

## A “WORK IN PROGRESS” – THE EVOLVING U.S.-INDIA DEFENSE SUPPLY RELATIONSHIP

*Robert S. Metzger and Sanjay J. Mullick*

India’s transformation as a rising power has been accompanied by significantly increased defense expenditures. Late in February 2011, the Indian Government announced a nearly 12% increase in the defense budget. Of the total defense budget of approximately \$36 billion (Rs 164,415 crores for fiscal 2011-12), capital acquisition is to receive 42%, or about \$15 billion (Rs 69,199 crores). India may spend as much as \$80 billion over the next five years on defense capital acquisition. Homeland or “internal” security represents an additional market opportunity. India is strongly committed to a policy of “indigenization” and self-reliance. In order to satisfy the requirements of the Indian military, and to obtain desired transfer of technology (“ToT”), however, a sizable portion of the defense capital acquisition budget will continue to involve purchases from foreign original equipment manufacturers (“OEMs”).

India makes capital acquisitions of defense equipment via the “Defence Procurement Procedure” (“DPP”), first released publicly in 2006 and subsequently revised periodically. The latest revision

was announced by India’s Ministry of Defence (“MOD”) on January 1, 2011. Within the same month, on January 25, 2011, the U.S. Department of Commerce, Bureau of Industry and Security, issued a rule formalizing the first set of U.S. export reforms specific to India. February 2011 marked Aero India 2011, the 8th international aerospace exhibition held by India. Some 675 companies from over 30 countries were in attendance. Since Aero India, the U.S. was disappointed with the exclusion of the two American fighters, the F-16 and F/A-18, from India’s pending \$11 billion Medium Multi-Role Combat Aircraft (“MMRCA”) competition. On the other hand, in early June India announced an intention to purchase ten Boeing-made C-17 cargo aircraft for \$4.1 billion. Finally, towards the end of June, the U.S. Senate Armed Services Committee requested the Department of Defense to submit a report later this year assessing the current state of U.S.-India security cooperation and recommending ways to enhance it, including possible sale to India of the F-35 Joint Strike Fighter.

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## ABOUT THIS ISSUE

### THE INDIAN DEFENSE PROCUREMENT MARKET

India has become the focus of great interest to global defense contractors in recent years. With an annual defense budget that has grown to over \$32 billion at an annual rate of 8% and is expected to double by 2015, the forecast of capital procurement over the next five to ten years exceeds \$100 billion and represents one of the fastest growing defense markets available to Western defense contractors. Industry reports observe that India is currently the “9th largest defense spender in the world with an estimated 2 per cent share of global defense expenditure, but with the third highest growth rate. Due to the need for updated equipment, India is set to undertake one of the largest equipment procurement cycles in the world.”

Increased regional threats have driven the evolution of an Indian defense policy that responds to threat perceptions concerning its two neighbors, China and Pakistan. The result is a move to refurbish the Indian defense industry through the enactment of a new Defense Procurement Procedure and a greater willingness to involve the private sector to satisfy India's defense needs.

In November 2010, the United States addressed many of India's key objections to its export treatment by elevating the export status of India and announcing several initiatives intended to expedite processing of export approvals as part of its interest in closer bilateral relations between the two countries. Global defense companies are now seeking to establish domestic Indian partnerships for product design, development and testing, and for sourcing components, thus making India a part of their global supply chain. Against the backdrop of the evolving landscape of the Indian defense market, procurement procedures and export regulations, contractors are moving to address the significant opportunities represented by the market.

In this issue of India Law News, the Section of International Law's India Committee addresses a number of issues relating to the evolving legal and regulatory landscape of the Indian Defense Market. Major Guneet Chaudhary (Ret.) of the Cavalry Regiment of the Indian Army, presents an article on the history and development of the Indian Ministry of Defense policies aimed at reforming defense procurement. In order to retool its military more effectively and efficiently, the Indian MoD enacted the 2011 Defense Procurement Procedure. Major Chaudhary provides an analysis of the issues considered by the regulators in the procedure's development and the resulting categories and requirements.

Anand S. Dayal, a partner with Koura & Company, presents an article describing the prevailing standards for judicial review of public

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procurement decisions as set out by the Supreme Court of India. Mr. Dayal points out that, although disappointed bidders may have little hope for mounting a successful challenge to a procurement award, many view procurement litigation as an effective means of delaying a final award through an interim status quo order so as to allow the unsuccessful bidder to pursue a second chance at the tender process.

Robb Fipp, Rina Singh and David Stevens of Veracity Worldwide, review the core challenges that Western defense companies face, along with guidance on how to manage a number of central issues and risks in the Indian defense procurement process. Their article discusses information collection, identification of key decision-makers and credible local partners, and tracking the actions of competitors in a characteristically opaque and secretive defense sector.

Vandana Shroff and Ashish Jejurkar of Amarchand, Mangaldas, Suresh A. Shroff & Co. present an article on increasing foreign direct investment in the Indian defense sector. Their article analyzes the various statutes and regulations presently limiting foreign direct investment in the sector to 26% and the arguments for and against raising that cap or eliminating it altogether. The authors present arguments set forth in a discussion paper by the DIPP in favor of increasing the cap in the defense sector from 26% to 74%, or liberalizing the cap to 100%. The arguments conclude that the main reason for lack of foreign direct investment in the sector has been that a relatively low percentage holding does not provide an adequate amount of control to attract investment.

An article on the Evolving U.S.-India Defense Supply Relationship authored by Robert S. Metzger of Rogers Joseph O'Donnell and Sanjay J. Mullick of Pillsbury Winthrop Shaw Pittman, LLP, explores the history, development and direction of defense sector cooperation between the United States and India. Tracing from the historical relationship through recent developments and possible future trends, the authors point out how the present Indian defense capital acquisition process is protracted, subject to unpredictable delays and too often fails to result in a contract award. They conclude that Indian private sector engagement must increase if India is to achieve defense self-sufficiency. They also point out that the U.S. must improve planning and coordination of FMS contracting with India, clarify and simplify its export control regimes, and take additional steps to recognize the importance of India as a regional power with whom it shares many political and geo-strategic interests, while remaining respectful of India's sovereign interests and well-demonstrated aversion to a bilateral relationship which compromises India's political independence and military autonomy.

Amy Stanley Hariani of King & Spalding LLP, presents an article on the June 2011 Indian purchase of ten C-17 Globemaster III airlifters from Boeing. Ms. Hariani provides a discussion of the deal that some

hail as a turning point in the U.S.-India defense trade relationship, and others view as simply another step toward increasing defense trade ties between the two nations. The article concludes that as long as the United States accepts that India will not align itself exclusively with the United States, the trading relationship in defense goods between the two countries will grow and prosper for years to come.

The robust and growing market represented by the Indian defense sector creates opportunities for global defense contractors seeking to participate in the new Indian emphasis on private sector involvement. Changing regulations in the United States and a renewed priority on US-India bilateral relations continue to draw US defense contractors toward the burgeoning market represented by this continually developing regional power. At the same time, the evolving Indian regulatory environment creates challenges for defense contractors as they seek to understand, accommodate and adapt to shifting and dynamic regulations, requirements and procedures. We hope you find the defense sector focus of this issue of India Law News to be informative and helpful.

**William R. Black and Guneet Chaudhary**  
Guest Editors

**W**elcome to the India Committee!

The India Committee is pleased to present the Summer issue of India Law News. Our special focus for this issue is defense procurement, and we are fortunate to have the support of Committee members William Black and Guneet Chaudhary, who served as guest editors. Thank you Bill and Guneet! Defense procurement is a topic that interests Committee members from all parts of the world. India's defense procurement budget has grown tremendously in recent years, offering new opportunities for manufacturers and defense contracting. Of course, navigating the procurement process in India is challenging and this issue of India Law News is intended to explain the law and regulatory framework, and offer practical tips when advising clients. We hope you find the articles in this issue useful.

The big news is that Committee is organizing a conference in Mumbai on January 19-21, 2012 to be attended by a delegation of lawyers from the U.S. The conference will address the key legal issues in doing business between Indian and U.S. companies, and should be particularly appealing to corporate, transactional, regulatory, and tax counsel. The conference will also provide a number of opportunities for networking and meetings in a less formal setting, both before and after the formal programming. We are busy making plans and are pleased to have the full support of the leadership of the ABA International Law Section.

The India Committee had a strong showing at the International Law Section's Spring meeting in Washington in April, both from India and the U.S. The India Committee held a business meeting to discuss the proposed conference in India and brainstorm other activities that the Committee is engaged in. India Committee members also had an opportunity to socialize and get to know each better. The India Committee sponsored a number of panel discussions, including one on doing business in India. The panel was moderated by Erik Wulff, and Priti Suri, Vishal Gandhi, and Aaron Schildhaus offered their expert analysis as members of the panel. In addition, there was a panel discussion on environmental law in India. Speaking of which, Stanford University Professor Armin Rosencranz, a panelist and expert on environmental law in India, has agreed to serve as guest editor for the Fall issue of India Law News, which will have a special focus on environmental law.

We welcome ideas from all Committee members and encourage you to participate in our activities in whatever way you can. We have enjoyed exceptionally strong interest from our members, and we want to thank you for that. We hope that you will be able to join us during the ABA International Section's Fall meeting in Dublin, Ireland from October 11-15, 2011. Keep giving us your great ideas on how to make this Committee's activities responsive to your interests and needs.

Sincerely yours,

[Erik Wulff](#) & [Vandana Shroff](#)



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### SUBMISSION DEADLINES

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The confluence of these events makes this an opportune moment to assess and reflect on the challenges involved in India defense procurement and to forecast the opportunities that can lie ahead for U.S.-India defense and strategic trade if the right steps are taken.

### **CRITICAL BARRIERS TO GREATER US-INDIA DEFENSE TRADE**

#### *A. Suitability of the U.S. Foreign Military Sales Procedure*

Thus far, the majority of U.S. defense sales to India have been accomplished as government-to-government foreign military sales (“FMS”) rather than as direct commercial sales (“DCS”) between a U.S. supplier and the Government of India (“GOI”). Though Boeing’s sale of P-8I maritime aircraft was a DCS sale, FMS has been used by the GOI to make major purchases of U.S. systems, such as the C-130J and, recently, the C-17.

India has reservations about FMS, however. A principal objection is that FMS does not comport with competition requirements of the DPP requiring bids be made on a firm fixed-price basis. Ordinary FMS procedures, in contrast, contemplate an “offer and acceptance” procedure which begins with a Letter of Request (“LOR”) from the government intending to make a purchase. A LOR may request only Price & Availability (“P&A”) data or a formal, ready-to-execute sales offer in the form of a Letter of Agreement (“LOA”). A P&A response is only an estimate of approximate costs and projected availability. An FMS sale is concluded only if there is an LOA, but the LOA itself normally does not contain a firm, fixed price, as the final price for an FMS purchase typically is not known until some time after execution of the LOA, i.e.,

after the USG negotiates the corresponding supply or service contract with the U.S. supplier.

The DPP also requires tendering companies to commit to a technical field evaluation phase before selection, a procedure not contemplated in the FMS process. Further, a crucial element of any GOI procurement from a foreign source is satisfaction of offset measures. The USG assumes no obligation to administer or satisfy any offset requirements – in FMS deals or otherwise.

There are countervailing considerations which favor FMS, even though aspects of FMS are difficult to align with the DPP requirements. General FMS policies recognize that “foreign nations often compete weapon systems procurements.” A competitive solicitation of a foreign government is treated as a LOR triggering the FMS case process. The U.S. response can be a *combination* of programs (a “hybrid”) which include FMS and DCS elements (and international cooperative agreement as well). Hence, one or more U.S. companies can respond to a solicitation under the DPP using a combination of FMS (for supply of defense articles) and DCS (for training, support equipment, and other services). Offset obligations are independently executed between the purchasing government and the supplier.

Concern as to whether FMS is “competition” reflects largely issues of alignment of U.S. systems to Indian requirements – not differences in philosophy. One objective of “competition” is to assure a public buyer it is paying a reasonable price. Here, the FMS structure is satisfactory. FMS acquisitions are to be conducted under “the same acquisition and contract management procedures” that the U.S. uses for its own



acquisitions. Moreover, price and cost justification is required for FMS contracts using the “same principles” as for other U.S. defense contracts. These rules are both well developed and rigorously enforced. Arguably, in FMS purchases, the GOI has a much higher degree of assurance as to the fairness of price, the assurance of delivery of goods at the contract price, and the integrity of the offering process, than realistically can be obtained through a procurement done entirely within the DPP framework.

Another criticism goes to fees and charges that accompany FMS cases. Depending on the particulars, categories of such charges can include an “administrative surcharge,” a “contract administration services (CAS) surcharge,” or a “logistics support charge,” among others. Again, there are reasons behind the U.S. approach which are mutually advantageous rather than self-serving of U.S. interests. And, these charges reflect the real costs of activities which the USG performs for the benefit of a foreign customer.

The USG considers the “support of U.S. origin defense articles critical to the success of the Security Assistance program.” The U.S. prefers a “Total Package Approach” (“TPA”) intended to assure FMS purchasers that they *sustain* as well *introduce* new equipment. The TPA includes elements such as training, technical assistance, initial and follow-on support. Considering well-publicized problems that the GOI has experienced with military articles supplied from countries, notably Russia, the commitment of government-backed support has high value. Even so, the USG requires that a “complete sustainability package” must be *offered* to the purchaser, but *purchase* of that package is not required.

Actually, therefore, the “hybrid” FMS mechanism presents the GOI with an opportunity to have both the “direct” relationship that it (or the Indian Armed Forces) may desire with the supplier while also having the confidence in a USG contract with the American supplier. An FMS sale does not mean that the foreign

purchaser is isolated from the transaction. FMS customers are “encouraged” to participate with U.S. acquisition personnel in discussions with industry to develop technical specifications, establish delivery schedules, identify special warranty or other requirements unique to the FMS customer, and review prices of varying alternatives, quantities and options as needed to make price-performance tradeoffs.

