A Comparative Analysis of the Chinese and Indian FDI Regimes

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Abstract

This article provides a comparative legal study of certain salient aspects of the Chinese and Indian Foreign Direct Investment (FDI) regimes, keeping in mind the differences in the constitutions and legal systems of both countries. India is presently perceived by foreign investors as having an uncertain regulatory environment as far as its FDI policy. However, implementation is a concern, though the government seeks to attract huge foreign investment, which is also viewed as a panacea to the mounting current account deficit problem. On the other hand, China has shown a consistent surge in FDI inflows in spite of its economic slowdown and marked legal reforms in recent years. Are there takeaway lessons for India from the merits (and demerits) of the Chinese Foreign Investment Regime? Yes, India can certainly learn from China's "national investment policymaking," though the benefits derived from this comparative study can be mutual. This article also objectively critiques relevant existing literature, revealing problems present in both FDI Regimes.

Introduction

Though China is currently far ahead of India in attracting Foreign Direct Investment (FDI), both countries are ranked by Transnational Corporations (TNCs) in the top prospective host economies for FDI for the 2013-15 period[1], first and third respectively. The question is how does

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[1] World Investment Report 2013: Global Value Chains: Investment and Trade for Development (UNCTAD), Fig. 1.25 at 22 (2013),

India realize its potential as it emerges as one of the top FDI destination countries? The solution can be explored from multiple perspectives: economic, political and legal. In the competition for FDI, India should not perceive China as a rival, indulging in a zero sum game. Instead, both countries should regionally integrate to create a positive sum game, benefitting Asia as a whole. Setting aside their political differences, mutually beneficial economic gains can be realized by both emerging countries. This article proposes to undertake a comparative analysis of salient law and policy aspects of the FDI Regimes in China and India. The comparisons will assess the differences in the constitutions and the legal systems of both countries. A researcher cannot objectively critique comparative laws without appreciating these fundamental differences. Moreover, this article pertinently critiques certain existing literature on the present topic.[2] Currently, India is perceived as having an uncertain regulatory environment as far as its FDI policy and its implementation is concerned. This increases transaction costs and becomes detrimental to the goal of the Indian Government to attract a large amount of FDI. It is arguable that due to enhanced legal and political risks, with an unfriendly, opaque, and uncertain legal and regulatory environment no host nation can attract sustainable and considerable FDI flows, regardless of its commercial and economic potential. Can there be lessons for India from the merits (and demerits) of the Chinese Foreign Investment Regime? The answer would vehemently be in the affirmative. India can certainly learn from China's "national investment policymaking," leading to an enhanced quantity and quality of FDI and translating into concrete economic gains and spill-over effects. Like China, India could realize consistent surges in FDI inflows in spite of economic slowdown, resulting in marked legal reforms. However, the comparative law and policy analysis done in this paper presents a learning opportunity for the Chinese scholars and policymakers too.

I. The 1982 Chinese Constitution and the Chinese Legal System

After Mao's death in 1976, the open door reforms were initiated in the Chinese Communist Party's third plenum of the 11th Congress in 1978 under Deng Xiaoping's leadership, marking the end of the Proletarian Cultural Revolution.[3] These efforts resulted in the current 1982 Constitution of the People's Republic of China, which is the "fundamental

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http://unctad.org/en/publicationslibrary/wir2013_en.pdf (last visited Jul 29, 2014) (hereinafter WIR 2013).

[2] *See e.g.,* Rohit Sachdev, *Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context*, COLUM. BUS. L. REV. 167 (2006) (hereinafter Sachdev).

[3] *See* QIANFAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS 47-48 (2012) (hereinafter Zhang).

law of the State and has supreme legal effect," as per its preamble.[4] The principle of "democratic centralism" is at the center of the Chinese institutional governance.[5] The centrist element in administration requires the central government to supervise and guide local authorities.[6] Article 11, a radical provision in the Chinese Constitution, was amended several times. The final amendment known as "Amendment Fourth," was approved on March 14, 2004 by the 10th National People's Congress (NPC) at its 2nd Session, and Article 11 now reads:[7]

> Individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy." "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy."[8]

Moreover, Article 11 should be read in conjunction with the mandate in Article 13. After being amended in 2004, Article 13 now reads:

> *Citizens' lawful private property is inviolable* . . . "The State, in accordance with law, protects the rights of citizens to private property and to its inheritance" . . . "The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and

[4] *See* CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (adopted on Dec. 4, 1982), *available at*: http://english.people.com.cn/constitution/constitution.html (last visited Jul 29, 2014) (hereinafter CHINESE CONSTITUTION); *id.* at 50. The Chinese Constitution is a unitary constitution.

[5] Zhang, *supra* note 3, at 50-51.

[6] *See* CHINESE CONSTITUTION, *supra* note 4, at Art. 3 (reading *inter alia* "The division of functions and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities."); *Zhang*, *supra* note 3, at 51.

[7] A careful comparison of the subsequent amendments with the previous ones and the original provision, as expressed in English language, shows certain discrepancies; as the original provision which has undergone amendment, as reproduced in some amendments are inaccurately written. Thus, at least the English version of the Chinese Constitution has discrepancies, which may not be there in the authoritative Chinese version; but due to the language limitations of this researcher the one in Chinese cannot be read and understood. CHINESE CONSTITUTION, *supra* note 4.

[8] *Id.*

> shall make *compensation* for the private property expropriated or requisitioned."[9]

However, the absence of qualifying adjectives like, "prompt," "effective," "adequate," and "just" may practically render this state obligation to pay 'compensation' pretty much useless. Yet this amendment was meant to be a significant and welcome addition to the Chinese constitution in 2004.[10]

In another amendment to the Chinese Constitution of 1993, known as "Amendment Two," the reference to "state enterprises" in Article 16 was changed to "state-owned enterprises" which demonstrated recognition of separation between ownership and management which hitherto was in the hands of the State. Furthermore, the Chinese Constitution also emphasizes that China is in primary stage of socialism and "the basic task of the nation is to concentrate its effort on socialist modernization in accordance with the theory of building socialism with Chinese characteristics."[11] These welcome and radical constitutional reforms in China have caused some apparent internal inconsistencies and tensions within the constitutional provisions; and despite these amendments, the Chinese State and Constitution in essence remain authoritarian.[12] The Chinese Constitution and laws, which have not been very dynamic, have often lagged behind the rapid social transformation in China. Accordingly, a thesis of "benign violation" has been propounded, advancing the view that under these circumstances some violations of the constitution and laws should be tolerated and legitimized for their salutary societal effects which otherwise would not be achieved.[13] However, the continuing economic reforms in China, though allegedly without "political check and balances," have widened the gulf of economic disparities between its people. This has resulted in a growing accumulation of wealth in the hands of some at the expense of ordinary people's livelihood and sometimes even lives.[14] This undesirable by-product of economic progress, as a result of China moving towards a socialist (market) economy, has caused tremendous pressure on the Chinese government to advance "maintenance of stability" and "social harmony" in the country.[15] In essence, there are four levels of governance in China: the central government; the provinces; the cities and counties; and townships and districts within cities.[16] The size of the central government in China is not

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[9] *Id.*
[10] *See also* Zhang, *supra* note 3, at 58.
[11] *See* CHINESE CONSTITUTION, *supra* note 4, at Amend. 3.
[12] *See* Zhang, *supra* note 3, at 60.
[13] *See id.* at 61.
[14] *See id.* at 73.
[15] *See id.*
[16] *See* CHINESE CONSTITUTION, *supra* note 4, at Art. 95; Zhang, *supra* note 3, at 82.

very large because the local governments and villages are in charge of implementing most regulations.[17]

The unitary framework of China's central laws is unlimited in competence and unconditionally superior to all local regulations.[18] In fact, local assemblies at any level can only pass "regulations," as "law"-making is in the exclusive domain of the national legislature.[19] However some conflicts arise between local legislations and rules enacted by the central government, despite the unlimited superiority of the latter.[20] Turning now to the hierarchy of legal norms in China, the 1982 Constitution in its preamble is declared to be the "fundamental law of the State and has supreme legal effect," designating it the apex of legal authority in China.[21] According to Article 5 of the Chinese Constitution, "[n]o law or administrative or local rules and regulations shall contravene the constitution" and "[n]o organization or individual may enjoy the privilege of being above the Constitution and the law."[22] Courts cannot apply or enforce any constitutional provision in their decisions, and only the standing committee of the National People's Congress (NPC) under Article 67 of the Constitution has the power "to interpret the Constitution and supervise its enforcement" and "to interpret the statutes."[23] In fact, the Chinese Constitution is a kind of party manifesto "rather than an instrument which is legally binding upon the organs of the State or which may be legally enforced by an aggrieved individual."[24] One view claims that the NPC is competent to exercise all powers of the State and "the powers of the party in power are unlimited and if any of their acts be tyrannical, there is no prospect of getting relief from an independent judiciary."[25]

