

## INDIA

### TRADE SUMMARY

In 2001, the U.S. trade deficit with India was \$6.0 billion, a decrease of \$1.0 billion from the U.S. trade deficit of \$7.0 billion in 2000. U.S. goods exports to India totaled nearly \$3.8 billion, an increase of \$97 million (2.7 percent) from the level of U.S. exports to India in 2000. India was the United States' 29<sup>th</sup> largest export market in 2001. U.S. imports from India totaled \$9.7 billion in 2001, a decrease of \$949 million (8.9 percent) from the level of imports in 2000.

U.S. exports of private commercial services (i.e., excluding military and government) to India were \$2.5 billion in 2000 (latest data available), and U.S. imports were \$1.8 billion. Sales of services in India by majority U.S.-owned affiliates were \$480 million in 1999 (latest data available), while sales of services in the United States by majority India-owned firms were \$151 million.

The stock of U.S. foreign direct investment (FDI) in India at the end of 2000 was \$1.3 billion, a decrease of 10.3 percent from the level a year earlier. U.S. FDI in India is concentrated largely in the banking, telecommunications, manufacturing, food and financial services sectors. A substantial number of new investment approvals are in infrastructure projects.

### IMPORT POLICIES

In June 1991, the then newly-elected government recognized that India's budget deficit, balance of payments problems, and structural imbalances would require reevaluation of past economic policies and structural adjustment assistance from international financial institutions. As part of its economic reform since that time, the Indian government has taken consistent steps towards a more open and transparent trade regime, leading to a significant increase in U.S.-India trade and investment. U.S. exports to India have stagnated

since 1996, but with substantial additional liberalization, U.S.-India trade could become quite significant.

The Indian government maintains a basic ceiling tariff rate (with a few exceptions) of 35 percent. Since the 1998/99 budget, a "special additional duty" of 4 percent, intended to be equivalent to sales tax paid by domestic producers, has been levied on imports. Under the 1999/2000 budget, customs duty rates of 0 percent, 10 percent, 20 percent, and 30 percent were replaced by higher rates of 5 percent, 15 percent, 25 percent, and 35 percent, respectively. Most items are also assessed an additional 10 percent surcharge on the basic customs duty; only those products subject to bound rates of duty are exempt.

On February 29, 2000, the Vajpayee Government introduced its 2000/2001 budget proposal. This budget retained the 10 percent surcharge on the basic customs duty and the additional 4 percent duty. These extra charges were applied more broadly than in the previous fiscal year. Many products that were scheduled to be removed from quantitative restrictions in April 2001 as a result of the U.S.-India dispute settlement agreement (described later in this chapter, under "balance of payments justification for restrictive import licensing") faced the peak 35 percent tariff.

Basic customs tariffs were reduced on certain selected products including: computers, mother boards, and floppy disks (from 20 to 15 percent); special capital goods for the manufacturer of semiconductors and integrated circuits (from 15 to 5 percent); microprocessors for computers, memory storage devices, cd-roms, integrated circuits and micro-assemblies and data graphic displays for color monitors for computers (from 5 to zero percent); specified raw materials for the manufacture of optical fibers (from 15 to 5 percent); cellular telephones (from 25 to 5 percent); cellular telephone battery packs (from 40 to 15 percent); cinematographic cameras and related equipment (from 49 to 25 percent); color positive film in jumbo rolls and color negative films

## INDIA

in certain sizes (from 15 to 5 percent); platinum and non-industrial diamonds (from 40 to 15 percent); crude oil (from 20 to 15 percent); and certain petroleum products (from 30 to 25 percent). In the recent past, India has selectively lowered tariffs on some capital goods and semi-manufactured inputs to help Indian manufacturers. The Indian Government has steadily reduced the import-weighted tariff from 87 percent in 1992 to the 1999/2000 level of 25.4 percent. The Government of India's budgets of 1998/99, 1999/00 and 2000/01, however, failed to reduce the maximum and import weighted average of tariffs. Despite reforms, Indian tariffs are still among the highest in the world, especially for goods that are produced domestically.

India maintains a variety of additional charges on imports, described as the equivalent of domestic taxes on local goods (the so-called countervailing duties), further raising the cost of imports as they enter the stream of domestic commerce. For example, on imported soda ash, which carried a 35 percent basic customs duty in 2000, was nearly 70 percent when additional countervailing duties and special additional duties are factored in. Industry reports that countervailing duties and infrastructure taxes for sugar and gum ranged from 59-70 percent in 2000. High effective rates also affect chocolate and confectionery products (67 percent); mayonnaise (68 percent); peanut butter (44 percent); appliances (40-89 percent); raisins (120 percent); camera parts and accessories (53.8 percent); motorcycles (more than 100 percent); and toys and sporting goods (32-54 percent). Exorbitant effective rates of 204 percent are assessed on distilled spirits imports and 114 percent on still and sparkling wines, plus additional duties of \$0.25 per liter for wines. U.S. producers also allege that the 40 percent (in 2000) excise tax on carbonated soft drinks represents a de facto discriminatory government policy because the carbonated soft drink market is supplied predominantly by foreign-owned invested producers.

The 2000/01 budget replaced the three-tier (8 percent, 16 percent, 24 percent) excise tax regime with a 16 percent central value added tax (CENVAT). Thus, for some products, the additional tax was doubled and some duty drawbacks have been withdrawn, resulting in higher charges. Furthermore, exceptions and additions to the 16 percent rate actually result in six different applied rates (zero percent, 8 percent, 16 percent, 24 percent, 32 percent, and 40 percent).

