INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 5 AND ISSUE 7 OF 2025

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

A ROLE OF INTERNATIONAL COMMERCIAL LAW IN FACILITATING FOREIGN DIRECT INVESTMENT: A CRITICAL ANALYSIS

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BEST CITATION – ADITI SINGH BHATI & AQUEEDA KHAN, A ROLE OF INTERNATIONAL COMMERCIAL LAW IN FACILITATING FOREIGN DIRECT INVESTMENT: A CRITICAL ANALYSIS, INDIAN JOURNAL OF LEGAL REVIEW (IJLR), 5 (7) OF 2025, PG. 1027-1041, APIS – 3920 – 0001 & ISSN - 2583-2344

THE CONCEPT OF FOREIGN DIRECT INVESTMENT

3.1 Introduction

Since the liberalisation policy of 1991, India has increasingly focused on policy reforms and is now considered to be one of the most favoured destinations for foreign investment. During the past year, in a bid to enhance India's global competitiveness by creating a favourable investment climate, the Government of India (central government or DPIIT) has allowed foreign direct investment (FDI) up to 100 per cent under the automatic route in the telecommunications sector2 in line with previous efforts towards relaxing FDI caps in certain sectors, such as defence and insurance, and up to 20 per cent under the automatic route in the Life Insurance Corporation of India (LIC) (see further in Section II.i, below). The government is actively trying to reduce the compliance burden, as evidenced by the soft launch of the National Single Window System (NSWS) and the creation of a simplified governance regime through amendments to the Insolvency and Bankruptcy Code, 2016, such as the introduction of a pre-packed insolvency process.

Another endeavour to attract FDI is the launch of PM Gati Shakti, an integrated and unified national plan for multi-modal connectivity for infrastructure development across sectors such as transportation, power, gas and renewable energy, among others. Along similar lines, the government has also streamlined labour law in the form of four codes (substituting 29 separate labour legislations).[31] Consequently, India has witnessed a marked improvement in the Ease of Doing Business rankings (currently placed 63rd, moving up 79 places within five years), as per the World Bank's Doing Business Report of 2020.[32]

The foreign investment regime in India is primarily governed by:

the Foreign Exchange Management Act, 1999 (FEMA) and the rules and regulations issued under it, such as the Foreign Exchange Management (Non-Debt Instruments) Rules of 2019 (the NDI Rules);[33]

the Consolidated Foreign Direct Investment Policy, 2020 (the FDI Policy) dated 15 October 2020, issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, read with the Press Notes issued by the DPIIT to amend the FDI Policy; and rules issued by central government and regulations issued by the Reserve Bank of India (RBI) under FEMA (collectively known as the FDI Regulations).

The FDI Regulations provide for sector-specific conditions, including investment caps, and classify sectors into two routes: the automatic route and the government route. Under the automatic route, prior approval from the RBI or from the concerned government department or ministry is not required for foreign investments, whereas under the government route, prior approval from central government or the RBI, or both, is required for foreign investments. The FDI Regulations also prescribe a list of activities in which foreign investment is prohibited.

3.2 Recent developments in the foreign investment regime

FDI in the telecommunications sector Pursuant to an amendment to the NDI Rules dated 12 October 2021 read with Press Note No. 4 of 2021 (issued by the DPIIT on 6 October 2021), FDI up to 100 per cent is now permitted under the automatic route in the telecommunications sector, subject to licensing and other conditions as specified in the FDI Policy.[34]

Amendments vide Press Note No. 1 of 2022:

FDI in LIC

Pursuant to an amendment to the NDI Rules dated 12 April 2022 read with Press Note No. 1 of 2022 (2022 Press Note, issued by the DPIIT on 14 March 2022), FDI up to 20 per cent is now allowed in LIC under the automatic route, subject to certain conditions such as compliance with the Life Insurance Corporation Act, 1956 and the Insurance Act, as applicable.[35]

Share-based employee benefits to employees or directors outside India

Pursuant to the above-mentioned amendment to the NDI Rules, issuance of share-based employee benefits (SBEBs) by Indian companies to their own employees and directors or those of a parent company, joint venture (JV) or wholly owned overseas subsidiary who are resident outside India is subject to the following conditions, among others:

- prior government approval is required for issuing SBEBs to citizens of Bangladesh or Pakistan;
- prior government approval is required for issuing SBEBs in a sector that mandates government approval; and
- issuance of SBEBs must be in accordance with the applicable rules and regulations and sectoral caps.[36]

Amendment to the definition of 'convertible note'

Pursuant to the 2022 Press Note, the term of a convertible note is extended from five to 10 years so as to provide relief to start-ups to recover from the economic distress triggered by the covid pandemic.[37]

3.3 Privatisation – paving the way for foreign investors

Given that India is an emerging economy with a large working population, one of the primary focuses of central government is to tap into global investments and push India towards becoming the most favoured manufacturing hub across the globe. The 'Make in India',[38] 'Atmanirbhar Bharat'[39] and production-linked incentive (PLI)[40] schemes promulgated by central government act in tandem with the liberalised FDI Regulations in India, and have provided a much-needed impetus to economic growth.

