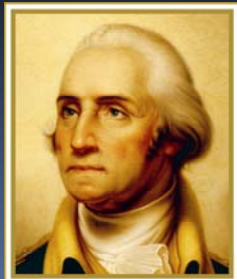


Offset Contracts under Defence Procurement Regulations in India: *Evolution and Challenges*



THE GEORGE
WASHINGTON
UNIVERSITY
WASHINGTON DC

Sandeep Verma

LLM Candidate, Government Procurement Law

The George Washington University Law School

February 9, 2009

Offset Contracts 101:

- **Definitions**

- requiring or encouraging private firms to purchase national products, either as a condition of access to government contracts or to improve those firms' chances of obtaining government contracts
- Offsets and *Quasi*-Offsets

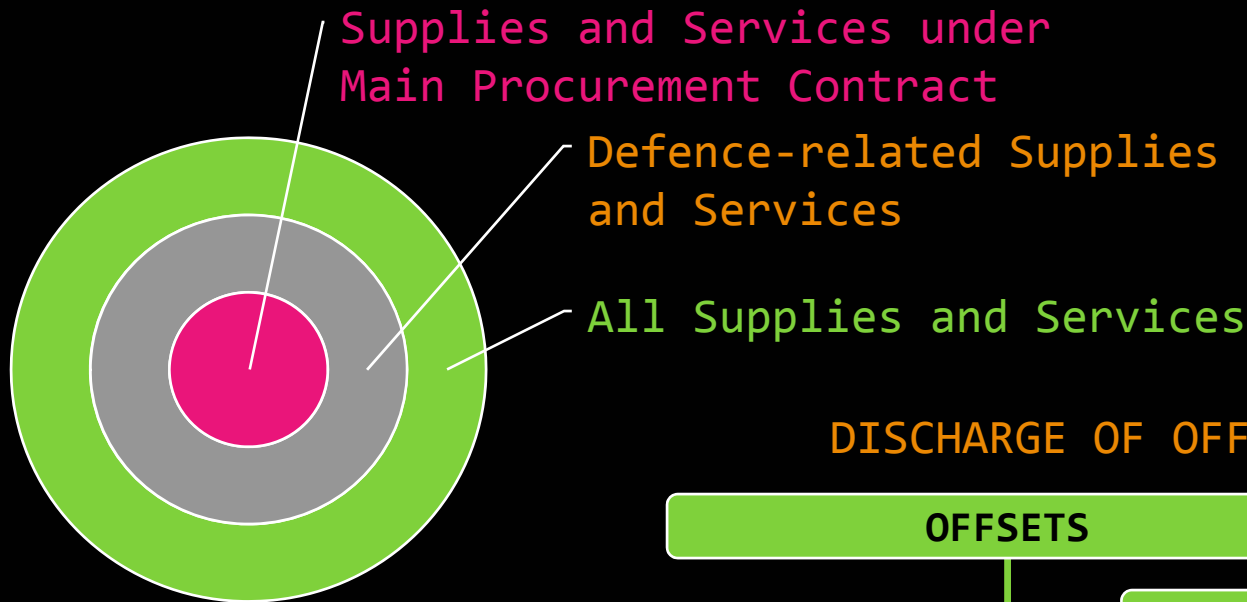
- **Objective**

- Industrial Base Mobilization

- **Effects**

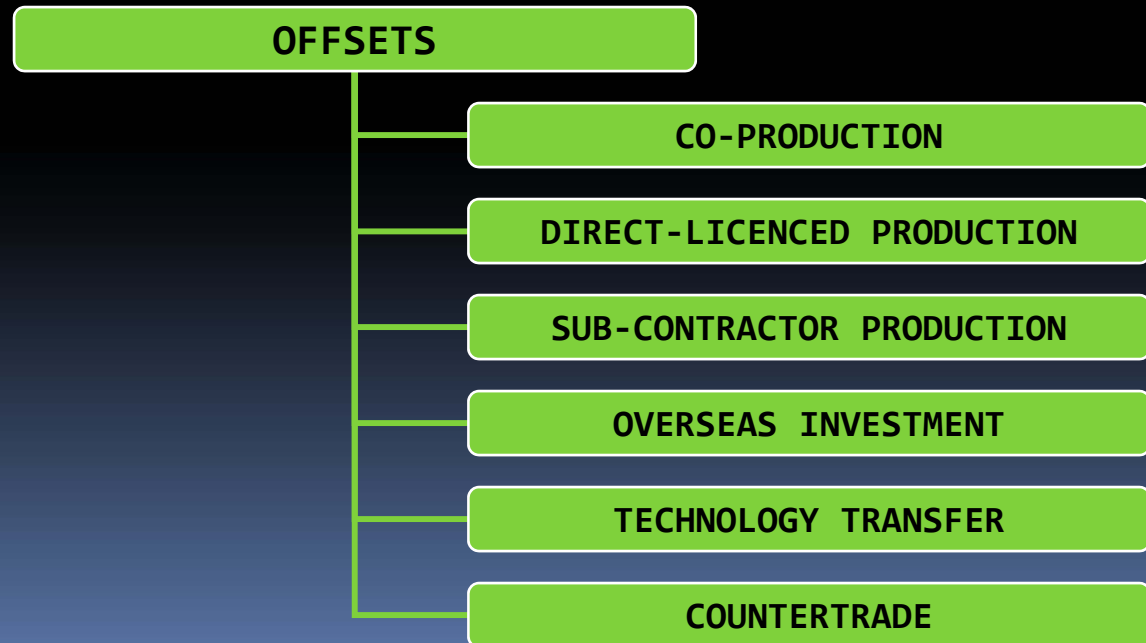
- Increased cost of performance, impacting both parties
- Increased contract risk, for both parties

