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Unit-I Competition Law a. Background b. Prohibitions c. Competition Commission of India

Unit-II: Corporate Finance and regulatory framework a. Security Contract (Regulation) Act 1956 b. SEBI Act 1992 c. Depositories Act 1996 d. The Securitization and Reconstruction of Financial Assets and enforcement of security Interest Act, 2002

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Unit-I Competition Law

BACKGROUND

Ensuring economic justice has been the main plank of the government since independence. With the same objective in mind, the Government enacted Monopolies and Restrictive Trade Practices Act, 1969. But this small piece of legislation attracted sharp criticism on account of its "ineffectiveness" in achieving the objectives stated in the Act. The Act was perceived to have failed in curbing concentration of economic power or in regulating the diverse monopolistic, restrictive and unfair trade practices. However, with the onset of globalization, it was realized that it would be better to promote competition and not concentration. A high-level committee was constituted in October 1999 under the chairmanship of SVS Raghavan to go into the aspects of competition policy and a related Law. The committee submitted its report in May 2000. Its recommendations formed the basis of a draft Bill, which was presented in the Parliament. The Bill got Presidential assent in January 2003, after two-and-a-half years. Objective of Competition Act, 2002 The Preamble of the Act declares the intention of the Government to press in service the provisions of the Act for the achievement of the following objectives: i. To prevent anti-competition practices; ii. To promote and sustain competition in markets; iii. To protect the interests of consumers; and iv. To ensure freedom of trade for all participants in the markets in India. On the whole, the legislation seeks to clear all the hurdles in promoting competition among business units of domestic and foreign origin. In this new Act, there is no mention of 'concentration' but whether such 'concentration' leads to employing anti-competitive practices. Prohibitions Anti-competitive agreements- According to Section 3 of the Act, no enterprise or association of enterprises shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. The key aspect in the implementation of the provision of this section is the identification of situation involving adverse effect on competition. The Act has identified the following types of arrangements/agreements that are likely to cause adverse effect on competition: i. Determining sale price or purchase price directly or indirectly ii. Limiting or controlling production, supply, markets, technical development or investment iii. Sharing markets or sources of supply by territory, type, size or in any other manner iv. Bid rigging or collusive bidding v. Tie-in arrangement vi. Exclusive supply agreement vii. Exclusive distribution agreement viii. Refusal to deal ix. Resale price maintenance As a matter of fact, many of the above agreements are those that were covered under Section 33 of the MRTP Act, 1969. Nevertheless, the present Act seeks to furnish a pointed interpretation to the words used in earlier clauses. More so, the new Act is also attempting to delimit practices like cartels, bid rigging, exclusive supply and distribution agreements. Due to lack of procession in the clauses of the MRTP Act, one had to depend on the interpretations of the MRTP Commission or courts. This anomaly was sought to be corrected through the Competition Act. Further, there has been a sea change in the trade environment after the advent of the WTO. A new set of trade issues has come to the fore for every developing economy, resulting in new type of restrictive trade agreements. WTO issues like TRIPS, TRIMS, state monopolies, anti-dumping measures, sanitary and photo sanitary measures, technical barriers to trade, etc. need to be addressed in the new Act. As such, the new Act attempted to take this changing environment into account and formulate a new policy. The attempt of the high-level committee needs to be appreciated for its far-sighted vision and for enhancing the scope of the Act. Abuse of 'Dominant Position' According to Section 4 of the Act, no enterprise shall abuse its dominant position. An abuse of dominant position is said to occur, when an enterprise: (a) Directly or indirectly imposes unfair or discriminatory purchase of selling prices on condition, including predatory prices; (b) Limits production, markets or technical development to the prejudice of consumers; (c) Indulges in action resulting in denial of market access; (d) Makes the conclusion of contracts subject to acceptance by other parties; (e) Uses dominance in one market to move into or protect other markets. For the purpose of determining whether an enterprise enjoys dominant position or otherwise, one or more of the following factors may be taken into account: (a) Market share (b) Size and resources of the enterprise (c) Size and importance of the competitors (d) Economic power of the enterprise (e) Technical advantages enjoyed by firm (f) Dependence on consumers (g) Monopoly status (h) Entry barriers (i) Countervailing buying power (j) Market structure and size (k) Any other factor which the commission considers to be relevant. It is evident from the above that the Act is attempting to describe the meaning of dominant position. In its explanation to Section 4, the Act has defined the term to mean a position of strength enjoyed by an enterprise in the relevant market in India, enabling it to: (i) operate independently of competitive forces prevailing in the market; (ii) effect its competitors or consumers of the relevant market in its favors. The power to decide on dominant position is vested in the hands of the Commission, having regard to the factors listed above. The dominance is required to be decided case by case and the rules are subjective in nature. Instead, the Act should have defined dominance in terms of a percentage of market shares. In fact this was the methodology of the old MRTP Act. There are two aspects of this issue. First is the 'determination of dominance' and the second is the 'determination of the abuse of dominance'. Though the first could be effectively determined, the case may be lost on the second ground. The authors of the Law should have followed the Microsoft case very closely and shaped their thinking on this aspect. Regulation Combinations Section 5 of the Act stipulates that any person who proposes to enter into an agreement or combination shall give a notice to the Commission in the prescribed form within seven days of occurrence of any of the following: (a) The board of directors of respective companies accepting a proposal of merger; (b) The conclusion of negotiations of an agreement for an acquisition or acquiring control; (c) The execution of a joint venture agreement or shareholder agreement or technology agreement. However, the Commission will not enquire into all types of combinations. It has fixed certain norms for the acquirer company and the one being acquired in terms of assets and turnover. It means that the Commission intends to enquire into only those cases that result in substantial control of the assets or turnover. Another important aspect of regulation is that a combination shall become void only when it causes or is likely to cause an appreciable adverse effect on competition. After receipt of the notice for combination, the commission will conduct an investigation to decide whether the combination in question leads to adverse effect or not. The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, direct the parties to the said combination to publish details of the combination within 10 working days of such direction, in such a manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objection, if any, before the Commission within 15 working days from the date on which the details of the combination were published. The Commission may, within 15 working days from the expiry of the period specified in Sub-Section 3, call for such additional or other information as it may deem fit from the parties to the said combination. The additional or other information called for by the Commission shall be furnished by the parties referred to in Sub-Section (4) within 15 working days from the expiry of the period. After receipt of all information and within a period of 45 working days from the expiry of the period specified in Sub-Section 5, the Commission shall proceed to deal with the case in accordance with the provisions contained in Section 31.Section 31 speaks of the scope of orders of the Commission on certain combinations. Where the Commission is of the opinion that any combination Does not, or is not likely to have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under Sub-Section (2) of Section (6). Where the Commission is of the opinion that the combination has, or is likely to have an appreciable adverse effect on competition, it shall direct that the combination shall not take effect. Where the Commission is of the opinion that the combination has, or is likely to have, appreciable adverse effect on the competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination Competition Commission of India is a body of the Government of India responsible for enforcing The Competition Act, 2002 throughout India and to prevent activities that have an adverse effect on competition in India. It was established on 14 October 2003. It became fully functional in May 2009. The Commission comprises a Chairperson and six members Establishment of Commission With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India". (2)The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued. (3) The head office of the Commission shall be at such place as the Central Government may decide from time to time. (4) The Commission may establish offices at other places in India. Composition Establishment of Commission With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India". 