

An ALM Publication.

2016

SEVENTH EDITION | 第七版

China Outbound Investment Guide

中国境外投资指南

**Expert analysis from leading
law firms around the world**
全球各地顶尖律所的专家分析

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Section 1: China outbound investment

a. What are the key sectors that attract China outbound investment (COI)? What are some notable Chinese investments or M&A that have recently taken place in India?

India and China have been at the forefront of the radical transition from developing to emerging economies. India's growth accelerated to 7.6% in 2015-2016 and deeper economic integration has helped China expand its growth rate to 6.7% in the first quarter of 2016. India is an attractive destination for Chinese investment due to its strategic location (although some tension exists), growing domestic market demand, large middle-class population, low labor costs and conducive regulations.

The Indian government has liberalized its Foreign Direct Investment Policy (FDI Policy) with the objective of spurring growth. Some of the key sectors that attract COI include:

- Transport and logistics
- Technology and telecommunications
- Infrastructure
- Energy
- Real estate

Recent Chinese investment targets in India can be broadly categorized into two groups: (i) "new economy business" (i.e. high-growth industries that involve cutting-edge technology); and (ii) the manufacturing and real-estate sectors. Notable recent COI investments in the past twelve months include:

New economy business:

- Indian e-commerce platform Snapdeal received a \$500 million investment from a consortium led by Alibaba Group Holding Ltd. Alibaba also acquired a 20% stake in online digital wallet Paytm for \$680 million.
- Didi Chuxing Technology Co. invested in Ola, India's most

“ **Indian e-commerce platform Snapdeal received a \$500 million investment from a consortium led by Alibaba** ”

popular mobile taxi-hailing application.

- Tencent Holdings Ltd. led an investment round of \$90 million into Practo Technologies Pvt. Ltd., a healthcare portal connecting patients to medical practitioners.
- Hillhouse Capital Management Group, Ltd. invested \$50 million in India's online auto-classifieds portal, CarDekho, and further participated in a subsequent round of funding.

Manufacturing and real estate:

- Dalian Wanda Group Co. Ltd. signed a memorandum of understanding with Haryana State to develop "Wanda Industrial New City". The \$10 billion investment, to be spread over a decade, is due to regulatory relaxations in the real-estate sector, where 100% FDI is now permitted.
- Xi'an LONGi Silicon Materials Corp. plans to invest \$235 million to establish a solar cell and parts factory.
- Kingfa Science & Technology Development Co. Ltd. and Lesso Group Holdings Ltd. propose to invest a combined \$70 million to manufacture plastic components in Maharashtra.
- Gionee Communication Equipment Co. Ltd. proposes to invest \$50 million over the next three years to make mobile handsets in India.

b. Which national and regional governmental bodies are responsible for driving COI in India?

The Department of Industrial Policy and Promotion (DIPP) is responsible for the formulation of the FDI Policy and facilitating investment into India.

The Reserve Bank of India (RBI), the central bank, oversees FDI that falls under the automatic route, i.e. investments not requiring prior government approval. These must be reported within 30 days of receipt of the foreign investment. RBI also promulgates rules, issues procedural instructions such as circulars, and notifies policies in tandem with DIPP. These, together with the *Foreign Exchange Management Act, 1999* (FEMA) and the FDI Policy, broadly form the regulatory framework for FDI in India.

The Foreign Investment Promotion Board (FIPB) processes applications for FDI that falls under the government approval route. It also facilitates resolution of project-related problems faced by foreign investors.

The Securities Exchange Board of India (SEBI), akin to the U.S. Securities Exchange Commission, governs listed companies, seeks to protect investors' interests in the public markets and promotes the development of the securities market.

Section 2: Investment vehicle and capital

a. What are the most common legal entities and vehicles used for COI in India? How long do they take to become operational? What are the key criteria for establishment and operation of these vehicles that are relevant to COI?

Investment entity

A company may be formed in India typically either as a public company—with a minimum of seven members and may offer securities to, and accept deposits from, the public—or a private limited company—which is unlisted, has a limited number of members and which restricts share transfers and issuances.

A company's members may have limited or unlimited liability. Such liability can be limited by shares or by guarantee.

A private company limited by shares is the most common legal entity, especially for off-market transactions. The process of incorporation involves several filings with the Registrar of Companies, including for name approval, filing the charter documents (memorandum and articles of association), determining the registered office address and appointing the first directors and other key personnel. This typically takes around three to four weeks.

Investment methods

Investment into a company is made by way of subscription of shares. The most common instruments are preference shares or debentures that are compulsorily convertible into equity. Preferential instruments are chosen as an alternative to plain equity, as they get paid first in the case of liquidation and also enjoy preferential dividends. The majority of the investment comes by way of compulsorily convertible instruments, which are not classified as external commercial borrowings subject to several restrictions by RBI. They are converted on the basis of a ratchet, with the conversion price linked to the company's future performance. The investor also typically acquires a nominal number of equity shares to exercise governance rights.

