Inbound M&As: in India: Issues and Challenges

K.S. Chalapti Rao
Biswajit Dhar

Working Paper 226
July 2020

ISID Institute for Studies in Industrial Development
New Delhi

ISID
Working Paper
226

Inbound M&As in India: Issues and Challenges

K.S. Chalapati Rao
Biswajit Dhar

ISID

Institute for Studies in Industrial Development
4, Institutional Area, Vasant Kunj Phase II, New Delhi - 110 070
Phone: +91 11 2676 4600 / 2689 1111; *Fax:* +91 11 2612 2448
E-mail: info@isid.org.in; *Website:* http://isid.org.in

July 2020

ISID Working Papers are meant to disseminate the tentative results and findings obtained from the ongoing research activities at the Institute and to attract comments and suggestions which may kindly be addressed to the author(s).

CONTENTS

Inbound M&As in India:
Issues and Challenges

K.S. Chalapati Rao, Biswajit Dhar*

*[**Abstract**: The liberal FDI regime with its emphasis on attracting increasingly large amounts of FDI, did not pay heed to the warning signals regarding its adverse impact. Importantly, there were no regulations on M&As for two decades and when they were finally introduced in 2011 under the Competition Act, 2002, they were rendered ineffective by setting high thresholds, providing exemptions and by narrowly focusing on competition. As a result, major domestic companies as also emerging leaders were taken over. The relative shares of acquisitions were far higher in case of manufacturing sector compared to services. In fact, official data seriously underestimates the extent of actual extent of cross-border acquisitions. Many foreign companies gained strong hold in the economy without adding capacities. The domestic private corporate sector lagged far behind in various respects. Belying the expectations of the policymakers, it invested far too inadequately in R&D. The paper argues that India should do more than establishing an FDI review mechanism. Cross-border acquisitions must be subjected to strict scrutiny by a specialized agency. Proactive and coordinated measures must be devised to encourage domestic enterprises. Special attention must be given to providing long-term risk capital.]*

***Keywords**: FDI, Cross-border M&As, crowding-out, Domestic Enterprises, StartUps*

I. Introduction

The economic reforms ushered in 1991 drastically transformed India's approach towards FDI. Besides attracting capital, the liberalized FDI policy was expected to expose the industrial sector to competition. Dr. Manmohan Singh, then Finance Minister, and who was credited with leading the reforms, expressed the confidence that "[A]fter four decades of planning for industrialization, we have now reached a stage of development where we should welcome, rather than fear, foreign investment. Our entrepreneurs are second to none".[1] On its part, the Statement on Industrial Policy, issued earlier on the same day,

---

* Prof. K.S. Chalapati Rao, Visiting Professor, ISID, and Prof. Biswajit Dha, JNU, New Delhi.

Acknowledgements: The authors gratefully acknowledge the support extended by Prof. M.R. Murty, the Program Director, Prof. K.V.K. Ranganathan and Dr. Beena Saraswathy.

Disclaimer: The responsibility for the interpretations, views expressed and errors if any, lies with the authors.

[1] Ministry of Finance., "Budget Speech 1991-92 (final)", para 12, Available at, https://www.indiabudget.gov.in/doc/bspeech/bs199192.pdf.

expected that the competitive pressure foisted by the liberalization policies will "induce our industry to invest much more in research and development than they have been doing in the past".[2]

In the following year's budget speech, Dr. Singh tried to allay the fears that foreign investment might hurt Indian industry. He said that "[T]hese fears are misplaced … Indian industry has also come of age, and is now ready to enter a phase where it can both compete with foreign investment, and also cooperate with it".[3] The industrial sector was also to be exposed to competition in a phased manner by lowering the trade barriers. Thus, Indian entrepreneurs were simultaneously exposed to competition from imports as well as multinational corporations (MNCs) in the domestic market.[4] Apart from drastically reducing the scope of the Industrial Licensing System, India voluntarily started moving away from imposing performance requirements like phased manufacturing program even before such measures were prohibited under the WTO four years later. Yet another important measure introduced by the new policy package was removing the provisions relating to concentration of economic power under the Monopolies and Restrictive Trade Practices Act (MRTP Act), including those related to acquisitions, through an Ordinance in September 1991. It was much later in 2002 that the Competition Act finally replaced the MRTP Act. The provisions relating to regulation of mergers and acquisitions (referred to as combinations) came into force in June 2011.

Following the path laid out in 1991, successive governments relaxed the FDI policy. It was claimed in the year 2000 that India had become one of the most open economies for FDI, especially for the manufacturing sector.[5] The reliance on FDI continued as reflected in the Common Minimum Program of UPA-I (2014) which said "FDI will continue to be encouraged. The country needs and can easily absorb at least two to three times the present

---

[2] Ministry of Industry, "Statement on Industrial Policy", July 24, 1991. Available at https://dipp.gov.in/sites/default/files/chap001_0_0.pdf. The Prime Minister, Mr. PV. Narasimha Rao, added "…why we should be squeamish about inviting foreign investment. Nothing else is the reason except an inferiority complex. ... there is absolutely no need for such a complex. As I said. we have successfully competed with others and we will be able to compete in future also. And in any case, we have to formulate a policy not on the basis of inferiority complex but on the basis of certain national confidence". See the Ministry of Industry 1991-92., "Debate on the Demand for Grants", August 26, 1991, Available at, https://eparlib.nic.in/bitstream/123456789/8655/1/10_I_26081991_p210_p230_t273.pdf. [Unless stated otherwise, all the URLs were live at the time of finalising the chpater.]

[3] Ministry of Finance., "Budget Speech 1992-93", para 22.

[4] Further, the government facilitated sales by (the existing) 100% export oriented units and those in free trade zones in the domestic market by lowering excise duty. It was stated: "[T]hese units have to be fostered if they are to compete effectively in the international market; for this purpose, they should not be prevented from creating a niche in the domestic market." Budget Speech 1991-92, para 112.

[5] Planning Commission, *Report of the Steering Group on Foreign Direct Investment*, August 2002.

level of FDI inflows"[6]. Importance of FDI was reiterated by NDA-2 in its "Make in India" initiative of 2014. Several reforms were introduced as part of Make in India for getting FDI and fostering partnerships. These were reportedly aligned with the World Bank's Ease of Doing Business parameters to improve India's ranking.[7]

The experience of the past three decades, however, indicates that India lags far behind in realising its industrialisation objectives. The National manufacturing Competitiveness Council (NMCC) report spoke of increasing the share of manufacturing to 23% in a decade[8], while Make in India spoke of 25% by 2025.[9] The efforts to increase the share of manufacturing sector in GDP to 25%, however, did not make any headway; the share of manufacturing was 16.4% of GVA (at current prices) in 2019-20.[10]

While cross-border M&As (CBMAs) have been important mode of entry for FDI[11], there is also considerable body of literature which suggests that for host developing countries greenfield investments are preferable to M&As.[12] It is also not the case that only less

---

[6] PTI, "Text of draft of Common Minimum Programme", Rediff, May 22, 2004, https://www.rediff.com/election/2004/may/21cmptext.htm

[7] "Make in India: The Vision New Processes, Sectors, Infrastructure and Mindset", **Make in India,** https://www.makeinindia.com/article/-/v/make-in-india-reason-vision-for-the-initiative.

[8] National Manufacturing Competitiveness Council., *The National Strategy for Manufacturing*, 10 April, 2009, available at, https://web.archive.org/web/20090410005158/http://nmcc.nic.in/pdf/strategy_paper_0306.pdf.

[9] Initially it was envisaged that the target of 25% would be reached by 2020. https://www.makeinindia.com/about. The target year was shifted back and forth. The most recent announcement one which we came across in this respect spoke of 2025. Ruchika Chitravanshi & Deepshikha Sikarwar., "Reformist Modi government to Retool UPA Policy, Declares Nirmala Sitharaman", *The Economic Times*, May 4, 2014, Available at: https://economictimes.indiatimes.com/news/economy/policy/reformist-modi-government-to-retool-upa-policy-declares-nirmala-sitharaman/articleshow/58504702.cms?from=mdr.

[10] India, National Statistical Office, "First Advance Estimates of National Income 2019-20", January 7, 2020.

[11] According to UNCTAD FDI statistics barring a few years following the 2008 financial crisis, the ratio of M&A deal values have generally been high, at times even exceeding 0.5. For the last five years (2014-2018) it was 0.44.

[12] Larry D. Qiu and Shengzu Wang, "FDI Policy, Greenfield Investment and Cross-border Mergers", 19 *Review of International Economics*, 5, 836–851, 2011. FDI related issues are more often than not inconclusive. However, a body of literature even while acknowledging the short and medium term differences between the impact of M&As and green field FDI, argues that the long term impacts of both are similar. See for instance: UNCTAD, *World Investment Report: Cross-border Mergers and Acquisitions and Development* 2000.
OECD even went to the extent of saying that "[T]he main benefits of FDI … include productivity gains and apply generally regardless of investors' mode of entry". Its survey of empirical evidence supports the existence of cherry-picking "whereby foreign investors acquire local firms which already perform well in the host economy and hence which best match the profile of the investor itself". OECD, *International Investment Perspectives: Freedom of Investment in a Changing World.* Part I, Chapter 4, 2007.

efficient domestic firms get acquired.[13] Equally relevant is the evidence that FDI could crowd-out domestic businesses.[14] Great deal of support also exists not only for the presence of domestic enterprises with absorptive capacity in order to benefit from FDI but also for driving industrialization.[15]

The limited objective of this chapter, is to provide a few results of M&A-related FDI inflows with emphasis on the manufacturing sector, and the role of the Competition Act 2002 in regulating inbound M&As. In order to provide the context, an attempt has been made to trace the changes in the FDI policy and the postures and response of the domestic industry, at some length. It offers a few suggestions keeping in view the global context of the past few years when the developed countries started erecting barriers to FDI to protect their long-term security and strategic interests. This is complementary to the earlier chapter on the relative position on FDI and domestic companies.

II. Liberalisation of FDI Policy and Domestic Industry's Response

The opening up to FDI was initially limited to what used to be referred to as high priority industries, requiring large investments and advanced technology. The Statement on

---

[13] UNCTAD, *World Investment Report*, 2000 noted that far more M&As were motivated by economic and strategic reasons than short-term financial gains. Larger TNCs have a greater tendency to acquire than smaller ones. TNCs that already have an affiliate would prefer acquisitions. Regarding entry into developing countries, the advantage of M&As "lies more in rapid market entry, local market knowledge, established distribution systems and contacts with the government, suppliers or customers".

[14] "The crowding out [of domestic enterprises] is more likely when foreign rivals are technologically sophisticated or when domestic firms have limited absorptive capacity", Cristina Jude, "Does FDI crowd out domestic investment in transition countries?", 27 *Economics of Transition and Institutional Change* 1, 163–200, 2019.

[15] See for instance: Sanjaya Lall and Rajneesh Narula, "Foreign Direct Investment and its Role in Economic Development: Do We Need a New Agenda", in Sanjaya Lall and Rajneesh Narula ed., *Understanding FDI-Assisted Economic Development*, 2006; UNCTAD Secretariat, "Strengthening linkages between domestic and foreign direct investment in Africa", TD/B/EX (57)/3, April 17, 2013, Available at: https://unctad.org/meetings/en/SessionalDocuments/tdbex57d3_en.pdf.
… [host countries] cannot look toward FDI as the principal engine for their growth and development; such investment can be a catalyst for growth and development, it can help and, in a few sectors, even make a crucial contribution – but the principal engine is, as a rule, a vibrant domestic enterprise sector. See: Karl P Sauvant., "The Rise of FDI Protectionism", 2013, CCSI, http://ccsi.columbia.edu/files/ 2013/12/sauvant_rise.pdf.
Support for national firms also comes from Alice H. Amsden, "National companies or foreign affiliates: Whose contribution to growth is greater?", 60 *Columbia FDI Perspectives*, February 13, 2012. Ha-Joon Chang argued that "only when domestic industry has reached a certain level of sophistication, complexity, and competitiveness do the benefits of non-discrimination and liberalisation of foreign investment appear to outweigh the costs." Ha-Joon Chang, "Regulation of Foreign Investment in Historical Perspective" in Lall and Narula ed., *Understanding FDI-Assisted Economic Development*, 2006.

Industrial Policy 1991 announced that approval for direct foreign investment up to 51% in individual enterprises will be given promptly in such industries. Dr. Manmohan Singh said in his 1991 Budget Speech that "... a special board would be constituted to negotiate with a number of large international firms and approve direct foreign investment in selected areas; this would be a special regime to attract substantial investment that would provide access to high technology and to world markets".[16] Within a few months, however, the policymakers desired to utilize FDI for building critical infrastructure like power and hydrocarbon sectors. Subsequently, foreign institutional investors were allowed to invest on the Indian stock markets in September 1992.

The drastic and multiple policy changes initiated in 1991, however, caused serious consternation among leading domestic entrepreneurs. This was because entry of foreign portfolio investors could make them easy targets to hostile takeovers, since they were managing a number of listed companies with far less than majority shares. The freedom given to MNCs to hike their stakes from 40%[17] to majority was cited to justify seeking level playing field for themselves.[18] Consequently, a variety of relaxations were made in the Companies Act to enable them to fortify control over group companies.[19]

The other threat was competition from MNCs operating in the home market and through imports, due to the concomitant policy of import liberalization. The fact that multinational corporations (MNCs) started going alone, by breaking away from the erstwhile joint ventures (JVs) with domestic entrepreneurs, caused serious disquiet. Mr. Rahul Bajaj, who was credited with leading the informal "Bombay Club", speaking for the domestic industry, noted that "… some foreign companies consider a large Indian company as a potential competitor and a threat. They do not want to have an alliance with such a company unless they have a controlling interest in the company. If at all they want to have an alliance, it is with relatively smaller companies which will be under the foreign company's influence".[20]

This was also the time when the apex chambers of commerce went through an upheaval. While the Federation of Indian Chambers of Commerce (FICCI) that had long represented domestic capital, would naturally have reservations about the freedom given to foreign

---

[16] This was the basis on which the Foreign Investment Promotion Board (FIPB) was set up in August 1991.