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(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission. (3) The Chairperson and other Members shall be whole-time Members. The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of – a) The Chief Justice of India or his nominee ---- Chairperson; b) The Secretary in the Ministry of Corporate Affairs ---- Member; c) The Secretary in the Ministry of Law and Justice ---- Member; d) Two experts of repute who have special knowledge ---- Members of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy (2) The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed. Term of office of Chairperson and other Members The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed. In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson. When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions. Resignation, removal and suspension of Chairperson and other members The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office: Provided that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest. UNIT-II Securities Contracts (Regulation) Act, 1956 Introduction India currently has two major stock exchanges--the National Stock Exchange, established in 1994, and the Bombay Stock Exchange (BSE), the oldest stock exchange in Asia, established in 1875. Until 1992 the BSE had a monopoly, marked with inefficiencies, high costs of inter mediation, and manipulative practices, so external market users often found them disadvantaged. The economic reforms of the early nineties created four new institutions: the Securities and Exchanges Board of India (SEBI), the National Stock Exchange, the National Securities Clearing Corporation, and the National Securities Depository. The National Stock Exchange (NSE) is a limited liability company owned by public sector financial institutions and now accounts for about two-thirds of the stock trading in India, as well as virtually all of its derivatives trading. The National Securities Clearing Corporation is the legal counter-party to net obligations of each brokerage firm, and thereby eliminates counter-party risk and the possibility of payments crises. It follows a rigorous 'risk containment' framework involving collateral and intra–day monitoring. The NSCC, duly assisted by the National Securities Depository, has an excellent record of reliable settlement schedules since its inception in the mid-1990s. The Securities and Exchanges Board of India has introduced a rigorous regulatory regime to ensure fairness, transparency and good practice. For example, for greater transparency, the SEBI has mandated disclosure of all transactions where the total quantity of shares is more than 0.5% of the equity of the company. Brokers must disclose to the Stock Exchange, immediately after trade execution, the name of the client and other trade details, and the Exchange must then disseminate this information to the general public on the same day. The new environment of improved transparency, fairness, and efficient regulation led BSE to also become a transparent electronic limit order. The Securities Contracts (Regulation) Act163, 1956 is enacted to prevent undesirable transactions in securities by regulating the business of dealing therein by providing for certain other matters connected therewith. It was enacted in the seventh year of the Republic Of India. Corporatization - "corporatization" means the succession of a recognized stock exchange, being a body of individuals or a society registered under the Societies Registration Act, 1860 (21 of 1860), by another stock exchange, being a company incorporated for the purpose assisting, regulating or controlling the business of buying, selling or dealing in securities carried on by such individuals or society. Demutualization - "demutualization" means the segregation of ownership and management from the trading rights of the members of a recognized stock exchange in accordance with a scheme approved by the Securities and Exchange Board of India; Corporatization and demutualization of stock exchanges- On and from the appointed date, all recognized stock exchanges (if not corporatized and demutualised before the appointed date) shall be corporatized and demutualised as per following procedure- (1) All recognized stock exchanges (if not corporatized and demutualised before the appointed date) shall, within time prescribed by SEBI, submit a scheme for corporatization and demutualization for its approval. However, the SEBI may specify the name of the recognized stock exchange, which had already been corporatized and demutualised, and such stock exchange shall not be required to submit the scheme. 2) On receipt of the scheme, the Securities and Exchange Board of India may, after making such enquiry as may be necessary and if it is satisfied that it would be in the interest of the trade and also in the public interest, approve the scheme with or without modification. (3) The scheme shall not be approved by SEBI if the issue of shares for a lawful consideration or provisions of trading rights in lieu of membership card of the members of a recognized stock exchange or payment of dividends to members has been proposed out of any reserves or assets of that stock exchange. (4) Where the scheme is approved , the same shall be published immediately by SEBI in official Gazette and by the recognized stock exchange in such two daily newspapers circulating in India, as may be specified by the SEBI and upon such publication the scheme shall have effect and be binding on all persons and authorities including all members, creditors, depositors and employees of the recognized stock exchange and on all persons having any contract, right, power, obligation or liability with, against, over, to, or in connection with, the recognized stock exchange or its members. (5) However, if SEBI is satisfied that it would not be in the interest of the trade and also in the public interest to approve the scheme under, it may, by an order, reject the scheme and such order of rejection shall be published by it in the Official Gazette. (6) The Securities and Exchange Board of India may, while approving the scheme by an order in writing, restrict— (a) the voting rights of the shareholders who are also stock brokers of the recognized stock exchange; (b) the right of shareholders or a stock broker of the recognized stock exchange to appoint the representatives on the governing board of the stock exchange; (c) the maximum number of representatives of the stock brokers of the recognized stock exchange to be appointed on the governing board of the recognized stock exchange, which shall not exceed one-fourth of the total strength of the governing board. (7) Every recognized stock exchange shall, in respect of which the scheme has been approved, either by fresh issue of equity shares to the public or in any other manner as may be specified by the regulations made by the Securities and Exchange Board of India, ensure that at least fifty-one per cent of its equity share capital is held, within twelve months from the date of publication of the order by the public other than shareholders having trading rights. Withdrawal of recognition of Stock Exchange - If the Central Government/ SEBI are of opinion that the recognition granted to a stock exchange should, in the interest of the trade or in the public interest, be withdrawn, the Central Government may serve on the governing body of the stock exchange a written notice in this regard and after giving an opportunity to the governing body to be heard in the matter, the Central Government may withdraw, by notification in the Official Gazette, the recognition granted to the Stock exchange. However, it will not have any effect on the validity of any contract entered into before the date of such notification. Where the recognized stock exchange has not been corporatized or demutualised or it fails to submit the scheme or the scheme has been rejected by the Securities and Exchange Board of India, the recognition granted to such stock exchange stand withdrawn and the Central Government shall publish, by notification in the Official Gazette, such withdrawal of recognition. However, it will not have any effect on the validity of any contract entered into before the date of such notification. Powers of Central Government / SEBI regulating the affairs of Stock Exchanges Power of Central Government to call for periodical returns or direct Inquiries to be made every recognized stock exchange shall furnish to the Securities and Exchange Board of India such periodical returns relating to its affairs as may be prescribed. Every recognized stock exchange and Every member thereof shall maintain and preserve for such periods not exceeding five years such books of account, and other documents as the Central Government, after consultation with the stock exchange concerned, may prescribe in the interest of the trade or in the public interest, and such books of account, and other documents shall be subject to inspection at all reasonable times by the Securities and Exchange Board of India. The SEBI, if it is satisfied that it is in the interest of the trade or in the public interest so to do, may, by order in writing. (a) call upon a recognized stock exchange or any member thereof to furnish in writing such information or explanation relating to the affairs of the stock exchange or of the member in relation to the stock exchange as the Securities and Exchange Board of India may require; or (b) Appoint one or more persons to make an inquiry in the prescribed manner in relation to the affairs of the governing body of a stock exchange or the affairs of any of the members of the stock exchange in relation to the stock exchange and submit a report of the result of such inquiry to the (Securities and Exchange Board of India] within such time as may be specified in the order or, in the case of an inquiry in relation to the affairs of any of the members of a stock exchange, direct the governing body to make The inquiry and submit its report to the Securities and Exchange Board of India. (c) If the member of the stock exchange is a firm, every partner, manager, secretary or other officer of the firm (d) Every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clauses (a), (b) and (c), whether directly or indirectly; shall be bound to produce before the authority making the inquiry all such books of account, and other documents in his custody or power relating to or having a bearing on the subject-matter of such inquiry. Where SEBI satisfied on the request of stock exchange or of its own motion that it is necessary to make bye laws or amend bye laws, the bye laws or amendment in bye laws can be made by it. These bye laws shall be published in Gazette. The making or the amendment or