

IP 07



In association with

SAB&T inc.
CHARTERED ACCOUNTANTS (S.A.)

The Mauritius Global Business route to India investments...

A brief overview of

**Collective Investment Schemes (funds),
FIIs, Sub-accounts, NRIs, OCBs and more...**

...yet another high end business solution brought to you by GWMS in association with SAB&T

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This Information Pack, IP 07, has been prepared for international investors and businesses who are seeking a cost and tax efficient jurisdiction for the structuring of their international business activities. IP 07 should be considered as a general guide only. IP 07 contains information, which, to the best of our knowledge and belief, is correct at the time of writing. You are however, strongly recommended to seek specific advice before acting on any information contained in IP07.

Foreign investments in Indian Capital Markets

Foreign companies/Individuals are permitted to invest in equity shares traded in Indian Stock markets if they are registered as a **Foreign Institutional Investor** (“FII”) or if they have a **sub account** in India.

However, foreign investors (whether registered as an FII or not) may also invest in Indian securities outside the FII route. Such investments require case-by-case approval from the Foreign Investment Promotion Board (“FIPB”) in the Ministry of Industry and Reserve Bank of India (RBI) or only by the RBI depending on the size of the investment and the industry in which this investment is to be made.

Investment in Indian securities is also possible through the purchase of Global Depository Receipts (GDR), American Depository Receipts (ADR), Foreign Currency Convertible Bonds and Foreign Currency Bonds issued by Indian issuers, which are listed, traded and settled overseas and mainly denominated in US dollars.

FII's & sub-accounts

FII

An FII is an institution established or incorporated outside India and registered with SEBI which proposes to make investment in India in securities of companies incorporated in India.

SEBI stipulates that the FII applicant would be one that proposes to invest its proprietary funds or funds on behalf of "broad based" Collective Investment Schemes¹ (“CIS”) or of foreign corporates and individuals and such applicant should belong to any of the following categories:

Pension Funds, Mutual Funds, Investment Trust, Insurance or reinsurance companies, Endowment Funds, University Funds, Foundations/Charitable Trusts/Charitable Societies who propose to invest on their own behalf, Asset Management Companies, Nominee Companies, Institutional Portfolio Managers, Trustees, Power of Attorney Holders, Bank.

Sub-account

¹ A Collective Investment Scheme is the modern terminology for a fund.



FII's can also invest on behalf of their sub-accounts. In such cases, the sub-account would be required to register as a sub-account of an FII already registered with the SEBI. The FII has to apply on behalf of the proposed sub-account by submitting Annexure B of the FII/sub-account registration regulations duly filled and signed by both the FII and sub-account. At present, fees of US\$ 1000 is payable to SEBI. Registration period would be about 3 working days from the date of receipt of complete application and fees.

A sub-account includes those institutions, established or incorporated outside India and those CISs, or portfolios established outside India, whether incorporated or not and corporates and individuals, on whose behalf investments are proposed to be made in India by an FII.

Non-resident Indians (NRI) and Overseas Corporate Bodies (OCB) are not entitled to get registered as sub-account. An NRI may however seek registration of his Mauritius company as a sub-account of an FII as the Mauritius company would be a foreign corporate.

There are two categories of sub-accounts:

1. Broad-based / proprietary sub-accounts which are allowed to individually invest up to 10% of the total issued capital.
2. Foreign Corporates and foreign individuals. Investments by each sub-account in this category should not exceed 5% of the issued capital. These limits are within the overall limit of 24% / 49% or the sectoral caps as the case may be and also apply to FIIs.

Broad based CIS / sub account

A broad based CIS is a fund which has at least 20 shareholders and no single investor holds more than 10% of shares and units of the CIS. Any investor who holds more than 10% of shares or units of the CIS should in turn also be broad based. The proprietary funds of the FII cannot be invested through a broad-based CIS. A Proprietary CIS is a fund wherein the ownership of the funds is that of the FII.

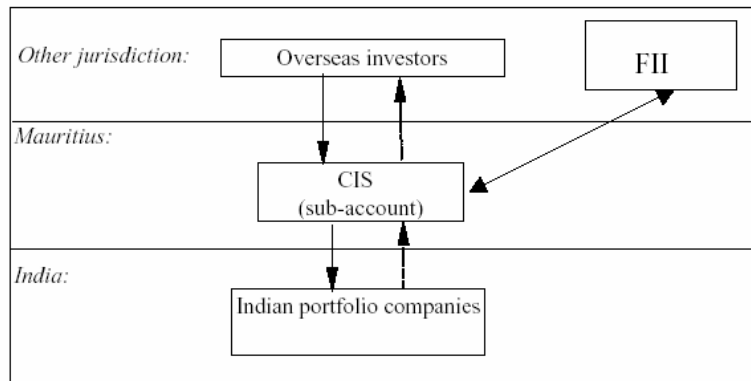
Please note that proprietary, foreign corporate and foreign individual sub-accounts need not be broad-based.

