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Expansion of Indian Enterprises: A Study of the Legal Framework Governing Outward Foreign Investment and Investor Protection Under Indian Law

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***Abstract*—Indian companies are no longer only on the receiving end of foreign capital. Over the past two decades they have bought foreign firms, set up subsidiaries abroad and taken stakes in overseas ventures, and individuals too now invest outside the country in growing numbers. This paper examines the legal framework that governs such outward investment, with particular attention to the overseas investment regime introduced in August 2022 under the Foreign Exchange Management Act, 1999. It traces the movement from a permission-based system to a largely automatic one, and studies the key features of the present law: the line drawn between overseas direct investment and overseas portfolio investment, the limits on financial commitment, the restriction on round-tripping and the reporting duties placed on investors. The paper then looks at investor protection from two sides, namely the protection of the Indian investor in the host state, which depends largely on India's investment treaty practice, and the protection of the shareholders of the Indian parent company, which rests on company and securities law. The study is doctrinal. It finds that the regime is far more workable than before but that gaps remain, especially in treaty coverage, cross-border insolvency and the treatment of minor compliance lapses. Some reforms are suggested.**

***Index Terms*—Bilateral investment treaty, FEMA, investor protection, outward direct investment, overseas investment rules 2022, round-tripping.**

I. INTRODUCTION

When Tata Steel acquired Corus in 2007, it was seen in India as something more than a business deal. It signalled that Indian firms could buy, and run, large companies in developed markets. Since then the outward movement of Indian capital has become routine rather than exceptional. Pharmaceutical companies have bought plants in the United States and Europe, IT firms have acquired consultancies abroad, and start-ups founded in Bengaluru are often incorporated, at least partly, in Singapore or Delaware. Monthly figures released by the Reserve Bank of India (RBI) now regularly show outward commitments running into several billion dollars.

This growth raises two sets of legal questions. The first is regulatory: under what conditions can an Indian resident send money abroad for investment, and how far does the State control it? India is still not a country with full capital account convertibility, so the answer is found in the Foreign Exchange Management Act, 1999 (FEMA) [1] and the rules made under it. The second is protective: once the money has left India, who protects it? The Indian investor faces risks in the host state, such as expropriation or arbitrary treatment, and the shareholders of the Indian parent face the risk that value will quietly leak out through overseas subsidiaries that are hard to monitor.

This paper attempts to deal with both questions together, since they are usually discussed separately. Part II states the method. Part III traces the evolution of the regime. Part IV examines the 2022 framework. Part V considers the corporate law overlay, and Part VI turns to investor protection. Parts VII and VIII offer a critical appraisal and suggestions, followed by a conclusion.

II. RESEARCH METHODOLOGY

The study is doctrinal and analytical. Primary sources include FEMA, the Overseas Investment Rules, Regulations and Directions of 2022, the Companies Act, 2013, SEBI regulations, India's Model Bilateral Investment Treaty and selected treaties and judicial decisions. Secondary sources include RBI publications, reports and commentary. The research questions are: (a) whether the 2022 regime strikes a fair balance between ease of investment and regulatory control, and (b) whether Indian law adequately protects Indian investors abroad and the shareholders of investing companies.

III. EVOLUTION OF THE OVERSEAS INVESTMENT REGIME

Under the Foreign Exchange Regulation Act, 1973, outward investment was treated with suspicion. Foreign exchange was scarce, and every proposal required case-by-case approval. Joint ventures abroad were allowed mainly where they would bring in exports of Indian machinery or know-how, and cash remittances were discouraged.

The 1991 reforms changed the outlook, and FEMA, which replaced FERA in 2000, shifted the basic approach from regulation to management. Section 6 of FEMA treats outward investment as a capital account transaction. After the amendment made by the Finance Act, 2015, the Central Government frames rules for non-debt instruments while the RBI regulates debt instruments. For about eighteen

years the field was governed by the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004, supplemented by numerous circulars. These regulations steadily liberalised the limits on investment, but the overall structure became cluttered. Many routine transactions, such as restructuring a loss-making subsidiary or writing off an investment, still needed specific RBI approval, and practitioners often complained that the law had to be pieced together from a dozen sources. On 22 August 2022 the old regulations were replaced by three instruments: the Foreign Exchange Management (Overseas Investment) Rules, 2022 issued by the Central Government [2], the Overseas Investment Regulations, 2022 issued by the RBI [3], and the Master Direction on Overseas Investment [4]. The stated purpose was to simplify the framework, bring most transactions under the automatic route and move from prior approval to a system of post-facto reporting.