The statutes enacted by the NPC or its standing committee form the second tier of legal norms known as "laws." There are no limits on the scope of national legislation so long as it does not violate any constitutional provisions.[26] Below the "laws" are the administrative directions enacted by the State council. An administrative regulation does not grant, but rather limits, administrative powers.[27] Further, administrative regulations need not be pre-authorized by a "law," and are

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17 *See* Zhang, *supra* note 3, at 83-84.
18 *See id.* at 84.
19 *See id.*
20 *See id.*
21 CHINESE CONSTITUTION, *supra* note 4.
22 *Id.* at Art. 5.
23 *See also* Zhang, *supra* note 3, at 85; B M GANDHI, DR DURGA DAS BASU COMPARATIVE CONSTITUTIONAL LAW 133 (2 ed. 2008) (hereinafter Gandhi).
24 Gandhi, *supra* note 21, at 152.
25 *Id.* at 375.
26 *See* Zhang, *supra* note 3, at 85-86.
27 *See id.* at 86.

deemed lawful unless they contravene any existing legal provisions.[28] However, the structure of the level below administrative regulations becomes somewhat obfuscated when one looks at the local regulations enacted by the provincial Local People's Congresses (LPCs) and departmental rules made by Ministries and Commissions under the State Council.[29] In fact, Article 82 of P.R.C. Legislation Law (LL),[30] amended in 2000, equates the effects of rules of departments and rules of local government, though confining their application "to their respective limits of authority." Below this level exists the lowermost, but arguably most pragmatic, tier of legal order. This level is comprised of a massive body of "normative documents," made by a variety of governmental units at all levels and executed with great swiftness and zeal, such as: orders; decisions; notices; and instructions of general applicability.[31] Actually, these "normative documents"' are the Chinese version of "red tape."[32] Unfortunately, despite China's "Regulation on Disclosures of Government Information," passed in 2007 and requiring publication of all documentation, in practice many of such orders are not published in accordance with the regulation.[33] However, it is alleged, that the laws considered to be at the top of the hierarchy of norms get paid lip service and the above unpublished rules, made without public consultations and often against public interest, are zealously enforced.[34]

Article 63 of the LL *inter alia* provides that:

> [t]he people's congresses or their standing committees of the provinces, autonomous regions and municipalities directly under the Central Government may, in light of the specific conditions and actual needs of their respective administrative areas, formulate local regulations, provided that such regulations do not contradict the Constitution, the laws and the administrative regulations. [35]

China lacks a centralized mechanism for reviewing legality of legislation. So to tackle the problems like "legislation fighting,' LL was enacted in the year 2000 in order to "define a complex hierarchy of reviewing

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[28] *See id.*
[29] *See id.*
[30] *See* LEGISLATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA (ORDER OF THE PRESIDENT NO.31), (2000)., promulgated on Mar. 15, 2000.
[31] *See* Zhang, *supra* note 3, at 87.
[32] *See id.*
[33] *Id.*
[34] *Id.* at 98-99.
[35] Legislation Law of the People's Republic of China (Adopted by the third Sess. of the Ninth Nat'l People's Cong. on March 15, 2000 and promulgated by Order No. 31 of the President of China on March 14, 2000) Art.63 (China).

authorities." As mentioned above, legislative review significantly limits the scope of judicial review by completely precluding courts from reviewing "concrete administrative acts" and does not extend to "abstract administrative acts" such as laws, regulations, rules or any other normative documents of general nature.[36] The real problem in China is identified as the executive's failure to faithfully enforce the Constitution and laws, and that "the governments often systemically practice a set of 'latent rules,' rules not found in open texts but formulated and carried out beneath what appears on the surface, often without public knowledge."[37]

This article now turns to the judicial system in China. The Supreme People's Court (SPC) is the highest court in China. Additionally, each province, municipality and autonomous region possess a High Court as well. Middle-level courts are present in cities which are divided into districts; and basic-level courts exist in city districts, counties and cities which have not been further divided into districts.[38] The Chinese judiciary is politicized and allegedly suffers from "Chinese judicial syndrome," which is an "interlocking combination of dysfunctional symptoms."[39] According to Prof. Zhang Qianfan of Peking University's Law School, the following are "dysfunctional symptoms" of "Chinese judicial syndrome":

> (1) local protectionism that seriously undermines the uniformity of law; (2) overall low professional and moral quality of judges, making them prone to corruption and unfit for impartial administration of justice; (3) bureaucratic management of the courts and political control of the judges, which are at odds with the generally recognized principle of judicial independence and impartiality; and (4) the lack of adequate material provisions (salary, funding and working conditions) for effective functioning of the courts.[40]

There have been successive attempts to reform the Chinese judiciary over the course of five-year outlines, beginning in 1999, which have established varied results.[41] Moreover, China has a long way to go in order to really achieve constitutionalism, despite having a written constitution.

II. Chinese FDI Legal Regime

[36] *See* Zhang, *supra* note 3, at 95.
[37] *Id.* at 98.
[38] *Id.* at 181-182.
[39] *Id.* at 186.
[40] *Id.*
[41] *Id.* at 188-94.

The above background knowledge is required to objectively compare the merits of the FDI regime in China, with that of India. Prior to indulging in such broad comparisons, it is necessary to fully appreciate the FDI regime of China. China uses the following four corporate vehicles for FDI: Wholly Foreign-Owned Enterprises (WFOEs), which are the most popular mode of FDI; the two types of Chinese-Foreign Joint Ventures viz., the Chinese-Foreign Equity Joint Venture (EJV) and the Chinese-foreign Contractual Joint Venture (CJV); and lastly the more recent Foreign Invested Company Limited by Shares (FICLS).[42] The cross border merger route is also available, and will be briefly discussed. It is worth mentioning, that the governing laws in China were amended after its entry into the World Trade Organization (WTO) to comply with the WTO norms. Though the Chinese FDI Regime is pretty complex, one of its distinguishing features, as seen above, is the creation and legal recognition of separate standardized business vehicles specifically for FDI.[43] The basic feature of all FDI in China, through any of the above modes, is that mandatory approval is required from the specified authorities, though the time limits for approval applications of each mode are statutorily prescribed.[44]

The "Law of People's Republic of China on Chinese-foreign Equity Joint Ventures" (EJV Law) which was the first law to govern Foreign Invested Enterprises (FIEs), was originally promulgated in the year 1979 and is still the governing law for EJVs. The EJV Law is quite pithy, consisting of just 16 articles, though it's elaborate Implementing Regulation is made up of 105 articles.[45] According to Article 4 of the EJV Law, the EJV shall consist of a limited liability company (LLC), and the

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[42] *See e.g.,* Hui Huang, *The Regulation of Foreign Investment in Post-WTO China: A Political Economy Analysis*, 23 COLUM. J. ASIAN L. 185, 188 (2009) (hereinafter Huang); and Jim Jinpeng Zhang & Jung Y. Lowe, *Foreign Investment Companies Limited by Shares: The Latest Chinese Organization for Major International Ventures*, 21 NW. J. INT'L. L. & BUS. 409 (2001) (hereinafter Zhang & Lowe).

[43] *See also* Matthew Sweeney, *Foreign Direct Investment in India and China: The Creation of a Balanced Regime in a Globalized Economy*, 43 CORNELL INT'L. L.J. 207, 210 (2010) (hereinafter Sweeney).

[44] Article 3 of the EJV Law prescribes a three month period for approval authorities to arrive at their decision. Under Article 5 of the CJV Law, the same period is shortened to 45 days. Article 6 of the WFOE Law establishes a similar 90 day decision period. Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (Adopted at the Second Sess. of the Fifth Nat'l People's Cong. on July 1, 1979 and promulgated by Order No.7 of the Chairman of the Standing Committee of the Nat'l People's Cong. on July 8, 1979; amended according to the Decision on Amending the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures made at the Third Sess. of the Seventh Nat'l People's Cong. on April 4, 1990, and amended for the second time according to the Decision on Amendment to the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures adopted at the Fourth Sess. of the Ninth Nat'l People's Cong. on March 15, 2001) (China) (hereinafter EJV Law).