Of great concern for India is the application of export controls and whether goals of transfer of technology can be accomplished. As a matter of policy, U.S. export controls apply equally to FMS as to DCS. However, the USG may determine to sell certain types of more sensitive equipment and technology, such as a new or complex system or service, only through FMS. (A transaction can combine FMS-only and DCS elements.) When the USG executes a response to an FMS LOR, it is the USG which is responsible to coordinate and secure necessary export approval. In practice, this can work faster, and with higher assurance, than when defense supplies services are sold through DCS and a private contractor must secure export authorization. As to transfer of technology, U.S. FMS policies encourage foreign manufacture of U.S. equipment when it is advantageous to assist in maintaining the purchaser’s defense industrial base or in improving general defense capabilities by collaboration.

Taken as a whole, there are objective benefits to India from the FMS process and its employment in combination with DCS. While FMS is not ideally aligned with the DPP, fundamental objectives are substantially similar. It behooves both the USG and the GOI, as well as prospective commercial partners from both countries, to anticipate and work through alignment issues. The USG has mechanisms to facilitate U.S. participation in international competition. These include the coordination of actions necessary to comply with U.S. law as well as working with the foreign government. Both countries would benefit from an



initiative to identify recurring issues in the application of FMS to the full scope of prospective GOI requirements, so that recommended practices and representative solutions may be developed in advance of future procurements.

### *B. Effectiveness of India's Defence Procurement Procedure*

U.S. firms have encountered considerable frustration and delay in attempting to secure business through the DPP. The strengths of the DPP, a rule-driven mechanism, include predictability, regularity and transparency. It provides an objective reference to the requirements and expectations of the MOD and of the process used to establish requirements, secure authorization for acquisition, and then to conduct procurement. Ultimately, however, the effectiveness of a procurement system is measured by whether it succeeds in accomplishing contract award and whether the end user acquires supplies and services which conform to its requirements. In this regard, some of the DPP's rigors have worked against its effectiveness. One recent article suggested that the GOI has accomplished "more than 70%" of its major defense acquisitions through means which proceed outside the formal procurement process of the DPP, such as inter-government agreement and "fast track" procedures.

The DPP is a "single stage, two-bid" system which posits that there are multiple sources available for a fully developed product for which at least two competitive bids can be obtained. The evaluation method is price-determined, assuming satisfaction of technical requirements. For a procurement to succeed under the DPP, it is best that each specified step, process, and action proceed exactly as prescribed. In the real world, however, this rarely occurs. Thus, the DPP has proven unwieldy, if not unsuited, to situations as have actually emerged while an acquisition is in process, where one or another event is outside the "frame" expected by the DPP.

The preference for formal competition is so strong that it has proven difficult for the MOD to proceed to make an award unless it has two fully compliant tenders under a DPP procurement. Several authorities are available under the DPP to allow for procurement in other than multiple bid situations. These include DPP ¶ 69 ("Single Vendor Situation"), DPP ¶ 71 ("Inter Government Agreement") and DPP ¶ 73 ("Procurement on Strategic Considerations"). Indian officials have proven wary of using these authorities, however, perhaps out of undue concern that flexible administration of the DPP will expose them to charges of favoritism or corruption. Recent history includes an example of cancellation of a solicitation long in the gestation, for a compelling military requirement, where one competitor decided it would prefer to scuttle the acquisition rather than lose the competition. For its own sake, India needs better measures to avoid and address this situation.

On procurements conducted under the DPP, where bids are deemed to satisfy the technical requirements, a low bidder (the "L1") is selected for contract negotiation only on the basis of bid price. This also is vulnerable to manipulation – "gaming" – by a potentially unscrupulous bidder. In several reported competitions, the realism of low bids has come into question. In one competition, it is understood that the MOD made "adjustments" to an unrealistically low bid which caused the ostensible "L1" to become the higher priced (and losing) "L2" bidder. The authority for such adjustments, in the DPP, is obscure at best, though the experience demonstrates the need for common sense flexibility in administration. In the U.S., in contrast, price "realism" may be a selection criteria. Bids can be disregarded, or unfavorably reviewed, if the proposed price is not realistic.

The DPP today does not allow for consideration of life cycle costs, though these are obviously most important in understanding the total cost of an acquisition. Nor does the DPP allow for the selection



decision to reflect qualitative discriminators such as higher performance and greater mission suitability. No credit is given for exceeding the specifications enumerated in a tender document. In the U.S., acquisition of complex articles and systems usually are acquired through a “best value” approach, in which the source selection authority also considers non-price factors such as better technical performance, lower performance or cost risk, and better past performance credentials.

Moreover, the DPP is poorly suited for acquisitions that call for design and development. It is very difficult for vendors to offer anything other than existing, “off-the-shelf” hardware. This means that when India procures via the DPP it is largely limited to acquisition of what others have already built. The result favors defense public sector undertakings (“DPSUs”) for developmental work and frustrates private sector engagement.

### *C. Realistic Prospects To Satisfy Offset Requirements*

Demands for offsets appear to be the “norm” in international acquisition of defense supplies or services from foreign sources. For India, questions of implementation and administration have importance because a successful foreign seller to India is required to enter into binding contractual obligations for offset commitments which are co-terminus with the period of performance of the main contract.

India’s offset requirements reflect important national policies. Where India purchases from a foreign source (“Buy-Global” or “Buy and Make”), offsets must equal or exceed 30% where the indicative cost of the procurement exceeds approximately \$66 million (Rs 300 crores). In certain acquisitions, such as the MMRCA competition, the offset requirement is greater still. The DPP Amendment of 2009, released on November 2, 2009, added an acquisition category for “Buy and Make (Indian)” where RFPs would be released only to Indian

firms. Such firms could partner with foreign OEMs, but this procurement category requires a minimum of 50% indigenous content.

Concerns exist as to the ability of Indian industry to “absorb” the offset commitments already made and those which will accompany future foreign purchases. India formerly was very restrictive in classification of transactions qualifying for offset credit. The DPP 2008 allowed discharge of offset obligations only through direct purchase of, or executing export orders for, “defence products and components manufactured by, or services provided by, Indian defence industries, i.e., DPSUs, the Ordnance Factory and private defence industry.” As implemented by DPP 2008, offset obligations could be discharged by direct purchase of services provided by Indian defense industries.

DPP 2011 is a welcome step. It enlarges qualifying “services” to also include testing of products and includes “training services and training equipment, e.g., simulators.” DPP 2011 also eliminated the prior requirement that offsets be “direct” to the defense sector and expands the categories of “eligible” offsets to include internal security and civil aerospace. The expansion of transactions eligible for offset satisfaction represents real progress, but a number of issues left unresolved present opportunities for further clarification and improvement.

*Retroactive Application:* The ostensible position of the MOD is that the revised offset rules of DPP 2011 apply only to contracts awarded on RFPs issued after the effective date of the new rules. This position might be revisited. As a matter of policy, if the expanded scope of offsets for “new” contracts serves the national interests of India, then the same interests should be served by allowing the policy to apply retroactively, albeit selectively. There are three principal considerations: first, the general interest of the GOI in achieving the industrial objectives of offset rules; second, the specific interest of the GOI in assuring



vendors of different size within India that they have real opportunity to participate in offset work; and third, the proposition that “fairness” to OEM competitors should discourage liberalizing offset requirements once a competition has been concluded. Since the offset rules exist for the benefit of the GOI, and confer no rights enforceable by private parties, it should be within the sound discretion of Government officials to take prudent actions in the application of these rules to achieve their fundamental purposes. Hence, for illustration, it would seem appropriate for the GOI to allow application of the DPP 2011 rules to contracts awarded after issuance of the 2011 rules but under RFPs released beforehand.

*Credit for Technology Transferred:* Today, the DPP does not give any offset credit for accomplished ToT *per se*, as offset satisfaction is purely a function of cash value of purchased eligible supplies or services, irrespective of technical content. Critical defense and dual-use technologies have “leverage” value after receipt, in that some technologies will enable greater industrial exploitation or have higher job-producing consequences than others. In addition, certain technologies may be comparatively more important for India to acquire from the standpoint of its security objectives. Offset credit should be awarded as promised technology is delivered, and for especially valuable technology the MOD should apply a “multiplier.” That this serves India’s national objectives—of indigenization and technology development—is self-evident. It also serves the interests of India’s foreign sales partners, by affording additional means to perform their contractual offset obligations.

*Allow Greater FDI:* DPP 2011 allows offset credit for foreign direct investment (“FDI”) in Indian industries “for industrial infrastructure for services, co-development, joint ventures and co-production of eligible products and components” as well as for certain organizations involved in R&D. Today, investment in

the defense industry is capped at 26%, reflecting concerns about sovereignty over the national defense industrial base. India will be more successful, in achieving ToT and the ultimate goal of indigenization, if the ceiling is increased, even to 49%, if not more. There are many and serious business considerations which discourage U.S. and other foreign firms from joint venture participation with a 26% cap on FDI. Control over transferred technology, assurance of proper use, and controls on unauthorized dissemination are hard to accomplish from a minority ownership position. Similarly, U.S. firms see minority ownership as making it more difficult to assure compliance with the myriad of U.S., Indian and other national anti-corruption laws.

*Enhanced Administration:* The DPP 2011 revisions, as concern offsets, are accompanied by many questions of interpretation and application. The MOD should enhance the resources of the Defence Offsets Facilitation Agency (“DOFA”) and clarify its authority to resolve issues of offset application, evaluation, and compliance. DOFA also should establish a collaborative mechanism to receive supplier inputs. DOFA should actively monitor performance of offset contracts, assess the state of capacity absorption, and evaluate and report on the successful implementation of offset arrangements. Today, for all its ambitions, there is little evidence that the offset program has succeeded in bringing high-tech jobs and new industries to India. Having a real-time knowledge base of the functionality of its offset requirements and flexibility in adaptation and application of the rules benefits India. No one benefits, in contrast, from rigid adherence to rules if the consequence is defeat of these important national objectives. Offset rules can be amended and subjected to appropriate exception in a fashion that is transparent and which considers the expectations of all interested parties.



D. Overcoming the “Trust Deficit” Prompted by U.S. Export Controls

U.S. export controls serve important policy objectives but their operation has proved slow and uncertain, causing frustration to India as a prospective purchaser and sometimes resulting in exclusion of U.S. suppliers from opportunities for which they offer superior products and technology. Following nuclear tests in 1998, the U.S. imposed sanctions on both India and Pakistan which included termination of foreign military sales and revocation of licenses for commercial sale of any item on the U.S. Munitions List. These sanctions—not forgotten by contemporary India decision makers—severely impacted U.S.-India defense cooperation. Collectively, the result has been called a “trust deficit,” which still besets the U.S.-India defense relationship.

In 2011, the U.S. has announced three major export reforms favoring India. Just as India’s DPP 2011 represented real progress in some areas, but insufficient accomplishment in others, the 2011 export measures are a step in the right direction, but do not yet achieve enough.

- The U.S. has removed several defense and space-related entities from the Entity List: Bharat Dynamics Limited, and the remaining subordinates of Defense Research and Development Organization (“DRDO”) and the Indian Space Research Organization. The Entity List consists of organizations the U.S. Government has determined are involved in or pose a risk of developing weapons of mass destruction. License requirements continue to apply to an entity removed from the Entity List, but there is no longer a general bar on exports, even if items are not sensitive technology.
- The U.S. has also realigned India in its country groupings, removing it from Country Groups D:2, D:3 and D:4, and adding it to Country

Group A:2. This reflects U.S. treatment of India on par with close allies and may facilitate cooperation and partnerships in the commercial space sector, such as space launch vehicles. Addition of India into Country Group A:2 places it into the list of Missile Technology Control Regime (“MTCR”) member states, though India is not formally an MTCR member. This will not remove the existing requirement for a license to export items controlled for missile technology reasons (which applies to all countries except Canada).

- President Obama has also announced U.S. support for India’s full membership in the four multilateral export regimes: the Nuclear Suppliers Group, Missile Technology Control Regime, Australia Group, and Wassenaar Arrangement.

The 2011 export reform initiatives were taken by the U.S. Department of Commerce. Further actions will be required of the Departments of State and Defense. State has a key role, as its jurisdiction encompasses export licensing under the International Traffic in Arms Regulations (“ITAR”), which is the responsibility of the Directorate of Defense Trade Controls. Other key actors on the U.S. side include the Defense Technology Security Administration, which administers technology release policies, and the Defense Security Cooperation Agency, responsible for security cooperation and security assistance and, specifically, for FMS sales.

What India seeks is *advance* assurance of the technology it will receive, in fact, should it make a contract award for the benefit of or to a U.S. company. Today, it is very difficult for the USG to coordinate among the various interested and assigned agencies and render such assurance. Such doubts affect the willingness of India to consider FMS sales, the eligibility of U.S. firms to make direct sales under the DPP, and the credibility of U.S. firms as prospective partners for industrial cooperation. For U.S. companies to effectively partner with the private sector in India, or



work with India's public sector defense establishment (e.g., DRDO), the U.S. must take positive and specific acts to overcome the lingering concern that U.S. companies cannot give to the GOI, or to industrial partners, positive and timely assurance on technology release. This may require efforts that are "exceptional" in their design for India's specific needs.

Further India-specific export reforms should be possible. For example, the Commerce Department has indicated it is prepared to remove certain export controls on India that currently are in place on the basis of "Regional Stability" or "Crime Control" reasons. Such controls affect items such as explosives detection equipment and night vision equipment, i.e., homeland security or "internal security" items, which the DPP has now made eligible for offset credit. The convergence of reforms on both the U.S. and Indian side has the potential to catalyze strategic trade between the two countries. However, for the U.S. to take such further steps, reciprocal action on India's part will be necessary. India may need to tighten its own controls on retransfer. Iterative progress on so-called "enabling" bilateral agreements such as the Communications and Information Security Memorandum of Agreement (known as "CISMOA") will encourage further U.S. actions.

At a high level, U.S. policy has elevated the importance of both the strategic and commercial relationship with India. From a practical perspective, however, these favorable developments are less than fully recognized by the actual bureaucratic machinery that processes export license applications. For the "strategic partnership" sought by the U.S. to have value to India, the U.S. must demonstrate a consistent pattern of timely technology transfer approvals and deliveries. Doubts as to whether the U.S. is a reliable supplier can be put to rest only by real world results.

