

FOREIGN INVESTMENT PROMOTION BOARD

*Review*  
2009



सत्यमेव जयते

Department of Economic Affairs  
Ministry of Finance  
Government of India



# Foreign Investment Promotion Board

# *Review*

January - December

# 2009



FIPB Unit  
Department of Economic Affairs  
Ministry of Finance  
Government of India

© Department of Economic Affairs  
All rights reserved

**Published by**  
FIPB Unit  
Department of Economic Affairs  
Ministry of Finance  
Government of India  
New Delhi-110001  
India  
[www.fipbindia.com](http://www.fipbindia.com)

**Designed & Printed by**  
Macro Graphics Pvt. Ltd.  
[www.macrographics.com](http://www.macrographics.com)

# Contents

<b>Foreword</b>	<b>ii</b>
<b>Acknowledgment</b>	<b>iii</b>
<b>Abbreviations</b>	<b>iv</b>
<b>Introduction</b>	<b>I</b>
<b>I Fact Sheet</b>	<b>3-8</b>
1.1 Fact Sheet: February 2003 - December 2008	3
1.2 Fact Sheet: January - December 2009	4
1.3 Proposals of Press Note 9(1999 Series) and Press Note 2 to 4 of 2009	5
1.4 Profile of Proposals	6
1.5 FDI Policy Changes - 2009	7
<b>2 Key Issues and Decisions</b>	<b>9-23</b>
2.1 Press Note 1 (2005 Series) Proposals – The Simplest and the Most Contentious	9
2.2 Constrictive Approach	10
2.3 Compounding	12
2.4 CCEA – Initial Approval and Subsequent Amendments – Press Note 7 of 1999	13
2.5 The Security Angle Increased Importance	14
2.6 Requests for Relaxation – Capitalisation Norms	16
2.7 The Other Than Cash Issue	17
2.8 On Press Note 2 of 2005 - Real Estate Proposals	18
2.9 Requirement of FVCI	19
2.10 Civil Aviation Sector	19
2.11 Satellite Radio	20
2.12 Mergers & Acquisitions	20
2.13 Compendium of Important Decisions	20
<b>3 In Focus</b>	<b>24-34</b>
3.1 The New Regime	24
3.2 Compounding of FEMA Contraventions	30
<b>Conclusion</b>	<b>35</b>
<b>Annexures</b>	<b>36-48</b>
Annexure I The composition of the Board	36
Annexure II Allocation of Business Rule	38
Annexure III Guideline for processing of proposals by the Board	43
Annexure IV List of proposals where FIPB/CCEA imposed the condition of compounding	45



सत्यमेव जयते


अशोक चावला  
ASHOK CHAWLA

वित्त सचिव  
वित्त मंत्रालय  
भारत सरकार  
नॉर्थ ब्लॉक, नई दिल्ली – 110001  
FINANCE SECRETARY  
MINISTRY OF FINANCE  
GOVERNMENT OF INDIA  
NORTH BLOCK, NEW DELHI - 110001  
Tel. : 23092611 Fax : 23094075

## FOREWORD

1. The Foreign Investment Promotion Board (FIPB) has been set up by Government to enable expeditious disposal of proposals involving foreign investment in specified sectors. As per the FIPB guidelines and extant practice, the constant endeavor is to ensure that Government decisions are communicated within a time frame of six weeks, from receipt of the proposal. In order to adhere to the specified timelines the FIPB normally meets twice a month to consider proposals that have been circulated in advance to the consulting Ministries/Departments.
2. The Board met 18 times during the Year 2009 to consider 566 proposals, some of them highly complex in nature with multi-layer corporate architecture spread across many countries. While the FIPB maintained its periodicity, in order to meet extra-ordinary situations, it conducted special and sometime frequent meetings. During the span of 22 days from August 21, 2009 to September 11, 2009, FIPB met thrice and considered 80 proposals including one hearing, involving a matter concerning Press Note 1 of 2005.
3. In the last review, a recommendation was made to rethink about proposals related to acquisition of status of holding-cum-operating companies as the proposal had no value addition to the working of FIPB. I am happy to note that a major rationalization of the policy was put into place through the issuance of Press Notes (PNs) 2, 3 and 4 of 2009, whereby, the definition of indirect foreign investment was clarified, and, a policy was instituted for down-stream investment by Indian companies. These clarifications enabled processing a number of proposals on the automatic route. The number of such proposals reaching FIPB has gone down drastically from 115 in 2008 to 48 in 2009.
4. A review document is meant not only to record and document for future but also to achieve the objective of being more objective and transparent. It is an admission of our strengths and failings in public domain, and acknowledgement that we are open to discussion, debate and dialogue within ourselves and with those outside. The current review document, the third since 2007, carries this tradition forward and goes a step further in also reflecting the views of other administrative ministries more explicitly.
5. I take this opportunity to compliment the FIPB secretariat for the review document as well as the diligence and sincerity which they have displayed in handling the flow of proposals all through the year.
6. My very best wishes and felicitations for the additional achievement of initiating e-filing of FIPB applications.

February 23, 2010

  
(Ashok Chawla)

# Acknowledgement

Review Document for January - December, 2009 encompasses moments of reflection and observation on the way FIPB, with its baggage of approvals and rejections, has functioned and evolved over the last one year and what the future beckons it to be.

In this journey, those at the apex have always inspired us to travel that extra mile and establish a new threshold. I am deeply grateful to Shri Ashok Chawla, Finance Secretary and Smt L. M. Vas, Additional Secretary, DEA, who have been the twin pillars of support for our efforts to have a more focused, open and objective approach to issues that arose.

While Dr Anup Pujari, erstwhile Joint Secretary for FIPB with his sharp and incisive remarks kept us on our toes, Shri Govind Mohan, Joint Secretary (Infrastructure & Investment) has infused more rigor, energy with his keen insights in each discussion on policy issues as well as procedural matters. My heartiest thanks to both of them.

This is not to forget the constant guide and colleague next door - Shri P.K. Bagga with his quintessential sense of humour and his in-depth analysis kept the fire alive. I deeply acknowledge and value his presence. I also take this opportunity to thank our colleagues in administrative ministries who have deeply enriched our deliberations. This review would be incomplete without them.

I owe special gratitude to Smt Aparna Bhatia, Director (PPP) in the I&I Division. She purely on account of her positive nature and as a good gesture, took great pains, despite her heavy engagements, to ensure that the document is published in an impressive format. I am also thankful to Shri Prashant Bharadwaj, MIS Expert, PPP Cell, who provided finishing touches to this document.

I feel happy in acknowledging Smt Monika Dhama, Under Secretary, who helped me with the manuscript and her insightful comments. I am also grateful to Shri Vijay Kumar Angural, Section Officer, for arranging the statistics and their proper presentation.