[45] *See also* Huang, *supra* note 42, at 188-89.

proportion of investment contributed by the foreign investor in an EJV "shall generally not be less than 25% of the registered capital" of the EJV.[46]

Though the EJV Law does not restrict the maximum foreign capital participation in an EJV, the same is restricted by the sectoral policy as contained in the "Catalogue for the Guidance of Foreign Investment Industries" (Catalogue) (as amended last in 2011). The Catalogue divides "foreign investment industries" into the following categories: "encouraged foreign investment industries," "restricted foreign investment industries," and "prohibited foreign investment industries." All other types of industries not mentioned in the catalogue are "permitted investments." In these three non-prohibited categories, "encouraged," "permitted," and "restricted," there is an increasing degree of pace and complexity in the approval process and considerable variance in designated approval authorities, depending on the monetary value of investment.[47] The Catalogue also places restrictions on the form of business associations, to the above four categories, in certain sectors. For example, under the "encouraged foreign investment industries"' list under the "mining and quarrying industries"' for the "venture prospecting and exploitation of petroleum, natural gas" the only forms of FIE prescribed are EJV or a Contractual Joint Venture.[48]

Article 5 of the EJV Law imposes the following condition: "The technology and the equipment that serve as a foreign joint venture's investment must be advanced technology and equipment that actually suit our country's needs. If the foreign joint venture causes losses by deception through the intentional use of backward technology and equipment, it shall pay compensation for the losses."[49] This condition is quite unique. Though Article 10 does not impose export obligations on an EJV, it "encourages" them. Article 15 of the EJV Law imposes upon the parties of an EJV to attempt resolving their disputes compulsorily first through consultation, and if that fails, through mediation or arbitration.[50] If the parties are unable to reach an arbitration agreement, the dispute is to be resolved through the courts.[51] In the case of expropriation of an EJV, pursuant to legal procedure in social public interest, the state under Article 2 will offer "corresponding compensation."[52] Additionally, a business license has to

[46] *See* EJV Law, *supra* note 44, at Art. 4.
[47] FRANÇOISE NICOLAS, CHINA AND FOREIGN INVESTORS: THE END OF A BEAUTIFUL FRIENDSHIP? (IFRI) 8 (2008).
[48] *See* Entry II.(2), Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011)(Ministry of Commerce, China "MOFCOM"), *available at* http://english.mofcom.gov.cn/article/policyrelease/aaa/201203/20120308027837.shtml (last visited Dec. 6, 2014).
[49] EJV Law, *supra* note 44, at Art. 5..
[50] *Id.* at Art. 15.
[51] *Id.*
[52] *Id.* at Art. 2.

be obtained before commencing business as a EJV.[53] One successful example of an EJV was carried out by Volkswagen, a well-known German Auto TNC, in 1984 for a term of 25 years (which was extended to 2030 in the year 2002).[54]

The Chinese-Foreign Contractual Joint Ventures Law (CJV Law) was promulgated in the year 1988, and has also undergone successive amendments like the EJV Law.[55] A different set of elaborate CJV Implementing Regulations of 1995 are in existence. The broad objective of the CJV Law, similarly to the EJV Law, is in form of an enactment contained in its Article 1, which reads as follows:

> This Law is formulated to expand economic cooperation and technological exchange with foreign countries and to promote the joint establishment, on the principles of equality and mutual benefit, by foreign enterprises and other economic organizations or individuals (hereinafter referred to as the foreign party) and Chinese enterprises or other economic organizations (hereinafter referred to as the Chinese party) of Chinese-Foreign Contractual Joint Ventures (hereinafter referred to as contractual joint ventures) within the territory of the People's Republic of China.[56]

A CJV gives more flexibility to the parties in comparison to an EJV. The EJV Law statutorily prescribes sharing of profits, risks and losses between the parties to the EJV in proportion to the respective capital contributions, whereas the CJV Law allows the parties to determine proportions by the CJV contract. Though state protection to the lawful interests of the joint venture and its partners are statutorily extended in both the laws, Article 3 of the CJV Law explicitly places the CJV under the supervision of the "relevant state authority."[57] Further, Article 11 explicitly states, *inter alia*, that: "The right of a contractual joint venture to make its own operational and managerial decisions shall not be free from any interference."[58] In Article 4, the State encourages export oriented or technologically advanced CJVs, though the above rigorous requirement in the Article 5 of the EJV Law is absent.[59] Article 25 of the

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[53] *Id.*
[54] *See* Huang, supra note 42, at 192.
[55] Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (Adopted at the First Sess. Of the Seventh Nat'l People's Cong. on April 13) (China) (hereinafter 'CJV Law').
[56] *Id.* at Art. 1.
[57] *Id.* at Art. 3.
[58] *Id.* at Art. 11.
[59] *Id.* at Art. 4.

CJV Law contains its dispute resolution provision for the joint venture parties, and is similar to the EJV Law provision discussed above.[60] However, consultations between parties are not even mandatory if the parties cannot agree, and in certain cases the dispute can go straight to litigation.[61] One important distinction between the two laws is, even though an EJV is specifically required to be a LLC, a CJV may or may not be in a form of a company, though it is undoubtedly a separate "Chinese legal person."[62] A CJV must obtain a similar business license, and the date of issue is considered to be the date of establishment of the CJV.[63]

To establish a Chinese-foreign joint venture three levels of approvals are needed:

> (1) a preliminary approval by the government department supervising the local Chinese enterprise, (2) final approval by the PRC authorities with jurisdiction over foreign trade and economic planning, and (3) the issuance of a business license by the appropriate government entities with authority over the regulation of industry and commerce.[64]

Joint ventures gained popularity among foreign investors as a way to counteract their own inexperience and unfamiliarity with the Chinese business and regulatory system, by obtaining a Chinese partner who possessed familiarity and experience with the Chinese business and regulatory environment.[65] However, gradually the popularity of joint ventures declined and WFOEs became the most popular vehicle of FDI. The reasons behind the decline in popularity of Chinese-foreign joint ventures are two-fold, including conflicts of interests and business priorities between the Chinese and the foreign partner. For example, the local partner usually wanted quick dividends, but the foreign investing partner sought to reinvest earnings back in the joint ventures business.[66] Secondly, the local partner often used the technology the foreign partner brought to the joint venture to manufacture its own products, and saw nothing wrong with it, while the foreign partner viewed this misappropriation of technology as a breach of trust.[67]

WFOEs are governed by the "Foreign-Invested Enterprise Law of PRC on Wholly Foreign Owned Enterprise" (WFOE Law) which was

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[60] *Id.* at Art. 25.
[61] *Id.*
[62] *See* EJV Law, *supra* note 44; CJV Law, *supra* note 55.
[63] CJV Law, *supra* note 55.
[64] DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 528–29 (2005) (hereinafter Chow).
[65] *Id.* at 526.
[66] *Id.* at 554-55.
[67] *Id.*

originally promulgated in 1986.[68] The WFOE Law also has a set of implementing regulations brought into force in 1990.[69] Article 3 makes clear that a WFOE must benefit the development of the Chinese economy and that the State encourages establishment of export oriented WFOEs and the use of advanced technology.[70] Furthermore, as stipulated by the State Counsel, certain lines of businesses are prohibited for WFOEs. Expropriation and compensation provisions are similar to the EJV Law discussed above. Similarly, per Article 7 of the WFOE Law, after obtaining a certificate of approval, within 30 days the WFOE shall apply to "industrial and commercial administrative authorities" to obtain a business license.[71] The WFOE Law does not contain a dispute resolution clause.

