CHAPTER -6

LEGAL REGIME REGULATING FOREIGN DIRECT INVESTMENT IN INDIA

6.1 Introduction

FDI is an important link between developing and developed states to meet their changing needs & demands and is a controlling ownership for a business situated in host state by an entity established in home state. In recent times, the flow of FDI has increased steadily from 1990s and as a result of which, the other types of capital flow such as equity fund, international debts, funds and grants have reduced. The flow of FDI in the present day is increasing because of two main factors 1) Liberalized policy framework in developing economy and 2) Expansion of Multinational Enterprises in developing states which helps all the states to proceed for more integrated global investment and production strategy.\(^1\) India being a developing economy must follow the same path to attract more FDI. Domestic capital is playing a vital role in economic development of India but alone it cannot fulfill the economic expenditure, in such situation FDI will complement the domestic capital to overcome the financial deficit condition. FDI helps host state by promoting sustainable growth, boosting country’s competitiveness, generating employment opportunities and reducing social & economic disparities. India like any other developing economy also needs FDI. To attract more FDI, India has liberalised its industrial policies as a result, it stands in 4\(^{th}\) place among the emerging economies and has become a favourable destination for FDI for the following reasons a) a world largest democracy with 1.2 billion people, b) stable political environment and responsive administrative set-up c) well established judiciary to enforce the rule of law and d) land of abundant natural resources & diverse climate.\(^2\)

6.2 Historical Growth of Foreign Trade in Ancient India

The first chapter has already explained the nexus between trade and investments as they are the two faces of the same coin. Trade is the most essential part of economic development of any state and India is not different. Trade is a part of industrial development which helps in disposal of goods manufactured by industries

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\(^2\)http://www.ministry of commerce and industry, Government of India, visited on 22/07/16 @4p.m
and industrial development depends upon internal and international trade. Indian overseas trade is as old as the Indus Valley Civilization and the relationship between Indian trade & foreign states in ancient time was very prosperous which is proved by the historical facts.\textsuperscript{3}

Dr. Sayce\textsuperscript{4} mentioned that the trade relationship between India and Babylonia must have been started in 3000 BC. According to him, it is proved by the facts that Indian teak was found in Babylonia which proves that India from time immemorial was having trade relationship with other states, it also says that India since ancient time is encouraging flow of goods which has led to the flow of capital in present day.

Another historian Mr. Lassen has mentioned that the Egyptians dyed their cloth with indigo and wrapped their mummies in Indian muslin cloth which proves that regular trade relationship between India & Egypt was established from ancient time.\textsuperscript{5} During this time, the exchange of goods between India and foreign states had encouraged close economic nexus as a result of which, even today, the foreigners are transacting international trade with India. When we look at the historical development of India’s foreign trade which started during Mauryan period where international transactions took place between India and other states like Syria, Egypt, Cyrene, Macedonia and Epirus. During this period, the entry of foreigners into Pataliputra\textsuperscript{6} had increased and in order to facilitate their trade and to administer their rights & obligations the Mauryan kings established a separate Municipal Board. These above facts highlights that India since ancient times has always opened its market for foreigners and their trade. The same footsteps have been followed even today but the transformation is we are not just welcoming the trade transaction but also allowing capital which is very much required for economic development of India at present.

During ancient period, kings had good trade relationship with Rome and the trade between Kushanas and Rome had reached its height. The trade relationship between India & China is not new, the historical records and the availability of the Chinese coin of 2\textsuperscript{nd} Century BC in Mysuru proves that the trade between India & China was well supported by both the countries. The Chinese silk conquered the

\textsuperscript{3}Radhakrishna Chaudhary, \textit{Economic History of Ancient India}, (Jananaki Prakashan, Patna & Delhi, 1982), at 144
\textsuperscript{4}Dr. Archibald Sayce, historian from Oxford University, 1845-1933
\textsuperscript{5}Supra Note 3, at 144
\textsuperscript{6}Capital city of Mauryan dynasty
world market and India played its role of being a facilitator to trader’s supply of silk to other states. India for many years played a vital role in Mediterranean trade as India was in direct contact with Far East countries and during this time the Indian foreign trade was carried through sea. The historian Prof. Rostovtzeff in his study has found that India supplied ivory, tortoise shell, pearls, etc to Egypt. Between 1st and 2nd century BC, the Greek marine traders undertook direct voyage to Indus delta, Gujarat coast and Malabar ports with the help of development of marine routes. During post-Mauryan period, Indian economy progressed because of flourishing foreign trade. The ancient India’s trade link with Western Asia is very old. Since 5th Century BC, there is a commercial link between West Asia and the present state of Tamil Nadu. The scope of international trade further increased and India’s trade connection with West Asia was the reason for alliance between Selucides Empire and Chandra Gupta Maurya which created a milestone in the history of Mauryan Empire. Indian trade with Rome had also increased as there was more demand for Indian luxury goods as a result of which marine trade between India and Rome was increased. The silk trade between Rome and India became possible when Rome diverted its sea route via East Coast of India to the ports of Malabar Coast and to the Westside. The Roman Empire during this period encouraged direct sea trade with India. In 25 BC, an expedition was sent by Augustus to secure sea route to India to increase its marine trade with India. The above data proves that the Indian foreign trade has not just emerged in new era but has its existence since time immemorial and it also proves that many states especially China had good international trade relation with India. Even today, India is one of the most favourable destinations where many foreigners are investing FDI.

The busy period of ancient Indian foreign trade began with the discovery of Mansoon, the Arabians & Indians used intervening seas as a highway for trade which was in turn a blessing in disguise for Indian international trade to flourish during the period. The diplomatic relationship between Ptolemies and Mauryan dynasty was a sequel to the regular commerce between India and Egypt. Athenaeus in his work describes the presence of Indian women, animals and spices in the

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7 Supra Note 3, at171
8 The Seleucid Empire was a Hellenistic state ruled by Seleucid dynasty during 312 BC to 63 BC
9 The founder of Roman Empire
10 Hippalus, a Greek navigator discovered the mansoon winds and the sea route to India across the Arabian Sea around 45AD
11 Royal family ruled Ptolemaic kingdom in Egypt from 305BC to 30BC
12 A Greek historian lived between end of 2nd and beginning of 3rd Century AD
procession of Philadelphens which proves that there was a close relationship between India and other foreign states. Arab acted as an intermediary between Eastern and Western states. In 1st Century AD, commercial activities between Arab states and India started, Indian goods found a ready market in West especially in Rome. The historical data by Pliny a historian, reveals that India alone took profit of £42,5000 by selling its goods at Rome.

Apart from China and Rome, India had good foreign trade transactions with Ceylon which was accessed by marine route from all parts of India. India has played a distinct role in foreign trade through marine routes with both East & West.

6.2.1 Trade Laws in Ancient India

The Smritis & Chanakya’s Arthashastra had prescribed various laws related to trade in India. According to these sources, there was a custom to impose just duties (tax) on the goods sold both by Indian & foreign traders without burdening them. This custom was followed for long time and became a trade practice which is followed even today, on the basis of this traditional practice, the customs duty is imposed by the government on traders who are liable to pay taxes as per the Customs Act 1962 in the present scenario. According to Narada writings, the goods imported from foreign states were not allowed if they had entered into India just for making profits. During ancient period, the foreign trade was encouraged in order to promote the Indian domestic goods in abroad. Even today Indian regulations follow these principles. The foreign trade is not just related for the protection of foreigner but also to protect our domestic market & local producers. The Indian FDI regulations also protect the interest of local producers while allowing FDI into India. The Vartta said that trade should be developed because it increases national wealth and the same was supported by Kautilya who said that internal & foreign trade must be subjected to payment of export and import duties as it gives revenue to the government. The ancient Indian economic history speaks only about export and import of goods but does not speak anything about the investments, as India was a rich country and there was no necessity of foreign investments for its economic development. As per Kautilya’s

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13Historian in Roman Empire between AD 23 and AD 79
14Ancient Vedic scriptures
15‘Varta of agriculture, cattle and trade’ means knowledge of economics which is included in Kautilya’s ‘Arthashastra’
16Supra Note 3, at 181
‘Arthasastra’ the principle of ‘National Treatment’ was accorded to foreign traders along with domestic trades during Mauryan period and kings had obligation to protect the interest of consumers in all circumstances.

The export and import activity of India was on high peak during ancient period. The literature related to Erythraean Sea speaks that South Indian trade was conducted via coastal line of South Arabia and Western India during 1st century AD. The Indian export goods included Ivory, tortoise shell, gems & precious stones which was the main source of revenue to the state. The above exported item had brought good foreign exchange to India and the export of mineral products brought huge foreign exchange currency to India during the same era. The literature source such as Junagadh rock inscription of Rudradaman enabled historians to make out the existence of good trade relationship between India and Rome. According to Mr. Pliny, the Indian export items drain Roman Empire nearly £22000000 per year which created economic crisis in Rome state. This proves that the huge quantity of import will always affect the economy. In the present situation, we have to learn from the historical facts that states should not import more goods as it affects their domestic economy and balance has to be maintained between export & import activities.

According to the Charter of Visnusena (592) AD, cited that as per the Indian foreign policy, the foreign merchants were given concession in trade matters but at the same time they were punished for offences committed by them. This indicates that the modern international principle of ‘National Treatment’ & ‘Preferential Treatment’ was well adopted in ancient India and there was a separate administrative machinery to take care of foreigner’s trade and their personal safety. The Indian foreign policy provided facilities to those who imported foreign goods which encouraged the Indian marine traders to involve in foreign trade. During ancient period, states took special care to expand foreign trade by controlling export and import business in India as a part of foreign policy and same was continued for a long time. Hence the foreign trade was encouraged in India. If the same foreign policy of protecting the interest of foreigners in host states is continued, it will encourage the foreign investors to invest

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18A name given by Greek and Roman to the Indian Ocean including Red Sea and Persian Gulf
19Supra Note 3, at 183
20Historian in Roman Empire between AD 23 and AD 79
21Refers to cases of weights and measure
more which will help the developing state to improve their economy with debt free capital.\textsuperscript{22}

6.2.2 Historical Antecedent of Flow of Foreign Capital into India

During British period, the flow of foreign capital into India in industrial ventures like tea & coffee, rubber, jute, indigo, machines, banking and railway was more as it was yielding more profits for foreigners especially British investors.\textsuperscript{23} According to the study conducted by Leland Hamilton Jenks, the flow of foreign capital into India during 1854-69 was about £150 million.\textsuperscript{24} In 1896, the survey conducted by Edward Crammond shows that the flow of foreign capital was Rs.441 Crores, later as per the survey of Sir George Paish during 1909-1914 about £365 million foreign capital entered into railway and tea plantation sector. In 1911 H.F. Howard estimated that £450 million foreign capital came into India and out of 450 million, a huge amount was invested in railway and local bodies.\textsuperscript{25}

Table-1 Estimation of flow of foreign capital into India 1870-1931\textsuperscript{26}