FIPB would not be able to carry on its rigmarole of meetings, minutes and more hearings without the involvement and hard work put in by the staff deployed in the section. What appears in the review bears testimony to their sweat and toil too. Deepest gratitude to each of them.

Prabodh Saxena  
*Director (FIPB)*  
Department of Economic Affairs

# Abbreviations

ADR	American Depository Receipt
CCEA	Cabinet Committee on Economic Affairs
CCRPS	Commutative Convertible Redeemable Preferential Shares
DIPP	Department of Industrial Policy and Promotion
DoC	Department of Commerce
DoR	Department of Revenue
DoT	Department of Telecommunication
ED	Directorate of Enforcement
FCCB	Foreign Currency Convertible Bond
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FERA	Foreign Exchange Regulation Act, 1973
FII	Foreign Institutional Investor
FIPB	Foreign Investment Promotion Board
FVCI	Foreign Venture Capital Investor
GDR	Global Depository Receipt
IPO	Initial Public Offer
JV	Joint Venture
KYC	Know Your Customer
LPG	Liquid Petroleum Gas
MHA	Ministry of Home Affairs
MIB	Ministry of Information & Broadcasting
MoD	Ministry of Defence



MoIA	Ministry of Overseas Indian Affairs
MSME	Ministry of Micro, Small & Medium Enterprises
NBFC	Non-Banking Financial Company
NCRPS	Non Convertible Redeemable Preferential Shares
NOC	No Objection Certificate
NRI	Non Resident Indian
OCB	Overseas Corporate Bodies
PAB	Project Approval Board
PN	Press Note
PSRA	Private Security Agencies (Regulation), Act 2005.
RBI	Reserve Bank of India
SEBI	Securities Exchange Board of India
SME	Small & Medium Enterprise
SPV	Special Purpose Vehicle
SSI	Small Scale Industry
STPI	Software Technology Parks of India
VCF	Venture Capital Fund
WOS	Wholly Owned Subsidiary

# Introduction

1. The FIPB (Foreign Investment Promotion Board ), as reconstituted in the year 2003<sup>1</sup>, has the following members:

- i. Secretary to the Government of India, Department of Economic Affairs, Ministry of Finance – Chairman
- ii. Secretary to the Government of India, Department of Industrial Policy and Promotion (DIPP).
- iii. Secretary to the Government of India, Department of Commerce (DoC).
- iv. Secretary to the Government of India (Economic Relations), Ministry of External Affairs (MEA).
- v. Secretary to the Government of India, Ministry of Overseas Indian Affairs (MoIA).

2. The Board has the discretion to co-opt other Secretaries to the Government of India and officers of financial institutions, banks and professional experts in industry and commerce, in case it feels the need to do so. The Secretary, Ministry of Small, Medium and Micro Enterprises and the Secretary, Department of Revenue have already been co-opted on the Board.

3. The mandate of the Board is to examine and approve / reject proposals for foreign direct investment as per the extant policy laid down in Press Notes and other related notified guidelines<sup>2</sup>.

4. The convention of undertaking a review/ self reflection of the proposals considered by the Board in a given annual year was started three years back. The first review of FIPB decisions, procedures and processes was done in November 2007 covering the period February 2003 to September 2007. The proposals considered from January 2008 to December 2008 were covered in the second review. The year 2009 is being covered in the current review.

*The mandate of the Board is to examine and approve / reject proposals for foreign direct investment as per the extant policy laid down in Press Notes and other related notified guidelines*

<sup>1</sup> See Annexure I

<sup>2</sup> See Annexure II and Annexure III

5. This Review is organized into three sections. Section I presents the fact sheet of the proposals considered by the FIPB during the period under review. Through charts and diagrams, it tries to offer a broad view. Section II gives an account of issues that dominated FIPB discussions during the year. In a limited way, it also tries to reflect on issues that need to be clarified in the FDI policy so that the FIPB can enthuse more objectivity in similar proposals. Section III assembles, a note on compounding and changes brought out by Press Notes 2 to 4 of 2009. The Conclusion speculates on the way forward while closing on the journey traversed so far.

# I. Fact Sheet

FIPB came to be housed in Department of Economic Affairs in February 2003. Since then it has regularly met to consider proposals of Foreign Direct Investment (FDI) that require approval of the Government.

## 1.1 Fact Sheet: February 2003 - December 2008

I. The details of the proposals considered and approved by FIPB from February 2003 to December 2008 are given below in Table I.

Table I: Proposals considered by FIPB till December 2008

Period	No. of Meetings held	No. of proposals considered	Proposals approved	Proposed inflow of FDI (Rs in crore)
February, 2003 to March, 2003	05	183	110	18.18
April, 2003 to March, 2004	34	1191	875	7,492.00
April, 2004 to March, 2005	23	921	728	13,723.00
April, 2005 to March, 2006	15	616	473	12,315.98
April, 2006 to March, 2007	18	422	336	39,612.00
<b>Total</b>	<b>95</b>	<b>3333</b>	<b>2522</b>	<b>73861.16</b>
April, 2007 to September, 2007 (Period of previous review)	11	229	158	9241.00
October, 2007 to December, 2007 (Period not covered in Review I)	05	128	83	3270.78
January 2008 to December 2008 (Period covered in Review II)	19	607	408	67924.40
<b>Total</b>	<b>35</b>	<b>964</b>	<b>649</b>	<b>80436.18</b>
<b>Grand Total</b>	<b>130</b>	<b>4297</b>	<b>3211</b>	<b>154297.24</b>

*FIPB approved 3211 proposals till December 2008 with proposed inflow of FDI amounting to Rs 154297.24 crore*

## 1.2 Fact Sheet: January 2009 - December 2009

2. The details of the proposals considered and approved by FIPB from January 2009 to December 2009 are given below in Table 2 and Figure 1. Category wise details of approved proposals are at Figure 2.

Table 2: Proposals considered by FIPB in 2009

Month	No. of Proposal considered	Approved	Auto Route	Deferred	Rejected	With-drawn	Noted	Proposed Inflow of FDI (Rs. in crore)
January	77	46	-	22	7	1	1	18513.80
February	51	29	-	19	1	1	1	616.08
March	49	26	8	10	3	2	-	1042.92
April	34	22	3	6	2	-	-	541.25
May	44	23	3	13	3	1	-	564.80
June	45	22	1	14	8	-	-	84.90
July	57	27	2	22	5	1	-	2665.77
August	53	19	7	20	6	1	-	3894.40
September	24	13	1	8	2	-	-	393.62
October	83	45	1	26	9	-	2	7019.30
November	26	19	-	3	4	-	-	4551.05
December	23	9	-	7	5	1	1	523.70
<b>Total</b>	<b>566</b>	<b>300</b>	<b>26</b>	<b>170</b>	<b>55</b>	<b>8</b>	<b>5</b>	<b>40411.59</b>

