

India Entry Strategy News



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WHITE PAPER-ENTRY OPTIONS

- *Manish Gaurav*

Foreign resident (including investors and strategic partners) wanting to set up operations in India, should *inter alia* consider the following:

- (i) Business Prospect; (ii) Strategic Partner; (iii) Laws; and (iv) Taxes.

In this paper, we are primarily discussing various entry options available for a non resident in India.

Laws: There are various laws which would be applicable to an entity entering into India. However among such laws the Foreign Exchange Management Act, 1999 (“**FEMA**”) and numerous circulars, notifications and press notes issued under the same; the Companies Act, 2013 and the Securities and Exchanges Board of India (“**SEBI**”) and other specific laws (depending upon the sector) are important. It is pertinent to mention here that India is a common law country.

Tax: In India the tax laws comprise of the Income Tax Act, 1961 and indirect tax laws including but not limited to value added tax, service tax, customs, excise. Further, India has tax treaties with various countries.

Setting up India operations

Setting up India operations or investing in India by non- residents should be in compliance with the foreign exchange regulations (especially the regulations governing the foreign direct investment. Most aspects of the foreign investment are governed by FEMA and the regulations made there under. In terms of the FDI Policy¹ there are certain sectors where 100% FDI is permitted whereas there are a few sectors where there is cap in investment along with other conditionalities.

In term of the RBI Regulations, a foreign company has the following options to enter into India and to do business (with certain conditions):

Liaison Office: A foreign company is required to obtain prior approval from the RBI which is generally granted for 3 (three) years. RBI *inter alia* requires that the foreign entity intending to open a liaison office should have a profit making track record during the immediately preceding 3 (three) financial years in the home country and its net worth [total of paid-up capital and free reserves, less intangible assets as per the latest audited balance sheet] should not be less than USD 50,000 or its equivalent.

A liaison office acts as a representative of the parent foreign company in India. A liaison office is not permitted to undertake any commercial activities and it should maintain itself from the remittances received from its parent foreign company. This option is generally preferred by a foreign company which intends to explore business opportunities in India.

¹ Enacted by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, the Consolidated FDI Policy (effective from April 5, 2013)



Branch Office: Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up Branch Offices in India with specific approval of the Reserve Bank of India. RBI *inter alia* requires that the foreign entity intending to open a branch office should have a profit making track record during the immediately preceding 5 (five) years in the home country and its net worth [total of paid-up capital and free reserves, less intangible assets as per the latest audited balance sheet] should not be less than USD 100,000 or its equivalent. It can represent the foreign parent company in India and act as its buying or selling agent in India. It can also *inter alia* under take the following activities:²

Rendering professional or consultancy services;

Carrying out research work, in areas in which the parent company is engaged;

Promoting technical or financial collaborations between Indian companies and parent or overseas group company;

Representing the parent company in India and acting as buying / selling agent in India;

Rendering services in information technology and development of software in India;

Rendering technical support to the products supplied by parent/group companies;

Foreign airline / shipping company.

Procurement of goods for export and sale of goods after import are allowed only on wholesale basis. It is not permitted to carry out manufacturing or processing activities in India, directly or indirectly. The branch office is permitted to remit surplus revenues to its foreign parent company subject to the applicable taxes. The tax on branch offices is approximately 40 per cent plus applicable surcharges and cess. A foreign company can explore this option if it intends to undertake the research and development activities in India.

Project Office: Foreign companies planning to execute specific projects in India can set up temporary project/site offices in India. The RBI has granted general permission to a foreign entity for setting up a project office in India, subject to the fulfillment of certain conditions that the foreign entity has secured a contract from an Indian company to execute a project in India, and

the project is funded directly by inward remittance from abroad; or

the project is funded by a bilateral or multilateral International Financing Agency; or

the project has been cleared by an appropriate authority; or

² Normally, the Branch Office should be engaged in the activity in which the parent company is engaged



a company or entity in India awarding the contract has been granted Term Loan by a Public Financial Institution or a bank in India for the project.

The activities of a project office must be related to or incidental to the execution of the relevant project. A project office is permitted to operate a bank account in India and may remit surplus revenue from the project to the foreign parent company. The tax on project offices is 40 per cent plus applicable surcharges and the cess.