[17] The Foreign Exchange Regulation Act 1973 (FERA), required companies with foreign shareholding to reduce the share of foreign investors to 40% to be treated on par with Indian companies. Exceptions were however, allowed in case of high technology and export-oriented ones. Biswajit Dhar and K. S. Chalapati Rao, *Understanding Foreign Direct Investment,* 2020.

[18] D.H. Pai Panandiker, *Level Playing Field*, *The Hindustan Times*, October 11, 1993, ISID Press Clippings Archive (hereafter ISID-PCA).

[19] K.S. Chalapati Rao, "Some Aspects of Corporate Ownership in India: Promoters versus Public", in S.R. Hashim, et. al. (ed.) *Indian Industrial Development and Globalisation*, 2009.

[20] Rahul Bajaj., "Role of Industry in the Changing Industrial Scenario", 17 *Vikalpa* 4, 4-6 (1992)

investors[21], the Confederation of Indian Industry (CII), an acknowledged pro-reformer, stirred the hornet's nest by accusing MNCs for following a "cowboy's" approach.[22] Assocham, a traditional bastion of foreign capital, also joined the battle against MNCs.[23] MNC members of CII and Assocham openly expressed displeasure about this move of domestic businessmen.[24]

The government headed by Mr. H.D. Deve Gowda, which lasted only 11 months, was responsible for a major wave of opening up to FDI. It extended the automatic approval facility to foreign investment proposals in 111 sectors involving up to 51% foreign share, just a couple of months before demitting office.[25] Mr. Inder Kumar Gujral, who headed the next government during 1997-98, voiced support for the domestic industry when he said that

> "[W]e will look after you and give you the benefits of paternity. Outsiders are welcome but not to take over, not to drown you. Foreign investment will be welcomed only in sectors where we want investment. Our policies will not make you non-competitive. We will not protect you but it won't be that anybody can come and throw you".[26]

At about the same time, Mr. Rahul Bajaj articulated the role he envisaged for foreign capital and technology and how much disadvantaged Indian companies were vis-à-vis their developed country counterparts. Non-discriminatory treatment to domestic and foreign capital, according to him, was "naturally supported by the developed world because it suits them … While preaching free trade, even developed countries care for (if not protect) their domestic corporations."[27]

---

[21] See for instance, "Assocham Welcomes MNCs, FICCI More Circumspect", The Business Standard, March 27, 1996, ISID-PCA.

[22] Charges against MNCs included the transfer of obsolete technology, the MNCs' majority share in JV partnerships, and unfair profit sharing. Confederation of Indian Industries, "MNCs: India Strategy Needs Rethink", 3–5, 1996. Reported in Min Ye, *Diasporas and Foreign Direct Investment in China and India,* 2014.

[23] The Assocham Panel on MNCs headed by Mr. L.M. Thapar wanted a cap of 40% on MNCs' share in consumer goods companies. Cherian Thomas, "MNCs Block Approval for Thapar Report", *The Business Standard*, February 26, 2013,, https://www.business-standard.com/article/specials/mncs-block-approval-for-thapar-report-197020801025_1.html.ds2w

[24] Cherian Thomas, "MNC Member on Thapar Panel Disowns Report", *The Business Standard,* January 27. 2013, https://www.business-standard.com/article/specials/mnc-member-on-thapar-panel-disowns-report-197011501100_1.html; Cherian Thomas, *MNCS Irked at Thapar Panel Stand*, *The Business Standard,* January 17, 2013, https://www.business-standard.com/article/specials/mncs-irked-at-thapar-panel-stand-197011401058_1.html; Aparna Kalra, *Pepsi Goes Anti-Swadeshi, wants MNCs to Quit Assocham, Financial Express,* August 10, 1995; "MNCs want Open CII Debate", *The Business Standard,* March 26, 1996, ISID-PCA.

[25] Dhar and Chalapati Rao, *supra* note 17.

[26] *The Economic Times*, August 17, 1997, as quoted in Baldev Raj Nayar, "Business and India's Economic Policy Reforms", 33 *Economic And Political Weekly* 38, pp. 2453-2468, 1998.

[27] Rahul Bajaj, "Indian industry in the year 2020", *The Hindustan Times* (August 25, 1997), ISID-PCA.

The Gujral government, however, did very little as a follow up.[28] It actually fell within a few months in March 1998 and was followed by the National Democratic Alliance (NDA-1), led by the Bharatiya Janata Party, well-known for its strong *Swadeshi* leanings. NDA-1, however, went only to the extent of introducing the requirement of an NOC from the domestic partners with whom the foreign investors had existing joint venture (JV) or licensing/franchise arrangements.[29] The specter of East Asian Financial Crisis continued from the earlier regime and FDI was seen as a stable form of capital compared to the volatile portfolio capital. In February 2000, the NDA-1 government "placed all items/activities under the automatic route for FDI/NRI and OCB investment" except in specific categories and within the sectoral caps.[30] The relevant ones in the context of this paper were: (i) proposals in which the foreign collaborator has a previous venture/tie-up in India and (ii) proposals relating to acquisition of shares in an existing Indian company in favor of a foreign/NRI/OCB investor.[31] Interestingly, the government of the day admitted that

> Hitherto MNCs generally explored licensing of technology as a means to access markets that were sheltered by quantitative restrictions and high tariff on imports. However, with the emergence of World Trade Organisation (WTO) the quantitative restrictions are being dispensed with and tariff on imports brought down. Therefore, MNCs are seeking to access the markets directly rather than through licensed production.[32]

The Next Phase in FDI Policies

At this point it will be relevant to note that following the emphasis in the Approach Paper to the Tenth Plan (2002-2007) on FDI to achieve the Plan's growth targets, the Planning Commission constituted a Steering Group on FDI in August 2001 *i.e.*, well after the FDI policy was liberalized extensively in February 2000.[33] The Group was mandated to advise

---

[28] The role of technocrats, most of whom had worked with World Bank/IMF in pursuing the reforms, was well-highlighted In Min Ye, supra note 22. e.g. Finance Secretary and the Chief Economic Adviser.

[29] Government of India, "Press Note No. 18 (1998 Series)" December 14, 1998, https://dipp.gov.in/sites/default/files/press18.pdf.

[30] Earlier in 1999, the distinction between small industries and others was removed for receiving FDI. The limit of 24 per cent set in 1991 was replaced by applicable sectoral caps, thereby implying that a small unit can even be fully owned by foreign investor (s) to the exclusion of domestic small entrepreneurs.

[31] Government of India, Ministry of Commerce & Industry, "Press Note No. 2 (2000 Series)" https://dipp.gov.in/sites/default/files/pn23_0.pdf. In the context of rising current account deficit and low level of FDI inflows, the *Economic Survey* 1999-2000 hoped that "[A]n expansion of the "automatic route" coupled with further liberalisation should help reverse this trend [of low FDI inflows] next year".

[32] Lok Sabha, *Starred Question No. 434*, (December 19, 2000).

[33] Supra note 5.

on the ways to meet the estimated requirement of FDI during the Plan period – to double the average annual FDI inflow from the level of $3.9 bn in 2000-01. The relevance of the Group for the present paper is not so much for the steps it suggested to attract FDI but in its discussion on M&As and crowding out by FDI contained in its report. It described, at some length, the crowding out effects such as preemption of domestic investment, MNCs competing with domestic enterprises for national savings and discouraging domestic enterprises from exporting due to loss of competitiveness arising out of exchange rate appreciation. It noted that in view of the double-edged nature of FDI of crowding-in and crowding-out of domestic investment, developing countries imposed performance requirements like local content, export commitments, technology transfer, dividend balancing and foreign exchange neutrality.[34]

> These regulations have been there to enhance the quality of FDI against the simple increase in the quantity of FDI inflow. Imposition of *performance criteria*, however, comes in the way of *the relative openness of the trade regime* and may make FDI less attractive for MNEs while deciding the location for their operations. In other words, a trade-off is involved between PERFORMANCE and OPENNESS. (emphasis as in original)[35]

This awareness, however, did not have any bearing on the Group's recommendations which were all aimed at facilitating inflows. It even suggested that application of sectoral caps should be minimized and entry barriers eliminated. Importance of the Group lies also in the fact that it has been the only official committee till date which specifically looked at the FDI policies.[36] Most FDI policy changes are brought in as administrative measures with the standard preamble which reads something like 'On a review of the extant policy on Foreign Direct investment, Government of India has decided…'. Some changes were even announced without any such formal introduction.

The Congress party returned to power in 2004 with Dr. Manmohan Singh as head of the United Progressive Alliance (UPA-1) government. The Government's first decision regarding FDI policy was to make the requirement of NOC less stringent by "eliminating its application to all new joint ventures and relaxing the hold local firms have on the future business plans of foreign partners for existing joint ventures".[37] Prime Minister Manmohan

---

[34] Supra note 5.

[35] Planning Commission, supra note 5, p. 65.

[36] The High Level Committee on FDI in Existing Pharma Companies, constituted by the Planning Commission in 2011 and headed by Mr. Arun Maira, then Member Planning Commission, was specific to brownfield investments in the pharmaceutical sector (hereafter Maira Committee). Government of India., *The High Level Committee on FDI in Existing Pharma Companies* (2011), https://pharmaceuticals.gov.in/sites/default/files/ArunMiaraCommitteeReport.pdf

[37] Office of the United States Trade Representatives, "Foreign Trade Barriers", (2006), https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2006/2006_NTE_Report/asset_upload_file294_9248.pdf. This was done through the Press Note 1 (2005 Series) dated January 12, 2005. The immediate fallout on an Indian trader is well described in Mathew Samuel., "Life is

Singh explained the rationale for this dilution at the CII Summit, 2005 in the following manner.

> This [requirement of NOC] is a regulatory provision that has been a source of some discomfort to investors. As I listened to tales of success of Indian firms in the global marketplace … I was convinced that measures like Press Note 18 are anachronisms today, having outlived their purpose. In the new dispensation … new joint ventures and collaborations will have to be shaped by commercial contractual agreements based on the free will of partners without government interference. For existing joint ventures, the protection will be restricted to the same - and not allied - field and not for defunct or sick joint ventures.[38]

Till the mid-2000s, i.e., well after the entire manufacturing sector was opened for unbridled entry of FDI, the inflows were modest. Then came the major change in the form of opening up the construction sector for which capital is more important than technology. This opened up the possibility of various types of financial investors getting a strong foothold in India. At one time, they contributed bulk of the inflows. During September 2004 to December 2009 what was termed as realistic FDI (RFDI) accounted for only 47.9 per cent of the top 2,748 individual inflows each amounting to at least $5 mn.[39] Private equity, venture capital and hedge funds were the next largest group contributing as much as 26.9% of the total. The share of other financial investors including banks was 9.3%.

The entry of financial investors should also be seen in the context of India reshaping the development financial institutions which provided long-term finance to the industry in the earlier decades.[40] ICICI Bank was formed in 1994, as a wholly-owned subsidiary of the ICICI. The ICICI was set up in 1955 with the participation of the World Bank for providing medium to long term finance to private enterprises. The parent was merged with

---

Not Good for LG's Indian Partner", *Tehelka,* December 11, 2014, http://old.tehelka.com/lifes-not-so-good-for-lgs-indian-partner/.

38 PMO, "PM's speech at the CII Partnership Summit", 2005, *Archivepmo,* January 12, 2005 https://archivepmo.nic.in/drmanmohansingh/speech-details.php?nodeid=62.

39 The study classified the reported FDI inflows by foreign investors who invested in their own or allied activities, irrespective of the sector as realistic FDI. The remaining were categorised as private equity, venture capital, hedge funds, other portfolio and India-related investors. The study covered 2,748 cases of inflows which accounted for 87.6 per cent of the total 92.4 bn. received during the period. See: K.S. Chalapati Rao and Biswajit Dhar, *India's FDI Inflows: Trends and Concepts*, RIS-ISID Monograph, 2011, http://isid.org.in/pdf/FDI_2011.pdf

40 The clutch of institutions which include the Industrial Finance Corporation of India (IFCI, 1948), State Financial Corporations (SFCs, 1951), Industrial Credit and Investment Corporation of India (ICICI, 1955), Industrial Development Bank of India (IDBI, 1964) Unit Trust of India (UTI, 1964) were set up to meet the needs of planned and rapid industrialisation on the one hand and the inadequate development of the capital market on the other. For an elaboration see: Chapter VII of Report of the Industrial Licensing Policy Inquiry Committee (Main Report), (July 1969), http://reports.mca.gov.in/Reports/8-Report%20of%20the%20industrial%20licensing%20policy%20inquiry%20committee,%20main%20report,%201969.pdf

subsidiary in April 2002. By then ICICI had moved away gradually from being a development finance institution providing project finance to one offering diversified financial services. IDBI, the apex development financial institution, met with the same fate with effect from October 1 2004 when the undertaking of IDBI was transferred to and vested in IDBI Bank Ltd.

