

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, or distributed in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the Managing Editor of the *International Journal for Legal Research & Analysis (IJLRA)*.

The views, opinions, interpretations, and conclusions expressed in the articles published in this journal are solely those of the respective authors. They do not necessarily reflect the views of the Editorial Board, Editors, Reviewers, Advisors, or the Publisher of IJLRA.

Although every reasonable effort has been made to ensure the accuracy, authenticity, and proper citation of the content published in this journal, neither the Editorial Board nor IJLRA shall be held liable or responsible, in any manner whatsoever, for any loss, damage, or consequence arising from the use, reliance upon, or interpretation of the information contained in this publication.

The content published herein is intended solely for academic and informational purposes and shall not be construed as legal advice or professional opinion.

**Copyright © International Journal for Legal Research & Analysis.
All rights reserved.**

ABOUT US

The *International Journal for Legal Research & Analysis (IJLRA)* (ISSN: 2582-6433) is a peer-reviewed, academic, online journal published on a monthly basis. The journal aims to provide a comprehensive and interactive platform for the publication of original and high-quality legal research.

IJLRA publishes Short Articles, Long Articles, Research Papers, Case Comments, Book Reviews, Essays, and interdisciplinary studies in the field of law and allied disciplines. The journal seeks to promote critical analysis and informed discourse on contemporary legal, social, and policy issues.

The primary objective of IJLRA is to enhance academic engagement and scholarly dialogue among law students, researchers, academicians, legal professionals, and members of the Bar and Bench. The journal endeavours to establish itself as a credible and widely cited academic publication through the publication of original, well-researched, and analytically sound contributions.

IJLRA welcomes submissions from all branches of law, provided the work is original, unpublished, and submitted in accordance with the prescribed submission guidelines. All manuscripts are subject to a rigorous peer-review process to ensure academic quality, originality, and relevance.

Through its publications, the *International Journal for Legal Research & Analysis* aspires to contribute meaningfully to legal scholarship and the development of law as an instrument of justice and social progress.

PUBLICATION ETHICS, COPYRIGHT & AUTHOR RESPONSIBILITY STATEMENT

The *International Journal for Legal Research and Analysis (IJLRA)* is committed to upholding the highest standards of publication ethics and academic integrity. All manuscripts submitted to the journal must be original, unpublished, and free from plagiarism, data fabrication, falsification, or any form of unethical research or publication practice. Authors are solely responsible for the accuracy, originality, legality, and ethical compliance of their work and must ensure that all sources are properly cited and that necessary permissions for any third-party copyrighted material have been duly obtained prior to submission. Copyright in all published articles vests with IJLRA, unless otherwise expressly stated, and authors grant the journal the irrevocable right to publish, reproduce, distribute, and archive their work in print and electronic formats. The views and opinions expressed in the articles are those of the authors alone and do not reflect the views of the Editors, Editorial Board, Reviewers, or Publisher. IJLRA shall not be liable for any loss, damage, claim, or legal consequence arising from the use, reliance upon, or interpretation of the content published. By submitting a manuscript, the author(s) agree to fully indemnify and hold harmless the journal, its Editor-in-Chief, Editors, Editorial Board, Reviewers, Advisors, Publisher, and Management against any claims, liabilities, or legal proceedings arising out of plagiarism, copyright infringement, defamation, breach of confidentiality, or violation of third-party rights. The journal reserves the absolute right to reject, withdraw, retract, or remove any manuscript or published article in case of ethical or legal violations, without incurring any liability.

CROSS-BORDER CAPITAL INVESTMENTS IN INDIA: LEGAL ISSUES AND CHALLENGES

AUTHORED BY - ALLEN VISHAL DSOUZA
LLM Christ University, Lavasa, Pune

Abstract:

Foreign investor protection in India stands out as a very important element of the larger economic and legal landscape of India, which is designed to draw and protect the foreign investments within Indian realms, thus contributing to the growth and development of the nation. India has an evolved and integrated system that integrates the international agreements such as Bilateral Investment Treaties (BITs), multilateral agreements, International Investment Agreements (IIA), as well as far-flung domestic regulations, which are largely controlled by SEBI, RBI, and the Ministry of Commerce. This protection reaching has considered both the foreign direct investment (FDI) and foreign portfolio investment (FPI), and these norms integrate principles, including fair and equitable treatment of the investors. Protection against unlawful expropriation, a dispute resolution framework, and market integrity provisions under the law. The incorporation of India into the international economy since 1991, following the LPG policy, has made it impossible to ignore the Investor Protection mechanism which exists in this country and have minimised the political risk and has triggered capital inflows that are sustainable. However, the international investor protection law and domestic security regulation co-exist with some challenges, particularly in the area of protection scopes enforcement, transparency, and regulation works full stop the complicated regulatory environment. Although the nation has invited 81 billion FDI in FY 2024-25, The gaps in ISDS enforcement as exemplified by high profile arbitration awards, lack of consistency in the regulatory policy due to an application of the retrospective doctrine of taxation and delay of e-commerce policy. Nonetheless, the awaited 2025-26 reforms, such as SWAGAT-FI framework, liberalization of FDI and a redesign of BITs, are indicators of a rebalancing towards investor incentives.

Keywords: Foreign Investor Protection, FDI & FPI, Regulatory Framework, Dispute Resolution.

Introduction:

Development of Investment Protection Structure in India.

Licensing, FERA, and Swadeshi nationalism, Pre-1991 Protectionist Regime¹. The pre 1991 foreign investment system in India was founded on economic nationalism of the post independence era². It laid more emphasis on self-sufficiency and import replacement. The Foreign Exchange Regulation Act (FERA), which was initially passed in 1947 and revised in 1973, perceived foreign exchange as a rare national resource that had to be preserved. It required Reserve Bank of India (RBI) permission of virtually all foreign inflows, restricted foreign equity to 40 percent in joint ventures and classified a company that reached this limit as a FERA company, which would be subjected to increased scrutiny. The Industrial Policy Resolution of 1956 also set aside 18 strategic sectors, such as the atomic energy, the defense, the railways, and the heavy industries under the public sector. The licensing was limited to priorities such as small-scale industries in order to restrict the foreign direct investment (FDI) by foreign investors³.

The introverted strategy minimized in flows with only about 100-200 million dollars inflow yearly between 1980 and 1990. This was mostly supplied by Non- Resident Indians (NRIs) and some multinationals in export-oriented units. Bilateral Investment Treaties (BITs) were simple by 1990, India had signed only four, with the UK, Germany, Kuwait and Romania. Ideological opposition to investor- state dispute settlement (ISDS) was high in regards to the sovereignty loss. What happened was a protectionist system whereby domestic dominance was given more precedence over internationalisation.

1991 LPG Reforms: Liberalization in Crisis.

The oil shocks of the Gulf War, decline of the Soviet Union, and drilling down to 1.1 billion of forex reserves in 1991 contributed to the balance of payments crisis, which necessitated a radical shift. This was hardly sufficient two weeks imports. India embraced Liberalization, Privatization, and Globalisation (LPG) under the IMF and World Bank loans. The New Industrial Policy of 1991 was radical. It also abolished the need of licensing of all but the 18 industries and canceled the 40 percent equity limit by FERA and also provided two pathways

¹ *Foreign Direct Investment Inflows Hit Record \$81 Billion in FY25, Services Sector Leads Surge*, IndBiz (June 2, 2025).

² Sharma, *Pre and Post 1991 Era for Indian FDI Framework Proposal*, 18 J. Interdisciplinary & Multidisciplinary Res. 39 (2023).

³ Anand, *Economic Policy Reforms, Foreign Direct Investment and the Patterns of MNC Presence in India: Overall and Sectoral Shares*, CDS Working Paper No. 493, at 1 (Ctr. for Dev. Studies Jan. 2020).

to FDI which were automatic approval by the RBI and approvals by the newly instituted Foreign Investment Promotion Board (FIPB)⁴.

The rapid progress was achieved by several milestone:

1991: FDI of up to 51 percent. 35 priority areas (example food processing, electronic), FIPB as a one window service. 1997: Peak Performance Institution (PPIs) allowed full FDI in export-oriented units, and increased manufacturing.

1998-2000: Disinvestment policies were opened to allow public sector interests; FERA backloads were cleared by the Voluntary Disclosure of Income Scheme.

