32E has been allowed to be proceeded with under section 32F, the Settlement Commission shall, until an order is passed under sub-section [(5)] of section 32F, have, subject to the provisions of sub-section [(4)] of that section, exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise Officer, under this Act in relation to the case. (2)
In the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission. (3)

The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings. (4)

SECTION 32J. Inspection, etc., of reports. — No person shall be entitled to inspect, or obtain copies of, any reports made by any Central Excise Officer to the Settlement Commission; but the Settlement Commission may, in its discretion furnish copies thereof to any such person on an application made to it in this behalf and on payment of the prescribed fee:

Provided that, for the purpose of enabling any person whose case is under consideration to rebut any evidence brought on record against him in any such report, the Settlement Commission shall, on an application made in this behalf, and on payment of the prescribed fee by such person, furnish him with a certified copy of any such report or part thereof relevant for the purpose.

SECTION 32K. Power of Settlement Commission to grant immunity from prosecution and penalty. — The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 32E has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act [and also either wholly or in part from the imposition of any penalty and fine] under this Act, with respect to the case covered by the settlement: (1)

Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under [sub-section (5) of section 32F within the time specified in such order] or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted. (2)

An immunity granted to a person under sub-section (1) shall stand withdrawn if such person fails to pay any sum specified in the order of the settlement passed under [sub-section (5) of section 32F within the time specified in such order] or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted. (2)

An immunity granted to a person under sub-section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person had, in the course of the
settlement proceedings, concealed any particular material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had no such immunity been granted.  (3)

SECTION 32L. Power of Settlement Commission to send a case back to the Central Excise Officer. — The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made. (1)

For the purpose of sub-section (1), the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him.  (2)

For the purposes of the time limit under section 11A and for the purposes of interest under section 11BB, in a case referred to in sub-section (1), the period commencing on and from the date of the application to the Settlement Commission under section 32E and ending with the date of receipt by the Central Excise Officer of the order of the Settlement Commission sending the case back to the Central Excise Officer shall be excluded.  (3)

SECTION 32M. Order of settlement to be conclusive. — Every order of settlement passed under sub-section [(5)] of section 32F shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

SECTION 32N. Recovery of sums due under order of settlement. — Any sum specified in an order of settlement passed under sub-section [(5)] of section 32F may, subject to such conditions if any, as may be specified therein, be recovered, and any penalty for default in making payment of such sum may be imposed and recovered as sums due to the Central Government in accordance with the provisions under section 11 by the Central Excise Officer having jurisdiction over the person who made the application for settlement under section 32E.

SECTION 32O. Bar on subsequent application for settlement in certain cases. — [(1)] [Where, before the 1st day of June, 2007] -
(i) an order of settlement passed under sub-section (7) of section 32F provides for the imposition of a penalty on the person who made the application under section 32E for settlement, on the ground of concealment of particulars of his duty liability; or

(ii) after the passing of an order of settlement under the said sub-section (7) in relation to a case, such person is convicted of any offence under this Act in relation to that case; or

(iii) the case of such person is sent back to the Central Excise Officer having jurisdiction by the Settlement Commission under section 32L,

then, he shall not be entitled to apply for settlement under section 32E in relation to any other matter.

[(2) Where an assessee has made an application under sub-section (1) of section 32E, on or after the 1st day of June, 2007 and if such application has been allowed to be proceeded with under sub-section (1) of section 32F, such assessee shall not be entitled to apply for settlement under section 32E in relation to any other matter:

Provided that such assessee shall not be prevented from filing an application for settlement if the issue in the subsequent application is, but for the period of dispute and amount, identical to the issue in respect of which the earlier application is pending before the Settlement Commission.

SECTION 32P. Proceedings before Settlement Commission to be judicial proceedings. — Any proceedings under this Chapter before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code (45 of 1860).

Let us sum up:

1. In this chapter we have seen the meaning, importance of arbitration.

2. Origin and development of international commercial arbitration along with illustrations and examples are covered in detail.

3. The Role of customs Act in regulation of International Trade has also explained by explaining the statutory provisions.

4. The role of central excise act in regulation of International Trade has been discussed in the light of existing provisions of the Act.
Unit-III

Foreign Exchange Regulation and Management

Foreign Exchange related taxation matters

Foreign Direct Investment and Transfer of Technology

In this chapter, firstly we will see some of the important provisions from the Foreign Exchange Management Act, 1999 having more emphasis on foreign currency matters.

THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999 ACT NO. 42 OF 1999 [29th December, 1999.]

An Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. BE it enacted by Parliament in the Fiftieth Year of the Republic of India as follows:-

Chapter-I

PRELIMINARY 1. Short title, extent, application and commencement.- (1) This Act may be called the Foreign Exchange Management Act, 1999.

(2) It extends to the whole of India.

(3) It shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention there under committed outside India by any person to whom this Act applies.

(4) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint: Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Definitions.-In this Act, unless the context otherwise requires.- (a) "Adjudicating Authority" means an officer authorized under sub-section (1) of section 16

(b) "Appellate Tribunal" means the Appellate Tribunal for Foreign Exchange established under section 18;
(c) "authorized person" means an authorized dealer, money changer, off-shore banking unit or any other person for the time being authorized under sub-section (1) of section 10 to deal in foreign exchange or foreign securities;

(d) "Bench" means a Bench of the Appellate Tribunal;

(e) "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6;

(f) "Chairperson" means the Chairperson of the Appellate Tribunal;

(g) "Chartered accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accounts Act, 1949 (38 of 1949);

(h) "currency" includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank;

(i) "Currency notes" means and includes cash in the form of coins and bank notes;

(j) "current account transaction" means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,- (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business, (ii) payments due as interest on loans and as net income from investments, (iii) remittances for living expenses of parents, spouse and children residing abroad, and (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children;

(k) "Director of Enforcement" means the Director of Enforcement appointed under sub-section (1) of section 36;

(l) "export", with its grammatical variations and cognate expressions, means- (i) the taking out of India to a place outside India any goods, (ii) provision of services from India to any person outside India;

(m) "foreign currency" means any currency other than Indian currency;

(n) "foreign exchange" means foreign currency and includes,- (i) deposits, credits and balances payable in any foreign currency, (ii) drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign
currency, (iii) drafts, travelers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

(o) "foreign security" means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

(p) "import", with its grammatical variations and cognate expressions, means bringing into India any goods or services;

(q) "Indian currency" means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934 (2 of 1934);

(r) "legal practitioner" shall have the meaning assigned to it in clause (i) of sub-section (1) of section 2 of the Advocates Act, 1961 (25 of 1961);

(s) "Member" means a Member of the Appellate Tribunal and includes the Chairperson thereof; (t) "notify" means to notify in the Official Gazette and the expression "notification" shall be construed accordingly;

(u) "person" includes- (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and (vii) any agency, office or branch owned or controlled by such person;

(v) "person resident in India" means- (i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include- (A) a person who has gone out of India or who stays outside India, in either case- (a) for or on taking up employment outside India, or (b) for carrying on outside India a business or vocation outside India, or (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period; (B) a person who has come to or stays in India, in either case, otherwise than- (a) for or on taking up employment in India, or (b) for carrying on in India a business or vocation in India, or (c)(i) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period; (ii) any person or body corporate registered or incorporated in India, (iii) an office, branch or agency in India owned or controlled by a person resident outside India, (iv) an office, branch or agency outside India owned or controlled by a person resident in India;

(w) "person resident outside India" means a person who is not resident in India;

(x) "prescribed" means prescribed by rules made under this Act;
(y) "repatriate to India" means bringing into India the realized foreign exchange and- (i) the selling of such foreign exchange to an authorized person in India in exchange for rupees, or (ii) the holding of realized amount in an account with an authorized person in India to the extent notified by the Reserve Bank, and includes use of the realized amount for discharge of a debt or liability denominated in foreign exchange and the expression "repatriation" shall be construed accordingly;

(z) "Reserve Bank" means the Reserve Bank of India constituted under sub-section (1) of section 3 of the Reserve Bank of India Act, 1934 (2 of 1934);

(za) "security" means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), savings certificates to which the Government Savings Certificates Act, 1959 (46 of 1959) applies, deposit receipts in expect of deposits of securities and units of the Unit Trust of India established under subsection (1) of section 3 of the Unit Trust of India Act, 1963 (52 of 1963) or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;

(zb) "service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

; (zc) "Special Director (Appeals)" means an officer appointed under section 18;

(zd) "specify" means to specify by regulations made under this Act and the expression "specified" shall be construed accordingly;

(ze) "transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Chapter II

REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE

Sec. 3. Dealing in foreign exchange, etc.-Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall- (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorized person; (b) make any payment to or for the credit of any person resident outside India in any manner; (c) receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside
India in any manner. Explanation.-For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorized person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorized person; (d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person. Explanation.-For the purpose of this clause, "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

Sec.4. Holding of foreign exchange, etc. 4. Holding of foreign exchange, etc.-Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India. 5. Current account transactions.

Sec.5. Current account transactions.-Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction: Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

Sec.6. Capital account transactions. -(1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction. (2) The Reserve Bank may, in consultation with the Central Government, specify- (a) any class or classes of capital account transactions which are permissible; (b) the limit up to which foreign exchange shall be admissible for such transactions: Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary courts of business. (3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following- (a) transfer or issue of any foreign security by a person resident in India; (b) transfer or issue of any security by a person resident outside India; (c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India; (d) any borrowing or lending in rupees in whatever form or by whatever name called; (e) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India; (f) deposits between persons resident in India and persons resident outside India; (g) export, import or holding of currency or currency notes; (h) transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India; (i) acquisition or transfer of immovable property
in India, other than a lease not exceeding five years, by a person resident outside India; (j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred- (i) by a person resident in India and owed to a person resident outside India; or (ii) by a person resident outside India. (4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. (5) A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India. (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

Sec.7. Export of goods and services.- (1) Every exporter of goods shall- (a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India; (b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by such exporter. (2) The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit. (3) Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

Sec.8. Realisation and repatriation of foreign exchange.- Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

Sec.9. Exemption from realization and repatriation in certain cases. - The provisions of sections 4 and 8 shall not apply to the following, namely:- (a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify; (b) foreign currency account held or operated by such person or class of persons
and the limit up to which the Reserve Bank may specify; (c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank; (d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from; (e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and (f) such other receipts in foreign exchange as the Reserve Bank may specify.

CHAPTER III AUTHORISED PERSON

Sec. 10. Authorized person.—(1) The Reserve Bank may, on an application made to it in this behalf, authorize any person to be known as authorized person to deal in foreign exchange or in foreign securities, as an authorized dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

(2) An authorization under this section shall be in writing and shall be subject to the conditions laid down therein.

(3) An authorization granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that—(a) it is in public interest so to do; or (b) the authorized person has failed to comply with the condition subject to which the authorization was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction or order made there under: Provided that no such authorization shall be revoked on any ground referred to in clause (b) unless the authorized person has been given a reasonable opportunity of making a representation in the matter.

(4) An authorized person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorized person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorization under this section.

(5) An authorized person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such
information as will reasonably satisfy him that the transaction will not involve and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or make only unsatisfactory compliance therewith, the authorized person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank.

(6) Any person, other than an authorized person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorized person under sub-section (5) does not use it for such purpose or does not surrender it to an authorized person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition or foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made there under shall be deemed to have committed contravention of the provisions of the Act for the purpose of this section.

Sec. 11. Reserve Bank's powers to issue directions to authorized person.--(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorized persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security. (2) The Reserve Bank may, for the purpose of ensuring the compliance with the provisions of this Act or of any rule, regulation, notification, direction or order made there under, direct any authorized person to furnish such information, in such manner, as it deems fit. (3) Where any authorized person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues, reasonable opportunity of being heard, impose on the authorized.

Sec. 12. Power of Reserve Bank to inspect authorized person.--(1) The Reserve Bank may, at any time, cause an inspection to be made, by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, of the business of any authorised person as may appear to it to be necessary or expedient for the purpose of- (a) verifying the correctness of any statement, information or particulars furnished to the Reserve Bank; (b) obtaining any information or particulars which such authorised person has failed to furnish on being called upon to do so; (c) securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made there under.
(2) It shall be the duty of every authorised person, and where such person is a company or a firm, every director, partner or other officer of such company or firm, as the case may be, to produce to any officer making an inspection under sub-section (1), such books, accounts and other documents in his custody or power and to furnish any statement or information relating to the affairs of such person, company or firm as the said officer may require within such time and in such manner as the said officer may direct.

CHAPTER IV CONTRAVENTION AND PENALTIES 1

Sec 13. Penalties.—(1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues. (2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf. Explanation.—For the purposes of this sub-section, "property" in respect of which contravention has taken place, shall include—(a) deposits in a bank, where the said property is converted into such deposits; (b) Indian currency, where the said property is converted into that currency; and (c) any other property which has resulted out of the conversion of that property.

Sec.14. Enforcement of the orders of Adjudicating Authority.—(1) Subject to the provisions of sub-section (2) of section 19, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section. (2) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudication Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied—(a) that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred, concealed, or removed any part of his property, or (b) that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial
part thereof and refuses or neglects or has refused or neglected to pay the same. (3) Notwithstanding anything contained in sub-section (1), a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating Authority is satisfied, by affidavit or otherwise, that with the object or effect of dealing the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority. (4) Where appearance is not made pursuant to a notice issued and served under sub-section (1), the Adjudicating Authority may issue a warrant for the arrest of the defaulter. (5) A warrant of arrest issued by the Adjudicating Authority under sub-section (3) or sub-section (4) may also be executed by any other Adjudicating Authority within whose jurisdiction the defaulter may for the time being be found. (6) Every person arrested in pursuance of a warrant of arrest under this section shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey): Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him. Explanation.-For the purposes of this sub-section, where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter. (7) When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority under this section, the Adjudicating Authority shall give the defaulter an opportunity showing cause why he should not be committed to the civil prison. (8) Pending the conclusion of the inquiry, the Adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required. (9) Upon the conclusion of the inquiry, the Adjudicating authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest: Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on his furnishing security to the satisfaction of the Adjudicating Authority for his appearance at the expiration of the specified period if the arrears are not satisfied. (10) When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release. (11) Every person detained in the civil prison in execution of the certificate may be so detained.- (a) where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and (b) in any other case, up to six months: Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison. (12) A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the
arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison. (13) A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973 (2 of 1974). 15. Power to compound contravention.

India's Double Tax Avoidance Agreements

The Central Government, acting under Section 90 of the Income Tax Act, has been authorised to enter into Double Tax Avoidance Agreements (hereinafter referred to as tax treaties) with other countries. The object of such agreements is to evolve an equitable basis for the allocation of the right to tax different types of income between the 'source' and 'residence' states ensuring in that process tax neutrality in transactions between residents and non-residents. A non-resident, under the scheme of income taxation, becomes liable to tax in India in respect of income arising here by virtue of its being the country of source and then again, in his own country in respect of the same income by virtue of the inclusion of such income in the 'total world income' which is the tax base in the country of residence. Tax incidence, therefore, becomes an important factor influencing the non-residents in deciding about the location of their investment, services, technology etc. Tax treaties serve the purpose of providing protection to tax payers against double taxation and thus preventing the discouragement which taxation may provide in the free flow of international trade, international investment and international transfer of technology. These treaties also aim at preventing discrimination between the tax payers in the international field and providing a reasonable element of legal and fiscal certainty within a legal framework. In addition, such treaties contain provisions for mutual exchange of information and for reducing litigation by providing for mutual assistance procedure.

Double taxation is the imposition of two or more taxes on the same income (in the case of income taxes), asset (in the case of capital taxes), or financial transaction (in the case of sales taxes). It refers to two distinct situations:

- taxation of dividend income without relief or credit for taxes paid by the company paying the dividend on the income from which the dividend is paid. This arises in the so-called "classical" system of corporate taxation, used in the United States.
- taxation by two or more countries of the same income, asset or transaction, for example income paid by an entity of one country to a resident of a different country. The double liability is often mitigated by tax treaties between countries.
It is not unusual for a business or individual who is resident in one country to make a taxable gain (earnings, profits) in another. This person may find that he is obliged by domestic laws to pay tax on that gain locally and pay again in the country in which the gain was made. Since this is inequitable, many nations make bilateral Double taxation agreements with each other. In some cases, this requires that tax be paid in the country of residence and be exempt in the country in which it arises. In the remaining cases, the country where the gain arises deducts taxation at source ("withholding tax") and the taxpayer receives a compensating foreign tax credit in the country of residence to reflect the fact that tax has already been paid. To do this, the taxpayer must declare himself (in the foreign country) to be non-resident there. So the second aspect of the agreement is that the two taxation authorities exchange information about such declarations, and so may investigate any anomalies that might indicate tax evasion.

