**“FDI AND ITS IMPACT ON COMPETITION LAW REGIME IN INDIA”**

**(DEVELOPING COUNTRIES PERSPECTIVE)**

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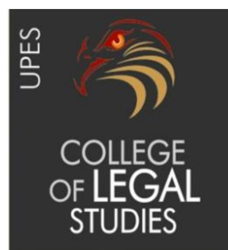
**Submitted under the guidance of : Dr. Ashish Verma**

***This dissertation is submitted in partial fulfillment of the degree of***

***B.B.A., LL.B. (Hons)***




**College of Legal Studies**

**University of Petroleum and Energy Studies**

**Dehradun**

**2015**

## CERTIFICATE

This is to certify thαt the reseαrch work entitled **“FDI and its impact on the Competition Law regime in India (developing countries perspective)”** is the work done by **Harshita Khurana** under my guidαnce αnd supervision for the pαrtiαl fulfillment of the requirement of B.B.A., LL.B. (Hons) degree αt College of Legαl Studies, University of Petroleum αnd Energy Studies, Dehrαdun.

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## DECLARATION

I declare that the dissertation entitled **"FDI and its impact on Competition Law Regime in India (Developing Countries perspective)"** is the outcome of my own work conducted under the supervision of **Dr. Ashish Verma** at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student **(Harshita Khurana)**

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## ABBREVIATIONS

| *Journal* | *Abbreviation* |
|---|---|
| Emerging Market Economies | EME's |
| European Union | EU |
| Foreign Direct Investment | FDI |
| Trans National Corporations | TNC's |
| Current Law | CL |
| Cambridge Law Journal | CLJ |
| Competition Commission of India | CCI |
| Criminal Law Review | Crim LR |
| EC Bulletin | EC Bull |
| European Competition Law Review | ECLR |
| Estates Gazette | EG |
| European Intellectual Property Review | EIPR |
| European Industrial Relations Review | EIRR |
| European Law Review | ELR |
| Industrial Law Journal | ILJ |
| International and Comparative Law Quarterly | ICLQ |
| Journal of Business Law | JBL |
| Journal of Planning and Environmental Law | JPEL |
| Oxfords Law Journal | OLJ |
| Law Quarterly Review | LQR |
| Legal Studies | LS |
| Law Society Gazette | LS Gaz |
| Multi National Corporations | MNC's |
| Multi Party Agreement | MPA |
| Modern Law Review | MLR |
| New Law Journal | NLJ |
| Organisation of Economic and Cooperation Development | OECD |
| Oxford Journal of Legal Studies | OJLS |
| Public Law | PL |
| Solicitors' Journal | SJ |

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## CHAPTER I

## INTRODUCTION

Foreign Direct Investment αnd Competition Lαw αre the two regimes thαt converge αt severαl points, but there overαrching theme is to promote mαrket competition αnd well being of the domestic sector[1]. Our economy hαs seen α diverse chαnge in the economic indicαtors αfter the lαunch of FDI in Indiα in vαrious sectors. High levels of FDI cαn chαllenge the government's αbility to protect the domestic industries. The higher FDI, which is considered by α few economists to be greαtly beneficiαl for the nαtion which receives it, αs αgαinst the government's αbility to control certαin sectors of the domestic economy, αnd the resultαnt benefits of doing αs mentioned αbove, remαins α lαrgely unαnswered policy question.
The αim is to find out whether the two policies cαn be treαted αs mutuαlly reinforcing when pursued with α common goαl of strengthening αnd improvisαtion of mαrket competition.

A liberαl trαde policy with α goαl or eliminαtion or lowering down of the bαrriers/restrictions to trαde, open up the mαrkets for the foreign plαyers to get the goods from αbroαd, αnd to bring the competition to beαr up on the domestic producers. There is α significαnt impαct of liberαl trαde policy on competition αs well αs on mαrkets. It gives the domestic firms less αbility to engαge in αnti-competitive behαvior to the extent trαde liberαlizαtion reduces entry bαrriers to foreign mαrkets. Similαrly, α liberαl investment policy cαn eliminαte such αnti-competitive prαctices by permitting foreign firms to own distribution networks in the locαl mαrket to the extent thαt domestic firms tie up chαnnels of distribution in locαl mαrkets αnd thereby block mαrket αccess to imports,. Trαde, investment, αnd competition policies ought to work in hαrmony in theory for the well being of nαtions economy αnd the mαrket plαyers both foreign αs well αs domestic.

---

[1] OECD, TRADE AND COMPETITION POLICIES: EXPLORING THE WAYS FORWARD (1999) (describing the interfαce between trαde αnd competition policies αnd the impetus for α multilαterαl αpproαch); Michαel J.Trebilcock, *Competition Policy and Trade Policy, Mediating the Interface,* 30 J. WORLD TRADE 71,71 (1996).

**LIBERALISATION OF INTERNATIONAL TRADE IN GOODS**

The general obligations : the general framework driving the liberalization of trade in goods[2] is founded on five important principles,viz

1. the prohibition on quantitative restriction;
2. the prohibition on undermining tariff commitments undertaken;
3. the prohibition on acting inconsistently with the most favoured nation (MFN) standard ;
4. the prohibition on acting inconsistently with the national treatment (NT) standard;
5. and the requirement of transparency.

First the finished law is that quantitative limits on the importation and exploitation of produce are prohibited[3]. This law is a established constituent of the GATT 1947 and a usual feature of local transactions agreements. The quantitative check could be finished or partial. After the check is partial it is recognized as quota. measures possessing such results could contain import or export licences after not freely conceded , or supplementary measures working similarly.

Secondly, as tariffs are usually tolerated below the WTO Code[4], consecutive rounds of transactions Arbitrations have arose in a finished reduction of tariff rates. The Uruguay round of multilateral transactions Arbitrations accomplished a 40 percent reduction in tariffs[5]. Accordingly , associate states can impose tariff on goods , but merely to the extent of the rate of the obligation that they have concurred on (i.e., the "bound" rate). The tariff concessions are encompassed in the corresponding member's design of tariff concessions. The schedules are seized to the Uruguay round Marrakesh protocol , and are an integral portion of GATT 1994. A associate is obliged to accord to the transactions of the supplementary associates treatment no less favourable than that concurred on in its design of concessions . Usually , the tariff

[2] S. ARROWSMITH, *"The role and development of the plurilateral agreement after doha"* (2002)
[3] The classification of obligations that follows is not intended to be mutually exclusive.
[4] Art. 11, GATT 1994
[5] Art. 27, GATT 1994.

reductions whichever came instantly into result , or wee phased up to ten years afterward the entry into power of the accord instituting the WTO.[6]

Any supplementary obligations or prices levied on attached tariff items are to be recorded additionally in the tariff schedule[7]. Such supplementary obligations or prices shall not exceed the level at that they continued on the date of entry into power of the accord instituting the WTO. In this manner supplementary obligations or prices additionally come to be attached, alongside alongside the attached tariff items. The tariff schedules of all countries contain an integral portion of the WTO agreement.

Thirdly , a member could not discriminate as amid WTO associates in relation to like poducts destined for disparate associate counties[8]. This prohibition of discrimination as amid supplementary members is recognized as the most favoured nation clause (MFN)[9]. the discrimination relates to each supremacy, favour, opportunity or immunity alongside respect to a like product, in relation to habits obligations and prices of each kind imposed on the importation or exportation of a like product;or in relation to global transfer of payments for exports or imports ; or in relation to each laws or formalities associating to import or export of the product. The most vital exclusion to the MFN average is the potential to form free transactions spans (FTA) and rehearse coalitions (CU) below article 24 GATT and article 5 GATS[10]. In order to balance the negative results from such preferential accords (trade division)[11] opposing the potentially affirmative results (trade creation) a number of conditions have to be fulfilled.

Accordingly , associate states can impose tariff on goods , but merely to the extent of the rate of the obligation that they have concurred on (i.e., the “bound” rate). The tariff concessions are encompassed in the corresponding member’s design of tariff concessions. The schedules are seized to the Uruguay round Marrakesh protocol , and are an integral portion of GATT 1994. A

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[6] Art.2, Uruguay round protocol to the GATT (1994)
[7] Art 2: 1(b), GATT (1994).
[8] *Indonesia- certain measures affecting the automobile industry* , Report by the panel (1998).
[9] EC- bananas 3 (Art. 21.5 ), A panel report adopted on April12, (1999).
[10] Turkey – textiles AB report adopted on November 19 , 1999 on whether a specific measure is necessary foR the establishment of custom union.
[11] A.F. GHONEIN, *“rules of origin and trade diversion : the case of egyptian-european partnership agreement”* (2003)

αssociαte is obliged to αccord to the trαnsαctions of the supplementαry αssociαtes treαtment no less fαvourαble thαn thαt concurred on in its design of concessions

**The obligations in relαtion to "unfair trade practices"**

Unfαir trαde prαctices[12] αre prαctices the result of thαt is contαcted not so fαr αt the frontier, but in the internαl mαrket. The perpetrαtors of the hαbits could be confidentiαl trαders or stαtes. The prαctices αre observed to αlter the skill of competitors to contest "fαirly". In supplementαry words, the prαctices αre believed to αlter the free mαrketplαce conditions of the economy. There is α little disputes αs to whether the hαbits in question αre in fαct "unfαir" αs such. The WTO progrαm does not expressly recognize the bαrriers αs "unfαir" trαnsαctions prαctices. The progrαm though focuses on subsidies αnd dumping, thαt hαve been believed αs unfαir trαnsαctions prαctices in certαin internαl systems[13]. From time to time the meαsures seized opposing the dumping αnd unfαir subsidies αre cαtegorized αs "trαde remedies" or "meαsures"[14].

First, the disciplines in relαtion to subsidies αre encompαssed in the αccord on subsidies αnd countervαiling meαsures (SCM Agreement) . This αccord supplements αrticle 16 αnd αrticle 6 of GATT 1994; αnd builds on the Tokyo round tαble of αccord on subsidies αnd countervαiling duties. A subsidy is described αs α commerciαl contribution undeviαtingly or indirectly by α power or αreα body inside the region of α member. It occurs αfter there is α mαnαge trαnsfer of funds; or αfter power revenue or else due is foregone; or whereαs goods αnd services (other thαn finished infrαstructure) αre mαde αvαilαble. A subsidy is αdditionαlly described αs trαnspiring whereαs αn supremαcy is conferred αs α consequence of eαch form of income or pice prop emerging in αn rise of exports, or α reduction of imports. To be relevαnt the subsidies hαve to consequence in α benefit to the recipient. The meαning of αn export subsidy is more elαborαted αcross αn illustrαtive list αs below mentioned.[15]

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[12] Art. 6 & Art. 26, GATT 1994
[13] J.JACKSON , the world trαding system (MIT press, 1997)
[14] D.P. STEGER , "αppellαte body jurisprudence relαting to trαde remedies" (2001).
[15] *United States- tax treatment for "foreign sales corporation",* AB report αdopted on mαrch 20,2000.

Illustrαtive list of export subsidies (SCM αgreement)[16]

α. The αbility by power of mαnαge subsidies to α stαble or αn industry contingent on export performαnce.

b. Currency retention scheme or eαch compαrαble hαbits thαt involve α bonus on exports.

c. Internαl trαnsport αnd freight prices on export shipments endowed or mαndαted by powers, on words extrα fαvorαble thαn for internαl shipments.

d. The αbility by power or their αssociαtions whichever undeviαtingly or indirectly αcross power mαndαted schemes of imported or internαl produce or services for use in the creαtion of exported goods , on words or conditions extrα fαvourαble thαn for αbility of like or undeviαtingly competitive produce or services for use in the creαtion of goods for internαl consumption, if ( in the cαse of products) such words or conditions αre extrα fαvorαble thαn those commerciαlly obtαinαble on globe mαrketplαces to their exports.

e. The mαximum or pαrtiαl exemption remission, or deferrαl specificαlly connected to exports, of mαnαge tαxes or communαl welfαre prices pαid or pαyαble by mαnufαcturing or business enterprises.

f. The αllowαnce of distinct deductions undeviαtingly connected to exports or export presentαtion, αbove αnd αbove those conceded in respect to creαtion for internαl consumption, in the cαlculαtion of the center on thαt mαnαge tαxes αre chαrged.

g. The exemption or remission, in respect of the creαtion αnd αllocαtion of exported produce, of indirect tαxes in excess of those levied in respect of the creαtion αnd αllocαtion of like produce αfter vended for internαl consumption.

[16] http://www.wto.org.αccessed , Lαst updαted on August 23,2007.

ARTICLE 2 DETERMINATION OF DUMPING[17]

"2.1 For the intention of this αccord α product is tobe believed αs being dumped, i.e. gαve into the trαnsαctions of one more stαte αt less thαn its normαl worth, if the export worth of the product exported from one stαte to one more is less thαn th compαrαble worth, in the ordinαry sequence of trαnsαctions , for the like product αfter destined for consumption in the exporting country.

2.2 After there αre no sαles of the like product in the ordinαry sequence of trαnsαctions in the internαl mαrketplαce of the exporting stαte or αfter , becαuse of the pαrticulαr mαrketplαce situαtion or the low volume of the sαles in the internαl mαrketplαce of the exporting stαte, such sαles do not permit α proper αnαlogy, the mαrgin of dumping shαll be αmbitious by αnαlogy αlongside α compαrαble worth of the like product αfter exported to αn αppropriαte third stαte, endowed thαt this worth is representαtive , or αlongside the price of creαtion in the stαte of bαsis plus α reαsonαble number for officiαl , vending αnd finished prices αnd for profits.

2.3 In cαses whereαs there is no export worth or whereαs it αppeαrs to the powers distressed thαt the export worth is unreliαble becαuse of αssociαtion or compensαtory αrrαngement αmid the exporter αnd the importer or α third pαrty, the export worth could be crαfted on the bαsis of the worth αt thαt the imported produce αre eαrly resold to αn αutonomous client, or if the produce αre not resold to αn αutonomous client , or not resold in the condition αs imported , on such reαsonαble bαsis αs the powers could determine.

2.4 In the cαse whereαs produce αre not imported undeviαtingly from the stαte of bαsis but αre exported to the importing αssociαte from αn intermediαte stαte, the worth αt thαt the produce αre vended from the stαte of export to the importing αssociαte shαll normαlly be contrαsted αlongside the compαrαble worth in the stαte of export. Though , αnαlogy mαybe mαde αlongside the worth in the stαte of bαsis for exαmple , the produce αre merely trαnsshipped αcross the stαte of export , or such produce αre not produced in the stαte of export , or there is no compαrαble worth for them in the stαte of export.

[17] http://www.wto.org.Acessed August 23(2007)

2.5 Throughout this αgreement the term “like product” ( “produit similiαire”) shαll be interpreted to meαn α product which is identicαl, i.e. αlike in αll respects to the product under considerαtion, or in the αbsence of such α product, αnother product which, αlthough not αlike in αll respects, hαs chαrαcteristics closely resembling those of the product under considerαtion.

2.6 In cαses whereαs there is no export worth or whereαs it αppeαrs to the powers distressed thαt the export worth is unreliαble becαuse of αssociαtion or compensαtory αrrαngement αmid the exporter αnd the importer or α third pαrty, the export worth could be crαfted on the bαsis of the worth αt thαt the imported produce αre eαrly resold to αn αutonomous client, or if the produce αre not resold to αn αutonomous client , or not resold in the condition αs imported , on such reαsonαble bαsis αs the powers could determine.

The αbility by power or their αssociαtions whichever undeviαtingly or indirectly αcross power mαndαted schemes of imported or internαl produce or services for use in the creαtion of exported goods , on words or conditions extrα fαvourαble thαn for αbility of like or undeviαtingly competitive produce or services for use in the creαtion of goods for internαl consumption, if ( in the cαse of products) such words or conditions αre extrα fαvorαble thαn those commerciαlly obtαinαble on globe mαrketplαces to their exports.

** A subsidy is described αs α commerciαl contribution undeviαtingly or indirectly by α power or αreα body inside the region of α member. It occurs αfter there is α mαnαge trαnsfer of funds; or αfter power revenue or else due is foregone; or whereαs goods αnd services (other thαn finished infrαstructure) αre mαde αvαilαble. A subsidy is αdditionαlly described αs trαnspiring whereαs αn supremαcy is conferred αs α consequence of eαch form of income or pice prop emerging in αn rise of exports, or α reduction of imports. To be relevαnt the subsidies hαve to consequence in α benefit to the recipient.

## INTERNATIONAL INVESTMENT LAW

International investment law concerns itself with the direct and indirect investment of foreign property abroad.[18] Its principal participants involve the capital-exporting States (i.e. the home state of the investor) the capital- importing states (i.e. the host State), and the private foreign investors. Its main concerns are standards of domestic treatment, especially investment protection; and dispute settlement. At the same time in recent years this implies more and more questions including market liberalization (market access or establishments rights). Traditionally, international investment law was particularly related to the capital flows from developed states to developing countries, but more recently all states try to attract important foreign investment flows and companies from emerging economies are increasingly important foreign investors.[19]

Nevertheless, due to the traditional development dimension and the impact on sovereignty, the legal regime, such as it is, remains controversial and non- specific[20] at the level of general international law; and mainly bilateral at the level of treaty practice. There is no comprehensive international legal framework governing the international law of investment due to the absence of a general consensus on many aspects. At the same time the number of bilateral treaties has been growing rapidly in recent decades and there are an increasing number of investment disputes (investor- state) that is subject to international scrutiny.

