2016 National IPR Policy called for trade secrets to serve as an "important area of study for future policy development" but India has not yet prioritized or embarked upon this work.

SERVICES BARRIERS

The Indian government has a strong ownership presence in major services industries such as banking and insurance. Foreign investment in businesses in certain major services sectors, including financial services and retail, is subject to limitations on foreign equity. Foreign participation in professional services is significantly restricted and, in the case of legal services, is prohibited entirely.

Insurance Services

Under India's Insurance Laws (Amendment) Act, 2015, foreign investment in Indian insurance companies is capped at 49 percent. The law further requires that all insurance companies be Indian "controlled." The Insurance Regulatory and Development Authority of India (IRDAI) has promulgated guidelines (October 19, 2015) on this "Indian control" requirement. The guidelines include: (1) a mandatory requirement that a majority of directors be nominated by Indian investors; (2) limitations on the rights of foreign-nominated board members; (3) requirements for how "key management persons" are to be appointed; and (4) requirements on the manner in which control over "significant policies" of the enterprise must be exercised. Foreign investors have expressed concern that the requirements create a rigid structure that ignores operational realities and will dilute the rights of foreign investors in Indian insurance companies, making additional FDI in the sector unattractive.

In December 2015, the IRDAI issued a revision to its regulations governing the provision of reinsurance services in India that affords Indian reinsurers a mandatory first order of preference (or right of first refusal) for reinsurance business in India. Such a requirement severely restricts the business for which foreign reinsurers can compete and decreases the interest of foreign reinsurers in establishing branches in India, resulting in negative impacts to the supply and cost of reinsurance services in the Indian market. In December 2018, IRDAI reaffirmed that the state-owned General Insurance Corporation (GIC) of India maintained the right of first refusal for all reinsurance contracts.

In October 2016, IRDAI circulated a discussion paper that called for the compulsory public listing of life insurers that have been in operation in India for seven years or more. Such a requirement to publicly list is rare, and companies generally decide whether to undertake an initial public offering based on an analysis of company-specific facts. IRDAI finally reversed its stance after strong resistance by insurance companies. In March 2017, the IRDAI Chairman made it clear that for the time being, it will not be compulsory for insurance companies to be publicly listed. However, he did not rule out the introduction of such a provision at some later stage.

Financial Services

Although India allows privately held banks to operate in the country, the banking system is dominated by state-owned banks, which account for approximately 72 percent of total market share and 84 percent of all Indian bank branches. Most banks are Indian-owned, with foreign banks constituting less than 0.5 percent of the total bank branches in India. Under India's branch authorization policy, foreign banks are required to submit their internal branch expansion plans on an annual basis, and their ability to expand is hindered by non-transparent limitations on branch office expansion.

Foreign banks also face restrictions on direct investment in Indian private banks. Unlike domestic banks, foreign banks are not authorized to own more than five percent of an Indian private bank without approval by the Reserve Bank of India (RBI). Total foreign ownership of any private bank from all sources (foreign direct investment, foreign institutional investors, and non-resident Indians) cannot exceed 74 percent.

Audiovisual Services

U.S. companies have reported that India's satellite programming downlinking policy is overly burdensome, including the requirement for foreign programmers to establish a registered office in India or designate a local agent. Programmers must also prove that they have a net worth of 50 million rupees (approximately $800,000) in order to downlink one content channel, and an additional 25 million rupees (approximately $400,000) of net worth for each additional channel.

The Telecommunications Regulatory Authority of India's regulations on content aggregation and distribution do not allow bundling of channels and certain types of distribution partnerships. Content aggregation is commonly used internationally, as it allows niche and foreign content to be bundled into and sold by domestic partners without a large local presence or sales force. These regulations cause difficulties particularly for small and international content providers because these companies must interact with each of the 60,000 local cable operators, radio broadcasters, and television broadcasters that they seek to target.

There are also a number of limits on foreign ownership in the audiovisual and media sectors: cable networks (49 percent); FM radio (26 percent); head end in the sky (74 percent); direct-to-home (DTH) broadcasting (74 percent); teleports (74 percent); news broadcasting (26 percent); and newspapers (26 percent).

Professional Services

Legal Services

Membership in the Bar Council of India (BCI), the governing body for the legal profession, is mandatory "to practice law" in India and is limited to Indian citizens. Foreign law firms are not allowed to open offices in India. The Advocates Act, which is administered by BCI, provides for foreign lawyers or law firms to visit India on a reciprocal basis for temporary periods to advise their clients on foreign law and diverse international legal issues. The United States and India are continuing to discuss liberalization of legal services under the TPF.

Accounting Services

Foreign accounting firms face obstacles to entering the Indian accounting services sector. Only accounting firms structured as partnerships under Indian law may supply financial auditing services, and only Indian-licensed accountants may be equity partners in an Indian accounting firm.

