

Doing Business in India - a Legal Perspective



I Introduction & General Overview

II Entry of Firms and Strategy

III Regulations - Automatic Routes/ Sectoral Caps/Prohibited Areas

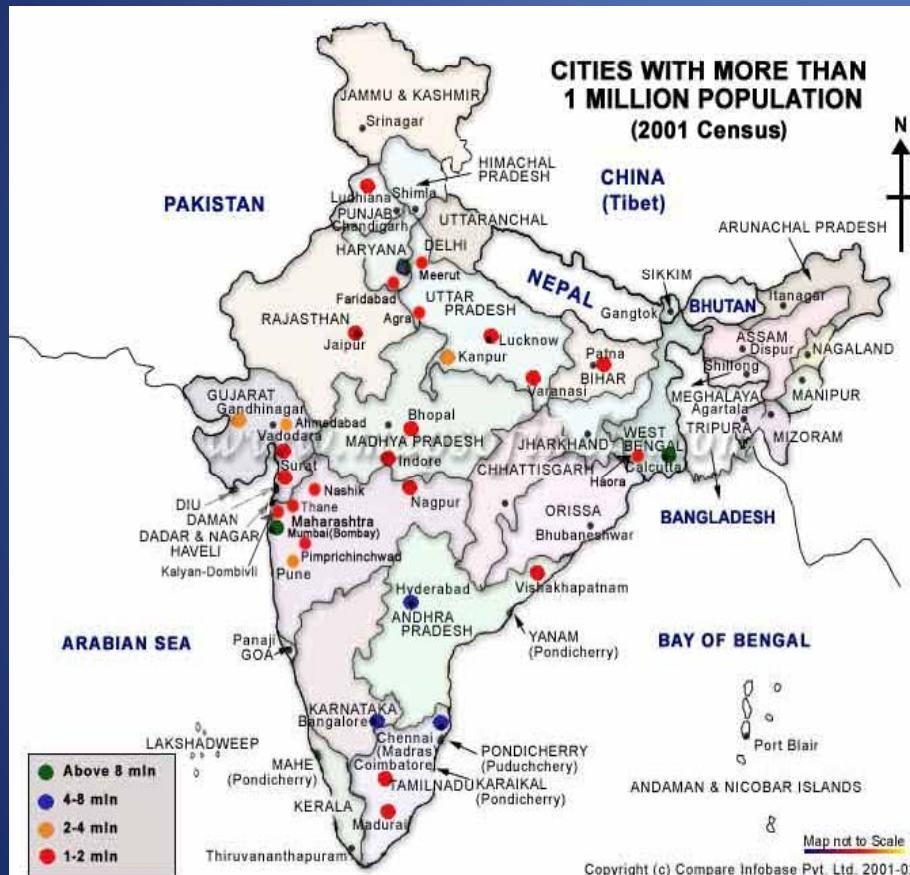
IV Agreements ; Negotiating Foreign Technology Agreements

V Funding, location, fiscal, Indian partner, recruiting talent, IPR, exit route, dispute resolution etc



- i. Land Area, Population, Major Cities, Demographic trends & Ports
- ii. General Comments , briefly
- iii. Regulatory





