INDIA

TRADE SUMMARY

The U.S. goods trade deficit with India was $14.5 billion in 2011, up $4.3 billion from 2010. U.S. goods exports in 2011 were $21.6 billion, up 12.4 percent from the previous year. Corresponding U.S. imports from India were $36.2 billion, up 22.5 percent. India is currently the 17th largest export market for U.S. goods.

U.S. exports of private commercial services (*i.e.*, excluding military and government) to India were $10.3 billion in 2010 (latest data available), and U.S. imports were $13.7 billion. Sales of services in India by majority U.S.-owned affiliates were $13.1 billion in 2009 (latest data available), while sales of services in the United States by majority India-owned firms were $7.2 billion.

The stock of U.S. foreign direct investment (FDI) in India was $27.1 billion in 2010 (latest data available), up from $20.9 billion in 2009. U.S. FDI in India is led by the information, professional, scientific, and technical services, and manufacturing sectors.

IMPORT POLICIES

U.S. exporters continue to encounter tariff and nontariff barriers that impede imports of U.S. products, despite the government of India's ongoing economic reform efforts. The United States has actively sought bilateral and multilateral opportunities to open India's market. The USTR and India's Minister of Commerce and Industry chair the United States-India Trade Policy Forum, which meets regularly to discuss the full range of bilateral trade and investment issues outlined in this chapter. Other bilateral dialogues, such as the Information Communication Technology Working Group and the Commercial Dialogue, also work to increase U.S. exports by highlighting areas and sectors of bilateral commercial opportunity and resolving practical issues that affect doing business in India.

Tariffs and other Charges on Imports

The structure of India's customs tariff and fees system is complex and characterized by a lack of transparency in determining net effective rates of customs tariff, excise duty and other duties and charges on imports into India. The tariff structure of general application is composed of a basic customs duty, an "additional duty" (also referred to as a "countervailing duty"), a "special additional duty," and an education assessment ("cess"). The additional duty, which is applied to all imports except for wine, spirits, or other alcoholic beverages, is applied on top of the basic customs duty, and is intended to correspond to the excise duties imposed on similar domestic products. The special additional duty is a four percent *ad valorem* duty that applies to all imports, including alcoholic beverages, except those exempted from the duty pursuant to an official customs notification. It is calculated on top of the basic customs duty and the additional duty. In addition, there is a three percent education cess (surcharge) applicable on the total import duty (not on the customs value of the imported product) on most imports, except those exempted from the cess pursuant to an official customs notification. A landing fee of one percent is included in the valuation of all imported products unless exempted through separate notification.

While India publishes applied tariff and other customs duty rates applicable to imports, there is no single official publication available to traders that includes all relevant information on tariffs, fees, and tax rates on imports. In addition to being announced with the annual budget, India's customs rates are modified on an *ad hoc* basis through notifications in the Gazette of India and numerous exemptions that vary according to product, user, or specific export promotion program, rendering the system complex to administer and more open to administrative discretion.

In order to determine the applicable applied tariff or other customs duty rate, importers must cross-reference separate customs and excise tax schedules with any applicable customs or excise notification that may subject the product to higher or lower rates than set forth in the schedules. Determining whether such notifications exist is extremely difficult and in some cases nearly impossible. For example, in conjunction with the publication of the annual budget in 2011, India's Central Board of Excise and Customs (CBEC) published a list of the almost 1,000 notifications in effect on that date, which modified the applicable duty rates on an even greater number of Harmonized System tariff lines. An importer must then determine whether CBEC issued any tariff-related notifications in respect of a given product subsequent to that listing at the time of the annual budget. In 2011, CBEC issued 130 such notifications. When these notifications are read with accompanying product lists and qualifying conditions issued separately by CBEC, it can be very difficult to determine what the net customs tariff and total effective duty rates are on a given imported product. This system lacks transparency and imposes significant burdens on importers. Working with a private publisher, the Ministry of Finance has implemented a subscription-based online database (http://www.custadaindia.com/) and CD database of tariff rates and nontariff measures.

India's tariff regime is also characterized by pronounced disparities between bound rates (*i.e.*, the rates that under WTO rules generally cannot be exceeded) and the most favored nation (MFN) applied rates charged at the border. According to the WTO, India's average bound tariff rate was 46.4 percent, while its simple MFN average applied tariff for 2010 was 12 percent. Given this large disparity between bound and applied rates, U.S. exporters face tremendous uncertainty because India has considerable flexibility to change tariff rates at any time. While India has bound all agricultural tariff lines in the WTO, over 30 percent of India's non-agricultural tariffs remain unbound, *i.e.*, there is no WTO ceiling on the rate.