Additionally, central government is looking towards disinvestments in public sector undertakings (PSUs) to potential foreign investors to reduce its fiscal deficit and to revive loss-making PSUs. Two key efforts in this direction are the strategic disinvestment of a 100 per cent government stake in Air India to Tata Group,[41] and the launch of an initial public offering of LIC.[42] The DPIIT further strategically disinvested its stake in Neelachal Ispat Nigam Limited to Tata Steel Long Products Limited.[43] Additionally, the Cabinet Committee on Economic Affairs gave its approval, in principle, for the disinvestment of Central Electronics Limited[44] and Pawan Hans Limited.[45] Further disinvestment processes are anticipated for certain PSUs, such as Shipping Corporation of India and a leading public sector bank.[46]

3.4 Distressed investments

There have also been certain marquee transactions by foreign investors for distressed assets, pursuant to the enactment of the Insolvency and Bankruptcy Code, 2016. Altico Capital India Limited, a non-banking finance company, was acquired by Ares SSG, a Hong Kong-based entity, for US$380 million.[47] ArcelorMittal and Nippon Steel, through a JV, participated in the successful resolution of Essar Steel India Limited.[48] The JV paid a consolidated sum of US$5.6 billion, which is to be divided between various creditors as per the approved resolution plan.[49] Another successful resolution process occurred in the case of Jet Airways (India) Limited, in which a consortium formed by a United Arab Emirates businessman of Indian origin and Kalrock Capital Partners Ltd emerged as the successful bidder for the defunct airline.[50]

Year in review

i Disclosure obligations under Companies Act in tandem with Press Note No. 3

The NDI Rules read with Press Note No. 3 of 2020 (Press Note 3) stipulate an obligation to obtain prior government approval for investment in equity instruments of an Indian company by an investor company incorporated or registered in a nation bordering India or a beneficial owner of such investment that is situated in or is a citizen of a nation bordering India. Non-compliance of the this obligation attracts penalties under Section 13 of FEMA. In a step further towards tightening the regulatory grip on investments from nations bordering India, the Ministry of Corporate Affairs (MCA) has implemented various amendments under company law in tandem with the Press Note 3 which, among other things, bring Indian investee companies under the scrutiny of disclosure mandates in relation to foreign investments from nations bordering India. The amendments are as follows.

Pursuant to an amendment to the Companies (Share Capital and Debentures) Rules, 2014 dated 4 May 2022, the transfer of shares to a person or entity from a nation bordering India shall require a declaration from the transferee to the Indian investee company stating that it is required to obtain government approval as per the NDI Rules and it has obtained the same. Further, a copy of the approval letter must be attached with Form SH-4 (Securities Transfer Form), which is to be submitted to the Indian company.[51]

Pursuant to an amendment to the Companies (Prospectus and Allotment of Securities) Rules, 2014 dated 5 May 2022, in the case of a private placement, the Indian investee company is required to ensure that no offer or invitation of any securities is made to any person or entity from a nation bordering India without having obtained government approval. Further, an investor from a nation bordering India is required to provide a declaration to the effect that it is required to obtain government approval as per the NDI Rules and that it has obtained approval and to attach the approval to Form PAS-4 (private placement offer cum application letter).[52]

Pursuant to an amendment to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 dated 30 May 2022, any compromise, merger, amalgamation or demerger between an Indian company and a company based in a nation bordering India requires a declaration from the foreign entity (at the stage of submitting an application before the National Company Law Tribunal) that it is required to obtain government approval as per the NDI Rules and that it has obtained approval. Further, the foreign entity shall attach a copy of the approval letter to Form CAA-16.[53]

Pursuant to an amendment to the Companies (Incorporation) Rules, 2014 effective from 1 June 2022, the subscribers and the first directors of a new company incorporated under the Companies Act are required to provide a declaration that they are required to obtain government approval as per the NDI Rules and that they have obtained approval. Further, they shall attach a copy of the approval letter to Form INC -32 (SPICe+).[54]

Pursuant to an amendment to the Companies (Appointment and Qualification of Directors) Rules, 2014 dated 1 June 2022, mandatory security clearance from the Ministry of Home

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Affairs (MHA) must be obtained and attached with the consent letter for the appointment of a foreign national from a nation bordering India as a director in an Indian company. Further, the foreign national shall provide a declaration in respect of having obtained government approval under the NDI Rules.[55]

3.5 Production-linked incentive scheme

To promote ease of doing business in India, central government launched the PLI scheme for large-scale electronic manufacturing on 1 April 2020, which provides an incentive of between 4 per cent and 6 per cent on the incremental sales of goods manufactured in India, and covers under target segments, to eligible companies, for a period of five years subsequent to the base year of 2019–2020.[56] To date, the PLI scheme has covered 14 sectors, including food processing, battery storage and pharmaceuticals.[57] The PLI scheme has revamped the manufacturing landscape of the Indian economy and has attracted several foreign investors across multiple sectors. A total of 95 applications have been approved under the PLI scheme for automobiles and auto components (including Suzuki Motor Gujarat Private Limited and Tata Motors Limited) and 61 for textiles (including Trident Limited, Monte Carlo Fashions Limited, etc.).[58] Pursuant to these favourable responses by central government, more than US$32 billion have been invested under the PLI scheme, including a 100 per cent FDI by an Israel-based entity in a textile plant in Gujarat.[59] It is key to note that the PLI scheme has substantially reduced import dependencies, particularly from China, and contributed significantly to economic growth by focusing on sectors that enable India to establish a strong foothold in the global value chain.[60]

