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A LEGAL ANALYSIS ON LIBERALIZATION OF OVERSEAS FUNDING IN INDIA

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Abstract

Foreign investment policy liberalization is a crucial element of India's structural reforms. While the necessity for foreign capital is undeniable, the breadth, accessibility, and impact of a liberalized foreign investment policy have been hotly debated. The liberalization of overseas funds in India is described in this study, as well as how India's foreign investment strategy lacks vision. Foreign Direct Investment (FDI) is a commitment in the financial interests of another nation by a foreign nation (a corporation or a person) in the form of gained greater. India became a rapidly big economy after economic reform in 1991. Ever since the legislative climate in India for foreign investment has steadily improved. In current history, India's foreign investment policy has broadened, but it is still far from comprehensive, and thus further liberalization of foreign investment policy looks to be necessary in light of the demands and responsibilities connected with the current global environment. The research paper also talks about the elements of foreign investment policy and the issues which are faced by foreign investors. Foreign investment is essential to make up for the lack of local investment in emerging countries, especially India. Furthermore, this paper suggests that one should encourage foreign investment since it allows us to accomplish our long-term goals of improving the balance of payments, accelerating economic growth, reducing inequality, and reducing individual psychological disparities in development, as well as being very useful and beneficial to the Economic growth of the country like India.

Introduction

Foreign investment policy liberalization has been a key component of India's economic reforms, which began in 1991. The first measure was to eliminate the long-standing 40% foreign ownership barrier and enable automatic approval of up to 51% international equity. Following that, a number of policies and processes were implemented to establish an atmosphere that allowed for open borders of foreign money. The trend of liberalizing foreign investment regulation has been continuing, and it is still ongoing now. India's economy has grown to become one of the largest presently. Overseas expenditures in India have changed dramatically, not just in terms of size but also in terms of its geographical distribution and

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sectoral mix. An examination of the patterns in direct investment over the previous few years demonstrates that, although inward and outward investment flows were relatively slow in the following decades, they picked up steam in the second half. Mergers and acquisitions are the most common ways for Indian companies to participate in overseas markets. Businesses will have immediate access to larger and more comprehensive industries as well as superior technology as a result of increased Merger and Acquisition activity, allowing them to expand their client base and attain a worldwide reach. Foreign corporations are ready to invest in India to take advantage of the prevailing investment regulations and benefits such as tax concessions and lower wage costs. In India, foreign investment is a key engine of economic growth and prosperity. Establishing an affiliated business or a franchise, purchasing a controlling stake in an established organization, or merging or forming a partnership with a corporation are all examples of foreign investment.

Elements of Foreign Investment policy

The rapid certification of foreign investment projects with up to 51% equity involvement is a significant component of the present Provisions. This is true for 34 businesses that represent a large and diverse range of the country's industrial sector. MNCs which were already functioning in various sectors in the nation with much less than 40% shareholdings owing to the previous policy, and especially those that were forced to lower their equity shares, have been permitted to grow their equity investments to 51%. Under the previous system, more than 51% ownership was also permissible in these areas. While requests must be completed and approvals must be secured, the clearance process has been simplified to guarantee speedier acceptance[2]. The technological environment and assistance to export are among the conditions for permitting more than 51 interactions with external ownership, as they have been in the previous years, but the attitude is favourable, and the emphasis is on speedier processing. The Foreign Investment Promotion Board (FIPB)[3] has been redesigned as the authority to grant proposals (as opposed to Foreign Investment Board)[4]. Since the FIPB was restructured and a constructive mentality was instilled, the authorization ratio has increased dramatically.[5] Clearly, there is a readiness to allow foreign corporations to have a greater equity stake in the company. The mechanism of instantaneous acceptance up to 51% has the