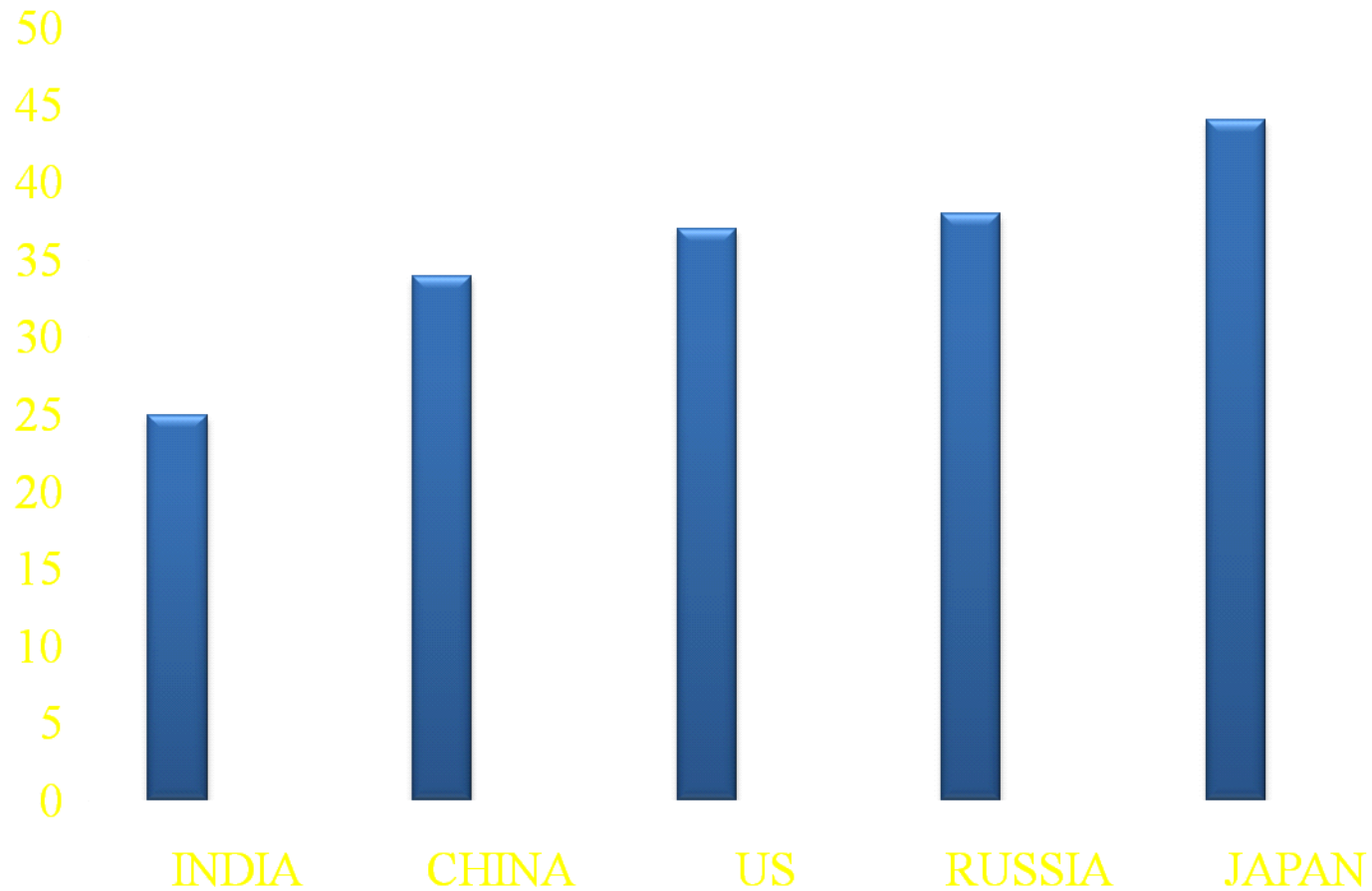
3.3 m sqKm

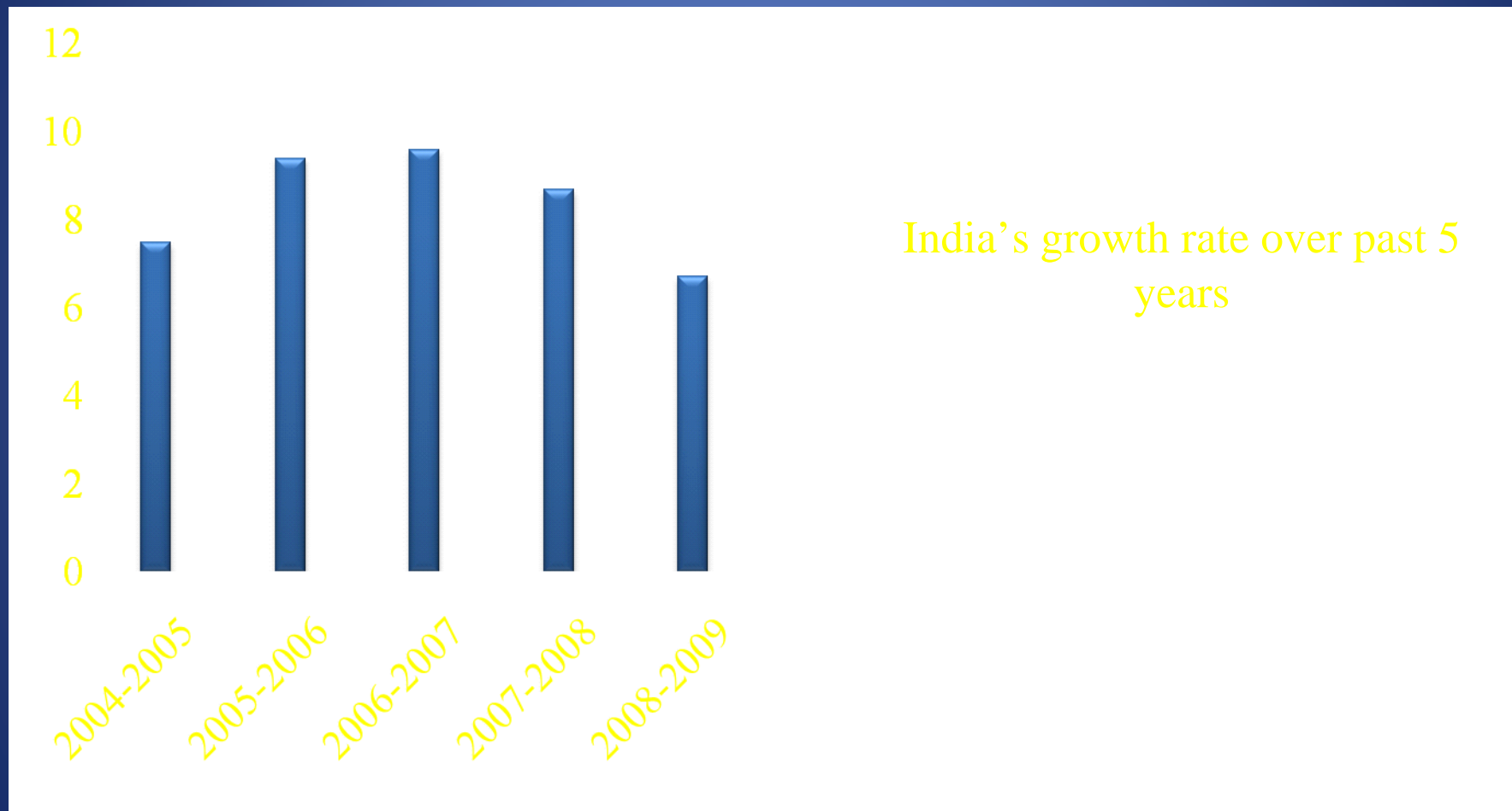
1.15 b. as in 08. Growing
@ 1.548% as on 08