3.6 National Single Window System

In furtherance of the ease of doing business and to strengthen certain other government initiatives, such as Make in India, Startup India and the PLI scheme, central government, introduced the NSWS in September 2021. The NSWS is a unified digital portal for filing all business approvals across various sectors under central ministries and state governments in a hassle-free and timely manner.[61] It is a single online interface to identify, apply and track approvals and registrations. It provides a host of online services to enhance transparency and ease the approval mechanism for investors.[62] The DPIIT has so far integrated online systems of 14 states and union territories and around 146 central approvals across 21 central departments and ministries have been enabled through the NSWS.[63] The first approval granted through the portal was on 11 January 2022 within 63 days of the application.[64]

3.7 Significant transactions and investments that have been consummated

Despite the economic shocks resulting from the covid-19 pandemic, the restrictions imposed by central government on investments from nations sharing land borders with India, and lately the supply chain disruptions trigged by the Russia–Ukraine conflict, India received the highest-ever total FDI inflow of US$83.57 billion in the 2021–2022 financial year (US$1.6 billion higher than financial year 2020–2021).[65] During the 2021–2022 financial year, FDI in India came from 109 nations, compared with 97 nations in the previous year.[66] There has been a substantial increase in FDI inflow in the manufacturing sector of 76 per cent compared with the previous financial year, with a significant portion of investments coming from Singapore, the United States and Mauritius.[67]

There was a significant increase in mergers and acquisitions (M&A) throughout the year as evidenced by a White & Case report recording 598 deals valued at a total of US$112.8 billion in 2021.[68] The two most prominent trends in the M&A regime in India in the previous year were increases in consolidation and disposals of non-core assets.

Among the various notable transactions during the past year is the acquisition of control and an increase in stake by Kubota Corporation in Escorts Kubota Limited.[69] PayU has agreed to acquire Billdesk for US$4.7 billion, which will be the largest deal in the payments space in India and the second largest buyout after Walmart's acquisition of Flipkart.[70] Further, Sumitomo Mitsui Financial Group, Inc acquired a 74.9 per cent stake in Fullerton India Credit Company Limited – one of the largest inbound control acquisitions from Japan.[71] Moreover, after further liberalisation of the insurance sector, Generali increased its stake in Future Generali India Insurance Company Limited to 74 per cent by acquiring a further 25 per cent stake.[72] Ahead of the 100 per cent FDI permissibility under the automatic route for the telecommunications sector, Google has proposed to invest around US$1 billion in Bharti Airtel and acquire a 1.28 per cent equity stake through an equity investment of US$700 million.[73] The more prominent private equity and venture capital investments for the year include investments in Flipkart by global investors including Walmart, Sovereign funds DisruptAD, Qatar Investment Authority,

Khazanah Nasional Berhad and Tencent.[74] Finally, Carlyle acquired a stake in Hexaware Technologies[75] and Blackstone Group acquired a controlling stake in ASK Investment Managers.[76]

3.8 Foreign investment regime

i Policy

Given that foreign investment is a significant factor in economic growth, the central government has liberalised foreign investments in most sectors over the years, and has permitted 100 per cent investment in several sectors under the automatic route (i.e., without prior government approval), except in those sectors involving security interests such as defence and space, larger public interest such as multi-brand retail, and sectors with data security implications. This can be observed from the fact that the RBI has mandated data localisation for financially sensitive data and strict action has been taken against certain multinational defaulters.[77]

All FDI proposals or transactions that fall under the government route are mandatorily required to be filed on the Foreign Investment Facilitation Portal (FIFP). Furthermore, as mentioned above, all foreign investment proposals (including changes in beneficial ownership, either directly or indirectly) from countries sharing land borders with India (i.e., Afghanistan, Nepal, Myanmar, Bhutan, Pakistan, China (including Hong Kong and Macau) and Bangladesh) will be mandatorily screened, regardless of whether the foreign investment is in a sector under the automatic route or the government route.[78]

3.9 Laws and regulations

The relevant laws and regulations have been mentioned in Section I, above. The DPIIT is the nodal authority for foreign investment in India. The DPIIT works under the aegis of the Ministry of Commerce and Industry and is responsible for, among other things, accelerating industrial development in India by facilitating investment in new and forthcoming technology, aiding ease of doing business in India, promoting FDI in India and supporting a balanced development of industries. The DPIIT works in tandem with the RBI and the relevant ministry or department in central government. For any type of foreign investment, there are certain mandatory requirements for reporting to the RBI that need to be complied with. Additionally, the Competition Commission of India (CCI) is India's antitrust regulator and plays an important part in screening foreign investment proposals that cross the threshold specified within the Competition Act, 2002 (the Competition Act) and the rules thereunder.

Depending on the sector, certain conditions may also be imposed by sectoral regulators. For example, the insurance sector is regulated by the Insurance Regulatory and Development Authority, the telecommunications sector is regulated by the Department of Telecommunications, the mining sector is regulated by the Ministry of Mines and the defence sector is regulated by the Ministry of Defence.

Voluntary screening

There is no voluntary screening requirement in India. However, if there are concerns about any interpretation issue in the FDI Policy, foreign investors may file representations to the DPIIT through industry bodies and seek informal guidance on the issues. Pursuant to this, a formal request for clarification can also be made to the DPIIT. The DPIIT in several cases has issued a clarification after receiving requests from industry bodies, as it has a wide outreach and affects a larger group.

Procedures

Investment in a sector requiring government approval

Any proposal for foreign investment in a sector or activity that requires prior approval from the government is to be filed on the FIFP in the prescribed format, along with the requisite documents specified therein. Once an application is filed on the FIFP in accordance with the DPIIT's standard operating procedures for processing FDI approvals, the proposal is sent to the relevant ministry or department by the DPIIT. The applicant is also required to submit a hard copy of the application to the relevant ministry, with supporting documents. The proposal is sent by the DPIIT to the other concerned stakeholders, such as:

- the RBI, to seek its comments in relation to FEMA;
- the MHA for security clearance; and
- the Ministry of External Affairs, for comments on the investor or beneficial owner.