<table>
<thead>
<tr>
<th>Year of Estimation</th>
<th>Survey conducted by</th>
<th>Amount(Crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1870</td>
<td>Leland Hamilton Jenks</td>
<td>225.1</td>
</tr>
<tr>
<td>1896</td>
<td>Edward Crammond</td>
<td>441.0</td>
</tr>
<tr>
<td>1910</td>
<td>H.F.Howrd</td>
<td>547.8</td>
</tr>
<tr>
<td>1926-27</td>
<td>Dr. V.K.R.V.Rao</td>
<td>574.9</td>
</tr>
<tr>
<td>1928-29</td>
<td>The Economist</td>
<td>354.0</td>
</tr>
<tr>
<td>1929</td>
<td>G.D. Birla</td>
<td>1,000.0</td>
</tr>
<tr>
<td>1929-30</td>
<td>Findlay Shirras</td>
<td>481.0</td>
</tr>
<tr>
<td>1930</td>
<td>The Financial Times</td>
<td>583.0</td>
</tr>
<tr>
<td>1930</td>
<td>Sir, Robert Kinderslay</td>
<td>458.0</td>
</tr>
<tr>
<td>1931</td>
<td>Associated Chamber of Commerce of India &amp; Ceylon</td>
<td>1,000.0</td>
</tr>
</tbody>
</table>

During 1839, the Assam Tea Company, the first company in India to attract £5,00,000 foreign capital which was fully invested by the British investors.\textsuperscript{27} In 1910,

\begin{itemize}
  \item \textsuperscript{22}Supra Note 3, at 190
  \item \textsuperscript{23}K. Mathew Kurian, \textit{Impact of Foreign Capital on Indian Economy}, (People’s Publishing House, New Delhi, 1966), at 33
  \item \textsuperscript{24}Leland Hamilton Jenks, \textit{The Migration of British Capital 1875}, (London, 1938), at 208
  \item \textsuperscript{25}Supra Note 23, at 34
  \item \textsuperscript{26}Supra Note 23, at 35
  \end{itemize}
the Joint-Stock Company which was registered in London, established its subsidiary in India having capital of 2 Crores later increased to 30 Crores as the flow of foreign investment was increased. This is how slowly the foreign capital entered into plantation sector in India. During the middle of 18th century, the flow of foreign capital in banking sector was increased and later it was also allowed in construction of canals to rivers & irrigation sector also. Lord Dalhousie in 1853 made policy to encourage British private capital into India and as a result, a large amount of foreign capital was invested in India especially in railway sector\(^\text{28}\) and he also provided guarantee of interest of 5% for the capital invested in India which was given by the government. The idea behind providing guarantee to the investors was to assure them the protection of their investments in India. The idea of providing guarantee to the investments is followed in the present day as it is introduced by the World Bank through MIGA which is an agency established by the World Bank to guarantee the foreign investments against non-commercial risk which would be faced by the investors in host state. The researcher has discussed already about investment guarantee scheme in chapter four. During British period, investment in railway sector by the British was not to develop Indian economy but to gain more profits and to facilitate England trade with India.\(^\text{29}\) The impact of foreign capital on Indian economy during this period cannot be isolated from trade, the policies were framed by British Government was in such manner that the international trade must flourish between their motherland and India.\(^\text{30}\) The flow of foreign capital and commercial policies of British Government had adverse impact on indigenous enterprises due to high competition in market. The foreign investment-cum-trade system entirely had a bad impact on Indian handicraft industry as it failed to compete with low cost machine made goods of foreign company in the market and as a result of which the Indian artistic work was smashed and slowly it destroyed the Indian domestic economy. During British period, the foreign capital destroyed Indian economy in two ways a) foreign investment-cum-trade which was backed by British Government policies destroyed indigenous goods & stopped its export and b) foreign investment in those sectors which were the base for Indian export of goods & raw materials was earning

\(^{27}\text{Supra Note 23, at 36}\)
\(^{28}\text{Supra Note 23, at 43}\)
\(^{29}\text{Supra Note 23, at 45}\)
\(^{30}\text{Supra Note 23, at 47}\)
profit for British. This reveals that in British period, the foreign investments slowly started entering into India along with trade which destroyed Indian industries.

The foreign capital always creates apprehension of disinvestment and after India got its independence the process of disinvestment started in 1947. Between 1947 and 1952 nearly 66 companies brought over by Indians with Rs 58.6 Crores, underwent the process of disinvestment and the repatriation of foreign investment was about 53 Crores during 1948.\textsuperscript{31} When foreign investors are not confident about the investment policies, immediately they will withdraw their investments. The disinvestment of capital will always damage the economy of host state. Recently the Indian TATA Iron & Steel company established in England has decided to take back its investment in the above entity and the England Government made all efforts to stop the disinvestment.

**Table-2: Foreign Investment in India between 1948 and 1960 (Crores)\textsuperscript{32}**

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>206.0 (80.5%)</td>
<td>326.4 (83.3%)</td>
<td>376.8 (83.1%)</td>
<td>392.5 (82.1%)</td>
<td>398.8 (80.4%)</td>
<td>398.8 (79.7%)</td>
<td>398.8 (78.0%)</td>
<td>441.6 (78.0%)</td>
</tr>
<tr>
<td>US</td>
<td>11.2 (4.4%)</td>
<td>30.1 (7.7%)</td>
<td>39.9 (8.8%)</td>
<td>47.0 (9.8%)</td>
<td>57.5 (11.6%)</td>
<td>60.0 (12.0%)</td>
<td>67.6 (13.2%)</td>
<td>72.6 (12.8%)</td>
</tr>
<tr>
<td>Switzerland</td>
<td>5.4</td>
<td>6.0</td>
<td>6.6</td>
<td>8.2</td>
<td>6.7</td>
<td>6.8</td>
<td>7.6</td>
<td>8.9</td>
</tr>
<tr>
<td>West Germany</td>
<td>0.1</td>
<td>0.1</td>
<td>2.5</td>
<td>2.8</td>
<td>3.5</td>
<td>3.8</td>
<td>5.4</td>
<td>6.8</td>
</tr>
<tr>
<td>Japan</td>
<td>0.2</td>
<td>0.1</td>
<td>0.2</td>
<td>0.2</td>
<td>0.6</td>
<td>0.6</td>
<td>0.6</td>
<td>1.4</td>
</tr>
<tr>
<td>Pakistan</td>
<td>8.4</td>
<td>4.1</td>
<td>4.4</td>
<td>4.2</td>
<td>4.2</td>
<td>4.2</td>
<td>4.2</td>
<td>4.2</td>
</tr>
<tr>
<td>Other countries</td>
<td>24.6</td>
<td>25.3</td>
<td>23.1</td>
<td>23.2</td>
<td>24.8</td>
<td>26.2</td>
<td>26.8</td>
<td>30.9</td>
</tr>
<tr>
<td>Total</td>
<td>255.8</td>
<td>392.0</td>
<td>453.4</td>
<td>478.2</td>
<td>496.1</td>
<td>500.4</td>
<td>511.5</td>
<td>566.4</td>
</tr>
</tbody>
</table>

Source: RBI Bulletin from 1960 to 1962, RBI website

The above table reveals that during 1948-1960, the flow of foreign capital increased steadily even without liberalization policies. FDI in export sector is increasing as there is a demand for such products in global market and the MNCs will invest in product specialization which makes local companies to compete with them and sometimes it may destroy them.

\textsuperscript{31}RBI Estimation during 1953, Supra Note 23, at 72
\textsuperscript{32}Supra Note 23, at 74
States depending upon foreign assistance to develop their economy, this situation was experienced by India during Second Five Year Plan where the World Bank India’s Chief Creditor-States were met to discuss about the financial aid for economic development of India and decided to provide financial aid after analysing the policy framework of India. But in actual practice, the member states had got opportunity to pressurise Indian government to change its policies which were against MNCs. We can analyse that in the name of giving financial aid, other governments will interfere in internal affairs of host state. To avoid this, FDI is the best alternative as it is neither a debt nor an aid from foreign government hence there is no threat to domestic economy.

During Second Five Year Plan, serious foreign exchange crisis took place which lead to exhaustion of foreign exchange due to which import of goods such as machinery, capital goods, luxury consumption goods, huge quantity of food grains was increased as there was less production of above mentioned goods. The huge quantity of imports can be substituted by manufacturing the goods in India and to fulfil this, manufacturing sector shall be kept opened for FDI where MNCs will manufacture and the goods will be made available for consumption. If goods are manufactured in India obviously it will curtail import and help to maintain the balance of payment which is very much required for economic development. This can be achieved through FDI.

There is a question, whether FDI is necessary for economic development of states specially like India?, which is very rich with human and natural resource and other side there is a lack of domestic capital which can be complemented by foreign investment in the form of FDI. FDI has a close nexus with globalization which is a need of the hour and the liberalized foreign policy help states to become a part of globalization process. India has emerged as 4th largest growing economy in the world and attracting FDI on the basis of the following criteria:

i) Land of huge natural resources

ii) Liberalized and transparent foreign policies & incentives based schemes

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33 Supra Note 23, pp120 & 121
34 Supra Note 23, at 167
iii) Low cost and skilled labour force

iv) Quick responsive administrative set-up

v) Simplified tax structure

vi) Transfer of profits and account convertibility

vii) Stable political environment

viii) High purchasing capacity of consumers

India has become a favourite destination for FDI for the following reasons:

i) The manufacturing and service sectors have developed as a result of which the investment climate has improved

ii) Increased demand for export of goods from big industries

iii) Committed towards fiscal consolidation

iv) India’s fiscal policy able to manage the liquidity against the fall of capital flow

v) India holds ¼ of the global portfolio flows to MNCs in 2004

vi) India’s foreign exchange reserves are in excess of external debt of the country

vii) FDI performance of MNCs has improved

viii) India’s financial market has increased due to institutional framework and market infrastructure

ix) India has adopted international financial standards and best practices to suit global competitions

6.3 Binding Effect of International Investment Laws in India

The relationship between international & municipal laws is advocated by many jurists. All the states are bound to adopt international principles after ratifying the international treaties. Being a party to the treaty, states implements treaty provisions by following the various theories such as specific adoption theory, transformation theory, constitution theory, etc. To attract more FDI, India has adopted international standards which are incorporated in many investment treaties like BITs & RIAs which are discussed in third chapter. India being a signatory for international
investment treaties has obligations to implement it through national investment policy or foreign policies. To promote FDI, Government of Indian has adopted certain measures and established various authorities to regulate foreign investment activities in India. India has signed many BITs with other states or private entities to attract FDI which are discussed in the following section of the chapter. The chapter also explains about the various issues related to the flow of FDI into India and its impact on Indian economy.

6.3.1 Bilateral Investment Promotion & Protection Agreements (BIPA)

Bilateral investment agreements are defined as the agreement between two states for promotion and protection of investment in each other’s territory. The purpose of BIT is to create favourable environment for flow of FDI in host states. BITs are the basis for flow of FDI into India and laid down terms & conditions for promotion and protection of FDI. As per the data of Union Ministry of Commerce & Industry, India has signed a number BITs with many states and entities to attract FDI which has proved that India is moving ahead in global market to protect the interest of foreign investors to develop its economy. The investment agreements signed by India are called as Bilateral Investment Promotion & Protection Agreement (BIPA), the features of BIPA are as follows: 36

i) Identifies the parties to the treaty, date of enforcement and period of BIPA
ii) Defines ‘Investments’ & ‘Investors’
iii) Provisions relating to fair & equitable treatment for foreign investors
iv) Principles of National Treatment & MFN treatment
v) Provisions relating to repatriation of profits
vi) Just & Transparent administrative procedures
vii) Provisions related to expropriation of investment and fair compensation
viii) Clauses related to settlement of investment disputes in domestic courts or arbitration forum
ix) Termination clause

36 Supra Note 35, pp 290 & 291
India has signed 72 BIPA with many states till date to attract FDI in various sectors. The list of BIPA and the model text of India’s BIPA are found in the annexure of the research thesis or websites mentioned in the footnote.37

6.4 Indian Legal Framework on FDI

India, a developing economy is showing keen interest in competing with developed states in global market for which it needs a huge capital. As we know India has not yet achieved self-sustain economy till date due to economic & social factors and India has to depend upon external capital to some extent to achieve its economic goals. The external capital will flow into India when a stable and predictable legal framework is provided by the government which assure investors about the protection of their investment in India. The key factor to attract FDI is the liberalized economic policies related to investment, industries, licensing, finance, etc. Since 1990, Government of India has adopted liberal economic reforms to improve its economy as the whole world is moving towards New-Economic Reforms in the present era. India has framed industrial policies which are attractive for FDI in the form MNCs, Greenfield investments, Brownfield investments and Merger & Acquisition process. These industrial policies are discussed below.

