**International Trade Law**

**Unit-1**

**Foreign Trade Development and Regulation Act. 1992**

Imports and exports are considered to be two important components of foreign trade. Foreign trade refers to nothing but the exchange of the goods and services between two or more countries, across their respective international borders. The former implies the physical movement of the goods into a country from another country following a legal manner. The latter is concerned with the physical movement of the goods and services out of the country in a legal manner. Thus, both the import and export have made the world a local market.

Foreign trade or international trade is considered to be extremely important for the brand survival as well as the growth of any country. This is because foreign trade acts as one of the primary economic boosters for that specific entity. Not only this, foreign trade is also supposed to cover up the need for a country for particular resources and to further get rid of the extra resources that are abundantly available in the country.

**The Foreign Trade (Development and Regulation) Act, 1992**

The foreign policy of India is governed and regulated by the Foreign Trade (Development and Regulation) Act, 1992. This Act was established on the 7th of August in the year 1992. The Act hasn’t been originated as a separate act to regulate the foreign policy, but the same came into existence as a replacement to the Import and Exports (Control) Act, 1947.  Today, the entire scenario of exports and imports in India is regulated and managed by the Foreign Trade (Development and Regulation) Act, 1992. This act has eliminated all the existing nuances of the previously introduced act and has given the Government of India some of the most enormous powers to control it. This act is considered to be a supreme legislation in accomplishment of the foreign trade taking place in the country. The Act has been incorporated with a major intention to provide a proper framework as to the development as well as standardization of the foreign trade by the way of facilitating imports and enhancing the exports in the country and all the other matters related to the same.

**Salient Features of the Act**

Foreign Trade (Development and Regulation) Act, 1992 is believed to be a breakthrough in the economic development of the country, especially in today’s world of globalization and industrialization. The entire act has been designed in such a manner so as to run in consonance with the current trade policies associated with the foreign countries. Thus, overall, this Act features everything that makes the economy of the country stronger whenever the regard of foreign trade is taken into consideration.

The following are considered to be the salient features of the act:

* The act has empowered the Central Government to make provisions for the development as well as regulation of foreign trade by the way of facilitating imports into as well as augmenting exports from the country and in all the other matters related to foreign trade.
* This act authorizes the government to formulate as well as announce the export and import policy and to also keep amending the same on a timely basis. The government has also been given a wide power to prohibit, restrict and regulate the exports and imports in general as well as specified cases of foreign trade.
* The act provides for certain appointments especially that of the Director-General to advise the Central Government in formulating import and export policy and to implement the same.
* The act commands every importer as well as exporter to obtain a code number called the ‘Importer Exporter Code Number (IEC)’ from the Director-General or the authorized officer.
* The act provides the balancing of all the budgetary targets in terms of imports and exports so that the nation reaches the very peak of economic development. The principal objectives here include the facilitation of sustain growth as to the exports of the country, the distribution of quality goods and services to the domestic consumer at internationally competitive prices, stimulation of sustained economic growth by providing access to essential raw materials as well as enhancement of technological strength and efficiency of Indian agriculture, industry as well as services and improvement of their competitiveness to meet all kinds of requirement of the global markets.

The current foreign trade policy so introduced in the country has laid down certain aims and objectives before it. The major objectives that the current foreign trade policy of our country has laid down are stated as under:

* The simplification as well as merger of all kinds of rewards schemes including the Merchandise Exports from India Scheme (MEIS), Service Exports from India Scheme (SEIS), incentives to be made available in these schemes for all the Special Economic Zones, duty credit slips to be freely transferable and useable for the payment of various duty and many others.
* Special boost has been given to ‘Make in India’ policy that has been launched by the government to encourage national as well as multinational companies to manufacture their products in India.
* The trade facilitation and ease in terms of the performance of legal business of all the kinds.
* The introduction of various other initiatives involving new schemes that could run in tandem with the growing needs and wants of the people at large and the increasing use of technology as well as digitalization into these initiatives so as to reach the summit of technical advancement.

**Importance of Foreign Trade Policy**

Foreign Trade policy of any country is equally important for the free flow of economy and the overall economic development of the country. Without a proper foreign trade policy, any country would fail to execute its import as well as export business smoothly. If there exists no proper foreign policy in a country, the entire import-export and international business of the country will fall down miserably and the same will surely meet a dead end. A foreign trade policy of any country ensures a free flow of business as well as economy while transacting or trading on an international scale. The same policy helps to maintain the free flow of economy of the country, thereby accelerating the financial growth, facilitating a free trade and liberalization as well as improving the overall standard of living of its people.

**FEMA**

The **Foreign Exchange Management Act, 1999 (FEMA)** is an Act of the Parliament of India “to consolidate and change the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India”. It was passed in the winter session of Parliament in 1999, replacing the Foreign Exchange Regulation Act (FERA). This act makes offences related to foreign exchange civil offenses. It extends to the whole of India., replacing FERA, which had become incompatible with the pro-liberalization policies of the Government of India. It enabled a new foreign exchange management regime consistent with the emerging framework of the World Trade Organization (WTO). It also paved the way for the introduction of the Prevention of Money Laundering Act, 2002, which came into effect from 1 July 2005.

**Objectives of FEMA**

The main objective of FEMA was to help facilitate external trade and payments in India. It was also meant to help orderly development and maintenance of foreign exchange market in India. It defines the procedures, formalities, dealings of all foreignexchange transactions in India. These transactions are mainly classified under two categories — Current Account Transactions and Capital Account Transactions.

FEMA is applicable to all parts of India and was primarily formulated to utilize the foreign exchange resources in efficient manner. It is also equally applicable to the offices and agencies which are located outside India however is managed or owned by an Indian Citizen. FEMA head office is known as Enforcement Directorate and is situated in heart of city of Delhi.