The DPIIT, the relevant ministry or department (or all three) might also ask for additional clarifications with respect to the application. After collating the comments received from the relevant stakeholders, the DPIIT presents the same to an inter-ministerial committee, consisting of secretaries and representatives of various ministries and government departments, for its approval. Once the proposal is approved by the inter-ministerial committee, it is sent to the MHA for final approval. Thereafter, the approval letter is sent online by the competent authority to the applicant. Although the standard operating procedure prescribes a timeline of 10 to 12 weeks from the date of filing an application for the decision on the application to be communicated to the investor, it takes approximately six to nine months for disposal of such applications. The time taken by the applicant to provide clarifications or relevant documents to the relevant ministry or department is excluded from calculating the period within which the government is supposed to dispose of a proposal.[79]

Foreign investment proposals above 50 billion rupees, even in sectors falling under the approval route, also require approval from the Cabinet Committee on Economic Affairs.[80]

3.10 Sector-specific requirements

i Prohibited sectors

FDI is prohibited in certain sectors, such as lottery business, including a government or private lottery or online lotteries; gambling and betting, including casinos; trading in transferable development rights; real estate business or construction of farmhouses; and activities or sectors not open to private sector investment, including atomic energy and railway operations (that is, other than the permitted railway infrastructure).[81]

ii Restricted sectors

As previously mentioned, investments in certain sectors require prior government approval and for some sectors there are additional obligations. The prominent sectors that require government approval or have additional obligations include the following:[82] defence sector: FDI up to 74 per cent is permitted under the automatic route and beyond 74 per cent under the government route wherever it is likely to result in access to modern technology or for other reasons to be recorded. Such an investment is subject to security clearance by the MHA and as per guidelines of the Ministry of Defence; multi-brand retail trading sector: FDI up to 51 per cent is permissible under the government route provided the conditions relating to minimum foreign investment as specified are observed; insurance (apart from insurance intermediaries): currently, FDI up to 74 per cent is permitted through the automatic route. The law was modified on 19 August 2021 and is subject to sectoral regulations. The conditions and restrictions for FDI in the insurance sector have also been relaxed with effect from 12 April 2022; and brownfield pharmaceutical sector: FDI up to 74 per cent is permitted under the automatic route and beyond 74 per cent under the government route. FDI in this sector is subject to the specified restrictions and conditions, including restrictions on the incorporation of non-compete clauses in the relevant investment agreements.

Typical transactional structures

Foreign investors can establish their footprint in India either by:

- setting up a company in India, which may be a JV company or a wholly owned subsidiary; or
- acquiring a company in India.

When investing in India, foreign investors need to be mindful of compliance with the FDI Regulations, sector-specific legislations, the Companies Act and the Competition Act. Traditionally, foreign investors preferred investing in brownfield projects given that they were well-established projects in India and the compliance burden was lower compared with greenfield projects. However, with the implementation of the PLI scheme, India has seen a rise in foreign investments in greenfield projects, especially JVs. Whether it is a brownfield JV or acquisition or a greenfield JV, there are distinct advantages. Although a brownfield investment allows a foreign investor to utilise the existing manufacturing facilities and distribution channels of the entity, it is easier for a foreign investor to exploit market inefficiencies through a greenfield venture.

Given the fiscal impact of the pandemic on businesses across the globe, the focus has shifted to core business operations. Foreign investors are now unlocking capital by investing in core assets of Indian companies. There has been a significant rise in business transfer, slump sale or asset transfer arrangements to carry out divestment of non-core assets given that they are easier to be accomplished and can be completed faster than demergers. Business transfers that constitute a slump sale are also preferred because they have lower tax implications, giving sellers the opportunity to maximise value.

Set out below is a summary of legal considerations for foreign investors in India.

i Joint ventures

Two foreign companies can have a JV in India subject to the limitations prescribed in the FDI Policy as applicable.[83] JVs provide flexibility and ease of operation. Having a JV with an Indian entity allows the foreign investor to access the regional know-how of the market. It allows an investor to lower the risk and be better prepared to face the Indian market. In such cases, an Indian entity can provide access to the existing manufacturing facility and distribution network, and also have an insight into the spending habits of Indian consumers. There are various factors to be kept in mind that essentially help in the success or failure of a JV, including but not limited to the following:

- a credible business partner;
- a viable business plan;
- business activities and related opportunities;
- an optimal investment structure and inter se rights of the parties;
- a right management team; and
- a transparent operation.

There have been several successful examples of JVs between an Indian entity and a foreign investor, such as Maruti Suzuki. However, there are certain risks associated with the JV model, such as dilution in value on account of financial leakages, deadlock between the JV partners on critical operational decisions leading to arm-twisting tactics being used to force an exit of the partner, or to effect a change in control and management of the JV company.

ii Corporate law residency requirements

The Companies Act does not prohibit a foreign national from acting as director provided the company has at least one director who has resided in India for 182 days.[84] Appropriate relaxations were provided to the applicability of this provision owing to the covid-19 pandemic.[85] However, the appointment of a foreign national as a managing director or full-time director will need central government approval if their period of residency in India before appointment is less than 12 months.[86]

iii Rules pertaining to takeover bids by foreign companies

The Securities and Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the Takeover Code) governs the takeover regime in India. There is no material difference in its applicability to a foreign investor from a domestic investor. The Code was introduced with the objective of not only providing a transparent corporate governance system for takeovers involving listed entities, but also to protect the interests of the investors by allowing them an exit opportunity. The Takeover Code seeks to restrict and regulate both direct and indirect acquisition of control, shares or voting rights in a listed entity. If such an acquisition leads to a breach of threshold limits under the Code or there is change in control, the acquirer is obliged to make an open offer to the public shareholders to acquire their shares in the listed company. This ensures a fair and transparent exit mechanism for the shareholders. The Takeover Code also allows another prospective acquirer to make a counter offer, thereby ensuring fair and effective competition between acquirers.

