The Concern of Public Policy in FDI: An Assessment in Indian Context

INTRODUCTION

One of the important aspects of India's foreign economic policy relates to foreign investment. India's attitude towards the employment of foreign capital is definite and clear-cut; there is no bar to the entry of foreign capital, except that the pattern of foreign investment is to fit in with the general plan for the economic development.[1] The use of foreign capital is a costly method of financing economic development in so far as profits and dividends are earned by foreigners, they are deductions from the national income that the investment yields.

However, reliance on foreign capital is not always a choice. When the supply of domestic capital is short and the need for economic growth is urgent, recourse to foreign capital becomes a necessity. In the present climate of international investment, the question is not whether foreign capital should be allowed to come or not; the question is whether it would agree to come or not. Thus, in the process of bringing more foreign capital and attracting more foreign investors, governments are competing with each other to attract foreign capital. Two bodies of literature hold difference in opinion about this competition. The first sees such discipline as harmful. Many scholars argue that the fear of capital outflows restricts governments from providing welfare services, environmental regulations, and non-productive public goods that citizens value. Capital mobility prompts a "race to the bottom" in social and environmental policy, both among sub-national governments within decentralized states and among countries competing in world markets.[2] By contrast, the second body of literature views such discipline as salutary. The competition for capital motivates governments to reduce their corruption, waste, and inefficiency, and to provide more growth-promoting infrastructure.[3]

Where there is an intense 'global race' for FDI, how important FDI is to a country's economic growth? It is certainly a difficult task to separate and quantify the complex package of resources that FDI confers on the host country. According to economic theory, the three principal contributions of FDI to a host country are: (1) the financial

---

[1] AK Das Gupta, India's Foreign Policy

[2] See, Keen, Michael and Maurice Marchand. 1997. "Fiscal Competition and the Pattern of Public Spending," Journal of Public Economics, 66, 1, 33-53; Rom, Mark Carl, Paul E. Peterson, Kenneth F. Scheve, Jr. 1998. "Interstate competition and welfare policy," Publius 1998, 28, 3, p.17; Rodrik, Dani. 1997. Has Globalization Gone Too Far? Institute for International Economics, Washington DC.

[3] See, Qian, Yingyi and Gérard Roland. 1998. "Federalism and the Soft Budget Constraint," American Economic Review, December, 88, 5, pp.1143-62; Montinola, Gabriella, Yingyi Qian, and Barry R. Weingast. 1996. "Federalism, Chinese Style: The Political Basis for Economic Success," World Politics, 48, 1, pp.50-81; Obstfeld, Maurice. 1998. "The Global Capital Market: Benefactor or Menace?" Journal of Economic Perspectives, 12, 4, Fall, pp.9-30; Stiglitz, Joseph E. 2000. "Capital Market Liberalization, Economic Growth, and Instability," World Development, 28, 6, pp.1075-1086

capital invested by foreign firms; (2) the export market access provided by them; and (3) the faster technology development that is expected to occur through technology transfer as part of the FDI package.[4]

There are various macro studies conducted to determine the nexus between FDI and growth. By and large, studies have found a positive link between FDI and growth,[5] though FDI appears less positive in least developed economies, suggesting existence of threshold level development.[6] UNCTAD notes that multinational corporations (MNC) can complement local development efforts by; (a) increasing financial resources for development; (b) boosting export competitiveness; (c) generating employment an strengthening the skill base; (d) protecting the environment and social responsibility; and (e) enhancing technological capabilities. [7] However, FDI and growth studies are open to a number of criticisms. For instance, an important critique has to do with causality: does FDI lead to greater productivity and overall economic growth, or are these pre-requisites for attracting FDI? Critiques believe that increased economic activity expands the market size, offering greater opportunities for foreign investors to reap economies of scale in a large market economy like India. Thus it is not *FDI led growth*, rather it is more in the nature of *growth led FDI.*[8] Apparently developing countries need to have reached a certain level of education, technological and infrastructure development before being able to benefit from the foreign presence in their markets.[9] An additional factor that may prevent a country from reaping the full benefits of FDI is imperfect and underdeveloped financial markets.[10]

In this context, it is important to note that the theory of *Comparative Advantage*[11] plays the most prominent role in the development of foreign investment phenomenon. It made a vital contribution to economic thought that attracts foreign investment.[12] The early logic of free trade could be advantageous for the countries based on the concept of the *Absolute Advantage*[13], which is practically a one-sided advantage to a country in supplying of goods and services. It may have negative impact on the other country which is in a disadvantageous position. But in certain situations, one country may make a specialised good with lower cost, other country may also make a different good with another type of

---

[4] World Investment Report, **FDI from Developing and Transition Economies: Implications for Development (UNCTAD, 2006)**

[5] Cite literature review

[6] Blomstrom M and A Kokko, The Economics of Foreign Direct Investment Incentives, Working paper 168, Stockholm, Sweden 2003

[7] World Investment Report (1999)

[8] Athreye, S. and S. Kapur (2001). "Private Foreign Investment in India: Pain or Panacea?", The World Economy, 24, pp.399-424.

[9] OECD 2002

[10] Id.

[11] David Ricardo, the Profounder of 'Comparative *Advantage* theory also known as *Ricardian* Theory.

[12] He opined that the countries should specialize in what they are best or most efficient at, and then exchange these products, so that every country would flourish. For details see Murray N. Rothboard, *https://mises.org/library/ricardian-law-comparative-advantage* visited on 20/05/2017.

[13] Adamsmith propounded the theory in *Wealth of the Nations* in which he highlighted that the "If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage. " (Book IV, Section ii, 12)

specialisation with low cost expenditure. Where both countries may have beneficial edge in the global trade, it is enlightened in *Comparative Advantage* Theory.

India, with its relatively well-developed financial sector, strong industrial base, and critical mass of well-educated workers, appears to be well placed to reap the benefits of FDI due to comparative advantage. In view of this, it is appropriate that Indian policymakers continue to make concerted efforts to make India an attractive destination for FDI.