## CONCLUSION

Indian officials acknowledge that the DPP is a "work in progress" and they appear genuinely receptive to constructive criticism and new ideas. Certain measures should be taken with some immediacy. The defense capital acquisition process takes a long time to reach fruition, and is subject to unpredictable delays and detours and sometimes fails to result in contract award. Vendors incur considerable expense in preparing for competition, in making offset arrangements, and in committing to the field trials which India requires on a "No Cost No Commitment" basis. Vendors will invest and accept the results of a fair competition. But they will not participate if RFPs only occasionally lead to contract award and after interminable delays.

Another issue is how to reconcile India's enormous public sector defense industry, and the political and economic interests it represents, with the proposition that private sector engagement must increase if India is to achieve defense self sufficiency. There is conflict between the announced objectives to increase private sector involvement and preservation of the prominence of DPSUs. A challenge is to demonstrate through successful "public-private" partnerships that mutually advantageous alliances can be achieved. The autarky which India seeks may require determined national promotion of private sector opportunities and active management of DPSU expectations and roles.

The U.S. has responsibilities as well. These include additional planning and coordination to improve the suitability of FMS as a means by which India can contract with U.S. The U.S. must continue efforts to clarify and simplify its export control regimes, and on a bilateral level must take additional steps to recognize the importance of India as regional power with whom it shares many political and geo-strategic interests. These measures, however, must be respectful of India's sovereign interests and well-demonstrated aversion to a



bilateral relationship which compromises India's political independence and military autonomy.

*Robert S. Metzger is a shareholder at Rogers Joseph O'Donnell, Washington, D.C. and San Francisco, CA, and may be contacted at [rmetzger@rjo.com](mailto:rmetzger@rjo.com).*

*Sanjay J. Mullick is counsel at Pillsbury Winthrop Shaw Pittman LLP, Washington, D.C., and may be contacted at [sanjay.mullick@pillsburylaw.com](mailto:sanjay.mullick@pillsburylaw.com)*



## NAVIGATING DEFENSE PROCUREMENT CHALLENGES IN INDIA

*Robb Fipp, Rina Singh, David Stevens*

**R**ising Chinese military power, ongoing tensions with Pakistan, and the creeping obsolescence of Indian military hardware are creating opportunities for Western defense corporations to aggressively enter a market in which they have long played relatively marginal roles. India, the world's largest arms importer as the recipient of nine percent of international arms transfers between 2006 and 2010, has increased its 2011 defense budget an additional 11.59 percent to \$36.03 billion. According to the Stockholm International Peace Research Institute, Russian companies accounted for 82 percent of India's 2006-2010 imports, but Western firms are poised to make substantial inroads as the Indian government seeks to expand and upgrade its arsenal with cutting-edge technologies. Israel has already developed into a key source of advanced missile systems, and France's Dassault and the European Aeronautic Defence and Space Company (EADS) are the finalists in the \$11 billion Medium Multi-Role Combat Aircraft (MMRCA) tender to replace India's aging fleet of Soviet-era MiGs. While lingering suspicion of US ties to Pakistan has complicated the positioning of American companies, steady improvements in Indo-US diplomatic relations and recognition of India as a strategic regional partner are likely to bolster market access for US firms.

Despite these shifts, penetrating the Indian defense market remains as difficult as it is potentially rewarding. This article provides an overview of the core challenges that Western defense companies face, along with guidance on how to manage a number of central issues and risks in the Indian defense procurement process. As in many emerging markets, successful entry and operation is contingent on robust information collection permitting companies to identify key decision-makers and credible local partners, monitor their standing with major stakeholders, and

track the actions of competitors. The nature of the defense sector, where decision-making can be particularly opaque and secretive, heightens the indispensability of such an approach.

### CHALLENGES OF THE INDIAN PROCUREMENT PROCESS

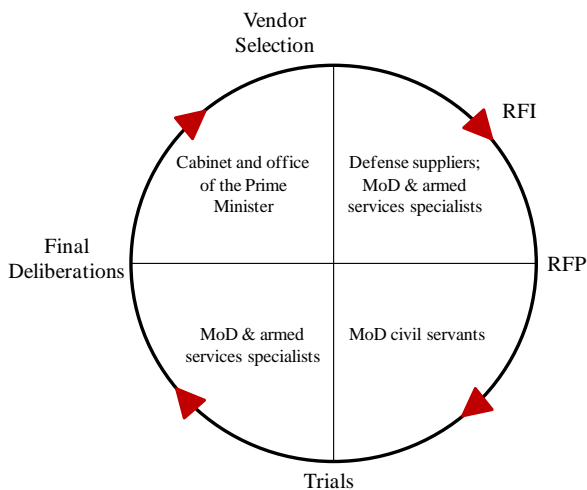
Entrants into India's defense sector must overcome a range of bureaucratic, regulatory, and political obstacles that demand patience, vigilance, and a clear understanding of local practices and dynamics. Indian governmental decision-making tends to be lumbering, opaque, and subject to corrupt practices that potentially skew the playing field against Western firms bound by the US Foreign Corrupt Practices Act (FCPA) and similar national and transnational statutes. In addition, while the Indian government has opened procurement to international participants, it remains committed to the development of an indigenous defense industry through local production and technology transfer requirements that necessitate careful management and negotiation.

#### *Defense Procurement Decision-Making*

India's vast and complex bureaucracy impedes streamlined decision-making, and contending interests among the multiple participants in the defense procurement process can subject decisions to particularly lengthy delays. The MMRCA tender is a case in point of the potential for start-and-stop progress. The Indian Air Force (IAF) submitted Requests for Information (RFI) to a range of international defense companies in 2004 but then took three years to issue Requests for Proposals (RFP). Despite projections of delivery in 2011, the government has yet to select a vendor.

Competing sets of actors can potentially enter the process at a number of different stages, exposing defense procurement to incongruent or rival agendas and to shifting criteria that may contribute to tender delays. While the armed services or intelligence agencies typically play leading roles in the evaluation and testing phases, Ministry of Defense (MoD) civil servants with little or no background in technical defense matters often shape RFPs. Particularly for large-scale projects, ultimate purchasing decisions often take place at the cabinet level or within the office of the Prime Minister. In the course of a typical procurement cycle, the basis for decision-making thus often evolves from potentially unrealistic criteria established by functionaries to technical criteria established by professionals, and then on to considerations subject to political and diplomatic pressures. Particularly at this final stage, vested interests can shift the basis of vendor selection away from objective performance to contenders' political influence and outreach efforts.

### Large-Scale Defense Project Procurement Cycle and Key Decision-Makers



### Competition and Corruption

India's emergence as a major market for arms and defense technology has intensified competition for military tenders, reinforcing incentives to capitalize on the underlying opacity of decision-making by resorting

to bribery and to bending or breaking regulations regarding the use of agents well-positioned to broker sales. In addition, Western companies may face an uphill battle against Russian and Israeli competitors whose established relationships with procurement officials may tilt tenders in their favor.

Despite a general crackdown on corruption in India, bribery remains a potentially significant factor in the defense sector, where the specialized nature and secretive handling of tenders creates opportunities for vendors to attempt to influence the process through illicit means. As discussed above, the selection procedures on which acquisition decisions depend often are shrouded in mystery or subject to unexplained shifts that underscore the degree to which small groups of officials can shape a tender's procedural course and outcome. Western companies find themselves at a potential disadvantage as enforcement of India's own anti-bribery statutes is inconsistent and not all international competitors are subject to the same anti-bribery statutes—such as the FCPA—in their home country or other jurisdictions.

Western defense suppliers entering a complex new market typically hire agents to assist them in minimizing their competitive disadvantages and winning audiences with key figures and bureaucratic entities. In the Indian context, however, reliance on agents can create more problems than it solves. Many former MoD personnel who offer their services as agents served during periods when corruption was an inescapable element of nearly all major acquisition decisions. This background may lead them to rely on a similar approach on behalf of their new employers, with or without the latter's knowledge or permission, requiring close monitoring of their actions in order to minimize FCPA exposure.

Indian MoD rules further complicate the task of locating suitable agents by prohibiting the payment of success fees to those who assist in winning tenders. This raises the expense and competition involved in hiring agents with proven track records, or pushes companies to hire them in ways that circumvent the

standing rules and create potential vulnerability to subsequent tender disqualification. Companies seeking to stay safely within MoD guidelines often are left with a selection of relatively junior agents typically less effective in advocating for projects with key constituencies.

### *Technology Transfers*

Upgrading the technological sophistication of the country's armaments to compete with regional rivals, including both China and Pakistan, is at the heart of India's current defense expansion and opening to international defense suppliers. As retired Air Marshal Padamjit Singh Ahluwalia, the former head of India's Western air command, has explained, "The Soviet Union gave equipment and transferred technology to India at subsidized costs and ensured a steady flow of material free from sanctions in time of conflict." On this basis, it emerged as India's preferred supplier. "After the break-up of the Soviet Union, however, the Russians began demanding hard cash for all sales at a time when they were losing their ability to compete with the West technologically. Because it has to pay cash, India now feels that it should shop around for the best technology possible."

Yet merely providing advanced weaponry is not sufficient to win major defense tenders, as India also seeks access to underlying technologies to maintain and develop its indigenous arms industry. As a result, international defense suppliers seeking to enter India face significant technology transfer requirements that have evolved into key tender selection criteria. Beginning with the MoD's 2005 Defense Procurement Policy (DPP), suppliers have to meet a 30-percent offset requirement for all defense orders over \$66.6 million in value; for the MMRCA RFP, the MoD raised the requirement to 50 percent. Offset conditions often place foreign companies in a position where commercial success depends on transferring sensitive technologies to Indian partners with few or no intellectual property protections, confronting suppliers with difficult choices and underscoring the importance of selecting trustworthy local manufacturing partners.

In addition, US or other government prohibitions on the export of certain technologies can limit the tender competitiveness of firms subject to these restrictions.

### **Keys to Successful Navigation**

Successful navigation of the Indian defense sector requires adapting to the local environment. This includes developing a nuanced understanding of Indian decision-making in conjunction with the ability to constrain the activities of competitors through local institutions. Rigorous due diligence of potential partners and agents is also vital to compete effectively while minimizing the danger of running afoul of the FCPA.

#### *Engage Early and Prepare for a Lengthy Process*

For companies seeking to enter India's defense sector, patience is a necessity. Tenders rarely adhere to their initial schedules, and companies must be prepared to stay the course over a long—and potentially elastic—period subject to delays, shifts in criteria, legal proceedings, and retendering. Early engagement in the tender process is key, particularly in the stage between the RFI and the RFP. Companies that wait for the RFP have missed a significant window of opportunity to develop pivotal relationships, gauge or stimulate demand and shape RFP requirements.

#### *Use Local Regulatory Bodies to Ensure a Level Playing Field*

The Indian defense market is potentially conducive to corruption, but companies need not sit back and allow less ethically constrained competitors to capitalize. When there are grounds for concern, companies can petition Indian regulatory and investigative bodies, including the Central Vigilance Committee (CVC) and the Central Bureau of Investigation (CBI), to examine suspicious proceedings. After losing a 2007 Indian military tender for 197 light attack helicopters, US-based Bell Helicopter protested vociferously that EADS had benefitted from preferential treatment. With the backing of the US government, Bell eventually succeeded in bringing its

case to the CVC, leading to the retendering of the contract on the grounds that EADS agents had engaged in improper activity and that the company had used a civilian helicopter model in test flights, biasing the trials decidedly in its favor.

### *Identify Qualified Indian Partners*

Partnering with capable and trustworthy Indian companies can reduce international defense suppliers' reliance on potentially problematic local agents while also facilitating the task of meeting offset requirements. Allowing Indian partners to take a leading role in tender bids naturally strengthens their competitiveness and appeal to Indian authorities. Locating credible local counterparts, however, requires detailed checks on candidates' technical backgrounds, political connections, and legal and business track records, including indications of their involvement in corruption. Confidence in the competence and trustworthiness of local partners should alleviate some concerns that accompany the transfer of sensitive technologies. Many of the same considerations hold true when companies opt to engage local agents to advance their tender prospects. Due diligence service providers who are familiar with the local lay of the land and have access to independent sources of information can vet potential agents to ascertain their professionalism, effectiveness, political positioning, and potential implication in unethical conduct.

### *Breaking the Indian Code*

Following a long period of relative exclusion, Western suppliers are at an early stage in the process of establishing their brands and mastering the Indian procurement process. While several companies have developed toeholds, there are no indications that any has truly deciphered the Indian puzzle or developed a strong basis of support among key decision-making constituencies. Even within Western companies that have succeeded in winning contracts, business units continue to grapple with the task of translating individual successes into a winning formula. The market remains relatively open and will reward those

with the patience and adaptability to meet its challenges.

*All authors are affiliated with Veracity Worldwide, a political risk consultancy focused on emerging markets, including the Indian defense sector.*

*Robb Fipp, Partner and Managing Director, is based in Singapore and can be reached at [rfipp@veracityworldwide.com](mailto:rfipp@veracityworldwide.com).*

*Rina Singh, Managing Director, is based in New Delhi and can be reached at [rsingh@veracityworldwide.com](mailto:rsingh@veracityworldwide.com).*

*David Stevens, Associate Director, is based in New York and can be reached at [dstevens@veracityworldwide.com](mailto:dstevens@veracityworldwide.com).*



## INCREASING FOREIGN DIRECT INVESTMENT IN THE DEFENCE SECTOR: SECURITY CONCERN OR STRENGTHENING INDIA'S DEFENCE?

*Vandana Shroff and Ashish Jejurkar*

U ntil May 2001, the Indian defence sector was closed to private players and was considered to be an exclusively governmental function. In May 2001, the Government of India, issued Press Note 4 (2001 Series) permitting foreign direct investment ("FDI") of up to 26% in the defence sector with prior approval of the Foreign Investment Promotion Board ("FIPB"). This press note reflected a new policy of liberalization for participation by the foreign manufacturers. However, this cap has remained unchanged for a decade.

