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comment

India at the data protection crossroads

India, whose citizens comprise one of the world's oldest and culturally rich societies, is now confronting a very modern cultural issue, as Stewart Dresner reports in this issue of *PL&B International*.

India has shown little interest in enacting data protection legislation as a vehicle to protect the privacy rights of Indians, since this appears to be a much lesser priority than other more pressing social issues. And what little pressure there is to enact such legislation encounters the real concern that India will become less attractive as a place for US companies to outsource their activities if data protection measures alienate American politicians and businesses. Already in this US election year, politicians and businesses are becoming skittish about outsourcing. Restrictive data protection laws may provide the excuse that they need to discourage outsourcing. The result for India could be the serious weakening of a vital technological and economic driver.

On the other hand, EU countries may be reluctant to outsource to India unless they are assured an adequate level of protection for any personal data that is transferred to India.

The Indian government therefore finds itself caught between a wish to satisfy its largest trading partner, the European Union, and US-based companies that have shown a marked preference for a contractual approach without data protection legislation. As Stewart Dresner's article shows, India must now engage in a delicate balancing act as it faces a range of options for reconciling data protection concerns with important business imperatives. *PL&B International* will continue to watch how the world's second most populous country will respond in the coming months and years.

Eugene Oscapella, Associate Editor

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Do you have a case study or opinion you wish us to publish? Contributions to this publication and books for review are always welcome. If you wish to offer reports or news items, please contact Alan Pedersen on Tel: +44 208 423 1300, or E-mail: alan@privacylaws.com.

India commits to data protection, continued from p.1

OUTSOURCING IS INDIA'S DATA PROTECTION DRIVER

This analysis is confined to the outsourcing context because there is little pressure from Indian human rights groups for a law for protecting the privacy rights of Indians, explains Anindya Acharya, Deputy Director of IT at the Confederation of Indian Industry (CII). The reason is that for India-based human rights groups, computerisation of Indian society has not developed to the extent where there is a substantial awareness of privacy. Other issues, such as the status of women, community health and education, are a much higher priority.

There are also other much more pressing issues for India-based businesses. The CII announced on March 30th that its new agenda will focus on

was essential to protect their investment and jobs in AP.

It was considered that an AP data protection law would reduce the attractiveness of the state as a location for inward investment if there were a legal environment inconsistent with other states which were equally interested in receiving a slice of the growing foreign investment in business process outsourcing.

Duggal explained that although India's constitution permits the states to legislate on special contracts - which is why AP's bill was described as a "special contracts" data protection bill - the federal Ministry of IT decided to take the initiative on legislating a data protection regime. The ministry decided that it was unwise to project internationally an image of India as a country which was not a secure location for processing personal data.

As a result, later in 2002, India's National Association of Software and

have also been raised in the UK. British members of the European Parliament have been lobbying for an EU investigation into outsourcing to India. They are calling for strong data protection safeguards and a requirement that will force companies operating in India to inform customers where they are calling from.

THE POLICY OPTIONS

There are broadly six policy options facing the IT Ministry's Advisory Committee:

1. Do nothing - This would be an easy option as India has attracted a significant inward investment in outsourcing with no data protection law. Companies deal with data protection law issues, if they wish, by leaving it to contracts between company headquarters and the data processing companies in India. This option appears attractive to US-based business.

2. Publish data protection guidelines - This option has the merit that it provides the government with the sense that it is fulfilling its September 2003 commitment to take action on data protection without imposing legally binding and costly obligations. The data protection guidelines could be on the lines of the EU's data quality principles or Canada's fair information practices. The CII hopes that such guidelines will be published later this year.

3. Negotiate an Indian Safe Harbor - From India's perspective, negotiating a Safe Harbor Agreement with the European Commission has certain attractions and this option is favoured by the CII and NASSCOM. It would give Indian companies an opportunity to declare to an Indian government agency that they were fulfilling many of the requirements of the EU Data Protection Directive in their own way. That declaration would then give these India-based companies an adequacy status without the time consuming effort of adopting a national data protection law. However, the European Commission shows little sign of wanting to repeat the lengthy negotiations which were needed to secure a safe harbor agreement with the US.

The CII's Anindya Acharya argues that India does more business with the

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environment-friendly business practices and lobbying for cleaner technology to minimise pollution, better communication and connectivity, adequate power supply, availability of water and more investment into infrastructure.

This does not mean that business has been silent when there were proposals for data protection laws over the last two years, according to Pavan Duggal, head of India's leading niche cyberlaw firm, Pavan Duggal Associates, and Advocate at the Supreme Court of India. Duggal told *PL&B International* that when in 2002 the government of south-eastern state, Andhra Pradesh (AP), proposed a data protection bill based closely on the EU Data Protection Directive, the companies consulted opposed the bill. They argued that it would increase compliance costs both for companies established in the state and those considering investing in business process outsourcing there. The AP government therefore reconsidered and before submitting the bill to the state legislature for debate, put the bill on hold, sensitive to companies' arguments that it

Service Companies (NASSCOM) published its own bill which represented a middle way between doing nothing and adopting a comprehensive EU-style data protection law. Soon afterwards, the IT Ministry established an advisory committee of three lawyers, including Pavan Duggal.

PRIVACY AS A POLITICAL ISSUE

Data protection is not an issue in the run-up to the April parliamentary elections. None of the political parties have so far made a statement on the subject but they have spoken on the need for an enabling environment for outsourcing.

However, one factor complicating the issue is that there is currently a groundswell of opinion in the US against outsourcing. Presidential candidate, John Kerry, has spoken of the loss of jobs from the US resulting from outsourcing to countries such as India. In such a climate, India wishes to tread carefully and not introduce any bill which is likely to alienate American business opinion.

Job losses and data security fears

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