revision of any bye-laws under this section shall in all cases be subject to the condition of previous publication. Power of Central Government to supersede governing body of a recognized stock exchange- where the Central Government is of opinion that the governing body of any recognized stock exchange should be superseded, then the Central Government may serve on the governing body a written notice that it is considering the suppression of the governing body, then it may, by notification in the Official Gazette; declare the governing body of such stock exchange to be superseded. It may appoint any person or persons to exercise and perform all the powers and duties of the governing body, and, where more persons than one are appointed, may appoint one of such persons to be the chairman and another to be the vice-chairman thereof. Power of Securities and Exchange Board of India to make regulations- Without prejudice to the provisions contained in section 30 of the Securities and Exchange Board of India Act, 1992, the Securities and Exchange Board of India may, by notification in the Official Gazette, make regulations consistent with the provisions of this Act and the rules made there under to carry out the purposes of this Act. In particular and without prejudice to the generality of the foregoing power, such regulations may provide for the manner in which at least fifty-one per cent of equity share capital of a recognized stock exchange is held within twelve months from the date of publication of The order under sub-section Every regulation made under this Act shall be laid, as soon as may be After it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation. Power to grant immunity- The Central Government may, on recommendation by the Securities and Exchange Board of India, if the Central Government is satisfied, that any person, who is alleged to have violated any of the provisions of this Act or the rules or the regulations made there under, has made a full and true disclosure in respect of alleged violation, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act, or the rules or the regulations made there under or also from the imposition of any penalty under this Act with respect to the alleged violation. Powers of Stock Exchanges To make rules restricting voting rights, etc.- A recognized stock exchange may make rules or amend any rules made by it to provide for all or any of the following matters, namely:— (a) the restriction of voting rights to members only in respect of any matter placed before the stock exchange at any meeting; (b) the regulation of voting rights in respect of any matter placed before the stock exchange at any meeting so that each member may be entitled to have one vote only, irrespective of his share of the paid-up equity capital of the stock exchange; (c) The restriction on the right of a member to appoint another person as his proxy to attend and vote at a meeting of the stock exchange; The rules of a recognized stock exchange made or amended in relation to any matter shall not have effect until they have been approved by the Central Government and published by that Government in the Official Gazette and, in approving the rules so made or amended, the Central Government may make such modifications therein as it thinks fit, and on such publication, the rules as approved by the Central Government shall be deemed to have been validly made, notwithstanding anything to the contrary contained in the Companies Act, 1956. To make bye-laws- Any recognized stock exchange may, subject to the previous approval of the Securities and Exchange Board of India], make byelaws for the regulation and control of contracts. In particular, and without prejudice to the generality of the foregoing power, such byelaws may provide for: (a) The opening and closing of markets and the regulation of the hours of trade; (b) A clearing house for the periodical settlement of contracts and differences there under, the delivery of and payment for securities, the passing on of delivery orders and the regulation and maintenance of such clearing house; (c) the submission to the Securities and Exchange Board of India] by the clearing house as soon as may be after each periodical settlement of all or any of the following particulars as the Securities and Exchange Board of India] may, from time to time, require. SEBI Act, 1992 In exercise of the powers conferred by section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board with the previous approval of the Central Government, hereby makes regulations:— "insider" means any person who, (i) is or was connected with the company or is deemed to have been connected with the company and is reasonably expected to have access to unpublished price sensitive information in respect of securities of company, or has received or has had access to such unpublished price sensitive information;] Prohibition on dealing, communicating or counseling on matters relating to insider trading. No insider shall—(i) either on his own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange any unpublished price sensitive information; (ii) communicate 21[or] counsel or procure directly or indirectly any unpublished price sensitive information to any person who while in possession of such unpublished price sensitive information shall not deal in securities: Violation of provisions relating to insider trading. Any insider who deals in securities in contravention of the provisions of regulation shall be guilty of insider trading. Investigation Power to make inquiries and inspection. If the Board suspects that any person has violated any provision of these regulations, it may make inquiries with such persons or any other person, to form a prima facie opinion as to whether there is any violation of these regulations. (2) The Board may appoint one or more officers to inspect the books and records of insider(s) or any other persons Board's right to investigate. Where the Board, that it is necessary to investigate and inspect the books of account, either records or documents (2), it may appoint an investigating authority for the said purpose. (a) to investigate into the complaints received from investors, intermediaries or any other person on any matter having a bearing on the allegations of insider trading; and (b) to investigate suo-motu upon its own knowledge or information in its possession to protect the interest of investors in securities against breach of these regulations. Procedure for investigation. Before undertaking any investigation, the Board shall give a reasonable notice to insider for that purpose. (2) Notwithstanding anything contained in sub-regulation (1), where the Board is satisfied that in the interest of investors or in public interest no such notice should be given, it may by an order in writing direct that the investigation be taken up without such notice. (3) On being empowered by the Board, the investigation authority shall undertake the investigation and inspection of books of account and the insider against whom an investigation is being carried out shall be bound to discharge his obligations. Obligations of insider on investigation by the Board. It shall be the duty of every insider, who is being investigated to produce to the investigating authority such books, accounts and other documents in his custody or control and furnish the authority with the statements and information relating to the transactions in securities market within such time as the said authority may require. (2) The insider shall allow the investigating authority to have reasonable access to the premises occupied by such insider and also extend reasonable facility for examining any books, records, documents and computer data in the possession of the stock-broker or any other person and also provide copies of documents or other materials which in the opinion of the investigating authority are relevant. (3) The investigating authority, in the course of investigation, shall be entitled to examine or record statements of any member, director, partner, proprietor and employee of the insider 35[or any other person. (4) It shall be the duty of every director, proprietor, partner, officer and employee of the insider to give to the investigating authority all assistance in connection with the investigation, which the insider may be reasonably expected to give. Submission of Report to the Board. The investigating authority shall, within reasonable time] of the conclusion of the investigation, submit an investigation report to the Board. Communications of findings, etc. The Board shall, after consideration of the investigation report communicate the findings to the person suspected to be involved in insider trading or violation of these regulations. The person to whom such findings has been communicated shall reply to the same within 21 days; and On receipt of such a reply or explanation, if any, from such person, the Board may take such measures as it deems fit to protect the interests of the investors and in the interests of the securities market and for the due compliance of the of the Act, the regulations made there under including the issue of directions under regulation Depositories Act, 1996 Rights and Obligations of Depositories, Participants, Issuers and Beneficial Owners Agreement between depository and participant (1) A depository shall enter into an agreement with one or more participants as its agent. (2) Every agreement shall be in such form as may be specified by the bye laws. Services of depository Any person, through a participant, may enter into an agreement, in such form as may be specified by the bye-laws, with any depository for availing its services. Surrender of certificate of security (1) Any person who has entered into an agreement shall surrender the certificate of security, for which he seeks to avail the services of a depository, to the issuer in such manner as may be specified by the regulations. (2) The issuer, on receipt of certificate of security under shall cancel the certificate of security and substitute in its records the name of the depository as a registered owner in respect of that security and inform the depository accordingly. (3) A depository shall, on receipt of information enter the name of the person referred in its records, as the beneficial owner. Registration of transfer of securities with depository (1) Every depository shall, on receipt of intimation from a participant, register