Limited Liability Partnership: LLP is a new form of business structure in India. It gives the benefits of limited liability of a company and the flexibility of a partnership. The LLP as a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP. No partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct. Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners or between the partners and the LLP as the case may be. Further, LLP is not subject to mandatory requirements applicable to a company with regard to provision of depreciation and transfer to reserves prior to distribution of profits. A foreign entity can invest/acquire stake in the LLP only after obtaining prior approval of the FIPB.

Partnership: A partnership is a relationship created between persons who have agreed to share the profits of a business carried on by all of them, or any of them acting for all of them. A partnership is not a separate legal entity independent of its partners. In the absence of a partnership agreement, each partner has an equal right to participate in the management and control of the business and the profits/losses are shared equally amongst the partners. Any partner can bind the firm and the firm is liable for all the liabilities incurred by any partner on behalf of the firm. Foreign investment is permitted in Indian partnership firms subject to prior approval of RBI.

Trust: In terms of the Indian Trusts Act, 1882, a trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. A trust arises when one person (the "trustee") holds legal title to property but is under an equitable duty to deal with the property for the benefit of some other person or class of persons. A trust is not regarded as a legal entity and as such it does not incur rights or liabilities. A beneficiary of a trust do not generally obtain rights against or incur liabilities to third parties because of the transactions or actions undertaken by the trustee in exercising its powers and carrying out its duties as a trustee. A foreign resident may only be the beneficiary of a trust, which is set up as a venture capital fund and only after receiving the prior consent of the FIPB.

Incorporated Entity: In India, the incorporated entities are governed by the provisions of the Companies Act. The authority that oversees companies and their compliances is the Registrar of Companies ("**RoC**").

Incorporation of a Limited Company

Company incorporation in India by any Indian / foreign person/entity is governed by the provisions of the Companies Act, 2013 ("**ICA**"). Primarily two types of companies are allowed to be incorporated, *i.e.*, private limited liability company and public limited liability company.



Generally, a public limited liability company is incorporated when the intention is to issue shares to public or accept deposits from the public. The regulations/compliances under the ICA are stricter for a public limited liability company as compared to a private limited liability company because of the obvious reason of public involvement in the company and the principles governing investor protection.

A private limited company has certain distinguishing characteristics such as there should be share transfer restriction in its articles of association, the minimum number of members should be 2 and maximum 200 (excluding the present and past employees of the company); its articles of association should prohibit any invitation to the public to subscribe to the securities of the company.

The ICA has introduced the concept of a Small Company. It is defined as a private company whose (i) paid-up share capital does not exceed Rs. 5,000,000.00/-(five million) or such higher amount as may be prescribed which shall not be more than Rs. 50,000,000.00/-(fifty million); or (ii) turnover as per its last profit and loss account does not exceed Rs. 20,000,000.00 (twenty million) or such higher amount as may be prescribed which should not be more than Rs. 200,000,000.00 (two hundred million).

Additionally, the ICA has introduced the concept of “One-Person Company” which is has been given certain exemptions in its compliance and filings. The Small Company and One-Person Company have been provided with certain relaxation in terms of compliances as required under the ICA.

A public limited company is defined as a company which is not a private company (but includes a private company that is the subsidiary of a public company). A public limited company may also list its shares on a recognized stock exchange by way of an initial public offering (“IPO”).

The ICA has also introduced the concept of the Dormant Company which states that a company can be classified as dormant when it is formed and registered under the ICA for a future project or to hold an asset or intellectual property and has no significant accounting transaction. Such a company may apply to the ROC in such manner as may be prescribed for obtaining the status of a dormant company.



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Manish advises companies in several sectors more particularly defence, e-commerce, media, information technology, retail, telecom, real estate, healthcare, power, pharmacy, automobiles. He has advised clients on various matters which inter alia involve foreign direct investment (FDI), joint ventures, venture capital/private equity investments, exits, mergers, structuring and general corporate advice.