In the European Union, member states have concluded a multilateral agreement on information exchange. This means that they will each report (to their counterparts in each other jurisdiction) a list of those savers who have claimed exemption from local taxation on grounds of not being a resident of the state where the income arises. These savers should have declared that foreign income in their own country of residence, so any difference suggests tax evasion.

(For a transition period, some states have a separate arrangement. They may offer each non-resident account holder the choice of taxation arrangements: either (a) disclosure of information as above, or (b) deduction of local tax on savings interest at source as is the case for residents).

Cyprus Double Tax Treaties:

Cyprus has concluded 34 double tax treaties which apply to 40 countries. The main purpose of these treaties is the avoidance of double taxation on income earned in any of these countries. Under these agreements, a credit is usually allowed against the tax levied by the country in which the taxpayer resides for taxes levied in the other treaty country and as a result the tax payer pays no more than the higher of the two rates. Further, some treaties provide for tax sparing credits whereby the tax credit allowed is not only with respect to tax actually paid in the other treaty country but also from tax which would have been otherwise payable had it not been for incentive measures in that other country which result in exemption or reduction of tax.
German Taxation Avoidance

If a foreign citizen is in Germany for less than a relevant 183 day period (approximately six months) and are tax resident (i.e., and paying taxes on your salary/benefits) elsewhere, then it may be possible to claim tax relief under a particular Double Tax Treaty. The relevant 183 day period is either 183 days in a calendar year or in any period of 12 months, depending upon the particular treaty is involved. The Double Tax Treaty with the UK, for example, looks at a period of 183 days in the German tax year (which is the same as the calendar year).

So, for example, you could work in Germany from 1 September through to the following 30 May, a total of 10 months, whilst being tax resident in Germany and could claim to be exempt from German tax under a Double Tax Treaty. This is assuming that during this period you were tax resident in another country and paying taxes on your salary and benefits there.

In some cases, it would be beneficial, from a tax standpoint, to claim exemption under a Double Tax Treaty, i.e., if your other country of tax residence levies much lower taxes. In other cases, whilst the tax liability may be broadly similar (e.g., as with the UK and Germany), claiming exemption under a Double Tax Treaty offers administrative convenience and savings in professional fees (payroll bureau, tax return filing etc). In Germany, if the criteria of a relevant Double Tax Treaty are satisfied then there is no requirement to submit a formal claim for relief; rather, exemption may simply be assumed. The other criteria are that you are paid by a non-German company and that the costs of your employment are borne by a non-German company. You should not, generally, have a problem satisfying these criteria.

If you are receiving a salary for working in Germany and that salary is subject to German tax, i.e., relief under a Double Tax Treaty is not available or desirable, you (as a company) or your employer is obliged to deduct a German withholding tax and pay this over to the German Revenue authorities on a regular basis. You will need to seek professional advice in Germany as to the calculation; regularity and transmission of these payments and contact details can be provided if required.

Double Taxation Avoidance Agreement Signed By India

India has comprehensive Double Taxation Avoidance Agreement (DTAA) with 79 countries. What it means is that there are agreed rate of tax and jurisdiction on specified
types of income arising in a country to a tax resident of another country. Under Income Tax Act 1961 of India, there are two provisions—section 90 and section 91—which provides specific relief to tax payers to save them from DTAA. **Section 90** is for taxpayer who has paid the tax to a country with which India has signed DTAA. While **Section 91** provides relief to tax payers who have paid tax to a country with which India has not signed DTAA. Thus, India gives relief to both kinds of taxpayers.

A large number of Foreign Institutional Investors who trade on the Indian stock markets operate from Mauritius. According to the tax treaty between India and Mauritius, Capital Gains arising from the sale of shares is taxable in the country of residence of the shareholder and not in the country of residence of the Company whose shares have been sold. Therefore, a company resident in Mauritius selling shares of an Indian company will not pay tax in India. Since there is no Capital gains tax in Mauritius, the gain will escape tax altogether.

**U.S. Citizens and Resident Aliens Abroad**

The US requires its citizens to file **tax returns** reporting their earnings wherever they reside. However, there are some measures designed to reduce the international double taxation that results from this requirement.

First, an individual who is a **bona fide resident** of a foreign country or is physically outside the US for an extended time is entitled to an exclusion (exemption) of part or all of their **earned income** (i.e. personal service income, as distinguished from income from capital or investments.) That exemption is currently set at $85,700 (2007).

Second, the US allows a **foreign tax credit** by which **income taxes** paid to foreign countries can be offset against US income tax liability attributable to foreign income. This can be a complex issue that often requires the services of a **tax advisor**. The foreign tax credit is not allowed for taxes paid on earned income that is excluded under the rules described in the preceding paragraph (i.e. no double dipping).

**Double taxation within the United States**

Double taxation can also happen within a single country. This typically happens when subnational jurisdictions have taxation powers, and jurisdictions have competing claims. In the United States a person may legally have only a single **domicile**. However, when a person dies different states may each claim that the person was domiciled in that state. **Intangible personal property** may then be taxed by each state making a claim. In the absence of specific laws prohibiting multiple taxation, and as long as the total of taxes do
not exceed the 100% of the value of the intangible personal property, the courts will allow such multiple taxation.

**Foreign Direct Investment and relating policies**

**POLICY and FDI**

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1. **INDUSTRIAL POLICY**

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The Government's liberalisation and economic reforms programme aims at rapid and substantial economic growth, and integration with the global economy in a harmonised manner. The industrial policy reforms have reduced the industrial licensing requirements, removed restrictions on investment and expansion, and facilitated easy access to foreign technology and foreign direct investment.

**Industrial Licensing**

1.1 All industrial undertakings are exempt from obtaining an industrial licence to manufacture, except for (i) industries reserved for the Public Sector (Annex I), (ii) industries retained under compulsory licensing (Annex II), (iii) items of manufacture
reserved for the small scale sector and (iv) if the proposal attracts locational restriction.[For procedure to obtain Industrial Licence refer to para 7.2].

**Industrial Entrepreneurs Memorandum (IEM)**

1.2 Industrial undertakings exempt from obtaining an industrial license are required to file an Industrial Entrepreneur Memoranda(IEM) in Part 'A' (as per prescribed format) with the Secretariat of Industrial Assistance(SIA), Department of Industrial Policy and Promotion, Government of India, and obtain an acknowledgement. No further approval is required. Immediately after commencement of commercial production, Part B of the IEM has to be filled in the prescribed format. The facility for amendment of existing IEMs has also been introduced. [For procedure to file IEM refer to para 7.1].

**Locational Policy**

1.3 Industrial undertakings are free to select the location of a project. In the case of cities with population of more than a million (as per the 1991 census), however, the proposed location should be at least 25 KM away from the Standard Urban Area limits of that city unless, it is to be located in an area designated as an "industrial area" before the 25th July, 1991.(List of cities with population of 1 million and above is given at Annexure-V). Electronics, Computer software and Printing (and any other industry which may be notified in future as "non polluting industry") are exempt from such locational restriction. Relaxation in the aforesaid locational restriction is possible if an industrial license is obtained as per the notified procedure.

1.4 The location of industrial units is further regulated by the local zoning and land use regulations as also the environmental regulations. Hence, even if the requirement of the locational policy stated in paragraph 1.3 is fulfilled, if the local zoning and land use regulations of a State Government, or the regulations of the Ministry of Environment do not permit setting up of an industry at a location, the entrepreneur would be required to abide by that decision.

**Policy Relating to Small Scale Undertakings**

1.5 An industrial undertaking is defined as a small scale unit if the investment in fixed assets in plant and machinery does not exceed Rs 10 million. The Small Scale units can get registered with the Directorate of Industries/District Industries Centre in the State Government concerned. Such units can manufacture any item including those notified as exclusively reserved for manufacture in the small scale sector. Small scale units are also free from locational restrictions cited in paragraph 1.3 above. However, a small scale unit is not permitted more than 24 per cent equity in its paid up capital from any industrial undertaking either foreign or domestic.

1.6 Manufacture of items reserved for the small scale sector can also be taken up by non-small scale units, if they apply for and obtain an industrial license. In such cases, it is mandatory for the non-small scale unit to undertake minimum export obligation of 50 per
cent. This will not apply to non-small scale EOU that are engaged in the manufacture of items reserved for the SSI sector, as they already have a minimum export obligation of 66 per cent of their production. In addition, if the equity holding from another company (including foreign equity) exceeds 24 per cent, even if the investment in plant and machinery in the unit does not exceed Rs 10 million, the unit loses its small scale status. An IEM is required to be filed in such a case for de-licensed industries, and an industrial license is to be obtained in the case of items of manufacture covered under compulsory licensing.

1.7 A small scale unit manufacturing small scale reserved item(s), on exceeding the small scale investment ceiling in plant and machinery by virtue of natural growth, needs to apply for and obtain a Carry-on-Business(COB) License. No export obligation is fixed on the capacity for which the COB license is granted. However, if the unit expands its capacity for the small scale reserved item(s) further, it needs to apply for and obtain a separate industrial license. (For procedure to obtain COB licence, refer to para 7.2(d)).

1.8 It is possible that a chemical or a by-product recoverable through pollution control measures is reserved for the small scale sector. With a view to adopting pollution control measures, Government have decided that an application needs to be made for grant of an Industrial Licence for such reserved items which would be considered for approval without necessarily imposing the mandatory export obligation.

Environmental Clearances

1.9 Entrepreneurs are required to obtain Statutory clearances relating to Pollution Control and Environment for setting up an industrial project. A Notification (SO 60(E) dated 27.1.94) issued under The Environment Protection Act 1986 has listed 29 projects in respect of which environmental clearance needs to be obtained from the Ministry of Environment, Government of India. This list includes industries like petro-chemical complexes, petroleum refineries, cement, thermal power plants, bulk drugs, fertilisers, dyes, paper etc. However if investment is less than Rs. 500 million, such clearance is not necessary, unless it is for pesticides, bulk drugs and pharmaceuticals, asbestos and asbestos products, integrated paint complexes, mining projects, tourism projects of certain parameters, tarred roads in Himalayan areas, distilleries, dyes, foundries and electroplating industries. Further, any item reserved for the small scale sector with investment of less than Rs 10 million is also exempt from obtaining environmental clearance from the Central Government under the Notification. Powers have been delegated to the State Governments for grant of environmental clearance for certain categories of thermal power plants. Setting up industries in certain locations considered ecologically fragile (eg Aravalli Range, coastal areas, Doon valley, Dahanu, etc.) are guided by separate guidelines issued by the Ministry of Environment of the Government of India.[For procedure to obtain environmental clearance, refer to para 21.1].

2. FOREIGN DIRECT INVESTMENT

| Automatic Route | Government Approval | Issue and Valuation of |
Government wishes to facilitate foreign direct investment (FDI) and investment from Non-Resident Indians (NRI)s including Overseas Corporate Bodies (OCBs), that are predominantly owned by them, to complement and supplement domestic investment. Investment and returns are freely repatriable, except where the approval is subject to specific conditions such as lock in period on original investment, dividend cap, foreign exchange neutrality, etc. as per the notified sectoral policy. The condition of dividend balancing that was applicable to FDI in 22 specified consumer goods industries stands withdrawn for dividends declared after 14th July 200, the date on which Press Note. No. 7 of 2000 Series was issued.

2.1 Foreign direct investment is freely allowed in all sectors including the services sector, except where the existing and notified sectoral policy does not permit FDI beyond a ceiling. FDI for virtually all items/activities can be brought in through the automatic route under powers delegated to the Reserve Bank of India (RBI), and for the remaining items/activities through Government Approval. Government approvals are accorded on the recommendation of the Foreign Investment Promotion Board (FIPB), chaired by the Secretary, Department of Industrial Policy and Promotion (Ministry of Commerce and Industry) with the Union Finance Secretary, Commerce Secretary, and other key Secretaries of the Government as its members.

**Automatic Route**

**(a) New Ventures**

2.2 All items/activities for FDI/NRI/OCB investment up to 100% fall under the Automatic Route except those covered under (i) to (iv) of para 2.9.

Whenever any investor chooses to make an application to the FIPB and not to avail of the automatic route, he or she may do so.

Investment in Public Sector Units as also for EOU/EPZ/SEZ/EHTP/STP units would also qualify for the Automatic Route. Investment under the Automatic Route shall continue to be governed by the notified sectoral policy and equity caps and RBI will ensure compliance of the same. The National Industrial Classification (NIC) 1987 shall remain applicable for description of activities and classification for all matters relating to FDI/NRI/OCB investment:

Areas/Sectors/Activities hitherto not open to FDI/NRI/OCB investment shall continue to be so unless otherwise decided and notified by Government. Henceforth any change in
sectoral policy/sectoral equity cap shall be notified by the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion.

(b) Existing Companies

2.3 Besides now companies, automatic route for FDI/NRI/OCB investment is also available to the existing companies to induct foreign equity. For existing companies with an expansion programme, the additional requirement are that (I) the increase in equity level must result from the expansion of the equity base of the existing company without acquisition of existing shares by NRI/OCB/foreign investors, (ii) the money to be remitted should be in the sector(s) under the automatic route. Otherwise the proposal would need Government approval through the FIPB. For this, the proposal must be supported by a Board Resolution of the existing Indian company.

2.4 For existing companies without an expansion programme, the additional requirements for eligibility for automatic route are (I) that they are engaged in the industries under automatic route (including additional activities covered under the automatic route regardless of whether the original activities were undertaken with Government approval or by accessing the automatic route), (ii) the increase in equity level must be from expansion of the equity base and (iii) the foreign equity must be in foreign currency.

2.5 The earlier SEBI requirement, applicable to public limited companies, that shares allotted on preferential basis shall not be transferable in any manner for a period of 5 years from the date of their allotment has now been modified to the extent that not more than 20 per cent of the entire contribution brought in by promoter cumulatively in public or preferential issue shall be locked in.

2.6 The automatic route for FDI and/or technology collaboration would not be available to those who have or had any previous joint venture or technology transfer/trade mark agreement in the same or allied field in India.

2.7 Equity participation by international financial institutions such as ADB, IFC, CDC, DEG, etc. in domestic companies is permitted through automatic route subject to SEBI/RBI regulations and sector specific caps on FDI.

2.8 In a major drive to simplify procedures for foreign direct investment under the "automatic route", RBI has given permission to Indian Companies to accept investment under this route without obtaining prior approval from RBI. Investors are required to notify the Regional Office concerned of the RBI of receipt of inward remittances within 30 days of such receipt and file required documentation within 30 days of issue of shares to Foreign Investors. This facility is available to NRI/OCB investment also. [For procedure relating to automatic approval, refer to para 8.1].

Government Approval
2.9 For the following categories, Government approval for FDI/NRI/OCB through the FIPB shall be necessary:

i. All proposals that require an Industrial Licence which includes (i) the item requiring an Industrial Licence under the Industries (Development and Regulation) Act, 1951; (ii) foreign investment being more than 24% in the equity capital of units manufacturing items reserved for small scale industries; and (iii) all items which require an Industrial Licence in terms of the locational policy notified by Government under the New Industrial Policy of 1991.

ii. All proposals in which the foreign collaborator has a previous venture/tieup in India. The modalities prescribed in Press Note No. 18 dated 14.12.98 of 1998 series, shall apply in such cases. However, this shall not apply to investment made by multilateral financial institutions such as ADB, IFC, CDC, DEG, etc. as also investment made in IT sector.

iii. All proposals relating to acquisition of shares in an existing Indian company in favour of a foreign/NRI/OCB investor.

iv. All proposals falling outside notified sectoral policy/caps or under sectors in which FDI is not permitted.

Whenever any investor chooses to make an application to the FIPB and not to avail of the automatic route, he or she may do so.

Areas/Sectors/Activities hitherto not open to FDI/NRI/OCB investment shall continue to be so unless otherwise decided and notified by Government. Henceforth any change in sectoral policy/sectoral equity cap shall be notified by the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion.

2.10 RBI has granted general permission under Foreign Exchange Management Act (FEMA) in respect of proposals approved by the Government. Indian companies getting foreign investment approval through FIPB route do not require any further clearance from RBI for the purpose of receiving inward remittance and issue of shares to the foreign investors. Such companies are, however, required to notify the Regional Office concerned of the RBI of receipt of inward remittances within 30 days of such receipt and to file the required document with the concerned Regional Offices of the RBI within 30 days after issue of shares to the foreign investors.