Progress made thus far in tariff reduction has helped U.S. producers, but further reductions of basic tariff rates and elimination of additional duties that existed in 2000 would benefit a wide range of U.S. exports. The United States has asked for a change to a specific (per kilogram) duty on pistachios, where under-invoicing by competing suppliers creates unfair competition and limits U.S. market access. Other industries that might benefit from reduced tariff rates include (current basic tariff rates in parenthesis): fertilizers (0-35 percent); wood products (0-35 percent); agricultural chemicals (35 percent); jewelry (35 percent); precious metal findings (35 percent); soda ash (35 percent); camera components (25 percent); instant print film (15 percent); paper and paper board (35 percent); ferrous waste and scrap (35 percent); computers, office machinery, and spares (0-35 percent); motorcycles (35 percent); completely built up (cbu) motor vehicles, completely knocked down (ckd) and semi-knocked down (skd) motor vehicle kits, and automotive parts and components (40 percent); air conditioners (35 percent) and refrigeration equipment (25 percent); heavy equipment spares (25-35 percent); medical equipment components (25 percent); copper waste and scrap (35 percent); hand tools (25 percent); cling peaches (35 percent); canned peaches and fruit cocktails (35 percent); citrus fruits (35 percent); sweet cherries (35 percent); vegetable juice (35 percent); still and sparkling wines (100

## INDIA

percent); distilled spirits (210 percent); carbonated soft drinks (40 percent); crude corn oil (35 percent); refined corn oil (45 percent); peanut butter (35 percent); pistachios (35 percent); salad dressing (35 percent), canned soup (35 percent), and textiles and apparel (20-40 percent).

The Vajpayee Government's budget for 2001/2002 contained several positive changes. The 2001-2002 budget eliminated the 10 percent surcharge on the basic customs duty. In addition, the excise tax ("countervailing duty" with respect to imports) regime was collapsed to a basic rate of 16 percent, with some products also subject to a maximum additional "special excise duty" of 16 percent (as opposed to 24 percent.) Specific customs duty reductions included a drop of the duty on soda ash from 35 percent to 20 percent. Excise duties on carbonated soft drinks would be reduced by 8 percent.

The Indian Government's proposed 2002/2003 budget announced on February 28, 2002, would reduce the peak tariff from 35 percent to 30 percent. It also contains a commitment to reduce tariffs to two levels by March 31, 2004: 10 percent for raw materials, intermediate products, and components, and 20 percent for finished products. The Special Additional Duty would be retained at the current 4 percent.

For many years India maintained a virtual embargo on oranges, lemons, and grapefruit, except for the hotel trade. In March 1999, India lifted restrictions for mandarin oranges (tangerines and satsumas), clementines, lemons, and grapefruit, but it continues to deny market access to navel and valencia oranges.

In the Uruguay Round, India undertook a two-tiered commitment on industrial products, binding tariffs on items in excess of 40 percent at a rate of 40 percent and binding items with tariffs below 40 percent at 25 percent, although some industrial goods (e.g., automobiles) and many consumer

products were excluded from India's offer. As a consequence, India's scope of bindings on industrial goods increased substantially from 12 percent of imports to 68 percent. The majority of these bindings exceed current Indian applied rates of duty. In agriculture, Uruguay Round tariff bindings are higher than applied rates in many product areas, ranging from 100 to 300 percent.

As a result of the Uruguay Round, India committed to reduce and bind its tariffs on textile and apparel products. By January 1, 2000, Indian tariffs were to be reduced to levels no higher than 20 percent for fibers, yarns, industrial fabrics, and home furnishings; 35 percent for apparel fabrics; and 40 percent for apparel. In October 2000, the Government of India announced duty reductions in 195 tariff lines (including textured yarn of nylon, polyester filament yarn, fabrics, sportswear and home textiles) in accordance with the United States-India Market Access Agreement for Textiles and Clothing of January 1, 1995. India maintains a significant number of import prohibitions in the textile sector (see below), and India remains one of the most heavily protected markets in the world from the standpoint of the U.S. textile industry.

### Import Licensing

While the *balance of payments* case (see next section) resulted in the elimination of restrictive import licensing on most consumer goods, U.S. industries still must deal with India's onerous licensing regime in other areas. The regime limits market access for U.S. goods which would be competitive in a more open trading environment. For example, importers of theatrical films must obtain a certificate from the central board of film certification stating that the film is suitable for import according to guidelines laid down by the government. U.S. industry maintains that this constitutes a pre-censorship "quality check" obstacle. In addition, the Indian Government requires a fee for certification.

## INDIA

The new automobile investment policy announced by the Indian Cabinet on March 5, 2002, eliminated previous local content and minimum investment, and allows automatic approval for 100 percent foreign equity investment for manufacturing automobiles and components. (See section on Trade-related Investment Measures).

In the motorcycle sector, special sales import licenses are necessary to import any motorcycle. Such licenses are extremely difficult to obtain. Further, these licenses are granted only to foreign nationals permanently settling in India; for nationals working in India for foreign firms holding greater than 30 percent equity; or embassies located in India.

Even after the last of India's balance-of-payments-related restrictions were eliminated on April 1, 2002, a variety of other products remain on India's negative list for imports. The negative list is currently divided into three categories: (1) banned or prohibited items (e.g., tallow, fat, and oils of animal origin); (2) restricted items which require an import license; and (3) "canalized" items importable only by government trading monopolies subject to cabinet approval regarding timing and quantity.