Evolution of India's FDI Policy

India's FDI policy can be divided into four phases[14]

EARLY POST-INDEPENDENCE PERIOD (1948-67): IMPORT PROTECTION AND RECEPTIVE ATTITUDE TO FDI: Soon after independence, India embarked on a strategy of import substituting industrialisation in the framework of development planning with a focus on development of local capability in heavy industries including the machinery manufacturing sector. The scope of import-substitution extended literally to almost everything that could be manufactured in the country.[15] The domestic industry was accorded considerable protection in the form of high tariffs and quantitative restrictions on imports. In order to channel country's scarce investible resources (the savings rate was just over 10 percent in 1950) according to Plan priorities, an industrial approval (licensing) system was put into place in the country that regulated all industrial investments beyond a certain minimum.[16] A number of key industries were earmarked for further development in the public sector either in view of their strategic nature or anticipated lack of initiative in the private sector because of large capital requirements. As a part of the development plans, large investments were made in human resources creating activities such as expansion of education, especially the technical and engineering facilities and creation of a scientific and technological infrastructure in the form of a network for national and regional laboratories in the country. The government also made investments in development of institutional infrastructure for industrial development such as term-lending and capital market's development.

As the domestic base of 'created' assets, *viz*, technology, skills, entrepreneurship was quite limited, the attitude towards FDI was increasingly receptive. FDI was sought on mutually advantageous terms though the majority local ownership was preferred. Foreign investors were assured of no restrictions on the remittances of profits and dividends, fair compensation in the event of acquisition, and were promised a 'national

[14] Globalization, Foreign Direct Investment & Technology Transfer: Impacts on and Prospect for Developing Countries (Routledge and UNU Press, London and New York, 1998)
[15] *Ibid*
[16] *Ibid*

treatment'.[17] The foreign exchange crisis of 1957-58 led to further liberalisation in the government's attitude towards FDI. In a bid to attract foreign investment to finance foreign exchange component of projects, a host of incentives and concessions were extended. The protection accorded to local manufacturer acted as an important locational advantage encouraging market seeking FDI. A large number of foreign enterprises serving Indian market through exports started establishing manufacturing affiliates in the country. This (*viz*, late 1950s and early 1960s) was the period when western multinational enterprises started showing real interest in India.

FROM 1968 to 1979: RESTRICTIVE ATTITUDE TO PROTECT THE DOMESTIC: BASE OF 'CREATED' ASSETS: Investments made in machinery fabrication facilities, manpower development, scientific and technological infrastructure made in the previous period had led to development of certain 'created' assets in the country. For instance, certain capabilities for process and product adaptations had been built up in the country. A number of local design engineering and project management consultants had accumulated considerable expertise while acting as sub-contractors for western prime consultants. A considerable plant fabrication capability had been built up in the country by late 1960s. The share of imported machinery and equipment as a proportion of gross domestic capital formation had gone down from 69% in 1950 to under 25% by 1968-69.[18] However, locally available skills and capabilities needed some sort of infant industry protection as these were not able to stand competition from more established industrialised country sources. Constraints on local supply of capital and entrepreneurship had begun to ease somewhat. On the other hand, outflow on account of remittances of dividends, profits, royalties, and technical fees, etc, abroad ,on account of servicing of FDI and technology imports from the earlier period, had grown sharply and had become a significant proportion of the foreign exchange account of the country. All these factors together prompted the government to streamline the procedures for foreign collaboration approvals and to adopt a more restrictive attitude towards FDI.

Restrictions were put on proposals of foreign direct investments unaccompanied by technology transfer and those seeking more than 40% foreign ownership. The government listed industries in which FDI was not considered desirable in view of local capabilities. The permissible range of royalty payments and duration of technology transfer agreements with parent companies were also specified for different items. The guidelines evolved for foreign collaborations, required exclusive use of Indian consultancy services wherever available. The renewals of foreign collaboration agreements were restricted. From 1973 onwards, further activities of foreign companies (along with those of local large industrial houses) were restricted to a select group of core or high priority industries. In the same year, a new Foreign Exchange Regulation Act (FERA) came into force which required all foreign companies operating in India to

[17] *Ibid*

[18] Nagesh Kumar, Liberalisation and Changing Patterns of Foreign Direct Investments Has India's Relative Attractiveness as a Host of FDI Improved? Economic and Political Weekly, 1321 (May 30, 1998)

register under Indian corporate legislation with up to 40% foreign equity. Exceptions from the aforesaid general limit were made only for companies operating in high priority or high technology sectors, tea plantations, or those producing predominantly for exports.

THE 1980S: CAUTIOUS DEREGULATION: Towards the end of the 1970s, India's failure to significantly step up the volume and proportion of her manufactured exports in the background of the second oil price shock began to worry the policy-makers.[19] It led to the realisation that international competitiveness of Indian goods had suffered from growing technological obsolescence and inferior product quality, limited range, and high cost which in turn were due to the highly protected local market. Another limiting factor for Indian manufactured exports lay in the fact that marketing channels in the industrialised countries were substantially dominated by Multi- national companies (MNCs). The government intended to deal with the situation by putting emphasis on the modernisation of industry with liberalised imports of capital goods and technology, exposing the Indian industry to foreign competition by gradually liberalising the trade regime, and assigning a greater role to MNCs in the promotion of manufactured exports. This strategy was reflected in the policy pronouncements that were made in the 1980s. These covered liberalisation of industrial licensing (approval) rules, a host of incentives, and exemption from foreign equity restrictions under FERA to 100% export-oriented units. Four more export processing zones (EPZ) were set up in addition to the two existing ones, namely those at Kandla (set up in 1965) and at Santacruz (set up in 1972)[20] to attract MNEs to set up export-oriented units. The trade policies gradually liberalised the imports of raw materials and capital goods by gradually expanding the list of items on the Open General Licence (OGL). Between 1984-85 alone, 150 items and 200 types of capital goods were added to OGL list.[21] Tariffs on imports of capital goods were also slashed. Imports of designs and drawings and capital good were permitted under a liberalised Technical Development Fund Scheme.

The liberalisation of industrial and trade policies was accompanied by an increasingly receptive attitude towards FDIs and foreign licensing collaborations. Approval systems were streamlined. A degree of flexibility was introduced in the policy concerning foreign ownership, and exceptions from the general ceiling of 40% on foreign equity were allowed on the merits of individual investment proposals. The rules and procedures concerning payments of royalties and lump sum technical fees were relaxed and withholding taxes were reduced. The approvals for opening liaison offices by foreign companies in India were liberalised. New procedures were introduced enabling direct application by a foreign investor even before choosing an Indian partner, A 'fast channel' was set up in 1988 for expediting clearances of FDI proposals from major investing countries, *viz*, Japan, Germany, the US and the UK,

[19] *Ibid*
[20] *Ibid*
[21] An Open General Licence (OGL) is a type of export licence issued by a government to its domestic suppliers.