6.4.1 Evolution of Industrial Policy

The Industrial Policy 1991 which forms the genesis of economic liberalization and laid foundation for flow of FDI into Indian economy. Indian industrial policy can be studied in three phases. First phase between 1948 and 1969- there was a cautious welcome to FDI which was meant for rapid industrialization. During this period the foreign firms were allowed to invest in few sectors such as fertilizers, machine tools and extensive concession and tax advantages were provided to attract MNCs in oil sector. Second phase- from 1969 to 1991- during this period Monopoly Restriction on Trade Practice Act (MRTP) 1969 and Foreign Exchange and Regulation Act (FERA) 1973 are enforced, under these legislations, restrictions were imposed on size of the industry, price of goods & service and FERA restricted the foreign equity flow upto 40%. A license was provided for technology transfer, royalty payment was fixed and the applicants were tied up with export obligations.38 In Third phase 1991-2000-the era of liberalization in Indian economy, India realised the significance of chain of

37http://www.finmin.nic.in/bipa/bipa_index, visited on 12/5/16 @ 5p.m
38Supra Note 35, at 79
liberalization, privatization & globalization mechanism which is considered as a
driving force of Indian economy and the present FDI Policy was rooted in 1991
liberal industrial policy. As per Industrial Policy 1991, FDI was allowed in automatic
route upto 51% in 35 high priority industries. The Foreign Technical Joint Venture
was also placed under automatic route with few restrictions.\(^{39}\) Fourth phase from
2000- India adopted globalization mechanism into its economy as a result of which
most of the FDI activities are placed under automatic route to facilitate and attract
more FDI into India.

**Relationship between Domestic Industrial Policies and FDI Policies**

In 2010, the Industrial Policy in India supported by specific investment
promotion and facilitation measures in particular to promote hardware and software
industry. This was implemented by Karnataka Government by establishing ‘Hi-Tech’
zone in Bengaluru at Electronic City.\(^{40}\) All these measure are adopted to provide
facilities to establish MNCs and to promote FDI in its economy. In order to encourage
software industry there must be a co-ordination between technology policy and FDI
policies, these policies shall be reviewed regularly to adapt to the requirements. To
maintain a balance between industrial policies and FDI policies, the host government
must consider certain components like: a) Selecting appropriate industry which will
be opened for FDI, b) Nurturing the selected industries, c) Safeguarding the policy
space, d) Improving international co-ordination by adopting international standards
and e) Avoiding investment restriction measures. As a part of liberalised economy,
Indian government enacted a new set of laws to regulate FDI which includes Foreign
Exchange and Management Act 1999 (FEMA) by repealing FERA 1973 which was
proved to be a hindrance for free flow of FDI into India.

6.4.2 **Foreign Exchange Management Act 1999 –Definition Clause\(^{41}\)**

**Investment on repatriation basis:** The investment, the sale proceeds of which, net of
taxes, are eligible to be repatriated out of India.

**Joint venture:** An Indian Company incorporated in accordance with laws and
regulations in India in whose capital a non-resident entity makes investment.

\(^{39}\)Supra Note 35, at 79  
\(^{40}\)World Investment Report 2011, at 106  
\(^{41}\)Consolidated FDI Policy Circular 2015 issued by Government of India, effect from 12 March 2015
**FDI:** Investment by non-resident entity/person resident outside India in the capital of an Indian Company under schedule 1 of FEMA (Transfer or issue of security by a person resident outside India) Regulations 2000.

### 6.4.3 Sectors Prohibited for FDI

FDI is allowed in India by two routes a) Automatic route and b) Government route. But as per the present Indian FDI Policy 2016, FDI is completely prohibited in few sectors to protect public interest, domestic economy and national security. The sectors where FDI is prohibited are as follows:

i) Lottery business including government, private, online lottery, etc.

ii) Gambling, betting including Casinos.

iii) Chit fund.

iv) Nidhi Company.

v) Trading in Transferable Development Rights (TDRs).

vi) Real Estate Business and Construction of Farm houses.

vii) Manufacturing of Cigars, Cheroots, Cigarillos and cigarettes, tobacco and tobacco substitutes.

viii) Sectors which are not opened for private investment like Atomic energy, Railway operations (other than permitted activities).

ix) Foreign Technical collaborations in the form of issue of licence for Trademark, brand name, franchise, management contracts are also prohibited in gambling, lottery business and betting activities.

### 6.4.4 Eligibility Criteria to Invest

i) A Non-Resident Entity according to FDI Policy 2015 except in prohibited sectors.

ii) Bangladesh entity or citizens can invest only under Government route.

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42Master Circular on FDI issued by RBI, Consolidated FDI Policy Circular 2015 issued by Government of India, effect from 12 March 2015
iii) A Pakistan entity or citizen can invest through Government route in sectors other than defence, space, atomic energy and sectors which are prohibited for foreign investments.

iv) NRIs residing in Bhutan, Nepal and citizens of both the states are permitted to invest only on repatriation basis and profits shall be transferred only by way of inward remittance in free foreign exchange.

v) An Indian Company which has issued shares to FIIs under FDI Policy 2015 for which the payment has been received directly into company’s account.

6.4.5 Entities Opened for FDI

i) FDI in Indian Company-Indian company can issues capital against FDI.

ii) FDI in Partnership firm-NRI or person of Indian origin outside India can invest in partnership firm on non-repatriation basis provided amount invested by inward remittance, the firm shall not involve in sectors like agriculture, plantation, real estate, print media and amount invested in these firms cannot be repatriated outside India.

iii) FDI on repatriation basis is permitted with prior permission of RBI and the same will be given after consulting Government of India.

iv) Investment by residents of other country can invest with prior permission of RBI and the same will be given after consulting Government of India.

v) FDI Venture Capital Fund (VCF).

vi) FDI in Trust other than VCF is not permitted.

vii) FDI in Limited Liability Partnership (LLP).

6.4.6 Types of FDI Instruments

FDI can be invested in Indian company in the following instruments:

i) Indian Company can issue equity shares, convertible debentures, convertible preference shares according to the price guidelines and valuation norms under FEMA Regulations.

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43 Supra Note 41, at 11
44 http://www.rbi.org.in/master circular, visited on 5/6/16, @ 8.20p.m
ii) With reference to the above mentioned FDI instruments, optional clause is available under FDI scheme, but certain conditions are imposed such as: minimum lock-in period of 1 year from the date of allotment of shares which means they cannot sell or convert the instruments to other form. After 1 year of lock-in period, if non-resident investors exercise the option subjected to FDI Policy can do so but without any assured return as per the price guidelines/valuation norms issued by RBI.

6.4.7 Remittance and Repatriation Procedures

Remittance of sale proceeds and remittance on winding up or liquidation of company where FDI is invested: sale proceeds of shares or securities and its remittance shall be done as per Foreign Exchange Management (Remittance of Assets) Regulations 2000.

AD Category-1 Bank can allow the seller (Resident outside India) of the security provided remittance can be done according to the prescribed guidelines and after receiving NOC/Tax Clearance Certificate from Department of Income Tax.

The remittance of winding up proceeds will be allowed subject to the payment of imposed tax mentioned above. Before claiming remittance of liquidation proceeds, the following documents shall be submitted by the investors:45

   i)   NOC/Tax Clearance Certificate issued by Department of Tax for remittance.

   ii)  Auditor’s certificate stating that the company has paid fully or adequately all its liabilities in India.

   iii) Auditor’s certificate stating that winding up is done according to the laws applicable in India.

   iv)  Auditor’s certificate stating that there is no legal proceedings against the investor or entity in India, no encumbrances for remittance.

Repatriation of Dividends

Dividends can be freely repatriating only after tax deduction at source or payment of Dividend Distribution Tax as per Foreign Exchange Management (Current Account transaction) Rules 2000.

45 Supra Note 41, at 79
Repatriation of Interest

Interest on fully convertible debentures is repatriating as per Foreign Exchange Management (Current Account Transaction) Rules 2000.

Reporting of FDI

The Indian Company receiving FDI from outside India for issue of shares & securities must report it to Regional Office of RBI within 30 days from the date of receipt of FDI and the same shall be submitted in Advance Reporting Form.

6.5 Authorities Regulating FDI

As mentioned earlier, performance of FDI in India is regulated by various authorities established by Government of India which includes Foreign Investment Promotion Board (FIPB), Reserve Bank of India (RBI), Secretary for Industrial Assistance (SIA), Foreign Investment Implementation Authority (FIIA), Foreign Investment Promotion Agency (FIPA) and Department of Industrial Policy & Promotion (DIPP). These authorities work under the supervision of Ministry of Commerce & Industry, Government of India with the objective of attracting more FDI into India in various sectors as per the rules and regulations. The establishment and functions of above listed authorities are discussed below.

6.5.1 Foreign Investment Promotion Board (FIPB)

FIPB is a wing in Department of Economic Affairs, Ministry of Finance of Government of India which is mainly responsible for processing of FDI applications for government approval as per the policies, notifications, press release and the guidelines issued by DIPP. FIPB offers a single window clearance for FDI projects and plays a key role in flow of FDI into India.46

Establishment of FIPB

It was constituted under Prime Minister Office (PMO) during economic liberalization period in 1990s. During this period, the FIPB recommendations for FDI were approved by three committees namely-a) Committee of Senior Officials to examine and make recommendations related to FDI, b) Empowered Committee headed by Finance Minister to decide on total investment project upto 300 Crores and c) Cabinet Committee of Foreign Investment (CCFI) to decide on recommendations

46http://www.fipb.gov.com, FIPB Review 2014, at 1, visited on 6/6/16 @ 4p.m
of FIPB on total investment projects more than 300 Crores.\textsuperscript{47} Later in 1996, the FIPB was transferred to DIPP where a Board was constituted for approval of recommendations of FIPB as under:

i) Recommendations of FIPB where the total investment in projects involved upto or less than 600 Crores will be considered and approved by Minister for Industry.

ii) The recommendations for projects each with investment more than 600 Crores would be submitted to CCFI for approval.

iii) CCFI would also consider the projects which are referred to it or rejected by the Minister for Industry.

**Transfer of FIPB to Department of Economic Affairs (DEA)**

Again in 2003, FIPB is transferred to DEA a wing of Union Ministry of Finance and the level of approval by DEA is retained as same which was followed in 1996 which is mentioned earlier. But in recent time, the limit of total investment is changed, if a project total investment in the form of foreign equity flow is more than Rs. 1,200 Crores is to be placed before CCEA for consideration.\textsuperscript{48}

**Composition of FIPB**

The Permanent member of the Board are the following Secretaries to the Government of India:

i) Secretary, DEA, Ministry of Finance (Chairperson)

ii) Secretary, DIPP, Ministry of Commerce & Industry

iii) Secretary, Department of Commerce (DOC), Ministry of Commerce & Industry

iv) Secretary, (Economic Relations), Ministry of External Affairs (MEA)

v) Secretary, Ministry of Overseas Indian Affairs (MOIA)

vi) Secretary, Department of Revenue (DOR), Ministry of Finance, (co-opted Permanently)

vii) Secretary, Minister of Small and Medium & Micro Enterprises (co-opted permanently). The Board can co-opt for Secretaries of other department or

\textsuperscript{47}http://www.fipb.gov.com. FIPB Review 2014, at 1, visited on 6/6/16 @ 4.30p.m

\textsuperscript{48}http://www.fipb.gov.com. FIPB Review 2014, at 2, visited on 6/6/16 @ 5p.m
officers of financial institutions who are expert in the field of industry and commerce.