India has liberalized many restrictions on the importation of capital goods. The importation of all second-hand capital goods by actual users is permitted without license, provided the goods have a residual life of five years. In March 1993, India abolished the two-tiered exchange rate regime, moving to a single market-determined exchange rate for trade transactions and inward remittances. The rupee is convertible on current account transactions, with indicative limits remaining on foreign exchange for travel and tourism. Capital account transactions for foreign investors, both portfolio and direct, are fully convertible. However, Indian firms and individuals remain subject to capital account restrictions.

India has committed to remove many apparel, fabric, and yarn imports from the restricted licensing list as a result of the United States-India market access agreement for textiles and clothing of January 1, 1995. Under the agreement, India provides "unrestricted" access for fibers, yarns, and industrial fabrics. In November 2000, the Government of India removed India's ready-made garments industry from the list of items reserved for small-scale industry. As a result, foreign companies may now invest up to 100 percent in this sector.

### **Balance of Payments Justification for Restrictive Import Licensing**

The United States and India reached agreement on December 28, 1999, on a timetable to lift quantitative restrictions (QRS) on imports of 1,429 agricultural, textile, and consumer products, following a WTO ruling that these restrictions were no longer justified under the balance of payments provisions of GATT Article XVIII:B. India had invoked the balance of payments justification for over 50 years. The QRS historically constituted significant barriers to doing business in India and their removal represents a significant liberalization of the Indian economy, affecting a wide range of U.S. industries. However, as previously noted (see "import policies"), many products freed from QRS now face the peak applied import tariff. Pursuant to the 1999 agreement, India lifted quantitative restrictions on 714 of the items on April 1, 2000, including consumer products and processed food items, while the remaining 715 items became freely importable on April 1, 2002. This advances by two years the timetable India previously agreed with the EU, Japan, and other trading partners.

### **Canalization**

Some commodity imports must be channeled ("canalized") through public sector companies, although several "canalized" items have been fully

## INDIA

or partially decontrolled recently. Currently, the main "canalized" items are petroleum products, bulk agricultural products (such as grains), and certain pharmaceutical products. Pursuant to the December 28, 1999, QR agreement described in the previous paragraph, India eliminated its "canalization", in the form that existed under the balance of payments (BOP) regime on April 1, 2001. India has, however, taken steps to bring its state trading practices into compliance with Article XVII of GATT 1994, as recommended by the BOP panel. The Indian Government requires imports of certain products, including petroleum products, bulk agricultural products (such as grains), and certain pharmaceutical products to be canalized through public sector companies.

### **Fertilizer Subsidy Regime**

The Indian Government maintains a subsidy regime for diammonium phosphate (DAP) fertilizer. Under the current DAP subsidy scheme, the Indian government subsidizes sales of domestically-produced and imported DAP at different levels. On July 31, 2000, India raised the subsidy differential to Rs. 3400/MT, the highest ever since the program's inception in 1992. While recently this differential has been reduced to Rs. 2350/MT, this differential is still much too high and hinders the U.S. fertilizer industry's ability to sell DAP to the Indian market.

The DAP subsidy regime is currently under review by the Government of India. While the proposed 2002/2003 budget would reduce total funding for fertilizer subsidies, the disparity in subsidy levels for domestic and imported DAP would remain unchanged. U.S. industry is working with the Government of India to narrow and eliminate the subsidy differential. The U.S. Government is working with the Government of India toward the same result.

### **Customs Procedures**

In December 1998, the Government of India fixed a minimum import price for certain imported steel products. These prices were fixed for imported hot-rolled steel coils, cold rolled steel coils, hot-rolled sheets, tin-plates, electrical sheets, and alloy steel bars and rods. Under the India minimum reference price valuation regime, importations of, for example, prime hot-rolled steel coils is allowed only if the minimum C.I.F. customs value is U.S. \$302 per ton. Minimum prices on primary steel products were withdrawn on January 1, 2000, but were reimposed on February 26, 2000, after the Calcutta High Court on that date ordered a stay of the Indian Government's decision to withdraw minimum prices for those products. The Indian Government has appealed the High Court's stay order to the Indian Supreme Court. In addition, on September 7, 2001, the Government of India amended its customs valuation rules, introducing new discretionary criteria that appears to allow rejection of a declared transaction value of imported goods based upon a judgment by customs that a particular sale was not done "in the ordinary course of trade under fully competitive conditions" or involved a "reduction from the ordinary competitive price." The U.S. Government is reviewing all of these actions with regard to their consistency with India's obligations under the WTO Agreement on Customs Valuation.

The opening of India's trade regime has reduced tariff levels, but it has not eased some of the most burdensome aspects of customs procedures. Documentation requirements, including ex-factory bills of sale, are extensive and delays are frequent. There have also been private sector reports of misclassification and incorrect valuation of goods for the purposes of duty assessment, in addition to corruption. The Indian customs service would also benefit from a significant streamlining of its procedures for moving products from the border into the stream of domestic commerce.

### **STANDARDS, TESTING, LABELING AND CERTIFICATION**

## INDIA

Indian standards generally follow international norms and do not constitute a significant barrier to trade. Requirements established under India's food safety laws are often outdated or more stringent than international norms, but enforcement has been weak. Opponents of foreign investment have tried to apply these laws selectively to U.S. firms, however these attempts have not withstood judicial scrutiny. Where differences exist, India is seeking to harmonize national standards with international norms.

