

Suggestions on TRAI Consultation Paper on Promoting Local Telecom Equipment Manufacturing No 12/2017 dated the 18th September, 2017.

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Q.1 Large number of initiatives have been taken by the government to promote electronics manufacturing, while these initiatives have succeeded in attracting significant investments in other sectors like LED, consumer electronics, mobile handsets, automotive electronics etc., they have failed to attract investments in telecom equipment sector e.g. PMA has worked very effectively in LED sector but did not work so effectively in telecom. Please enumerate the reasons with justifications for the poor performance of local telecom manufacturing industry in spite of numerous initiatives by the government/ industry.

Preamble:

1. As regards local telecom/mobile manufacturing, India is passing through disconnected priorities and misplaced conceptions of globalization, protectionism etc. India is facing some of following issues:
 - i) *Globalization v/s Localization*
 - ii) *World class quality/latest state of art products, Institutes v/s local needs*
 - iii) *Liberalization, the bogey of global supply chain v/s protection, local manufacturers*
 - iv) *Incentives, concessions v/s real issues faced by local manufacturers*
 - v) *Large Marketing & Advertisement budgets of large multinational companies v/s small funds of new entrepreneurs, start up and local companies*

- vi) *The so called highly professional advice given by pseudo experts with vested interest for imports v/s the unknown a smaller entrepreneur with relatively poor voice and image.*
- vii) *IPR onslaught involving huge and costly legal battles/contest by foreign experts v/s relatively a new Indian entrepreneur*

2. Hence, there is a dichotomy within Government and policy makers and continuous lobby by import savvy bodies to oppose any steps for make in India, on the pretext of global economy, cheaper equipments and so called lack of technologies and infrastructure, protectionism and absence of so called global supply chain. In the name of promotion of domestic manufacturing, Indian policies have always been forced by import lobbyist to engross in incentives, concessions and subsidies, misconceived PMA etc. **There is strong need to protect local manufacturing core policy and its implementation from the pseudo experts, external pressures, and imports savvy lobbyists.**
3. There is generally a perception created by vested interests in India as to what is need for local manufacturing, in the era of globalization. Any initiative for local manufacturing is blasted as protectionism and against the global supply chain. However it needs to be appreciated that there is no conflict between local manufacturing and globalization. The local manufacturing is need of the Country for its growth, save foreign exchange, national security issues as also employment.
4. India is facing the challenges of local manufacturing of telecom, mobile, FTAs, global supply chain issues which tooth and nail oppose local manufacturing, technology gluts making things costly, the syndrome of bottled water instead of genuine water needs of rural population, the most sophisticated advanced mobile phone v/s real feature phone of low cost needed by majority of populations, the real need of technology suited for Indian conditions/needs for rural areas and unconnected areas instead of so called latest/high tech technology.
5. President Donald Trump of USA has shown the way. The USA President has openly come out with a policy of Buy American, Hire American and enforcing that vigorously. A determination by President Donald Trump and all talks of protectionism have gone.

Donald Trump is a crusader challenging everything before us. His first priority is America, its job, its economy. He is not keen to take care of entire world, but America first. In one way he has become mouthpiece and vocal to issues of so called globalization and liberalization, under which banner we have been losing our own Country's interest and caring for others. As per the words of Donald trump "we've enriched foreign industry at the expense of American industry; and spent trillions of dollars overseas while America's infrastructure has fallen into disrepair and decay." India also doing same by encouraging so called updated/high tech/latest technologies, high cost smart phones and bogey of world class standards, which is killing own local industry.

6. Yes in telecom sector, the manufacturing has been on record highest priority by all successive Governments by way of several announcements and NTP 1994, 1999, 2012, National Electronics Policy, 2012, Niti Aayog Report on Make in India Strategy on Electronic Products, 2016, National Manufacturing Policy, 2011, Triad of policies announced in 2012 NTP 12, NPE 12-ESDM, NPIT 12-IT Hub and Budgets after Budgets. Despite the high demand for telecom equipments, the domestic telecom equipment manufacturing industry has not been able to keep pace. Now NDA Government has come up with Make in India as flagship program. Apart from economic reasons, loosening burden on foreign exchange, the security considerations also suggest that India should aim achieving self sufficiency in telecom equipment and employment.
7. The local manufacturing of telecom equipments/mobile handsets also becomes priority for National security angles:

- i) *As per answer to Lok Sabha UNSTARRED QUESTION NO.294 on 22ND July, 2015, "India imported Rs. 69516 Crores of telecom equipments during 2013-2014, of which import from China constituted about 63%. **The modern age telecom equipments are prone to spyware/malwares etc. These Trojans, spyware /malware etc. are the potential threats, if embedded in any of the telecom network elements by vendor or any other third party source, which may damage the concerned network element causing disruption in services,***

infecting other network elements or leakage of information to unintended user.”

ii) *Also answer to Lok Sabha Parliament Question No. 3930 dated 17.12.2014 says: “In the modern age, telecom equipments are prone to spyware/malwares etc., if attempted by the outfits, antisocial/anti national activists or unfriendly country. These spyware/malware etc. are the potential threats, if embedded in any of the telecom network elements by vendor or any other third party source, which may damage the network element concerned causing disruption in services, infecting other network elements or leakage of information to unintended user.*

8. The “Make in India” initiative was launched in India by Hon’ble Prime Minister Dr Narendra Modi on Sep 25, 2014, with an aim to turn the nation into a global manufacturing hub and telecom/mobile/electronics is an important part of the same. Local manufacturing is also one of the nine pillars of “Digital India” initiatives again launched by Hon’ble Prime Minister on 2nd July, 2015. Electronics manufacturing is one of the 25 focus sectors of the Make in India programme, which seeks to transform India into a global design and manufacturing hub. Digital India target to achieve “Net Zero import” by 2020 is a manifestation of the intent. Let us also see how important Make in India is for the NDA Government:

i) *Answer to Lok Sabha Parliament Question No.5950 dated 10.4.2017 By Commerce and Industries Minister: Make in India initiative aims to make India a hub for manufacturing, design and innovation. It focuses on infrastructure, simplified processes, job creation, skill development and fostering innovation in select thrust sectors.*

ii) *Answer to Lok Sabha Parliament Question No 5726 7.4.2017: The Government has launched the new manufacturing policy under the ‘Make in India’ programme with the aim to increase the share of **manufacturing in the country’s Gross Domestic Product from 16 percent to 25 percent by 2022.***

iii) The importance of local manufacturing has also been emphasized by Mrs. Aruna Sundarajan, Secretary, DOT vide press news dated 5th September, 2017 as "If India has to reduce dependency on import, there is need to encourage local telecom companies to not just make for India but also for overseas markets like middle east Asia and Africa." And "If we do not want forever to be an importer of products from outside we will have to make sure that local companies are encourage"

9. Local manufacturing was embedded in the license agreement of operators by specifying some points, but not implemented in real sense of letter & spirit in holistic manner, as imports remained duty free and cheap and lower rate financed imported equipments, without professional and focused nurturing of end to end integrated local supply chain of telecom equipment manufacturing. This led to unviable unsustainable, unworkable local supply chain despite all committed and fragmented policy announcements. Piecemeal approach in economic world does not attract investment & constitutes a business risk plants which will very soon turn into NPA & NCLT case.

10. There is strong need to differentiate assembly and manufacturing. What Indian policies promote and want is manufacturing and not assembly. And to ensure that various concessions/incentives announced for manufacturing are not unduly grabbed by the so called assembly unit, which has been the case so far. On several occasions assembly work is handled by EMS Companies, where there is uncertainty for continuation of work by EMS as also it can be stopped anytime. Whereas the investment in fixed assets done by one Company, on that basis manufacturing incentives/facilities are claimed by several number of Companies. The assembly of telecom equipment does not give real value to the Country. Some examples to bring in this point are given below:

i) A study long back during the year 2009 found that China was assembling iPhones, in a Foxconn unit and contributed sale revenue of about US\$2 Bn. And China hardly got US \$ 6.50 out of each iphone of US \$ 600.

- ii) *Times Magazine 16th May, 2011 carried an article on manufacturing of iPhones ((Copy attached as Annexure I). This clarifies that out of 500 USD cost of iPhone, only 7 USD goes to China for manufacturing. USA gets profit of 321 US \$ and balance cost of components/parts etc. is US \$ 179. So assembly contribution is little above 1% only in both studies quoted here and above.*
- iii) *India's own experience of large scale assembly of about 10 lacs phones per day, so called manufacturing of mobile phones a by a world leading brand at Chennai. IT did created employment. But it hardly created image and brand of India as mobile manufacturing. Actual data of gains to India are not available, but estimated to be less than 1% of total sales revenues.*
- iv) *India's another own experience. When it comes to India name in telecom, we talk of CDOT switches and optical, Cordect, MARR, optical fiber and seldom talk of assembly units set up by some foreign companies or assembly plants set by Indian Companies.*

11. VALUE BASED sustainable SUPPLY CHAIN for telecom equipment. Manufacture supply comprises of long interdependent chain of R&D---Raw materials, Chemicals needed for mfg components & PCBs----chips & components--PCB industry--software & H ware Telecom equipments, design & manufacture. Each has a sub ECO system of its own synergy & Linkages of each sub Eco system should be policy theme.
12. Let us realize that we are not able to address the monopoly/anti competitive situation of selected foreign manufacturers...virtual monopoly of few.
13. Political will/Policy has always been there. So why we could not achieve the results. Simply saying this is due to non implementation of the same by vested interests/lobbyist/officers/pseudo experts of Government/PSUs/Bodies who were responsible for its success. There is strong need of a study to find out how and why the results has not been achieved and those found guilty needs to be appropriately handles as per Laws of India.

14. Present time is India's best time to regain its glory and make India hub for telecom/mobile/ICT manufacturing. If it cannot be achieved now, then can never be. Several Government agencies are working on local manufacturing DOT, MeitY, Niti Aayog, DIP etc. If India cannot take strong decisions, forcefully implement the policies, and then better to declare India does not to manufacture locally telecom/mobile equipments....however sad it may be.

Analysis & Ground Reality

1. There has been lack of will & initiatives and regular review monitoring by Government to implement its own policy statements and linkages & coordination amongst neither various Government departments nor any mid policy course corrections took place.

Some examples:

- *The NP 2012 provisions:*
 - *“Create a corpus to promote indigenous R&D, IPR creation, entrepreneurship, manufacturing, commercialization and deployment of state-of-the-art telecom products and services during the 12th five year plan period.”*
 - *“To create a Telecom Finance Corporation as a vehicle to mobilize and channelize financing for telecom projects in order to facilitate investment in the telecom sector”*
- *The National Electronics Policy, 2012:*
 - *To incubate a \$400 billion in Electronic System Design and Manufacturing (ESDM) sector which would generate employment for over 28 million people over the next 8 years till 2020.*
 - *To build a strong supply chain of raw materials, parts and electronic components to raise the indigenous availability of these inputs from the present 20-25 per cent to over 60 per cent by 2020.*

- *To create long-term partnerships between ESDM and strategic and core infrastructure sectors – Defence, Atomic Energy, Space, Railways, Power, Telecommunications, etc.*
 - *To market India as an investment destination among leading nations.(Para 1.6 page 8 under strategies)*
 - *Promotion of exports various measures spelled out .(see Para 2.1sub para a to e on page 8 under strategies)*
 - *To facilitate vendor & dealer network development to support ESDM industry. .(Par 1.8 page 8 under strategies)*
 - *To facilitate sourcing, stockpiling & indigenous mining/exploration of Rare earth metals required for manufacture of electronic components & devices (Para 1.10 page 8 under strategies)*
- Spectrum Allocation Policy NFAP 2011: These provisions of NFAP 2011 and NTP 2012 clearly envisage the need for de-licensing of certain frequency bands for specific usages and to encourage Indian Innovations in Telecom & lead the Global Market:
 - *NFAP 2011 identifies the provisions to assign frequencies in GSM frequency bands for operation of Micro cellular low powered telecommunication systems using indigenously developed systems and technologies under IND foot notes 50 & 55.*
 - *“IND 50”: Requirements for Micro cellular low powered, telecommunication systems with maximum EIRP up to 4 Watts, FDD access techniques may be considered at specific locations for indigenously developed systems and technology, in a small chunk, in the frequency band 900 MHz presently used by existing wireless users of captive systems subject to co-ordination on case-by-case basis”.*
 - *“IND 55”: Requirements for Micro cellular low powered telecommunication systems with maximum EIRP up to 4 Watts, FDD access techniques may be considered at specific locations for indigenously developed systems and technology, in a small chunk, in the frequency band 1800 MHz presently used by existing wireless users of captive systems subject to co-ordination on case-by-case basis”*

- *Further, NTP 2012 has also envisaged one of the strategies as under:*

“4.7” To consider requirement of spectrum in certain frequency bands in small chunks at specified locations for encouraging indigenous development of technologies/ products and their deployment”

The facts are there is no firm implementation of above Policy statements all these years.

2. **Telecom Finance Corporation:** This was provided in NTP 2012, as quoted above. As per answer to Lok Sabha Question No 1231 dated 23.11.2016, the Telecom Commission directed on 02.07.2013 to set up Telecom Finance Corporation. On the basis of tenders dated 9.12.2013/14.07.2011, inviting consultant for preparation of DPE, the report has been submitted on 28.10.2016. As per answer to question “since then a ‘Consultancy Monitoring Committee’ of Department of Telecommunications is examining this report.”

The aims and objectives of TFC (Telecom Finance Corporation) were given in reply to Lok Sabha Parliament Question No 3624 dated 18.3.2015 as below:

- (i) *To make available schemes of funding such as line of credit, bridge loans, corporate loans, debt refinancing, venture capital financing and other related financial/funding solutions for borrowers in telecom sector.*
- (ii) *To mobilize various sources from domestic & international sources at competitive rates.*
- (iii) *To support manufactures of telecom equipment especially in small & medium scale sectors by providing financing at competitive rates.*
- (iv) *To provide non-fund based service like-Guarantees, Letter of Credit, Letter of Comfort, Indemnification, Financial advisory and consultancy services and other relates activities.*
- (v) *To work as a catalyst to streamline the functions of its borrowers in financial, technical and managerial areas to ensure optimum utilization of available resources.*
- (vi) *Financing of all such activities that contribute towards overall development of Information & Communications Technology (ICT) in the country.*

(vii) To expand into other financial services like Merchant Banking etc. to provide a complete bouquet of financial services to prospective clients.

(viii) To participate by way of equity contribution in other infrastructure related funds.

(ix) To adopt best practices in financing infrastructure and develop core competencies in facilitating infrastructure development.

(x) To provide inputs for policy framework and regulation from the financial angle.

(xi) To promote development of green and energy efficient equipment taking into account economic viability

This has yet to be formed and need to find out who is responsible for delay of a decision taken as far as back 2011.

3. Issues Hampering Growth:

The major reason for India not become hub for telecom/mobile manufacturing is just not limited to the incentives, concessions etc. BUT in fact the real issues are following:

i) **Market access and repeating Market access-MARKET DISTINCTION**

*Here the issue is that the telecom equipments are a B2B market and not mass consumption crowd of public i.e. **B2C mass** market as exemplified in Q no.1 of TRAI Consultation Paper "while these initiatives have succeeded in attracting significant investments in other sectors like LED, consumer electronics, mobile handsets, automotive electronics etc". The comparison is illusory and un correct and an Apple orange comparison. **This market Distinction is to be clearly appreciated for policy nurturing of Telecom equipment success for policy in letter & spirit.***

While is B2C is mass public consumption, B2B market for Telecom equipment is constituted by set of few operators who have their boundary limits defined by Licensing framework, regulatory frame work of laws of State Govt., local bodies, investment decisions, hyper completeive conditions, business risks, credit agencies granting loan & time to launch services etc. Thus their investment considerations are entirely different.

ii) Need to follow the approach taken by defense local manufacturing of IDDP- “Indian Designed, Developed & Manufactured products” and differentiate between Buy Global/Buy Indian and Buy and Make Indian/Buy & Make Global, where upto 90% of research is also funded.

- *As per Lok Sabha Parliament Question No 2221 dated 29.7.2016, “The Defence Procurement Procedure (DPP) focuses on giving boost to the ‘Make in India’ initiative of the Government through indigenous design, development and manufacturing of defence equipment, platforms and systems. A new category viz. ‘Buy (Indian- IDDM)’ [Indigenously Designed, Developed and Manufactured] has been introduced as the most preferred category of Procurement. The ‘Make’ procedure has been simplified to ensure increased participation of Indian Industry. There is provision for Government funding of upto 90% in cases involving design and development systems / equipment which necessitate harnessing of critical technologies and which may involve large infrastructure investment. Provisions for involving private industry as Production Agencies and Technology Transfer Partners have been incorporated.”*

- *The same was also give as per answer to Lok Sabha Parliament Question No 940 dated 21.7.2017, “ Defence capital acquisitions are carried out as per Defence Procurement Procedure (DPP) wherein emphasis has been given to procurement from domestic defence industry by according preference to ‘Buy [Indigenously Designed, Developed and Manufactured (IDDM)]’, ‘Buy (Indian)’, ‘Buy & Make (Indian)’ and ‘Make’ categories of capital acquisition over ‘Buy (Global)’ category”*

iii) Need to strictly follow specifications made by Telecom Engineering Center, DOT for all equipments whether procured by private or public sector, State Governments,

the absence of which results in purchasers specifying so called odd/latest/high tech/approvals by foreign bodies/associations.

- iv) Onslaught of foreign Companies in advertisement and marketing and lobbying expenses. The real question is the sudden “criminal” show of money power by exponential advertisement and publicity, which locals can hardly face, etc.
- v) Indian Telecom Operators have been traditionally depending upon Imports, due to purported zero duty import under ITA 1, which is wrong and also along with availability of cheap credit from foreign lines of credits. Initially there was a license condition to obtain equipment from local manufacturers, but that was not implemented.
- vi) Onslaught of IPR case by foreign companies. Need for compulsory licensing.
 - *IPRs have become another big issue. Several Court cases are going on. There is need for an agency, department, Company, who can tell the domestic manufacturers as to how many IPR patents licenses and royalties are required and the same should be payable on the relevant component, chip rather than the entire cost of product.*
 - *Some out of way thinking is needed for protection of Indian manufacturing companies from legal onslaught of IPR cases from world.*
 - *The Indian manufactures procures components from across world and then assembles the product. If there is any IPR violation, then it is with the manufacturers of components/chips. There is need for an appropriate policy for asking royalty on IPR on the component manufacturers rather than the product assemblers/manufacturers.*
- vii) Virtual interest free or 1-2 or ½ % interest loans without any securities.
- viii) Need to simply put import duty of 35 % on all wireless products and equipment.

- *The global experts have fooled us to believe that India committed ZERO duty under ITA 1 on all imports of mobile equipments and products, thankfully corrected during current year by imposing 10% duty on some equipment.*
- *A misuse of this is clear from the fact that imports under the category "Others" (parts of telegraph / telephony equipment) from 30 thousand crores in 2016 to 40 thousand Crores in 2017 & in the six months of current year, it has already crossed 70 thousand Crore on annualized basis. This is because of SKD parts of telecom equipment are being imported under "others" category.*

ix) The new local manufacturers and start ups do not qualify for supply to PSUs/private Companies in the absence of experience and minimum work done criterias.

x) Onslaught of new technology/so called high tech products by foreign companies. Let us realize that no wireless technology commits any speed and simply says up to so and so speed. There is continuous trend of changing technologies mostly driven by developed Countries; hence any initiatives for local production are likely to be outdated soon.