The last foreign investment vehicle which remains to be discussed is the Foreign Invested Company Limited by Shares (FICLS). FICLS are regulated by a 1995 Law called, "The Provisional Regulations on the Establishment of Foreign-Funded Joint Stock Companies Limited" (FICLS Regulations).[72] This law allows "foreign shareholders" to jointly set up foreign funded joint stock companies with the "Chinese shareholders." Both classes of "shareholders" can be "companies, enterprises and other economic entities or individuals," foreign or Chinese, as applicable.[73] According to Article 5 there are two alternative means of establishing a FICLS: "promotion"' (involving, at least one foreign promoter) and "public offer," whose eligibility norms are established in the second paragraph of Article 6.[74] The minimum registered capital required for setting up a FICLS is RMB 30 million Yuan, with the total value of the shares purchased and held by the foreign shareholders consisting of no less than 25% of the company's total

[68] Law on Wholly Foreign- Owned Enterprises (Adopted at the fourth Sess. Of the Sixth Nat'l People's Congress on April 12, 1986, revised on October 31, 2000 at the 18th Meeting of the Standing Committee of the Nat'l People's Cong. by the Decision on Revision of the "Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment) (China) (hereinafter WFOE Law).
[69] *Id.*
[70] Sachdev, *supra* note 2 at 208 ("In reality, pursuant to the WFOE Articles 3 and 6, a WFOE application will face tough examination prospects unless it encourages the development of China's national economy through one of the following (or related) methods: adoption of advanced technology and equipment; development of new products; production of import substitutes; or exportation of at least fifty percent of annual output. While the government has relaxed the approval procedures in practice, especially in non-crucial industries, the approval process is still more restrictive than that regulating joint ventures.")
[71] WFOE Law*, supra* note 68, at Art. 7.
[72] Provisional Regulations on the Establishment of Foreign-Funded Joint Stock Companies Limited (Promulgated by Decree No. 1 of the Ministry of Foreign Trade and Economic Cooperation on January 10, 1995) (China) (hereinafter 'FICLS Law').
[73] *See id.* at Art. 1; and Zhang & Lowe, *supra* note 42.
[74] FICLS Law, *supra* note 72, at Art. 5-6.

registered capital.[75] The approval process for both the aforementioned means to set up a FICLS is delineated in Article 9 of the FICLS Regulations.[76] The FICLS Regulations also establish requirements and procedure to be followed for conversion of foreign funded joint ventures, WFOEs, and FICLS. FICLSs do not enjoy tax exemptions or tax deduction preferences which are available to joint ventures and WFOEs under domestic law.[77] All regulatory filings are done in Chinese.

Mergers and Acquisitions (M&As) though very popular modes of cross border investments globally, are not very popular among foreign investors investing in China. The law governing M&As is the "Provisions on the Takeover of Domestic Enterprises by Foreign Investors," enacted in 2006. The law deals with two types of M&As: "Equity M&As" and "Asset M&As." This article does not seek to focus on the Chinese M&A law, and thus does not explore the Chinese M&A regime further.[78]

III. Comparing Chinese FDI Regime with the Indian one: the Analysis and Lessons (with a critique of Sachdev and Sweeney):

This part of the article focuses on broadly comparing the Chinese and the Indian FDI Regimes and drawing some lessons from this comparative exercise.[79] For this academic exercise, apart from having recourse to the preceding information and analysis, the author will use two pertinent articles which indulge in a similar comparative exercise. The articles were published in the years 2006 and 2010, with the latter relying on the former. The first article is by Rohit Sachdev[80] and the second article

[75] *Id.* at Art. 7.
[76] *Id.* at Art. 9.
[77] *Id.* at Art. 26.
[78] *See* Hui Huang, *China's New Regulation on Foreign M&A: Green Light or Red Flag?*, 30 UNSW LAW JOURNAL 802 (2007) (providing a detailed analysis of Chinese M&A law).
[79] *See* Mauro Bussani & Ugo Mattei, *Diapositives versus Movies – The Inner Dynamics of the Law and its Comparative Account*, THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 3, 3–4 (Mauro Bussani & Ugo Mattei eds., 2012) (stating emphatically that: "[n]owadays, much literature is produced by scholars who take a quick look at non-domestic legal systems, and thereby present their studies as comparative, while their analysis remains embedded in the positive law paradigm." The author leaves it to his readers to determine whether this article is able to portray some elements of a standard 'comparative' law work or not); H. Patrick Glenn, *Aims of Comparative Law*, ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 57, 57–65 (Jan M. Smits ed., 2006); Luke Nottage, *Commercial Regulation*, ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 135, 135–45 (Jan M. Smits ed., 2006).; Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, ST. THOMAS L. REV. 513 (2002); JAAKKO HUSA, ABOUT THE METHODOLOGY OF COMPARATIVE LAW—SOME COMMENTS CONCERNING THE WONDERLAND (MAASTRICHT WORKING PAPERS) (2007).
[80] *See* Sachdev, *supra* note 2.

is by Matthew Sweeney.[81] This chapter does not endorse all the views expressed in these articles. In fact, to the contrary, it will indulge in a constructive criticism of some of the prominent views expressed in these articles, and challenge certain inferences drawn therein.

Sachdev states in his article that, "India's statutory governance of FDI is comparatively more convoluted and more antiquated than China's, and therefore, it is less conducive to attracting, processing, and retaining FDI inflows."[82] This article refutes such a claim. The current Indian FDI statutory regime is based on the Foreign Exchange Management Act of 1999 ("FEMA") and its pertinent regulations, particularly the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations of 2000 (commonly referred to as "FEMA 20" from its notification number). Even the government of India attempts to provide the FDI Policy in one place through its Consolidated FDI Policy, the current version of which has become recently available in April 2014. As far as "antiquity" is concerned, the basic laws and regulations governing Chinese FDI are older than their Indian counterparts and are not amended and updated as frequently as the Indian ones. However, it is true that sometimes too frequent amendments in laws cause an element of uncertainty in the regulatory environment, which is undesirable in policy formulation and implementation. These frequent policy changes also sometimes cause undesirable law and policy gaps.

As far as Sachdev's claim that India's governance of FDI is more "convoluted" than China's, in my objective assessment, it is difficult to state which of the two legal regimes is more convoluted. The drafting of the Indian FDI Policy and Regulations appear to be better than their Chinese counterparts. The claim that the Indian laws are more "convoluted" is probably based on the assumption drawn from the article's next sentence, which reads as follows: "[i]n addition, *China uses distinct legal vehicles* that prove more transparent and more comprehensible for foreign investors than India's outdated legislation."[83] As discussed above, the author fails to prove that Indian FDI Legislation is either antiquated or outdated. The fact that "China uses distinct legal vehicles," as discussed above, does not prove his claim. In fact, the Chinese FDI Regime provided for these standardized foreign investment vehicles not in foreign investors' interests, but rather to protect its own interests. The Chinese FDI Regime was skeptical of permitting and liberalizing FDI, so it created these statutes from the scratch in a "piecemeal ad hoc" manner, while carrying out its economic reforms through trial-and-error and allowing the government to roll them back if and when the measures do not succeed.[84]

[81] *See* Sweeney, *supra* note 43.
[82] *See* Sachdev, *supra* note 2, at 169.
[83] *Id.*
[84] *See* Huang, *supra* 42 , at 203-204

Actually, there are inconsistencies in the Chinese FIE laws.[85] In fact, despite the efforts of the authorities to resolve conflicts between the Chinese Company Law and FIE Regime, which are supposed to supplement and complement each other, whenever both apply, certain conflicts remain particularly due to certain difficulties in interpreting administrative opinions, decisions and decrees issued for this purpose.[86]

The second statement made by Sachdev which deserves comment states as follows: "China, on the other hand, has a vertically integrated FDI approval process, which generates significant tension between state and national authorities but is nevertheless comparatively more facilitative of FDI inflows."[87] As far as foreign exchange control laws and FDI Policy in India is concerned, both of them are made at the national level, and not at the state level. Even the Foreign Investment Promotion Board (FIPB), whose clearance becomes indispensible for the sectors/activities falling under the "government route" as per the Indian FDI Policy, comes under the Central Government's Ministry of Finance. As far as local or state level clearances are required, only the competent authorities can give them. Similarly, when an FDI deal in India triggers the Takeover Code (administered by the Securities and Exchange Board of India), the Companies Act provisions, or the Competition Act provisions (administered by the Competition Commission of India), the same have to be complied with, and the requisite regulatory approvals sought. In fact, when seeking approval for FDI *per se*, there is no three-layered structure in India as in China. Most of the sectors/activities open for FDI in India now fall under the "automatic route" and require no prior approval from the Reserve Bank of India (RBI)/Government, only subsequent reporting. The differences in the Chinese unitary system and the Indian federal system must be kept in mind when comparing the two regimes, and an author's preference for one over the other may be very subjective.

