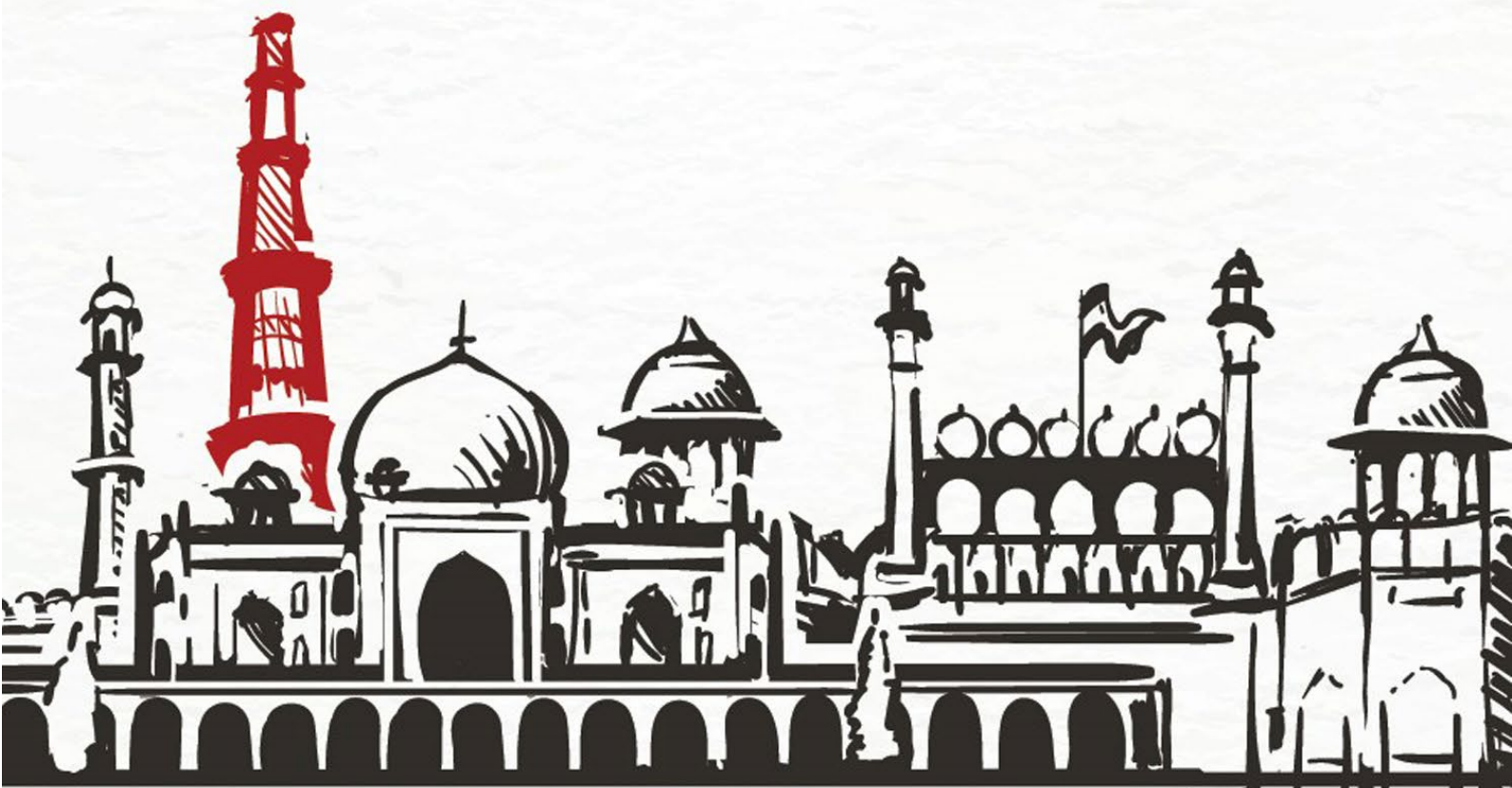


INDIA NEWSLETTER

Quarter of January to March 2024



The commercial ties between India and Japan are experiencing a dynamic expansion, setting a new precedent in their long-standing bilateral relationship. As of the latest financial year, the synergy between these two economic powerhouses has been particularly notable in sectors such as digital transformation, renewable energy, and sustainable urban development. This period has seen an acceleration in collaborative ventures, with Japan's direct investments in India scaling new heights and bilateral trade volumes witnessing a robust growth. Japan is the 5th largest investor in Indian economy with cumulative investment inflows of approximately USD 41 billion till December 2023.¹

The strategic dialogue facilitated by the leaders of both nations has further solidified this partnership, emphasizing innovation, environmental sustainability, and the development of smart cities as key pillars for future cooperation. Furthermore, the commitment to enhancing supply chain resilience and promoting technological exchanges has opened avenues for Japanese enterprises to tap into India's vast market potential and innovation ecosystem. This burgeoning relationship, underpinned by mutual respect and shared goals, not only enriches the economic landscape of both countries but also contributes significantly to the stability and prosperity of the Indo-Pacific region.

¹ Invest India, Country Desk, Japan Plus, available at <https://www.investindia.gov.in/country/japan-plus>, last accessed on April 05, 2024.