- *The Country needs low power, low cost equipments suited to rural areas of India, which are quite spread and scarcely populated with lack of electricity, roads etc. Yet the operators always would like to prefer the imported equipments available may be of higher powered or high costs. The import savvy lobbies always are in forefront to lobby for a specific or proprietary technology or product for operators.*
- *Generally we talk of China as biggest manufacturers now. Let us appreciate that China did not allowed in beginning 3G (WCDMA/CDMA 200 EVDO) and started working on its own technology and came up with TD SCDMA as an alternative to 3G and then TD LTE for 4G.... hence equipment procurement retained substantially within china. India never thought of working on its own technology. In fact on the contrary its own technologies like CDOT, MARR, Low Power BTS etc. did not got the encouragement to scale them up to global level, leave within India.*

xi) Faulty and loose implementation of PMP:

- *It is very easily defeated by imposing some unique specifications, Country specific membership of foreign bodies and of Course cheaper or almost dumping prices. On several occasions even Central Government and on most of occasions State Government do not follow PMP. There is no clarity in definition of criteria to meet PMA guidelines, as a result of which several companies claimed indigenous manufactures by simply showing local procurement of software.*
- *Not able to remove the restrictions conditions of foreign approvals, vendor specific specifications, enlistment with foreign bodies which are open only top foreign companies, non implementation of PMA even by DOT's own establishments and PSUs, smart cities, conditions such as presence and operation in multiple foreign countries, enlistment in private foreign body Gartner's Golden Magic Quadrant, irrelevant experience, Membership of organizations like ECMA (European Computer Manufacturing Association) instead of Indian associations.*
- *PMP has just resulted in increase imports of Populated PCBs. Since 2013 i.e. after launch of PMA scheme populated PCB import has more than doubled every year:*
 - *2015 it became 1. 2 thousand Crores*
 - *2016 it became 3.5 thousand Crores*
 - *2017 it crossed. 8 thousand Crores*
 - *2017-18 in six months, it has already crossed 21 thousand Crores on annualized basis*

xii) Let us appreciate the fact that major global brands emerged and R&D created well known brands, when their countries supported them by a policy directive on new technologies and from time to time course corrections leading to creation of viable ECOSYSTEM. Take example of:

- a) *USA not allowing GSM for about 10-15 years and depending only on CDMA technologies indigenously developed by a US Company.*
- b) *So called Europe club not promoting CDMA and adopting GSM*

- c) *Korea not allowing GSM for substantial time and promoting CDMA (ETRI) resulting in big brands such as Samsung, LG etc.*
- d) *China used its own standards for local development. During 1985 China mandated that V 5.1 compatible programme controlled switching systems. This standard was not compliant with any foreign company. The Chinese local HJD04 programme controlled switches were developed during 1991. That was first large-capacity switching device designed and produced by China.*
- e) *China not allowing 3G, 4G and insisting its own technology calling it TD-SCDMA, TD-LTE (developed by China Academy of Telecommunications Technology (CATT)*
- f) *China protecting its own HD DVD technology/specifications.*
- g) *China followed a Market Access Policy for China 'leapfrog' old technologies. It provided strict restrictions on foreign firms and joint ventures. There was high degree of regulation in the manufacture of mobile handsets, import quota on components, requirement of production licence, network license to sell mobiles in China. Success of this policy is evident from the fact that during 1998 no smart phone local Chinese brand and now so many such as Huawei, ZTE, Gionee, Oppo, Vivo, Coolpad etc.*
- h) *Japan mandating its own standards for mobiles phones and using them fearlessly and these specifications were applicable only in Japan.*

xiii) Let us also realize that Indian Automobile industry is a typical/poster boy success story where, by standardization support, Govt. is able to bring global competitiveness in the Automobile ancillary industries and almost all global brands in automobile are in India for manufacturing with ancillary developments.

xiv) Govt. not able to appreciate that

~ assembly or EMS is not make in India, but a tool to camouflage the Govt. plans for local manufacturing.

~ traders, importers, Global Consultants represented by pseudo Indians will always give recommendations to counter local manufacturing

~ the telecom network whether owned privately or by Government is a matter of

National security and strategic importance and local equipments needs to be mandated for all.

~ Adoption of policies suggested by importers lobby has resulted in closing of several local manufacturing units in India in the past.

~ The indigenous technology developed by CDOT/ IITs/Local companies has failed to get market within India.

~ Before entry of private operators, there were several Indian players for landline equipments. All of them are closed now.

The CDOT ERAX, MARR, Switches, FWT, EPBT, optical fibre, OFC, telecom towers, batteries and power supplies, test instruments, wires and cables, drop wire etc. were all manufactured within India. During pre mobile era, when Govt. PSU was the only operators, procurement of telecom equipment from local manufactured sources was a part of most of the tenders.

xv) Mobile Handset Manufacturing:

As regards handset manufacturing, here again we have been fooled to give focus on incentives/concessions rather than actual issues which needed attention. It suits the import savvy lobbyist to defer the attention of Government/Officers to non necessary areas. The issues are:

- a. The issue is not incentive/concessions, but huge marketing/lobbying/advertisement budgets of foreign firms, which Indian companies can hardly face and support. At times this tantamount to “Criminal” show of money power.

Recently a foreign mobile handset manufacturer acquired IPL rights at about 500% increase and has provided another budget of more than Rs 2300 Crores for publicity,

- b. Unabated large scale imports from China etc and flooding the Indian markets by virtual dumping or subsidized sale prices directly or by so called export incentives of other Countries.

- c. Nothing prevents us to impose 35% or 50% duty on import of handsets. The only inhibition is lobbies of importers. Need for a clear cut policy whether we want import or local manufacturing.
- d. Need to appreciate that under the pretext of safety and high technical products, India introduced multiple BIS testing and approvals, becoming the only Country in world to have 6 approvals for phone, battery, fuel cells, charger, Indian language, SAR, which are easily managed by foreign/Indian large firms but difficult for small local manufacturers. Need to have one common testing by TEC, DOT.
- e. There is a private monopoly of one body for issuing IMEI numbers to local handset manufacturers and Urgent need of one additional Governmental agency to issue IMEI numbers in India.

This Company is also doing lots of private business of consultancy, testing etc. TRAI has earlier recommended to the Government for at least one more Government agency for this purpose. No visible action taken.

- f. Need to appreciate that so called assembly or EMS is not make in India, but a tool to camouflage the Govt. plans for local manufacturing by diverting attention to noncore issues. This has been amply explained hereinabove. The products made by EMS Company can hardly be considered IDDP or locally manufactured. They are at best assembled in India with no commitment of the brand/importer for continuous manufacturing over any given period.
- g. The so called Phased Manufacturing program has failed to create Indian brands and Indian manufacturing and imports of foreign brands continues unabated. The answer is not saving in some import duty on components, but how to actually promote local manufacture rather than imports.
 - *India is just able to come up with only assembly of phones from imported components and have failed to have real Make in India or establish even a single Indian brand across world comparable to well known Samsung, Oppo , Vivo, Apple etc. Infact the sales of most of Indian known brands*

have been down substantially in recent times and new and new Chinese brands are appearing for the reasons mentioned above. This is simply because of taxes on imported phones, locally made content in those phones is usually restricted to headphones and chargers etc. - about 5 to 20 % of a device's cost.

- *With all round publicity campaigns and policies, the china brands have 51% market share in Indian smart market. That speaks of our policies and failure thereof. (Source IDC)*
- *Under the so called Phased Manufacturing Program, the attention has been diverted to reduce duties on some components parts on year to year basis. This is to be seen as a strategy to continue to imports at higher levels and keep focus away from real issues as given above ie. High marketing expenses, IPRs, and continuation of duty free imports of finished mobile handsets by just imposing duty on some percentage of overall cost. And there is no formal mechanism to ensure localization of the so called small parts etc and the importer of finished product can continue to import the same by paying some duty on some portion of cost. For example:*

○ Custom duty on SKD is	Nil
○ 80% SKD parts/components	
○ Custom duty on balance 20%	
○ Components/parts is	10.30%
Average custom duty on SKD	2.06%

- h. Recent studies have shown that Government of India’s policies to promote domestic manufacturing of mobile phones has generated only 6% value addition. Majority of components for these phones are being imported and only final assembly and packaging activities are being carried out within the Country under the guise of “Make in India” to avail attractive Govt. incentives. Low value-addition will neither result in a positive impact on the economy nor lead to significant job creation. The alternate approach that is gaining currency worldwide is “Design-led Manufacturing” where the Country leads through home-grown R&D with domestic ownership of critical design know-how and IPR, which is also essential for security and self-reliance in a digital world. It is

therefore critical to modify “Make in India” mission to “Design and Make-in-India” and focus more on core technology areas that are also security sensitive

- i. The foreign companies are imposing high unreasonable and undefined costs on Indian companies, whether importers or manufacturers, for the so called IPR, when they fail to enforce them on other Countries from where goods are imported. Indian companies are made to fight the legal battles of their own unlike in some countries where the legal battle is contested by Government agencies. Need for compulsory licensing.
- j. Lack of clarify as to who deals with mobile manufacturing- Meity or DOT.

The wireless and mobile as per allocation of business rules lies with Department of Telecom (DOT), which is specialized department for such products. DOT has mandated IMEI, SAR tests, Standard Operating Procedure for verification of fake IMEI numbers on mobile, CEIR, ICDR, Indian Languages, Panic Button, GPS, Mandatory testing. And Department of Electronics and IT has prescribed Compulsory registration/BIS testing, Surveillance. There is need that the appropriate department ie. DOT should look after all the mobile, wireless related issues. Including of telecom/mobile in the MeitY schemes of MSIP etc. is not an issue. These schemes are owned, operated by MeitY and let them remain with MeitY.

- k. Looking forward vey soon the handset manufacturers are likely to face something about 5000 USD per model as fees for GMS ie. Google Mobile service license fees. (Actual fees are not known because of Confidentiality clauses). Need for Government to promote own Indian IOS for handset and bargain as a Country with Google for better rates.
- l. Let us also appreciate that no official data is available for domestic manufacturing, investments made, employment created....hence being flooded by useless data given by few vested interests. Need for a structured policy for collection of data relating to investments made, employment generated, sales achieved and value addition achieved, revenue earned by Government as percentage of sales etc.

m. In the absence of qualified data, there is growing policy uncertainty; Data is needed for formulation of policies, assessing its impact and for effective policy formulation, its impacts and the need for improved mechanisms to redesign/correct the existing policy/procedures/regulations. Data is also needed to study the impact of disruptions due to policy/latest technology/changes globally.

Suggestions:

1. Take on record the real issues rather than lost in fab, components, supply chain, infrastructure etc.
2. Declare telecom/mobile a strategic area of importance for Government of India, so that India has more freedom in various multi Country negotiations/agreements and WTO etc.
3. Impose 35% duty on all wireless equipments, products including handsets. Any technology that was commercially deployed after 1995 is not covered under ITA1 commitments and hence 35 % BCD needs to be imposed.
4. Get one more Governmental body authorized to issue IMEI numbers in India. By law debar private regulatory body to engage in allied services of consultancy, approvals, testing, trading etc. to avoid conflict of interest and customers being forced to avail these allied services.
5. Mandate TEC specifications for all telecom procurements whether private or public
6. Bring the defence concept of IDDP, Make & Buy Indian /Global, wherein 90% of R&D is supported by Government.
7. Mandate compulsory licensing for IPRs for telecom and mobile. Also declare one Government agency, which can inform various IPRs to be followed and will also negotiate royalties' payable for all Indian manufacturers and contest legal battles for Indian manufactured products.
8. Abolish criteria of past experience, provenness for local manufacturer's and start ups.
9. Issue clarifications that all issues relating to mobile/wireless shall be dealt by DOT, as per Allocation of Business Rules.
10. Need to have one common testing for mobile phones by TEC, DOT/BIS under supervision of DOT, which already has mandated mandatory testing of all telecom products including mobile phones.
11. Implement PMA effectively and forcefully.
12. Clear cut differentiation between assembly and manufacturing. What India need is manufacturing and not assembly.

13. Declare a policy that 5G/IOT/M2M or so and so technology products shall be deployed only if manufactured in India.
14. Replicate Automobile model for telecom with our own specifications and ancillary supports.
15. Let us decide our own Indian specifications for telecom/mobile products, which are applicable only in India (like in Japan, China) and then local manufacture by one and all becomes necessary.
16. Implement the provisions of NFAP 2011 and NTP 2012, which envisage the need for de-licensing of certain frequency bands for specific usages and to encourage Indian Innovations in Telecom & lead the Global Market.
17. Keeping in view above allow 2-3 Mhz Frequency band in GSM and suitable for 4G to be allocated for in-building, in-campus applications. Need for opening up the more unlicensed band spectrum and reservation of small chunk of frequency band for development and commercialization of new generation telecom application including IOT for captive uses is very essential.
18. Need for Government to promote own Indian IOS for mobile handset and bargain as a Country with Google for better rates.
19. Need for a structured policy for collection of data relating to investments made, employment generated, sales achieved and value addition achieved, revenue earned by Government as percentage of sales etc.
20. To solve the inter departmental, inter ministerial coordination, urgent need for one nodal ministry/department to be designated responsible for proper implementation, achieving the roadmap.
21. Strict enforcement of anti-dumping and anti-circumvention rules with regard to telecom product/mobile handset imports. Both the foreign exporter and domestic importer of such goods should be penalized once such duty evasion is established. E.g., FTA act provides for license/suspension of such players which is never used.

Q.2 What policy measures are required to be instituted to boost Innovation and productivity of local Telecom manufacturing in our Country? Please provide details in terms of Short-Term, Medium-Term and Long-Term objectives.

Preamble

The fact is that world over there remains only two telecom equipment manufacturers Nokia and Ericsson and adds to that two from China Huawei, ZTE. Others just manufacture and supply some portion of equipments. So fundamental question is, if India is able to support any more

firm Indian soils? Primarily it appears to be distant dream, if we look at the support given to these manufacturers from their respective Countries. Add to that the experience history of last 60 years have taught us. So is it not the correct time to say India does not want to become hub for telecom manufacturing. So innovations and productivity becomes irrelevant and loveable words of import lobbyists.

Yet here again the issues are not incentive/concessions/taxes reduction or GST. The fundamental questions are:

1. Getting funding for Innovators/Start Ups/R&D from private/Government funds without security.
2. Who will bear the risk of failure, innovator or investor or Government?
3. Who will give access to market to new innovator, in the absence of past experience and provenness?
4. Most of funding from Government flows to academic institutions and not to industries. Who will reverse this trend? There is need for an audit of all funding given so far to IIT/IIMs/DSIR as to what Indian product/brand has been created and established in the market substituting a imported product.
5. Appreciate that the model of Innovations and R&D by consortium of academic institutions and Industry by way of Center of Excellence by DOT has not proven success. There is NIL Indian products so far available in market substituting imported product.
6. Appreciate there is no telecom/mobile specific R&D/Innovation scheme for funding. Telecom Equipment Manufacturing Council (TEMC) formed by Government in its recommendations submitted on 5th September, 2013 on R&D, IPR and Standardization, had recommended creation of new funding schemes for telecom sector, i.e., Telecom Entrepreneurship Promotion Fund (TEPF), Telecom Research & Development Fund (TRDF) and Telecom Manufacturing Promotion Fund (TMPF) with total outlay of Rs 17,500 Crs, as recommended in the 12th Five year plan. These have not been implemented and need to be implemented fast.
7. Let us appreciate Singapore model, where 30%/50% of direct costs for product development and core research are borne by Government. This is 90% in India for defence manufacturing.
8. Let us realize that the biggest demand worldwide is for a affordable rural network suited for Indian conditions. The rural situation on ground in India is different than other parts of world. Also that non availability of telecom networks to unconnected and rural areas is problem world over, with no easy solution in hand sight. The global manufacturers are

busy in 4G,5G and may be 6G etc. and not able to devote energies and focus for unconnected areas and unconnected populations.

Most of the equipments available worldwide designed with specifications and power etc. primarily for urban cities and high paying customers. They ride on so called high efficiencies and usability brings little concern about its impact on society and its adoption demographics. Hence difficulty in adopting the same as it is for rural areas, which are scattered very thinly populated and not so well pay off customers and with little or low infrastructure, power availability.

In this behalf let us quote Chairman, TRAI statement on 4th October, 2017- (<http://telecom.economictimes.indiatimes.com/news/internet-remains-unaffordable-for-rural-indians-trais-sharma/60939440>)

“basic Internet infrastructure continues to remain inadequate in most rural and remote areas of the Country,”

“provisioning of Internet access to all sections of the population, including rural masses, is essential for their digital empowerment and, in turn, for bridging the urban-rural divide.”

“The current situation calls for the adoption of a range of innovative solutions that will help in enabling the broadest set of users to connect to the Internet through reliable and ubiquitous networks, access to which is within their reach and means,”

9. Yes, we have indigenous technologies and products available with CDOT and private equipment manufacturers. Need to promote, protect and flourish the same. On the other hand we deny them access to market sometimes on the ground of latest technology, sometimes lack of experience, sometimes asking to prove the equipment (which is already proven and working in Government network) and not allowing Indian companies to bid in the USO tenders for rural networks.
10. Let us also realize that telecom technologies need huge investments and there are few selected players globally active in this field with global operations and multimillion dollar sales and large market base. Any new Indian company even if they develop technology, will need proper care, support from Government to grow and attain even a small percentage of global market. IT has also been seen that such large scale

investments cannot come from single source of Government or private and it has to be combined efforts of all. It is also seen that most of foreign companies use Indian soil for software development, but finally the product IPRs are located outside India and we have yet to see any foreign company whom has used Indian soil for software/research, to come up with an Indian product used for global markets.

The solution to this has been found in defence sector. As per Lok Sabha Starred Question 85 answered on 28th July, 2017, the Government has finalised the policy on Strategic Partnerships in the Defence Sector. The Policy on Strategic Partnership is intended to institutionalize a transparent, objective and functional mechanism to encourage broader participation of the private sector, in addition to Defence Public Sector Undertakings (DPSUs) / Ordnance Factory Board (OFB), in manufacture of major defence platforms and equipment. There is need for such a policy for telecom sector as well.

Suggestions:

1. Government gives assurance of access to market and eligibility in Govt. /PSU procurements, WITHOUT PAST CRITERIA/PROVENNESS.
2. Initial funding by Government without securities.
3. An assurance in policy that start up/innovator product will not be branded outdated technology and ineligible by the time it comes to market.
4. Mm
5. An audit of all funding given so far to IIT/IIMs/DSIR as to what Indian product/brand has been created and established in the market substituting a imported product. Shift focus to industries and private houses rather than depending upon academic institutions only.

6. AN ASSURANCE IN POLICY THAT THE START UP/INOVATIONS PRODUCT WILL NOT BE SHOOT DOWN BY I 1 CRITERIA.
7. Abolish Center of Excellence created by DOT.
8. All out support to create a Country Champion for telecom/handset sector. Make it success by funding, research, advance orders, market access.
9. Give grants to industry as well as all academic institutes and not just IIT/IIMs.
10. Implement the recommendations of TEMC- Telecom Equipment Manufacturing Council for Telecom R&D Fund (TRDF) of Rs 10,000 Crores and new funding schemes i.e., Telecom Entrepreneurship Promotion Fund (TEPF) and Telecom Manufacturing Promotion Fund (TMPF) with additional total outlay of Rs 7,500 Crs, as recommended in the 12th Five year plan. These have not been implemented and need to be implemented fast.
11. Bring in Singapore model for 30/50% funding of direct expenses for product development/core research.
12. Ruthlessly and fearlessly promote the locally manufactured available products and technologies for rural network and forcefully decline all lobbyist tactics to deny them even access to tenders/market on one or other ground.
13. Need for Telecom strategic Partnership Policy on the lines of defence Policy on Strategic Partnership, as explained above.
14. There is dire need to promote new innovations and technologies and also consider ways and means to allow non operators segment to come up with solutions. Need to promote new technology/innovations like white space etc.
15. Promote and give market access to new technology/innovations/start ups and Indian companies manufacturing the telecom equipment suited and need for rural areas and unconnected areas rather than harping on latest/state of art/high tech technology developed elsewhere in worlds for dense urban and no rural areas.

Q.3 Are the existing patent laws in India sufficient to address the issues of local manufacturers? If No, then suggest the measures to be adopted and amendments that need to be incorporated for supporting the local telecom manufacturing industry.

Issues Hampering Growth

The answer to TRAI Question No 3 is Absolutely NOT. The existing patent laws have worked 100% against the local manufacturing companies in Telecom/Mobile Handset industry.

In fact IPR royalties are biggest hurdles and bottleneck for local manufacturing. Once local manufacturer achieves some level, several IPR patent holders start asking royalties and manufacturer does not know how to respond.

The fundamental issues are:

1. There is no authority whatsoever in India or abroad, who tell that how many patents and how much royalty is applicable for any telecom/mobile handset products. As a result the royalties payable are not known at the start of project. Once project achieves critical mass, the royalty claims starts bumping. **So manufacturers are placed in UNKWON LIABILITY POSITION.** The answer to this is compulsory licensing by Government, wherein all patents holders are required to approach Government for licensing. TRAI in this behalf in its Consultation paper has said:

*“However, **there is no single window like structure in place**, which can provide clarity in terms of patent licensing requirements at the time of commencement of manufacturing activities.”*

2. As stated by TRAI in its consultation paper itself, *“**the concept of SEPs does not have any statutory recognition in the Patents Act, 1970.**”* So various Courts, industries, forums, bodies take their own interpretation and understanding and there is no unanimity across globe or even within one Country. Even the Standard Setting Organizations like European Telecommunications Standards Institute (ETSI) and Institute for Electrical and Electronics Engineers (IEEE) do not declare any patent as SEP.
3. There is no authority in Government or abroad, who confirms that so and so patent is SEP (Standard essential Patent). As a consequence any patent holder start claiming it to be SEP and starts demanding royalty. Majority of legal battles on authenticity of SEP ends up in negotiations, hence the patent is SEP or not remains not known.
4. Nobody in Government or foreign body tells what royalty rates on the IPR are. As a result this goes on negotiations and taking shelter of confidential clause, the patent holder does not disclose the rate of royalties decided in the past. This creates UNKWON

LIABILITY and the rates depend on the bargaining/financial powers of the manufacturers. TRAI in its consultation paper in this behalf has said:

“Non Disclosure Agreements may result in differential in royalties to be paid. Rate of royalty differs substantially from one potential licensee to another. This results in higher costs for the local manufacturers and therefore higher purchase costs for the consumers. A need therefore exists to transparently mention the range of royalties to be paid in percentages wherever feasible”

5. Logically royalty should be on the cost of component/part on which patent holder have IPR. As a rule royalties are claimed on the entire cost/sale price of the product. Legal battle in this behalf remains unsolved and is decided by negotiations. As such this is another UNKNOWN LIABILITY. TRAI in its Consultation Paper itself has said in this behalf:

“Issues pertaining to the basis for determination of royalty i.e., whether on the value of the Smallest Saleable Patent Practicing Component (SSPPC) or on the net price of the downstream product, or some other criterion remains open ended”

6. The same argument also applies to occasions when readymade product, called CBU Complete built Unit is imported.
7. On various occasions the Government prescribes the technology to be adopted to meet the given licence conditions/specifications, but no disclosure as to what are royalties on IPRs. So one more UNKNOWN LIABILITY
8. The manufacturer is left to himself to contest the legal battle. Any new manufacturer's capability and financial powers are limited as compared to IPR holders, who contest case worldwide with high legal professionals and high costs. In some countries like china, the IPR cases are handled by a Government agency. There is need that Government decides some agency in India to handle and guide and contest legal IPR case.
9. Globally there is fierce competition and contest in Courts on various IPR cases on daily basis. Same Company files against one others in several Countries. On Most of times the cases are not decided and negotiations arrived and on several occasions contrary judgments may appear. The Indian judicial system is hardly able to keep track of latest judgments/happening worldwide due to first being overloaded with several cases and

then lack of any training/skills available in India by Government. Most of the lectures/articles are written by interested lobbyists, depriving the opposite view. The answer is special Courts in India and also training for judicial persons from Government level with balanced speakers of all the sides.