Despite its goal of moving toward Association of Southeast Asian Nations (ASEAN) tariff rates (approximately five percent on average), India has not reduced the basic customs duty in the past four years. India also maintains very high tariff peaks on a number of goods, including flowers (60 percent), natural rubber (70 percent), automobiles and motorcycles (60 percent for new products, 100 percent for used products), coffee (100 percent), poultry (30 percent to 100 percent), and textiles (some *ad valorem* equivalent rates exceed 300 percent).

Many of India's bound tariff rates on agricultural products are among the highest in the world, ranging from 100 percent to 300 percent, with an average bound tariff of 118.3 percent. While many Indian applied tariff rates are lower (averaging 33.2 percent on agricultural goods in 2010), they still present a significant barrier to trade in agricultural goods and processed foods used by food processors and retailers (*e.g.*, potatoes, apples, grapes, canned peaches, chocolate, cookies, and frozen french fries and other prepared foods used in quick-service restaurants). The large gap between bound and applied tariffs in the agriculture sector allows India to use tariff policy frequently to adjust the level of protection in the market, creating uncertainty for traders. For example, in April 2008, in an effort to curb inflation, India reduced applied duties on crude edible oils and corn to zero, refined oils to 7.5 percent, and butter to 30 percent. However, in November 2008, India raised crude soy oil duties back to 20 percent and then reduced them again to zero in March 2009.

India has taken steps to reduce and simplify the general rate of central excise duty for domestic products, reducing the corresponding "additional duties" paid on imported products. For example, in 2009, as part of an economic stimulus package, India cut the excise duty on most products from 10 percent to 8 percent.

Later that year, India implemented dual excise rates of four percent and eight percent *ad valorem*, which actually doubled the four percent duty rate on several items (*e.g.,* man-made textiles, ceramic tiles, plywood, wood products, writing ink, zip fasteners, and MP3/MP4 players). The fiscal year 2009-2010 budget, however, reversed the stimulus cut in the general excise duty and set it back to 10 percent, where it remains.

In July 2007, after the United States initiated WTO dispute settlement procedures to challenge the additional duty on alcoholic beverages, India issued a customs notification exempting alcoholic beverages from the additional duty. (Under the prior customs notification, imports of alcoholic beverages were subject to rates of additional duty ranging from 20 percent to 150 percent *ad valorem* and in some cases higher specific duties.) Simultaneously, India raised the basic customs duty on wine from 100 percent to 150 percent. The basic customs duty on distilled spirits remained at 150 percent. When India exempted alcoholic beverages from the additional duty, it announced it was doing so in lieu of applying state-level excise duties on wine and spirits. These state-level taxes can result in imported wine and spirits being taxed at a significantly higher rate than like domestic products.

Imports also are subject to state-level value-added or sales taxes and the Central Sales Tax as well as various local taxes and charges. In September 2007, India issued a customs notification allowing importers to apply for a refund of the special additional duty paid on imports subsequently sold within India and for which the importer has paid state-level value-added taxes. Importers report that the refund procedures are cumbersome and time-consuming. India announced its intention to implement a national goods and services tax (GST) by 2011, which has been extended to 2012, that would replace most indirect taxes, including various charges on imports. Implementation of a national GST, however, will first require amending the Indian Constitution.

Import Licensing

India maintains a "negative list" of imported products subject to various forms of nontariff regulation. The negative list is currently divided into three categories: banned or prohibited items (*e.g.*, tallow, fat, and oils of animal origin); restricted items that require an import license (*e.g.*, livestock products and certain chemicals); and "canalized" items (*e.g*., petroleum products and some pharmaceuticals) importable only by government trading monopolies subject to cabinet approval regarding timing and quantity. India, however, often fails to observe customary transparency requirements such as publication of this information in the Official Gazette or notification to WTO Committees, which can, in practice, act as a barrier to trade.

India allows imports of second-hand capital goods by the end users without requiring an import license, provided the goods have a residual life of five years. Refurbished computer spare parts can only be imported if an Indian chartered engineer certifies that the equipment retains at least 80 percent of its residual life, while refurbished computer parts from domestic sources are not subject to this requirement. India has required import licenses for all remanufactured goods since 2006. India's official Foreign Trade Policy, last issued in October 2011, treats remanufactured goods the same as second-hand products and provides no criteria for different levels of transformation that would distinguish remanufactured, refurbished, reconditioned, and second-hand goods. As with licensing requirements on other products, U.S. industry representatives report that the requirement is onerous as implemented: the license application requires excessive details; quantity limitations are set on specific part numbers; the delay between application and grant of the license is long and creates uncertainty; and in some cases industry representatives report that they have been unable to obtain a license.