the transfer of security in the name of the transferee. (2) If a beneficial owner or a transferee of any security seeks to have custody of such security, the depository shall inform the issuer accordingly. Options to receive security certificate or hold securities with depository (1) Every person subscribing to securities offered by an issuer shall have the option either to receive the security certificates or hold securities with a depository. (2) Where a person opts to hold a security with a depository, the issuer shall intimate such depository the details of allotment of the security, and on receipt of such information the depository shall enter in its records the name of the allotted as the beneficial owner of that security. . Rights of depositories and beneficial owner (1) Notwithstanding anything contained in any other law for the time being in force, a depository shall be deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner. (2) Save as otherwise provided in sub-section (1), the depository as a registered owner shall not have any voting rights or any other rights in respect of securities held by it. (3) The beneficial owner shall be entitled to all the rights and benefits and be subjected to all the liabilities in respect of his securities held by a depository. Pledge or hypothecation of securities held in a depository (1) Subject to such regulations and bye-laws, as may be made in this behalf, a beneficial owner may with the previous approval of the depository create a pledge or hypothecation in respect of a security owned by him through a depository. (2) Every beneficial owner shall give intimation of such pledge or hypothecation to the depository and such depository shall thereupon make entries in its records accordingly. (3) Any entry in the records of a depository shall be evidence of a pledge or hypothecation. Furnishing of information and records by depository and issuer (1) Every depository shall furnish to the issuer information about the transfer of securities in the name of beneficial owners at such intervals and in such manner as may be specified by the byelaws. (2) Every issuer shall make available to the depository copies of the relevant records in respect of securities held by such depository. Enquiry and Inspection Power of Board to call for information and enquiry (1) The Board, on being satisfied that it is necessary in the public interest or in the interest of investors so to do, may, by order in writing, - (a) call upon any issuer, depository, participant or beneficial owner to furnish in writing such information relating to the securities held in a depository as it may require; or (b) Authorize any person to make an enquiry or inspection in relation to the affairs of the issuer, beneficial owner, depository or participant, who shall submit a report of such enquiry or inspection to it within such period as may be specified in the order. (2) Every director, manager, partner, secretary, officer or employee of the depository or issuer or the participant or beneficial owner shall on demand produce before the person making the enquiry or inspection all information or such records and other documents in his custody having a bearing on the subject matter of such enquiry or inspection. Power of Board to give directions in certain cases Save as provided in this Act, if after making or causing to be made an enquiry or inspection, the Board is satisfied that it is necessary - to prevent the affairs of any depository or participant being conducted in the manner detrimental to the interests of investors or securities market.it may issue such directions - (a) To any depository or participant or any person associated with the securities market; or (b) To any issuer, as may be appropriate in the interest of investors or the securities market. Penalty Offences Whoever contravenes or attempts to contravene or abets the contravention of the provisions of this Act or any regulations or bye-laws made there under shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both. Offences by companies (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. (2) Notwithstanding anything contained in where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The Securitization and Reconstruction of Financial Assets and Interest Act, 2002 "Securitization" means acquisition of financial assets by any securitization company or reconstruction company from any originator, whether by rising of funds by such Securitization Company or reconstruction company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial assets or otherwise; Registration of securitization companies or reconstruction companies No securitization company or reconstruction company shall commence or carry on the business of securitization or asset reconstruction without-- (a) Obtaining a certificate of registration granted and Having the owned fund of not less than two crore rupees or such other amount not exceeding fifteen per cent of total financial assets acquired or to be acquired by the securitization company or reconstruction company, as the Reserve Bank may, by notification, specify: provided that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of securitization companies or reconstruction companies: provided further that a securitization company or reconstruction company, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitization or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it. (2) Every securitization company or reconstruction company shall make an application for registration to the Reserve Bank in such form and manner as it may specify. (3) The Reserve Bank may, for the purpose of considering the application for registration of a securitization company or reconstruction company to commence or carry on the business of securitization or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such securitization company or reconstruction company, or otherwise, that the following conditions are fulfilled, namely:-- (a) that the Securitization Company or reconstruction company has not incurred losses in any of the three preceding financial years; (b) that such securitization company or reconstruction company has made adequate arrangements for realization of the financial assets acquired for the purpose of securitization or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified institutional buyers or other persons; (c) that the directors of Securitization Company or Reconstruction Company have adequate professional experience in matters related to finance, securitization and reconstruction; (d) that the board of directors of such securitization company or reconstruction company does not consist of more than half of its total number of directors who are either nominees of any sponsor or associated in any manner with the sponsor or any of its subsidiaries; Cancellation of certificate of registration (1) The Reserve Bank may cancel a certificate of registration granted to a securitization company or a reconstruction company, if such company-- (a) Ceases to carry on the business of securitization or asset reconstruction; or (b) ceases to receive or hold any investment from a qualified institutional buyer; (c) Has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or (d) Fails to-- (i) Comply with any direction issued by the Reserve Bank under the provisions of this Act; or (ii) Maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or (iii) Submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or (iv) Obtain prior approval of the Reserve Bank Acquisition of rights or interest in financial assets Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitization company or reconstruction company may acquire financial assets of any bank or financial institution-- (a) by issuing a debenture or bond or any other security in the nature of the debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or (b) By entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and as may be agreed upon between them. (2) If the bank or financial institution is a lender in relation to any financial assets acquired by the securitization company or the reconstruction company, such securitization company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets. (3) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or noobjections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset and to which the concerned bank or financial institution is a party or which are in favor of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favor of the securitization company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitization company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favor of the securitization company or reconstruction company, as the case may be. (4) If, on the date of acquisition of financial asset any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution. The Securitization and Reconstruction of Financial Assets and enforcement of security Interest Act, 2002 Financial indiscipline is the hallmark of Indian industry. The ever-growing Non Performing Assets ('NPA'), a fine euphemism coined to describe the bad loans, prompted the passing of the Recoveries of Debts due to Banks and Financial Institutions Act, 1993 whereby a special Debt Recovery Tribunal ('DRT') was set up for the recovery of NPA. However, this could not speed up the recovery on one hand and on the other the strict civil law requirements rendered almost futile the attachment and foreclosure of the assets given as security for the loan. Further, the balance sheets of the banks and financial institutions were turning red due to heavy mandatory provisions for NPAs. Realizing that every fifth borrower is a defaulter, the Government was under pressure to make adequate provisions for the recovery of the loans and also to foreclose the security. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('the Securitization Act') aims to achieve these twin objectives besides providing for a broad legal framework for asset securitization and asset reconstruction. Salient features. The salient features of the Securitization Act are as under: • Incorporation of Special Purpose Vehicles viz. Securitization Company and Reconstruction Company. • Securitization of Financial Assets. • Funding of securitization. • Asset Reconstruction. • Enforcing security interest i.e. taking over the assets given as security for the loan. • Establishment of Central Registry for regulating and registering securitization transactions. • Offences & Penalties. • Boiler - plate provisions. • Dilution of provisions of SICA. • Exempted transactions • Incorporation & Registration of Special Purpose Companies The Securitization Act proposes to securitize and reconstruct the financial assets through two special purpose vehicles viz. 