The third statement in *Sachdev* that merits response reads as follows:[88]

> This analysis reveals that a country's (in this case, China's) disregard of the "rule of law" in political governance may, ironically, allow it more effectively (1) to grant rule of law protections to investors and (2) to implement more efficient approval processes than a country such as India, which preserves rule of law at the highest levels of governance, yet at the expense of streamlined FDI statutory governance and approval procedures. As a result, China can tailor more effectively its FDI governance to foreign direct investors'

[85] *See id.* at 204.
[86] *See id.* at 209-12
[87] Sachdev, *supra* 2, at 169.
[88] *Id.* at 169-70.

> interests and assist them in circumventing red tape and procedural delay.

The above statement suggests that "rule of law" is antithetical to an efficacious FDI regime, which this article disputes. In fact, in international investment law, the standard of protection that has dramatically arose to prominence is the "Fair and Equitable Treatment" (FET) Standard, which draws upon the host state's capability to maintain "rule of law."[89] It has been proposed that the "rule of law," embodied in different municipal legal systems, which aspires to "subject public power to legal control," can be a standard for explaining the normative content of FET.[90]

The following seven sub-elements emerge from the arbitral case law:[91] (1) the requirement of stability, predictability, and consistency of the legal framework; (2) the principle of legality; (3) the protection of legitimate expectations; (4) procedural due process and denial of justice; (5) substantive due process and protection against discrimination and arbitrariness; (6) transparency; (7) the principle of reasonableness and proportionality. Some elaboration on some of these sub-elements is necessary. Legal security and legal certainty, which are derived from the "rule of law" concept, are associated with domestic law and corresponds to sub-element (1) above.[92] There are limits to this sub-element, as foreign investors are not excluded from the regulatory changes taking place in the host state.[93] Thus, a foreign investor needs to do investment planning and adjust itself to the host state's legal framework.[94] On the sub-element (2) pertaining to "legality," the domestic actors compliance with national laws is used as a basis for assessment of FET.[95] The sub-element (3) relates to "legitimate expectations," which can arise from the general framework's provisions of the host state.[96]

As far as the existence of red-tape is concerned, as discussed above, a lot of red-tape orders are passed by the Chinese authorities and remain unpublished.[97] It is unfortunately true that undesirable bureaucratic corruption and red-tape exists in the Indian system too, which, in absence of any evidence, may or may not have attributed to the delays in approval

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[89] *See generally*, Stephen W. Schill, *Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law*, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephen W. Schill ed., 2010).
[90] *Id.* at 158–59.
[91] *Id.* at 159-60.
[92] *Id.* at 161.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 162. For example, in Noble Ventures v. Romania, ICSID 12/10/2005, the tribunal relied on observance of domestic legal rules to decline violation of FET.
[96] Schill, *supra* note 89, at 165.
[97] *See supra* note 33 and accompanying text

and implementation process in foreign investment deals.[98] However, the preciseness and certainty in FDI law and policy, and its implementation by the regulators whose regulatory space is well delineated and without overlaps and without any regulatory overreach, is much desired in the Indian FDI Regime.[99] The professional, competent and independent Judiciary in India, with a large number of competent, able assisting corporate lawyers, is not bad for foreign investors; it actually increases the effectiveness of the legal system, which is one of the important determinants in attracting FDI in a host state.[100]

The numerous problems in the Chinese judicial system have been discussed above, and Sachdev is not oblivious to them.[101] Furthermore, the High Courts in India and its Supreme Court have the efficacious power of judicial review over both the legislation and the administrative law. In somewhat contradistinction to its Chinese counterparts, as discussed above, this judicial review is also available to the foreign invested Indian entities, and to the foreign investors as well, to challenge these laws and administrative actions.[102] These Indian courts can effectively address violations of constitutional provisions, providing suitable reliefs to the aggrieved persons. Despite this, though, it is also correct that the Indian courts are overburdened with work, and the extreme docket pressure sometimes leads to inordinate delays in disposal of cases, with undesirable results for both India as a host state and for the affected foreign

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[98] *See, e.g.*, T.R. SAREEN & S.R. BAKSHI, 3 SOCIO-ECONOMICS & POLITICAL DEVELOPMENT IN SOUTH ASIA 124–61.

[99] *See* Ajay Kr. Sharma, *A Critique of the Indian FDI Law and Policy: Problems & Solutions*, 2 NLUJ LAW REVIEW 30, 54–55 (2013) (hereinafter Sharma).

[100] *See* Amanda Perry-Kessaris, *Finding and Facing Facts about Legal Systems and Foreign Direct Investment in South Asia*, 23 LEGAL STUD. 649, 668–69 (2003) (establishing that the Indian courts were most 'effective' when compared to the ones in Bangladesh, Pakistan, the UK and the US; suggesting a locational advantage for India in this respect for attracting FDI)..

[101] *See* Sachdev, *supra* note 2, at 184-85.

[102] *See* M.P. JAIN, INDIAN CONSTITUTIONAL LAW 461–505 (5 ed. 2003); DR. JUSTICE A R LAKSHMANAN, A R MANOHAR & JUSTICE BHAGABATI PROSAD BANERJEE, 2 DURGA DAS BASU SHORTER CONSTITUTION OF INDIA 1185–1361; 1379–1458 (14 ed.) (discussing the powers of the Indian High Courts to issue certain writs including, writ of mandamus); T.R. Andhyarujina, *The Evolution of Due Process of Law by the Supreme Court*, SUPREME BUT NOT INFALLIABLE 193, 193–213 (B.N. Kirpal et al. eds., 2000); I. P. MASSEY, ADMINISTRATIVE LAW 283–434 (7 ed. 2008) (discussing *inter alia* both the principles and modes of judicial review of administrative action in India); S.P. SATHE, ADMINISTRATIVE LAW 51–112, 216–296 (1999); JUSTICE G. P. SINGH & JUSTICE ALOK ARADHE, MP JAIN & SN JAIN: PRINCIPLES OF ADMINISTRATIVE LAW 584–688 (6 ed. 2010) (discussing *inter alia* at length judicial control of administrative action and judicial control of administrative discretionary powers in India including in cases of abuse of discretion involving *mala fides* and exercise of power on irrelevant considerations); REPORT OF THE WORKING GROUP ON FOREIGN INVESTMENT (GOVERNMENT OF INDIA) 58–59 (2010) (discussing the importance of judicial review as an important part of rule of law for reasons of accountability, fairness and participation).

investor.[103] These merits in the Indian Legal and Judicial system should not be undermined when comparing the Chinese and Indian regimes, though the systemic problems should be tackled institutionally for both investment promotion and efficacious protection.

Before proceeding further, a comparative table below presents comparisons between China and India on some indicators used by Transparency International (TI) (including some borrowed ones) to measure *inter alia* corruption, transparency and governance standards, with author's inferences:[104]

Table: Comparisons of China with India on TI Indicators

Indicator (ref. year)	**Explanation of the indicator**	**Performance**		**Author's Inferences**
		China	**India**	
Corrupt-ion Percept-ion Index (2014)	"The Corruption Perception Index ranks countries/territories based on how corrupt a country's public sector is perceived to be. It is a composite index, drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions. Scores range from 0 (highly corrupt) to 100 (very clean)."	RANK: 100/174 SCORE: 36/100	RANK: 85/174 SCORE: 38/100	In comparison to the 2013 Index, the position of India has significantly improved to 85 from 94, whereas the position of China has drastically fallen by 20 places from 80 to 100. In fact. there is complete reversal of ordering from the last year's tally. India now leads China by 2 percent by improving its score by 6 percent. This casts doubts over the efficacy over the Chinese policy to tackle corruption concerning both "tigers and flies"; though significant scope for improvement exists

[103]*See White Industries Australia Ltd. v. Republic of India*, 2011 UNCITRAL, Final Award (Nov. 30).
[104] *See* Transparency International (Accountability) for India, http://www.transparency.org/country#IND (last visited Dec. 7, 2014); Transparency International (Accountability) for China, http://www.transparency.org/country#CHN (last visited Dec. 7, 2014).