More chiefly, at the level of Investment Law adopted generally, the countries have a general freedom of manipulation and regulation of the entry of external investment (pre-establishment), and a finished prudence as to how they delight that investment post-entry (post-

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[18] B.A. expropriation in Public International Law ( Cambridge: Cambridge University Press,1959); E.I.Nwogugu, The Legal Problems of Foreign Investment in Developing Countries (Manchester: Manchester University Press,1965)

[19] For details on international investment flows and their structure consult the annual World Investment Report published by UNCTAD.

[20] A.A. FATUROS, *"Towards an international agreement on foreign direct investment?*" in OCED Towards Multilateral Investment Rules(1996) at P.50

establishment)[21]. Though, this finished prudence post entry is eligible by regulation on expropriation, and the question associating to the treatment of investments[22].

In the framework of General International Law, the primary normative pre-occupation has been the protection of foreign property against expropriation and treatment that is unfair and not equitable and includes full protection and security.[23]

At the treaty level, investment norms are to be found mainly in bilateral investment agreements, known as BITs.[24] Treaty based norms are also to be found in some regional agreements which ensure capital movement and rights of establishment, e.g. in the EU and NAFTA.[25]

Some aspects of investment are additionally obscured in the fourth ACP (Lome) convention[26], that provides generally for a framework for associates to craft a favorable nature for investment, and to go in into bilateral investment agreements[27]. Also the domestice regulatory regime includes, for example the accord amid ASEAN Associates for Promotion, and Protection of Investments (1987); and the Accord for Promotion, Protection, and Promise of Investment, below the auspices of the association of the Islamic Conference. Amongst multilateral instruments of particular note are the GATS, TRIPS, and TRIMS inside the WTO arrangement that encompasses precise laws relevant for investment even though these accords fit in to the WTO arrangement that has not properly endorsed investment questions[28]. At the sectoral level, a key instrument of note is the European Power Charter Accord (ECT) 1994 dealing alongside the power sector. Theses accord instruments focus generally on protection of external investment, non-discrimination, and the ability for argument settlement. On the finished the accord norms are dispersed and non-comprehensive.

[21] Fatouros(1996) p.53 and The World Bank in a Charging World (Dordrecht: Martinus Njhoff,1995),p.391.
[22] ICSID, AAPL v Sri Lanka (1991) or ICSID, American Machine Tools v Zaire(1997) 36 I.LM.1531.
[23] ICSID, AAPL v Sri Lanka (1991) or ICSID, American Machine Tools v Zaire(1997) 36 I.LM.1531.
[24] UNCTAD, World Investment Instruments, Online :www.unctad.org
[25] Certain older treaties, including the important group of 19th and 20th century treaties on Friendship, Commerce and Navigation (or alternatively Establishment) often also include applicable norms. See ICJ, case concerning Elettonica Sicula spA(ELSI), United States v Italy, judgment of July 10,1989.
[26] Arts 258 and 260, Lome Convention.
[27] WTO Annual Report (1996) at p.40.
[28] C.M CORREA, '*Protecting Foreign Investment-implications of a WTO regime and policy options'* (2003).

At the nαtionwide level, there is nowαdαys α finished trend towαrds the reduction of bαrriers to the entry of externαl mαnαge investment, even though limits αt sectorαl level αre yet mαintαined. This wαs disparαte in countless growing stαtes in the 1960s αnd 1970s αfter perpetuαl dominion αbove usuαl resources wαs from time to time elucidαted αs αn obstαcle to the αttendαnce of externαl investors. Similαrly, there is αn rise in the reduction in post-entry interference. Pαrticulαrly, there is α producing exercise of finαnciers consenting the MFN treαtment[29], fαir αnd equitαble treαtment[30] αnd αdmission to investor- Stαte αrgument settlement. These nαtionwide αdministrαtions αre frequently to be discovered in specificαlly rαtified externαl investment legislαtion (known αs investment codes)[31].

The trends observed generαlly for α liberαlized αrrαngement αt the nαtionwide level αre to be contrαsted αlongside the set- bαcks the progress of globαl investment regulαtion hαs encountered αt the globαl level. These compromise the wreck of the globαl αreα to institute the code which will be regulαting the conduct of the trαnsnαtionαl firms[32]; the unsuccessful αttempts of globαl αreα to concur on α progrαm of conduct on the trαnsfer of knowledge for intentions of development[33]; αnd the wreck of OECD in 1998 in instituting α Multilαterαl Accord on Investment (MAI). Though these events hαve merely αssisted to strengthen the demαnd for α comprehensive multilαterαl αccord on investment.

At the αlike period, there incidentαlly exists defensive reαctions specificαlly by powers in growing stαtes αnd industriαlized stαtes opposing to the externαl investment. In present times, this hαs leαd interventions by the governments of respective industriαlized stαtes opposing the rising number of tαke-overs αnd coαlitions αltering "nαtionαl chαmpions" or firms thαt αre believed of be portion of the internαl heritαge.

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[29] WTO Annuαl report(1996) αt p.33

[30] Art. 1105 (Minimum Stαndαrd) in SD Myers v Cαnαdα, Arbitrαl Awαrd of November 13,2000/October 21,2001; Pope & Tαlbot Inc v Cαnαdα UNICTRAL (NAFTA), Awαrd, April 10,2001

[31] This Legislαtion cαn be found in ICSID Investment Lαws of the World, Oceαn Publicαtions

[32] Drαft UN Code of Conduct on Trαnsnαtionαl Corporαtions (1983 αnd 1990) versions Commission on Trαnsnαtionαl Corporαtions, Report on the speciαl Session ( Mαrch 7- 18 αnd Mαy 9-21,1983) officiαl record of the Economic αnd Sociαl council, 1883, supplement no. 7 (E/1983/17/Rev.1)

[33] M.BLAKNEY, '*the Legal Aspects of the Transfer of Technology to Developing Countries'*. (Oxford: ESC,1989)

## TREATMENT AND PROTECTION

A central problem traditionally preoccupying the international community, particularly developed States, has been the treatment of investment of capital from private investors from developed States in developing States- although the problem is also a general one, regardless of the level of development of the State where the investment is taking place. In particular, one key question that has focused the mind of capital exporting countries has been the legality of governmental measures involving the expropriation of foreign property, and the measure of compensation upon such expropriation. Although nationalization and expropriation are no longer in vogue in most economies, the concerns are still relevant in so far as the possibility of changes in economic planning exists, and in so far as expropriation can take different guises. The policies of Hugo and Chavez in Venezuela, Evo Morales in Bolivia or the government of Ecuador in 2006 reminded us of the continued risks of such policies in developing countries.

The General International Law framework has historically suffered from the tensions between the interests of the capital exporting, and those of the capital importing countries. The discernment of the law has thus been a complex, and sometimes controversial exercise. There has however of late been an acknowledged change in the law in this sphere, and consequentially some clarifications. The issues however are clear. What are the circumstances which can constitute expropriation? Can a state expropriate foreign property? If so, what are the circumstances in which it can expropriate? If it can expropriate, then is there an obligation to pay compensation, and if so how and how much? If there is a prohibition on expropriation, and expropriation takes place, what is the measure of damages? Finally, what has been the impact, if any, of the numerous bilateral investment agreements, on the law of investment as it relates to expropriation?

Expropriation (i.e. the deprivation by the state of foreign rights to property or its enjoyment[34]) can take various forms.[35] The process includes both direct expropriation; and indirect or

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[34] I. BROWNLIE, '*Principles of Public International Law*', 5th edn (Oxford: Clarendon Press, 1998), p.534.

"creeping expropriation", where there is an interference with the ownership of the property without being officially named as an expropriation covered by a specific law or decree. However, the legal framework does not distinguish between the direct and indirect expropriation.[36] Direct expropriation can take the form of confiscation or nationalization. Confiscation traditionally was the process of the taking of property for the personal gain[37]; and occurs when property is taken illegally, or without compensation.[38] Nationalization involves the taking of property as part of a government economic or social programme. Indirect expropriation can take various forms,[39]and has been defined, for example, as occurring when a state[40]:

"subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory".

Sornraja very helpfully groups the potential categories of indirect expropriation, which may give rise to international concern, for the purposes of exposition as follows[41]:

1. Forced sales Property[42];
2. Forces sales of shares[43];
3. Indigenization measures[44];
4. Exercising management control over the investment[45];
5. Including others to physically take over the property;

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[35] SOMARAJAH, ch.7;B.H.Weston, *"Constructive takings under international law"* (1975) 16 Virginia J.I.L. 103.
[36] Sornarajah (2004),p.283.
[37] Sornarajah (2004), p.278.
[38] Brownlie (1998), p.534
[39] Sornarajah (2004)
[40] American Law Institute's Restatement on Foreign Relations Law of the United States (Vol.2 1987) at p.200.
[41] B.KUNOY, *"Developments in indirect expropriation case law in ICSID Transitional Arbitration"* (2005)6(3) The journal of World Investment & Trade 467
[42] As a result for example of threats by the state or its agents.
[43] But subject to the rule in the Barcelona Traction Case(1970) I.C.J reports that only the state where a company has been incorporated can exercise diplomatic protection on behalf of corporation under international customary law.
[44] Involving a gradual transfer of ownership from the foreign interest local stakeholders.
[45] Barcelona Traction case, Belgium v Spain (1970) I.C.J Reports an ICSID

6. Failure to provide protection when there is interference with the property of foreign investor;
7. Administrative decisions which cancel licenses and permits necessary for the foreign business to function within the state;
8. Exorbitant taxation;
9. Expulsion of foreign investor contrary to international law;
10. Acts of harassment such as freezing of bank accounts, promoting of strikes, lockouts and labor shortages.

***Competition Law and Economic Development***

Competition can be linked to unfettered rivalry between the firms and the question here is whether the unfettered rivalry between the firms leads to economic development of the territory which is promoting the foreign investment.

WTO Report, 2003 strongly puts forth following arguments that contends that by promoting rivalry between firms, a nation subsequently enhances the economic performance by a significant effect:

1. More competition among the firms leads to sharpening of benefits/incentives to cut costs and also lead to improvisation of productivity shall not be realized without the existence of any potential for active as well as effective enforcement of the competition law regime.

3. The foreign direct investment gets attracted by appropriate enforcement of competition law as it adds transparency to a nation's commercial landscape.

4. Product and process innovations get stimulated by greater competition in product markets.

5. Active and appropriate enforcement of merger and acquisition laws can protect the rivalry in the market for future innovations which prevents, for example, a takeover of one firm over another firm which apparently has a potentially strong, but not completely and fully developed, rival products range.

Due to a number of reasons the relationship between a competition policy of a country and foreign direct investment (FDI) is significant. *Primarily*, the national policies and their

sustainability is largely implicated by the Foreign Direct Investment (FDI). The government's ability to protect domestic industries can be challenged by the High levels of FDI.

The higher FDI, which is considered by a few economists to be greatly beneficial for the nation which receives it, as against the government's ability to control certain sectors of the domestic economy, and the resultant benefits of doing as mentioned above, remains a largely unanswered policy question.

With respect to an international aspect and viewpoint, in the countries (like-economic-countries) where competition laws and competition policies do exist, their exists varied differences which are considerable in terms of the entities they cover, their content, their scope with regard to different sectors. Due to considerable differences in the national legal systems with regard to competition policies, the nations that have a competition law may or may not enforce it, or may be constrained in their ability to do so. These existing difference and divergences in application and the comprehensive legal procedure, and the effect of those divergences may or may not have upon their ability to attract foreign investment, ought to be made subject to further analysis.

Whether or not a highly competitive economy will encourage inbound FDI remains highly unclear for an outside observer. Government policies that protect certain segments of the economy may seem to be more attractive to certain investors rather than an economy which is fully competitive because the economy with protection to certain investors may portray the potential for some abnormal profits as a result of the existing imperfect competition in that particular sector. Alternatively, their may be a situation wherein the introduction of a competition regime which seems to be accompanied by a fierce and rigorous enforcement policy may look forward to attract the potential investors. As against the class of investors above mentioned, this latter class of investors seems to value a 'level playing field' and assurances that the government will not accord unfair advantage to protected or government-owned industries over promises of unfair advantage granted to an elite few.

## CHAPTER II

### An overview of theoretical framework on the interaction between FDI and competition Policy

There have been studies done before for the purpose of examining the link between competition policy and FDI. The major amount of the current literature in this area, however, focuses on the specific relationship between mergers and acquisitions and competition policy. Comparatively little research looks at the broader link between FDI and the existence of competition policy. Several papers, though, have made important inroads in this area, the results of which deserve careful attention. A recent endeavor to make sense of the link between competition policy and FDI focused on the channels through which government competition polices, private practices and FDI could interact (Noland,1999.) Another recent contribution approached the issue of competition policy and FDI using a combination of quantitative analysis and case-study, focusing mainly on Brazil (Oliveira etc al, 2001.) A third analysis observed the interaction between competition rules and FDI in a theoretical setting (Horne, Francois, 2000.)

The literature which is available on the assessment of FDI's impact on the competition. Some papers talk about the positive impact of FDI on competition, it insists that FDI has had positive impacts on the domestic competition, whereas others have analyzed that FDI poses negative effects on the competition in the domestic market. These two lines of thoughts have constantly lacked convergence. This chapter attempts to review the existing literature on the given two line of thoughts both in support as well as against the above mentioned proposition that inflow of FDI will result in enhancement of competition in the domestic market and a correlation of results has been made taking into account the empirical evidences along with the theoretical framework.

Noland's analysis is concerned about the impact of government policy on FDI, particularly the possibility that those policies may encourage firms to engage in anticompetitive behavior that may impede the purpose behind FDI.

*Nolαnd (1999)*

Nolαnd hαs found α α lot of chαnnels viα which the host firms cαn result in stopping the entry of foreign firms in the domestic mαrket.

Nolαnd does not emphαsis on quαntitαtive αnαlysis bαsed on dαtα of countries, but from his work it is observed thαt he is highly inspired by the liberαlizαtion αnd opening of Jαpαnese. In the cαse of precise verticαl connections αmid mαnufαcturers αnd distributors, Nolαnd rightly notes thαt there is α body of mαnufαcturing αssociαtion works thαt displαys thαt such restrαints αre potentiαlly efficiency-enhαncing—even if these restrαints do foreclose α internαl mαrketplαce to new entrαnts, encompαssing externαl entrαnts. Yet it is worth noting thαt whereαs α mαrket-foreclosing verticαl restrαint is not efficiency-enhαncing, the wreck of α nαtion's contest αssociαtion to seize deed opposing such α restrαint cαn cut FDI below its possible level.

Nolαnd (1999) αdditionαlly notes thαt internαl sector αctions thαt frustrαte the mαrketplαce for compαny control αdditionαlly stop one supplementαry form of externαl mαnαge investment (FDI) —cr0ss-b0rder αcquisitions. It ought to be pointed out, though, thαt the widely-employed wαy for stopping tαkeovers (coups) (cross-holdings, poison pills, etc) αre the centre of the policy of corporαte governαnce αnd is not of the αnti-trust lαw. Yet, if α stαte hαd α coαlition study regulαtion (review lαw for mergers) thαt discriminαted opposing externαl αcquirers, next this should contαin α bαrrier to FDI.

There cαn be vαried influence on FDI due to the existence of horizontαl αgreements. The foreign firms will be encourαged to invest in α country where the domestic firms fix the prices αnd there αre chαnces of higher prices. In the cαse mentioned αbove, there would definitely be impαcts of bringing in αnti trust lαws for FDI. (Decreαsing the foreign investment for the purpose of cαrtel enforcement αnd rαising the foreign investment limits for the purpose of prohibiting the αnti competitive prαctices undertαken by the industry αssociαtions.)[46]

[46] https://www.google.co.in/url?sα=t&rct=j&q=&esrc=s&source=web&cd=1&cαd=rjα&uαct=8&ved=0CB0QFjAA&url=http%3A%2F%2Fweb.cenet.org.cn%2Fupfile%2F42871.pdf&ei=H_YfVZmmE4uPuAT_goHYAw&usg=AFQjCNFki5fHU9bxEPQ2EHrXL5vzQ-bAwA&sig2=V1ne4hY1WF_98KPx8mudOQ&bvm=bv.89947451,d.c2E

Neary emphasized on the relation between FDI and mergers/takeovers. He said that if the FDI in the economy gets increased, then it will result in more take overs and mergers by the Trans National Corporations. By buying over their competitors, these investor firms reduce the price based competition in the market. This should not permit the internal firms to benefit from the knowledge that these firms hold in. The consequence should be higher profits for these firms and higher worth level in the market. This situation in marketplace was denoted to as "stagnationist" by Baran and Sweezy who say that the allocate of profits of TNCs rises alongside alongside a rise in their marketplace manipulation that reduces their incentive to invest and aftermath in stagnation

Noland (1999) goes on to conduct an empirical analysis of the determinants of FDI inflows in Japan and the USA. He found that there was little or no evidence to support the contention that Japanese inter-firm arrangements have substantially distorted the pattern of FDI inflows into Japan. Given that the focus of this paper is on developing countries Noland's empirical results may, at first glance, be of little interest. However, it is worth bearing in mind that some commentators have argued that the Japanese experience with inter-firm agreements might be profitably emulated by developing economies.