The debate in relation to the FDI cap in the defence sector was reinvigorated in May 2010, when the DIPP issued a Discussion Paper setting out the pros and cons in relation to increasing the FDI cap in the defence sector ("Discussion Paper"). The Discussion Paper, the first of several discussion papers put forth by the DIPP on important topics for public discussion, raised strong arguments for increasing the FDI cap in the defence sector from 26% to 74%, and stated that liberalizing the FDI cap to 100% would be desirable.

### *Existing Regulatory and Policy Framework*

FDI of up to 26% in the defence sector is permitted with prior approval of the FIPB. At present, the defence industry is subject to industrial licensing requirements under the Industries (Development & Regulation) Act, 1951. Additionally, the guidelines for production of arms and ammunition which have been notified *vide* Press Note 2 (2002 Series), sets out, inter alia, the following conditions:

- (i) Applications for a license shall be considered and a license shall be issued by the DIPP, in consultation with the Ministry of Defence. Cases involving FDI, in contrast, shall be considered by the FIPB;

- (ii) Management of the applicant company should be in Indian hands. Majority representation on the Board, as well as the Chief Executive role of the company, should be allocated to resident Indians;
- (iii) A three year "lock-in" period is applicable for transfer of equity shares of an Indian defence company from one foreign investor to another foreign investor. Any such transfer would be subject to prior approval of the FIPB;
- (iv) The Government retains the right to verify the background of foreign vendors and their domestic promoters, including their respective financial standing and credentials in the global arms and ammunitions market. Preference is to be given to original equipment manufacturers or design establishments, companies with an established supply record with the Armed Forces, Space and Atomic Energy sector, and/or companies with an established R&D base;
- (v) The relevant licensing authority would be required to satisfy itself of the adequacy of the net worth of the foreign investor, taking into account the category of weapons and equipment proposed to be manufactured;
- (vi) No purchase guarantee is to be given by the Ministry of Defence;
- (vii) Capacity norms for production are to be included in the license based on the application and the recommendations of the Ministry of Defence looking into the existing capacities of similar and allied products;
- (viii) Purchase preference and price preference may be given to public sector organizations as

per the guidelines of the Department of Public Enterprises;

- (ix) Adequate safety and security procedures must be put into place by the licensee, which remain subject to verification by authorized Government agencies; and
- (x) Arms and ammunitions manufactured are to be sold primarily to the Ministry of Defence or other Government entities under the control of the Ministry of Home Affairs and State Governments, with the prior approval of the Ministry of Defence, and not to any other country or person or entity. Export of manufactured items is subject to relevant policy and guidelines applicable to ordinance factories and defence public sector undertakings (“PSUs”). Non-lethal items would be permitted for sale to persons or entities other than the Central or State Governments with the prior approval of the Ministry of Defence.

Moreover, the Defence Procurement Policy provides, *inter alia*, for an offset policy. An “offset” is essentially an agreement in which a foreign purchaser, usually a developing country government, requires the contractor (usually a foreign supplier) to agree to purchase a predetermined level of components from subcontractors located within the purchasing nation, or to fulfill other portions of the contractor’s international purchasing requirements from firms within that nation, or even to assist that nation in selling its unrelated products to third parties. The policy stipulates that all contracts awarded to foreign vendors worth over INR 3 billion would carry an offset obligation of a minimum of 30% of the value of a defence purchase. The offset obligations of a foreign defence supplier can be satisfied in any of the following ways under the Defence Procurement Policy:

- (i) direct purchase of components or goods manufactured or supplied by local Indian companies in the defence sector, or execution of export orders of goods or services manufactured or supplied by local Indian companies in the defence industry;

- (ii) FDI in Indian companies/organisations engaged in the defence industry and defence R&D; or
- (iii) credits earned for satisfying offset obligations at an earlier date which have been “banked” may be discharged against future contracts.

Given that India is one of the largest importers of defence equipment and makes large purchases from foreign suppliers, these purchases would result in offset obligations for the foreign suppliers, resulting in a greater interest in FDI in the defence sector by these foreign suppliers. Additionally, due to the high level of defence spending in India, the defence sector could also prove to be a potentially major revenue source for foreign defence equipment suppliers. Nevertheless, the defence sector remains one of the most heavily regulated and closed sectors in view of its sensitive nature.

#### *Private Participation and FDI in the Defence Sector under the Current FDI Framework*

Most defence equipment manufacturing in India is still conducted by the ordinance factories set up in the 1960s and a handful of defence PSUs, such as Hindustan Aeronautics Limited, Bharat Electricals Limited, Bharat Dynamics Limited, and Garden Reach Shipbuilders & Engineers Limited, to name just a few. Private participation and FDI in the defence sector under the existing FDI policy framework are not very significant. The Tata group, Mahindra & Mahindra, Larsen & Toubro and Godrej & Boyce are some of the private sector firms that carry the status of Raksha Udyog Ratna (“RUR”), which enables these firms to bid for defence contracts and manufacture defence equipment. RUR status enables these firms to receive the same treatment as defence PSUs, which include certain benefits such as substantial government financial investment (up to 80%) for design, development and manufacture of defence products, including fighter aircraft, tanks and warships.

There have been exceptions to the 26% cap, such as India’s joint venture with Russia to manufacture BrahMos missiles, where the Ministry of Defence obtained a special dispensation from the Cabinet to

enable the Russian contractor, NPO Mashinostroyeniya, to hold a 50% equity stake in Brahmos Aerospace Private Limited. Hindustan Aeronautics Limited and a French company, Snecma, have also been permitted to form a 50-50 joint venture for the manufacture of aircraft engines. However, the Ministry of Defence recently rejected certain other proposals, such as for a 49% foreign equity in a joint venture between Mahindra Defence Systems and UK-based BAE Systems, and a separate proposal for a joint venture between Larsen & Toubro and European EADS. Overall, the exceptions for allowing FDI beyond 26% have been few (only in the case of joint ventures with PSUs), and obtained only at the discretion of the Government.

A number of joint ventures in the defence equipment manufacturing space have been announced. Tata Advanced Systems Limited has signed a memorandum of understanding with Lockheed Martin Aerostructures for the C-130 aircraft produced by Lockheed. Another Tata Company, Tata Industries Limited, had formed a joint venture with Boeing Company in 2008 to manufacture defence-related aerospace components in India. Indian aerospace firm Axis Aerospace and Technologies (AAT) and Russian defence exporter FGUP Rosoboronexport have also signed an agreement creating a joint venture focusing on avionics for the Indian Airforce's front line Sukhoi SU-30 and MiG-29 fighter jets, as well as military helicopters such as the Kamov Ka 27.

### *The Case for Increasing the FDI Cap: From Import Dependence to Indigenous Manufacturing and Exports*

In the decade between the time FDI and private participation were first permitted in the defence sector and the date of the Discussion Paper, FDI inflows in the sector amounted to only Rs. 7 million. This low investment figure provides a clear indication of the failure of current FDI policy to attract sufficient foreign investment in the defence sector. However, India is one of the largest users and importers of conventional defence equipment, ranking among the top ten countries in the world with respect to defence expenditure. The cumulative defence budget for the

financial year 2006-2007 was USD 20.11 billion. According to the Discussion Paper, nearly 70% of India's expenditure (by value) for defence procurements is allocated to imports and only the remaining 30% can be allocated to domestic production. The majority of domestic production is met either through ordinance factories or defence PSUs, rather than from private manufacturers. Additionally, even in cases of domestic manufacturing, a large component of defence sub-systems is imported, with the domestic PSU acting merely as systems integrators. Therefore, India remains highly dependent on imports. Moreover, indigenous R&D has not kept pace with present-day warfare requirements. Suppliers are keen to sell their own products from abroad rather than localize production of their defence equipment in India. However, offset obligations do allow for some portion of the purchase price for foreign defence equipment to be distributed back into India. Ordinance factories and PSUs have been unable to modernize their facilities and have not kept up with advances in technology.

In terms of the Companies Act, 1956 ("Companies Act"), every shareholder has a right to vote on every resolution placed before the company and his voting right on a poll is in proportion to his share of the paid-up equity share capital of the company. There are essentially two types of resolutions which can be passed at a general meeting of the shareholders of a company - an "ordinary resolution" and a "special resolution." An "ordinary resolution" is a resolution where the votes cast by members in favour of the resolutions exceed the votes cast against such resolution. A "special resolution" is a resolution where the votes cast by the members in favour of the resolution cannot be less than three times the votes cast against such resolution. Generally, matters which are more critical to a company, such as liquidation, merger, etc. are required to be passed by a "special resolution."

With a 26% interest, foreign investors can only have blocking rights with respect to special resolution matters, such as amendment of charter documents, liquidation, mergers, etc. The foreign investor can exercise control only if it has more than a 50% stake.

Thus the current defence sector FDI cap of 26%, which provides only blocking rights to the foreign investor, deters original equipment manufacturers from investing in India or from transferring technology to the relevant Indian partner. To increase foreign participation, increasing the FDI cap to at least 51% will serve to attract foreign investment.

The stated objective of the Government of India has been to “reverse” this trend of import dependence and ensure that India can meet at least 70% of its defence requirements through indigenous manufacturing. Given the capital-intensive nature of the defence industry, it may take a long time for domestic companies to acquire modern technologies without the additional capital provided by FDI. As a result, manufacturing within India, with full transfer of state of the art technology, is preferable to importing the equipment from foreign companies. Additionally, in view of the significant amount of defence spending, decreasing the import dependence on foreign equipment suppliers would also amount to large savings in foreign exchange for India.

### *Concerns Regarding Increase in FDI Cap*

The Discussion Paper acknowledged the special sensitivities inherent in the defence sector, and accordingly recommended that the views of the Ministry of Defence be taken into consideration prior to any policy being passed by the DIPP. However, according to certain news reports, the DIPP’s proposal has not been viewed favourably by the Ministry of Defence. In its Discussion Paper, the DIPP specifically noted the following concerns regarding a potential increase in FDI cap in the defence sector:

- Ordnance factories and defence PSUs may be rendered obsolete in the face of competition from global weapons manufacturers;
- Ownership and control of firms operating in a critical and highly sensitive industry may be passed on to foreign hands, thereby increasing India’s dependence on foreign investment and foreign companies in relation to manufacture its defence equipment;

- Availability, reliability and maintenance services of supplies during times of war;
- Transfer of critical equipment, design or source code to other players / countries which may have adverse interests to India;
- Export of defence equipment manufactured in India to other players / countries which may have adverse interests to India; and
- Internal security of particular factories or other locations where arms or ammunition are manufactured.

### **The Discussion Paper addressed each of these concerns:**

- The ordinance factories and defence PSUs currently lag behind the technology curve and have proved inadequate in meeting India’s defence requirements. Collaborations with domestic manufacturers with FDI may ensure modernization of the ordinance factories and defence PSUs. The Discussion Paper also notes that in areas where the ordinance factories and defence PSUs are capable of meeting the requirements, the government need not award licenses in such areas.
- In view of the widespread dispersion of weapons manufacturers across nationalities, the danger of dependency on a particular nation’s weapons manufacturers may be unfounded.
- Availability, reliability and maintenance services of supplies could be ensured by the Government’s retention of certain expropriation powers in cases of national security.
- The danger of transferring critical information to other players / countries poses greater concern in the case of importation from foreign suppliers, because the Government is comparatively better suited to controlling FDI with respect to domestic manufacturers than importation from foreign suppliers.

- The danger of exporting equipment to entities inimical to Indian interests may be addressed by export controls, which a number of Western countries such as the United Kingdom utilize.
- Internal security concerns may be addressed by ensuring adequate safeguards and security requirements.

### *The Way Forward: Suggestions on the Policy Change*

The Parliamentary Standing Committee on Defence on “Indigenisation of Defence Production – Public Private Partnership” expressed the view that the possibility of increasing the FDI limit to 49% in the defence sector should be examined by the Government after keeping in mind the fact that national interest must reign supreme in defence-related matters. A number of developed nations such as the United States and the United Kingdom have permitted FDI of up to 100% and have included adequate safeguards to address their national security concerns. Safeguards which are being used by various countries include:

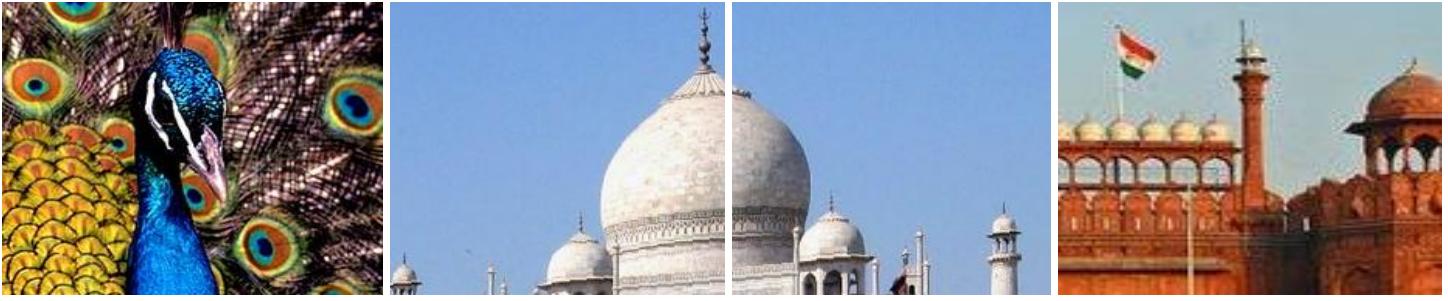
- all procurements from the U.S. defence industry must be approved by the U.S. Government and published if the procurement value exceeds a defined amount;
- Foreign military sales in the U.S. are routed through the U.S. Department of Defense itself;
- In the US, industry bodies provide for a forum for exchange of information between the government and private participants and

advise the government on national security related issues concerning the defence industry;

- Production and technical certifications and standards for the defence industry are used by various countries including India; and
- Satisfaction of offset obligations through FDI by foreign firms enhances the domestic defence industry. A vibrant domestic defence industry reduces dependence on foreign suppliers and creates employment for the domestic population. Many countries including Australia, Austria, Belgium, Brazil and Canada have offset policies (though the US is formally against any offset policies and labels it as an unfair trade practice).