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注目の最新情報 – 2024 年 1 月～3 月

パート A: 産業別最新情報

1. 自動車および自動車部品生産連動型インセンティブの延長が決定

インド政府は自動車および自動車部品の生産連動型インセンティブの付与期間を当初予定していた会計年度 2026-27 年から 2027-28 年へと 1 年間延長した。

2. 輸送産業でのグリーン水素の使用に関するパイロットプロジェクトスキーム

新・再生可能エネルギー省は、国家グリーン水素ミッションに基づき、5,900 万米ドルの予算投入を伴う、グリーン水素の輸送産業での使用に向けたパイロットプロジェクトの導入計画ガイドラインを通達した。

パート B: 海外投資家向けの総合的な最新情報

1. インド証券取引委員会によるオルタナティブ投資ファンド向けガイドライン

インド証券取引委員会 (SEBI) は 2012 年インド証券取引委員会 (オルタナティブ投資ファンド) 規則を改正し、2024 年 10 月 1 日以降、オルタナティブ投資ファンドによる投資を電子形態で行うことを義務付けた。さらにカテゴリー I および II に属するオルタナティブ投資ファンドのうち、元本 6,000 万米ドル以下で、2024 年 1 月 12 日の時点で 1 年以上投資を保有しているファンドは 2025 年 1 月 31 日までにカストディアンを任命しなければならなくなった。

2. 特定の客観的な基準を満たす海外ポートフォリオ投資家に追加の情報開示が義務付けられる

インド証券取引委員会は通達を改正し、特定のカテゴリーに該当する外国ポートフォリオ投資家 (FPI) が開示する必要がある情報を追加した。所有権や経済的利益を有するあらゆる事業体の詳細を含む追加情報の開示の免除については、経営する企業グループ内においてインドの株式資産の 50% 以上を保有する FPI に拡大された。免除を受けるには、通達に記載された基準を満たす必要がある。

3. 1996年仲裁法の11条 (6) に基づき仲裁人の任命申請期間は1963年出訴期限法の規定に従う

仲裁法は仲裁者の任命申請期間を特段定めていない。この点に関して、インド最高裁判所は *Arif Azin Co. Ltd. vs. Aptechn Ltd.* において、*Bharat Sanchar Nigam Ltd. and Another vs. M/S Nortel Networks Pvt. Ltd.*² の判決に触れ、仲裁法に従い、仲裁人の任命申請期間は 1963 年出訴期限法 17 条残存条項 (出訴期限の日程) によって補われなければならない、具体的には 1963 年仲裁法で別途期間が定められていない場合は、あらゆる申請の期間を 3 年間とすると判示した。

² (2021) 5 SCC 738.

4. **輸入品の申告価格は当該の物品が過去の同様・同一の輸入品と比べて低い場合は認められない**

最高裁判所は、*M/S Global Technologies and Research vs. Principal Commissioner of Customs, New Delhi (Import)*において1962年関税法および2007年関税評価（輸入品の価格の決定）規則に関して、輸入者が税関申告書で申告した価格は当該の物品が過去の同様・同一の物品と比較して価格が低く見積もられている場合、却下される可能性があるとする判決を下した。さらに、最高裁判所は関税租税裁判所（CESTAT）が税に関する最終的な事実調査機関であると認識し、CESTATによる事実認定が適切ではなく、証拠となる記録と相反する場合に限り介入すると判示した。今回の裁判では、最高裁判所はCESTATの事実認定が証拠と相反していなかったため、同機関の命令を支持し、事実認定には介入しなかった。

5. **意見公募のため2024年デジタル競争法案の公布が行われる**

企業省（MCA）は、デジタル競争法委員会（CDCL）が作成したレポートをリリースし、2024年デジタル競争法案の公布を行った。意見公募の期限は2024年4月15日に定められた。

6. **宇宙産業の海外投資制度を緩和**

インド政府は宇宙産業における海外直接投資ポリシーを改訂した。今回の改訂では宇宙産業の海外投資を3つのアクティビティに分割し、自動投資に対する制限を定め、制限を超える投資についてはインド政府の承認が必要になった。

Key Updates from January to March 2024

Part A: Sector specific updates

1. **Production linked incentive for automobile and auto-components extended**

The Government of India (GoI) has extended the production linked incentive for automobile and auto-components by 1 (one) year i.e., from financial year 2026-27 to 2027-28.

2. **Scheme for pilot projects on use of green hydrogen in the transport sector**

The Ministry of New and Renewable Energy (MNRE) introduced scheme guidelines for implementation of pilot projects for use of green hydrogen in the transport sector with a budgetary outlay of approximately USD 59 (fifty-nine) million under the National Green Hydrogen Mission.

Part B: General updates for foreign investors

1. **Guidelines for Alternate Investment Funds (AIFs) by Securities and Exchange Board of India (SEBI)**

SEBI has amended the SEBI (Alternative Investment Funds) Regulations, 2012 thereby requiring any investments made by AIFs after October 01, 2024, to be in dematerialised form. Further, Category I and Category II AIFs having corpus less than or equal to USD 60 (sixty) million and holding at least 1 (one) investment as of January 12, 2024 are required to appoint a custodian by January 31, 2025.

2. **Amendment to circular for mandating additional disclosures by Foreign Portfolio Investors (FPIs) that fulfil certain objective criteria**

SEBI has amended the circular mandating additional disclosures to be made by certain categories of FPIs. The exemption for making additional disclosures such as granular details of all entities holding any ownership, economic interest, etc. has been extended to an FPI having more than 50% (fifty percent) of its Indian equity Asset under Management in a corporate group, subject to meeting the criteria laid down in the circular.

3. **Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Arbitration Act)**

The Arbitration Act does not provide for a specific time period for filing an application for appointment of arbitrator. In this regard, the Supreme Court of India (SC) in the case of *Arif Azin Co. Ltd. vs. Aptech Ltd.*, reaffirming its earlier decision in the matter of *Bharat Sanchar Nigam Ltd. and Another vs. M/S Nortel Networks Pvt. Ltd.*,³ has held that the time period for filing an application for appointment of arbitrator under the Arbitration Act must be covered by the residual provision under Article 137 (Schedule for Period of Limitation) of the Limitation Act, 1963 i.e., a period of three years for any application for which no other period is provided under the Limitation Act, 1963.

³ (2021) 5 SCC 738.