**Applicability of FEMA Act**

* Exports of any foods and services from India to outside, foreign currency, that is any currency other than Indian currency,
* Foreign exchange,
* Foreign security,
* Imports of goods and services from outside India to India,
* Securities as defined in Public Debt Act 1994,
* Banking, financial and insurance services,
* Sale, purchase and exchange of any kind (i.e. Transfer),
* Any overseas company that is owned 60% or more by an NRI (Non Resident Indian) and
* Any citizen of India, residing in the country or outside (NRI)

**Major Provisions of FEMA Act 1999**

Here are major provisions that are part of FEMA (1999)

* Free transactions on current account subject to reasonable restrictions that may be imposed.
* RBI controls over capital account transactions.
* Control over realization of export proceeds.
* Dealing in foreign exchange through authorized persons like authorized dealer or money changer etc.
* Appeal provision including Special Director (Appeals)
* Directorate of enforcement
* Any person can sell or withdraw foreign exchange, without any prior permission from RBI and then can inform RBI later.
* Enforcement Directorate will be more investigative in nature
* FEMA recognized the possibility of Capital Account convertibility.
* The violation of FEMA is a civil offence.
* FEMA is more concerned with the management rather than regulations or control.
* FEMA is regulatory mechanism that enables RBI and Central Government to pass regulations and rules relating to foreign exchange in tune with foreign trade policy of India.

**Special economic Zones**

A **special economic zone (SEZ)** is an area in which business and trade laws are different from the rest of the country. SEZs are located within a country’s national borders, and their aims include: increased trade balance, increased investment, job creation and effective administration. To encourage businesses to set up in the zone, financial policies are introduced. These policies typically regard investing, taxation, trading, quotas, customs and labour regulations. Additionally, companies may be offered tax holidays, where upon establishing in a zone they are granted a period of lower taxation.

The creation of special economic zones by the host country may be motivated by the desire to attract foreign direct investment (FDI). The benefits a company gains by being in a special economic zone may mean that it can produce and trade goods at a lower price, aimed at being globally competitive. In some countries the zones have been criticized for being little more than labor camps, with workers denied fundamental labor rights.

Modern SEZs appeared from the late 1950s in industrial countries. The first was in Shannon Airport in Clare, Ireland. From the 1970s onward, zones providing labour-intensive manufacturing have been established, starting in Latin America and East Asia. The first in China following the opening of China in 1979 by Deng Xiaoping was the Shenzhen Special Economic Zone, which encouraged foreign investment and simultaneously accelerated industrialization in this region. These zones attracted investment from multinational corporations.

**SEZ in India**

SEZs were introduced to India in 2000, following the already successful SEZ model used in China. Prior to their introduction, India relied on export processing zones (EPZs) which failed to make an impact on foreign investors. By 2005, all EPZs had been converted to SEZs. As of 2017, there are 221 SEZs in operation, with a further 194 approved for 2018. For developers to establish an SEZ in India, applications can be made to the Indian Board of Approval. Companies, partner firms and individuals may also apply by completing Form-A which is available on the Department of Commerce’s website. There are four types of SEZs in India, which are categorized according to size: Multi-sector (1,000+ hectares); Sector-specific (100+ hectares); Free Trade & Warehousing Zone (FTWZ) (40+ hectares); and Tech, handicraft, non-conventional energy, gems & jewellery (10+ hectares).

**Export Processing Zone (EPZ)**

An Export Processing Zone (EPZ) is a Customs area where one is allowed to import plant, machinery, equipment and material for the manufacture of export goods under security, without payment of duty. The imported goods are subject to customs control at importation, through the manufacturing process, to the time of sale/export, or duty payment for home consumption.

**Advantage of an Export Processing Zone**

* It helps to boost the manufacturing sector the country and thus leading to the creation of job.
* It helps to boost the GDP and individual income of a particular economy.
* It helps to attract company to the particular country.
* On the whole export processing zones help in welfare and development of a particular economy

**Disadvantage of an Export Processing Zone**

* Many times companies dumb their goods in the domestic market which can lead to price wars and thus hampering the health of the domestic producer
* Many companies also tend to dump their waste in the host country which can be detrimental to the environment of the country.

**Basics of international trade**

A country specializes in a specific commodity due to mobility, productivity and other endowments of economic resources. This stimulates a country to go for international trade. The basis of international trade lies in the diversity of economic resources in different countries. All countries are endowed by nature with the same productive facilities.

Economists cite Ricardo’s theory of Comparative Advantage as the first principle of international trade. This theory demonstrates that it benefits all countries to be involved in international trade, even if they do not have an absolute advantage. Ricardo demonstrated that countries benefit from specializing in those areas where they offer the greatest relative (or comparative) advantage. Thus, all countries can benefit from international trade, especially with the subsequent “knock-on” effects of this activity.

Michael Porter identifies four factors which either individually or in combination will help a country develop competitive advantage in a given industry. These factors are presented in a diagram known as Porter’s diamond. The four factors are:

**· International trade between nations**

International trade between nations is a very important part of an economy. For the most part, international trade is beneficial between two nations that have strong markets in two different sectors.

A country with a strong market in one sector has a comparative advantage over another nation because of lower opportunity costs. This opportunity cost translates into gains from trade because of the resulting net savings by a nation on manufacturing goods. By importing goods, a nation does not have to spend time, money or resources developing sectors of an economy, which it does not necessarily need.

International trade becomes an attractive option when gains from trade are taken into account. When a nation produces a certain good, such as automobiles, the product can be exported to another nation for goods and services in return.

**· Demand conditions**

Porter’s model states that strong local demand creates benefits based on better understanding of market needs. Proximity to the market facilitates this dialogue.

**· Factor conditions**

The factors of production- land, labour, enterprise and capital- all potentially contribute to the development of competitive advantage. Many Gulf nations are rich in oil and gas resources; South Africa is rich in diamond mines. Developed nations such as Switzerland and Germany have well-educated labour markets, whereas other nations, such as Sudan, Haiti and Benin have low levels of literacy.