Most financial investors generally acquire between 10% and 25% of the fully-diluted equity share capital and insist on board representation and veto rights. The controlling stake is then left with the promoters, subject to investors' rights. Strategic investors however, prefer significant or "controlling" stakes; a greater than 25% interest provides important minority protection rights, while a greater than 50% or 75% stake gives majority control and almost full control, respectively.

The differences in post-transaction status between target unlisted public and private Indian companies are insignificant. However, important corporate governance rules applicable to public listed companies, under the agreement executed with stock exchanges, include those governing the composition and manner of appointment of the board of directors and the constitution of specified committees, such as the audit committee,

“ **India has significantly eased...compliance and cost-related burdens for private companies** ”

and public disclosure of managerial remuneration. Access to the public markets must be weighed against these requirements.

India has significantly eased restrictions and compliance and cost-related burdens for private companies, such as by granting increased flexibility in structuring share capital, permitting the issuance of equity shares with differential voting rights and partial approval exemptions for related party transactions. These are often the key determinants in choosing the appropriate investment vehicle.

Section 3: Investment approval

a. Explain the process and timing for foreign investment approval.

Foreign investments in sectors under the automatic route do not require prior approval. The target company is only required to notify RBI of the inward remittance receipt within 30 days and submit form FC-GPR within 30 days of issuance of shares to the non-resident investors.

FIPB offers a single-window clearance to investment proposals that fall under the government route. An application form, along with the required documents and information, must be submitted to the FIPB in the prescribed format. Processing the application usually takes around 20-30 days (if all information is complete and accurate in the first instance).

b. Briefly explain the investment restrictions for any specially regulated/restricted sectors, including whether the government is entitled to any special rights in those sectors (e.g. golden shares).

FDI is prohibited in a limited number of sectors, such as:

- Lottery business, including online lotteries.
- Gambling and betting, including casinos.
- Trading in Transferable Development Rights (TDRs).
- Real estate business (essentially trading) or farm-house construction.
- Manufacturing of tobacco cigarettes or its substitutes.
- Atomic energy and railway operations.

FDI in the following sectors requires prior FIPB approval:

- Mining and separation of titanium bearing minerals/ores, its value addition and integrated activities.
- Defense: FDI above 49% requires approval on a case-by-case basis wherever it is likely to result in access to modern and 'state-of-the-art' technology.

AUTHOR BIOGRAPHIES

**Siddharth Raja**

Siddharth Raja is a corporate and commercial lawyer with over 18 years of professional, global experience in private equity & venture capital transactions, as well as expertise in cross-border and domestic M&A, corporate finance and general commercial law. His clients include leading global private equity & venture capital funds, and many significant Indian and multinational corporations (especially in the IT, ITES, and healthcare and pharmaceutical sectors).

A Foreign and Commonwealth Office Chevening Scholar, as well as a J. N. Tata Scholar, Siddharth completed his Masters in International Economic Law at the University of Warwick Law School in the UK in 1998, before stinting first in Mumbai and later with O'Melveny & Myers in Hong Kong. Siddharth is a graduate of the prestigious National Law School of India University, where he was a Gold Medalist.

In 2004 he set up the law firm Narasappa, Doraswamy & Raja (later renamed Samvād: Partners), which now has over 50 lawyers nationwide. He is admitted to practice law in India and in England & Wales (currently not practicing).

Apoorva Chandrika

Apoorva Chandrika, an Associate with Samvād: Partners, is a corporate and commercial lawyer working on M&A, private equity & venture capital transactions, general corporate and commercial advisory and real estate. Deals that Apoorva has worked on include investments into recruitment solutions, financial services and intermediation, hospitality and e-commerce companies.

Apoorva holds a B.B.A., LL.B. (Hons.) degree from School of Law, Christ University, Bangalore (2015). She received the Certificate of Academic Excellence for graduating top of her batch. Apoorva was the convenor of the Journals & Publications Society and a core member of the Editorial Board of the law school's journal. She is admitted to practice law in India.

- Broadcasting, carriage and content services.
- Print media.
- Civil aviation, where FDI exceeds 74%.
- Establishment and operation of satellites.
- Private security agencies.
- Telecom services.
- Single brand product retailing and multi-brand retail trading.
- Banking.
- Brownfield investments in pharmaceuticals.

The government currently does not enjoy any special rights such as golden shares in these sectors. Many business activities/sectors however, have specific conditions and restrictions on FDI (for instance, a minimum lock-in requirement for FDI in some cases). If India's FDI regime is divided between approval and non-approval routes, the issue often turns on sector-specific restrictions. Therefore, it is important to examine sector-specific rules that may trigger approval requirements.

c. Which authority oversees competition clearance, when is notification mandatory, and what is the merger control process?