4. **Valuation declared for imported goods may be discarded if the concerned goods are undervalued in comparison to previously imported similar / identical goods**

The SC has, in the case of *M/S Global Technologies and Research vs. Principal Commissioner of Customs, New Delhi (Import)*, held that, in terms of the Customs Act, 1962 and the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the import value declared by an importer, under its bill of entry, may be discarded if the said imported goods are undervalued in comparison to past imports of similar / identical goods. Further, it held that Customs Excise and Service Tax Appellate Tribunal (CESTAT) is the final fact-finding authority in tax matters, accordingly, the Supreme Court only intervenes with factual findings by the CESTAT in cases where such findings are found to be perverse and contrary to documentary evidence on record. In the present case, the Supreme Court upheld the CESTAT's order and did not intervene with the factual findings of the CESTAT since such findings were not found to be contrary to documentary evidence on record.

5. **Draft Digital Competition Bill, 2024 notified for public comments**

The Ministry of Corporate Affairs (MCA) has released a report prepared by the Committee on Digital Competition Law (CDCL) which, among other things, notifies a draft Digital Competition Bill, 2024 for public comments until April 15, 2024.

6. **Liberalisation of foreign investment regime in the space sector**

The GoI has revised the Foreign Direct Investment Policy in the space sector, by dividing foreign investment in this sector into 3 (three) different activities with defined limits for automatic investment, beyond which an approval from the GoI will be required.

Section A: Sector specific updates

Automobile

Tenure of production linked incentive (PLI) scheme for automobile and auto components extended

The Government of India (GoI) has extended the tenure of the PLI scheme for automobile and auto components by 1 (one) year i.e., till financial year (FY) 2027-2028.⁴ Under this PLI scheme, selected entities can claim financial incentives as a percentage of the sales made by such entity. According to the amended scheme, incentives will be applicable for a continuous period of 5 (five) FYs, beginning from the FY 2023-2024. Disbursement of incentives under this scheme will begin in FY 2024-2025. The scheme specifies that approved applicant can avail benefits for 5 (five) consecutive FYs, up to FY 2027-2028. Additionally, the amendments outline if a selected entity doesn't reach the required sales target in the first year, it will not be eligible for any incentives that year. However, it can still get incentives in the following year if its sales grow by at least 10% compared to the first year's target. However, the company will remain eligible for benefits in the following years if it achieves the threshold calculated with a 10% (ten percent) year-on-year growth over the initial year's threshold. Furthermore, the amendment provides for a revised outlay of approximately USD 422 (four hundred and twenty-two) million for FY 2024-2025, up from approximately USD 58.3 (fifty-eight point three) million in the earlier scheme.

Renewable energy

Scheme for pilot projects on use of green hydrogen in the transport sector

The Ministry of New and Renewable Energy (MNRE) has on February 14, 2024 introduced scheme guidelines for implementation of pilot projects for use of green hydrogen in the transport sector under the national green hydrogen mission with a budgetary outlay of approximately USD 59 (fifty-nine) million till financial year 2025-26.⁵ The scheme aims to provide incentives for development, selection, validation of technologies for (i) use of green hydrogen as fuel for certain categories of buses, trucks and other four wheelers (such as bus and truck with (a) fuel cell based propulsion technology; and (b) internal combustion engine based propulsion technology); and (ii) supporting infrastructure like setting-up the hydrogen refuelling stations. The objectives of the scheme include deployment of green hydrogen as fuel in trucks and buses in a phased manner, evaluating and assessing the feasibility of green hydrogen as a fuel source and effectiveness of hydrogen refuelling stations. The scheme is essentially aimed at identifying operational challenges and deficiencies concerning technological facilities, regulations, implementation methodologies, infrastructure and supply chain. Scheme guidelines issued alongside the scheme outline the selection methodology and procedure for selection of pilot projects. The guidelines also provide that financial support under this scheme in the initial years will be used in reducing the capital incurred for production of hydrogen powered vehicles and associated infrastructure for setting up hydrogen refuelling stations, thereby making the process less

⁴ Ministry of Heavy Industries, Tenure of Production Linked Incentive (PLI) Scheme for Automobile and Auto Components extended by One Year with partial amendments, dated January 01, 2024, available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1992170>, last accessed, January 25, 2024.

⁵ Ministry of New and Renewable Energy, Scheme Guidelines for Pilot Projects on use of Green Hydrogen in the Transport Sector, dated February 14, 2024, available at <https://cdnbbsr.s3waas.gov.in/s3716e1b8c6cd17b771da77391355749f3/uploads/2024/02/20240214177858805.pdf>, last accessed February 25, 2024.

capital intensive. However, it must be noted that such financial support will not be extended for production of hydrogen or acquisition of land etc.

Pharmaceutical

Guidelines on Production Linked Incentive Scheme revised

The Department of Pharmaceuticals has on March 12, 2024, updated the Guidelines for the Production Linked Incentive Scheme (PLI Scheme)⁶ to revise the provisions concerning scheduled commercial operation date (i.e., the date on which the unit begins commercial operation) and invocation of bank guarantees. As per the revised provisions of the PLI Scheme, the competent authority can revise the scheduled commercial operation date for projects delayed beyond one year without cancelling their approval. Bank guarantees will now be invoked if projects are not commissioned by the revised scheduled commercial operation date. Additionally, if an applicant is selected for multiple eligible products, separate approval letters and bank guarantees are required for each product.

A detailed coverage of the same is available in our newsletter 'Checking the Pulse' (<https://induslaw.com/publications/pdf/alerts-2024/checking-the%20pulse-recent-legal-developments-in-the-indian-healthcare-and-pharma-sector.pdf>).