'Securitization Company ('SCO')' and 'Reconstruction Company (RCO)'. SCO and RCO ought to be a company incorporated under the Companies Act, 1956 having securitization and asset reconstruction respectively as main object. The Securitization Act requires compulsory registration of SCO and RCO under the Securitization Act before commencing its business. Further a minimum financial stability requirement is also provided by requiring SCO and RCO. The RBI has the power to specify the rate of owned fund from time to time. Different rates can be prescribed for different classes of SCO and RCO. Existing SCO and RCO are also required to get registered under the .Acting as recovery agent on behalf of any bank or financial institution. • Acting as manager1 to manage the secured assets the possession of which has been taken over by the secured creditor. • Acting as receiver if appointed by any Court or Debt Recovery Tribunal. A SCOO or RCOO, which is carrying on any other business other than that of securitization or asset reconstruction before commencement of the Securitization Act, has to discontinue such other business within one year from the commencement of the Securitization Act. Securitization of financial Assets Under the Securitization Act only banks and financial institutions can securitize their financial assets pertaining to NPAs with a securitization company. Securitization means, according to the Securitization Act, acquisition of financial assets by any securitization company or Reconstruction Company from any financial institution or banks. The necessary funds for such acquisition may be raised from 'qualified institutional buyers , by issuing security receipts representing undivided interest in such financial assets or otherwise. Financial assets are as under: • A claim to any debt or receivables or part thereof, whether secured or unsecured. • Any debt or receivables secured by, mortgage of, or charge on, immovable property. • A mortgage, charge, hypothecation or pledge of movable property. • Any right or interest in the security whether full or part underlying such debt or receivables. • Any beneficial interest in property, whether movable or immovable, or in such debts, receivables, whether such interest is existing, future, accruing, conditional or contingent. • Any financial assistance. The much-needed legal framework for the securitization of financial assets has been made by the enactment of the Securitization Act. Securitization of financial assets is a financial tool for the lenders to securitize their future cash flows from the secured assets and thus to release their funds blocked in them. In the hands of the SCO and RCO the secured assets become "merchandise", realization of which gives them their return. This aspect brings in the much-needed expertise in adept handling in realization of the secured assets. The legal impediments of normal civil law procedure to foreclose the mortgaged assets have thus been effectively removed by empowering the enforcement of the secured assets. Securitization of financial assets may take some time to fructify as it requires sound accounting principles also for which standards to be prescribed. In other words there should be accounting framework, as well, besides legal framework. Acquisition of Rights and interests in financial assets. This is the main part of securitization. Section 5 provides for the acquisition of rights or interests in financial assets of any bank or financial institution by SCO / RCO, notwithstanding anything contrary contained in any agreement or any other law for the time being in force, in either of the following manner: • Issuing a debenture or bond or any other security in the nature of debenture, as consideration agreed upon by a SCO /RCO and bank/financial institution, incorporating therein the terms and conditions of issue. • Entering into an agreement with bank/financial institution for the transfer of such financial assets on such terms and conditions as may be agreed upon. Upon acquiring the financial assets from the bank/financial institution, the SCO/RCO steps into the shoes of the lender qua the borrower. The Securitization Act has provided for all necessary rights and powers for SCO/RCO to realize the financial assets from the borrower. Funding of Securitization. The SCO/RCO may raise the necessary funds, for the acquisition of financial assets, from the QIB by issuing a security receipt. Security receipt is exempted from compulsory registration under the Registration Act. Security receipts issued by any SCO or RCO shall be "securities" within the meaning of Section 2(h)(ic) of the Securities Contracts (Regulation) Act, 1956. A Scheme of acquisition has to be formulated for every acquisition detailing therein the description of financial assets under acquisition, the quantum of investment, rate of return assured etc. Further separate and distinct accounts have to be maintained in respect of each scheme of acquisition. Realizations made from the financial assets have to be held and applied towards the redemption of investments and payment of assured returns. In the event of non-realization of financial assets, the QIB holding not less than 75% of the total value of the security receipts issued, are entitled to call a meeting of all QIB and pass resolution and every such resolution is binding on the SCO/RCO. Assets Reconstruction A SCO or RCO may, according to the guidelines prescribed by RBI, carry out asset reconstruction in any one of the following manners: • Taking over the management of the business of the borrower. • Changing the management of the business of the borrower. • Selling or leasing of a part or whole of the business of the borrower. • Rescheduling of the payment schedule of the debt. • Enforcing the security interest. • Entering into settlement with the borrower for the payment of debt. However, the above measures are subject to the provisions contained in any other law for the time being in force. Enforcing Security Interest The second objective of the Securitization Act is to provide for the enforcement of security interest i.e. taking possession of the assets given as security for the loan. Section 13 of the Securitization Act contains elaborate provisions for a lender (referred to as 'secured creditor') to take possession of the security given by the borrower. The sum and substance of the provisions are as under: • The Lender has to send a notice of demand, giving details of the amount payable and the secured assets5 intended to be enforced in the event of nonpayment, to the defaulting borrower to discharge his liabilities. • No borrower, after the receipt of the demand notice, shall transfer the secured assets in whatsoever manner without prior written consent from the lender. • The Borrower has to discharge the liabilities within 60 days from the date of receipt of notice of demand. • In the event of nonpayment of demand by the borrower, the lender may take any one or more of the following measures: o Taking possession and / or management of the secured assets of the borrower with a right to transfer the same by way of lease, assignment or sale for realizing the secured asset. o Appointing any person as manager to manage the secured assets the possession of which has been taken over. o Asking any person, who has acquired any of the secured assets from the borrower and owes money to the borrower, to pay so much of the money which is sufficient to pay the secured debt. • Any transfer of secured assets made by the lender shall be deemed to be made by the owner of such secured asset. • If the borrower pays all the dues together with all costs, charges and expenses incurred by the lender before the date fixed for the sale of the secured assets, the lender shall not transfer or sell the secured assets. • When they are more than one lender or joint financing, the approval of lender(s) representing not less than 75% of the amount due is required to take any steps to enforce the security interest and such approval is binding on all the lenders. • In the case of a corporate borrower under liquidation the sale proceeds from the secured assets shall be distributed as per Section 529A of the companies Act, 1956. • In the event of lender opts to realize his security instead of relinquishing his security and proving his debt, may retain the sale proceeds of his secured assets after depositing the workmen's dues with the Liquidator. • If the sale proceeds of the secured assets are not fully satisfying the debt due, the lender may file a claim before the DRT or before a competent court for the recovery of the shortfall. • The lender also has an option to proceed against any of the guarantors or sell the pledged assets without taking any measures against the borrower. • The lender can take the assistance of the Chief Metropolitan Magistrate or District Magistrate, as the case may be, in taking possession of the secured assets from the borrower. • If any person, including the borrower, is aggrieved by any of the measures adopted by the lender, he may prefer an appeal to the DRT within 45 days by depositing at least 75% of the claim of the lender. The decision of the DRT is further appealable to an Appellate Tribunal. • The lender can initiate any proceedings to enforce the security interest unless his claim of the financial asset is made within the period prescribed under the Limitation Act, 1963. Establishment of a Central Registry The functions relating to securitization, asset reconstruction and creation of security interest is sought to be administered and regulated by a Central Registry. Branch offices of the Central Registry may be established as and when the need is required. A Central Registrar shall head the Registry. The functions of the Central Registry are as under: • Particulars relating to securitization of assets, reconstruction of financial assets and creation of security interest are entered in a record called Central Register. • The records can be kept in electronic form also i.e. in floppies, diskettes etc. • The particulars of every transaction of securitization, asset reconstruction