Since 2005, India has subjected imported boric acid to stringent requirements, including arbitrary quantity limitations and conditions applicable only to imports used as insecticide. Traders (*i.e.*, wholesalers) of boric acid for non-insecticidal use remain unable to import boric acid for resale because they are not end users of the product and cannot obtain no-objection certificates (NOCs) from the Ministry of Agriculture. NOCs are required before applying for import permits from the Ministry of Agriculture's Central Insecticides Board & Registration Committee. Meanwhile, local refiners continue to be able to produce and sell non-insecticidal boric acid, with a requirement only to maintain records showing they are not selling to insecticidal end users.

Customs Procedures

U.S. exporters have raised concerns regarding India's application of customs valuation criteria to import transactions. India's valuation procedures allow India's customs officials to reject the declared transaction value of an import when a sale is deemed to involve a lower price compared to the ordinary competitive price. U.S. exporters have reported that India's customs valuation methodologies do not reflect actual transaction values and raise the cost of exporting to India beyond applied tariff rates. U.S. companies have also faced extensive investigations related to their use of certain valuation methodologies when importing computer equipment. Companies have reported being subjected to excessive searches and seizures.

Furthermore, as explained above, India does not assess the basic customs duty, additional duty, and special additional duty separately on the customs value of a given imported product. Rather, India assesses each of these duties cumulatively, that is, the additional duty is assessed on the sum of the actual (or transaction) value and the basic customs duty, while the special additional duty is assessed on the sum of the actual (or transaction) value, the basic customs duty, and the additional duty. This can result in importers paying higher duties than they should be liable for on the basis of the actual value of their imported product.

India's customs officials generally require extensive documentation, which inhibits the free flow of trade and leads to frequent and lengthy processing delays. In large part this is a consequence of India's complex tariff structure and multiple exemptions, which may vary according to product, user, or intended use. While difficulties persist, India has shown improvement in this area through the automation of trade procedures and other initiatives.

Motor vehicles may be imported through only three specific ports and only from the country of manufacture.

GOVERNMENT PROCUREMENT

India applies sector-specific procurement policies in certain areas, such as defense procurement. India's defense "offsets" program requires companies to invest 30 percent or more of the value of contracts above Rs 300 crores ($67 million) in Indian produced parts, equipment, or services. Recently, offsets were expanded to include civil aviation. Offset requirements are often so onerous that they dissuade foreign companies from bidding. In addition, it is not uncommon for the Defense Ministry to request significant changes to previously accepted offset proposals. India has indicated that it is considering broadening the areas of acceptable offsets, but a new policy has not been announced.

India's government procurement practices and procedures are often not transparent. Foreign firms also rarely win Indian government contracts due to the preference afforded to Indian state-owned enterprises and the prevalence of such enterprises. Similarly, the 2006 Micro, Small and Medium Enterprise (MSME) Act authorizes the government to provide procurement preferences to MSMEs. India requires purchase of certain items from MSMEs, but this list has been gradually reduced to 21 specific goods and services (*e.g.*, pickles/chutneys, bread, wood furniture, wax candles, safety matches, and fireworks). India provides similar preferences to government-registered "small scale industry units" for certain products.

India is not a signatory to the WTO Agreement on Government Procurement (GPA), but became an observer to the WTO Committee on Government Procurement in February 2010. In response to domestic pressure to increase procurement transparency, the government of India released two draft public procurement bills for public comment in September 2011, one prepared by the Ministry of Finance and the other prepared by the Planning Commission. Through these draft bills, India is seeking to harmonize its various procurement instructions, guidelines, and recommendations into one law. The United States submitted comments on both drafts, which included concerns that certain provisions appeared to deviate from the best practices set out in the revision of the GPA approved in December 2011. In February 2012, the Group of Ministers on corruption approved a second draft based on the Ministry of Finance bill incorporating some comments received but still containing provisions of concern to the United States. The revised draft public procurement law may be considered during the 2012 "Budget Session" of Parliament.

EXPORT SUBSIDIES

India's tax exemption for profits from export earnings has been completely phased out, but tax holidays continue for certain export-oriented enterprises and exporters in Special Economic Zones. In addition to these programs, India continues to maintain several other export subsidy programs, including duty drawback programs that appear to allow for drawback in excess of duties levied on imported inputs. India also provides pre-shipment and post-shipment financing to exporters at a preferential rate. India's textile industry enjoys subsidies through various modernization schemes, such as the Technology Upgradation Fund Scheme and the Scheme for Integrated Textile Parks. In 2011, India reinstated the previously suspended Duty Exemption Passbook Scheme for cotton and yarn; this program enables exporters to earn credits that they can sell to importers, who can apply for duty-free import status for certain products. Numerous other sectors, including paper, rubber, toys, leather goods, and wood products receive subsidies tied to export performance. After several consecutive years of not submitting a subsidies notification, India recently submitted two notifications to the WTO Committee on Subsidies and Countervailing Measures (SCM Committee), both of which notify only one central government program of preferential tax incentives related to Free Trade Zones, Special Economic Zones, and Export Processing Zones covering the 2003-2009 time period. These notifications were substantially incomplete, as they failed to notify several well-known subsidies, including export subsidy programs maintained by India. Because of India's failure to notify its subsidy programs in a timely manner, USTR "counter-notified" 50 Indian subsidy programs to the WTO Subsidies Committee in October 2011 under Article 25.10 of the SCM Agreement.