**Objectives of FIPB**

1. Conducts investment promotion activities in India and abroad to attract FDI
2. Facilitates foreign entity, foreign investors and NRI to invest in India
3. Conduct discussions and negotiations at each level with foreign investors
4. Early clearance of FDI proposals and its approval
5. Review of policies, issue guidelines, frame transparent rules and regulations

The Minister in-charge of FIPB will consider the recommendations of FIPB on proposals related to FDI equity flow upto Rs 3000 Crores and if the total equity flow is more than Rs 3000 Crores the recommendations will be placed before Cabinet Committee on Economic Affairs (CCEA).

**Approval for FDI under Government Route through FIPB**

1. The Minister of Finance in-charge of FIPB will consider FIPB recommendations if total FDI inflow is Rs.2000 Crores or below.
2. The recommendations of FIPB for total FDI inflow if it is more than Rs.2000 Crore would be placed before CCEA for consideration.
3. CCEA will also consider the FDI proposals which may be referred to it by FIPB or Minister of Finance.

After taking approval from FIPB/CCEA, if the same foreign entity wants to bring in additional FDI into the same entity the fresh approval is not required.

**6.5.2 Reserve Bank of India (RBI)**

The most important authority regulating FDI in India is RBI which was established in 1935 under Reserve Bank of India Act 1934 as a Central Bank of India

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50 [http://www.fipb.gov.com](http://www.fipb.gov.com), visited on 14/08/16 @ 11.15a.m
51 Supra Note 4, at 37
with the objective of financial supervision of financial sector in India. The Main functions of RBI are as follows:\textsuperscript{52}

\begin{enumerate}
    \item[i)] Monetary authority: To frame and implement the monetary policy to maintain price stability and to ensure the flow of money into various sectors.
    \item[ii)] Regulatory and supervision of financial system: To prescribe parameters for banking operations with the objectives of protecting the depositor’s interest and provide cost effective financial service to the public.
    \item[iii)] Manager of foreign exchange: It manages the foreign exchange under FEMA 1999 to facilitate foreign trade and investments.
    \item[iv)] Issuer of currency and developmental role.
\end{enumerate}

RBI being a manager of foreign exchange regulates the flow of FDI into Indian economy. Along with FIPB, RBI also frames policies, issue notifications and Master Circulars related to FDI. Summary of FDI notifications and Master Circulars are as follows:\textsuperscript{53}

Under Automatic route, the foreign investors are required to submit related documents within 30 days to RBI for records and data.

Under Government route, FIPB being a government body handles approval for FDI, the sectors where prior approval is required which includes:

\begin{enumerate}
    \item[i)] Proposal attracting compulsory licensing
    \item[ii)] Items of manufacturing reserved for small scale sectors
    \item[iii)] Acquisition of existing shares
\end{enumerate}

The investors are required to intimate the Regional Office of RBI within 30 days about the remittance and submit the required documents within 30 days of issue of shares to the foreign entity.\textsuperscript{54}

FDI can enter into India under two routes a) Automatic Route and b) Government route.

\textsuperscript{52}http://www.rbi.org.in, visited on 06/06/16, @ 9a.m
\textsuperscript{53}http://www.rbi.org.in/mastercircular, visited on 05/06/16, @ 8.20p.m
\textsuperscript{54}Supra Note 49, at 4
Under Automatic route foreign investors do not require prior approval from RBI or Government of India to invest FDI, under this route 100% FDI is allowed in many sectors which are as follows:

- Agriculture - 100%
- Automobiles - 100%
- Automobile components - 100%
- Aviation - 100%
- Biotechnology - 100%
- Chemicals - 100%
- Commodity Exchanges - 49%
- Construction - 100%
- Electrical machinery - 100%
- Electronic system - 100%
- Food processing - 100%
- IT/ Business Processing Management - 100%
- Insurance - 49%
- Leather - 100%
- Mining - 100%
- Oil and Gas - 100%
- Pension - 49%
- Power Exchanges - 49%
- Pharmaceuticals - 100%
- Plantation - 100%
- Ports and Shipping - 100%
- Railways - 100%
- Renewable Energy - 100%
- Roads and Highways - 100%
- Textile and Garments - 100%
- Thermal power - 100%

[http://www.makeinindia.com, FDI Consolidated Policy June 2016, visited on 1/12/16, @ 1p.m](http://www.makeinindia.com)
Tourism and Hospitality-100%

Under Government route, foreign investors should obtain prior approval from FIPB, Department of Economic Affairs, Ministry of Finance or DIPP, Government of India. FDI under this route is allowed only in limited sectors with permitted cap. The cap restrictions will be changed from time to time depending upon the requirement of the economy. The process of fixing cap restriction is always being a very transparent process. The sectors which come under this route are as follows:56

- Mining & Minerals- upto 100%
- Defence manufacturing- beyond 49% and upto 100%
- Publishing & Printing- upto 100%
- Air Transport Service- beyond 49% and upto 100%
- Satellite establishment & Operation- upto 100%
- Telecom service - beyond 49% and upto 100%
- Single Brand Retail- beyond 49% and upto 100%
- Multi brand Retail- upto 51%
- Pharma -Brownfield- beyond 74% upto 100%
- Banking private sector- beyond 49% and upto 74 %
- Banking public sector- upto 20%
- Broadcasting- upto 49%

FDI can be attracted in four stages which are as follows:

i) Trial period to attract FDI- In this stage, FDI will be attracted into host state to get more capital, China started with this stage where it allowed FDI only from overseas Chinese.

ii) Development stage of FDI-liberalized rules and regulations will be adopted which provides extensive and preferential treatment to foreign investors.

iii) Economic strengthening stage- to establish a socialist market economy to attract FDI.

iv) Adjustment period stage- where FDI will be allowed in particular sectors.

56http://www.makeinindia.com, FDI Consolidated Policy June 2016, visited on 1/12/16, @ 1p.m
Procedures to allow FDI in India

Foreign investors prefer Government route as there is absence of stable policy and lack of clarity which helps them to escape from strict screening of their investments.

Prior approval of FIPB is required in the following cases:

i) Indian company is being established with foreign investment and is owned by non-resident entity.

ii) An Indian company is established with foreign investments and is controlled by non-resident entity.

iii) The control of Indian company whose shares are transferred to non-resident entity by merger, acquisition and amalgamation process.

iv) The owner of Indian company where shares are transferred to non-resident Indian through merger, acquisition and amalgamation process.

Post-approval procedures

i) Clearance Process: clearance with land, building design, pre-construction, labour standards from the government before the launch of its operation and the clearance process differs from sector to sector.

ii) Registration & Inspection Process: Company must maintain proper records related to production, sales & export, use of raw materials, labour standards, financial details and environmental safeguard measures. During its operation, the company is inspected by labour inspector, fire inspector, food inspector, central exercise inspector, air & water inspector, mines inspector, city inspectors and many officers will supervise the operating activities of foreign entity in India.

iii) FEMA Regulations: A foreign entity with FDI can enter into India in the following forms- a) Joint venture or b) Wholly-owned subsidiary through Liaison officer or Representative by establishing project office or Branch office. The above mentioned office operates as per FEMA Rules 2000.

Liaison officer/Representative: The officer collects information about available market opportunities and informs Indian consumers about the company and its
products, but he cannot take up any commercial activities directly or indirectly. RBI gives approval for establishment of liaison office in India.

Project office- RBI grants approval for FDI project for establishment of project office of foreign entity to execute specific project with conditions.

Branch office: Foreign Company engaged in manufacturing and trading activities at home states and can set up their branch office in India for the following reasons with the approval of RBI:

i) Export-Import of goods

ii) Render consultancy services

iii) Carrying research work related to parental company’s activities

iv) Promote technical collaboration with Indian company

v) Development of software and render services related to IT

vi) Provide technical support

Restriction on branch office will be imposed saying that it shall not indulge in manufacturing activities, in case if it is needed, it can ask any Indian company to manufacture and can remit profit to home state as per RBI guidelines.

The Branch office is restricted to SEZ, its business activities and transaction will not be allowed outside the SEZ in India, further approval is not required for its activities but however specified conditions will be imposed on it.

**Technology Transfer**

Transfer of technology is allowed through FDI or by an agreement also. India being a developing state has adopted liberal policy so as to allow foreign technology into it.

Technology transfer through Automatic approval:

RBI gives automatic approval for foreign technology collaboration for sectors, but subjected to the following:

i) Lumsum payment not exceeding US $ 2 million

ii) Payment of royalty is limited to 5% in domestic sale and 8% for export subjected to total payment of project is 8% on sale over 10 years period
Transfer of technology through FIPB route:

i) Proposal for compulsory licensing

ii) Manufacturing of goods which are reserved for small scale sectors

iii) Extension of foreign technology collaboration agreements

iv) Any other proposal which shall not fall under automatic route mentioned above

India shall provide national treatment for technical collaboration, they have to obtain NOC from joint venture projects if they need to establish another company in the same sector.

**Yearly FDI inflows according to RBI Sources**

As per the data shown in Chart-2, the Regional Offices of RBI have disclosed statistical data about flow of FDI during 1990 to 2015 in India. As liberal policies were introduced in India, it started attracting FDI which slowly increased in succeeding years. From 1995 to 2007 there was fluctuation in flow of FDI, the highest flow of FDI was in 2014-15 as importance was given by Government of India by launching ‘Make in India’ campaign.

**6.5.3 Secretary for Industrial Assistance (SIA)**

SIA is established by Government of India as a part of DIPP to provide single window service for foreign investors to fulfill the procedural aspects of FDI.

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57http://www.rbi.org.in, visited on 06/06/2016 @ 10p.m
procedural aspects includes entrepreneurial assistance, investors facilitation, receiving & processing applications, conveying government decision about approval of FDI, monitoring implementation of FDI projects and it also notifies the decision of the government about investment and technology. With respect to the same, a data base must be created by SIA for quick reply to the query of FDI projects.\textsuperscript{58}

\textbf{6.5.4 Foreign Investment Implementation Authority (FIIA)}

FIIA is also established by Government of India to co-ordinate with DIPP for approval of FDI projects in India. The authority helps in quick transmitting the approval into implementations and to provide pro-active, after care service to foreign investors in obtaining necessary permission from other agencies related to FDI. The SIA of DIPP functions as Secretariat of FIIA.\textsuperscript{59} DIPP has announced that FDI in tobacco sector is completely banned in any form including licensing for franchise, trademark, brand name, management contract. The decision is yet to be confirmed by the Cabinet. The objective behind this is to protect public health.\textsuperscript{60} As a result of this decision the stocks & shares in tobacco industries have come down. Many have suggested that the government must completely stop the manufacturing of tobacco products where foreign entities are involved.