or creation of security interest shall be filed within 30 days of the transaction by SCO, RCO or the lender as the case may be. • Modifications made in the security interest registered with the Registry are to be filed within 30 days of such modification. • Satisfaction of security interest is required to be filed with the Registry within 30 days of satisfaction. • Records maintained at the Central Registry are open to inspection for any person on payment of the prescribed fee. Offences & Penalties Following are the offences prescribed under the Securitization Act: • Default in filing particulars of transactions relating to asset securitization, asset reconstruction and creation of security interest. • Default in filing particulars of modification. • Default in giving intimation of particulars satisfaction. • Non-compliance of RBI directives by SCO and RCO. • Contravention, including attempt to contravene and abetting in contravention, of any of the provisions of the Securitization Act or any rules made there under. Following are the penalties prescribed in the Securitization Act: • For default in filing particulars of transactions mentioned above, every company and every officer of the company or every lender or officer of the lender shall be punished with a fine which may extend to Rs.5000/- for every day during which the default continues. • For non-compliance of RBI directives every company and every officer of the company shall be punished with a fine which may extend to Rs.5, 00,000/-; and for continuing offence an additional fine of Rs.10, 000/- for every day during which the default continues. • For contravention of any provisions of the Securitization Act, the punishment is imprisonment for a term which may extend to one year, or with a fine, or with both. UNIT-III Foreign Trade (Development & Regulation) Act 1992 Foreign Trade, as all of you must be aware is one of the most important factors in the overall economic development of the country. For an ordinary person it is a very complex area which involves a whole gamut of policies, procedures etc. laid down by different Departments of the Government, which are responsible for this activity. Therefore, it is not easy to understand this complex maze of policies/procedures and an exporter or prospective exporter in a country like India who wants to enter into this area, does not know where to start. In this chapter, we will be trying to understand this complex scenario and we would have an overview of foreign trade, its policies, procedures and some of the important schemes for the exporters/ importers, being run by the Government Departments. The basic idea of this exercise would be to acquaint ourselves with all aspects of foreign trade so that we are able to know how the foreign trade is regulated in the country and how one can maximize the benefits being given by the Government to the exporters/ importers under its various schemes executed by different departments. General provisions regarding export/import After having explained legal mandate of the policy, its objectives and overall strategy to achieve these objectives, let us understand broadly the general provisions contained in the Foreign Trade Policy (FTP) which every exporter or importer or prospective importer and exporter of the country need to be aware of. These are: (i) In general, all export and import is free without any control of Government except for the areas where there is a specific restriction mentioned in the FTP. The FTP released by office of DGFT normally is contained in three important publications: (a) Foreign Trade Policy. (b) Handbook of Procedures. (c) ITC (HS) classification. Foreign Trade Policy is the basic documents, which contains the policy, whereas Handbook of Procedures contains the detailed procedures and appendices, etc., which are required in order to implement the policy. Export promotion schemes Major Export Promotion Schemes at present in operation in the country are as follows: (i) Export Promotion Capital Goods (EPCG) Scheme. (ii) Duty Exemption Scheme (DES). (iii) Export Oriented Unit Scheme (100% EOU Scheme). (iv) Special Economic Zone (SEZ Scheme). (v) Status Holder Scheme. Export Promotion of Capital Goods (EPCG) Scheme This scheme allows import of Capital Goods (CG) at concessional basic customs duty of only. This permission to import capital goods at concessional duty also puts on the unit importing under this scheme, an export obligation equivalent to 8 times of duty saved on import of CG. Export obligation is required to be fulfilled within 8 years, counted from the date of issuance of this permission/authorization. Under this policy, even spares, jigs and moulds are also permitted to be imported under concessional duty. REGULATIONS OF EXPORTS Foreign Trade Policy Export Policy, similar to imports, also indicates an item wise policy and it is a part of ITC (HS) classification book. In fact the items here are categorized as prohibited, restricted, STE or free. Similar to the import policy, an eight-digit classification has been followed in the export policy also. A large majority of the items are already free for the purpose of exports from India. Few items such as special chemicals, organisms, materials, equipments and technologies (SCOMET items), certain seeds and planting material, ores, birds, animals etc., are not allowed to be exported and hence fall under prohibited category. Then there are certain items like marine products, dairy, poultry etc. which can be exported subject to certain conditions in view of specific restrictions imposed by importing countries. These items can be exported only after quality/health certificates are issued by the designated authority i.e. Export Inspection Council of India. General conditions for the imports As has already been explained the general import policy is governed on the basis of item wise policy as given in the ITC (HS) Classification book i.e. policy would be indicated as prohibited, restricted, free or under STE. However, still it would be better to have a general idea about important conditions, which an importer must bear in mind before venturing into this area. Government of India has imposed certain conditions on the import of certain specified items in view of basic WTO parameter of national treatment i.e. an imported product, after it has entered a country – upon payment of custom duties, has to be given similar treatment, which is accorded to a similar domestic product. There cannot be any discrimination between an imported and domestic product. Some of these provisions are: (i) Import of hazardous waste into India would be subject to the provisions of Hazardous Wastes (Amendment) Rules, 2003. (ii) Import of beef in any form and import of products containing beef are not allowed in the country. Consignments of edible oil and processed food would also need to carry a declaration that these do not contain any beef in them. (iii) All package products need to follow the provisions given under Standards of Weights and Measures, (Packaged Commodities) Rules, 1977. All imported packaged commodities need to have all necessary information on the package itself as per the provisions of the above mentioned Rules, including mention of Maximum Retail Price (MRP) of that product. (iv) In order to ensure that import products also follow the same conditions which are imposed on domestic products, the import policy contains a list of products, import of which need to comply with the mandatory quality standards enforced by Bureau of Indian Standards (BIS) – presently there are 68 items which are under mandatory list and a copy of the items is given at Annex-A. (v) Import of meat and poultry products into India are subject to all conditions including that of quality, as laid down under Meat Food Products Order, 1973. These products are required to meet all sanitary and hygiene conditions prescribed under the Order. (vi) Import of edible/food products need to follow all provisions contained in Prevention of Food Adulteration Act, 1954 (PFA Act). (vii) All primary agricultural products can be allowed for import only after issue of a Sanitary and Phyto-sanitary Standards (SPS) import permit by Ministry of Agriculture. (viii) Import of textile and textiles articles is allowed subject to the condition, among others, that these products do not contain any of the hazardous dyes. (ix) Imports of edible/food products are also required to follow provisions of shelf life, as is applicable to domestic producers i.e. the product, at the time of importation must have a valid shelf life of not less than 60% of its original shelf life. (x) Import of genetically modified (GMO) food is allowed subject to certain conditions. UNCTAD Draft Model on Trans-national Collaboration International trade flows have recovered after the global crisis, while their growth has decelerated recently. World economic growth rates have also declined of late and remain unpredictable. Given the uncertain status of global trade, output and employment, the international trading system issues, non-tariff measures, competition policy, and sustainable development issues, their evolution should be monitored to help assess how to boost global economic resilience, sustainable growth and inclusive development. Continuing efforts to strengthen multilateral trade cooperation are essential. Consideration could also be given to reformulating Governments' role in trade policymaking in order to better focus trade on contributing to inclusive growth and development The international trading system faces a defining moment. The growing importance of developing countries in international trade, along with the increased prominence of regional trade agreements and South–South trade, has given rise to a multiple trading system. The multilateral trading system (MTS) underpinned by WTO rules remains a central pillar of the international trading system. However, the impasse of the WTO Doha Round, which reflects wider tensions between globalization and national development interests, underlines the need to seek new ways of fostering multilateral consensus on trade liberalization and development. There have been also growing calls for reformulating trade policymaking to better focus on the primary objective of inclusive growth and development. Services are crucial in growth, inclusive development and employment, including in achieving the Millennium Development Goals. For