The Competition Commission of India (CCI) is the primary quasi-judicial body regulating competition and governing merger clearance. Any acquisition of control, shares, voting rights or assets, mergers or consolidations that cross the asset value/turnover thresholds specified must be reported. The underlying principle is that combinations that are likely to have an appreciable adverse effect on competition (AAEC) in India need to be notified.

CCI should be notified within 30 days of approval of the proposed combination by the enterprise's directors or execution of definitive documents for acquisition. If CCI forms a *prima facie* opinion that a combination is likely to have an AAEC in the relevant market, it may direct further investigation, require the enterprise to publish details of the combination, invite objections from the public and proceed to pass an order either approving or rejecting the combination, or proposing modifications. If the CCI does not pass an order within 210 days from the date of notification, then the proposed combination is deemed cleared.

d. Are there any unique processes that could potentially block a foreign investment?

This depends largely on the specific sector of investment. However, an important restriction in some cases is the requirement for approvals where the investment is in the form of non-cash consideration, for instance, if it involves a share swap or any other adjustment mechanism not in accordance with the pricing guidelines highlighted below. The grant of such approvals is discretionary.

For listed entities, the securities law framework in India has been revised significantly in the last decade with the introduction of SEBI's *Substantial Acquisition of Shares and Takeovers Regulations, 2011* (Takeover Code), which governs secondary

acquisition of a listed company's shares.

An acquirer is required to make an open offer if it is entitled to exercise 25% or more of the voting rights in the target company. Further, acquisition of "control" is also a trigger for an open offer irrespective of the extent of shareholding acquired by the acquirer.

The Takeover Code also restricts acquirers from executing the private arrangement that triggered the open offer until the completion of the open offer itself. This is to ensure that the acquirers have sufficient incentive to comply with their obligations.

SEBI has also imposed disclosure requirements for deals that do not necessarily trigger the open offer requirements. For example, any acquirer whose shareholding rises to 5% or more must disclose the shareholding to the target company, as well as to the stock exchange, within two days of the change actually occurring.

e. Are there approval requirements when a foreign investor increases or exits its investments?

The approval requirements for a foreign investor seeking to increase or exit its investments are primarily geared towards the price at which an acquisition or sale of shares occurs. Different pricing norms have been prescribed for acquisition and sale of equity by non-residents. Acquisition of equity must be at a price not lower than that determined in accordance with the pricing guidelines, for listed companies, and internationally-accepted pricing methodologies, for unlisted companies. The price arrived at would act as a ceiling. In 2014, RBI allowed the issue of equity instruments with "optionality" clauses under the FDI regime. The guiding principle is that the non-resident investor is not guaranteed any assured exit price at the time of investing and must exit at the fair price at the time of exit, subject to any applicable lock-in period requirement.

Section 4: Tax and grants

a. Are there any tax structures and/or favorable intermediary tax jurisdictions that are particularly useful for FDI into India?

Investment vehicles are commonly based out of tax-favorable jurisdictions such as Singapore or Mauritius. The recent amendment protocol to the India-Mauritius double taxation avoidance agreement (DTAA) provides for a shift in the taxation of capital gains from residence-based to source-based taxation, i.e. India now has the right to impose tax on capital gains arising from the sale of shares of Indian companies. This is based solely on the date on which shares are acquired, and investments prior to March 2017 remain unaffected. India has signed DTAAAs with over 84 countries including China, the U.S., UK, Japan, Singapore, Australia and the EU nations. In general, provisions of the domestic income tax law or tax treaty, to the extent more beneficial, may be applied by non-residents.

India has also signed bilateral investment promotion agreements with 82 countries that allow for lower duties on imports.

“ Foreign companies are taxable at 40% with a surcharge of around 2.5% of the tax ”

b. What are the applicable rates of corporate tax and withholding tax on dividends?

The corporate tax rate for domestic companies is 30% with a surcharge of around 10% of the tax. Foreign companies are taxable at 40% with a surcharge of around 2.5% of the tax. A minimum alternate tax is levied at 18.5% of the adjusted profits of companies where the tax payable is less than 18.5% of their book profits.

No withholding tax is applied on dividends as those declared by an Indian company are tax-free for all shareholders. However, the Indian company declaring the dividend is liable to pay dividend distribution tax at 20.36% on the dividends declared/distributed.

c. Does the government have any FDI tax incentive schemes in place?

The government has offered several key tax benefits to startups such as (i) exemption on capital gains tax for investing in startups; (ii) a three-year income tax exemption for startups, subject to non-distribution of dividends by the startup; and (iii) tax exemptions on investments made above the fair market value.

Further, a foreign company will be regarded as a tax resident of India under the "place of effective management" test, i.e. if key management is located, and commercial decisions are made, that year in India.

d. Other than through the tax system, does the government provide any other financial support to investors? If so, please provide an overview.