0.5 b Labour force

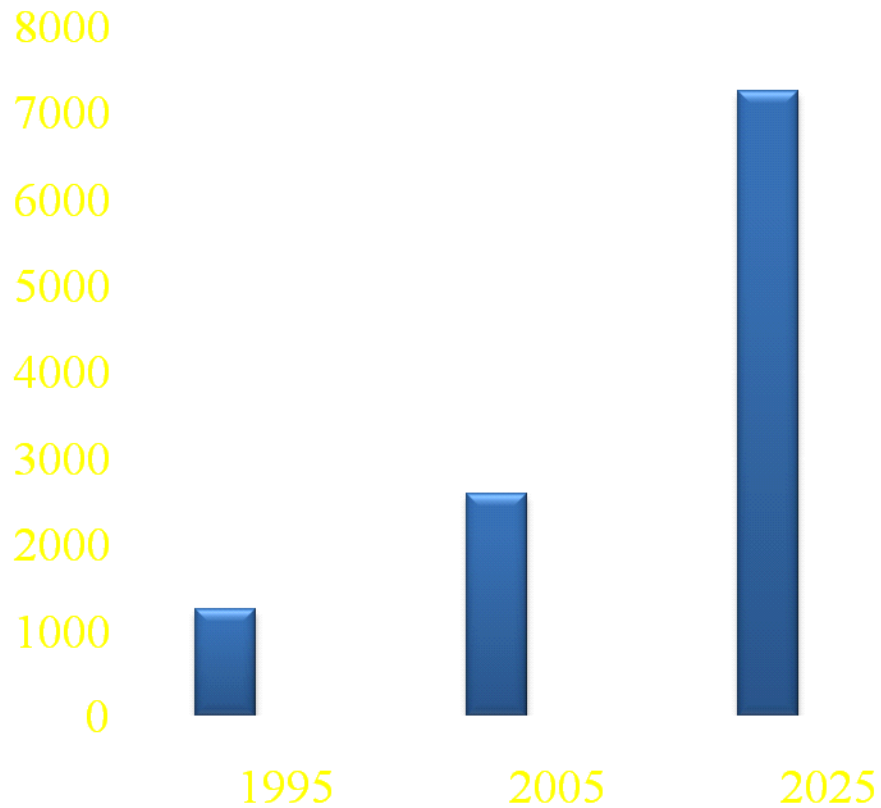
Federal system but, Centre
more powerful







Average Household Disposable Incomes (in USD)



Negatives ?

Positives ?



- Red Tape / Corruption
- Infrastructure
- Necessity to train workers



- Economic reforms started in 1991
- Stable democratic environment/Freedom of Press/Judicial independence & Rule of law
- Growing consumer classes (250 – 300 m. est.)
- Untapped natural resources
- Competitive wages
- Controlled inflation
- Tax incentives (SEZ, EOU, STP etc)
- Top 3 FDI destination (after US & China)



- Liberal foreign investment policies since 1991
- Shift from stringent to liberal – FERA to FEMA
- Fiscal incentives
- Well regulated capital markets and financial services sector
- Trade reforms
 - Export Import policy
 - Rationalization of tax structure
- Emphasis on corporate governance



- i Business Organisations – options
- ii Joint Venture /Wholly Owned Subsidiary
- iii Major Regulations



- Liaison/Representative Office
- Branch Office
- Project Office
- Joint Ventures
- Wholly Owned Subsidiary



- RBI permission necessary
- Permitted activities:
 - Representing the parent company/group
 - Promoting export import
 - Promoting technical/financial collaborations
 - Communication channel



- RBI permission necessary
- Permitted activities:
 - buying /selling agents
 - research
 - export and import activities
 - professional /consultancy services
 - technical and/or financial collaboration between Indian companies and overseas companies



- Permission of RBI required
- branch office for the purpose of executing a project, usually turnkey construction/ installation
- cannot undertake any other activities than those incidental to execution of the project



- Involves another party – Indian or foreign- Implications ?
- financial participation in equity or otherwise, involvement in policy, direction, management, marketing and control.
- JV Agreement will therefore cover:
 - Equity, Initial change, transfer and other funding
 - Control and Board of Directors and casting vote
 - Funding options,
 - Appointment of CEO and other Senior Executives
 - Markets in India & access
 - Intellectual Property Rights
 - Non-compete
 - Obligation of Parties
 - Royalties
 - Exit
 - Dispute Resolution including deadlock provisions



- Only in sectors where 100% FDI permitted
- Information to RBI necessary – no advance permission required
- Local Directors not essential but usual



M & A

- Indian Companies Act 1956
- Foreign Exchange Management Act 1999
- Substantial Acquisition of Shares and Take Over Code by Securities and Exchange Board of India (SEBI)
- Income Tax Act 1961
- Sick Industrial Companies (Special Provisions) Act 1985
- Competition Act, 2002



18 of 1998

1 & 3 of 2005

2,3 & 4 of 2009

Issued by Department of Industrial Policy and Promotion under Ministry of Commerce & Industry



- (i) If an Existing Venture (technical/equity) in same class – (January 12, 2005)
- (ii) FIPB approval

FIPB approval not required if:

- Investment by Venture Capital fund
- Existing JV < 3% investment by either party
- Existing JV / collaboration is defunct or sick