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Japan plans JV firm to finance bullet train projects in India

Japan has offered to set up a joint venture company like the Delhi Metro Rail Corporation to finance bullet train projects in India. The project that also figured in the talks between Japanese Prime Minister Shinzo Abe and Prime Minister Manmohan Singh has already been approved by the Planning Commission.

A Commission source said the proposed corporation will announce bullet trains for seven pair of destinations, all of them to be leveraged by a mix of yen debt and equity. Japanese experts from a consulting firm and Indian officials have conducted surveys last week in the Mumbai-Ahmedabad corridor (about 500 km) for a pre-feasibility study for the first of these projects. Prior to that, Government of India officials from the Commission and rail ministry have been over to Tokyo to complete the details of the project.

<http://indianexpress.com/article/business/business-others/japan-plans-jv-firm-to-finance-bullet-train-projects-in-india/>

Japan set to enter Indian defence market

A DAY after Prime Minister Manmohan Singh endorsed his Japanese counterpart's idea of a new Indo-Pacific strategic axis, the two countries Wednesday agreed to form a joint working group to set up the sale of the first platform with defence uses out of Japan the US2 amphibious aircraft.

The JWG will also examine the possibilities of co-production of these aircraft in India, which would make it the symbol of Japan's entry into the defence market after decades of a self-imposed ban on such exports.

The two leaders also agreed to revive talks on a bilateral civil nuclear cooperation agreement, which has been stuck for about two years, by directing their officials to accelerate the process.

The negotiations will be accelerated for an early conclusion of an agreement for peaceful uses of nuclear energy, Japanese Prime Minister Shinzo Abe said after bilateral deliberations.

<http://indianexpress.com/article/world/world-others/japan-set-to-enter-indian-defence-market/>

'Japan's lending to India hit by rupee depreciation, project delays'

JICA disbursed Rs 6,800 cr of the committed Rs 20,000 cr

The Japan International Cooperation Agency (JICA), a governmental agency of Japan, has committed loans worth Rs 20,000 crore in 2012-13 to India. However, it



could disburse only Rs 6,800 crore. A senior official from the agency attributed the slowdown in the off-take due to rupee depreciation and project delays.

Ichiguchi Tomohide, senior representative (deputy chief representative) at JICA's India Office said that "the disbursement was less due to rupee depreciation and project delays. The delays are mainly due to land acquisition, clearance and delay in tendering."

He noted, some of the major projects which are getting delayed are metro rail projects in Bangalore and Kolkata, where land acquisition is an obstacle

http://www.business-standard.com/article/economy-policy/japan-s-lending-to-india-hit-by-rupee-depreciation-project-delays-114021401036_1.html

Japan and India Sign Energy and Telecommunications Agreements

India and Japan have signed agreements on cooperation in areas including energy and telecommunications during the visit by Prime Minister Shinzo Abe to New Delhi, the countries said over the weekend.

Prime Minister Manmohan Singh of India held talks with Mr. Abe on Saturday and said that India was taking steps to facilitate Japan's links with India's growing economy.

Mr. Singh said that India was also discussing with Japan the possibility of buying an amphibious aircraft called the US-2 and co-producing it in India.

"More broadly, we are working toward increasing our cooperation in the area of advanced technologies," he said.

http://www.nytimes.com/2014/01/27/business/international/japan-and-india-sign-energy-and-telecommunications-agreements.html?_r=0

India 2014 Elections: BJP Leader Narendra Modi's Bromance With Japan's Shinzo Abe

If the prime minister of Japan, Shinzo Abe, could vote in India's upcoming elections, he would surely cast a ballot for Narendra Modi, the prime ministerial candidate for India's right-wing opposition Bharatiya Janata Party (BJP). Abe and Modi are not only fellow nationalist, hawkish conservatives, but also long-time friends with shared views on many issues and could help each other greatly in the years to come.

ForeignPolicy.com reported that when Abe was elected to a second term as Japan's prime minister in a landslide in late 2012 (he previously held the top job from 2006-2007), one of the first foreign dignitaries to congratulate him was none other than Modi, the chief minister of the Indian state of Gujarat, not the leader of a sovereign nation.