FULL-SCALE LIBERALISATION AND INTEGRATION WITH WORLD ECONOMY: In June 1991, the Indian government initiated a programme of macro-economic stabilisation and structural adjustment supported by the IMF and the World Bank. As a part of this programme a New Industrial Policy (NIP) was announced on July 24, 1991 in the parliament which has started the process of full scale liberalisation and intensified the process of integration of India with the global economy. The NIP and subsequent policy amendments liberalised the industrial policy regime in the country, especially, as it applied to FDIs beyond recognition. The industrial approval system in all industries was abolished except for 18 strategic or environmentally sensitive industries. In 34 high priority industries FDI up to 51% was approved automatically if certain norms are satisfied, FDI proposals did not necessarily have to be accompanied by technology transfer agreements. Trading companies engaged primarily in export activities were also allowed up to 51% foreign equity, to attract MNEs in the energy sector, 100% foreign equity was permitted in power generation. International companies were allowed to explore non-associated natural gas and develop gas fields including laying down pipelines and setting up liquified petroleum gas projects. A new package for 100% export-oriented projects and companies in export processing zones was announced.

A Foreign Investment Promotion Board (FIPB) authorised to provide a single window clearance has thence been set up to invite and felicitate investments in India by international companies. The existing companies were also allowed to raise foreign equity levels to 51% for proposed expansion in priority industries. The use of foreign brand names for goods manufactured by domestic industry which was restricted was now liberalised. India became a signatory to the Convention of the Multilateral Investment Guarantee Agency (MIGA) for protection of foreign investments in April, 1992. The Foreign Exchange Regulation Act of 1973 has been amended and restrictions placed on foreign companies by the FERA have been lifted. Companies with more than 40% of foreign equity are now treated on par with fully Indian owned companies. New sectors such as mining, banking, telecommunications, highways construction and management have been thrown open to private, including foreign owned, companies. These relaxations and reforms of policies have been accompanied by active courting of foreign investors at the highest level.

CONCEPTUALISING PRESENT FDI FRAMEWORK

FDI eludes definition owing to the presence of many authorities: Organisation for Economic Co-operation and Development (OCED), International Monetary Fund (IMF), International Bank for Reconstruction and Development (IBRD) and United Nations Conference on Trade and Development (UNCTAD). All these bodies attempt to illustrate the nature of FDI with certain measuring methodologies.

Generally speaking, FDI refers to capital inflows from abroad that invest in the production capacity of the economy and are usually preferred over other forms of external finance because they are non-debt creating, non-volatile and their returns depend on the performance of the projects financed by the investors. FDI also facilitates international trade and transfer of knowledge, skills and technology.[22]

Foreign Direct Investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor… The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship.[23]

FDI refers to an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor. Further, in cases of FDI, the investor's purpose is to gain an effective voice in the management of the enterprise. The foreign entity or group of associated entities that makes the investment is termed as "direct investor'. The unincorporated or incorporated enterprise – a branch or subsidiary, respectively, in which direct investment is made – is referred to as a 'direct investment enterprise.'[24]

Statutorily, FDI means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000.[25]

Section 6 of the Foreign Exchange Management Act, 1999 enumerates the capital account convertibility clause and prohibits transactions done under capital account transaction head. Said provision provides that, RBI to prescribe the conditions for debt instrument in capital account transactions and Central Government to prescribe the non-debt instrument. Both central government and RBI may consult each other in discharging there functions. Further through same provision both authorities are also empowered to prescribe the limit upto which foreign exchange shall be admissible in transactions. These provisions become the source of authority and to carry out the

[22] Planning Commission of India, Report of the Steering Group on Foreign Direct Investment: Foreign Investment India, p 11. (New Delhi, 2002). Accessed on June 10, 2005. Available at http://planningcommission.nic.in/aboutus/committee/strgrp/stgp_fdi.pdf. Internet

[23] World Investment Report, 1999

[24] IMF, balance of payments Manual (5th Edition 1993)

[25] *Infra; Contra*, SEBI (Foreign Portfolio Investors) Regulations, 2014 prescribe 10% as the the limit of indirect investment for foreign portfolio investor on stock exchange; Foreign Exchange and Regulation Act (FERA), 1974 stipulated foreign firms to have equity holding only up to 40 per cent, exemptions were at the government's discretion. Setting up of branch plants was usually disallowed; foreign subsidiaries were induced to gradually dilute their equity holding to less than 40 per cent in the domestic capital market. The law also prohibited the use of foreign brands, but promoted hybrid domestic brands (Hero-Honda, for instance).

provision of FEMA various rules and regulations are framed under Section 46 and 47 by Central Government and RBI respectively.

The Government of India had decided to take up series of initiatives in respect of policies relating to the area of industrial licensing, foreign investment, foreign technology agreements, public sector policy, monopolies and restrictive trade practices etc. in the New Industrial Policy of 24-07-1991.[26] For achieving social and economic justice to end poverty and unemployment and to build a modern democratic socialist prosperous, forward looking India, it was felt necessary that India should also grow as a part of the world economy and not in isolation. Department of Industrial Policy and Promotion (DIPP) as per the Allocation of Business Rules, 1961 was allocated the subject of 'Direct foreign and non-resident investment in industrial and service projects, excluding functions entrusted to the Ministry of Overseas Indian Affairs'. As per the policy suggested by DIPP, relevant amendments were made by RBI in[27] its regulations.

Over the past several years, India has progressively liberalised her foreign direct investment (FDI) policy. As a result, in most sectors, foreign investors can hold 100% of the equity in firms registered in India. Restrictions that remain on foreign ownership are imposed in two ways. One, foreign investors are not allowed to invest in 11 sectors,[28] and two, some sectors (mostly in services)[29] are subject to ceilings on FDI and/or specific government approval. The justification for so doing varies depending upon the sector, but includes *inter alia* the desire to retain a certain degree of control over the operations of the investee companies in Indian hands and possibly to give time to the domestic entrepreneurs to gain strength so as to withstand competition from foreign companies. Notable among the areas subject to caps are defence industries, insurance, civil aviation, print media, broadcasting, telecommunication, banking and single brand product retail trade. The caps are generally placed at 26%, 49% or 74%. In order to prevent foreign investors from breaching the ceilings by investing through other companies incorporated in India which they either “own” or “control”, the government has spelt out the methodology for calculating direct and indirect foreign equity in Indian companies.[30]

Sectoral Caps usually observed in FDI Policy:

Share in Equity (%)	Significance/implications
10	Usually taken as the minimum share capital required to exercise

[26] Para 24 of the policy stated that Government would welcome foreign investment in high priority industries requiring large investments and advance technology for which approval for direct foreign investment up to 51% foreign equity was permitted

[27] All press notes are forwarded to RBI to incorporate necessary amendments in the Regulations.