During 2009 FIPB approved 300 proposals with FDI inflow of Rs 40411 crore

Figure 1: Proposals approved/advised auto route/deferred/rejected/withdrawn/noted

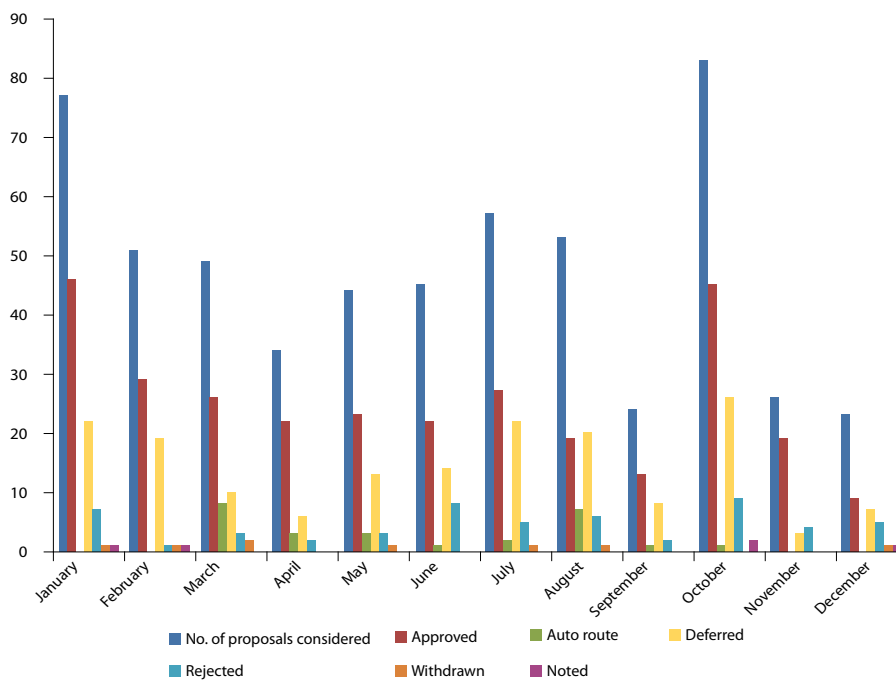
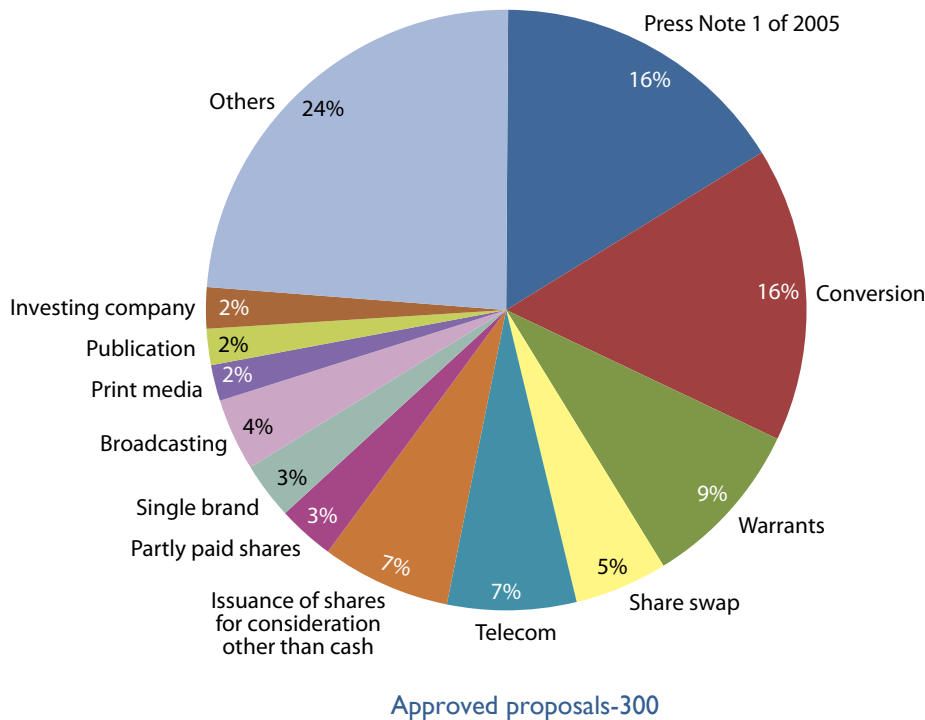


Figure 2: Categories of proposals approved



### Explanatory Notes

- i Press Note I refers to proposals under Press Note I of 2005 read with Press Note 3 of 2005 wherein the applicant had a JV/Technology Transfer Agreement with an Indian partner as on January 12, 2005.
- ii Conversion refers to permitting downstream investment by acquiring the status of holding company.
- iii Others includes Courier Services, Internal Accruals, Down Linking, Mortgage, VCF, Defence Sector, Up-linking, Test Marketing, SSI, Airlines Sector, OCB, Issue of Units, Leasing, LPG, Duty Free Shops, Compulsorily Fully Convertible Debentures, Credit Information, Asset Reconstruction, Amalgamation, Tea Plantation, Minimum Capitalization, Currency Future Derivatives, Commodity Broking, Atomic Energy, Initial Public Offer, Retail Sector, Stock Exchange, CCEA Proposals, Audio Web Conferencing, etc.

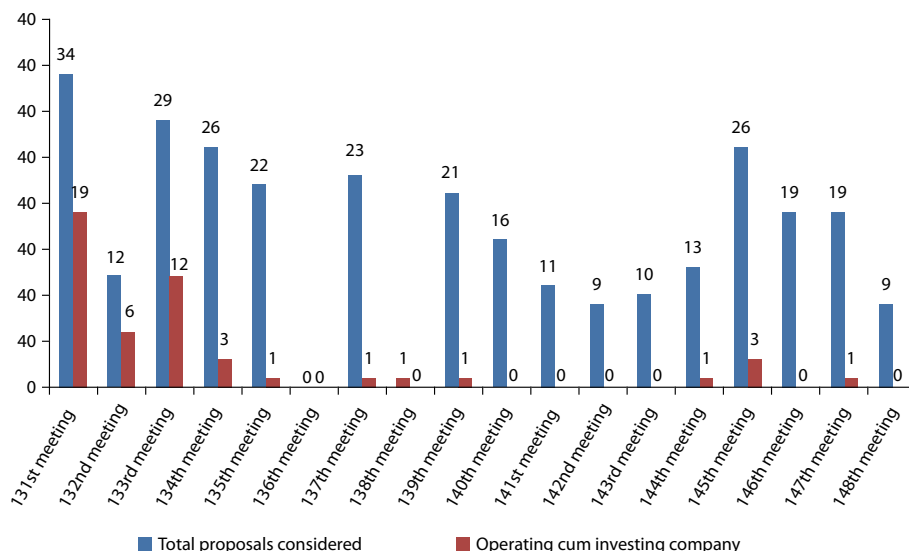
### 1.3 Proposals of Press Note 9 of 1999 Series and Press Note 2 & 4 of 2009

3. In the last review, it was noted that 19% of the proposals pertained to Press Note 9 of 1999 wherein the applicants had applied to acquire the status of Operating cum Holding company. The said Press Note was deleted by Press Note 4 of 2009, dated February 25, 2009.