During its two terms, the UPA government further relaxed the rules governing entry and expansion of FDI, in stages. The focused initial approach gradually gave way to the generalized objective of attracting FDI irrespective of its ability to transfer technology, promote exports, etc. In fact, till 2012, all the major relaxations were preceded by worsening of Current Account Deficit (CAD). The statement of then Finance Minister, Mr. P. Chidambaram, explained the situation vividly: "I have been at pains to state over and over again that India, at the present juncture, does not have the choice between welcoming and spurning foreign investment. If I may be frank, foreign investment is an imperative."[41]

The only instance where the government had to slightly backtrack was in case of cross-border M&As in the pharmaceutical industry, in November 2011, due to intense pressure from civil society. The foreign acquirers, instead of taking advantage of the automatic route were required to seek approval in case they wish to acquire existing Indian companies. Approvals could still be given for 100% ownership in such cases.[42] The Committee headed by Mr. Arun Maira, then a Member of the Planning Commission, suggested that such investments be better scrutinized by the newly functional Competition Commission instead of the FIPB. This provision was diluted in 2016 when approval was required only when the acquisition went beyond 74%, by the succeeding NDA-2 Government which again was led by the BJP. The NDA-2 government also completely freed brownfield FDI in medical devices. The process of relaxing FDI entry restrictions was accelerated by the NDA government which declared that "FDI reforms reflect a decisive change in philosophy, from viewing FDI as a tolerable necessity to something to welcome".[43] The process culminated in finally removing the scrutiny mechanism in the form of Foreign Investment Promotion Board (FIPB) as the government felt that the approval process 'wastes the time and energy of the investors'.[44]

Warning Posts Ignored

In the context of the decelerating growth of the manufacturing sector, then Prime Minister Dr. Manmohan Singh constituted an Expert Group in the National Manufacturing Competitiveness Council (NMCC), in January 2008, *i.e.*, after one and a half decades of opening up and about seven years after FDI was accorded near free and full entry into the

---

41 Government of India, "Budget Speech 2013-14", para 11.

42 Government of India, "Press Note No. 3 (2011 Series)", November 8, 2011.

43 Ministry of Finance, *The Economic Survey 2015-16*, Volume 1, p. 2.

44 Ministry of Commerce and Industry, "Reforms in FDI", November 10, 2015, https://pib.gov.in/newsite/printrelease.aspx?relid=130371.

manufacturing sector. Besides suggesting immediate steps to reverse the deceleration and measures to ensure sustained growth of the sector over the next 10-15 years, the Group was asked to "suggest policy measures to leverage FDI to modernize manufacturing in India and create a strong technological base".[45] The Prime Minister's Group (hereafter PMGR) underlined that the country requires such a base both from the point of view of maintaining competitiveness of manufacturing but also for ensuring the long-term security needs of the country. Regarding the development of strategic industries, the Group noted that "[M]anufacturing is not only the backbone of the economy but is also the muscle behind National Security". PMGR opined that formulating a suitable FDI policy which encourages transfer of technology and which promotes domestic manufacturing growth should be a crucial element in the strategy.

The Group noted that Indian firms did not invest adequately on R&D and the improvements if any were not of the required level and scale. On the other hand, the liberal FDI policy, which permitted 100% foreign ownership, negated the objective of liberal technology import policy. The Group hence wanted the government to re-examine the policy of permitting 100 percent subsidiaries of foreign companies in the manufacturing sector as it was making purchase of technologies by unaffiliated enterprises difficult. According to them, India needed a FDI Policy "that would encourage development of domestic technological capabilities including innovation capabilities of a high order for ensuring long-term growth of the Manufacturing Sector".[46]

The group recommended the setting up of a High Level Technical Committee

(i) to review the FDI policy from the point of view of transfer of technology as well as considerations of National Security;
(ii) to identify technologies needed by the country from the point of view not only of general technological development but also from the strategic point of view; and
(iii) to identify specific areas of technology in which the FDI should be attracted along with appropriate conditions including of transfer of technology as also suggest needed policy changes in respect of FDI.[47]

To the best of our knowledge no such committee was set up nor the policy of 100% FDI was tampered with. In fact, over the years, 100% FDI was allowed even in defence industries albeit with certain caveats. Going by the Groups' logic, 100% acquisitions by foreign companies would not be in India's interest. In fact, about a decade later, an official Discussion Paper reiterated the need to review India's FDI policy. It spelt out that

---

[45] India, NMCC, *Report of the Prime Minister's Group, Measures for Ensuring Sustained Growth of the Indian Manufacturing Sector*, September 2008, p. 1. (hereafter PMGR) The Group was headed by V. Krishnamurthy, who had headed many large public sector enterprises.

[46] PMGR Report, *supra* note 45, p. 15.

[47] PMGR Report, *supra* note 45, p. 19.

> FDI policy has largely aimed at attracting investment. Benefits of retaining investment and accessing technology have not been harnessed to the extent possible. FDI policy requires a review to ensure that it facilitates greater technology transfer, leverages strategic linkages and innovation.[48]

Even this was not followed up.

III. Some Glimpses of FDI and the Domestic Private Corporate Sector

FDI inflows picked up soon after the new policy towards FDI was announced in 1991. During the initial years, a major part of the inflows were directed at either acquiring majority shares in the already invested companies or to start operations using existing operations of domestic companies. A study conducted for the Ministry of Finance in early 1995 noted that the share of equity hike cases in actual inflows was as high as 53.8 per cent till January 1995.[49] It was explained that equity hike cases did not capture the extent of takeovers that were happening. Besides acquisitions, formation of joint ventures with domestic market leaders by transferring the latter's existing businesses which gave foreign investors a ready platform to launch from, was also indicated. The study cautioned that

> The foreign investor with substantial financial strength and strong brand name may attempt to marginalise the local partner once he gains hold over the local market. The local partner, with the prospect of getting a substantial money without the risk of competing with powerful TNCs may prefer to sell his business. In many a case it is the sheer financial power that comes into play and the target the local market leader.
>
> …
>
> The process has just begun. TNCs are in the process of setting up holding companies and identifying targets. The next two-three years should see a sea change in the Indian market with TNCs occupying key positions in most consumer goods industries.[50]

The study wondered

> While on one hand one can argue that such transfers will infuse technology and result in modernisation of the manufacturing process, a point arises whether it would not be possible to achieve this objective through independent transfer of technology and a degree of support to local industry.[51]

---

48 India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion. "Industrial Policy – 2017: A Discussion Paper", August 29, 2017, http://dipp.nic.in/whats-new/industrial-policy-2017-discussion-paper.

49 S.K. Goyal, et. al., *Foreign Investment Approvals & Implementation Status: A Review (August 1991 - December 1994*), ISID, March 1995. Available at: http://isid.org.in/pdf/FIA9194u.pdf. The study was sponsored by the Ministry of Finance.

50 S.K Goyal, *supra* note 49, p. 62.

51 S.K Goyal, *supra* note 49, p. 66.

Interestingly, then Prime Minister P.V. Narasimha Rao, while participating in the Motion of Thanks to the Presidential Address to the Parliament, sought to dispel the apprehension that Indian industry was being taken over by MNCs.[52] He said that the government gave permission wherever Indian companies felt that they would benefit from infusion of fresh capital and technology. It was made a pre-condition that the Indian company's board had to pass a resolution to that effect. Hence, according to him, such cases were voluntary and not predatory. It was, however, ignored that being already under foreign control, board's approval for the existing MNC affiliates would be a mere formality. The forewarnings contained in the ISID report submitted to the Finance Ministry were obviously ignored. Obviously, the policymakers of day were not prepared to hurt the reform process by acknowledging the already manifested negative fallout of the liberal policies.

In the context of the initial resistance of the domestic private sector, it would be relevant to look at its subsequent approach to the sustained increase in the freedom offered to FDI in India. Importantly, it gradually turned around to not only support but also to participate in the government's efforts at attracting FDI. For instance, FICCI shed its cautious approach towards FDI. From the late 1990s major MNCs started becoming its members.[53] Even not taking into account companies having substantial foreign private equity participation and companies controlled by non-resident Indian groups, almost one-fourth of the executive committee members are either from foreign subsidiaries or from joint ventures. FICCI even became a joint venture partner of Investindia, the National Investment Promotion and Facilitation Agency of India, with the government, to attract foreign investment, in 2009. A number of industry councils are headed exclusively by representatives of foreign companies or together with leading Indian companies.[54] On its part, the CII proclaims that

---

[52] Lok Sabha Secretariat, *Lok Sabha Debates,* April 28, 1995 https://eparlib.nic.in/bitstream/123456789/3190/1/lsd_10_13_28-04-1995.pdf.

[53] Prominent among these were: Hindustan Lever, ICI, Bayer, Colgate, Pepsico, Procter & Gamble, Pfizer, Reckitt Benckiser and British Gas. Interestingly, the global consultants Arthur Andersen, KPMG and Ernst & Young were also among the new members. Sanjay Sardana, "MNCs, PSUs do to FICCI Image what Traditional Cos Could Not", *Financial Express,* August 15, 2002, ISID PCA. FICCI's promotion of FDI in retail cannot be unrelated Amazon, Amway and Walmart being its corporate members.

[54] Co-Chair of FICCI's Food Processing belongs to Indian the subsidiary of American breakfast foods maker Kellogg's. Chair of FMCG panel belongs to Hindustan Unilever, Co-Chair to Hershey, Chair of Taskforce on Direct selling to Amway India and Co-Chair to Oriflame – none of them being a domestic enterprise.
CII's Chemicals Committee is headed by representative of BASF, the other two members are from Dow Chemical and SRF. Co-Chair of the FMCG Committee belongs to Hindustan Unilever and Co-Chair of Pharmaceutical Committee is from Hospira Healthcare. Financial Reporting and Taxation Committees are headed respectively by persons from Deloitte and Ernst & Young.
Assocham: Co-Chairman of Food Processing & Value Addition belongs to Pepsico. In respect of IPR the Chairman is from Ericson Forum and one of the Co-Chairs is from DuPont. Similar is the

> For MNCs to be able to deliver their full potential in meeting the growth and development objectives of the country, it would be critical that we recognize their contribution to the country and provide them with a conducive regulatory and business environment.
>
> CII, under the aegis of its National Committee on MNCs, has been working pro-actively in promoting a healthy business environment for the MNCs in India. Through meetings, reports, representations and conferences, CII has been at the forefront in taking up the MNC's policy issues with the relevant departments of the government at both Central as well as state levels.[55]

In sum, the apex chambers have reached a stage where they not only have become extremely constrained to voice the domestic industry's point of view but they became active promoters of MNCs in India.[56]

M&As and Inflows

It is only since 1995-96 that inflows through what are termed as the acquisition route are being reported separately; the share of acquisition in equity inflows for the period 1995-96 – 2001-02 was 17.7%. (Table 1) While there were year-to-year fluctuations in the contribution of acquisition-related inflows, overall, they accounted for a slightly larger portion of the total equity inflows during the subsequent 18 years (19.5%). RBI has started reporting sectoral distribution of non-acquisition related inflows from 2002-03 onwards. Comparison of the sectoral distribution of non-acquisition related inflows reported by the RBI[57] and the sectoral distribution of total equity inflows reported by the administrative ministry for foreign investment regulations, the Department for Promotion of Industry and Internal Trade (DPIIT),[58] can help to estimate the relative importance of acquisitions separately for manufacturing and others. For the manufacturing sector share of non-acquisition-related inflows was quite small at 26.5% compared its share in total equity inflows which itself was low at 32.9%. The share of acquisitions was considerably higher

---

case with manufacturing: BMW and Nokia respectively; Chair of Medical Devices from Abbott Healthcare; Pharmaceuticals and Biotechnology from Abbott & GSK. Electronics and Hardware is the sole preserve of MNCs: Dell and Apple.

55 CII, *MNC*, Available at: https://www.cii.in/sectors.aspx?enc=prvePUj2bdMtgTmvPwvisYH+5EnGjyGXO9hLECvTuNss5/pTaxBJ6jFu3DmRWoqS.

56 See for instance, Rema Nagarajan., "Desi med device cos feel CII, FICCI more responsive to MNCs", *The Times of India*, February 11, 2017.

57 Since 2004-05, RBI has been reporting sectoral distribution of non-acquisition related inflows in its annual reports. For instance see Appendix Table-9 (p. 244) of the Annual Report 2018-19. While inflows into services are reported at a disaggregated level, those into the manufacturing sector are clubbed together. We subtracted the non-acquisition related inflows into the manufacturing sector and others reported by the RBI from the corresponding total inflows derived from the annual inflows reported by the DPIIT in its online *FDI Newsletter* to estimate acquisition-related inflows into manufacturing and other sectors.

58 Earlier known as Department of Industrial Policy and Promotion (DIPP).

than that for other activities in different periods. Overall, while it was 35.3% for the manufacturing sector, it was only 12.4 for the others. This could, however, be an underestimate as can be seen from the following.