The Foreign Exchange Management Act (FEMA), 1999⁶, closed the switch by redesignating violations as civil (capable of fines instead of imprisonment) and with the introducing of current account convertibility and controlled capital account. By 2000, the cumulative inflows of FDIs had soared to 17.8 billion with cumulative growth of 15 times over the previous decade this was a sign that India was becoming an investment destination.

Post-2000 consolidation: Opening in sectors, BIT (maxium 83 active as of 2015) with such protections as fair and equitable treatment (FET), most-favored-nation (MFN) provision, and with ISDS in first- generation treaties⁵. The process of sectoral de-reservation was persisting- FIPB simplified approvals, and the policy-making body was changed to the Department for Promotion of Industry and Internal Trade (DPIIT). Market integrity was professionalized with the establishment of the Foreign Portfolio Investment (FPI) Regulations (2014, consolidated 2019) and the established of the SEBI in 1992.

STATEMENT OF THE PROBLEM:

There are research gaps regarding legal research. These are the key research gap is dispute and overlap between SEBI regulation and foreign investment and other Indian laws such as FEMA and FDI policy where no significant research has been done. the effectiveness of the existing laws in terms of transparency, protecting the investors and understanding the relationship between International treaties and domestic Indian law to FPIs and FDI, the impact of regulatory changes on market stability and investor confidence. The emerging issues as well are evaluated, including beneficial ownership disclosures and efficiency of enforcement in the emerging investment sector in India.

⁴ Palit, *India's Foreign Investment Policy: Post-crisis Realignment*, at 1 (Ifri Asia Vis. 2018).

⁵ Akhtar, *Inflows of FDI in India: Pre and Post Reform Period*, 2 INT'L J. HUMANITIES & SOC. SCI. INNOVATION 1 (2013).

RESEARCH OBJECTIVES:

1. To propose necessary reforms to law and policy in related to foreign investment in India, align India's law and policy in tune with international standards.

RESEARCH QUESTIONS:

1. What reforms are necessary to enhance/ improve the Indian legal framework in relation to foreign investments in India to meet the international standards?

Three-level infrastructure:

International Layer: Early BITs (1994-2015) focused on broad protection; the 2016 Model BIT restricted ISDS, putting state regulatory space at the fore (example by exhaustive FET definitions and the exhaustion of local remedies)⁶.

Multilateral layer: Trade Related Investment Measures (TRIMs) of the WTO and GATS Mode 3 (commercial presence), investment in ASEAN-India FTA (2010) and other FTAs⁷.

Domestic Layer: FEMA- RBI in macro stability, SEBI in securities regulation, Companies Act, 2013, in governance⁸.

The critical difference became determined by Balance of Payments Manual section by section since FDI is less 10 percent voting rights and operational control (managed through sectoral caps and pricing principles) FPI is passive portfolio holdings (more than 10 percent control, managed through registration and concentration limit)⁹. This division maximized both inflow FDI long term growth and FPI liquidity, which directed annual FDI towards 60 billion by 2019. The current architecture of the India balances between investor confidence and policy freedom but has such issues as retrospective taxation (example the Vodafone disputes) and critics of Model BIT.

The Process of transitioning India to a more flexible FEMA Rules as compared to being strict on FERA.

The replacement of FERA by the FEMA in 1999 corrected three major issues about the way India dealt with foreign money coming into the country. Think of it as the shift away the strict

⁶ *India's Model Bilateral Investment Treaty*, Brookings Inst. (2018)

⁷ *A Possible WTO Agreement on Investment: Identifying Emerging Issues and Their Implications for India*, WTO Centre Working Paper (IIFT) (2016)

⁸ Usha Nathan, *India's Investment Treaty Program After the Model Treaty: A Struggle for Balance*, 37 U. Pa. J. Int'l L. 127 (2015).

⁹ *India's Foreign Portfolio Investment Policy: A Roadmap for Global Competitiveness*, Indian J.L. Legis. Rsch. (2023)

lockdown rules into smarter rules that nonetheless made things safe.