\textbf{6.5.5 Foreign Investment Promotion Agency (FIPA)}

‘Invest India’ is a non-profit company which acts as Investment Promotion & Facilitation Agency of Government of India. The Agency consists of functional experts who provide all the relevant data about the states in India and the sectors opened for FDI in India. The Agency facilitate the investors by arranging the meetings, identification of location, speed up approvals, after care service which includes providing remedy to the investors and this authority is promoted by DIPP.\textsuperscript{61} Investment promotion measures include the following:

i) Market creation mechanism

ii) Implementing effective promotion programmes

iii) Aftercare services

\textsuperscript{58}Supra Note 49, at 4
\textsuperscript{59}Supra Note 49, at 4
\textsuperscript{60}The BusinessLine, Thursday, November 17\textsuperscript{th} 2016, at 1
\textsuperscript{61}http://www.investindia.gov.in, visited on 1/12/16 @ 2p.m
iv) Investment guarantee schemes
v) Credit guarantee schemes

6.5.6. Department of Industrial Policy and Promotion (DIPP)

This authority acts as a nodal department for government to frame FDI policies, it supervises the functions of FIPA discussed above.

Functions

i) Encourage industrial growth by providing financial and infrastructure support
ii) Facilitating FDI by co-ordinating among various agencies for fast approval
iii) Maintaining good information data base
iv) Initiate changes for better and transparent administration
v) Framing and implementation of industrial policies
vi) Maintaining data related to inflow of FDI into India
vii) Encouragement of foreign technology collaborations and framing policy for the same

DIPP plays a key role in resolving the problems faced by investors in implementing the projects with the help of FIIA, which in turn consult the state authorities. The DIPP also play a role as facilitator in development of industries and improvement of investments, it promotes investment through exchange of information on investment opportunities available in India. It advises the prospective investors about FDI Policy, licence procedures, etc. DIPP facilitates bilateral and multilateral treaties for protection of international investments.

6.6 ‘Make in India’ Initiative

‘Make in India’ is a programme launched by Government of India encouraging MNCs and Indian companies to manufacture products in India. The programme is launched by Sri Narendra Modi, Prime Minister, Government of India on 25th September 2014 to encourage foreign investments in manufacturing sector and to promote Swadeshi Movement once again in India. The purpose of ‘Make in India’ initiative is to make India a top destination for foreign investment at global level. The objectives of this initiative programme includes making India a manufacturing hub,

http://www.dipp.gov.in.com, Annual Report 2015-16, issued by DIPP, at 1
creating job opportunities, technology transfer, encouraging flow of foreign
investments, to increase export trade, supplement importing and skill enhancement.
With these objectives, FDI is allowed in 25 sectors with increased cap in defence upto
49 % and 100 % FDI in railway sector. After the initiation of ‘Make in India’
programme the flow of FDI has increased to US $ 45,682 million from October 2014
to December 2015.63

Along with Central Government, the state governments are also providing
powerful infrastructure facility and stable FDI policies to harness FDI in India which
is very beneficial to investors. FDI is allowed in following key sectors in Indian
states from Fiscal Year 2000 to 2016:

Table 3: Sectorwise flow of FDI in India

<table>
<thead>
<tr>
<th>State &amp; UT</th>
<th>Sectors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andhra Pradesh</td>
<td>BT, Tourism, IT, Food &amp; Agro-based industry</td>
</tr>
<tr>
<td>Arunachal Pradesh</td>
<td>Art &amp; Craft, Tourism and Education service</td>
</tr>
<tr>
<td>Assam</td>
<td>IT, Tourism, Horticulture, Food processing, BT, Bamboo industry</td>
</tr>
<tr>
<td>Bihar</td>
<td>Agro-based industry, Sericulture, Chemical, Tourism, BT and Pharmaceutical</td>
</tr>
<tr>
<td>Chhattisgarh</td>
<td>Processing of medicinal, Aromatic and dye plants, Auto components, spares and Cycle industry, Manufacturing of plants, Machinery and Engineering spares and Pharmaceuticals</td>
</tr>
<tr>
<td>Goa</td>
<td>IT &amp; IT enabled services, Pharmaceuticals, Drugs, BT, Tourism, Food processing and Entertainment</td>
</tr>
<tr>
<td>Gujarat</td>
<td>Agro-based industry, Food processing, Chemical &amp; allied industry, IT, Mineral based &amp; allied industry, Plastic &amp; allied industry, Infrastructure, Textile and Port related activities,</td>
</tr>
<tr>
<td>Haryana</td>
<td>Agro-based industry, Food processing, Electronic, ICT, Automobiles, Hosiery, Textile, Garments, Export oriented units, Footwear and Leather garments,</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>Horticulture, Mineral water bottling, Automobile manufacturing units, Cold storage units, Electronic units, Floriculture and Handicrafts,</td>
</tr>
<tr>
<td>Jammu &amp; Kashmir</td>
<td>Food processing, Agro-based industry, Floriculture, IT and Sports goods industry</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>Mining &amp; mineral-based industry, Agro based industries, Sericulture, Engineering, Auto components, Tourism, Ceramics</td>
</tr>
</tbody>
</table>

63Press Information Bureau, Ministry of Commerce & Industry, Government of India, 9/3/2016 @ 5.20p.m, at 1
<table>
<thead>
<tr>
<th>State</th>
<th>Major Industries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Karnataka</td>
<td>IT, BT, Telecom, Auto &amp; auto components, Food processing, Floriculture, Tourism and Infrastructure</td>
</tr>
<tr>
<td>Kerala</td>
<td>Mineral &amp; clay based products, Agriculture, Horticulture, Traditional industries, Tourism, Auto components, marine products and Agro-processing industries</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>Agro-processing industries, Cement, Textile, Power, Education, Tourism and IT</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>Textile, Auto industry, BT, Floriculture, Textile, Leather and Food processing</td>
</tr>
<tr>
<td>Manipur</td>
<td>Agro-based industry, Handicraft, Sericulture, Tourism, Telecommunication, Petro-chemicals and Pharmaceuticals</td>
</tr>
<tr>
<td>Meghalaya</td>
<td>Mineral based industry, Horticulture, Agro-based industry, Power generation, Export promotion, Industry park, Tourism, BT, IT, Electronics and Tissue culture</td>
</tr>
<tr>
<td>Mizoram</td>
<td>Bamboo and timber based industry, Food processing, Horticulture, Mines &amp; minerals, Handloom, Handicrafts and Tourism</td>
</tr>
<tr>
<td>Nagaland</td>
<td>Food processing, Agro-based industry, Tourism, Mineral based industry and Pharmaceuticals</td>
</tr>
<tr>
<td>Orissa</td>
<td>BT, Mineral based industry, Agro based-food processing, IT, Tourism, Handicrafts, Handlooms, Chemicals and Fertilizers</td>
</tr>
<tr>
<td>Punjab</td>
<td>Agriculture, Dairy, Poultry, Meat processing, Leather industry, Sports goods, Textile and Light engineering goods</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>IT, BT, Agriculture based industry, Power, Education, Urban infrastructure, Tourism, Gems &amp; jewellery.</td>
</tr>
<tr>
<td>Sikkim</td>
<td>Eco-tourism, Handicrafts, Handlooms, Floriculture and BT</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>Engineering, Automobiles, Software, BT, Healthcare, Pharmaceuticals, Tourism and Textile</td>
</tr>
<tr>
<td>Telangana</td>
<td>BT, Agro based industry and Tourism,</td>
</tr>
<tr>
<td>Tripura</td>
<td>Natural gas, Food processing, Rubber, Tea, Handicraft, Bamboo, Handloom, Tourism and IT</td>
</tr>
<tr>
<td>Uttar Pradesh</td>
<td>Power, Food processing, Agro-based industries, Animal husbandry, Engineering and Horticulture</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>Hydropower, Floriculture, Food processing, Agro-based industries, ICT, Engineering and Horticulture</td>
</tr>
<tr>
<td>West Bengal</td>
<td>Agribusiness, Tourism, IT, Metals, Petrochemicals, Leather and Food processing</td>
</tr>
</tbody>
</table>
Statistical data about flow of FDI into India from 2000-01 to 2014-15

The data revealed by the chart showcases the flow of FDI into India between 2000 and 2015, there is a fluctuation in amount of flow of FDI and no stability maintained. As per the data, the highest FDI flow took place during 2011-12 as new sectors are opened for FDI in India. Later, due to economic recession in developed states, the flow of FDI came down in 2012-13 and gradually is increased in 2013-14 but again it came down in 2014-15 where FDI flow was less than the previous years.

To attract more FDI and to make India a favourable destination for FDI, liberal FDI polices should be framed which is one among the key factors for flow of FDI. To initiate and to promote ‘Make in India’ programme, the Consolidated FDI Policy 2016 is framed with liberal norms to facilitate foreign investors.

To simplify the procedural aspects for approval in various sectors, the foreign investment are put under composite cap. Factors influencing FDI in India are large pool of skilled and competitive manpower, R&D base, favourable policies, growing domestic market, huge natural resources and higher disposable income which helps in development of economy. Development of economy includes transformation in society, improving life standard of people below poverty line and enabling them to access health care and education.

64http://www.fipb.gov.in, visited on 05/06/2016, @11a.m
India received $50 billion FDI in 2015-16 which is highest in Indian economy through ‘Make in India’ initiative. 100% FDI in automatic route in e-commerce & retail business is accepted, but it is not permitted in inventory-based model of e-commerce. 100% FDI in B2B e-commerce is allowed but not in B2C. Market based model of e-commerce means providing an IT platform by an e-commerce entity on a digital and electronic network to act as a facilitator. Inventory based model e-commerce means e-commerce activity owned by e-commerce entity and is sold to consumers directly according to government guidelines.

According to WTO Report 2015, in May 2016 G20 (India) economies applied nearly 145 new trade restrictive measures on foreigners. Since 2009, a total of 1,583 trade restrictive measures are imposed by G20 member states.

6.7 India’s Efforts to Attract FDI

India is an emerging economy in the world and making all efforts to strengthen its ties with other states to progress in various fields such as economic, culture, technology, intellectual property, R&D and many more. To compete in global economy and to fulfill its economic objectives, India needs sufficient capital which can be met by FDI. India has taken various measures such as reliable foreign policy, signing BITs with investors, liberal investment policy, launching investment programmes, etc to attract FDI into its economy and the same are discussed below.

6.7.1 Indian Foreign Policy

The Indian government under the leadership of Mr. Narendra Modi, Prime Minister gave significance to review Indian Foreign Policy to attract more investments across the globe. Mr. Narendra Modi visited 18 countries in 57 days to develop good relationship with other countries and the same had significant impact on economic development which opened gates for new business. The aim of the visit is to increase flow of FDI which is estimated around $28.8 billion and transfer of technology.67 The aim behind all these initiative is to make India a reliable and favourable destination for foreign investments. Mr. Narendra Modi had made a good start towards achieving the aim within one year of resuming the office as a Prime Minister of India which is really a commendable start for economic development of

67‘The Hindu’, Friday, 29/05/2015, at 10
India. India entered into investment & trade agreements to strengthen its economic relationship with China, ASEAN states, SAARC states, UK and other states.