10. The fact is that the mobile/telecom manufacturers import basic chip/semiconductor and other components from abroad. Any violation of any IPR has to be on that component/chip/semiconductor. Indian manufacturers just assemble that. So any violation of IPR patent is at the end of component/chip manufacturing. If Indian Company is also manufacturing component/chip, then he should be liable to pay IPR royalties, otherwise not.
11. Currently, the Indian Patent Act mandates all patent holders to submit relevant information on the working of their patents in the territory of India by submitting a special Form 27 every year once the said patents are granted. A modified and longer version of Form 27 (Form 27S) may be designed for SEP holders that should apply right at the filing stage.
12. Appreciate how Government helps in local manufacturing by negotiating with IPR Holders.

Thinking for themselves

India and China aim to challenge western tech firms through innovation, not just cheap labour

ON THE sixth floor of the sleek headquarters of Sasken Communication Technologies in Bangalore, India, a small cubicle serves as an office for the chief executive, Rajiv Mody. There, hanging on a wall beside a photograph of Mahatma Gandhi, is a plaque of patent number 5,072,402, for a "Routing System and Method for Integrated Circuits", granted to Mr Mody by America's patent office. Sasken, a publicly traded firm with

over 2,400 employ-

ees, writes the code that is embedded deep inside the hardware of telecoms equipment, from mobile phones to high-speed internet modems. The patent on the wall is a visible sign that the company, like India itself, is trying to shift from low-end work to more sophisticated technologies, complete with home-grown inventions. The same thing is happening in China. And both countries are using the intellectual-property system to stake out their turf.

For the moment, both are better known

as places where intellectual property needs special protection. As a strategy for economic development, nabbing someone else's patents is nothing new. Immediately after America's declaration of independence, its government made it official policy to steal inventions from Europe, expediting the country's rise as an industrial power in the 19th century, notes Doron Ben-Atar of Fordham University in New York. Yet in India and China, the pressure for respecting intellectual property more is

Without home-grown technology, India and China have to depend on foreign firms, and they do not like it. China, in particular, has seen a surge in the royalties it is paying to foreign firms, and is trying to stem the flow. When Qualcomm's boss went to China in 2001 to negotiate royalty payments for his company's third-generation mobile-phone standard, he agreed to accept less than what he charges others. Within a year, China was working on developing its own 3G wireless standard. If it succeeds, Qualcomm will see its royalties shrink further.

13. Significant IPR creation is happening in the Country, the need for classification of domestically manufactured products in true sense as 'domestic products having IPR resides in India' and rest to be construed as Assembled or Manufactured in India.
14. Let us not be bogged down by lobbyist that there is conflict between Competition IPR and both can exist simultaneously, even though IPRs are de-facto monopolies. There is need for interface and right balance between competition and IPR. Every Nation has make IPR policies considering their development level, Nation needs and priorities. This achieves more significance in present era where globalization is facing a backlash across several economies. Competition is an important policy to promote and protect public interests. Hence need for appropriate policy formulation, implementation and enforcement to promote both innovation and consumer welfare.

Detailed note attached as Annexure IV

Suggestions:

1. Make telecom and mobile handsets under compulsory licensing.
2. Declare one Government body who will decide the SEP/IPR patent royalties payable
3. Declare one Government agency that will contest and handle all IPR legal cases filed by IPR holders for Indian manufacturers.
15. Declare special courts in India for IPR Cases and also training for judicial persons from Government level with balanced speakers of all the sides.
4. Clarify in the policy statement that IPR Royalties are payable on the cost of components having IR and not on the entire sale cost of product.
5. Clarify as a policy that as and when Government mandates any technology for standard/specifications, it should also indicate IPR Patent royalties payable.
6. Clarify as a policy that IPR royalties are payable by the manufacturer of component/chips/semiconductors and not by users of the same.
7. A committee consisting of academia, DoT and domestic industry should vet and approve all SEP patents and any licensing charges to be paid. Government of India organization to be set up that will examine validity and negotiate on behalf of all Indian equipment manufacturers to get “reasonable” patent pricing for SEPs claimed by any patent holder.
8. Government to negotiate for IPR royalties for India as a whole for manufacturing and then applicable to all manufacturers, refer example of china quoted above.
9. By policy make classification of domestically manufactured products in true sense as ‘domestic products having IPR resides in India’ and rest to be construed as Assembled or Manufactured in India.
10. Enforce fiercely, fearlessly and forcefully the definition of ‘Domestically Manufactured Products’ under PMA as per TRAI recommendations on Telecom Equipment Manufacturing Policy:

- *The products have been designed, developed and manufactured in India by an entity duly incorporated in India*
- *IPRs for the products reside in India.*
- *Commercial value of the IPRs accrue to India*
- *The product meets the minimum value addition criterion prescribed in the policy.*

Q.4 Is the existing mechanism of Standardisation, Certification and Testing of Telecom Equipments adequate to support the local telecom manufacturing? If not, then please list out the short-comings and suggest a framework for Standardisation, Certification and Testing of Telecom Equipments.

Issues Hampering Growth:

- 1. No the existing arrangements are not satisfactory. Hence answer to TRAI question is NOT AT ALL**
2. There is lack of clarity. There is no Government authority responsible for standardization. The certification and testing are done by TEC, DOT and that is satisfactory, except that for mobile some of testing are done by private labs and BIS. That needs to be transferred to TEC, DOT, as mandatory testing of all telecom equipments including mobile has already been announced assigned to TEC.
3. As regards standardization, the work is done by several foreign bodies like ETSI/3GPP etc. and to some extent recently undertaken by TSDSI in India, which is 100% controlled and dominated by foreign manufacturers and some academic institutions. There is hardly any involvement of any Indian manufacturers in TSDSI, whereas in TEC, DOT all the Indian manufacturers along with foreign manufacturers takes part. The membership of TEC, DOT is FREE, but quite expensive for TSDSI. The agenda/minutes consultation for TEC, DOT is quite open, transparent and also sent to various associations Indian or foreign. Even the consultations of TRAI/DOT/ Meity/ Niti Aayog/ ITU Geneva are open and all are invited whether paid members or not. Infact the Hon'ble Prime Minister of India has a website, wherein anybody can offer views/suggestions. In this background

the consultations/discussions in TSDSI are very secretive and restricted to only paid members. The only safeguard is that there are some members from DOT on the Board. **And biggest safeguard is that one of DDG of DOT is handling day to day affairs, so Indian needs are taken care of. We would like to put in sincere efforts done by that officer.**

4. Let us appreciate that the TSDSI and its members majorly repeats the work being done by foreign companies in their Country and then opines it as Indian view. Let us appreciate the fact that even if an Indian person is representing Foreign Company, his prime interest is that of foreign Company rather than Indian side. And also lets appreciate that any recommendations from TSDSI goes to foreign controlled bodies like ETSI,3GPP etc., where again the majority interests belongs to foreign Companies.
5. Let us also appreciate that even if we are able to get one or hundred recommendations adopted, the fact is there are thousands of issues and recommendations and India will always be in minority. There is current flavor of 5G. We may contribute something here and there, but can we say that 5G standards would be made and dominated by Indian requirements, even though we are second largest market in world. No not at all.
6. There are some myths prevalent in the market that TSDSI is the standard making body of India. **This is not correct.** Yes DOT is represented on the Board of TSDSI. The TSDSI is a 100% private association based in India with the purpose of making recommendations/suggestions for standards in India for telecom and electronic products. The normal purpose of society includes interaction with international standard organization and to promote indigenous standards. **The recommendations made by**

TSDSI cannot be termed as Indian Standards. The Indian standards would continue to be made by TEC (Telecom Engineering Center), a 100% unit of DOT.

7. It is to be clarified that the suggestions/recommendations by TSDSI are in NO WAY MANDATORY or OBLIGATORY and they cannot be termed as India Standards. The TSDSI site itself clarified this (<http://tsdsi.org/main/faq/>)

Will there be a Government control in TSDSI?

No. TSDSI will function according to its bylaws having representation from all stakeholders. The governing council will be an elected one. The chairman and vice chairman will also be elected ones. The Government will nominate 5 members on the council as per the bylaws.

8. It is clear from the Rules as stated below that the final authority to adopt standard as National Standard is DOT:

19.2.1 e) After approval by the General Body, the proposed Standard shall be sent to DoT for ratification and adoption as National Standard.

19.3.1 Recommendations in the form of draft national opinion in all the technical matters concerning national interests shall be sent to DoT, at least 4 weeks in advance for consideration and approval, before taking up in any other National or International forums.

9. **TEC:** TEC is the official Standard/specifications making body of Government of India for telecom products. It is a 100% unit of DOT. TEC makes standards based on inputs from various sources. For making standards, TEC has a system of draft proposed standard, then sub manufacturer's forum, then manufacturer's forum, then DCC (Development Coordination Committee) and then final approval by Sr. DDG of TEC, who reports to Member (Technology) DOT. To that extent whereas Sr. DDG is competent

to approve the standards, but he is guided by Member (Technology) and Secretary DOT in turn. TEMA (Telecom Equipment Manufacturers Association of India) along with all other Indian/foreign associations/individual industry members are invited for participation in various committees/forums in TEC and they can submit their views/suggestions. No membership of fees is payable to TEC for joining the consultations and to be part of standard/specification making.

10. It is also submitted that the corporate membership of TSDSI is not open to associations or individuals. And only corporate members shall be eligible for election of the Governing Council. And only corporate members can take part National and International bodies. in See extracts of TSDSI Rules and Regulations below:

4.1.1 Corporate membership of the Society is open only to a company, institutions, research centres or Govt. Department/body, but not to an individual or association of industries/societies. A small group of companies cannot join collectively as one Member, that is, no such collective representation is allowed for corporate membership.

4.2.2 b) Only Corporate Members shall be eligible for election to the Governing Council and shall have the right to nominate candidates for election as officials of the Society.

4.2.2.d) Each Corporate Member shall also have one vote in all consultations carried out by correspondence.

4.2.2. f) Only Corporate Members can participate In meetings of national and international standards bodies of which TSDSI is a partner organization.

11. There is also restriction on associations to nominate any industry member on TSDSI. See Rule below:

4.2.4: However, if an association/ society becomes a member, only its nominee, who is its employee or elected official, can participate in the proceedings of the Society.

12. TRAI in its Consultation Paper in this behalf has said:

“India being a large market for such products, it may therefore be necessary that India specific requirements / specifications are incorporated considering our local needs.”

Suggestions

1. Declare that the standardization work will be handled by TEC, DOT or CDOT
2. By law include all Indian manufacturers in TSDSI with voting rights without any fees.
3. Enforce from Government side that any SEP should be declared as such by TSDSI or foreign bodies and also the rates of royalty should be fixed for the component only and not for the entire sale price of the product.
4. Mandate and implement mandatory TEC specifications for all procurements in India by private/public/state/central Government to avoid manipulations and access to domestic manufacturers.

Q.5 Please suggest a dispute resolution mechanism for determination of royalty distribution on FRAND (Fair Reasonable and Non Discriminatory) basis.

Issues Hampering Growth:

1. Let us accept that FRAND is a loose word coined by foreign companies for extracting maximum and undue moneys in the name of royalties from manufacturers at two stages first for component manufacture and then for final product assembly.
2. FRAND has not been defined by any Government or foreign or Indian body. Most of the legal cases contested for FRAND have resulted in negotiations without any decision. So it is left to individual to interpret and take view. FRAND also has no legal basis. It is just an statement from the Company to the standard making body that they will give IPR utilization permission on FRAND basis.
3. On account of confidentiality clause, the details of terms agreed by and between the IPR holder and the Company are never disclosed. In the absence of which what is FAIR is left to be determined by the patent holder.

As stated by TRAI in its consultation Paper,

- *“Presently, calculation of royalty on FRAND basis remains a challenge and is the bone of contention in the ongoing SEP disputes”.*
- *And further “the term “reasonable” used in the expression FRAND is often interpreted differently by a patent licensor as opposed to patent licensee”.*
- *And “but lack of any guiding factors and asymmetric bargaining capacity between licensor and licensee often ends up in litigation.”*

4. Detailed discussions on FRAND are attached at Annexure IV

Suggestions:

1. Declare by law that a given Government body will determine and supervise the FRAND negotiations.
2. Declare by law that the standard body should include the terms and conditions of FRAND and the terms agreed with existing companies should be disclosed on website.

Q.6 Are the current fiscal incentives sufficient to promote the local telecom manufacturing? Please suggest the fiscal incentives required to be instituted along with the suitable mechanism for implementation of these incentives?

Suggestions:

This has already been discussed at length in response to questions above. In brief no incentive/concessions needed, just give market access and R&D budgets, save Indian manufacturers from IPR bang downs, declare one additional Government agency for handset IMEIs, transfer all mobile manufacturing policy/procedure works to DOT, transfer mobile testing work to TEC instead of private labs under BIS, reduce compliances of mobile testing.

Q.7 Are there any issues under ITA which need to be addressed for making the local Telecom Manufacturing more competitive and robust

Analysis-Situation on Ground

1. The situation and discussions as to why India has not committed ZERO duty on all telecom products is given in Annexure II hereto. This has also been amply discussed herein above.

ITA 1 is not applicable to any wireless equipments/products/handset mobiles. It applies to technology prevalent during 1996 or so.

Suggestions:

1. Simply impose custom duty of 35% on all the wireless/mobile products/equipments. This has also been successfully demonstrated by Government, when Govt. on 11 July 2014, vide Notification No. 11/2014 imposed basic customs duty of 10% ad valorem for four product categories which did not exist when ITA-1 was signed. And during current year on 30th June, 2017, 10% BCD was levied on wireless equipments covered in 85.17 and 84.43 chapters. The duty already imposed as above be raised to 35%.
2. Ruthlessly and fierce fully DO NOT ALLOW of Imports of telecom equipments of the new technology products under "Others" (HS Code 85176990) classification.
3. Realize that in some sectors Indian can be world leader, such as optic fibres. All out efforts need to be made to protect and harbor and promote such sectors. Indian manufacturing units are already competing with US, China, Japan, Korea, Europe etc. As there is no commitment under ITA 1, hence duties of 35% must be imposed on import of optic fibre and related materials.

Q.8 Should an export oriented/promotion approach be adopted in the telecom equipment manufacturing sector? If yes, Please suggest the steps to be taken to create suitable environment to attract foreign investment players for setting up establishments which in turn can result in technology dissemination, innovation, generation of jobs, skilled labour force, etc.?

Issues Hampering Growth:

1. Lot of measures are itself indicated in para 2 Page no. 8 of NPE 2012.(page 8 under strategies) and other policy initiatives, but not cared to be implemented.
2. Let us appreciate that exports can be achieved only when we have substantial base of supplies India. Any export incentive/concession is hardly of any use, if we are not able to address the Indian market. We have several examples of good Indian technologies,

CDOT, MARR, Corpect, IP exchanges, OFC, radio equipments, EPBT, FWT, switches, etc. but not able to export.

3. The Government declares several Lines of credits/grants to various countries. The local telecom/mobile/UICF equipments should be made a part of that.
4. Hence appreciate that let us first make large Indian base and then we talk of exports.
5. As regards foreign manufacturers, while they need to be appreciated, but biggest issue is that they are more interested to expand in India rather than manufacture in India. Under the grab of FDI and foreign investment, most of the money is utilized for sale/distribution centers, marketing, sales discounts, advertisements etc. There is clear need to distinguish between the investments brought in India for manufacturing and for allied matters. We have already allowed 100% FDI in telecom/mobile sector?
6. Also appreciate that any investment in share market is no real investment for India, as the shares can be transferred/sold back anytime depending upon global situations in share market.
7. Also appreciate that tax disputes of Nokia, Vodafone, cancellation of 2G licenses by Court are big negative image creation in world market for Indian telecom sector.

Suggestions:

1. Implement policies and procedures to make Indian locally manufacture products to have large base in Indian market.
2. Make locally manufactured telecom/mobiles/ICT products as a part of LOI/Grants being announced by Government.
3. By law differentiates foreign investment for manufacturing v/s foreign inflow for marketing, advertisement, sales/marketing centers etc.
4. Mandate that any FDI for manufacturing needs to be locked in for five years atleast.
5. Settle tax disputes immediately.
6. Actively use Govt-to-Govt (G2G) line of credit for promoting exports of high-tech equipment and projects from India to Africa, ASEAN, SAARC and Latin America. Private sector companies should be supported, if they are capable to lead such efforts in their respective fields. Such project approvals should happen in a timely manner by EXIM bank.

7. Promote branding of India as a "Product Nation" in the technology sector- we are currently well known for IT services exports. (MOC, DOT, MEITY). Establish a 100 cr telecom export promotion fund which will be used for hosting events, conferences and international "buyer-seller" meets that will showcase domestic companies to national and international customers
8. Establish a 100 Cr Telecom Export Promotion fund to brand India as the "Silicon Valley of Asia". The fund will be used for hosting events, conferences and international "buyer-seller" meets that will showcase domestic companies to national and international customers.

Q.9 Does the existing PMA policy require any change? If yes, then please provide complete details with justifications.

Issues Hampering Growth

This has already been discussed hereinabove.

Suggestions:

This has already been discussed in above points. In brief,

- Need to implement PMA in real sense of letter and spirit.
- PMA to be applicable for procurement of electronics products made under centrally Sponsored Schemes and grants made by Central Government, as already provided.
- Apply PMA to all telecom networks in India whether private or public and State Government procurements.
- Implement PMA fearlessly and forcefully,
- Apply PMA for manufacturing and Differentiate between assembly and manufacturing.
- Apply PMA forcefully and by law for smart city projects, which have element of Central Government funding.
- PMA to be freed from L1 theory. PMA at L1 prices will never resurrect industry and years after years, India would be sitting & discussing the same subject. Genuine Indian Companies will always find it difficult to supply at L1 price because (i) we are comparing an established large supply based company with newly started Indian company with almost nil base of supplies (ii) costs are much higher in India than China costs and it is

for this reason Indian companies have only resorted to SKD / CKD assembly (iii) China has low interest rates & enjoys preferred purchase price because of economies of scale so their prices are bound to be lower.

- The procurements under PMA need to be made on Indian specifications. Global best specifications as asked for in tenders to be substituted with “Specifications that meet user Indian/functional requirements and are available with domestic manufacturers”. Decide on product champions who have proven & established design & manufacturing capabilities and consider specifications available with them & slowly expect them to upgrade.
- Monitor Foreign exchange outgo for all PMA availed companies by doing micro management at the manufacturer level so that macro management of India’s economy is automatically taken care off. PMA benefit should be given only if the Foreign exchange outgo on the manufacturer’s balance sheet along with his downstream vendors is less than 20% of the overall revenue of the manufacturer in the balance sheet. Balance sheet revenue includes services / warranty / support charges / Marketing advertisement & profits so work backwards & maximum FE outgo should not exceed 20 to 25%.
- In Government tenders, even if there is only one “Indian Product”, the same should be procured, rather than being imported.

Q.10 Any other relevant issues that needs to be addressed to encourage local telecom manufacturing in our Country.

Preamble

Present time is India’s best time to regain its glory and make India hub for telecom/mobile/ICT manufacturing. If it cannot be achieved now, then can never be. Several Government agencies are working on local manufacturing DOT, MeitY, Niti Aayog, DIP etc. If India cannot take strong decisions, forcefully implement the policies, and then better to declare India does not to manufacture locally telecom/mobile equipments....however sad it may be.

Suggestions:

Enough has been said hereinbefore. Yet:

1. Need for Government to act in real sense and not just dump the recommendations coming out from TRAI.
2. Need to adopt something on the lines of SEBI registration of Consultants/Research Analyst "SECURITIES AND EXCHANGE BOARD OF INDIA (RESEARCH ANALYSTS) REGULATIONS, 2014" dated 1.9.2014.