- No more jail for small mistakes: under FERA, even the slightest of slip-ups with foreign money such as mere civil fines (up to three times the value of the mistake), rather than a serious crime as traffic ticket. This simplified doing business without the act of people cheating.
- Less Hassle with Ownership: FERA explained that when foreigners held over 40 percent of the stock of the company it was declared to be a foreign company with added aggravation and restrictions. Thailand compelled investors to make small investment in order to evade red tape. FEMA has completely cancelled this cap and allowed the 100 percent foreign owned companies to operate freely in the sectors that they are permitted to do such as a full foreign shop with store in India without being compelled to include any Indian partner.
- Freer Money Flow Back Home: FERA rendered it difficult to repatriate profits or dividends overseas that held cash of investors. The initial statement of FEMA makes its purpose obvious.

Both promote foreign trade and foreign payments and safeguard the foreign reserves of India. RBI is responsible in day to day regulations (as in the case of Non-Debt Instruments Rules of 2019 on investments), whereas the government is in charge of overall policy in sectors. It's a team effort. As India is a blend of free and repressive, RBI executes the business, the government dictates the strategy.

SEBI 2019 Rules on Foreign Portfolio Investor (FPIs):

To ensure that portfolio investments (not long-term stock purchases, but effective ownership of an entire business) are honest; SEBI has developed simple categories: Category I of inoffensive participants such as governments or large pension funds (easy market entry), and Category II of any other (such as hedge funds). They have to acquire a Legal Entity Identifier (LEI, a unique identifier such as a passport number), disclose the actual owners of such (strengthened after 2023

Adani issues to identify non-transparent owners), and comply with rules of takeover and pricing. This makes FPIs remain "hands off investors, barring cunning methods of bypassing more restrictive FDI quotas, such as the acquisition of stocks without the company¹⁰.

¹⁰ Sec. & Exch. Bd. of India, *Mandating Additional Disclosures by Foreign Portfolio Investors (FPIs) that Fulfil Certain Objective Criteria*, Circ. No. SEBI/HO/MRD-2/PoD-2/P/CIR/2023/155 (Aug. 28, 2023).

Strategic Background: The Nature of the Foreign Money Coming into India and Why It Matters
FDI Inflows: Reaching the \$81 Billion by 2024-25.

The history of India to attract foreign direct investment (FDI) funds in the country to establish factories, offices, or even businesses has been a rollercoaster that has turned into a rocket. During the 2024-25 (April 2024 to March 2025) financial year, gross FDI reached an incredible high of \$81.04 billion, compared to the previous year which experienced a 13.6% rise, the highest in many years since 2021-22. Total inflows have exceeded \$1 trillion since the massive liberalization launch in 1991. Of this, 48 percent is fresh equity (new shares purchased), 20 percent reinvested profits indicating that investors are here to stay.

SEBI Foreign Portfolio Investor (FPIs) 2019 Rules:

To ensure that portfolio investments (not long-term ownership of businesses) is honest, SEBI made simple categories, the Category I is secure operators such as the government or large pension funds (easy entry), and the Category II is the rest of the world (including hedge funds). They will need to obtain a Legal Entity Identifier (LEI, similar to a passport number), disclose their true ownership (strengthened after 2023 Adani issues to identify the hidden owners), and comply with takeover and pricing regulations¹¹. This keeps FPIs as hands-off investors and prevents the shifty methods of evading increased FDI restrictions, such as stock purchases without control over the company.

Strategic Context: The Flows of Foreign Money into India and Why This is Important
FDI Inflows: It is Hitting \$81 Billion in 2024-25. The history of India to attract foreign direct investment (FDI) funds to construct factories, offices or business has been a rollercoaster ride that has been turned into a rocket. As of 2024-25 (April 2024-March 2025), gross FDI of SARA was incredible in the tune of 81.04 billion, a 13.6 percent increase over the previous period of the year 2021-22. Total inflows have exceeded to \$1 trillion since the big liberalization kick off in 1991. Of this, 48 percent is fresh equity (new shares purchased), 20 percent reinvested earnings, a factor that proves the investors are not going elsewhere.