Pursuant to an amendment dated 6 December 2021, SEBI amended the delisting framework under the Takeover Code, which provided, among other things, that:

- if a prospective acquirer seeking to acquire control under Regulation 3(1), Regulation 4 or Regulation 5 of the Takeover Code is desirous of delisting the target company, the acquirer must propose a higher price for delisting with a suitable premium over the open offer price;
- if the delisting threshold of 90 per cent is met pursuant the open offer, all shareholders who tender their shares shall be paid the same delisting price – if the threshold is not met, all shareholders who tender their shares shall be paid the same takeover price;
- if a company is not delisted pursuant to the open offer under this framework, and the acquirer crosses 75 per cent because of the open offer, a period of 12 months from the date of completion of the open offer will be provided to the acquirer to further attempt delisting under the SEBI (Delisting of Equity Shares) Regulations, 2021 using the reverse book-building mechanism;
- in the event of a failure to delist during this extended timeline, the acquirer must comply with the minimum public shareholding norm within 12 months of the end of such period; and
    - if the acquirer, at the time of the open offer, states up front that it would opt to remain listed and the total stake at the end of the tendering period exceeds 75 per cent, the acquirer may opt for either proportionately scaling down the purchases made under both the underlying share purchase agreement and the shares tendered under the open offer in such a manner that the 75 per cent threshold is never

crossed. Alternatively, the acquirer shall have to become compliant with the minimum public shareholding within the time stipulated under the Securities Contracts (Regulations) Rules, 1957.

iv Other corporate structures for ownership

Apart from a company, another popular corporate structure for ownership is a limited liability partnership (LLP). Unlike a traditional partnership, partners in an LLP do not have a personal liability. Similar to a company, an LLP has a separate legal personality. There is no restriction on the type of business that can be carried out through an LLP. However, foreign investors can only invest in those LLPs where 100 per cent FDI is allowed under the automatic approval route and no sectoral conditions are applicable. Thus, an LLP cannot be used for every type of investment in India.[87] To further ease doing business and foster the start-up system in India, recent amendments have been introduced to decriminalise various minor, technical and compliance-related offences. These offences are now subject to an internal adjudication mechanism.[88]

Other strategic considerations

i Strategic considerations

There are certain factors that foreign investors should consider before investing in India, such as the key opportunity sectors in India; mode of investment; nature of business operations; FDI restrictions (if any) in the proposed business; approvals required from central government, the RBI or other sectoral regulators for setting up a business; availability of land; incentives being provided by various states in India; and special benefits and incentives for setting up a business in special economic zones. Furthermore, owing to the effects of the covid-19 pandemic, consolidation is occurring in various industries and behemoths are looking to sell non-core assets to raise liquidity for their core assets and to better manage their core assets. This can be a consideration for a foreign investor who is looking for a good bargain.

ii Merger control regime in India

Mergers and acquisitions in India are also governed by the Competition Act, and regulations and guidance notes issued thereunder. Sections 5 and 6 of the Competition Act require the pre-notification of all acquisitions, mergers and amalgamations where the turnover or assets of the parties and groups cross specified thresholds (collectively described as 'combinations') to the CCI, which is responsible for merger review that applies the standard of appreciable adverse effect on competition (AAEC). India follows a mandatory and suspensory merger control regime and notifiable combinations may not be completed in any way until clearance has been given by the CCI (or a 201-day long-stop period has passed without decision). Failure to notify and gun-jumping attract significant penalties.

The CCI's review process consists of two phases. In Phase I, the CCI will form its prima facie opinion of whether or not the combination is likely to cause or has caused an AAEC within the relevant market. If there are no prima facie AAEC concerns, the CCI will clear the combination. The substantive test employed by the CCI is whether the transaction causes or is likely to cause an AAEC in the relevant market in India. In undertaking the assessment, the CCI will look at a number of factors set out in Section 20(4) of the Competition Act, including market shares, barriers to entry, ability to raise prices after completion of the transaction and countervailing buyer power.

3.11 Conclusion

India has positioned itself as a lucrative destination for foreign investment. With notable growth in FDI inflows in entities such as start-ups across different sectors, amid the huge blow to the global economy triggered by the Russia–Ukraine conflict and the covid-19 pandemic, India has reinforced itself as a stable and reliable economy with vast potential for foreign investors to leverage investment opportunities in India. Various laws and policies, as discussed above, are strongly geared towards attracting foreign investment in India and positioning India as an important stakeholder in the world economy. The continued liberalisation, coupled with numerous economic reforms, is marked by a favourable growth in foreign investment in India. As an additional step towards Atmanirbhar Bharat, central government has launched PLI schemes to financially incentivise domestic manufacturing.