On November 24, 2000, the Indian Government promulgated new regulations dictating that imports of all prepackaged commodities intended for retail sale carry specified declarations prior to clearance through Indian customs. They include: name and address of the importer; generic or common name of the commodity being imported; net quantity; month and year of packaging; and the maximum retail price at which the commodity will be sold to the consumer (including taxes, freight, and transport charges). Industry reports that India imposes difficult and extensive requirements for marking of imported fabrics which are expensive to implement. Also on November 24, 2000, the Indian Government promulgated new regulations dictating that imports of 131 commodities (including food preservatives, color dyes, steel, cement, electrical appliances and dry cell batteries) are subject to compliance with specified Indian quality standards and that exporters/manufacturers will be required to register with, and obtain a certificate from, the Bureau of Indian Standards before exporting such goods to India. To receive such certification, exporters/manufacturers must establish a presence, pay an annual fee as well as a percentage of the invoice value of shipments to India, and subject all certified exports to inspection. India has not notified these new requirements to the WTO, as required by the WTO Agreement on Technical Barriers to Trade (TBT).

In addition, the Indian Government recently amended the *Prevention of Food Adulteration Act*, requiring additional information on manufacturers and ingredient details on each food package. For imported foods, the name and address of the exporter must be indicated on the label. If the food is shipped in bulk containers for repacking or bottling, additional details on the country of origin as well as the name and address of the packer are required on each package. No distinctions are made between imported and domestically-produced goods, except in the case of some bulk grains. India has not notified these new requirements to the WTO, as required by the WTO Agreement on Technical Barriers to Trade.

In 2001, the Indian Ministry of Health proposed new product standards for distilled spirits. The intent of the new standards are not clear. If enacted as proposed, exports to the Indian market of U.S. distilled spirits products could be severely impeded. As with the measures described in previous paragraph, India has not notified these proposed standards to the WTO.

India has adopted some of the most stringent emissions standards for imported, large displacement motorcycles. India's standards are written to accommodate only small displacement four-stroke motorcycles such as those manufactured by Indian producers. Even the latest low-emission technology used by U.S. manufacturers fails to meet India's requirements. In addition, India's procedures for establishing emissions standards are vague and lack the transparency required by the WTO Agreement on Technical Barriers to Trade.

### **Sanitary and Phytosanitary (SPS) Restrictions**

India applies a range of SPS measures that have not been demonstrated as based on science and, therefore, do not conform to international standards or the WTO SPS agreement. India's SPS requirements are restrictive and lack

## INDIA

transparency. For example, many of India's quarantine pests are already present in India, while others do not pose a significant level of risk. These requirements are a major hindrance to U.S. agricultural exports to India, particularly for wheat and soybeans.

The Indian Government has issued excessively restrictive plant protection rules on soybeans. A return to more reasonable measures is being discussed by Indian and American agricultural officials. Labeling of genetically modified products is not yet an issue in India. India's imports of genetically modified products are negligible.

### GOVERNMENT PROCUREMENT

India is not a signatory to the WTO Agreement on Government Procurement. Indian government procurement practices and procedures are neither transparent nor standardized, and generally discriminate against foreign suppliers, but are improving under the influence of fiscal stringency. Specific price and quality preferences for local suppliers were largely abolished in June 1992, and recipients of preferential treatment are now supposedly limited to the small-scale industrial and handicrafts sectors, which represent a very small share of total government procurement. Despite the easing of policy requirements to discriminate, local suppliers are favored in most contracts where their prices and quality are acceptable. Reports persist that government-owned companies cash performance bonds of foreign companies even when there has been no dispute over performance.

A second area of discrimination affecting U.S. suppliers is the prohibition of defense procurement through agents. Most U.S. firms do not have enough business in India to justify the high cost of resident representation. Another problem area involves the fact that some major government entities routinely use foreign bids to pressure domestic producers to lower their prices,

permitting the local bidder to resubmit tenders when a foreign contractor has underbid them. When foreign financing is involved, principal government agencies tend to follow multilateral development bank requirements for international tenders. However, in other purchases, current procurement practices usually result in discrimination against foreign suppliers when goods or services of comparable quality and price are available locally.

### EXPORT SUBSIDIES

Export earnings are exempt from income and trade taxes, and exporters may enjoy a variety of tariff incentives and promotional import licensing schemes, some of which carry export requirements. Export promotion measures include duty exemptions or concessional tariffs on raw material and capital inputs, and access to special import licenses (SIL) for restricted inputs. Pursuant to the WTO panel report on India's quantitative restrictions, the SIL regime were eliminated on April 1, 2001. These subsidies have caused concern for U.S. industries, particularly the agrochemical sector. According to industry representatives, since no corporate taxes are levied on income generated from exports by Indian companies, this enables them to price goods below international competitive levels while maintaining a constant profit margin. Commercial banks also provide export financing on concessional terms. The 2000/01 budget phases out the tax exemption on export income over five years in equal steps. The 2002/03 budget proposal includes a proposed reduction in the income tax deduction for export profits from 100 percent to 90 percent.

### INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Based on past practices, India was identified in April 1991 as a "priority foreign country" under the "Special 301" provision of the 1974 Trade Act, and a Section 301 investigation was initiated on May

## INDIA

26, 1991. In February 1992, following a nine-month investigation under "Special 301," the USTR determined that India's denial of adequate and effective intellectual property protection was unreasonable and burdens or restricts U.S. commerce, especially in the area of patent protection.

