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## FOREIGN DIRECT INVESTMENT AND GLOBALISATION

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### Abstract

As sophisticated Indian legal system is it has derived its basis from the English common law. While these sophistications are appreciated in many aspects but there are aspects which are adversely affected due to these tedious procedures. India at global level is emerging as a new economy and emerging as a new market. The multi- national companies are now seeing India as a new market and opportunity to expand their business. While discussing the different aspects of economy and impact of globalization and foreign direct investment, the first basis is that the FDI is considered to be the safest way of international capital flows and the globalization in layman terms is the moral and social changes that are experienced by the human beings in their daily lives. The highlights the fact that the process of globalization in India facilitates the foreign companies to have a indirect influence on the economy of the country and manage the economic activities accordingly. Investment in India provides the base and pre-requisite for economic growth and development.

*Key Words : Legal Provisions of FDI, Corporate Governance, Sustainable Growth*

### Foreign Direct Investment

A foreign direct investment (FDI) is an investment in the form of a controlling ownership in a business in one country by an entity based in another country. It is thus distinguished from a foreign portfolio investment by a notion of direct control. The origin of the investment does not impact the definition, as an FDI: the investment may be made either "inorganically" by buying a company in the target country or "organically" by expanding the operations of an existing business in that country. Foreign direct investment (FDI) in India is a major monetary source for economic development in India. Foreign companies invest directly in fast growing private Indian businesses to take benefits of cheaper wages

and changing business environment of India. Economic liberalisation started in India in wake of the 1991 economic crises and since then FDI has steadily increased in India, which subsequently generated more than one crore jobs. According to the *financial times*, in 2015 India overtook China and the US as the top destination for the Foreign Direct Investment. In first half of the 2015, India attracted investment of \$31 billion compared to \$28 billion and \$27 billion of China and the US respectively.

### Government Initiatives

The government of India has amended FDI policy to increase FDI inflow. In 2014, the government increased foreign investment upper limit from 26% to 49%

insurance sector. It also launched Make in India initiative in September 2014 under which FDI policy for 25 sectors was liberalised further. As of April 2015, FDI inflow in India increased by 48% since the launch of "Make in India" initiative.

India was ranking 15th in the world in 2013 in terms of FDI inflow, it rose up to 9th position in 2014 while in 2015 India became top destination for foreign direct investment. The Department of Industrial Policy & Promotion is the nodal Department for formulation of the policy of the Government on Foreign Direct Investment (FDI). It is also responsible for maintenance and management of data on inward FDI into India, based upon the remittances reported by the Reserve Bank of India.

The FDI policy is reviewed on an ongoing basis, with a view to making it more investor-friendly. To attract higher levels of FDI, Government has put in place a liberal policy on FDI, under which FDI up to 100%, is permitted, under the automatic route, in most sectors/activities. Significant changes have been made in the FDI policy regime in recent times, to ensure that India remains an increasingly attractive investment destination. The Department plays an active role in the liberalization and rationalization of the FDI policy. Towards this end, it has been constructively engaged in extensive stakeholder consultations on various aspects of the FDI policy.

## Taxation in India

**Taxes in India** are levied by the central government and the state governments.

Some minor taxes are also levied by the local authorities such as the Municipality.

The authority to levy a tax is derived from the constitution of India which allocates the power to levy various taxes between the Central and the State. An important restriction on this power is Article 265 of the Constitution which states that "No tax shall be levied or collected except by the authority of law". Therefore, each tax levied or collected has to be backed by an accompanying law, passed either by the parliament or the state legislature. In 2015-2016, the gross tax collection of the Centre amounted to ₹14.60 trillion (US\$200 billion).

### Goods and Services Tax

Goods and services tax is an indirect tax collected on supply of goods or service.

- Central Tax: Portion of Tax to central government on intra state sales.
- State Tax: Portion of Tax to state on intra state sales.
- Integrate Tax: tax for inter-state sales.

### Custom Duty

Custom Duty is an indirect tax for goods when import or export. When import goods from outside in the tax known as import custom duty. When goods export to outside India is known as export custom duty. The tax collected by Central Board of Indirect Taxes and Customs.

### Local Body Taxes

"Local Body Tax", popularly known by its abbreviation as "LBT", is the tax imposed by the local civic bodies of India on the entry of goods into a local area for consumption, use or sale therein. The tax is imposed based on the Entry 52 of the State list from the Schedule VII of the Constitution of India which reads; "*Taxes on the entry of goods into a local area for consumption, use or sale therein.*" The tax is to be paid by the trader to the civic bodies and the rules and regulations of these vary amongst different States in India. The LBT is now partially abolished as of 1 August 2015.

## Outward Indian Foreign Investment (OFDI)

Overseas investments have become crucial for promotion of global business by entrepreneurs. Overseas direct investment from India represents relatively new aspect of India's integration into global economic and political systems. There is need of a balanced approach to be evolved by having strong policy guidelines which could help Indian enterprises to actively seek opportunities overseas, especially in the manufacturing sector and at the same time, safe guarding the domestic industry and the economy as well. India's foreign direct investment (FDI) outflows more than doubled in 2017 to 11.3 billion dollars whereas the FDI inflows fell down 9% to about 40 billion dollars, according to the report by UNCTAD (United Nations Conference on Trade and Investment). This

drop in inflows happened despite India having Petrol Complex Ltd in Singapore as one of its largest FDI deals<sup>1</sup>.