This has not only fostered India's integration into the global supply chain, thereby characterising it as a global manufacturing hub, but has also significantly contributed towards increasing foreign investment in the manufacturing sector. The launch of GatiShakti and the NSWS portal have enabled substantial progress in tackling infrastructural efficiencies and reducing costs to further enhance business systems and foster the ease of doing business. Thus, the policies and reforms are significantly aligned towards tapping global investments. Sectors such as automobile (particularly electric vehicles), chemicals, pharmaceuticals, healthcare and insurance are expected to witness exponential growth in the coming years in terms of FDI, marked by a series of structural economic reforms in India.

2000-2001 to USD 31,853 million in 2014, reaching a staggering USD 46,556 million in 2011-2012.[103] Unsurprisingly, the number of BITs in the world increased from 500 in the 1990s to more than 3200 BITs by the end of 2014[104]. UNCTAD has reported an increase in Investor-State Disputes from 50 in 1996 to 608 by the end of 2014.

4.16 The Sovereign Blow

India suffered its first investment arbitration award under the in White Industries v. India. It was a stunner to the unsuspecting Indian government. The ad-hoc UNCITRAL tribunal used the 'Most-Favored Nation' [MFN] clause in the India-Australia BIT to import the 'effective means standard' from the India-Kuwait BIT, and hold India liable for its excruciatingly slow judiciary. Shortly thereafter, India started receiving similar requests for arbitration under other international investment instruments. As a reactionary measure, the Indian government initiated the termination of around 57 BITs and vowed a complete revamp of its existing international investment regime[105].

India also commenced the process of reviewing its Model Bilateral Investment Treaty (BIT); which would replace the 2003 Model BIT as the fundamental text for negotiating investment treaties in the future. The Draft Model Bilateral Investment Treaty ("Model BIT") was released on 24th March 2015 for public consideration and comment. The Model BIT received mixed reviews from proponents, academicians and stakeholders.

An efficacious mechanism for redressal of investor-state disputes remains one of the primary objectives of entering into BITs[106].

END NOTES

31 Press Information Bureau, Press Release, 'Lok Sabha passes 3 Historic and path breaking Labour Codes' (22 September 2020), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1657898 (last accessed 12 February 2025).

32World Bank Group, Doing Business 2020, available at https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf (last accessed 12 February 2025). Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2021 (notified 12 February 2025).

34 id.; Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Press Note No. 4 (2021), 'Review of Foreign Direct Investment (FDI) policy on Telecom Sector' (6 October 2021), available at https://dpiit.gov.in/sites/default/files/pn4-2021_0.PDF (last accessed 12 February 2025).

35 id.; Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Press Note No. 1 (2022), 'Review of FDI policy for permitting foreign investment in Life Insurance Corporation of India (LIC) and other modifications for further clarity of the existing FDI policy' (14 March 2022), available at https://dpiit.gov.in/sites/default/files/Press_Note_1_2022_14March2022.pdf (last accessed 12 February 2025).

36 Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Press Note No. 1 (2022), Review of FDI policy for permitting foreign investment in Life Insurance Corporation of India (LIC) and other modifications for further clarity of the existing FDI policy' (14 March 2022), available at https://dpiit.gov.in/sites/default/files/Press_Note_1_2022_14March2022.pdf (last accessed 12 February 2025).

37 The Economic Times, 'Startups get up to 10 yrs for converting debt investment into equity' (20 March 2022), available at https://economictimes.indiatimes.com/news/economy/policy/startups-get-up-to-10-yrs-for-converting-debt-investment-into-equity/articleshow/90332410.cms (last accessed 12 February 2025).

38 Press Information Bureau, Press Release, 'Make in India' (24 March 2021), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1707197 (last accessed 12 February 2025).

39 Press Information Bureau, Press Release, 'English Rendering of Prime Minister Shri Narendra Modi's Address to the Nation on 12.5.2020' (12 May 2020), available at https://pib.gov.in/PressReleseDetail.aspx?PRID=1623418 (last accessed 12 February 2025).

40 Ministry of Electronics and Information Technology, 'Production Linked Incentive Scheme (PLI) for Large Scale Electronics Manufacturing' (notified on 1 April 2021), available at https://www.meity.gov.in/writereaddata/files/production_linked_incentive_scheme.pdf (last accessed 12 February 2025); Press Information Bureau, Press Release, 'Shri Piyush Goyal chairs the review meeting on Single window system for industrial clearances and approvals' (22 June 2021), available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1729456 (last accessed 12 February 2025).

41 Press Information Bureau, Press Release, 'Air India strategic disinvestment completed' (27 January 2022), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1792950 (last visited on 12 February 2025).

42 Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Press Note No. 1 (2022), 'Review of FDI policy for permitting foreign investment in Life Insurance Corporation of India (LIC) and other modifications for further clarity of the existing FDI policy' (14 March 2022), available at https://dpiit.gov.in/sites/default/files/Press_Note_1_2022_14March2022.pdf (last accessed 12 February 2025).

43 Press Information Bureau, Press Release, 'Strategic Disinvestment of Neelachal Ispat Nigam Limited (NINL) completed' (4 July 2022), available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1839113 (last accessed 12 February 2025).

44 Press Information Bureau, Press Release, 'Government approves strategic disinvestment of Central Electronics Ltd.' (29 November 2021), available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1776205 (last accessed 12 February 2025).

45 Press Information Bureau, Press Release, 'Strategic Buyer approved for disinvestment of Pawan Hans Limited' (29 April 2022), available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1821380 (last accessed 12 February 2025).

46 Press Information Bureau, Press Release, 'Expression of Interest for Sale of SCI' (10 December 2021), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1780125 (last accessed 12 February 2025).