In April 1992, the President suspended duty-free privileges under the Generalized System of Preferences (GSP) for \$60 million in trade from India. This suspension applied principally to pharmaceuticals, chemicals, and related products.

### Patents

India's patent protection is weak and has adverse effects on U.S. pharmaceutical and chemical firms. India's patent act prohibits patents for any invention intended for use or capable of being used as a food, medicine, or drug, or relating to substances prepared or produced by chemical processes. Many U.S.-invented drugs are widely reproduced in India since product patent protection is not available. U.S. agrochemical industries have joined other industries in raising concern about India's inadequate intellectual property protection. As a result, industries have withheld marketing and production of produce compounds in India. U.S. industry estimates that export sales losses, as a result, range from \$5-25 million.

Under existing law, processes for making such substances are patentable, but the patent term for these processes is limited to the shorter of five years from patent grant or seven years from patent application filing. This is usually less than the time needed to obtain regulatory approval to market the product. Where available, product patents expire 14 years from the date of patent filing. India also fails to protect biotechnological inventions, methods of agriculture and horticulture, and processes for treatment of humans, animals, or plants. Indian policy guidelines normally limit

Benefits on certain chemicals, added to GSP in June 1992, were withheld from India, increasing the trade for which GSP is suspended to approximately \$80 million. Significant revisions to India's copyright law in May 1994 led to the downgrading of India as "priority foreign country" to the "priority watch list," a designation under which India has remained since 1995.

recurring royalty payments, including patent licensing payments, to eight percent of the selling price (net of certain taxes and purchases). Royalties and lump sum payments are taxed at a 30 percent rate.

Many of these barriers must be removed as India undertakes its Uruguay Round obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). The Indian Government has announced its intention to conform fully to the IPR-related requirements of the Uruguay Round. Patent legislation, including "mailbox" provisions designed to meet India's initial set of TRIPS obligations, was introduced and passed in the upper house of Parliament in December 1998 and the lower house of Parliament in March 1999, in advance of the April 19, 1999, deadline established by the WTO dispute settlement process.

India has so far failed to meet its January 1, 2000, deadline to fully implement its TRIPS obligations including further amendments to its patent bill. A joint parliamentary committee is reviewing the patent amendments bill, which was introduced in Parliament in December 1999. Passage of the bill has been expected now for two years. Enactment of this bill would be an important step forward. However, it is not clear that the draft bill is TRIPS



## INDIA

compliant.

Aside from failing to meet its immediate obligations, the Indian Government has announced its intention to take full advantage of the transition period permitted developing countries under TRIPS (i.e., until January 1, 2005) before implementing full patent protection for pharmaceutical and agricultural chemical products. The United States continues to press for passage of a TRIPS compliant regime and to urge accelerated implementation of the TRIPS patent provisions. A small, but growing, domestic constituency, made up of some Indian pharmaceutical companies, technology firms and educational and research institutions, favors an improved patent regime, including full product patent protection. India's decision in August 1998 to join the Paris Convention and the Patent Cooperation Treaty, effective from December 1998, is a sign of improved IPR protection.

### Copyrights

Under pressure from its own domestic industry, India implemented a strengthened copyright law in May 1995, placing it on par with international standards for copyright protection. However, piracy of copyrighted materials (particularly popular fiction works and certain textbooks), remains a problem for U.S. and Indian producers. Video, record, tape, and software piracy are also widespread, but enforcement has improved. Indian copyright law has undergone a series of changes over the last 10 years to provide stronger remedies against piracy and to protect computer software. In 1994, Parliament passed a comprehensive amendment to the Copyright Act of 1957. India's law now provides: rental rights for video cassettes; protection for works transmitted by satellite, cable, or other means of simultaneous communication; collective administration of rights; and limiting judicial discretion with respect to the level of penalties imposed on copyright pirates. However, there is no statutory presumption of

copyright ownership and the defendant's "actual knowledge" of infringement must be proven. In December 1999, as part of its TRIPS obligations, the Indian government passed an amendment to the Copyright Act 1957, increasing the period of protection of performers' rights from 25 to 50 years, and extending the provisions of the act to broadcasts and performances made in other countries on a reciprocal basis.

Indian copyright law offers strong protection, but the Indian constitution gives enforcement responsibility to the state governments. Classification of copyright and trademark infringements as "cognizable offenses" has expanded police search and seizures authority, while the formation of appellate boards has speeded prosecution. The amended law also provides for new minimum criminal penalties, including a mandatory minimum jail term, that U.S. industry believes will go far in controlling piracy, if implemented. Other steps to improve copyright enforcement include: the establishment of a copyright enforcement advisory council, including a judiciary commissioner, with responsibility for policy development and coordination; the initiation of a program for training police officers and prosecutors concerned with enforcement of copyright laws; and the compilation of data on copyright offenses on a nationwide basis to assist in enforcement and application of penalties. However, because of backlogs in the court system and documentary and other procedural requirements, few cases have been prosecuted recently. While a significant number of police raids have been planned and executed, the law requires that in order to seize allegedly infringing equipment, the police must witness its use in an infringing act.