4. For the 566 proposals considered by the FIPB during the period under review, only in 48 proposals the applicants wanted to change the status to a investing company that would enable them to make downstream investments (Figure 3). This is just 8.5% of the total proposals. Again it is to be kept in

*For the 566 proposals considered by the FIPB during the period under review, only in 48 proposals the applicants wanted to change the status to a investing company*

Figure 3: Investing Company proposals



consideration that out of these 48 proposals, 37 were under Press Note 9 of 1999 till the time it was deleted. The Board considered only 11 proposals under Press Note 4 of 2009 and in many of them advised automatic route to the applicants.

5. The FDI inflow was nil in 122 proposals. An analysis of which shows that:
  - i. Eight proposals came to the FIPB because of telecom sector.
  - ii. Eight proposals came to FIPB because of share swap.
  - iii. Nine proposals came to FIPB because of broadcasting activity.
  - iv. Twelve proposals came to FIPB because of Press Note I of 2005 angle.
  - v. Eighteen proposals came to FIPB because of issuance of shares for consideration other than cash.
  - vi. The remaining 67 proposals include proposals of: (a) amalgamation; (b) courier services; (c) currency future derivatives; (d) defence sector; (e) internal accruals; (f) IPO; (g) leasing; (h) LPG; (i) minimum capitalization; (j) mortgage; (k) OCB; (l) partly paid shares; (m) print media; (n) single brand; (o) SSI; (p) test marketing; (q) issuance of units; (r) up linking and; (s) warrants.

*Reduction in FIPB proposals post Press Note 4 of 2009 which repealed Press Note 9 of 1999 on downstream investment by Indian companies*

## 1.4 Profile of Proposals

6. The main countries, in terms of the number of investment proposals, are as follows:
  - i. Mauritius
  - ii. USA
  - iii. Singapore
  - iv. Germany
  - v. Japan

- vi. Netherlands
  - vii. UK
  - viii. France
  - ix. Italy
7. The important sectors covered, in terms of the number of proposals, were as follows:
- i. Industrial appliances
  - ii. Telecommunication
  - iii. Software development (though on automatic route, such proposals came to the FIPB because of conversion, warrants, share swap, etc.)
  - iv. Information and Broadcasting sector (including publication and print media)
  - v. Trading
  - vi. Power

## 1.5 FDI Policy Changes - 2009

8. The following Press Notes were issued in 2009:
- i. **Press Note 1 of 2009:** Foreign investment in Print Media dealing with news and current affairs- It provides that FDI up to 100% is permitted with prior approval of the Government in publication of facsimile edition of foreign newspapers provided the FDI is by the owner of the original foreign newspaper(s) whose facsimile edition is proposed to be brought out in India, in accordance with the conditions stipulated in the Press Note.
  - ii. **Press Note 2 of 2009:** Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in Indian Companies.
  - iii. **Press Note 3 of 2009:** Guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities.
  - iv. **Press Note 4 of 2009:** Clarificatory guidelines on downstream investment by Indian Companies. A detailed discussion on Press Note 2 to 4 of 2009 is in Section III of this document
  - v. **Press Note 5 of 2009:** Guidelines for foreign investment in Commodity Exchanges – In order to allow existing Commodity Exchanges to comply with the guidelines notified vide Press Note 2(2008), the Government allowed a further transition/ complying/ correction time to the existing Commodity Exchanges from June 30, 2009 to September 30, 2009.
  - vi. **Press Note 6 of 2009:** Clarificatory guidelines on FDI into a Small Scale Industrial Undertaking (SSI)/ Micro & Small Enterprises (MSE) and in Industrial Undertaking manufacturing items reserved for SSI/ MSE. It clarifies that:
    - a. The present policy on FDI in MSE permits FDI subject only to the sectoral equity caps, entry routes and other relevant sectoral regulations.

*Major rationalization of FDI policy due to recognition of both ownership and control as determinants of FDI policy and stipulation of which comprises indirect foreign investment*



- b. Any industrial undertaking, with or without FDI, which is not a MSE, manufacturing items reserved for manufacture in the MSE sector (presently 21 items) as per the Industrial Policy, would require an Industrial License under the Industries (Development & Regulation) Act, 1951, for such manufacture. Such an industrial undertaking would also require prior approval of the Government (FIPB) where foreign investment is more than 24% in the equity capital.
- vii. **Press Note 7 of 2009:** Guidelines for foreign investment in Commodity Exchanges – a further transition/complying/correction time has been permitted to them beyond September 30,2009 till March 31, 2010.
- viii. **Press Note 8 of 2009:** Liberalization of Foreign Technology Agreement Policy – Payments for royalty, lumpsum fee for transfer of technology, use of trademark/ brand name have been allowed under the automatic route, without the need for Government approval.

*Two of the 8 Press Notes namely Press Note 5 and 7 are about correction time for foreign investment in Commodity Exchanges*

## 2. Key Issues and Decisions

The FIPB has always taken a proactive and constructive approach to facilitate foreign investment in the country even where there are gaps in the FDI policy or where the policy is silent. Such an approach is consistent with its role as a Board tasked with promotion of investment. During the period under review, the FIPB was required to decide on many proposals which threw up new issues. Some of these are illustrated below.

### 2.1 Press Note I of 2005 Series Proposals – The Simplest and the Most Contentious

1. During the year, FIPB (also referred to as “**Board**”) conducted two personal hearings in Press Note I cases on proposals already decided by it, owing to the directions of Delhi High Court. In June 2007, the Board reconsidered the proposal of **M/s Houghton Hardcastle (India) Limited**<sup>3</sup>. FIPB had earlier approved the proposal despite the objection of the Indian partner. This time around, the Board analyzed the arguments given by both the parties and observed that the Indian JV partner had themselves admitted that they have assigned the business of the existing JV to another joint venture from April 1, 2005, which is in the same line of business as Houghton International Inc., USA. The Board held that the existing JV has been made defunct and such circumstances, therefore, there cannot be any jeopardy if the existing foreign collaborator, Houghton International Inc., USA, launches a new venture. The Board confirmed its previous decision.