In the last year of Manmohan Singh government (2013-14), the FDI inflows were estimated to be 24 billion which soon rose 27%, i.e. more than 30 billion dollars. The following increase in inflows each year were with 40% increase and 22% increase respectively. Indian Industries continue to invest larger and larger capital in different countries. After seeing a dip in the first year of Modi government, the outflows have been steadily rising. The two top destinations of Indian FDI are Singapore and Mauritius. What is interesting about this is the fact that the flow from these two countries has been rising rapidly. Flow from Mauritius rose from \$ 5 billion in 2013-14 to \$ 9 billion in 2014-15.<sup>2</sup> The pattern and composition of global outward foreign direct investment has changed during last two decades. The share of developing countries in global outward foreign direct investment flows has risen to the level of 35%. There has been tremendous growth in outward foreign direct investment from India since 2005-06. There has been shift in composition, trend, funding ways and issues

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<sup>1</sup> Asit Ranjan Mishra *India's FDI outflow more than doubled, FDI inflow fell 9% in 2017: UNCTAD*, (June 08, 2018) Livemint

<sup>2</sup> A K Bhattacharya *FDI outflows : Mauritius is India's largest overseas investment destination*, 2 May, 2017, Business Standard

<[https://www.business-standard.com/article/economy-policy/fdi-outflows-mauritius-is-india-s-largest-overseas-investment-destination-117043000425\\_1.html](https://www.business-standard.com/article/economy-policy/fdi-outflows-mauritius-is-india-s-largest-overseas-investment-destination-117043000425_1.html)>

as well in context of outward foreign direct investment from India<sup>3</sup>.

Guidelines for overseas investment by Indian firms existed before the process of liberalization and globalization of Indian economy in 1991-92. Guidelines were quite restrictive and subject to condition of no cash remittance and mandatory repatriation of dividend from the profits from overseas projects. With a steady rise in the capital inflows, particularly in the second half of 2000s, the overall foreign exchange reserve position provided comfort to progressive relaxation of the capital controls and simplification of the procedures for outbound investments from India. The Reserve Bank of India has relaxed certain limits related to outward foreign direct investment from India. The Government of India has drafted tactical plans to promote overseas investment by Indian firms<sup>4</sup>.

One important issue that warrants close monitoring of capital outflows is the implications for domestic investment. There is need to ensure that overseas investment by Indian companies do not dampen domestic investments. There is need to examine the potential impact of rising trend in overseas FDI on domestic investment, growth and employment.

It should be examined against the benefits that domestic companies gain somewhere else in terms of expanded market base,

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<sup>3</sup> Dr. O. S. Deol, *Outward Foreign Direct Investment from India*, IOSR Journal of Business and Management

<sup>4</sup> *ibid*

backward and forward vertical integration and economical skilled labour<sup>5</sup>.

Globalisation *refers to the integration of markets in the global economy, leading to the increased interconnectedness of national economies*<sup>6</sup>. Globalisation is common in financial markets such as money markets, capital markets and insurance markets.

Globalisation has increased at an accelerated rate due to improvements and advancements in communication technology, transportation, global interactions, global initiatives, online banking, increasing capital mobility, increase of MNCs and TNCs<sup>7</sup>. Liberalisation of the state policies also play a huge role in increased global activities. Another interesting factor for increasing globalisation is social media, where producers can use tools such as micro-marketing to target international consumers.

FDI plays a direct role in growing a business globally. It provides firms with new markets, leads to tax reductions, tax rebates, and provides cheaper production facilities<sup>8</sup>. On the other hand, the companies receiving investment get access to new resources, funding, new technology etc. FDI reduces the pressure by the government in a state on the local production, introduces opportunity

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<[http://www.economicsonline.co.uk/Global\\_economics/Globalisation\\_introduction.html](http://www.economicsonline.co.uk/Global_economics/Globalisation_introduction.html)>

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

<sup>8</sup> Sunanda Sharma *Role of Foreign Direct Investment In Inclusive Globalisation* Vol.1 No. 3, [March 2012], IJSSIR

for co-production and joint ventures with other partners situated globally.

FDI helps in economic growth of countries and helps increase employment ratio of the said countries by introduction of and enhancement/ improvement of companies and helps smaller as well as medium sized companies to increase their business globally. It also helps them to compete with international corporations.

With the concept of Liberalisation in the countries, new and developed policies, international treaties, conventions, circulars, tariff, easement on restrictions and privatization of companies have led to increased globalisation in the field of FDI.

Countries, by way of FDI, optimizes their financial status and helps increase business in a wider market. Investments also help the companies pay for advertisements, better quality of raw materials and enhanced technology by which they are able to increase the market scope, provide better products and aim higher. India ranks 15<sup>th</sup> in service output based on FDI and provides employment to 23% of citizens. These employment sectors include hotels, restaurants, fast food chains, insurance, financing, real estate, trade, communication, business services etc.