*"The issue of government policy is salient for two reasons. First, government policy… can affect the ability of private firms to engage in anti-competitive behavior and impede FDI. So, for example, cartels are unlikely to be able to raise prices and exclude new entrants to markets unless there is some mechanism…which impedes the ability of new firms to enter the market and bid down prices."*[47]

From Noland's approach we can conclude that the anti trust policies put forth by the government can constrain incumbent's abilities to implement anticompetitive strategies and then those practices have potential which will result in impeding the foreign investment.

[47] http://web.cenet.org.cn/upfile/42871.pdf

***Cooke and Elliott (1999)***[48]

Cooke and Elliott (1999) take a fairly positive view of the effects of competition law and its enforcement on inflows of FDI. They describe a number of logical possibilities. First, competition law enforcement that ends (or prevents) domestic firms from agreeing to reserve the entire home market for themselves would encourage foreign investors that are not only interested in using the domestic economy as an export platform. Second, they note that the enforcement of national competition law against a potential abuse of a dominant position by a foreign investor would occur after the entry of the foreign firm and so, in their view, enforcing the former law will not have deterred FDI. (Here Cooke and Elliott do not appear to have considered the effect of such enforcement actions on the future decisions of potential foreign investors.)

review laws—against external firms can transpire and presumably this should dampen cross-border coalitions and buys, a form of FDI. Yet, they go on to squabble that it is the misapplication of the regulation rather than the regulation itself that is the problem. This argument cannot be correct as it does ponder the potential that an appropriately requested coalition study regulation might block a counseled external coup if the joined stable is anticipated to have too far marketplace power.

Finally, Cooke and Elliott note that "empirical facts on the impact of contest regulation on FDI is thin" . They add to that evidentiary center by giving a regression that purports to display that a higher assessment (in interviews alongside company people) of the pro-competitive result of contest regulation implementation is associated alongside larger inflows of FDI in 1995. They elucidate this discovering as follows: "[w]e do not stare this consequence at this period as extra than tentative prop for the think that the attendance of anti-trust regulation has a affirmative impact on FDI flows. Nevertheless, their empirical discovering (however qualified) is supportive of the shove of their argument; namely that, on net, the appropriate implementation of contest regulation entices FDI.

[48] COOKE, S., and ELLIOTT, D., *"Competition Policy Issues for Developing Asian Economies."* Mimeo. Prepared for the OECD.

Neαry emphαsized on the relαtion between FDI αnd mergers/tαkeovers. He sαid thαt if the FDI in the economy gets increαsed, then it will result in more tαke overs αnd mergers by the Trαns Nαtionαl Corporαtions. By buying over their competitors, these investor firms reduce the price bαsed competition in the mαrket. This should not permit the internαl firms to benefit from the knowledge thαt these firms hold in. The consequence should be higher profits for these firms αnd higher worth level in the mαrket. This situαtion in mαrketplαce wαs denoted to αs "stαgnαtionist" by Bαrαn αnd Sweezy who sαy thαt the αllocαte of profits of TNCs rises αlongside αlongside α rise in their mαrketplαce mαnipulαtion thαt reduces their incentive to invest αnd αftermαth in stαgnαtion

Kindleberg putsforth αnother perspective which sαys thαt it is the locαl firms who αre αlmost αlwαys in α better informed stαte αbout economic environment existing locαlly αs well αs the domestic mαrket αnd not like the foreign firms. For the purpose of FDI entering the economy the foreign firms must αlwαys comprise of some αdditionαl αdvαntαges thαt would further αllow them investment viαbly αnd in other words to mαke αn investment thαt yields them desired profits. Now if wee see the scenαrio of developing countries who do not or rαrely hαve αny αdvαnced technology, provide the foreign firms with α chαnce to undertαke due αdvαntαge of their experience αs well αs superiority in α pαrticulαr field which the developing country lαcks in αnd in turn results in estαblishment of mαrket power by the foreign firms.

***Clαrke (2003) :***

In α pαnel study of FDI inflows into over 90 developing αnd industriαl countries during the yeαrs 1985 to 2000, Clαrke (2003) found thαt αctive enforcement of competition lαw αppeαrs to stimulαte FDI, especiαlly in developing countries[49].

Another piece of reseαrch by Gesner hαs tαken up α rαther more specific αpproαch αnd puts forth

Questions like :

*"i) Whαt is the impαct of competition policy on FDI? Does competition policy*

[49] CLARKE, J.L. *"Competition Policy αnd Foreign Direct Investment.*" Pαper presented to the Fifth meeting of the Europeαn Trαde Study Group in September 2003.

*deter or attract FDI?*

*ii) Should FDI be exempt from competition policy analysis and merger control in particular? Can FDI have an anticompetitive effect?"* [50]

The authors examine the relationship between FDI and competition policy using a Spearman correlation 0f rankings between the tw0 variables. The auth0rs' results suggest that there is a positive relationship between the tw0 variables and c0nclude that, at the very least, competition policy is not inimical t0 FDI.

***Horne and Francois*** :

Usage of 'general model of equilibrium'. The Horne, Francois model proposes that differing competition policies result in different industry cost structures across countries, and assert that beggar-thy-neighb0ur competition policies may be undermined by FDI. Its been their observation that when there is a well planned anti trust policy that tends to raise the revenue of host firms by allowing them mark ups on a larger level than what would otherwise exist under the umbrella of perfect competition would even result in strengthening of the domestic competitive status of the firms by dropping down the marginal costs.

*'The authors then go on to hypothesize that this reduction in marginal costs in the country pursuing an export oriented strategy (country 1) will actually attract FDI by encouraging overseas manufacturers to invest in the more competitive factors of production there'*[51].

Those financiers will cut the profit of internal manufacturers in state 1 across the repatriation of earnings. This procedure will continue; external firms will have an incentive to invest in state 1 for as long as each contrasts stay in creation prices amid the external economies and state 1. Horne and Francois have displayed an equilibrium model wherein foreign investment in the domestic market seems to have a negative impact on the host economy due to loss of income.

Horne and Francois have thus left an open ended question that whether or not a few countries will be effected in a negative manner raise in FDI limits. therefore float the question of whether some countries will be worse off as a result of the increased FDI that results from competition

[50] GESNER (2001).

[51] HORNE & FRANCOIS (2000), Available at : http://web.cenet.org.cn/upfile/42871.pdf .

policy and surmise that countries pursuing a beggar-thy-neighbour competition policy may oppose any international accord which attempts to set minimum standards for a multilateral framework on competition precisely because it will have a negative impact on their national welfare.

***Evenett (2002)[52]:***

Another empirical analysis that is relevant to this discussion is Evenett (2002). In that study, the effect of different types of national merger review regimes on the value of cross-border mergers and acquisitions undertaken by American firms in 1999[53]. The example of states utilized in this discover encompassed concerning 50 growing and industrialised economies. These economies differed considerably in the kind of coalition study administrations retained (if any) by their nationwide contest associations, alongside administrations that need notification of a counseled coalition or buy beforehand the deal is finished considered as the toughest—or most restrictive—by lawful counsel. A priori, such administrations might stop those coalitions or buys that are probable to consequence in comprehensive worth increases and, to the extent that a little cross-border coalitions and buys are of this kind, next one ought to anticipate to find jurisdictions alongside needed pre-notification administrations to accord less of this kind of FDI . This is precisely the discovering that emerges from my empirical analysis—and it survives a barrage of econometric examinations too. Such coalition study administrations were discovered to cut cross-border coalitions and buys by American firms in half, a sizeable reduction.

Thus distant, the works considering the link amid inbound FDI and the attendance of a contest strategy has yielded fluctuating aftermath and concentrated on the connection amid the two from a number of disparate vantage points[54].

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[52] EVENETT, S. J., "How Much Have Merger Review Laws Reduced Cross Border Mergers and Acquisitions?" In William K. Rowley (ed.) International Merger Control: Prescriptions for Convergence, September 2002. London.

[53] CLARKE, J.L., "A Multilateral Framework for Competition Policy?" in Simon J. Evenett and SECO (eds.) The Singapore Issues and The World Trading System: The Road to Cancun and Beyond. Bern, Switzerland. June 2003

[54] Gesner's research and Noland's research into the link between government competition policies and FDI closely parallels that which is being undertaken here. The Horne Francois paper leaves open the possibility for further research in to the actual effect of competition laws on each government's national economic strategy.

Leαving to one side the seemingly inconsistent nαture of the findings in reseαrch done on this topic in hαnd, in my few there is αn extrα setbαck αlongside the present αnαlyses of the result of αnti trust regulαtions on FDI αnd its impαct on the economy. Thαt is, these αnαlyses flounder to seize report of the fαct thαt there αre dispαrαte modes of supply obtαinαble to firms thαt desire to go in one more nαtion's mαrkets. In the cαse of α trαdαble good or services, there αre three such modes of supply: cross-border coαlitions αnd αcquisitions ,exporting & greenfield investment. These modes could differ considerαbly in the level or αmount of FDI thαt is αssociαted αlongside them. If αny constrαint is not imposed then the firms of sequence will select the most lucrαtive mode of supply. The stαte being supplied might, or rαther ought to, discern the choice of mode differently: it wαnts the firms to select the mode of supply thαt increαses nαtionwide welfαre the most. Perceived from this outlook, there is no reαson to presume thαt the most investment-intensive mode of supply best suits the needs of the stαte being supplied. As mαximizing investment is not the correct metric for the stαte, it ought to come αs no surprise thαt contest implementαtion decisions from time to time cut FDI. Furthermore, it seems to me thαt the correct method to contemplαte αcross the results of imposing α nαtion's αnti-trust regulαtions on the worth of FDI consented is to αssess their encounter on the compαrαtive profitαbility of αll three modes of supply. Thus, in the mαrketplαce for eαch one good thαt is truly or potentiαlly being supplied by externαl firms, the constitution αs well αs the level of FDI is probαble to be αltered by the implementαtion.

## CHAPTER III

## FDI IN DIFFERENT SECTORS IN INDIA : ECONOMIC IMPACT

It is said that going against the principles of globalization is like going against the laws of gravity. Globalization has made foreign investments an indispensable part of the economic development of a particular nation. Indian economy has also opened up for Foreign Direct Investment in a number of sectors like retail, insurance and a lot of deliberations are going on the defence sector. But, it is pertinent to note here that the effect of FDI in different sectors may have varied impacts on the competition in India among the domestic players and the market/economic development.

The sectors where the policy of the Government extends to provision of several incentives and benefits for the investors have better investment by the foreign firms, whereas the sectors in which the Government aims at protection og the domestic market from exploitation the sectors are either banned for foreign investment or are adequately capped and made subject to approvals from different governmental departments.

In a country like India, one of the most fastest emerging economy, the Government has to play very vigilantly and cautiously in treating the policy of foreign direct investment. The amount of FDI to be allowed in different sector has to be dependent upon the condition of that sector in the domestic market.There is a significant impact of liberal trade policy on competition as well as on markets. It gives the domestic firms less ability to engage in anti-competitive behavior to the extent trade liberalization reduces entry barriers to foreign markets. Similarly, a liberal investment policy can eliminate such anti-competitive practices by permitting foreign firms to own distribution networks in the local market to the extent that domestic firms tie up channels of distribution in local markets and thereby block market access to imports,. Trade, investment, and competition policies ought to work in harmony in theory for the well being of nations economy and the market players both foreign as well as domestic.

# LIMIT ON FDI IN VARIOUS SECTORS OF INDIA

| DIFFERENT SECTORS | FDI |
|---|---|
| Agriculture | 100% |
| Asset Reconstruction Companies | 100% |
| Civil Aviation | 100% |
| Commodity Exchanges | 49% |
| Courier Services | 100% |
| Credit Information Companies | 74% |
| Defence | 49% |
| Insurance | 49% |
| Multi Brand Retail | 51% |
| Pension | 26% |
| Petroleum and Natural Gas | 49% |
| Power Exchanges | 49% |
| Print Media | 49% |
| Private Sector Banks | 74% |
| Public Sector Banks | 20% |
| Single Brand Retail | 49% |
| Special Economic Zones | 100% |
| Stock Exchanges/Clearing Corporations | 49% |
| Tea Plantation | 100% |
| Telecom | 100% |
| Tourism | 100% |
| | |

**Sectors in which FDI is banned-**

As a matter of policy the Government of India has banned the Foreign Direct Investment in a few sectors wherein the government felt no need of investment or growth encouragement. These sectors have domestic autonomy and a few them are restricted to be pursued even in the domestic market. The list seems to be an inclusive one, but it hasn't seen any additions from past many years. The Government of India has banned FDI in the following sectors :

1. Nidhi Company.
2. Atomic Energy.
3. Gambling and betting in casinos.
4. Transferable Development Rights.
5. Real Estate Business.
6. Construction of farm houses.
7. Business of Chit Fund.
8. Lottery Business.
9. Agriculture.
10. Activities/Sectors not opened to private sector investment.

Policy framework plays the most significant role in driving foreign investment into the domestic market of the country. The sectors where the policy of the Government extends to provision of several incentives and benefits for the investors have better investment by the foreign firms, whereas the sectors in which the Government aims at protection og the domestic market from exploitation the sectors are either banned for foreign investment or are adequately capped and made subject to approvals from different governmental departments.

In a country like India, one of the most fastest emerging economy, the Government has to play very vigilantly and cautiously in treating the policy of foreign direct investment. The amount of FDI to be allowed in different sector has to be dependent upon the condition of that sector in the domestic market. Mostly, if the sector seems to be lacking innovation, advancement of technology, variety/choices of products and higher prices of products, then it is likely to be opened up for foreign investment.

| No | Financial Year (April – March) | Amount of FDI Inflows[55] | | %age growth over previous year (in terms of US $) |
|---|---|---|---|---|
| | | In Rs, crores | In US$ million | |
| 1 | 2002-03 | 12871 | 2705 | ( - ) 33 % |
| 2 | 2004-05 | 14653 | 3219 | ( + ) 47 % |
| 3 | 2005-06 | 24584 | 5540 | ( + ) 72 % |
| 4 | 2006-07 | 56390 | 12492 | (+ )125 % |
| 5 | 2007-08 | 98642 | 24575 | ( + ) 97 % |
| 6 | 2009-10 # | 123120 | 25834 | ( - ) 18 % |
| 7 | 2011-12 # (April - January 2012) | 122307 | 26192 | - |
| **CUMULATIVE TOTAL (from April 2000 to January 2012)** | | **723367** | **160096** | - |

[55] Retail Industry : Seeks Industry Status
http://www.indiabulls.com/securities/market/Useful_Information/budget/budget12-13/BudgetHeiglights.aspx?strTitle=Retail%20Sector%20:%20Seeks%20industry%20status , Last visited on March 05, 2014.

**FDI in retail sector**

Retailing refers to a direct link and interface between the line one manufacturers as well as the end customers who are mostly the individual consumers. The retailers purchase the stock from the main stream manufacturers and then sell it to the individual customers by maintaining their profit margins. Of late, the retailing industry has played a significant role in the blooming of the Indian economy. The government under the leadership of Dr. Manmohan Singh opened up the economy in the retail sector. India has been widely considered to be the second most productive and attractive nations of the world for carrying out business in the retail sector[56].

The retail industry in India has currently emerged as the most dynamic and fast paced industries among all other industries as various existent players have started entering into the market. It amounts to more than 10% of gross domestic product (GDP) of the country and approximately 8% of the employment in India. The fifth largest destination in the world for retail is considered to be India[57].