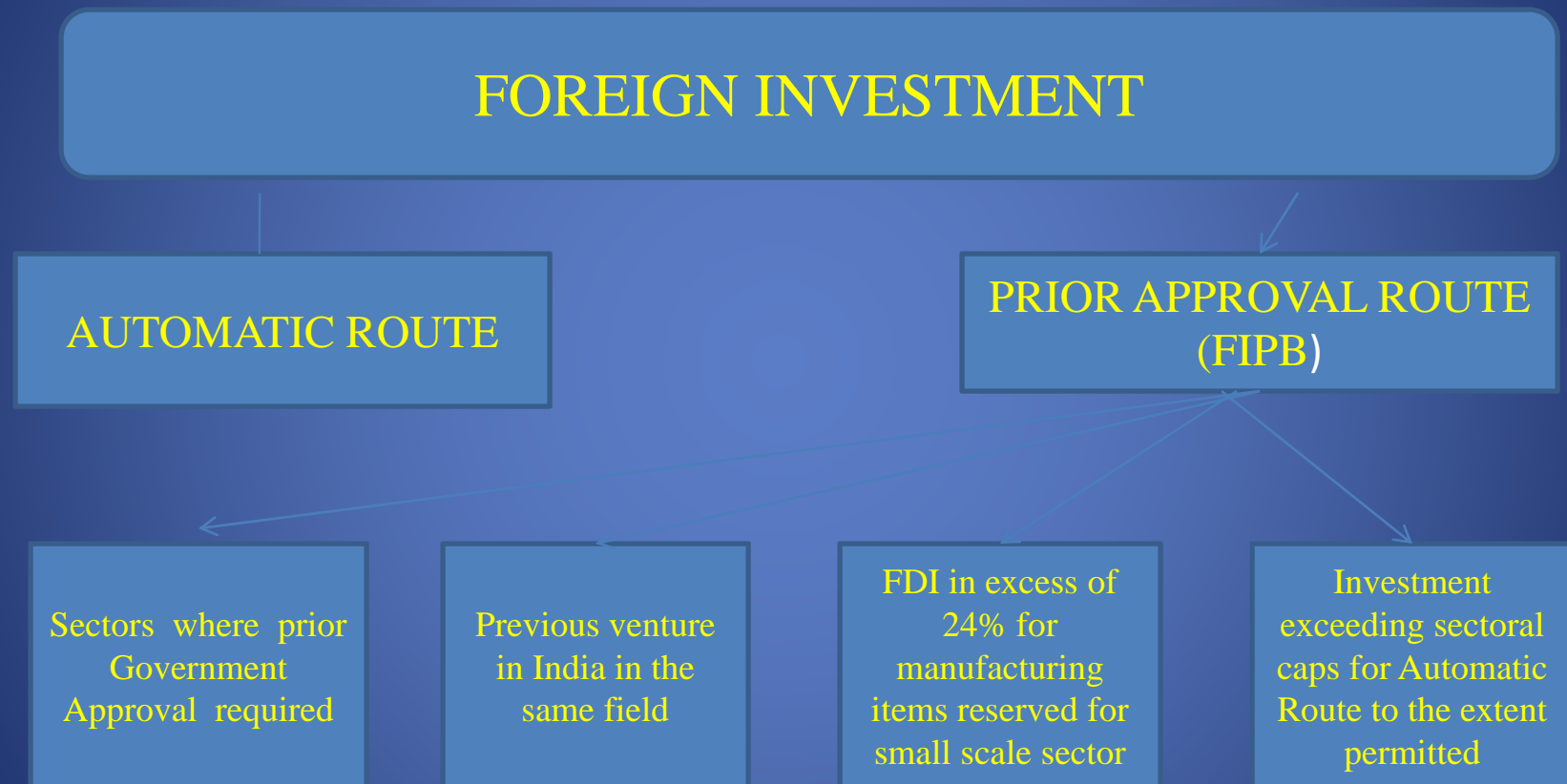
Total Foreign investment – How calculated

- Direct investment – all foreign investment
- Indirect investment – investment in Indian company through investing Indian company which are owned &/or controlled by non – resident
- owned and controlled



1. Automatic Route/Approval Route
2. Sectoral Caps
3. Prohibited Sectors





- FDI in sectors/activities under automatic route do not require a prior approval. Only an intimation to the Reserve Bank of India required within 30 days of inward remittances or issue of shares to foreign investors.
- Institutional investors like FIIs & Venture Capital Fund can make investments in India for themselves and Sub Account holders.
- FDI in other sectors require permission from the Foreign Investment Promotion Board (FIPB). see Form FC/IL.



III

FDI with Approval from Foreign Investment Promotion Board	FDI without Approval from Foreign Investment Promotion Board
<p>(i) 100%:</p> <ul style="list-style-type: none"> ▪Cigar And Cigarette Manufacturing ▪Courier Services Other Than Those Under the Ambit of Indian Post Office Act, 1898 ▪Tea Sector – Including Tea Plantation ▪Trading Items Sourced From Small Scale Sector ▪Test Marketing For Equipment for which company has approval for manufacturer ▪Publishing Of Scientific Magazines ▪ISP without Gateway (Specified) 49% To 100% ▪Small Scale Industries from 74% To 100% 	<p>(i) 100% :</p> <ul style="list-style-type: none"> ▪Airports Greenfield Project ▪Air Transport Services for Non Resident Indians . ▪Alcohol Distillation And Brewing ▪Coal And Lignite Mining (Specified) ▪Coffee, Rubber Processing ▪Warehousing Construction & Development (Specified) ▪Floriculture, horticulture, Animal Husbandry ▪Specified Hazardous Chemicals ▪Industrial Explosives Manufacturing ▪Mining (Diamonds, Precious Metals) ▪Non Banking Finance Companies (Conditional) ▪Manufacture Of Telecom Equipment



III

<p>(ii) 74%:</p> <ul style="list-style-type: none"> ▪ Atomic Minerals ▪ Satellite Establishment And Operation ▪ Telecommunication: Basic & Unified Access Services 49% To 74% ▪ ISP with Gateways, Radio Paging, ▪ End To End Bandwidth 49% To 74% 	<p>(ii) 74%:</p> <ul style="list-style-type: none"> ▪ Airports Existing ▪ Banking (Private Sector)
<p>(iii) 49%:</p> <ul style="list-style-type: none"> ▪ Asset Construction Companies ▪ Cable Network ▪ Direct-to-home (DTH) ▪ Setting Up Hardware Facilities ▪ Investment Companies In Infrastructure/ Service Sector (Except Telecom) 	<p>(iii) 49%:</p> <ul style="list-style-type: none"> ▪ Air Transport Services Other Residents ▪ Telecommunication Basic And Cellular Services ▪ ISP with Gateways, Radio Paging, End To End Bandwidth ▪ ISP without Gateway (Specified)
<p>(iv) Others:</p> <ul style="list-style-type: none"> ▪ Fm Radio: 20% ▪ Up-linking News And Current Affairs: 26% ▪ Petroleum And Natural Gas Refining (PSU) : 26% ▪ Single Brand Product Retailing : 51 % ▪ Newspapers And Periodicals : 26 	<p>(iv) Others:</p> <ul style="list-style-type: none"> ▪ Insurance 26 %