Institutional Evaluation: The Inherent Issue, Scattered Rules and Lax Implementation

The investment mechanism in India has already provided more than 1 trillion dollars in investment inflows since 1991, yet there is one systemic weakness that is dragging it down: regulatory dispersion combined with weak enforcement. Imagine a team of superstars without

¹¹ Pushan Palit, *India's Foreign Investment Policy: Post-crisis Realignment*, Asia Vision No. 18 (French Inst. for Int'l Rels. 2018).

a common plan. SEBI, RBI, courts, and states are pulling in different directions confounding and causing delays and lost trust that drives off billions. This trap of fragmentation appears everywhere, whether it is the consent given to an approval every day or a lawsuit in billions of dollars.

Collision in Regulators Lack a Rulebook

SEBI protects the small investors (it protects stock markets, its 1992 Act requires) and RBI/FEMA takes care of the foreign cash flows and economic stability. Duplicates cause disorder such as FPIs being required to be SEBI registered and report to the RBI if not (Form FC-GPR), or a 10 percent stake automatic conversion of FPI to more restrictive FDI, a rule by RBI in Nov 2024. The helpful ownership regulations also clash: the deep-dive disclosures of SEBI overlap with those of RBI on the foreign-control checks. None of the legal frameworks unify them, and as a result, investor protection measures put in place by SEBI (such as FPI debt caps when the rupee is falling) collide with the growth pressure made by RBI. In 12 landmark cases, Ranjan (2023) identifies these rifts and slows the market and increases the costs.

Enforcement:

The most important tool of investors- ISDS lawsuits under treaties- in this case, play back. India has 30 claims (26 pursued), costing India over \$10 billion approx. in awards, such as Cairn Energy, 1.23 billion (2020 retrospective tax hit, pursued across the French/US/UK courts) and Vodafone, 60 million. Enforcement delays New York Convention exceptions (public policy) to taxes, arbitration law evading treaty awards, and judicial interventions state-level.

Emerging Rules:

Only 180 FPIs were disclosed by the owner (50 percent or 50,000 crore in assets) of SEBI, a post-Adani/Hindi bag. Press Note 3 (2020) imposes \$10 billion of neighbour-linked FDI not with evident criteria. Localization of data (RBI/DPDP Act) is tearing up global tech, challenging the suitability of the WTO. All these doubts leave India at 5th in the 2025 FDI rankings of the UNCTAD, behind smoother systems such as the US or Singapore. On the topic of having a single playbook of regulators, speeding courts and harmonizing rules, India will be putting itself in a deadlock of its potential. Streamlining would catapult it to the top unlocking jobs and billions.

Regulatory Agencies and Mandates:

The foreign investment protection framework of India is based on an integrated system of regulatory bodies with their own statutory duties based on a federal system balancing macroeconomic stability, market integrity and sectoral policy goals. These organizations, the Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce and Industry, and National Company Law Tribunal (NCLT), are working under the liberalization paradigm of post 1991 and regulate FEMA, SEC rules and other such laws.

Reserve Bank of India (RBI): RBI is the main authority of capital and current account transactions, which is empowered by FEMA, 1999 (Sections 3-7) and is established by RBI Act, 1934 (FC-GPR), Annual FLA (Foreign Liabilities and Assets) filings. Its major operations include conservation of foreign exchange using Liberalised Remittance Scheme (LRS) limits, the implementation of the sectoral pricing guidelines to the FDI transfers (DCF method to unlisted entities) and the supervision of Foreign-Owned Controlled Entities (FOCE) using the broadened definitions in 2025, and the 10 percent FPI-to-FDI reclassification level. One of the recent reforms is particularly the November 2024 circular that mandates a simpler 5-trading-day period of automatic reclassification in case FPI holding is above 10 percent of the listed entities, cutting down on the delays in the past and improving the coordination among the RBI and SEBI custodians.

Securities and Exchange Board of India (SEBI): SEBI regulates 11913 registered FPIs (as of June 2025) and imposes beneficial ownership (BO) disclosure, SEBI Takeover Code, 2011 and Minimum Public Shareholding (MPS) requirements. The main functions encompass integrity of the market by monitoring any manipulative activities, Investor Protection and Education Fund (IPF) of up to 10 lakh damages on aggrieved investors, and the SWAGAT-FI (Single Window Automated and Generalised Access to Trusted Foreign Investors) structure that will be rolled out by 2026. Markedly, the March 2025 circular had raised the BO disclosure threshold to 50,000 crore AUM (previously 25,000 crore), and had excluded the small (diversified) sovereign/pension funds but increased attention on concentrated holdings in the wake of Adani-Hindi scrutiny.