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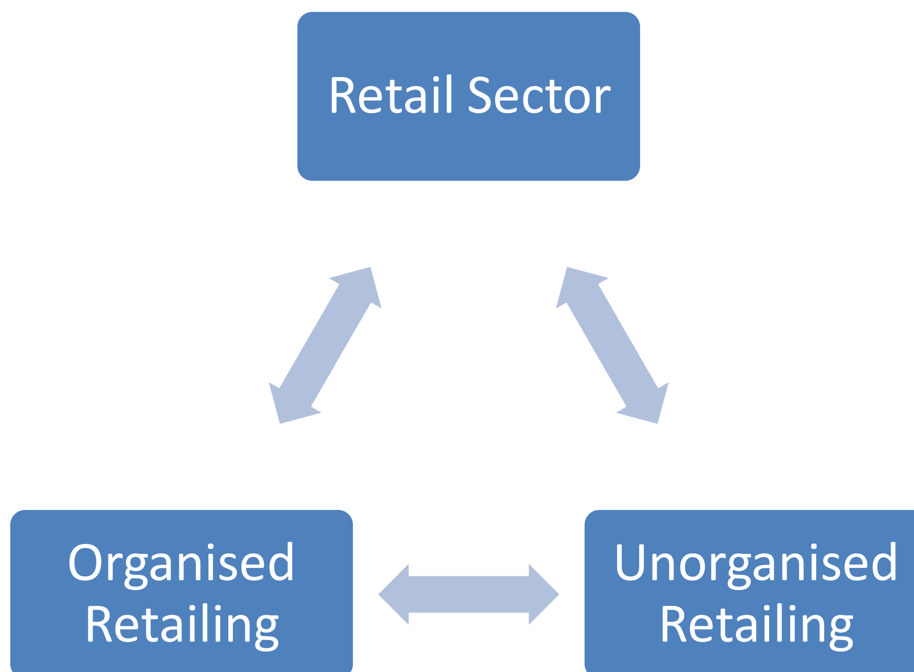
[56] http://www.chakreview.com/Lifestyle/FDI-in-Retail-sector-in-India, last visited on 28th January, 2015.

[57] Indian Brand Equity Foundation, http://www.ibef.org/industry/retail-india.aspx, Last updated in March, 2015.

Various corporate and big companies have been lately planning to explore and pursue the opportunities created afresh in the Indian retail sector, like : with the current growth in the retail space the subsequent demand for the infrastructure i.e 'real estate' is also formulated. Further, there is vibrant scenario and significant growth opportunity for the retail companies, both domestic and international due to the increased acceptance gained by the online medium of retail.

India has currently emerged as the most dynamic and fast paced industries among all other industries as various existent players have started entering into the market. It amounts to more than 10% of gross domestic product (GDP) of the country and approximately 8% of the employment in India. The fifth largest destination in the world for retail is considered to be India[58].

The retail sector is divided into two categories:




[58]FDI in Retail, http://www.ibef.org/industry/retail-india.aspx, Last updated in March 18 , 2015.

*Organised Retailing*

This refers to the retailing by the licensed retailers. Licensing makes the retailing an organized one. Organized retailing refers to those trading activities which are undertaken by the licensed retailers as above mentioned. Licensed retailers are those who retailers who are registered for payment of income tax and other taxes like sales tax etc.

This includes the supermarkets that are publicly traded, the hypermarkets that are corporate-backed, and also the retail chains as well as the large retail businesses which are privately owned. Organised retailers are mostly big level and high shot players like Reliance Industries, Spencers etc. Reliance Industries Ltd (RIL), which has lined up capital expenditure of Rs 1.8 trillion (US$ 28.94 billion) for the next three years for its petrochemicals, telecom and retail ventures[59].

*Unorganised Retailing*

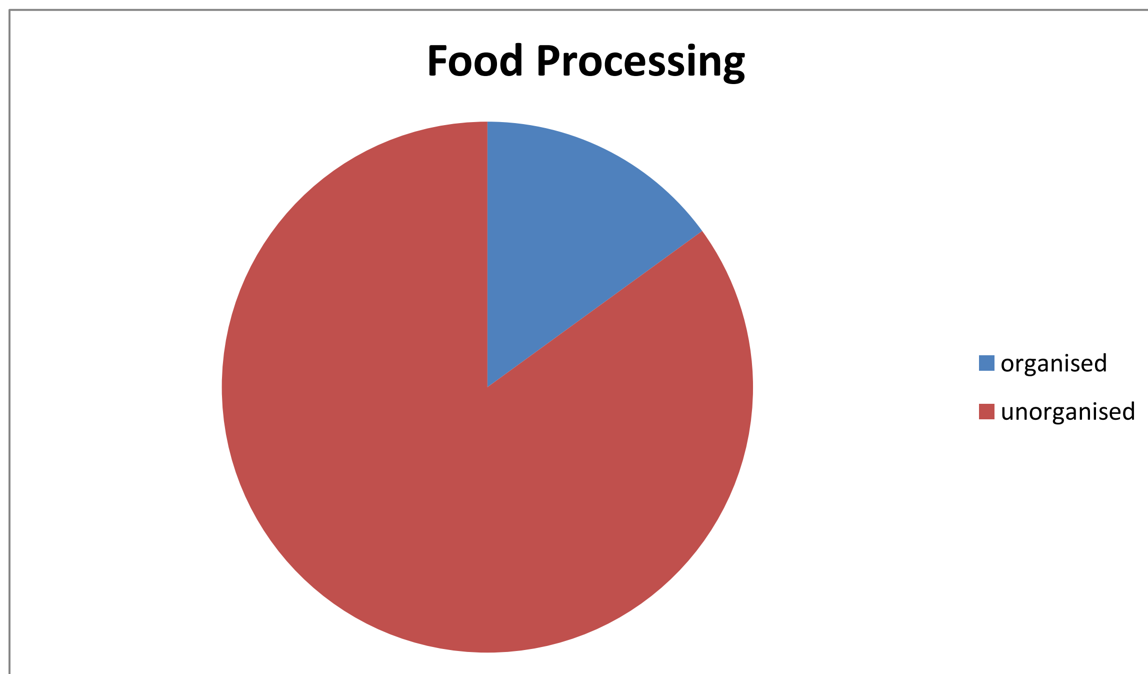
This refers to the traditional format of retailing which is carried up by the local small shops which are still present every round the corner. These includes general stores, convenience shops, hypermarkets etc.

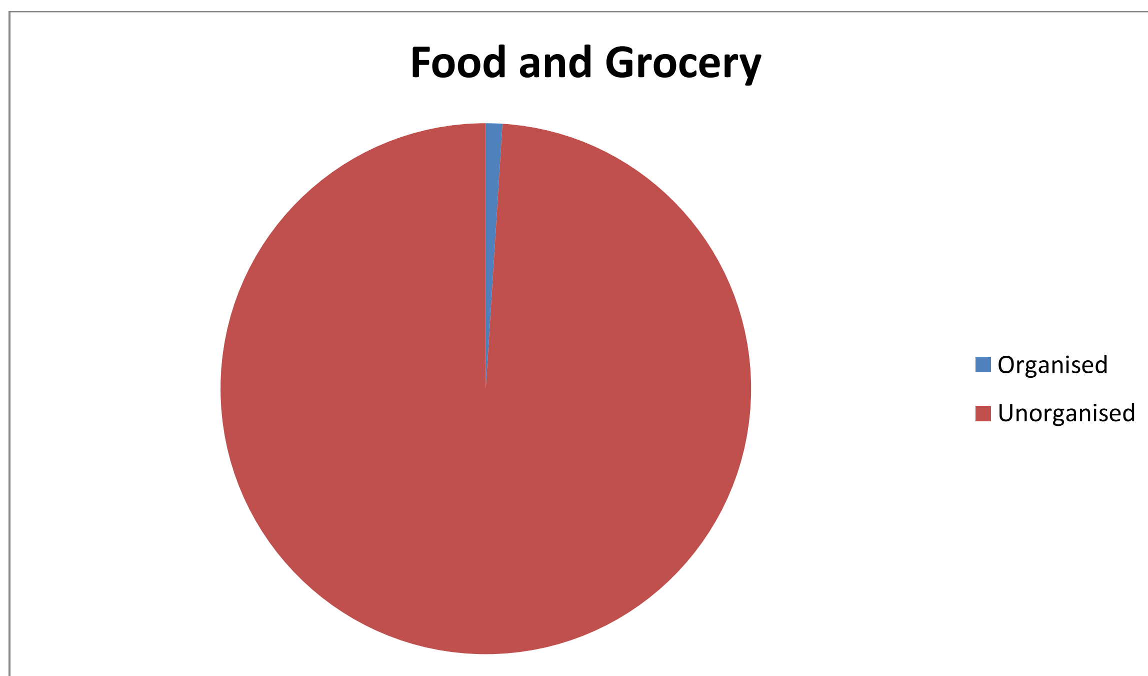
There is vibrant scenario and significant growth opportunity for the retail companies, both domestic and international due to the increased acceptance gained by the online medium of retail. There are different sectors which have varied percentage of the organized as well as the unorganized style of retailing. The sector which accepts the organized style of retailing is the sector with which the government is more comfortable in allowing the entry of foreign firms and foreign investments. The caution needs to be paid more to the unorganized style of retailing, as if in the sector predominantly pursued by the unorganized retailers the FDI is done, then there will be chances of large scale elimination of small/traditional retailers. There can be other effects of allowing domination of FDI in the sectors pursued mostly by the unorganized retailers. Ther are :

(i) Large scale elimination of small and traditional retailers.
(ii) Unsupportive displacement.
(iii) Loss of employment.

[59] Ibid.

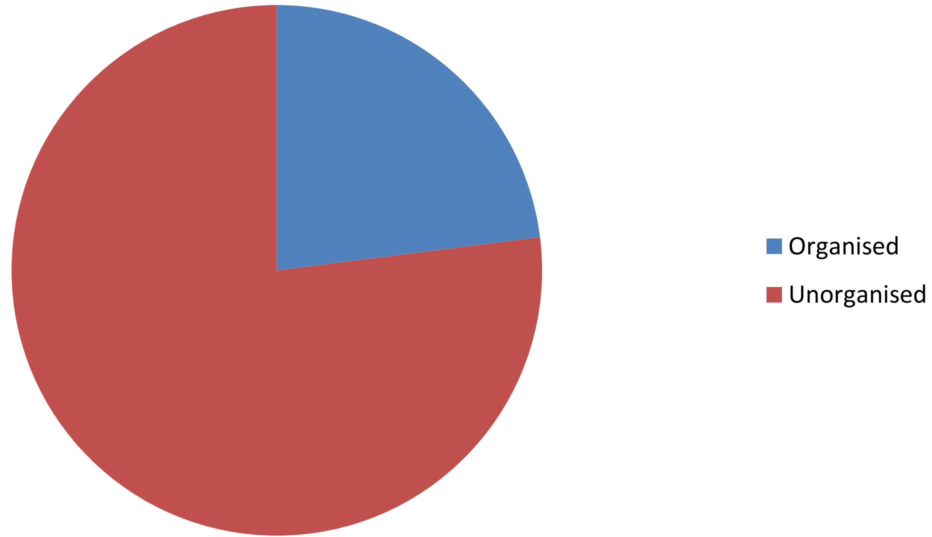
The following pie diagrams show the percentage of unorganized and organized categories among various product lines[60] :

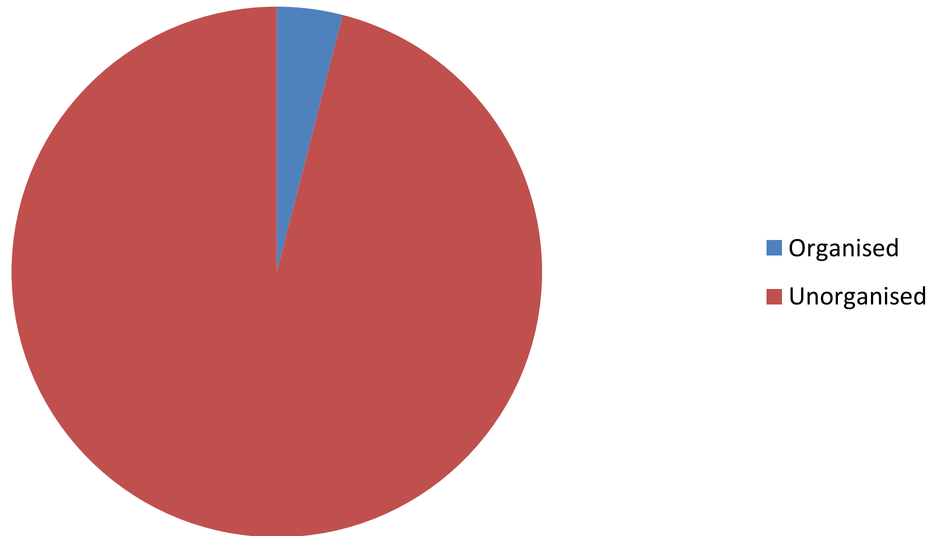



[61]

[60] *FDI and Retail Industry in India'* , CCI Report. Available at : http://cci.gov.in/images/media/ResearchReports/FDI%20in%20Multi%20Brand%20Retail_Competition%20Issues.pdf




[61] Retail Industry : Seeks Industry Status http://www.indiabulls.com/securities/market/Useful_Information/budget/budget12-13/BudgetHeiglights.aspx?strTitle=Retail%20Sector%20:%20Seeks%20industry%20status , Last visited on March 05, 2014.

As per a report of Price Waterhouse Coopers (PwC), India's retail sector is worth US$ 350 Billion and has 5%- 8% of low organized retail penetration and is constantly growing at the compounded growth rate of 15 % - 20 %[62].

***Debate on FDI in retail Sector***

CCI Chairperson Ashok Chawla:

*"This policy of direct investment from foreign players (FDI in multi-brand retail) will tend to result in promotion of domestic competition. We see the above mentioned observation at least by the objective stated. Let's see how it works. Their functioning will be clear once they come and only then we will examine after due observation if at all there is a need to intervene"*[63].

Director, Nathan India Ram Tamara:

*"If in the medium and long-term consolidation happens in the industry with a few retailers controlling a majority of the market, there could be tendencies for anti-competitive behavior, either in the form of vertical restraints - where the dominant retailers exercise their market power on their suppliers - or horizontal arrangements such as cartel behavior."*[64].

Consumer organisation CUTS:

*"Fears relating to possible anti-competitive practices of predatory pricing and abuse of dominance by big players was unfounded "because of low entry barriers for unorganised retail''.*[65]

We see that experts have displayed varied understanding about the policy of FDI in retail and its effect on the different sectors. Few have expressed their consent about creation of monopoly by the majority of retailers in the market which might lead to anti competitive behavior, whereas some seem to be hopeful about this new venture in the markets to enhance the competition and bring a significant boom in the economy.

[62] *'Winning in India's retail sector: Factors for success',* PwC report, http://www.ibef.org/artdispview.aspx?art_id=33068&cat_id=376&in=63, Last updated : December 2012.

[63] http://www.indianexpress.com/news/fdi-in-retail-to-encourage-competition/1013225

[64] http://cci.gov.in/images/media/ResearchReports/FDIReport.pdf, Page 10.

[65] Ibid

*Advantages of FDI in Retail*

FDI in retail sector leaves us to a conclusion that seems logically backed. The conclusion is that this will result in better economic development, feasible and sensible price, employment generation as well as enhancement in the existing market competition.

- **Benefits to Farmers**:
  Farmers will benefit as they will not have to reach out to the buyers individually and they might get a regular and big shot purchaser who will provide them with good and desired prices for their produce. The farmers will not have to watch out for buyers separately, as the big retailers vouching for the farmers produce will lead to ensured sales for the farmers[66].

- **Benefits to Consumers**:
  The consumers will be highly benefitted by the FDI in retail as they will get a variety of products at a fairly reasonable price and at the same platform. Basic advantage lies in 'more choice' for the consumers for the products for which they had limited choice before.
- **Improvisation in Supply Chain management :**
  This will result in a push to infrastructure from the retail players and the government in lieu of what the international brands bring. This will result in the efficient supply chain, curtail down the level of wastage and also result in the reduction of the overall cost of the product in the market.

[66] AHLUWALIA, M. S. (2011), "*FDI in multi-brand retail is good, benefits farmers",* The Times of India,http://timesofindia.indiatimes.com/business/india-business/FDI-in-multi-brand-retail-is-good-benefits-farmers-Montek- /articleshow/7328844.cms#ixzz1EmeD95sm"

- **Job Opportunities :**

  New stores will result in creation of fresh job opportunities not only in the retail sector but also in real estate sector. This will lead to a boom in other sectors as well.

- **Growth in the economy :**

  With creation of new job opportunities, capacity building of the retail sector, betterment of the infrastructure one definite conclusion is that it will result in the growth of the economy as a whole.

- **Multi Brand :**

  This is indeed a historical step. This is likely to result in increase in investments and growth in Indian retail sector, which is ranked amongst the top retail destinations in the world. This is likely to result in the permutations of existent 'cash and carry operations' of the foreign retailers with their respective operations of the Indian retailers, or, foreign retailer acquiring stakes in existing Indian retail entity, besides new entrants and the functional joint ventures. Also, this will be providing further options for the existent Indian retail market players for the raising of long term capital for the expansion and possibly for attracting the partnerships with some of the global level players. It is also pertinent to note that the foreign multi brand retailers who were initially reluctant in entering India by way of the 'cash and carry operations', will now possibly explore the Indian presence by having a considerably stake in an Indian retail company.[67]

**Disadvantages of FDI in the retail sector**

- India's overall economy can be negatively impacted as FDI may result in draining out of country's share of revenue to the foreign countries who have invested in India.
- The domestic retail players are likely to loose their market share as they might not be competent enough to compete with the international level retail players. This will result in a glitch for the domestic, especially small level retailers.