Some basic facts to be noted here are that 2/3<sup>rd</sup> of the foreign investment is used on machinery, buildings and equipments. Also, a large proportion of these are investments are divided among large multi-national corporations<sup>9</sup>.

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<sup>9</sup> Ibid

However, there is always a threat in FDI since many companies which produce products such as hi-tech products experience variations in profits since the demand for their products in a market keep fluctuating. Another risk that is usually experienced by small and medium companies is that due to investment they may produce more products than are needed or bought by the consumers. This usually happens due to smaller market or unwanted product. Some products require significant development time before the benefits can be reaped from it.

One crucial indicator of economic crisis is corruption. Corruption is considered not only as a moral wrong, but also as a major factor causing economic inequalities. It is measured by using corruption perception index by Transparency International. Corruption prevents efficient and fair market. According to recent studies conducted in 2017, India ranks 81 in global Corruption Perceptions Index, whereas China ranks 77 and New Zealand ranks on 1<sup>st</sup> position out of 180 countries, indicating the lowest accounted rate of corruption in the world<sup>10</sup>. The analysis also shows that countries indicating worse level of corruption have least protection and least number of NGOs.

In India, the inward investment is highly centralized to three hemispheres, namely, agriculture sector, industry sector and services sector. In 2017-2018, the agriculture sector of India grew by 2.1%, the industry sector by 4.4% and service sector

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<[https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](https://www.transparency.org/news/feature/corruption_perceptions_index_2017)>

grew by 8.3%.<sup>11</sup> This is mainly due to the inflows of FDI investments and has helped increase salary and quality of living of workers.

Overall, globalisation has a positive impact on FDI since globalisation promotes FDI and in return FDI helps promote globalisation. FDI, thus, represents the peak of globalisation and, therefore, the world economy, causing a growing movement of capital across country borders, thus aiding developing countries and providing various incentives to the investing companies which they might not have gotten in their own nation.

## Regulatory and Statutory Framework of FDI

Ever since the economic crisis of 1991, India has moved from a partial liberal policy of FDI to a liberal and open door policy which came into effect in the early 1990s. India needed investors to generate inflows into the economy since the economic crisis had rendered the financial position weaker than ever. One of the most important laws made after the independence of India was Foreign Exchange Regulation Act, 1947, which was later repealed and replaced by Foreign Exchange Management Act, 1999. Before the introduction of FEMA, FERA<sup>12</sup>

was proved to be significant, due to various provisions, some of which are –

- Section 2(h) - definition of “foreign exchange”.
- Section 2(p) – definition of “person resident in India”
- Section 6 – definition of “Authorized dealers in Foreign exchange”
- Section 8 – restrictions on dealing in foreign exchange
- Section 9 – Restrictions on payment
- Section 13 – Restrictions on import and export of certain currency and bullion
- Section 19 – Regulation of export and transfer of securities
- Section 29 – Restrictions on establishment of place of business in India

FEMA<sup>13</sup> provides for the regulation and management of foreign exchange. Some of the important provisions of FEMA include: -

- Section 3 – Dealing in foreign exchange
- Section 4 – Holding of foreign exchange, etc.
- Section 7 – Export of goods and services
- Section 8 – Realization and repatriation of foreign exchange
- Section 13 – Penalties ( and contravention)
- Section 42 – Contravention by companies

<sup>11</sup> *Agriculture sector to grow 2.1%: Can it double farm income by 2022?*, 01:27, Jan 29, 2018  
Economic Times

<<https://economictimes.indiatimes.com/markets/stocks/news/agriculture-sector-to-grow-2-1-can-it-double-farm-income-by-2022/articleshow/62692884.cms>>

<sup>12</sup> The Foreign Exchange Regulation Act, 1947 [ACT, No. VII of 1947]

<sup>13</sup> The Foreign Exchange Management Act, 1999 [ACT, No. 42 of 1999]

The Supreme Court of India, in *Natwar Singh v. Director of Enforcement*, analysed FEMA as:

“FEMA is a self-contained and special legislation dealing with the Foreign Exchange management. It essentially deals with regulation and management of the Foreign Exchange. The provisions of the Act mandate that save as otherwise provided in the Act, rules or regulations made thereunder or with the general or special permission of the Reserve Bank, no person shall deal in or transfer any Foreign Exchange or foreign security to any person not being an authorised person; make any payment to or for the credit of any person resident outside India in any manner; receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner; enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India in any manner. It is further provided that no person resident in India shall acquire, hold, own, possess or transfer any Foreign Exchange, foreign security or any immovable property situated outside India. That if any person contravenes any provision of the Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under the Act, or contravenes any condition subject to which an authorization is issued, he shall, upon adjudication, be liable to a penalty. For the purpose of adjudication, the Central Government may, by an order, appoint officers of the Central Government as the Adjudicating Authorities for holding inquiry in the manner prescribed after giving the person alleged to have committed contravention against whom a complaint has been made, a reasonable

opportunity of being heard for the purpose of imposing any penalty.”<sup>14</sup>

Important provisions of FEMA include: -

- Section 4 – Holding of foreign exchange
- Section 6 – Capital account transactions
- Section 8 – Realization and repatriation of foreign exchange
- Section 14 – Enforcement of the orders of Adjudicating Authority
- Section 39 – Presumption as to documents in certain cases
- Section 42 – Contravention by companies
- Section 47 – Power to make regulations

### Master Circular of Reserve Bank of India Regarding FDI

Master Circular is issued by RBI on 1<sup>st</sup> July every year to inform government, commercial banks and general public about the monetary policies and economic indicators applicable on the whole country.