- Automobile & Components
- Banking & Financial Services
- Infrastructure
- IT – ITeS
- Media & Entertainment
- Healthcare, Pharmaceuticals & Biotechnology
- Retail
- Travel & Tourism

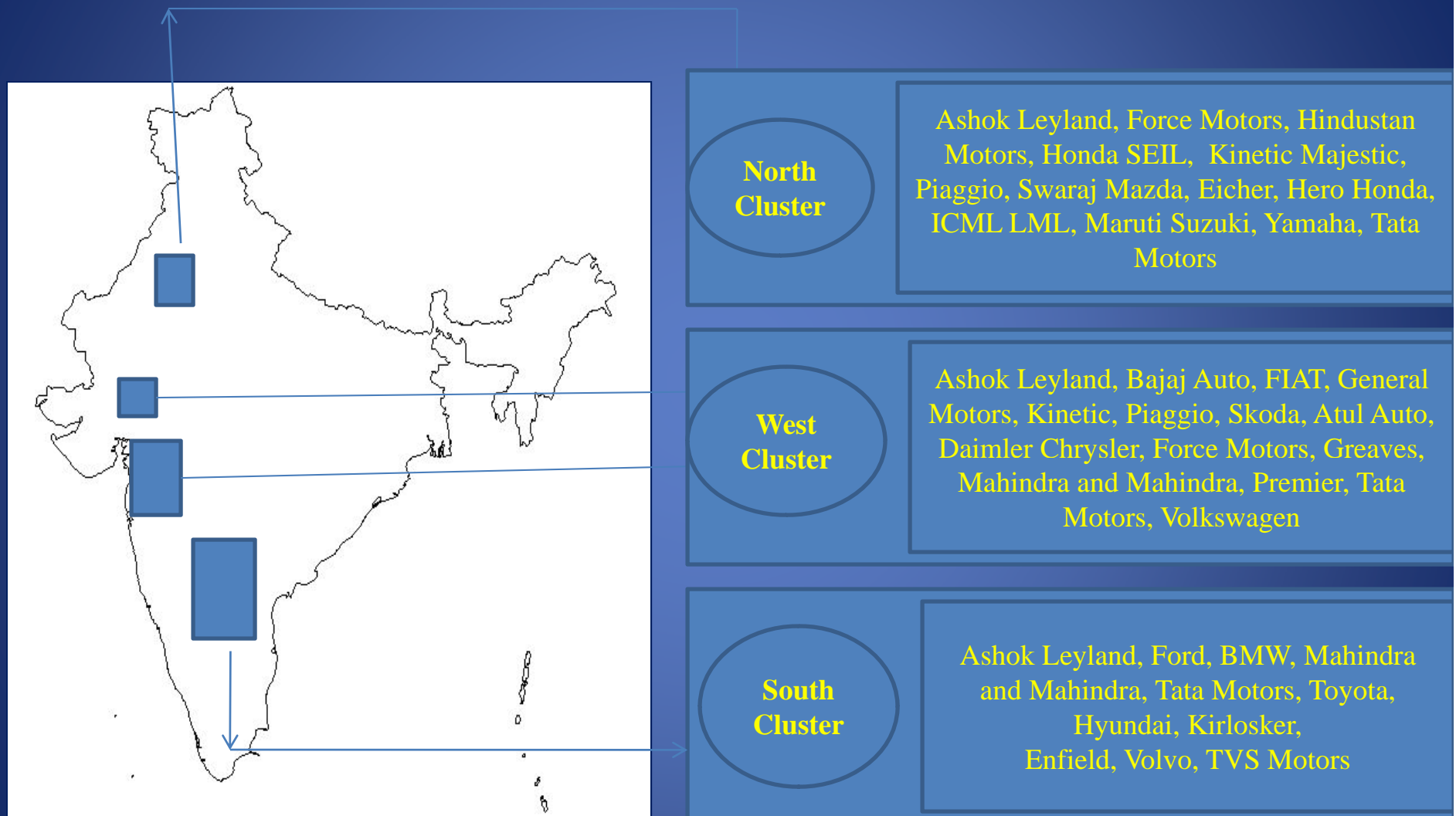


- Metal & Mining
- Public Private Partnership
- Oil & Gas
- Power
- Real Estate
- Telecom
- SEZ/ Export Oriented Units/ Food Processing
- Civil Aviation



- FDI inflow for the period 2000-09 - USD 3.36 b
- 100% FDI under automatic route
- Largest motorcycle manufacturer in the world
- Global hub for small and compact car manufacturers
- No minimum investment criteria
- Investment incentives provided by state governments on large investments
- Weighted Tax Deduction up to 150% for in-house research & R&D activities
- 5th largest bus & truck market in the world
- 11th largest car market in the world





Size of the Industry (2008)

Banking	USD 1081b
Insurance	Life = USD48.6b Non life = USD 8.7b



(i) Banking

- FDI up to 74% (FDI+FII) on automatic route within this limit, FII Investment not to exceed 49%
- Foreign banks permitted to set up wholly owned subsidiaries in India (can set up 20 branches in a year against earlier limit of 15)
- Basel II compliant
- Low NPA -- large opportunity



(ii) Insurance

- Sector with vigorous growth(33% pa)
- Several Joint Ventures Announced.
- Current FDI limit 26%, likely to increase to 49%.
- In recent WTO negotiations, India has offered up to 51 per cent foreign investment in insurance auxiliary services



(iii) Non-Banking Financial Institutions

- FDI up to 100% on an automatic route. Reserve Bank of India Act, 1934 defines a non banking financial company
- FDI/NRI investments allowed in the 18 NBFC activities as per levels indicated.