A case by case study of the manufacturing companies which received at least $5 mn RFDI during the decade 2004-05 to 2013-14, suggested that acquisition related inflows accounted for as much as 55.0% of the total. If one goes by the official classification the corresponding share works to only 33.8%. Much of the difference was due to inflows into new FDI companies whose operations were based on acquired existing businesses (16.5%). Acquisitions can also take place through downstream investment by existing FDI companies using the funds received from abroad or resources raised locally (accumulated profits and borrowings) and equity swaps. Such inflows are not treated as *acquisition of existing shares* in the official statistics. Recently released data also confirm our earlier view that acquisition-related inflows could also be reported under the approval route leading to under-reporting of inflows through the acquisition route.[59]

Table 1: Relative Contribution of Acquisition Related Inflows to FDI Equity Inflows: Manufacturing and Non-Manufacturing Sectors

(percentages)

Period	*Share of Acquisitions in Total Equity Inflows*	*Share of Manufacturing Sector in Total Equity Inflows*	*Share of Manufacturing Sector in Non-Acquisition Equity Inflows*	*Share of Acquisitions in Manufacturing Sector's FDI Inflows*	*Share of Acquisitions in Non-Manufacturing FDI Inflows*
	RBI	*DPIIT*	*RBI*	*DPIIT-RBI*	*DPIIT-RBI*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
2002-03 to 2007-08	29.7	30.5	22.5	45.3	17.5
2008-09 to 2013-14	23.5	41.6	31.3	44.7	13.6
2014-15 to 2019-20	14.9	27.8	24.6	24.1	10.8
2002-03 to 2019-20	19.5	32.9	26.5	35.3	12.4

Source: Based on data from DPIIT for Col. (2); RBI from Cols (3) & (4), derived from DIPP and RBI data Cols. (5) & (6).

Some of the problems associated with the reported official figures can further be understood from the following. It is relevant to note that the estimated inflows into the manufacturing sector during 2008-09 – 2013-14 and 2014-15 – 2019-20 were $66.8 bn and $70.1 bn. respectively. That is, higher by only about $3.3 bn. or about 4.9%. When looking at the estimated inflows into the manufacturing sector we, however, found a huge spike in 2016-17 -- $14.3 bn., higher by $4bn compared to the inflows in the preceding and following years. Similar spike was also noticed in the case of non-acquisition type of inflows into the

[59] Out of the 46 remittances under the approvals route during October-December 2019, three are reported as "brownfield". Interestingly, "brownfield" investments are also reported under the "automatic route". This further indicates that official classifications cannot be taken at their face value. DPIIT, XXVIII *FDI Newsletter*, January, 2020.

sector. Part of the explanation for this lies in a mix of classification, delayed reporting of inflows and conceptual issues. The following cases from the manufacturing sector illustrate the types of problems associated with more than $5 billion inflows reported for the year 2016-17.

1. $1,661 mn. inflow against Ambuja Cements: There was *no actual inflow* as the shares were issued pursuant to the scheme of amalgamation of Holcim (India) with the company.
2. $932 mn investment in Essar Power. The activity was shown as "manufacture of electricity distribution and control apparatus", instead of power generation. While this should have been classified under power generation, even the shares against this amount were actually issued during 2009-10 and 2010-11.
3. $719 inflow pertains to duplicate reporting of the shares issued by JSW Steel to JFE Steel, Japan in October 2010 and reported first in August 2011.
4. $356 mn in Procter and Gamble Home Products: The shares were issued during March 2011 and March 2013.
5. $320 mn. reported against Emerson Process Management India: The shares were actually issued in October 2013.
6. $293 million was reported against GE India Industrial: There was no actual inflow as the shares were issued against the reorganisation of group companies.
7. $110 mn. in Lafarge Aggregates and Concretes (India): The company was already was amalgamated with Lafarge India Ltd during 2015. Hence there was no question of it receiving FDI during 2016-17.
8. $102 mn. in Reid & Taylor: Shares were issued in 2008-09.[60]

If the above problems are taken into account, the *actual* FDI into the manufacturing sector reported for the latest six years, instead of being higher, might end up being lower than that in the previous six years. It will also have implications for the total inflows during a period and its distribution by sectors and mode of entry.

Overall, estimated shares of acquisition-related inflows in RFDI received by High technology, Medium High Technology, Medium Technology, and Low Technology companies were 85.6, 43.9, 45.6, and 43.5% respectively. (Table 2) Industries in which the share of acquisitions was quite high were electrical machinery and apparatus n.e.c. (88%); other non-metallic mineral products (85%); chemicals including pharmaceuticals (82%), machinery and equipment (43%); and food products and beverages (38%).[61] The fact that only about a third of the inflows went into the manufacturing sector and the share of

[60] K.S. Chalapati Rao and Biswajit Dhar, India's Recent Inward Foreign Direct Investment: An Assessment, Institute for Studies in Industrial Development, New Delhi, 2018.

[61] K.S. Chalapati Rao and Biswajit Dhar, "Analysis of India's FDI Inflows during 2004-05 to 2013-14", in *India's Inward FDI Experience During the Post-Liberalisation Period with Emphasis on the Manufacturing Sector*, a programme report submitted to the Indian Council of Social Science Research, Institute for Studies in Industrial Development, 2016.

acquisitions was 35.3 per cent, what could have contributed to the creation of new capacities or financing of manufacturing operations would be only 22 per cent of the total inflows of $463 bn. during 2002-03 to 2019-20 *i.e.*, about $100 bn. Since the official figures grossly underestimate the extent of acquisition-related inflows, what could have gone into new capacity creation would have been much smaller.

The ambiguity in reporting inflows by mode of entry gets further amplified when one looks at the recent remittance-wise details. As mentioned earlier, equity inflows are reported under three routes: (i) Government, (ii) Automatic and (iii) Acquisition of Existing Shares. The last mentioned is treated as representing M&As or "Brownfield" investments. However, the *FDI Newsletter* published online by the DPIIT recently started classifying inflows into three further categories: Greenfield; Brownfield; and Received in the Company. Interestingly, some of the inflows received through the Government/Automatic routes are shown as "Brownfield". On the other hand, only a few remittances through the Government/ Automatic routes are marked as "Greenfield". Rest are categorised as just "Received in the company". If one goes by the route of entry alone, brownfield investments would account for 16.5% of the equity inflows during the period October 2019 – June 2020. If in addition all those marked as "Brownfield" under the Government and RBI Automatic routes are also taken into account, the share would work out to 19.7%! The extent of lack of clarity on the end use of the funds received can be seen from the fact that 94.3% of the inflows are marked as just "Received in the Company"! Can the information beset with such extremely high level of vagueness be useful for assessing the efficacy of FDI policy?

Table 2: Estimated Shares of Acquisitions in Large FDI Inflows into Industries Classified According Level of Technology: 2004-05 – 2013-14

Industry Category	*Inflows ($bn.)*	*Share of Acquisition-related Inflows (%)*	
		Based on Official Reporting	*Estimated*
High Technology	12.4	44.7	85.6
Medium High Technology	20.5	35.8	45.6
Medium Low Technology	9.5	20.3	43.5
Low Technology	6.2	26.3	43.9
All Industries	**48.6**	33.8	55.1

Source: Modified version of Table 19 in K.S. Chalapati Rao and Biswajit Dhar, *Analysis of India's FDI Inflows*, INDIA'S INWARD FDI EXPERIENCE IN THE POST-LIBERALISATION PERIOD WITH SPECIAL REFERENCE TO THE MANUFACTURING SECTOR, a project report submitted to the ICSSR, ISID, (January 2016).

Note: All manufacturing companies receiving at least $5 mn inflows during the period were identified. The above analysis pertains to the realistic FDI (RFDI) received by those companies.

Relative Position of FDI Companies in the Indian Corporate Sector

Broadly speaking, as the following evidence suggests, at least two things appear to have happened over the years. FDI companies gained a significant place in the Indian corporate sector, especially in technology intensive industries. Companies with FDI accounted for about 27% of the paid-up capital of non-government companies during 2013-14 to 2015-16 with equity under the FDI scheme[62] constituting about 21% of the total. The corresponding shares for the manufacturing sector for the year 2013-14 were much higher at 37% and 30.5%, respectively. The shares would turn out even higher if downstream investments by FDI companies are also taken into account.

The relative importance of FDI companies in the Indian private corporate sector is further corroborated by a quick analysis of the D&B Hoover's data. Foreign-affiliated companies (excluding those controlled by non-resident Indians) had a share of about 27 per cent in the turnover of non-oil manufacturing companies each having at least $10 mn turnover.[63] The corresponding shares in case of Low, Medium, and Medium High & High technology industries were 18%, 13% and 42% respectively. The overall share was 27.6%. In case of larger companies with a minimum $50 mn. turnover, the respective shares were: 24%, 15% and 48% respectively. The overall share was one-third. That the Indian domestic companies are way down in the global pecking order is evident from the fact there were only seven Indian companies in the Fortune Global 500 for the year 2019. None of the three private companies, Reliance Industries, Tata Motors and Rajesh Exports entered the list on their technology strength.[64]

R&D Orientation or Lack of it of Domestic Enterprises

As noted by the PMGR, domestic companies did not become sufficiently R&D-oriented. They continue to compare very poorly with their global counterparts. For instance, among the global 2,500 top spenders, there was no Indian company in as many as 38 industries. Even in industries in which Indian companies had a presence, they fared poorly with respect to China too. (Table 3) Low or nil R&D spending by domestic companies as well as lack of access to imported technology is further evident from a quick exercise based on the Prowess data for the year 2014-15. (Table 4) Against 40 per cent of the FDI companies which spent neither on R&D or on import of technology, 82 per cent of Indian companies fell in this category. This applies to technology intensive sectors also. Overall, 95 per cent of the

---

62 Total equity of FDI companies and within that equity under the FDI scheme were taken from the RBI's Annual Census of Foreign Liabilities and Assets for the respective years. Results of the Census are available online at the RBI's website rbidocs.org.in. Total equity of non-government companies and of manufacturing companies was taken from the annual reports of the Ministry of Corporate Affairs.

63 Accessed from D&B Hoovers Data, Available at: https://app.dnbhoovers.com.

64 The respective ranks of these companies were: 106, 265 and 495. Tata Motors place in the Top 500 was due to Jaguar, UK and that of Rajesh Exports can be attributed to the acquisition of gold refining unit in Switzerland. The other Indian companies were: Indian Oil Corporation, ONGC, Bharat Petroleum and State Bank of India. US had the largest number of companies with 121 closely followed by China with 119. Out of the 25 new entrants in 2019 as many as 12 belong to China.

domestic companies did not report R&D.[65] It was no different in case of technology intensive industries. Even considering that there could be some reporting issues, the enormity of the situation cannot be ignored.

Table 3: Relative Position of Indian Companies in Global R&D Spending

Industry/Sector	*India's Rank within the sector*	*Relative to the Top Spending Country (%)*	*Relative to China's Spending (%)*	*India's Top Spender Relative to Global Top Spender (%)*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
Automobiles & Parts	8/19	1.9	28.0	14.4
Chemicals	12/18	0.9	13.1	5.0
Industrial Engineering	19/22	0.7	1.0	2.6
Industrial Metals & Mining	7/13	6.0	6.0	14.3
Oil & Gas Producers	13/16	1.6	1.6	3.0
Oil Equipment, Services & Distribution	5/7	5.6	19.0	9.1
Pharmaceuticals & Biotechnology	10/27	1.9	33.1	2.4
Software & Computer Services	14/23	0.4	1.9	0.6

Source: Based on http://iri.jrc.ec.europa.eu/sites/default/files/contentype/scoreboard/2019-12/SB2019_main%20stats _GLOBAL2500.xlsx accessed on April 27, 2020.

Note: Column (3) gives the rank of the top spending Indian company and the total number of companies in the industry.

Table 4: R&D and Technology Import Behavior of 7,289 Manufacturing Companies by Type of Industries and Ownership

(Percentages)

	No R&D & No Technology Payments	*No R&D. But Report Tech Payments*	*Spend on R&D but Make No Payments for Technology*	*Spend on R&D Also Pay for Technology*	*Total*
FDI Companies	40.6	12.3	27.8	19.3	100.0
Others (Predominantly Indian)	**82.1**	13.1	2.6	2.2	100.0
- Technology Intensive Industries #	72.8	20.9	2.6	3.7	100.0
- Others	87.9	8.3	2.6	1.2	100.0
All Companies	77.6	13.1	5.3	4.0	100.0

Source: Based on CMIE Prowess data. Minimum sales Rs. 1 crore in 2014-15. Estimates are preliminary.

Chemicals & chemical products, Pharmaceuticals, Computers, electronics and parts, Electrical equipment, Machinery & equipment, Transport equipment.

[65] An earlier study of top Indian private sector manufacturing companies covering the years 1989-90 and 1999-00 underlined their poor R&D efforts.
M.R. Murthy and K.V.K. Ranganathan, "Structural Characteristics of the Large Indian Private Corporate Sector in the Post-liberalisation Period", ISID Working Paper No. 2013/03.

JVs and Technology Transfer

A survey conducted for the Ministry of Finance, in the initial years of opening up, revealed that catering to India's domestic market (which implies competing with domestic enterprises) was the top most objective of foreign investors. Exporting to regional markets was the distant second objective. On the other hand, domestic enterprises were looking forward to joining hands with them for getting access to advanced technologies. They also wanted to export to regional markets with their support. Another important observation was that they had to accept foreign equity because of the collaborator's insistence thereby implying that the domestic companies would have preferred to get technology without yielding control.[66] Even so, approvals for technical collaborations started falling sharply soon after opening up. Share of technical collaborations, which was about 70 per cent in 1991, decreased to 35 per cent in 1998. It was about 85 per cent in 1981.[67] RBI's surveys of foreign collaborations also reflect a similar phenomenon.[68]

Out of the 602 manufacturing companies which received RFDI, three-fourths of them had foreign shares of 90 per cent or more. Overall, about 90 per cent of these companies were majority foreign-owned. Only 8 per cent companies were new joint ventures. Another 10 per cent were older companies converted into JVs with entry of RFDI. Going alone was thus the most preferred form of operation for MNCs in the new liberal FDI regime. Financing domestic enterprises and imparting technology to them were not their priorities.