6.7.2 India and China

Mr. Narendra Modi, kept his commitment to pursue an activist neighbourhood policy, foreign policy outcome needs a long period of gestation. The approach towards China has clearly needed to be more subtle and handy. The Heads of both states visited each other states to develop a good bond, Chinese President Xi Jinping’s visited India in September 2014 and Mr. Modi’ visited China in May 2014 was exceptional and expected for good progress in many fields. Mr. Modi’s recent visit did yield much in economic terms, agreements & MOU related to business worth of $22 billion was signed. He welcomed China’s investment into India in infrastructure and energy related projects. After the visits, both the Heads made a joint statement which shows positive efforts in bilateral trade development & investments matters and they assured that both the states will take measures to remove impediments which are affecting the bilateral trade and investments which will facilitate greater market access. 68

6.7.3 Association of South East Asian Nation-Impact on Indian FDI Policy

The Association started with look East Policy in 1991 having 10 states namely Brunei, Darussalam, Cambodia, Indonesia, Lao, PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam as its members. India became Sectoral Dialogue Partners in 1992 & Full Dialogue Partners in 1996. The first ANEAN Economic Ministers- India Meeting was held in September 15th 2002 at Brunei Darussalam where member decided to establish an ASEAN- Indian Economic Linkages Task Force (AIELTF) for economic co-operation between India and AESAN member states. In 2002, the first ASEAN- India Summit was held in Cambodia where the then Indian Prime Minister proposed for:

i) India will extend special and differential trade treatment to ASEAN states to improve their market access to India,

ii) To establish Free Trade Area within 10 years.

68'The Hindu’, Friday, 19/05/2015, at 10
India is importing large quantity of goods from ASEAN states which includes artificial resins, plastic materials, natural rubber, electronic goods, organic chemicals, edible oils, etc which is increasing slowly as a result of which ASEAN states are pressurising India to reduce import tariffs on importing goods such as palm oil, tea, pepper and coffee.  

6.7.4 India & Singapore Comprehensive Economic Co-operation Agreement (CECA)

In 2003, a Joint Study Group was set-up to establish a comprehensive economic co-operation agreement between India and Singapore. The agreement includes the following:

i) FTA on trade in goods, services & investments

ii) An improved DTAT

iii) Bilateral agreement on investment promotion, protection and co-operation

iv) Programme of co-operation in many areas including health care, education, media and tourism. As a result of this, in 2005, India and Singapore signed CECA as per which in December 2007 India granted market access to Singapore goods on additional 539 tariffs.

6.7.5 India & EU Broad Based Trade & Investment Agreement

India signed a broad based trade and investment agreement with EU, the objective of the agreement was to promote trade and investment through bilateral agreement & economic co-operation.

6.7.6 Impact of Tax Pact on Flow of FDI in India

Tax treaty benefits are promoting free flow of FDI into India from Mauritius. According to the study of WTO and a report prepared for the Sixth Trade Policy Review of India which stated that between 2010-11 and 2013-14 a large amount of FDI came into India from Mauritius when compared to other states and the reason for this is Tax treaty between India and Mauritius, India became a reliable destination for FDI from Singapore during the same period. As per the tax treaty, a preferential provision is included according to which FDI is exempted from Capital Gains Tax.

According to DIPP, in 2012-13 India received $9.49 billion and $4.85 billion FDI in 2013-14. During the same period $5.98 billion FDI came into India from Singapore. FDI are invested in service sector such as financial, banking, insurance, business outsourcing, R&D, courier, telecommunication, technical service and automobile industries in India. When compared to the investment in earlier period, FDI flow from Mauritius in 2011-13 is decreased due to General Anti-Avoidance Rule (GAAR)\(^{70}\) and steps taken by India Government with respect to tax avoidance from foreign investors. India took initiative at G20 Seoul Summit in November 2010 for concluding Tax Information Exchange Agreement (TIEA) and Double Taxation Avoidance Agreement (DTAA) and argued that a state cannot avoid DTAA if other state is requesting for the same. As a result of which many states signed DTAA with India and India also urged for automatic exchange of tax information with or without request.\(^{71}\)

### 6.7.7 FDI and Double Taxation Avoidance Agreement (DTAA)

Due to FDI and globalization, international tax laws have gained significance in international investment laws. India and Mauritius signed a Protocol related to Double Taxation Avoidance Agreement (DTAA) at Port Louis to amend DTAA, according to the protocol the Capital Gains earned by Mauritius will be taxed according to domestic tax rate from 2019-20 onwards, at present the Mauritius has nil tax rate on Capital Gains. Economic Secretary Shaktikanta Das said that the tax incentives will boost the foreign investments in India.\(^{72}\) Hence India is making liberal policy related tax provisions to attract FDI.

Apart from Singapore, FDI from US, Netherland and Germany has also increased, FDI from US has increased from $806 million in 2013-14 and $557 million in 2012-13 to $1.69 billion in April-2015. From Netherlands FDI is increased from $2.27 billion in 2013-14 and $1.85 billion in 2012-13 to $3.29 billion in April 2015. From Mauritius, India received FDI of $8.44 billion in April 2015. According to the report of DIPP, India has signed 72 BITs.\(^{73}\) In addition to this, India has signed

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\(^{70}\) A Tax avoidance regulation of India which was introduced in Budget Session during 2012, but later it was delayed for 2 years, the rule was for imposing tax on past overseas deals

\(^{71}\) Supra Note 35, pp 39 & 40

\(^{72}\) ‘Business line’, Wednesday, May 11, 2016, at 1

\(^{73}\) Look into DIPP website for India’s BITs list
Bilateral Investment Treaties with 14 states\(^7^4\) which are not yet enforced. India is estimated to require around 1 trillion FDI to renovate its infrastructure sector including ports, airports and highways to boost growth. The Government of India has relaxed FDI norms in various sectors including insurance, railways and medical devices to attract more FDI.

**Table 4: Flow of FDI from Mauritius between 2011-12 and 2015-16\(^7^5\)**

<table>
<thead>
<tr>
<th>Sectors</th>
<th>Percentage of FDI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Services</td>
<td>18.9</td>
</tr>
<tr>
<td>Telecommunication</td>
<td>11.5</td>
</tr>
<tr>
<td>Hotel tourism</td>
<td>10.6</td>
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<tr>
<td>Computer software &amp; Hardware</td>
<td>6.2</td>
</tr>
<tr>
<td>Power</td>
<td>6.1</td>
</tr>
<tr>
<td>Construction</td>
<td>3.9</td>
</tr>
<tr>
<td>Trading</td>
<td>2.4</td>
</tr>
<tr>
<td>Drugs &amp; Pharmaceuticals</td>
<td>1</td>
</tr>
</tbody>
</table>

**6.7.8 India and International Investment Agreements (IIAs)**

The history of India in development of international investment agreement was started in 1947. After India got independence, the US was the first states to propose FCN treaty with India as India’s economic policies was reliable and the same was continued till 1980s.\(^7^6\) During the period of 1988-91, India started adopting liberalized economic policies as a result of which India became a signatory for MIGA Convention in 1992. In 1993, India signed another treaty with European Community called ‘Third Generation Co-operation Agreement on Partnership and Development’ which laid the foundation for India’s IIAs at international level. India signed its first IIA with UK in 1994 as India had already adopted liberalised trade policies as result of which it started attracting foreign investors. As of 2006, India had signed 61 IIAs out of this 41 investment treaties are ratified and in the meantime India entered into

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\(^7^4\)Check DIPP website for pending BITs of India

\(^7^5\)‘Business line’ Wednesday, May 11 2016, at 1

economic co-operation agreements consisting of investment measures and these IIAs have adopted direct investor-state arbitration mechanism.\textsuperscript{77}

Mr. Peter Varghese, Australia’s diplomat said ‘despite a change in the business environment in the past year, the Government of India has not been able to clear several road blocks to investment. He urged the government for more responsive and sympathetic attitude and Mr. Peter also said that India has not managed to remove the obstacles and hurdles related to FDI. He pointed out that the administrative procedure is onerous, it should be certain and simple.\textsuperscript{78} This statement proves that the foreign states will be encouraged to invest FDI in India provided simple regulatory measures being adopted by the government.

Government of India has cleared 16 FDI proposals worth of 6,751 Crores, the approvals were based on the recommendations of FIPB. The top proposals includes Torrent Pharmaceuticals’ plan to increase foreign institutional investment limit to 35% from 13.09% amounting to 3000 Crores and Star India Private limited proposal for further issuance and transfer of shares to its foreign collaborator and acquisition of another Indian company on a slump sale basis, for a value of Rs 2,500 Crores. In another clearance for Pharma major Biocon’s unit Sygene International’s plan to increase the foreign investment limit to 44% from 10% through offer of shares to FII, foreign portfolio investors and NRIs worth Rs.930 Crores. Proposals from BASF Chemical India Private Ltd, Ordain Health Care Global, TRIF Kochi projects, TRIF Real Estate and Development, Berggren Real Estates and Today Magazine Life style also got the nod from DIPP.\textsuperscript{79}

a) India is a third largest FDI sources for UK

India is not just receiving FDI into its economy but also encouraging its nationals to investing in other states. India has emerged as a third largest source of FDI for UK after US & France in terms of projects. According to the recent report released by UK Trade and Industry (UKTI), the US remained the largest source of inward investment with a total of 564 projects in 2014-15, followed by France 124 projects and India 122 projects where they invested FDI. During the same year, investment from India increased by 65%. This resulted in creation of 7,730 jobs as

\textsuperscript{77}Supra Note 76, at 57
\textsuperscript{78}‘The Hindu’, Tuesday, 09/06/2015, at 12
\textsuperscript{79}‘The Hindu’, Thursday, 18/06/2015, at 15
well as protection of 1,620 jobs. India invested FDI in healthcare, agricultural technology, food and drinks. As per the Inward Investment Report 2014-15 of UK, 70 states invested a record of £1 trillion in UK in 2014-15, making it Europe’s top FDI destination. In 2014-15, Indians were the third largest job creators in UK which is a tremendous demonstration to strengthen our ties, the UK is also the largest G20 investor in India, proving the two-way relationship. As Mr. Narendra Modi said, when UK and India work together, it will become an unbeatable combination as it is pointed out by Mr. James Bevan KCMG, British Commissioner to India. The annual investment figures from UK for 2014-15 financial year shows that UK has attracted 12 % more FDI projects compared to the previous year. The Indian Venture Capital Fund Vistaar Group has been named in the report as a key foreign investor in creative industry for establishment of post-production studio at Media City, Manchester.80

As per the data of DIPP, the FDI in India increased to $3.60 billion in April 2015. In April 2014 it stood at $1.70 billion, while in March it was reduced to 40%. Amongst the top 10 sectors, computer software and hardware received the maximum FDI of $709 million in April followed by automobile with $655 million, trading with FDI of $441 million, power with $109 million and service sector with $217 million. During April, India received maximum FDI from Singapore $1.13 billion followed by Mauritius $907 million, the U.S invested $392 million and the Netherlands with $374million. During 2014-15, foreign funds inflows grew at 27 % which increased to $30.93 billion against $24.29 billion in 2013-14.81

b) India among top 10 FDI Destinations

After 2008, for the first time India reached 9th position among the top 10 FDI recipients during 2014 as per UNCTAD World Investment Report 2015 with 22% rise in FDI inflows to 34 billion, India was in 15th position in the last two years and it is the only nation among BRICS states which has not yet crossed the $50 billion-a-year FDI mark. According to the report, the global FDI fell 16% to $1.23 trillion in 2014 due to the vulnerability of global economy, uncertainties in FDI policies and political risks. It is pointed that India is dropped out from the list of top 20 outward FDI flows states.82

80‘The Hindu’, Wednesday, 24/06/2015, at 15
81‘The Hindu’, Wednesday, 24/06/2015, at 15
82‘The Hindu’, Thursday, June 25th, 2015, at 16
c) India ranked best for Investment

According to the Daniel Altman’s Baseline Profitability Index (BPI) India has reached top first position among 110 states in attracting more FDI in 2015 which is a way ahead of China and US. In 2014 India was in 60\textsuperscript{th} position, the ranking is based on baseline profitability that assumes that three factors which affects the ultimate success of FDI are a) growth of the value of the asset, b) preservation of the same value and c) the repatriation process. All these factors with stable regulatory mechanism will attract FDI. According to this report, the reason for the achievement in 2015 is reduction in corruption as a result of which FDI was protected well. A good ranking indicates good returns from FDI which improves economic conditions.\textsuperscript{83} India must continue its hardwork with the same ease to attract FDI in future years also.