This is because every now and then a defined consultancy Company submits a report giving recommendations for local manufacturing and then these reports form basis of subsequent discussions in Government. Most of these reports are funded and sponsored by vested interests/importers lobby. There is hardly any requirement of disclosures by them as to whom they are representing and also there are no qualifications prescribed for them. As a result any person appointed by the company becomes an expert. It is well known fact that most of the smart city project reports are tailor made by some consultants to serve some one's interest. Recommendations of Bidder Company to qualify in Gartner's quadrant are proof of such situations.

3. The recommendations made by TRAI in its 2011 paper needs to be implemented fast:
 - i) "A Telecom Research and Development Corporation (TRDC) should be set up and an amount of Rs 15,000 crore may be made available to this Corporation for the following purpose: (a) Setting up of an R&D fund. (b) Establishing a Research and Development Park"
 - ii) "Create a Telecom Manufacturing Fund (TMF) for providing venture capital to indigenous manufacturing in the form equity and soft loans for supporting pre and post commercialization product development and brand creation. The TMF would be managed by a corporate body and

headed by a person of eminence in the field of Banking/ venture capital finance.”

- iii) The manufacturing fund should be an open fund with contribution from the Government and other bodies like finance corporations. The Government would initially provide an amount of Rs 3000 crore to establish TMF and start financing activities.

The TRAI Consultation paper says that this “Being addressed through TCOE and EDF”. This is not correct. TCOs have been failure to bring any product or manufacturing. This has been discussed earlier. There is o funds allotment under EDF for telecom.

- iv) TRAI recommended for TRDC with Rs 15,000 Crores initial corpus.
- v) One of the recommendations of TRAI in 2011 were:

“An autonomous Telecom Standards Organization (TSO) be set up for carrying out all works relating to telecom standards. It will also have the responsibility of driving international standards and drawing up specifications of the equipment to be used in the Indian telecom network. The governing board of the organization should consist of experts from the academia, research centres, industry and the Government and the organisation should be headed by a person of eminence in the area of technical standardization.”

In TRAI Consultation paper it has been stated that these are met by TSDSI. As has been stated hereinabove, TSDSI does not have local manufacturers on board and TSDI is more working on creating/endorsing international standards and focusing on 5G or latest technologies etc. rather than **“the responsibility of driving international standards and drawing up specifications of the equipment to be used in the Indian**

telecom network”

Hence TRAI recommendations still need to be implemented in real sense. As suggested above this work can be handled by TEC, DOT.

vi) TRAI’ s Recommendations on Telecom Equipment Manufacturing Policy in 2011:

- An income tax holiday for 10 years, as applicable to the software industry, for domestic telecom manufacturers having annual turnover of less than Rs 1000 crore. Further, it was recommended that telecom equipment manufacturers be exempted from payment of Minimum Alternative Tax. However, these benefits are yet to be allowed under the Income Tax Act, 1961.
- Government or government licensee (service providers - both public and private) would be responsible for meeting the market access criterion even if the installation, maintenance and operations are outsourced.
- The Department of Telecom (DoT) should suitably modify the relevant clauses in the UAS Licenses issued/to be issued and the Unified Licence to include the stipulations of percentages of market access, value addition and auditing in respect of domestic products.
- The service provider procuring more than 10% of the market access requirement of telecom equipment in the form of Indian Manufactured Products should get a rebate equivalent to 10% of its licence fee for that year and the service provider procuring more than 20% of its telecom equipment requirement in the form of Indian Manufactured Products should get a rebate equivalent to 20% of its licence fee for that year. For the purpose of this recommendation licence fee does not include USOF (Universal Service Obligation Fund) contribution of 5% of AGR.

If a service provider is not able to meet the criteria of market access then it will deposit an amount equal to 10% of the shortfall in the value of the equipment in the Telecom Research fund or the Telecom Equipment Manufacturing fund.

- A Telecom Equipment Manufacturing Organisation (TEMO) should be set up to coordinate between manufacturers and service providers for proper implementation of the telecom equipment manufacturing policy.
 - All domestic telecom equipment manufacturers producing Indian Products or Indian manufactured products and having an annual turnover of less than Rs 1000 crore, should get access to debt finance for capital and working capital for a period of 5 years on subsidized terms. The extent of subsidy will be 6% for the Indian Product Manufacturers and 3% for producers of Indian Manufactured Products. The Government should formulate a subsidy scheme for the purpose and the subsidy grants can be channelized for disbursement directly to the lending banks.
 - The requirement for “provenness” be waived for domestic manufactured products provided that the turnover of the domestic manufacturer is less than Rs 1000 crore and provided that the domestic product meets the requirement of quality, technical specifications and standards and are certified by the testing and certification organization. In such a case the qualifying Company would be given order upto 10% by quantity.
 - TCIL (Telecommunications Consultants India Limited) may be strengthened as a system integrator for installing and operating networks in other countries using telecom equipment sourced from India. Further, to enable more autonomy and efficiency, TCIL may be disinvested such that the Government holds up to 49% equity.
4. Present time is India’s best time to regain its glory and make India hub for telecom/mobile/ICT manufacturing. If it cannot be achieved now, then can never be. Several Government agencies are working on local manufacturing DOT, MeitY, Niti Aayog, DIP etc. If India cannot take strong decisions, forcefully implement the policies, and then better to declare India does not to manufacture locally telecom/mobile equipments....however sad it may be.

Attachments: Annexure I - Illustration - Apple iPhone VA
Annexure II - India Position on ITA 1
Annexure III - List of IPR cases pending at Delhi High Court
Annexure IV - IPR Detailed Note

An Illustration – Apple iPhone

Apple's long-awaited white iPhone 4, which hit stores April 28, is expected to be another smash for Steve Jobs. But how much will it benefit the American economy? Though invented in the U.S., the iPhone is manufactured in China, so, ironically, iPhones sold in the U.S. add to the trade deficit with the Middle Kingdom. Yet China contributes almost nothing to the value of an iPhone; it does little more than assemble parts from elsewhere. A host of other countries, including the U.S., benefit more from producing the world's hottest gadget.

WHERE THE PARTS FOR A \$500 IPHONE ARE MADE

\$61 – JAPAN : It doesn't innovate as much as the U.S., but its tech prowess means a lot of high-end manufacturing value stays there

\$7 – CHINA : Often more of an assembly line for other nation's wares, work here accounts for only 3.6% of an iPhone's production cost

\$48 – UNSPECIFIED :

\$11 - U.S. : While America doesn't make much of what goes into the iPhone, it's always better to innovate than to fabricate; just see Apple's profit

\$30 – GERMANY

\$23 - SOUTH KOREA

iPhone retail price **\$500**
 Parts and assembly **-\$179**
Apple's profit **\$321**

Adding Up the iPhone. How an American invention makes money for the world

Apple's long-awaited white iPhone 4, which hit stores April 28, is expected to be another smash for Steve Jobs. But how much will it benefit the American economy? Though invented in the U.S., the iPhone is manufactured in China, so, ironically, iPhones sold in the U.S. add to the trade deficit with the Middle Kingdom. Yet China contributes almost nothing to the value of an iPhone; it does little more than assemble parts from elsewhere. A host of other countries, including the U.S., benefit more from producing the world's hottest gadget. —MICHAEL SCHUMAN



SALARIES The Great Divide CEO pay is rising again, outpacing the rest of us



GDP Is the Recovery Over? The latest economic-growth figures are grim

The U.S. government's gross-domestic-product report for the first quarter of 2011, released April 28, showed that nearly every sector of the economy slowed compared with the last three months of 2010. The numbers were weaker than expected. Consumer spending down. Business spending down. Housing sector down. Exports down. Federal spending way, way down. (It decreased 7.9%, the largest drop in more than a decade.) The housing sector is also decreasing. There was, of course, one thing that was up: inflation. So is this a brief pause on the way to a healthy recovery, or is it the first sign, now that the stimulus package has ended and Ben Bernanke says he'll stop juicing the bond market come June, that this recovery was never really sustainable? Right now, most signs point to the latter. —STEPHEN GANDEL



'A lot of people are having a very tough time. I can certainly understand why people are impatient.'

—Ben Bernanke, chairman of the Fed, which will stop pumping money into the financial system despite slowing economic growth

An Illustration – Apple iPhone



Where the Parts of
a **\$500** iPhone
are made



iPhone retail price
\$500
Parts & Assembly
- \$179

Apple's Profit
\$321

Annexure II

India Position on ITA 1

Earlier there was an impression that India has committed zero duty imports under ITA1 for all telecom products including mobile handsets and wireless equipments. However, this is not found to be correct, as per detailed discussions held in DOT in its meeting on 16th Jan, 2017. Brief details of presentations given here and discussions held are reproduced below.

India joined the ITA on 25th March 1997. 217 tariff lines were brought to 0% duty since the year 2005, according to which:

1. Each member shall bind to eliminate Custom Duties and other duties and charges of any kind, within the meaning of Article II, Clause 1(b) of the General Agreement on Tariff and Trade 1994 with respect to the following:-
 - All products classified (for classifiable) with Harmonised System (1996) (HS) heading listed in **Attachment A** to the Annex of Ministerial Declaration and
 - All products specified in **Attachment B** to the Annex of Ministerial Declaration, whether or not they are included in Attachment A.

(**Attachment B** lists specific products to be covered by ITA wherever they are covered in classified HS Code)

2. The ITA Agreement was based on Harmonised System classification 1996 under which Sub-heading 8517 of ITC HS is as under:

“Electrical apparatus for line telephoning, line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for **carrier-current line system** for digital line systems, Videophones” i.e. the items intended to be covered under 8517 were wire-line equipments and their parts.

3. Other than 8517, telecom equipments for Radio Telephony and Radio Telegraphy were covered under two more ITC HS subheads in Attachment A

852510: Transmission apparatus other than apparatus for radio-broadcasting or television and,

852520: Transmission apparatus incorporating reception apparatus

4. **Major Changes in HS Codes for Telecom Products** have been made in the year 2007 by World Custom Organisation (WCO)

-) The description for 8517 modified in 2007 to:

Telephone sets, including telephones **for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)**, other than transmission or reception apparatus of heading 8443, **8525**, 8527 or 8528.

5. WCO in their remarks under heading HS 8517 in 2007 has stated ***“the structure of heading 8517 has been revised based on technological progress in the telecom technology sector. At the same time, the scope of heading 8517 has been expanded in the transposition of heading 8525, transfer of certain products to heading 8517”***

The scope of heading 8517 has been expanded in the year 2007 due to revision of HS Codes by WCO, it now includes all the items of wire lines as well as wireless. Additions are:

HS 85176100- Base Stations,

HS 85171290 – Telephones for cellular networks or for other wireless networks other than Push Button type,

HS 85176290 and 85176990 under sub head **“others”**.

6. Now let us see India’s position. India had given commitment to any products as applicable prior to 2007. There is no Indian commitment for any products added after 2007. However, with revision of scope of 8517, products more than our specific commitments were abused and wrongly all the products started being imported under ZERO Duty. This resulted in rise in import of these items
7. Government of India identified some Non ITA 1 products and imposed duty of 10% on 4 non-ITA-1 products in 2015-16 budget announcement vide Customs Notification No. 11/2014
- i) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers; **[HS 85176990]**
 - ii) Optical transport equipment, combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS), Optical Transport Network(OTN) products, and IP Radios; **[HS 85176290]**
 - iii) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products; **[HS 85176990]**
 - iv) Multiple Input / Multiple Output (MIMO) and Long Term Evolution (LTE) Products. **[HS 85176990]**

This imposition of duties on Non ITA 1 has remained as it is, in spite of objections by some industries etc.

8. The WTO has been pushing for ITA 2 to include following items:

- i) HS 851761- Base Station,
- ii) HS Code 851762,
- iii) HS 85176960-Others
- iv) ITC HS Code 851770- Parts.

ITA-2 was signed by the 24 Members Countries on 16th December, 2015. However, India is not a signatory of ITA-2. The fact that WTO was pushing for ITA 2 for above wireless products, makes it clear that these items are not covered under ITA 1.

9. As per minutes of meeting held in DOT on 16 Jan 2017, “Telecom Equipment Manufacturers were of the view that India had signed ITA— 1 in 1997 for the telecom products existing at that time. Subsequently, the scope of heading 8517 was expanded in the year 2007 due to revision of HS Codes by WCO, it now includes all the items of wire lines as well as wireless. The description of products concerned and related technology has enlarged. Most of the Domestic telecommanufacturers were of the view that they support imposition of BCD on telecom items.” The DOT in the meeting arrived at consensus on following items as not covered in ITA 1:

S.N	HS Code	Product description
1.	85176100	Base stations
2.	851762'90	Other
3.	85176990	Other of Others
4.	851770	Parts of 'above'
5.	8517 1290	Other—Telephones for Cellular Networks or other wireless networks

- It is clear that there would be several other items not covered in ITA 1. There is need for imposing atleast 35% import duties on all non ITA 1 items. This will encourage their local manufacturing within India. There is need also to protect large scale imports of new technology products under “Others” (HS Code 85176990) classification

Annexure III – List of IPR cases pending at Delhi High Court

S. No	Parties	Suit No	Date of Filing	Interim Direction	Issues	Evidence	Final Decree
1	TLM Ericsson v. Mercury Electronics & Anr (Micromax Suit)	CS(OS) 442/2013	March 4,2013	Interim Direction dated 19.03.2013 directing payment of royalty at 2% of sale price of every 3G phone sold. Direction later modified on 12.11.2014 to reduce the rate of payment to the Plaintiff directly.	July 7,2015	Trial has not even commenced	No
2	TLM Ericsson v. Gionee Communication Equipment Co Ltd & An.r	CS(OS) 2010/2013 [Now CS (Comm) 1533 of 2016]	October 2013	Interim Order was passed by the Hon'ble High Court vide order dated 22.10.2013. However, vide order dated 31.10.2013 the order dated 22.10.2013 was modified directing payment at royalty rate of 2% for every 3G phone sold. Further vide order dated 19.10.2015 in FAO (OS) 574/2015 the rate of payment has been again modified. The payment has to be made to the Plaintiff directly.	No issues framed	No	No
3	TLM Ericsson v. Intex	CS(OS)104 5/2014 [Now CS(Comm) 769 of 2016]	April, 2014	Interim Direction dated 13.03.2015 requiring	No issues framed	No	No

S. No	Parties	Suit No	Date of Filing	Interim Direction	Issues	Evidence	Final Decree
	Technologies (India) Limited			payment of royalties 50 % of which shall be paid to the Plaintiff and 50% to the Registrar General. The order has been stayed in appeal.			
4	TLM Ericsson v. Xiaomi Technology and Ors	CS(OS) 3775/2014 [Now CS (Comm) 434/2016]	December, 2014	Ad Interim Order dated 08.12.2014 passed restraining the manufacture of certain mobile devices. On 08.08.2016, consent order passed fixing rate of royalty payments to the Plaintiff directly.	No issues framed	No	No
5	TLM Ericsson v. Lava International Limited	CS(OS) 764 of 2015 [Now CS(Comm) 65/2016]	March 2015	On 10.06.2016, the Ld. Single Judge directed payment of INR 50 Crores into Court as a precondition for non-operation of interim order restraining manufacture of mobile devices. On 22.06.2016 the order was modified by the Division Bench requiring deposit of INR 30 Crores	Feb 2, 2016	Evidence Recorded. Since no interim payment has been made to the Plaintiff, the trial has completed in about an year's time.	No
6	Dolby International AB & Anr v. GDN	CS(Comm) 1425/2016	17.10.2016	Ex-parte Injunction order passed on 20.10.2016 which was vacated by the	Before framing of issues, the Plaintiff has	No	No

S. No	Parties	Suit No	Date of Filing	Interim Direction	Issues	Evidence	Final Decree
	Enterprises Pvt Ltd & Ors			Division Bench vide order dated 01.12.2016 in FAO(OS)(COMM) 132/2016	withdrawn cause of action against the Defendant No. 1 in order dated 26.07.2017		
7	Dolby International AB & Anr vs. Universal Digital Connect Limited & Ors	CS(COMM) 1429/2016	17.10.2016	Ex-parte Injunction order passed on 20.10.2016 and modified by an order dated 17.11.2016 requiring deposit of royalties in the Hon'ble Court. The matter thereafter has been adjourned time and again as settlement talks are going on between the parties.	No issues framed	No	No
8	Dolby International AB & anr vs. Shreejee Tradelinks & Anr	CS(COMM) 1428/2016	17.10.2016	Ex_parte Injunction order passed on 20.10.2016 and matter settled on 01.05.2017	NA (Disposed of)	NA	NA
9	Dolby International AB & Anr vs. Mitashi Edutainment Pvt Ltd	CS(COMM) 1427/2016	17.10.2016	Ex_parte Injunction order passed on 20.10.2016 and matter settled on 22.03.2017	NA (Disposed of)	NA	NA
10	Dolby International AB &	CS(COMM) 1426/2016	17.10.2016	Ex-parte Injunction order passed on	No issues framed	No	No

S. No	Parties	Suit No	Date of Filing	Interim Direction	Issues	Evidence	Final Decree
	Anr vs. Das Telecom Private Limited & Ors			20.10.2016 and order modified requiring interim royalty payments to be deposited in Court on 27.10.2016			

Annexure IV

TEMA/CMAI - Details of issues on IPR/FRAND for local manufacturing of telecom equipments.

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Background

TRAI has issued a **Consultation Paper on Promoting Local Telecom Equipment Manufacturing No 12/2017 dated the 18th September, 2017.**

One of the questions in the Consultation Paper is:

Q.3 Are the existing patent laws in India sufficient to address the issues of local manufacturers? If No, then suggest the measures to be adopted and amendments that need to be incorporated for supporting the local telecom manufacturing industry.

This paper discussed the related to IPR for local manufacturing of telecom/mobile manufacturing. The brief views have already been contained in the response. However details are given here.

Make in India is an important scheme of Government of India. There has been great interest from national and foreign companies to invest in India for Make in India. Several proposals are coming up in various sectors. CMAI and TEMA are promoting Make in India for electronics, telecom, and Mobile sector. The CMAI and TEMA have been used in this paper representing both.

DIPP Paper mentioned in this note refers to “Discussion Paper on Standard Essential Patents and their availability on FRAND Terms dated 1st March, 2016”,

http://dipp.nic.in/English/Discuss_paper/standardEssentialPaper_01March2016.pdf)

Of late IPR on electronics, telecom, and mobile has been receiving attention with manufacturers and there are undefined costs on manufacturing. There is also ambiguity on SEP, FRAND. In India royalty has been prescribed by Delhi High Court on net sale price of finished product rather than on the component/chip on which patent is claimed to have been used.

By the nature of the purported technology patent accepted by SSO and Government later knowingly or unknowingly, there is no escape for manufacturers but to follow the same and that tantamount to be dominance and anticompetitive. Neither Government nor anybody else discloses the IPR/SEP/Patent royalties payable. There is hardly any definition or procedure available for FRAND for determining the royalty. **Hence there is need for a policy of declaration of SEP by a statutory authority and FRAND terms and procedures.**

A reference is made to the news that appeared in Hindustan Times on 23.2.2016 with heading “Make in India runs into high royalty fee hurdle”. The news highlighted the grievances of the manufactures of smart phones/cell phones in India, particularly on the issue of high cost of Royalty payable to the entities having Standard Essential Patents (SEPs). Such high cost has become a hurdle in the Govt. of India’s initiative of “Make –in-India”. The news report also said that it is also a matter of concern that the Royalty is being charged on the value of entire device of mobile phone in place of the value of the component in which such Patents are used.

High cost of Royalty has always been a cause of concern in the minds of mobile and telecom manufactures and the rate of Royalty has always been the issue contested in the Courts not only in India but also abroad. There have also been instances where the royalty rates have been increased once the patent has been accepted. There have also been cases where patentee has bullied the user into accepting the royalty terms by coercion and forces. In several cases the Courts have reduced substantially the royalty asked by patentee. The law regarding fixation of Royalty is in the developing stage. Any determination, though claimed to be on FRAND basis, is hardly a standard industry practice. The determination on so called FRAND basis and also validity and nature of patents has always been a question challenged in the Courts and in majority of cases there have been settlements out of

Courts. That means validity of patents or royalty terms unsettled by Courts and settled in private way without full knowledge to world as to what has been settled.

In India the IPR related issues for mobiles have been raised in Delhi High Court and CCI. In most of the cases interim royalty has been ordered to be paid on the basis of entire cost of product, without going into detailed arguments. A list of IPR cases pending at Hon'ble Delhi High Court is given at Annexure III along with interim royalties declared.

Hon'ble Supreme Court of India in its Case Number 18892 OF 2017 identified trends of Hon'ble Delhi High Court for grant of interim relief in intellectual property right litigations with no effort to dispose of the cases at trial.

It is wide-spread and so much so that several foreign Companies have filed cases and have been collecting royalties by way of interim measures over several years and have not even brought their cases to trial. In such cases where interim relief is granted, the matters do not reach trial for 4-5 years and the burden of the injunction order itself operates as a deterrent disabling the Defendant from defending the case on merits. It also severely affects the local manufacturing units in India.

TEMA/CMAI appreciates and acknowledges various notes/research papers/news items/judgments etc. of several persons/bodies which has been relied upon while preparing this note.