⁶ Policy No. 31026/16/2020, Ministry of Chemicals and Fertilizers, Department of Pharmaceuticals, Government of India, Modifications in the guidelines of Production Linked Incentive (PU) Scheme for promotion of domestic manufacturing of critical Key Starting Materials (KSMs)/ Drug Intermediates and Active Pharmaceutical Ingredients (APIs) in the country (PLI BD), relating to revision of Scheduled Commercial Operation Date (SCOD) and invocation of bank guarantee – reg., dated March 12, 2024, available at <https://pharmaceuticals.gov.in/important-document/modificationsguidelines-production-linked-incentive-scheme-promoting-domestic>, last accessed on April 03, 2024.

Section B: General updates

In this section, we explore the latest regulatory developments, which showcases India's commitment to creating a more transparent, secure, and investor-friendly business environment.

For instance, Securities and Exchange Board of India's (SEBI) amendment for mandating additional disclosures by Foreign Portfolio Investors (FPIs) that fulfil certain objective criteria indicates the regulators drive towards promoting ease of investing in India. Similarly, the revised entry routes of the space sector removing the requirement to obtain prior government approval for any foreign direct investment, depicts the intention of the GoI to make India a preferred choice among foreign investors, across various industries.

These examples, among others, highlight India's ongoing efforts to refine its regulatory framework, making it an increasingly attractive destination for global investors and businesses seeking a dynamic and secure market.

Securities and Exchange Board of India (SEBI)

Foreign Investment in Alternative Investment Funds (AIFs)

The Government of India (GoI) had on March 07, 2023 notified the Prevention of Money-laundering (Maintenance of Records) Amendment Rules, 2023 whereby certain provisions of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 were amended. Prior to the amendment, the controlling interest for determining the beneficial ownership for companies was defined to mean ownership or entitlement to more than 25% (twenty-five percent). Vide the amendment, the threshold for controlling interest has been reduced to 10% (ten percent) of the shares or capital or profits of the company. In January, SEBI amended the Master Circular for Alternate Investment Funds dated July 31, 2023⁷ vide circular dated January 11, 2024 in line with the above-mentioned amendments in the Prevention of Money Laundering (Maintenance of Records) Rules, 2005. If an existing investor fails to meet the revised criteria, such AIF is prohibited from drawing down further capital contribution from the investor until such investor meets the revised criteria.

Guidelines for AIFs with respect to holding their investments in dematerialized form and appointment of custodian.

In January, SEBI amended the SEBI (Alternative Investment Funds) Regulations, 2012 to provide for the requirement of AIFs to hold their investment in dematerialised form and appointment of custodian by the AIF. Subsequently, SEBI released guidelines⁸ in this regard which specify that:

- (i) any investments made by AIFs after October 01, 2024 must be held in dematerialized form, irrespective of whether such investment is made directly in the investee company or whether such interest is acquired from another entity. However, investments made by AIFs prior to October 01, 2024 are exempt from such requirement, except in cases where (a) the investee company is mandated by law to facilitate dematerialization of its securities, or (b) if the AIF, on its own or

⁷ Securities and Exchange Board of India, Master Circular for Alternative Investment Funds (AIFs), dated July 31, 2023, available at <https://www.sebi.gov.in/legal/master-circulars/jul-2023/master-circular-for-alternative-investment-funds-aifs-74796.html>, last accessed January 28, 2024

⁸ Securities and Exchange Board of India, Guidelines for AIFs with respect to holding their investments in dematerialised form and appointment of custodian, dated January 12, 2024, available at, https://www.sebi.gov.in/legal/circulars/jan-2024/guidelines-for-aifs-with-respect-to-holding-their-investments-in-dematerialised-form-and-appointment-of-custodian_80614.html, last accessed January 25, 2024

along with other SEBI registered entities which are required to hold investments in dematerialised form, exercises control over the investee company. Such investments (in (a) and (b) above, made prior to October 01, 2024 must be held in dematerialised form on or before January 31, 2025. Notably, the Ministry of Corporate Affairs, in October 2023 mandated dematerialization of securities of all private companies by September 30, 2024. Such requirements of holding investments in dematerialized form are not applicable on AIFs whose tenure ends before January 31, 2025 or AIFs which are in extended tenure as on January 12, 2024.

- (ii) under the AIF regulations, the sponsor or manager of the AIF is required to appoint a custodian registered with SEBI for safekeeping of securities of the AIF. Such custodian for a scheme of the AIF must be appointed prior to date of first investment of the scheme. Ongoing schemes of category I (one) and category II (two) having corpus less than or equal to approximately USD 60 (sixty) million and holding at least one investment as on January 12, 2024 are required to appoint a custodian by January 31, 2025.

Revised pricing methodology for institutional placements of the privately placed infrastructure investment trusts (InvITs)⁹

Listed InvITs, whether public or privately placed, are permitted to raise funds by way of institutional placement, in addition to the other methods specified in the regulations. In February, SEBI amended the master directions for InvITs and issued revised pricing guidelines for institutional placement by such listed InvITs. While the pricing mechanism applicable to public InvITs remains unchanged, with the prescribed floor being the 2 (two) week average of the weekly high and low of the closing price of units of the same class quoted on the stock exchange, institutional placement by privately placed InvITs are now required to be made at a price not less than the net asset value per unit based on the full valuation of all existing assets of the InvIT. The change is expected to simplify the pricing process for privately placed InvITs, aligning it with the intrinsic value of the assets, thereby potentially leading to more investment activity in this space.

Guidelines for returning of draft offer document and its resubmission¹⁰

As part of the public issue and rights issue process in India, issuers are required to submit the draft offer documents with SEBI for its observations. In certain cases, multiple revisions/ changes are required to be made in the course of SEBI review, leading to longer processing time for the drafts. On February 06, 2024, SEBI issued guidelines on returning and resubmitting draft offer documents, intended to enhance the clarity, consistency, and comprehensibility of disclosures in draft offer documents, and to reduce the processing time of draft offer documents.

