



# Doing Business in India

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DOING BUSINESS IN INDIA

# Asian Affairs Committee

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# DOING BUSINESS IN INDIA

Speakers

Agenda

Networking

# Practice Pointers on Doing Business in India - a Review of Legal Framework

- World's largest democracy that is open for business where large profits can potentially be made
  - Democracy and legal framework
  - Open for business (“reforms”)
  - Opportunities for large profits

# Democracy

- Constitutional democracy
  - World's longest written constitution – 30 times U.S. Constitution
  - Gets restated when amended, it now has 491 Articles and 12 Schedules
- The idea of elections and the right to vote has struck deep roots
  - Like Diwali, Holi and cricket – Voters' Super Bowl and World Series

# Reality Check

- Most political parties are privately-held
  - Teams in Super Bowl and World Series
- Preferred method of seeking political change is non-cooperation, public disorder or armed resistance
  - As distinguished from change through constitutional means
  - New country

# Organization of Government

- Union of States with a dominant federal government
  - 28 States, 7 Union Territories
  - Legislative powers of the Union and the States are enumerated
    - Residual powers with Union (“Centre”)
    - Most business laws are Union laws. Example: UCC-type laws, banking, corporation, property, income tax, criminal, civil procedure, criminal procedure, matrimonial and family law, etc.

# 3 Branches of Government

- **Legislature, Judiciary & Executive**
  - No separation (and co-equal) in the U.S. sense
  - But “differentiated”
- **Supremacy of the Parliament**
  - Constitution amended 98 times
  - But cannot change “basic structure”



# Reality Check

- Dominance of Executive
  - Legislature has abdicated law-making to Executive initiative?
    - The case of treaties and bilateral agreements
    - Bills proposed by Executive become law (only 14 private bills have ever become law)
    - Executive controls when an enactment becomes effective
    - Majority group in Parliament makes the Executive
    - Voting is on party-lines
    - Enormous role of delegated legislation and administrative reporting and review
  - Expanding role of administrative tribunals

# Laws Promote Executive Control

- Ouster provisions
  - “...shall not be called into question in any court”
- Enabling laws
  - Provides for rule-making by Executive
    - Ganga clauses
  - Notification in Official Gazette
  - Publication and right to comment is rare
- Most laws create large administrative machinery
  - Companies Act
    - (“privatizing the private sector”)

# THE GAZETTE OF INDIA

EXTRAORDINARY

PART II — Section 1  
PUBLISHED BY AUTHORITY

NO. 12 NEW DELHI, TUESDAY, JANUARY 14, 2003 / PAUSA 24, 1924

Separate paging is given to this Part in order that it may be  
filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE  
(Legislative Department)

*New Delhi, the 14th January, 2003/Pausa 24, 1924 (Saka)*

The following Act of Parliament received the assent of the President on the 13th January, 2003 and is hereby published for general information:—

THE COMPETITION ACT, 2002  
No. 12 of 2003

*[13th January, 2003.]*

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—

## CHAPTER I PRELIMINARY

### Short title, extent and commencement

1. (1) This Act may be called the Competition Act, 2002.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

### Definitions

2. In this Act, unless the context otherwise requires,—
  - (a) "acquisition" means, directly or indirectly, acquiring or agreeing to acquire—
    - (i) shares, voting rights or assets of any enterprise; or
    - (ii) control over management or control over assets of any enterprise;
  - (b) "agreement" includes any arrangement or understanding or action in concert,—
    - (i) whether or not, such arrangement, understanding or action is formal or in writing; or
    - (ii) whether or not such arrangement, understanding or action is intended to be enforceable

# 3 Branches of Government

- Judiciary (through the Supreme Court) often interjects itself into policy-making and governance
  - Filling vacuum
  - Constitutional basis

# Judicial & Quasi-Judicial System

- Supreme Court is the nation's highest court
  - Original, appellate and advisory jurisdiction
  - 817 Judgments in 2012 (compare 70+ cases in 2011-12 term in U.S.)
  - 31 judges (28 filled)
- High Courts
  - 24 in number
- District Courts
  - Three tiers
  - 629 districts

## Tribunals

Several, including Central Administrative Tribunal, Company Law Board, Customs, Excise and Service Tax Appellate Tribunal, Debts Recovery Tribunal, the Debt Recovery Appellate Tribunal, Income Tax Tribunal, Income Tax Appellate Tribunal, Intellectual Property Appellate Board, etc.

# Reality Check

- Cases Pending in Courts
  - Supreme Court: 66,692 (Jan 1, 2013)
  - High Courts: approx. 4.2m (mid 2012)
  - District Courts: approx. 28m (mid 2012)
  - Tribunals: numbers not readily available
- Government as Party
  - The life of a dispute and the automatic “appeal”
  - Why not to litigate against the Government

# Risks and Rewards

- Coca Cola & IBM is history
  - Foreign enterprise has taken deep roots
  - But there is scope for MIGA and others
- Under-regulated, or over-regulated with poor enforcement and corruption
- Uncertainty, Wild West and the opportunity for rewards

# Working with Lawyers/ Negotiating

- Stylistic? Yes, but save yourself loads of billable time
  - Date format; Letter size; Page break; Page numbers; Margins; Font; Line spacing...
  - Closing agenda, checklist and time schedule
- Negotiating Tips
  - “Ready to finalize” and decisions not made by the boss
  - Everything is negotiable (including “full, final and exclusive”)
  - “What taxes do you want to pay this year?” Changing the facts
  - Do not say no if invited home for a meal, etc.



# Access to Legal Information

- Online databases
  - [indiacode.nic.in](http://indiacode.nic.in)
  - [indiancourts.nic.in](http://indiancourts.nic.in)
  - [lexisnexis.co.in](http://lexisnexis.co.in)
  - [indlaw.com](http://indlaw.com)
  - [scconline.com](http://scconline.com)
  - [manupatra.com](http://manupatra.com)
  - [indiankanoon.org](http://indiankanoon.org)
- Government departments and regulators
  - [rbi.org.in](http://rbi.org.in)
  - [sebi.gov.in](http://sebi.gov.in) (do not miss the investor complaint video)
  - [aarulings.in](http://aarulings.in)
  - [traigov.in](http://traigov.in)
  - [ccigov.in](http://ccigov.in)
  - [india.gov.in](http://india.gov.in) (citizen-oriented)

# Thank you!

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