The policymakers' assertion that the Indian entrepreneurs had come of age and they can negotiate technology purchases might have been good on paper but in practice foreign companies did not find it necessary to associate domestic companies as they can serve the Indian market directly in an environment in which the policymakers were eager to attract foreign investment. Even when some JVs are formed, the objective will not be met unless the terms are chosen carefully; the relative shares of foreign and domestic partners need not reflect the extent and type of control exercised over the JV's operation by the two sides. As mentioned earlier, the limited opening up during the 1980s did result in the formation of many JVs. Some of them survived the exit of foreign partners e.g. TVS Suzuki (now TVS Motors) and Hero Honda (now Hero MotoCorp). But that regime also allowed JVs to be formed with non-serious/subservient local partners whose role was to help foreign

---

66 S.K. Goyal, et. al., *Foreign Investment Approvals: An Analysis (August 1991 – July 1993)*, ISID, March 1994. Available at: http://isid.org.in/pdf/FM94u.PDF.

67 K.S. Chalapati Rao, M.R. Murthy and K.V.K. Ranganathan, "Foreign Direct Investments in the Post-Liberalisation Period: An Overview", XI *Journal of Indian School of Political Economy* 4, July- Sep 1999, pp. 423-454.

68 Leaving aside the indeterminate cases, out of the 297 companies having technical collaborations, as many as 206 were foreign subsidiaries and a further 83 were foreign associates. Pure technical collaborations cases were only eight. RBI, "Survey on Foreign Collaboration in Indian Industry: 2016–2018 – Data Release", January 28, 2019, https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR1763D210CB9DD5334E909839E771EA2FC65D.PDF

companies to meet the equity norms and probably also to provide infrastructure and manage the political environment.

Tata Timken Ltd., the JV between Tatas and Timken offers an example where one of the largest industrial houses of India known for its technological strength agreed to give complete freedom to the foreign collaborator in respect of technology and the manufacturing process.[69] The JV was promptly taken over by the foreign partner in the new regime. Allowing such one-sided agreements reflects poorly on the managers of the supposedly restrictive regime. Had the joint venture agreements been carefully monitored, India would most probably have seen many survivors like the TVS Motors and Hero MotoCorp.

The more recent 50:50 JV by Voltas, also a constituent of the Tata group, with Koc of Turkey, is another glaring example why the expectation of domestic partners learning from their foreign counterparts need not be realistic. Voltas, which started as a JV of Tata Sons with Volkart Brothers of Switzerland in 1954, has been a well-known Indian brand for consumer durables. Since 1999-00 the company spent paltry sums on R&D; in most of the years it was less than 0.1% of its sales. While it started reporting import of finished goods in 2001-02, imports picked up quickly and reached Rs. 405 crore in 2007-08. After averaging about Rs. 700 crore during 2011-12 to 2013-14, imports fell to a little less than Rs. 200 crore during the next two years. Total purchase of finished goods however more than doubled from Rs. 1,443 crore in 2013-14 to Rs. 3,231 crore in 2015-16 and remained above Rs. 3,600 crores in the following four years.

The JV agreement was entered into in May 2017 between Ardutech BV, a subsidiary of Arcelik AS - part of the Koc Group, "to tap the fast growing Consumer Durables market in India". The JV was christened as Voltbek Home Appliances Pvt Ltd. According to the annual report of Voltas, the JV will "leverage the strong brand presence and wide sales and distribution network of Voltas which is the market leader for residential room air conditioners in India, with over 20% market share".[70] The JV partner would bring "its strong R&D and manufacturing prowess, in addition to a wide product range and global sourcing capabilities". The Articles of Association of the JV clearly show that the foreign partner will exercise control over manufacturing, finance and sales. (See Box 1) The fact is, a six-decade old domestic company belonging to one of India's largest and oldest industrial houses agreed to play a subordinate role to a Turkish business group instead of doing its homework that too after 25 years of opening up.

---

[69] Chandra Shekhar, *Political Economy of India*, 1992.

[70] Voltas Limited, *Annual Report 2016-17*, p. 11.

Box 1: Relative Responsibilities of Domestic and Foreign Partners in the JV Voltbek Home Appliances Pvt Ltd

Voltas: to identify and shortlist the parcels of land required for the Manufacturing Facility; in applying for, procuring and obtaining all the requisite approvals, licenses and permits, as may be required under applicable Laws,

ABV: assist the Company in finalizing the layout of the Manufacturing Facility;

The Company **cooperate with ABV** in facilitating the maintenance of **the quality standard by permitting ABV** … to inspect the Company's Manufacturing Facilities and/or providing with the specimens of the Products for testing

If the Company wishes to sell any finished Products not manufactured by the Company, **it shall purchase such finished Products from ABV or ABV's** Affiliates provided such finished Products are manufactured by ABV or ABV's Affiliates.

Secondments: ABV shall identify individual **employees of itself** and its Affiliates from time to time **for secondment to the Company**.

ABV shall nominate the individuals to be appointed to the following positions (i) CFO, (ii) **Chief of Manufacturing; and (iii) Chief of Purchasing**.

Voltas shall nominate the individuals to be appointed to the following positions (i) CEO, (ii) Chief of Marketing; and (iii) Chief of Sales.

ABV: Ardutech BV, subsidiary of Arçelik A.S.; part of the Koç Group, Turkey

Source: Articles of Association of Voltbek Home Appliances Pvt Ltd downloaded from the MCA website during November 2018.

The Targets are not always Lemons

In the literature on M&A type FDI, most often the impact is seen in terms of rescuing troubled assets and/or the post-acquisition performance in terms of growth and productivity. There is the inherent assumption that inefficient firms get taken over by their technologically superior suitors. As noted earlier, it need be the case always.

It is well-known that the Parle group, led by Mr. Ramesh Chauhan, filled the void left by Coca-Cola when it exited India in the 1970s. The group not only became a leader in soft drinks but also made a mark in promoting fruit juices, even internationally.[71] Incidentally, after having fought vehemently against the entry of Pepsi in 1989 in joint venture[72] with Voltas and Punjab Agro Industries Corporation, the Parle group surrendered when it had to fight with another global giant which was eroding its base by weaning away its bottlers.

[71] "History and Marketing Strategies of Maaza Brand", *Brandyuva*, 2019. https://brandyuva.in/2019/08/marketing-strategies-of-maaza.html

[72] Pepsi took complete control of the JV in 1994. Surajeet Das Gupta, "How India became Pepsi's right choice", *The Business Standard*. https://www.business-standard.com/content/general_pdf/032814_02.pdf

It is relevant to note that Coca-Cola is still reaping dividends from the brands acquired from the Parle group. Mr. Chauhan proudly declared that

> It is a great feeling that Thums Up is still number one. Despite all the years gone by, their (multinationals) own brands have not been able to overshadow ThumsUp.[73]

The takeover of Matrix laboratories Ltd., another home-grown company by Mylan of USA, towards the end of 2006, serves as another relevant case. Even at the time of acquisition, the company was export-oriented, deriving two-thirds of its sales from exports. It also had an R&D unit spending more than 12 per cent of the sales on R&D. the company laid the foundation for further expansion into foreign markets by acquiring Docpharma, Belgium. It also entered into a strategic partnership with Mchem group of China, acquired a major stake in Explora Laboratories of Switzerland and formed two-way JVs with Aspen of South Africa. Matrix was a profit-making company with accumulated reserves far outweighing its borrowings. Mr. Prasad, the Indian promoter of the company was credited with steering the "transformation of Matrix Laboratories from a $1 million (market capitalization) API company into a $1 billion global pharmaceutical business in a span of only six years.". The company was recognized as "Fastest Wealth Creator" in 2004, 2005 and 2006.[74] It was renamed as Mylan Laboratories Ltd in October 2011.

Matrix Laboratories was a valuable acquisition for Mylan as according to the acquirer

> The deal transformed Mylan overnight into one [of] the world's largest manufacturers of active pharmaceutical ingredients (API) and allowed us to vertically integrate the production of our finished dosage form (FDF) medicines.[75]

Announcing the deal, Mylan's Vice-Chairman and CEO said

> In addition to bringing substantial tangible benefits in the form of their *world-class* manufacturing *capabilities and product portfolios*, Matrix and their European subsidiary, Docpharma, have demonstrated a deep understanding of their respective regions and markets.[76] (emphasis added)

Acquisitions played important role in the further expansion of the company India. Those identified from ProwessIQ are shown in Table 5. None of these acquisitions figured in the FDI inflows reported by the government because these were downstream deals. Incidentally, Prowess does not list any greenfield/expansion project against the company.

---

73 "No regrets selling Thums Up, says Bisleri chief Ramesh Chauhan", *Business Line,* June 13, 2013 https://www.thehindubusinessline.com/companies/no-regrets-selling-thums-up-says-bisleri-chief-ramesh-chauhan/article23106362.ece

74 Matrix Laboratories Ltd, *Annual Report 2006-07*, p. 4.

75 Mylan, "Mylan in India", https://www.mylan.in/en/about-mylan/mylan-in-india

76 Mylan, "Mylan Laboratories to Acquire Up to 71.5% Controlling Interest in Matrix Laboratories", http://newsroom.mylan.com/press-releases?item=122766.

Table 5: Select Indicators and Events of Matrix Laboratories Over the Years

(Amount in Rs. Million)

Year	*Net Sales*	*PBT/Loss*	*Interest Paid*	*R&D Expenditure*	*Foreign Exchange*	
					Earning	*Expenditure*
2003-04	Medikon Laboratories & Fine Drugs & Chemicals (Merged)					
2004-05	PE investors Newbridge and Maxwell (Mauritius) enter as shareholders. Sigma Laboratories (Acquisition of Assets)					
	6,367	1,303	62	272	3,404	1,716
2005-06	Stride Pharma Science (Merged)					
	6,671	1,824	82	599	4,171	2,581
2006-07	Mylan USA acquires 71.5% of the company's equity. PE investors exit.					
	7,495	996	154	801	5,263	2,711
2007-08	9,386	-2,984	268	1,197	6,393	2,483
2008-09	Oct 2008 Astrix Laboratories (Merged)					
	14,790	1,890	569	2,214	12,431	4,274
2009-10	18,680	2,138	510	2,659	15,393	6,069
2010-11	28,444	4,657	433	2,937	23,462	8,484
2011-12	39,320	4,692	575	3,264	34,202	11,280
2012-13	SMS Pharma & Unichem Labs (Acquisition of assets)					
	53,694	5,195	630	4,063	44,544	16,045
2013-14	69,372	8,449	2,485	4,995	59,355	24,136
2014-15	Onco Therapies, Agila Specialities, Astrix Labs (Merged)					
	78,044	1,343	5,686	6,102	69,108	35,154
2015-16	Jai Pharma (Merged)					
	95,063	-555	6,364	5,925	83,281	43,258
2016-17	96,228	-4,695	8,569	6,631	85,388	39,905
2017-18	96,380	-3,309	8,170	6,460	85,123	40,048
2018-19	Madaus Pharmaceuticals (Merged)					
	1,09,690	-4,083	8,277	7,710	94,017	47,506

Source: Based on Prowess, CMIE and Annual Reports of Matrix/Mylan Laboratories Ltd

Following the acquisition of Agila Specialities in 2013 from Strides Arcolab, Mr. Rajiv Malik, President of Mylan, added:

> The acquisition of Agila transforms Mylan into a global powerhouse in injectables research and development (R&D) and manufacturing, *with four dedicated state-of-the-art R&D facilities* staffed by more than 400 scientists and 13 dedicated manufacturing

> sites across six countries, and capabilities across all key technologies and product areas.[77] (emphasis added)

Between 2011-12 and 2014-15 the company's net sales doubled; so did foreign exchange earnings and reported expenditure on R&D. It is noteworthy that the foreign acquirer did not import any technology subsequently.[78] Obviously, acquisitions helped strengthen the company's R&D operations. The acquisitions were funded by some equity infusion into the company and borrowings from the parent and affiliates. Barring the first year following the initial acquisition, the company was declaring profit before tax, till 2014-15. During the last three years, however, the company declared substantial losses. Apart from the possibilities of transfer pricing, other and more direct factor that contributed to the losses is the interest payment which far exceeded the reported losses in the last three years. Had the funds been brought as equity from the parent, instead of as loans, the company would have been required to show profits and pay corporate tax in India. Also, if dividends were paid out, it would also have been required to pay dividend distribution tax. Indeed the company did not pay dividends during any of the years since it went into Mylan's fold.

The foreign private equity investors were rewarded handsomely for parking their funds for about four years. They would have got Rs 2100 crore against the Rs 337 crore invested initially. Their involvement did seem to have prepared the ground for getting the company ready for the chopping block. Besides the well-known large cases, there have been many acquisitions of smaller companies. Some had grown almost on the back of series of acquisitions. A frequent common factor is the private equity investment. Many of these companies probably would have remained in domestic hands had there been relevant lead companies which could have acted as nuclei and scaled up the operations.

It is also relevant to note that Matrix had the ingredients to become a major player in the industry like some of its contemporaries like Aurobindo Pharma and Hetero Drugs. If companies nurtured through extensive support mechanism, incentives and concessions end up in this fashion, the domestic economy would not derive full benefits from the efforts and base for future industrial development would get eroded, especially in crucial sectors like pharmaceuticals.

IV. Regulation of M&As

As noted earlier, the provisions relating to acquisitions were removed from the MRTP Act through an Ordinance in September 1991. This was followed by the MRTP Amendment Act in December 1991 which deleted the main provisions relating to Concentration of

---

[77] Mylan, "Mylan Completes Acquisition of Agila to Create Leading Global Injectables Platform", https://investor.mylan.com/news-releases/news-release-details/mylan-completes-acquisition-agila-create-leading-global

[78] For instance, the company in Annexure-4 to the Directors Report for the year 2015-16 stated that "No technology has been imported".