FDI in India is undertaken in accordance with the FDI policy formulated and announced by the Government of India. Every year “Consolidated FDI Policy Circular” is issued by the government on 31<sup>st</sup> March describing the policy and the process to be followed with regard to the FDI Policy in India. Foreign Exchange Management Act, 1999 (FEMA) provides regulations prescribing mode of investments, pricing guidelines, issue or

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<sup>14</sup> (2005) 11 SCC 552



acquisition of shares etc.<sup>15</sup>. The Reserve Bank of India issues notifications based on FEMA, which is amended from time to time.

**Routes-** under FDI Scheme, investments can be made in debentures, shares and convertible preference shares of a company by non-residents by two routes, i.e. automatic route and government route. The former does not require the prior approval from RBI or Government of India, whereas the latter does require the prior permission of Government of India (Foreign Investment Promotion Board, i.e. FIPB, Department of Economic Affairs, i.e. DEA, Ministry of Finance or Department of Industrial Policy and Promotion)<sup>16</sup>.

### Eligibility<sup>17</sup> –

- A person resident outside India or an entity incorporated outside India, can invest in India, subject to FDI Policy of Government of India.
- A citizen of Bangladesh or an entity incorporated in Bangladesh can invest in India with prior approval from FIPB.
- A citizen of Pakistan or an entity incorporated in Pakistan can invest in India with prior approval from FIPB, subject to prohibitions applicable to all foreign investors in

India and India Company, and must not be engaged in sectors or activities pertaining to defense, space and atomic energy.

- NRIs, resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan can invest in form of shares and convertible debentures of Indian Companies under FDI Scheme, subject to the condition that the consideration must be paid only by way of inward remittance in **free foreign exchange** through normal banking channels.
- Overseas Corporate Bodies have been de-recognized as a class of investors with effect from September 16, 2003, however, OCBs which are incorporated outside India and are not under adverse notice of RBI can make investments as incorporated non-resident entities, with prior approval from Government of India.

The master circular also contains provisions regarding the type of instruments to be used, pricing guidelines, mode of payment, foreign investment limits, prohibited sectors and investments in MSEs as well as mode of investment under FDI Scheme.<sup>18</sup>

### FDI Policy of 2017

The FDI Policy of 2017 incorporates various features and has proved to be a boon for the Indian economy. In 2016-17 the FDI inflows under Modi Government was 60.1 billion<sup>19</sup>.

<sup>15</sup> Master Circular No. 15/2014-2015, Reserve Bank of India  
<[www.rbi.org.in/scripts/BS\\_ViewMasCirculardetails.aspx?id=9006](http://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9006)>

<sup>16</sup> Ramni Taneja *Foreign Direct Investment and Globalization*, Eastern Book Company Lucknow (2014)

<sup>17</sup> Ibid, 14

<sup>18</sup> Ibid, 15

<sup>19</sup> Rishab Shroff, *India announces new Foreign Direct Investment Policy, 2017-2018* India Corporate Law (September 6, 2017)

This rate has been seeing steady growth and the FDI Policy and Scheme governing the overseas inflows and outflows have been carefully amended from time to time. The Department of Industrial Policy and Promotion (DIPP) issued the FDI policy of 2017 on 28<sup>th</sup> August, 2017.

Some of the important amendments of the policy were as follows<sup>20</sup> –

- Abolition of Foreign Investment Promotion Board (FIPB) and introduction of Foreign Investment Facilitation Portal (FIFP)
- Introduction of Competent Authorities including DIPP
- DIPP has introduced ‘Standard Operating Procedure’ (SOP) with detailed procedures for processing of FDI proposals.

### Judicial Interpretation of FDI Policy

After the commencement of liberalization in 1991, there have been manifold increase in FDI regulation framework. One of the major and primary source of the regulations is Foreign Exchange Management Act, 1999 (FEMA) accompanied by various circulars and notifications issued by the RBI. To practice in court with respect to FDI and globalization, one needs to have knowledge of the FDI policy of India and FEMA<sup>21</sup>.

The economic policy is seen as a “Pristine preserve of the government of India”<sup>22</sup>.

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<<https://corporate.cyrilamarchandblogs.com/2017/09/india-announces-new-foreign-direct-investment-policy-2017-2018/>>

<sup>20</sup> Ibid

<sup>21</sup> Ibid, 16

<sup>22</sup> Ibid, 16

In the landmark case of *BALCO Employees’ Union of India v. Union of India* (BALCO case)<sup>23</sup>, the Supreme Court of India uses a conservative approach and quotes:

“Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to “trial and error” as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed.”