(iv) Capital Markets

- Booming capital markets
- Regulated by the by the Securities and Exchange Board of India (SEBI) since 1992



(v) Venture Capital Funds

- Automatic route is not available. A registered Foreign Venture Capital Investor (FVCI) may invest in Indian Venture Capital Undertakings (IVCU) or in a VCF after approval from RBI.
- Offshore venture capital company may contribute upto 100% of the capital of a domestic venture capital fund and may also set up a domestic asset management company to manage the fund.
- Investment in a single company by a VCF/VCC shall not exceed 5% of the paid-up corpus of a domestic VCF/VCC.
- Automatic/Approval Route, Sectoral Caps, Government Regulations



Emerging Trends (Infrastructure Investment XIth plan)

Sector	Investment (USD b)
Power	105
Roads and Bridges	76
Telecommunication	65
Railways	63
Irrigation	55
Water supply & sanitation	49
Ports	18
Airports	8
Storage	5
Gas	5



Opportunities

- NHAI to award 53 road projects with project cost - USD 12 m
- 35 Non – Metro airports to be modernized
- Metro rail projects, monorail planned in some cities

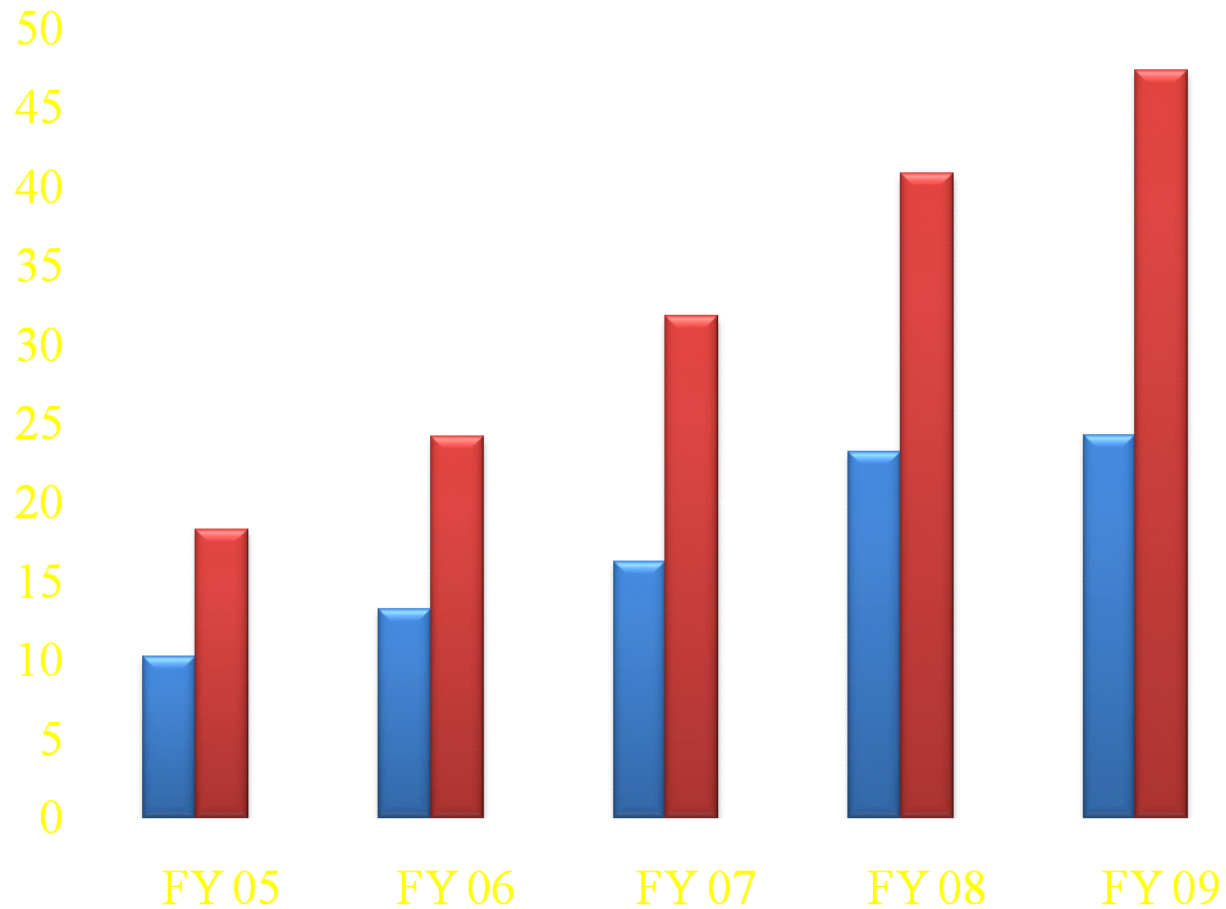
Challenges

- Long gap between announcement & awarding projects
- Obtaining approvals & clearances cumbersome & time consuming
- Land acquisition issues
- Stiff competition in road sector



Size of the Industry	USD 64 b
Estimated growth rate 2007 - 2008	34 %
Expected growth rate 2008 - 2013	16.4%
Expected industry size 2013	USD 137b
Key players	TCS, Wipro, Infosys Technology, IBM, Cognizant, Accenture, Tech Mahindra, HCL Technologies Microsoft, DEL , Patni Computers





Size of the industry (2009)	USD 17.1b
Growth	12.4%
Expected growth rate 2009 - 2013	12.5%
Number of Television Households (2008)	USD21 b
Number of films released	Over 1000 films every year
Newspaper published	Over 60000 newspapers in 22 languages
Number of radio stations	Over 205
Key players	Zee Entertainment Enterprise, Sun TV Network, UTV Software Communication, Bennet Coleman & Co. HT Media, Adlabs Films, Crest Animation, PVR