instance, intermediate services, such as transport, telecommunications, financial services, business services including professional services and research and development (R&D) services, allow specialization, creation and diffusion of knowledge, and exchange, thus contributing to increasing economic complexity, productive capabilities and participation in the global supply chain. The wide and deep impact of services on development is affirmed by recent studies; discussions by Governments under the UNCTAD multi-year expert meeting on services, trade and development; and the Global Services Forum Trade allows developing countries to access knowledge, skills and technologically advanced capital goods and inputs that can enhance their production capacities for exporting products, creating new jobs in the process. Development pillars of a trading system conducive to employment creation can include, for example, preferential access for LDCs, reduction of tradedistorting subsidies in developed countries, and commitments in trade agreements reflecting the level of development. Regional integration of goods and services markets as well as institutions can have a significant positive effect on employment creation and wage gains. Trade agreements therefore need to integrate measures to not only foster trade growth but also develop productive capacities and create productive employment. This does not imply that trade liberalization or trade openness as such and associated trade and economic growth necessarily guarantee job creation. Many countries, including in Africa, have opened their markets without much concomitant success in labor market expansion. Moreover, open markets will not necessarily create decent jobs. Countries need to adopt complementary measures to trade reforms in order to improve employment creation opportunities. It is essential to foster integration production and trade in sectors that hold greater promise for employment creation opportunities, such as agriculture and certain manufacturing and services sectors. In many commodity-dependent developing countries or resource-intensive countries, for example, prospects for greater employment creation could emerge from a process of structural transformation into value-added sectors. Strategies that could be considered include promotion of effective integration into regional and global supply chains. Governments could provide support services, including support to development of technologies and competitiveness; share in long-term investment risks; encourage strategic orientation of FDI; and provide export promotion services for export sectors. Favorable economic conditions such as predictable economic environments, reasonable secure property rights and macroeconomic stability are also important. Education, training and skill development are also important. Since trade is heavily skillbiased, targeted education and technical training avoid skill mismatches and help enterprises to find the skills they need to maintain competitiveness and innovate. Furthermore, given the large size of the informal sector in many developing countries, policies that improve access to capital by the informal economy are important for the creation of job opportunities, especially for the poor. Strengthening links between the labor-intensive informal sector and the relatively more export-oriented formal sector would promote employment. Social security systems could mitigate the costs of higher fluctuations and adjustment costs that appear to be associated with exposure to external shock. UNCTAD has strengthened its work on trade and employment. As part of the International Collaborative Initiative on Trade and Employment, it contributes jointly with other international organizations to deepening understanding of the linkages between trade and jobs and to develop policy-relevant conclusions. With the International Labor Organization (ILO), UNCTAD developed a practical methodology to assess the employment effects of regional trade agreements. Currently, UNCTAD is working with the ILO on a project on trade and employment in agriculture. Today, a substantial share of the production processes of global supply chains (GSCs) takes place in developing countries. Policymakers in many developing countries are interested in linking their enterprises to GSCs, as this would enable producers within the chain to acquire management know-how and hands-on information on quality standards and technology, thus to become more competitive. Participation in GSCs could also create economy-wide externalities for developing countries, such as employment, improvement in technology and skills, productive capacity upgrading and export diversification. On the other hand, participation in GSCs could involve some challenges. Many developing country enterprises take part in labor-intensive manufacturing segments of GSCs and may be stuck in low value-added segments within sectors where chains are shorter and less technologically intensive. Yet even if the profits retained in such segments by enterprises are generally low due to intense competition, they may still benefit from production processes optimization, technological upgrading and easier access to foreign investments. Moreover, being a supplier within a GSC sends a strong signal about the productive capacity of the firm in terms of quality and timely delivery. The key problem for developing countries is not how to participate in GSC but rather how to maximize the benefits from such participation. To properly address this issue, there is a need for more research and better data, including those on transnational corporations (TNCs) as lead firms. GSCs chains can be a powerful force in enabling technology transfers and industrial process upgrading, lead firms may be unwilling to transfer technology to subsidiaries, especially when property rights are not well secured. In this regard, developing countries have a number of options to facilitate the rise of their firms along the GSCs. Government support can play a crucial role especially in regard to: (i) promotion policies to attract investments from lead firms; (ii) reduction of tariffs and non-tariff measures for imported production inputs; and (iii) efforts to boost supply efficiency by improving the business environment, transport, logistics, education and training; and (iv) guaranteed long-term commitments in policies (especially those related to trade, intellectual property and fiscal policies) so as to minimize the risk for foreign enterprises and business relationships. Control and Regulation of foreign companies in India The Regulations for Foreign Company Investments (FCI) are established to control the flow of foreign investments in different sectors in the Indian economy. The limits to FCI vary in different sectors with the aim of maintaining a proper balance between domestic and foreign investments. Approval to FCI is of two types - approvals by government and automatic approval. The Regulations for Foreign Company Investments control the inflow of investments in India made by foreign companies. These regulations are formulated under the Foreign Direct Investment (FDI) policy by the Foreign Investment Promotion Broad. The FDI policies in India are primarily development oriented, seeking to maximize the economic growth while maintaining a proper balance of domestic and foreign investments. These regulations allow approval of Foreign Company Investments by means of automatic route, as suggested by the Reserve Bank of India (RBI) or approval route, which requires confirmation from the Government of India. Foreign collaborations and joint ventures A foreign company, depending upon its nature of business activities in India, may operate through an Indian company in any of the following manners:- • As a joint venture with Indian partner • As a wholly owned subsidiary (a company where 100 per cent share holding is held by the foreign company) A joint venture company in India is like any other company for the purposes of Indian Companies Act, Indian Income-tax Act and other applicable laws, rules and regulations. Where the foreign party does not confine itself only to the transfer of technical know-how to the Indian party but also agrees for financial participation with the Indian party, the parties conclude joint venture agreement. Collaboration Agreements: The foreign entrepreneur would normally enter into an agreement with its Indian partner for carrying on business operations in India. Such agreements are called collaboration agreements. The rights and obligations of the foreign party will be primarily contained in the collaboration agreement. It is therefore, recommended that the collaboration agreement should be made to form a part of the Articles and Memorandum of Association of the joint venture company. Furthermore, the collaboration agreement should be specifically approved in the meeting of the Board of Directors of the joint venture company. There are two types of foreign collaboration: a. financial collaboration (foreign equity participation) where foreign equity alone is involved; b. technical collaboration (technology transfer) involving licensing of technology by the foreign collaborator for appropriate compensation. There are three relevant approving authorities: 1. the Reserve Bank of India (RBI); and 2. the Department of Industrial Development in the Ministry of Industry, Government of India. 