Architecture Services

Although Indian companies continue to demand high-quality U.S. design for new buildings and infrastructure development, foreign architecture firms find it difficult to do business in India due to the legal environment. Court cases against foreign design firms seeking to perform work in India and harassment of their potential clients creates uncertainty for U.S. providers of architectural and related services, causing significant losses for those companies.

Telecommunications Services

Barriers to Entry

In 2013, India eliminated a 74 percent cap on FDI in Indian wireless and fixed telecommunications providers, though government approval is required for FDI above 49 percent. U.S. companies note that India's one-time licensing fee for telecommunications providers (approximately $500,000 for a service-specific license or $2.7 million for an all-India Universal License) serves as a barrier to market entry for smaller companies. The government of India continues to hold equity in multiple telecommunications firms. These ownership stakes have caused private carriers to express concern about the fairness of India's general telecommunications policies. For example, valuable wireless spectrum was set aside for Mahanagar Telephone Nigam Limited (MTNL) and Bharat Sanchar Nigam Limited (BSNL), state-owned telecommunications service providers in India, instead of being allocated through competitive bidding. Although it does not appear that MTNL and BSNL paid a preferential price, they did receive their spectrum allocation well ahead of privately owned firms.

Remote Access Policy

Global telecommunications operators have made significant investments in establishing India's network infrastructure. However, policies pertaining to remote access (RA) to their networks for network operators negatively impact network security and compliance and hamper telecommunications services suppliers' ability to efficiently operate networks in India. Telecommunications operators are required under their license to obtain pre-approval to remotely configure and operate their networks. Delayed RA approvals leave networks vulnerable to cyber-attacks. India should utilize international standards for security in lieu of the strict RA policy, and should move to an "information filing" process, replacing the "pre-approval process."

Satellite Services

India's Ministry of Information and Broadcasting (MIB) has issued guidelines that establish a preference for Indian satellites to provide capacity for delivery of Direct-to-Home (DTH) subscription television services. In practice, authorized DTH licensees have not been permitted to contract directly with foreign satellite operators and have encountered procedural and contracting delays when they have sought to do so. Rather, DTH licensees must procure foreign satellite capacity through Antrix, the commercial arm of the Indian Space Research Organization (ISRO), which, in turn, only permits such procurements if it does not have available capacity on its own system. This issue is compounded by a lack of transparency regarding ISRO's plans for future transponder capacity. When ISRO does permit the use of foreign satellite capacity, the foreign satellite operator must sell the capacity to ISRO, which, in turn, resells the capacity to the end-user with a surcharge.

Foreign satellite operators are thus prevented from developing direct relationships with DTH licensees. This is a particular concern to the United States, as it puts U.S. satellite operators at a competitive disadvantage, promotes market uncertainty, and prevents DTH licensees from offering a fuller range of services from U.S. satellites. The United States continues to encourage India to adopt an "open skies" satellite policy to allow consumers the flexibility to select the satellite capacity provider that best suits their business requirements and to promote market access for foreign satellite service providers.

India also imposes onerous licensing requirements on foreign satellite-based personal communications services. Licenses require high application fees and bank guarantees as well as prohibitively expensive capitalization requirements. Further, licensees must construct local ground station facilities before offering service. In addition, the use of any kind of satellite phone in India requires a license, and the use of foreign satellite phones in Indian waters is prohibited entirely. Together, these requirements make it economically unfeasible for many foreign satellite communications providers to offer services in India.

Distribution Services

India permits 100 percent FDI in single brand retail. Foreign investments exceeding 51 percent are contingent on, among other things, a requirement to source at least 30 percent of the value of products sold from Indian sources, preferably from small and medium-sized enterprises. In June 2016, the Indian government relaxed these sourcing requirements for companies engaged in the distribution of 'state-of-art' and 'cutting-edge' technology: firms would have three years from the opening of a single-brand retail outlet to meet the 30 percent requirement as long as the initial 5 year average was 30 percent. In January 2018, India further relaxed the requirement, allowing firms to offset the local sourcing requirement by sourcing products from India for global supply chains during the first 5 years the investment. Despite these modifications, the local content requirements remain prohibitive.

India permits up to 51 percent foreign ownership in companies in the multi-brand retail sector, but leaves to each Indian state the final decision on whether to authorize such FDI in its territory. In addition, where FDI is allowed, it is subject to conditions, including: (1) a minimum investment of approximately $100 million, at least 50 percent of which must be in "back-end infrastructure" (*e.g.*, processing, distribution, quality control, packaging, logistics, storage, and warehouses); (2) a requirement to operate only in cities that have been identified by the relevant state government; and (3) a requirement to source at least 30 percent of the value of products sold from "small" Indian enterprises that have a total investment in plant and machinery not exceeding $2 million. Several foreign companies have reported that the local sourcing requirements and other conditions on foreign investment have diminished the commercial incentive for expanding investment in India's retail sector.