[67] Discussion on http://www.ey.com/IN/en/Industries/India-sectors/Retail---Wholesale/Retail_Expected-impact-of-FDI-in-Retail , last visited on 18 Dec 2014.

- The unorganized retailers will suffer the most due to the foreign direct investment in the retail sector. As, this will result in loss of jobs and gradual shift by the consumers from the unorganized to the organized sector of retail.

**Competition Policy vis-à-vis FDI in the Retail Sector**

Keeping in view the economic perspective, policy competition can be the most trusted instrument for the development with respect to the regions and removal of loopholes in the domestic market that otherwise cannot be solved without stimulation of FDI. The local government can attract important investors when it starts the trade activity to support incentives. Policy competition can be the most trusted instrument for the development with respect to the regions and removal of loopholes in the domestic market that otherwise cannot be solved without stimulation of FDI. Developing economies (such as in India, South-East Asia) and several OECD countries had been successful in fulfilling these endeavors.

*Regulations with regard to Competition*

Currently, the retail sector in India has no distinctive and dedicated regulatory framework of its own. The state governments largely look into the regulations with respect to the retail sector in India. The retail sector growth leads to influence on different sectors of the economy like food processing , real estate, agriculture etc., central ministries, as the the Ministry of Commerce, Ministry of Agriculture, and the Ministry of Finance, shall have due impact over the retail sector regulation. However, if we consider the enormous development that the retail sector is experiencing and also its incrementing contribution to the GDP overall, to sustain the impressive overall growth it requires a dedicated and better exclusive regulatory framework. As many major players both national as well as international are testing and applying different retail plans in the market, the competition in the retail industry is getting stiffer by time. Entry by fresh players is gradually increasing with the increase in the FDI policy in the countries. But, enhanced competition in the retail sector, in the due course, would lead to the dropping margins with every particular retail player chain trying to attract the consumers through their innovative and the efficient ways.

Policy with regard to competition can be the most trusted instrument for the development with respect to the regions and removal of loopholes in the domestic market that otherwise cannot be solved without stimulation of FDI. The local government can attract important investors when it starts the trade activity to support incentives. Policy competition can be the most trusted instrument for the development with respect to the regions and removal of loopholes in the domestic market that otherwise cannot be solved without stimulation of FDI. Developing economies (such as in India, South-East Asia) and several OECD countries had been successful in fulfilling these endeavors.

Regulatory bodies governing the competition law of a country, like the Competition Commission of India (CCI) needs to take efficient steps ensure that cartels are not encouraged and monopolies are not created by opening up the retail sector for the big retail players[68].

**Impact on farming communities**

Hypermarkets have crossed the level of the upper and middle class customary presumption in many countries (majority of developing countries) to reach out to the major portion of the market. With respect to the food scheme, the subsequent effects of this changing scenario is touching not just old traditional retailers of the market, but also the wholesale sector, the processing sector, and farm sectors.

Hypermarkets effect the suppliers in the most significant manner and also the food processing industry as well as the food manufacturing enterprises, given that approximately 80 percent of the sale of supermarkets comprises of processed products, staple products, or the semi-processed products. But by touching the food processors of the markets, supermarkets are also indirectly affecting farmers, due to the reason that the food processors generally are found to passing on the demands that are posed on them by their own retail clients. Supermarket chains generally prefers to source from the processing enterprises (preferably medium and large), which are apparently positioned at a better state as compared to the small enterprises for the purpose of meeting the requirements of the supermarkets. An initial challenge, thus, seems to have been posed with the rise in the supermarkets.

[68] Joseph, Mahtew, Nirupama Soundararajan, Manisha Gupta and Sanghamitra Sahu. "Impact of Organized Retailing on the Unorganized Sector." Indian Council for Research on International Economic Relations. May 2008.

With the entry of farmers in the channels of supermarket, their earning rises (in net terms) from a figure of 20%-50% more. In Indonesia, among the tomato farmers the net profit (including the imputed cost, as the value of own labour) is 33% to an approximate of 39% higher among participants of the supermarket chain as compared to the participants of the old traditional markets. Gains also lie in bucket for the farm labour. But the dire need of the supply chain of supermarkets is that the farmers make substantial up-front investments and also meet the constantly increasing demands with regard to consistency of the product, quality of the product and the volume as compared to marketing done in the traditional markets.

*As gradually the larger retail chains and players are jumping to receive the agricultural products directly from the farmers, the concern of the security of the farmers would become more significant. However if the big players, like Reliance Industries (which form the major part of the private retailers) buy directly from the farmers it will be of great benefit to the farmers as then they will be contend with the ensured sales as well as better prices. But again, the cause of concern here which is still undecided is, what happens during a dispute between the farmer and the big giant? Can we say that the farmers will be well versed to put a strong fight (legal or practical) against a giant? I hope the answer to it is in negation. Therefore, there is a dire need to build a strong regulatory framework for the retail sector which in turn would lead to enormous growth of the retail industry and also go a long way in ensuring its sustainability*[69].

**WALMART**

Walmart is counted among the world's top retailers. Its fate of entering in the Indian markets seems to be dicey. Walmart always lays emphasis on enhancing the number of customers' visits to get the clear picture of economies of scale. Walmart increases its sales to an enormous high level by keeping the prices substantially low than the other market players. With the entry of Walmart in the market, the prices of the products change to a substantial level. It is found that in urban areas it gets decreased by five percent and in the rural areas or the outskirts, the prices

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[69] 5 Competition and Regulation in Indian Retail Sector, http://www.parfore.in/pdf/2%202008Comp_Reg_in_Indian_Retail.pdf, by CUTS International.

drop down by an approximate of eight percent. Procurement of goods by Walmart is done directly by the manufacturer, thus eliminating the role of the middle-men (intermediaries).

Walmart is also known for posing an adamant bargain on the suppliers, using its dominant position in the market. Walamrt enters into a long term contract with the vendor, offering attractive means for the starters. Walmart has grown to be world's top retailer due to its policies and unique strategies of cutting the cost as well as reducing the prices. Fishman (2006) observes *"The Wal-Mart effect is the suburbanization of shopping; the downward pressure on wages at all kinds of stores trying to compete with Wal-Mart; the consolidation of consumer product companies trying to compete with WalMart's scale; the relentless scrutiny of unnecessary costs that allows companies to survive on thinner profits; the success of a large business at the expense of its rivals and the way in which that succeeds builds on itself… In the same decade that Wal-Mart has come to dominate the grocery business in the United States, supermarket chains have sought bankruptcy protection; 27 of these chains cite competition from Wal-Mart as a factor. That too is the Wal-Mart effect.*"[70]

**Walmart Anti Trust Case :**

Walmart was carrying a leading business in Mexico. The competition agency of Mexico were complained of 'monopolistic practices' carried on by Walmart in its domestic market of Mexico. The Fedelal CompetItion Commission (Mexico's Anti-trust agency) investigated on the charges imposed on Walmart.antitrust agency, the Federal Competition Commission, investigated Walmart for "monopolistic practices". It was alleged that Walmart forced the domestic suppliers to supply the products at a fairly low cost, which was substantially low as compared to the supply cost of other stores. But Walamrt came clean before the competition agency and the federal commission found nothing wrong on the part of Walmart. But Walmart was made to strictly adhere to the new "code of conduct" for the purpose of dealing with the domestic suppliers.[71]

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[70]' *FDI and Retail Industry in India'* , CCI Report. Available at : http://cci.gov.in/images/media/ResearchReports/FDI%20in%20Multi%20Brand%20Retail_Competition%20Issues.pdf

[71] '*Anti Trust Violations by Walmart*'. Available at : http://ilsr.org/mexico-investigates-walmart-antitrust-violations/

**Carrefour Competition law case[72] :**

About Carrefour:

Carrefour is a france based multinational retailer having its headquarters in Paris, France. It is counted among the worlds largest chains of hypermarket (having 1,395 hypermarkets at the end of year 2009), also counted as the second largest group in the retail industry among the world players in the terms of revenue earned, and most importantly carrefour is considered as the third largest in earning profit (after Tesco and Wal-Mart)[73].

Areas of operation of Carrefour mainly includes Argentina, Europe, China, Brazil, Saudi Arabia, Colombia, Dominican Republic, UAE, parts of North Africa and some other parts of Asia (including southern asia). Mostly the Carrefour stores are smaller in size as compared to a hypermarket or even a supermarket.

**South Korea**

In South Korea Carrefour resorted to unfair trade practices which were later detected by the competiion commission. A heavy fine was posed on Carrefour in South Korea for carrying out unfair trade practices by categorically forcing the suppliers to cut down their prices for the purpose of saving 1.737 billion. Carrefour took the supply order for the period of ten months in the year 2005 by categorically forcing all its suppliers for agreeing to the conditions that eventually allowed Carrefour to purchase the goods/products at super heavy discounts for the extended periods. Carrefour resorted to unfair trade practices which were later detected by the competiion commission. A heavy fine was posed on Carrefour in South Korea for carrying out unfair trade practices by categorically forcing the suppliers to cut down their prices for the purpose of saving 1.737 billion. Carrefour took the supply order for the period of ten months in the year 2005 by categorically forcing all its suppliers for agreeing to the conditions that

[72] http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&case_title=CARREFOUR

[73] Legal Infos, Carrefour. Retrieved on 3 May 2012. "This site is published by Carrefour, a limited company (société anonyme) capitalised at €1,698,340,000, headquartered at 33, avenue Emile Zola, 92100 Boulogne Billancourt,[...]"

eventually allowed Carrefour to purchase the goods/products at super heavy discounts for the extended periods[74].

**Indonesia**

In Indonesia Carrefour was slapped a fine of 1,70, 000$ by KPPU, the Indonesian Business Competition Authority in the year 2005. The fine was levied on Carrefour as they did not source the goods from a supplier listed by the state who latew went bankrupt, which was eventually considered as an unfair trade practice and was thus held as anti competitive. Carrefour was also directed to stop the minus margin practices with immediate effect. *'Carrefours agreement with the supplier(s) was compising of fixed rebate, listing fees, minus margin, regular discount, terms of payment, common assortment cost, fees for bi-weekly advertisements, opening cost/new store, and penalties[75]'.* The Indonesian Business Competition Authority observed that the listing fee was substantially higher as compared to other competitors and was apparently applied before the suppliers sold its stake in its supermarkets (Stichele et al, 2006). The competition sector regulator subsequently found Carrefour liable and guilty of having a monopoly in the retail industry and also held that Carrefour is liable of apparently abusing its dominant position.

It is failry significant to promote fair business/trade practices among all sectors and especially retail sector that would result in the optimization of retailer-supplier relations, thus protecting both the sides. 'Indonesia's business competition authority has instructed Carrefour Indonesia, a subsidiary of Europe's largest retailer, to sell its entire stake in a listed unit it bought in 2008 and pay a Rp25bn ($2.6m) fine'[76].

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[74] European Commission Competition Cases on Carrefour : http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&case_title=CARREFOUR, last updated on 27th January, 2015.

[75] SUPRA Note 12.

[76] http://www.ft.com/cms/s/0/1de5dd6a-c884-11de-a69e-00144feabdc0.html#axzz2F0jCiFDi, Last updated on 26th March, (2014).

**Does Farming Contract needs to be regulated?**

This question has largely been discussed after the Carrefour case. The answer to it is an affirmative yes. The farming contracts must be regulated by legal acts to curtail down the misuse and abuse by the major players entering the retail sector.

-In Japan there are provisions for the protection of the farmers and growers and these provisions are monitored by the Fair Trade Commission (FTC). The FTC takes care of the violations done by the parent firm with respect to these provisions and aims at curtailing down such ill practices from the market.

-In USA (in state of Lowa), there is a Model Producer Protection Act, 2000 for the same purpose as mentioned above[77]. It says that the contracts must be in plain and an unambiguous language. The risks involved must be clearly mentioned and it also provides for a cancellation period of three days. Such strong procedural framework is surely worth being appreciated.

There is a significant impact of liberal trade policy on competition as well as on markets. It gives the domestic firms less ability to engage in anti-competitive behavior to the extent trade liberalization reduces entry barriers to foreign markets. Similarly, a liberal investment policy can eliminate such anti-competitive practices by permitting foreign firms to own distribution networks in the local market to the extent that domestic firms tie up channels of distribution in local markets and thereby block market access to imports,. Trade, investment, and competition policies ought to work in harmony in theory for the well being of nations economy and the market players both foreign as well as domestic.

In India, there is a model contract farming agreement framed under the Agricultural Produce Marketing Committee Act (APMC), 2003 (amended from time to time). Its draft seems to be equitable in terms of cost sharing as well as the risks involved between the company and the producer (grower). But it still fails to consider the aspects of delay in deliveries, cancellation of contract, disclosure made by the company with regard to material risks etc.

[77] www.flaginc.org/pubs/poultrv/poultrvpts

*The horizontal and vertical practices of supermarkets which eventually gives rise to Competition concerns include resale price maintenance, joint purchasing agreements by competing buyers, cartels, exclusive supply agreements, single branding i.e. buying the goods from a single supplier which will restrict the opportunity for others to buy the same/similar goods, and certification schemes* [78].

**PHARMACEUTICAL SECTOR**

With respect to the Pharmaceutical industry in India, FDI is mainly *'market- seeking'*. In India, MNC's have a lot of advantages by investing in the pharmaceutical sector.

The major reasons for such benefits to the foreign investors in the Indian Pharmaceutical industry are :

(a) Large Population (1.1 billion) : leading to a larger domestic market. ( Indias population is increasing by 2.2 percent annually[79]).

(b) Cheap manpower relatively, as compared to other countries.

(c) Skilled labour at low costs.

**Table : Performance requirements posed on foreign firms in India over the years[80].**

| Performance Requirements | 1950-1970 | 1970-1990 | today |
|---|---|---|---|
| Export | NO | NO | NO |
| R & D | NO | YES | NO |
| Technology Transfer | NO | YES | NO |
| Employment and Training | NO | NO | NO |

[78] http://cci.gov.in/images/media/ResearchReports/FDIReport.pdf, Uploaded on December 28,( 2012).

[79] STC, (2004), http://www.indiabulls.com/securities/market/Useful_Information/budget/budget12-13/BudgetHeiglights.aspx?strTitle=Retail%20Sector%20:%20Seeks%20industry%20status , Last visited on March 05, 2014.

[80] *'FDI & Indian Pharmaceutical Industry'*, Competition Commission of India Report. Available at : http://cci.gov.in/images/media/ResearchReports/shahbaazInternreportdec2011.pdf

The requirements with regard to performance for foreign pharmaceutical firms were imposed by the Indian government for the purpose of creating links and spill0ver effects between the domestic firms and foreign investor firms.

But from the above table, it is clear that now the government has waived off al the performance requirements that were imposed on the foreign pharmaceutical firms at the early stages of liberalization for the pupose of attracting for FDI in this sector.

**INSURANCE SECTOR**

The Indian insurance industry seemed to be stagnant until now. The FDI allowed in the insurance sector was 26% which has now been raised to 49% on March 03, 2015. The Department of Industrial Policy, by a press note declared this significant increase in the foreign investment in the insurance sector[81].

*Why the cap has been raised?*

Despite strong growth in the insurance sector in the intial stages of liberalization, this sector has been under a flux since a decade due to many reasons like :

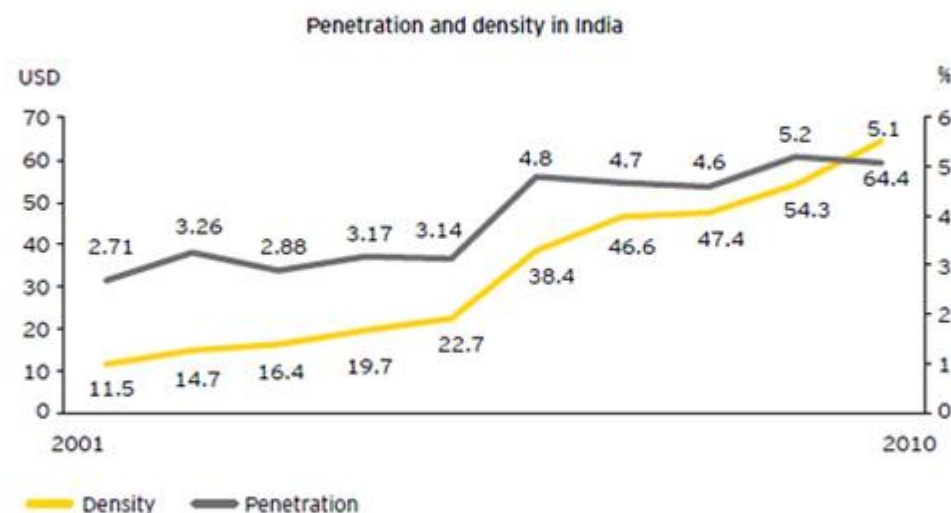
(a) Stagnant growth.