* **Related and supporting industries**

Successful national industries normally attract good local suppliers, which in turn increases the competitiveness of this industry in international markets. Competitive advantage, once established, can be sustained and developed by improvements in each of these areas. For example, national governments may support training initiatives or allow tax incentives or grants to encourage or aid supporting industries to further develop the national advantage.

**· Firms, strategy,structure and rivalry**

High levels of local competition encourage competitive companies to improve, and the resulting strong competition in home markets provides a base for exploiting strengths internationally.

**International Business Theories**

For the success of business, it is important to understand all the key types of international trade theories. The concept of international trading is not limited to, just sending and receiving products and services and putting all of the profits in the pockets. Instead, it’s a lot more complicated thing. In fact, its current shape is the result of many different types of **international trade theories** that helped it in its evolution through various eras. Honestly saying, apart from making your syllabus boring, these theories can be of great assist in the long run since most parts of these ideas still, hold right. So in this article, we will go through each and every theory and will provide you with a somewhat in-depth detail of these.

**7 Types of International Trade Theories**

1. Mercantilism
2. Absolute Advantage
3. Comparative Advantage
4. Heckscher-Ohlin Theory
5. Product Life Cycle Theory
6. Global Strategic Rivalry Theory
7. National Competitive Advantage Theory

Above are the 7 different types of international trade theories, which are presented by the various authors in between 1630 and 1990.

**Mercantilism**

The oldest of all international trade theories, **Mercantilism**, dates back to **1630**. At that time, **Thomas Mun** stated that the economic strength of any country depends on the amounts of silver and gold holdings. Greater are the holdings, more economically independent a country is.

Furthermore, the idea of favoring greater exports and promoting efforts to minimize imports also belongs to the same theory. Well! The thinking behind this concept is evident since you pay for the imports from the pay that you get from exports. So, if you a country has a lot to pay for the imported products then it will get from exported products, its economy will get inclined towards declination. Even though the view is old but the roots of modern thinking towards the financials is deeply embedded in it.

**Absolute Advantage**

The Theory of **Absolute Advantage** is based on the notion of increasing the efficiencies in the production processes. In **1776**, **Adam Smith**, a renowned financial expert of the time being, proposed the theory that the manufacturing a product with high efficiency as compared to any other country on the globe is highly advantageous.

The concept can just be understood by the idea that if two countries specialize in exactly same kind of product. But the product of one country being better in quality or lower in price will bring tremendous absolute advantage to the country as compared to the other one. From another point of view, if two countries specialize in entirely different products, then they can quickly increase their influence in their localities by having trade with each other (by creating absolute advantages at both ends).

**Comparative Advantage**

As compared to absolute advantage, **Comparative Advantage** favors relative productivity. According to this concept, as put forward by **David Ricardo** in **1817**, a country with maximum absolute advantage in the creation of more than one product as compared to other, can still trade with another country with less efficient ways to create that product, that’s readily available in first, to boost its productivity.

To illustrate this idea with an example, let’s say that I have expertise in two fields like graphics designing and writing, where designing lets me earn a lot more than writing. Keeping in mind that I can work on only one side at a time, I will most likely hire a writer, and we both will work in a comparative atmosphere.

**Heckscher-Ohlin Theory**

Both the Absolute as well as Comparative international trade theories assume that the choice of the product that can prove itself to be of great advantage is led by free and open markets instead of using the resources available inland. That’s what caused **Bertil Ohlin**and**Eli Heckscher** to put forward the idea of determination of the prices that relies on the differences in supply and demands.

This can just be understood as, if the supply of a product grows greater than it is in demand in the market, its price falls and vice versa. So, export of a country should mainly consist of the product that is abundantly available in it, and imports should count the products that are in high demand. Since, this concept ensures utilization the country’s factors like labor, land and funding sources for the purpose of product manufacturing that’s why it is also known by the name of “factor proportion theory.”

**Product Life Cycle Theory**

In the **1970s**, **Raymond Vernon** introduced the notion of using a product’s life cycle to explain global trade patterns, in the field of marketing. According to theory, as the demand for a newly created product grows, the home country starts exporting it to other nations. Where when the demand grows, local manufacturing plants are opened to meet the request. And the scenario covers the whole globe time to time, thus making that product a standardization.

You can take the example of computers in consideration to understand how this works. The earlier personal computers appeared in **1970’s** available only in a few countries and from **1980’s to 1990’s**, the product was moving through the stage of maturity where the production spread to many other nations. And now in 21st century, every third house has a PC in it.

**Global Strategic Rivalry Theory**

The continuous evolutionary behavior of international trade theories brings us back in the **1980’s** where **Kalvin Lancaster** and **Paul Krugman** introduced the concept of strategies, based on global level rivalries, targeting multinational corporations and the struggle needed in achieving higher advantages as compared to other international companies.

According to the concept, a new firm needs to optimize a few factors that will lead the brand in overcoming all the barriers to success and gaining an influential recognition in that global market. In all these factors, a thorough research and timed developmental steps are crucial. Whereas, having the complete ownership rights of intellectual properties is also necessary. Furthermore, the introduction of unique and useful methods for manufacturing as well as controlling the access to raw material will also come handy in the way.

**National Competitive Advantage Theory**

**Michael Porter** in **1990’s** suggested that the success of any business in international trade depends on upgradable and innovational capacities of the industry as well as four other factors, which determine how that firm is going to perform in this global level race. The main concept behind this theory gives the feel of holding factor proportion as well as many other international trade theories in it.

One of those factors is the availability of resources in the local market and their prices which are necessary for providing a sustainable and stable environment for the trade to grow. Moreover, the ability of the firm to face competitors and its capacity to upgrade itself also determines the success rate of that brand. Furthermore, keeping the track of the change in demand and the behavior of local suppliers is also important.