The United States submitted a formal request to the SCM Committee in February 2010 requesting a calculation of the export competitiveness of Indian textile and apparel products. The resulting calculation, published in March 2010, indicated that, with respect to textile and apparel products, India had met the definition of "export competitiveness" set out in Article 27.6 of the SCM Agreement. As a result, India must phase out export subsidies for those products over a period of eight years, in accordance with the SCM Agreement. Since the calculation, India has announced some reductions in duty drawback rates for textile products and the intention to eliminate certain subsidy programs. However, India not only continues to offer subsidies to the textiles and apparel sector designed to promote exports; it has also extended or expanded such programs, and even implemented new export subsidy programs that benefit the textiles and apparel sector.

There is a special initiative for agricultural exports in India's Foreign Trade Policy 2009-2014, including a scheme called *Vishesh Krishi Gram Upaj Yojana* (VKGUY – "Special Agriculture Produce Scheme"), aimed at boosting exports of fruits, vegetables, flowers, some forest products, and related value-added products. Under the plan, exports of these items qualify for a duty-free credit that is equivalent to five percent of their free-on-board export value. The credit is freely transferable and can be used to import a variety of inputs and capital goods. To mitigate the impact of the global economic slowdown on exports, the government has made several additional agricultural products eligible under VKGUY, such as soybean meal, marine products, and tea.

INTELLECTUAL PROPERTY RIGHTS PROTECTION

India remains on the Priority Watch List in the 2011 Special 301 Report because of concerns regarding weak protection and enforcement of intellectual property rights (IPR). Although India continues to make incremental progress towards establishing a more comprehensive and stable legal framework for the recognition and protection of IPR, India needs to improve its IPR regime by providing stronger protection for copyrights, trademarks, and patents. India also needs to provide effective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products.

While amendments have been introduced in the Indian Parliament to modernize India's copyright regime, such legislation was not enacted in 2011. The United States has raised a number of concerns with the draft copyright legislation, including inadequate protection against unlawful circumvention of technological protection measures connected to Indian and foreign rights holders' copyrighted works. Large-scale copyright piracy, especially in the software, optical media, and publishing industries, continues to be a major problem. In addition, India's criminal IPR enforcement regime remains weak. More police action against those engaged in manufacturing, distributing, or selling pirated and counterfeited goods as well as expeditious judicial dispositions for criminal IPR infringement actions and imposition of deterrent-level sentences, is needed. The United States also encourages India to consider legislative options to combat more effectively hard goods and digital piracy.

SERVICES BARRIERS

The Indian government has a strong ownership presence in major services industries such as banking and insurance, while private firms play a preponderant to exclusive role in some of the fastest growing areas of the services sector, such as information technology and business consulting. Key sectors such as telecommunications, financial services, and legal services remain either closed to foreign investment or are subject to restrictions on foreign participation.

Insurance

Foreign equity in the insurance sector is currently limited to 26 percent of paid-up capital. India introduced legislation in late 2008 to allow foreign equity participation of up to 49 percent and also allow entry of foreign re-insurers. In 2009, the Insurance Laws (Amendment) Bill went to the Standing Committee on Finance for evaluation; the Committee did not release its report on the bill until December 2011, recommending against increasing the 26 percent foreign equity cap. As lawmakers continue to consider increasing foreign investment in the sector, many existing investors are approaching 10 years of doing business in India. Under current regulations, at the 10 year mark, any partner in an insurance enterprise is required to divest its equity stake down to 26 percent. Given the 26 percent equity cap, this requirement effectively applies only to Indian partners, as a result of which many existing joint ventures may be required to locate new Indian partners or otherwise modify their ownership structure. While the Insurance Regulatory and Development Authority said it plans to publish a clarification of these regulations, foreign investors continue to operate in an environment of extreme uncertainty.

Banking

Although India allows privately held banks to operate in the country, the banking system is dominated by government-owned banks and direct investment by foreign banks is subject to restrictions. State-owned banks account for roughly 72 percent of the assets and 86 percent of all bank branches in the banking system. As of September 2011, there were 38 foreign banks with 321 branch offices operating in India under approval from the Reserve Bank of India (RBI), including four U.S. banks with a total of 52 branches. Under India's branch authorization policy, foreign banks are required to submit their internal branch expansion plans on an annual basis, but their ability to expand is severely limited by nontransparent quotas on branch office expansion. No licenses to open additional bank branches have been issued to U.S. banks since March 2009, despite several banks having applied.