IV. THE 2022 FRAMEWORK: SALIENT FEATURES

A. ODI and OPI

The most important conceptual change is the clear separation of overseas direct investment (ODI) from overseas portfolio investment (OPI). ODI covers investment in unlisted equity capital of a foreign entity, subscription to the memorandum of a foreign entity, investment of ten per cent or more in a listed foreign entity, and investment that gives control even where the holding is below ten per cent. Everything else is OPI. "Control" is defined in terms of the right to appoint a majority of directors or to control management or policy decisions. An investment once classified as ODI continues to be treated as ODI even if the holding later falls below ten per cent. The distinction matters because the conditions, limits and reporting differ sharply between the two.

B. Financial Commitment and Limits

An Indian entity may make a total financial commitment, which includes equity, debt and guarantees, of up to four hundred per cent of its net worth under the automatic route. Where the commitment exceeds one billion US dollars in a financial year, prior approval of the RBI is required even if it is within the net worth limit. A listed Indian company may make OPI up to fifty per cent of its net worth. Resident individuals may invest within the Liberalised Remittance Scheme ceiling of USD 250,000 a year, and their ODI is limited to operating foreign entities that do not have subsidiaries under their control.

The 2022 regime also opened a door that was earlier closed. An Indian entity that is not itself in financial services may now invest in a foreign entity engaged in financial services, other than banking or insurance, provided it has posted net profits in the preceding three financial years. Investments by entities whose accounts are classified as non-performing, or which are under investigation by agencies such as the Enforcement Directorate, require a no-objection certificate from the lender or the regulator concerned.

C. Prohibited Activities and Round-Tripping

ODI is not permitted in real estate business, gambling, or financial products linked to the Indian rupee without RBI approval. The more debated restriction concerns round-tripping. Earlier, an "ODI-FDI" structure, where money went out from India and came back through a foreign entity, generally required RBI approval. Rule 19(3) of the OI Rules now permits such investment as long as the structure does not exceed two layers of subsidiaries. Banks, non-banking financial companies, insurers and government companies are exempted. In the author's view this is a sensible middle path. It accepts that genuine business groups often have overseas holding companies that also invest back into India, while still trying to stop the use of layered structures to disguise domestic money as foreign capital. The difficulty is that the rule is drafted in broad terms, and whether a given structure "results in" more than two layers is not always obvious.

D. Pricing, Reporting and Compliance

Transfers must be at a price determined on an arm's length basis using internationally accepted pricing methods. Deferred payment of consideration is permitted. Every investment has to be reported through the designated authorised dealer bank, and an Annual Performance Report is to be filed for each foreign entity. Delays can now be regularised by paying a Late Submission Fee, which removes the earlier need to approach the RBI for compounding in every case of minor delay. Further, in February 2026 the RBI was reported to have begun consultations with banks to simplify the regime further, which suggests that the framework is still being refined.

V. THE CORPORATE LAW OVERLAY

FEMA tells an Indian company whether it may invest abroad; company law tells it how the decision must be taken. Under Section 179 of the Companies Act, 2013, decisions to invest funds and to make loans or give guarantees must be taken by the board at a meeting. Section 186 caps investments, loans and guarantees at sixty per cent of paid-up share capital, free reserves and securities premium, or one hundred per cent of free reserves and securities premium, whichever is higher, and anything above that needs a special resolution of shareholders [5]. Section 188 applies where the overseas counterparty is a related party, which is common within groups.

An interesting interaction arises with the restriction on layers. Section 2(87) and the Companies (Restriction on Number of Layers) Rules, 2017 limit companies to two layers of subsidiaries, but the rules expressly do not prevent acquisition of a foreign company that has subsidiaries beyond two layers under the laws of its own country. So

company law is relaxed for foreign layers while FEMA's round-tripping rule is strict about layers where money returns to India. The two rules serve different purposes, but a company planning a structure must satisfy both, and the difference in drafting can confuse.

For listed companies, the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 add further safeguards [6]. They require oversight of material subsidiaries, including foreign ones, approval of material related party transactions by shareholders, and disclosure of acquisitions. Section 129(3) of the Companies Act requires consolidated financial statements, so the performance of overseas subsidiaries reaches the shareholders of the parent. In theory, these provisions protect shareholders against the misuse of overseas subsidiaries. In practice, much depends on the quality of audit and board scrutiny, since information about a foreign subsidiary is often available only through the parent's own management.