2. In the second hearing case, namely, **M/s Takata India Private Limited**<sup>4</sup>, the Board confirmed its previous decision<sup>5</sup>. The Board noted that the parties had settled their own terms and conditions at the time of entering into the Collaboration and Shareholder Agreement and the Indian Partner has now tied up with another party which is the global competitor of the foreign partner. The Board observed that issue of jeopardy has to be examined in the context of the extant business arrangement and agreements between the parties. The jeopardy cannot be invoked as a measure to stifle legitimate business activity

*Despite ongoing liberalization of the FDI policy, the issue of Jeopardy caused to the existing domestic partners still remains dominant*

<sup>3</sup> Item No. 1 of 138th FIPB meeting held on June 16, 2009

<sup>4</sup> Item No. 1 of 142nd FIPB meeting held on August 21, 2009

<sup>5</sup> Item No. 1 of 88th FIPB meeting held on January 12, 200

and prevent competition. Since the extant arrangement as enshrined in the non-compete clause was mutually agreed between the two parties and has also been observed by the foreign partner subsequently, the present case does not merit the protection of 'jeopardy' and consequently provisions of Press Note I of 2005.

3. Generally, the Board took a constructive approach in interpretation of the Press Note making it as practical as is possible, since clarificatory policy announcements in this respect are yet to be made. In the proposal of **M/s John Deere Construction & Forestry Company, USA**<sup>6</sup>, the Board held that Press Note I of 2005 Series will not be applicable after expiry of the technology license agreement, where the agreements legally provided for terms of cessation of the agreement. In the proposal of **M/s Celebi Hava Servisi A.S., Turkey**<sup>7</sup>, the Board noted that since the two companies provide servicing in different locations, i.e., Mumbai and Delhi, there is no possibility of jeopardy and accordingly advised the applicant to access automatic route. In the proposal of **M/s S.N. Power Holding Singapore Pte. Limited, Singapore**<sup>8</sup>, the Board took the view that the NOC given by current Indian partner, whose affiliates were holding more than 3% share on 12 January 2005, is sufficient compliance of requirement of Press Note I of 2005 and there is no necessity of procuring the NOCs of affiliates of the Indian partner who were holding more than 3% equity on the anointed date.

*Though the Board was liberal in its interpretation of applicability of Press Note I of 2005, yet it clarified that there is no provision/precedent for giving a blanket or a composite approval*

4. However, whilst considering the proposal from **M/s Goldman Sachs (Mauritius) NBFC LLC, Mauritius**<sup>9</sup>, the Board clarified that there is no provision/precedent for giving a blanket or a composite approval and it is not possible to waive-off the condition of Press Note I of 2005.

5. While critics may feel that Press Note I has outlived its utility, the high pitched debate on the issue of jeopardy and Indian JV partners alleging foul play by the foreign collaborator cannot make us oblivious to its continuing relevance.

## 2.2 Constructive Approach

6. In the proposal of **M/s NTT Docomo Inc., Japan**<sup>10</sup>, the Board, in order to cut the time short, recommended the proposal for approval of Finance Minister without the MHA clearance but with the condition that the proposal be put to CCEA only after the clearance is received.

7. In the proposal of **M/s Four Seasons Hotel**<sup>11</sup>, DIPP had stated that since the proposal is only for amendment of the technical part of the approval and payment of fees for the same, the proposal may be referred to PAB for consideration. The Board observed that all the consultations are over and Ministry of Tourism has conveyed its no objection to the proposal. The Board, with the consent of the representative of the DIPP approved, as an exceptional case, the proposal within the FIPB itself rather than referring it to the PAB.

<sup>6</sup> Item No. 33 of 134th FIPB meeting held on March 20, 2009

<sup>7</sup> Item No. 2 of 140th FIPB meeting held on July 10, 2009

<sup>8</sup> Item No. 12 of 148th FIPB meeting held on December 18, 2009

<sup>9</sup> Item No. 31 of 143rd FIPB meeting held on August 28, 2009

<sup>10</sup> Item No. 16 of 131st FIPB meeting held on January 9, 2009

<sup>11</sup> Item No. 17 of 135th FIPB meeting held on April 20, 2009

8. In the proposal of **M/s Dun & Bradstreet Information Services India Private Limited, Mumbai**<sup>12</sup>, the Board did not accept the request of DoR for further examination of the proposal and approved it with the observation that the applicant company is a company of international repute and DoR can continue to examine the issue of flow of funds separately.

9. In the proposal of **M/s Fuchs Lubricants (I) Private Limited**<sup>13</sup>, the company had stated that the condition imposed in their FIPB approval of dilution of 26% stake to Indian Parties is expiring on March 31, 2009. The company could not comply with this so far due to recessionary market conditions, import substitution and export. The company had requested for extension of further 5 years or waiver of the condition of dilution of 26% stake to Indian Parties. The Board clarified that no requirement of dilution is imposed now as per Press Note 7 of 2008. The proposal was accordingly approved.

10. In the proposal of **M/s United Breweries (Holdings) Limited, Bangalore**<sup>14</sup>, the Board noted that objections of DoR were not cogent enough to advocate rejection. Even if the funds borrowed were guaranteed against assets based in India, it was for the lender to satisfy itself and moreover this was only in the realm of a contingent possibility, viz., one that was likely to occur only in case of default in payment of loan.

11. The Board, conscious of the fact that DIPP and DEA are in the process of working out a policy on warrants, made few decisions supporting the proposals of warrants by relaxing the previously imposed condition of full conversion in 18 months, particularly after SEBI (ICDR) Regulations 2009 came into force. In the proposal of **M/s Electrosteel Casting**<sup>15</sup>, the Board allowed the company time for conversion of warrants in accordance with SEBI (ICDR) Regulations, 2009.

12. In the proposal of **M/s Xenosoft Technologies India Private Limited, Hyderabad**<sup>16</sup>, involving share swap, the Board overruled the objection by DIPP and held that as, especially in the IT sector, many similar proposals pertaining to overseas acquisitions through a share swap have been cleared in the past, an ongoing policy practice cannot be abandoned suddenly. The Board allowed this inward leg of the transaction subject to issue/pricing/valuation guidelines of RBI/SEBI.

13. The Board continued with the practice of allowing issuance of partly paid up shares on the same analogy of warrants i.e. they must be converted into fully paid up share in a maximum period of 18 months from the date of issue of partly paid up shares<sup>17</sup>. The Board, in view of specific circumstances, gave a further relaxation of 6 months (3 months each in two relaxations: in the proposal of **M/s Teesta Urja Private Limited**<sup>18</sup> and 3 months in the case of **M/s Reliance Asset Reconstruction Company Limited**<sup>19</sup>). The Board clarified in the proposal of **M/s Tikona Digital**

*The Board, in select proposals, have relaxed the rigours of the procedural requirements. This has been done in order to promote foreign investment from justified sources*

<sup>12</sup> Item No. 49 of 131st FIPB meeting held on January 9, 2009

<sup>13</sup> Item No. 30 of 134th FIPB meeting held on March 20, 2009

<sup>14</sup> Item No. 15 of 141st FIPB meeting held on July 24, 2009

<sup>15</sup> Item No. 15 of 146th FIPB meeting held on October 30, 2009

<sup>16</sup> Item No. 5 of 147th FIPB meeting held on November 20, 2009

<sup>17</sup> Item No. 19 of 132nd FIPB meeting held on January 22, 2009

<sup>18</sup> Item No. 19 of 146th FIPB meeting held on October 30, 2009

<sup>19</sup> Item No. 13 of 146th FIPB meeting held on October 30, 2009

**Networks Private Limited**<sup>20</sup> that the time limit for conversion is to be adhered only by foreign investors and not the Indian investors.