**Drivers of international trade**

As the international environment is constantly changing due to today’s economic crisis, where are we going to be able to grow our businesses? You may need to grow your business internationally. At HSI, we have noticed that different companies have different reasons for growing their business and these are summarized below:

1. **Cost**

**A. Export**

* Some companies require large capital investments in plants and machinery.
* Strong incentive to spread the costs of these fixed costs over a large number of units

**B. Import / Outsourcing**

Some companies, in response to consumer demands, attempt to offer goods at the lowest possible price, moving manufacturing overseas (such as in China or Mexico)

Strong incentive to lower production costs

**2. Competitition**

* Companies follow their domestic competitors abroad to maintain their world-wide market share.
* Companies retaliate against foreign competitors entering their home market by going to these competitors’ home markets.
* Companies counter a competitor’s new product entry by offering a similar product, often produced abroad.

**3. Market factors**

* Consumers’ tastes and preferences have become increasingly uniform worldwide.
* Consumers have become increasingly knowledgeable about products and willing to try new foreign alternatives.

**4. Technology**

* Diffusion of information is universal
* Competition for products is worldwide: the Internet allows people to trade with one another.

**Policy framework for FDI in India**

India is one of the fastest growing economies since last few years and witnessed a large amount of foreign investment in various sector. The government has formulated it Policy aiming towards attracting more and more funds considering the domestic business concerns simultaneously. This article throws a light upon what has been formulated and the procedure to be followed in the same. This present document is an analysis of the legal requirements, policies and procedures for FDI in India and is helpful for the investors’ lawyers, company secretaries and finance professionals.

**POLICY AND REGULATORY FRAMEWORK TOWARD FDI**

The Government has put in place a policy framework on Foreign Direct Investment. Which is embodied in the Circular on Consolidated FDI Policy, issued which is updated every six months, to capture and keep pace with the regulatory changes. The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Press Notes/ Press Releases which are notified by the Reserve Bank of India as amendments to the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000 (notification No.FEMA 20/2000-RB dated May 3, 2000).

**AUTOMATIC ROUTE**

FDI Policy permits FDI up to 100 % from foreign/NRI investor without prior approval in most of the sectors including the services sector under automatic route. FDI in sectors/activities under automatic route does not require any prior approval either by the Government or the RBI. The investors are required to notify the concerned Regional office of RBI of receipt of inward remittances within 30 days of such receipt and will have to file the required documents with that office within 30 days after issue of shares to foreign investors.

The present Automatic Route allows Indian companies engaged in all industries except for certain select industries/sectors to issue shares to foreign investors up to 100% of their paid up capital in Indian companies. There are also some areas where though Automatic Route is available, foreign investors cannot invest beyond a certain percentage of the paid up capital of the Indian companies or where investment is subject to some other conditions.

**GOVERNMENT APPROVAL ROUTE**

All activities which are not covered under the automatic route, prior Government approval for FDI/NRI shall be necessary. Areas/sectors/activities hitherto not open to FDI/NRI investment shall continue to be so unless otherwise decided and notified by Government.

An investor can make an application for prior Government approval even when the proposed activity is under the automatic route.

**Proposals requiring Government Approval**

FDI up to 100% is allowed under the automatic route in all activities/sectors except the following which will require approval of the Government:

* Activities/items that require an Industrial License.
* All proposals falling outside notified sectoral policy/caps or under sectors in which FDI is not permitted.
* Proposals in which the foreign collaborator has a previous/existing venture/tie up in India in the same.

Prior Government approval for new proposals would be required only in cases where the foreign investor has an existing joint venture, technology transfer, trade mark agreement in the same field. With the amendment of the Press Note 18, joint ventures formed with foreign investment before December 12, 2004 would be considered as “existing JVs” which will fall under the ambit of Press Note 18. The foreign partner in such JV has to obtain a No Objection Certificate (NOC) from the Indian partner for starting new venture in India in the “same” field of activity.

However, Government via Press Note No. 1 (2005 Series) made an exception that even in cases where the foreign investor has a joint venture or technology transfer/ trademark agreement in the ‘same’ field prior approval of the Government will not be required in the following cases:

1. Investments to be made by Venture Capital Funds registered with the Security and Exchange Board of India (SEBI); or
2. Where in the existing joint-venture investment by either of the parties is less than 3%; or
3. Where the existing venture/ collaboration is defunct or sick.

Application for proposals requiring prior Govt’s approval should be submitted to FIPB in fresh Application . The application shall be filed online through FIPB portal. Plain paper applications carrying all relevant details are also accepted. No fee is payable. The following information should form part of the proposals submitted to FIPB: –

a) Whether the applicant has had or has any previous/existing financial/technical collaboration or trade mark agreement in India in the same or allied field for which approval has been sought; and

b) If so, details thereof and the justification for proposing the new venture/technical collaboration (including trade marks).

c) Applications can also be submitted with Indian Missions abroad who will forward them to the Department of Economic Affairs for further processing.

d) Generally foreign investment proposals received in the DEA (Department of Economic Affairs) are placed before the Foreign Investment Promotion Board (FIPB) within 15 days of receipt. The decision of the Government in all cases is usually conveyed by the DEA within 30 days.

**PROHIBITED SECTORS FOR FDI IN INDIA**

FDI is not permissible in the following cases

* Gambling and Betting, or
* Lottery Business, or
* Business of chit fund
* Nidhi Company
* Housing and Real Estate business (to a certain extent has been opened. For details please see note on Construction)
* Trading in Transferable Development Rights (TDRs)
* Retail Trading (discussions are being held to open this area-B2B and Cash & Carry are permitted)
* Atomic Energy
* Agricultural or plantation activities or Agriculture (excluding Floriculture, Horticulture, Development of Seeds, Animal Husbandry, Pisiculture and Cultivation of Vegetables, Mushrooms etc. under controlled conditions and services related to agro and allied sectors) and Plantations(other than Tea plantations)

**GENERAL PERMISSION OF RBI UNDER FEMA**

RBI has granted general permission under Foreign Exchange Management Act (FEMA) in respect of proposals approved by the Government. Indian companies getting foreign investment approval through FIPB route do not require any further clearance from RBI for the purpose of receiving inward remittance and issue of shares to the foreign investors.