3. Foreign Investment Promotion Board (FIPB): The FIPB is the nodal, single window agency for all matters relating to foreign direct investment (FDI) as well as promoting investment into the country. Secretary, Industry (Department of Industrial Policy and Promotion) chairs it. Its objective is to promote Foreign Direct Investment into India: - [I] by undertaking investment promotion activities in India and abroad, [ii] facilitating investment in the country by international companies, non-resident Indians, and other foreign investors, [iii] through purposeful negotiation/discussion with potential investors, [iv] early clearance of proposals submitted to it, and [v] review policy and put in place appropriate institutional arrangements, transparent rules and procedures and guidelines for investment promotion and approvals. Validity of foreign collaboration approval: Government approval for foreign collaboration is valid for an initial period of two years, which may be extended for one more year. In case any further extension is needed, beyond the period of three years, it will be considered by the Foreign Investment Promotion Board on the recommendation of the administrative ministry. A representation on the foreign collaboration approval of the Government, if any required to be made, may be sent to the concerned department with reference to the item of manufacture along with a copy of the same to the Secretariat for Industrial Assistance. The administrative ministry will examine the request keeping in view the various steps taken by the applicant for implementation of the foreign collaboration approval and make suitable recommendation for consideration by the appropriate authority. Execution of foreign collaboration agreement: The Indian party and the collaborator should execute an agreement on foreign collaboration within the validity, or extended validity, period strictly in conformity with the terms prescribed by the Government. The letter of approval issued by the Secretariat for Industrial Assistance will be made a part of the foreign collaboration agreement to be executed between the Indian company and the foreign collaborator and any provision of the agreement which is not covered by the said letter or is at variance with the provisions of that letter shall be void and be not binding on the Government of India. This agreement will be scrutinized by the concerned ministry/department. If it is found to be in accordance with the terms specifically approved by the Government, a letter approving the terms of the agreement will be issued to the party. A copy of the agreement will be sent to the Reserve Bank of India (RBI) through the Department of Economic Affairs to enable the RBI to authorize remittances to the foreign collaborator. Areas of Foreign Collaboration From time to time, the Government of India issues a list of industries indicating 'where foreign investments may be permitted'. The lists are illustrative only. Although a broad technology base has been achieved in the country, nevertheless a need to update the production technology may arise due to constant technological advance in the developed countries. The Government of India (Foreign Investment Promotion Board) also considers import of technology in industries of the industrial policy in which foreign investments and technical collaborations are freely allowed. UNIT-IV Background Traditionally Indian forex market has been a highly regulated one. Till about 1992-93, government exercised absolute control on the exchange rate, export-import policy, FDI (Foreign Direct Investment) policy. The Foreign Exchange Regulation Act (FERA) enacted in 1973, strictly controlled any activities in any remote way related to foreign exchange. FERA was introduced during 1973, when foreign exchange was a scarce commodity. Post independence, union government's socialistic way of managing business and the license raj made the Indian companies noncompetitive in the international market, leading to decline in export. Simultaneously India import bill because of capital goods, crude oil & petrol products increased the forex outgo leading to sever scarcity of foreign exchange.

FERA was enacted so that all forex earnings by companies and residents have to reported and surrendered (immediately after receiving) to RBI (Reserve Bank of India) at a rate which was mandated by RBI. Post liberalization, the Government of India, felt the necessity to liberalize the foreign exchange policy. Hence, Foreign Exchange Management Act (FEMA) 2000 was introduced. FEMA expanded the list of activities in which a person/company can undertake forex transactions. Through FEMA, government liberalized the export-import policy, limits of FDI (Foreign Direct Investment) & FII (Foreign Institutional Investors) investments and repatriations, cross-border M&A and fund raising activities. Prior to 1992, Government of India strictly controlled the exchange rate. After 1992, Government of India slowly started relaxing the control and exchange rate became more and more market determined. Foreign Exchange Dealers association of India (FEDAI), set up in 1958, helped the government of India in framing rules and regulation to conduct forex exchange trading and developing forex market In India. Appointment of Adjudicating Authority. For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under subsection and a reasonable opportunity of being heard for the purpose of imposing any penalty: Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. (2) The Central Government shall, while appointing the Adjudicating Authorities under subsection (1), also specify in the order published in the Official Gazette, their respective jurisdictions. (3) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government. (4) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority. (5) Every Adjudicating Authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and— (a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860); (b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974). (6) Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavor shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint, Provided that where the complaint cannot be disposed off within the period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing off the complaint within the period. Appeal to Special Director (Appeals). The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction. (2) Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal to the Special Director (Appeals). (3) Every appeal shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed: Provided that the Special Director (Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period. (4) On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit confirming, modifying or setting aside the order appealed against. (5) The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority. (6) The Special Director (Appeals) shall have the same powers of a civil court which are conferred on the Appellate Tribunal (a) all proceedings before him shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860); Establishment of Appellate Tribunal. The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals) under this Act. Appeal to Appellate Tribunal. Save as provided in sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to sub-section (1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal: Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government : Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty. (2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be Prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period. (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against. (4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be. (5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal: Provided that where any appeal could not be disposed of within the period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the period. (6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority under section 16 in relation to any proceeding, on its own motion or otherwise, calls for the records of such proceedings and makes such order in the case as it thinks fit. Composition of Appellate Tribunal. The Appellate Tribunal shall consist of a Chairperson and such number of Members as the Central Government may deem fit. (2) Subject to the provisions of this Act,— (a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof; (b) a Bench may be constituted by the Chairperson with one or more Members as the Chairperson may deem fit; (c) the Benches of the Appellate Tribunal shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, notify; (d) the Central Government shall notify the areas in relation to which each Bench of the Appellate Tribunal may exercise jurisdiction. (3) Notwithstanding anything contained in sub-section (2), the Chairperson may transfer a Member from one Bench to another Bench. (4) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit. Qualifications for appointment of Chairperson, Member and Special Director (Appeals). A person shall not be qualified for appointment as the Chairperson or a Member unless he— (a) in the case of Chairperson, is or has been, or is qualified to be, a Judge of a High Court; and (b) In the case of a Member, is or has been, or is qualified to be, a District Judge. (2) A person shall not be qualified for appointment as a Special Director (Appeals) unless he— (a) has been a member of the Indian Legal Service and has held a post in Grade I of that Service; (b) has been a member of the Indian Revenue Service and has held a post equivalent to a Joint Secretary to the Government of India. Term of office. The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office: Provided that no Chairperson or other Member shall hold office as such after he has attained,— (a) in the case of the Chairperson, the age of sixty-five years; (b) in the case of any other Member, the age of sixty-two years. Terms and conditions of service. The salary and allowances payable to and the other terms and conditions of service of the Chairperson, other Members and the Special Director (Appeals) shall be such as may be prescribed: Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member shall be varied to his disadvantage after appointment.. If, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a Member, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled. Resignation and removal. The Chairperson or a Member may, by notice in writing under his hand addressed to the Central Government, resign his office: Provided that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of term of office, whichever is the earliest. (2) The Chairperson or a Member shall not be removed from his office except by an order by the Central Government on the ground of proved misbehavior or incapacity after an inquiry made by such person as the President may appoint for this purpose in which the Chairperson or a Member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges. Member to act as Chairperson in certain circumstances. In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office. (2) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties. Reference Books: 1. Competition Act 2002 2. Security Contract (Regulation) Act 1956 3. SEBI Act 1992 4. Depositories Act 1996 5. Foreign Trade (Development & Regulation) Act 1992, 6. Foreign Exchange Management Act, 1999 7. Taxman's Student's Guide to Economic Laws