Pursuant to the guidelines, draft offer documents may be returned by SEBI in case its initial scrutiny suggests any of the following:

- (i) The draft is not written in simple, clear, and concise language. Guidelines emphasize the use of short sentences, active voice, lists, tables, and visual data representations to make the documents more understandable.

⁹ Securities and Exchange Board of India, Revised Pricing Methodology for Institutional Placements of Privately Placed Infrastructure Investment Trust (InvIT), dated February 08, 2024, available at <https://www.sebi.gov.in/legal/circulars/feb-2024/revised-pricing-methodology-for-institutional-placements-of-privately-placed-infrastructure-investment-trust-inv-it-81268.html>, last accessed February 26, 2024.

¹⁰ Securities and Exchange Board of India, Guidelines for returning of draft offer document and its resubmission, dated February 06, 2024, available at, <https://www.sebi.gov.in/legal/circulars/feb-2024/guidelines-for-returning-of-draft-offer-document-and-its-resubmission-81146.html>, last accessed February 26, 2024.

- (ii) The draft contains complex presentations that could render disclosures incomprehensible or lead to multiple interpretations should be avoided. Repetition of information across different sections without adding value or clarity is also discouraged.
- (iii) Inconsistency in numbers or facts, across sections in the draft offer documents, and as submitted to SEBI as responses to clarifications sought.
- (iv) The draft requires substantial revisions or additions on key disclosures.
- (v) If corrective measures are required to be taken on account of regulatory interpretations, or if any 'regulatory authority or enforcement agency has expressed material concerns regarding the draft offer document.

Issuers may resubmit the draft offer documents for SEBI's review only after addressing the insufficiency for which the draft offer document was returned.

Amendment to Circular for mandating additional disclosures by Foreign Portfolio Investors (FPIs) that fulfil certain objective criteria

SEBI vide circular No. SEBI/ HO/ AFD/ AFD-PoD-2/CIR/P/2023/148 dated August 24, 2023¹¹ had mandated FPIs (i) holding more than 50% (fifty percent) of their Indian equity assets under management (AUM) in a single Indian corporate group; and/ or (ii) holding individually, or along with their investor group, more than USD 3 billion of equity AUM in the Indian markets, to make additional disclosures such as granular details of all entities holding any ownership, economic interest, or exercising control in the FPI, on a full look through basis, up to the level of all natural persons etc. However, subject to conditions specified in the above-mentioned circular, certain categories of FPIs such as Government and Government related investors, public retail funds, exchange traded funds (with less than 50% (fifty percent) exposure to India and India-related equity securities), pooled investment vehicles etc. were exempted from the additional disclosure requirements.

In this regard, in March 2024, the SEBI has amended the above-mentioned circular and provided that the exemption provided for making additional disclosures is extended to an FPI having more than 50% (fifty percent) of its Indian equity AUM in a corporate group, as long as:¹²

- (i) the apex company of such corporate group has no identified promoter;
- (ii) the FPI holds not more than 50% (fifty percent) of its Indian equity in the corporate group, after disregarding its holding in the apex company (with no identified promoter); and
- (iii) the composite holdings of all such FPIs (that meet the 50% (fifty percent) concentration criteria excluding FPIs which are either exempted or have disclosed) in the apex company is less than three percent (3%) of the total equity share capital of the apex company.

It must be noted that when the 3% (three percent) limit is met or breached, depositories are required to make this information public before start of trading on the next day. Thereafter, for any prospective investment in the apex company by FPIs, that meet the 50% (fifty percent) concentration criteria in the

¹¹ Available at https://www.sebi.gov.in/legal/circulars/aug-2023/mandating-additional-disclosures-by-foreign-portfolio-investors-fpis-that-fulfil-certain-objective-criteria_75886.html

¹² Circular no. SEBI/HO/AFD/AFD-POD-2/P/CIR/2024/19, Amendment to Circular for mandating additional disclosures by Foreign Portfolio Investors (FPIs) that fulfil certain objective criteria, dated March 20, 2024, available at https://www.sebi.gov.in/legal/circulars/mar-2024/amendment-to-circular-for-mandating-additional-disclosures-by-fpis-that-fulfil-certain-objective-criteria_82418.html, last accessed on April 05, 2024.

corporate group, the FPIs shall be required to either realign their investments below the 50% (fifty percent) threshold within 10 (ten) trading days or make additional disclosures prescribed in the above-mentioned circular dated August 24, 2023. The provisions of this circular have come into force with immediate effect.

Safeguards to address the concerns of the investors on transfer of securities in dematerialized mode

SEBI Master Circular for Depositories dated October 06, 2023¹³ prescribed guidelines to address the concerns arising out of transfer of securities from the Beneficial Owner (BO) accounts without proper authorization by the concerned investor. Vide its circular dated March 20, 2024¹⁴, SEBI has added the following key safeguards in such respect, with effect from April 1, 2024:

- (i) the depositories shall give more emphasis on investor education particularly with regard to careful preservation of Delivery Instruction Slip (DIS) by the BOs;
- (ii) the DPs shall not accept pre-signed DIS with blank columns from the BO(s);
- (iii) if the DIS booklet is lost / stolen / not traceable by the BO, the same must be intimated to the DP immediately by the BO in writing. On receipt of such intimation, the DP shall cancel the unused DIS of the said booklet;
- (iv) the DPs shall not issue more than 10 (ten) loose DIS to one account holder in a financial year (April to March);
- (v) the DPs shall put in place appropriate checks and balances with regard to the verification of signatures of the BOs while processing the DIS;
- (vi) the DPs shall cross check with the BOs under exceptional circumstances before acting upon the DIS; and
- (vii) the DPs shall mandatorily verify with a BO before acting upon the DIS, in case of an inactive/dormant account, whenever any security in such account is transferred at a time.