[2] Das T., *Liberalization of Foreign Investment Policy in India: Some Observations,*2, 1, 39-40 (1998)
[3] The Foreign Investment Promotion Board, 2017
[4] *Foreign Direct Investment Policy,* https://dpiit.gov.in/policies-rules-and-acts/policies/foreign-direct-investment-policy
[5] *INDIAN INVESTMENT ABROAD - OVERSEAS DIRECT INVESTMENT BY INDIAN COMPANIES,* (Oct. 2021), https://www.ibef.org/economy/indian-investments-abroad

consequence of freeing up a lot of administrative effort by decreasing the number of requests that need to be scrutinized and providing more objective treatment to applications having overwhelming overseas investments. This demonstrates professionalism in the response to FDI, which was previously almost non-existent. Most crucially, ideological beliefs are rarely allowed to dominate the arrangement of property or the amount of money invested.[6] Furthermore, the policy of subject to approval is almost 51% of the foreign equity conditions, meaning that certain joint venture enterprises are not required to satisfy any requirements or are not subject to any conditions. To commence, a pay-out matching criterion was implemented to guarantee that foreign currency expenses were matched from internal resources, that is, imports must balance exports and there was no net outflow of foreign currency.[7] This was done in order to relieve the country's balance-of-payments difficulties. This criterion was later removed in order to make the insurance more appealing. Other responsibilities, such as a responsibility to export or an industrialization obligation, are not enforced. This is yet another illustration of the measured approach to FDI.

Issues faced by Foreign Investors in India

India has one of the world's quickest extending economies. Understanding that India can possibly detonate one's marketing projections, the country's advancement in 1991 brought about a critical section of enormous global companies. Regardless of great economic situations, an enormous number of unfamiliar brands have attempted to flourish in India. There were a tonne of explanations behind their disappointment in India, regardless of whether it was the leaving of General Motors or the end of the Royal Bank of Scotland.[8]

Ease of doing business in India. This is most likely one of the greatest hindrances India faces in drawing in FDI. The administration, debasement, work and land securing laws are shockingly confounded and dial back the whole course of setting up a business. A country which is restless to draw in business should hope to perceive how different nations are dealing with these issues and what steps they have taken to make it alluring for the unfamiliar organisations to set up their shops. Tax collection that is material to the corporate benefits. The worldwide expense scene has seen extensive changes in the new past and this will keep on being something similar in the close to term. With regards to India, the aggregate sum of

[6] Tarun, *supra* note. 1

[7] Abbasali Abounoori, *The Effective Elements on Foreign Direct Investment Current,* https://irjabs.com/files_site/paperlist/r_2215_140706015536.pdf

[8] Nagaraj R., *Foreign Direct investment in India in the 1990's,* 38 JSTOR, 1, 1701(2003).

incomes gathered through the different expenses and obligations misses the mark concerning the prerequisites.[9]

A fundamental assessment of the circumstance is basic prior to deciding the main three obstacles looked by an unfamiliar organization in building up its activities in India. In the first place, decide why India is vital to your association and yet again approve it through careful market examination. Second, compute how much cash and time expected to make a drawn-out presence[10]. Whenever you've considered this, you'll be more ready to look at minimum a portion of the difficulties that this nation might toss in your direction. This year, India climbed several positions over the years to reach at 63rd rank on the "ease of doing business" record[11]. Throughout the span of the 2000s, the FDI strategy was bit by bit changed. Various unfamiliar venture restrictions have been lifted, and methodology have been smoothed out. For worldwide financial backers, India's hopeful monetary possibilities and administrative changes have made it a positive market.[12]

Venture Capital Landscape

India's increase in private foreign capital inflows following liberalization, as well as the nature of these inflows, is consistent with evidence from other emerging countries. The first opinion maintains that the decline in US interest rates between 1989 and 1992, combined with a cyclical recession in the US, Japan, and many parts of Europe, drove global capital to emerging countries in quest of higher returns. The opposite point of view emphasizes the importance of 'internal' or 'pull' factors such as credible economic reforms, improved macroeconomic performance, and local policies that boosted investor confidence and drew in international capital.[13] Another internal incentive for entering foreign capital has been proposed: currency realignment. The extent to which each element contributes, however, is unknown because capital flows are a jointly determined variable due to their interaction. Since independence, India has pursued a mixed economy solution that integrates the benefits