2.11 For greater transparency in the approval process, Government have announced guidelines for consideration of FDI proposals by the FIPB. The guidelines are stated in Annexure-III. The sector specific guidelines for FDI and Foreign Technology Collaborations are stated in Annexure-IV. [For procedure relating to Government approval, refer to para 8.2].

**Issue and Valuation of Shares in case of existing companies**
2.12 Allotment of shares on preferential basis shall be as per the requirements of the Companies Act, 1956, which will require special resolution in case of a public limited company.

In case of listed companies, valuation shall be as per the RBI/SEBI guidelines as follows:

The issue price shall be either at:

a) The average of the weekly high and low of the closing prices of the related shares quoted on the Stock Exchange during the six months preceding the relevant date or

b) The average of the weekly high and low of the closing prices of the related shares quoted on the Stock Exchange during the two weeks preceding the relevant date.

The stock exchange referred to is the one at which the highest trading volume in respect of the share of the company has been recorded during the preceding six months prior to the relevant date.

The relevant date is the date thirty days prior to the date on which the meeting of the General body of the shareholder is convened.

In all other cases a company may issue shares as per the RBI regulation in accordance with the guidelines issued by the erstwhile Controller of Capital Issues.

Other relevant guidelines of Securities and Exchange Board of India (SEBI)/(RBI) including the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherever applicable, would need to be followed.

**Foreign Investment in the Small Scale Sector**

2.13 Under the small scale policy, equity holding by other units including foreign equity in a small scale undertaking is permissible up to 24 per cent. However there is no bar on higher equity holding for foreign investment if the unit is willing to give up its small scale status. In case of foreign investment beyond 24 per cent in a small scale unit which manufactures small scale reserved item(s), an industrial license carrying a mandatory export obligation of 50 per cent would need to be obtained.

**Foreign Investment Policy for Trading Activities**

2.14 Foreign investment for trading can be approved through the automatic route up to 51% foreign equity, and beyond this by the Government through FIPB. For approval through the automatic route, the requirement would be that it is primarily export activities and the undertaking concerned is an export house/trading house/ super trading house/star trading house registered under the provisions of the Export and Import policy in force. The sectoral policy of trading activities is elaborated at S. No. 8 viz. Trading of Annexure IV (Sector Specific Guidelines for Foreign Direct Investment) of this Manual.
Both in the case of automatic and Government approvals, the valuation and pricing of shares would be governed by the provisions stated in paragraph 2.11 above. Closely held companies would also be governed, mutatis mutandis, by the same guidelines.

Other Modes of Foreign Direct Investments

2.16 Global Depository Receipts (GDR)/American Deposit Receipts (ADR)/Foreign Currency Convertible Bonds (FCCB): Foreign Investment through GDRs/ADRs, Foreign Currency Convertible Bonds (FCCBs) are treated as Foreign Direct Investment. Indian companies are allowed to raise equity capital in the international market through the issue of GDR/ADRs/FCCBs. These are not subject to any ceilings on investment. An applicant company seeking Government's approval in this regard should have a consistent track record for good performance (financial or otherwise) for a minimum period of 3 years. This condition can be relaxed for infrastructure projects such as power generation, telecommunication, petroleum exploration and refining, ports, airports and roads.

2.17 There is no restriction on the number of GDRs/ADRs/FCCBs to be floated by a company or a group of companies in a financial year. A company engaged in the manufacture of items covered under Automatic Route is likely to exceed the percentage limits under the Automatic Route, whose direct foreign investment after a proposed GDR/ADR/FCCBs issue is likely to exceed 50 per cent/51 per cent/74 per cent as the case may be, or which is implementing a project not contained in project falling under Government Approval route, would need to obtain prior Government clearance through FIPB before seeking final approval from the Ministry of Finance.

2.18 There are no end-use restrictions on GDR/ADR issue proceeds, except for an express ban on investment in real estate and stock markets. The FCCB issue proceeds need to conform to external commercial borrowing end use requirements; in addition, 25 per cent of the FCCB proceeds can be used for general corporate restructuring.

Preference Shares

2.19 Foreign investment through preference shares is treated as foreign direct investment. Proposals are processed either through the automatic route or FIPB as the case may be. The following guidelines apply to issue of such shares:-
(i) Foreign investment in preference share are considered as part of share capital and fall outside the External Commercial Borrowing (ECB) guidelines/cap
(ii) Preference shares to be treated as foreign direct equity for purpose of sectoral caps on foreign equity, where such caps are prescribed, provided they carry a conversion option. If the preference shares are structured without such conversion option, they would fall outside the foreign direct equity cap.
(iii) Duration for conversion shall be as per the maximum limit prescribed under the Companies Act or what has been agreed to in the share holders agreement whichever is less.
(iv) The dividend rate would not exceed the limit prescribed by the Ministry of Finance.
(v) Issue of Preference Shares should conform to guidelines prescribed by the SEBI and RBI and other statutory requirements.

3. INVESTMENT BY NON RESIDENT INDIANS OVERSEAS CORPORATE BODIES

3.1 For all sectors excluding those falling under Government Approval, NRIs (which also includes PIOs) and OCBs (an overseas corporate body means a company or other entity owned directly or indirectly to the extent of at least 60% by NRIs) are eligible to bring investment through the Automatic Route of RBI. All other proposals which do not fulfill any or all of the criteria for automatic approval are considered by the Government through the FIPB.

3.2 The NRIs and OCBs are allowed to invest in housing and real estate development sector, in which foreign direct investment is not permitted. They are allowed to hold up to 100 per cent equity in civil aviation sector in which otherwise foreign equity only up to 40 per cent is permitted.

4. FOREIGN TECHNOLOGY AGREEMENTS

4.1 With a view to injecting the desired level of technological dynamism in Indian industry and for promoting an industrial environment where the acquisition of technological capability receives priority, foreign technology induction is encouraged both through FDI and through foreign technology collaboration agreements. Foreign technology collaborations are permitted either through the automatic route under delegated powers exercised by the RBI, or by the Government. However, cases involving industrial licenses/small scale reserved items do not qualify for automatic approval and would require consideration and approval by the Government. Automatic route for technology collaboration would also not be available to those who have, or had any previous technology transfer/trade-mark agreement in the same or allied field in India. Further, automatic approval for EOU/EHTP/STP units are governed by provisions under Para 5.2 and 6.2.

**Automatic Approval**

4.2 The Reserve Bank of India, through its regional offices, accords automatic approval to all industries for foreign technology collaboration agreements subject to (i) the lump sum payments not exceeding US $ 2 Million; (ii) royalty payable being limited to 5 per cent for domestic sales and 8 per cent for exports, subject to a total payment of 8 per cent on sales over a 10 year period; and (iii) the period for payment of royalty not exceeding 7 years from the date of commencement of commercial production, or 10 years from the date of agreement, whichever is earlier (The aforesaid royalty limits are net of taxes and are calculated according to standard conditions). [For procedure for automatic approval, refer to para 9.1].
Payment of royalty up to 2% for exports and 1% for domestic sales is allowed under automatic route on use of trademarks and brand name of the foreign collaborator without technology transfer. In case of technology transfer, payment of royalty subsumes the payment of royalty for use of trademark and brand name of the foreign collaborator. Royalty on brand name/trade mark shall be paid as a percentage of net sales, viz., gross sales less agents’/dealers’ commission, transport cost, including ocean freight, insurance, duties, taxes and other charges, and cost of raw materials, parts, components imported from the foreign licensor or its subsidiary/affiliated company.

Payment of royalty upto 8% on exports and 5% on domestic sales by wholly owned subsidiaries to offshore parent companies is allowed under the automatic route without any restriction on the duration of royalty payments.

**Government Approval**

4.3 For the following categories, Government approval would be necessary:
(a) proposals attracting compulsory licensing
(b) Items of manufacture reserved for the small scale sector
(c) Proposals involving any previous joint venture, or technology transfer/trademark agreement in the same or allied field in India. The definition of "same" and "allied" field would be as per 4 digit NIC 1987 Code and 3 digit NIC 1987 Code.
(d) Extension of foreign technology collaboration agreements (including those cases which may have received automatic approval in the first instance)
(e) Proposals not meeting any or all of the parameters for automatic approval as given in para 4.2.

[For procedure for Government approval refer to Para 9.2]

4.4 The items of foreign technology collaboration which are eligible for approval through the automatic route, and by the Government are technical know how fees, payment for design and drawing, payment for engineering service and royalty. Exclusive payment for use of brand names and trademarks are not allowed, although such payments may be subsumed in the other fee payable.

4.5 Payments for hiring of foreign technicians, deputation of Indian technicians abroad, and testing of indigenous raw material, products, indigenously developed technology in foreign countries are governed by separate RBI procedures and rules and are not covered by the foreign technology collaboration approval. Similarly, payments for imports of plant and machinery and raw material are also not covered by the foreign technology collaboration approval. For any of these items, entrepreneurs may contact the RBI.

**5. 100% EXPORT ORIENTED UNITS/ EXPORT PROCESSING ZONES/ SPECIAL ECONOMIC ZONES/ INDUSTRIAL PARKS**

5.1(a) 100 per cent Export Oriented Units (EOUs) and units in the Export Processing Zones (EPZs)/Special Economic Zones (SEZs), enjoy a package of incentives and
facilities, which include duty free imports of all types of capital goods, raw material, and consumables in addition to tax holidays against export.

5.1(b) 100 per cent FDI is permitted under automatic route for setting up of Industrial Park/Industrial Model Town/Special Economic Zones in the country. To encourage investment in this sector, 100 per cent income tax exemption for 10 years within a block of 15 years is also granted for the Industrial Parks set up during the period 1.4.1997 to 31.3.2006.

**Automatic Approval**

5.2 The Development Commissioners (DCs) of Export Processing Zones (EPZs) /Free Trade Zones (FTZs)/Special Economic Zones (SEZs) accord automatic approval to projects where (a) Activity proposed does not attract compulsory licensing or falls in the services sector except IT enabled services; (b) Location is in conformity with the prescribed parameters; (c) Units undertake to achieve exports and value addition norms as prescribed in the Export and Import Policy in force; (d) Unit is amenable to bonding by customs authorities; and (e) Unit has projected the minimum export turnover, as specified in the Handbook of Procedures for Export and Import.

All proposals for FDI/NRI/OCB investments in EOU/EPZ units qualify for approval through automatic route subject to the sectoral norms. Proposals not covered under the automatic route would be considered and approved by FIPB. [For procedure for automatic approval, refer to para 10.1 & 10.5].

5.3 Conversion of existing Domestic Tariff Area (DTA) units into EOU is also permitted under automatic route, if the DTA unit satisfies the parameters mentioned above and there is no outstanding export obligation under any other Export Oriented scheme of the Government of India.

5.4 FDI upto100% is allowed through the automatic route for all manufacturing activities in Special Economic Zones (SEZs), except for the following activities:

a. arms and ammunition, explosives and allied items of defence equipments defence aircraft and warships;
b. atomic sustances;
c. narcotics and psychotropic substances and hazardous chemicals;
d. distillation and brewing of alcoholic drinks; and
e. cigarettes/cigars and manufactured tobacco substitutes.

For services, norms as notified, would be applicable
Government Approval

5.5 All proposals which do not meet any or all of the parameters for automatic approval will be considered and approved by the Board of Approval of EOU/EPZ/SEZ set up in the Department of Commerce.

6. ELECTRONIC HARDWARE TECHNOLOGY PARK, SOFTWARE TECHNOLOGY PARK SCHEMES AND SPECIAL ECONOMIC ZONES

6.1 In order to provide impetus to the electronics industry, to enhance its export potential and to develop an efficient electronic component industry, Electronic Hardware Technology Park (EHTP), Software Technology Park (STP) schemes and Special Economic Zones (SEZ) offer a package of incentives and facilities like duty free imports on the lines of the EOU Scheme, deemed exports benefits and tax holidays.

Automatic Approval

6.2 The Directors of STPs in respect of STP proposals; and the Designated Officers in respect of EHTP proposals accord automatic approval if -
(a) the items do not attract compulsory licensing; (b) the location is in conformity with the prescribed parameters; (c) the export obligation laid down in the respective EHTP scheme or STP scheme is fulfilled; (d) the unit is amenable to bonding by the Customs, and all the manufacturing operations are carried out in the same premises and the proposal does not envisage sending out of the bonded area any raw material or intermediate products for any other manufacturing or processing activity.

All proposals for FDI/NRI/OCB investments in EHTP/STP units are eligible for approval through Automatic Route subject to parameters listed under para 2.9.[For procedure to obtain Automatic Approval, refer to para 11.2].

Government Approval

6.3 All proposals which do not meet any or all of the parameters for automatic approval need to be considered and approved by the Government. Also, Government approval for FDI/NRI/OCB investments under EHTP/STP need to be obtained through the FIPB in respect of proposals covered under para 2.9.[For procedure to obtain Government approval, refer to para 11.3 & 11.4].

PROCEDURES

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7. APPROVAL PROCEDURES

The description of activities seeking all industrial approvals including foreign direct investment are required to be given as per the National Industrial Classification of All Economic Activities (NIC), 1987, published by the Central Statistical Organisation, Ministry of Statistics and Programme Implementation, New Delhi. Copies of the publication can be obtained on payment from Controller of publications, 1 Civil Lines, Delhi-1 10054 or from any outlet dealing in Government Publications.

7.1 General Procedures

IEM:

(a) All industrial undertakings exempt from the requirements of industrial licensing, including existing units undertaking substantial expansion, need to file information in the prescribed Industrial Entrepreneurs Memorandum, i.e. Form IEM (Annexure-VII). The form is available at all outlets dealing in Government Publications, Indian Embassies, the Entrepreneurial Assistance Unit (EAU) of the Secretariat for Industrial Assistance (SIA), Department of Industrial Policy and Promotion, Udyog Bhavan, New Delhi-110011, and can also be downloaded from the Web site of the SIA (http://indmin.nic.in).

(b) The Memorandum (IEM) should be submitted to the EAU of the SIA in person or by post. A computer acknowledgement containing the SIA Registration Number (for future reference) will be issued across the counter immediately if delivered in person or sent by post if received through post. No further approval from SIA is required.

(c) The IEM should be submitted along with a crossed demand draft of Rs.1000/- drawn in favour of "The Pay & Accounts Officer, Department of Industrial Development, Ministry of Industry", payable at the State Bank of India, Nirman Bhawan Branch, New Delhi up to 10 items proposed to be manufactured in the same unit. For more than 10 items, an additional fee of Rs 250 up to 10 additional items needs to be paid through crossed demand draft.
(d) All Industrial undertakings also need to file information in Part 'B' of the Memorandum at the time of commencement of commercial production. The prescribed form is appended to Form IEM. This second Memorandum has also to be filed with the EAU in SIA, but no fee is required.

(e) No amendment/modifications are made to any IEM filed before 30th June, 1998 except for clerical errors. Where any amendment/modification is sought to be made in such IEMs, a fresh memorandum in Form IEM, along with the prescribed fee has to be filed for which a fresh acknowledgement will be issued. An IEM would be cancelled/deleted from the SIA records if, on scrutiny, it is found that the proposal contained in the IEM is licensable.

(f) In respect of IEMs filed in the new form made effective from 1st July, 1998, amendments/modifications will be made on the request of the entrepreneur, as per the notified procedure.

7.2 Procedural Requirements for Licensed Sectors

Industrial Licence:

(a) All industrial undertakings subject to compulsory industrial licensing are required to submit an application in the prescribed format, i.e. Form FC-IL(Annexure-VIII). Licenses are granted under the provisions of the Industries(Development and Regulation) Act, 1951. The form is available in the EAU of the SIA, at all outlets dealing in Government Publications, Indian Embassies, and can also be downloaded from the Web site of the SIA - http://indmin.nic.in. Applications for the manufacture of chlorine and caustic soda, along with associated products should include information regarding the chlorine utilisation programme.

(b) Application in Form FC-IL should be submitted to the EAU of the SIA, Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Udyog Bhawan, New Delhi - 110011. Approvals will normally be available within 4-6 weeks of filling the application.

(c) The application, in Form FC-IL, should be submitted along with a crossed demand draft of Rs.2500/- drawn in favour of the Pay & Accounts Officer, Department of Industrial Development, Ministry of Industry, payable at the State Bank of India, Nirman Bhawan, New Delhi.

Carry on Business (COB) Licence

(d) A COB licence is required when a small scale unit exceeds the prescribed small scale limit of investment in plant and machinery by way of natural growth and continues to manufacture small scale reserved item(s). Also, if exemption from Industrial licensing granted for any item is withdrawn, the industrial undertakings who are manufacturing such item(s) require COB licence. The application for COB licence should be submitted
in prescribed form "EE" to the SIA, Department of Industrial Policy and Promotion, along with a crossed demand draft of Rs.2500/- drawn in favour of the Pay & Accounts Officer, Department of Industrial Development, Ministry of Industry, payable at the State Bank of India, Nirman Bhawan, New Delhi.