One of the major concern persisting between the prospective overseas countries who want to invest in Indian Companies is the prolonged time period of dispute resolution when a case goes to courts. In India, there are only 18, 000 judges and more than 50 million cases, 50% of which have been going on for more than a year and 40% of that have been going on for more than 5 years<sup>24</sup>. Seeing the overburdened judges and the time wasted on soliciting relief, more

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<sup>23</sup> (2001) SCC, 333, 362: AIR 2002 SC 350.

<sup>24</sup> Spoken by Justice T S Thakur, *More FDI only If Judiciary Is Effective: CJI* (October 24, 2016 9: AM), Livelaw

<<https://www.livelaw.in/fdi-judiciary-effective-cji/>>

and more people are seeking mediation, conciliation and arbitration. The recent amendments made in Arbitration and Conciliation Act are seen as a relief to settle cases in a hassle-free and timely manner.

The judgment in the Vodafone Case is has huge implications for foreign direct investment (FDI) in India since it enables serious investors like Vodafone - who are interested in investing hugely in India - to buy shareholdings held abroad without fear of the taxman.

Vodafone had bought Indian mobile operator Hutch through \$11.2 billion deal in May 2007. Through companies based in Netherlands and Cayman Islands, Vodafone acquired 67 percent in Hutchison-Essar Ltd (HEL) from the Hong Kong-based Hutchison group. The Indian IT department demanded Rs. 11,000 crore in taxes claiming that though the deal happened abroad, the underlying assets were Indian and hence liable to taxes as applicable here. The taxman won his case in the Bombay High Court, and Vodafone was asked to pay Rs 11, 000 crore. When the company appealed to the Supreme Court, it had to deposit Rs 2,500 crore and provide a bank guarantee for the balance Rs 8,500 crore .Both the money and the bank guarantee will have to be returned as the court has made it clear that "Vodafone has no obligation under section 163 clause 1 (c) of Income Tax Act. "In its verdict delivered on Friday, a three-judge Supreme Court bench headed by Chief Justice Sarosh H Kapadia said that the income-tax department has "no jurisdiction" to tax an overseas transaction

between companies incorporated outside India<sup>25</sup>.

## Protection of FDI and Foreign Investors

One of the leading features of globalization is the cross border movement of capital. Simply companies or multinational corporations invest in different countries. For a company going to make investment in other countries may face many risk factors.

Uncontrollable events especially those related with discretionary actions by the foreign government may make its investment unsafe. To avoid such situations and to ensure safety for overseas investment of the domestic companies, a government can get into a bilateral agreement with a foreign government. These bilateral agreements are called Bilateral investment Treaties (BITs) or Bilateral Investment Promotion and Protection Agreements (BIPAs)<sup>26</sup>.

Bilateral Investment Promotion and Protection Agreements (BIPAs) are agreements between governments of two Countries for the reciprocal

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<sup>25</sup> *Vodafone verdict: SC puts FDI welcome mat back In place* ( December 20, 2014 06:14:58 IST) Firstpost <<https://www.firstpost.com/business/vodafone-verdict-sc-puts-fdi-welcome-mat-back-in-place-189122.html>>

<sup>26</sup> *Tojo Jose What are Bilateral Investment Promortion and Protection Agreements (BIPAs)?* (January 10, 2016) IndianEconomy: Economy & Finance < [www.indianeconomy.net/splclassroom/what-are-bilateral-investment-promotion-and-protection-agreements-bipas/](http://www.indianeconomy.net/splclassroom/what-are-bilateral-investment-promotion-and-protection-agreements-bipas/)>

promotion and protection of investments in each other's territories by individuals and companies situated in either State. They provide treaty based protection to foreign investment. The BIPAs are thus bilateral agreements by countries to protect the investment by each country's investors in the other country<sup>27</sup>. BIPAs are now instrumental in giving safety and mutual trust simultaneously for cross national investors. Though the BIPAs are signed by governments, the beneficiaries are business entities. Investment protection is given for investment by companies in other countries. There is substantial economic logic in crafting BIPAs. All investors are seeking those investment destinations which provide most protective, hospitable and profitable climate for their investments<sup>28</sup>. Similarly, countries would like to project themselves as investment friendly destinations to attract more foreign investment. Because of these two, large numbers of BIPAs are signed globally. From the Indian angle, bilateral investment treaties not only encourage capital flows into India but also provide safe business environment for Indian investors abroad. By March 1994, India signed the first BIPA with UK, which

had first raised the demand for such an investment protection pact. Similar agreements were to follow soon the same year with Russia and later with Germany, Malaysia, Denmark and other countries. By 2010, India signed up with 72 countries and enforced these agreements too and another 11 were signed but are yet to be enforced.

### Impact of Various Laws on FDI

Various laws govern and regulate the provisions and working of FDI in India. Some of these important laws include Indian Contract Act, 1872, Sale of Goods Act, 1930, Information Technology Act, 2000 and Indian as well as International Environment Laws and Conventions.

- Indian Contract Act, 1872 – Drafted by the British Empire, the Indian Contract Act of 1872 holds immense significance in today's world. The Indian Contract Act stipulates the essentials of a valid contract, distinction between valid, void and voidable contract, free consent etc. form crucial aspects and structure of FDI policy and norms followed in the country.