47 Financial Express, 'Ares SSG Capital completes acquisition of Altico Capital' (12 March 2021),available at https://www.financialexpress.com/industry/ares-ssg-capital-completes-acquisition-of-altico-capital/2210865/ (last accessed 12 February 2025).

48 'ArcelorMittal and Nippon Steel complete acquisition of Essar Steel' (16 December 2019),available at https://corporate.arcelormittal.com/media/press-releases/arcelormittal-and-nippon-steel-complete-acquisition (last accessed 12 February 2025).

49 Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta (2020) 8 SCC 531.

50 Jet Airways, 'Order regarding approval of the resolution plan by the Adjudicating Authority (National Company Law Tribunal, Mumbai)' (30 June 2021), available at https://www.bseindia.com/xml-data/corpfiling/AttachHis/aee37070-c804-4ee6-b4b7-66e76f02dfbe.pdf (last accessed 12 February 2025).

51 Companies (Share Capital and Debentures) Amendment Rules, 2022 (notified on 4 May 2022), available at https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=Nzg2MjcwNzE=&docCategory=Notifications&type=ope n (last accessed on 10 February 2025).

52. Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022 (notified on 5 May 2022), available at https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=Nzg2MjU1Nzg=&docCategory=Notifications&type=ope n (last accessed on 10 February 2025).

53 Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 (notified on 10 February 2025), available at https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MTEwNjc1OTYz&docCategory=Notifications&type=op en (last accessed on 10 February 2025).

54. Companies (Incorporation) Second Amendment Rules, 2022 (notified on 20 May 2022), available at https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=OTk2MzQ2NzU=&docCategory=Notifications&type=o pen (last accessed on 10 February 2025).

55 Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 (notified on 1 June 2022), available at https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MTE1OTMyNDY3&docCategory=Notifications&type= open (last accessed on 10 February 2025).

Ministry of Electronics and Information Technology, 'Production Linked Incentive Scheme (PLI) for Large Scale Electronics Manufacturing' (notified on 1 April 2021), available at https://www.meity.gov.in/writereaddata/files/production_linked_incentive_scheme.pdf (last accessed 10 February 2025); Press Information Bureau, Press Release, 'Shri Piyush Goyal chairs the review meeting on Single window system for industrial clearances and approvals' (22 June 2021), available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1729456 (last accessed 10 February 2025).

Press Information Bureau, Press Release, 'Cabinet approves PLI Scheme to 10 key Sectors for Enhancing India's Manufacturing Capabilities and Enhancing Exports – Atmanirbhar Bharat' (11 November 2020), available at https://www.pib.gov.in/PressReleasePage.aspx?PRID=1671912 (last accessed 20 February 2025.

Invest India, 'Production Linked Incentive (PLI) Schemes in India', available at https://www.investindia.gov.in/production-linked-incentives-schemes-india# (last accessed 18 February 2025); Swarajya, 'Seven Foreign Companies Among 61 Qualify Under PLI

SchemeFor Textiles With Total Investment Of Rs 19,077 Crore' (15 April 2022), available at https://swarajyamag.com/news-brief/seven-foreign-companies-among-61-qualify-under-pli-scheme-for-textiles-with-total-investment-of-rs-19077-crore (last accessed 18 February 2025).

Press Information Bureau, Press Release, 'PLI Scheme and PM Mitra Parks will help Indian textile sector achieve the desired scale and size while also emerging as a strong competitor in the global market: Smt. Jardosh' (30 June 2022), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1838215 (last accessed 18 February 2025).

The Times of India, 'Mobile imports: PLI scheme has helped reduce India's dependency on China: says CRISIL report' (5 July 2022), available at https://timesofindia.indiatimes.com/gadgets-news/mobile-imports-pli-scheme-has-helped-reduce-indias-dependancy-on-china-says-crisil-report/articleshow/92685029.cms (last accessed 18 February 2025); Business Standard, 'PLI scheme to put India on firm footing in global value chain: Amitabh Kant' (22 July 2022), available at https://www.business-standard.com/article/economy-policy/pli-scheme-to-put-india-on-firm-footing-in-global-value-chain-amitabh-kant-122062201084_1.html (last accessed 18 February 2025).

61 National Single Window System, 'About us', available at https://www.nsws.gov.in/about-us (last visited on 01 September 2022); Press Information Bureau, Press Release, 'National Single Window System for Investors and Businesses Launched by Shri Piyush Goyal,' 22 September 2021, available at https://pib.gov.in/PressReleasePage.aspx?PRID=1756966 (last accessed 18 February 2025).

62 id.

63 Press Information Bureau, Press Release, 'e-investment' (23 March 2022), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1808809 (last accessed 18 February 2025).

64 The Economic Times, 'Most ministries, 400 more approvals on single window system by March 31' (9 February 2022), available at https://economictimes.indiatimes.com/news/india/most-ministries-400-more-approvals-on-single-window-system-by-march-31/articleshow/89459520.cms?from=mdr (last accessed 18 February 2025).

65 Press Information Bureau, Press Release, 'India gets the highest annual FDI inflow of USD 83.57 billion in FY21- 22' (20 May 2022), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1826946#:~:text=India%20has%20recorded%20highest%20ever,the%20Financial%20Year%202021%2D22 (last accessed 18 February 2025).

66 Press Information Bureau, Press Release, 'Foreign Investment Facilitation Portal (FIF) completes 5 years since Union Cabinet decision to abolish FIPB' (24 May 2022), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1827889 (last accessed 18 February 2025).