8. FOREIGN DIRECT INVESTMENT

8.1 Procedure For Automatic Route

The proposals for approval under the automatic route are to be made to the Reserve Bank of India in the FC(RBI) form. In a major drive to simplify procedures for foreign direct investment under the "automatic route", RBI has given permission to Indian Companies to accept investment under this route without obtaining prior approval from Reserve Bank of India. However, investors will have to file the required documents with the concerned Regional Office of the RBI within 30 days after issue of shares to foreign investors. This facility is available to NRI/OCB investment also.

8.2 Procedure For Government Approval

FIPB

(a) All other proposals for foreign investment, including NRI/OCB investment and foreign investment in EOU/EPZ/STP/EHTP units, which do not fulfil any or all of the parameters prescribed for automatic approval, as given in paragraph 2.8, 3.1, and 3.2 are considered for approval on merits by the Government. All such proposals are considered for approval by the Foreign Investment Promotion Board (FIPB). The FIPB also grants composite approvals involving foreign technical collaborations and setting up of Export Oriented Units involving foreign investment/foreign technical collaboration.

(b) Applications to FIPB for approval of foreign investment should be submitted in Form FC-IL (Annexure-VIII). Plain paper applications carrying all relevant details are also accepted. No fee is payable. The following information should form part of the proposal submitted to FIPB:

i. Whether the applicant has had or has any previous financial/technical collaboration or trade mark agreement in India in the same or allied field for which approval has been sought?; and

ii. If so, details thereof and the justification for proposing the new venture/technical collaboration (including trade marks).

(c) The application can be submitted with the EAU of the SIA, Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Udyog Bhavan, New Delhi - 110011. Applications can also be submitted with Indian Missions abroad who will forward them to the SIA for further processing.
(d) Foreign investment proposals received in the SIA are placed before the Foreign Investment Promotion Board (FIPB) within 15 days of its receipt. The Board has the flexibility of purposeful negotiation with the investors and considers project proposals in totality in order to ensure optimum foreign direct investment into the country. The recommendations of FIPB in respect of project proposals involving a total investment of up to Rs. 6 billion are considered and approved by the Commerce & Industry Minister. Projects with a total investment exceeding Rs. 6 billion are submitted to the Cabinet Committee on Economic Affairs (CCEA) for decision.

(e) The decision of the Government in all cases are conveyed by the SIA normally within 30 days.

(f) RBI has granted general permission under Foreign Exchange Management Act (FEMA) in respect of proposals approved by the Government. Indian companies getting foreign investment approval through FIPB route do not require any further clearance from RBI for the purpose of receiving inward remittance and issue of shares to the foreign investors. Such companies are, however, required to file the required document with the concerned Regional Offices of the RBI within 30 days after issue of shares to the foreign investors.

(g) Similarly, for inward remittance and issue of shares to NRI/OCB up to 100 per cent equity also, prior permission of RBI is not required. These companies have to file the required documents with the concerned Regional Offices of RBI within 30 days after the issue of shares to NRIs/OCBs.

9. FOREIGN TECHNOLOGY COLLABORATION

9.1 Procedure for Automatic Approval

Applications for automatic approval for such foreign technology agreements should be submitted in Form FT (RBI) with the concerned Regional Offices of Reserve Bank of India. No fee is payable. Approvals are available within 2 weeks.

9.2 Procedure for Government Approval

(a) All other proposals for foreign technology agreement, not meeting any or all of the parameters for automatic approval, and all cases of extension of existing foreign technical collaboration agreement, are considered for approval, on merits, by the Government. Application in respect of such proposals should be submitted in Form FC-IL to the Secretariat for Industrial Assistance, Department of Industrial Policy & Promotion, Ministry of Industry, Udyog Bhawan, New Delhi. No fee is payable. The following information should form part of the proposal submitted to SIA:

i. Whether the applicant has had or has any previous financial/technical collaboration or trade mark agreement in India in the same or allied field for which approval has been sought?; and
ii. If so, details thereof and the justification for proposing the new venture/technical collaboration (including trade marks).

Approvals are normally available within 4 to 6 weeks of filing the application.

10. 100% EXPORT ORIENTED UNITS AND UNITS SET UP IN EPZ/FTZ/SEZ

A. PROCEDURE FOR APPROVAL FOR EOUs

10.1 Applications in the prescribed form for 100 per cent EOUs should be submitted to the Development Commissioners (DCs) of the Export Processing Zones (EPZs) concerned for automatic approval and to the SIA for Government approval. The Form is printed in the Handbook of Procedures for Export and Import, 1997-2002 published by the Ministry of Commerce and is also available at all outlets dealing in Government Publications. The application should be submitted along with a crossed demand draft of Rs.5000/- drawn in favour of the "Pay & Accounts Officer, Department of Industrial Development, Ministry of Industry", payable at the State Bank of India, Nirman Bhavan Branch, New Delhi.

10.2 Procedure for Automatic Approval for EOUs

Applications in the prescribed form for 100 per cent EOUs should be submitted to the DCs of the EPZs. Wherever, the proposals meet the criteria for automatic approval, as given in paragraph 5.2, the DC of the EPZ would issue approval letters within 2 weeks.

10.3 Procedure for Government Approval for EOUs

Proposals not covered by the automatic route shall be forwarded by the DC to the Board of Approval (BoA) for consideration. On consideration of the proposal by the board, the decision would normally be conveyed in six weeks.

10.4 Procedure for foreign direct investment/NRI investment

For proposals not covered under automatic route, the applicant should seek separate approval of the FIPB as per the procedure outlined in para 8.2 above.

B. PROCEDURE FOR APPROVAL FOR UNITS LOCATED IN EPZ/FTZ/SEZ

10.5 Applications for setting up units in EPZs/SEZs be submitted to the concerned DC of the EPZ/SEZ. The Form is printed in the Handbook of Procedures for Export and Import, 1997-2002 published by the Ministry of Commerce and is also available at all outlets dealing in Government Publications. The application should be submitted along with a crossed demand draft of Rs.5000/- drawn in favour of the "Pay & Accounts Officer, Department of Industrial Development, Ministry of Industry", payable at the State Bank of India, Nirman Bhavan Branch, New Delhi.
10.6 Procedure for Automatic Approval for units located in EPZ/FTZ/SEZ

Applications in the prescribed form for 100 per cent E0Us should be submitted to the DCs of the EPZs/SEZs. Wherever, the proposals meet the criteria for automatic approval, as given in paragraph 5.2 the DC of the EPZ/SEZ would issue approval letters within 2 weeks.

10.7 Procedure for Government Approval for units located in EPZ/FTZ/SEZ

Proposals not covered by the automatic route shall be forwarded by the DC to the Board of Approval (BOA) for consideration. On consideration of the proposal by the Board, the decision would normally be conveyed in six weeks.

10.8 Procedure for Foreign Direct Investment / NRI Investment

All proposals for FDI/NRI/OCB investment in EPZ/E0U/SEZ are eligible for approvals under Automatic Route subject to parameters listed in para 2.9. All proposals not covered under Automatic Route the applicant should seek separate approval of the FIPB as per the procedure contained in Para 8.2 above.

11. EHTP/STP UNITS

11.1 Procedure for Approval for EHTP/STP

Application, in the prescribed form, should be submitted to the concerned Directors of STPs or the Designated Officers of EHTPs for automatic approval, and to the SIA for Government approval. The application should be submitted along with a crossed demand draft for Rs. 5000/- drawn in favour of the "Pay & Accounts Offer, Department of Industrial Development, Ministry of Industry", payable at State Bank of India, Nirman Bhawan, New Delhi. The form is available in any outlet dealing with Government Publications.

11.2 Procedure for Automatic Approval for EHTP/STP

Application, in the prescribed form, should be submitted to the concerned Directors of STPs or the Designated Officers of EHTPs for automatic approval. Wherever, the proposals meet the criteria for automatic approval, as given in paragraph 6.2, the approval letters are issued within 2 weeks. All other proposals shall be forwarded to the Inter Ministerial Standing Committee for consideration.

Procedure For Government Approval For EHTP/STP

11.3 Application, in the prescribed form, should be submitted to the Officer designated by the Ministry of Information Technology for the purpose. Such applications shall be forwarded by the Officer designated to the Inter Ministerial Standing Committee in the Ministry of Information Technology for consideration. On consideration by the Inter
Ministerial Standing Committee, a decision would be normally conveyed within six weeks.

PROCEDURE FOR FOREIGN DIRECT INVESTMENT / NRI INVESTMENT

11.4 All proposals for FDI/NRI/OCB investment in EHTP/STP Units are eligible for approval under Automatic Route subject to parameters listed in para 2.9. For proposals not covered under Automatic Route, the applicant should seek separate approval of the FIPB, as per the procedure outlined in para 8.2 above.

Procedure for Foreign Direct Investment in Industrial Park

11.5 As 100% FDI is permitted under automatic route for setting up of Industrial Park, the procedure mentioned in para 8.1 will be applicable for seeking requisite approval.

Procedure for availing Income Tax benefit for the Industrial Park

11.6 For availing 100% tax exemption available under Section 80 IA of the Income Tax Act, 1961, for setting up, operating, maintaining and maintenance of Industrial Park, proposal has to be submitted in IPS-I form, available on this Department’s website, to the Secretariat for Industrial Assistance. The proposals which meet the specified criteria (Please refer to Industrial Park Notification, 2002 available on the Department’s website) are approved under automatic route. Otherwise, they are considered under non-automatic route by an Empowered Committee. Application for automatic approval has to be submitted in duplicate and for non-automatic approval in six sets. The proposal in IPS-I form has to be accompanied with a Demand Draft of Rs 6000/- drawn in favour of "Pay & Accounts Officer, Department of Industrial Development" payable at State Bank of India, Nirman Bhavan Branch, New Delhi.

FACILITATION

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12. INVESTMENT PROMOTION AND FACILITATION

12.1 Foreign Investment Promotion Board (FIPB)

The Government has revamped the FIPB and transferred it to the Industry Ministry. The FIPB is the nodal, single window agency for all matters relating to FDI as well as promoting investment into the country. It is chaired by Secretary, Industry (Department of Industrial Policy and Promotion). Its objective is to promote FDI into India:

[i] by undertaking investment promotion activities in India and abroad,

[ii] facilitating investment in the country by international companies, non-resident Indians and other foreign investors,

[iii] through purposeful negotiation/discussion with potential investors,

[iv] early clearance of proposals submitted to it, and

[v] review policy and put in place appropriate institutional arrangements, transparent rules and procedures and guidelines for investment promotion and approvals.

12.2 After its revamping, the FIPB has played a proactive role in promoting and attracting FDI into the country and further facilitating expeditious clearance to the proposals submitted to it. The FIPB has also decided to monitor implementation of mega projects to further facilitate investment and remove bottlenecks and as part of this exercise, to get studies commissioned through professional bodies and undertake other promotional measures.
12.3 Mailbox facility for filing of proposals for FIPB

A mailbox facility is available on the SIA website in the name of siaapplication@ub.nic.in for filing applications for FIPB.

13 FOREIGN INVESTMENT IMPLEMENTATION AUTHORITY (FIIA)

Government has set up the Foreign Investment Implementation Authority (FIIA) in the Ministry of Commerce & Industry. The FIIA will facilitate quick translation of Foreign Director Investment (FDI) approvals into implementations, provide a pro-active one stop after care service to foreign investors by helping them obtain necessary approvals, sort out operational problems and meet with various Government Agencies to find solutions to problems and maximizing opportunities through a partnership approach.

13.2 Role

The FIIA shall take steps to:

- Understand and address concerns of investors;
- Understand and address concerns of approving authorities;
- Initiate multi agency consultations; and
- Refer matters not resolved at the FIIA level to high levels on a quarterly basis, including cases of projects slippage on account of implementation bottlenecks.

13.3 Functions

The functions of the FIIA shall be as under:

- Expediting various approvals/permissions;
- Fostering partnership between investors and government agencies concerned;
- Resolve difference in perceptions;
- Enhance overall credibility;
- Review policy framework; and
- Liaise with the Ministry of External Affairs for keeping India’s diplomatic missions abroad informed about translation of FDI approvals into actual investment and implementation.

13.4 The modalities of functioning of FIIA shall be as under:

i. The FIIA shall set up a Fast Track Committee (FTC) to review and monitor mega projects. It will nominate members of the FTC from representatives of various Ministries/agencies/State Government at the working level. The representative of the AM concerned shall act as the project coordinator and shall head the FTC. The FTC shall prescribe the
time frame within which various approvals/permissions are to be given on a project to project basis. FTC shall also flag issues that need to be resolved by FIIA. Based on the inputs provided by FTC, the FIIA will give its recommendations on each project on the basis of which Administrative Ministries/State Government shall take action under their own laws and regulations.

ii. The FIIA will initiate inter Ministerial consultations and make appropriate recommendations to the competent authority, i.e. Ministry/Department concerned at the Central Government level and the State Government, as the case may be, on issues requiring policy intervention.

iii. The FIIA will act as a single point interface between the investor and Government agencies including Administrative Ministries/State Governments/Pollution Control Board/DGFT/Regulatory Authorities/Tax Authorities/Company Law Board, etc.

iv. The FIIA shall meet once every month to review cases involving investment of Rs. 100 crore or more, consider references received from the FTC, and monitor the functioning of various FTCs. It would also entertain any complaint regarding implementation bottlenecks from FDI approval holders regardless of the quantum of investment.

v. The FIIA shall also make recommendations from time to time on any issue relating to the speedy implementation of FDI projects and also to provide transparency in government functioning with respect to FDI projects.

- 13.5 The Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion shall function as the Secretariat of the FIIA.

13.6 Approval holders are requested to send their suggestions and problems, if any to any of the following officers in SIA or at FIIA’s e-mail address at fiia@ub.nic.in:

a. Joint Secretary, SIA
b. Director (FIPB)
c. Director (FIIA)
d. Director (100% EOU & NRI Investment)
e. Director (IP&ID Cell)
f. Joint Director (IL & TC)

The issues raised are taken up with the concerned Department/authorities and are discussed in the meeting of FIIA.

14. FOREIGN INVESTMENT PROMOTION COUNCIL (FIPC)

Apart from making the policy framework investor-friendly and transparent, promotional measures are also taken to attract Foreign Direct Investment into the country. The Government has constituted a Foreign Investment Promotion Council (FIPC) in the Ministry of Industry. This comprises professionals from
Industry and Commerce. It has been set up to have a more target oriented approach toward Foreign Direct Investment promotion. The basic function of the Council is to identify specific sectors/projects within the country that require Foreign Direct Investment and target specific regions/countries of the world for its mobilisation.

15. SECRETARIAT FOR INDUSTRIAL ASSISTANCE (SIA)

15.1 SIA has been set up by the Government of India in the Department of Industrial Policy and Promotion in the Ministry of Commerce & Industry to provide a single window for entrepreneurial assistance, investor facilitation, receiving and processing all applications which require Government approval, conveying Government decisions on applications filed, assisting entrepreneurs and investors in setting up projects, (including liaison with other organisations and State Governments) and in monitoring implementation of projects. It also notifies all Government Policy relating to investment and technology, and collects and publishes monthly production data for 213 select industry groups.

15.2 SIA’s Promotional Activities

As an investor friendly agency, it provides information and assistance to Indian and foreign companies in setting up industry and making investments. It guides prospective entrepreneurs and disseminates information and data on a regular basis through its two monthly newsletters the "SIA Newsletter" and the "SIA Statistics" as also through its Website address, i.e. http://indmin.nic.in . It also assists potential investors in finding joint venture partners and provides complete information on relevant policies and procedures, including those, which are specific to sectors and the State Governments.

15.3 Entrepreneurial Assistance Unit (EAU) of the SIA

The Entrepreneurial Assistance Unit functioning under the Secretariat for Industrial Assistance, Department of Industrial Policy and Promotion provides assistance to entrepreneurs on various subjects concerning investment decisions. The unit receives all papers/applications related to industrial approvals and immediately issues a computerised acknowledgement which also has an identity/reference number. All correspondence with the SIA should quote this number. In case of papers filed by post, the acknowledgement will be sent by post. The Unit extends this facility to all papers/applications relating to IEMs, Industrial Licenses, Foreign Investment, Foreign Technology Agreements, 100 per cent EOUs, EHTP, STP Schemes, etc.