India offers location-based incentives for mega projects and investments in less developed regions based on negotiations with the relevant state governments. For example, tax benefits are available for undertaking manufacturing activities in the northeastern states. Incentives include stamp duty exemption for land acquisition, refund or exemption of value-added tax, and exemption from payment of electricity duty. In addition to industry-specific benefits, there are export-linked incentives, such as benefits for expenditure on research and development and employment of new workmen. There are also exports-related incentives including duty drawback, duty exemption/remission schemes, focus products and market schemes. "Make-in-India" is an incentive-based scheme introduced by the government to encourage manufacturing in India.

e. Are there any reciprocal tax arrangements between India and China? If so, how can they aid investors?

India and China have a DTAA in place that governs the taxation of income from immovable property, business profits, shipping and transport, as well as dividends, interest, royalties,

and fees for technical services. The DTAA provides clarity on which contracting state has the right to tax income and helps in preventing fiscal evasion. Capital gains are taxable in both China and India (long-term capital gains) at the rate of 20%.

There are several bilateral trade agreements, memoranda of understanding and protocols for trade and economic cooperation executed between India and China.

Section 5: FX controls and local operations

a. What foreign currency or exchange restrictions should investors be aware of?

There are no prohibitive foreign currency or exchange restrictions; although it is regulated. All foreign investments are freely repatriable subject to sectoral FDI policies. Current account remittances such as profits and dividends are also freely repatriable.

Capital account transactions entail certain compliance requirements. Purchase and sale of equity shares are subject to pricing guidelines. Acquisition and transfer of immovable property by non-residents require RBI's prior permission.

b. Are there any legal restrictions on bringing in foreign workers and how difficult is it for foreign investors to secure expatriate visas for shareholder representatives, senior managers and workers in practice?

Foreigners need to have an employment visa in order to work in India. The employee's salary must be more than \$25,000 per year. Many companies opt instead to having workers obtain project visas. Project visas do not have the \$25,000 requirement, but only cover professionals in the power and steel sector.

Shareholder representatives have an easier time securing visas. As they are not paid a salary, they are eligible for business visas. Business visas are available for expatriate entrepreneurs or investors who want to conduct business in India. Unlike employment visa holders, business visa applicants usually work on behalf of a foreign company for a limited time and do not work for a local employer. Business visas are generally issued with a six-month validity period or more, and provide for multiple entries. However, business visa holders are not allowed to remain in India for longer than six months at a time.

c. What are the requirements and process for purchasing commercial property?

A foreign national resident outside India is not permitted to purchase immovable property in India, but can only inherit property from an Indian resident.

A foreign company having a registered branch office or other place of business in India can purchase immovable property. The payment must be made by way of foreign inward remittance

through a proper banking channel. A declaration must also be filed with RBI within 90 days from the acquisition date.

Importantly, acquisition of immovable property by Chinese entities with branch offices in India, requires prior RBI approval. Foreign companies with liaison offices in India are not permitted to acquire immovable property other than by way of lease for no more than five years.

Section 6: Dispute resolution

a. Does India have a bilateral investment protection treaty with China or other jurisdictions commonly used for investing in the country?

China and India executed a bilateral investment protection treaty in 2006, which requires each party to create and encourage favorable investment conditions and accord fair and equitable treatment to investors. Each party should also ensure that the others' investments are not nationalized or expropriated, provide repatriation and returns without undue delay, and allow for dispute settlement. India has also entered into similar treaties with around 80 other countries.

b. How efficient are local courts' enforcement and dispute resolution proceedings, and are there any procedural features foreign investors must be aware of?

The dispute resolution mechanism in India is sluggish and poses challenges to a speedy and efficient redressal process. International institutional arbitration is strongly advised in cross-border agreements involving Indian companies.

c. Do local courts respect foreign judgments and are international arbitration awards enforceable?

Ordinarily, a foreign court judgment is treated on par with Indian court judgments for enforcement purposes if the same principle is applied to Indian court judgments in that foreign jurisdiction. Chinese court judgments cannot, however, be so executed but must be proved in an Indian court, as India and China do not have such reciprocity in place. Foreign arbitral awards are enforceable. The person intending to enforce a foreign award must make an application to the court with the award, a copy of the arbitration agreement and any other documentation necessary for proving the foreign award.

d. Are local judgments and arbitration awards from India generally enforceable in other jurisdictions?

The enforceability of Indian judgments is largely dependent on the local laws in other jurisdictions; the position *vis-à-vis* China is explained above. However, India is a signatory to the New York Convention, and therefore its arbitral awards are enforceable in other contracting states, including China.

Quotes

"Sound knowledge of the private equity space, with experience representing both multinational and domestic investors. Bengaluru and Delhi offices frequently represent emerging companies, as well as funds investing into start-ups. Has been active of late on investments into the IT and infrastructure sectors."

Chambers Asia-Pacific 2016

"The team handles both rupee and foreign currency lending transactions. Counts prominent international and domestic banks as clients.....highly rated for its work for investors in the Bengaluru market, with growing resources in Mumbai and Delhi."