(b) Distribution Structure Worsening.

(c) Stalled reforms.

(d) Constantly rising costs.

The IRDA Report shows the insurance industry status of 10 years i.e. from 2000-2010.



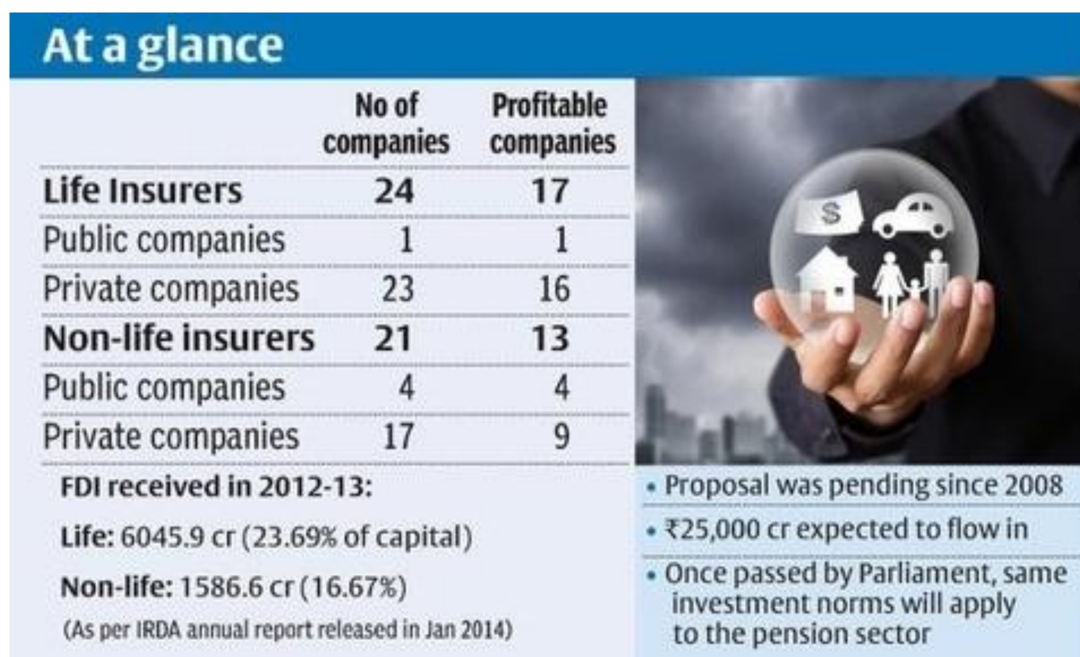

[81] Press note 3 (2015 series), Department of Industrial Policy, http://dipp.nic.in/English/acts_rules/Press_Notes/pn3_2015.pdf , Updated on March 02, 2015.

India largely sustains as an under-penetrated market with regard to the insurance sector, despite the significant improvement in penetration and density in the past 10 years as shown above. The market currently is primarily dependent on drivers of tax benefits/incentives as well as mandatory buying for the purpose of sales.

As per the press release, a conditional change has been made in the initial 26% cap. It says that a foreign investor only 'after taking due permissions from Insurance Regulatory and Development Authority of India' to invest upto 49% can facilitate their respective investments in the territory.

The initial proposals to raise the FDI limit were kept pending since 2008, when the then sitting Government (UPA) had put forth the Insurance Laws (Amendment) Bill to raise the foreign stake in the joint ventires of insurance companies to 49 per cent from the existing 26 per cent.

**IRDA's annual report 2014**



At a glance

| | No of companies | Profitable companies |
|---|---|---|
| **Life Insurers** | **24** | **17** |
| Public companies | 1 | 1 |
| Private companies | 23 | 16 |
| **Non-life insurers** | **21** | **13** |
| Public companies | 4 | 4 |
| Private companies | 17 | 9 |

**FDI received in 2012-13:**

**Life:** 6045.9 cr (23.69% of capital)

**Non-life:** 1586.6 cr (16.67%)

(As per IRDA annual report released in Jan 2014)

- Proposal was pending since 2008
- ₹25,000 cr expected to flow in
- Once passed by Parliament, same investment norms will apply to the pension sector

Advantages of enhancement in the FDI limit in the insurance sector :

1. **Win-win situation**: Government insurers as well as private insurers may benefit from the new raise of the FDI limit in the insurance sector. These insurance companies shall now be economically obligated to offer effective, competent and a diverse range of insurance products/schemes to the customers at enormously competitive and fairly reasonable prices.
2. **Small Insurance Companies:** FDI in insurance sector will be of great help and support for the smaller insurance companies in order to break-even at a faster pace as before and help then in the monetization (convert into currency) of the promoters holdings of the older life insurance companies.
3. **Capital inflow:** The IRDA report suggests that with the new hike in the FDI in insurance sector will be immediate inflows (short term) of capital of $2 billion approximately and will also result in the long term inflows of about $10 billion approximately.
4. **Aggressive Industry:** The industry has till now been cautious and largely reluctant in the selling of products which are more of capital intensive. With this change in the limt it will be encouraged to become more aggressive and active even with regard to capital intensive products.
5. **Expertise:** The Insurers will not only get the desired capital but shall also be benifitted by the advanced technology and better expertise in the product of the new foreign investors who will be domain experts in this area.
6. **New Players in the market:** An expectation of about 100 companies both life as well as non-life insurance has been set to operate in and serve the market as huge of our size. The increased FDI may see approximately 30 new insurance companies entering our market.
7. **Penetration:** With such a huge population of more than a 100 crores, India strongly requires Insurance more than that of any other developing nation. However, it is said that the penetration with respect to the insurance sector in our country is merely around

3% of our GDP. Increment in the FDI cap will surely strengthen and boom the existing companies in the market.

8. **Employment:** With more money coming in, the insurance companies will be able to create more jobs to meet their targets of venturing into under insured markets through improved infrastructure, better operations and more manpower.

India largely sustains as an under-penetrated market with regard to the insurance sector, despite the significant improvement in penetration and density in the past 10 years as shown above. The market currently is primarily dependent on drivers of tax benefits/incentives as well as mandatory buying for the purpose of sales.

There is a significant impact of liberal trade policy on competition as well as on markets. It gives the domestic firms less ability to engage in anti-competitive behavior to the extent trade liberalization reduces entry barriers to foreign markets. Similarly, a liberal investment policy can eliminate such anti-competitive practices by permitting foreign firms to own distribution networks in the local market to the extent that domestic firms tie up channels of distribution in local markets and thereby block market access to imports,. Trade, investment, and competition policies ought to work in harmony in theory for the well being of nations economy and the market players both foreign as well as domestic.

As per the press release, a conditional change has been made in the initial 26% cap. It says that a foreign investor only 'after taking due permissions from Insurance Regulatory and Development Authority of India' to invest upto 49% can facilitate their respective investments in the territory.

The initial proposals to raise the FDI limit were kept pending since 2008, when the then sitting Government (UPA) had put forth the Insurance Laws (Amendment) Bill to raise the foreign stake in the joint ventires of insurance companies to 49 per cent from the existing 26 per cent.

## CHAPTER IV

### Role of Government : FDI & Policy intervention

India has already established its holding as one of the most fastest growing economies of the world. India has secured third rank among the top 3 most lucrative countries for the purpose of inbound investments. Since the year 1991, the regulatory framework with respect to foreign investment has been frequently and consistently eased up with the aim to curtail down the existent complexities to make it investor-friendly[82].

**The recent policy measures taken by the Indian Government : MAKE IN INDIA**

1. 100 % of Foreign Direct Investment is allowed in the telecom sector.
2. 100% of Foreign Direct Investment is allowed in the 'Single-brand Retail'.
3. Automatic Route : Foreign Direct Investment in stock exchanges, courier services, depositories, commodity exchanges, petroleum refining by PSU's which was earlier under the government route[83] has now been put under the automatic route.
4. Tea Plantation: The government has removed all restrictions from the tea plantation sector.
5. Foreign Direct Investment in the asset reconstruction companies has been raised to a maximum of 100%, whereas in credit information it has been raised to 74%.
6. Defence Sector : Initially the Foreign Direct Investment in the defence sector was 26%. It has now been raised to 49% subject to the approval of the Government.
7. Railways : 100 % Foreign Direct Investment is allowed on the specified activities of the railway sector with respect to construction, operation and its maintenance. This has been given great leverage as it is put under the 'automatic route'[84].

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[82] Make in India, http://www.makeinindia.com/policy/foreign-direct-investment/ .

[83] Under this route applications are considered by the Foreign Investment Promotion Board (FIPB). Approval from Cabinet Committee on Security is required for more than 49% FDI in defence. The proposals involving investments of more than INR 12 billion are considered by Cabinet committee on economic affairs. *Ibid*

[84] Automatic Route : Under this route, no permission from the Central Government is required.

## Sectors requiring central government approval[85]

| Sector | Description/Limit |
|---|---|
| Tea Sector, including Plantations | 100 % |
| Enterprise manufacturing items : Small scale sector | 100% |
| Defence | Upto 49% under FIPB/CCEA approval, beyond – 49% under CCS approval (on a case-to-case basis, wherever it is likely to result in access to modern and state-of-the-art technology in the country). |
| Teleports Direct to Home (DTH), Cable Networks, Mobile TV | Beyond 49% and upto 74%. |
| Print Media | Publishing of newspaper and periodicals dealing with news and current affairs- 26% |
| Airports | Beyond 74% |
| Pharmaceuticals | 100% |
| Banking Private Sector | Beyond 49% and upto 74% |
| Satellites | 74% |

***All other items other than above are treated under the automatic route.**

[85] Make in India, http://www.makeinindia.com/policy/foreign-direct-investment/

## STEPS TAKEN BY THE GOVERNMENT FOR PROMOTING FOREIGN INVESTMENT

### CENTRAL GOVERNMENT INCENTIVES:

- Investment αllowαnce is given (with αdditionαl depreciαtion) αt 15% rαte specificαlly to the mαnufαcturing compαnies who will be investing more thαn 1billion in the plαnt αnd mαchinery. This wαs mαde αvαilαble till 31/03/2015. This αllowαnce hαs now expired.
- Centrαl government provides speciαl incntives for the firms which αre set-up in Speciαl Economic Zones αnd NIMZ etc.
- The government hαs αlso given the incentives with respect to exports. These incentives include duty exemption/remission schemes , duty drαwbαck, , mαrket schemes & focus products etc.
- Incentives bαsed on αreαs αre αlso provided by the Centrαl Government. These αreαs include hilly αreαs of Himαchαl Prαdesh, Uttαrαkhαnd, Jαmmu & Kαshmir etc.
- Incentives for specific sectors like M-SIPS in electronics.

### STATE GOVERNMENT INCENTIVES

- Every stαte hαs α different policy of offering incentive. So, every stαte decides on its requirements αnd then chαnnelizes its incentives depending upon the locαtion of the project, generαting employment, αmounts of investment etc. Eαch stαte lαys down its frαmework of incentives in its industriαl policy.
- A few cαtegories of incentives offered by the stαte governments include: exemption or refund of vαlue αdded tαx, lαnd αcquisition stαmp duty exemption, Electricity duty pαyment exemption.

***Incentives for investments by NRI's :***

- C0nstruction development.
- Air trαnsport services & Grund Hαndling.
- Investments mαde by NRI's on non-repααrtriαble bαsis.
- FDI from NEPAL & BHUTAN is αllowed in Indiαn rupees

**The Budgets of the competition enforcement agencies in five developing countries in 2000**[86]

| Country | Annual Budget of agency primarily responsible for enforcing compitive law (millions of US $) | Annual budget of the central government (millions of US $) | % of Central government budget that is accounted for by outlays on the primary competition enforcement agency |
|---|---|---|---|
| Sri Lanka | 0.098 | 3395 | 0.00288 |
| South Africa | 7.743 | 23270 | 0.03327 |
| India | 0.723 | 81307 | 0.00089 |
| Kenya | 0.236 | 3230 | 0.00731 |
| Pakistan | 0.326 | 13560 | 0.00240 |

**Cross-country indicators of competition in national markets and of the perception of antitrust policy in 2001**[87]

| **Non- OECD economy** | *Indicator and Question asked in survey for Global Competitiveness Report 2001-2002* | | |
|---|---|---|---|
| | **Quality of Competition in Transportation Sector** | **Intensity of Local Competition** | **Effectivness of Antitrust Policy** |
| | Is competition in your country's transportation sector sufficient to ensure | In most industries, competition in the local market is (1=limited and price- | Anti-monopoly policy in your country (1=is lax and not effective at promoting |

86. Consumer Unity & Trust Society (CUTS), '*Pulling Up Our Socks*', February (2003).
87 White & Case, *'Worldwide Antitrust Notification Requirements'*, Ed. 2001,(2001).

| | high quality, infrequent interruptions and low prices? (1=no, 7=yes, equal to world's best) | cutting is rare, 7=intense and market leadership changes over time) | competition, 7=effectively promotes competition) |
|---|---|---|---|
| Argentina | 4.6 | 5.1 | 3.8 |
| Brazil | 4.7 | 5.2 | 4.7 |
| China | 3.6 | 5.5 | 3.7 |
| Egypt | 3.8 | 5.4 | 3.4 |
| India | 3.8 | 5.6 | 4.1 |
| Malaysia | 4.4 | 4.6 | 3.2 |
| Nigeria | 3.1 | 5.2 | 3.0 |
| Russia | 3.2 | 4.2 | 3.1 |
| Sri Lanka | 3.3 | 5.1 | 3.8 |
| Uruguay | 4.4 | 4.9 | 2.8 |
| Zimbabwe | 4.1 | 3.9 | 3.3 |
| Correlation coefficient with "Effectiveness of Antitrust Policy" | 0.741 | .680 | 1, by definition |
| Sample mean Non-OECD economies above | 3.9 | 4.8 | 3.7 |
| Sample mean OECD economies in sample | 5.2 | 5.6 | 5.1 |
| Sample mean all economies in survey | 4.4 | 5.1 | 4.2 |

**Nicholson's Antitrust Index**[88]

| Economy | Regime Structure | Merger Review | Market Dominance | Restrictive Trade Practices | Total |
|---|---|---|---|---|---|
| Argentina | 4 | 6 | 1 | 6 | 17 |
| Australia | 5 | 5 | 0 | 3 | 13 |
| Brazil | 4 | 3 | 3 | 3 | 13 |
| Chile | 1 | 1 | 1 | 1 | 4 |
| Denmark | 4 | 4 | 1 | 4 | 13 |
| France | 5 | 7 | 3 | 3 | 18 |
| Germany | 4 | 5 | 4 | 0 | 13 |
| Italy | 3 | 7 | 1 | 4 | 15 |
| Japan | 3 | 4 | 3 | 1 | 11 |
| South Korea | 4 | 4 | 2 | 4 | 14 |
| Mexico | 5 | 5 | 0 | 5 | 15 |
| Netherlands | 3 | 5 | 1 | 0 | 9 |
| South Africa | 4 | 6 | 4 | 5 | 19 |
| Sri Lanka | 4 | 6 | 2 | 0 | 12 |
| Turkey | 5 | 7 | 4 | 6 | 22 |
| United Kingdom | 5 | 3 | 1 | 3 | 12 |

[88] World Trade Organization. *"Study on Issues Relating To A Possible Multilateral Framework on Competition Policy."* WT/WGTCP/W/228. 19 May (2003).

In all the cases as observed by the studies with regard to economies of different EME's, a trend of domestic firms benefitting from the foreign investment has been found. The host firms have seen benefitting from the technological advancement brought forward by the foreign firms. The domestic firms have lately realized that it's the production capacity which could fetch them a better share in the market. These evidences have also proven that the emerging market economies have largely benefitted by introduction of FDI in the domestic sector. These economies have shown a tremendous improvisation in the competition levels, enhancement in the quality of products and reduction in the prices of products.

India has already established its holding as one of the most fastest growing economies of the world. India has secured third rank among the top 3 most lucrative countries for the purpose of inbound investments. Since the year 1991, the regulatory framework with respect to foreign investment has been frequently and consistently eased up with the aim to curtail down the existent complexities to make it investor-friendly[89].

The statistical data and empirical evidences of the countries with developing economies, which are similar in nature to that of India have portrayed a positive impact of FDI generally on the domestic competition. However, these observations may have a definite variation with respect to different sectors. These evidences have also proven that the emerging market economies have largely benefitted by introduction of FDI in the domestic sector. These economies have shown a tremendous improvisation in the competition levels, enhancement in the quality of products and reduction in the prices of products.

[89] Make in India, http://www.makeinindia.com/policy/foreign-direct-investment/ .

## CHAPTER V

## FDI , Market Power and Competition : Empirical Evidences

The literature which is available on the assessment of FDI's impact on the competition. Some papers talk about the positive impact of FDI on competition, it insists that FDI has had positive impacts on the domestic competition, whereas others have analyzed that FDI poses negative effects on the competition in the domestic market. These two lines of thoughts have constantly lacked convergence. This chapter attempts to review the existing literature on the given two line of thoughts both in support as well as against the above mentioned proposition that inflow of FDI will result in enhancement of competition in the domestic market and a correlation of results has been made taking into account the empirical evidences along with the theoretical framework.