15.4 The Unit also atttends to enquiries from entrepreneurs relating to a wide range of subjects concerning investment decisions. It furnishes clarifications and arranges meetings with nodal officers in concerned Ministries/Organisations. The
Unit also provides information regarding the current status of applications filled for various industrial approvals.

15.5 Investment Promotion and Infrastructure Development (IP & ID) Cell

In order to give further impetus to facilitation and monitoring of investment, as well as for better coordination of infrastructural requirements for industry, a new cell called the "Investment Promotion and Infrastructure Development Cell" has been created. The functions of the Cell include:-

[a] Dissemination of information about investment climate in India;

[b] Investment facilitation;

[c] Developing and distributing multimedia presentation material and other publications;

[d] Organising Symposiums, Seminars, etc. on investment promotion;

[e] Liaison with State Governments regarding investment promotion;

[f] Documentation of single window systems followed by various States;

[g] Match-making service for investment promotion;

[h] Coordination of progress of infrastructure sectors approved for investment/technology transfer, power, telecom, ports, roads, etc.;

[i] Facilitating Industrial Model Town Projects, and Industrial Parks, etc.;

[j] Promotion of Private Investment including Foreign Investment in the infrastructure sector;

[k] Compilation of sectoral policies, strategies and guidelines of infrastructure sectors, both in India and abroad; and

[l] Facilitating preparation of a perspective plan on infrastructure requirements for industry.

15.6 Project Monitoring Wing

Project Monitoring Wing, created within the IP&ID Cell in June 1998, has now been functioning under Foreign Investment Implementation Authority Section with effect from 27.7.2001. The functions of the Project Monitoring Wing are as follows:
(i) Coordination with Central and State level Ministries/Departments concerned and related agencies for tracking and monitoring approved projects, and compilation and analyses such information;

(ii) Direct contact, wherever necessary, with entrepreneurs and updation of the information on projects, and provision of necessary assistance.

16. NODAL OFFICERS

16.1 The Department of Industrial Policy and Promotion has identified officers at the Deputy Secretary/Director level as Nodal officers for facilitation of all matters relating to the industrial projects pertaining to a State. For large projects involving sizeable amount of FDI, officers have been identified in the Department of Industrial Policy and Promotion and other departments concerned (e.g. the Ministry to which the investment proposal pertains) and the State Government to act as contact officers so that these projects can be implemented within the time schedule. The officers of the Project Monitoring Wing are in touch with the contact officers.

17. FOCUS WINDOWS

17.1 The Department of Industrial Policy and Promotion also has opened Country Focus Windows for countries with sizeable investment interest in India. At present, the Focus Window cover countries such as USA, Germany, France, Switzerland, UK, Australia, Japan and Korea. For each focus window a senior officer in the Department provides facilitation and assistance.

18. INTERNATIONAL CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION

International Centre for Alternative Dispute Resolution (ICADR) has been established as an autonomous organization under the aegis of Ministry of Law, Justice and Company Affairs to promote settlement of domestic and international disputes by different modes of alternate dispute resolution. ICADR has its headquarters in New Delhi and has regional office in Lucknow and Hyderabad. More information on ICADR can be obtained from the website: http://www.icadr.org

19. PUBLICATIONS

19.1 SIA Newsletter

This is a monthly publication and covers information on data relating to Foreign Direct Investment, NRI investment, sectoral break-ups, country wise break-up, all approvals accorded for Foreign Direct Investment, and NRI investment during the
month, FDI inflows, and policy notifications issued during the month. Annual issues of SIA Newsletter for 1999 and 2000 have been officially released and is now available and can be obtained on payment from Controller of Publications, 1 civil lines, Delhi - 110 054 or from any outlet dealing in Government publications.

19.2 SIA Statistics

This is also a monthly publication which contains data relating to Industrial Licenses, approvals granted for setting up 100 per cent Export Oriented Units, details of approvals for Industrial Licenses, EOUs, Foreign Technical Collaboration etc., monthly data on industrial production of 209 select industry groups, as well as policy announcements by Government during the month. Annual issues of SIA Statistics have been officially released and is now available and can be obtained on payment from Controller of Publications, 1 civil lines, Delhi - 110 054 or from any outlet dealing in Government publications.

19.3 Other Publications

These publications include this Manual as well as sector specific publications, such as on the Indian Automobile industry, Cement industry, Engineering industries, Leather industries, etc. A set of publications relating to the Infrastructure sector with specific volumes on Ports, Roads, Power, Telecom, and Railways is also published. Other publications include information on Current taxation and duty structure, Entry options for business in India, and the like. A comprehensive publication 'India Investment Guide' has recently been published.

All or any of these publications are available through the EAU of the SIA, the Investment Promotion and Infrastructure Development Cell, as also Indian Missions abroad. These can also be downloaded from the SIA Website.

20. SIA WEBSITE http://dipp.nic.in

20.1 A new website (http://dipp.nic.in) of the Department of Industrial Policy & Promotion has been recently launched. The Home page of the website has been created with the intention to convey information relating to the investment climate in India and contains the ready reckoner on investing in India, Manual on Industrial Policy & Procedures, other publications, State industrial policies, forthcoming promotional events, projects on offer, investment opportunity in selected sectors, profile of industries looked after by the Department, FIPB application status, downloadable forms, etc.. The Japanese, German, French, Italian & Spanish Versions of the Manual are also available on the website. The earlier website of SIA is now available at http://siadipp.nic.in.
20.2 On line advisory services through Chat Room/Bulletin Board are available during prescribed hours on Internet through SIA website. Assistance for drafting and filing of all application with SIA is also provided.

20.3 SIA website is hyperlinked to the website of all Ministries/Department(s) of the Central Government as well as State Governments, Banks, Financial Institutions and Industry associations.

21. SUBMISSION OF MONTHLY PRODUCTION RETURNS

21.1 All industrial undertakings, whether exempt or not from compulsory industrial licensing, are statutorily required to submit a monthly production return in the proforma to the

Deputy Director (Statistics),

Industrial Statistics Unit,

Department of Industrial Policy & Promotion,

Room No. 326, Udyog Bhawan,

New Delhi – 110 011

Fax: 011-301 4564/301 2626

Email: ipp_ddstat@ub.nic.in

every month regularly so as to reach him by the 7th of the following month positively. This information is used to compile various industrial growth which is time bound monthly exercise. A copy of the monthly production returns should also be submitted to the Concerned Administrative ministry/Department and to the concerned technical authorities viz. Iron and Steel Controller; Coal Controller, Directorate of Sugar; Directorate of Vanaspati, Vegetable Oils and Fats and Textile Commissioner, as the case may be.

21.2 In the case of small scale industrial undertakings, the monthly production return should be submitted to the appropriate State Government or Commissioner of Industries and to the Department of Small Scale and Agro & Rural Industries, Government of India along with a copy to the Small Industries Service Institute.

22. PROCEDURE FOR OTHER ENVIRONMENTAL CLEARENCES
22.1 Entrepreneurs are advised to approach Ministry of Environment and Forests, Paryavaran Bhavan, Phase II, CGO Complex, Lodhi Road, New Delhi- 110003.

23. INFORMATION ON EXPORTS AND IMPORTS

23.1 Exports and imports of plant machinery would be as per the existing Export-Import Policy in force. For any information or facilitation, entrepreneurs can contact the Directorate General of Foreign Trade (DGFT), Ministry of Commerce & Industry, Udyog Bhavan, New Delhi-110011.

24. EXTERNAL COMMERCIAL BORROWINGS

24.1 Applications may be submitted by the borrowers in the prescribed format to the Joint Secretary(ECB), Department of Economic Affairs, Ministry of Finance, North Block, New Delhi-110001. The policy and procedures are contained in the guidelines issued by that Ministry and are available on the SIA website.

25. COMPANY REGISTRATION

25.1 Information and details may be obtained from the Department of Company Affairs, Shastri Bhavan, New Delhi-110011 or the Registrar of Companies located in all State capitals.

26. GRIEVANCES AND COMPLAINTS

26.1 Business Ombudsperson

To facilitate expeditious redressal of grievances and attend to complaints relating to delays in grant and implementation of industrial approvals and facilitate their disposal, the Government has appointed a BUSINESS OMBUDSPERSON in the Ministry of Commerce and Industry. Additional Secretary& Financial Adviser, Ministry of Commerce and Industry, Udyog Bhavan, New Delhi-110011 has been nominated to act as Business Ombudsperson.

26.2 Grievances Officer & Joint Secretary

Grievances and complaints are also received by the Grievances Office-cum-Joint Secretary, Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Udyog Bhavan, New Delhi-110011, either through post or through the mail box in the EAU of the SIA and at Reception of the Ministry of Commerce & Industry at Gate No.13 of Udyog Bhavan, New Delhi-110011. Any such communication is handled expeditiously and steps are taken to redress the grievance.

27. CITIZENS CHARTER
27.1 The Department of Industrial Policy and Promotion has also got its own Citizens Charter which outlines general procedures and standards of performance expected from the Department.

**Sum Up:**

1. In the above analysis we have seen the importance of FEMA Act, 1999 in relation to regulation and prohibition of foreign regulations.

2. The authorization of authorized persons also covered under the act along with the punishment provisions for the various offences under the act.

3. The double taxation treaties entered by India. The legal regimes of double taxation among various nations are also discussed in brief.

4. The Foreign Direct Investment procedures in technology transfer agreement, procedures, automatic and approved routes, concerned authorities under FDI policy are also explained in detail.

5. At the end we have discussed the transfer of technology agreement under FDI are covered along with procedural requirements.
Unit-IV

WTO obligations, conceptual framework and agreement. Trade in Services.

Competition Laws-Introduction, Economic theories of competition,

Regulation and control of anticompetitive practices (International and National Perspective).

WORLD TRADE ORGANIZATION

Introduction:

(a) Organisational Structure

The World Trade Organization (WTO) is the successor organization to the GATT (General Agreement on Tariff and Trade). It came into effect on 1 January, 1995 as a result of the conclusion of Uruguay Round of Multilateral Trade Negotiations. India is a founder member of both GATT in 1947 and the WTO in 1995. The membership of the WTO stands at 147. The Fifth Ministerial Conference, at its meeting in Cancun in September 2003, approved the membership package of Nepal and Cambodia, the first among the Least-Developed Country (LDC) Members to join the WTO after its inception in 1995. These two countries would become full Members of the WTO once they complete the ratification process.

The mandate of the WTO includes trade in goods as well as trade in services. Trade-related issues like trade-related investment measures and trade-related intellectual property rights are also covered. The Ministerial Conference of WTO, represented by the Trade Ministers of all the Members, is the highest decision making body of the WTO and is required to meet at least once every two years. In the interregnum, its functions are carried out by the General Council consisting of the representatives of all the members. The General Council is assisted in its work by three sectoral councils, viz; the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade Related Aspects of Intellectual Property Rights (TRIPs) and by a large number of Committees,
Working Groups/Parties and other bodies dealing with specific Agreements or subjects. All these bodies are serviced by the Secretariat headed by the Director General of the WTO. In addition to such functions as may be assigned to the General Council under various agreements, the General Council also acts as the Dispute Settlement Body (DSB) and Trade Policy Review Body (TPRB).

Newly acceding members are expected to grant Most Favoured Nation (MFN) treatment and National Treatment (NT) to existing members of WTO. India has been actively participating in the accession process of various countries. The acceding countries extend concessions on a non-reciprocal basis to all the interested existing members by entering into negotiations with them and signing bilateral agreements. During the year under report, India signed bilateral agreements with Nepal and Cambodia. These concessions offered in bilateral agreements are then consolidated and submitted in the form of a protocol of accession and materialized to all the WTO members.

(b) The Doha Work Programme:

The Doha Ministerial Declaration of the WTO adopted in November 2001 a comprehensive agenda, called the Doha Work Programme and mandated completion of negotiations on issues covered under this Work Programme by 31 December 2004. The Doha Ministerial Declaration also mandated continuance of the study process for the four Singapore issues until the Fifth Ministerial Conference and taking decision on negotiations thereon, on the basis of an explicit consensus at that Conference.

As mandated at Doha, the Fifth Ministerial Conference of the WTO was held at Cancun (Mexico) from 10-14 September 2003 to review the progress of negotiations under the Doha Work Programme and take decision on modalities of negotiations on Singapore issues on the basis of an explicit consensus decision among WTO Members. Apart from approving the WTO Membership of Nepal and Cambodia, the Conference could not take any decision on the major issues before it in view of lack of consensus among WTO Members, namely Agriculture, Singapore issues and Development related issues. However, the Ministers adopted a Ministerial Statement at the end of the Conference on
14 September 2003 which recognised that more work needed to be done to make progress as required under the Doha mandates. It instructed the officials of WTO Member countries to continue working on outstanding issues with a renewed sense of urgency and taking fully into account all the views expressed by Ministers in the Conference. Further, the Chairman of the General Council in close cooperation with the Director General of WTO was asked to coordinate this work and convene a meeting of the General Council at Senior Officials Level no later than 15 December 2003 to take action necessary at that stage to enable the Members to move towards a successful and timely conclusion of the negotiations. Finally, the Ministers reaffirmed their commitment to all the Doha Declarations and Decisions and to implement them fully and faithfully.

(a) Agriculture:

As per the Doha Ministerial mandate, modalities for negotiations in agriculture were required to be established by 31 March 2003, and draft Schedules based on these modalities to be submitted by the Fifth Session of the Ministerial Conference in Cancun, Mexico, in September 2003. Negotiations based on the mandate in Article 20 of the Agreement on Agriculture had formally commenced on 1 January 2000, when initial negotiating proposals were also made by many Members, including India. The work undertaken in the first two phases of these negotiations, which was largely analytical, was carried over into the post-Doha phase. Under Phase 3 of the work programme post-Doha, dedicated special sessions were held, following which in November 2002 the Chairman of the Committee on Agriculture, Special Session, presented an overview paper on the negotiations on agriculture as a basis for comprehensive and substantive review of possible modalities, including rules-related elements. Based on further discussions on this overview paper, the Chairman presented the first draft modalities in mid-February 2003, with a limited revision thereon in March 2003. However, divergences remained among WTO Members on key issues in the negotiations in agriculture, in particular on the nature and extent of reduction in trade-distorting domestic support and in improvements in market access to be achieved. WTO Members that grant export subsidies have also been resisting agreeing on phasing out such subsidies across all products. Modalities could not,
therefore, be established by 31 March 2003, and WTO Members agreed to intensify their work towards establishing modalities as soon as possible.

By July 2003, however, it was evident that it may not be possible to establish comprehensive modalities even by the Cancun Ministerial meeting on 10-14 September 2003, and accordingly, the discussions thereafter were based on developing a framework for the modalities. While the European Communities (EC) and the United States (US) had held divergent positions in the discussions earlier, on 13 August 2003 they presented a joint text on a possible framework for modalities for negotiations in agriculture, which was self-serving. While actual level of commitments were not included in the proposed framework, the possibility of the EC and the US retaining their high levels of domestic support and border protection through tariffs, tariff rate quotas, and special safeguards was implicit in their proposals. Equally, they proposed phasing out export subsidies across a limited number of products only, and introduced a new concept of parallelism in the effects of reduction of direct and indirect subsidies on exports, which could create adverse effects for tackling distortions in world markets for agricultural products. Argentina, Brazil, China, Egypt, India, Indonesia, and South Africa, supported by some other developing countries formed an alliance called the G-20 basically to ensure that the framework to be agreed at Cancun would fully meet the objectives of the Doha mandate to substantially reduce trade-distorting domestic support, eliminate export subsidies and provide substantial improvements in market access while securing the food and livelihood security and rural development concerns of developing countries. They presented a proposal for a possible framework on 20 August 2003, as partially revised on 29 August 2003. Many aspects of the G-20 position were shared by some other developing countries and some developed countries, including from the Cairns Group of agricultural products’ exporting countries. The Draft Ministerial Declaration presented by the Chairman of the General Council on 24 August 2003 for the consideration of the Ministers at Cancun largely mirrored the EU-US proposal for a framework on agriculture with a few elements from the G-20 proposal as well. At Cancun, the focus of discussions was largely on agriculture in recognition of the centrality of agriculture in resolving the impasse across various aspects of the Doha Work Programme. Based on the discussions
at Cancun, the Chairman of the Ministerial Conference presented a revised Draft Ministerial Declaration on 13 September 2003. However, the divergences among WTO Members could not be bridged at Cancun, and subsequently, the Chairman of the General Council along with the Director General, WTO, have held informal consultations in light of the decision of the Cancun Ministerial Conference to convene a meeting at Senior Officials level by 15 December 2003 to move towards successful and timely conclusion of the negotiations.