Executive Summary in very brief:

The executive summary is not a substitute for detailed discussions that follows. This is just to give gist of notes and suggestions very briefly and reliance need to be made on detailed views as appearing hereinafter.

1. Make in India, Digital India are big focus of NDA Government and the study shows that number patents that claim an invention on these standards is constantly increasing. Hence there is definite need to look into this as a policy statement/issue.
2. IPR Policy of India should be targeted as clear demonstration of protection and advancement of National Interests. The role of the Government should be to facilitate, and not to actively promote intellectual property rights. These rights do not themselves translate to increased innovation, economic growth or well being; they are mere proxies for unclear productive gains. Actively encouraging a 'service' or 'performance' based corporate approach to increasing the 'use' or 'take-up' of intellectual property rights, risks privatizing the public goods nature of these rights."
3. *CMAI/TEMA would like to recommend that the principal of "eminent domain"- which essentially allows the State to subordinate private property right to the public interest in certain circumstances – must be considered for India.*
4. There is no need to get concerned by statements of IPR Indexes.
5. The Standard Setting Organizations appear to have not disclosed the patents relied by them, in the absence of which there is ambiguity as to what patents are to be followed. **There is no way to find as on date, as to what patents the manufacturer need to follow for manufacture of a telecom or mobile product.** This gives rise to

uncertainty and unknown demands from alleged patent holders. **Hence there is Need for appropriate regulations making it compulsory to disclose to statutory authority the patents involved in standards made by SSO. This can be enforced at the time of acceptance of the standard by Indian departments.**

6. A private body called SSO setting standards and various Countries adopting the same under the excuse of seamless connectivity without knowing that it involves which patents or SEP and without knowing that it involves payment of royalties at what rates. SSO also hardly scrutinize or verify the validity of patent.
7. There is no authority who decides if particular patent is SEP or not. SEP is declared by the patent holder, which may or may not be verified & legally sustainable. The contention that the particular patent is SEP or its validity is also contested legally and mostly decided out of Courts or by negotiated settlements. That also does not answer the question on validity of patent or its SEP nature. In some cases even after Courts passed orders for royalty, later the patent was not found to be valid. **There is definite need for a statutory agency/Body to verify, validate, authenticate and then announce the correctness of declaration of SEP by patent holders and FRAND terms and procedures.**
8. The technology provider does give undertaking to SSO that it will license the technology on FRAND basis. No one knows what are FRAND terms and conditions. FRAND has no formal definition or procedure or statutory backing. There is hardly any way to find out what reasonable royalty is and the existing royalty terms for other licensees, in the absence of all data provided by patent holder on the pretext of NDA signed with other users. The NDA when offered to

Indian companies says applicable as per laws of Sweden/Singapore or other Countries. It is left for negotiations between parties ie. Patent holder and manufacturers. SSO also does not help or coordinate FRAND terms. SSO is also not involved in FRAND negotiations. So it is left to Civil Courts to adjudicate and give judgments on individual cases world over. **There is Need to address the FRAND issue/terms and conditions and mandatory applicable of Indian laws. There is also need for a statutory provision in statute for SSO and its experts from different fields to provide inputs, logics/basis, guidelines supported with legal and statutory backgrounds and keeping in view the economic viability and need for the public at large to inform about different methods that can be used to quantitatively determine royalty terms. There is definite need for a statutory provision for cap on total royalty that can be claimed, so that it does not exceed exponentially. There is need for some statutory provision for a correlation between the cost of acquiring technology/patent and the rates of royalty. There is thus need for a statutory provision for patentee to arrive at reasonable basis on which royalty can be demanded keeping the shelter of FRAND. There is a need for a statutory provision to address the royalty/tax issues and jurisdiction between places of manufacture/selling and IPR residing in which Country.**

9. Department of Telecommunications (DOT) has accepted the standards as informed by ETSI and other SSO formed by SSO without any knowledge of the patents or SEP involved and no information about the percentage/extent of royalties payable. DOT has made them mandatory to be followed. Other Departments like Department of

Electronics and IT, BIS, Tec etc. also accept and prescribe the standards without any knowledge of patents/SEP/royalties involved. This has created a situation where the standards cannot be met without following the SEP. This has exposed the Indian Companies to unknown liabilities. **There is a Need for Government Departments to consider the SEP/Patents/Royalties while approving the standards so that its impact on viability and consumer is assessed. Hence there is need for appropriate regulations making it compulsory to disclose to statutory authority the patents involved in standards made by SSO and the terms and rates of royalty offered to other licenses worldwide and also make it mandatory to follow the Indian laws and jurisdiction. This can be enforced at the time of acceptance of the standard by Indian departments. There is also a need to ascertain at the time of accepting the standards, as to which SEP holders were member of the Committee/ETSI while forming the standards. This will help decision makers to have a view of the interested parties in standard making by SSO like ETSI, 3GPP, etc. There is further need for Government/ DOT to find out from records if ETSI informed Government/DOT of the patents and SEPs. If not, it is important that a formal protest need to be taken to ETSI even now and a policy to be cautious in future.**

10. The applicability of SEP and FRAND need much wider consultation and discussions, specially looking at the fact that these are one of most litigant matters worldwide and hardly there is a universal definition.
11. FRAND has no formal definition or procedure or statutory backing and is left for negotiations between parties ie. Patent holder and manufacturers. There is hardly any way to find out what is

reasonable royalty in the absence of all data provided by patent holder on the pretext of NDA signed with other users. The NDA when offered to Indian companies says applicable as per laws of Sweden/Singapore or other Countries. **There is need to provide statutory disclosure of terms and conditions of FRAND/Royalty across world and also NDA and other matters to be applicable as per Indian Laws and jurisdiction.**

12. By the very nature of SEP, there is no choice or alternative and thus it becomes dominant player and anticompetitive. While IPR is to be respected, the anticompetitive behaviors can hardly be accepted. **CMAI/TEMA recommends that a proper balance need to be maintained between Competition Laws and IPR Policies and promotion of Innovations/Start Up India and Make in India. While patent needs to be protected the anticompetitive behaviors cannot be allowed.**

13. Normally the patentee files claim for royalty with a self certified and self tested report of the purported infringement. **There is need for a procedure under Indian laws to provide for a statutory/ Government authority to certify and test this matter.**

14. IPR issues have been contested legally world over very forcefully and at high costs where several cases have been filed on each other and statistics **reveal that 99% of the cases are settled or negotiated without waiting for a Court judgment.** There is admittedly not wide spread knowledge and expertise available within Country in such matters. As in China, **there is a need in India for a strong support from Government and statutory provisions for an institutional mechanism to deal with IPR related cases as a country rather than leaving it to individual companies to contest.** There is also need for statutory provisions for

the concerned Indian agency/body to be equipped with experienced background to make balanced view out of arguments pleaded and great amount of research needed to find out the alternative or counter decisions/judgments. There is also need for a statutory provision for a strong IPR cell in India to keep watch on happenings around world, which have bearing on Indian side.

15. In order to implement Make in India there is need for **Compulsory Licensing, which is permitted as per International and National Laws.**

16. In the case of telecom and mobiles mostly SKD level manufacturing is started in beginning which is later followed by CKD level. Also the fact is critical component/chips/parts are imported. The purported patents are used not by Indian manufacturers but by the suppliers and manufacturers of chip/components/parts. **Hence there is need for statutory provisions to address the issue as to how far it is fair to enforce patents on Indian manufacturers, unless they individually make chip/components/parts and actually use the patented technology. Also for the purpose of equal treatment, there is also need to ensure that the purported royalties are also charged on other companies supplying products in India.**

17. The purported royalty should be charged from the component manufacturer and inbuilt in the price of the product, rather than demanding from use of chip/component. **There is need for policy initiatives and statutory provisions in India to ask the patent holders to claim royalty and file cases against with component manufacturers in the Countries of actual manufacturing such as China, USA, Taiwan, Finland, Japan etc.**

18. Again in case of telecom/Mobile, in some cases the complete built units (CBU) are imported from a foreign manufacturer. Obviously

it is the foreign manufacturer who utilizes the purported patent and is responsible to follow patents and pay royalty etc. **There is need for statutory provisions to address that in such cases how far it is fair to force the patents royalty and applicability on Indian importers. Similar treatment to CBU imports whatsoever in India and royalty on the same.**

19. The SEP holder demanding royalties from Indian Companies but not on other brands/products marketed in India. These are subject to service tax/sales tax. **There is need for a policy so that demand of service tax/sales tax also needs to be raised on other brands/products utilizing the same technology and marketing in India to enable equal treatment to all and not put Indian companies in disadvantages position.**
20. There is accordingly need for the Government to find out the royalties paid on use of Ericsson patents in India by other telecom Companies and the sales/service tax paid on the same. If not then the consequential actions thereon.
21. There is need for the Government/ Revenue Department to find out how much royalties have been paid on patented technologies by others and service tax/sales tax paid on that. If not paid, then what are consequential actions needed.
22. With regard to taxes and duties:
 - There is need to give exemption to Service Tax/VAT/TDS
 - Or there is need for reimbursement/refund of said tax amounts, as industry is going to be badly affected due to such additional liability on the brands.
 - In case of Direct Tax...royalty payment attracts TDS deduction also....hence royalty amount should be inclusive of all taxes. Else there will be additional tax/TDS burden on brand owner in India.
 - Or we request lower TDS rate on royalty for mobile industry.

PARA WISE DISCUSSIONS:

1. Brief outlines of IPR Issues in Delhi High Court and CCI

There are several cases pending in Delhi High Court and CCI. Details are not given here for the sake of brevity. In brief Delhi High Court ordered interim royalty on entire cost of product. Cases are pending.

As regards CCI,

- i) On 24.6.2013 Micromax filed before CCI accusing Ericsson of abusing its dominance position and anticompetitive practices. (Case No. 50 Of 2013). On 30.9.2013 Intex filed before CCI (Case No. 76/2013)
- ii) On 12.11.2013 and 16.1.2014 50/2013 & 76/2013 CCI passed orders in both the above referred cases and observed that prima facie it is apparent that Ericsson is dominant in the relevant market of GSM and CDMA in India, enjoys complete dominance over its present and prospective licensees in the relevant product market, seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents. **The CCI concluded that the requested royalties 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI ordered** directing the DG CCI to investigate the matter regarding violations of the provisions of the Competition Act by Ericsson, as SEP holders. The CCI has further directed that if DG finds that Ericsson has contravened the provisions of the Competition Act, he shall also investigate the role of persons who at the time of such contravention, were in-charge of and responsible for the conduct of Ericsson so as to fix the responsibility of such persons under Section 48 of the Competition Act.

- iii) The Competition Commission of India also found Ericsson prima facie guilty of abuse of its dominant position in the matter of Ericsson vs. iBall (September 2015).
- iv) This was challenged in Delhi Court. Delhi High Court in its order dated 30.3.2016 Telefonaktiebolaget LM Ericsson (PUBL) versus CCI W.P. (C) 464/2014 & CM Nos.911/2014, 915/2014 and WP (C) 1006/2014 & C M Nos. 2037/2014, 2040/2014 has upheld the authority and views of CCI orders dated 12.11.2013 and 16.1.2014.
- v) The case is pending with CCI.

2. Demonstration of protection and advancement of National Interests

CMAI/TEMA recommends that the IPR Policy of India should be targeted as clear demonstration of protection and advancement of National Interests. India already has a fully TRIPS-compliant IP regime and policies on IPR should promote local innovation, entrepreneurship and access to technologies.

Background

- i) The “Second Modi-Obama Summit” by “Brookings India” published in January, 2015 in Article” IP Rights-Signs of Convergence” by Mr Subir Gokarn, Former RBI Governor vide Page 29 bring out following:

India’s negotiating position must be based on a clear demonstration of protection and advancement of national interests, relating to both the innovation environment and the spread of benefits of technology

ii) And in the same reference on Paged 27 is brings out:

*The Ministry of Commerce announced the setting up of a think on IPR issue. Chaired by a former judge,It emphasized a larger and very signification motivation: the need to stimulate and incentivize innovation in India. In effect, **it opened up the question of whether the current regime was serving India's own interests;***

iii) *Prof Sivaramjani Thambisetty, an Associate Professor of Intellectual Property Law at London School of Economics and Political Science vide the article appearing on 19.12.2014 <http://spicyip.com/2014/12/guest-post-the-twelve-gifts-of-a-national-intellectual-property-policy.html> opined:*

“The role of the Government should be to facilitate, and not to actively promote intellectual property rights. These rights do not themselves translate to increased innovation, economic growth or well being, they are mere proxies for unclear productive gains. Actively encouraging a ‘service’ or ‘performance’ based corporate approach to increasing the ‘use’ or ‘take-up’ of intellectual property rights, risks privatizing the public goods nature of these rights.”

3. Eminent Domain

*CMAI/TEMA would like to recommend that the principal of “**eminent domain**”- which essentially allows the state to subordinate private*

property right to the public interest in certain circumstances – must be considered for India.

Background

The “Modi Obama Summit” published by “Brookings India” in September, 2014 in Article” IP Rights-An eminent Domain approach for India and US” by Mr Subir Gokarn, Former RBI Governor vide Page 45 bring out following: (Extracts of the Article is attached Annexure C)

*The issue of patents and regulatory data protection is undoubtedly the most contentious.To the extent that such knowledge is in the private domain, the power of the state to make it public, at least in a limited way, must be used. This situation seems to resemble the ones in which the “**eminent domain**” power is used in the U. S. that power is based on the premise that the public good sometimes outweighs the private interest. Using it in the context of IPR clearly brings a cross-border dimension to an otherwise largely domestic issue, but the principal is valid and could provide the basis for a middle-ground solution.*

This is again covered in other Article by Mr Subir Gokarn(as mentioned above) in another issue of “ The Second Modi-Obama Summit” published in January, 2015, where vide Page 29 it says:

*On the larger technology for development, the principal of “**eminent domain**”- which essentially allows the state to subordinate private property right to the public interest in certain circumstances – must be given some space. Which would require capping the potential returns on IPR Eminent domain is a well-established principal in U. S. jurisprudence.*

4. Be aware of IPR Indexes and Lobbyists

i) There is some news or statements of India IPR index being low. This statement in isolation can hardly be seen in right perspective. Moreover these are issued by industry chambers or private bodies. **There is no need to get concerned by statements of IPR Indexes.** India has to make policies what are best for it keeping in view its priorities. Some of such statements are given below:

a) As per news 27.4.2015 appearing in Financial Express:

<http://www.financialexpress.com/article/fe-columnist/ipr-must-promote-local-innovation/67087/>

*“According to the **US Chamber of Commerce’s** Global Intellectual Property Center, India continued to score lowest in its International Intellectual Property Index (for 25 countries), and most notably in categories relating to patents, copyrights and international treaties. India did slightly better in categories such as enforcement, trademarks and trade-secrets.”*

b) As per news appearing in Financial Express on 13.4.2016:

Global Intellectual Property Index presents a dismal picture of India in respect of safeguarding IPR, with it being ranked 37th out of 38 countries. It scored 7.05 out of 30.....

ii) It need to be appreciated that in the context of IPR cases in world for decades and several patent companies, several SSOs, several SEPs, multi fold litigations across globe, billions of dollars at stake, there are several lobbyist firms/bodies/legal luminaries/NGOs/self declared experts, who are ready to do batting for a particular side. India has witnessed the experience

in the matter of net neutrality, where millions of responses were filed with telecom regulator. However India is competent and seasoned enough to decide the matters keeping in view the interest of India above everything and the net neutrality case has proved that.

5. Competition and IPR Policies

CMAI/TEMA recommends that a proper balance need to be maintained between Competition Laws and IPR Policies and promotion of Innovations/Start Up India and Maker in India

Background

- i) Competition law and Intellectual Property Rights policies are linked together by the needs of innovation and several legal rules regulations to arrive at reasonable balance the scope and effect of each policy.
- ii) IPRs policy is meant to foster innovation. This benefits consumers through the new technologies/products. This is expected to spur economic growth. It provides innovators provision to exclude other parties from the commercial use of innovative products/technologies/services for a defined period. This in one way it creates monopoly for some period.
- iii) Competition law is essential to curb market distortions, prevention of Anti competitive practices, abuse of monopoly, giving consumers benefits of good prices/ choice/qualities/services.
- iv) The provisions in the Indian Patents Act facilitate competition while at the same time preserve the core exclusive rights of patent holders to commercially exploit their inventions and recoup their investment.
- v) *As per DIPP Paper the competition law aims to prevent the misuse of dominant position or stockpiling of market power while patent law grants monopoly rights with certain exceptions to prevent abuse of such rights. The basic idea behind the Standard Essential*

- Patents (SEPs) system is to reconcile the interaction between patents which are primarily 'private' and 'exclusive' as against standards which are meant to be 'public' and 'non-exclusive'.*
- vi) Para 110 of Delhi High Court Judgment dated 30.3.2016 brings harmony between competition and IPR:
whereas patent laws are concerned with grants of rights enabling the patent holder to exclude others from exploiting the invention, and in that sense promoting rights akin to a monopoly; the competition law is essentially aimed to promote competition and, thus, fundamentally opposed to monopolization as well as unfair and anticompetitive practices that are associated with monopolies
- vii) As regards anticompetitive practices, the Competition Act of Canada gives the Federal Court power to expunge trademarks, to license patents (including setting all terms and conditions), to void existing licenses and generally to abridge or nullify normal patent or trademark rights where the trademarks or patents have been used to injure trade or commerce unduly or to prevent or lessen competition unduly.
- viii) The existence of anti-competitive practices is also considered a ground for the granting of compulsory licenses in the laws of Chile, Argentina and the Andean Group Countries etc. In South Africa, a compulsory license can be granted if the demand for a protected product is being met by importation and the price charged by the patentee is "excessive in relation to the price charged therefore in countries where the patented article is manufactured by or under license from the patentee or his predecessor or successor in title".
- ix) CCI in its order dated 12.11.2013 concluded that the requested royalties (as asked by Ericsson) 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI further ordered investigation in the matter by the Director General.

Extracts from DIPP Paper in this behalf are given below:

10.2.2.2 Micromax Informatics Ltd v Telefonaktiebolaget LM Ericsson

Micromax Informatics Limited filed a complaint with the CCI, alleging that Ericsson abused its allegedly dominant position by imposing exorbitant royalties for the use of its SEPs, thereby violated the Competition Act, 2002. Micromax further argued that using the sales price of the downstream product, as the royalty base constitutes misuse of SEPs that would ultimately harm consumers. Micromax alleged that Ericsson was charging exorbitant royalties as no alternate technology is available and Ericsson is sole licensor for the SEPs necessarily implemented in 2G and 3G Wireless Telecommunication Standards.

CCI in its preliminary order stated that, in the relevant product market, Ericsson was 'the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. and thus was in a dominant position in the market for devices that implement such standards. CCI expressed that 'FRAND licenses are primarily intended to prevent "patent holdup" and "royalty stacking" and observed that "patent hold-up" undermines 'the competitive process of choosing among technologies' and thus threatens 'the integrity of Standard Setting activities. CCI also said that Ericsson's royalty rates were excessive and discriminatory, given that they were set as a percentage of the price of downstream products instead of as a percentage of the price of the GSM or CDMA chip.

The CCI concluded that the requested royalties 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI further ordered investigation in the matter by the Director General.

10.2.1.2. Intex Techs. (India) Ltd v Telefonaktiebolaget LM Ericsson

Conclusion in this case is in many regards similar to that of Micromax

CCI held that a refusal to share the commercial terms of the FRAND license may lead to discriminatory commercial terms

CCI also said that charging different licensing fees for the use of the same technology from different users is against FRAND terms.