Foreign individuals mean all foreign residents other than NRIs and OCBs.



Structuring of Mauritius based Global Business² CISs

There is at present no securities regulatory authority in Mauritius but the appropriate legislation will be introduced very soon. Currently, the Financial Services Commission, which is the financial services industry regulator in Mauritius, applies best industry practice to CISs and is responsible for the licencing of the CISs after a thorough review of the surrounding relevant circumstances and constitutive documents. In practice, a licenced Mauritius Global Business CIS would register as a sub-account of an existing FII with the SEBI. The structure chart is depicted below.



Mauritius is an ideal jurisdiction for locating the holding company because:

1. Mauritius has a very unique and very favourable tax treaty with India;
2. Mauritius offers a flexible choice of entities;
3. The effective tax rate is only 3% and there are no capital gains tax;
4. Corporate laws in Mauritius allow enough flexibility for repatriation of capital;
5. There are no exchange controls in Mauritius hence repatriation of income is easy;

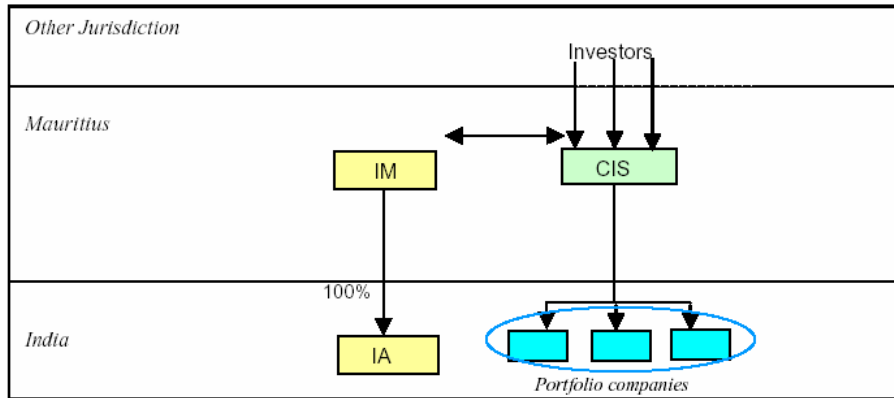
Most commonly used structures for Mauritius Global Business CISs are as follows:

Foreign Investors only

An investment company or an LLC or an LP is set up in Mauritius as a CIS and foreign investors pool their funds therein. The CIS then invests the funds directly into Indian portfolio companies. To enhance the Mauritius tax residency status of the CIS, an investment manager (“IM”) may also be organized in Mauritius for managing the assets of the CIS. The IM generally enters into an Investment Advisory Agreement with an investment advisor (“IA”) organized in India for identifying deals and to carry out preliminary due-diligence on prospective investment opportunities. The IA could be a 100% subsidiary of IM.

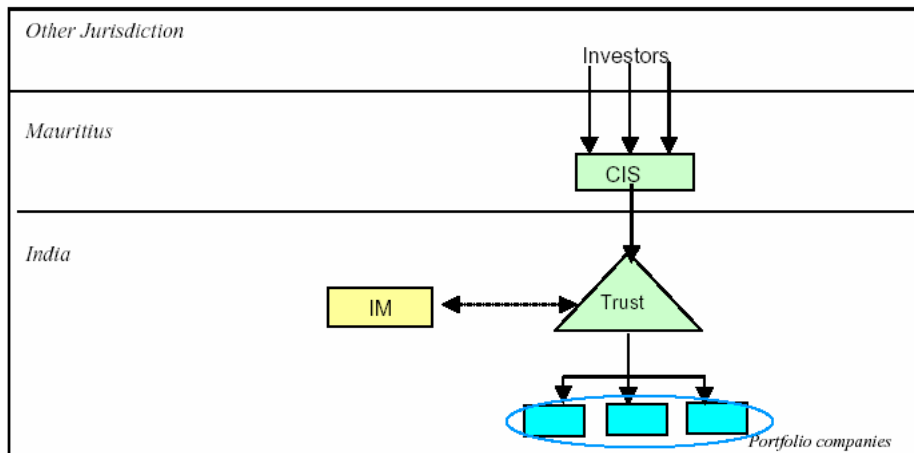
² Mauritius has in December 2001 replaced the term Offshore by Global Business.