[9] Dr. Bobby Srinivasan & Dr. Sudhakar Balachandran, *Challenges to Foreign Direct Investment in India*, Great Lakes (published on September 18, 2014) https://blog.greatlakes.edu.in/chennai/challenges-foreign-direct-investment-india-dr-bobby-srinivasan-dr-sudhakar-balachandran/

[10] *Eyebrows raised over India's ease of doing business ranking by World Bank*, The New Indian Express (Aug. 29 2020), https://www.newindianexpress.com/business/2020/aug/29/eyebrows-raised-over-indias-ease-of-doing-business-ranking-by-world-bank-2189787.html

[11] The World Bank, *Ease of Doing Business in India* (last visited on January 3, 2022 at 07:51 PM) https://www.doingbusiness.org/en/data/exploreeconomies/india

[12] Enforcing Contracts, Department of Justice, Government of India (last visited on January 3, 2022 at 07:49 PM) https://doj.gov.in/eodb/

[13] Kohli R., *Capital flows and their macroeconomic effects in India*, 2 ICRIER, 24, 28-32 (2001).

of both the capitalist and communist economic systems. Some historians claim that, over time, this policy resulted in the construction of a plethora of regulations and laws that were intended to govern and regulate the economy but instead hampered growth and progress. Others claim that India, which began its development path with near-stagnation, has since been able to increase savings, establish a diversified industrial sector that produces a variety of goods, and sustainably increase agricultural output, ensuring food security. In 1991, India experienced a financial recession linked to its foreign debt: the government was unable to repay its foreign debt; foreign exchange reserves, which are normally maintained to import petroleum and other important items, plummeted to levels that were insufficient for even a month's worth of imports. The problem was exacerbated by rising prices for basic items. As a result of all of this, the government implemented a new set of policy measures that shifted the direction of our development strategies.[14] Although several liberalization measures were implemented in the 1980s in the fields of industrial licensing, export-import policy, technology upgrade, fiscal policy, and foreign investment, the 1991 reforms were more comprehensive.[15] The foreign investment ceiling in banks increased to roughly 74 percent. Foreign institutional investors such as financial intermediaries, mutual funds, and unit trusts can now invest in the Indian equity market. The foreign currency market was the site of the first significant adjustment in terms of overseas funding. The rupee depreciated against foreign currencies in 1991 as a short-term solution to the balance of payments crisis. The liberalization of trade and business regime was implemented to improve industrial production's global competitiveness, as well as overseas investors and innovation into the economy. The goal was also to ensure the effectiveness of local industries and encourage technological progress.[16]

One reason typically blamed for the many debt, currency, and financial crises that have afflicted Latin American countries is resident capital flight, which is helped by liberalized capital account and exchange rate regimes. India, on the other hand, has been sheltered from this for a long time because net capital liberalization was late and concentrated on foreign

[14] KUMARI A., *Liberalization, Privatization and Globalization: An Appraisal in India,* 11 IRJMST, 1, 2250-1959 (2020).

[15] *Ibid.*

[16] Jadhav N., *Capital account liberalization: the Indian experience. In India's and China's Recent Experience with Reform and Growth,* 6 PFSA, 20, 275-307 (2005).

capital inflows. This is no longer the case, thanks to the liberalized rule for resident Indians' access to foreign exchange.[17]

RBI introduced schemes like the Liberalized Remittance Scheme for Indian residents making a significant change in methods of attracting overseas funding for Indian industry. They were also allowed to open, maintain, and retain foreign currency accounts with banks outside India for the purpose of carrying out the Scheme's activities. [18] There are several ways in which overseas funding is brought in India like FIPB (Promotion Investment Board), Acquisition of existing shares and inflows through them, schemes by RBI for NRIs and borrowings for external sources.[19] There are some disadvantages of this overseas funding in India that somewhere it has led to disappearance of small-scale industries, exchange crisis and cultural erosion is also visible,