The companies are however required to notify the concerned Regional office of the RBI about receipt of inward remittances within 30 days of such receipt and to file the required documents with the concerned Regional offices of the RBI within 30 days after issue of shares to the foreign investors or NRIs.

**FDI IN LIMITED LIABILITY PARTNERSHIPS (LLP’S)**

Government of India recently allowed FDI in LLP’s however LLPs with FDI will not be allowed to operate in agricultural/plantation activity, print media or real estate business. FDI in LLP is allowed with the previous approval of the Government. Further it is allowed with the Government’s approval only in those sectors in which 100% FDI is allowed under automatic route under the FDI policy. Thus those sectors which are not available under automatic route is not available for FDI in LLP. The followings are some conditions with respect to FDI in LLP’s.

* LLPs with FDI will not be eligible to make any downstream investments.
* Foreign Capital participation in LLPs will be allowed only by way of cash consideration.
* Investment in LLPs by Foreign Institutional Investors (FIls) and Foreign Venture Capital Investors (FVCIs) will not be permitted.
* LLP’s are not allowed to raise ECB (external commercial borrowings)

**FDI IN EOUS/ SEZS/ INDUSTRIAL PARK/ EHTP/ STP**

**Special Economic Zones (SEZs)**

100% FDI is permitted under automatic route for setting up of special Economic Zone. Units in SEZ qualify for approval through automatic route subject to sectoral norms. Details about the type of activities permitted are available in the Foreign Trade Policy issued by Department of Commerce. Proposals not covered under the automatic route require approval by FIPB.

**100% Export Oriented Units (EOUs)**

100% FDI is permitted under automatic route for setting up 100% EOU, subject to sectoral norms.  roposals not covered under the automatic route would be considered and approved by FIPB.

**Capitalization of Import Payables**

FDI inflows are required to be under the following modes;

* By inward remittances through normal banking channels or
* By debit to the specified account of person concerned maintained in an authorized dealer/authorized bank.

Issue of equity to non-residents against other modes of FDI inflows or in kind is not permissible under automatic route. Issue of shares for consideration other than cash requires prior Government Approval.

**INDUSTRIAL LICENSING**

**Industrial Licensing Policy**

Industrial Licenses are regulated under the Industries (Development & Regulation) Act, 1951. The requirements of Industrial licence has been progressively reduced. At present industrial licence for manufacturing is required only for the following:

* Industries retained under compulsory licensing,
* Items reserved for small scale sector; and
* When the proposed location attracts locational restriction industries requiring Compulsory Licensing

The following industries require compulsory industrial license:

* Distillation and brewing of alcoholic drinks;
* Cigars and cigarettes of tobacco and manufactured tobacco substitutes;
* Electronic Aerospace and defence equipment: all types;
* Industrial explosives including detonating fuses, safety fuses, gun powder, nitrocellulose and matches;
* Hazardous chemicals;

1. a) Hydrocyanic acid and its derivatives
2. b) Phosgene and its derivatives
3. c) Isocyanates and di-isocyanates of hydrocarbon, not elsewhere specified example: Methyl Isocyanate); and

* Drugs and Pharmaceuticals (according to modified Drug Policy issued in September, 1994 and subsequently amended from time to time)

Prior Government approval required in all cases where Industrial Licence is required to start the business. i.e. all sectors requiring industrial license comes under approval route and requires Government approval.

**INDUSTRIES UNDER SMALL-SCALE SECTOR**

An industrial undertaking is defined as a small-scale unit if the capital investment in plant and machinery does not exceed Rs 10 million. Small-scale units can get registered with the Directorate of Industries/District Industries Centre of the State Government. Such units can manufacture any item, and are also free from locational restrictions.

**Manufacture of items reserved for small-scale sector**

Non-small scale units can manufacture items reserved for the small scale sector only after obtaining an industrial license. In such cases, the non-small scale unit is required to undertake an obligation to export 50 per cent of the production of SSI reserved items.

**FDI IN SSI UNITS**

A small scale unit cannot have more than 24 per cent equity in its paid up capital from any industrial undertaking, either foreign or domestic. If the equity from another company (including foreign equity) exceeds 24 per cent, even if the investment in plant and machinery in the unit does not exceed Rs 10 million, the unit loses its small-scale status.

**Locational Restrictions**

Industrial undertakings are free to select the location of a project. Industrial Licence is required if the proposed location is within 25 KM of the Standard Urban Area limits of 23 city having population of 1 million as per 1991 census.

Locational restriction does not apply:

1. i)  If the unit were to be located in an area designated as an ‘’industrial area’’ before the25th July, 1991.
2. ii)  Electronics, Computer software and Printing and any other industry, which may be notified in future as “nonpolluting industry”, are exempt from such locational restriction.

The location of industrial units is subject to applicable local zoning and land use regulations and environmental regulations.

**FOREIGN TECHNOLOGY AGREEMENTS**

**General Policy**

For promoting technological capability in Indian industry, acquisition of foreign technology is encouraged through foreign technology collaboration agreements. Inductions of know-how through such agreements are permitted either through automatic route or with prior approval from the Government.