CCI further said that imposing a jurisdiction clause of the agreement that prevented Intex Tech. (India) Ltd. from adjudicating its disputes in a Country where both parties were in business also provided prima facie evidence of an abuse of a dominant position

10.2.1.3. Best IT World (India) Private Ltd. v Telefonaktiebolaget LM Ericsson

*CCI observed that, because there is no alternate technology available for Ericsson's patents in the 2G, 3G, and 4G standards, Ericsson enjoys a complete dominance over its present and prospective licensees in the relevant market. **CCI opined that practice of forcing a party to execute NDA and imposing excessive and unfair royalty rates, prima facie, amount to abuse of dominance in violation of Section 4 of the Act***

- x) Ericsson challenged the order of CCI in Hon'ble High Court of Delhi. The Delhi High Court has upheld the jurisdiction of Competition Commission of India (CCI) in the judgment delivered on 30th March, 2016.
- xi) After investigations, if the DG, CCI find the conduct of Ericsson violative of sections 3/4 of the Act, and the CCI accepts the same, then CCI may impose penalty up to 10% of the applicable turnover of Ericsson. CCI may also mandate the manner for charging the royalty. Affected parties can file compensation claim before the COMPAT. The CCI may also direct Ericsson to change its

distortionary / abusive practices, and ask them to limit royalties on a component basis only.

xii) It has also been seen that on several occasions the rates of royalties' have been increased manifold by patentee, once his patent is validated and accepted. Some relevant extracts:

- a) Martin Shkreli Founder and former CEO of Turing Pharmaceuticals in Sep 2015 raised price of Daraprim drug by 5,556 percent (from US\$13.5 to US\$750 per tablet) after acquiring patent rights for drugs.
- b) Extracts from news item appearing in Financial Express on 27.4.2015 indicating patent holders started higher prices post TRIPS, though related top pharmaceutical industry:
<http://www.financialexpress.com/article/fe-columnist/ipr-must-promote-local-innovation/67087/>

Increased R&D and patenting activity by foreign affiliate firms (subsequent to strengthening of IP regimes) have rarely strengthened local innovation systems in developing countries. The Indian experience in this regard is no different.

c) It is alleged that post-TRIPS new drugs have become exclusive monopoly of innovating firms. The Indian experience indicates that post-TRIPS, multinationals in India have started marketing new patented drugs at higher prices..... No wonder that Indian Courts have often upheld pro-consumer and pro-competitive merits in cases of IP conflicts between foreign and domestic drug manufacturers,

xiii) The Delhi High Court in its Judgment dated 30.3.2016 has referred some judgments, extracts of which are given below:

- a) Para 188/189: In ***Broadcom Corporation v. Qualcomm Incorporated: 501***
 On an appeal preferred by Broadcom,.....It observed that "*when a patented technology is incorporated in a standard, adoption of the standard eliminates alternative to the patented technology*". In such circumstances, the patent holder may be in a position to demand supra-competitive royalties. The Court proceeded to hold that "***in a consensus-oriented private standard-setting environment, a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, coupled with an SDO's reliance on that promise when including the technology in a standard, and the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct***"
- b) Para 191: In the Matter of Rambus, Inc., No. 9302, at 4 (F.T.C. Aug.2, 2006), The Federal Trade Commission found that Rambus had distorted the standard setting process and engaged in anti-competitive
- c) Para 192: ***Eurofix-Bauco v. Hilti***,
 the European Commission held that it was an abuse to demand excessive royalty with the sole object of blocking or unreasonably delaying a licence.
 Upheld on appeal (Case T-30/89 Hilti AG v. Commission: **[1991] ECR II-1439**).
- d) Para 193: Orange Book Case, Germany 6th May, 2009 in **KZR 39/06, (Orange-Book Standard)**
- e) **Para 194:** in *Germany Courts Motorola for GPRS and Samsung for UMTS against Apple*. European Commission held that that Motorola has abused its dominant position by seeking injunctive reliefs against Apple. In the case of Samsung, Commission did

not proceeded for decision, but accepted the Samsung's binding commitments not to seek injunctions in relation to any of its present or future SEPs for mobile devices for a period of five years against any potential licensee who accepted the specified licensing framework which provided for (a) a negotiation period of 12 months; and (b) in absence of a consensus, a determination by Court or an arbitrator of FRAND terms.

- f) **Para 195: Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH: (Case C-170/13) on LTE standard 16 July, 2015:** The European Court of Justice held that a refusal of a proprietor of an SEP to grant a licence on FRAND terms may, in principle, constitute an abuse within the meaning of Article 102 of TFEU

6. Compulsory Licensing

CMAI/TEMA recommends that the Government should invoke compulsory licensing by taking on record that the public requirements with regard to a patented product have not been met and the product is not available for the public at an affordable price.

Background

International Compliance

- i) This is a TRIPS & Indian Patent Act compliant provision empowering the Governments to check and control the misuse of patents.
- ii) The concept of Compulsory License at international level was first recognized and provided for vide Article 5(A)(2) the Paris Convention of 1967. The convention specifically mentioned that the member Countries have right to take legislative measures providing for the grant of Compulsory licenses to prevent the

abuses which might result from the exercise of exclusive rights conferred by patent.

- iii) With the advent of the WTO, Compulsory license is now dealt in the TRIPS Agreement, and the relevant parts of the Paris Convention are inscribed into the TRIPS Agreement (*Article 2 of the TRIPS Agreement.*) The TRIPS Agreement and the Paris Convention for the Protection of Industrial property do not limit the grounds for application of Compulsory licenses by member States. (Paris Convention 1883 as amended by the Stockholm Act of 1967. at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html)
- iv) The TRIPS Agreement only lays down the conditions which have to be respected in granting and working of a compulsory license. These conditions basically require the license to be given only after negotiations with the patent owner for authorized use on reasonable terms have failed, and should last only until the ground for such grant subsists. This condition of prior negotiations can also be waived in situations of ‘national emergency’, ‘other circumstances of extreme urgency’, ‘public non-commercial use’ and ‘anti-competitive practices’, but the patent Owner has to be informed.
- v) Article 31 of TRIPS outlines conditions under which a Government can legally impose compulsory licensing, including the following:

. b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time, except in the case of a national emergency

· the requirement for prior efforts to seek authorisation and for producing predominantly for domestic use may be waived in

cases where the compulsory license is permitted in order to remedy an anti-competitive practice; and

· Compulsory license can extend to dependant patents with conditions.

- vi) Countries who have used flexibilities under the TRIPS Agreement or harnessed provision of compulsory licensing are Zimbabwe, Zambia, South Africa, Indonesia, Brazil , Malaysia, Thailand, etc.
- vii) Refusal to deal as a ground for granting a compulsory license has been provided in many national laws, such as the patent laws of China, Argentina and Israel.
- viii) The existence of anti-competitive practices is also considered a ground for the granting of compulsory licenses in the laws of Chile, Argentina and the Andean Group Countries etc. In South Africa, a compulsory license can be granted if the demand for a protected product is being met by importation and the price charged by the patentee is "excessive in relation to the price charged therefore in countries where the patented article is manufactured by or under license from the patentee or his predecessor or successor in title". *(This Para also appear hereinbefore in the heading of Competition, but repeated here for compulsory licensing provisions)*

Compulsory Licence Provisions in India

- i) The Government can invoke compulsory licensing if it feels that the public requirements with regard to a patented product have not been met and the product is not available for the public at an affordable price.
- ii) India has promoted compulsory licensing in its National Manufacturing Policy as a mechanism available for Government entities to effectuate technology transfer in the clean energy

sector. India is also stated to have taken view to multilateralise compulsory licensing approach in negotiations under the UNFCCC.

- iii) In India, the first Compulsory Licence was given in March, 2012, as per news appearing on 17.11.2015 Financial Express

<http://www.financialexpress.com/article/industry/companies/india-needs-predictable-ipr-regime-novartis/166905/>

In March 2012, Controller General of Patents Design and Trademarks, P H Kurian had granted the first-ever CL to Hyderabad-based Natco Pharma to sell a generic version of Nexavar, a patented kidney cancer drug invented by German pharma giant Bayer

- iv) **The USTR Report 2014 Special 301 Report vide page 44 states that India's Controller-General of Patents granted a compulsory license under Section 84 of India's Patents Act (which allows private parties to initiate proceedings seeking a compulsory license of a patented article).** This was upheld by a IPAB Judgment. **The grant of the compulsory license was based, in part, on the innovator's failure to "work" the patent in India because it imported its products, rather than manufacturing them in India.** The IPAB modified the Controller-General's reasoning to clarify that "in some cases" the "working" requirement could be met solely by importation. **The IPAB, however, rejected the innovator's explanation that economic factors prevented manufacturing in India, stating, "the patentee must show why it could not be locally manufactured.** A mere statement to that effect is not sufficient, there must be evidence." This decision was appealed to Bombay High Court. The decision of Bombay High Court is not readily available.
- v) Compulsory licensing can be granted on the grounds of the existence of: (i) a refusal to license and (ii) anticompetitive exercises of IPRs by Patent holders.

- vi) It may be noted that in India in the case of Ericsson, the Competition Commission of India has already prima facie found it to be anti competitive and against its enforceability. This was stayed by Delhi High Court in interim judgment. However in the final judgment dated the 30th March, 2016, the Delhi High Court has upheld the authority of CCI and upheld their views. This has been discussed hereinbefore

Indian Patent Laws for Compulsory Licensing

- i) The Patent Act 1970 of India (Section 84, 90) provided for compulsory licensing of a patented invention to an interested person (only after the expiration of three years from the date of sealing of the patent). Section 92 of the Patents Act provides that compulsory licence could be granted even prior to the expiry of the period of three years. Section 84(1) provides three grounds mentioned below:

(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied ,or

(Taken from some here else) which may be the consequence of:

- inadequate manufacture in India or failure to grant licenses on reasonable terms, resulting in (1) prejudice to an existing trade or industry or its development, (2)prejudice to the establishment of a new trade or industry in India, (3) prejudice to the trade or industry of any person or class of persons, (4) demand for the patented article not being met by local manufacture, (5) failure to develop an export market for the patented articles made in India, and (6) prejudice to the establishment of commercial activities in India;*
- prejudice to the establishment or development of trade or industry in India in goods not protected by the patent arising from restrictive conditions imposed by the patentee;*
- non-working of the patent in India on a commercial scale;*
- demand for the patented article being met by importation from abroad; and commercial working of the patented invention in India being hindered or prevented by import of the patented articles from abroad.*

(b) that the patented invention is not available to the public at a reasonable affordable price.

(c) that the patented invention is not worked in the territory of India

- ii) **Very Importantly**, some of the grounds as per Sub Section(7) of Section 84 of the Patent Act(vide para 129 of Delhi High Court Judgment dated 30.3.2016) for fulfillment of “*that the reasonable requirements of the public with respect to the patented invention have not been satisfied* “ are:

d) if the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable; or

e) if the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by-

(i) the patentee or persons claiming under him; or

(ii) persons directly or indirectly purchasing from him; or

(iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement.”

- iii) Since the coming into force of the WTO TRIPS Agreement, the Act has been amended three times. The Patents (Amendment) Act, 2002 replaced the old chapter on compulsory licensing.
- iv) The Indian law requires authorities to give regard to certain general considerations while granting compulsory licenses. These considerations, given in Section 83, include some directly relevant to the relationship between IP and competition law. They include, inter alia that patents are not granted merely to enable a patentee to enjoy a monopoly for the importation of the patented article; that the patentee does not abuse his rights including through resort to practices which unreasonably restrain trade or adversely

- affect the international transfer of technology; and that patents are granted to make the benefits of the patented invention available at reasonably affordable prices to the public.
- v) Section 84 specifies the grounds for applying for a compulsory license, which include public interest, affordability and working in India. *(Public interest is explained in sub-section 7. From a competition perspective, any action or omission by the patentee that impedes commercial activity in India could be adjudged as against public interest.)*
 - vi) Section 89 explains the general purposes of granting compulsory license as:
 - (i) That the patented inventions are worked on a commercial scale in the territory of India without undue delay and to the fullest extent that is reasonably practicable;*
 - (ii) That the interests of any person for the time being working or developing an invention in the territory of India under the protection of a patent are not unfairly prejudiced.*
 - vii) Section 90 of the Act also empowers the Controller to settle the terms and conditions for compulsory licences.
 - viii) Sections 92 (1) and 92 (3) enable the Central Government and the Controller, respectively, to deal with circumstances of national emergency or circumstance of extreme urgency related to public health crises by granting relevant compulsory licences.
 - ix) The new amendment also requires an applicant for a compulsory license to prove that s/he approached the patentee with reasonable terms for a license. Similarly, where the patent holder imposes a condition for a grant-back, prevention of challenges to the validity of the patent is deemed to be against public interest.
 - x) The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price, may order the patentee to grant a licence upon such terms as he may deem fit.

Thus, many provisions in the Indian Patents Act facilitate competition while at the same time preserving the core exclusive rights of patent holders to commercially exploit their inventions and recoup their investment.

7. Royalty on Patented Components and not on entire product

CMAI/TEMA recommends suitable legal provisions so that royalty is payable only on the cost of component/part/chip where Patent is held and not on the entire cost of product.

Background

It is a matter of concern that in India the Royalty is being charged (as per interim judgment of Delhi High Court dated 13th March, 2015) on the value of entire device of mobile phone in place of the value of the component in which such Patents are used and the patent was for a particular component/chip/part. This practice has been seriously frowned at in major jurisdictions across the globe.

To quote from DIPP Paper:

Page 25 Para 10.2.2

Telefonaktiebolaget LM Ericsson against Micromax: The Court used the net sales price of the downstream device as a royalty base in calculating amount of royalty.

Intex Techs. (India) Limited¹ and Xiaomi Technology and Ors

High Court in both the cases took similar view and passed similar orders based on principle followed in Micromax case.

- ii) As per para 8 of CCI order dated 12.11.2013 Case No. 50/2013, Micromax has said that: The OP (ie. Ericsson) had arbitrarily imposed royalty on basis of sale price of the phone, while the royalty should be charged on basis of value of technology/chipset used in the phone. Due to this, royalty for use of same chipset in a smart phone is more than 10 times the royalty for ordinary phone, while the chipset gives no additional value to a smart phone, then it gives to an ordinary phone.
- iii) It may be relevant here to refer to para 17 of CCI order dated 12.11.2013 Case No. 50/2013, wherein CCI observed:

*17. The allegations made in the information and not refuted by OP (ie Ericsson) concerning royalty rates **make it clear that the practices adopted by the OP were discriminatory as well as contrary to FRAND terms. The royalty rates being charged by the OP had no linkage to patented product, contrary to what is expected from a patent owner holding licences on FRAND terms. The OP seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents. Refusal of OP to share commercial terms of FRAND licences with licensees similarly placed to the informant, fortified the accusations of the Informant, regarding discriminatory commercial terms imposed by the OP. For the use of GSM chip in a phone costing Rs. 100, royalty would be Rs. 1.25 but if this GSM chip is used in a phone of Rs. 1000, royalty would be Rs. 12.5. Thus increase in the royalty for patent holder is without any contribution to the product of the licensee. Charging of***

two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-a-vis high cost phones.

- iv) It may be submitted here that as per para 180/181 of Delhi High Court dated 30.3.2016:

Para 180

Intex claimed that Ericsson's demand for payment of royalty at an *ad valorem* rate based on the value of the product instead of the component that uses the said technology is patently unfair as it amounts to Ericsson claiming part of the value of the product that is attributable to other features and innovations which are unconnected with the technology claimed to be patented by Ericsson.

Intex further alleged that the products in question use several patented technologies and unreasonable demand of royalties by patent holders would result in 'royalty stacking'. It is alleged that excessive demands of royalty by Ericsson amounts to a 'patent holdup' and, thus, prevents supply of products to the consumers.

Para 181

Intex has also complained that Ericsson had indulged in "bundling and tying licensing" which according to Intex is anti-competitive and proscribed under the Competition Act.

- v) Even on the face of it, this looks strange as the total cost of product/mobile varies from company to company, brand to brand, features to features.
- vi) There are several cases in this behalf. Especially in some cases of pharmaceutical the entire product cost has been considered in

some instances. The facts of case are entirely different. One cannot segregate the components/parts in the final product ie. Medical tablet or syrup. That is not the case in telecom/mobile/electronics. Also there is no concept of SKD/CKD in case of pharmaceutical industry. If a particular chemical is imported for use in formulation, then it cannot be asked to pay royalty on the said chemical. It is difficult to apply same principal to electronic/mobile/telecom products, where there are thousands of patents on several components/parts and the cost of final product varies substantially.

vii) For electronics/mobile/telecom, there are several case laws in this behalf confirming that royalty cannot be asked on the entire cost of product. Some of which are:

a) One of interesting case is **Cornell University v. Hewlett-Packard Co.**, 609 F.Supp.2d 279 (2009) (United States District Court, N.D. New York)

In this case HP was asking royalty on entire product even though he had patent for a small part. The Courts give detailed judgment with arguments and justifications. The decision quoted in summary are:

Holdings:

The District Court, Randall R. Rader, Circuit Judge, sitting by designation, held that:

[1] entire market value rule could not be applied to damages calculation;

[2] hypothetical processor revenue was appropriate royalty base;

.....

[5] jury included quantifiable amount in verdict that could be stricken, allowing for remittitur;

(Remittitur is the process by which a Court compels a plaintiff to choose between reduction of an excessive verdict and a new trial.)

(A district Court's duty to remit excessive damages is a procedural issue, not unique to patent law,)

[6] maximum recovery rule would have been violated by making upward adjustment to unchallenged royalty rate component of verdict.

.....

Damages: An over-inclusive royalty base in patent infringement suit, including revenues from the sale of non-infringing components, is not permissible simply because the royalty rate is adjustable. 35.S.C.A. § 284.

b) In Mauritis Dolmans Institute for Prospective Technological Studies, SEP Workshop Seville, Oct 27, 2014, reference has been made to the following decisions wherein the issue that whether or not the Royalty should be charged on the entire value of device.

Entire Market Value – limiting case law

IP Innovation v RedHat (2010): sound economic basis needed
“In invoking the entire market value rule, Mr. Gemini included 100% of Red Hat’s and Novell’s total revenues from sales of subscriptions to the accused operating systems in his

proposed royalty base. Mr. Gemini's methodology **however does not show a sound economic connection between the claimed invention and this broad proffered royalty base. The claimed invention is but one relatively small component of the accused operating systems."**

c) In *Uniloc v. Microsoft* (2011):

CAFC reaffirms limitation of entire market value, but using a low royalty rate is no excuse for using the "entire market value" for minor features: "Uniloc argues that the entire market value of the products may appropriately be admitted if the royalty rate is low enough, relying on the following statement in *Lucent Technologies*. [...] **The Supreme Court and this Court's precedents do not allow consideration of the entire market value of accused products for minor patent improvements simply by asserting a low enough royalty rate."**

8. Indian Government Departments accepting Standards without knowing the IPR/SEP and royalty terms

1. Department of Telecommunications (DOT) has accepted the standards as informed by ETSI and other SSO formed by SSO without any knowledge of the patents or SEP involved and no information about the percentage/extent of royalties payable. DOT has made them mandatory to be followed. This has created a situation where the standards cannot be met without following the SEP. This has exposed the Indian companies to unknown liabilities. **There is a Need for policy measures to ensure that the Government Departments**

consider the SEP/Patents/Royalties while approving the standards so that its impact on viability and consumer is assessed.

- i) Delhi High Court in its Judgment dated 30.3.2016 vide Para 194. Has said *“In recent times, there has been much advancement in the telecommunication sector and technology. Companies - such as Ericsson -have acquired a large portfolio of patents which have been accepted as a part of the standards established by various SSOs. Enforcement of these SEPs has become a major area of dispute between the technology company holding the SEPs and mobile phone manufacturers.”*
- ii) A reference is made here to para 14 of CCI order dated 12.11.2013 Case No. 50/2013, vide which CCI observed:

Ericsson’s patents having been accepted by Department of Telecommunication, India and every telecom service provider in India is required to enter into a “Unified Access Service License Agreement with Department of Telecommunication (Dot). As per letter dated 03.10.2008, DoT has directed that All GSM/CDMA network equipment imported into India should also meet the standards of international telecommunication technology, as set by International Telecommunication Union, Telecommunication Engineering Center and International Standardization bodies such as 3GPP, 3GPP-2, ETSI, IETF, ANSI, EIA, TIA, IS.

- iii) CCI in its orders dated 12.11.2013 and 16.1.2014 has *“expressed a prima facie view that the patent holder enjoys complete dominance over its present and prospective licensees. The CCI concluded that the requested royalties 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI ordered directing the DG CCI to investigate the matter*

regarding violations of the provisions of the Competition Act by Ericsson, as SEP holders.”

- iv) As para 20 of Delhi High Court Judgment as stated above, it has been observed by CCI *“that Ericsson was a member of ETSI and held several SEPs which were recognized as standards by ETSI”*. Thus there was conflict of interest in SSO while standards were formed. **In view of this, there is a need to ascertain at the time of accepting the standards, as to which SEP holders were member of the Committee/ETSI while forming the standards. This will help decision makers to have a view of the interested parties in standard making by ETSI or other SSO.**
- v) **There is need for Government/ DOT to find out from records if ETSI informed Government/DOT of the patents and SEPs. If not, it is important that a formal protest need to be taken to ETSI even now and a policy to be cautious in future.**
- vi) It would be seen from the para 164 of Delhi High Court Judgment dated 30.3.2016, that **the Section 21 of the Competition Act provides for a statutory authority to make a reference to the CCI if it proposes to take a decision which may be contrary to the provisions of the Competition Act.** We request Government/DOT to find out from records the view taken for not making reference to CCI. We also request that it be mandated for all Government Departments in future that a reference be made to CCI while accepting a SEP for standards that may have affect contrary to Competition Act i.e., Dominance or anticompetitive.
- vii) The Delhi High Court Judgment dated 30.3.2016 clarifies that IPR are goods and hence liable for service/sales tax. **There is accordingly need for the Government to find out the royalties**

paid on use of Ericsson patents in India by other telecom companies and the sales/service tax paid on the same. If not then the consequential actions thereon.