				for India as well.
Control of Corruption (2010)	"Control of corruption reflects perceptions of the extent to which public power is exercised for private gain. This includes both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests. Point estimates range from about -2.5 to 2.5. Higher values correspond to better governance outcomes."	RANK: *percentile* 33% SCORE: -0.603028712	RANK *percentile* 36% SCORE: -0.516719172	The authenticity of this indicator is more, as it used and measured by the World Bank to calculate 'World Governance Indicators', being one of its six dimensions. On this indicator India scores better than China, though only marginally, by three percentiles.
Open Budget Index (2010)	"The Open Budget Index assesses the availability in each country of eight key budget documents, as well as the comprehensiveness of the data contained in them. It also examines the extent of effective oversight provided by legislatures and supreme audit institutions, as well as the opportunities available to the public to participate in national budget decision-making processes. Scores	BUDGET OPEN-NESS: Scant or none SCORE: 13	BUDGET OPEN-NESS: Significant SCORE: 67	Here, Indian score is significantly higher than the Chinese. A more 'open budget' shows at least greater transparency in fiscal policy making which is good for foreign investors.

	range from 0 (scant or no information) to 100 (extensive information)." A more elaborate classification into different categories on basis of the said scores is also done.			
Judicial Independence (2011-2012)	"Judicial Independence is an indicator in the Global Competitiveness Index produced by the World Economic Forum. It measures the perceived extent in which the judiciary of the country is independent from influences of members of government, citizens, or firms. Scores range from 1 (heavily influenced) to 7 (entirely independent)."	RANK: 63/142 SCORE: 3.9/7	RANK: 51/142 SCORE: 4.3/7	A 5.71 per cent difference in the 'judicial independence' indicator between the Chinese and the Indian judiciary does not appear to be too significant and alarming. However, the researcher's above claims based on the doctrinal research, and on basis of his personal experience as an Indian Lawyer, currently an academic, and in past as a practising Advocate and a Judge makes him doubt this marginal difference. The constitutional differences, discussed above, themselves show much difference in the judicial powers and autonomy of the superior courts in both countries as far as powers of judicial review are concerned alone.
Rule of Law (2010)	"This dimension captures perceptions of the extent to which agents have confidence	RANK: *percentile* 45% SCORE: -	RANK: *percentile* 55% SCORE: -	On this indicator India significantly leads China. The anticipated benefits of 'rule of law' for foreign investors

	in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. Rule of Law is one of the six dimensions of Worldwide Governance Indicators. Point estimates range from about -2.5 to 2.5. Higher values correspond to better governance outcomes."	0.346839923	0.057769364	have been discussed above.
Voice & Accountability (2010)	"Voice and Accountability c aptures perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media. Control of corruption is one of the six dimensions of the Worldwide Governance Indicators. Point estimates range from about -2.5 to 2.5. Higher	RANK: *percentile* 5 % SCORE: -1.64950121	RANK: *percentile* 59 % SCORE: -0.42402758	As expected due to the differences in the forms of governments between the two countries, China scores poorly on this indicator, whereas India, being a robust democracy, scores reasonably well. This difference *per se* is beneficial for India as a FDI destination.

	values correspond to better governance outcomes."			

Furthermore, it may also be incorrect to use the Chinese legal regime as the basis for justification of the rapid and huge FDI inflow into China compared to India, as there are several other determinants apart from "market-friendly" and investment & investor friendly and incentivizing policies which help in a host state becoming a magnet for FDI, including economic and business-facilitative factors, good infrastructure, and the state of existing and potential markets.[105] It must also be kept in mind that even Sachdev concedes that there may be "round-tripping" to the extent of 50% of the FDI inflow reported by China, but still the gap between India and China in receiving FDI is considerable.[106]

Let us now scrutinize another of Sachdev's statements: "First, unlike in India's case, the Chinese government drafted FDI legislation by breaking dramatically with past economic and legal policy, thereby explicitly signaling to foreign investors China's desire for capital from abroad. Second, the structural framework of Chinese FDI laws proves relatively more transparent and user friendly than its Indian counterpart."[107] And further, "FDI legislation seemingly retains fewer rule of law elements than does its Chinese counterpart, which generally falls far short of extending rule of law protections to its own citizens. India's foreign investors must meander through a tangle of unclear and disjointed rules, whereas China's investors are afforded clear rules, protections, and rights, all embodied in the FIE vehicle of choice."[108] The 1991 Indian Industrial Policy, though not completely and unnecessarily breaking from the past, as FDI was permitted from a very long time in India, ushered in the era of liberalization of foreign investment regime in India. Subsequently, there have been numerous FDI law and policy reforms in India until date, with mixed results.

Keeping in view the preceding submissions and the above discussion on the Chinese FDI regime, it does not appear to be relatively dramatic from the Indian standpoint, though it is indeed a dramatic reformation in China which started off only in 1979. The clarity and inconsistencies in the Chinese FDI Regime have already been commented on above. The

[105] *See* UNCTAD WORLD INVESTMENT REPORT 2003: FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES, 86–87 (2003).
[106] Sachdev, *supra* note 2, at 176.
[107] *Id.* at 194.
[108] *Id.* at 198.

difficulty in understanding an alien legal regime for a foreign investor and his home country's corporate lawyers is indeed real. Thus, for effective business transactions, the role of competent and efficient local legal counsels, experienced in dealing in the regulatory due diligence and other pertinent aspects relating to their national laws, cannot be undermined.

Complexities exist in both Indian and Chinese regimes, making it terse to understand them holistically and wholesomely, and to connect the dots among the assorted laws that may apply in a particular FDI deal. As such, a simplistic comparison and inference as done by Sachdev, cannot be practical. Sachdev subsequently states, that, "foreign investors are offered certain legally guaranteed (via legislative decree) rights in China, but only an administrative overseer in India."[109] It is true that the Chinese FIE laws explicitly guarantee certain limited rights to the foreign investors against certain state measures. On face of it, the absence of similar rights in Indian FDI laws appears to be a relative deficiency. However, as discussed above, the legal and constitutional rights and remedies are available to the foreign investors to enforce them in the Indian courts of competent jurisdiction. Furthermore, as discussed earlier, these statutory and constitutional rights may not be efficaciously enforced in the Chinese courts, though the Indian courts have been fair in adjudicating these claims against the State.[110] The other relevant criticisms, made earlier, equally apply to this statement.

Similarly, this article refutes the claim of Sachdev that: "[t]he IDRA is the current form of the Industrial Policy Resolution of 1948, which was passed upon independence more than fifty years ago with the goal of granting the federal government the ability to direct and to control industrial activities."[111] It is true that the Industries (Development and Regulation) Act of 1951 ("IDRA") is a regressive industrial licensing law in India. But, as a result of the changes made in the 1991 Industrial policy and subsequent reforms, most of the industries in India are now exempted by the Central Government from the pertinent licensing provisions of the IDRA, thus rendering the IDRA pragmatically redundant in most cases. The above statement in Sachdev's article is thus misleading. Furthermore, the service sector is *per se* not covered under the IDRA. Another objectionable statement made by Sachdev reads: "Due to the conspicuous absence in India of Chinese-style, cookie-cutter legal vehicles for FIE formation, foreign investors considering investment in India inevitably confront less certainty and a more convoluted legal setting for investing." The accuracy of this claim is refuted on the basis of this article's preceding arguments.

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[109] Sachdev, *supra* 2, at 196.
[110] *See, e.g.*, *Vodafone International Holdings B.V. v. Union of India*, 2012 1 Comp LJ 225 (SC) (a 3 Judge bench decision of the Supreme Court of India).
[111] Sachdev, *supra* note 2, at 197.

After appreciating the governance and constitutional differences between the two countries, with one having a unitary structure and other having a federal structure,[112] it is not difficult to observe the chinks in the following statement made by Sachdev: "The Chinese model formally incorporates state and local governments, while the Indian model is formally national and leaves foreign investors on their own to deal with the state and local governments once national approval has been granted."[113] No evidence is given about whether foreign investors in China have to deal with the Chinese local authorities themselves, or whether the centre facilitates their local clearances. However, in India, the "Foreign Investment Implementation Authority," under the Central Government's Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce, exists to help foreign investors obtain necessary approvals at both Central and State levels.[114] Sachdev also criticizes the FIPB's working and compares it to the erstwhile Chinese Ministry of Foreign Trade and Economic Cooperation (MOFTEC) (now MOFCOM).[115] Indeed, regardless of the comparisons, the FIPB needs to improve its transparency and efficiency. Restoration of "guidelines for consideration of FDI proposals by FIPB"[116] in the Indian "consolidated FDI Policy" would go a long way in this respect.