Reserve Bank of India (RBI)

Draft circular on declaration of dividend by banks and remittance of profits to head office by foreign bank branches in India.¹⁵

The RBI has issued a draft circular outlining revised guidelines for declaration of dividends by banks and remittance of profits to their head office by foreign bank branches in India. The existing guidelines have been reviewed and revised in light of implementation of international standards (e.g., Basel III standards) for strengthening the regulation and supervision of banks. The draft provides that foreign banks having branch offices in India and meeting the eligibility criteria (such as capital adequacy, compliance with certain provisions of the Banking Regulation Act, 1949, and absence of any explicit restrictions on the bank by the RBI in this respect) may remit net profit/ surplus (net of tax) of a quarter

¹³ Available at https://www.sebi.gov.in/legal/master-circulars/oct-2023/master-circular-for-depositories_77789.html

¹⁴ Circular no. SEBI/HO/MRD/MRD-PoD-2/P/CIR/2024/18, Safeguards to address the concerns of the investors on transfer of securities in dematerialized mode, dated March 20, 2024 available at https://www.sebi.gov.in/legal/circulars/mar-2024/safeguards-to-address-the-concerns-of-the-investors-on-transfer-of-securities-in-dematerialized-mode_82417.html, last accessed on April 05, 2024.

¹⁵ Reserve Bank of India, Declaration of dividend by banks and remittance of profits to Head Office by foreign bank branches in India, dated January 02, 2024, available at https://www.rbi.org.in/scripts/bs_viewcontent.aspx?Id=4364, last accessed January 25, 2024.

or year, earned in the normal course of business arising out of its Indian operations, without prior approval of the RBI, provided that the accounts of the bank are audited and in the event of excess remittance, the head of office of the relevant foreign bank immediately makes good the shortfall. The board of directors of the bank while proposing dividends or remitting profits should consider various factors, such as qualifications and emphasis of matters in auditors report, capital position vis-à-vis capital requirement, and long-term growth plans of the bank.

Revised directions on Risk Management and Inter-Bank Dealings – Hedging of foreign exchange risk¹⁶

The RBI issued updated directions on January 05, 2024, concerning risk management and inter-bank dealings, specifically focusing on the hedging of foreign exchange risk. The aim is to consolidate and update the regulatory framework for foreign exchange transactions as well as to incorporate directions from previous regulations concerning currency futures and exchange-traded currency options. Foreign exchange transactions are primarily settled via three mechanisms, i.e., cash (settlement on same day on today's rate), tom (settlement done the next day on the rate quoted and transacted today), and spot transactions (the rate is quoted and transacted today for settlement on second working day).

The directions will come into effect from April 05, 2024. Key points from the updated directions include:

- (i) **Definitions and scope:** The directions provide detailed definitions to clarify the scope of hedging activities. These include terms like 'anticipated exposure' and 'contracted exposure', which refer to currency risks arising from future and already entered transactions, respectively. Currency risk is defined as the potential for loss due to movements in exchange rates or interest rates related to foreign currencies.
- (ii) **Facilities and products:** The directions outline the facilities and products available for both residents in India and persons resident outside India, detailing how they can manage currency risk. For example, broadly, authorized dealer banks may offer foreign exchange contracts, involving Indian Rupees or otherwise, to both retail (individuals) and non-retail (financial institutions, non-banking finance companies) users for cash, tom, and spot. The products may include, *inter alia*, currency swaps, option contracts etc.
- (iii) **Types of contracts:** The directions distinguish between deliverable and non-deliverable foreign exchange derivative contracts, providing a framework for how these instruments can be used for hedging purposes. Deliverable contracts are contracts where the underlying currencies are physically exchanged on the settlement date. Whereas non-deliverable contracts are cash-settled and do not involve the physical delivery of the currency.

Master Directions on Commercial Paper and Non-Convertible Debentures of original or initial maturity up to 1 (one) year¹⁷

The RBI issued revised master directions for commercial papers (CPs) and non-convertible debentures (NCDs) with an original or initial maturity period of 1 (one) year, superseding the existing RBI directions on CPs and master directions on acceptance of public deposits by non-banking financial

¹⁶ Reserve Bank of India, Risk Management and Inter-bank Dealing – Hedging of foreign exchange risk, dated January 05, available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12594&Mode=0>, last accessed January 24, 2024.

¹⁷ Reserve Bank of India, Master Direction – Reserve Bank of India) Commercial Paper and Non-Convertible Debentures of original or initial maturity up to one year) Directions, 2024, dated January 03, 2024, available at [https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=12592#:~:text=CPs%20and%20NCDs%20shall%20be,%2Fput\)%20is%20not%20permitted](https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=12592#:~:text=CPs%20and%20NCDs%20shall%20be,%2Fput)%20is%20not%20permitted), last accessed January 25, 2024.

companies (NBFCs). The directions will be applicable on all persons/ agencies dealing in such CPs and NCDs and are set to come into force from April 01, 2024 and will be applicable on CPs and NCDs issued after this date. Key features of the master directions are:

- (i) **Eligible issuers:** The following entities are permitted to issue CPs and NCDs, (a) Companies as defined under Companies Act, 2013; (b) NBFCs; (c) infrastructure investment trusts and real estate investment trusts; (d) all India financial institutions(AIFIs); (e) other corporate entities statutorily permitted to incur debt or issue debt with minimum net worth of at least INR 100 Crores (approximately USD 12 (twelve) million)¹⁸; (f) cooperative societies and limited liability partnerships with a minimum net worth of INR 100 Crore (approximately USD 12 (twelve) million); (g) and entities specifically permitted by the RBI.

In order to qualify as an eligible issuer, all fund-based facilities availed by such issuer from banks, AIFIs or NBFCs are classified as a 'standard asset' at the time of issue of CPs/NCDs.