Economic Power in Chapter III, in particular Section 23 dealing with 'merger, amalgamation and takeover'. The need for a competition policy was felt soon after in 1992 when Hindustan Lever Ltd (HLL), leading FMCG subsidiary of Unilever, acquired Tata Oil Mills Ltd (TOMCO), one of its chief competitors. The acquisition increased the market share of HLL manifold as there was a large overlap in the cosmetics and toiletries segment.[79] The matter went up to the Supreme Court which ruled that amendments to FERA and MRTP were meant to permit foreign companies to do business in India and hence the merger "cannot be struck down as being against the public policy".[80]

An alternative to the MRTP Act, however, started emerging only with the appointment of an Expert Group on 'Interaction between Trade and Competition Policy' by the Ministry of Commerce in October 1997. This was consequent to the decision to set up an Expert Group on competition policy at the Singapore Ministerial of WTO in 1996.[81] The Expert Group constituted by the Ministry of Commerce and headed by Dr. S. Chakravarthy recommended the enactment of a new competition law. The result is the setting up of a High Level Committee on Competition Policy and Law headed by Mr. S Raghavan. (hereafter Raghavan Committee).

The Competition Act received Presidential assent in January 2003 and the Competition Commission started working with one member from October 2003. The anti-competitiveness provisions and abuse of dominance were notified much later in May 2009. Provisions relating to combinations became operative after two years, from June 1, 2011. That is, for about two decades, after the MRTP Act was truncated by removing the provisions relating to concentration of economic power in 1991, there was no specific restriction on M&As except the due process under the Companies Act. SEBI acquired powers to regulate M&As of listed companies under the Substantial Acquisition of Shares and Takeovers) Regulations in 1997. Its main objective, however, is shareholder protection. Though there are also sectoral regulators, their primary objective was not competition.[82]

The delay in implementation of the Competition Act can be attributed to multiple factors. Litigation in the Supreme Court, the pressure not to place hurdles in the path of domestic companies' restructuring so that they can acquire mass to take on their much larger global counterparts and to give time to the new competition authorities to gain experience, are the main reasons. In fact, the pressure against merger control continued even after the

---

[79] Following the merger the market share of HLL was reported to have increased substantially: soaps (from 19.7% to 26%); synthetic detergents and scouring agents (from 33.1% to 46.7%). See: Aditya Bhattacharjea, Trade, Investment, and Competition Policy: An Indian Perspective, in Aditya Mattoo, et.al. (eds.), *India and the WTO*, World Bank and Oxford University Press, 2003.

[80] Aditya Bhattacharjea, "Trade, Investment, and Competition Policy: An Indian Perspective", in Aditya Mattoo, ibid.

[81] WTO, "Singapore Ministerial Declaration: Adopted on 13 December 1996", WT/MIN (96)/DEC, 18 December, paragraph 20.

[82] S Chakravarthy, "Evolution of Competition Policy and Law in India", in Pradeep Mehta, ed., *Towards A Functional Competition Policy for India: An Overview,* 2005

Competition Bill was introduced following the Raghavan Committee recommendations. A general refrain as seen in the Raghavan Committee and the concerned Parliamentary Standing Committee proceedings was that Indian enterprises were relatively very small and that they should be given time to grow. The Raghavan Committee noted that

> …, it is extremely important that the law regarding mergers be very carefully framed and the provisions regarding prohibition of mergers be used very sparingly. This is particularly important at the current stage of India's corporate development. Relative to the size of major international companies, Indian firms are still small. With the opening of trade and Foreign Direct Investment, Indian firms need to go through a period of consolidation in order to be competitive. Any law on merger regulation must take account of this reality.[83]

Regarding the government's intention to retain power to exempt certain class of industries in Clause 52 of the Bill, the Department of Company Affairs explained that

> … public interest and consumer interest are not synonymous. The Competition Bill, in most of its provisions, gives consumer interest primacy and place of pride. But there could be occasions and circumstances, when public interest may have a larger relevance than consumer interest. For instance, global competition may extinguish the domestic industries in a particular sector, for various reasons. In such a circumstance, in terms of cost benefit analysis, if the damage to public interest, namely, the larger society, is very significant, Government should have the power to exempt that sector (a class of enterprises) from the operation of Competition Law. Such protection will normally be for a limited period, to enable the particular sector to accept the challenge of competition, become competitive and compete domestically and globally.[84]

Interestingly, some of those who opposed the Bill and those who supported it recognised the threat the Indian companies were facing from MNCs! In his evidence before the Committee Mr. Rahul Bajaj even suggested that "if Indian Companies would not perform they should be taken over by Indian Companies itself (sic)".[85]

As a result, the combination provisions were made applicable with certain asset/turnover limits. Taking into consideration the acquirer's assets/turnover outside India had offered some protection in respect of cross-border acquisitions. The 2007 amendment to the Act, however, diluted it by inserting the provision that such acquirer should have certain minimum assets/turnover in India to attract the provisions of the Competition Act.[86] Greater leeway was thus provided to cross-border acquisitions especially for acquiring

---

[83] Government of India, *Report of the High Level Committee on Competition Policy and Law (Raghavan Committee Report), 2013*, p. 46.

[84] Rajya Sabha, Department-Related Parliamentary Standing Committee on Home Affairs, *93rd Report on Competition Bill*, 2001, November 21, 2002, para 7.16.

[85] Ibid, para 4.3.

[86] It was proposed to increase the thresholds based on the wholesale price index or exchange rate.

smaller companies in India, irrespective of their niche and strategic nature, even before the provisions became operational. The exemptions thus exposed smaller companies and start-ups for cross-border acquisitions.[87] Importantly, the Amendment deleted the provisions relating the establishment of a specialized 'mergers bench'.

The thresholds were doubled in 2016. The *De Minimis* exemption limits were set at Rs. 350 crore assets and Rs. 1000 crore turnover thereby exempting acquisition of enterprises below those limits from the operation of combination provisions for a period of five years.[88] Consequently, the number of notices relating to combinations fell to nearly half to 69 in 2017-18 from the previous year's level of 125. [89] The Competition Amendment Bill 2020 sought to do away with specifying the thresholds within the Act so that they can be revised easily without seeking the nod of Parliament.[90]

Applicability and Application of Combination Provisions

There are two main aspects of the operation of combination regulations which are relevant in the context of this study. First is the high and rising thresholds and exemptions which narrowed the scope for the Act's applicability. According to the D&B Hoover's database, there could be just about 1,500 entities with a turnover of more than Rs. 3,000 crores in India in 2017-18.[91] Foreign-controlled ones among these will obviously be even fewer. In the context of the pressure/desire to let the Indian companies restructure and grow, the higher threshold can probably be justified. However, since the basic approach does not distinguish between cross-border acquisitions and those by domestic companies, they tend to facilitate takeover of domestic companies by their much larger developed country counterparts.[92] The thresholds also do not distinguish between sectors, their capital

---

87 One indeed does not find Facebook (Little Eye labs), Microsoft (Inmage Systems), Google (Halli Labs and Sigmoid Labs) among the combination notices filed with the CCI. Similar is the case with Oski Technology Inc (Chip Design Pvt Ltd) and Axiom Design Automation Inc (Syschip Design Technologies Pvt Ltd)

88 Competition Commission of India, *Revised Thresholds*, https://www.cci.gov.in/sites/default/files/whats_newdocument/Revised%20thresholds.pdf

89 Competition Commission of India, *Annual Report 2018-19*.

90 The Bill also has an important provision whereby the criteria for control was tightened to take into consideration "material influence" instead of "controlling the affairs or management".

91 ProwessIQ consists of around 600 companies with minimum turnover of Rs. 3000 crore either in 2014-15 or 2015-16. The asset threshold does cover more companies (around 2000). The actual coverage will be, however, larger when thresholds are considered at the group level and when the relevant sizes of targets and acquirers are considered together. It is, however, not possible to estimate the potential coverage.

92 Sub-thresholds for each party individually were notified by the Commission following the pressure from domestic industry and American and International Bar Associations. In meant "turning a blind eye to mergers in which foreign firms with no current Indian business enter the Indian market by taking over local firms, instead of competing through exports or direct investment." Aditya Bhattacharjea, *Of Omissions and Commissions: India's Competition Laws*, 45 *Economic and Political Weekly* 35, 2010, pp. 36-37.

intensity, strategic nature, etc. The problem posed by the high thresholds was even acknowledged by the Competition Commission officials in the context of regulating brownfield investments in the pharmaceutical sector. The Chairperson of the Commission "categorically submitted that unless there was a specific change in the provisions of the Competition Act regarding threshold limits, the Act may not prove to be an effective instrument of oversight".[93]

The issue of different thresholds for different sectors did come up. According to the Ministry of Corporate Affairs, the objective behind introducing 5A in the Competition Amendment Bill 2012 which intends to authorise the Government to specify different value of assets and turnover for enterprises[94] was

> To enable different thresholds of value of assets and turnover for different classes of enterprises for the purpose of bringing them more closely under the Competition Commission in the event of acquisitions, mergers and amalgamations. This was considered necessary to address specific sectors with implications or public interest (which may otherwise escape scrutiny because of high thresholds under Section 5)[95]

The Bill was ultimately allowed to lapse even after submission of the report by the Standing Committee and offering its support for the insertion of 5A. It is relevant to note in this context that India's submission to the WTO, citing a Working Paper of the South Centre, argued against giving national treatment to MNCs while implementing competition policy.[96] A persuasive case was made by Ajit Singh, the author of the Working Paper, to subordinate the competition policy to industrial policy. The steps that Singh suggested regarding domestic companies were: maintain steady growth of profits,

---

[93] Rajya Sabha, Departmentally Related Parliamentary Standing Committee on Commerce, *One Hundred and Tenth Report on FDI in Pharmaceutical Sector,* (13th August, 2013), p. 107. According to the evidence given to the Standing Committee, the Expert Committee set up by the Planning Commission suggested the review of the hike in the thresholds and exemptions withdrawn. Interestingly, the Department of Pharmaceuticals felt that the Competition Commission should examine the brownfield pharma investment instead of FIPB while the DIPP favoured the FIPB route. In fact, CII earlier objected to sector-specific thresholds as they would "undesirably" add complexity. "CII bats for more safeguards in Competition Amendment Bill", *Financial Express,* March 25, 2013, ISID-PCA.

[94] The Competition (Amendment) Bill, 2012, Bill No. 136 of 2012, as introduced in Lok Sabha.

[95] Standing Committee on Finance, Ministry of Corporate Affairs, *Competition Amendment Bill 2012*, 2013-14, p. 27

[96] WTO, *Communications from India, WT/WGTCP/W/149* (September 18, 2000), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/W149.pdf; and *WT/WGTCP/W/216* (September 26, 2002); https://docs.wto.org/dol2fe/Pages/SS/ directdoc.aspx?filename=Q:/WT/WGTCP/W216.pdf . Ajit Singh and Rahul Dhumale, *Competition Policy, Development And Developing Countries*, South Centre Working Paper No. 7, (November 1999), https://www.dropbox.com/sh/wg8txyimpyu0tvp/ AADisRkZwIKvSeGpbc_GoQ6-a/T.R.A.D.E.%20Working%20Papers/EN/WP%207.pdf?dl=1.

coordinated government action to prevent over capacity, coordination between competition and industrial policies, etc. Further, he underlined that

> The current competition policies in the United States and the European Union are unsuitable for developing countries. Countries at different levels of development and governance capacities require different types of competition policies. A good model for many emerging countries with effective governance structures is that of the Japanese competition policy during 1950–1973. The Japanese used both competition and cooperation to promote rapid industrialization. [97]

From the above, it should have followed that India would start distinguishing between M&As by domestic and foreign companies. But it was not to be.

The second is the criteria for evaluating merger proposals. Even when certain cross-border acquisitions happen to fall under the ambit of the Act, the emphasis of the Act being on competition, many would again be permitted, especially the vertical M&As. In fact, Section 20 (4) of the Act lists 14 factors "[F]or the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market". Thus, with the emphasis on competition and lack of nationality consideration, CCI will not stop CBMAs of smaller and niche startups. In fact, in case of the takeover of Agila Specialities by Mylan, the Commission gave its clearance taking into consideration, apart from the modifications in the Share Purchase and Restrictive Covenant Agreements, the *factors stated in subsection (4) of Section 20 of the Act*, "the proposed combination is not likely to have an appreciable adverse effect on competition in India".[98]

Similar was the case with the takeover of KKR-backed Gland Pharma[99] by China's Fosun. While the CCI cleared the deal,[100] the FIPB referred it to the Cabinet Committee on Economic Affairs (CCEA). Anticipating delay or even rejection due to the ongoing tension at the border, the Chinese company scaled down its intended share purchase from 86% and settled for 74% which was permitted under the automatic route due to the change in the policy announced earlier in 2016.[101] It was not the concern of the CCI that a home-

---

97 Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions*, G-24 Discussion Paper Series, No. 18, (September 2002).

98 CCI, Order on Combination Registration No. C-2013/04/116 (June 20, 2013), http://www.cci.gov.in/sites/default/files/C-2013-04-116%281%29.pdf.

99 Gland Pharma is India's first injectable drugs manufacturer. Its revenue comes mainly from exports to the United States and Europe. Three-fourths of its total income was in the form of earnings in foreign exchange in 2016-17. The company received 'Outstanding Export performance Award under the Formulations Fast Growing-1 category from the Pharmaceuticals Export Promotion Council of India in 2016.