14 Whilst considering the proposal from **M/s Rama Cylinders Private Limited**<sup>21</sup> the Board deleted, on the facts of the proposal, the 18 months time limit for warrants that the unlisted company had issued before, as the warrants were envisaged only a deterrence to compel company to come up, with an IPO.

15. All the above instances clearly reflect that Board has not been a stumbling block and has rightly justified the word promotion in its nomenclature.

## 2.3 Compounding

16. The Board in the year 2009, had a relook at the issue of compounding. In the proposal of **M/s Dynamatic Technologies Limited, Bangalore**<sup>22</sup>, the Board observed that, although the company already has FDI, it has not yet started the manufacturing of defence equipments. Therefore, the approval may be given without compounding. Similarly, it did not impose any compounding in the proposal of **M/s Goldman Sachs Investments (Mauritius) I Limited, Mauritius**<sup>23</sup>, where *ex-post facto* approval was sought by applicant for acquisition of 2,100,000 equity shares representing 7% of the paid up and issued share capital of National Commodity & Derivatives Exchange Limited from ICICI Bank Limited and divestment of excess investment of 2% by June 30, 2009. The Board held that as there was no policy at the time of investment, there cannot be any question of regularization. The Board accordingly deliberated and noted the investment made by the company subject to compliance with Press Note 8 of 2008.

17. In the proposal of **M/s Velankani Information Systems Private Limited, Bangalore**<sup>24</sup>, the company had made downstream investment without the FIPB approval but has also withdrawn the same before applying for FIPB *post facto* approval. Since the company had rectified its mistake, the Board gave the *ex-post facto* approval without compounding. In a number of proposals, where the warrants<sup>25</sup> and partly paid up shares<sup>26</sup> had been fully converted before FIPB approval was sought, the Board was pleased to give its approval without insisting on the condition of compounding. In the proposal of **M/s Vista Pharmaceuticals Limited**<sup>27</sup>, the Board noted that when the company initially informed RBI about issuance of warrants, RBI did not advise them to obtain FIPB approval. It was only when the company notified the RBI of the full conversion of warrants, RBI asked them to get the approval from FIPB. The Board held that in light of these facts, compounding should be

*Where there was no policy at the time of investment, there cannot be any question of regularization or compounding*

<sup>20</sup> Item No. 30 of 139th FIPB meeting held on June 19, 2009

<sup>21</sup> Item No. 34 of 145th FIPB meeting held on October 9, 2009

<sup>22</sup> Item No. 34 of 133rd FIPB meeting held on February 23, 2009

<sup>23</sup> Item No. 10 of 133rd FIPB meeting held on February 23, 2009

<sup>24</sup> Item No. 16 of 133rd FIPB meeting held on February 23, 2009

<sup>25</sup> M/s Anant Raj Industries Limited, New Delhi, M/s Gati Limited and M/s Electrosteel Castings Limited, Kolkata, Item No 4, 5 and 10 respectively of the 135th FIPB meeting held on April 20, 2009.

<sup>26</sup> M/s Bronx Process Engineering (P) Limited, Haryana, Item No 9 of 135th FIPB meeting held on April 20, 2009.

<sup>27</sup> Item No. 16 of 140th FIPB meeting held on July 10, 2009

waived. The Board took the same decision in the proposal of **M/s Exensys Software Solutions Limited**<sup>28</sup>, where the facts were similar.

18. Again in the proposal of **M/s Star India Private Limited**<sup>29</sup>, as the company did inform FIPB about the foreign investor in their amendment application dated September 29, 2008 without exactly asking for its approval, the Board approved the earlier foreign investment without compounding in the subsequent application.

19. In the proposal of **M/s Scorpio Distilleries Private Limited (now Diageo Radico Distilleries Private Limited)**<sup>30</sup>, where the share of the Indian partner was purchased by the foreign investor in February 2005 itself and before the date of clarificatory Press Note 3 of 2005, the Board held that there is no need for imposing the condition of compounding.

20. However, in few proposals where no benefit of doubt could be extended, Board did impose the condition of compounding. One such proposal was of **M/s Luxury Goods Retail Private Limited**<sup>31</sup>, where the investing company had made investment without seeking the approval of FIPB.

21. In the proposal of **M/s Cholamandalam DBS Finance Limited**<sup>32</sup>, the company in its representation against compounding for issuance of warrants without FIPB approval contented that since the warrants did not involve any foreign direct investment in the company; the contravention is not quantifiable and cannot be compounded by RBI. The Board held that it is not for the Board to adjudicate on the competence of RBI to compound and if the applicant feels that their proposal is not covered by compounding provisions of RBI, they should raise the issue with RBI during the proceedings for compounding.

22. Compounding, though not a major deterrent, still is a formidable check. What is noteworthy with reference to all compounding proposals and in a way a matter of appreciation too is that FIPB has looked into circumstances of each proposal and has used its discretion or rather the human element to distinguish black from the shades of grey. Principles of fair play have not been denied in spirit despite the ambiguity surrounding this provision. A detailed discussion on compounding follows in Section III.

## 2.4 CCEA<sup>33</sup> – Initial Approval and Subsequent Amendments – Press Note 7 of 1999

23. **M/s Daimler India Commercial Vehicles Private Limited (formerly known as M/s Daimler Hero Commercial Vehicles Limited)** was issued FC approval dated April 4, 2008 (as amended from time to time). The company, vide letter dated March 5, 2009, addressed to FIPB & DIPP had sought increase in the foreign and equity participation from 60% to 100%. In response to this, DIPP, vide their OM dated 13.3.2009 had opined that

*The provision of compounding by RBI has been used selectively and benefit of doubt extended in genuine proposals*

<sup>28</sup> Item No. 10 of 142nd FIPB meeting held on August 21, 2009

<sup>29</sup> Item No. 18 of 146th FIPB meeting held on October 30, 2009

<sup>30</sup> Item No. 14 of 148th FIPB meeting held on December 18, 2009

<sup>31</sup> Item No. 14 of 147th FIPB meeting held on November 20, 2009

<sup>32</sup> Item No. 9 of 141st FIPB meeting held on July 24, 2009

<sup>33</sup> During the year 10 proposals were taken to CCEA

FDI upto 100% is permitted on the automatic route as per the extant policy. DIPP is of the view that prior approval of FIPB is not required since approval was granted on April 4, 2008 and hence the requirement of Press Note I of 2005 has been complied with. However, such a change should be intimated to FIPB. FIPB was of the view that the original proposal was processed by FIPB/CCEA in the FIPB meeting held on 8.2.2008 as it attracted Press Note I of 2005 and the investment was greater than Rs. 600 crore. Hence, the proposal needs to be referred to FIPB and then for consideration of CCEA. Accordingly, FIPB, vide OM dated March 23, 2009 and April 29, 2009 had sought clarification from DIPP whether DIPP had over-ruled Press Note 7 of 1999 and Press Note I of 2005 in approving the proposal for increase in the foreign equity participation from 60% to 100%. There was no response from DIPP. Thereafter, FIPB had advised the company to seek *post facto* approval for the increase in the foreign equity participation from 60% to 100%. The *post facto* approval was granted with compounding by the Board<sup>34</sup>.