Offset Contracts 101:



TYPES OF OFFSETS

DISCHARGE OF OFFSET OBLIGATIONS



Offset Contracts 101:

- **Choices for Buying Countries**
 - Quantum of offset obligations
 - Types/ mix of Offset obligations
 - Vehicles for discharge of obligations
- **Differing K-types**
 - Fixed-Price-Type of Main Contract v. Cost-Type Offset Contract, resulting in differing stakeholder interests

Offsets under the WTO:

- **GATT (General Agreement on Tariffs and Trade)**
 - Countertrade Prohibition
 - National Security and Government Procurement Exceptions
- **GPA (Government Procurement Agreement); including GPA Revised Text**
 - Offset Prohibition
 - National Security and Developing Country Exceptions
- **Defence offsets as a GPA-compliant tool**

Framework for Procurement Reform in Offset Contracts:

- Issues with Offset Contracts are essentially “contract performance” – type of issues
 - Reforms must address the primary objective of mandating offset obligations
 - Desiderata of Procurement Reform: Efficiency, Uniformity, Best Value, Risk Avoidance
- Within that objective, the push should be one to reduce contract risks
 - Increasing transaction efficiency
 - Reducing uncertainty and enhancing predictability
 - Using risk-allocation principles

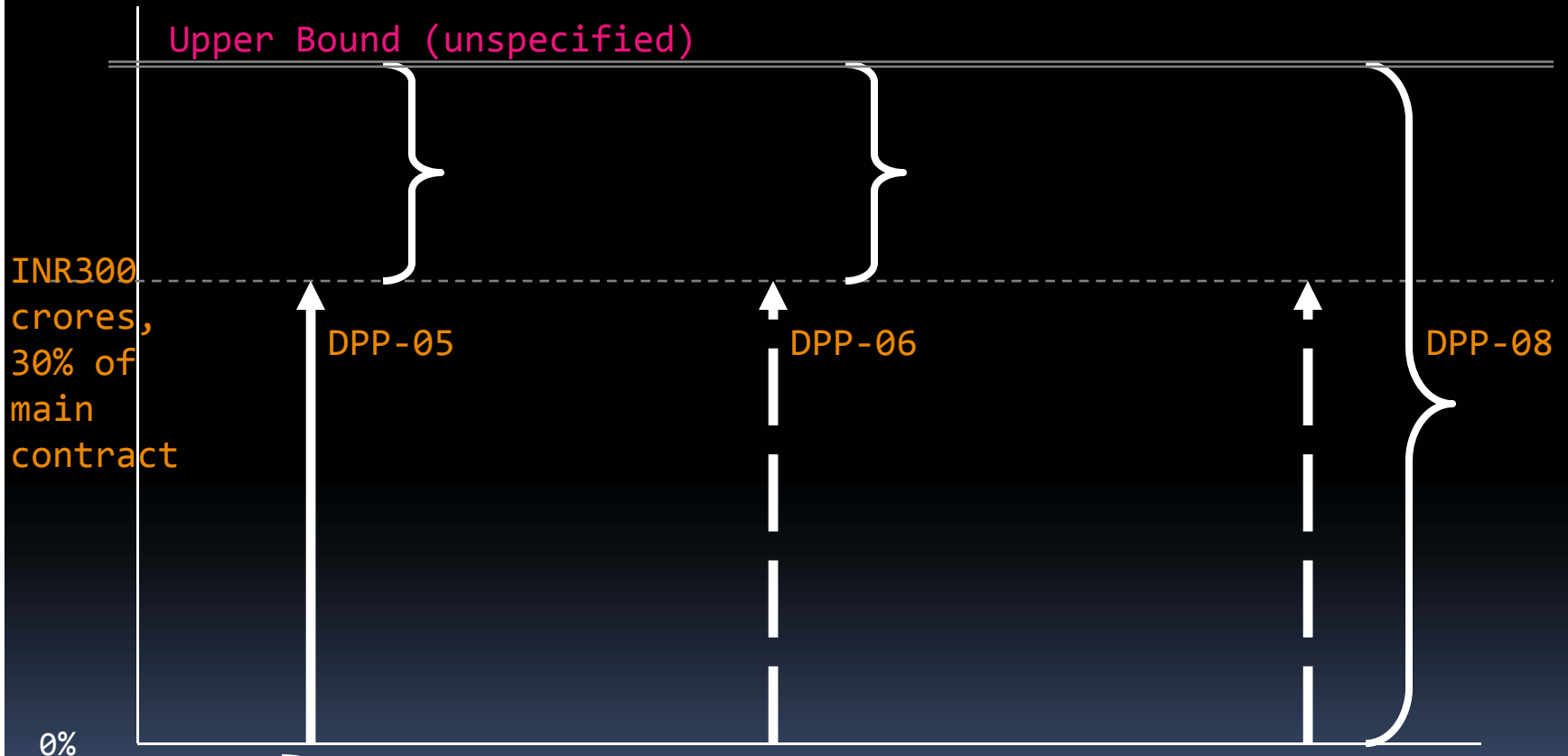
Analyzing the Regulatory Framework:

- DPP-05, DPP-06 and DPP-08 in terms of
 - Applicability and Quantum
 - Scope and Partnerships
 - Offset Contract Administration
 - Banking of Offset Credits
 - Others

Regulatory Guidance on Applicability and Quantum:

- **Applicability wef September 1, 2008**
 - Cases-under-process re DPP-05 and DPP-06: DPP-08/p74 read with p77 may suggest further processing of old cases as per new procedures
- **para dealing with consideration of change in 30% obligations stands deleted**
- **Grounds for mandating higher obligations (“*but de facto*”)**
 - strategic importance of the acquisition or the technology
 - ability of Indian defence industry to absorb the offset
 - export potential generated
 - type of acquisition
- **para dealing with considering implementation of multipliers (DPP-06/p2.5) stands deleted; *but see* DPP-8/p3.1(g)**
- **No offset obligations under FTPs: cut-and-dry exemption**

Evolving Applicability and Quantum:



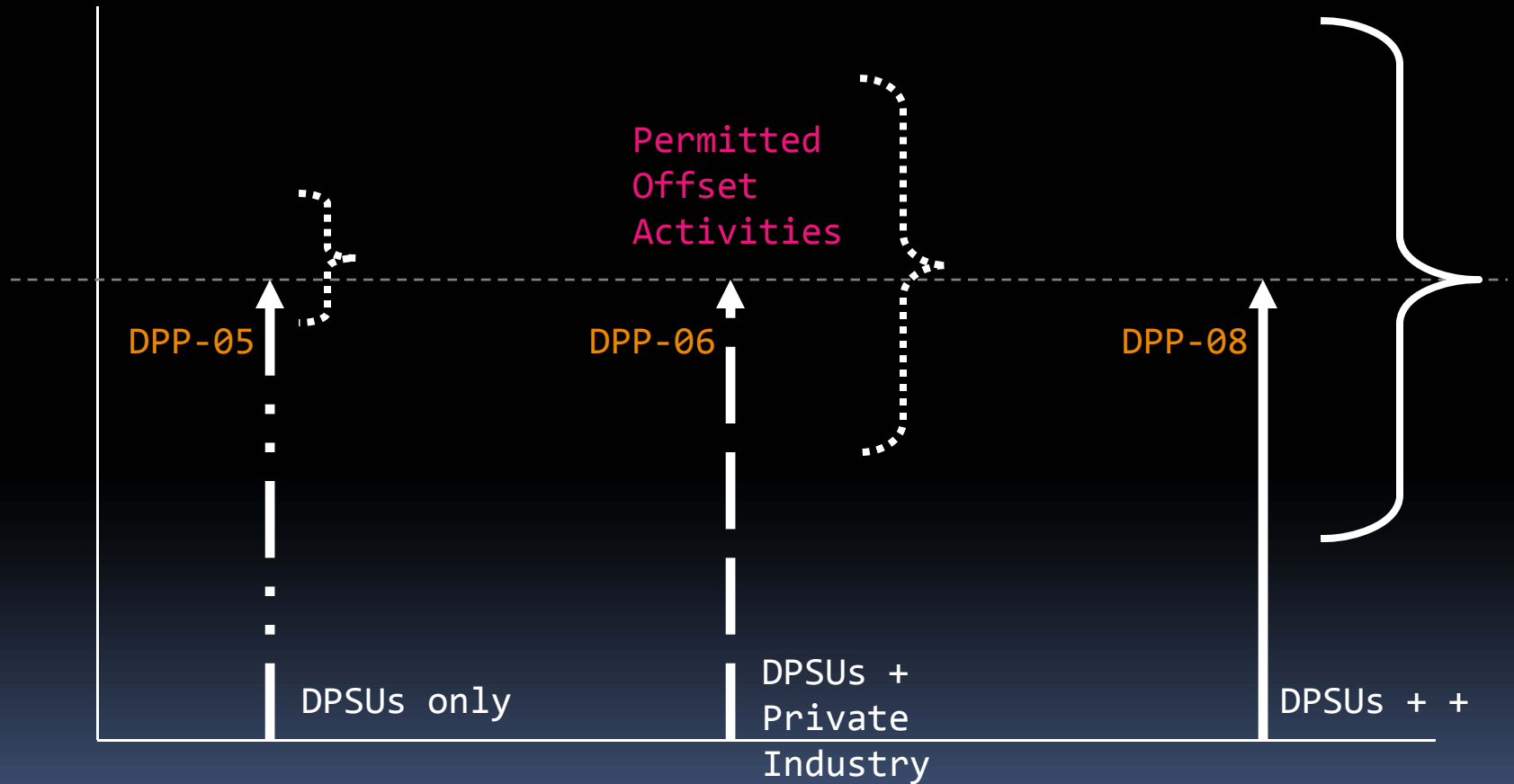
Legend:

- Curly brackets denote permissible variation in prescribed offset percentage
- Dashed lines indicate restricted applicability of offset clauses to “Buy (Global)” and “Buy and Make with ToT” contracts

Regulatory Guidance on Scope and Partnerships:

- **Eligible Indian Industries**
 - list of eligible participating local institutions expanded under DPP-o6
 - “licensed private industry” under DIPP para stands deleted under DPP-o8
- **Eligible Offset Activities**
 - list of letters of intent/ industrial licenses issued for the manufacture of items under defence industries (DPP-6)
 - list of defence products eligible for discharging offset obligations under DPP-o8
 - deletion of civil infrastructure from eligibility list
 - Direct offsets v. Indirect Offsets

Evolving Scope and Partnerships:



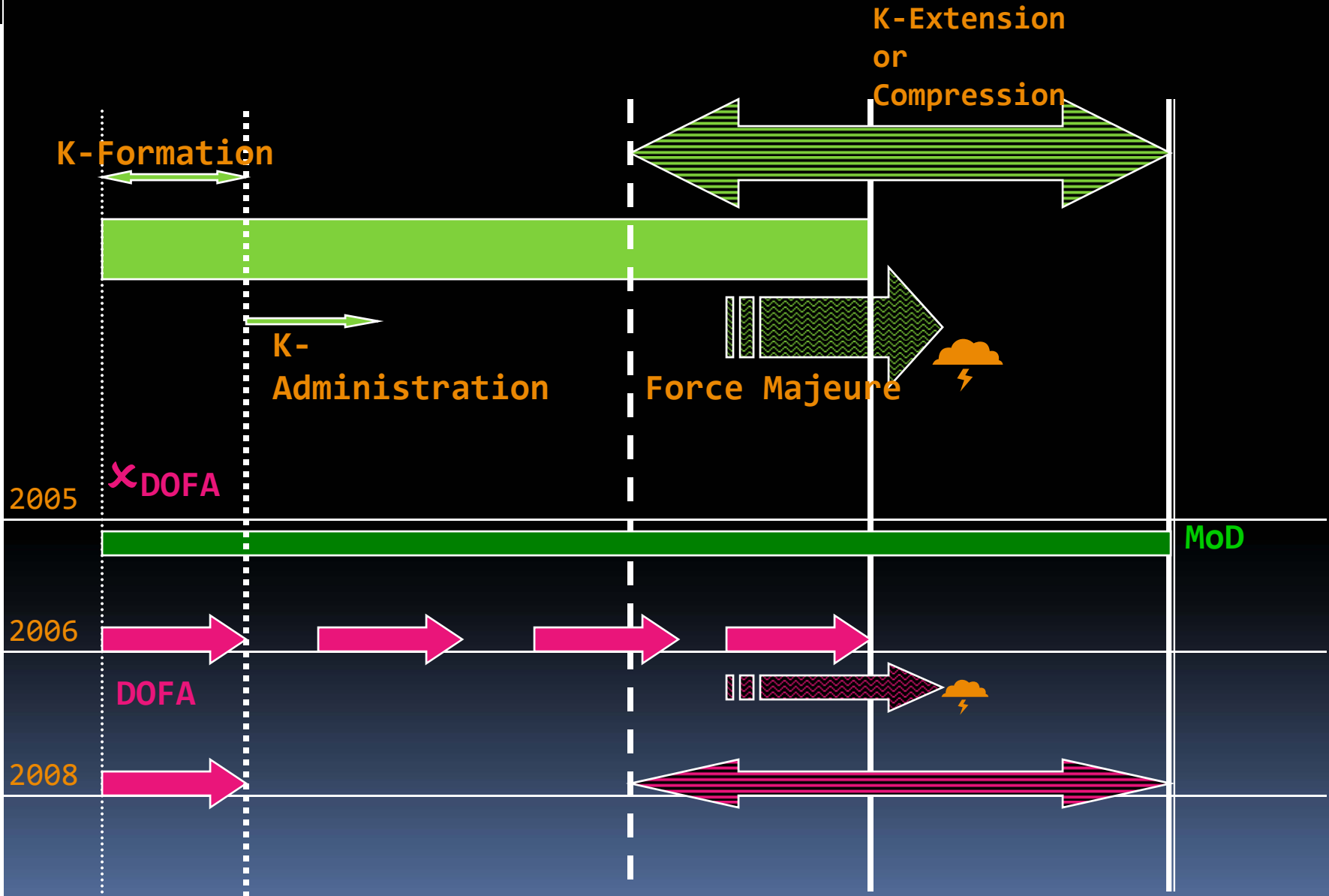
Remaining Scope and Partnership Issues:

- DIPP-Industrial Licensing
- Movement appears to be one towards increasingly indirect offsets
- The push for ToT as an eligible offset vehicle
 - Capacity
 - Valuation
 - Direct v. Indirect

Regulatory Guidance on DOFA:

- Charter of Duties
 - DPP-o6/p3 read with p10.1
 - DPP-o8/p3 read with p10.1
- p3(c) dealing with assistance function in monitoring of offsets remains on board; *but see* DPP-8/p10.1 *contrasted with* DPP-6/p10.1
- Para on advisory role in clarifications on policies and procedures stands deleted
- Para on composition stands deleted
- Para on advisory role in identifying areas in which offsets will be preferred remains on board, *but see* (deleted) DPP-o6/p2.5
- No role in banking of offset credits

Offset Contract Administration:



Redefining DOFA'S role:

- Changing involvement in K-Administration
- DOFA's placement and expertise
 - An Executive Committee
 - An Executive Agency
 - An Autonomous Institution
- Conflicts of Interest Issues
 - In re placement within MoD
 - In re composition
- DOFA as DOMA

Regulatory Guidance on Banking of Offset Credits:

- DPP-o6/p6.4
 - only contracts for export of defence products or services or investment made after the signing of the main contract would be reckoned for discharging offset obligations
- DPP-o8/p 2.1(d)
 - In anticipation of future obligations
- DPP-o8/Annex 7 to Appendix D
 - In excess of contractual obligations
- Non-transferable, except between prime and sub within same acquisition programme
- Banked credits valid for discharge against RFPs issued within 2 financial years of date of approval

Issues with Banking of Offset Credits:

- Transfer of Anticipatory Offset Credits
- Date of Approval criteria may lead to distortion between discharge of obligations and claims for credits
- Additional Guidance needed on
 - Certification Process
 - Valuation Process
 - Verification of claims
 - Handling of Disputes
 - Govt-Prime Ktr
 - Prime Ktr-Indian Partner
- Indirect Offsets get banked in the process

Other Issues:

- **Dispute Resolution**
 - Overall K, Offset Ks
 - Private Arbitration v. Administrative Tribunals
- **Applying the regulatory model to different K-types**
- **Trading of Offset Credits**
 - Efficiency concerns v. “per se” offset objectives
- **FTP exemptions from offset obligations**



■ *Thank You*



☞ sverma@law.gwu.edu
sverma@rajasthan.gov.in