100 Competition Commission of India, Order on Combination Registration No. C-2016/08/425 (December 13, 2016). https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2016-08-425O.pdf

101 The original Indian promoters who had representation on the acquired company's board of directors, no longer find a place on it. Dr Ravi Penmetsa, son of the company's founder, is now

grown R&D-based and export-oriented company was being sold-off. Would it really have mattered if, as the Maira Committee had suggested, the brownfield FDI was handled by the CCI and the CCI was enabled to examine more cases by lowering the thresholds?

V. Some Relevant Global Developments

Developing countries in their catching up efforts have been made to rely excessively on foreign direct investment notwithstanding the well-known associated risks including crowding out of domestic investments. The fact of the matter is that developed home countries have been treating FDI as a tool to establish and continue their dominance over the global economy. This was clearly evident from the behavior of the US.[102] Bringing to fore national security concerns is a much later development. Recent responses once again confirm that developed countries do whatever it takes to keep their supremacy.[103] In fact, they are leading in protecting their economies from adverse effects of FDI. As the UNCTAD recently noted:

> The policy trend observed in 2018 towards more investment regulations and restrictions related to national security, particularly in respect of foreign investment in strategic industries and critical infrastructure, continued and intensified in 2019 and in the first months of 2020. Numerous countries, almost all of them developed countries, adopted more stringent screening regimes for foreign investment with the main objective of protecting their national security. A significant number of these changes were made in reaction to the COVID-19 pandemic.[104]

---

designated as "Mentor and Advisor". He ceased to be the company's CEO & MD in April 2019. KKR, the foreign private equity investor, led the sell-off after being with the group for just about two years. KKR received VCCircle's 'Exit of the Year' award for the sale of its stake in Gland Pharma to Fosun! KKR, (February, 22, 2018) https://www.kkr.com/global-perspectives/kkr-blog/kkr-awarded-exit-year-gland-pharma#:~: text=By%20KKR%20Feb%2022%2C%202018,(%E2%80%9CFosun%20Pharma%E2%80%9D).

102 Dhar and Chalapati Rao, *supra* note 17.

103 Karl Sauvant, even while cautioning the possibility of the overuse of FDI protectionism, acknowledged that "the international investment law and policy regime – which, deliberately, had developed primarily with foreign investors in mind – needs to give more attention to the policy interest of host countries." He also underlined that even though FDI can make crucial contribution, that "the principal engine is, as a rule, a vibrant domestic enterprise sector. Karl Sauvant., "The Rise of FDI Protectionism", http://ccsi.columbia.edu/files/2013/12/sauvant_rise.pdf. Stiglitz put it forthrightly when he said "[T]he rules of the game have been designed for the most part by the advanced industrial countries, or more accurately, by special interests in those countries, for their own interests, and often do not serve well the interests of the developing world, and especially the poor". Joseph Stiglitz, *Development Policies in a World of Globalization*, https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/1454/Stiglitz_DevelopmentPolicies.pdf

104 UNCTAD, *World Investment Report*, 2020, p. 98.

UNCTAD also expects that the pandemic-induced restrictive measures might result in further protection of strategically important high-technology industries.[105] The process started much earlier and Covid-19 has only given an impetus to it. UNCTAD noted fully a decade back the pronounced use of national security provisions in relation to cross-border acquisition of their industries by the developed countries and expected that developing countries may have to invoke such provisions in times of economic crisis. It also noted the evolution of the concepts of national security and strategic industries.[106] On its part, OECD noted that the traditional concerns based on ownership transfer are fading out and non-ownership transactions are emerging. The ones discussed were: (i) leases, concessions and public procurement; (ii) use of equipment in sensitive infrastructure and supply chains; (iii) global allocation of venture and human capital; and (iv) international research cooperation. The last one's relevance lies in the fact that it could be a substitute to acquisition of advanced technologies by other countries.[107]

The case of Committee on Foreign Investment in the United States (CFIUS) of US in scrutinizing foreign investments is well-known. On its part, the European Union has been striving to devise a framework to protect its technologies. France and Germany had given an impetus to the process by stressing the importance of industrial policy because a strong industry gives Europe "sovereignty and economic independence" and proposed a three-pronged strategy for the success of the EU.

1. Massive investment in innovation to create, develop and produce new technologies.
   - Europe should fund start-ups and innovative technology companies. It should complete the "Capital Markets Union" in order to finance enterprises easily, especially when they grow in scale.
2. Adapt the regulatory framework to strengthen European companies to face global competition.
   - Competition rules are essential but existing rules need to be revised to be able to adequately take into account industrial policy considerations in order to enable European companies to successfully compete on the world stage. Today, amongst the top 40 biggest companies in the world, only five are European.
3. Introduce effective protective measures to defend European technologies, companies and markets.
   - … there is no regulatory global level playing field. And there won't be one any time soon. This puts European companies at a massive disadvantage.

---

[105] Ibid., p. 157.

[106] UNCTAD, *The Protection of National Security in IIAs*, 2009.

[107] OECD, "Acquisition- and ownership-related policies to safeguard essential security interests New policies to manage new threats: Research note on current and emerging trends", March 12, 2019.

4. Europe will only succeed if it is capable of defending its technologies, companies and markets.[108]

The recent measures by these two countries are worth referring to. France has extended its review mechanism to food independence, print and digital media and R&D in energy storage and quantum technologies and reduced the review threshold from 33.33% to 25%. More recently, Germany has added healthcare sector to the review mechanism. Earlier in December 2018 it brought down the screening threshold from 25% to 10%.[109] Other EU countries which introduced changes include Italy, Spain and Hungary. EU foreign investment screening mechanism also seeks to cover portfolio investments when they confer certain rights on the foreign investors. Equally importantly, France and Germany proposed Euro 500 bn. recovery fund to be given as grants to the "hardest-hit sectors and regions in the EU".[110] The United Kingdom tightened its merger control regime to review acquisitions to meet public health emergency. The activities intending to be covered under this provision include "vaccine research companies, personal protective equipment manufacturers, internet service providers and food supply chain companies".[111]

Other developed countries are also raising the wall to protect themselves against harmful effects of FDI. Japan reduced the qualifying stake from 10% to 1%. It also released a list of 3,800 companies categorized into those requiring prior notification, those not requiring prior notification and those with exemption in some cases. Out of these, 518 companies in 12 industries are deemed to be important from national security.[112] Australia announced that *all* foreign investors who seek to acquire sensitive assets will be scrutinized irrespective of the size of the deal.[113] Canada decided to protect itself against "opportunistic investment behavior" to prevent damage to national economic and security interests, during the period of the Covid-19 pandemic. The Republic of Korea too introduced measures to further regulate foreign investment in core technologies. The United States

---

[108] BMWI, "A Franco-German Manifesto for a European industrial policy fit for the 21st Century", https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

[109] BMWI, "Investment Screening", https://www.bmwi.de/Redaktion/EN/Artikel/Foreign-Trade/investment-screening.html.

[110] DW, "Coronavirus: France, Germany propose €500 billion recovery fund", May 18, 2020, https://www.dw.com/en/coronavirus-france-germany-propose-500-billion-recovery-fund/a-53488803.

[111] Caroline Thomas, "COVID-19 crisis inspires global tightening of Foreign Investment Screening: United kingdom", Nortonrose Fullbright, https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/ knowledge-pdfs/global-rules-on-foreign-direct-investment/global-rules-on-foreign-direct-investment---uk.pdf?la=en&revision=140fda80-0ed3-42d7-902f-eb48faeddaa0

[112] UNCTAD, *World Investment Report*, 2020. The full list of 3800 can be accessed from https://www.mof.go.jp/international_policy/gaitame_kawase/fdi/list.xlsx. There were qualified exemptions for foreign institutional investors.

[113] Kirsty Needham and Scott Murdoch, *Australia Shakes up Foreign Investment Laws for National Security*, Reuters June 5,2020, https://in.reuters.com/article/us-australia-investment/australia-shakes-up-foreign-investment-laws-for-national-security-idINKBN23C01J.

introduced new measures to manage national security risks in respect of telecommunications and power sectors. Not all the measures were taken in response to the pandemic as they had been in the making prior to its outbreak.[114] Restrictions on activities by state-controlled entities by the developed countries, though apparently are aimed at China, could be used against other developing countries too.

Developing Countries in a Bind

Developing countries seek FDI not only to supplement capital but also to benefit from the associated intangibles, especially advanced technologies. While freer FDI regime does not ensure transfer of technologies, especially to unaffiliated entities, the present international regime makes many performance requirements and channels of acquiring/developing technologies illegal. Given this scenario, by following a liberal FDI regime with no checks on cross-border M&As, if the developing countries continuously lose the strengths developed by internal efforts, they will remain perpetually dependent upon external sources. Though there have been persistent attempts to show that the long-term effects of greenfield and M&A type investments are the same, loss of technological base is more severe and direct in case of M&As. Even while asserting that 'it makes little economic sense' to differentiate between M&A and green field FDI, OECD admitted that "even if cross-border M&As are beneficial to the acquired enterprises, policy makers need to ask themselves whether the effects on the host economy as a whole are also positive."[115]

It is relevant to note the observations of the South Commission in 1990. The Commission clearly identified the problem of dependence on import of technologies from MNCs by private domestic enterprises in developing countries and the former's disregard for developing local technological capabilities. In doing so, the domestic enterprises did not promote local capabilities. This has in turn constrained their ability to identify suitable technologies and to negotiate proper terms and conditions for acquiring the same.[116] The efforts to term the measures adopted by host countries to minimize costs and maximize benefits from foreign investments as trade distorting was described as "a travesty of the facts", as it ignores MNCs' restrictive practices in trade and technology transfer.[117] It underlined that inclusion of trade related investment measures (TRIMS) in the Uruguay Round negotiations of GATT, as demanded by the developed countries, would "ultimately severely cramp the ability of the capital-importing countries to regulate such investment in accordance with their own national development priorities".[118] Importantly, Dr. Manmohan Singh, who was soon to spearhead India's liberalisation programme, and start

[114] OECD and UNCTAD, *Twenty-third Report on G20 Investment Measures*, (29 June, 2020) https://www.wto.org/english/news_e/news20_e/g20_oecd_unctad_report_jun20_e.pdf.

[115] OECD, *International Investment Perspectives 2007: Freedom of Investment in a Changing World*, p. 87

[116] South Commission, *Report of the South Commission: The Challenge to the South*, Oxford University Press 1990, p. 44.

[117] South Commission, *supra* note 116, p. 252.

[118] South Commission, *supra* note 116, p. 251.

withdrawing the performance requirements, was the Secretary General of the South Commission at that time.

As the Chairman of the South Commission put succinctly, the underlying approach of the report was that "responsibility for the development of the South lies in the South, and in the hands of the peoples of the South".[119] Given the current harsh realities wherein the entire South is unlikely to act together, the least individual developing countries needs to do is to be proactive rather than reactive and set up institutions and policies that serve their interest. Developing a technology base of their own, which does not happen overnight, and protecting it from foreign acquisitions should be an integral part of developing countries' approach towards FDI. Developing countries cannot be silent spectators if MNCs, instead of transferring technologies, take away the fruits of research conducted by domestic enterprises. Technology-based domestic enterprises, therefore, should be treated as strategic national assets and their cross-border acquisitions should be regulated strictly. Fortunately for them, the developed countries are showing the way. It is up to the developing countries to learn from them.

VI. A Few Lessons for India

The confidence expressed in the Industrial Policy Statement of 1991 that the Indian entrepreneur has "come of age so that he no longer needs such bureaucratic clearances of his commercial technology relationships with foreign technology suppliers" and the expectation regarding domestic industry's R&D-orientation have proven to be misplaced. The deeply prejudiced technocrats ensured that the protests of domestic enterprises did not hurt the reform process. Attempts were even made to justify the concessions given to MNCs through expatriate Indian economists.[120] Successive governments of various political combinations, instead of formulating a nuanced FDI policy, reduced it to a generalized one to attract capital. Full foreign ownership is permitted in mining, production of seeds and planting material, petroleum and natural gas, telecommunication services, aviation, satellites establishment and operation, broadcasting carriage services, credit information companies, the entire manufacturing sector including pharmaceuticals, medical devices, computers, and defence industries. As a result, a number of sectors that

---

[119] South Commission, *supra* note, 116, p. vii.

[120] Even while referring to the negative fallout on domestic enterprises Bhagwati and Srinivasan forcefully argued for creating an environment conducive for FDI. The responsibility for failure if any of the FDI in delivering the anticipated benefits was credited to the very policy framework which sought to prevent these ill effects of FDI. They emphasized that "a compromise in regard to the acceptance of intellectual property rights (however "unfair") as demanded by the United States and in fact by other OECD countries, should be treated simply as a (minor) cost of attracting DFI, for multinationals now treat the acceptance of such rules s an index of the seriousness of a country in attracting DFI". Jagdish Bhagwati, and T.N. Srinivasan, "India's Economic Reforms", Ministry of Finance, July 1993, p. iv. In his Preface to the publication, Dr. Manmohan Singh explained that he had invited these two scholars to study the ongoing reforms and suggest future action.

are seen as of strategic importance by developed countries, especially in the current context, are open for 100% FDI participation in India.