- (ii) **Eligible investors:** All residents and non-residents (to the extent permissible under the foreign exchange regulations of India) are permitted to invest in CPs and NCDs provided that no residents or non-residents can invest in CPs and NCDs issued by any related party in the primary or secondary market.
- (iii) **General Guidelines:** The guidelines cover various crucial aspects, including primary issuance, discount/coupon rates, credit enhancement, end-use, rating requirements. Both CPs and NCDs are required to be issued in dematerialized form, held with a SEBI-registered depository, and adhere to specific denominations and tenors.

The primary issuance must meet disclosure requirements, settle within T+4 (four) working days, and involve an issuing and paying agent (IPA). Credit enhancement provisions allow support from banks and AIFIs, while non-bank entities may provide guarantees. Funds from NCDs must be used for current assets, with a minimum 'A3' credit rating mandated.

Secondary market trading occurs on recognized stock exchanges or over-the-counter (OTC) markets with specified settlement cycles. The guidelines outline buyback conditions, repayment norms, default reporting, and market timing, with standardized procedures by Fixed Income Money Market and Derivatives Association of India guiding market practices. In case of default, the issuer cannot issue either instrument until full repayment of the defaulted obligation or 6 (six) months from the default date, whichever is earlier.

- (iv) **Reporting:** The directions mandate timely reporting of primary issuances, secondary market transactions, buybacks and defaults. For example, all secondary market transactions in CPs and NCDs executed in the OTC market or recognized stock exchanges are required to be reported by each counterparty to the transaction with the time stamp within 15 (fifteen) minutes of execution on the F-TRAC platform.

Arbitration

Limitation Act 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996

The Supreme Court of India in the matter of *Arif Azin Co. Ltd. vs. Aptech Ltd.*,¹⁹ has held that the period for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) has to comply with the limitation period prescribed under the Limitation Act, 1963 (Limitation Act).

¹⁸ Please note that the USD values are as of April 05, 2024.

¹⁹2024 SCC OnLine SC 215.

The issue at hand was whether the provisions of Limitation Act apply to an application under Section 11(6) of the Arbitration Act for appointment of an arbitrator. It must be noted that Section 11(6) of the Arbitration Act does not provide for a time-limit for filing an application. However, Section 43 of the Arbitration Act provides that the provisions of the Limitation Act shall be applicable to arbitrations. The Court held that since the Limitation Act does not specifically provide a time period for filing an application for appointment of arbitrator under the Arbitration Act, the same would be covered by the residual provision under Article 137 of the Limitation Act. Further, the bench also recommended that the Arbitration Act is amended to provide for a specific time-period of limitation within which an application for appointment of arbitrator has to be filed.

Tax

Valuation declared for imported goods may be discarded if the concerned goods are undervalued in comparison to previously imported similar/identical goods

The Supreme Court has, in the case of *M/S Global Technologies and Research versus Principal Commissioner of Customs, New Delhi (Import)*²⁰, held that, in terms of the Customs Act, 1962 and the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the import value declared by an importer, under its bill of entry, may be discarded if the said imported goods are undervalued in comparison to past imports of similar / identical goods. In such circumstances, it is proper for the adjudicating authority to attribute a higher value, than the declared value. For exercising the said powers, it is, however, imperative that the concerned goods are found to be identical or similar, through documentary evidence.

The concerned matter pertained to import of camera stabilizer devices. Based on an investigation by the customs authorities and statements given by the Importer, it was found that the importer had previously imported identical/similar items at a higher and different unit price. On account of the same, the Adjudicating Authority ordered for confiscation of the said imported goods, and demanded differential duty payments, along with interest and penalties. In appeal, the said finding was reversed by the Appellate Authority. Subsequently, in further appeal by the Customs, the Customs Excise and Service Tax Appellate Tribunal (CESTAT) reversed the findings of the Appellate Authority and affirmed the view taken by the Adjudicating Authority.

In the appeal before the Supreme Court, the importer emphasized on the fact that the concerned imported goods were lower versions, and there was difference in hardware and software functions, in comparison to past imports. However, the Supreme Court found that CESTAT as well as the adjudicating authority has given detailed reasons to justify that the imported goods are similar / identical to past imports. Additionally, the Court also found it relevant that the Appellant itself made a statement before the Adjudicating Authority that there is a little difference in hardware and software functions. Accordingly, on account of factual findings by the CESTAT, the findings of CESTAT have been upheld.

It must be noted that CESTAT is the final fact-finding authority in tax matters. Accordingly, the Supreme Court only intervenes with factual findings by the CESTAT in cases where such findings are found to be perverse and contrary to documentary evidence on record.

²⁰ 2024 INSC 204.

Competition

Draft digital competition bill notified for public comments

The Ministry of Corporate Affairs (MCA) on February 27, 2024 released a report prepared by the Committee on Digital Competition Law (CDCL) which, among other things, recommended an introduction of an extant legislation specifically applicable to large digital enterprises, to supplement the Competition Act, 2002 (as amended) (Competition Act). In this regard, the CDCL report comprised a draft Digital Competition Bill, 2024²¹ (DCB), inviting public comments until April 15, 2024.

Set out below are the key features of the DCB:

- (i) Identification of core digital services: CDCL recognised that there could be higher error costs that may be associated with an ex-ante competition framework and opined that the scope of the DCB should apply only to clearly identified digital services that are susceptible to market concentration to avoid unintended chilling effects. The current list of core digital services identified in the DCB comprises: (a) online search engines; (b) online social networking services; (c) video-sharing platform services; (d) interpersonal communications services; (e) operating systems; (f) web browsers; (g) cloud services; (h) advertising services; and (i) online intermediation services.
- (ii) Identification of Systemically Significant Digital Enterprises (SSDE): The DCB suggests that each enterprise engaged in the business of core digital services and meeting the prescribed financial and user thresholds in each of the preceding three (3) financial years would be considered as a SSDE. Upon completion of the identification process between the enterprise and the Competition Commission of India (CCI), such enterprise shall be designated as an SSDE for a period of 3 (three) years.
- (iii) Self-Reporting: An enterprise shall, within a period of 90 (ninety) days of meeting the SSDE thresholds would be required to inform the CCI that it fulfils the criteria to qualify as an SSDE in one or more core digital services. Further, the enterprise would also have an obligation to identify and inform the CCI of all other enterprises within its group involved in the provision of core digital services.