Press Information Bureau, Press Release, 'India gets the highest annual FDI inflow of USD 83.57 billion in FY21-22' (20 May 2022), op. cit. note 37, above.

68 White & Case, 'India M&A sets new records in 2021' (22 February 2022), available at https://mergers.whitecase.com/highlights/india-ma-sets-new-records-in-2021# (last accessed 18 February 2025).

69 Escorts Kubota Limited, Press Release, 'Escorts Limited & Kubota Corporation reinforce their long-standing partnership. Kubota increases its stake in Escorts Limited' (18 November 2022), available at https://www.escortsgroup.com/media-room/press-releases/escorts-limited-kubota-corporation-reinforce-their-long-standing-partnership-kubota-increases-its-stake-in-

escorts-limited.html (last accessed 15 February 2025).

70 The Times of India, 'In largest payment deal PayU parent acquires BillDesk for $4.7 billion' (1 September 2021),

available at https://timesofindia.indiatimes.com/business/india-business/in-largest-payment-deal-payu-parent-acquires-billdesk-for-4-7-billion/articleshow/85808245.cms (last accessed 15 February 2025).

71 Fullerton India, 'SMFG completes the purchase of 74.9% stake in Fullerton India'(1 December 2021), available at https://assets.fullertonindia.com/sites/default/files/Press-Release-Final.pdf?PwiattaHhSPNQJWM7dPom6qi8zecj3g5&_ga=2.238304576.1953206931.1657799041-48986581.1657799041 (last accessed 15 February 2025).

72 The Economic Times, 'Generali completes acquisition of 25% stake in Future Generali India Insurance from Future Group' (7 May 2022), available at https://economictimes.indiatimes.com/industry/banking/finance/insure/generali-completes-acquisition-of-25-stake-in-future-generali-india-insurance-from-future-group/articleshow/91401274.cms?from=mdr (last accessed 15 February 2025).

73 India Brand Equity Foundation, 'Foreign Direct Investment (FDI)' (last updated August 2022), available at https://www.ibef.org/economy/foreign-direct-investment (last accessed 15 February 2025); The Economic Times, 'Google to invest up to $1 billion in Bharti Airtel' (28 January 2022), available at https://economictimes.indiatimes.com/markets/stocks/news/google-to-invest-up-to-1-billion-in-partnership-with-airtel/articleshow/89170733.cms (last accessed 15 February 2025).

74 VCCircle, 'Flipkart Raises Fresh Funds For $37.6 Bn Valuation Ahead Of IPO' (12 July 2021), available at https://www.vccircle.com/walmart-s-flipkart-raises-3-6-bn-in-funding (last accessed 15 February 2025).

75 VCCircle, 'Investcorp Eyes India Private Equity Growth And Capital Boost For Online Retailer' (5 October 2021), available at https://www.vccircle.com/investcorp-eyes-india-private-equity-growth-and-capital-boost-for-online-retailer (last accessed 15 February 2025).

76 The Economic Times, 'Blackstone buys ASK, plans to tap global ties to grow Indian company' (14 February 2022), available at https://economictimes.indiatimes.com/markets/stocks/news/blackstone-buys-ask-plans-to-tap-global-ties-to-grow-indian-company/articleshow/89554627.cms?from=mdr (last accessed 15 February 2025).

77 Reserve Bank of India, Press Release, 'Reserve Bank of India takes supervisory action on Mastercard Asia / Pacific Pte. Ltd.' (14 July 2021), available at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR5309163E3DE3C9140A1A574D3647A0B9D8E.PDF (last visited on 15 February 2025).

Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

79 id.

Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Consolidated FDI Policy (15 October 2020), Paragraph 4.1.5, available at https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf (last accessed 15 February 2025).

81 Foreign Exchange Management (Non-debt Instruments) Rules, 2019, Schedule I.

Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

83. Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

84 The Companies Act, 2013, § 149(3).

85 Ministry of Corporate Affairs, General Circular No. 11/2020, 'Special Measures under Companies Act, 2013 (CA- 2013) and Limited Liability Partnership Act, 2008 in view of COVID-19 outbreak' (24 March 2020), available at: https://www.mca.gov.in/Ministry/pdf/Circular_25032020.pdf (last accessed 15 February 2025).

The Companies Act, 2013, Schedule V, Part I.

87 Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Press Note No. 1 (2011), 'Review of the policy on Foreign Direct Investment - Allowing FDI in Limited Liability Partnership firms - amendment to paragraphs 2.1, 3.3.5 and 3.3.6 of "Circular I of 2011 - Consolidated FDI Policy"' (20 May 2011), available at https://dpiit.gov.in/sites/default/files/pn1_2011_1.pdf (last accessed 15 February 2025).

88. The Limited Liability Partnership (Amendment) Act, 2021 (notified on 13 August 2021).

103 Fact Sheet on Foreign Direct Investment from April 2000 to December 2014. http://dipp.nic.in/English/Publications/FDI_Statistics/2014/india_FDI_December2014 .pdf.

104 Prabhash, Ranjan, India and Bilateral Investment Treaties: From Rejection to Embracement to Hesitance?Available at SSRN: http://ssrn.com/abstract=2728840 or http://dx.doi.org/10.2139/ssrn.2728840.

105 See P. 45, Para 1.31, Andrew Newcombe, Lluís Paradell, Law and Practice of Investment Treaties, Standards of Treatment, Kluwer Law International, Wolters Kluwer..

106 Article 2.4 of the Model BIT