In the past, foreign banks have not opened wholly-owned subsidiaries because of RBI-imposed caps on ownership. Foreign banks are not authorized to own more than five percent of on-balance sheet assets of an Indian private bank without approval by the RBI, while individual investors, including foreign investors, cannot own more than 10 percent of any private bank. Total foreign ownership from all sources (FDI, foreign institutional investors, and non-resident Indians) cannot exceed 74 percent. In addition, voting rights are capped at 10 percent.

In January 2011, the RBI issued an update to its Road Map for Foreign Bank Entry. After receiving feedback to this paper, the RBI in August 2011 issued guidelines for setting up new private sector banks, including foreign banks. According to these guidelines, foreign direct investment in private sector banks would be limited to 49 percent for the first five years of investment, after which it could be raised to 74 percent, but with individual shareholding limited to five percent. The new guidelines also propose that shareholding of five percent or more in a bank be subject to prior RBI approval. These guidelines cannot enter into force, however, until the passage of certain amendments to the Banking Regulation Act. The amendments are expected to be presented in the Parliament in 2012.

Audiovisual Services

Although India has removed most barriers to the importation of motion pictures, U.S. companies continue to experience difficulty importing film and video publicity materials and are unable to license merchandise in connection with movies due to royalty remittance restrictions. The industry had also been experiencing difficulty importing digital masters of films loaded on an electronic medium as opposed to those imported on cinematographic film, owing to a different customs duty structure. Beginning with its fiscal year 2010-2011 annual budget, India started charging a customs duty only on the value of the carrier medium for films, as well as for music and gaming software imported for distribution. In all such cases, the value representing the transfer of intellectual property rights is also subject to a service tax.

U.S. companies continue to face difficulties with India's "Downlink Policy." Under this policy, international content providers that down-link programming from a satellite into India, must establish a registered office in India or designate a local agent. U.S. companies have reported that this policy is overly burdensome and can result in having a taxable presence in India. India also requires that foreign investors have a net worth of $1 million (up from the previous amount of $300,000) in order to be allowed to downlink an initial content channel, and an additional $500,000 (up from the previous amount of $200,000) of net worth for downlinking each additional channel.

Accounting

Foreign accounting firms encounter several hurdles to entering the Indian accounting services sector. Before an accountant can practice in India, the accountant must become a member of the Institute of Chartered Accountants of India (ICAI), which requires taking ICAI courses, undergoing practical training at an ICAI accredited organization, and passing an examination. Foreign accounting firms may only practice in India if their home country provides reciprocity to Indian firms. Only firms established as a partnership may provide financial auditing services, and foreign-licensed accountants may not be equity partners in an Indian accounting firm.

Foreign accounting firms are also concerned with proposed amendments to the Indian Companies Act in the Companies Bill 2011. The Companies Bill 2011, which has been cleared by the Indian Cabinet, will replace a half-century old law, and is expected to be brought before Parliament in 2012. The proposed amendments include provisions that would require clients to rotate audit firms every five years and increase third party liability. Foreign firms are concerned that these changes will disrupt business continuity and represent a departure from the practices employed by most G20 countries.

Legal Services

The Bar Council of India (BCI) is the governing body for the legal profession in India. Membership in the BCI is mandatory to practice law in India, but is limited to Indian citizens. Foreign law firms are not allowed to open offices in India.

Indian lawyers have filed suit in the Bombay and Madras High Courts against a group of foreign law firms, challenging the ability of foreign attorneys to provide any type of legal services in India, including advising on matters of foreign (*i.e.*, non-Indian) or international law under ambiguous provisions of the 1961 Advocates Act. The Bombay High Court issued a judgment in December 2009, finding that non-litigation advisory services provided by foreign lawyers fell within the purview of the current Advocates Act, and were therefore restricted to Indian lawyers. However, the judgment also noted that the issue of foreign firms being able to practice law in India was under consideration by the government, and directed the government to "take [an] appropriate decision on this issue as expeditiously as possible." In the separate case before the Madras High Court, the court ruled on February 21, 2012 that the Advocates Act did not prevent foreign lawyers from advising clients on foreign (non-Indian) law and international legal issues (*e.g.*, in connection with international arbitrations) on a "temporary" basis. An adverse ruling would have barred foreign lawyers from advising clients in India and had a serious impact on cross-border trade and investment.