Regulations

Television

FDI – 100%; Cable network & DTH players 49%

Films

FDI – 100%

Print

FDI – 100%



Industry	Size of Industry	Expected Growth	Expected size 2013
Pharma	17b	18% (08- 13)	37b
Healthcare	36b	12% (08-12)	65b
Biotechnology	2.5b	31% (08 – 15)	13 – 16b



Regulations & Government Incentives

- 5 year tax holiday for hospitals set up in Tier II & III cities between April 2008 & March 2013
- Tax deduction 150% on R&D spent
- Exemption – clinical trials from service tax



- Cash & Carry – 100% FDI
- Penetration of private labels are also on the rise
- Retail franchising has been growing @60% for the last 3 years
- FDI in single brand retail 51% - highly debated issue



Size	USD 28b
Expected Size 2018	USD 60b
Foreign Visitor spend	USD 19b.
Global ranking	One of top 5 holiday destinations



- (i) Industry Size (2006) – USD 43b
- (ii) FDI
 - Exploration and mining of diamonds– 100%
 - Exploration and mining of gold & silver – 100%
 - Setting up of coal processing plant – 100%
- (iii) Regulatory approval for mining projects takes
3 – 7 yrs
- (iv) Delay in land acquisition



- Over the past 3 – 4 years – government plays the role of regulator and private participator invests in the build out of infrastructure
- Share of private investment in the total estimated investment on infrastructure developments – 25%



- 15 % of Indian GDP
- Contributes 45% of energy needs
- 100% foreign participation



- Installed capacity – 145,000 mw
- FDI – 100% automatic
- Prominent National players – NTPC, Powergrid,
- Foreign Players - ABB, Alstom, Areva T & D, GMR, Adani
- Opportunities in:
 - generation
 - coal based plants, particularly
 - natural gas
 - untapped hydropower
 - renovation & modernization



- Sector size: 5% gdp (\$ 57 billion) [expected to double in 3 years].
- 100% Foreign Direct Investment, automatic including townships, hotels and SEZs.
- 100% tax exemption in SEZs, Industrial Parks and hotels

Opportunities

Rising population; therefore opportunities residential, commercial, retail and SEZ sector.



- 74% Foreign Direct Investment permitted. Automatic up to 49%
- Current Subscriber base : 348 million.
- Growth rate 18% (slightly behind China and Russia).
- Foreign Players: Vodafone, Flextronics, Nokia, Motorola, Samsung, Alcatel-Lucent, Virgin.

Opportunities

755,000 towers needed by next year, global telecom manufacturers have their bases in India.



- SEZs
- Export Oriented Units (EOU)
- Food Processing
- In-house Research and Development
- Infrastructure
- Power Projects
- Transfer Pricing



(i) Units in SEZs:

Tax deductions:

100% for the first 5 years.

50% for the next 5 years.

50% for the next 5 years (subject to conditions for creation of specified reserves).

(ii) SEZ Developers:

100% tax holiday on profit in developing SEZ for 10 consecutive years out of which 15 years has been extended to undertakings involved in developing SEZ's notified on or after 1 April, 2005.

(iii) Offshore Banking Units:

Tax holiday :100% and 50 % for first 5 Years, and for next 5 consecutive years respectively.



- Tax deductions of 100% on profits from exports for 10 consecutive years from the year of manufacture but only upto 31st March next year- expected to be extended
- 10 years tax holiday in a block of 20 years – Roads, rails, bridges, water treatment, irrigation, sewerage etc.
- 10 years tax holiday in a block of 15 years – developing, operating and maintaining ports, airports etc.



Food Processing

- 100% tax holiday for first 5 Years.
- 30% tax holiday for the next 5 Years.

In – House R&D

- 1 ½ times of Scientific Research expenditure excluding the cost of land & building
- Deduction available on expenditure incurred up to March 2012



- Generation, distribution, transmission – 10 years in a block of 15 years including renovation if more than 5% - hospitals, hotels, convention 100% tax holiday for first 5 years.
- 10 years tax holiday in a block of 20 years – Roads, rails, bridges, water treatment, irrigation, sewerage etc.
- 10 years tax holiday in a block of 15 years – developing, operating and maintaining ports, airports etc.



- Section 92 – price of any transaction between associated enterprises either or both of whom are non residents shall be arms length

Similar to OECD guidelines except:

- Wider definition of the term associated enterprise
- Concept of arithmetical mean opposed to internationally followed statistical measures of median/ arm's length price



FDI inflow for the year 2000-09 - USD 219.23 m

(i) Airports

- Greenfield projects - 100% Automatic.
- Existing projects – 74% Automatic; Beyond this approval necessary.

(ii) Air Transport Services

Scheduled - 49%- FDI; 100% - for NRIs. No participation by Foreign Airlines direct or Indirect.



- Retail Trading (other than single brand),
- Real Estate - trading
- Atomic Energy,
- Lottery, Gambling and Betting



Foreign Technology Agreements

- Royalty payment, Technical know-how;
- Lump sum not to exceed US\$2 million;
- Royalty on domestic sales not to exceed 5%;
- Royalty on exports does not to exceed 8%.



Regulations

- Corporate
- Labour Law
- Tax
- Finance
- Intellectual Property
- Competition
- Consumer Protection
- Finding a Partner
- Dispute Resolution
- Exit Route



(i) Governing Laws - mainly

- Companies Act 1956
- Securities and Exchange Board of India Act 1992
- Securities Contracts (Regulation) Act 1956

(ii) Company Registration

- In broadly two types - private and public.
- Private Company usually chosen: lesser regulatory requirements and greater flexibility, but there are restrictions on the number of shareholders and offering of shares to public.



- can be formed with two shareholders.
- Steps for incorporation of a Private Limited Company briefly
- Post incorporation steps.

(iii) Corporate Governance

Clause 49 of the Listing Agreements with Stock Exchanges as prescribed by the Securities and Exchange Board of India seeks to ensure good corporate governance.