**Scope of Technology Collaboration**

The terms of payment under foreign technology collaboration, which are eligible for approval through the automatic route and by the Government approval route are technical know-how fees, payment for design and drawing, payment for engineering service and royalty. Payments for hiring of foreign technicians, deputation of Indian technicians abroad, and testing of indigenous raw material, products, and indigenously developed technology in foreign countries are governed by separate RBI procedures and rules and are not covered by the foreign technology collaboration approval. Similarly, payments for imports of plant and machinery and raw material are also not covered by the foreign technology collaboration approval.

**Automatic Route**

Government has delegated powers to Reserve Bank of India to allow payments for foreign technology collaboration by Indian companies under automatic route subject to the following limits:

(i) The lump sum payments not exceeding US $ 2 Million;

(ii) Royalty payable being limited to 5 per cent for domestic sales and 8 per cent for  exports. The aforesaid royalty limits are net of taxes and are calculated according to standard conditions.

Terms of payment qualifying for automatic route is irrespective of the extent of foreign equity in the Indian company.

**Use of trademarks and brand name**

Payment of royalty up to 2% for exports and 1% for domestic sales is allowed under automatic route for use of trademarks and brand name of the foreign collaborator without technology transfer. Royalty on brand name/trade mark shall be paid as a percentage of net sales, viz., gross sales less agents’/dealers’ commission, transport cost, including ocean freight, insurance, duties, taxes and other charges, and cost of raw materials, parts and components imported from the foreign licensor or its subsidiary/affiliated company.

In case of technology transfer, payment of royalty subsumes the payment of royalty for use of trademark and brand name of the foreign collaborator.

**ENTRY OPTIONS FOR FOREIGN INVESTORS IN INDIA**

**Entry Options**

A foreign company planning to set up business operations in India has the following options:

Incorporated Entity

1. By incorporating a company under the Companies Act,1956 through

* Joint Ventures; or
* Wholly Owned Subsidiaries

Foreign equity in such Indian companies can be up to 100% depending on the requirements of the investor, subject to equity caps in respect of the area of activities under the Foreign Direct Investment (FDI) policy.

As an Unincorporated Entity

**As a foreign Company through**

* Liaison Office/Representative Office
* Project Office
* Branch Office

Such offices can undertake activities permitted under the Foreign Exchange Management (Establishment in India of branch or office of other place of business) Regulations,2000.

**Incorporation of Company**

For registration and incorporation, an application has to be filed with Registrar of Companies (ROC). Once a company has been duly registered and incorporated as an Indian company, it is subject to Indian laws and regulations as applicable to other domestic Indian companies.

**Liaison Office/Representative Office**

The role of the liaison office is limited to collecting information about possible market opportunities and providing information about the company and its products to prospective Indian customers. It can promote export/import from/to India and also facilitate technical/financial collaboration between parent company and companies in India. Liaison office can not undertake any commercial activity directly or indirectly and can not, therefore, earn any income in India. Approval for establishing a liaison office in India is granted by Reserve Bank of India (RBI).

**Project Office**

Foreign Companies planning to execute specific projects in India can set up temporary project/site offices in India. RBI has now granted general permission to foreign entities to establish Project Offices subject to specified conditions. Such offices can not undertake or carry on any activity other than the activity relating and incidental to execution of the project. Project Offices may remit outside India the surplus of the project on its completion, general permission for which has been granted by the RBI.

**Branch Office**

Foreign companies engaged in manufacturing and trading activities abroad are allowed to set up Branch Offices in India for the following purposes:

* Export/Import of goods
* Rendering professional or consultancy services
* Carrying out research work, in which the parent company is engaged.
* Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
* Representing the parent company in India and acting as buying/selling agents in India.
* Rendering services in Information Technology and development of software in India.
* Rendering technical support to the products supplied by the parent/ group companies
* Foreign airline/shipping company.

A branch office is not allowed to carry out manufacturing activities on its own but is permitted to subcontract these to an Indian manufacturer. Branch Offices established with the approval of RBI, may remit outside India profit of the branch, net of applicable Indian taxes and subject to RBI guidelines Permission for setting up branch offices is granted by the Reserve Bank of India (RBI).

**Branch Office on “Stand Alone Basis” in SEZ**

Such Branch Offices would be isolated and restricted to the Special Economic zone (SEZ) alone and no business activity/transaction will be allowed outside the SEZs in India, which include branches/subsidiaries of its parent office in India.

No approval shall be necessary from RBI for a company to establish a branch/unit in SEZs to undertake manufacturing and service activities provided that:

(i) Such units are functioning in those sectors where 100% FDI is permitted,

(ii) Such units comply with part XI of the Companies Act (Section 592 to 602),

(iii) Such units function on a stand-alone basis

**Current issues relating to FDI**

1. Ease of doing business in India. This is probably one of the biggest stumbling blocks India faces in attracting FDI. The bureaucracy, corruption, labour and land acquisition laws are frighteningly complicated and slows down the entire process of setting up a business. A country which is anxious to attract business should look to see how other countries are managing these issues and what steps they have taken to make it attractive for the foreign companies to set up their shops.
2. Taxation that is applicable to the corporate profits. The global tax landscape has seen considerable changes in the recent past and this will continue to be the same in the near term. In the context of India, the total amount of revenues collected thru the various taxes and duties falls extremely short of the requirements. For ex., in the last budget presented by FM Jaitley which states that for every 100rs our government spends, Rs.24 is borrowed money. This is already extremely high, so our government is not in a position to lower the corporate taxes as the revenue collected will make the deficit even higher. Each country uses a particular tax rate which depends upon a number of factors including the historical baggage it carries. In the current state of the economy large amounts of money is required for socio-economic development and subsidies, etc. Currently, our Indian corporate tax for a domestic companies stands at 33.99% when the net income exceed 10 crores. We are presenting a table of corporate tax rates for other countries for comparison.

From this table, you can observe that India has one of the highest corporate tax rates.