Certain important provisions of the Indian Contract Act, 1872 include: -

➔ “Section 2. Interpretation-clause -

- In this Act the following words and expressions are used in the following senses, unless contrary intention appears from the context:

<sup>27</sup> Ibid

<sup>28</sup> Ibid, 23

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that either to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made, signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called "promisee",

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

(f) Promises which form the consideration or part of the consideration for each other, are called reciprocal promises;

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.”

Some other sections of grave importance to FDI mechanism include free consent

(section 14), undue influence (section 16), coercion (section 15), Fraud (section 17), misrepresentation (section 18), mistake (section 19), lawful objects (section 23), Agreement in restraint of trade void (section 27), agreement in restraint of legal proceedings (section 28), agreements void for uncertainty (section 29) and agreement to do impossible act (section 56), compensation for loss or damage caused by breach of contract (section 73).

- Sale of Goods Act, 1930 – Section 12(2) and 12(3) state the definition of condition and warranty and section 55-60 provide remedies of breach of contract to both the buyer and the seller

1. Section 55 – a suit for price by the seller against the buyer
2. Section 56 – a suit for price by the seller against the buyer for non-acceptance of the goods
3. Section 57 – a suit for damages by the buyer to the seller for the non-delivery of the goods
4. Section 58 – a suit for specific performance by the buyer against the seller
5. Section 59 – a suit by the buyer against the seller for breach of warranty
6. Section 60 – a suit for damages by the seller or the buyer for anticipatory breach of contract

- Information Technology Act, 2000 –

1. Section 2 (i), (j), (k) and (l) provide definitions concerning computer, computer network,

- computer resource and computer system. All of which become important for FDI management.
2. Section 65 of IT Act, 2000 stipulates penalties and imprisonment for tampering with computer source documents.
  3. Section 72 deals with the question of breach of confidentiality and privacy and provides penalties.
  4. The act also highlights provisions dealing with Digital signatures and electronic signatures, electronic governance, attribution, acknowledgement and dispatch of electronic signatures, regulation of certifying authorities etc.
- Environment Laws – Various Indian as well as International environment laws and conventions such as Environment Protection Act, 1986 (EPA) Hazardous Waste (Management and Handling Rules), 1989, Public Liability Insurance Act, 1991, Water (Prevention and Control Pollution) Act, 1974 help keep accumulation of hazardous materials on check and make sure that the nature isn't harmed. It helps make FDI in an environment friendly manner. The EPA provides a framework for the central government to coordinate environment related issues and safeguard the natural resources in order to reassure that they are not exploited. The EPA empowers the government to take all necessary steps to ensure the protection and

improving quality of environment and controlling pollution that various MNCs (multinational corporations) tend to exploit or leaves the environment vulnerable to such exploitation. FDIs are usually invested while making sure that such conventions and laws are not broken and that the companies that are being invested in are in full compliance with the environmental norms and treaties signed by the nations.

To such an economy, disputes arising in the commercial world are going to be common. The Indian judicial system in its present state is in a chaotic situation already as being over burdened by pending cases and shortage of judges is adding up to this situation. ADR present a new way of resolving disputes outside the court resulting in a fast, effective and more efficient way and the win-win situation that mediation creates for both the parties is like a cherry on the top for people. The introduction of ADR mechanisms has revolutionized the grounds of dispute resolution. Providing a non-adversarial ground for dispute resolution, having high efficacy and being cost effective.

After the assessment the suggestions came up (also made by the Malimath committee<sup>29</sup>)

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<sup>29</sup> **Justice Malimath Committee Report (1989-1990)**<sup>29</sup>:

The committee did in-depth review of the court system and it underlined the need for ADR mechanisms. While studying the Alternative Modes and Forums for Dispute Resolution the committee supported the recommendations made in the 124<sup>th</sup> and 129<sup>th</sup> report of law commission to make necessary amendments to provide the court power for recommending or compelling the parties to opt for ADR methods (as private litigation or arbitration and mediation).

for **new and different procedural reforms and different legislative amendments and changes** for legalizing the use of mediation as a dispute resolution method along with other ADRs.

In this regard parliament enacted three acts:

- 1) Legal Services Authorities Act, 1987; Amended by legal services authorities (amendment) act, 2002;
- 2) Arbitration and conciliation Act, 1996; and
- 3) The Code of Civil Procedure (amendment) Act, 1999

## **The Arbitration and Conciliation Act, 1996**

The law governing the arbitration and conciliation in India is the Arbitration and conciliation act, 1996 (ACA). It became an act of the Indian Parliament with effect on 22 August 1996, attempting to effectively implements its liberal economic policies by the government and in turn attract the foreign investors and business communities. The Arbitration and Conciliation act also includes the rules and laws which may be required for international national commercial arbitration Section 2(f)<sup>30</sup>.

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The law commission in its 129<sup>th</sup> report<sup>29</sup> advocated the need for amicable settlements of dispute between the parties.

<sup>30</sup> "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is— (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other

India is party to 3 important international conventions:

1. The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (First Schedule of the Arbitration and Conciliation Act).
2. The Geneva Protocol on Arbitration Clauses, 1923 (second Schedule of the Arbitration and conciliation Act).
3. The Third Schedule includes Geneva Convention on the Execution of Foreign arbitral Awards.