Shrey Verma of ForeignPolicy.com noted that a phone conversation between the Japanese prime minister and the Gujarat chief minister was rather "odd by strict standards of protocol," but underscored how the "personal relationship between the two men and the economic partnership between Japan and Gujarat has thrived over the years."



<http://www.ibtimes.com/india-2014-elections-bjp-leader-narendra-modis-bromance-japans-shinzo-abe-1560414>

India seeks more Japanese investments: PM

The Prime Minister Manmohan Singh has sought increased Japanese investment in India even as both the countries have agreed to explore the idea of concrete cooperation in manufacturing and research and development in the electronic sector as well as in energy efficient and energy saving technologies.

"I believe there is enormous untapped potential in our business ties," Singh said after the annual summit level meeting between India and Japan adding that the presence of Japanese companies in India increased 16 per cent last year. The Japanese Prime Minister, Shinzo Abe, is currently in India for the annual summit meeting. Abe will also be the chief guest for the Republic Day celebrations to be held here on Sunday.

<http://www.thehindubusinessline.com/economy/india-seeks-more-japanese-investments-pm/article5617939.ece>

Delhi Metro expansion to be funded by \$1.95 bn Japanese loan

Japan on Saturday announced 200 billion yen (\$1.95 bn) in new loans for extension of the Delhi Metro and two other projects as visiting Japanese Prime Minister Shinzo Abe and Prime Minister Manmohan Singh held talks in New Delhi on boosting economic and strategic cooperation. Both sides inked eight agreements, including on boosting tourism.

Abe, who was also the chief guest at the Republic Day celebrations on Sunday, also announced step up loans for "symbolic projects" of bilateral cooperation including the Delhi Mumbai Industrial Corridor and for a high-speed rail project.

On the civil nuclear agreement, Abe said both sides have agreed to continue talks for "early conclusion of the agreement". To promote people to people contacts, Japan also announced short term multiple entry visas for Indians and to promote educational and academia exchanges.

Manmohan Singh, describing Japan as at the "heart of India's Look East policy, said Japan has been a ready partner in India's economic development and in our quest for a peaceful, stable and prosperous Asia and the world".

[http://businesstoday.intoday.in/story/delhi-metro-expansion-to-be-funded-by-\\$1.95-bn-japanese-loan/1/202733.html](http://businesstoday.intoday.in/story/delhi-metro-expansion-to-be-funded-by-$1.95-bn-japanese-loan/1/202733.html)

Japan enters where China is barred – northeast India

Japan is sailing in where China fears to tread. As India and Japan ramp up their bilateral relationship, India has invited Japan to invest in and build overland infrastructure in areas which are generally out of bounds for Chinese investments.

India and Japan used the visit of Japanese Prime Minister Shinzo Abe to dramatically expand the scope of bilateral cooperation to include the politically sensitive northeastern states of India, areas where Chinese investment or projects are actively discouraged. Japanese companies will have the opportunity to help the development



of the northeast specially to build roads, and aid agriculture, forestry and water supply and sewerage in these states.

<http://timesofindia.indiatimes.com/india/Japan-enters-where-China-is-barred-northeast-India/articleshow/29427619.cms>

China on the radar, India invites Japan for India-US Malabar naval war games

Injecting some much-needed thrust to its rapidly expanding strategic partnership with Japan, India has invited the Japanese forces to take part in this year's edition of the India-US Malabar naval war games that have riled China in the past. India and Japan on Saturday also decided to hold another joint working group meeting in March to discuss the sale of Japanese US-2i ShinMayva amphibious aircraft to Indian Navy, apart from ramping up defence ties through regular joint combat exercises and military exchanges as well as cooperation in anti-piracy, maritime security and counter-terrorism.

Both the Malabar war games and the proposed sale of amphibious planes are crucial in the sense that they mark a departure from the past, both for India and Japan. India has largely restricted the Malabar exercise to a bilateral one with the US after China protested against the 2007 edition of the war games in the Bay of Bengal since they were expanded to include the Australian, Japanese and Singaporean navies as well.