Chambers Asia-Pacific 2015

"The Firm provides true value for money, with great business acumen. The young team brings real energy to the Bengaluru market, and handles corporate and M&A, PE, TMT and dispute resolution matters."

Asia Pacific Legal 500 (2013)

"Thoroughly professional, very helpful, and accommodative of tough time lines when required."

Asian Legal Business (2013)

Recognitions

Chambers & Partners Asia Pacific (2016)

Banking & Finance (Band 4)

Corporate/M&A (Band 4)

Dispute Resolution (Band 4)

Private Equity (Band 3)

Projects, Infrastructure & Energy (Recognised Practitioner)

Technology, Media, Telecoms (TMT) (Band 4)

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ADVOCATES

The Firm

Samvād: Partners, one of the INDIA's leading law Firm, is a partner-led, solution-oriented law firm. The Firm is committed to providing smart and quality legal advice to our clients; maintaining the highest levels of professional integrity; and nurturing our lawyers in a work environment that motivates them to achieve and maintain the highest standards.

Our Team

The Partners of the Firm are leaders in their respective fields of practice. The majority of our Partners have a rich mix of domestic and international experience, having worked in several legal and financial capitals around the world, including London, Hong Kong, Singapore, Mumbai, New Delhi and the Hague.

Practice Areas

- Anti-Corruption and Corporate Governance
- Banking & Finance
- Commercial Real Estate
- Competition Law
- Dispute Resolution – Arbitration & Litigation
- General Corporate Advisory
- Human Resources & Employment
- Infrastructure
- Intellectual Property
- Mergers & Acquisitions and Joint Ventures
- Private Equity & Venture Capital
- Technology, Media and Telecommunication

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第一节：中国境外投资

1. 印度哪些主要行业吸引中国境外投资？最近中国在印度进行了哪些重大的投资或并购交易？

中印两国一直处于从发展中经济体到新兴经济体巨变的前沿。印度增长率在2015–2016年间上升至7.6%，更深层的经济整合使中国在2016年一季度将增长率提升至6.7%。凭借其战略位置(尽管紧张局势持续)、不断增长的国内市场需求、巨大的中产经济人口、低廉的劳动力成本和有利的法规，印度成为中国投资颇具吸引力的目的地。

为推动增长，印度政府采取自由化的外国直接投资政策(FDI政策)。吸引中国对外投资的主要领域包括：

- 交通和物流
- 技术和电信
- 基础设施
- 能源
- 房地产

“

印度电商平台Snapdeal获得阿里巴巴集团控股有限公司领导的联合体的5亿美元投资

近期中国投资在印度的目标可大致分为两类：(i) “新经济业务” (即涉及尖端技术的高增长工业)，及(ii) 制造业和房地产业。过去十二个月中，值得关注的中国对外投资包括：

新经济业务：

- 印度电商平台Snapdeal获得阿里巴巴集团控股有限公司领导的联合体的5亿美元投资。阿里巴巴还以6.8亿美元获得在线电子钱包Paytm的20%股权。
- 滴滴出行科技有限公司投资印度最受欢迎的手机叫车应用Ola。
- 连接患者和医生的医疗门户Practo Technologies Pvt. Ltd获得腾讯领投的9000万美元投资。
- 高瓴资本集团以5000万美元投资印度在线汽车分类门户CarDekho，并进一步参与之后的融资。

制造业和房地产业：

- 大连万达集团有限公司与印度哈里亚纳邦签署开发“万达产业新城”的谅解备忘录。这笔100亿美元投资将耗时十年，因印度房地产业监管放宽，允许100%外国直接投资而得以实现。

- 西安隆基硅材料股份有限公司计划投资2.35亿美元，建立太阳能电池和部件工厂。
- 广州金发科技股份有限公司和中国联塑集团控股有限公司拟共同投资7000万美元，在印度马哈拉施特拉邦生产塑件。
- 金立通信设备有限公司拟在未来三年间投资5000万美元，在印度生产手机。

2. 哪个国家或地方机构负责促进中国在印度的投资？

印度商工部工业政策促进局(DIPP)负责制定外国直接投资政策及促进对印度的投资。

印度储备银行(RBI)是印度央行，监管自动许可FDI(即不要求政府事先批准的投资)。这些投资须在收到外国投资后30天内报告。RBI也颁布规则、发布通知等程序性指示，并与DIPP同步公布政策。这些与1999年外汇管理法(FEMA)和FDI政策大致构成印度FDI的监管框架。