Telecommunications and Broadcasting

Foreign investment in wireless and fixed telecommunications in India is limited to 74 percent, and U.S. companies have noted that India's initial licensing fee (approximately $500,000 per service) for telecommunications providers serves as a barrier to market entry for smaller market players. Foreign investment in cable networks and "direct-to-home" (DTH) broadcasting is limited to 49 percent. TV channels, irrespective of ownership or management control, are required to transmit from ground stations (*i.e.,* up-link) located in India; while 100 percent foreign ownership is permitted for entertainment and general interest channels, foreign investment in news and current affairs channels up-linking from India is limited to 26 percent. In August 2009, the Telecommunications Regulatory Authority of India (TRAI) recommended to the Department of Telecommunications (DoT) that the foreign direct investment cap for cable networks and DTH be increased from 49 percent to 74 percent. This recommendation has not yet been implemented.

India issued a series of new requirements for telecommunications service providers and equipment vendors in December 2009, March 2010, and July 2010, explaining that these were adopted to maintain the security of its commercial telecommunications networks. The requirements apply to the purchase of imported products and do not apply to products manufactured or developed in India by Indian-owned or -controlled manufacturers. Issued in the form of amendments to telecommunications service licenses, the new regulations imposed an inflexible and unworkable security approval process, mandating the forced transfer of technology to Indian companies, the escrowing of source code, and assurances against malware and spyware during the entire use of relevant equipment. These measures effectively halted billions of dollars worth of trade in telecommunications equipment and seemed unlikely to advance India's stated security objectives.

India issued a new telecommunications security policy in May 2011, which eliminated many of the most trade-distorting conditions of the previous telecommunications security policy that did not address the security issues cited by India. Concerns remain, however, regarding certain provisions in the May 2011 policy, including: (1) the requirement for telecommunications equipment vendors to test all imported information and communications technology (ICT) equipment in labs in India; (2) the requirement to allow the telecommunications service provider and government agencies to inspect a vendor's manufacturing facilities and supply chain, and to perform security checks for the duration of the contract to supply the equipment; and (3) the imposition of strict liability and possible "blacklisting" of a vendor for taking "inadequate" precautionary security measures, without the right to appeal and other due process guarantees.

The government of India continues to hold equity in three telecommunications firms: a 26 percent interest in the international carrier, VSNL; a 56 percent stake in MTNL, which primarily serves Delhi and Mumbai; and 100 percent ownership of BSNL, which provides domestic services throughout the rest of India. These ownership stakes have caused private carriers to express concern about the fairness of India's general telecommunications policies. For example, valuable wireless spectrum has been allocated and set aside for MTNL and BSNL instead of being allocated by competitive bidding. Although BSNL and MTNL paid a price that was equal to the final bid price paid by the winners of the 3G auction, they received their spectrum well ahead of private players.

India does not allow companies to provide Internet telephony over networks connected to the publicly switched telecommunications network unless they obtain a telecommunications license. In August 2008, TRAI forwarded recommendations to the DoT, suggesting that the barriers to the provision of Internet telephony be eliminated entirely. In December 2010, the DoT rejected TRAI's recommendations.

U.S. satellite operators have long raised concerns about the closed and protected satellite services market in India. Even though current Indian regulations do not preclude the use of foreign satellites, foreign satellite capacity must in practice be provided through the Indian Space Research Organization (ISRO), effectively requiring foreign operators to sell capacity to a direct competitor. U.S. companies have noted that this requirement creates additional costs, allows ISRO to negotiate contract terms with the goal of moving the service to one of its satellites once capacity is available, and puts ISRO in a position of being able to determine the market growth rate. Although TRAI has in the past recommended that India adopt an "open skies" policy and allow competition in the satellite services market, no measures have been adopted to date to implement TRAI's recommendations for further liberalization.

Distribution Services

While 100 percent foreign ownership is permitted in wholesale cash and carry services, the retail sector in India is largely closed to foreign investment. Foreign investment in single-brand retailing is limited to 51 percent, while foreign investment in multi-brand retailing is prohibited outright. In January 2012, India issued a circular allowing foreign investors to invest in single-brand retail in excess of 51 percent (and up to 100 percent), but subject to a condition that 30 percent of the value of products sold by the retailer be sourced from small industries in India with plant and machinery capital of less than $1,000,000. This requirement is likely to be prohibitive for retailers in technology industries, and those operating with globally-integrated supply chains. A November 2011 effort by the government of India to open India's multi-brand retail market for the first time to foreign investment (subject to a 51 percent equity cap and conditions on minimum capitalization, state licensing, minimum back-end investment, and sourcing conditions) remains stalled due to political opposition.

India has periodically interpreted the activities of direct selling companies as violating the Prize Chits and Money Circulation Schemes (Banning) Act of 1978, creating uncertainty for companies operating in this market. Raids and seizures of property were undertaken in 2006 against a U.S. direct selling company operating in India with Foreign Investment Promotion Board approval. The case remains with the courts and could go to trial at any time. Industry groups have asked that the Department of Industrial Policy and Promotion issue a press note establishing a definition of direct selling and clarifying ambiguities, including ambiguity related to commissions earned in connection with the sale of products.