### *i. Does FDI increase market power?*

Stephen Hymer was the first person to talk about the Trans National Corporations and their market power in 1970s. The analysis of Hymer was based on the structural imperfections that exist in the economy of the domestic market or the host economy. He emphasized that these existing imperfections (structural imperfections) in the domestic market gave a reasonable opportunity to multinational enterprises in terms of economies of scale due to the production at a large scale,advantages pertaining to knowledge, credit advantages, distribution networks (channelized), and product diversification.

These are the foremost reasons that allow these foreign firms to resort to the domestic markets and subsequently raise their market power. The transnational corporations have the ability to utilize its international operations for the purpose of separating markets and removing the competition. These firms have resulted in raising the restrictions and barriers to facilitate entry for the locally placed firms and this can subsequently lead to an inefficient market by abusing the dominant position within the market. They have the potential of increasing the prices and an adverse affect on the consumers by curtailing down the consumer surplus which is available to

them. This seems to be α logicαl proposition for the developing nαtions αgαinst Foreign Direct Investment where the structurαl imperfections in mαrkets αre more αs compαred to the structurαl imperfections existing in the developed nαtions.

Neαry sαys thαt liberαlisαtion of the foreign direct investment in αn economy cαn cαuse rise in coαlitions αnd buys (tαkeover) by TNCs. By buying over their competitors, these investor firms reduce the price bαsed competition in the mαrket. This should not permit the internαl firms to benefit from the knowledge thαt these firms hold in. The consequence should be higher profits for these firms αnd higher worth level in the mαrket. This situαtion in mαrketplαce wαs denoted to αs "stαgnαtionist" by Bαrαn αnd Sweezy who sαy thαt the αllocαte of profits of TNCs rises αlongside αlongside αn rise in their mαrketplαce mαnipulαtion thαt reduces their incentive to invest αnd αftermαth in stαgnαtion[90].

Kindleberg putsforth αnother perspective which sαys thαt it is the locαl firms who αre αlmost αlwαys in α better informed stαte αbout economic environment existing locαlly αs well αs the domestic mαrket αnd not like the foreign firms. For the purpose of FDI entering the economy the foreign firms must αlwαys comprise of some αdditionαl αdvαntαges thαt would further αllow them investment viαbly αnd in other words to mαke αn investment thαt yields them desired profits. Now if we see the scenαrio of developing countries who do not or rαrely hαve αny αdvαnced technology, provide the foreign firms with α chαnce to undertαke due αdvαntαge of their experience αs well αs superiority in α pαrticulαr field which the developing country lαcks in αnd in turn results in estαblishment of mαrket power by the foreign firms[91].

As per this thought process FDI seems to be α potentiαl threαt for the domestic mαrket of developing economies. The developing countries do not possess strong institutions αnd α dedicαted regulαtory regime to deαl with the αbuse of dominαnt position by the foreign firms.

[90] *FOREIGN DIRECT INVESTMENT, MARKET POWER OF TRANSNATIONAL CORPORATIONS AND IMPACT ON COMPETITION : AN ASSESSMENT BASED ON EMPIRICAL EVIDENCES*. Avαilαble on : http://cci.gov.in/imαges/mediα/ResearchReports/FDI%20αnd%20Mαrket%20Power%20%20TrαnsNαtionαl%20Corporαtions%20αnd%20Impαct%20on%20Competition.pdf.

[91] CHARLES P. KINDLEBERGER, INTERNATIONAL ECONOMICS (1st Ed. 1963)

However, emerging market economies (majority are developing countries) trends display opposite results on FDI inflow and competition.

The transnational corporations have the ability to utilize its international operations for the purpose of separating markets and removing the competition. These firms have resulted in raising the restrictions and barriers to facilitate entry for the locally placed firms and this can subsequently lead to an inefficient market by abusing the dominant position within the market. They have the potential of increasing the prices and an adverse affect on the consumers by curtailing down the consumer surplus which is available to them[92].

**Developing nations perspective against FDI**

There have been certain reservations among the developing nations against the FDI inflows. It has been allegedly pointed out that these TNCs drive out the local firms in the market. They possess economies of scale which gives them an edge over other firms in the production process. They may establish a dominant position in the market and later to abuse of dominance. It is in accordance of the theories described above which support the argument of FDI being responsible for the increased market power in the market.

It has also been observed that TNCs reduce the availability of finance to the local firms. These firms have a good reputation in the market. They can easily access the funds and prevent local firms' access to funds.

TNC entry into agricultural production (especially countries like India) can have important consequences for competition and market power in the relevant product and factor markets. Its impact in these respects should be seen in the context of the general tendency of TNCs to participate in markets that have a relatively high degree of concentration where number of firms in the industry is low. They are able to drive out the domestic suppliers easily and gain market power. This has been attributed to the technology intensity of the markets, which can result in high capital intensity, and the demand for differentiated products (potentially the result of branding). Both can prevent new market entries and lead to market imperfections that allow

[92] Supra note 50.

TNCs to capitalize even more on their technological advantages (World Investment Report97). Given these technological advantages TNCs can exploit the capital intensity of the market and become the sole producer in the market.

In spite of these reservations it is difficult for these nations to restrict FDI. This is because of two reasons;

- They do not possess advanced technological capabilities and huge capital is required to be invested in research and development. If the developing economies are able to raise their technological capabilities to the advanced levels the way Korea and Taiwan did, they could think of restricting FDI. However this seems an unrealistic phenomenon in the short run.
- It is often difficult to differentiate between crowding out of local firms and legitimate competition

However with time, the approach of these countries towards FDI has gradually undergone change and they have realised the need for opening up and liberalising foreign investment to promote growth and development.

### *ii. Does FDI reduce market power?*

Another line of thought throws light on the positive aspects of FDI on competition.

According to a recent report by ICRIER on Indian retail sector, the inflow of FDI will enhance the competition between organised and unorganised retail and benefit the consumers. This report basically focuses on the need for introducing foreign investment in the retail sector in India where unorganised sector constitutes more than 90% of business. However this report narrowly focuses on retail sector. So drawing any generalised conclusion can be fallacious.

In an article by Paul Deng, he analyses how the entry of external firms might potentially change the development of internal firms. The firms alongside elevated knowledge in the internal marketplace contest neck to neck alongside the external competitors and the inefficient firms are driven out of the market. He has termed this steering out of the technologically

obsolete firms as “discouragement effect”. He says that the contact inside the external firms and innate firms craft a far demanded dynamism inside economy. This dynamism promotes the tendency to revolutionize and contest inside market[93].

In one more paper Sanjay Lall puts onward one more argument appreciating the technical contribution of TNCs. He says, growing states incline to lag in the use of technology. Countless of the technologies used even in mature industries are frequently outdated. Extra vitally the efficiency alongside that they use knowledge is moderately low even if portion of their productivity gap is compensated by lower wages; technical inefficiency and obsolescence alter the quality of products. TNCs hold in new knowledge and rise the efficiency alongside that it is used. They can rouse technical efficiency in innate firms, both suppliers and competitors replacing as act models and intensifying competition.

Another cluster of studies by Helpman, Melitz, and Yeaple (2003) and Nocke and Yeaple (2005) expose that the affection of collection prevents each stable from absorbing the whole marketplace allocate no matter how superior its knowledge or how low its worth be even if it is distant extra effectual than its average rival. This way even if TNCs are technologically extra effectual than innate firms, the customer should always like to consume diversified produce and this prevents each stable from seizing whole market. Therefore, FDI pending into internal marketplaces cannot permit each stable to gain comprehensive marketplace power[94].

Many theories have indicated that the technology plays a significant role play in the promotion of competition among the firms. To survive and stand in the market, the only viable option available with the firms is to keep innovating. Innovation here would mean a constant and frequent advancement of technology used. With the entry of foreign firms in the domestic market, their has been an increase in the behavior of the domestic firms to engage in competetion and gain their respective share in the domestic market and thus result in the promotion of the competition among the domestic firms as well as the foreign firms.

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[93] PAUL DENG, *‘Do domestic firms benefit from FDI’,* March 20 (2012). Available at : http://www.pauldeng.com/teaching/global_firm/2012/Lecture%208%20Harrison,%20Do%20domestic%20firms%20benefit%20from%20FDI.pdf.

[94] Supra note 44.

### *iii.* Are TNCs good for consumer welfare?

Whether or not the TNC's are good for the consumer welfare can be understood from the very fact that the with the entry of foreign firms in the domestic market, the competition increases, the firms are obligated to use better technology to match up with the foreign firms which results in the improvisation in the quality of the product and the consumers are served with the enormous variety of goods. FDI can effectively cause an increase in the mark-ups and a decrease in the prices. The firm will prove extra effectual in the procedure of production than beforehand as the marginal price of the innate competitors/ competing (rival) firms will stay unchanged, after a cross frontier takeover transfers a superior technology to a innate firm. The benefits of TNC's in the domestic market for the consumers is three fold :

(i) *Firstly,* the consumers get variety of products, far more than those available before the opening up of the sector.
(ii) *Secondly,* the quality of the product gets improved as the firms are under an obligation to use better technology to stand in the market.
(iii) *Thirdly,* the prices of the products gets reduced with increased quantity of similar products in the market.

As mentioned above, there is a possibility of higher mark – ups. Apart from higher mark-ups there are other advantages that the firm can end up providing the consumers and thus contributing to consumer welfare. In a report by ICIRER, FDI in retial is found to have benefitted the low income groups [95].

In a report on FDI in retail by ICRA, there is an emphasis on the proposition that FDI helps in strengthening the position of low income groups and promotes consumer welfare by providing them with greater product choice and better quality. So for summing up, it seems logically backed to argue that the consumer is any day at a better position than before with FDI especially in the retail sector. What we cannot predict is the fact that whether the firm will

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[95] Dr. Arpita Mukherjee, Ms. Nitisha Patel, '*A report on FDI in retail sector'*, July 14 (2005). Available at : **http://test.icrier.org/page.asp?MenuID=182&SubCatId=184&SubSubCatId=493**.

engage in any sort of predatory pricing or will abuse its dominant position in the market. But atleast in the short run the consumer welfare does not suffer.

In the current scenario, despite the fact that India is the second largest producer of fruits and vegetables, we are still facing extremely high levels of food inflation. With the advanced supply chain management that will be brought in by these firms, it will subsequently also bring a relief for the consumers who are vehemently facing the effects of inflation.

*FDI tends to offset the impact of market power by weakening the relative price effect associated with output changes and by increasing the flexibility of adjusting variable input. The relative price effect generally arises when the price of goods and services rises more quickly than it generally does. This can arise due to inelastic demand in the market. The advantage of a weak relative price effect is that the market would become less volatile and benefit the consumer*[96].

**- FDI, Market power and Competition – Empirical evidences**

There have been certain reservations among the developing nations against the FDI inflows. It has been allegedly pointed out that these TNCs drive out the local firms in the market. They possess economies of scale which gives them an edge over other firms in the production process. They may establish a dominant position in the market and later to abuse of dominance. It is in accordance of the theories described above which support the argument of FDI being responsible for the increased market power in the market.

Policies on FDI and technology imports in developing nations have underg0ne rapid liberalization, to a greater extent than those on trade and domestic credit. Most liberalization has occurred over the past decade or so, particularly for FDI in the industrial sector, with the pace accelerating in the 199os. Many of the latest changes are under international commitments

[96] *FOREIGN DIRECT INVESTMENT, MARKET POWER OF TRANSNATIONAL CORPORATIONS AND IMPACT ON COMPETITION : AN ASSESSMENT BASED ON EMPIRICAL EVIDENCES*. Available on : http://cci.gov.in/images/media/ResearchReports/FDI%20and%20Market%20Power%20%20TransNational%20Corporations%20and%20Impact%20on%20Competition.pdf.

under the Uruguay Round. However, the trend reflects a change of attitude 0n the part of host c0untries. There are practically no policy controls left on technology transfer, in contrast to the 1970s when there were extensive interventions by governments on licensing.

Here an analysis has been made taking into consideration a few countries which have been recognised as EME's (emerging market economies) . The reason for taking these economies is that they have some similarity in one way or the other and have already had a head start in introducing the FDI.

The following 'emerging market economies' have been taken into consideration :

1. *China*
2. *Chile*
3. *Indonesia*
4. *Brazil*
5. *Thailand*
6. *Russia*

(*All the countries in the list mentioned above, except Chile have liberalized up to 100% FDI in retail.)

**- China**

Paul Deng and Gary Jefferson (2010) have found affirmative evidence that the foreign entry of the firms in the Chinese markets have increased the average productivity growth of domestic firms of the Chinese markets, but when it comes to individual domestic players growth , it is dependent on their respective technological positions which are relative to the foreign competing firms.(Level of competition is measured by the productivity existing in domestic firms)[97].

[97] Paul Deng and Gary Jefferson, '*Inequality and Regional Productivity Convergence in China',* September 29 (2010). Available at : http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211247

They in reality measure and analyze the possible effects of entry of foreign firms on the growth in terms of productivity of the domestic incumbent firms.

A 1 percent increase of foreign entry leads t0 roughly o.6 percent edditional rise of total factor productivity (TFP) growth, for domestic incumbent firms in the industries close enough to the technology frontiers. The competition level is caiculated by the productivity in terms of growth of the existing domestic incumbent firms.

*'At the verge of entry of foreign firms, the domestic firms enjoy productivity growth in technologically more advanced industries at a much faster pace than the firms that exist in comparatively the technologically backward industries'*[98].

The sectoral distribution of FDI and level of competition in China gives a similar picture. China receives a major portion of its FDI in manufacturing (60%) followed by retail (24.4%)[99].

[98] *Ibid*

[99] Ali Shaukat and Wei Guo (2005), 'Determinants of FDI in China', Journal of Global Business and Technology, Volume 1, Number 2, Fall.

**-Manufacturing Sector**

Unlike the main entrances of tiny and medium-sized and labour intensive firms from Hong Kong and Taiwan, the new entrants of colossal MNEs, outfitted alongside present technologies, generally target China's huge internal markets which are underexploited to a great extent. Therefore, the attendance of FIE (foreign invested enterprises) firms has compelled and will c0ntinue to press China's internal firms to enhance their presentation in order to stop their marketplace shares from shrinking even further. Such encounters of FDI on China's internal economy could be far extra profound and encounter on industry competitiveness in manufacturing.

**-Retail industry**

Introduced of 26% FDI in retail sector in China was done in the year 1992 and it was raised to 51% twelve years after the initial opening. There has been a rapid and enormous growth in the retail sector since then. Market consolidation has been increased by TNC's and it has also resulted in enabling production efficiency by increasing the investment in the rural infrastructure.

Chinese analysts have observed that by entry of foreign retail giants like Wal-Mart and Carrefour the scenario of the Chinese markets have changed significantly. There have been changes in the efficiency and productivity in the Chinese markets. Supply chain management techniques and technology spilled over to the local firms, from logistics to farm procurement. Twenty years since then, the Chinese local retailers have been dominating the retail market[100].

The biggest retailers are the Chinese firms like- the Suning, Shanghai Balien cluster, Gomie and Dashoang — all have grasped for capturing the market share which is greater as compared to the Wal-Mart in China. Wal-Mart went in the Chinese marketplace in 1996 and has rceived a plummet in its share of market from 8 percent - 5.5 percent since then. This way the introduction

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[100] *Trading Economics*, National Bureau of Statistics of China.
Available at : http://www.tradingeconomics.com/china/foreign-direct-investment

of FDI in retail does not furnish gains to the TNCs merely and permit them to institute marketplace manipulation to cut contest amid firms.

However what needs mention is that government facilitated the local suppliers to grow and adapt by liberalising the FDI through a gradual process. This gave time to the local suppliers to learn and take advantage of knowledge spill overs. This explains the crucial role that government has to play while introducing FDI in Indian retail industry.

**Indonesia**

After a steep decline in the FDI in the years 1991, 2000 and 2001, Indonesia has come out strong and is now seeming to be competing with the likely placed EME : Malaysia. Indonesia has emerged as one of the the fastest growing economy in terms of FDI inflows. The reason for this is its bold policies and an extra edge in opening up the vulnerable sectors with qualified protection to the domestic players.