India allows for 100 percent FDI in business-to-business (B2B) electronic commerce, but prohibits foreign investment in business-to-consumer (B2C) electronic commerce. India also does not allow foreign-owned e-commerce firms to take ownership of inventory that requires them to operate, as a marketplace-based electronic retailing model. In December 2018, India announced new regulations that expressly prohibit subsidiaries of foreign-owned marketplace-based e-commerce sites from selling products on their parent companies' sites. The new rules also prohibit exclusivity arrangements by which e-commerce retailers can contract to offer any product on an exclusive basis. The only exception allowing FDI in B2C electronic commerce permits investment in single-brand retailers that meet certain conditions, including the operation of physical stores in India. This narrow exception limits the ability of most potential e-commerce investors to access the Indian market.

Indian states have periodically challenged the activity of direct selling (*i.e.*, the marketing and selling of products to consumers away from fixed locations) as violations of the Prize Chits and Money Circulation Schemes (Banning) Act of 1978 (Prize Chits Act), creating uncertainty for companies operating in this sector. This central government legislation contains no clear distinction between fraudulent activities and legitimate direct-selling operations. Enforcement of the Prize Chits Act is reserved to the states, which have adopted varying implementation guidelines and taken unexpected enforcement actions on the basis of the ambiguous provisions of the Act, including the arrest of a chief operating officer of a direct selling company.

Previously, stakeholders asked India to issue guidance establishing a definition of direct selling and clarifying ambiguities, including uncertainty related to commissions earned in connection with the sale of products. In 2016, after extensive advocacy by the U.S. government and private industry, India approved new guidelines governing direct selling that established clear legal definitions of direct selling, but enforcement and application of the new guidelines is still left to state authorities.

Education

Foreign suppliers of higher education services interested in establishing a presence in India face a number of barriers, including: a requirement that representatives of Indian states sit on university governing boards; quotas limiting enrollment; caps on tuition and fees; policies that create the potential for double-taxation; and difficulties repatriating salaries and income from research.

In June 2016, India's former planning commission, NITI Aayog, submitted its report to the Prime Minister's Office (PMO) and the Human Resource Development (HRD) Ministry calling for the invitation of foreign universities to set up campuses in India. The report suggested that foreign education providers be allowed entry into the country via three possible regimes: (1) operation of foreign universities in the country should be regulated by law; (2) the University Grants Commission (UGC) Act of 1956 should be amended along with the relevant regulations on universities, to allow foreign universities to be deemed universities; and (3) to facilitate joint ventures between Indian and foreign institutions, the UGC and the All India Council for Technical Education (AICTE) regulations should be modified to add viable co-beneficial arrangements and twinning programs. However, no action has been taken to date with respect to the report's recommendations.

BARRIERS TO DIGITAL TRADE AND ELECTRONIC COMMERCE

Data Localization Requirements

India has recently promulgated a number of data localization requirements that would serve as significant barriers to digital trade between the United States and India. These requirements raise costs for suppliers of data-intensive services by forcing the construction of unnecessary, redundant data centers and prevent local firms from taking advantage of the best global services available.

In October 2018, the Reserve Bank of India (RBI) implemented a requirement that all payment service suppliers store all information related to electronic payments by Indian citizens on servers located in India. RBI announced this rule in April without advance notice and without input from stakeholders. Requiring local storage of all payment information raises costs for payment service suppliers, and disadvantages foreign firms, which are more likely to be dependent on globally distributed data storage and information security systems. Furthermore, an only-in-India data storage requirement will hamper the ability of service suppliers to detect fraud and ensure the security of their networks.

In July 2018, the Indian government published a draft Personal Data Protection Bill. If passed into law, the bill would impose onerous burdens on firms, especially foreign firms, that process personal information. Most concerning is a data localization requirement: firms would be required to store a copy of all personal information related to Indian persons on a server located in India, and an as-yet-undefined category of "critical" personal information could not be transferred out of India under any circumstances. These data localization provisions would damage the digital economy without supporting privacy. Additionally, the bill would authorize immense fines and criminal penalties in response to data breaches. The U.S. Government submitted comments on the draft bill to India in September.

India's 2015 National Telecom M2M (machine to machine) Roadmap (Roadmap) would require all M2M gateways and application servers serving customers in India to be located within India. The Roadmap also recommends that foreign subscriber identification modules (SIMs) be permitted in devices to be used in India only if they fulfill traceability criteria and that machines sold and manufactured in India should only be equipped with SIMs of Indian telecommunications providers. The Roadmap has not been implemented but continues to create uncertainty related to India's policy environment for digital services.