<http://timesofindia.indiatimes.com/india/China-on-the-radar-India-invites-Japan-for-India-US-Malabar-naval-war-games/articleshow/29368706.cms>

India, Japan to set up lab to promote research

India and Japan today signed an agreement for setting up a laboratory to focus on research in health sciences, medicine and agriculture.

While the two countries established a joint research laboratory--DBT-AIST International Laboratory for Advanced Biomedicine (DAILAB)-- in Japan in 2003, the new lab will come up in India to give a further boost to scientific collaboration, said chairman of the Indian Scientists Association in Japan Sunil Kaul.

"Now, we are trying to make a parallel kind of sister laboratory in India to have easy exchange of personnel from India to Japan and Japan to India and do the same thing together or complement each other. We would like to encourage more students, researchers to come to India and vice versa".

http://zeenews.india.com/news/science/india-japan-to-set-up-lab-to-promote-research_915717.html

Japan to give Indians 3-yr multiple-entry visas

Indians can now get a "three-year" visa with "multiple" entries to visit Japan, a senior official in the Shinzo Abe administration said here Sunday.



As Abe participated in the Republic Day parade as its chief guest, Japan foreign ministry's Press secretary Kuni Sato said, "There will be multiple-entry visas, which will last up to three years, for Indian ordinary passport holders."

Presently, Indian tourists can get only single-entry visas to Japan for short duration. However, Indian visitors to the US, UK get up to 10-year visas. This visa relaxation was made by Tokyo since Japanese tourists get visas-on-arrival to India.

Sato, who accompanied the Japanese PM to India, also said that Prime Minister Manmohan Singh was briefed about the regional situation, including China's activities, by Abe.

<http://indianexpress.com/article/india/india-others/japan-to-give-indians-3-yr-multiple-entry-visas/>

India close to buying Japan-made military aircraft

India is set to become the first country since World War Two to buy a military aircraft from Japan, helping Prime Minister Shinzo Abe dismantle a ban on weapons exports that has kept his country's defence contractors out of foreign markets.

The two countries are in broad agreement on a deal for the ShinMaywa Industries (7224.T) amphibious aircraft, which could amount to as much as \$1.65 billion, Indian officials said on Tuesday.

However, several details need to be worked out and negotiations will resume in March on joint production of the plane in India and other issues.

New Delhi is likely to buy at least 15 of the planes, which are priced at about \$110 million each, the officials said.

<http://in.reuters.com/article/2014/01/28/india-japan-idINDEEA0R07S20140128>

India, Japan Discuss Joint Development of Amphibious Aircraft

India and Japan are negotiating joint development of an amphibious search-and-rescue aircraft called the US-2. Japanese Defense Minister Itsunori Onodera, who is visiting here Jan. 5-8, discussed the matter with Indian Defence Minister A.K. Antony, said Indian Ministry of Defence sources.

Analysts here said joint development of the US-2 aircraft in India will sharply boost defense ties between the two countries.

Indian Prime Minister Manmohan Singh, during a visit to Japan last year, set up a joint working group to explore how to cooperate on the US-2. Indian Navy sources, however, said the total number of aircraft needed still must be settled because only then can the Japanese work out the pricing, an MoD source said.

<http://www.defensenews.com/article/20140106/DEFREG03/301060020/India-Japan-Discuss-Joint-Development-Amphibious-Aircraft>

India, Japan sign 8 pacts of economic cooperation



India and Japan signed Saturday night eight pacts of economic cooperation on the first day of Japanese Prime Minister Shinzo Abe's visit to New Delhi, said local media reports Sunday.

Half were connected with Japanese aid including soft loans and outright grants. Seventy percent of the Japanese loans will go for implementing phase-III of the Delhi Metro project.

The two countries decided to make joint naval exercises a permanent feature and India invited Japan to join the Indis-U.S Malabar series of joint military exercises, said the Hindu daily.

The two sides also reviewed the progress made in selling hi- tech US-2 amphibious aircraft of Japan to India. This is the first time Japan is offering to sell military planes to a foreign country since Second World War.

The two sides also decided to hold political-security consultations on a regular basis to be joined by their national security chiefs and defense ministers, according to the reports.

http://news.xinhuanet.com/english/business/2014-01/26/c_133075046.htm

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