It is essential for India to revise its FDI policy by increasing the FDI cap to attract greater foreign investment in the defence sector. It would be an ineffectual policy change, if upon liberalization of the sector, the Government were to limit the FDI cap to 49%, because the main reason for lack of FDI in the sector has been that a relatively low percentage holding does not provide adequate amount of control.

*Vandana Shroff is a Senior Partner and Ashish Jejurkar is a Partner at Amarchand & Mangaldas & Suresh A. Shroff & Co. and they specialize in corporate law, mergers and acquisitions, and private equity. They may be contacted by email at vandana.shroff@amarchand.com and ashish.jejurkar@amarchand.com.*



## THE BOEING DEAL AND THE FUTURE OF U.S.-INDIA DEFENSE TRADE

*Amy Hariani*

**O**n June 6, 2011, the Government of India announced its purchase of ten C-17 Globemaster III airlifters from Boeing for \$4.1 billion. Some hail this announcement as a pivotal turning point in the U.S.-India defense trade relationship, while others say that it is simply one more step in the right direction for increasing defense trade ties between the two nations. Like those in the latter group, Timothy J. Roemer, U.S. Ambassador to India, said, “[f]or India, the [Boeing] sale adds strategic and humanitarian muscle to its defense needs” and that the sale will sustain 23,000 jobs in America. Ambassador Roemer also indicated that the Boeing contract would strengthen political and economic ties between the United States and India and lead to enhanced cooperation on security issues.

Nothing is more telling of a deep and solid partnership than the sharing of defense technology and sale in defense goods. But the strategic and economic alliance that the United States has enjoyed with India is a relatively new relationship and it will surely continue to experience setbacks as the relationship matures. As the friendship between the United States and India matures, and the U.S.-India defense trade grows, it is important to understand the objectives of both countries and how each ally might fulfill the other’s expectations for defense security and cooperation.

### THE TURNING POINTS IN THE U.S.-INDIA DEFENSE TRADE RELATIONSHIP

In order to understand the current relationship between the United States and India, it is critical to examine the historical relationship between the two countries. During the Cold War, India aligned itself with Russia and the United States aligned itself with Pakistan. In 1991 these alliances began to shift with the

easing of India’s foreign investment restrictions and the end of the Cold War. Throughout the 1990s, India experienced impressive economic growth as New Delhi continued to loosen restrictions on foreign trade and investment. Many credited Finance Minister Manmohan Singh for India’s dramatic growth during this time. As a result of his financial reforms, Mr. Singh became popular with the Indian electorate and was elected Prime Minister in 2004 as a member of the popular Congress Party.

In the early 2000s, Prime Minister Singh and President George W. Bush were quick to form a friendship, especially as President Bush was looking for allies in the region to assist with the U.S. War On Terror and to counter the ever-impending economic threat of China. U.S.-India relations continued to grow and, by July 2005, Prime Minister Singh and President Bush concluded a global partnership and framework agreement to share U.S. nuclear technology. The U.S.-India Civil Nuclear Cooperation Agreement, or the 123 Agreement as the agreement is sometimes called, was seen as a watershed agreement and a turning point for U.S.-India defense trade. After completing the 123 Agreement, the United States and India continued to deepen their friendship and reliance on each other. India wanted access to nuclear technology, and the U.S. wanted to sell it to India. Although India promoted the 123 Agreement as a means of meeting the country’s substantial energy needs, India was simultaneously complaining to the United States that it also was concerned about its security, particularly with respect to nearby neighbors China and Pakistan.

President Barack Obama continued to deepen the U.S.- India defense trade relationship by visiting India in the first half of his current term. During his November 2010 visit, the U.S. President announced his

plans to boost trade with India. In so doing, President Obama said he would make “‘fundamental reforms’ to the export controls that guide trade between the two countries...[including] removing several Indian space and defense companies from the entities list, which identifies firms that manufacture products with dual civilian and military purposes and makes it more difficult for them to trade with the United States.” President Obama’s announcement thus concluded another turning point in the U.S.-India defense trade relationship.

To facilitate increased defense trade with India, the U.S. Department of Commerce announced in January 2011 that it was easing export controls on U.S. goods to India by issuing a regulatory Final Rule. The stated objectives of the Final Rule were to realign U.S. export policy toward India to reflect the strategic partnership between the two countries and to expand U.S.-India cooperation in civil space, defense, and other high-technology sectors. Among the changes made in the Final Rule were to remove nine Indian space and defense organizations from the Department of Commerce’s Entity List (a list of foreign end users involved in proliferation activities). Coincident with the issuance of the Final Rule, Commerce Under Secretary Eric L. Hirschhorn stated that the United States would support India’s full membership in the four multilateral export control regimes: the Wassenaar Arrangement, the Nuclear Suppliers Group, the Australia Group, and the Missile Technology Control Regime. By February, 2011 it appeared that there were few obstacles that could stop the growth of the U.S.-India defense trade.

On April 28, 2011, however, the relationship that was otherwise humming along was provided a jolt when the Government of India decided to rule out both of the U.S. companies (Boeing and Lockheed Martin) competing for an \$11 billion fighter-jet supply contract for the Indian Air Force (IAF Contract). The exclusion of the U.S. companies from the \$11 billion deal – and subsequent awarding of the IAF contract to an EU-based defense supplier – was widely viewed as a setback for the Obama Administration and the ability

for India to create a truly meaningful defense relationship with the United States. Ambassador Roemer went so far as to announce that he would resign his post the day after the United States lost its bids to the IAF Contract. While Ambassador Roemer stated that he was leaving India for personal reasons, many in the defense community linked the two events as more than a coincidence. Whatever disappointment existed at the time of the IAF Contract announcement, however, quickly disappeared. In fact, shortly after the IAF Contract announcement, Boeing admitted that it still believed that India presented enormous market opportunities.

Boeing was right, because on June 6, 2011 the U.S. defense trading relationship with India regained its footing when the Government of India awarded Boeing the C-17 Globemaster III contract. Many hailed the contract as evidence that the United States and India were on the path to long-term trade in defense goods. Ron Somers, president of the U.S.-India Business Council (USIBC), stated that the contract was a “testament to India’s appreciation of U.S. technology and confidence in the U.S. as a long-term defence sales partner. This largest-ever Indian purchase of U.S. defence technology, we hope, will be just the beginning of much more to come.” According to news reports, “[o]nce these planes are delivered, India will possess the largest fleet of Globemaster III after the United States.” Ambassador Roemer stated that the deal would “further strengthen the strategic ties between the U.S. and Indian armed forces, leading to enhanced cooperation for a safer and more secure region and world.”

### **FOR GEOPOLITICAL AND FINANCIAL REASONS, TRADE IN DEFENSE GOODS IS IMPORTANT TO INDIA AND THE UNITED STATES**

While commercial trade between the United States and India has progressively improved since the opening of India’s economy in 1991, trade in defense goods signals a new turning point in the U.S.-India partnership. The Boeing C-17 aircraft deal represented the first U.S. military aircraft purchase in India’s

history. Although India would like access to enhanced military technology, the United States must remember that India cautions itself against aligning too closely with any single country. In addition, India is currently negotiating a free trade agreement with the European Union and announced on May 12, 2011 that it was entering into Free Trade Agreement negotiations with Australia. Although Free Trade Agreements with the EU and Australia would likely require several years to conclude, these negotiations should signal to the United States that deepening U.S.-India ties run parallel to India's efforts to develop defense cooperation and trading partnerships with other allies around the world. Therefore, the United States must remember that while India may want defense technology, it does not necessarily need it from the United States.

India must also recognize that the United States demands certain expectations from its relationship with India. The United States is relying heavily on India to fulfill President Obama's National Export Initiative to double U.S. global exports within five years. Consequently, India should recognize that the United States is relying on India's promise to boost U.S. exports by purchasing defense and nuclear items from the United States. India should understand that if it fails to perform on its promises, the United States may instead look to other developing nations to promote U.S. exports. India's delay in living-up to its promises is now evident by India's nuclear liability law, which has effectively stalled the sale of civilian nuclear technology to India and rendered the 123 Agreement meaningless at the moment. India should seek to understand the U.S. motivations in partnering with India and be honest about its ability to fulfill the American expectations of that partnership.

### **THE U.S.-INDIA DEFENSE TRADE RELATIONSHIP WILL CONTINUE FOR MANY YEARS TO COME**

The trading relationship between the United States and India will continue to grow and prosper as the countries further develop their relationship. But India will not rely on the United States alone to

support its defense needs. India will use a multi-ally approach to build its defense arsenal by relying on the United States, the European Union, and other trading partners. As long as the United States understands that India is not going to align itself only to the United States and that India will continue to look out for what is best for India, the trading relationship in defense goods between the two countries will grow and prosper, albeit with setbacks along the way, for years to come.

*Amy Stanley Hariani is an associate in the international trade group at King & Spalding LLP, with a particular focus on trade issues with India. She advises in import and export compliance, trade remedies, market access issues, and cases before the World Trade Organization. She can be reached at [ahariani@kslaw.com](mailto:ahariani@kslaw.com) or [amyjstanley@gmail.com](mailto:amyjstanley@gmail.com).*



## PUBLIC TENDER PROCESS PROTEST IN INDIA AND DEFENCE PROCUREMENT

*Anand S. Dayal*

Defence procurement in India is subject to the legal and regulatory framework governing general public procurement. As a result, governmental procurement processes in India's defence sector must conform to all applicable public procurement laws, in addition to the guidelines set forth in the *Defence Procurement Procedure, 2011*, issued by India's Ministry of Defence. A key measure for ensuring transparency and accountability with respect to public procurement is an effective and independent administrative mechanism whereby participating vendors may challenge the lawfulness of the bid solicitation, review and/or award processes. For example, the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) provides for such a review process, and has served as a guide to legislative enactments in other developing countries. Given the absence of this administrative mechanism under Indian law, the judicial system remains the only viable avenue for relief for vendors seeking to challenge the conduct or outcome of the Indian public procurement process.

This article describes the prevailing standards for judicial review of public procurement decisions. An analysis reveals that the available grounds for setting aside a procurement decision — as set out by the Supreme Court of India — are fairly narrow, thereby leaving disappointed bidders with little hope for mounting a successful challenge to a procurement award. However, bidders tend to view procurement litigation as an effective means of delaying a final award so as to allow the unsuccessful bidder to pursue a second chance at the tender process. Assuming bidders can make out a prima facie case of malfeasance with respect to the tender process, bid protest litigation can be effective because lower courts tend to grant a plaintiff-bidder's request for an interim *status quo* order

whilst the facts are established, even where allegations of process malfeasance or other misconduct are built upon scant or questionable evidence.

### IMPORTANCE OF PUBLIC PROCUREMENT

The pace of global investment and trade with India is accelerating, particularly in the areas of defence and homeland security. India is viewed as a particularly attractive market in the Obama administration's National Export Initiative, which aims to double U.S. exports over the next five years. Since defence procurement almost exclusively involves purchases by state owned entities, such as public sector undertakings, ordinance factories and procurement wings of the armed services, businesses in the defence and homeland security sectors are, and will increasingly be, involved in the public procurement process.

### UNIQUE CHALLENGES POSED BY DEFENCE PROCUREMENT

Defence procurement presents certain unique challenges when compared to other categories of public procurement. For example, technical specifications — particularly for weapon systems — often constitute the key determining factor in awarding a defence procurement contract. Conventional wisdom is that once the specifications are written, the "game" is almost over. As a result, bid protests in the defence procurement area tend to place greater emphasis on the early stages of the procurement process, rather than simply the final outcome. Claimants typically allege that the ground rules governing the tender process were somehow unfair to the complainant. A typical "pre-award" protest might involve a claim that some aspect of the solicitation process effectively disadvantaged the claimant in its ability to compete

fairly for the contract. Technically, of course, such protests are almost always “post-award,” in the sense that claims tend to be filed only after the bidder is disqualified, or a competing firm is identified as the lowest bidder once the financial bids are made public.

## **RULES GOVERNING PUBLIC PROCUREMENT**

Defense procurement in India is centralized and conducted exclusively by the Ministry of Defence. General public procurement, in contrast, is decentralized, and most state, central and public sector agencies have their own procurement departments. Different procurement practices are applied at the central level and at the state level, and by public sector agencies and enterprises wherein the government owns a majority interest.

Selling to the Indian governmental or public sector often proves to be a frustrating experience for foreign suppliers. Indian governmental procurement practices routinely lack transparency and standardization. Moreover, there is no comprehensive law exclusively addressing public procurement in India. However, public procurement processes are subject to, and required to comply with, a variety of individual rules and directives issued by the central government, including the following:

- General Financial Rules, 2005 (GFR), which sets out general rules and procedures for financial management, procurement of goods and services, and contract management;
- Delegation of Financial Powers Rules (DFPR);
- Manual on Policies and Procedures for Purchase of Goods, issued under the GFR;
- Guidelines on transparency and objectivity in public procurement issued by the Central Vigilance Commission (CVC); and
- The Defence Procurement Procedure, 2011, and related manuals.

Public procurement bidding in India is generally divided into two stages, as bidders are invited to submit separate technical and financial-related bids (see GFR Rule 152). Technical bids are evaluated first, and are used solely to determine whether the bidder

qualifies to continue the process. Once qualified bidders are short-listed, the financial bids are opened in the presence of all short-listed bidders, and the contract is awarded to the qualifying bidder with the lowest financial bid (see GFR Rule 160). The two-stage bid system is used even in more complex and less well-defined procurement processes, such as the award of concessions or the divestment of public sector undertakings.

## **CHALLENGING THE PROCUREMENT AWARD (BID PROTEST)**

India does not offer an established set of rules or a specialized tribunal for purposes of addressing protests and challenges to the procurement process. Due to the absence of an effective and independent administrative bid-protest process in India, bidder complaints are rarely addressed in a timely manner. A specialized administrative and/or judicial process – modeled along the lines of India’s income tax appeal process, for example – would likely offer timing efficiencies and increased consistency of adjudication with respect to similar claims.