Postal and Express Delivery

In 2011, the Department of Posts announced a proposed bill to replace the 1898 Post Office Act. Although the Department of Posts has not yet publicly released the text of the bill or otherwise made it available for comment, it has identified certain features of the bill in response to a question from Parliament. This response indicates that the bill would establish a monopoly on express delivery of items weighing up to 50 grams, and require that private operators charge twice the Express Mail Service rate in order to provide services falling within the monopoly. The bill would also establish a new licensing and registration scheme, potentially granting India Post regulatory authority over its private sector competitors. U.S. companies have expressed concern both with elements of the bill disclosed thus far, and with the possibility that the bill may move ahead for Parliamentary approval without an opportunity for stakeholder input on the final text of the bill.

Education

Foreign providers of higher education services interested in establishing in India face a number of market access barriers, including a requirement that representatives of Indian states sit on university governing boards; quotas limiting enrollment; caps on tuition and fees; policies that create the potential for double-taxation; and difficulties repatriating salaries and income from research. A draft Foreign Education Providers Bill, which is expected to be introduced in the Parliament in 2012, may address some of these issues.

INVESTMENT BARRIERS

Equity Restrictions

India continues to prohibit or severely restrict foreign investment in certain sectors, such as agriculture, multi-brand retail trade, railways, and real estate. Foreign direct investment (FDI) is permitted without the need for prior approval in many sectors, including bulk manufacturing activities, whereas prior government approval is required for investment in others. The Department of Industrial Policy and Promotion (DIPP), within the Ministry of Commerce and Industry, began issuing consolidated FDI policy circulars in April 2010, with circular revisions contemplated every six months. The last revision was released in October 2011 (http://dipp.nic.in/English/Policies/Policy.aspx).

In its October 2011 "Consolidated FDI Policy," the Ministry of Commerce and Industry sought to clarify ongoing confusion about FDI rules applicable to existing investors in India. The Consolidated FDI Policy circular provides that if a company with foreign investment is majority-owned and controlled by resident Indians, the "downstream" investments of that company do not count towards FDI caps in the receiving entity or sector. By contrast, downstream investment by a foreign majority-owned or foreign controlled entity counts towards FDI caps. Thus, foreign shareholding is counted as domestic shareholding, so long as the investment is transacted via a company "controlled" by Indian residents and is less than 50 percent foreign-owned. The government no longer differentiates between portfolio and direct investment in calculating foreign ownership. As a result, several large firms, particularly banks with high foreign portfolio holdings may be in potential breach of foreign ownership limits. India's two largest banks, ICICI Bank and HDFC Bank, may soon become "foreign" banks in light of the Consolidated FDI Policy Circular. Foreign investors hold 77 percent equity in ICICI and 64 percent in HDFC.

India has allowed 100 percent FDI in the pharmaceutical sector for several years with no requirement of government approval. In October 2011, India appeared to have moved away from this openness, adopting a requirement that foreign acquisition of pharmaceutical firms ("brownfield investments") be approved by the Competition Commission of India (CCI). FDI will still be permitted up to 100 percent, but such investment will no longer be automatic in this sector. Instead, the CCI is charged with "balancing" the public health concerns with the need to attract FDI when deciding whether to approve a particular acquisition. This "balancing" requirement erroneously presumes that FDI in the pharmaceutical sector is in tension with the government's public health objectives, and places the evaluation of such objectives in the hands of the CCI, which appears to be neither competent nor statutorily authorized to perform such analysis. The CCI has been tasked with developing regulations within six months to govern these brownfield decisions, during which time the Foreign Investment Promotion Board will determine approvals for acquisition of pharmaceutical firms by foreign companies.

India's stringent and nontransparent regulations and procedures governing local shareholding inhibit inbound investment and increase risk to new entrants. Attempts by non-Indians to acquire 100 percent ownership of locally traded companies often face regulatory hurdles that may render ownership unobtainable under current practice, even though such acquisitions are legally permissible. Price control regulations in some sectors, such as the pharmaceutical sector, have further undermined incentives for foreign investors to increase their equity holdings in India.

Investment Disputes

India's poor track record in honoring and enforcing agreements with U.S. investors in the energy sector has improved in recent years. The central government, which has limited jurisdiction over commercial disputes involving matters under state jurisdiction, has sought to have India's states engage with investors in an effort to settle commercial disputes. A secure legal and regulatory framework for the private sector and institutionalized dispute resolution mechanisms to expedite resolution of commercial issues are important features of an attractive investment climate. India's backlog of over 20 million legal cases throughout the country (according to a 2008 UN Development Program report) reflects the frequent delay of legal proceedings in India.