Cable piracy continues to be a significant problem, with estimates of tens of thousands of illegal systems in operation in India at this time. Copyrighted U.S. product is transmitted over this medium without authorization, often using pirated

## INDIA

video cassettes as source materials. This widespread copyright infringement has a significant detrimental effect on all motion picture market segments - theatrical, home video and television - in India. For instance, pirated videos are available in major cities before their local theatrical release. Industry representatives estimate annual losses to the U.S. motion picture industry due to audiovisual piracy to be \$66 million. U.S. industry estimates that annual losses by the U.S. motion picture industries due to India's import authorization policies and remittance restrictions are approximately \$5 million to \$10 million. The Information Technology Act of 2000 provides a legal framework for the prevention of piracy and protection of intellectual property rights to include penalties for the unauthorized copying of computer software.

### Trademarks

The Government of India has committed to upgrading its trademark regime, including according national treatment for the use of trademarks owned by foreign proprietors, providing statutory protection of service marks, and clarifying the conditions under which the cancellation of a mark due to non-use is justified. In May 1995, the Government of India introduced in Parliament a trademark bill that passed the lower house. However, opposition in the upper house stalled discussion of the legislation, which was finally passed in December 1999. Protection of foreign marks in India is still difficult, although enforcement is improving. Guidelines for foreign joint ventures have prohibited the use of "foreign" trademarks on goods produced for the domestic market (although several well-known U.S. firms were authorized in October 1991 to use their own brand names). The required registration of a trademark license (described by U.S. industry as highly bureaucratic and time-consuming) has routinely been refused on such grounds as "not in the public interest," "will not promote domestic industry," or for "balance of payments reasons."

The Foreign Exchange Regulation Act (FERA), replaced by the Foreign Exchange Management Act 1999 (FEMA) in June 2000, restricts the use of trademarks by foreign firms unless they invest in India or supply technology.

In an infringement suit, trademark owners must prove they have used their mark to avoid a counterclaim for registration cancellation due to non-use. Such proof can be difficult, given India's policy of discouraging foreign trademark use. Companies denied the right to import and sell products in India are often unable to demonstrate use of registered trademarks through local sale. Consequently, trademarks on restricted foreign goods are exposed to the risk of cancellation for non-use. The new trademark act provides protection for service marks for the first time. Trademarks for several single ingredient drugs cannot be registered. There have been several cases where unauthorized Indian firms have used U.S. trademarks for marketing Indian goods. However, the Indian courts have upheld trademark owner rights in infringement cases.

### SERVICES BARRIERS

Indian Government entities run many major service industries either partially or entirely. However, both foreign and domestic private firms play a large role in advertising, accounting, car rental, and a wide range of consulting services. There is growing awareness of India's potential as a major services exporter and increasing demand for a more open services market.

### Insurance

Prior to 2000, all insurance companies were government-owned, except for a number of private sector firms which provide reinsurance brokerage services. Foreign insurance companies had no direct access to the domestic insurance

## INDIA

market except for surplus lines, some reinsurance, and some marine cargo insurance. On December 7, 1999, the Indian Parliament passed the Insurance Regulatory and Development Authority (IRDA) bill that ended a government monopoly and established an insurance regulator. The law opened India's insurance market to private participation with a limit on foreign equity in domestic companies of 26 percent of paid-up capital. In the WTO Financial Services negotiations that concluded in December 1997, India bound the limited range of insurance lines then open to foreign participation. In addition, India committed to most-favored-nation (MFN) treatment effective January 1999, for the financial services sectors, dropping a previous MFN exemption.

### Banking

Most Indian banks are government-owned and entry of foreign banks remains highly regulated. The Reserve Bank of India issued in January 1993 guidelines under which new private sector banks may be established. Approval has been granted for operation of 25 new foreign banks or bank branches since June 1993. As of July 2000, 43 foreign banks are operating in India. Foreign bank branches and representative offices are permitted based upon reciprocity and India's estimated or perceived need for financial services. Five U.S. banks now have a total of 16 branches in India. They operate under restrictive conditions including tight limitations on their ability to add sub-branches. Operating ratios are determined based on the foreign branch's local capital, rather than global capital of the parent institution. India's commitments under the 1997 WTO Financial Services Agreement provides for a greater role for foreign banks starting in January, 1999. Foreign banks are allowed to open twelve new branches annually (up from the prior commitment of eight per year). In addition, foreign financial services companies, including banks, are to be allowed to provide equity venture capital in India, up to 51

percent of a company's total equity. However, India did not agree to grant national treatment to foreign companies investing or seeking to invest in the financial services sector, nor did it make any commitments on cross-border banking.

### Securities

Foreign securities firms have established majority-owned joint ventures in India. Through registered brokers, foreign institutional investors (FII), such as foreign pension funds, mutual funds, and investment trusts, are permitted to invest in Indian primary and secondary markets. However, FII holdings of issued capital in individual firms are limited; total aggregate holdings by FIIs cannot exceed 30 percent of issued capital (the limit can be raised to 40 percent with the approval of the board of directors of the company concerned), and holdings by a single FII are limited to 10 percent of issued capital. Foreign securities firms may now purchase seats on major Indian stock exchanges, subject to the approval of a regulatory authority. In the 1998/99 budget, FIIs were allowed for the first time to invest in the debt securities of unlisted Indian companies. Indian companies no longer require prior clearance from the Reserve Bank of India for inward remittance of foreign exchange and for the issuance of shares to foreign investors. The recent introduction of mortgage-backed securities has, in addition, led to the creation of a secondary mortgage market. The 2002/2003 budget proposal recommends freeing FII portfolio investment from sectoral limits except in specified sectors.