[28] Lottery Business including Government/ private lottery, online lotteries etc.; Gambling and betting including casionos etc.; Chit Funds; Nidhi Company; Trading in transferable Development Rights; Real Estate Business or Constructions of Farms houses; Manfacturing of cigars, cheroots cigarillos and cigarettes of tobacco or of tobacco substitutes; Atomic energy; Railways

[29] Financial Services and Information Services

[30] See, Annexure 5 FDI Master Circular 2016 [notified through Press Note No 2 (2009 Series)]

	control/ influence. Identification of FDI relationship is based on this perception. Under Sections 241 and 242 of the Indian Companies Act, 2013, those holding a minimum of 10% share capital (alone or together with others) can approach the Tribunal against oppression of minority shareholders and mismanagement. The 10% shareholding is also significant from the point of suggesting scheme of merger with other company/ies. (Section 230-232 of the Companies Act, 2013) Regulation 21(7), SEBI (FPI) Regulations 2014, imposes restrictions at this level by a single portfolio investor.
20	International Accounting Standard 28 assumes that the investor exerts significant influence if it holds, directly or indirectly, 20% or more of the voting power at stake. Similar position is also reflected in Companies Act, 2013 in the definition of 'associate company" wherein this percentage reflects "significant influence".[31]
25	Securities and Exchange Board of India (SEBI) (Substantial Acquisition of shares and Takeover) Regulations, 2011 applies when this percentage of voting rights is reached by the acquirer. Based on the shareholding pattern of listed Indian companies, the Achutan Committee felt that 25% is the level at which promoters would be capable of exercising **de facto** control.[32]
26	Most often used FDI cap starts from this figure. The minimum shareholding required to get special resolutions passed at a company's general meetings being 75%, those controlling 26% shareholding can block any special resolution, if they so desire. This is also called 'negative control' which may not help the owner of those voting rights to get a resolution passed independently but such person can prevent any significant decision from being taken.
49	Another important cap on FDI in certain restricted sectors. The objective is to have majority shares (51%) in Indian hands.
51	Minimum government shareholding required under the Companies Act, 2013 to be classified as a government company.[33] In other cases, such percentage of shareholding implies that the person has majority control over the company and if the owner of such shares is a company, the company is called a holding company and is imposed with certain responsibilities w.r.t its subsidiary company.[34]

[31] Section 2(6) of the Companies Act, 2013
[32] http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf
[33] Section 2(45) of the Companies Act, 2013
[34] For example See Section 129(3) wherein a holding company must consolidate the accounts of all its subsidiary companies and show the accounts of all as if it were a 'single economic entity'.

74	This is the upper limit allowed where 100% FDI is not permitted. This is the counterpart of 26%. Indian shareholders with 26% shareholding will be in a position, if they so desire, to block special resolutions.
100	This implies that the Indian company can be wholly-owned by the foreign enterprise and therefore all control lies with the latter.

Some distortions which are present in the FDI policy are as follows:

(i) Special rights can change the relationship in favour of the minority shareholders irrespective of the extent of their voting rights. These rights are often given to institutional investors or promoters of a company;

(ii) Another manner in which the aforesaid percentages can lose their significance is the deployment of differential voting rights. For example, where a person holds 10% shares with differential voting rights which allow him to exercise votes amounting to 30% voting rights;

(iii) The situation would also depend on the distribution of remaining shareholding. This is more so in case of listed companies where the shares are so scattered that a person holding 3% may be a majority shareholder because no other has a higher accumulated shareholding in the company.

Role of Judiciary in Public Policy pertaining to FDI

As mentioned before, FDI is an arena of Ministry of Finance and the FDI policy is annually released by DIPP. Judiciary has been reluctant in deliberating on the issue of public policy generally, as well as when it is specific to Foreign Direct Investment. Some of the recent judgments have been analysed below to give a glimpse of the nature of approach taken by the hesitant judiciary:

In *Premium Granites* v. *State of T.N*[35] when the quality of public policy was questioned, the Supreme Court observed that "it is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must, be left to the discretion of the Executive and Legislative authorities as the case may be." And therefore , the apex court refused to dissect the public policy through the lens of judicial review.

The Supreme Court in *State of Punjab and anr* v. *Devans Modern Brewaries Ltd* [36], while echoing the change of business environment due to liberalisation and privatisation in the world, observed that the "*Socialism might have been a catchword from our history. It may be*

[35]1994 AIR 2233, 1994 SCR (1) 579

[36] (2004) 11 SCC 26

present in the preamble of our Constitution. However, due to the liberalisation policy adopted by the central government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away." but when it came to assessing the public policy in the light of such deviation from socialism, the court refused to say anything.

Similarly, in the case of *Balco Employees Union* v. *Union of India and others*[37] Supreme Court stated that "*the process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority*." This judgment pointed out that the only scenario in which the court would scrutinise a policy matter is when it is patently violative of constitutional goals. This pronouncement also emphasised the discretion of government with regard to policy making wherein the government can experiment with the policies as long as it is done in good faith.

In *Government of Andhra Pradesh and others* v. *A Hanumantha Rao*[38], Andhra Pradesh High Court laid down the parameters of judicial review of the executive policy- "*..a policy refers to a tendency of probable effect with respect to the social or political well – being of a State, where court cannot not exercise its power of judicial review that amounts to questioning the wisdom of executive behind the policy decision*"[39]

The views on the efficacy of a government policy and the objectives such policy seeks to achieve may differ but in any case are beyond the clutches of the judicial review. The counter-view(s) may have some merit but under our Constitution, the executive has been accorded primary responsibility of formulating governmental policy. The executive function comprises both the determination of policy as well as carrying it into execution. If the Government of the day after due reflection, consideration and deliberation feels that by allowing FDI in a particular sector will help growing the economy and it will facilitate better access to the market for the producer of goods and enhance the employment potential, then it is not open for the Court to go into merits and demerits of such policy.