For vendors seeking to challenge a procurement decision, the only meaningful avenue for redress is to petition a court for judicial review of the procurement decision on grounds that the procurement process was not conducted lawfully. Generally such claims may be filed only after specific action is taken by the procuring agency, such as announcing the short-list of qualified bidders, or opening the financial bids and identifying the lowest bid. A court will require as a threshold matter that there be such a specific administrative action giving rise to an actual (not hypothetical) case or controversy. The option of approaching the court prior to short-listing the qualified bidders or revealing the financial bids is generally not available. The inability to file such “pre-award” relief claims — for example, on grounds that the rules of procurement are unfair to the complainant — can prove particularly frustrating in defence procurement, where challenging the specifications used for the procurement is often a key ground of the bid protest.

Besides approaching the court, disappointed bidders can, of course, seek to resolve their concerns with key officials of the procuring agency and seek

their intervention. Such attempts at privately negotiated relief rarely lead to a satisfactory resolution. Top officials of the relevant agencies typically prefer not to involve themselves in a procurement dispute out of fear of allegations of favoritism toward a particular bidder. Their inclination is to allow the dispute to be settled in a judicial forum, as the judicial process insulates officials from allegations of misconduct if their award decision is later questioned. On occasion, for less critical matters, the procurement agency may rely on a formal legal opinion of outside counsel certifying, for example, the validity of a decision to disqualify a particular bidder, or some other procurement-related action.

## JUDICIAL REVIEW OF PROCUREMENT DECISIONS

Given the lack of an administrative review mechanism, challenges to a procurement decision are brought by filing a petition in the jurisdictional state high court. The legal basis for such petitions lies in Article 14 of the Constitution of India, which prohibits the state from denying to any person equality before law and equal protection of the laws. The relief sought by the challenging bidder is typically an interim order staying the award of the contract or continuation of the project and, ultimately, a plea to set aside the award (if made) and require a re-tender. Often bidders who have been disqualified in the qualification (first) round will challenge their disqualification on the grounds that it was improper.

### *Judicial review of administrative action generally*

There is no statute governing the judicial review of administrative action, including, for example, defense procurement decisions. India lacks a specific legislative enactment that sets forth the grounds, scope and standards of judicial review of administrative action, such as the United States Administrative Procedure Act. Accordingly, the law governing the judicial review of administrative actions has evolved through judicial pronouncements on constitutional doctrine, such as equality before law, protection of fundamental rights and separation of powers. The foundational pronouncement on the appropriate level of judicial review of the government's exercise of contractual powers is the Supreme Court's decision in *Tata Cellular*

*v. Union of India*, AIR 1996 SC 11. In *Tata Cellular*, the court held that "shortly put the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (1) Illegality: This means the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (2) Irrationality: i.e., the so-called *Wednesbury* principle of unreasonableness (akin to inquiring whether the administrative action has some arguably rational basis; if so, it is acceptable).
- (3) Procedural impropriety (or, as described by the court in *Siemens Public Communications Networks v. Union of India*, an "infirmity in the decision making process."

The court went on to clarify that "[t]he above are only the broad grounds but does not rule out addition of further grounds in course of time." Later decisions have largely followed the *Tata Cellular* decision, and have declined to expand the scope of judicial review.

### *Principles of judicial review of procurement decisions*

Applying the foregoing principles of judicial review of administrative action in the context of a challenge to public procurement decisions, the court in *Tata Cellular* set forth the following six principles:

- (1) The modern trend points to judicial restraint in administrative action;
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made;
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible;
- (4) The terms of the *invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. More

often than not, such decisions are made qualitatively by experts;

- (5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*; and
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Later decisions of the Supreme Court have consistently applied the above principles in reviewing procurement decisions. See, e.g., *Siemens Public Communication Networks v. Union of India*, AIR 2009 SC 1204. Also the court has affirmed that the same principles apply where the grant of a licence is challenged (rather than the award of a tender). *Raunaq Int'l Ltd. v. IVR Construction Ltd.*, AIR 1999 SC 393.

#### *No relief without a showing of mala fide and safeguarding public interest*

As the foregoing principles have been applied over time, what has crystallized is that two elements must be satisfied in order for a court to intervene in a public procurement decision:

- (1) there must be a showing of *mala fide*, ulterior motive, or favoritism ("when there has been no allegation of malice or ulterior motive and particularly where the court has not found any *mala fides* or favoritism in the grant of contract," it is not permissible for the court to intervene. *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.* (1997) 1 SCC 738); and
- (2) there must be a substantial public interest to justify intervention by the court in the interim.

Setting aside the award of a contract simply because there would be a saving of public money, for example, is not justified. *Sorath Builders v. Shreejirupa Buildcon Limited*, Civil Appeal No. 1127 of 2009, SCT (2009).

With respect to the grant of interim relief, which is also governed by the Specific Relief Act, 1963 and the Code of Civil Procedure, 1908, the court will weigh the balance of convenience, public interest and the financial import of the transaction. Furthermore the party seeking interim relief will be required to provide security for any increase in costs as a result of the ensuing delay and any damages suffered by the opposite party in consequence of an interim order. The Supreme Court has required that "[i]n granting an injunction or stay against the award of a contract by the government, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. Furthermore, "any interim order which stops the project from proceeding further must provide for reimbursement of costs to the public in case the litigation fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made in the interim order, the interim order may prove counter-productive." *Raunaq Int'l Ltd. v. IVR Construction Ltd.*, AIR 1999 SC 393.

#### *Lower courts more willing to intervene*

Challenges to public procurement awards and the grant of some form of interim relief by the courts are common. Although the law as laid down by the Supreme Court permits judicial intervention in public procurement decisions only in relatively narrow circumstances, lower courts have been less restrained in granting interim *status quo* orders, which are known to be disruptive and costly for defendants. Also challengers at the pleading stage frequently file claims alleging willful misconduct and unlawful influence in the procurement process, despite the absence of credible evidence to substantiate the claims. In such situations, it is not uncommon for a lower court to issue a *status quo* order pending a limited hearing on the merits, which hearing can take weeks or months to occur. The Supreme Court noted that "it is unfortunate that despite repeated observations of this court in a

number of cases such petitions are being readily entertained by the High Court without weighing the consequences." *Ranuaq Int'l* cited above. As a guiding principle, the Supreme Court suggested the following maxim "if the government acts fairly, though falters in wisdom, the court should not intervene."

*Anand S. Dayal is a partner with Koura & Company, Advocates and Barrister, based in New Delhi, India. Anand advises US and other multinational companies on their activities in India, including on public procurement. He can be contacted at [dayala@vsnl.com](mailto:dayala@vsnl.com) or [adayal@kouraco.com](mailto:adayal@kouraco.com).*



## DEFENCE PROCUREMENT POLICY 2011: A WORK IN PROGRESS

*Major (ret'd) Guneet Chaudhary*

The Indian Armed Forces fought the 1962 Indo-China War with World War II era weapons systems while Chinese soldiers were equipped with the latest in automatic weaponry. Soon thereafter, India turned to the U.S.S.R. for modern weaponry. Western countries were not keen on selling weapons to India because of its close ties to the Eastern Bloc. In any event, India could not afford the more expensive western weapons.

Today, of course, India is not viewed suspiciously by the West. And as India experiences strong economic growth, its defence budget has also grown, enabling the Indian Armed Forces to procure advanced, reliable, and technologically sophisticated western weapons systems. The Government of India has increased its defence budget by 11 percent in 2011-12, to Rs 164,415 crore (nearly \$36 billion), to fuel the rapid modernization of the Army, Navy, and Air Force. Last year, the defence budget increase was 4%. According to KPMG, deals worth US \$24.66 billion have been signed recently by the Indian Ministry of Defence ("MoD") with global integrators, such as Tata and the European Aeronautic Defence and Space Company (EADS), and other deals valued at US \$41.99 billion are being negotiated.

There are a number of reasons why the Indian government has decided to modernize its defence capabilities. Mainly, Russia has failed to keep its promise to supply weapons systems and spare parts in a timely manner. Since the Kargil war, India has been in desperate need of a weapons system upgrade and the Indian government has decided to embark on a major defence acquisition program, aimed at adopting advanced technology. According to Retired Brigadier Gurmeet Kanwal who heads the government-funded Centre for Land Warfare Studies, "China is the real

long-term challenge on the strategic horizon and India's security planning is geared toward it." Our oldest rival and neighbour Pakistan, which has nuclear weapons like India, is also a factor in strengthening defence planning.

The Indian Army will need to upgrade its artillery, tanks, missiles, ammunition, and other equipment. The Indian Air Force desperately needs to upgrade its ageing and obsolete fleet of MIG 21 fighter jets. It has also introduced plans to modernize its airfields with sophisticated radar and newer avionics. The Indian Navy seeks more stealth features, including an Air-Independent Propulsion (AIP) system, and land attack capabilities in new submarines. The Navy has approached French ship builders for sophisticated combat management systems for the Scorpene submarines being built in India.

The government has also moved ahead with a \$10.5 billion fighter jet contract, one of the largest acquisitions in history. India aims to introduce surveillance helicopters, transport aircraft, and submarines to expand its defences in the air as well as in the Indian Ocean. India is set to place a follow-up order for three more Airborne Warning and Control Systems ("AWACS"), and is seriously considering American Gulfstream, Brazilian Embraer, and European Airbus. According to some sources, the Indian Air Force has selected the C-17 as the new heavy lift aircraft and will be placing an initial order of 10 aircraft through the US Government's Foreign Military Sales ("FMS") route. The MoD is considering the proposal and the first aircraft may be delivered three years after a contract is executed.

As China designs a stealth aircraft to rival the US F-22, India is gearing up to overhaul the Air Force of its Soviet era planes. The Saab JAS-39 Gripen was competing with the Boeing F/A-18 Super Hornet, Dassault Rafale, Eurofighter Typhoon, Lockheed F-16, and Russia's MiG-35 to win a fighter jet contract, which officials say may eventually lead to the purchase of up to 200 aircraft. On 27th April 2011, the Eurofighter Typhoon and Dassault Rafale had been shortlisted for the contract. On the other hand, the Indian Navy has chosen to rely on indigenous products and has its own design bureau. India, which long focused its military planning on Pakistan, is also determined to modernize its Navy to counter China's influence in the Indian Ocean through its "string of pearls strategy" of developing a network of friendly ports from Gwadar in Pakistan to Hambantota in Sri Lanka.

The MoD has implemented a policy aimed at reforming defense procurement in order to retool its military more effectively and efficiently. On January 6th, 2011, the MoD released the Defence Procurement Procedure ("DPP"), which supersedes DPP 2008 and DPP 2009. The objective behind continuously updating procurement procedure, as stated in DPP 2011, is to demonstrate "the highest degree of probity and public accountability, transparency in operations and impartiality as well as free competition." The main aim of DPP 2011 is the "expeditious procurement of the approved requirements of the armed forces in terms of capabilities sought and the time frame prescribed by optimally using the allocated budgetary resources."

One of the major changes affects offsets, a special form of counter-trade in relation to the sale of defence equipment to the Government, where a foreign vendor reinvests or undertakes specified programs with a view to compensate or assist the buyer to generate benefits to the buyer's country's economy. The offset obligation has been increased to 30%, making it more favourable to Indian stakeholders and industry. Under DPP 2011, internal security, civil aerospace, and training services, including flight simulators, are now included in the offset policy.

The offset policy will benefit the domestic manufacturing and aerospace sectors.

The revised Policy intends to expand India's defence industrial base, encourage indigenous production and reduce imports enabled through the Policy's simplified procedures. Ultimately, the offset policy aims to promote incremental changes in Indian defence manufacturing capabilities and investment in defence manufacturing, export of Indian defence equipment, and investment in defence research and development. MoD has taken into account the interests of stakeholders and has enabled Indian industry to take full benefit of the capital procurements in defence by exploitation of its offsets clause.

The government aims to set into motion a modernization program of its defence capabilities due to many reasons. Mainly, Russia has been failing in keeping its promises of timely supply of weapon systems and spare parts. Since the Kargil war, India is in desperate need for an upgrade. The Indian government needs to embark on a major defence acquisition program, aimed at adopting advanced technology. The Indian Navy and Coast Guard needs ramping up and therefore modernizing the country's maritime forces should be primary. The Indian Army requires upgrades in its artillery, tanks, missiles, ammunitions and other such equipments. The IAF desperately needs to upgrade from the ageing and obsolete MIG 21 to introducing plans for modernized airfields with sophisticated Radars, DF and newer avionics. The Navy is looking for more stealth features, an Air-Independent Propulsion (AIP) system, and land attack capabilities in the new submarines. The AIP would help increase the submergence of submarines by 3-4 times thereby making them hidden and more lethal. The Indian Navy has approached French ship builders for such sophisticated combat management system for the Scorpene submarines being built in India.

KPMG research indicates that deals worth US\$ 24.66 billion (approximately) have been signed by the Indian MoD with global integrators such as Tata and European Aeronautic Defence and Space Company (EADS) in the past number of months and another US\$ 41.99 billion (approximately) deals are in the process of getting signed.

The objective behind the continuously updated procurement procedure as mentioned in the forewords of the DPP 2011 is to demonstrate "the highest degree

of probity and public accountability, transparency in operations and impartiality as well as free competition.”

The scope of the defence procurement procedure has been enlarged since 1992 through amendments in 2003, 2005, 2006, 2008, 2009 and now 2011. The DPP 2011 was released in January 2011 and has been expanded to include “civil aerospace, internal security, training within the ambit of the eligible products and services for discharge of offsets obligations.” This policy is a stepping-stone for the manufacturing and the service industries as well as the IT sector. The main aim of this policy as mentioned in its forewords is the “expeditious procurement of the approved requirements of the Armed Forces in terms of capabilities sought and the time frame prescribed by optimally using the allocated budgetary resources.”

The offset policy aims at promoting incremental changes in Indian defence manufacturing capabilities and investment in defence manufacturing, export of Indian defence equipment, and investment in defence research and development.