VI. INVESTOR PROTECTION IN THE HOST STATE

A. India's Treaty Practice

Once capital leaves India, the investor is subject to the laws and courts of the host state. Historically the main external protection came from bilateral investment treaties (BITs). India signed more than eighty BITs from 1994 onwards, mostly on a model that offered broad protections such as fair and equitable treatment and direct access to international arbitration.

The picture changed after White Industries Australia Ltd. v. Republic of India [8], where a tribunal held India liable because of the long delays in Indian courts in enforcing an arbitral award. This was followed by a wave of claims, including those arising from retrospective taxation. India adopted a new Model BIT in December 2015 [7] and thereafter terminated most of its older treaties. The 2015 Model narrows the definition of investment, omits the fair and equitable treatment standard, excludes taxation measures and requires investors to pursue local remedies for at least five years before going to arbitration.

The model was designed with India as a host state in mind. But the same treaties also protect Indian investors abroad, and a narrow treaty cuts both ways. An Indian company facing arbitrary action in a foreign country may find that there is no treaty at all, or that the treaty requires it to spend years in that country's courts before it can bring a claim. Recent treaties with the United Arab Emirates (2024) [12] and Israel, which was signed in September 2025 and came into force in July 2026 [11], show that India is slowly rebuilding its network, though largely on the restrictive model. The Delhi High Court's decision in Union of India v. Vodafone Group PLC [9], which declined to restrain a treaty arbitration, also shows that Indian courts treat investment treaty claims as a distinct field from commercial arbitration.

B. Domestic Enforcement and Accountability

Investor protection also has a domestic side, since the State protects the larger economy from misuse of the outward route. Violations of FEMA attract civil penalties under Section 13, which may extend to three times the sum involved. The Foreign Exchange (Compounding Proceedings) Rules, 2024 [10] provide a quicker way to settle contraventions. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 [13] deals with foreign assets that are not disclosed. These provisions are necessary, but heavy penalties for technical lapses can deter smaller investors, who often lack specialised advice.

VII. CRITICAL APPRAISAL

The 2022 framework is clearly an improvement. It is more coherent, it moves routine matters to the automatic route, and it treats investors as responsible actors rather than suspects. Still, several gaps remain.

First, the round-tripping provision is vague. Terms such as "directly or indirectly" and "at any time thereafter" leave investors uncertain whether a later investment by a foreign subsidiary into India might make an earlier ODI unlawful.

Second, treaty protection for Indian investors is thin. A policy built to defend India as a respondent has left Indian companies abroad with limited protection, and the requirement of exhausting local remedies is a real burden in countries where courts are slow or not independent.

Third, India has no working framework for cross-border insolvency. Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 [14] depend on reciprocal agreements that have not been made, and the UNCITRAL Model Law has not been adopted despite official recommendations. When an Indian group with overseas subsidiaries fails, creditors and shareholders in India have little reach over foreign assets.

Fourth, oversight of foreign subsidiaries depends on disclosure that is largely controlled by the parent's management. Minority shareholders have limited tools to verify what happens abroad.

VIII. SUGGESTIONS

On the basis of the above, the following reforms are suggested. The RBI and the Central Government should issue illustrations explaining how the two-layer test applies to common group structures. India should negotiate treaties that reflect its position as a capital exporter, perhaps with a shorter local remedies period or an exception where local courts are ineffective. Adopting the UNCITRAL Model Law on Cross-Border Insolvency, with suitable changes,

should be given priority. Listed companies with significant overseas investment could be required to disclose subsidiary-level information on related party dealings and impairments. Lastly, a graded approach to penalties would help first-time and small investors.

IX. CONCLUSION

Outward investment is now part of the ordinary growth of Indian enterprises. The 2022 regime reflects that reality by replacing a cluttered, approval-heavy system with a principled and mostly automatic one. Yet the law of outward investment is not only about permission to remit money. It is also about what happens afterwards, both to the Indian investor in a foreign country and to the shareholders who ultimately own that investment. On this second question Indian law is less developed. Treaty protection is narrow, cross-border insolvency is missing and oversight of overseas subsidiaries is uneven. If India wants its companies to compete globally, its legal framework must protect them abroad as carefully as it regulates them at home.

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