A writ petition was filed praying for quashing Press Note Nos. 4,5,6,7 and 8 of (2012 Series) being unconstitutional and without any authority of law.[40] By these Press Notes, the policy of Foreign Direct Investment (FDI) in Single-Brand Product Retail Trading,

[37] 2002 (2) SCC 333 at page 362
[38] 2005(2) ALD 780, 2005 (2) ALT 653, see para 20, the parameters of judicial review and the grounds available for evaluating the policy decisions of the Executive.
[39] *Ibid para 20,* It is well settled that the Court, in exercise of its power of judicial review, cannot substitute its own view and express its opinion as to whether some other policy should have been adopted. That would amount to questioning the wisdom of the Executive behind the policy decision.
[40] Manohar Lal Sharma vs. Union of India and Anr., (2013) 6 SCC 616

Multi-Brand Retail Trading, Air Transport Services, Broadcasting Carriage Services and Power Exchanges had been reviewed. Submissions of the petitioner and intervenor were that the impugned FDI Policy is not founded on any material obtained from the government agency and no extensive consultation was made before formulation of the impugned Policy.

In this case, the Supreme Court held that the impugned policy is only an enabling policy and the State Governments/Union Territories are free to take their own decisions in regard to implementation of the policy in keeping with local conditions. It further held that "…*It is, thus, left to the choice of the State Governments/Union Territories whether or not to implement the policy to allow FDI up to 51% in Multi-Brand Retail Trading. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in Multi-Brand Retail Trading does not appear to suffer from any of these vices*.[41] This case was an extension of *Balco* because in addition to the sole basis on which courts can interfere in a policy designed by the government, this case included other situations like arbitrariness and blatant abuse of power as the criteria for allowing interference of courts. In all other cases, the court is only a mute spectator and must honour the separation of power as prescribed by the Constitution.

Other reforms for easing FDI

A major reform that has been brought about recently is the abolition the Foreign Investment Promotion Board, which was a bureaucratic establishment to grant permissions but was usually leading to unnecessary delay in the flow of funds to India and was being blamed for high level corruption. The body regulated inbound investments from foreigners that required approval of the government, i.e. sectors which were considered sensitive and therefore had been restricted from free access of investment, for eg. defence, pharmaceuticals, etc. It was an inter-ministerial body[42] , formed in the early 1990s in the wake of liberalization, which had jurisdictions on investments upto Rs.5000 crores[43]. While the government has dismantled this structure[44], this does not imply that FDI in every sector will be automatic. Instead, now the concerned ministry pertaining to the sector handles the sanctions along with DIPP. Infact, it is believed that the abolition of this office is a mere administrative convenience while factually, no relaxations on the control exercised on such incoming investments have been implemented.[45]

---

[41] *Ibid.*

[42] It consisted of: Secretary, Department of Economic Affairs, Ministry of Finance (Chairman); Secretary to Government, Department of Industrial Policy & Promotion, Ministry of Commerce & Industry; Secretary to Government, Department of Commerce, Ministry of Commerce & Industry, ; Secretary to Government, Economic Relations, Ministry of External Affairs; and Secretary to Government, Ministry of Overseas Indian Affairs.

[43] Beyond this limit, the Cabinet Committee on Economic Affairs had power to decide on investments in certain sectors.

[44]Press Information Bureau- Government of India, Cabinet approves phasing out Foreign Investment Promotion Board , 24 May, 2017 , available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=162097

[45] Divya Rajgopal, Dismantling FIPB might improve ease of doing business, Economic Times, Feb 01, 2017 available at http://economictimes.indiatimes.com/news/economy/policy/dismantling-fipb-might-improve-ease-of-doing-business/articleshow/56914886.cms.

One of the main reasons for the abolition of the Board was because FIPB took a span of 1-3 months on an average to decide on each matter which killed precious time of the foreign investors, crucial for their business. Over a period of time, this prevented quick decision-making and gave way to red-tapism and high level corruption. Another reason was that FIPB had lost major portion of its substratum since nearly ninety percent of the investment comes through the automatic route now[46] and majority of the sectors have been opened for 100% investment through automatic route. This leaves minimal work for the board (only 11 sectors) which can also be handled by DIPP now.

Overall, the dismantling of the board is in pursuance of the policy of the current government- to make India business friendly and to ensure 'ease of doing business' here. Nevertheless, red-tapism and corruption can still creep in since the ministries of the concerned sectors now have authority of 'independent decision making'. Also rules pertaining to restrictions like lock-in period, involvement of Indian residents in management/board of directors, still exist and are contributing to the shying away of the foreign investors. Another criticism imputed on this move of the government is the decentralization and a step back from the single window clearance which FIPB provided.

SECTOR SPECIFIC FDI POLICY

While all sectors deserve a discussion in this paper, time and space constraints demand cherry-picking of those sectors which have witnessed drastic change in policy perspective leading to relaxations in the sectoral caps. These sectors play significant role in India's economy and changes to them can only be warranted by change in policies of the government. With this view, we have discussed the following arenas of the economy:

1. Banking sector
2. Civil Aviation
3. Defence
4. Pharmaceuticals

FDI policy in Banking Sector

The banking system is central to a nation's economy and that applies whether the banks are local or foreign-owned. The owners or shareholders of the banks have only a minor stake and considering the leveraging capacity of banks (more than ten to one) it puts them in control of very large volume of public funds of which their own stake is

[46] Arun Jaitley, Finance Minister was quaoted as saying "More than 90% of the total FDI inflows are now through the automatic route. The FIPB has successfully implemented e-filing and online processing of FDI applications. We have now reached a stage where FIPB can be phased out. We have therefore decided to abolish the FIPB in 2017-18",reported by Arun s, Govt approves phasing out of 25-year-old Foreign Investment Promotion Board, 24 May, 2017, THe Hindu, available at http://www.thehindu.com/business/Economy/cabinet-approves-abolition-of-fipb/article18561815.ece

miniscule. In a sense, therefore, they act as trustees and as such must be fit and proper for the deployment of funds entrusted to them. The stable and continuing operations depend on the public confidence in individual banks and in the banking system as a whole. For a developing economy like India, there is also much less tolerance for downside risk among depositors many of whom place their life savings in the banks.