Importantly, many of India's leading credit rating agencies and credit information companies are American-controlled.[121] The listed Crisil, reported to be having 65% market share, is majority-owned by Standard & Poor (69.22%). ICRA, which is also listed, is a subsidiary of Moody's (51.86%). Both these were acquisitions. India Rating and Research Pvt. Ltd. is fully owned by Fitch. America's TransUnion International acquired 92.1% stake in the country's leading credit information service provider, namely Credit Information Bureau India Limited (CIBIL) in 2017.[122] Equifax Inc USA owns 59.4% share of Equifax Credit Information Services Pvt Ltd, Experian PLC UK holds 66.7% of Experian Credit Information Co of India Pvt Ltd, and CRIF SPA of Italy owns 72.1% of CRIF High Mark Credit Information Services Ltd. Dun & Bradstreet later joined as promoter of SME Rating Agency of India Ltd (now Acuite Ratings and Research Ltd), which was initially promoted by the Small Industries Development Bank of India, with 35.7% share. Thus, foreign companies are privy to the financial information on a vast number of business entities and individuals of India.[123]

The felt need to review the FDI policy had never been followed up even though it was mooted as far back as 2008 and reiterated in 2017.[124] Instead, piecemeal relaxation of FDI policy has been continuing. Even the recent efforts at tightening foreign investments to curb "opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic"[125] are aimed only at investments from neighboring countries (a thinly veiled attempt addressed at investments by Chinese entities). The policymakers seem to believe that opportunistic M&As by other countries are benign and those by China are harmful.

---

[121] It is reported to be "India's leading credit information company with one of the largest collections of consumer information". TransUnion Cibil, "About TransUnion Cibil", https://www.transunioncibil .com/about-us/about-transunion-cibil,

[122] CIBIL was originally promoted by State bank of India and HDFC Bank. Subsequently TransUnion and Dun & Bradstreet joined with 10% stake each. After successive changes in stakes, CIBIL ended up as a subsidiary of TransUnion International (92.1% share), the remaining is reportedly being held by financial services companies. Ostensibly RBI wanted the ownership of CIBIL to be broad-based "with no single entity owning more than 10% of the paid-up capital in the first stage, and 5 per cent thereafter". "SBI, HDFC Bank dilute their stake in Cibil", *Indian Express*, May 17, 2005. ISID PCA. One does not know when RBI relaxed the 10% rule.

[123] Cibil alone has "over 5,000 members–including all leading banks, financial institutions, non-banking financial companies and housing finance companies–and maintain credit records of over 1000 million individuals and businesses". TransUnion Cibil, *supra* note 118.

[124] FDI policy should be a nuanced one. Even a World Bank Paper told that: "Investment policy formulation requires a framework sophisticated enough to differentiate between the various kinds of foreign direct investment, as well as potential challenges and benefits for development". Roberto Echandi, Jana Krajcovicova and Christine Zhenwei Qiang, "The Impact of Investment Policy in a Changing Global Economy: A Review of the Literature", World Bank Policy Research Working Paper No. 7437, October 2015.

[125] DPIIT, *Press Note No. 3 (2020 Series),* April 17, 2020. People's Bank of China's acquisition of 1.01% stake in HDFC, India's leading housing finance company, has triggered this move.

Given its present position of not being able to access technology and not spending enough on R&D, technology-based domestic companies which are nurtured through liberal tax incentives are of immense strategic importance. Losing them to any country, let alone China will be a serious blow with long term adverse implications. When the European countries unhesitatingly address the issue of fire sale, India's approach aimed at only the neighbouring countries can at best be termed as feeble.

It has been almost two decades since FDI has been allowed to invest freely in the manufacturing sector. FDI acquired a prominent place in many technology-intensive industries, with M&As playing a major role. There is little scope for domestic leaders to emerge in such industries and *remain* domestically-owned. There have also been many problems associated with foreign manufacturing companies: weak local linkages, adverse effect on CAD, perpetual dependence on technology from parents, transfer of resources (in many forms) and relatively far less investment in manufacturing sector (and much less in new capacity creation).[126] At the general level, there has been high and persistent loss of foreign exchange due to disinvestment/repatriation.[127] FDI, which is sought to meet CAD, can, in fact, contribute to future deficits.[128] India cannot continue to rely on FDI to achieve the goal of creating an internationally competitive manufacturing sector. The observations of PMGR regarding spillovers from FDI are extremely relevant here.[129]

Over the years, India lost many (potential) leaders across the board through CBMAs. The situation did not improve even after the combination provisions under the Competition Act became operative. It is a wonder how the simple logic that high thresholds and exemptions would be taken advantage of not only by domestic companies but also by their more powerful MNC counterparts, has been missed all along. India's stand at the international fora that domestic and FDI companies cannot be treated similarly is quite at variance with its actions at home. Even when some CBMAs were examined by the Competition Commission, its narrow focus on competition has let it decide in favor of the foreign acquirers. Thus, even lower thresholds would not have helped in preventing CBMAs in the absence of a discriminatory approach. Just as they were found wanting in

---

[126] Speaking in the context of leaders of major countries stressing on nationalism and challenging the globalisation trend, Satya Nadella, CEO of Microsoft said that "[A]ny company that just collects rent internationally will be in trouble". "One just cannot set up shop and give nothing back, one has to create local opportunity". Companies must be able to show in terms of what they have done for countries "[I]n terms of local taxes, in terms of local small business productivity, local large business competitiveness, their educational outcomes, their entrepreneurial work, that's what matters". This only shows what should be done and what is mostly not being done. https://www.bloombergquint .com/business/multinationals-need-to-create-local-opportunities-microsofts-satya-nadella-says

[127] Average ratio of equity repatriations to equity inflows during 2018-19 and 2019-20 was 37.5%.

[128] This warning was issued by the RBI itself. Reserve Bank of India, *Annual Report 2016-17*, p. 62.

[129] "It is a fact that …spillover effects do take place but not only that such spill over takes long time for the benefits to percolate, …, it [also] ensures that the technology gap keeps widening. PMGR Report, p. 99.

the earlier regulated regime, the Indian policymakers also failed to extract the best for the country out of the policies of opening up.

The fact that there have been very few contested takeovers implies that conditions were missing for domestic entrepreneurs to remain in business and to scale up. CBMAs are only a symptom behind which there are many contributing related aspects like trade, finance, technology and entrepreneurial failure. Thus, restricting brownfield investments alone will not serve the purpose. Positive steps will have to be devised keeping the sectoral needs in focus to encourage domestic enterprises. The focus should, therefore, shift to better understand the constraints faced by the domestic industry. In the absence of leading Indian companies, promising start-ups cannot be prevented from selling off to MNCs. The approach has to be ccomprehensive and integrated. It is not enough to increase the spending on R&D. Private equity funding which has been a conduit for many CBMAs including niche and R&D-based companies should be substituted by long term stable domestic funding. The emphasis placed by France and Germany on the funding aspect cannot be lost sight of.

The merger policy cannot be nationality neutral. Cross-border acquisition of domestic companies should be treated separately. Instead of relying on the Competition Act, a new mechanism needs to be devised to prevent India from losing advantage in critical areas. A separate body should be set up to oversee FDI's operations including M&As. In fact, there was a move to bring in a National Security Exception Act (NSEA) in 2006, to review foreign investment-related security threats on the lines of CFIUS. It was reported to have been scuttled due to differences between the Ministries of Commerce and Industry and Finance on one hand and Ministry of Home Affairs and the National Security Council on the other.[130] Also relevant in this context is the suggestion of the PMGR for setting up a High Level Technical Committee which was, however, not followed up. It should be noted that some of the problems are associated with liberal FDI policies and are not specific to M&As.

Regarding competition, the Chinese approach of distinguishing between low technology mass consumption goods and technology-intensive and heavy investment sectors could provide a useful starting point. While the former would operate on market principles, with due regard to the interests of domestic MSMEs, large enterprise groups have to be 'cultivated', and organized and orderly competition has to be ensured in others.[131]

---

130 United States Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries,* February 2008.
The DIPP seems to have been the main spoilsport. Gaurav Malani, "New FDI Law under Consideration", *Economic Times*, November 28, 2006, https://economictimes.indiatimes.com/news/economy/policy/ new-fdi-law-under-consideration/articleshow/609042.cms?from=mdr

131 Examples listed in this regards were: auto industry, steel production, telecommunications, glass production, electronic and electrical products manufacturing, chemical industry, aerospace and aircraft manufacturing industry. Xinli Zheng, *China's 40 Years of Economic Reform and Development*, 2018, p. 387.

With inadequate expenditure on R&D and continuing lopsided JV arrangements, India cannot expect to build its technological strength. First and foremost the policy of allowing 100% FDI companies should be reviewed. This was one of the important recommendations of the PMGR. Indeed, it has been found that

> When MNCs established their presence in the host country with their own wholly foreign-owned subsidiaries, there were fewer and less complete transfers.[132]

Lastly, in order to bring in fundamental change in India's approach, there is a need to rely less on the present set of apex chambers and global consultants. The industry bodies are not in a position to project and promote the interests of domestic industry as many of them have sizable number of MNC members and they also rely on global consultants. This is all the more important because the government involves these chambers more intently than their smaller and regional counterparts. The policymakers should strengthen the feedback mechanism by tapping a wider set of enterprises and fostering bodies which are predominantly domestic enterprise-based and itself relying less on the same set of global consultants for analysis and advice. India has also to think about the present "bureaucrats everywhere" practice. The billion dollar question is whether the Indian policymakers are ready to take up the challenge of bringing in the much-needed fundamental change in the approach towards policymaking in general and FDI in particular of which CBMAs are only one part.

---

[132] Gregory T. Chin, *China's Automotive Modernization: The Party, State and Multinational Corporations*, 2010, p. 234.

List of ISID Working Papers

225 Liberalisation, Structural Change and Productivity Growth in Indian Organised Manufacturing Sector, *R. Rijesh*, May 2020

224 Foreign Direct Investment and Innovation activities in Indian Manufacturing Industries, *Sanjaya Kumar Malik*, April 2020

223 Is Domestic Value Addition a Source of Export Sophistication? A Case Study India, *Anjali Tandon,* April 2020

222 Occupational and Employment Mobility among Migrant Workers: A Case Study of Slums of NCT of Delhi, *Ajit Kumar Jha & Arvind Pandey*, March 2020

220 Special Economic Zones: Location and Land Utilisation, Surya Tewari, March 2020

220 Import Intensity of India's Manufactured Exports – An Industry Level Analysis, *Mahua Paul & Ramaa Arun Kumar*, February 2020

219 Industrial Structure, Financial Liberalisation and Industrial Finance in India, *Santosh Kumar Das*, January 2020

218 India and Industry 4.0, *T.P. Bhat*, January 2020

217 Review of Industrial and Development Corridors in India, *H. Ramachandran*, December 2019

216 Economic Reforms and Market Competition in India: An Assessment, *Beena Saraswathy*, December 2019

215 Financial Risk Protection from Government-Funded Health Insurance Schemes in India, *Shailender Kumar*, November 2019

214 Outward FDI from India: Review of Policy and Emerging Trends, *Reji K. Joseph*, November 2019

213 Structural Asymmetry in Global Production Network: An Empirical Exploration, *Satyaki Roy*, October 2019

212 Assessing Factor Proportions in Tradable Sectors of the Indian Economy, *Anjali Tandon*, October 2019

211 Promoting Access to Healthcare in India: Role of Health Insurance and Hospital Network, *Shailender Kumar*, August 2019

210 Voyeurism, Misogyny and Objectification of Women: Critical Appraisal of the Historicity of the State of Women in Society and its possible impact on advertising, *Jaishri Jethwaney*, August 2019

209 FDI in R&D in India: An Analysis of Recent Trends, *Reji K. Joseph, Biswajit Dhar, Akoijam Amitkumar Singh*, June 2019

* Most of the working papers are downloadable from the institute's website: http://isidev.nic.in/ or http://isid.org.in/

About the Institute

The Institute for Studies in Industrial Development (ISID), successor to the Corporate Studies Group (CSG), is a national-level policy research organization in the public domain and is affiliated to the Indian Council of Social Science Research (ICSSR). Developing on the initial strength of studying India's industrial regulations, ISID has gained varied expertise in the analysis of the issues thrown up by the changing policy environment. The Institute's research and academic activities are organized under the following broad thematic areas:

Industrialization: Industrial policy, manufacturing sector, MSMEs, technology development, production networks, industrial clusters/corridors, SEZs, land acquisition, natural resources, regional development, entrepreneurship, sustainability, etc.

Internationalization: Cross-border flows of capital flows, FDI, technology transfer, IPRs, balance of payments, trade and investment agreements, etc.

Corporate Sector: Ownership and control, finance and governance, financial institutions, company law, securities legislation, regulatory bodies, M&As, business groups, public enterprises, public-private partnership, business ethics, CSR, etc.

Labour and Employment: Employment growth and structural transformation; labour force; skill development; quality of employment, labour flexibility; differentiations and disparities; informal sector and un-organised workers; etc.

Public Health: Social, cultural and economic determinants of health; structure of health systems; research and capacity building in the areas of pharmaceuticals, medical devices and healthcare sectors; IPRs and other areas of industry-health interface, etc.

Media & Communication: Studies in the area of media, communication and advertising.

ISID has being maintaining databases on corporate and industrial sectors in particular and other areas of developmental and social and economic issues in general. Its Online Reference Services includes On-Line Index (OLI) of 252 Indian Social Science Journals as well as 18 Daily English Newspapers Press Clippings Archive on diverse social science subjects which are widely acclaimed as valuable sources of information for researchers studying India's socio-economic development.

ISID

Institute for Studies in Industrial Development

4, Institutional Area, Vasant Kunj Phase II, New Delhi - 110 070

Phone: +91 11 2676 4600 / 2689 1111; Fax: +91 11 2612 2448

E-mail: info@isid.org.in; Website: http://isid.org.in