Lastly, one other statement made by Sachdev merits reaction. It reads: "[a]pprovals in China are likely to stall at the national level, but turnaround occurs much more quickly at the state and local levels."[117]

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[112] *See* Jain, *supra* note 102, at 553–55; CONSTITUTION OF INDIA, Art. 245, 246 (adopted on Nov. 26, 1949), *available at*: http://indiacode.nic.in/coiweb/welcome.html (last visited Dec. 2, 2014) (hereinafter Indian Constitution) (dealing with "extent of laws made by Parliament and by the Legislatures of States" and "Subject matter of laws made by Parliament and by the Legislatures of States" respectively).

[113] Sachdev, *supra* note 2, at 208.

[114] *See* Foreign Investment Implementation Authority (FIIA), DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION (DIPP), http://dipp.nic.in/English/Investor/FIIA.aspx (last visited Dec. 2, 2014) (which reads: "Government of India has set up the Foreign Investment Implementation Authority (FIIA) to facilitate quick translation of Foreign Direct Investment (FDI) approvals into implementation, to provide a pro-active one stop after care service to foreign investors by helping them obtain necessary approvals, sort out operational problems and meet with various Government agencies to find solution to their problems. Investors, facing any type of difficulties on implementation of projects, are requested to make application in the following proforma to the concerned authorities given in the Table below.").

[115] *See* Sachdev, *supra* note 2, at 209-10.

[116] *See e.g.,* DIPP Circular 2, Para. 4.7 (2010) (establishing such guidelines); and *Sharma, supra* note 99, at 43-44.

[117] Sachdev, *supra* note 2; *see*, REPORT OF THE STEERING COMMITTEE ON FOREIGN DIRECT INVESTMENT (GOVERNMENT OF INDIA) 22 (2002) (endorsing a 2001 A.T. Kearney study itself states: "Despite a very similar historical mistrust of foreigners and foreign investment arising from colonial experience, modern (post 1980 China) differs fundamentally from India. Its official attitude to FDI, reflected from the highest level of government (PM, President) to the lowest level of government bureaucracy (provinces) is

Despite alleged excessive red-tape at the local level in China, if the approvals do come at quick speed, it may be due to two probable alternative reasons: either (1) with respect to FDI approvals, local authorities display a radically different attitude contradicting their usual approach or, (2) there are extraneous considerations involved in approval process that are speeding up the approvals at that level, though the former seems more likely.[118] Though it is arguable that, after the Chinese Ministry of Commerce promulgated measures for handling complaints by FIEs and foreign investors in 2006, the efficiency of granting clearances might have increased as a consequence.[119] However, a close reading of these measures show that the remedies which may be meted out by the "complaint-accepting organ," which focus on issuing suggestions and facilitating coordination between the complainants and concerned department, may not deter the erring officials enough to expedite the process. An inducement of corruption to get the deals through may have its own drastic consequences on foreign investors coming from a developed capital exporting country. This is mostly due to their own home-state laws, rather than the host-state's laws dealing with corruption in either China or India.[120] Similar claims made elsewhere by Sachdev, which mostly reiterate the above submissions, are not dealt with herein. These criticisms are made purely in academic spirit, and do not display any national bias towards India. Further, they do not undermine the academic contribution of Sachdev.

Sweeney rightly recognizes that "India's regime is arguably more open" than China's.[121] In fact, the list of sectors that are prohibited for FDI in India is considerably shorter than the Chinese "Catalogue of Prohibited Foreign Investment Industries," mentioned above. As far as the certainty in the classification policy for industries in the "Catalogue" is concerned, the Chinese policy has also been somewhat uncertain and changing, as suggested by the categorizations and subsequent re-categorizations in many sectors. Unlike the Indian FDI Policy, in China, the list of sectors prohibited for FDI contains certain industries which were not prohibited hitherto were added later on. For example, in the 2011 Catalogue, the real estate industry was reclassified from a "restricted" to a "prohibited"

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one of consciously enticing FDI with a warm welcome. They recognize the multifaceted and mutual benefits arising from FDI.") However, the reader will do well to keep in mind that this report is more than a decade old, and much water has flown in the river Ganges since 2002.

[118] *See* Chow, *supra* note 64, at 10-11.

[119] *See* PRC Ministry of Commerce, Decree No. 2 2006 (Oct. 1) (promulgating Provisional Measures of the Ministry of Commerce on Handling Complaints Lodged by Foreign-Invested Enterprises).

[120] *See, e.g., Chow*, *supra* note 64, at 448-55 (discussing Foreign Corrupt Practices Act and its application on the US Corporations investing abroad).

[121] Sweeney, *supra* note 43, at 210.

category.[122] However, while Sweeney's analysis goes on so well, it suddenly falters as soon as the author starts his comparative endeavor by examining "differences between each regime." Partly, Sweeney's analysis has to do with the reliance he places on Sachdev's view that the Indian FDI regime is "antiquated" and "convoluted" (as expressed and critiqued above). It is important to note the following excerpt from Sweeney's analysis:[123]

> Analytically, the differences can be divided between the statutory structure of each regime, including the legal entity used and the relevant governing regulations, and the approval process necessary to consummate a foreign investment. These differences go a long way toward explaining the dramatic disparities in FDI inflows between India and China and may better explain the current disparity in investment inflows than other political and economic explanations.
>
> The statutory structure of China's investment regime, and the context in which it was promulgated, provide investors with greater predictability of government actions, is more transparent and user-friendly, and by being tailored to FDI, has signaled China's deep and lasting commitment to attracting foreign investment. Rohit Sachdev summarizes the differences:
> "India's statutory governance of FDI is comparatively more convoluted and more antiquated than China's… India's outdated legislation."
>
> Investors are unlikely to make significant investments unless they are provided some sense of certainty or predictability in how a host nation will interpret its FDI laws and whether it will respect the contractual rights and property rights inherent in the investment. Absent a high degree of confidence in the clarity, integrity, and stability of investment rules, investors may exaggerate the dangers inherent in a host nation's investment regime, resulting in less investment than would otherwise be provided.

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122 *See* Clifford Chance, AN OVERVIEW OF THE LATEST CHANGES TO CHINA'S INDUSTRY CATALOGUE FOR FOREIGN INVESTMENT CLIFFORD CHANCE (2012), http://www.cliffordchance.com/briefings/2012/01/an_overview_of_thelatestchangestochina.html/An-Overview-of-the-Latest-Changes-to-China's (last visited Jul 29, 2014).

123 Sweeney, *supra* note 43, at 226-27.

The arguments advanced above in respect of Sachdev's similar views, some of which are expressly relied on by Sweeney, can be put forth against the above observations, so far as they criticize the Indian FDI Regime in comparison to the Chinese. In India, though FDI in companies registered under the Companies Act are the major concern of the FDI Regime, FDI in other forms of business vehicles, like partnerships and LLPs, is also conditionally allowed under the FDI Policy.[124] Respective laws regulate all forms of business associations in India. In China too, as discussed above, the Chinese Companies Act applies to certain FIEs along-with their governing laws. So, such assumptions and inferences on lay comparisons between the two regimes are unjustified.

Another of Sweeney's excerpts which merits response reads as follows:[125]

> Investors may be more confident in China's commitment to attracting FDI than in India's efforts. First, investors may view China as more likely than democratic India to maintain consistent policy goals and objectives because of China's long-term communist leadership. Or alternatively, investors may have more confidence in a single party regime to put into effect liberalizing reforms beneficial to investors, which, in an open democracy, may be too politically costly to enact. Second, China has explicitly and actively sought to reform its investment regime to court foreign investment in a way that signals a deep commitment to attracting and maintaining high levels of foreign investment. The sustainability of this commitment to foreign investment may be furthered by the single-party autocratic rule of China. Because there is less of a threat of political change in China, there may be a perception that the government is less likely to make an about-face and curtail investment rights. China's FDI laws were formed with the specific intention of attracting foreign investments and were tailored to that end, beginning with the promulgation of the EJV law following Deng Xiaoping's "open door policy" of 1979. Soon thereafter, the Chinese constitution was amended to more explicitly allow for foreign investment.

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[124] *See* Consolidated FDI Policy Circular of 2014, ¶ 3.2 (Dep't of Industrial Policy and Promotion ('DIPP'), Min. of Commerce & Industry, Govt. of India, Apr. 17, 2014), http://dipp.gov.in/English/Policies/FDI_Circular_2014.pdf (last visited Jul 29, 2014) (hereinafter FDI Policy, 2014).