Under FEMA's regulatory framework, banking sector was kept under a 100% approval route. However, this figure was diluted twice in 2002 and 2004. The biggest change in the banking sector was witnessed in 2002 wherein the cap on foreign direct investment (FDI) in private and public sector banks, was set at 49 and 20% respectively.[47] Nonetheless, to regulate the foreign investment and control in banking sector, Section 12 (2) of the Banking Regulation Act, 1949 provides that in the case of private banks the maximum voting rights per shareholder will be 10% of the total voting rights. This helped in diversification of ownership which is desirable as is also ensuring fit and proper status of such owners and directors. The next set of reforms took place in 2004 which announced a set of decisions with reference to foreign investment in the banking sector, which relaxed the cap on foreign equity in Indian banks to 20% in the case of public sector banks and 74% in the case of private banks.[48]

The fact of the matter is that governance rules in the banking system have indeed been changed to accommodate the private investor (domestic and foreign) after liberalisation. Consequent to the announcement of the Ministry of Commerce, the Reserve Bank of India issued a more detailed and comprehensive set of policy guidelines on ownership of private banks.

More importantly, in the interest of diversified ownership, the guidelines had declared that no *single* foreign entity or group could hold more than 10%. There was also a 10% limit set for individual Foreign Institutional Investors (FIIs) and an aggregate of 24% for all FIIs, with a provision that this can be raised to 49% with the approval of the Board of Directors and General Body of the company. Finally, the 2004 guidelines set a limit of 5% for individual NRI portfolio investors with an aggregate cap for NRIs of 10%, which can be raised to 24% with Board approval. In keeping with this more cautious policy, the RBI decided to retain the stipulation under the Banking Regulation Act, Section 12 (2), that in the case of private banks the maximum voting rights per shareholder will be 10 per cent of the total voting rights (1% for public banks). The 10% ceiling on equity ownership by a single foreign entity was partly geared to align ownership guidelines with the rule on voting rights.

The problem with well-performing private banks is not that it is difficult to attract foreign equity investment, but that the current rules do not allow entry of those enterprises whose intent is to exercise control over a local bank with an adequate shareholding and

[47] See, Master Circular of Foreign Direct Investment, 2016
[48] *Ibid*

equivalent voting rights. Hence, if the need is to allow foreign equity infusion to meet prudential requirements such as the Basel norms, that is still possible. What is not allowed is the entry of single foreign investors seeking to establish or acquire domestic private banks with a controlling stake and voting rights.

There are a number of implications of such an expansion of foreign presence. To start with, even with the diluted regulation that is currently in place, it is clear that the private banks in general, and foreign banks in particular have been lax in meeting the regulatory norms. The takeover trend would result in a sharp reduction in the extent of regulation of banking sector operations by the RBI. The implications of this for the priority sectors, especially agriculture, was predicted to be quite damaging, however the figures below show a completely different picture. RBI Annual Report 2015-16[49] suggest following figures in priority sector lending wherein the regulatory requirement is 40% of adjusted net bank credit (ANBC) or credit equivalent amount of off-balance sheet exposure, whichever is higher. As on end-March 2016, bank-group wise achievement of priority sector target is: PSBs (39.3 per cent), PVBs (45.1 per cent) and FBs (35.3 per cent) which shows that even public sector banks are not able to match the regulatory requirements.

Financial year	Public Sector Banks	Private Sector Banks	Foreign Banks
2014-15	17,512 (37.3%)	5,303 (42.8%)	970(35.9%)
2015-16	19,850 (39.3%)	6,480 (44.1%)	1,104 (35.3%)

Second, the expansion in foreign bank presence will subject public sector banks to unfair comparisons with regard to "profitability" and "efficiency", and this would force these banks to change their lending practices as well. Among the factors that account for this differential in profitability, there are two that are important. One is that the operating expenses for a given volume of business tend to be higher with public sector banks. The other is that income generated out of a given volume of business tends to be lower in their case of the public sector banks. These are the two areas in which changes are being made as part of the effort of the public sector banks to "match up" with the performance of private domestic and foreign banks. The expansion of foreign presence would only accelerate this tendency.

FDI Policy in the context of Civil Aviation

The changes to investment policy in aviation sector come less than a week after the Union Cabinet approved the National Civil Aviation Policy 2016, which had maintained a status quo on the FDI regime in the sector. The Government has proposed to promote the growth of Indian aviation sector in a significant manner as the development of this

49 Available at https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR2016CD93589EC2C4467793892C79FD05555D.PDF

sector has a multiplier effect on the economy. As per an International Civil Aviation Organisation (ICAO) study, the output multiplier and employment multiplier are 3.25 and 6.10 respectively.[50] The Government has proposed to take flying to the masses by making it affordable and convenient.

The National Civil Aviation Policy (NCAP 2016) is a step in that direction. The NCAP 2016 has been finalised on the basis of the feedback received from the public, other stakeholders and experts. Said policy visions, to create an eco-system to make flying affordable for the masses and to enable 30 crores domestic ticketing by 2022 and 50 crores by 2027, and international ticketing to increase to 20 crores by 2027. Similarly, cargo volumes should increase to 10 million tonnes by 2027.

India already had a very liberal foreign investment regime in the civil aviation sector, as barring the case of scheduled commercial airlines, FDI was allowed up to 100 per cent in most other areas. Besides airports, the government allows 100 per cent FDI for non-scheduled air transport services and helicopter/seaplane services. For maintenance and repair organisations as well as ground handling services to 100 per cent FDI is permitted. The Indian Civil Aviation sector has seen a lot of growth since the early 2000s. The "Open Skies Policy" initiated by the Government of India ("GOI") led to a spurt of airlines which have since catered to the growing passenger traffic.[51] Present policy allows overseas entities (excluding airlines) to own 100% in domestic airlines as it seeks greater foreign direct investment (FDI) inflows into the country. This is against the current 49% FDI limit under the automatic route in domestic airlines (scheduled air transport service/domestic scheduled passenger airline and regional air transport service). It has now been decided to raise this limit to 100%, with FDI up to 49% permitted under the automatic route and FDI beyond 49% through government approval. For non-resident Indians (NRIs), 100% FDI will continue to be allowed under the automatic route while the foreign airlines which are keen to have a 100% stake in Indian airlines have unfortunately been explicitly barred. According to the International Air Transport Association (IATA), which represents some 260 airlines that make up 83% of global air traffic, growth in India is being propelled by a comparatively strong economic backdrop as well as by a substantial increase in service frequencies

Unlike elsewhere in the world, the Indian civil aviation market is on an unprecedented rise with passenger traffic increasing every year at a healthy pace, almost 20% annual growth which makes India one of the fastest growing markets in the world.[52] This growth has put a lot of pressure in the allied infrastructure including airports, ground handling, Maintenance Repair & Overhaul (MRO), etc.