As per RBI Report, the total FDI in India has reached new peak of $51.64 billion in 2015-16 when compared to the previous fiscal years 2011-12 where the total FDI was $46.56 billion and $44.29 during 2014-15.\textsuperscript{84}

d) Big surge in Foreign Institutional Investment in 2014-15

‘Make in India’ initiative in September 2014 started attracting FDI into India as a result of which FDI equity inflows from October 2014 to April 2015 over the corresponding period last year rose to 48%. The inflows through the Government route grew 87% during 2014-15 to $2.22 billion despite more sectors having been liberalised during this period and more than 90% of FDI being on Automatic route. The Government amended FDI Policy to foster a positive investment climate and to attract investment in focussed areas such as affordable housing, smart cities, financial inclusion and reforms in railway infrastructure and medical devices where it is allowed 100% FDI. This shows that India stands committed to frame liberal FDI policies which are investor friendly.\textsuperscript{85}

Even though inflow of FDI is increased but, there are several challenges faced by the investors in India such as delay in land acquisition, environmental clearances, high rates of interest which are the big deterrents for investors. The policy action for reviving investments, growth and employment must be continued at an accelerated

\textsuperscript{83} ‘The Hindu’, Saturday, June 27\textsuperscript{th}, 2015, at 1
\textsuperscript{84} http://www.yahoo.finance, visited on 26 April 2016, @ 1.20p.m
\textsuperscript{85} ‘The Hindu’, Wednesday, July 15, 2015, at 15
pace. To overcome this situation, the interest rates must be reduced which may reduce the price of the goods and attract consumers and make investment projects more attractive.\textsuperscript{86} Brazil, India and Indonesia revealed at UNCTAD Expert meeting on transformation of IIAs regime in February 2015 that they are amending the IIAs approach to attract more FDI into their economy.\textsuperscript{87} According to UNCTAD World Investment Report 2013, India stood in 14\textsuperscript{th} position among top 20 host states with $24 billion in 2012 and $28 billion FDI inflows.\textsuperscript{88} But India has no place among the list of top 20 in FDI outflow during the same year.\textsuperscript{89} Mr. Arun Jaitley, Finance Minister said, Indian Government has removed the unnecessary conditions which had slow down the flow of FDI into India, especially in Greenfield projects which has made India a favourable destination for FDI.\textsuperscript{90} The uncertainty in FDI Policy is affecting free flow of FDI which is evidenced in a report released by RBI which said that the gross equity of FDI flows to India moderated to $20.3 billion in 2010-11 from $27.1 billion in the preceding year.\textsuperscript{91}

A Global Shipping and logistic firm Maersk has invested about $800 million in ‘Make in India’ initiative, but investor said that India needs energetic set of policy mechanism to make ‘Make in India’ initiative a grand success.\textsuperscript{92} Ms. Nisha Biswal, US Assistant Secretary of State for South & Central Asia Affairs said US’s FDI in India could be doubled provided Indian policies are need to be transparent, predictability and certain.\textsuperscript{93}

6.8 Key Issues Related to FDI in India

As we know FDI is playing a key role in economic development of India, since many years various issues related to flow of FDI into India is highlighted. As discussed earlier, the flow of FDI has both negative and positive impact on Indian economy, it may affect the cultural life of people or may affects the society. The issued related flow of FDI in India is highlighted below.

\textsuperscript{86} ‘The Hindu’, Saturday, July 18, 2015, at 11
\textsuperscript{87} 'World Investment Report 2015, at 25
\textsuperscript{88} 'World Investment Report 2014, Figure 2, at 4
\textsuperscript{89} 'World Investment Report 2014, Figure 3, at 5
\textsuperscript{90} 'Business Line’, Wednesday, March 30, 2016, at 4
\textsuperscript{91} 'Deccan Herald’, Thursday, April, 12, 2012
\textsuperscript{92} ‘Business Line’, Thursday, April 21, 2016, at 6
\textsuperscript{93} ‘Business Line’, Wednesday April 20, 2016, at 10
a) FDI and Defence sector

Defence sector in India is consuming a lot of amount from annual financial budget expenditure. India import 70% defence equipment from abroad which will impact on its foreign exchange. According to the annual budget of Government of India from 1960-61 to 2004-05 shows that defence requirements is being depending upon public borrowings and paying huge interest. In the year 1960-61, the net defence expenditure was 281 Crores and the interest paid on public borrowing is 116 Crores consecutively it increased and in 2004-05 the net defence budget was 77,000 Crores and the interest on public borrowing was 1,25,905 Crores. Most of the developed states are manufacturing their defence equipment indigenously, but developing economy like India is depending on other states. This situation can be healed allowing FDI in defence sector. At present 49% of FDI with government approval is allowed. According to the statistics released by Ministry of Commerce & Industry of Government of India, FDI flow in defence sector is $0.08 US million during 2014-15.

b) FDI and Single & Multi-brand Retail Sector

FDI Policy of India has allowed 100% FDI in single brand retail shopping and 51% FDI in multi-brand retail which has become a debatable issue saying that the entry of multi-brand retail outlet will have adverse impact mom-and-pop shops/Kirani shops and on local producers. In July 2010, the Ministry of Commerce & Industry and DIPP constituted a Committee of Secretariat led by Cabinet Secretary Ajit Seth recommended increasing FDI cap to 51% in multi-brand retail shops but it is not yet been decided by the government. When committee proposed for 51% of FDI the Department of Consumers Affair supported upto 49% and Small & Medium Enterprises Ministry supported upto 18% in multi-brand sector, the difference are found among departments. FDI in multi-brand sector is allowed but with certain safety measures has to be adopted by the government such as:

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95Id at 185
96Sectorwise FDI Equity flow in FY 2014-15 and September 2015, http://www.dipp.nic.in, visited on 02/12/15 @ 12.30p.m
97http://www.dipp.nic.in, visited on 2/2/16, @ 11p.m
98http://www.dipp.nic.in, visited on 2/2/16, @ 11p.m
i) Building back-end infrastructure, logistic or agro-processing units to ensure foreigner’s contribution in development of infrastructure and logistic to store goods

ii) 50% of jobs to be reserved for rural youth

iii) SME sector produced goods shall be used

iv) To ensure public distribution system and food security system

v) Protect the interest of small & local producers

Benefits of FDI in retail sector

i) It will keep the food price under control

ii) Cut wastages

iii) Avoid intermediaries

iv) Customers receives quality products at low prices

v) Job creations

vi) Environmental safety

vii) Growth of GDP

viii) Farmers’ interest will also be protected

c) FDI & E-commerce

Due to entry of FDI in e-commerce, demand for office space has increased, the key player of e-commerce such as Jabong, Ola, Flipkart, etc have shifted to huge office space as a result of which the leasing activities of premises are increased.\textsuperscript{99} The FDI Policy related to on-online marketing has imposed certain conditions like a single vendor or group vendor cannot contribute more than 25\% of the earnings of the market place, the FDI should not influence the sale price of goods/services directly or indirectly and it may provide support services such as warehousing, logistics, order fulfilment, call centre, payment collection, etc to the sellers.\textsuperscript{100}

\textsuperscript{99}Business Line, Friday April 1 2016, at 5

\textsuperscript{100}Business Line, Wednesday, March 30 2016, at 6
d) Issues Related to FDI in E-commerce

The Retailers Association of India and the Confederation of All India Traders have complained to DIPP alleging that the e-commerce companies such as Flipkart, Amazon and Paytime are violating FDI Rules by offering discounts.\textsuperscript{101}

FDI Policy should channel it with SDGs sectors to ensure sustainable development by adopting the following strategies:\textsuperscript{102}

i) Introduce innovative financial and funding mechanism: the funding mechanism which uses public sources to mobilize private funds example: public-private joint venture.

ii) Effective pricing mechanism through market based schemes which are basic to put financial market and investors on sustainable process.

iii) Promote stock exchange with transparency and make investors to inform about their investments to the concerned authorities.

iv) To introduce reforms in financial market which includes reform of payment, performance structure and new rating methodologies will encourage long-term investment in SDG sectors.

While implementing Sustainable Development Goals (SDGs) certain hurdles like entry barriers, inadequate risk return ratio, lack of information, lack of effective promotion projects and lack of investors’ expert knowledge will be faced by the investors. In order to overcome the above hurdles, there must be effective policies which includes following:\textsuperscript{103}

i) To remove the entry barriers, there must be proper polices to attract investments and to protect public interest especially in sensitive sectors.

ii) Tools such as Public Private Partnership (PPP), Investments Insurance Schemes and Advance Market Commitments which will help in improve the risk-return in SDGs investment projects.

iii) To establish new investment schemes and new generation of investment promotion institutions.

\textsuperscript{101}Business Line, Wednesday May 11 2016, at 6

\textsuperscript{102}World Investment Report 2104, pp 32& 33

\textsuperscript{103}World investment Report 2014, pp 33&34
iv) There must be a joint venture between host & home states and between MNCs and Development Banks to overcome knowledge & information gap to encourage investments in SDGs sectors.

v) There must be a good governance, strong institution and stakeholder’s agreement to attract more FDI in SDGs sectors.

vi) To implement SDGs investment assessment mechanism, corporate social responsibilities for mobilizing and channelizing FDI must be introduced.

In 2009-2010, the inflow of FDI increased in India which accounted for more than 4% of $39 billion in South Asia region. In 2010-11, India issued new FDI Consolidated Policy which facilitated the expansion of MNCs, allowed the conversion of non-cash item into equity but with the approval of Government and during the same year FDI was also allowed in agriculture sector.104

e) Corporate Social Responsibility (CSR)

When FDI is allowed, the civil organizations always objected saying that flow of FDI will affect public interest and domestic economy. To overcome such situation, the host states can introduce CSR measures according to which, MNCs must contribute for social activities in host states. CSR has created certain standard such as a) Inter-governmental standard, b) Multi-stakeholder initiative standard, c) Industry association codes, d) Individual company codes. The combination of all these standards will be a multifaceted universe of standards.105 The main sources for CSR standards are the declarations and agreements implemented by UNO-Global Compact which includes 10 guiding principles for enterprises, ILO-Fundamental Labour Standards and OECD-Guidelines on MNCs.106 The multi-stakeholder standard includes the cross-border partnership to initiate and supervise standard for regulation of market & civil society, consumers, labourers and business who will be affected by inflow of FDI. The industry and company codes are jointly developed by the companies with an intention to address social and environmental aspects.