The biggest problem under radar its roots to political corruption, terrorism and human trafficking. Inflation in the economy and trade deficit are the consequences of irregular use of overseas funds in India.[20] The underlying goal of economic liberalization has remained the same since 1991, despite changes in political parties bringing advances by moving forward from a closed to open and market economy. Every year, developments in economic reforms placed India in ninth place in terms of industrial output and third place in research and technology.[21]

Legal Challenges

India's overall set of laws is perplexing, and its courts are overburdened with cases. There are likewise numerous procedural compliances that should be clung to before a foundation can start its tasks in India. Now and again, even before tasks start, financial backers get snared in lawful debates concerning property, activity overall and so forth Thus, unfamiliar undertakings should go through different pointless tasks to acquire the vital licenses and endorsements to start carrying on with work in India. Residents and outsiders, the same should stand by months, if not years, to get the at least 100 endorsements needed to begin a business. This is to a great extent because of the way that administration keeps on taking off, infrequently joined by defilement. The problems of clearing India's administrative hindrances

[17] Jayati Ghosh, *The dollar drain India must worry about*, The Hindu Business Line (Mar. 09, 2018), https://www.thehindubusinessline.com/opinion/columns/the-dollar-drain-india-must-worry-about/article22312376.ece1.

[18] *Ibid.*

[19] Nasir M., *Policy of foreign direct investment liberalisation in India: implications for retail sector*, 65 IRE, 65, 465-487 (2018).

[20] Research FDI, *16 ADVANTAGES AND DISADVANTAGES OF FOREIGN DIRECT INVESTMENT*, Research FDI (Mar. 11, 2021), https://researchfdi.com/foreign-direct-investment-advantages-disadvantages/.

[21] *Ibid.*

and formality are every now and again defeated by the prizes of an effective market passage. Unfamiliar organizations may not see the value in managing superfluous inconveniences and speaking with government authorities, yet they should stick to the guidelines. At the point when you don't react, Indian government delegates have gained notoriety for hitting you up. It is similarly significant for an unfamiliar organization hoping to build up a base in India to put resources into both hard and delicate foundations. Cooperation with nearby colleagues, on a specialized, monetary, and legitimate level – could accordingly assist you with keeping away from starting dangers and set aside time and cash. An organization named Larive International associates Dutch organizations with peers in rising business sectors like India and other Asian nations.[22]

Tax System

As per the World Bank[23], tax planning and installment in India requires approximately 214 hours out of each year. The expense framework in India is amazingly muddled. Unfamiliar endeavours are dependent upon an incredible 40% corporate personal duty, in addition to an extra charge and schooling cess. Unfamiliar endeavours with pay over Rs. 1,00,00,000 are dependent upon a 2% additional charge, or a 5% duty in the event that the pay surpasses Rs. 10,00,00,000. The schooling cess rate is 2%, and the auxiliary and advanced education cess rate is 1%. Because of the intricacies of expense rules, organizations might wind up paying inaccurate assessment installments assuming that they don't look for the counsel of particular experts. The Goods and Services Tax (GST) went into power on July 1, 2017, and it is an aberrant expense that applies to the assembling, deal, and utilization of labour and products in India (GST). A World Bank investigation, causing us a deep sense of dismay, demonstrated that the GST charge change is one of the most mind boggling, with the most elevated rate in Asia and the second-most elevated rate among 115 countries utilizing a GST framework.[24] New modern endeavours, R&D exercises, advancement of specific regions, sends out, and other direct assessment motivators are given by the Indian government as expense occasions, derivations, and different structures. This is done to advance trade, venture, and proportional

[22] Bhumika Saishri Panigrahi, *Issues faced by foreign investors while establishing operations in India*, iPleaders (published on October 10, 2021) https://blog.ipleaders.in/issues-faced-by-foreign-investors-while-establishing-operations-in-india/

[23] The World Bank, *Taxes and Government revenue*, https://www.worldbank.org/en/topic/taxes-and-government-revenue#1