## 2.5 The Security Angle Increased Importance

### 2.5.1 Striking the Balance

24. In the proposal of **M/s Unitech Wireless (Tamilnadu) Private Limited, New Delhi**<sup>35</sup>, MHA conveyed that the security clearance is subject to the additional condition that no personnel who has worked in Telenor, Pakistan shall be allowed to work in the Indian company.

### 2.5.2 Private Security Agencies (Regulation) Act

25. There is no policy on FDI in security services. In the last review, it was mentioned<sup>36</sup> that we need to frame a policy as Board is expecting more proposals under the Private Security Agencies (Regulation) Act, 2005 ( The PSAR Act) which allows only 49% foreign equity.

26. In the proposal of **M/s G4S Corporate Services (India) Private Limited, Gurgaon, Haryana**<sup>37</sup>, the Board considered the applicant's contention that the provisions of PSAR Act will not apply to holding company but only to three of their group companies, which are in the security business. The Board held that the holding company holds majority shareholding in their subsidiaries, the provisions of the PSAR Act will be relevant to the holding company also and if the holding company is taken out of the purview of the PSAR Act and the same is applied only to the downstream companies, the objective of the PSAR Act will be defeated as holding company by nature of its definition controls the downstream companies. The Board subsequently rejected the representation against rejection.

27. The proposal of **M/s Dynamic Alternatives Private Limited**<sup>38</sup> to hold 100% foreign shareholding was rejected by the Board as being in

*The Board endeavoured to take security clearance in most of the proposals where considered essential. Exception were made on merits and in the interest of expeditious processing of the proposals*

<sup>34</sup> Item No. 33 of 143rd FIPB meeting held on August 28, 2009

<sup>35</sup> Item No. 16 of 142nd FIPB meeting held on August 21, 2009

<sup>36</sup> Point F2 on Page 26 of the Review 2008

<sup>37</sup> Item No. 18 of 132nd FIPB meeting held on January 22, 2009

<sup>38</sup> Item No. 20 of 143rd FIPB meeting held on August 28, 2009



conflict with the provisions of the PSAR Act. The company represented saying that they are carrying out training and consulting activities which falls under automatic route. The company's main activity in India would be to carry on training programs, seminars, consulting and audits related to security services and systems that the industries may adopt for various security matters such as surveillance cameras, placing of security guards at various points within the company, upgrading program and education of latest technologies related to security and surveillance system. The company further stated that the provisions of PSAR Act would be applicable only when they enter into providing the security services, with or without armed guards to the industries and individuals. The company has reiterated that they are not going to hire people and place them as security guards, armed or otherwise, at the clients' premises. The company would be auditing their current existing security system, whether outsourced or their own securities, and consult and suggest them for any further improvement that they could carry out in order to make premise even more secure from miscreants/intruders. The company confirmed that they do not fall under the purview of the provisions 2(f), 2(g) of the PSAR Act. The Board rejected the representation on the categorical suggestion of MHA that proposed activities of the company including training etc., comes under the PSAR Act and further that MHA also does not support the proposal from security angle.

*The Board, on recommendation of MHA, imposed additional security conditions while approving specific proposals*

28. In a country where security is not only the primary but also the predominant concern, the Board has duly respected the need and emphasis of MHA to satisfy itself but not at the cost of undue delay or unnecessary queries once initial approval has been in place. The balance as most of us would agree is a delicate one to tread and FIPB has not been found wanting as is evident in the discussion on proposals above.

### 2.5.3 Proposals of Revocation

29. For the first time, Board was faced with the challenge of dealing with MHA's recommendation on revocation of approval letter on security considerations in two proposals, detailed below.

**30. M/s ByCell Holding A.G. Switzerland** was granted FC approval vide FC No. 24 (2006)/382 (2005) dated January 17, 2006, amended from time to time, to undertake the activities of offering CGM based cellular telephone services in whole of India with 74% foreign equity. The amendment approval was granted with the clearance of MHA in 2007. However, subsequently MHA, vide their OM dated March 3, 2009 read with OM dated January 27, 2009 withdrew their security clearance. The matter was placed before FIPB in a meeting specially convened to discuss the matter on May 11, 2009<sup>39</sup>. In view of the withdrawal of security clearance by MHA, the FIPB decided that the approval granted vide letter dated February 14, 2008 be withdrawn. On the request of DoT, the Board also decided in its meeting held on July 10, 2009 for revocation of all existing FC approvals, including specifically, FC approval dated January 17, 2006 and amendment approvals dated March 22, 2006 & October 24, 2007 granted to the company<sup>40</sup>.

<sup>39</sup> Item No. 1 of 136th FIPB meeting held on May 11, 2009

<sup>40</sup> Item No. 29 of 140th FIPB meeting held on July 10, 2009



31. M/s ByCell, has filed a W.P. No. 8989/2009 and CM. No. 6454/2009 in the High Court of Delhi. An interim order was passed by the High Court with the direction that if any representation is made by the petitioner, the same will be considered by the Government of India. The Court further directed that any cancellation or action by the Government of India will be subject to final outcome of the Writ Petition. The company vide their letter dated 29.6.2009 has sought permission to change the shareholding pattern of Tenoch Holdings, so that Mr. Naumchenko and Mr. Poluetkov will directly hold shares in Tenoch Holdings Cyprus, and no company incorporated in Panama or British Virgin Islands is involved. The representation dated 29.06.2009 of the company was considered in few meetings and finally again rejected by the FIPB<sup>41</sup>.

32. In the proposal of **M/s Telcordia Technologies Inc., USA**<sup>42</sup>, dealing with mobile number portability solutions, MHA requested for deferment. The Board noted that the company is engaged as the software provider for the Telecom companies and already has a license from DoT and approved the proposal without waiting further for the advice of MHA. After a gap of six months, MHA informed that it does not support the proposal. FIPB Secretariat requested MHA for reasons. The same were provided with the rider that they should not be communicated to the company. The matter was placed before the Board<sup>43</sup>.