Since the Cancun Ministerial Conference the G-20 has been continuously coordinating its common approach to the informal consultations by the Chairman General Council. India has also been participating in the meetings of the G-20, both at the Ministerial level and at the Officials level, in order to secure its interests and to safeguard its concerns in agriculture in the on-going negotiations. The G-20 has also been outreaching to other WTO Members towards generating a better understanding of its position. India has also been holding bilateral discussions with other WTO Members towards mutual appreciation of interests and concerns in the multilateral negotiations as well as to promote bilateral trade and cooperation.

**(b) Services:**

The General Agreement on Trade in Services (GATS), negotiated during the Uruguay Round, is the first set of multilaterally agreed and legally enforceable rules and disciplines ever negotiated to cover international trade in services. At the conclusion of Uruguay Round, India had taken commitments in a few areas of economic interest, including Financial Services, Telecommunication Services, Health Services, Business Services, Construction and related Engineering Services, Tourism & Travel Services etc. India's commitments are based on its domestic policy and the commitments have been taken mainly in mode 3 (i.e. commercial presence) and are within the framework of our policy on Foreign Direct Investment (FDI).

The negotiations under GATS for progressive liberalisation commenced from 1.1.2000 in accordance with the Guidelines and Procedures for Negotiations drawn up by the
members, based on a proposal by India and 22 other developing countries. The Doha Ministerial Conference took note of the progress of negotiations and mandated that the participants/member-countries file their initial Requests for specific commitments by 30th June, 2002 and their initial Offers by 31st March, 2003. Many countries, including India, have interpreted the deadline given in the DMD as an indicative one and, accordingly, the process of exchange of requests and submission of initial offers is still underway.

India has submitted Requests to a number of Member countries in Architectural Services, Audio Visual Services, Computer and Related Services, Health Services, Maritime Services, Tourism and Travel Related Services, Financial Services, Construction and Related Engineering Services, and Accounting and Book-keeping Services. India has also received Requests from 27 countries in various Service Sectors. Bilateral meetings have been held with the respective trading partners, on the margins of the meetings of the Council for Trade in Services in Geneva wherein requests made and received were discussed. As part of this Request-Offer process, over 40 countries including India have submitted their initial Offers to the WTO.

India's core objectives in the negotiations under GATS are ensuring easier access for the movement of natural persons (Mode 4), particularly skilled professionals, and facilitating increased provision of remote services through electronic means (Mode 1). On the other hand, the core interest of most of our trading partners as evident from the requests is in Mode 3, in which the request is either for binding the presently applicable FDI policy or to offer a more liberal policy than that currently prevailing. Being fully engaged in the services' negotiations, India is actively participating in bilateral negotiations on requests and offers.

On the rule-making side, the Working Party on Domestic Regulations (WPDR) is undertaking work for developing disciplines applicable to licensing requirements & procedures, qualification requirements & procedures, and technical standards. Such disciplines are expected to be based on objective criteria and are not more burdensome than necessary. In the Working Party on GATS Rules, discussions are on-going in the
areas of Emergency Safeguards Measures, Subsidies and Government Procurement under GATS. The Negotiations on Safeguards have made some progress while in the other two areas not much has been achieved. Negotiations on Safeguards were scheduled to be completed within two years of the coming into effect of the Agreement, but it could not be completed by the specified target date and the deadline has been extended till 15th March, 2004. On Subsidies, Government Procurement and Domestic Regulations, as per the negotiating Guidelines and Procedures, the negotiations are to be concluded prior to the conclusion of negotiations on specific commitments.

Issues relating to Services were not deliberated to any significant degree at the Fifth Ministerial Conference held in Cancun in September 2003.

(c) Non-Agricultural Market Access (NAMA):

Negotiations on market access for nonagricultural products commenced following the mandate at the Doha Ministerial Conference. A Negotiating Group on Market Access (NGMA) was established and was given a time frame of up to the Cancun Ministerial Conference for finalizing the modalities for negotiations.

Several formal and informal meetings of the NGMA were held during 2002 and 2003. Several proposals were made by Members including detailed proposals on modalities by India, China, EC, Japan, South Korea and the US. No consensus could be reached on any of these proposals. Finally on 16 May 2003 the Chairman of the NGMA submitted a set of modalities on his own responsibility which reflected the ambitions and concerns expressed by the various Members. In view of divergences among Members, no final decision inter alia on NAMA could be adopted at Cancun. Post-Cancun, divergences between developed and developing country Members have come into sharper focus. Most developing countries have been stressing that the concept of less than full reciprocity should be incorporated in the core formula for tariff reductions and the sectoral initiative should be voluntary with a positive end tariff for developing countries. India has also been stressing the need for treating non-tariff barriers (NTBs) as part of the NAMA negotiations and incorporating them in the final modalities to be agreed upon.
(d) Developmental Issues

(i) TRIPS and Public Health:

The Doha Declaration on TRIPS and Public Health recognized the problem of countries having insufficient or no manufacturing capacities in the pharmaceutical sector in effectively using the flexibility of compulsory license because of restriction on export under the provisions of Article 31(f) of TRIPS Agreement and directed the TRIPS Council of WTO to find a solution to this problem.

Various proposals were submitted in the TRIPS Council by the developing as well as developed countries. This led to the Decision in the WTO General Council meeting held on 30 August, 2003 regarding grant of waivers from the obligations under Article 31(f) and 31(h) of the TRIPS Agreement. This will ease the problem being faced by developing countries and LDCs having no or insufficient manufacturing capacities in the pharmaceutical sector in issuing compulsory licenses. This is intended to be a temporary mechanism which is to be followed by an amendment to the TRIPS Agreement. This decision would enable manufacture and export of pharmaceutical products under compulsory license to countries with limited or no manufacturing capacities in the pharmaceutical sector.

(ii) Implementation Issues:

The various Subsidiary Bodies of the WTO were mandated to deliberate upon certain implementation issues and make recommendations for adoption by the General Council/TNC. There has been very little progress in the successful resolution of these implementation issues to the satisfaction of developing countries. As the implementation issues are very important part of the Doha Ministerial Declaration addressing the concerns of the developing countries, we are consistently advocating our stand that these issues will have to be addressed to our satisfaction.

(iii) Review of Special and Differential Treatment (S & DT) Provisions:
The Doha Ministerial Conference instructed the Committee on Trade and Development (CTD) to examine all the S&DT clauses in the WTO Agreements in the following context: (i) Identify the non-mandatory or `best endeavour clauses; and (ii) How to make the "non mandatory" or 'best endeavour' clauses mandatory and make them precise, effective and operational. The CTD was required to report to the General Council with clear recommendations for a decision by July 2002.

Of the 88 issues for consideration, India, either on its own or along with likeminded Members, submitted 11 proposals in the Committee on Trade and Development. Even though July 2002 deadline was initially fixed for the Committee on Trade and Development to report the recommendations for adoption, no progress could be made by that time. By the end of 2002, there were only 4 out of 88 proposals on which understanding could be reached. The deadline was, therefore, revised to February 2003. In May 2003, General Council Chairman circulated a list of proposals on S&D, classified into 3 overall categories: Category 1 included 36 proposals on which the Chairman of the General Council felt there was a "greater likelihood of reaching agreement". Category 2 comprised 38 proposals, including those that were being discussed as part of mandated negotiations. Category 3 comprised 12 proposals on which delegated have had most difficulty in finding consensus.

During the days immediately preceding the Cancun Conference the Chairman of GC concentrated attention on Category 1 of the S&DT issues on which he felt there was likelihood of agreement before Cancun. In fact, Category 1 covered only issues that are of very limited value addition to developing countries including the LDCs. Para 11 of the Draft Ministerial Text of 24th August 2003 and para 12 of the revised draft text of 13th September 2003 related to Special and Differential Treatment provisions. Decision was made on 27 issues out of 88 issues proposed in the draft text of 13th September 2003. All these issues related to Least Developed Countries (LDCs) and even to them the economic benefits that accrue would be minimal. Issues in Category 2 and 3 are of greater and more significant economic and trade importance to developing countries and LDCs. These were left un-addressed. No time frame was also indicated. The absence of any significant
movement in S&DT review antagonized LDCs, in general, and the African Group, in particular, at Cancun, which contributed to the outcome of the Conference.

**(iv) Technical Assistance:**

Activities to impart technical assistance to developing countries including LDCs are being carried out by the WTO as a part of Annual Technical Assistance Plan. The developing countries have however emphasised that seminars alone are not adequate. To ensure that the fruits of Doha are reaped by the developing countries, the technical cooperation should ensure creation of hardware and trained human resources in the developing countries. Therefore, the focus of technical cooperation needs to be changed towards achieving this objective.

Department of Commerce in collaboration with UN Conference on Trade and Development (UNCTAD) and the UK Department for International Development (DFID) has launched a project, entitled "Strategies and Preparedness for Trade and Globalization in India". The aim of the project is two-fold, viz. to assist in understanding the development dimension of key trade issues, particularly as they related to the current WTO Agenda; and to strengthen the country's human and institutional capacity for analysis of globalization-related issues and facilitate a policy environment that will support and sustain a more equitable process of globalization.

**(e) Singapore Issues:**

The four Singapore Issues, viz. relationship between trade and investment; interaction between trade and competition policy; transparency in government procurement; and trade facilitation have been under discussion in a clarificatory mode since the Doha Ministerial Conference in 2001. Discussions in the respective Working Groups focused on the elements identified in the Doha Declaration. We have been maintaining that the process was a clarificatory one as understood by the Doha Declaration read along with the Chairman's Understanding before the adoption of the Declaration. The Chairman's clarification made it clear that negotiations would proceed based only on explicit consensus and individual Members have the right to take a position to prevent this
consensus and thus block negotiations from proceeding. The period since Doha did not see the emergence of any consensus on modalities.

Ever since the Doha Summit, on Singapore Issues India have been actively participating in the discussions in different working groups. While maintaining our original stand that these issues had no place under the WTO framework as they were non-trade issues, we also submitted papers to the Working Groups highlighting our concerns on a number of elements in the Singapore Issues. India emphasized that there was no clarity on many elements and hence there was no case for coming to an explicit consensus agreement on modalities of negotiations as required by the Doha Mandate. Our goal was to continue the clarification process at the WTO till there was further clarity.

This lack of consensus on modalities was reflected in the draft Ministerial Text which was transmitted by the Chairman, General Council for the consideration of Ministers at Cancun. On all the Singapore Issues, the two diverging viewpoints one seeking commencement of negotiations on the basis of annexed modalities and the other seeking continuation of the clarification process at the WTO were reflected as alternative options.

India, along with 15 other countries who constituted a Core Group on Singapore Issues called the G-16, made a submission on this issue to the General Council. In this submission (WT/GC/W/514), it was highlighted that there was lack of clarity on many elements in each of the Singapore Issues. The elements needing further clarification were annexed to the submission. The submission requested that these elements for clarification be annexed to the draft Ministerial Text and also circulated to all Members. This submission was also circulated as a Ministerial Document at the Cancun Ministerial.

In the days before the Ministerial Conference formally began at Cancun, there were a number of bilateral meetings both at the Ministerial level and at official level. India forcefully put forward its position on continuation of the clarification process although proponents desired commencement of negotiations. We also reiterated the lack of explicit consensus on modalities.
The core group of 16 countries (G-16) including India which was formed on Singapore Issues consisted of Bangladesh (representative of the LDC group), Botswana, China, Cuba, Egypt, Indonesia, Jamaica, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Zambia, Zimbabwe, Uganda and Venezuela. The G-16 took a strong and effective stand highlighting the problems in including Singapore Issues at the WTO and the lack of explicit consensus on modalities. The G-16 also wrote to the facilitator on Singapore Issues highlighting our concerns.

However, the second draft Ministerial text released on 13 September 2003 ignored the position taken by over 90 countries including India and suggested commencement of negotiations on three of the four Singapore Issues, viz, Investment, Transparency in Government Procurement and Trade Facilitation. This was completely unacceptable to India and the Commerce & Industry Minister of India made a forceful intervention in the debate on this draft pointing out the lack of explicit consensus.

(i) Relationship between Trade and Investment:

In 2003, two meetings of the Working Group on the Relationship between Trade and Investment took place. In both the meetings, discussion centered on the elements identified in Paragraph 22 of the Doha Declaration.

Prior to the Cancun Ministerial, the Department hosted an International Conference on Trade, Investment and Development of 15 developing countries in New Delhi from 18 to 20 May, 2003 with a view to exploring possible coalition building in this area. The conference enabled a better understanding of the issues involved and the generation of a common position on investment.

(ii) Interaction between Trade and Competition Policy:

In 2003, two meetings of the Working Group on the Interaction between Trade and Competition Policy took place. Here too, discussion centered on the elements identified in Paragraph 22 of the Doha Declaration.
(iii) Transparency in Government Procurement:

In 2003, two meetings of the Working Group on Transparency in Government Procurement took place. The discussion focused on twelve elements identified by the Chair in the context of Transparency in Government Procurement. At Cancun, the draft decision for Ministers’ consideration sought to initiate multilateral negotiations in this area. Initially, it was proposed that the negotiations should be wide ranging. Later, however, the draft was modified to suggest that the area of concern for developing countries like applicability of the WTO Dispute Settlement Understanding; product coverage; and prescriptions regarding domestic review mechanism would be included in the negotiations without prejudging the positions of Members.

(iv) Trade Facilitation:

Trade Facilitation broadly deals with modernisation, harmonization and simplification of Customs clearance procedures. The strong demanders for multilateral rule on Trade Facilitation continued to be EC, Canada, Australia, Norway and Switzerland. Most of the other developed and several developing countries also supported this proposal. During the study process and the meetings held in the Council for Trade in Goods of WTO during March and June 2003, India along with many other developing countries like Brazil, China, Malaysia, Philippines, Jamaica and Uruguay continued to highlight that they were still unconvinced about the need for binding rules on Trade Facilitation in WTO in view of several concerns including resource implications.

(f) Rules & RTAs:

These negotiations are currently being undertaken in the Negotiating Group on Rules (NG Rules). In respect of Anti-dumping and Subsidies Agreements, the various proposals submitted to the Negotiating Group on Rules (NG Rules) have generally sought
strengthening of disciplines. India has made three submissions to the NG Rules. The first submission has sought special and differential treatment for developing countries during anti-dumping and countervailing duty investigations. The second submission has identified specific provisions of the Anti-Dumping Agreement which require amendments. In respect of the Subsidies Agreement, India's submission inter-alia seeks inclusion of capital goods and consumables in the definition of inputs consumed in the production process, clarification in provisions relating to duty drawback schemes and improvement in provisions relating to export competitiveness.

Apart from negotiations on Anti-Dumping Agreement and the Subsidies Agreement, the NG Rules has also been discussing issues relating to Regional Trade Agreements (RTAs) and Fisheries Subsidies. In respect of fisheries subsidies the negotiations have so far not gathered adequate momentum. In respect of RTAs, concern has been expressed by various countries at the increasing number of such agreements that could undermine the multilateral trading system. Presently, the focus is to reach some agreement that would improve the transparency of RTAs. Issues being discussed for enhanced transparency include when to notify Regional Trading Agreements (at the time of signature or after ratification); where to notify such agreements (in the Committee on Regional Trade Agreement (CRTA) or in the Council for Trade in Services, or in the Council for Trade in Goods and for RTAs under the Enabling Clause in the Committee for Trade and Development); what to notify (whether to have a factual report prepared by the WTO Secretariat to aid the process of examination of RTAs); how to notify the changes to existing RTAs; and periodicity of examination of RTAs.

India has responded to these proposals in a constructive manner. It has however expressed strong reservation on the proposal by several countries that to enhance transparency, all RTAs, including those formed under the Enabling Clause, should be notified to the CRTA and be subject to a factual enquiry process (while RTAs under GATT Article XXIV and GATS Article V be subject to a factual enquiry followed by an examination process). This stand has been taken with a view to keep intact the character of the Enabling Clause which, unlike GATT Article XXIV and GATS Article V, does not provide for examination but only for notification and, upon request, for prompt.
consultation. As pointed out in India's paper in WTO on this subject (TN/RL/W/114), the 
Enabling Clause is the codification of the concept of the differential and more favorable 
treatment and this can not be allowed to be diluted in any way in course of the current 
negotiations which is often called a development round.

India in its Paper TN/RL/W/114 has also emphasized the need to discuss substantive 
issues like definition of the term "substantially all trade" under GATT Article XXIV, 
addressing the trade distorting effects of the preferential rules of origin; and clarification 
of issues concerning SPS, TBT and Trade Defense Measures in the RTA context.