The structure would be as follows:



Indian + Foreign Investors

Where India based investors are also expected to participate in the CIS, a trust or a company is organized in India. The India based investors would then invest in the trust whereas foreign investors would continue to pool their investments in a Mauritius based CIS which would in turn invest in the India trust. Under this scenario, the portfolio investments are made by the trust which is registered with SEBI. The trust may appoint an IA and/or an IA in India. Any carry interest accruing to the Indian IM may be drawn directly from the trust. The CIS may in turn continue to also have its own IM and/or IA.

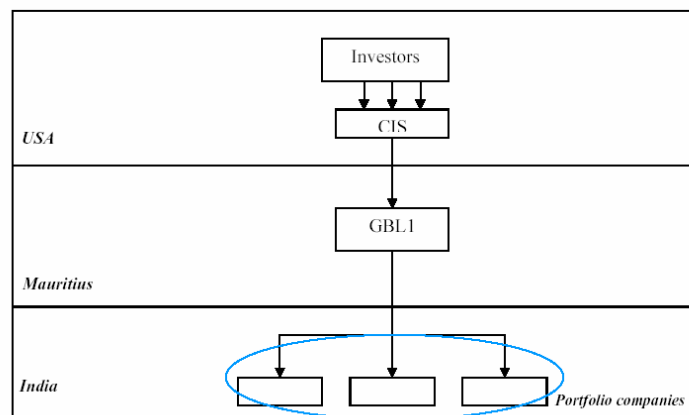




Foreign Investors only but only SPV³ in Mauritius

Under this scenario, the CIS is organized in a jurisdiction other than Mauritius, for e.g. USA. All pooling of funds is done at the US CIS level. An investment holding company⁴ or an LLC is set up in Mauritius to act as an SPV or *conduit* for the US CIS to invest in India. The IM may or may not be organized in Mauritius. A Mauritius IM would however have the benefit to enhance the Mauritius tax residency status of the Mauritius SPV. The IM generally enters into an Investment Advisory Agreement with IA organized in India for identifying deals and to carry out preliminary due-diligence on prospective investment opportunities. The IA could be a 100% subsidiary of IM.

The Mauritius vehicle, being a foreign corporate, would then apply for registration as a sub-account of an FII. The structure would be as follows:



Caveats to the above structure

The establishment of only an SPV in Mauritius instead of a full fledged Mauritius CIS has the benefit of a cheaper structure but it is essential that the following *caveats* to the above structure be borne in mind and the potential risks assessed:

There have been instances in the past where the use of Mauritius as a mere *conduit* for investing into India has been looked upon unfavorably by the Indian tax authorities, for e.g. the NatWest Bank PLC case where it was deemed that the Mauritius *conduit* was used merely for tax avoidance purposes and the observation was made that in cases where the use of Mauritius is *prima facie* for avoidance of tax, the benefits of tax treaty should not be available to the Mauritius entity.

However, in the subsequent AIG case, the benefits of India-Mauritius tax treaty was granted on the grounds that if there was a commercial justification for setting up a SPV then the fact

³ SPV=Special Purpose Vehicle

⁴ A Category 1 Global Business Licence company (“GBL1”) is the appropriate tax treaty company



that it was established in Mauritius, should not *per se* result in denial of a ruling and benefits under the India-Mauritius tax treaty.

It is therefore strongly recommended that professional advice be sought at the planning stage.

The Ruling of the Supreme Court of India

The October 2003 ground breaking ruling of Supreme Court of India (*reaffirmed subsequently in a Judicial Review of the October ruling*) has reaffirmed the availability of the India-Mauritius tax treaty benefits to Global Business investors investing into India through Mauritius. Very interestingly and progressively, the Supreme Court of India ruled that in the absence of an anti-treaty shopping provision in the India-Mauritius tax treaty, the benefits of the tax treaty could not be denied so long as the Mauritius entity is a resident of Mauritius.

Genuine NRI v/s OCB

Recent reports, at the time of writing in February 2004, seems to suggest that the Indian government seems now more inclined to distinguish overseas corporate bodies (OCBs) from NRIs, groups of NRIs and companies owned by non-resident Indians in so far as their access to Indian secondary and primary markets is concerned.

The RBI had banned OCBs' access to secondary market via the portfolio investment scheme in November 2001, following the recommendations of the joint parliamentary committee that had probed the security market scam. The RBI has subsequently also banned OCBs from investing in primary market as well.

