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Doing business in India: A mountain of challenges?

We read so much about the rapid growth of India's economy and that recent reforms have made this huge country a more attractive place for foreign investors. But is the reality more complicated? How much do remaining barriers still get in the way and how does an investor prepare with confidence for entering the Indian market?

Inward investors have much to gain but only if they take sensible steps and get advice in the right areas, i.e. those that are relevant to their business. Some examples follow.

First, the good news: most Indian economic sectors are open to foreign investment. Among the very few that still need governmental approval are print media, banking, defence, telecom and investments above ₹20 billion (US$300 million).

The current government has worked hard to simplify the investment process. While old foreign direct investment norms created legal disputes due to the need for an investor and an Indian joint venture partner to seek the permission of the Indian government to enter into new business, the current laws have simplified the process to a large extent.

Intellectual property will demand great attention by any inward investor, as the implementation and enforcement processes available in India are not in line with many developed economies. In the field of patents, it may be necessary to obtain the consent of all co-owners of a patent to its exploitation through licence, assignment or sale.

Additionally, pharmaceutical companies will need to be aware of the line of jurisprudence that tends to balance the rights and commercial interest of the patent holder against the public interest in making a drug freely available, which has resulted in court rulings to make drugs available to the public at little or no cost.

Copyright holders should take care to specify the intended duration of any assignment, as the assignment period is restricted to five years unless clearly fixed. The assignee needs to exercise such rights within one year – or risk deemed reversion to the assignor. And if the territory is not made clear in writing, it is likely to be interpreted as meaning the whole of India.

Real estate investors will need to be aware that if they are using a wholly owned subsidiary of their non-Indian company or group, the minimum investment value is US$5 million, unless they wish to invest in low cost housing, where such restrictions don't exist.

In the area of employment, investors should note that post-termination restrictive covenants (typically non-compete clauses) are not enforceable. Both the regulations and termination of employment for employees classified as "workmen" are subject to compliance with the Industrial Disputes Act, the state or local Shops and Establishments Act and many local and state orders and rules. The employment and termination of non-"workmen" and managerial employees is easier to handle and is subject to other regulations and contract law.

Infrastructure is the biggest challenge that India faces and it is one of the major reasons why outsourcing and industry hasn't taken off as expected over the years. Lack of reasonably priced and dependable power generation, a robust road transport system and government ownership of railways and certain ports and airports adds to infrastructure bottlenecks. Lack of availability of reasonably priced capital and poor deployment of capital have been the major reasons for this situation.

The current government has taken up infrastructure as a thrust area. Railways, solar energy, roads and ports are among the most active and attractive investment opportunities India offers today, but fruits of such investments are still a few years away.

Dispute resolution in India is a key challenge to inward investors, delay being the most obvious factor. Arbitration and alternative dispute resolution methods are available but not always accepted in the negotiation. Even arbitration in India has been subject to delays until recently when new legislation has provided that all arbitration proceedings are to be concluded within a period of 12 months.

This all points investors towards consideration of litigation risks and how to mitigate such risks internationally. Linked to this is the fact that India continues to be perceived as susceptible to corruption, although this perception has improved in the past 12 years or so.

In 2015, India was ranked 76th out of 168 countries in Transparency International's Corruption Perceptions Index, better than in 2005, when India was tied for 88th out of 159 countries.

The government's recent move to demonetize large currency notes is also widely perceived as a strong anti-corruption move by India.

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