(g) *Dispute Settlement Understanding (DSU)*:

The deadline for finalization of DSU amendment proposals was May 2003 and the 
negotiations on DSU are not a part of single undertaking. The time frame for concluding 
negotiations on DSU has been extended to May 2004. Comprehensive set of proposals 
have been tabled by EC, India along with certain other countries, Australia, LDCs, Africa 
Group, Costa Rica, Mexico, Japan etc.

**Other Issues relating to the TRIPS Agreement:**

(i) *Negotiations on extension of higher level of protection to geographical indications 
other than wines and spirits*

Doha Ministerial Declaration under paragraph 18 directed that this issue would be 
addressed in the TRIPS Council pursuant to paragraph 12 of the Declaration. Trade 
Negotiations Committee (TNC) set up after Doha Conference was to report to the 
General Council by the end of 2002, however as there was no consensus among the 
Members on this issue, no agreement could be reached. Draft Cancun Ministerial Text 
(Second Revision dated 13th September 2003) under para 13 regarding implementation 
issues, while reaffirming the mandates given under para 12 of Doha Ministerial 
Declaration and Decision on Implementation-Related Issues and Concerns, instructed the 
TNC and other negotiating bodies to redouble the efforts to find appropriate solutions as 
a priority and requested the Director General to continue the consultations undertaken by
him on issues including issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits. The General Council shall review progress and take appropriate action. However, since there was no consensus among the Member countries on the draft Cancun Ministerial Text, the above draft language also could not be agreed to.

(ii) **Negotiations on the relationship between TRIPS Agreement and CBD:**

Doha Ministerial Declaration under paragraph 19 directed that this issue would be addressed in the TRIPS Council pursuant to paragraph 12 of the Declaration. TNC was to report to the General Council on this issue by the end of 2002, however as there was no consensus among the Members on the issue, no agreement could be reached. Draft Cancun Ministerial Text (Second Revision) under para 23 while taking note of the work undertaken by the TRIPS Council, agreed that this work shall continue on the basis of para 19 of Doha Ministerial Declaration and the progress made so far. The General Council shall report on its work in this regard to next Ministerial Session. However, since there was no consensus among the Member countries on the draft Cancun Ministerial Text, the above draft language also could not be agreed to.

(iii) **Negotiations on Non-Violation Complaints:**

Doha Declaration on Implementation-Related Issues and Concerns under para 11.1 directed the TRIPS Council to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It was agreed that, in the meantime, Members would not initiate such complaints under the TRIPS Agreement. A number of proposals from developing and developed countries were submitted in the TRIPS Council in this regard. The draft Cancun Ministerial Text (Second Revision) under para 22 took note of the work done by the TRIPS Council and directed it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraph 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the first Ministerial Conference to
be held after 1 August 2004. It was agreed that, in the meantime, Members would not initiate such complaints under the TRIPS Agreement. However, since there was no consensus among the Member countries on the draft Cancun Ministerial Text, the above draft language also could not be agreed to.

**Trade and Environment:**

Doha Ministerial Declaration has provided a negotiating mandate. Para 31(i) the relationship between existing WTO rules and specific trade obligation set out in Multilateral Environment Agreements (MEAs), limited in scope to parties to the MEA in question; Para 31(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO Committee; Para 31(iii) Market access negotiations for environmental goods and services.

Para 32 of Doha Declaration provides that the Committee on Trade and Environment (CTE) to pursue the work programme on all agenda items and give particular attention to (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development; (ii) the relevant provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights; and (iii) labeling requirements for environmental purposes.

EC, Argentina, Australia and Switzerland, India, the US and other countries made submissions under para 31(i) of the Doha Declaration. India stated that the mandate given under this para refers only to the trade measures that are mandatory and specific in their entirety.

Under Para 31(ii) on the issue of information exchange and observer ship between the MEAs and the WTO, the US and the EC proposed regular procedure for information exchange sessions and document exchange between MEAs and WTO.
On para 31(iii) on the issue of market access for environmental goods and services, the US has proposed that the APEC list of environmental goods should be taken as the starting basis. This has not been agreed to by other Members. The developing countries have stated that the APEC list lacks balance for them. Countries other than EC and Switzerland have opposed inclusion of products based on non-product related Process and Production Method (npr-PPM).

In para 32(i) India made a submission (WT/CTE/W/207) on "The effects of environmental measures on market access, especially in relation to developing countries in particular the least-developed among them, India and other developing countries have been raising this issue and there is a consensus amongst WTO members that the adverse implication on market access of developing countries should be minimised.

Under Para 32(iii) regarding eco-labelling, EC proposed that the Cancun Ministerial Conference should give a fresh mandate to the CTE to carry out work on voluntary eco-labeling schemes. This has not been agreed to.

**Future Work**

As mandated by the Ministers at Cancun, a meeting of the WTO General Council was held at Senior Officials' level in Geneva during 15-16 December 2003 with a view to achieving progress in the ongoing negotiations under the Doha Work Programme. In their opening statements, the Chairman of the General Council and the Director General, WTO reported progress towards getting the negotiations on track and that there was a firm commitment to do so by all Members. In this regard, they called for the WTO negotiating bodies to be reactivated with a view to taking action necessary to move towards a successful and timely conclusion of the negotiations. In the meeting, India reiterated its commitment to successful and timely completion of the Doha Development Agenda based on the fulfillment of the mandate agreed to at Doha. On agriculture, it supported the G-20 position that in line with the Doha mandate, the modalities to be adopted should be capable of ensuring that negotiations on agriculture would result in substantial reductions in domestic support, substantial increase in market access, phasing out of all
forms of export subsidies and operational and effective special and differential treatment that took into account rural development and food security concerns of developing countries, besides effectively addressing the particular concerns of recently acceded countries. On non-agricultural market access, it favoured a framework that fully reflected the principles laid down in the Doha mandate, especially the principle of `less than full reciprocity' in reduction commitments for developing countries. The modalities for negotiations should incorporate suitable special and differential provisions for developing countries with a degree of flexibility in respect to Sensitive Products (SP). Further, sectoral initiatives with regard to zero or uniform tariff should be voluntary rather than mandatory for developing countries. India also wanted the non-tariff barriers to be adequately dealt with in the on-going negotiations. On Singapore issues, India wanted three of the four issues other than Trade Facilitation to be completely dropped from the WTO agenda while on Trade Facilitation, clarificatory work could continue subject to final decision on modalities of negotiations being decided by explicit consensus of all Members. Finally, India emphasised the need for concerted and conscious efforts of Members to ensure that the development dimension of the negotiations was not diluted, but continued to occupy centre stage as this alone would ensure progress of trade liberalization on a sustained basis.

The negotiations slowly returned back to track with the General Council deciding on the Chairpersons of the various WTO bodies including the negotiating groups for the year 2004 at its meeting on 11 February 2004. Negotiations under the Doha Work Programme resumed in the specific negotiating bodies in March 2004.

**Important Disputes Involving India at the WTO**

(a) **EC - Bed Linen Compliance Dispute:**

In the EC-Bed Linen Compliance dispute, the Appellate Body of the WTO concluded that EC has failed to act consistently with provisions of Anti-Dumping Agreement while implementing the rulings and recommendations of the WTO's Dispute Settlement Body (DSB) in an earlier dispute with India regarding imposition of anti-dumping duty on bed
linen imports. The finding of the Appellate Body circulated on 8th April 2003 is linked with a previous dispute against EC in which it had been held that EC had failed to comply with requirements of the Anti-Dumping Agreement while imposing anti-dumping duty on bed linen imports from India in November 1997. On 7 August 2001 the Council of the European Union adopted Regulation 1644/2001 amending the original definitive anti-dumping duties on bed linen from India, purporting to comply with the DSB's recommendations and rulings in the original dispute, whilst simultaneously suspending its application. India strongly disagreed that this re-determination complied with the rulings of the DSB and sought the establishment of a Compliance Panel to examine the existence or consistency of action taken by the EC to implement the DSB decision in the dispute. The Compliance Panel concluded that EC had complied with the DSB decision in the original dispute. India subsequently appealed certain issues of law and legal interpretations developed by the Compliance Panel. While reversing a new finding of the Compliance Panel, the Appellate Body held that EC's determination of volume of dumped imports for purposes of making a determination of injury was not based on an objective examination.

At its meeting on 24th April 2003, the DSB adopted the Appellate Body Report and the Panel Report in this Compliance dispute.

(b) US - Rules of Origin:

The United States included in its legislation implementing the results of the Uruguay Round negotiations, new rules for the determination of the origin of textiles and apparel products that changed the criteria to determine the origin of products. At India's request, a WTO panel was established on 24 June 2002, to consider India's claims regarding the new rules of origin for textiles and apparel products implemented by the United States.

The U.S. rules of origin create trade restrictive effects because they entailed new quantitative restrictions on Indian products exported to third countries, which had previously never been subject to any restrictions. They create distorting effects because they shifted origin from a third country where the fabric was dyed and printed and
subjected to two further finishing operations to the country where the greige fabric was formed and because they favoured products of export interest to the EC over products of export interest to developing countries. They create trade disruptive effects because of their sheer complexity and the arbitrary nature of the criteria used. The panel report has rejected all the claims made by India in this dispute. The DSB has adopted the panel report during its meeting held on 21st July 2003.

(c) EU GSP Dispute

A WTO dispute settlement panel established at India's request in January 2003 has upheld India's contention that the European Communities has violated its GATT/WTO obligations in granting tariff preferences to 12 countries under the "Drug Arrangements" window of its GSP scheme without extending these preferences to other developing countries. The Panel Report, circulated on 1st December 2003 has also ruled that the EC has failed to demonstrate that the Drug Arrangements are justified under the Enabling Clause, which otherwise allows the developed countries to grant tariff preferences to developing countries without allowing the same advantage to developed countries.

India's dispute with EC had arisen primarily because EC included Pakistan as beneficiary country under its Special Tariff Arrangement for Combating Drug Production and Trafficking under its GSP Scheme for the years 2002-04. Such a scheme was in operation even in earlier years with beneficiaries being restricted to ANDEAN and Central American countries. While the scheme, in India's view was not compatible with WTO rules even then, it had not agitated the matter in WTO since it was not significantly affected. India invoked dispute settlement proceedings of the WTO in this case with extreme reluctance and after having exhausted all available avenues for a negotiated settlement with the EC. The matter was taken up repeatedly with the EC at various levels including at the ministerial level. Even after initiating the dispute under WTO's dispute settlement procedures in March 2002, India continued its effort in seeking a bilateral solution to the problem with EC. However at no stage did EC respond positively to India's concerns.
The Panel has recommended that the Dispute Settlement Body requests the EC to bring its measure into conformity with its obligations under GATT 1994. The Panel Report has not yet been adopted by the DSB as the EC has, on 8 January 2004, appealed against the findings of the Report before the Appellate Body.

(d) India 27 Definitive Anti-dumping Measures:

On 8th December 2003 the European Communities has requested consultations with India regarding definitive anti-dumping measures in 27 cases. The EC considers that in all of these cases the investigations were conducted and determinations made in violation of India's obligation under GATT 1994 and the Anti-Dumping Agreement. India has entered into consultations with the EC in this dispute.

(e) India Imposition of Anti-dumping duty on imports of Lead Acid Batteries from Bangladesh:

On 28 January 2004 Bangladesh requested consultations with India regarding imposition by India of Anti-dumping duty on imports of Lead Acid Batteries from Bangladesh. Bangladesh is particularly concerned about certain aspects of the investigation leading to the imposition of the definitive anti-dumping duties which cannot be reconciled with Article VI of the GATT 1994 and various provisions of the Anti-Dumping Agreement. Furthermore according to Bangladesh, as a result of the imposition of anti-dumping duties in a manner not justified under Article VI of the GATT 1994 and the Anti-dumping Agreement, India may likewise be acting inconsistently with its obligations under Articles I:1 and II:1 of the GATT 1994. India and Bangladesh held consultations in this dispute on 26-27 February 2004.

Transparency & Interaction with Stakeholders:

An institutionalized system of interaction with various concerned stakeholders has been set up. There have been detailed interactions with Apex industry associations as well as holding of joint Seminars/ Workshops on various issues related to WTO. Greater degree of integration has been achieved with academic institutions and a number of studies have
been entrusted to them. Interaction with relevant administrative Ministries had also been institutionalized through inter-Ministerial groups and the formation of the WTO Coordinating Group of Secretaries chaired by Commerce Secretary. Expert groups have been set up in each of the sectors so that both academic and professional inputs are available to the Ministry on ongoing negotiating issues. A monthly newsletter devoted entirely to WTO issues is brought out by the Department, both in English and Hindi, and this is also available on the Department's Web-site. Separately, copies are sent to all the Indian Missions abroad, Chief Secretaries of all States and Union Territories and all Secretaries to the Government of India. Further, India's position on issues under negotiations has also been put on the Web-site for wide dissemination. Efforts have also been made to disseminate information to State Governments especially in areas of interest to them like Agriculture.

**UN-Economic and Social Commission for Asia and Pacific (ESCAP):**

India is one of the founding members of UN-Economic and Social Commission for Asia and Pacific (ESCAP). The main activities of ESCAP include evaluation and execution of projects in the socio-economic fields with an aim for improving national capabilities to deliver effective social services and develop requisite infrastructural and environmental capabilities. ESCAP's major work during the year focused on :-

i ) Regional Economic Cooperation.

ii) Poverty alleviation through economic growth and social development.

iii) Environment and sustainable development.

iv) Development of transport, communications, tourism and infrastructure development in the region, and

v) Enhancing capabilities of national Statistical Organisations.

India worked in close cooperation with ESCAP during the year with active participation in ESCAP initiatives. Under the New Delhi Action Plan, India is implementing certain
infrastructure projects including Asian Land Transport and Infrastructure Development (ALTID) project, which is of interest to India. The three components, of this project namely Asian Highway Project, Trans-Asian Railway Project and Accession to International Conventions on Land Transport Facilitation are being implemented by Ministry of Road Transport and Highways, M/o Railways, M/o Finance (D/o Revenue) respectively.

**Competition:**

Merriam-Webster defines competition in business as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms". It was described by Adam Smith in *The Wealth of Nations* (1776) and later economists as allocating productive resources to their most highly-valued uses and encouraging efficiency. Later microeconomics theory distinguished between perfect competition and imperfect competition, concluding that with the no system of resource allocation is more efficient than perfect competition. Competition, according to the theory, causes commercial firms to develop new products, services and technologies, which would give consumers greater selection and better products. The greater selection typically causes lower prices for the products, compared to what the price would be if there was no competition (monopoly) or little competition (oligopoly).

However, competition may also lead to wasted (duplicated) effort and to increased costs (and prices) in some circumstances. For example, the intense competition for the small number of top jobs in music and movie acting leads many aspiring musicians and actors to make substantial investments in training which are not recouped, because only a fraction become successful.

Three levels of economic competition have been classified:

1. The most narrow form is direct competition (also called category competition or brand competition), where products which perform the same function compete against each other. For example, one brand of pick-up trucks competes with several other brands of pick-up trucks. Sometimes, two companies are rivals and one adds new products to their line, which leads to the other company distributing the same new things, and in this manner they compete.
2. The next form is **substitute** or **indirect competition**, where products which are close substitutes for one another compete. For example, butter competes with margarine, mayonnaise and other various sauces and spreads.

3. The broadest form of competition is typically called **budget competition**. Included in this category is anything on which the **consumer** might want to spend their available **money**. For example, a family which has $20,000 available may choose to spend it on many different items, which can all be seen as competing with each other for the family's expenditure.

In addition, companies also compete for **financing** on the capital markets (equity or debt) in order to generate the necessary cash for their operations. An **investor** typically will consider alternative investment opportunities given his risk profile and not only look at companies just competing on product (**direct competitors**). Enlarging the investment universe to include **indirect competitors** leads to a broader **peer universe** of comparable, indirectly competing companies.

Competition does not necessarily have to be between companies. For example, business writers sometimes refer to **internal competition**. This is competition within companies. The idea was first introduced by **Alfred Sloan** at **General Motors** in the 1920s. Sloan deliberately created areas of overlap between divisions of the company so that each division would be competing with the other divisions. For example, the **Chevy** division would compete with the **Pontiac** division for some **market segments**. Also, in 1931, **Procter & Gamble** initiated a deliberate system of internal brand-versus-brand rivalry. The company was organized around different **brands**, with each brand allocated resources, including a dedicated group of employees willing to champion the brand. Each brand manager was given responsibility for the success or failure of the brand, and compensated accordingly. This is known as **intra-brand competition**.