1. Besides the taxes, corruption adds up significantly to the cost of doing business. It will not be far-fetched to say that 1-2% surrogate has been added due to corruption.
2. In the last few years, the land prices have shot through the roof. One estimate shows that the production costs in India is very much affected because of the land prices. The BJP government should ponder over this problem before they arrive at a reasonable tax rate for multinational companies. Things such as education cess and surcharge should be totally removed to lower the tax rate. Unfortunately for India the tax collected from individuals is limited since less than 3% of the population pay income tax at all. India continues to be a welfare state and most of the costs associated with welfare are borne through deficits. The budget deficit in India is a nightmare and the accumulated deficits (debt) are around 77% of the GDP.

When you want to attract foreign capital, we should make it attractive for them to earn an reasonable rate of return from their investments. If taxes take away bulk of their earnings, then the amount they can distribute to the share-holders gets much smaller. The foreign investment also faces currency value changes and this makes it even more difficult for foreign companies to set up shops in India. While in India, we clammer for FDI, we also find that we are being marginalized because of the not-so-friendly nature of doing business here. Its time our government recognizes this and takes necessary steps to attract more and more FDIs. Every year, nearly 1 crore people join in the job market and hoping to find something useful to do with their lives. If the business climate is not favourable to foreign companies, they have alternative places to go, which is only at the cost of India’s growth opportunities. Finally, the investors, no matter where they live in the world, will always prefer a higher rate of return for a given level of risk, the question to answer is whether India can deliver that.

**The Industries (Development and Regulation) Act**

The Industries (Development and Regulation) Act, (IDRA), came into force from 8th May 1952 under a notification of the Central Government published in the Gazette of India.

The Act extends to whole of India including the state of Jammu & Kashmir with a view to being under Central and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all India importance.

**Objectives of the Act:**

The Important objectives are,

**(i) To Implement the Industrial Policy:**

The Act provides the necessary means to the Central Government in order to implement its industrial policy.

**(ii) Regulation and Development of Important Industries:**

The Act brings under the control of the Central Government the development and regulation of a number of important industries listed m the first schedule attached to the Act as the activities of such industries will affect the country as a w о e and, therefore, the development of such important industries must be governed by the economic factors of all India importance.

**(iii) Planning and Future Development of New Undertakings:**

A system of licensing is introduced under the Act to regulate planning and future development of new undertaking on sound and balance lines and may be deemed expedient in the opinion of the Central Government.

The Act confers on the Central Government power to make rules for the registration of existing undertakings for regulating he production and development of the industries specified in the schedule attached to the Act The Ac a so provided for the constitution of the Central Advisory Council and Development Council.

**Definitions:**

Some of important definitions given in section 3 of the Act are as under:

1. **Advisory Council [Sec. 3 (a)]:**

It means the Central Advisory Council established under Sec. 5 of the Act.

1. **Current assets and current liabilities:**

**Current Assets [Sec. 3(ab)]:**

Current assets mean bank balance and cash. They include such other assets or reserves are expected to be realised in cash or sold or consumed within a period of not more than 12 months in the ordinary course of business such as stock-in-trade, amounts due from sundry debtor for sale of goods and for services rendered, advance tax payments and bills receivable.

They however do not include sums credited to a provident fund, and a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by a company owning an industrial undertaking.

**Current Liabilities [Sec. 3(ac)]:**

Current liabilities mean liabilities which must be met on demand or within a period of 12 months from the date they are incurred. They include any current liability which is suspended under Sec. 18-FB.

1. **Development Council [Sec. 3 (b)]:**

It means a Development Council established under Sec. 6.

1. **Factory [Sec. 3 (c)]:**

It means any premises, including the percents thereof, in any part, of with a manufacturing process in being carried on or is ordinarily so carried on:

(i) With the aid of power if 50 or more workers are working thereon on any day of the preceding 12 months; or

(ii) Without the aid of power if 100 or more workers are were working thereon on any day of the preceding 12 months. Further in no part of such premises any manufacturing process should be carried on with the aid of power.

1. **High Court [Sec. 3 (cc)]:**

‘High Court’ means the High Court having jurisdiction in relation to the place at which registered office of a company is situated.

1. **Industrial Undertaking [Sec. 3 (d)]:**

It means an industrial undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including the Government.

**(1) Ancillary industrial undertaking [Sec. 3 (aa)]:**

It means an industrial undertaking which in accordance with the proviso to sec. 11-B(1) and the requirement specified under sec. 11-B(1)] is entitled to be regarded as an ancillary industrial undertaking for the purposes of this Act (inserted by the Amendment Act, 1984).

**(2) Small-Scale industrial undertaking [Sec. 3 (i)]:**

It means an industrial undertaking which, in accordance with the requirements specified under Sec. 11 B (1) is entitled to be regarded as a small-sele industries undertaking for the purpose of this Act (inserted by the Amendment Act 1984).

**(3) Existing Industrial Undertaking [Sec. 3(bb)]:**

It means: (a) Industrial undertaking pertaining to any of the industries specified in the first schedule as originally enacted. An industrial undertaking which was in existence on the commencement of the industries (Development and Regulation) Act 1951, i.e. 8th May, 1952 or for the establishment of which effective steps had been taken before such commencement, and

(b) In the case for an industrial undertaking pertaining to any of the industries added to the first schedule by any amendment thereof, an industrial undertaking which is in existence on the coming into force of such amendment or for the establishment of which effective steps had been taken before the coming into force of such amendment.

1. **New article [Sec. 3(dd)]:**

In relation to an industrial undertaking which is registered or in respect of which a licence or permission has been issued under this Act, ‘New article’ means—

(a) Any article which falls under an item in the first schedule other than the item under which articles ordinarily manufactured or produced in the industrial undertaking at the date of registration or issue of the licence or permission, as the case may be, fall;

(b) Any articles which bears a mark as define in the Trade Mark Act, 1940 or which is the subject of a portent. If at the date of registration or issue of the licence or permission, as the case may be, the industrial undertaking was manufacturing or producing such article bearing that mark or which is the subject of that patent, the article not fall in the category of ‘New article’.