### Motion Pictures

Beginning in August 1992, as agreed with the United States Government, the Indian Government began implementation of its commitments, introducing a number of significant changes in film import policy. However, some issues of concern remain; for example, the pre-censorship "quality check" procedures and fees. U.S. industry

## INDIA

emphasizes that the pre-censorship certification is in itself a form of censorship. U.S. companies also have experienced difficulty in importing film/video publicity materials. More significant, however, was the \$6 million annual ceiling applied to remittances by all foreign film producers for balance-of-payments reasons. This ceiling was eliminated in November 2001. The Indian Government removed the import licensing requirement for motion pictures in January 2002. India, under a 1956 Cabinet resolution, bars any foreign ownership of the print media, preventing the approval even of joint ventures.

The Cable TV Network Regulation Amendment Bill of 2000 was passed by the lower house of Parliament in August 2000. It aims to check dissemination of "undesirable programs" by cable TV networks while empowering local authorities to take punitive measures against those violating the law. In July 2000, the Government also announced an uplinking policy that allows all TV channels, irrespective of their equity structure, to uplink from India if they undertake to comply with the Indian code of conduct on content.

### Accounting

Only graduates of an Indian university can qualify as professional accountants in India. Foreign accounting firms can practice in India, if their home country provides reciprocity to Indian firms. Internationally recognized firm names may not be used, unless they are comprised of the names of proprietors or partners, or a name already in use in India. This limitation applies to all but the two U.S. accounting firms that were established prior to the imposition of this rule. Effective July 1, 1998, the Institute of Chartered Accountants of India (ICAI) banned the use of logos of accounting firms. Financial auditing services may only be provided by firms established as a partnership. Foreign accountants may not be equity partners in an Indian accounting firm.

### Construction, Architecture and Engineering

Many construction projects are offered only on a non-convertible rupee payment basis. Only projects financed by international development agencies permit payments in foreign currency. Foreign construction firms are not awarded government contracts unless local firms are unable to perform the work. Foreign firms may only participate through joint ventures with Indian firms.

### Legal Services

The Indian Bar Council has imposed restrictions on the activities of foreign law firms in recent years that have sharply curtailed U.S. participation in the Indian legal services market.

### Telecommunications

India has taken some positive steps towards liberalizing the telecommunications market and introducing private investment and competition in basic telecommunications services. However, concerns remain regarding interconnection charges new entrants must pay, alleged irregularities in the tendering process, India's weak multilateral commitments in basic telecommunications, and continued bias of telecommunications policy towards government-owned service providers.

The national telecommunications policy allows private participation in the provision of cellular as well as basic and value-added telephone services. Foreign equity in value-added services is limited to 51 percent. For cellular and basic services, the limit is 49 percent. However, as it has been difficult to raise the amounts of money needed to finance the new networks, creative financing arrangements have been allowed in some cases that exceed the formal limit. Private operators can provide services within regional "circles" that roughly correspond to India's states. These operators currently are not permitted to offer

## INDIA

domestic long distance or international services, significantly restricting the market their networks could serve. Delays in awarding and issuing licenses for both cellular and basic service, as well as the imposition of new rules, limits and restrictions, particularly for basic services, have served to inhibit more rapid growth in India's telecommunications infrastructure. Local production requirements remain an important factor in negotiations to establish service operations.

A new telecommunications policy was released in March 1999. The Indian Government decided to allow foreign companies to invest up to 74 percent in Indian registered companies to establish and operate satellite systems. India announced a technology neutral regime in 1999 for cellular services. In order to remove barriers on mergers and acquisitions in the telecommunications services sector, in August 2000, the Indian Government of India permitted foreign partners to quit a venture by waiving the five-year mandatory presence in the venture with a minimum equity of 10 percent.

India's partially-privatized (with private-sector management control), majority government-owned corporation VSNL is the primary provider of international long distance service. India has stated that it will open international long distance to competition in 2002, two years ahead of schedule. In August 2000, the Indian Government opened domestic long-distance telephony to the private sector with a one-time entry fee of one billion rupees (\$22 million), a 15 percent revenue-sharing requirement, and a 49 percent foreign equity limit.

India continues to modernize its regulatory framework, with a draft "convergence bill" which is likely to be considered by Parliament in the first half of 2002. The bill will consolidate authority over telecommunications, Internet, and broadcasting in a single, "super" regulator. In February 2000, the Indian Government said it

would split the powers of the Telecom Regulatory Authority of India (TRAI) and set up a separate appellate authority, which would hear appeals against TRAI orders as well as disputes between service providers. Industry representatives generally welcomed the ordinance, which they hope will make the regulatory framework more transparent and consistent. Licensing authority, however, remains with the Department of Telecommunications and not the regulator.

India created the National Task Force on Information Technology and Software Development in 1998 to draft India's national informatics policy. As a result, on November 7, 1998, competitors to VSNL were granted licenses to operate ISP's (Internet service providers). Competition in this market should generate lower prices for consumers and increased opportunity for U.S. equipment suppliers.

### INVESTMENT BARRIERS

The United States and India have not negotiated a bilateral investment treaty, although an updated agreement covering operations of the Overseas Private Investment Corporation (OPIC), was signed in November 1997. That agreement modernizes and replaces the arrangements that had governed OPIC operations since 1957. OPIC operations resumed in November 1998 following the partial lifting of sanctions imposed on India after its nuclear tests in May 1998.