[24] Prakhar Dua, Kishore Joshi and Nischal Joshipura, *India: Foreign Investment-Recent Trends & Issues*, XII, The NLR (published on August 5, 2021) https://www.natlawreview.com/article/india-foreign-investment-recent-trends-and-issues

financial collaborations. To be qualified for this advantage, one should initially decide if the country wherein they live or create cash has a DTAA with India. The substance liable for deducting charge at source should get Form 10F, an expense home authentication, and a self-affirmation in an approved way. The hotly anticipated Goods and Service Tax was taken on in India, working on the duty framework and further developing the credit chain, eliminating the tax assessment course impact.[25] Under the SEZ idea, the Indian government needs to build up an issue-free climate for sends out, upheld by a coordinated improvement on foundation and a bundle of motivators to draw in unfamiliar and homegrown speculation. The public authority has made various strides to revive financial backer interest in SEZs, including changing various guidelines, for example, least land region necessities, proprietorship move/deal, etc.[26]

Rights to Intellectual Property

On the off chance that somebody plans to lead business in India or as of now carry on with work there, they should see how to utilize, ensure, and authorize your privileges to your organization name, logo, plan, or thought. India, as involved with the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), has met its responsibilities by executing applicable rules controlling the accompanying:

- Trademarks,
- Geological Indications,
- Patents,
- Industrial designs,
- Copyrights and other related freedoms.

India has legitimate intellectual property laws, and it joined the WIPO Internet Treaties in July 2018, particularly the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WIPO PPT) (WPPT). Notwithstanding, implementation is remiss, and protected media theft is uncontrolled.[27] There is no legal assurance for proprietary innovations in Indian law. At the point when an encroachment happens, it is basic to

[25] Bhumika, *supra* note. 22
[26] Dr. Bobby Srinivasan & Dr. Sudhakar Balachandran, *supra* note 8.
[27] Dr M.S. Khan and Amir Moin Khan, *FDI AND INDIAN ECONOMY-: Issues, Challenges and Prospects in India*, 4, IJR Paripex, 44, (2015) (published on December 2015) https://www.worldwidejournals.com/paripex/recent_issues_pdf/2015/December/December_2015_1449635381__16.pdf

accumulate however much proof as could reasonably be expected. In India, organizations encountering duplicating have an assortment of choices.[28]

Dispute Resolution

In India, the general set of laws is established on precedent-based law. As a result of the significant stretch of British pioneer predominance under the British Raj, it is generally founded on English custom-based law. The Indian Arbitration and Conciliation Act, 1996[29] is the nation's controlling mediation act, and it depends on the United Nations Commission on International Trade Law's (UNCITRAL)[30], Model Law on International Commercial Arbitration[31], which was embraced in 1985. In the interim, the Indian Council of Arbitration (ICA), the Delhi International Arbitration Center (DAC), the Indian Merchant Chamber (IMC) in Mumbai, and the Nani Palkhivala Arbitration Center (NPAC) in Chennai are among the homegrown establishments.[32]

Conclusion

The decision to liberalise the Indian economy in 1991 transformed the country's whole picture in comparison to other global economies. India's economy is currently the world's fourth largest and second fastest expanding. The underlying goal of economic liberalisation has remained the same since 1991, despite changes in political parties bringing advances by moving forward from a closed economy to a market-based economy. Between independence and 1990, the previous closed economy system was riddled with corruption, severe limitations, protectionism, and slow-moving growth. In retail FDI will play a bigger role in the future transformation of the retail sector from extremely unorganised to modernised. In terms of policy ramifications, increasing liberalisation could have some negative consequences for conventional players that are unable to compete in the global marketplace; nonetheless, this will not obstruct the capacity to enact the liberalisation policy.

[28] Bhumika, *supra* note. 22

[29]The Indian Arbitration and Conciliation Act, 1996

[30]The United Nations Commission on International Trade Law, 1966

[31] Model Law on International Commercial Arbitration, 1985

[32]Rashmi Perumal, Liberalisation of the Law relating to Foreign Institutional Investment and its Impact on Economic Development, Legal Service India (last visited on January 3, 2022 at 08:59 PM) http://www.legalservicesindia.com/article/689/Liberalisation-of-the-Law-relating-to-Foreign-Institutional-Investment-and-its-Impact-on-Economic-Development.html