- viii)** It is said that SEP has been widely used in telecom technologies in India. Whereas one company Ericsson has raised demand for royalties from mobile manufacturers Micromax, Intex, **there is need for the Government/ Revenue Department to find out how much royalties have been paid on patented technologies by others and service tax/sales tax paid on that. If not paid, then what are consequential actions needed.**

9. Role of Standard Setting Organizations (SSO)

- i) As per DIPP Paper, *while there are various definitions for the term "Standard, in simple terms, a standard can be defined as 'a set of technical specifications that seeks to provide a common design for a product or process'. These standards could be mandatory when enforced by law or voluntary.*

The de jure standards are, in general, set by Standard Setting Organizations (SSOs) such as the European Telecommunications Standards Institute (ETSI), the International Telecommunication Union (ITU), Institute of Electrical and Electronics Engineers (IEEE) etc. The role of SSOs is to coordinate and facilitate a standard setting process with the involvement of various stakeholders. Standards can be adopted at a worldwide scale, or only at a regional scale or even national scale

- ii) There are several Standards bodies spread across world and they differ from one another in their membership and areas of operation or vision. They also differ on the technology underlying the standard, and the IPR policies meant to safeguard the interests of patent licensors as well as the licensees. Most of them are private entities. The Countries have hard time in reconciling various standards set by different SSOs. On some occasions there is also contradiction in between different SSOs standards.
- iii) Incidentally there is only one and the one a formal statutory body ITU-International Telecom Union, Geneva, a subset of UN, where 197 member Countries elect the officers and all decisions are based on majority and consensus. Their working by and large takes a view which is technology independent and not catering to any particular patent or SEP. There is hardly any reference to standards of ITU in most of the IPR related litigations.
- iv) A reference be made here to para 11 of CCI order dated 12.11.2013 Case No. 50/2013, wherein CCI observed :

*Standardisation is a voluntary process wherein a number of market players reach a consensus for setting “common technology standards” under the support of a Standard Setting organisation, which in the present case is ETSI. In simple terms, standardisation is the process of developing and implementing technical standards. Such technological standards are termed as **Standard Essential Patent, when they are patented and for which there are no non-infringing alternatives. Once a patent is declared as Standard Essential Patent, it faces no competition from other patents until that patent becomes obsolete due to new technology/inventions.***

- v) Delhi High Court in its Judgment dated 30.3.20116 also referred to standardization vide para 9 as:

Thus, any technology accepted as a standard would have to be mandatorily followed by all enterprises involved in the particular industry.

The implication of accepting a patented technology as a standard is that all devices/equipments compliant with the established standard would require to use the patented technology and its manufacture would necessarily require a licence from the patentee holding the SEP.

- vi) This is a big dilemma. A private body called SSO setting standards and various Countries adopting the same under the excuse of seamless connectivity without knowing that it involves which patents or SEP and without knowing that it involves payment of royalties at what rates.
- vii) Membership of SSOs and contribution or no contribution of technology providers is a voluntary work rather than a statutory or legal requirement. The working of SSO tends to form standards which its members submit and to that extent it favour to members. To that extent there is a conflict of interest.
- viii) By and large SSO does not inform as to what patents are involved or which is SEP. SSO does not appear to have disclosed the patents relied by them and need to be followed by manufacturers to meet the standards. There is no way to find as on date, as to what patents the manufacturer need to follow for manufacture of a

- telecom or mobile product. This gives rise to uncertainty and unknown demands from alleged patent holders.
- ix) SSO also hardly scrutinize or verify the validity of purported patent. It is left to patent holder to announce that it has SEP.
 - x) Every SSO has its own IPR related policy.
 - xi) The SSOs does take commitment from technology providers that they will give licenses on FRAND basis. These are a private contract between the standards body and the members. These are not disclosed to world. No fixed royalties and other terms are informed to world. No one knows what is FRAND terms and conditions. SSO does not help or coordinate FRAND terms. There is lack of information of existing royalty terms due to NDA and no statutory backing for FRAND. As a result of negotiations between patent holders or SEP and users is left to individual negotiations and terms and laws and interpretations. So it is left to Civil Courts to decide if FRAND has been followed or not or if the same is anti competitive or not and also to adjudicate and give judgments on individual cases world over. These are then interpreted and relied to settle disputes between patentee and manufacturers; according to the laws governing patents and contracts of the individual Country. This is true for India, USA and other Countries.
 - xii) Added to this is the fact that negotiations between SEP and users on royalty and other terms are termed as private. Even in most of litigations, the result is a negotiated agreement outside the Court system. And there is a system of NDA, whereby SEP holder and user are not permitted to disclose the terms at what they have licensed to other users. It becomes difficult then to know as to on

what terms royalties have been decided for other users. To that extent, this can be seen as nontransparent.

- xiii) **There is need for a provision in statute for SSO and its experts from different fields to provide inputs, logics/basis, guidelines supported with legal and statutory backgrounds and keeping in view the economic viability and need for the public at large to inform about different methods that can be used to quantitatively determine royalty terms.** Yet it is too much to expect from a private members body, unless Government provides statutory requirement for the same.
- xiv) **There is also need for appropriate regulation making it compulsory to disclose the patents involved in standards made by SSO and terms of royalty etc.**

10. ETSI one of SSO

At times it is argued that ETSI determines the FRAND and SEP. It is not correct. ETSI determines standards. ETSI has no role in determining FRAND.

Background

Uniloc v. Microsoft (2011):

It has been mentioned in above that the standards setting bodies like European Telecommunications Standards Institute (ETSI) ETSI, do not play role in determining FRAND. The observations are as under:-

“It is important to note that standards setting bodies, and in particular the European Telecommunications Standards Institute (ETSI) ETSI, do not dictate the terms of template licenses nor do they give guidance on what FRAND

might be. Further they do not set a royalty rate, which may be considered FRAND, and they do not check or scrutinize the purported essentiality of any patent notified to them. Consequently, there is scope for uncertainty, debate and, potentially, litigation.”

11. Standard Essential Patent- SEP declarations by patent holders fared badly in CourtsNeed Government Intervention

- i) Make in India, Digital India are big focus of NDA Government and the study shows that number patents that claim an invention on these standards is constantly increasing. Hence there is definite need to look into this as a policy statement/issue.**
- ii) As per DIPP Paper with an increasing pervasiveness of standardized technology in virtually all sectors, and particularly telecommunications, in India and worldwide, issues associated with SEPs are increasingly agitated
- iii) There is no authority who decides if particular patent is SEP or not. SEP is declared by the patent holder, which may or may not be verified & legally sustainable. The contention that the particular patent is SEP or its validity is also contested legally and mostly decided out of Courts or by negotiated settlements. That also does not answer the question on validity of patent or its SEP nature. In some cases even after Courts passed orders for royalty, later the patent was not found to be valid. **There is need to provide legal provisions to some Indian authority to verify and validate and then announce that a particular patent is SEP.****
- iv) As per European Commission Competition Policy brief
http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf

there are thousands of SEPs reading on technologies implemented in various standards set by the SSOs. For example, **the total number of SEPs declared to ETSI is 155, 4748. More than 23,500 patents have been declared essential to the GSM and the "3G" or UMTS standards developed by ETSI.** These standards need to be implemented in virtually all smart phones and tablets sold in Europe.

v) As per para 1 of CCI order dated 12.11.2013 Case No. 50/2013, **“Ericsson, on its official website, claims to have 33,000 patents to its credit, with 400 of these patents granted in India,** and the largest holder of “Standard Essential Patents for mobile communication.

vi) It may be relevant to refer here Para 16 of CCI order dated 12.11.2013 Case No. 50/2013 vide which CCI observed:

16. From the perusal of the Information and the documents filed by the Informant, prima facie it is apparent that Ericsson is dominant in the relevant market of GSM and CDMA in India and holds large number of GSM and CDMA patents. Ericsson has 33,000 patents to its credit, with 400 of these patents granted in India, and the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc.

*Further, since the OP (ie. Ericsson) holds SEPs and there is no other alternate technology in the market, **OP enjoys complete dominance over its present and prospective licensees in the relevant product market. As such, OP can be said to be dominant.***

vii) The RPX Study <https://www.rpxcorp.com/wp-content/uploads/2014/01/Standard-Essential-Patents-How-Do-They-Fare.pdf> points out:

- **Overall, Alleged and Declared SEPs were relatively unlikely to succeed. Plaintiffs won on slightly more than a quarter of Alleged and Declared SEPs on a Unique Patent Basis across District Court and ITC proceedings.**
 - **Alleged and Declared SEPs were generally less successful than other patents.** Plaintiffs won nearly twice as often on a Unique Patent Basis on other patents than Alleged and Declared SEPs.
 - Alleged and Declared SEPs fared poorly in District Court proceedings. Plaintiffs won on only about a fifth of Alleged and Declared SEPs on a Unique Patent Basis and 28% of Alleged and Declared SEPs on a Defendant Patent Basis. Plaintiffs won on 12% of Alleged and Declared SEPs on a Defendant Patent Basis if patents that were dropped or that lost prior to a verdict are taken into account.
 - Alleged and Declared SEPs fared better at the ITC. Plaintiffs won on one third of Alleged and Declared SEPs on a Unique Patent Basis and on nearly half of Alleged and Declared SEPs on a Defendant Patent Basis. (Plaintiffs won on only one third of Alleged and Declared SEPs on a Defendant Patent Basis)
 - Cases involving Alleged and Declared SEPs tended to proceed further. Defendants in cases involving Alleged and Declared SEPs were roughly twice as likely to reach a summary judgment order (9.8% vs. 5.3%) and trial (2.4% vs. 1%) than defendants in cases that did not involve alleged and declared SEPs.
- viii) In Japan also, the Tokyo District Court ruled that Samsung had indeed illegally abused its Standards Essential Patents to demand a sales ban and excessive royalties against the iPhone maker.

<http://appleinsider.com/articles/14/05/17/japanese-court-rules-samsung-abused-frand-patents-against-apple>

Japanese Courts found Samsung had abused SEPs in three ways.

- **First, by failing to honor its duty under Japanese Civil Code to negotiate with licensees in good faith**, given that its SEPs were created under a commitment to offer other firms licensing under Fair, Reasonable and Non Discriminatory (FRAND) terms.
- Second, the Court determined that Samsung had **declared its "E-bit patent" to be essential to practicing the 3GPP mobile standard, but then subsequently attempted to win a preliminary sales injunction against Apple with that patent. Courts worldwide have recognized that sales bans are in inappropriate remedy in SEP cases where the two parties are simply negotiating a FRAND license.**
- Third, the Court found that Samsung **did not disclose its E-bit patent to the ETSI standards body until about two years after its 3GPP working group adopted the "invention" claimed by Samsung in its patent as part of its standard that any phone manufacturer would have to license in order to make a functional device.**
- The Court capped Samsung's licensing demand to 9.9 million Yen (\$95,000 U.S.) for the patent against its excessive demands.

ix) As per DIPP Paper para 10 *Indian jurisprudence on Fair, Reasonable, and Non-Discriminatory (FRAND) licensing practices for standard-essential patents (SEPs) is at a relatively nascent stage.....para 9, Standard Essential Patents are yet to receive a legislative definition*

- x) No other jurisdiction in the world recognizes SEPs explicitly, i.e. in the IP Policy or Acts; it is always on a case to case, and on a patent basis by judicial determination.
- xi) In India SEP for telecom/mobile has been claimed by Ericsson. It is understood that Nokia, SiproLab, Sisvel, Core etc. have also issued letters to Indian Companies claiming patents and royalty. Nobody knows how many more may claim in near future. **There is definite need for a statutory provision for cap on total royalty that can be claimed, so that it does not exceed exponentially.**
- xii) Another issue is self certification done by patentee and royalty demanded. In case of Ericsson v/s Intex, **Ericsson submitted results and reports of lab tests it had conducted in-house on four "representative" Intex handsets available in the market. The reports were accompanied by an affidavit from telecom expert Vijay Ghate and another by Max Olofsson, the Director of Patent Licensing at Ericsson.**

Issue is how far reliance can be made on some self identified and self selected alleged expert. In this case the alleged expert was not known to conduct such tests before, nor does he appear to have an accredited/certified test lab. It is alleged that the test report said that the sample is following standards of SSO. And that Ericson has SEP on that. There was not clarity if the test certified that the company infringed the patents.

In view of this, there is need for a procedure under Indian laws to provide for a statutory/ Government authority to certify and test that the product has infringed the purported patent.

- xiii) As per DIPP Paper, *SEP is a patent that claims an invention that must be used to comply with a standard.Standards*

organizations often require members to disclose and grant licenses to their patents and pending patent applications that cover a standard that the organization is developing..... Patent hold-up can occur when the owner of a patented technology fails to disclose its patent to an SSO and then later asserts that patent, when access to its patented technology is required to implement the standard. This conduct may provide the patent owner with market power that is derived from its technology being necessary to access the standard rather than its ex-ante value to buyers.

..... In order to ensure that standard setting remains beneficial, it is necessary to ensure that in cases where adopting a standard necessarily involves the incorporation of a patent into the industry standard, the relevant patent holder is not in a position to unjustly exploit its market power newly accrued to it (for example, by extracting exorbitant royalty rates) to the detriment of the entire industry.

There appears to be little or no information available in public domain with SSO and manufacturers in India as to what patents are to be followed, as has been stated hereinabove.

xiv) As per European Commission Competition Policy brief

http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf

In the Samsung and Motorola cases, the Commission clarifies that in the standardization context, where the SEPs holders have committed to (i) license their SEPs and (ii) do so on fair, reasonable, nondiscriminatory (FRAND) terms, **it is anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs if the licensee is willing to take a licence on FRAND terms. In these circumstances, the seeking of injunctions can distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices.**

As a result of the Commission's investigation, Samsung committed to not seek injunctions in Europe on the basis of SEPs for mobile devices for a period of five years against any potential licensee of these.

- xv) There is definite need for an agency/Body to declare authenticate the declaration of SEP by patent holders**

12. FRAND....a undefined term

- i) High cost of Royalty has always been a cause of concern in the minds of manufactures and the rate & basis of Royalty has always been the issue contested in the Courts not only in India but also abroad.
- ii) The SEP holders are stated to have given undertaking to SSO that they will license patents on FRAND basis. There are confusion on FRAND ie. Fair, Reasonable and Non Discriminatory. The determination on so called FRAND basis also has always been a question challenged in the Courts.
- iii) This has been discussed substantially in SSO and SEP
- iv) The applicability of SEP and FRAND need much wider consultation and discussions, specially looking at the fact that these are one of most litigant matters worldwide and hardly there is a universal definition.
- v) 'FRAND licenses are primarily intended to prevent patent hold-up and royalty stacking. This means that when standard technologies are protected by patent rights, there is a possibility for "hold-up" by the patent owner to demand higher royalties or burdensome

licensing terms before the standard was chosen. Hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the high costs of such patents get transferred to the final consumers.

- vi) FRAND has no formal definition or procedure or statutory backing and is left for negotiations between parties ie. Patent holder and manufacturers. There is hardly any way to find out what is reasonable royalty in the absence of all data provided by patent holder on the pretext of NDA signed with other users. The NDA when offered to Indian companies says applicable as per laws of Sweden/Singapore or other Countries. **There is need for a statutory provision for patentee to disclose the terms and rates of royalty offered to other licenses worldwide and also make it mandatory to follow the Indian laws and jurisdiction.**
- vii) The SEP holders on several occasions use unfair and nontransparent practices. In view of NDA these details are not disclosed, leading to nontransparent and one sided negotiations.

For example:

- *charging separate rates from SEP holding and non SEP holding companies*
 - *the terms also vary from Country to Country, client to client.*
 - *offering entire pool of patents as a bouquet instead of the specific patent which is claimed to have been used by company.*
 - *offering the entire pool of patents of 2G/3G etc.*
 - *demanding exorbitant and excessive royalties. There are cases where Courts passed substantially reduced amounts (Some examples given below)*
- viii) **There is need for some statutory provision for a correlation between the cost of acquiring technology/patent and the rates of**

- royalty.** It is said Ericsson purchased technology patents from the Inventor for Rs. 65 (USD 1) in 1998. Against this royalty from India for 20 years can be estimated to be in thousand of Crores.
- ix) Indian Companies did started negotiations with alleged patent holders that remained inconclusive, as is trend world over leading to Court cases.
 - x) It may be stated here that patentee and Ericsson in the present case refuses to share with companies the commercial terms and royalty payments it had with other companies on the grounds of NDA with them, which strongly suggested that different royalty rates/commercial terms were being offered to the potential licensees belonging to the same category.
 - xi) Martin Shkreli Founder and former CEO of Turing Pharmaceuticals in Sep 2015 raised price of Daraprim drug by 5,556 percent (from US\$13.5 to US\$750 per tablet) after acquiring patent rights for drugs. It is difficult to justify this with FRAND.
 - xii) World over the royalties fixed by Courts were substantially lower than demanded by patentee. That brings the point that SSO and patentee have failed by and large to demand fair reasonable royalty on which basis FRAND has been started. And also this means litigations. **There is thus need for a statutory provision for patentee to arrive at reasonable basis on which royalty can be demanded keeping the shelter of FRAND.**

Some of the cases in the past have been:

- a) Microsoft v Motorola: Royalty reduced from 2.25 % of end product ie.6 Bn \$ per year to 1.4 Mn USD per year

Details:

- SEPs for IEEE 802.11 (WiFi) and ITU H.264 (MPEG)
- October 2010 – Motorola demanded license fees @ 2.25% of end product (about \$6B per year)
- November 2010 – Microsoft filed suit claiming the offer was not based on FRAND
- July 2011 – Moto sued for injunction in Germany
- US Court granted “anti-suit” injunction and awarded damages in favor of Microsoft for \$ 14.5M and set royalty @ \$0.035 per H.264 patent; \$0.316 per 802.11 patent (about \$1.4M per year)

b) Innovatio: Court reduced royalty asked by Innovatio from \$ 2500-3500 per installation to 0.0956 \$ per WIFI Chip or royalty per patent \$ 83-100 to 0.0050

Details:

- IEEE 802.11 (WiFi) SEPs
- 2011: Innovatio purchased about 30 WiFi patents and declared 19 as SEP and demanded from end users \$2500 - \$3000 per WIFI installation or about \$83 - \$100 per patent
- December 2011: CISCO, Netgear etc. filed cases against Innovatio for FRAND breach
- After analysis, Court fixed FRAND royalty of \$0.0956 per WiFi chip, or \$0.0050 per patent.

xiii) There are also cases where even after fixing the royalty by Courts, the patent was found to be invalid. For example

Realtek Semiconductor Corp. v. LSI Corp. et al., Case number 5:12-cv-03451, in the United States District Court for the Northern

District of California, San Jose Division. Realtek v LSI

<http://www.law360.com/articles/548585/print?section=ip>

Details

- IEEE 802.11 (WiFi) SEPs
 - 24.6. 2012: Realtek requested FRAND license and on 29.6.2012 filed suit for FRAND breach
 - 16.6.2014, the Court awards \$3.8M in damages in favor of Realtek
 - Court determined royalty on FRAND basis at 0.12% and 0.07% for the patents (about \$0.001 - \$0.003 per WiFi chip) about half of what LSI was seeking royalties.
 - The jury finding followed a decision in May 2013 in which **Judge Whyte ruled that LSI had initiated a complaint with the U.S. International Trade Commission only to gain leverage in its royalties dispute.** Judge White found that LSI had sued at the ITC in an attempt to force Realtek, a Wi-Fi chipmaker suing for breach of contract, to pay higher royalties for the standard-essential patents.
 - International Trade Commission (ITC) subsequently found one of the patents invalid and not infringed
- xiv) In some cases the Court did not determined FRAND and decided that no injunction. For example:
- a) Apple v Motorola (US)
 - Details
 - *SEPs for ETSI GSM standard, others*

- *In August 2007 Motorola offered license @2.25% of each end user product*
- *In October 2010 Motorola filed ITC complaint, seeking exclusion of Apple products from import into US*
- *In October 2010 Apples files patent infringement case; Moto counterclaims*
- *Appeals Court rules Motorola may not seek or enforce injunction because Apple was not an “unwilling licensee” and because Motorola could be adequately compensated by payment of FRAND royalties. No FRAND rates were fixed.*

b) Apple v Motorola (EU): case similar to US case as above

Details:

- *Motorola filed for injunction in Germany*
- *Apple filed complaint with EC (DG Comp)*
- *German Court issued injunction*
- *EC found Motorola abused its dominant position, held that seeking or enforcing an injunction on the basis of SEPs is abusive when (1) FRAND commitment, and (2) willing licensee*

c) Samsung v Apple (EU). In this case Court did not decide FRAND royalty but said it be arrived by independent adjudicator or Court or Arbitrator

Details:

- *Various ETSI Telecom SEPs*
- *Samsung and Apple global dispute regarding smart phones, right from 2009.*

- *In December 2012: EC (DG Comp) informed Samsung of its preliminary view that Apple was willing to enter a FRAND license, and Samsung seeking injunction against Apple based on SEPs could be a violation of EC Competition Law*
- *Samsung entered a binding commitment with the following material terms:*
 - *It will not seek or enforce an injunction against a party who agrees to the Licensing Framework*
 - *Licensing Framework means negotiations for 12 months; if no agreement even then, FRAND to be determination by independent adjudicator, Court or arbitration if mutually agreed*

13. Globally Patent Litigations are high costs and complexed...Need for Government Intervention

CMAI/TEMA recommends suitable institutional mechanism to address the litigations in IPRS and also Special Courts to consider IPR Patent cases.

Background

- i) World is full of litigations for IPRs between several Companies. IPR issues have been contested legally world over very forcefully, where several cases have been filed on each other.
- ii) The legal battle is extremely costly. The contesting of patents cases involve very high costs. World over patent cases are contested intrinsically. The case involves technical as also legal expertise.