The CSR standards are substitute for labour laws, environmental laws and social security measures. The host state must make FDI policies inclusive of CSR

104 World Investment Report 2011, at 96
105 World Investment Report 2011, at 111
106 World Investment Report 2011, pp111& 112
standards and the same must be implemented effectively in corporate governance. In current scenario, MNCs are following voluntary CSR (Soft laws) which are non-binding nature. While framing CSR policies, the host governments can include many options such as development of CSR standards, applying CSR to public procurement policies to promote business of environment friendly products, capacity building initiative inclusive of sharing of knowledge, technical assistance, skill and assistance to suppliers. The host state’s policy must make rules asking MNCs to submit report to stock-exchange authority on implementation of CSR measures.107

f) FDI and Agriculture

Agriculture is a backbone for Indian economy where 70% of population is depending upon agriculture as a source of livelihood and investment in agriculture sector in India is very poor. In the recent days, FDI is allowed in Agriculture sector, the lack of liberal policies as it is a sensitive sector fails to attract more FDI. At international level UNCTAD, FAO, World Bank and IFAD are working together to remove food scarcity from the world.108 To improve investment in agriculture sector, the international organizations have introduced ‘Principles of Responsible Investment in Agriculture’. At Seoul Summit G-20 leaders emphasised on requirement of private investments in agriculture sector to increase food production and to fulfill the objectives of food security which is the goal of FAO.109 In 2008, MNC(Amway) was involved in contract farming across the world covering 110 state territory. FDI in agriculture will promote technology transfer, better access to credit and market, improvement of skills related to agriculture & farming.110 100% of FDI is allowed through FIPB route in marketing food products which are produced and manufactured in India.111 There must be proper co-ordination between MNCs and local farmers. In this context the host government must address the following issues:112

i) Lack of capacity of small holders to supply product in standardized manner

ii) Lack of capital

iii) Lack of adequate technology

107 World Investment Report 2011, pp 117, 118 &119
108 World Investment Report 2011, at 103
109 World Investment report 2011, at 104
110 World Investment Report 2009, at 2
111 Press Information Bureau, Ministry of Commerce & Industry, Government of Karnataka, 9/3/16 @5.30p.m
112 World Investment Report 2009, at 35
iv) Lack of transportation

v) Lack of organization among farmers

vi) Lack of education and awareness among the farmers

In order to attract more FDI in agricultural sector there must be proper legislative provisions, specially related to land acquisition. The present FDI Policy has allowed 100% FDI in agricultural farm sector as a result of which FDI has increased to Rs.553.14 Crores during 2015-16 when compare to the flow of FDI in 2014-15 which was just 365.14 Crores, 2013-14 it was 559.66 Crores, 2012-13 it was 875.90 Crores.\textsuperscript{113}

g) FDI and Technology

The BITs must concentrates on dissemination of clean technology which includes facilitation of cross-border technology flow, establish link between MNCs and the host states to fill the lacuna of technology, training the employees with managerial skills, promoting technology generating. Low-carbon FDI includes industries such as a) Renewable electricity generation, b) Recycling and c) Manufacturing of environmental technology products (Turbines, solar panels and bio fuel). Mr. Ashok Hinduja, Chiarman, Hinduja Group (India) has suggested that government must create Special Purpose Vehicles (SPV) for each new project in all the sectors for FDI approval related issues as land clearance, etc.\textsuperscript{114}

h) Impact of FDI on Worker’s Rights

The present international trade and investment conventions have a deep impact on workers’ rights in host state. The basic workers’ rights includes right to organize independent trade union, collective bargaining related to settling industrial disputes, guaranteed health insurance, paid vacations, safety measures at workplace. All these rights are at higher risk in current scenario.\textsuperscript{115} The US’s MNCs to increase its productions entered into developing states where vast and cheap labour resources are available, these MNCs are exporting the manufactured goods back to US and the chain of new industrialized states such as Mexico, Brazil, Thailand and Taiwan.\textsuperscript{116}

These kinds of business method will exploit the workforce and the developing states

\textsuperscript{113} Business Line, Wednesday April 27, 2016, at 5
\textsuperscript{114} Business Line, Thursday April 28, 2016, at 11
\textsuperscript{115} Supra Note 1, pp133 &138
\textsuperscript{116} Supra Note 1, at 141
will start suspecting MNCs. Due to this, workers are placed in unfair condition which should be addressed at international forum because it infringes their fundamental rights which are guaranteed in many conventions. Another issue related to workers’ right is, MNCs will have institutional agreement which will not allow workers to form an independent union and the practice is adopted by the Government of Malaysia with respect to workers’ election in factories.\textsuperscript{117} The host states must introduce labour standards to protect workers’ rights in MNCs. Developed states have taken many such measures example in US between 1984 and 1988 Caribbean British Initiatives (CBI), Generalized System of Preferences (GSP), Overseas Investment Corporation (OIC) are established to protect worker’s rights and Omnibus Trade and Competition Act (OTCA) was also enacted by US Government. These types of measure shall be adopted by all the developing states to safeguard the interest of workers.\textsuperscript{118}

NAFTA has played a vital role in protection of workers’ rights in MNCs, under this provision MOU is signed between US and Mexico in 1992 to address issues such as child labour, workers’ rights and established a permanent forum to settle these matters.\textsuperscript{119} The US, France and other states insisted WTO to include workers’ rights in agenda of Ministerial Meeting of Singapore 1996 and to establish a Working Group to discuss the nexus between labour force and investments, but later it was rejected by WTO saying that ILO is a proper forum to address the issue.\textsuperscript{120}

6.9 Role Indian Judiciary in Upholding FDI Policy

Indian judiciary has played a key role in interpretation and application of FDI policies either by protecting the interest of investors or upholding the FDI policies issued by the Government. The researcher has analysed the following cases related to FDI in India.

**BALCO Employees’ Union v. Union of India\textsuperscript{121}**

Bharat Aluminium Company Limited (BALCO) was a Government of India undertaking established in 1965 under Companies Act 1956 with its paid-up share capital of Rs.488.85 Crores. The Company was involved in manufacturing and sale of aluminium products. In 1996 the Government of India issued policy of disinvestment

\textsuperscript{117}Supra Note 1, at 142
\textsuperscript{118}Supra Note 1, at 145
\textsuperscript{119}Supra Note 1, at 146
\textsuperscript{120}http://www.naftanow.org, visited on 1/12/16, @ 5p.m
\textsuperscript{121}(2002)2 SCC 333, AIR 2002 SC 350
according to which government will sell 51% equity in respect of BALCO. This was challenged by BALCO employees’ union by filling a writ petition before Delhi High Court. Later, the case transferred to hon’ble Supreme Court of India. The Court held that, the disinvestment by the government in BALCO was valid and subsequently it was dismissed. The reason behind the decision was the procedure of disinvestment was just fair & equitable and transparent procedures are followed and there is no arbitrary in exercise of power by the government.122

**Manohar Lal Sharma v. Union of India**123

Writ petition was filed before hon’ble Supreme Court of India by Mr. Manohar Lal Sharma, petitioner requesting to quash the Press Note Nos 4,5,6,7 & 8 date 20th September 2012 related to FDI in Single-Brand Products Retail Trading, Multi-Brand Retail being unconstitutional and without authority of law. The court dismissed the petition by upholding the Government Policy of Multi-Brand Retail Sector.124

**Federation of Association of Maharashtra v. Union of India (Whole sale trading-B2B)**125

The present case is related to FDI in Cash & Carry Whole Sale Trade. In 1997 Government of India issued FDI Policy and Guidelines for FIPB in respect of trading business where 100% FDI is allowed in Cash & Carry Wholesale Trading but subjected to condition that such companies shall engaged only in business to business (B2B) not in retail trading. The M/S Metro Cash and Carry Pvt Ltd, which is an Indian Company and M/S Metro Cash & Carry, GmbH which is a foreign corporation took permission for establishment of a ‘State of the Art’ cash and carry complex food and non-food products in cities, but the approval was subjected to condition that they shall sell the products only to retail seller but not to ultimate consumers. Later FIPB revoke the approval stating that Metro’s business concepts was based on selling to registered business customers not to the ultimate consumers. The writ petition was dismissed by the court stating that FIPB’s act of revocation of approval is valid.126

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122Balco Case, available at http://www.indiankanoon.org/doc/1737583, visited on 11/06/16 @5p.m
123(2013)6 SCC 616
124Supra Note 35, pp 279-848, at 850
125ILR (2004)2 Del 830
126Case law @ http://www.indiankanoon.org/doc/837644, visited on 11/06/16 @ 6p.m
Radio House v. Union of India

The case is related to FDI in retail sector which was allowed by Government of India. Government of India granted approval for a wholly owned subsidiary of Metro AG, a German multinational company established two ‘Cash & Carry’ stores in Bengaluru, Karnataka. The Government of India granted approval to Metro Cash & Carry Co to carry on Cash & Carry Wholesale business in India with certain conditions such as it would sell its products only to register retail sellers and it should not indulge in retail business. The petitioner alleged that Metro Co was indulge in selling spectacles, jewellery, audio, visual, etc for the same price whether for 100 units or 1 unit which made them a retail seller. High Court of Karnataka uphold the letter of approval issued by Government of India but laid down that the government must monitor the activities of the subsidiary for compliance of FEMA rules and must take action if it is violated by the subsidiary in India. The petition was partly allowed.

In actual practice, the Metro Cash & Carry is issuing Metro Card to individuals also but not directly, it is issuing in the name of retail sellers who can give it to ultimate customers also. Consumers are purchasing goods from the above said outlet but the purchased bill will be issued in the name of retail seller which is an eye wash method adopted by the Metro shops. As per the non-doctrinal research data, many consumers possess Metro Cash & Carry Card and they are using it as ultimate consumers.

Mt. Thakur, former Chief Justice of India urged the Hon’ble Prime Minister Mr. Narendra Modi to strengthen Indian Judiciary to resolve investment disputes, if judiciary is not working effectively the investors will not come forward to invest in India.

Pension Fund Regulatory Development Authority (PFRDA) has given statutory backing to the pension regulatory which had stipulated that FDI in pension sector cannot exceed 26% of the paid up capital as said by R.V. Verma, Member of PFRDA, now 49% FDI is allowed in pension sector under Automatic route.

127(2008)146 Com cases 236, www.indiakanoon.org/doc/620294, visited on 23/4/16, @ 7 p.m
129Business line, Wednesday April 13 2016, at 1
130Consolidated FDI Policy 2016
6.9 Conclusion

To conclude, India’s running a current account deficit which is tempting to depend on FDI inflows from other states. However FDI should be viewed as an investment having lasting and long term investment objectives in the recipient states aiming at broader socio-economic implications such as enhancing technical knowledge and employment generation. The quantity of FDI is important and the quality also, the fear of monopoly of power of FDI cannot be ruled out. According to 110th Report of the Parliamentary Standing Committee on Commerce growing acquisition of domestic pharmaceutical companies by foreign multinationals is affecting the availability of crucial medicines at affordable rates. FDI in retail and insurance sector in India has also generated a lot of debate. Regarding FDI in retail sector while the supportive argument is that it would eliminate middlemen and provide more employment opportunity as well as much wider variety of consumer products, the opposing argument regarding FDI in retail is that it would have adverse impact on local traders and small-scale enterprises by creating monopoly power of big retailers. In some cases, it may be difficult to attract FDI in priority sectors as foreign investors may not be interested in such sectors due to less profit opportunities as well as long gestation period involved with, such investors may prefer to invest to expand their business. It would be worthwhile to note that India has a large and growing market, a large magnitude of skilled and semi-skilled labour force, internationally competitive technical knowledge base. Hence, instead of policies that would promote higher dependence on FDI inflows merely for meeting the current account deficits, the country should promote FDI policies for better regional development, generation of employment opportunities, acquisition of new technology & knowledge and development of human resource.

The host states shall regularly publish appropriately all the data related to FDI which will help all the stakeholders to access information about flow of FDI in India. Host states must provide aftercare services to FDI, it must adopt dichotomy of FDI policies which consisted of both liberalization and promotion of FDI on one side and regulation of FDI on the other side in the interest of public.

131Employment News dated 15/11/2013, at 64