### Equity Restrictions

Automatic approval is now granted by the Reserve Bank of India for equity investments of up to 51 percent in 48 industries covering the bulk of manufacturing activities. The Indian Government has also authorized existing foreign companies to increase equity holdings to 51 percent. The government now allows automatic approval by the Reserve Bank of India of equity investments of up to 74 percent in eight categories including mining

## INDIA

services, storage/warehousing, and transport. In addition, 100 percent of FDI is automatically approved in a few sectors like electricity generation and transmission, construction/maintenance of roads, venture capital funds, pharmaceuticals and business electronic commerce.

All sectors of the Indian economy are now open to foreign investment, except those with security concerns, such as defense, railways, and atomic energy. Proposals for foreign equity participation exceeding 51 percent (74 percent in the case of eight industries) and projects considered to be "politically sensitive" are considered by the Foreign Investment Promotion Board (FIPB). Through 1994, the FIPB had approved almost all the requests made for higher foreign ownership and for other "exceptional" cases, but still reserved the right to deny requests for increased equity stakes. However, foreign firms report that increases in foreign equity, especially to 100 percent foreign ownership, have become more difficult to obtain since 1994. On February 2, 2000, the Indian cabinet announced its decision to allow automatic approval for more foreign investments and to review industry-specific equity limits. However, the broadening of automatic approval applies only to new investment and does not apply to foreign companies that already have an existing venture in India or to foreign companies acquiring stakes in existing Indian companies.

Industries have expressed concern with the Indian Government's stringent and non-transparent regulations and procedures governing local shareholding. Current price control regulations have undermined incentives to increase equity holdings in India. Some companies report forced renegotiation of contracts in the power sector to accommodate government changes at the state and central levels.

### **Trade-Related Investment Measures (TRIMS)**

In December 1997, the Ministry of Commerce issued Public Notice No. 60, which established the new policy applicable to all existing and new foreign auto investments in India. Under the policy, new and existing joint venture companies seeking to import partially assembled vehicles or unassembled vehicle kits or automotive components were required to sign a memorandum of understanding (MOU) with the government of India imposing the following requirements: \$50 million minimum equity investment in joint ventures with majority foreign ownership; local content requirements; export obligations; and foreign exchange balancing.

On July 20, 1999, the United States held formal consultations with India under Article 4 of the WTO Dispute Settlement Understanding, arguing that these measures violate India's WTO TRIMS commitments. Unable to resolve the dispute, in July 2000, the United States initiated a dispute settlement procedure in the WTO, in which the EU later joined. In December 2000, a panel was formed to hear the dispute. In December 2001, the panel ruled in favor of the United States and EU. India appealed the panel's finding in February 2002. On March 14, 2002, India withdrew its appeal.

In June 2000, the Indian Government waived the dividend-balancing condition which required 22 specified industries to match export earning to dividend remittance over a period of seven years, thereby removing grounds for another potential dispute on TRIMS. The new automobile investment policy announced by the Indian Cabinet on March 5, 2002, eliminated previous local content and minimum investment, and allows automatic approval for 100 percent foreign equity investment for manufacturing automobiles and components.

### **ANTICOMPETITIVE PRACTICES**

Both state-owned and private Indian firms engage

## INDIA

in most types of anticompetitive practices with little or no fear of reaction from government overseers or action from a clogged court system. India suffers from a slow bureaucracy and regulatory bodies that reportedly apply monopoly and fair trade regulations selectively. These practices are not viewed as major hindrances to the sale of U.S. products and services, although one U.S. industry, soda ash, has been denied access to the Indian market since 1996 as a result of an adverse ruling by the government of India Monopolies and Restrictive Trade Practices Commission. U.S. firms tend to be more concerned with such basic issues as market access, corruption, arbitrary or capricious behavior on the part of their partners or government agencies, and procurement discrimination from both public and private institutions.

### ELECTRONIC COMMERCE

The Indian Government is currently developing a policy regarding electronic commerce. In order to develop electronic commerce, India will have to change the Indian Telegraphic Act of 1885 which does not allow encrypted information to be transmitted over telephone lines. In addition to amending this act, India also plans to make amendments to the Copyright Act of 1957 in order to make circumvention of technological measures like encryption an offense. In June 2000, India passed the Information Technology Act which establishes a legal framework for authentication and origin of electronic communications through digital signatures and contains amendments to existing laws. Penalties for computer crimes, such as unauthorized access to computer networks, introducing viruses, copying of software, and electronic forgery have been specified. In November 1998, Internet services were opened to the private sector for the first time. Private operators can now set up gateways for international connectivity. Foreign equity of up to 49 percent is permitted, and there is no limit on the number of licenses to be issued in a given area.

### OTHER BARRIERS

India has an unpublished policy that favors counter-trade. The Indian Minerals and Metals Trading Corporation is the major counter-trade body, although the State Trading Corporation also handles a small amount of counter-trade. Private companies are encouraged to use counter-trade. Global tenders usually include a clause stating that, all other factors being equal, preference will be given to companies willing to agree to counter-trade. The exact nature of offsetting exports is unspecified as is the export destination. However, the Indian Government does try to eliminate the use of re-exports in counter-trade. India's drug policy is an issue of concern for U.S. industries. The policy imposes a stringent price control regime which adversely affects U.S. companies from a commercial standpoint. There is no system allowing for automatic adjustment of prices to offset cost fluctuations. With the lack of effective intellectual property protection coupled with a rigid pricing system, U.S. industries face extreme obstacles to maintaining viable businesses in India. Industries most significantly affected are pharmaceutical companies placing the best and latest innovative drugs out on the Indian market. Industry representatives have expressed interest in the government of India adopting free pricing measures.