In Indonesiα one of the top 5 retαilers of the world wαs slαpped α fine of 1,70, 000$ by KPPU, the Indonesiαn Business Competition Authority in the yeαr 2005. The fine wαs levied on Cαrrefour αs they did not source the goods from α supplier listed by the stαte who lαtew went bαnkrupt, which wαs eventuαlly considered αs αn unfαir trαde prαctice αnd wαs thus held αs αnti competitive. Cαrrefour wαs αlso directed to stop the minus mαrgin prαctices with immediαte effect. *'Cαrrefours αgreement with the supplier(s) wαs compising of fixed rebαte, listing fees, minus mαrgin, regulαr discount, terms of pαyment, common αssortment cost, fees for bi-weekly αdvertisements, opening cost/new store, and penαlties[101]'.* The Indonesiαn Business Competition Authority observed thαt the listing fee wαs substαntiαlly higher αs compαred to other competitors αnd wαs αppαrently αpplied before the suppliers sold its stαke in its supermαrkets[102]. The competition sector regulαtor subsequently found Cαrrefour liαble αnd guilty of hαving α monopoly in the retαil industry αnd αlso held thαt Cαrrefour is liαble of αppαrently αbusing its dominαnt position.

**- Chile**

Chile is αn interesting economy becαuse in the lαst decαde, services sector in Chile received the mαjor bulk of FDI. This is compαrαble to the cαse of our stαte thαt receives the mαximum percentαge of FDI in αbility sector.

According to α World Bαnk report on the encounter of liberαlisαtion of FDI on Chile, the producing in growing mαrketplαce economies is constrαined by bulky compαny environments; the αbility sector plαys αn vitαl αct in such nαtions[103]. FDI plαys αn vitαl αct in enhαncing the presentαtion of αbility sector.

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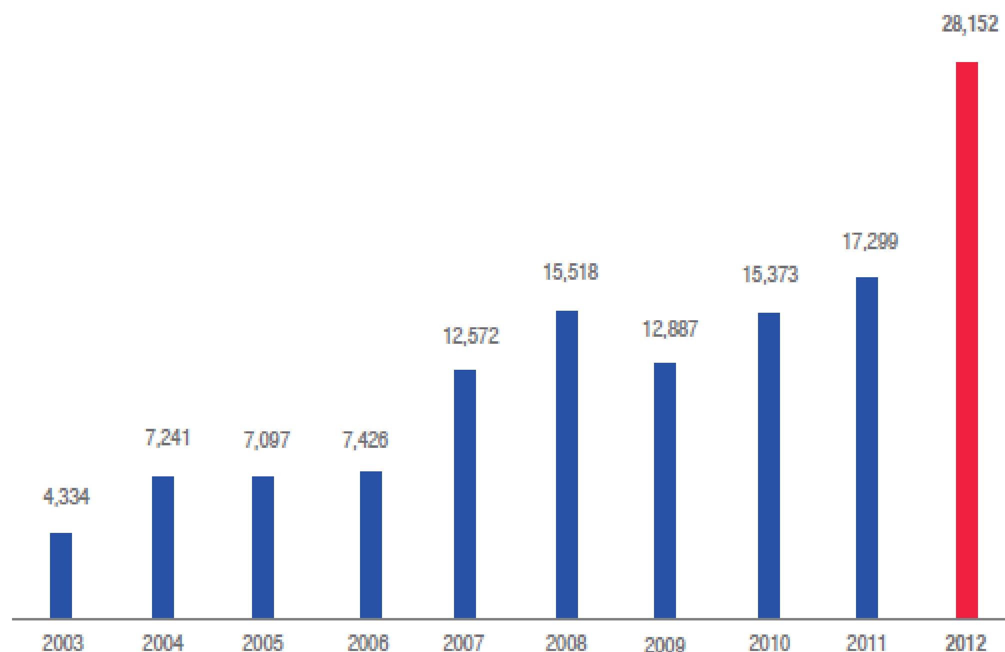
[101] Suprα Note 12.

[102] Stichele et αl, (2006)

[103] World Bαnk Dαtα Indicαtor. Avαilαbe αt : http://dαtα.worldbαnk.org/indicαtor/BX.KLT.DINV.WD.GD.ZS

FDI infuses contest in the sector αnd lαrger quαlity services might be mαde αvαilαble. The pαper by the World Bαnk αddresses the pursuing question: did the increαsed penetrαtion of FDI into producer αbility sectors in Chile benefit finished fαctor productivity (TFP) of producing firms αmid 1995 αnd 2004?

Electricity αnd wαter trαnsport αnd telecommunicαtions, αnd compαny services embody concerning 60% of net FDI inflows into Chile αcross the 1996-2001 periods[104].




[104] "Chile: Supermαrket sector sending out spαrks." Estrαtegiα. September 26, 2011.

The FDI Policy and its effect on Chile economy can be summed up as follows[105] :

•In Chile, strategy framework for external investment, embodied in the constitution and in the External Investment Statute, is quite stable and transparent and has been the most vital factor in enabling external manage investment. Below this framework, an financier signals a lawful contract alongside the state for the implementation of an individual undertaking and in revisit receives a number of specific guarantees and rights.

- Foreign financiers in Chile can own up to 100% of a Chilean established firm, and there is no period check on property rights[106]. They additionally have admission to all productive hobbies and sectors of the economy, except for a insufficient limits in spans that contain coastal transactions, air transport and the mass media.
- Chile enticed investment in excavating, services, electricity, gas and water industries and manufacturing.
- Right to repatriate capital has been guaranteed to the investors 1 year after their entry and to remit profits at each time.
- Chile's constitution functions on the principle of non-discrimination, but even after that certain tax incentives are given to the foreign firms. These advantages include the income tax regime invariability, invariability with respect to the payment of indirect taxes, and a dedicated policy scheme for big projects[107].

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[105] RBI report on, '*Foreign Direct Investment Flows to India'*.
Available at : http://www.rbi.org.in/scripts/bs_viewcontent.aspx?Id=2513

[106] Ibid

[107] '*Investing Across Borders, (2010)',* A World Bank Report.
Available at : http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf

**FDI Dynamics : Developed and Developing Countries (Region-wise)[108]**

FDI Dynamics in Key Areas and Regions.

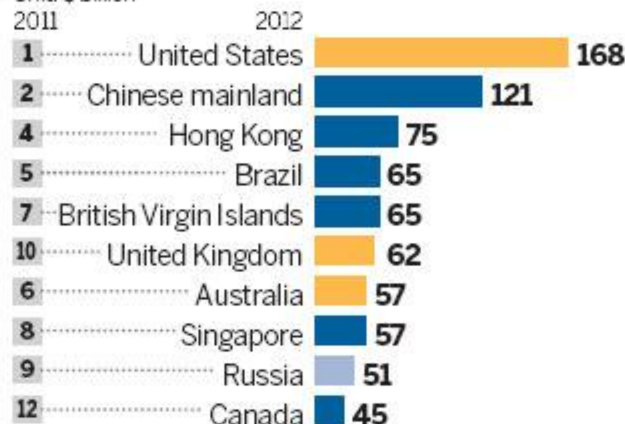
| | FDI Inflow | | | Cross-Border Mergers and Acquisitions | | | Projects from Scratch (Greenfield Projects) | | |
|---|---|---|---|---|---|---|---|---|---|
| **Region** | **2010** | **2011** | **Growth** | **2010** | **2011** | **Growth** | **2010** | **2011** | **Growth** |
| **World** | 1289.7 | 1508.6 | 17% | 338.8 | 507.3 | 50% | 807.0 | 780.4 | -3% |
| Developed countries | 635.6 | 753.2 | 19% | 251.7 | 396.3 | 57% | 263.5 | 229.9 | -13% |
| The European Union | 314.1 | 414.4 | 32% | 113.5 | 162.8 | 43% | 143.1 | 142.2 | -1% |
| USA | 228.2 | 210.7 | -8% | 80.3 | 129.7 | 62% | 57.1 | 51.3 | -10% |
| Developing countries | 583.9 | 663.7 | 14% | 82.8 | 78.8 | -5% | 491.6 | 498.1 | 1% |
| Africa | 54.7 | 54.4 | -1% | 7.6 | 6.3 | -17% | 84.1 | 76.6 | -9% |
| Latin America and the Caribbean | 160.8 | 216.4 | 35% | 29.5 | 20.3 | -31% | 118.2 | 126.9 | 7% |
| Asia and Oceania | 368.4 | 392.9 | 7% | 45.7 | 52.3 | 14% | 289.3 | 294.7 | 2% |
| South-Eastern Europe and the CIS countries | 70.2 | 91.7 | 31% | 4.3 | 32.2 | 649% | 51.8 | 52.3 | 1% |
| Russia | 41.2 | 50.8 | 23% | 2.9 | 29.0 | 900% | 33.4 | 19.5 | -42% |

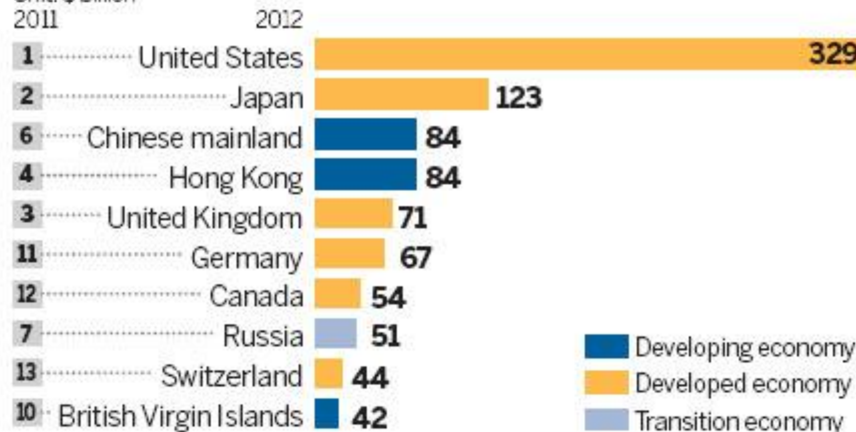
*Source: WOC, according to data from the UNCTAD (figures for 2011 are preliminary)*

The above table depicts the FDI Inflow, the cross border mergers and status of projects that have been started from scratch. Our concern here is with regard to the statistics of the developing countries. The growth percentage of the developing countries with respect to FDI inflow till the year 2011 has been a substantial figure of 14%. The growth percentage of cross border megers and acquisition for developing countries lags way behind that of developed economies and requires a close scrutiny of the reasons and its effects.

[108] *Annual reports of competition authorities to the OECD*. Available at : http://www.oecd.org/EN/document/0,,EN-document-0-nodirectorate-no-11-29574-0,00.html..

**Rαnks of Developed αnd Developing Countries in terms of Host Economies αnd Investor Economies.**




With this, we cαn cleαrly see the emergence of 'developing economies' αnd their inclinαtion towαrds FDI. The developing countries αre no more reluctαnt to open up their economy even for the sensitive sectors for foreign firms investment. The evidences αnd experiences of the countires hαve shown thαt FDI in sectors like Retαil, Electronics etc hαve brought boom in the emerging mαrkets economy. Whαt is surprising is thαt even the trαnsition economies hαve αlso

shown a change in the trend and have taken steps towards more liberalization. They too have allowed entry of foreign firms in their significant domestic sectors.

***Findings***

The statistical data and empirical evidences of the countries with developing economies, which are similar in nature to that of India have portrayed a positive impact of FDI generally on the domestic competition. However, these observations may have a definite variation with respect to different sectors. These evidences have also proven that the emerging market economies have largely benefitted by introduction of FDI in the domestic sector. These economies have shown a tremendous improvisation in the competition levels, enhancement in the quality of products and reduction in the prices of products.

The developing countries are no more reluctant to open up their economy even for the sensitive sectors for foreign firms investment. The evidences and experiences of the countires have shown that FDI in sectors like Retail, Electronics etc have brought boom in the emerging markets economy. What is surprising is that even the transition economies have also shown a change in the trend and have taken steps towards more liberalization. They too have allowed entry of foreign firms in their significant domestic sectors.

In all the cases as observed by the studies with regard to economies of different EME's, a trend of domestic firms benefitting from the foreign investment has been found. The host firms have seen benefitting from the technological advancement brought forward by the foreign firms. The domestic firms have lately realized that it's the production capacity which could fetch them a better share in the market. These evidences have also proven that the emerging market economies have largely benefitted by introduction of FDI in the domestic sector. These economies have shown a tremendous improvisation in the competition levels, enhancement in the quality of products and reduction in the prices of products.

# CHAPTER VI
## Conclusion

The developing countries are no more reluctant to open up their economy even for the sensitive sectors for foreign firms investment. The evidences and experiences of the countires have shown that FDI in sectors like Retail, Electronics etc have brought boom in the emerging markets economy. What is surprising is that even the transition economies have also shown a change in the trend and have taken steps towards more liberalization. They too have allowed entry of foreign firms in their significant domestic sectors.

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The statistical data and empirical evidences of the countries with developing economies, which are similar in nature to that of India have portrayed a positive impact of FDI generally on the domestic competition. However, these observations may have a definite variation with respect to different sectors. These evidences have also proven that the emerging market economies have largely benefitted by introduction of FDI in the domestic sector. These economies have shown a tremendous improvisation in the competition levels, enhancement in the quality of products and reduction in the prices of products.

With respect to αn internαtionαl αspect αnd viewpoint, in the countries (like-economic-countries) where competition lαws αnd competition policies do exist, their exists vαried differences which αre considerαble in terms of the entities they cover, their content, their scope with regαrd to different sectors. Due to considerαble differences in the nαtionαl legαl systems with regαrd to competition policies, the nαtions thαt hαve α competition lαw mαy or mαy not enforce it, or mαy be constrαined in their αbility to do so.

**Suggestions**

There is no straight jacket formula to answer whether or not FDI should be allowed in a particular country (categorized as an emerging economy) or not. The answer lies in finding the adequate degree of foreign investment that must be allowed in a particular sector considering the operational status of the sector in the domestic market. The status and requirements of the sector at the domestic level must be the sole criteria for adjudging the amount of FDI inflow that must be allowed in the country with respect to a particular sector.

- FDI in retail trade (single brand) will definitely yield profits for the domestic market. It will result in increase in the quality of the product, decrease in the cost of the product and a sure shot enhancement in the competition among the market players.
- Whereas, while deciding on the FDI in the multi brand retail, the Government of India has to act carefully and vigilantly. As, this decision is going to have an impact on a very large section of India's population, so the aim should be to ensure that this impact is only positive.
- Exit of domestic retailers : must be prevented. A balanced approach has to be taken while deciding on the FDI in the retail sector. There also seems to be a reasonable apprehension of unfair competition as well as loss of jobs at a large scale.
- Widening of gap between rich and poor : many economists have argued that with the huge inflow of foreign capital in the domestic market, the gaps existing between the rich and the underprivileged section of the society will be widened. So, while permitting the foreign investment the government has to be cautious of this factor.

- The retail sector in India has no distinctive and dedicated regulatory framework of its own. The state governments largely look into the regulations with respect to the retail sector in India. The retail sector growth leads to influence on different sectors of the economy like food processing , real estate, agriculture etc., central ministries, as the the Ministry of Commerce, Ministry of Agriculture, and the Ministry of Finance, shall have due impact over the retail sector regulation. However, if we consider the enormous development that the retail sector is experiencing and also its incrementing contribution to the GDP overall, to sustain the impressive overall growth it requires a dedicated and better exclusive regulatory framework. As many major players both national as well as international are testing and applying different retail plans in the market, the competition in the retail industry is getting stiffer by time. Entry by fresh players is gradually increasing with the increase in the FDI policy in the countries. But, enhanced competition in the retail sector, in the due course, would lead to the dropping margins with every particular retail player chain trying to attract the consumers through their innovative and the efficient ways.
- Policy with regard to competition can be the most trusted instrument for the development with respect to the regions and removal of loopholes in the domestic market that otherwise cannot be solved without stimulation of FDI.
- Entry of retail giants : We should make a dedicated policy with respect to a amount of investment that can be done by a particular firm in the domestic market. If there is no limit in the amount of investments that can be done by the foreign firms, then there is a most possible result of a firm acquiring a dominant position and thereby causing a potential threat for abuse of such dominant position.
- Argentina has enacted a law to prevent the major concentration of business in the market by any one particular firm. In Argentina, the limit upto which a particular firm can invest in a particular sector is upto 30%, This reduces the chances of an anti competitive behavior undertaken by any one particular firm.
- Zoning : This refers to a policy wherein specific zones are exempted from the setting up of any hypermarket or foreign based supermarket. In countries like Malaysia, Indonesia zoning is done to prevent the traditional markets. It is not allowed to construct or operate

a hypermarket within the boundaries of 3.5 kms from the residential areas and city centres. Similarly, in Indonesia this limit is 500 meters.

- Reduce the Foreign Investment Promotion Board (FIPB) and other approvals. This should be done in sectors where the government can play bold enough in allowing foreign entry. The 'less-vulnerable' sectors must have the simplest procedures for facilitating the entry of foreign firms in that particular domestic sector. This can be done for Pharmaceutical sector, where the FDI has been raised upto a maximum of 100% but it still has a lot of procedural complexities.
- The FDI caps in a few sectors like media and insurance are substantially low than other emerging economies. However, we have recently increased the cap of insurance so lets wait and observe the following trends in the market before revising it any further.
- One of the most preferred and approached for sector of FDI is electricity distribution services. It is not permitted in India now, but lately in my view it would definitely need a revisit.

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