The good news is that the Indian government seems to appreciate that a similar ban on genuine NRI investors would be unfair. It is reported that the Foreign Investment Promotion Board (FIPB) of India would soon attempt to lay down criteria for identification of NRI status or otherwise of entities intending to invest in India. It is believed that if the FIPB succeeds in its endeavour to come up with measures to distinguish the NRI investor from the OCB as defined, then the onus of additional formalities could be waived.



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Other documents in the IP series available on request:

IP01 General Global Business information

IP02 Global Business Collective Investment Schemes in Mauritius : The GWMS CIS Solution

IP03 BPO Information booklet

IP04 Global Business Collective Investment Schemes in Mauritius : The GWMS PCC Solution (with a South African bias)

IP05 Global Business Collective Investment Schemes in Mauritius : The GWMS PCC Solution (general)

IP06 Ship Registration in Mauritius

Source: Certain information contained in IP07 has been obtained from SEBI website & other sources freely available on the net.



About us...

GWMS is an emerging Management Company incorporated in Mauritius and licensed by the Financial Services Commission to provide advisory and management services to businesses worldwide.

The board of GWMS comprises mainly of Chartered Accountants of calibre and experience in diverse sectors encompassing accounting, audit, management, global business, international and local taxation among others. GWMS is able to handle back office work like running your payroll, handling the accounting and taxation aspect of your business, registration of your company for VAT, PAYE (employee income tax) and NPF (pension fund) among others. In other words, we take care of the “hassles” and let you concentrate on what you do best...running your business!

GWMS is formally (by signed agreement) the Preferred Partner of SAB&T Incorporated, Chartered Accountants (SA) (“SAB&T”), www.sab-t.co.za in Mauritius. SAB&T has 15 directors and is a rapidly growing financial services provider with six offices located in the major centres of South Africa. It is a full fledged member of SC International, an international and widely known group of independent accountants, represented in over 60 countries and with 203 member offices globally. Consequently, GWMS, by virtue of its association with SAB&T, also benefits from the SCI network. Mr Bashier Adam, the CEO of SAB&T is also a director of GWMS and he has a seat on the management board of SC International as the Chairman for the SAMEA region.

GWMS is also proud to be formally (by signed agreement) the Preferred Partner in Mauritius, of Corporate Catalyst (India) Pvt Ltd , www.ccindia.com, a Business Advisory, Corporate Finance and Tax Advisory firm based in Delhi with offices in Mumbai and associate offices in major centres in India. The Chairman of Corporate Catalyst (India) Pvt Ltd has served as the Chief Consultant to the Ministry of Finance, Government of India and another director has been the Ambassador of India to Japan, Thailand and Libya. The board of Corporate Catalyst (India) Pvt Ltd also comprise of professionals of calibre and vast experience.

We have the pleasure to announce that GWMS has, this November 2003, formally entered into a strategic alliance agreement with **AGN MAK, Chartered Certified Accountants**, www.agnmak.com, of Dubai, UAE, whereby GWMS is now the Preferred Partner of AGN MAK in Mauritius and vice versa. We look forward to a mutually beneficial and long lasting professional relationship with AGN MAK

AGN MAK is a full fledged member of Accountants Global Network International which is represented in over 72 countries and serving the globe from over 400 independent office locations. AGN MAK, the UAE representative of AGN International is a multidisciplinary practice and has offices in the major emirates of the UAE, in Oman, Azerbaijan and India. AGN MAK has emerged as one of the top ten multidisciplinary practices in the region, with a comprehensive portfolio including auditing and accountancy services, most disciplines of management consultancy and a structured business support service.

GWMS has formally concluded yet another Preferred Partner agreement with **Corporate Management Services (CMS)**, www.cmsmk.com, of Hong Kong to provide our clients with more quality international business solutions. CMS provides incorporation and management services including China market entry solutions, China company credit reports and accounting/audit services, among others, in over 20 jurisdictions. CMS specializes in China, Hong Kong, British Virgin Islands (BVI) and other tax-free countries. With their local presence and international vision, they are able to bridge the cultural and business gaps that often hinder business success in Asia. CMS is strategically located on the top floor of the Bank of America Tower, a Hong Kong landmark close to the country’s core business district.

If you wish to structure your international business in a commercially viable and low cost jurisdiction and seek to maximize your tax efficiency...you need to talk to GWMS...

If you wish to access the African continent for your international trading business, then the Mauritius Freeport might be the answer to your questions...to find out, talk to GWMS...

GWMS...the smart way to do business