ANTICOMPETITIVE PRACTICES

Historically, Indian firms faced few, if any, disincentives to engage in anticompetitive business practices. However, in 2002, the Indian government enacted the Competition Act, which created the CCI. The CCI began taking on cases in 2009, after delays caused by litigation and legislative amendments. The final provisions of the Act, governing mergers and acquisitions, came into force on June 1, 2011. The CCI is in the process of becoming fully staffed, and officials with the Federal Trade Commission and U.S. Justice Department have conducted multiple trainings with these new employees to discuss international best practices with the CCI.

OTHER BARRIERS

India has an unwritten policy that favors countertrade (a form of trade in which imports and exports are linked in individual transactions). The Indian Minerals and Metals Trading Corporation is the major countertrade body, although the State Trading Corporation also handles a small amount of countertrade. Private companies also are encouraged to use countertrade. Global tenders usually include a clause stating that, all other factors being equal, preference will be given to companies willing to agree to countertrade.

India issued new guidelines in July 2010 as part of the Jawaharlal Nehru National Solar Mission (JNNSM), requiring that eligible solar project developers source certain materials from domestic manufacturers in order to receive preferential power rates. In the first part of Phase I of the JNNSM, all projects based on solar photovoltaic (PV) technology were required to source crystalline silicon modules from manufacturers in India, while solar thermal projects were required to meet a 30 percent local content threshold. These local content requirements were expanded significantly in August 2011, such that PV cells as well as modules used in JNNSM projects must be manufactured in India. These restrictions have effectively blocked imports of U.S. equipment based on crystalline silicon technology for use in JNNSM projects, affecting a large segment of U.S. solar manufacturers.

India issued a number of policy proposals in 2011 aimed at encouraging domestic manufacturing in the telecommunications equipment, electronic products, and information technology areas. These proposals include certain recommendations by the TRAI; procurement preference guidelines for electronic products, adopted by the Cabinet and awaiting final approval by the Ministry of Communications and Information Technology (MCIT); and Draft National Policies on Electronics, Information Technology, and Telecommunications also proposed by MCIT. Certain aspects of these proposals, if implemented, would impose significant barriers to trade in the ICT sector. Moreover, such approaches, as well other proposals such as increased conformity assessment procedures and domestic preferences in government procurement, will likely do little to foster domestic manufacturing, but instead produce perverse consequences of discouraging investment, weakening ICT infrastructure, and increasing costs to Indian consumers and firms seeking to do business in India.

Potential challenges to making defense sales include the lack of a signed Communication Interoperability and Security Memorandum of Agreement (CISMOA) and a Basic Exchange and Cooperation Agreement

(BECA) between the United States and India. A signed CISMOA would provide the framework necessary to ensure that sensitive communication encryption capabilities are adequately protected, and would act as the first step toward making some of the most advanced U.S. communication and jam resistant navigation technologies available to India. A signed BECA would provide a structure for exchange of geospatial data used in sophisticated navigation and cockpit display systems.

India has steadily increased export duties on iron ore and its derivatives. In June 2008, India enacted export tariffs of 15 percent on all grades of iron ore and its concentrates, but revised the tax to five percent in December 2008. In December 2009, India raised this export tax rate to 10 percent, leaving the export duty on iron ore fines at 5 percent. India then increased the export tax on iron ore lumps to 15 percent in April 2010. In February 2011, India increased the export duty on both iron ore lumps and fines to 20 percent, and increased that export duty to 30 percent in January 2012. In July 2010, the Indian state of Karnataka banned the export of iron ore from the state. Exporters have challenged this ban, and in June 2011, the Supreme Court lifted the ban temporarily. Officials from the state of Orissa indicated in January 2011that they intend to adopt an iron ore export ban as well. Such restrictions affect international markets for raw materials used in steel production. India also requires that exports of high grade iron ore (greater than 64 percent iron content) pass through state trading enterprises, with the state-owned Minerals and Metals Trading Company acting as a clearinghouse. In 2010 India became the world's sixth largest steel producing economy, and it appears the Indian government is using these measures to improve supply and lower prices of inputs used by India's rapidly growing steel industry.

India implemented export restrictions and bans on cotton and yarn during 2010 and 2011. These restrictions contributed to significant volatility on world cotton markets and appear to have provided India's textile and apparel producers with more affordable cotton during a period of record high world cotton prices. Following intensive U.S. engagement and changing conditions in the world cotton market, India now permits the export of cotton and yarn subject only to registration with the government.

In the agriculture sector, India has established tariff-rate quotas for corn and dairy products. Access to the tariff-rate quotas is complicated by end-user requirements that often lead to low fill rates.