Finally, most businesses also encourage competition between individual employees. An example of this is a contest between sales representatives. The sales representative with the highest sales (or the best improvement in sales) over a period of time would gain benefits from the employer.

It should also be noted that business and economic competition in most **countries** is often limited or restricted. Competition often is subject to legal restrictions. For example, competition may be legally prohibited, as in the case with a **government monopoly** or a **government-granted monopoly**. **Tariffs**, **subsidies** or other **protectionist** measures may also be instituted by government in order to prevent or reduce competition. Depending on
the respective economic policy, pure competition is to a greater or lesser extent regulated by competition policy and competition law.

Competition between countries is quite subtle to detect, but is quite evident in the World economy. Countries compete to provide the best possible business environment for multinational corporations. Such competition is evident by the policies undertaken by these countries to educate the future workforce. For example, East Asian economies such as Singapore, Japan and South Korea tend to emphasize education by allocating a large portion of the budget to this sector, and by implementing programmes such as gifted education. (See separate sub-markets principle).

Competition law, known in the United States as antitrust law, has three main functions. Firstly, it prohibits agreements aimed to restrict free trading between business entities and their customers. For example, a cartel of sports shops who together fix football jersey prices higher than normal is illegal. Secondly, competition law can ban the existence or abusive behaviour of a firm dominating the market. One case in point could be a software company who through its monopoly on computer platforms makes consumers to use its media player. Secondly, competition law can ban the existence or abusive behaviour of a firm dominating the market. One case in point could be a software company who through its monopoly on computer platforms makes consumers to use its media player. Thirdly, to preserve competitive markets, the law supervises the mergers and acquisitions of very large corporations. Competition authorities could for instance require that a large packaging company give plastic bottle licenses to competitors before taking over a major PET producer. In this case (as in all three), competition law aims to protect the welfare of consumers by ensuring business must compete for its share of the market economy.

In recent decades, competition law has also been sold as good medicine to provide better public services, traditionally funded by taxpayers and administered by democratically accountable governments. Hence competition law is closely connected with the law on deregulation of access to markets, providing state aids and subsidies, the privatisation of state-owned assets and the use of independent sector regulators, such as the United Kingdom telecommunications watchdog Ofcom. Behind the practice lies the theory, which over the last fifty years has been dominated by neo-classical economics. Markets are seen as the most efficient method of allocating resources, although sometimes they fail, and regulation becomes necessary to protect the ideal market model. Behind the theory lies the history, reaching back further than the Roman Empire. The business practices of market traders, guilds and governments have always been subject to scrutiny and sometimes severe sanctions. Since the twentieth century, competition law has become global. The two largest, most organised and influential systems of competition regulation are United States antitrust law and European
Community competition law. The respective national authorities, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) in the United States and the European Commission's Competition Directorate General (DGCOMP) have formed international support and enforcement networks. Competition law is growing in importance every day, which warrants for its careful study.

COMPETITION LAWS: AN OVERVIEW

Competition Law essentially focuses on the behavior of businesses. Protection of consumer interests and entrepreneurs' business opportunities are among the main objectives of Competition Law enacted by various countries. Alongside, Competition policy provides for comprehensive government action on economic policies. It is only when the two are implemented jointly that the economic principles of 'fair market regulation' becomes workable. For an economy to have sustainable growth potential, the balance between free market competition and sectoral regulation is crucial. Competition Law attempts to create a harmony between the natural turn of economic events, which may favor a restriction of competition for greater economic profit, and the need to ensure fair prices and opportunities to consumers and other market players, alike.

After Independence, the Government of India adopted a "Command-and-Control" over the regulation of the market and economy. The Competition Law of India was initially contained in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act).

However, with the widespread reforms in 1991 and the international trend of globalization, the ambit of the MRTP Act was deemed inadequate for fostering competition and eliminating anti-competitive practices in the national and international market.

India reviewed the MRTP Act through appointment of a high level committee on Competition policy and Law (the Raghavan Committee), and enacted the Competition Act, 2002 (the Act) w.e.f 14 January 2003. After a six-year long wait, since the President signed the Competition Bill 2002 in law, India's official anti-monopoly body, the Competition Commission of India (CCI) became operational on May 20th, 2009.
Created under the Competition Act, 2002, and later amended by Parliament in September 2007 the CCI will be responsible for investigation of mergers, market shares and conditions. The commission will ultimately replace the Monopolies and Restrictive Trade Practices Commission (MRTPC). The MRTPC will continue to function for the next two years, dealing with pending cases, before being dissolved.

At present, Sections three and four of the Competition Act have been notified by the government to start their operations starting May 20th, 2009. Sections 3 and 4 deal with the two of the major elements of competition i.e., anti-competitive agreements and abuse of dominant position, respectively. Sections 5 and 6 dealing with mergers and acquisitions are yet to be notified after CCI fully investigates the effects of these sections on the market.

The CCI plans to take on more of a developmental role, rather than that of a regulator-cum-adjudicator. The focus will to sensitize stakeholders on the benefits derived from the enforcement of the competition policy. However, the main objective of the commission is to ensure that businesses function in the interest of consumers.

The success and efficacy of the Competition Commission will be evident through the rules and regulations it implements in the coming months. The establishment of such an anti-competitive regulatory body is; however, reflective of India's changing economic mindset.

COMPETITION LAW IN INDIA

Competition refers to economic rivalry amongst enterprises to control market for products (goods and services). In order to ensure a free and competitive market and to assure consumers the best price and quality products and services, abuse of market power i.e takeover, mergers, cartelisation etc. have to be curbed. Competition Law of a country envisages to prevent and curb all practices that have an adverse impact on competition.

Historical Background of Competition Law in India

October 1999: The Raghavan Committee appointed by the Government to examine the impediments of the existing MRTP Act and to meet the challenges and avail of the opportunities offered by globalization.

January 13, 2003: Pursuant to the recommendations of the Raghavan Committee, the Competition Act, 2002 was enacted to replace the extant MRTP Act. However, a PIL was filed in SC challenging the appointment of the Chairperson of the Competition Commission on ground that the Chairperson of the Commission was not from judiciary (Brahm Dutt Vs. Union of India).

March 09, 2006: The Competition (Amendment) Bill, 2006 was introduced to amend the Competition Act, 2002.

Aug 29, 2007: The Competition Amendment Bill, 2006 was withdrawn and replaced by the Competition Amendment Bill, 2007, which received presidential assent to become The Competition Amendment Act, 2007, which provided for setting up of a Competition Appellate Tribunal. The substantive provisions have been notified vide Notification No. SO1242 (E) Dated 15.05.2009 and Notification No. SO1241 (E) Dated 15.05.2009.

The Competition Commission and the Appellate Tribunal has thus become fully operational from May 20, 2009.

**Relevant Provisions of the Competition Act, 2002**

1. **Section 3**: Prohibition of "Anti-Competitive Agreements" having appreciable adverse effect on competition within India

2. **Section 4**: "Abuse of Dominant Position"

3. **Section 5 and 6**: Regulation of "Combinations"* having appreciable adverse effect on competition within the relevant market in India
4. **Section 7**: Establishment of the Competition Commission of India ("CCI")

**Ambit of Competition Act**:

1. Prohibits Anti-Competitive Agreements.

2. Prohibits Abuse of Dominant Position.

3. Provides for Regulation of Combinations and Enjoins Competition Advocacy

1. **Anti-competitive Agreements**: [Section 3 of The Competition Act, 2002](https://www.gov.in/), as amended by [The Competition (Amendment) Act, 2007](https://www.gov.in/). Most prominent among anti-competitive agreements are Horizontal agreements, Vertical agreements and Cartels.

   **Horizontal Agreements**: Includes agreements to fix prices, agreements to limit production, supply, markets, investments or provisions of services, bid rigging; collusive bidding etc.

   **Vertical Agreements**: Includes exclusive supply agreements, exclusive distribution agreements, resale price maintenance, tie in arrangement; refusal to deal etc.

   **Cartels**: Includes an association of producers, sellers, distributors, traders or service providers or firms who enter into anti-competitive agreement to limit, control or attempt to control production, distribution, sale or price of, trade in goods or provisions of services.

**CHAPTER II**

**PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT POSITION AND REGULATION OF COMBINATIONS**

**Prohibition of agreements** Anti-competitive agreements

3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.
(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:
Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—
(a) tie-in arrangement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;
(e) resale price maintenance,
shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods; (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) The Copyright Act, 1957 (14 of 1957);

(b) The Patents Act, 1970 (39 of 1970);

(c) The Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) The Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) The Designs Act, 2000 (16 of 2000);

(f) The Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
(ii) The right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

**Prohibition of abuse of dominant position**

**Abuse of dominant position:**

4. [(1) No enterprise or group] shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 4[under sub-section (1), if an enterprise or a group].——

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access 5[in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour.
(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.
6[(c)“group” shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]

Regulation of combinations Combination:

5. The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—
(a) any acquisition where—
(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—
(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
(B)[in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]
(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,— (A)either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
(B)[in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]
(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—
(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—
(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]
(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—
(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]
(c) any merger or amalgamation in which—
(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—
(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]
(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, as the case may be, would belong after the merger or the amalgamation, as the case may be, have or would have,—
(A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or (B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees fifteen hundred crores in India; or]
rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India;]
Explanation.— For the purposes of this section,—
(a) "control" includes controlling the affairs or management by—
(i) one or more enterprises, either jointly or singly, over another enterprise or group;
(ii) one or more groups, either jointly or singly, over another group or enterprise;
(b) "group" means two or more enterprises which, directly or indirectly, are in a position to—
(i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or
(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
(iii) control the management or affairs of the other enterprise;
(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

Regulation of combinations:
6. (1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of—
(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

15[(2A)No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier.]

(3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Explanation.—For the purposes of this section, the expression—

(a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961(43 of 1961);

(b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of section 10 of the Income-tax Act, 1961(43 of 1961);

Relevant Indian Case Laws on Anti-competitive Agreements

1. Union of India V. Hindustan Development Corporation MANU/SC/0219/1994

2. TELCO V. Registrar of Restrictive Trade Agreements MANU/SC/0254/1977

3. Mahindra & Mahindra Ltd V. Union of India MANU/SC/0391/1979


A position of strength enjoyed by an enterprise in a relevant market in India, which enables it to operate independently of competitive forces prevailing in relevant market.

**Dominance includes**

Pricing Strategy: Predatory pricing or Unfair pricing: Imposing directly or indirectly unfair or discriminatory condition on price upon purchase or sale of goods or services.

Denial of market access: Indulging in practices resulting in denial of market access in any manner.

Limiting or restricting of goods or services: Limiting or restricting production or development of goods and services

**Relevant Indian Case Laws on Abuse of Dominance**

DGIR V. UB-MEC Batteries [MANU/MR/0010/1996]

Director- General (Investigation and Registration) Vs. Rajashree Cement [MANU/MR/0006/1994]

Director-General (I & R) Vs. Bajaj Tempo Ltd. [MANU/MR/0011/1996]


Competition law bars any combination or merger of an entity with another entity which causes or is likely to cause an appreciable adverse effect on competition within the relevant market.
Transactions that come within the purview of "combination" are Acquisition of control shares, voting rights and Assets.

Acquisition of control by a person over another enterprise, when such person already has control (direct / indirect) over another enterprise engaged in production / distribution / trading of similar / identical / substitutable goods or services

The provision for regulation of combinations do not apply to share subscription / financing facility / any acquisition by Public Financial Institutions FII Bank Venture capital fund pursuant to any covenant of a loan agreement or investment agreements

**Relevant Indian Cases on Mergers or Acquisitions**

Director General (Investigation and Registration) Vs. Hindustan Lever Limited [MANU/MR/0027/2003]

Director General (Investigation & Registration) Vs. Tata Oil Mills Company Ltd. and Anr [MANU/MR/0104/2001]

Maharashtra General Kamgar Union and Ors. Vs. Hindustan Lever Ltd. and Anr. [MANU/MR/0013/1994]

**Exemption to Competition Laws**

Govt by notification may exempt from the purview of competition law, the following

1. Any class of enterprises in the interest of national security/public interest.

2. Any practice/agreement arising out of international treaty/agreement

3. Any enterprise performing a sovereign function on behalf of government.

**Enforcement Activities of the Competition Commission of India:**

The Competition Commission of India (CCI) will have the authority to ban any enterprise or person from continuing with an agreement, which prevents and/or reduce competition in a market. The order to discontinue with anti-competitive practice will be known as 'cease and desist' order. The Commission will also have the power to impose a penalty of
up to 10 per cent of the turnover, which can increase to higher of three times of the profit or 10 per cent of the turnover for each year of collusion between the parties. CCI can modify any agreement, or direct an enterprise to abide by its orders. The Commission is further empowered to order the de-amalgamation or division of any enterprise, which holds a dominant position in order to prevent the abuse of such dominance.

Appeals against the orders of the Competition Commission can be challenged before the Competition Appellate Tribunal. Any individual, local authority, State Government or Central Government, aggrieved over the orders and directives issued by the CCI can appeal for a change. Appeals against orders of the Tribunal can in turn be challenged in the Supreme Court of India.

CCI has received the first formal complaint from Multiplex Owners Association alleging cartelization by Bollywood Film Producers.

**Fee charged for complaints made to the Competition Commission of India**

The Competition Regulator will charge a non-refundable fee of Rs 50,000 from every complainant filing a complaint alleging anti-competitive behavior by its market rival. The hefty fee is to act as a check against filing of frivolous complaints by entities against their business or market rivals.

**ABUSE OF DOMINANCE IN THE INDIAN COMPETITION LAW:**

In India, following the economic reforms and liberalization of the economy, it was found necessary to review the competition law. This exercise resulted in the enactment of a new Competition Act, 2002 which was passed by Parliament in December 2002 and it received the assent of the President in January, 2003. Certain provisions of the Act have been notified by Government but the other provisions have not yet been notified.

Meanwhile, Government has issued a notification establishing the Competition Commission of India w.e.f. 14th October 2003. According to Section 18 of the Act
Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants, in markets in India. Accordingly, under the Act, the Commission is to take action against anti-competitive agreements (such as cartels) and abuse of dominant position (such as predatory pricing and unfair or discriminatory conditions of prices). The Commission is also empowered to regulate combinations, i.e., mergers, acquisition of shares or acquiring of control, etc., above the threshold given in the Act. The Commission would be able to begin its functions in these areas only after the concerned sections are notified. Initially, the Commission is expected to undertake Competition Advocacy. At this stage, no adjudication work is to be undertaken, which is in accordance with the Hon'ble Supreme Court’s interim order in a case relating to the Competition Act pending before it.

Thus abuse of dominant position by an enterprise, is a serious violation under the Indian Competition Act. Section 4 of the Act specifically states that no enterprise shall abuse its dominant position. It also states that there shall be an abuse of dominant position if an enterprise imposes unfair or discriminatory conditions or prices in the purchase or sale of goods or provision of services or if it limits or restricts production of goods or provision of services or technical and scientific development or it denies market access, etc. It is interesting to note that dominant position is not defined on the basis of any arithmetical parameters or any particular share of the market as is the case in the MRTP Act, 1969. On the other hand, dominance of an enterprise is to be judged by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, an enterprise with a share of say less than 25% of the market could possibly be determined to be the dominant. if it satisfies the above criteria; on the other hand, an enterprise with higher market share may not be considered as dominant. if it does not meet the criteria mentioned in the Act. The Act also lays down a number of factors which the Commission needs to take into consideration in determining whether an enterprise enjoys a dominant position or not, such as market share, size and resources of the enterprise, size and importance of competitors, economic power of the enterprises,
vertical integration of the enterprises, entry barriers, etc. which would involve a fair amount of economic analysis.

In case an enterprise is held by the Competition Commission of India to have abused its dominant position, there are penalties that can be imposed and various directions that can be given by the Commission. It can impose a penalty of not more than 10% of the turnover of the enterprise. It can pass a ‘cease and desist order’, and pass such other orders as may be considered appropriate. It can also recommend to the Central Government for division of dominant enterprise. Thus, the Competition Commission of India would have the power to inter alia direct the enterprise to disclose information to its competitors (as has been directed by the European Competition Commission) or it can recommend division of an enterprise (as had been ordered initially by the US trial court in 2000), if these are considered appropriate to the case.

Sum up:

1. In this chapter, we have seen the structure of WTO and also conceptual framework. Importance of trade agreement and trade in services are dealt elaborately.
2. Special emphasis laid on the Doha rounds declaration; the problems faced by Indian have been covered in this chapter.
3. The origin and development of competition laws have been explained with help of some statutory provisions and some illustration’s
4. We have also seen the regulation and control of anti competitive practices both international and national perspectives are also covered.