The primary benefit of this FDI policy is that airport development has now been opened to further investment. As we have seen from the examples of Delhi, Hyderabad,

[50] National Aviation Policy, 2016 para 1.2
[51] *See*, http://pib.nic.in/newsite/PrintRelease.aspx?relid=155471
[52] The Economic Times, India sees highest domestic air passenger growth in 2016: IATA, February 2, 2017

Mumbai, Bengaluru and Kochi, privatization has certainly resulted in improved service standards as these airports have only served to enhance passenger experience. These airports have been consistently rated as the best in the world. Increasing private involvement in the form of FDI will only improve the quality standards of Indian airports.

The Indian aviation market is witnessing a period of boom wherein passenger traffic is increasing at a healthy rate. Tier II & III cities are also witnessing increasing frequencies and passenger traffic. Hence, this offers an attractive investment opportunity to any foreign investor since the passenger numbers are very healthy and hence the returns on investment will be very positive.

However, this policy decisions is ineffective and will not enable any foreign investor to invest in India due to the 'substantial ownership and effective control' clause. The obstacle of Substantial Ownership and Effective Control (SOEC) for airlines operating in India comes up at two stages - first when an airline applies for a flying permit to Director General of Civil Aviation and second when it wants to fly abroad and this could well put a spanner in foreign investors' plans. In the first instance, clear rules exist mandating the majority control, board seats etc of any airline wanting to fly in India resting with Indians. To obtain a flying permit, majority control should be in Indian hands at all times.[53] In the second case, when an airline wants to fly from India to another country, International Civil Aviation Organisations (ICAO) norms mandate that only an airline which has SOEC of Indians can fly international.

For the SOEC mandate while obtaining a flying permit, the government now plans to amend the rules to accommodate the new FDI norms.[54] Trouble is brewing over the second instance. Put simply, the second provision means that although technically an airline in India can now have 100% foreign investment (which could be a mix of up to 49 % by a foreign airline and remaining by FIIs or other foreign entities), such an airline may not be allowed to then operate overseas.

FDI Policy in Defence Sector

Defence is quintessential area of concern for every sovereign country. It is protected from externalities for obvious reasons of independence during the times of war/external aggression. Historically during the British rule, kings used to have agreement called as subsidiary alliance wherein the defence services were outsourced to East India company for a payment and if kings fail to pay, East India Co. could acquire a portion of land in

[53] Clause 3, Minimum Requirements for the Grant of Permit to operate Scheduled Passenger Air Transport Services, 1994

[54] *See,* http://www.financialexpress.com/industry/100-fdi-aviation-future-domestic-airline-completely-foreign-owned-icao-clears-fog/321114/

lieu of the payment. This lead to a gradual increase in power of the company[55]. In independent India, defence was kept under central control as it was directly linked to sovereignty and India's experience with foreign hands in defence sector was bitter. Thus India prohibited FDI in the sector for long period of time, i.e ,till June, 2016.

Initially, we were purchasing most of the modern developed planes and other defence weapons from outside because though India had production facility, it lacked the technology to produce them at cost effectively. Further, if India bought such weapons from a foreign country, the county would only sell the product, not the technology. Also, problem with respect to training, usage and maintenance of these products arose. For instance, India bought fighter planes 'Sukhoi' from Russia and Hindustan Aeronautics Limited does provide maintenance support, yet, India is heavily dependent on Russia for that[56]. Due to this deprivation of technology, India had 'state of the art' products, but no technology to improvise or build further. It was also noticed in few cases that where the product was bought along with warranties and an agreement to train domestic personnel for a stipulated period of time, on the expiration of such fixed period, the product would become useless because some vital part will stop functioning as a consequence of which , the whole product would be rendered useless.

Recently, the government decided to open up the sector for foreign investment upto 100% through government route instead of the previous 49% automatic route. This implies that the original equipment manufacturers can now independently set up their business in India unlike before wherein they had to establish a joint venture with an Indian counterpart (who would hold a controlling stake in the business) to be able to transact with Indian defence ministry and allied offices. However, a caveat that has been injected is that the technology being provided by the foreign manufacturer should not be available in India though the requirement of 'state of the art' technology is now taken away.[57]
This move of the government is in consonance of its policy to foster competition in the market and to ensure a level-playing field wherein now foreign manufacturers can now bid and compete in Defence procurement space.[58]Other policy considerations for such relaxation were (i)the policy of 'make in India' which has been aggressively implemented in all sectors and ;(ii) employment generation.

---

[55] Richard B. Barnett , North India Between Empires: Awadh, the Mughals, and the British, 1720-1801, Berkely, Los Angeles, London: University of California Press, 1980, p. 151
[56]Dinakar Peri, Long-term supply pact for Sukhoi jets inked, 17 March, 2017, available at http://www.thehindu.com/news/national/long-term-supply-pact-for-sukhoi-jets-inked/article17523088.ece
[57]
[58] P.R. Sanjai and Shally Seth Mohile, What does 100% FDI in defence mean?, June 22, 2016 available at http://www.livemint.com/Industry/MqTrPlsdKy1D0YUGnVfygI/What-does-100-FDI-in-defence-mean.html. Also note the comment of the official spokesperson for Tata Motors Ltd, a leading car manufacturer in India, who observed that "A 100% FDI in defence will create a win-win situation for the country's defence forces, local industries and international OEMs. It will ensure availability of cutting edge technologies for the defence forces, boost local manufacturing in India and provide assured returns for international OEMs. The move will also enhance overall R&D to develop and deploy solutions catering specifically to the country's security needs."

Despite this tremendous move towards liberalization of a crucial sector, the government needs to be careful of not killing indigenous manufacturers and suppliers in this sector who will face the wrath of competition for the first time (and therefore may not be ready for it) which will leave the economy completely dependent on foreign suppliers. Also it makes our defence system vulnerable because all technology used in defence will be known to the other countries as well and in case of hostility between India and another developed country, India will stand at a disadvantage. Also, the "defence manufacturing is a sector that remains highly capital intensive and the risk levels for investors remain quite high as the ultimate payoff is unpredictable."[59]Therefore such full throttle opening of the sector will not ensure heavy flow of funds *per se*.