外国投资促进委员会(FIPB)处理需获得政府许可的FDI申请，并协助解决外国投资者面临的项目相关问题。

印度证券交易委员会(SEBI)与美国证券交易委员会类似，管辖上市公司、旨在保护投资者在公开市场的利益、并促进证券市场的发展。

第二节：投资工具和资本

1. 中国境外投资在印度最常用哪些法律实体和工具？要多少时间便可投入运作？关于这些投资工具的设立和营运，有哪些主要规定适用于中国境外投资？

投资实体

一般而言，公司可通过两种形式在印度设立：一种是公众公司，即至少有七名成员，可向公众发行证券并接受公众的款项；另一种是私人有限公司，即非上市公司，成员数量有限，并限制股份转让和发行。

公司成员可承担有限或无限责任。此责任可以股份或担保方式为限。

私人股份有限公司是最常见的法律实体，尤其对场外交易而言。设立程序涉及在公司注册处作多项备案，包括名称批准、章程文件(备忘录和公司章程)备案、确定注册办事处地址、任命第一批董事和其他主要人员。这一般需要花费大约三到四周时间。

投资方法

向公司的投资通过股份认购的方式进行。最常见的工具是优先股或强制转为股权的债券。优先工具被选为单纯股权的另一选择，因为其可在公司清算时首先获得付款并享受优先股股息。大多数投资则采用强制转化工具的形式，此种工具没有被归为受制于多项RBI限制的外部商业借贷。此类贷款基于棘轮条款进行转换，转换价与公司未来业绩挂钩。此外，投资者通常购买名义数量的股票来行使治理权。

“

印度已大大减轻对私人公司的限制、合规及成本相关负担

”

多数金融投资者一般购买10%至25%的完全稀释股份资本，并主张董事会代表和否决权。控股权一般由发起人保有，但须受制于投资者权利。而战略投资者则更青睐重大或“控股”权益；大于25%的权益可提供重要的小股东保护权，而大于50%或75%的权益可分别提供大股东控制权乃至近乎完全的控制权。

目标非上市公众公司和私人印度公司之间的交易后状态区别不大。但是，根据与股票交易所签署的协议，公众上市公司适用重要的公司治理规则，包括管辖董事会的构成和任命方式、特定委员会(如审计委员会)的组成以及公开披露管理人员薪酬的规则。进入公众市场须针对这些要求加以权衡。

印度已大大减轻对私人公司的限制、合规及成本相关负担，例如增加股本结构的灵活性、允许发行差别投票权的股票、以及关联方交易审批部分豁免。这些往往是选择适当投资工具时重要的决定性因素。

第三节：投资审批

1. 请说明审批外国投资的程序和时间。

自动许可行业的外国投资不需要事先批准。目标公司只需要在收到汇入汇款30天内通知RBI，并在向非居民投资者发行股份后30天内递交FC-GPR表格。

FIPB为须经政府许可的投资建议书提供单独窗口的审查。申请表及必要文件和信息须以规定格式提交给FIPB。如果所有信息一次性完整准确，申请处理一般需花费20–30天。

2. 请简单说明一下对任何受特殊监管/限制的领域的投资限制，包括政府是否在这些行业里有特殊权利(例如黄金股份)。

FDI在有限数量的行业内遭禁止，例如：

- 彩票业，包括在线彩票
- 赌博投注，包括赌场
- 可转让开发权(TDR)交易
- 房地产业务(即本质为房地产交易)或农舍建设
- 烟草、卷烟或其替代品的制造
- 原子能和铁路营运

下列行业的FDI需事先取得FIRB批准：

- 含矿物/矿石的钛的开采和分离，增值和合成活动
- 国防：对于49%以上股权的FDI，如有可能接触到现代“顶尖”技术，则需获得批准(视情况而定)
- 广播、运输及内容服务
- 平面媒体
- FDI超出74%股权的民航业
- 建造及营运卫星
- 私人安全代理

- 电信服务
- 单一品牌产品零售及多品牌零售交易
- 银行业
- 制药业褐地投资

政府目前在这些领域不享有任何特殊权利(例如黄金股份)。但是，许多业务活动/领域对FDI有特定条件和限制(例如在某些情况下，FDI有最低锁定要求)。如果印度FDI机制被分为审批和无审批这两种路径，那么问题通常为行业特定的限制。因此，有必要检查可能有审批要求的行业特定规则。

3. 哪个机构负责竞争审查？什么情况下必须报告？并购控制程序是怎样的？

印度竞争委员会(CCI)是主要的准司法性机构，监管竞争并管辖对并购的核准。对任何超出资产价值/营业额限额的控制权、股份、投票权或资产的任何收购，或任何并购或联合都必须予以报告。基本原则是，对于可能对印度的竞争造成重大不利影响(AAEC)的结合需作出通知。

应在企业董事批准拟议结合或签署并购的决定性文件后的30天内通知CCI。如果CCI的初步意见是结合可能对相关市场的竞争造成重大不利影响，则可能指示作进一步的调查、要求企业发布结合详情、邀请公众表达反对意见，进而通过指令，批准或拒绝结合或提议修改。如果CCI未在通知日后210天内通过指令，则拟议结合视为获得批准。