The DPP 2011 has been changed in many respects from the DPP 2008 and has incorporated amendments from that recommended in 2009. Certain amendments issued to DPP 2008 in the year 2009 have been incorporated in DPP 2011.

One of the most significant changes introduced is with respect to Off Sets expanding its scope by permitting investment in “Civil aerospace”, “internal security” and “Training” within the ambit of eligible products and services for discharge of offset obligation.

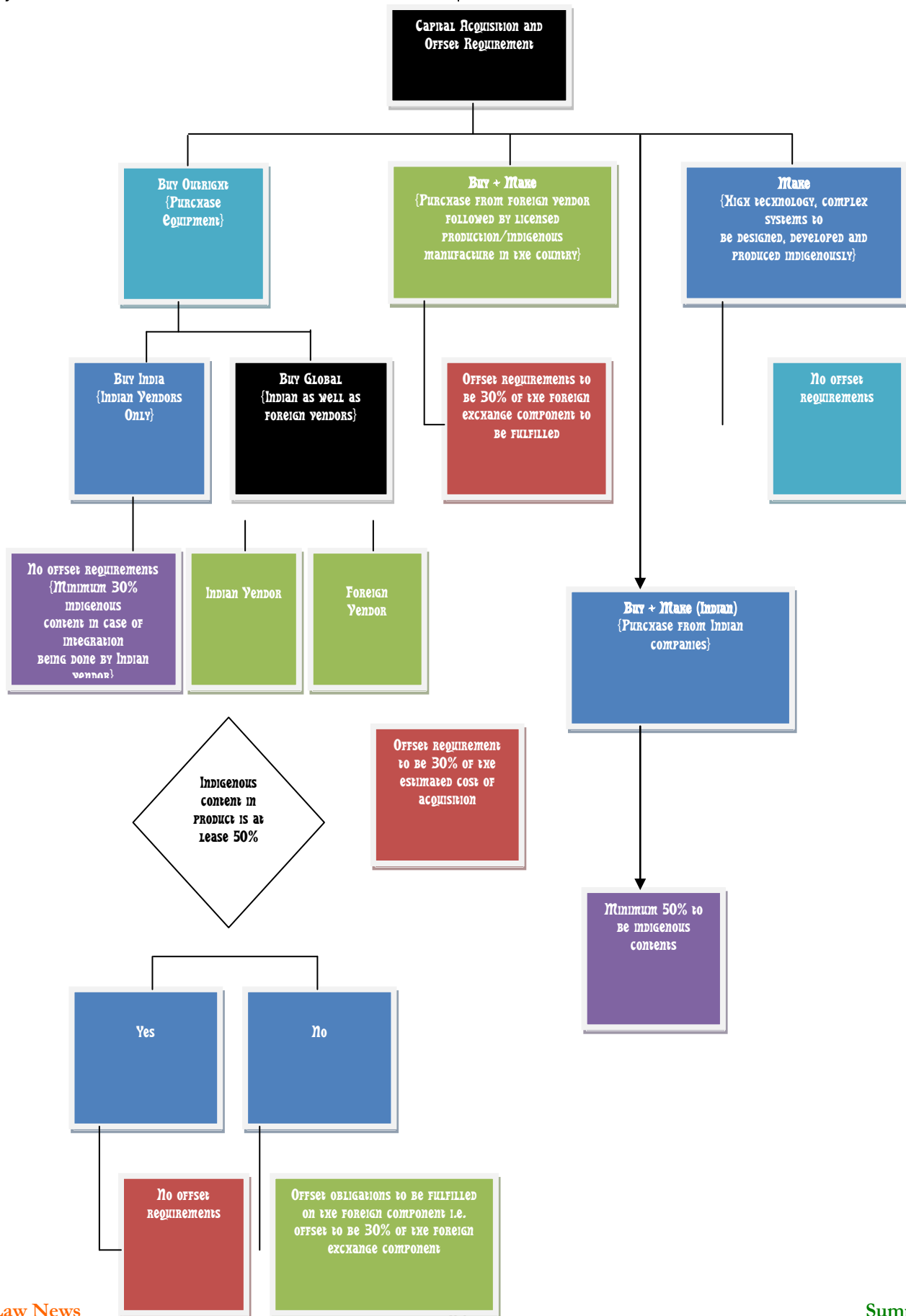
There have also been additions in the Appendix and Annexure to DPP 2011, including amendments related to Request for Proposal (“RFP”), Transfer of Technology (“ToT”) for Maintenance Infrastructure, Technical Oversight Committee (“TOC”), Trial Evaluation, Exchange Rate Variation (“ERV”), Performance and Warranty Bond, and Fast Track Procedure, among others. The new procedure establishes a more formalized procurement process, particularly as to the contracting mechanism for the ship building industry.

The introduction of a “Buy and Make (Indian)” category is a positive step to encourage the participation of the Indian private industry in defence acquisitions. Under DPP 2011, As provided by the policy, the acquisitions fall under four categories: (i) are covered under the “Buy,” (ii) Decision, “Buy and Make,” (iii) decision, “Buy and Make (Indian),” decision and (iv) “Make.” decisions. The flow chart below describes the capital acquisition and the offset requirements:

“Buy” means an outright purchase of equipment. Based on the source of procurement, acquisition under this category is subclassified as “Buy (Indian)” or “Buy (Global).” “Indian” means Indian vendors only, and “Global” mean foreign as well as Indian vendors. “Buy Indian” must have at least 30% indigenous content if an Indian vendor is integrating the systems.

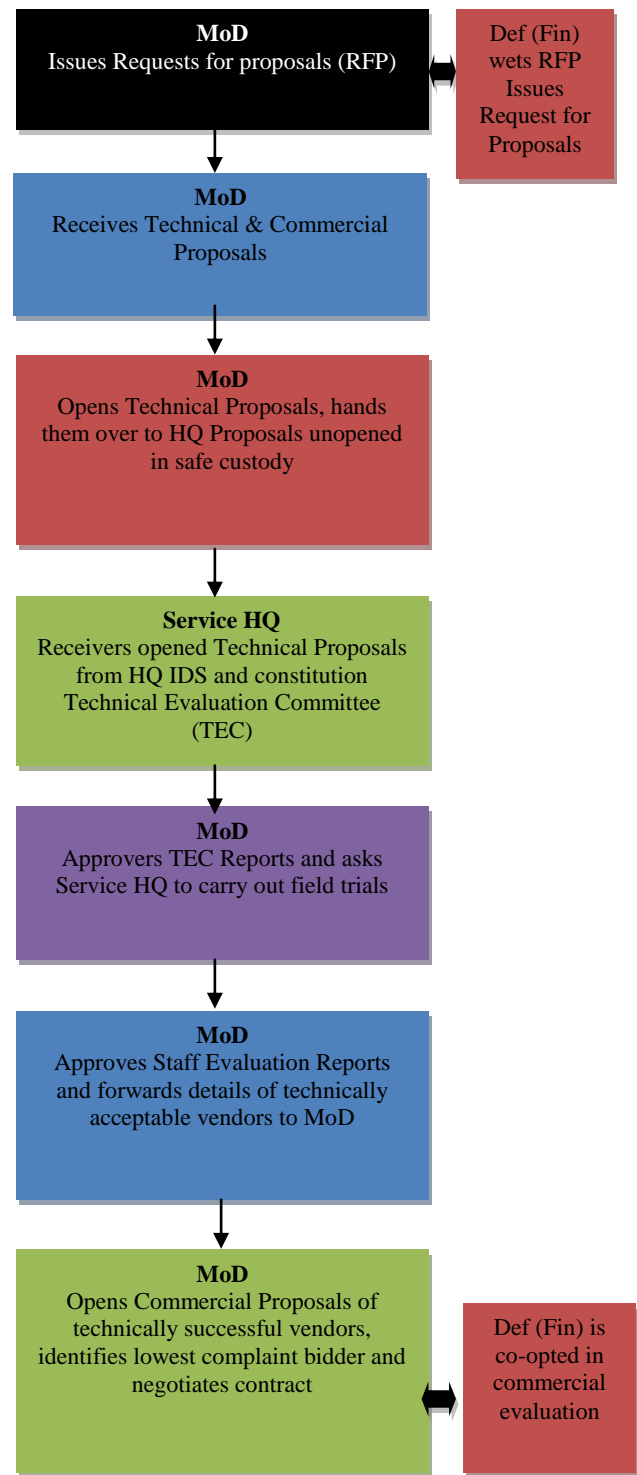
An acquisition under the “Buy & Make” category means a purchase from a foreign vendor followed by licensed production or indigenous manufacture in the country. An acquisition under the “Buy & Make (Indian)” category means a purchase from an Indian vendor, including an Indian company forming a joint venture or establishing a production arrangement with an original equipment manufacturer, followed by licensed production or indigenous manufacture in the country. “Buy & Make (Indian)” must have at least 50% indigenous content on a cost basis. An acquisition under the “Make” category includes high technology complex systems to be designed, developed, and produced indigenously.

The following flow chart describes the capital acquisition and offset requirements under each category:



Important commercial changes have also been made under DPP 2011. For instance, the Exchange Rate Variation clause has now been made applicable to all Indian vendors when they compete with their foreign counterparts under the “Bio-Global” category.

DPP 2011 may be faulted for its failure to more effectively address institutional and human resources, which are crucial for an efficient acquisition process. An acquisition department has been set up to specifically handle capital procurements and has vital acquisition functions, such as the formulation of qualitative requirements and post-contract monitoring. The Comptroller and Auditor General of India (CAG), in a 2007 report pointed out systemic weaknesses in Army acquisitions, including *inter alia*, “delays” in acquisition; lack of effective coordination among the services in procurement of common items/capabilities; “major drawbacks” in the formulation of QRs; and, deficiencies in the process of technical and trial evaluations. Reiterating the Group of Minister’s (GoM’s) recommendation, the Comptroller and Auditor General of India (CAG) has suggested, “an integrated defence acquisition organization . . . incorporating all the functional elements and specialisation involved in defence acquisition under one head.” Nearly a decade has passed since the GoM made its recommendation and a few years since the CAG made its observations, yet the successive DPPs, including the 2011 version, have not adopted these recommendations. The MoD procurement budget is Rs. 43,800 Crores for 2010-2011. This is a huge amount of money requiring cautious expenditure and it is therefore important that a strong acquisition department is formed with an adequate number of professionals with the requisite knowledge in their respective fields. This issue has been ignored by the MoD. Currently, MoD is controlling every stage of the procurement procedure as can be seen in the diagram given below:



The increased categorization of procurement has led to more confusion and difficulties in evaluating a category. Also the offset guidelines in DPP-2011 do not allow the provisions of multiplier and technology transfer through the offset route. There is a probable fear of being dumped with redundant technologies because of the lack of a strong monitoring system.

These shortcomings need to be overcome soon in order for the offset route to become useful.

The FDI policy also needs to be reviewed so that the “Buy and Make (Indian)” and offset policy is successfully implemented, but a change in foreign direct investment policy is outside the purview of the DPP. Also, there is clear discrimination between the public and private sectors. Therefore, it was important that DPP enunciate uniform set of guidelines for both.

There is no doubt that DPP 2011 has improved on the shortcomings of DPP 2008. Notwithstanding the positive changes, DPP 2011 falls short on several above stated accounts. Nevertheless, the new DPP enhances national procurement competence. India is currently the 10th largest defence spender in the world, with an estimated 2 percent share of global

defence expenditure. Defence will remain a spending priority sector by the Indian Government because of past conflicts and continuing terrorism threats and hostile neighbouring countries.

*Guneet Chaudhary is a senior partner at Jurisconsultus, and a retired Major of the Cavalry Regiment of the Indian Army.*

***Chicago-Area Businessman Found Guilty of Providing Material Support to Pakistani Terror Organization; Acquitted of Conspiracy Charges Relating to November 2008 Terrorist Attacks in Mumbai***

On June 9, 2011, an Illinois federal jury convicted Chicago-area businessman and Pakistani native Tahawwur Rana of one count of conspiracy involving a terrorism plot against a Danish newspaper and one count of providing material support to Pakistan's Lashkar e Tayyba ("Army of the Good"), a U.S.-designated foreign terrorist organization. Rana's conviction on the two counts proved to be a mixed result for U.S. prosecutors, as jurors seemed to doubt testimony provided by the government's key witness and ultimately acquitted Rana on charges of providing material support to Lashkar in connection with the 2008 terrorist attacks in Mumbai, India, that killed more than 160 people, including six Americans. Judge Harry D. Leinenweber presided over the case, *U.S. v. Kashmiri, et. al.*, in the U.S. District Court for the Northern District of Illinois.

U.S. prosecutors focused their case around Rana's association with his childhood friend and fellow Pakistani native David C. Headley (a.k.a. Daood Gilani), a U.S. citizen who performed espionage work for Lashkar and surveyed potential attack sites in Mumbai. As owner of First World Immigration Services ("First World") in Chicago, Rana was alleged to have prepared false immigration documents to facilitate Headley's travels. Jurors also heard testimony that Rana had approved the opening of a First World branch in Mumbai to provide cover for Headley's espionage and surveillance activity. During his five-day testimony, Headley recounted to jurors a meeting in Chicago with Rana in which Headley disclosed his surveillance work for Lashkar and certain espionage instructions he claims to have received from Pakistan's Inter-Services Intelligence Agency (the "ISI"). Jurors found Headley's testimony to be sufficiently credible to find Rana guilty of providing material support to Lashkar as a general matter, but otherwise insufficient to convict Rana of providing direct material support in the Mumbai attacks.

Headley pleaded guilty in 2010 to all twelve federal terrorism charges brought by the United States in connection with his role in the Mumbai attacks and the joint plot with Rana and others to attack the offices of *Morgenavisen Jyllands-Posten*, the Danish newspaper whose publication of cartoon depictions of the Prophet Muhammad in September 2005 sparked a wave of protests and threats of retaliation in and from the Islamic world.