[125] Sweeney, *supra* note 43, at 228.

In fact, the above observations are amazing, if they offer explanation to the Chinese FDI growth. Sweeney firmly believes that a democracy such as India – keeping in mind the differences in ideologies amongst some political parties with respect to permissibility and limits of FDI in certain sectors – should provide a better overall investment environment when compared to a single party autocratic and communist state like China. Jensen (2003) and Busse (2004) show a positive association between democratic rights and FDI inflows. Just because the Chinese constitution and statutes explicitly give certain rights to the foreign investors, it does not mean that pragmatically it will lead to a better sense of security to the foreign investors and investment compared to India. The "rule of law" in a robust democracy in India with several institutional checks and balances gives a better guarantee and security to the foreign investment and investors. Though, it must be kept in mind that both countries have signed numerous Bilateral Investment Treaties (BITs), including the one in the year 2006 between themselves, and so are obligated under these BITs to the protected investor of the other contracting parties, who may enforce their treaty rights in investment treaty arbitration.

The Indian government's general policy towards FDI in its country, regardless of the political parties forming the government, has been investment and investors' friendly, and is summed up at the very onset under the "intent and objective" chapter of the country's FDI policy as:[126]

> It is the intent and objective of the Government of India to attract and promote foreign direct investment in order to supplement domestic capital, technology and skills, for accelerated economic growth. Foreign Direct Investment, as distinguished from portfolio investment, has the connotation of establishing a "lasting interest" in an enterprise that is resident in an economy other than that of the investor.

Though some of the observations, similar to that of Sachdev (discussed above) are not discussed here, one of Sweeney's observations must be addressed, which reads:[127]

> Additionally, India should re-evaluate industry specific FDI restrictions. Some restrictions may make sense, considering political and social differences. But as one commentator points out, the specifics of some restrictions suggest a lack

[126] *See* FDI Policy, 2014, *supra* note 125, at ¶ 1.1.1.
[127] Sweeney, *supra* note 43, at 239-40.

> of careful deliberation: "Why, for example, does India permit 100% FDI in the manufacture of hazardous chemicals and industrial explosives, but 74% in telecoms, 26% in insurance and none at all in supermarkets?"

Though a good suggestion duly supported in this article, the illustration cited from a view of a "commentator," though apparently attractive, is not really a cogent one. Permitting "100% FDI in the manufacture of hazardous chemicals and industrial explosives" does not mean that environmental and safety concerns are given a go by, as there are municipal laws to take care of these aspects in domestic companies, whether having FDI or not. This submission however does not amount to an endorsement of the adequacy of the Indian legal regime in dealing with any future tragic mass torts incidents by Multinational Enterprises (MNEs), keeping in mind the Bhopal tragedy, despite the current laws like, the Public Liability Insurance Act, 1991. The lower limits in telecom and insurance are because of the grave strategic and security concerns involved therein, though they are apparently innocuous when compared to the hazardous chemicals industry. In fact, in China the telecom sector comes under the 'restricted list' in the catalogue and have much lesser permissible foreign investment limits. The relevant entry in the 2011 Catalogue reads: "Tele communication companies: telecommunication increment service (the foreign capital less than 50 percent), motion tone and data service in basic telecom, interior business and international business (the foreign capital less than 35 percent, 49 percent no later than 11th in December in 2007 is permitted)."

Notably, under the current 2014 Indian consolidated FDI Policy the "telecom services" sector permits 100% FDI, with up to 49% under the "automatic route." In insurance sector too, despite much opposition, the Indian government is seeking to enhance FDI limit to 49%.[128] As far as the comment regarding "supermarkets", which pertains to the "multi brand retail trading," is concerned, currently FDI is conditionally permitted in India in this sector up to 51%, but it is of course a contentious political and policy issue in India. In China, retail industry dealing with distribution of "grain, cotton, vegetable oil, sugar, medicines, tobaccos, automobiles, crude oil, capital goods for agricultural production" falls within the "restricted sector" in the 2011 Catalogue and the additional condition imposed on it is that: "Chinese should hold the majority of shares of the

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[128] *See Plan to hike FDI in insurance with cap on voting rights*, THE HINDU, July 7, 2014, http://www.thehindu.com/business/Industry/plan-to-hike-fdi-in-insurance-with-cap-on-voting-rights/article6186828.ece (last visited Dec 7, 2014); *see also* Kavita Chowdhury, *Decks cleared for Insurance bill, if Parliament is not disrupted*, BUSINESS STANDARD INDIA, December 6, 2014, http://www.business-standard.com/article/economy-policy/decks-cleared-for-insurance-bill-if-parliament-is-not-disrupted-114120600795_1.html (last visited Dec 7, 2014).

multiple shops which have more than 30 branch stores and sale different kinds and brands of commodities from multi-suppliers." The Chinese foreign invested retail entities, which would be dealing in the other commodities, would presumably be under the "permitted sector." This classification, though seemingly intended to protect indigenous sale of certain (presumed) essential commodities, may create unnecessary business hindrances for foreign invested retail enterprises. So, a Retail FIE that intends to open a chain of supermarkets in China will have to comply with the "restricted list" procedure and conditions. Otherwise, it will not be able to sell some of the commonly sold items listed therein, including vegetable oil, cotton, and sugar, with possible adverse business consequences like losing many prospective customers.

Before concluding, some of the salient aspects of the Chinese FDI Regime that may be considered by the policymakers for incorporation in the Indian FDI regime can be succinctly stated as takeaway lessons. The quality of the FDI, accompanied with technology transfer, and the resultant "spillover effects," can be important considerations for a developing country. As seen above, the Chinese FIE Laws duly emphasize upon these aspects. Without violating any international law obligation, India can also consider incorporating a similar strategy in its FDI norms in order to stress the quality of FDI with resultant spillovers for domestic industry. Statutorily laid down time limits for deciding FDI proposal applications in India are highly desirable, much like certain FIE regulatory approvals under the Chinese regime. Though Alternative Dispute Resolution (ADR) is generally provided for under India's Arbitration and Conciliation Act of 1996, Indian law and policymakers would do well to consider imposing prior mandatory consultations and conciliations in order to resolve disputes involving foreign investors and their Indian JV partners (or Indian shareholders) before the matter goes for arbitration or litigation. A last suggestion that Indian policymakers should consider is to set up dedicated complaint centers for handling complaints by entities with FDI and the foreign investors against the administrative officials, as discussed above and implemented by the 2006 Chinese Ministry of Commerce Measures. Although this article has commented on the possible inadequacy of these Chinese Measures, there can be a more efficacious mode of dispute settlement machinery for foreign investors and foreign invested companies in India, apart from the existing mechanisms under its revolutionary Right to Information Act of 2005 and the 2010 Guidelines for Redress of Public Grievances.[129]

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[129] *See* Compilation of Guidelines for Redress of Public Grievances (Dept. of Administrative Reforms & Public Grievances, Ministry of Personnel, Public Grievances & Pensions, GoI), (2010), http://goicharters.nic.in/PGR_Guideline.pdf (last visited Jul 29, 2014).; *see also* SINGH AND ARADHE, *supra* note 102 at 909–28 (discussing secrecy in Government of India as well as right to information in India, as well as access to information in the U.K., the U.S.A., Australia and New Zealand).

Conclusion

This article has indulged in a comparative study of the Indian and Chinese FDI Regimes, drawing lessons for the Indian policymakers and offering various suggestions. However, by thoroughly critiquing some of the relevant existing literature, this article points out the inadequacies and lacunae in the claims and supporting arguments that are generally made to praise Chinese FDI regime and to project it as a cause of the huge FDI into China. On the other hand, this article discusses the somewhat unfair assertions that are made against the Indian FDI regime by those lacking appreciation for the constitutional and other differences in the polity of the two countries. Sometimes, this is apparently due to the inadequate knowledge of the Indian FDI Law and Policy, which this article criticizes with proper reasons. However, before indulging in the said comparative study, this article begins with an explanation of the salient aspects of Chinese legal regime regulating FDI into China, after delineating on the Chinese Constitution and its legal system. From the standpoint of an Indian author, this preliminary appreciation of the Chinese foreign legal system was much needed. Of course, the comparative study portrayed in this article may also benefit Chinese policymakers.

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