Department of Promotion of Industry and Internal Trade (DPIIT): Based on the Allocation of Business Rules, 1961 and Consolidated FDI Policy (since its annual update), DPIIT decides on

sectoral caps and Press Notes, and 95% automatic route approvals (since 2017) through FIPB as its successor. Its mandates include liberalization, i.e. the raising of the insurance to 100 percent FDI (December 2025 through the Sabka Bima Amendment), and the monitoring of government route application (defense, multi-brand retail). The 2025 reforms added automatic routes to defense (74%), space (100%), and insurance, which reflects Atmanirbhar Bharat without removing national security vetoes under Press Note 3.

Ministry of Commerce and Industry: The Ministry has its authority based on FEMA Section 47 and the External Commercial Borrowings (ECB) framework and is connected to the investment policy by establishing Comprehensive Economic Partnership Agreements (CEPAs) with UAE (2022) and Australia (2023). The central ones are ECB controls (hedged/unhedged cap up to \$750 million), policy coordination at the FTAs, and trade-investment synergies. An example of how it has been used is the 2025 Insurance Amendment Act which has made it possible to have a full foreign ownership but requires premium reinvestment in local markets.

National Company Law Tribunal (NCLT): NCLT is a court established by the Companies Act 2013 (Sections 230-234) to adjudicate on cross-border mergers, scheme approvals and amalgamation of foreign companies, checking on PN3 compliance, and downstream investments. Its operations assure corporate structural integrity during FDI inflows, 2024 procedural reforms are 20 percent faster on merger approvals (average 150 days instead of 180 before), smoothing over M&A by foreign acquirers.

The coordination process between agencies has been enhanced through the 2025 monthly RBI-SEBI committee which discusses FPI-FDI convergences, BO harmonization and the single-window portal under DPIIT, which regulates silos created before 1991 and inhibiting inflows.

The investment protection regime in India that was a product of LPG crucible in 1991 capped the transition of the country since the economic isolationism to global integration as the country attracted over 1 trillion in accumulated FDI since 1991. The epochal revolution overthrew the FERA draconian restrictions, considering foreign exchange violations as criminal offences with 40 percent equity limit to FEMA facilitative ethos, whereby there was openness of the capital accounts in moderation of macroeconomic protection. A three-way infrastructure was formed: BITs providing treaty-based safeguards such as Fair and Equitable Treatment (FET); multilateral agreements with investment chapters in WTO TRIMs and FTAs; domestic fortifications through transactional supervision by RBI, market supervision by SEBI and policy

supervision by Commerce/DPIET.

FDI implies sustainable operational hegemony (>10% equity), and FPI thus temporary portfolios, which allows gradual liberalization FDI through sectoral gates, FPI through registration gates¹². When FEMA in 1999 bestowed the cross-border flux upon RBI but left the policy to Central fiat, it was the fulfilment of the vision of LPG in the face of rupee volatility. The 2019 FPI codex by SEBI applies ingress rituals, LEI issuance and BO unveiling, which reliably safeguards against creep of integrity of control.

Conclusion:

International capital investments in India have developed under a complicated set of the international treaties, national laws and institutional structures. Although since 1991 liberalization has seen India become a key target of investment in the world system, fragmented regulation systems, duplication of mandate and inadequate enforcement measures still remain a challenge. The reforms like SWAGAT-FI framework, opening up the insurance sector, and restructuring bilateral investment treaties are some indications that India is planning to harmonize its investment regime with the international standards without jeopardizing the national interests. Striking a balance between investor protection and regulatory sovereignty is a delicate balance but there must be a coordination effort between the SEBI, RBI, DPIIT, and other agencies to increase investor trust. Finally, the ability of India to maintain and increase cross-border capital flows will hinge upon whether it manages to establish a consistent code of securities laws, enhance their enforcement and align domestic and foreign legal requirements. It is through solving these structural problems that India can open up to its full potentials as a safe or secure attractive business capital of the world.

¹² IMF BPM6