4. 是否存在任何特别的程序有可能会阻拦外国投资？

这主要取决于特定的投资行业。但在某些情况下有一重要限制，即如果投资采用非现金对价形式，例如涉及换股或不按照下文所述的定价指引制定的任何其他调整机制，就需要获得批准。该等批准将酌情作出。

对上市实体，印度证券法框架在过去十年经过重大修订，引入SEBI的2011年《大量持股和收购条例》(《收购条例》)，管辖对上市公司股份的二次收购。

如果收购人有权行使目标公司25%或以上的投票权，则需作公开要约。此外，无论收购人获得的持股程度，获得“控制权”也要求作公开要约。

《收购条例》还限制收购人行使有公开要约要求的私人安排，直至公开要约本身已经完成。这是为了确保收购人有遵守其义务的充分诱因。

SEBI还对无须遵守公开要约要求的交易提出了披露要求。例如，持股比例上升至5%或以上的任何收购人必须在实际变化发生的两天内，向目标公司和证交所披露持股比例。

5. 对外国投资者增资或撤资有什么审批要求吗？

对增加或退出投资的外国投资者的批准要求主要依据股份买卖发生时的价格。对非居民的股权买卖有不同的定价标准规定。对上市公司而言，股权收购价不得低于根据定价准则确定的价格；对非上市公司而言，则不得低于根据国际认可的定价方法确定的价格。得出的价格将作为最高限额。2014年，RBI允许在FDI机制下发行带有“期权性”条款的权益工具。指导原则是非居民投资者在投资时没有得到任何既定退出价的保证，必须在退出时以公允价格退出，并且须符合任何适用的锁定期要求。

作者简介



Siddharth Raja

Siddharth Raja是公司法和商法律师，在私募股权投资和风险投资交易领域拥有超过18年全球专业经验，具备跨境与国内并购、公司融资和一般商法方面的专长。他的客户包括全球领先的私募股权投资和风险投资基金，以及许多主要的印度及跨国公司（以IT、ITES、医疗和制药领域为主）。

Siddharth是英国外交和联邦事务部志奋领奖学金和塔塔奖学金获得者，1998年在英国华威大学法学院获得国际经济法硕士学位，曾先后在孟买以及美迈斯律师事务所香港代表处任职。

Siddharth在2004年迁回至班加罗尔，创立Narasappa, Doraswamy & Raja (后更名为Samvād Partners) 律师事务所，该所目前在全国有50多名律师。

Siddharth是班加罗尔印度管理学院管理学院的访问教员，并曾在班加罗尔印度管理学院教授他专长的学科。

Siddharth是印度以及英格兰和威尔士认可的执业律师（现不执业）。

Apoorva Chandrika



Apoorva Chandrika律师专注于并购、私募股权投资和风险投资交易、一般公司法和商法咨询以及房地产业务。她曾处理多笔私募股权投资和风险投资交易，涉及对招聘解决方案、金融服务与中介、酒店业以及电子商务公司的投资。

Apoorva曾对科技、医疗和制药行业的公司开展法律尽职调查，起草并审阅交易文件以及有关软件服务、许可、电子钱包和网络支付系统、网站使用条款和隐私政策的协议。

Apoorva的成绩在全部10个学期名列前茅，因此获得学业优异证书。她获许在印度执业。

第四节：税收及补助

1. 有没有一些税务结构或有利的中间税务管辖区，是对外商直接投资印度尤其有用的？

投资工具通常设立于新加坡或毛里求斯等提供税收优惠的司法管辖区。印度-毛里求斯避免双重征税协议(DTAA)最近的修订议定书规定，将财产收益税从基于注册地的税制转变为基于来源的税制，即印度现在有权对出售印度公司股份的财产收益征税。此征税仅基于购得股份日期，2017年3月前的投资依旧不受影响。印度已与包括中国、美国、英国、日本、新加坡、澳大利亚和若干欧盟成员国在内的超过84个国家签署避免双重征税协议。一般而言，国内所得税法或税收协定如果更加优惠，则可能适用于非居民。

印度已与82个国家签署了双边投资促进协议，降低对进口品的关税。



**外国公司税率为40%，
附加费约为税收的2.5%**



2. 企业所得税和股息预提税的适用税率是多少？

国内公司的企业所得税率为30%，附加费约为税收的10%。外国公司税率为40%，附加费约为税收的2.5%。如果应付税款低于账面利润的18.5%，则须缴纳最低替代税，金额为调整后利润的18.5%。

印度公司申报的股息对所有股东免税，因此股息免缴预提税。但是，申报股息的印度公司须为其申报/派发的股息缴纳20.36%的股息派发税。

3. 政府是否有实施任何外国直接投资税务激励计划？

政府已为初创企业提供多项税收优惠，例如(i)投资初创企业可免缴财产收益税；(ii)在初创企业不派发股息的前提下，初创企业三年内免缴所得税；以及(iii)超出公允市场价值的投资可免税。