In pre-trial proceedings earlier this year, Rana had notified the Court that any role he may have played in the Mumbai attacks was conducted with "public authority" on behalf of the government of Pakistan and the ISI. Rana told the Court that by acting under the authority of the Pakistani government and the ISI — rather than at the behest of Lashkar — the Court was obligated to grant Rana immunity from criminal prosecution in the United States under the U.S. Foreign Sovereign Immunities Act (the "FSIA"). As evidence for Islamabad's role in the attacks, Rana cited portions of Headley's earlier grand jury testimony concerning the espionage work that Headley suggested had been ordered and supervised by ISI.

Judge Leinenweber granted the government's motion to exclude Rana's public authority defense, holding that neither the FSIA nor any other law cited by Rana permitted a defendant to rely upon the authority of a foreign government agency or official to authorize the defendant's violation of U.S. federal law. In fact, Rana proffered no evidence that he relied on representations from any U.S. federal official — or any party with apparent authority as a federal official — to engage in his alleged illegal activities. In rejecting Rana's defense, the Court further noted as a jurisdictional matter that Rana held his meetings with Headley on U.S. territory in Chicago, rather than in Pakistan or India.

Rana faces up to 30 years in federal prison as a result of his conviction on the two terrorism-related charges.



### ***United States Court of Appeals for the Fifth Circuit Affirms Conviction of H-2B Visa Fraud Perpetrator)***

On March 16, 2011, the U.S. Court of Appeals for the Fifth Circuit affirmed the conviction of Bernardo Pena for his role in a scheme to profit from inducing workers from India to illegally enter the United States through the use of non-immigrant H-2B work visas. *U.S. v. Pena*, 2011 U.S. App. LEXIS 5357 (5th Cir. 2011).

Pena had worked for AMEB Business Group ("AMEB"), a Brownsville, Texas-based company specializing in assisting U.S.-based employers to recruit foreign temporary workers by managing the workers' H-2B visa application process. An H-2B visa permits an alien to enter the United States for up to one year to work in nonagricultural, labor-related jobs, with the possibility of an extension of up to three years.

In April 2005, Viscardi Industrial Services ("Viscardi") hired AMEB to prepare and submit H-2B visa applications for 400 Indian and Mexican workers at a charge of \$1,000 per worker, as Viscardi needed staffing assistance on various construction projects in Louisiana and Texas. AMEB contacted Mahendrakumar Patel ("Mack") to recruit workers in India, and Mack in turn arranged for his relative, Rakesh Patel, to contact Rakesh's brother Naimesh in India to identify particular workers who might undertake such an overseas assignment. Pena traveled to India in late 2005 to assist a group of 300 workers with the application and interview process. While the laborers awaited consular interviews, Pena's boss signed a written agreement with Keith Viscardi (owner of the industrial services firm) and Mack and Rakesh Patel to charge the Indian visa applicants \$20,000 per visa, as opposed to the normal \$500 to \$1,000 cost for such services. Although Viscardi testified that Pena had not been a party to the agreement and that AMEB's owner instructed Viscardi not to discuss the agreement with Pena, the government showed jurors an e-mail message from Pena addressed to Mack in which Pena sought to enter a three-way side deal between Mack, Pena and Pena's twin-brother and AMEB colleague, Alberto, to charge each worker only \$15,000 and cut the others out of the deal.

The U.S. Consulate in Mumbai ultimately approved 88 visa applications before receiving an anonymous fax

stating that the workers had paid large sums of money to enter the United States without the intention of returning. Following a State Department investigation, the Consulate denied all remaining pending applications.

A jury convicted Pena on all 18 counts including conspiracy charges, encouragement and inducement of illegal immigration for private financial gain, and aiding and abetting of money laundering. In upholding Pena's conviction, the Fifth Circuit reasoned that the government had sufficiently met its evidentiary burdens during trial by showing Pena's extensive involvement in the conspiracy through travel to India, signing of H-2B visa applications, and Pena's e-mail correspondence with Mack acknowledging and seeking to manipulate the terms of the scheme.



### ***United States Court of Appeals for the Ninth Circuit Clarifies Scope of "Changed Circumstances" Exception to U.S. Asylum Application Deadline***

On April 5, 2011, the U.S. Court of Appeals for the Ninth Circuit reversed an Immigration Judge's denial of Ayubhai Vahora's asylum application on the basis that Vahora, a Sunni Muslim and native of a predominantly Hindu village in Gujurat, India, had demonstrated sufficiently "changed circumstances" so as to merit a congressionally-designed exception to the normal one-year filing application deadline for refugees seeking asylum inside the United States. *Vahora v. Holder*, 2011 U.S. App. LEXIS 6867 (9th Cir 2011).

Vahora's religious affiliation in Gujurat and his leadership activities on behalf of the local Muslim community in the 1990s led Vahora's Hindu neighbors to target him through frequent incidents of harassment and violence. After mobilizing fellow Muslims to rebuild a mosque destroyed by a Hindu mob in Vahora's town in 1992, Vahora was detained for a series of five days by police and subject to 12-14 beatings per day lasting a debilitating 10-12 minutes each. In addition, Vahora was dismissed from his job by his Hindu employer and harassed and threatened by local supporters of the Hindu nationalist Bhartiya Janta Party ("BJP").

Vahora ultimately fled to the United States on April 5, 2001, ostensibly for purposes of seeking temporary refuge and without the intent of seeking asylum (Vahora had previously travelled to London twice, only to be beaten or threatened by police upon returning home). In February 2002, a group of Hindu fundamentalists burned down Vahora's family home and farmhouse amidst widespread Hindu rioting in the region. Upon filing a complaint with local authorities, police arrested Vahora's brother, Karim, whose whereabouts continue to remain unknown despite repeated inquiries by Vahora and his family.

Eventually Vahora's older brother, Husman, fled for his life and went into hiding following his own police detention, prompting Vahora to file an affirmative application for U.S. asylum on December 16, 2002. The Immigration Judge ("IJ") rejected Vahora's claim on the basis that Vahora had failed to file his application within his first year inside the United States following his arrival from India (see 8 C.F.R. § 208.4(a)(2)). Vahora appealed, contending that he was eligible for an exception to the one-year filing requirement on the basis that intervening events between February 2002 and the eventual filing date, including the intensified regional violence, direct attacks on Vahora's family home and property, and confrontation of Vahora's brothers by Indian police, constituted sufficiently "changed circumstances" so as to merit an exception to the one-year timeframe under 8 C.F.R. § 208.4(a)(5). The Board of Immigration Appeals (the "BIA") upheld the IJ's ruling, however, finding that uptick in violence and direct attacks on Vahora's family and property were insufficient indicia of changed circumstances, particularly in light of the substantial civil unrest and familial violence to which Vahora was exposed prior to fleeing India for the United States in 2001.

In reversing the BIA's ruling, the Ninth Circuit found compelling the evidentiary record surrounding the events of February 2002, which had been described by some accounts as "India's worst religious violence in decades" and a material heightening of previous civil tension that had been brewing while Vahora was still in the region. The majority also found to be material in its analysis of Vahora's "changed circumstances" petition the increasingly direct and expanded targeting of Vahora's family by Gujarati rioters and police.

In a bristling dissent, Ninth Circuit Judge Alex Kozinski stated that the majority's ruling made "mincemeat" of the one-year filing requirement, and accused the majority of partaking in a "tired game" of judicial usurpation and "creative interpretation." In the dissent's view, an asylum seeker may only rely upon the "changed circumstances" exception if the applicant *had not* previously "experienced circumstances that arguably would establish a colorable claim for asylum within the statutory time period for filing." Reasoning that Vahora possessed an arguably meritorious case for asylum even prior to the February 2002 violence, and that denial of such an application within the one-year filing deadline would not have prejudiced Vahora from filing a subsequent application should circumstances have worsened in Gujarat, Judge Kozinski concluded that "there can be no changed circumstances, regardless of how much country conditions may have deteriorated."

The Ninth Circuit majority responded by noting the somewhat misaligned incentive that Judge Kozinski's interpretation would create for refugees such as Vahora that do not seek asylum initially, but rather seek to wait some period of time and evaluate whether tensions might subside in their home country such that return may be possible. In response to the dissent's claim that "[i]llegal immigrants can now sit on their asylum claims indefinitely, assured that virtually any change in country conditions will excuse their lateness," the majority found itself unable to "conceive of a reason why any immigrant who intends to seek asylum and has an asylum claim he believes to be meritorious would withhold filing and wait, in the perverse hope that conditions in his homeland might deteriorate, rather than file his application when he is eligible."



*United States Court of Appeals for the Eleventh Circuit Affirms Dismissal of Bollywood Copyright Infringement Claim Against U.S. Hip-Hop Producer*

On March 25, 2011, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of a copyright infringement suit brought by Bollywood music and distribution company Saregama India Ltd. ("Saregama") against the popular U.S. hip-hop producer Timothy Mosley (a.k.a. "Timbaland") and various recording companies involved in the

production of the 2005 song “Put You on the Game” (“PYOG”) by Grammy-nominated rap artist Jaceon Taylor (a.k.a. “The Game”). *Saregama India Ltd. v. Mosley, et al.*, 635 F. 3d 1284 (11th Cir. 2011).

As musical producer for the work, Timbaland had allegedly interspersed The Game’s choral interludes with an approximately one-second looped vocal snippet from “Baghor Mein Bahar Hai” (“BMBH”), a feature song from the 1969 Hindi cinematic classic “Aradhana.” Specifically, while The Game trumpets a certain mastery over the factional and flirtatious goings-on of his hometown of Compton, California, PYOG listeners hear a mellifluous descending G minor arpeggio chord delivered by a female vocalist. The chord bears similarity to the notes delivered by *Aradhana*’s female protagonist as she engages in a timeless Bollywood routine: fending off a bedazzled romantic suitor in bucolic pastures, only to find herself drawn ever closer as the song’s melody and rhythmic intricacies develop.

In a 2007 complaint filed with the U.S. District Court for the Southern District of New York, Saregama claimed to own a copyright in the BMBH sound recording pursuant to a 1967 agreement (the “Agreement”) between the Indian film producer, Shakti Films, and Saregama’s predecessor in interest, Gramophone Company of India, Ltd. A federal district court in Florida (to where the case had been transferred) granted summary judgment to the defendants on the basis that the Agreement conferred on Saregama only a two-year exclusive right to re-record any pre-recorded song covered by the Agreement, and that such right became non-exclusive – and ceased being a copyright – at the conclusion of the Agreement’s two-year term. As a result, the Court determined that Saregama did not currently own a copyright in the BMBH sound recording and granted summary judgment without having to address whether BMBH was actually covered by the Agreement, or whether the particular PYOG voiceover sample was sufficiently similar to the BMBH melody.



### *India Calls for EU Member State Action on Generic Drug Seizures as a Condition to Withdrawing WTO Case*

Indian Commerce and Industry Minister Anand Sharma informed members of press on April 6, 2011 that India would withdraw a case filed with the WTO in 2010 on the issue of generic drug seizures by EU transit authorities only when all members of the 27-nation bloc amended their transit rules to prevent such incidents. Sharma reported that the EU had provided India with written confirmation that the seizure of generic drugs in transit was in fact wrong and that customs rules would be amended to stop the seizures. However, Sharma insisted that the case would remain with the WTO until appropriate legislative steps had been taken at the various EU member state levels.

India’s formal request for consultations in 2010 with the EU and Netherlands under WTO dispute settlement rules (*European Union and a Member State – Seizure of Generic Drugs in Transit* (WT/DS408/1)) cited at least sixteen instances of “seizures of consignments of generic drugs originating in India at ports and airports in the Netherlands on the ground of alleged infringement of patents subsisting in the Netherlands while these consignments were in transit to third country destinations.” India understood the seizures to have been made by Dutch authorities under the so-called “manufacturing fiction,” by which generic drugs actually manufactured in India and in transit to Nigeria, Peru, Brazil, and other destinations were treated as if they had been manufactured in the Netherlands. India alleges the generic drug seizures to constitute an unreasonable and discriminatory restriction on the freedom of transit, in contravention of GATT 1994, and also a violation of WTO rules established as part of the Doha Round to protect certain instances of compulsory licensing of pharmaceuticals for public health purposes.

Following India’s filing of the case in Geneva, a number of other WTO members submitted formal requests to join the consultations with the EU, including fellow manufacturers of generic drugs for international export such as Canada and China, traditional generics importers such as Ecuador, and countries such as Brazil, whose trade interests in generic drugs are driven by import and export considerations alike.

Sean G. Kulkarni is an international trade and economic affairs attorney based in Washington, D.C. Sean currently serves as an International Trade Policy Fellow at the Ways and Means Committee of

the U.S. House of Representatives. Sean may be reached at [sean.g.kulkarni@gmail.com](mailto:sean.g.kulkarni@gmail.com).

## SUBMISSION REQUESTS

### Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee's jurisdiction. These submissions are then compiled as respective committee's *Year-in-Review* articles and typically published in the Spring Issue of the Section's award-winning quarterly scholarly journal, *The International Lawyer*. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee's Year-in-Review by emailing the [Co-Chairs](#) and requesting submission guidelines.

### India Law News

*India Law News* publishes articles and recent case notes on significant legal or business developments in India that would be of interest to international practitioners. The Fall 2011 issue of *India Law News* will carry a special focus on environmental law. Please read the Author Guidelines available on the [India Committee website](#). Note that, *India Law News* does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the [Editorial Board](#).

## INDIA COMMITTEE

The [India Committee](#) is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-US relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the US, as well as other countries, in an effort to support the global Rule of Law.

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### BECOME A MEMBER!

Membership in the India Committee is free to all members of ABA International. If you are not an ABA International member, you may become one by signing up on the [ABA website](#). We encourage active participation in the Committee's activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the [Co-Chairs](#). You may also participate by volunteering for any of the Committee's projects, including editing a future issue of the *India Law News*.

Membership in the India Committee will enable you to participate in an online "members only" listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

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### UPCOMING EVENTS

#### 2011 ABA Annual Meeting

August 4-9, 2011  
Metropolitan Hotel  
Toronto, Ontario, Canada  
Format: Live/In-Person

#### ABA Section of International Law 2011 Fall Meeting

October 11-15, 2011  
Dublin, Ireland  
Format: Live/In-Person

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