**Mediation**, (another dispute resolution method) is an interactive and structured way of resolving the conflicts by the help of a neutral third party by opening new channels of communication and negotiation between the parties.

### **Advantages of Mediation:**

- 1.) Mediation proceedings are fair and party-centered in nature. Thus, giving the parties the power to control the decision of the dispute by self-determination.
- 2.) Mediation is voluntary and gives parties the opportunity to present their case in the manner they see fit.
- 3.) Mediation is a speedy, efficient, economic and flexible process which allows the parties to resolve the dispute by determining the terms of the

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than India; or (iii) 1 [\*\*\*] an association or a body of.. cont.

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individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country;

agreement in a crafty and in manner they deem fit.

- 4.) Mediation is a confidential process making it even more favorable process for the parties.
- 5.) Mediation creates a workable condition for both the parties rather than destroying the relationship between the parties. Also, mediation provides a full and final resolution without any further appeal revision or litigation against the terms of settlement.

### **Conciliation:**

Conciliation is a voluntary process and the conciliator has no authority to impose his/her solution on the parties. Like all the other ADR proceedings in conciliation the main spirit lies in the mutual determination of the parties to resolve the dispute. Conciliation may be defined as a non-adversarial and non-adjudicatory method for settlement of a dispute in which an impartial third party helps the parties to reach a mutually agreeable solution. The rules for conciliation are contained in the Arbitration and Conciliation Act 1996 (recently amended in 2015). Just like mediation the process of conciliation is flexible, voluntary-confidential and interest based process.



## **Sustainable development: the business perspective for environment and energy debate**

It has to be understood by all the key players of the FDI that there is a need to change the orthodox way of thinking and taking the environment and energy issues and globalization as isolated factors. The situation where all the players including the stakeholders, investors, governments and industries understand this would be an ideal situation and beneficial for all.

The business charter for the Sustainable Development introduced at the Second world Industry Conference on Environmental Management by the International Chamber of Commerce (ICC) in Rotterdam<sup>31</sup>, 1991 included the repercussions of the worldwide concerted efforts for the protection of environment, wherein an environmental codes of conduct and a principle of shared responsibility by the key players, government and industry is provided, the sense of legal nexus should be incited and should be carved into the very basis of the industry. The sense of corporate social responsibility was needed to be induced and it can best be achieved by an introspective view of business policies and adopting specific policies on the issue of environment. The importance of corporate understanding the environmental issues is even recognized by the World Trade Organisation (WTO) itself, in its founding document known as Marrakesh Agreement

<sup>31</sup>

[https://www.iisd.org/business/tools/principles\\_icc.aspx](https://www.iisd.org/business/tools/principles_icc.aspx)

the aspects of sustainable development and protection and preservation the environment has been discussed and emphasized upon.

Transboundary issues should be dealt effectively by voluntary participation and making regulations for the same. We are living in a world where most of the environmental problems are the result of the industries that are present now making it important to deal with the issues collectively and voluntarily rather than turning a blind eye towards the reality.

The temperament of development by sustainability was achieved by the corporate world and as we know the concept of sustainability cannot be addressed without dealing with the issues of environment change.

There had been global efforts by many to bring the concept of sustainable development in the corporate world. At first the Kyoto protocol conference in 1977 addressing the issues of GHG emission by reducing the same<sup>32</sup>. Some major conventions and treaties are<sup>30</sup>:

1. Stockholm declaration (signed by India in June 1972): the Stockholm declaration was the reason for the amendment of the Indian constitution took place wherein under the article 253 of the Indian constitution the Air (prevention and control) Act, 1981 (amended in 1987). Its main purpose was of it was the prevention, control and abatement of the air pollution. The Stockholm conference was also raised a little emphasis about the

<sup>32</sup> <https://unfccc.int/process/the-kyoto-protocol>

sustainable development in the future.

2. Montreal Protocol on Ozone depleting substances, 1985 (Signed by India in June 1992): in order to monitor the ozone layer depletion at an international level for the for the UNEP's (United Nations Environment Programme) world plan of action on the ozone layer. It was in 1981 that the governing council of the UNEP gave the authorization to draft a global framework convention on the stratospheric ozone protection. The Montreal protocol is responsible for the regulation of certain substances which result in the depletion of the Ozone. India as a part of this formed the Ozone Depleting Substances (Regulation and Control) Rules, 2000 under which there are categorized 95 ozone depleting substances according to their ozone depletion potential.
3. Helsinki Protocol on the reduction of Sulphur emissions or their transboundary fluxes, 1986. To control Sulphur emissions worldwide resulted into this Protocol.
4. The Vienna Convention, concluded in 1985: It was a framework agreement in which different nations and states agreed to cooperate and join their hand together for the research and scientific assessments of the ozone problem, to exchange information, and to adopt the

required measures to control the same.

5. Sofia Protocol to control the emissions of Nitrogen Oxides or their transboundary fluxes, 1988: this protocol deals with another harmful gas. The Protocol deals with the regulation of Emissions of Nitrogen Oxides or their Transboundary Fluxes.
6. United Nations framework convention on climate change, 1992 (signed by India in November 1993) UNFCCC, concluded at the "earth summit", held in Rio de Janeiro from 3 to 14 June 1992. The aim of this convention was to stabilize greenhouse gas concentrations in the atmosphere at acceptable levels preventing the dangerous anthropogenic interference with our climate system.