1. **Notified Order [Sec. 3 (e)]:**

It means an order notified in the official Gazette.

1. **Owner [Sec. 3 (f)]:**

In relation to an industrial undertaking, ‘owner’ means the person, who, or the authority which has the ultimate control over the affairs of the undertaking, where the said affair are entrusted to a manager or managing director, such manager or managing director shall be deemed to be the owner of the undertaking.

1. **Prescribed [Sec. 3 (g)]:**

It means prescribed by rules made under this Act.

1. **Schedule [Sec. 3 (h)]:**

It means a schedule to this Act.

1. **Scheduled Industry [Sec. 3 (i)]:**

It means any of the industries specified in the first schedule. The first schedule to the Act includes 38 industries engaged in the manufacture or production of any of the articles mentioned under each of the headings or sub-heading given in the schedule.

**Scope of the Act:**

This Act applies to the whole of India including the State of Jammu & Kashmir, The provision of the Act apply to industrial undertaking, manufacturing any of the articles mentioned in the first schedule. An industrial undertaking (also called a factory) for the purpose of the Act is the one where manufacturing process is being carried on:

(a) With the aid of power provided that fifty or more workers are working or were working on any day of the preceding twelve months; or

(b) Without the aid of power provided that one hundred or more workers are working or were working on any day of the preceding twelve months.

(c) The Act applies only on industrial undertakings. Trading houses and financial institutions are outside the purview of the Act.

**Exemption from the Act:**

The Act empowers the Central Government to grant exemption from this Act in certain cases section 29B of the Act provides that if the Central Government is of opinion that it would not be in public interest to apply all or any provision of this Act to any industrial undertaking, then the Central Government, by notification in the Official Gazette, may exempt any industrial undertaking or class of industrial undertakings from the operation of all or any of the provision of this Act.

**Following are the notifications;**

(a) Notification issued in 1973 granting exemption from the operation of section 10, 11, HA and 13 to small-scale units, ancillaries and other undertaking, with an investment of Rs. 3 crores (Now raised to Rs. 5 crores) each.

(b) Delicensing of certain industries (notification dated 1st November, 1975).

(c) Excess capacity over licensed capacity allowed, in certain industries (notification dated 1st November, 1975).

(d) Exemption of industrial undertakings pertaining to the manufacture of an article on the basis of technology developed by CSIR (Notification dated March 25, 1980)

(e) List of industries in which automatic expansion to the extent of 5 percent per annum of 25 percent in the five-year plan period over and above the licensed capacity permitted (Notification dated 14th August, 1980).

(f) List of industries where full utilisation of installed capacity without limit is permitted (notification dated 4th Sep. 1980).

(g) Exemption granted on exports (notification dated 17th March, 1981).

(h) Exemption to industrial undertaking from the operation of sections 10, 11, 11A and 13 of the Act subject to fulfillment of certain conditions (video notification no. 477 (E) dated July 25, 1991)

**Provisions of the Act:**

The Act has 31 sections. All of them can be classified into three broad categories depending upon the purposes they seek to serve:

1. **Preventive Provisions:**

Preventive provision provide for:

(i) Registration and Licensing;

(ii) Investigation; and

(iii) Revocation of Licence.

**(i) Registration of an existing undertaking:**

Sec. 10 provides that the owner of every industrial undertaking other than the Central Government shall get his undertaking registered within a specified period. The industrial undertaking of which the Central Government is the owner. On registration, the owner shall be issued a certificate of registration containing the production capacity of the industrial undertaking and other particulars.

In specifying the production capacity in the certificate of registration the Central Government takes into consideration the following factors:

(i) The productive or installed capacity as specified in the application.

(ii) The level of production immediately before the date on which the application for registration was made;

(iii) The level of the biggest annual production during the three years immediately preceding the introduction of an Amendment Bill to this Act in 1973;

(iv) The extent to which production during the said period was used for export; and

(v) Such other factors as may be considered relevant, including the extent of underutilisation of capacity, if any.

**Registration Abolished:**

As a consequence to the new industrial policy, existing schemes of registration have been abolished.

**Licensing of Undertakings:**

Licence is required for establishing a new undertaking, for manufacturing a new article by an existing undertaking, for effecting substantial expansion by an existing unit, for changing location of an existing undertaking and for carrying on issues by an existing undertaking.

**(a) Licensing of New Undertaking:**

Sec. 11 of the Act provides that no person or authority, other than the Central Government, shall establish, after the commencement of this Act, a new undertaking without a licence issued by Central government. A State Government also needs a license to set-up a new unit.

**(b) Production of New Article:**

See. 11A provides that no owner of an industrial undertaking other than the Central Government, which is registered under sec. 10 of this Act or licensed or permitted under Sec. 11. of the Act, shall produce or manufacture a new article without obtaining a licence to do so.

**(c) Licence of effecting Substantial Expansion:**

Sec. 13 lays down that no owner of an industrial undertaking other than Central Government, shall effect a substantial expansion of an undertaking which has been registered or licensed, without a licence issued to that effect by the Central Government. What is substantial expansion in not made clear in this Act.

However from the various notifications issued by the Central Government from time to time, it has been made clear the expansion up to percent will be regularised. In other words, expansion upto 25 per cent will not be considered as substantial.

**(d) Licence for Shifting Location:**

Sec. 13 lays down that without obtaining licence to the effect, no owner can change the location of the whole or any part of industrial undertaking which has been registered.

**(е) Licence to carry on Business:**

Licence is also necessary to carryon business (COB) by an existing undertaking to which licensing provision of the Act did not originally apply on account of exemption order issued by the government and subsequently became applicable as a result of cancellation of the exemption order under certain other circumstance as provided in the Act.