A detailed coverage of the same is available in our Infoplex article 'Digital Competition Bill, 2024' (<https://induslaw.com/publications/pdf/alerts-2024/digital-competition-bill-2024-is-ex-ante-regulation-the-next-best-thing-since-sliced-bread-or-a-frankenstein-in-the-making.pdf>).

Others

Liberalisation of foreign investment regime in the space sector

The GoI on February 21, 2023, approved amendments to ease the Foreign Direct Investment policy in the space sector, by creating sub-sectors and liberalising thresholds.²² Previously, 100% (one hundred percent) foreign investment was permitted, with the prior approval of the GoI, in Indian entities that are engaged in the establishment and operation of satellites, subject to sectoral guidelines prescribed by the Department of Space or the Indian Space Research Organisation. This effectively meant that for an Indian entity engaged in any activity in the space sector, access to foreign capital or technological

²¹ Ministry of Corporate Affairs, Report of the Committee on Digital Competition Law – 2024, dated February 27, 2024, Available at <https://www.mca.gov.in/bin/dms/getdocument?mcs=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>, last accessed on March 07, 2024.

²² Press Information Bureau, dated February 21, 2024, available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2007876>, last accessed March 27, 2024.

know-how was somewhat restricted, as a case had to be first made before the government authorities before foreign collaboration was possible.

As per the revised norms, 100% (one hundred percent) FDI continues to be permitted in the space sector, the entry routes for such foreign investments have been divided into 3 (three) different activities with defined limits for each activity, beyond which an approval from the GoI will be required. The revised entry routes are as follows:

Relevant Space Activity	Permitted FDI	Entry Route
Satellites-Manufacturing & Operation, Satellite Data Products and Ground Segment & User Segment	Up to 74%	Automatic
Launch Vehicles and associated systems or subsystems, Creation of Spaceports for launching and receiving Spacecraft	Up to 49%	Automatic
Manufacturing of components and systems/ subsystems for satellites, ground segment and user segment	Up to 100%	Automatic

Direct listing of Indian Companies on International Financial Services Centre (IFSC) exchanges

The finance minister, in July 2023, had announced the GoI’s decision to enable direct listing of listed and unlisted companies on IFSC exchanges. While enabling provisions were included in the Companies (Amendment Act), 2020 to allow direct listing of public companies in India on permitted stock exchanges, such provisions were notified by the MCA by way of a gazette notification with effect from October 30, 2023.²³ In this regard, the MCA on January 24, 2024 notified the Companies (Listing of equity shares in permissible jurisdictions) Rules, 2024²⁴ prescribing the framework for entities eligible to directly list outside India. Currently, for the purposes of direct listing, IFSC in India has been recognised as a permissible jurisdiction, and the India International Exchange and NSE International Exchange in IFSC are recognised as permitted stock exchanges. These rules allow certain classes of unlisted Indian public companies, subject to compliance with the foreign exchange laws in India, to list on IFSC exchanges.

A detailed coverage of these rules are available in our Infolex article ‘Listing beyond Borders: Direct listing of Indian companies on IFSC exchanges’ (<https://induslaw.com/publications/pdf/alerts-2024/listing-beyond-borders-direct-listing-of-indian-companies-on-ifsc-exchanges.pdf>).

²³ Notification no. S.O. 4744(E), Ministry of Corporate Affairs, Notification dated October 30, 2023, Available at <https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=Mzc2MDg5OTY0&docCategory=Notifications&type=open>, last accessed on February 08, 2024.

²⁴ Notification no. G.S.R. 61(E), Ministry of Corporate Affairs, Companies (Listing of equity shares in permissible jurisdictions) Rules, 2024, dated January 24, 2024, Available at <https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=NDE1NzI3NjYy&docCategory=Notifications&type=open>, last accessed on February 08, 2024.

Market Bulletin

Key market developments in the months of January to March 2024 included the following:

1. India and Bhutan have signed a memorandum of understanding between the Government of India and the Royal Government of Bhutan for general supply of petroleum, oil, lubricants and related products from India to Bhutan.
2. 3 (three) new semiconductor units received approval from the GoI in February, 2024 under the Development of Semiconductors and Display Manufacturing Ecosystems in India. Reportedly, these 3 (three) units have the potential to create direct employment of 20,000 (twenty thousand) advanced technology jobs and 60,000 (sixty thousand) other jobs.
3. C-DOT, the telecom research and development centre of the Department of Telecommunications (DoT), GoI and Indian Institute of Technology, Roorkee have signed an agreement for developing a 140 (one hundred forty) GHz fully integrated transmitter and receiver module.
4. Bharat Biotech and Serum Institute of India plan to collaborate to create a vaccine with the aim to eradicate polio, globally.
5. Construction of India's first semiconductor fab in Dholera, Gujarat has been started by Tata Electronics in collaboration with Powerchip Semiconductor Manufacturing Corporation, a Taiwanese company.
6. Adani Green Energy Limited (AGEL) has announced that it is the first company in India to cross the 10,000 (ten thousand) megawatts mark of operational portfolio, comprising 7,393 (seven thousand three hundred ninety-three) MW solar, 1,401 (one thousand four hundred one) MW wind and 2,140 (two thousand one hundred forty) MW wind-solar hybrid electricity.
7. Simmtech Co. Ltd., world's largest manufacturer of semiconductor substrates from South Korean has signed a memorandum of understanding with the Government of Gujarat to set up a chip component plant in Gujarat.

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