- There are millions of patents and thousands of contest cases. The success rate is very low. There is compromise in most of the cases.
- iii) The modern era of digitalization has also created a challenge from taxation perspective. The MNCs operate in a global environment in various Countries by multilayered and criss cross companies and subsidiaries in different parts of world. Hence it is easy for Multi-National Companies to fragment their production and supply chain across various low tax jurisdictions. They can park and manage the Intellectual Property Rights in a particular country tax jurisdiction, production and delivery from different and several Country tax jurisdictions. This poses challenge to determine as to which place/country the IPR resides. The final products pass through several countries and their tax jurisdictions and may or may not be taxed either depending upon the concerned treaty/FTA/ domestic laws. That also gives them choice of licensing the IPR from any Country of their choice and on different terms for different customers.
 - iv) One critical issue is if a licensee/company files case for revocation of patent, then the patentee expects the company to prove it. Similar was in the case of **Ericsson claimed that the burden of proving invalidity of patents lies on Micromax. That is a herculean task and costly task in terms of research and lack of knowledge due to NDA.**
 - v) There are questions of tax jurisdiction whether where products are manufactured or where products are sold. In Indian context the decisions are generally where product is manufactured, as would be seen from cases below (may not be fully relevant here). Their relevance for IPR cases with international cases needs examination.

There is a need for a statutory provision to address the royalty/tax issues and jurisdiction between places of manufacture/selling and IPR residing in which Country.

<http://www.lakshmisri.com/Uploads/MediaTypes/Documents/Situs%20of%20IP%20for%20taxing%20rights.pdf>

- *Qualcomm- Delhi Tribunal 56 taxmann.com 179 (Delhi - Trib.)*
- *royalties for use of a technology is taxable in the place where the technology is used.....hence when used in manufacturing then manufacturers place and if used in product operations/working, then at place of use.*
- *Anglo French Textiles- Madras High Court [1993] 199 ITR 785 (Mad.)....where manufacturing takes place*
- *Lufthansa- [2015] 278 CTR 1 (Delhi)*
- *Havells - [2012] 253 CTR 271 (Delhi)*
- *Metro & Metro- [2013] 158 TTJ 308 (Agra - Trib.)*
- *Titan [2007] 11 SOT 206 (Bangalore)*

- vi) Traditionally India has not been able to develop patent litigation expertise due to lack of abundant Indian patents and other economic conditions. India also does not have specialized Courts for patent cases and the cases are bundled with other several pending cases, whereby on several times adequate attention and time is hardly available to argue and submit the details.
- vii) Indian Courts and Companies by and large hardly possess full technical knowledge/expertise by international standards/IPR disputes. We also hardly possess complete technical knowledge to study and examine the patent v/s others. Let us admit that India does not have expertise for contesting the IPR cases, as the battle is fought world over by several leading lawyers and also as proxy by Governments especially of China and USA.

- viii) Let us realize the fact that Countries like the US and UK have had a head start of over 100 years of IPR litigations. There can always be a decision taken/argued/decided sometime, somewhere that suits the particular Legal Counsel to argue. **This give rise to need for statutory provisions for the concerned Indian agency/body to be equipped with experienced background to make balanced view out of arguments pleaded and great amount of research needed to find out the alternative or counter decisions/judgments.** It is easy said than done.
- ix) The statistics **reveal that 99% of the cases are settled or negotiated without waiting for a Court judgment.** That means final decision on who owns IPR is not certain. That also does not answer the question on validity of patent or its SEP nature.
- x) There is admittedly not wide spread knowledge and expertise available within Country in such matters. As in China, **there is need for an institutional mechanism to contest IPR cases at Government level rather than individual level.**
- xi) Given below are some of facts with regard to litigations world over:

a) 99% of cases are settled.

As per Nalsar University of Law Paper (Copy attached at Annexure....), A typical patent infringement case in the US costs 1 - 3 million dollars in legal fees for each side. This is despite the fact that 99% of all patent infringement cases are settled.

- b) Obviously the patent numbers are large. As per IAM study <http://www.iplytics.com/general/iam-magazine-publishes-study-on-standard-essential-patents/>

“Future technologies such as Internet of Things, smart cars, smart home and smart energy will increasingly rely on patented technology standards such as LTE, Wifi, NFC, RFID and Bluetooth. The number of patents that claim an invention on these standards is consequently constantly increasing. So called Standard Essential Patents (SEPs) can be extremely lucrative in terms of royalty income, but also in terms of being strong bargaining chips in cross-licensing negotiations. Accordingly, also the number of SEP litigation cases as well as the number of SEP transfer deals has been become more frequent.”

The study makes use of data from the IPlytics Platform tool, connecting information on:

- 80 million world-wide patents documents
- 2 million world-wide standards documents
- 300,000 declared standard essential patents (licensing statement, FRAND commitment, reciprocity statement, etc.)
- 450,000 patents referencing standard as prior art
- 15,000 patents that are subject to a patent pools
- 42,000 patents that are subject to US litigation

xii) Interestingly, it is seen that companies like Ericsson does not appear to conduct its licensing activities in China, where most of the manufacturing for mobile and telecom is done. If it does, then according to Indian patent law, it cannot ask for a royalty again, as the patents have been exhausted. As stated earlier the actual use of purported patent is in the manufacture of chip, which is then used as a component for manufacturing mobile phone. So obviously it is for the chip manufacturers to follow the patents and

not for the mobile manufacturers. Hence, the Companies claiming patent should logically file claims in the Country where components are being manufactured.

- xiii) Incidentally Chinese companies also have faced litigation in India ... Xiaomi from Ericsson and ZTE from Vringo. Interestingly the mobiles are manufactured in China, the purported technology patent is used in china, and even then there is no such ongoing litigation in China.
- xiv) There are several rulings worldwide that preliminary injunction cannot be granted when the parties are engaged in negotiations for a license. Delhi High Court, however, passed interim judgment and payment of royalties without waiting for final judgment.

Some of the global cases, and also as quoted by DIPP Paper and European Commission are:

a) DIPP Paper:

9.1.1 *eBay Inc. v. Merc Exchange, L.L.C, the US Supreme Court* clarified that there is no special "patent law" that provides for granting injunctions in patent infringement.

9.2.2.2 *Samsung v. Apple* Court in this case held that seeking an injunction during negotiation of the FRAND license must be considered as an abuse of law or a breach of pre-contractual good faith. The Court held that injunction would put Apple under considerable pressure in the negotiation of the terms and conditions of the FRAND license. The injunction could compel Apple to agree to a license fee that exceeds the level that Apple could claim on the basis on Samsung's FRAND declaration (CMAI/TEMA comments: This case is discussed hereunder separately also)

9.2.3.2 *Nokia v. I.P Com's* High Court of Justice did not grant IP Com's request for injunctive relief, but ordered Nokia to plead on further issues, including FRAND

9.3 Samsung Electronics vs. Apple, The Tokyo District Court refused Samsung's request for a preliminary injunction on the ground that the asserted patents are SEPs encumbered with a FRAND commitment

9.4 China A Chinese Supreme Court advisory opinion issued in 2008 suggested that a Court will not find patent infringement if a patentee participates in standard-setting or otherwise agrees that the patented technology may be incorporated into a standard and subsequently files suit seeking injunctive

b) European Commission

Also as per European Commission Competition Policy brief (this is repeated here)

http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf

*In the Samsung and Motorola cases, the Commission clarifies that in the standardization context, where the SEPs holders have committed to (i) license their SEPs and (ii) do so on fair, reasonable, nondiscriminatory (FRAND) terms, **it is anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs if the licensee is willing to take a licence on FRAND terms. In these circumstances, the seeking of injunctions can distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices.***

As a result of the Commission's investigation, Samsung committed to not seek injunctions in Europe on the basis of SEPs for mobile devices for a period of five years against any potential licensee of these.

c) **[Ericsson v. TCT Mobile \(standard essential patents; injunction\)](#)**

Feb 2014 Detailed Judgment at:

<http://www.eplawpatentblog.com/2014/February/2013-11-29-TGI-Paris-JME-Ericsson-c-TCT%20Mobile-translation.pdf>

And discussions on this subject vis a vis EU/Germany etc. are at

<http://www.eplawpatentblog.com/eplaw/2014/02/fr-ericsson-v-tct-mobile-standard-essential-patents-injunction.html>

Ericsson in this case accused TCT Mobile of infringing the French designations of these patents by marketing product ranges of mobile phones suitable and intended for use on the 3G network

A preliminary injunction cannot be granted for standard essential patents (SEP) when the parties are engaged in negotiations for a license where they agree on the geographical and technological scope of the license, the only disagreement being on the financial terms; such a measure would confer an unjustified advantage on the patentee.

On 29 November 2013, the Judge dismissed Ericsson's injunction request. This judgment by the tribunal de grande instance de Paris deals with preliminary injunction proceedings based on standard essential patents (SEP) in the telecom industry

In France, it is only the second decision on such a legal issue in the same industry after the Samsung v. Apple judgment dated 8 December 2011 of the same Court which denied Samsung's request for an injunction in view of Apple's argument that the chips of the allegedly infringing smartphones had been manufactured by Qualcomm under a licence of Samsung's patents, the patentee's rights being thereby exhausted.

(Samsung v. Apple Samsung Electronics Co. and Samsung

Electronics France v. S.A.R.L. Apple France, Tribunal de Grande Instance, Paris, France, 8 December 2011, Case No. 11/58301)

This French decision is in line with the European Commission's position (press release of 21 December 2012 and Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents of 6 May 2013) **that dominant patent holders should not have recourse to injunctions when SEPs are concerned and the potential licensee is willing to enter into a licence on FRAND terms.**

Samsung v. Apple case dealt with by the Rechtbank Den Haag on 14 March 2012, which held that, in view of the negotiations on the terms of a FRAND licence between the parties, **Samsung's request for an injunction should be seen as an abuse of authority and contrary to the pre-contractual obligation to negotiate in good faith.**

- xv) The violations of FRAND in the Netherland Case has been mentioned in the France Judgment dated 8.12.2011 Case No. 11/58301 Samsung v/s Apple
http://www.eplawpatentblog.com/2011/December/2011-12-08_TGI_Paris_Samsung_Apple_translation%284%29.pdf

On 27 June 2011, Apple Inc. served a summons upon Samsung Electronics Co. Ltd, Samsung Electronics Benelux B.V., Samsung Electronics Europe Logistics B.V. and Samsung Electronics Overseas B.V. to appear in preliminary proceedings in order to obtain a preliminary injunction upon Samsung concerning its Galaxy S, Galaxy S II and Galaxy Ace smartphones, as well as its Galaxy Tab tablets, on the grounds that Samsung implemented the claims of three patents, six community designs and copyrights.

In a decision of 24 August 2011, the Dutch Court dismissed all of Apple's requests, except for one of the patents, concerning certain products at issue.

Apple Inc. lodged an appeal against this decision. The appeal proceedings are pending.

On 12 July and 9 August 2011, Samsung brought counterclaims against Apple according to which the Apple products iPhone 3G, iPhone 3GS and iPhone 4, as well as the iPad and the iPad 2 in their "Wi-Fi + 3G" versions, infringed four patents (European patent No. 1 188 269, European patent No. 1 478 136, European patent No. 1 097 516 and European patent No. 1 114 528) covering the UMTS standard and declared essential in that respect

The hearing of the oral pleadings concerning patents No. 1 097 516 and No. 1 114 528 is scheduled on 17 and 18 October 2011.

On 8 September 2011, Samsung Electronics Co. Ltd initiated an action for a declaration of non-infringement against Apple Inc. requesting the judge to hold that the Samsung Galaxy Tab tablets do not infringe community design No. 000181607-0001 held by Apple Inc.

On 14 October 2011, the Hague Court handed down a decision in preliminary proceedings holding that the price offer made by Samsung was obviously not FRAND, and that Samsung violated its obligation to negotiate in good faith with Apple concerning the

terms of a licence, therefore its request for an injunction relating to the Apple products was not founded.

The Hague Court also mentioned that it could not be excluded that Samsung's action be considered on the merits as an abuse of the right to initiate legal actions.

- xvi) World over there are interesting criss cross suits in between the parties. In some cases even the two same companies are in Courts in different countries. One such example is mentioned in the judgment dated 8.12.2011 Case No. 11/58301 Samsung v/s Apple http://www.eplawpatentblog.com/2011/December/2011-12-08_TGI_Paris_Samsung_Apple_translation%284%29.pdf

The judgment records that both Samsung and Apple in IPR cases have filed various suits in the Courts of

Europe: France, Netherlands, Germany, UK, Spain, Italy, OHIM;

Other parts of world: US, Japan, Korea and Australia.

In such situation it is obvious that the litigant costs are high and need thorough study of various Courts in world as to the progress, decisions, appeals etc. as they all have relevance on each other.

- xvii) It must be reiterated here (as is mentioned elsewhere in this note) that the SKD/CKD manufacturers in India are actually importing components/chips and assembling in India. Intex/Micromax and other mobile manufacturers source custom-made mobile devices, among other products from various Countries and marketed them in India under its brand name. Hence the purported technology is being used not by manufacturers in India, but by the foreign component/chip supplier. Logically the demand of royalty should be from company, who is actually using it who happens to be component/chip manufacturer. Also perhaps the royalty cost can be easily included in the cost of component/chip.

- xviii) In some cases the same patent holder fails to file patent case or get relief in other Countries but come to Indian Courts and get relief here. (Ex. Xiaomi case in India)
- xix) In some cases the companies claiming patent royalty pays huge sum as compromise money or fine in other Countries, but hardly discloses this facts in Indian Courts. Or in other words Indian Courts have little time to dig out such cases world over and consider their relevance in India.
- xx) One such case was in China, where Qualcomm paid 975 Mn. USD to Government to settle all pending IPR cases. Details given below:

<http://phys.org/news/2015-02-qualcomm-mn-china-antitrust-probe.html>

China fines Qualcomm record \$975M in anti-monopoly case (Update)

February 9, 2015 by By Joe Mcdonald

China fined chipmaker Qualcomm 6 billion yuan (\$975 million) in the biggest of a wave of anti-monopoly penalties that have rattled foreign companies.

.....

Qualcomm Inc. abused its dominance in wireless technology to charge manufacturers "unfairly high" licensing fees, a Cabinet agency announced Tuesday. China is the world's biggest producer of mobile phones and other wireless devices, and Beijing has complained about the high cost of technology licenses.

China has launched a series of anti-monopoly investigations over the past two years against foreign automakers, technology suppliers and other companies in an apparent effort to force down prices. Business groups say the secretive way the

investigations are conducted is alienating companies, but regulators deny they are treated unfairly.

Qualcomm, one of the biggest makers of chips used in mobile phones, said Monday it also agreed to change some of its practices for licensing technology to Chinese companies.

San Diego-based Qualcomm expressed disappointment with the findings by the **Chinese Cabinet's National Development and Reform Commission**, but said it will not contest the matter.

The fine was the highest imposed to date by Chinese authorities on a foreign company. It was twice the size of the 3 billion yuan (\$492 million) fine for GlaxoSmithKline, a British pharmaceutical company, in September in a bribery case.

The NDRC said Qualcomm improperly bundled unrelated licenses with mobile phone technology, forcing Chinese customers to pay for licenses they didn't need.

"Qualcomm's acts to eliminate or restrict market competition, hinder and inhibit technological innovation and development and harm the interests of consumers violate China's anti-monopoly law," the agency said in a statement.

Qualcomm said it will offer licenses for its current 3G and 4G Chinese patents separately from licenses to its other patents. It also will give existing licensees in China an opportunity to adopt the new terms for sales of branded devices for use in China going back to Jan. 1.

"We are pleased that the investigation has concluded and believe that our licensing business is now well positioned to fully

participate in China's rapidly accelerating adoption of our 3G/4G technology," said Derek Aberle, president of Qualcomm, in a statement.

Qualcomm makes most of its profit from licensing fees paid by companies that use its chips. China accounts for about half the company's revenue.

The NDRC said the fine was calculated on the basis of 8 percent of Qualcomm's 2013 revenue in China.

Business groups welcomed the enactment of China's anti-monopoly law in 2008 as a step toward clarifying operating conditions. Since then, they have said it is enforced more actively against foreign companies than against local rivals. That has fueled sentiment among foreign companies that they are less welcome in China.

Almost half of companies that responded to a survey by the American Chamber of Commerce in China in September said they believed they were targeted for "selective and subjective enforcement" of anti-monopoly, food safety and other rules. The chamber warned China risked damaging its status as an attractive place to invest.

Business groups complain Chinese regulators pressure foreign companies to attend regulatory proceedings without bringing lawyers and to refrain from challenging penalties.

Last year, 12 Japanese auto parts suppliers were fined a total of \$202 million after regulators said they colluded to raise prices. Audi and Chrysler were fined for enforcing minimum prices dealers could charge for vehicles and service. A regulator cited

by state media said Daimler AG's Mercedes Benz unit violated the law but no penalty was announced.

In 2013, five foreign dairy companies and one from Hong Kong were fined for enforcing minimum prices for distributors.

Among technology companies, the government also is looking at Microsoft Corp.'s Windows operating system and how it handles compatibility, bundling and publication of documentation.

Qualcomm said Monday the fine will reduce its earnings for the fiscal year ending Sept. 27.

Qualcomm Inc. now forecasts earnings per share between \$3.56 and \$3.76, down from its previous estimate of \$4.04 to \$4.34.

But its adjusted earnings, which exclude charges related to the settlement, are now expected to range from \$4.85 to \$5.05 per share, up from its prior range of \$4.75 to \$5.05 per share, partly due to higher revenue.

For investors, the Chinese ruling resolves significant uncertainty about the future of Qualcomm's business in China. Its stock added \$1.93, or almost 3 percent, to \$69.04 in after-hours trading on Monday. It had ended regular trading up 76 cents to \$67.11.

- xxi) As would be seen from above, in China the IPR cases are defended by a Government body. (Chinese Cabinet's National Development and Reform Commission). In USA even though it is private Companies who contest IPR cases, but USA Government heavily supports IPR Cases of USA Companies in other Countries through various mechanism such as India US forums, Country Reports etc.

Left to private parties, as it is very herculean and costly task to defend IPR cases in Courts based on International Legal firms.

Hence CMAI/TEMA recommends:

- **There is a need in India for a strong support from Government and statutory provisions for an institutional mechanism to deal with IPR related cases as a country rather than leaving it to individual companies to contest.**
- **There is need for policy initiatives and statutory provisions in India to ask the patent holders to claim royalty and file cases against with component manufacturers in the Countries of actual manufacturing such as China, USA, Taiwan, Finland, Japan etc.**

14: Needed Equal Treatment for Taxes and Duties on IPR Royalties

- i) As standards have been forced on manufacturers without knowledge of the Government or Companies, there is need to realize that there is additional liability of Service Tax/VAT.
- ii) The Delhi High Court Judgment dated 30.3.2016 clarified that IPR are goods and hence liable for service/sales tax.

We accordingly request Government to find out the royalties paid on use of Ericsson patents in India by other telecom companies and the sales/service tax paid on the same. If not then the consequential actions thereon.

The relevant pars of judgment are:

Para 47: Mr Kathpalia (Sr. Advocate appearing on behalf of CCI) also controverted the contention that the SEPs were not 'goods'. He submitted that intellectual property rights also fell within the expression 'goods' under the Sales of Goods Act and referred to the decision in the case of Tata Consultancy Services v. State of AP: AIR 2005 SC 371 in support of his contention.

Para 94: This brings us to the question whether patent are “goods” as defined in the Sale of Goods Act, 1930. Sub- Section 7 of Section 2 of the Sale of Goods Act, 1930 defines 'goods' as under:-

(7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under contact of sale”

Para 95: As is apparent from the above, the definition of goods is extremely wide and takes within its fold every kind of movable property.....

Para 96:Thus, plainly, the word 'goods' would encompass all kinds of property other than land,

iii) The other issues connected with this are:

- **There is need to give exemption to Service Tax/VAT/TDS**
- **Or there is need for reimbursement/refund of said tax amounts, as industry is going to be badly affected due to such additional liability on the brands.**
- **In case of Direct Tax...royalty payment attracts TDS deduction also....hence royalty amount should be inclusive of all taxes. Else there will be additional tax/TDS burden on brand owner in India.**
- **Or we request lower TDS rate on royalty for mobile industry.**

15. Global decisions on IP shall have affect in India.

There is need for a statutory provision for a strong IPR cell in India to keep watch on happenings around world, which have bearing on Indian side. One such example is:

Link: http://www.smart-biggar.ca/en/articles_detail.cfm?news_id=1103

i) Google's appeal of worldwide injunction to be heard by Supreme Court of Canada (19 February, 2016)

The Supreme Court of Canada has agreed to hear Google's appeal of a worldwide injunction forcing it to block certain infringing websites from its search results. The appeal raises issues of how to provide meaningful protection of rights over a borderless Internet, while not unduly burdening innocent third parties or preventing access to information.

We seek earnest support of the Government to make success of Make in India by conducive policies for IPR SEP FRAND as discussed hereinabove