FDI and Pharmaceutical Sector

The Indian pharmaceuticals market boasts of being the 3rd largest in terms of volume and 13th largest in terms of value, as per a report by Equity Master. India is also the largest provider of generic drugs globally with the Indian generic drugs accounting for 20% of global exports in terms of volume. In fact, over 80% of the anti-retro-viral drugs used globally to combat AIDS are supplied by Indian pharmaceutical firms. [60]

The sector has recently been opened to upto 100% through automatic route since the year 2015 and has come a long way since its Drug Policy of 1978 wherein it resolved to achieve self-reliance[61]. Such relaxation is in view of the current government's target called "Pharma Vision 2020", a policy which intends to transform India into a world leader in the area of end-to-end manufacturing of drugs. The opening of the market is in order to relieve itself from dependence on China for Active Pharmaceutical Ingredients[62] apart from emphasizing on the 'make in India' programme. The Indian government has also introduced measures to ensure affordability of drugs through Drug Price Control Order and the National Pharmaceutical Pricing Authority which will be facilitated by this relaxation and so will be the rural health programme. Since the sector is scattered in nature, a number of mergers and acquisitions have also been observed in the pharmaceutical industry[63]. The Indian government, being keen on inflow of funds in this area, has also smoothened the inroads through the Companies Act, 2013 which now allows mergers of Indian company with a foreign company(with regard to brownfield

---

[59] Sujatha, 100% FDI in Defence: What it Means, June 27, 2016 available at http://www.mapsofindia.com/my-india/india/100-fdi-in-defence-what-it-means

[60]Indian Brand Equity Foundation, Indian Pharmaceutical Industry, 25 May, 2017, available at https://www.ibef.org/industry/pharmaceutical-india.aspx

[61] Drug Policy of India, 1978 introduced by Hathi Committee. See Arvind Badiger *et al*, Economic Reforms and Drug Policy: Economic Reforms and Drug Policy: Economic Reforms and Drug Policy: A Micro Level Analysis, 2006 available at http://www.iipa.org.in/common/pdf/PAPER%202_Economic%20Reforms%20and%20Drug%20Policy.pdf

[62] At present, India's need for Active Pharmaceutical Ingredients is satisfied by China to the extent of 85%.

[63]FDI in pharma to boost M&A deals, private equity investments: experts, 22 June, 2016, available at http://www.livemint.com/Companies/UuPjuc77Bqn4ZcxITQj4xK/FDI-in-pharma-to-boost-MAs-PE-investments-say-experts.html

projects).[64] Such increase of production through foreign funds will also help increase the export of drugs.

A thorn in this rosy picture which often pricks the foreign investors is the strong policy of the Indian government regarding compulsory licensing and strong clutches on the prices of the life saving drugs. Three years ago, Novartis faced a grave defeat for its cancer saving drug patent application which was denied by the Supreme Court of India[65]on the ground that the updated drug could not fulfill the criteria of 'inventiveness', an essential for the grant of patent.[66] The judgment is significant for our discussion because it prevented "evergreening" of the drug which is a malpractice usually followed by companies for continuation of their patent monopoly beyond prescribed period by showing minor changes to the product and calling it a new product/patent. It also ensured access of the drug to poor who could not afford it otherwise. The judgment was frowned upon by the USA government but showed a strong inclination towards public interest, a policy consideration staunchly followed by the government.

The Patent Act of India also prescribes for compulsory licensing to any person provided certain conditions are met and the drug is neither worked nor affordable in India[67], the public interest being of prime concern.[68]

A concern that is raised in this area is that while competition increases as a result of such liberal inflow of funds, various diseases which are peculiar to tropical regions/developing countries, eg. malaria, will be ignored in the race to compete with the developed countries because the focus of the domestic business houses , in terms of research and development[69], will be on competition.

CONCLUSION

India has a unique standing in the world because it neither stands in the queue of the developing countries, having surpassed the GDP growth of most of the developing nations but is till to catch up with the developed countries too. So, one can imply that India is the super-developing economy for which development at an accelerated pace is crucial. Given this mandate, India needs to maintain the sensitive balance between an attractive destination for investment while not compromising on its constitutional goals. This balance is being sought through the implementation of dynamic public policies of

---

[64] Through Section 234 of the Act. Under the Companies Act, 1956, the foreign company could be the merging company but could not be the resultant company.

[65] Novartis AG v. Union of India , Civil Appeal No.s. 2706-2716 of 2013 dated 1 April, 2013.

[66]India's Novartis Decision, New York Times, 3 April, 2013, available at http://www.nytimes.com/2013/04/05/opinion/the-supreme-court-in-india-clarifies-law-in-novartis-decision.html

[67] Section 84 of the Patent Act, 1970 provides : "(1) At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory license on patent on any of the following grounds, namely:-
(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or
(b) that the patented invention is not available to the public at a reasonably affordable price, or
(c) that the patented invention is not worked in the territory of India…."

[68] See generally Justice N. Rajagopala Ayyangar, Report on the Revision of the Patents Law, September, 1959, para 125 onwards.

[69] Nidhi Tewathia, Foreign Direct Investment in Indian Pharmaceutical Industry: An Assessment, International Journal of Social Science and Humanities Research, Vol. 2, Issue 3, pp: (20-26), Month: July 2014 - September 2014

the government which are injected from time to time in the arena of foreign direct investment.

Through this paper, we analysed as to what goes into the decision making process with regard to capital inflow in certain crucial sectors of our economy sector and how does the government and legislators balance the need for investment with the need to protect the industry from financial shocks. The new government has implemented many reformative measures and smoothened the road for foreign investment by harmonizing the laws concerning the sectors as well. However, the judiciary, as is our finding through the aforesaid analysis , has been reluctant to delve into the scrutiny of the policies made by the government except in the cases of blatant disregard to principles of natural justice. In this regard, the researchers submit that the judiciary should actively participate in the judicial review of these policies even if it is not a patent violation of the laws of the land. What is desired from them is examination through the lens of constitution without assessing whether the policy is going to succeed or not, similar to how judiciary has struck a beautiful balance in corporate law wherein it does not scrutinize the business judgment (because that is not the area of expertise of the judges) but whether it was taken bona fide or otherwise.