- Industrial Disputes Act 1947
- Factories Act 1948
- Minimum Wages Act 1948
- Workmen's Compensation Act 1923
- Payment of Wages Act 1936
- Payment of Bonus Act 1965
- Payment of Gratuity Act 1972
- Employees Provident Fund and Miscellaneous Provisions 1952
- Maternity Benefit Act 1961



(i) Income Tax

- Tax Incidence
- Corporate
- Individual
- Tax Incentives
- Rates of Taxes
- Advance Ruling for the benefit of Non-residents
- Withholding Tax



(ii) Service Tax

- Introduced in 1994. At present service tax is levied on more than 100 services including telecom, insurance, brokerage and banking. New services are being added to the list by each successive Finance Act .
- Taxable Services
- Service tax is levied @ 10.3 %



(iii) Excise Duty

Excise duty is levied on the “manufacturer” or producer of dutiable goods. For ease of collection, duty is paid at the time of removal of goods from the point of manufacture .



(iv) Customs Duty

- Customs duty is levied on almost all imports into India and is payable upon goods being cleared in.
- Countervailing duty is also levied on imported goods.
- For the protection of domestic industries, the authorities may also levy protective and anti-dumping duties.

(v) Sales Tax & VAT

- Besides the Central Government, various State Governments also impose a tax on sales within their respective states. Such local sales tax varies from state to state.



(vi) Transaction Tax

- Securities Transaction Tax (“STT”) is levied on equity shares, derivatives, units traded on recognised stock exchanges and on units of equity oriented mutual funds.
- The STT is applicable at different rates on the value of the taxable securities transaction and is payable by the buyer and seller of the securities.



- i. Foreign Exchange
- ii. Raising Finance



(i) Foreign Exchange

- Foreign Exchange Management Act 1999
- Prior approval requirements
- Repatriation and Remittance Facilities
- Repatriation of Capital Invested in India
- Remittance by Individual Foreigners
- Receipt of Funds from Abroad



ii Raising Finance

- Raising Funds through Stock Markets
- Foreign Institutional Investors
- Foreign Portfolio Investment
- GDRs/ADRs/FCCBs
- ECBs



Raising funds through Stock Markets

- 1855 Asia's first stock exchange established in India.
- India second highest intensity of trading in Asia.
- Investor population more than 20 m.
- The combined average daily turnover of the major stock exchanges is US\$48 b
- Securities Contracts (Regulation) Act 1956



Foreign Institutional Investors (FIIs)

- FIIs must seek permission of SEBI to make investments for themselves & for their sub-accounts
- FIIs net investments crossed US\$ 2 b in 09
- FII registrations up 25%, 45 FIIs registered with SEBI – majority of these are from USA



Foreign Portfolio Investment

- FIIs registered with SEBI and Non-Resident Indians eligible to purchase the shares and convertible debentures under the Portfolio Investment Scheme.
- FIIs can invest up to individual ceiling of 10 percent, and an overall ceiling of 24 percent, of the share capital of an Indian company,
- Only after SEBI registration and RBI permission.
- Indian company can, with approval of shareholders, enhance the overall limit to the sectoral caps.



GDRs/ADRs/FCCBs

- Foreign Investment through GDRs/ADRs, Foreign Currency Convertible Bonds (FCCBs) treated as Foreign Direct Investment.
- Indian companies allowed to raise equity capital in international market through the issue of GDR/ADRs/FCCBs.
- No restriction on the number of GDRs/ADRs/FCCBs to be floated by a company or a group of companies in a financial year.
- No end-use restrictions on GDR/ADR issue proceeds, except for an express ban on investment in real estate and stock markets.



ECBs

- ECBs include commercial bank loans, buyers' credit, suppliers' credit, securities instruments viz. Floating Rate Notes, Fixed Rate Bonds etc.,
- ECBs can be raised from recognized international banks, international capital markets, multilateral financial institutions, export credit agencies, foreign collaborators and foreign equity holders.
- RBI has issued Guidelines on Policies and Procedures for External Commercial Borrowings



Intellectual Property Laws

- Trademarks
- Patents
- Copyrights
- Industrial Designs
- Geographical Indications
- Semiconductor Layout

Protection of Intellectual Property



- Monopolies and Restrictive Trade Practices Act 1969
- Competition Act 2002



Consumer Protection Act 1986

This Act provides for the better protection of the interests of consumers and makes provision for establishment of consumer councils and other authorities for the settlement of consumer disputes and matters connected therewith.



- gauge your prospective partner's ability, keenness, preparedness & SWOT
- access to cutting edge technology
- better brand value
- good marketing chain
- ability to work the system
- owner and the senior management careful assessment



- Stake sale/Asset sale
- Winding Up



- i. Litigation
- ii. Alternate Dispute Resolution Mechanisms
- iii. Enforcement of Foreign Judgments and Awards



i. Litigation

- India's independent judicial system began under the British, and its concepts and procedures resemble those of Anglo-Saxon countries
- India has a well-developed and organised judiciary, with a three-tier court system-the Supreme Court of India, the various High Courts and the subordinate judiciary
- There are a number of Tribunals, which decide disputes in particular industry segments



ii Alternate Dispute Resolution Mechanisms

- In India arbitration is as old as the village panchayats. Since the nineteenth century, legislation has provided a formal method for dispute resolution by arbitration
- The first enactment in India on arbitration was the Arbitration and Conciliation Act 1940
- Arbitration and Conciliation Act 1996 is based on the UNCITRAL model. It provides for domestic and international arbitration and makes rules for the expeditious enforcement of foreign awards



iii. Enforcement of Foreign Judgments and Awards

- As per the Civil Procedure Code 1908, in certain cases a foreign decree can be executed in India directly as if it had been passed by an Indian court
- Foreign arbitration awards are enforceable as decrees of Indian courts



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