India ratified the Vienna Convention<sup>33</sup>, 1985 on 18<sup>th</sup> March 1991 and it came into force on 16<sup>th</sup> June 1991. The trend that can be observed is that there should be more and more emphasis on the implementation and strictness of the environment protection laws and the punishment being much stricter and harsher.

Even the **International Chamber of Commerce**<sup>34</sup> has set out a basic set of 16 Principles of environmental Management

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<sup>33</sup> The main motive of the Vienna Convention is a framework wherein the agreed parties do efforts to take appropriate measures in order to prevent the activities that harm the ozone

<sup>34</sup> A Non-Governmental Organisation

through its Business Charter for Sustainable Management<sup>35</sup>, these principles include:

1. The Corporate Priority
2. Integrated Management
3. Process of improvement
4. Employee education
5. Prior assessment
6. Products and services
7. Customer advice
8. Facilities and Operations

Also includes emergency preparedness, transfer of technology and contributions to common efforts *etc.*

Also the aspect of environmental diligence is taken into account as for an industry the public relations and its reputational issues are of utmost importance. A company, industry or an enterprise if has to survive in future than its reputation must be well maintained hence the investore should and also take due care before investing in any industry. According to “The Aon European Risk Management and Insurance Survey 2002-2003”, the loss of reputation is seen as the second biggest threat to business<sup>36</sup>.

As global trade and FDI evolving through the time the intricate legislations developing for the environmental prosperity have made the statute books more impactful against the business operations and further with effective implementations acts as a ground setter for further business relations. As the importance of India in global market is

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[https://www.iisd.org/business/tools/principles\\_icc.aspx](https://www.iisd.org/business/tools/principles_icc.aspx)

<sup>36</sup> <http://www.aon.com/2017-global-risk-management-survey/pdfs/2017-Aon-Global-Risk-Management-Survey-Full-Report-062617.pdf>

becoming more and more significant its extensively framed environmental laws are acting as a restriction factor for any further investment. The investors not only has to worry about the rules and framework presently there but also has to think about the future developments that may take place regarding the same.

But it also has its own advantages as the rules are extensively codified and the minimization of impact is taken more into consideration the investors can be of surety that the standards would be maintained and there would be no lacuna in the enforcement of the same.

## The concept of Corporate Governance

The subject of corporate-governance is one of the most important topics that has surfaced in recent years. Corporate governance is the system of rules, practices and processes by which a firm is directed and controlled. Corporate governance essentially involves balancing the interests of a company's many stakeholders, such as shareholders, management, customers, suppliers, financiers, government and the community<sup>37</sup>. The basic level of confidence in a company is associated to good corporate governance. FDI is not only provide capital funding but it also provides the skill-set the technology and other peripheral requirements that may be attached to such

<sup>37</sup>

<https://www.investopedia.com/terms/c/corporategovernance.asp>

activities and also provide the job opportunities.

## The relation of corporate Governance and FDI

The FDI inflows are very sensitive and responsive to the corporate governance being practiced in a particular economy.

The concept of corporate governance had its origin in India from the fraud of Satyam<sup>38</sup>. Any decision on investing is highly dependent on a number of key factors including<sup>39</sup>:

1. Assessment of internal resources.
2. Competitiveness
3. Market analysis
4. Market expectations

Some Corporate Governance Practices that influence the FDI are<sup>40</sup>:

1. Fraud Risk Management: Has serious repercussions on the market as the fairness of the market is decided on this basis.
2. Corporate Social Responsibility: These gain momentum in case of industries which affect the society or have polluting history in the past, the main essence is to give society back.

3. Risk management Practices: plays an important role in the stable and long lasting investment environment.
4. Performance Management System: The giant corporations and quality institutions always attract the FDI eg. IT sector of India.
5. Joint Venture Partners: the global village phenomenon has come up with joint ventures helps in cost cutting and other factors. The FDI inflows in these sectors are highly sensitive to the reliability and hope of good results.

## CONCLUSION

In conclusion the FDI in India continues to be local-market seeking in the first place, its world-market orientation has clearly increased in the aftermath of economic reforms. The view taken was found out to be true while not only the FDI and Globalization affects specific growth in different economic sectors it even led to development of the related rules, regulations, and statutory authority. India's Foreign Direct Investment (FDI) policy has been gradually liberalized to make the market more investor friendly. Another finding is even for FDI and Globalization the international institutions have taken care of the environmental protection aspects and its an increasingly supportive pillar for even the existence of a business company. India's

<sup>38</sup>

<https://www.thehindubusinessline.com/companies/how-satyam-scam-raised-the-bar-of-corporate-governance/article7085855.ece>

<sup>39</sup> EFFECTS OF CORPORATE GOVERNANCE ON FOREIGN DIRECT INVESTMENT Prof. Rupesh Kumar Gupta

<sup>40</sup> ibid



Foreign Direct Investment (FDI) policy has been gradually liberalised to make the market more investor friendly.