此外，外国公司将根据“有效管理地”测试被视为印度纳税居民；“有效管理地”指当年主要管理层位于印度，并在印度进行商业决策。

4. 除了税务之外，政府对投资者还提供其他财务支持吗？如有，请加以概述。

根据与相关州政府的谈判，印度为较不发达地区的大型项目和投资提供基于位置的激励措施。例如，在东北部州开展制造活动可享有税收优惠。激励措施包括购买土地免印花税、增值税退款或免税，以及免缴电力税。除行业特定优惠外，还有出口相关的激励措施，例如研发支出和雇用新工人费用的优惠。其他出口相关激励包括关税退款、关税免除/减免计划、重点产品及市场计划。政府还推出“印度制造”激励计划来鼓励印度制造业的发展。

5. 印度与中国之间是否有任何互惠税务安排？如有，这些安排如何帮助投资者？

印度与中国已签署避免双重征税协定，管辖对不动产、商业利润、航运和交通运输产生的所得、以及股息、利息、特许权使用费和技术服务费的征税。避免双重征税协定明确，缔约国有权对收入征税，并协助避免财政逃税。财产收益须按20%税率在中国和印度纳税(长期财产收益)。

中印两国已签署多项有关贸易和经济合作的双边贸易协议、谅解备忘录及议定书。

第五节：外汇管制及本地经营

1. 有什么外币或外汇限制是外国投资者需要注意的？

尽管有监管措施，但不存在禁止性的外币或外汇限制。在遵守行业性FDI政策的前提下，所有外国投资均可自由汇出。经常账户汇款(例如利润和股息)亦可自由汇出。

资本账户交易涉及特定的合规要求。权益股买卖须遵守定价准则。非居民购买和转让不动产需获得RBI的事先准许。

2. 对输入外国劳工有什么法律限制？在操作上外国投资者为股东代表、高级经理和员工取得外国员工签证有多困难？

外国人须有工作签证才能在印度工作。雇员年薪须超过2.5万美元。许多公司宁愿选择让员工取得项目签证。项目签证没有2.5万美元的要求，但仅涵盖电力和钢铁行业的专业人士。

股东代表较易取得签证。因为他们没有工资，有资格获得商务签证。希望在印度开展业务的外国创业者或投资者可获得商务签证。有别于工作签证持有者，商务签证申请者一般代表外国公司工作一段有限的时间，并且不为本地雇主工作。商务签证一般签发的有效期为六个月或以上，并可多次入境。但是，商务签证持有者一次不得在印度停留超过六个月以上的期间。

3. 购置商业物业有什么规定和程序？

在印度以外的外国人不得购买印度不动产，仅可从印度居民继承房产。

在印度设有注册分支机构或其他营业场所的外国公司可购

买不动产。支付须通过适当的银行渠道，以外国汇入汇款的方式进行。购买之日起90天内须向RBI申报。

重要的是，在印度设有分支机构的中国实体购买不动产需事先获得RBI批准。除五年或以下的租约外，在印度设有联络办事处的外国公司不得购买不动产。

第六节：争议解决

1. 印度是否有和中国或其他地方签订关于投资印度常用的双边投资保护协定？

中印两国在2006年签署双边投资保护协定。协定要求双方创造并鼓励有利投资条件、给予公平平等待遇、对投资不设国有化和征用的规限、规定不无故延迟投资利润的调回和返还，并规定争议的解决。印度已与约80个其他国家签署了类似协定。

2. 当地法院的执行和争议解决程序的效率如何？有什么特别的程序是外国投资者必须注意的？

印度的争议解决机制运作缓慢，对快速有效的补救程序而言是一大挑战。对涉及印度公司的跨境协议，强烈建议采用国际机构仲裁。

3. 当地法院尊重外国判决吗？可执行国际仲裁裁决吗？

一般而言，如果在某一外国司法管辖区，印度法院判决与该国外国法院判决有同等执行力，那么在印度，该国法院判决也与印度法院判决有同等执行力。但中印两国间并不存在这一互惠关系，因此中国法院判决不能以这种方式在印度法院执行，而是必须经印度法院加以证明。外国仲裁裁决可在印度执行。有意执行外国裁决的人须凭裁决、仲裁协议副本、以及任何证明外国裁决必须的任何其他文件向法院提出申请。

4. 印度当地的判决和仲裁裁决一般会在其他司法管辖区执行吗？

印度判决的可执行性主要取决于其他司法管辖区的当地法律，相对中国的情况已在上文说明。但印度是《纽约公约》的缔约国，因此其仲裁裁决可在其他缔约国执行，包括中国、香港和澳门。

China Outbound Investment Guide

中国境外投资指南

An **ALM** Publication.



A fully bilingual guide co-published with
一本全双语指南，合作出版的律所包括：

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