33. The Board was of view that revocation of approval already granted by FIPB is on a different footing than rejection of a new proposal. Revocation entails huge consequences for an investor and principle of natural justice demands that before an approval is revoked, the concerned company is informed about the reasons and an opportunity is granted to it to make a representation, if it so desires. The Board further observed that while communicating the objection of MHA, care can be taken that only essence and not the verbatim language of MHA's communication is disclosed to the company. The Board, accordingly, directed the FIPB Secretariat to apprise MHA about the views of the Board and the legal position on the issue and ask for their comments on the suggestion of communicating the substance of MHA's objection to the company and for giving a chance to the company to clarify its position. The Board further directed DoT to consider the apprehensions of MHA from technical point of view and advise FIPB on it. The FIPB Secretariat has communicated the concern and views of the Board to MHA.

*The need to have a FDI policy for investments in private security services became more urgent and pressing*

## 2.6 Requests for Relaxation – Capitalisation Norms

34. The Board has, during the year, consistently refused any request for relaxation of capitalisation norms.

35. In the proposal of **M/s Asha Micro Credit Limited, Chennai**<sup>44</sup>, the company wanted relaxation for minimum capitalisation norms on the ground that it is in the field of micro finance for disempowered women. The Board did not find the reason to be so compelling that could warrant relaxation.

<sup>41</sup> Item No. 45 of 145th FIPB meeting held on October 9, 2009

<sup>42</sup> Item No. 22 of 133rd FIPB meeting held on February 23, 2009

<sup>43</sup> Item No. 22 of 148th FIPB meeting held on December 18, 2009

<sup>44</sup> Item No. 6 of 141st FIPB meeting held on July 24, 2009

36. The Board also took a stand that severity of the downturn global economy is not a sufficient ground for making any exception. It was of the view that any dilution can cause a deluge. In the proposal of **M/s Cargill Capital & Financial Services India Private Limited**<sup>45</sup>, the Board refused the request for extension of the deadline for capitalization of upto US \$ 50 million. Similarly, in the proposal of **M/s Capricorn Infrastructure Private Limited**<sup>46</sup>, the Board observed that relaxation from capitalisation norms can only be considered in the event of extraordinary circumstances and noted that none exists in the instant case.

37. In the proposal of **M/s Three C Investment (Mauritius) Limited, Mauritius**<sup>47</sup>, as per extant policy, NBFC companies are subject to minimum capitalization norms. Where due to reduction of capital, the company does not satisfy the minimum capitalization norms, the Board rejected the request for relaxation from the minimum capitalization norms as the same is not permissible under the extant policy. Relaxation from capitalisation was also not agreed in the proposal of **M/s Redington India Private Limited**<sup>48</sup>, **M/s LGT Venture Philanthropy Foundation**<sup>49</sup> and **M/s Brampton Infrastructure India Private Limited, Delhi**<sup>50</sup>.

38. The sole exception was made in the proposal of **M/s Mundus Real Estates Private Limited, Margao**<sup>51</sup>, where the project was being abandoned and repatriation was being sought. In that proposal, the Board observed that investment have been made which are not in compliance with Press Note 2 of 2005. Further the project is not intending to be completed. Thus, while the extant investment violation of Press Note 2 of 2005 may be approved for the purposes of determining the compounding fee etc, thereafter repatriation may be permitted by RBI subject to tax dues.

39. Waiver of capitalisation norms tantamounts to dilution of Press Notes itself and the FIPB in its wisdom rightly decided that one cannot throw the baby out with the bathwater. Therefore, despite the recession, requests for easy going on capitalisation have not been adhered to. Rare exceptions have been those that had reached a stalemate.

## 2.7 The Other Than Cash Issue

40. In the proposal of **M/s Kerns Aero Products Private Limited**<sup>52</sup>, shares against machinery imported were allowed subject to a) consent of the parent company, b) supporting audited statement, and c) meeting tax liability as per law. In the proposal of **M/s Quattro BPO Solutions Private Limited**<sup>53</sup>, Board allowed issuance of sweat equity shares subject to Section 79A of the Companies Act, notification dated December 4, 2003 issued by D/o Company Affairs (now M/o Corporate Affairs) for “Unlisted

*The Board respected the views of the security agency and allowed revocation of existing approvals on security considerations subject to dictates of natural justice*

<sup>45</sup> Item No. 10 of 141st FIPB meeting held on July 24, 2009

<sup>46</sup> Item No. 19 of 142nd FIPB meeting held on August 21, 2009

<sup>47</sup> Item No. 11 of 132nd FIPB meeting held on January 22, 2009

<sup>48</sup> Item No. 28 of 143rd FIPB meeting held on August 28, 2009

<sup>49</sup> Item No 5 of 144th meeting held on September 11, 2009

<sup>50</sup> Item No. 10 of 147th FIPB meeting held on November 20, 2009

<sup>51</sup> Item No. 4 of 143rd FIPB meeting held on August 28, 2009

<sup>52</sup> Item No. 33 of 131st FIPB meeting held on January 9, 2009

<sup>53</sup> Item No. 5 of 141st FIPB meeting held on July 24, 2009

Companies (Issue of Sweat Equity Shares) Rules, 2003 and Regulation 8 of FEMA 20.

41. The Board allowed issuance of shares against transfer technology in the proposal of **M/s Actis Biologics Private Limited**<sup>54</sup>. Issuance of shares for payment of rent as a part of pre incorporation expenses also received the favour of the Board in the proposal of **M/s GIA India Laboratory Private Limited**<sup>55</sup>. Board allowed a payment of \$ 214, 000 of the purchase price in the form of shares in the proposal of **M/s Mold-Tek Technologies Limited**<sup>56</sup>. Whilst considering **M/s Mitsuba Sical India Limited**<sup>57</sup>, the Board allowed a request from the applicant to issue equity instead of redemption, as the applicant was unable to redeem the Redeemable Preference shares.

42. But in the proposal of **M/s Marconi Telecommunications (I) Private Limited**<sup>58</sup>, Board held that issue of shares against trade payable is not permitted as it involves transaction between a parent company and its WoS, and is anyway subject to pricing guidelines and norms of SEBI/RBI. Similarly in the proposal of **M/s MD Group Inc, Canada**<sup>59</sup>, issuance of shares was sought against Franchisee right. The Board held that the extant policy permits issuance of shares for consideration other than cash in the case of lump sum fees, royalty and ECB. Issuance of shares against internal accruals, import of second hand machinery etc. has also been allowed on a case to case basis, but it cannot be allowed against an intangible asset like Franchisee right.

43. The Board also rejected the proposals of **M/s Sun Technics Energy Systems Private Limited**<sup>60</sup> (*shares against trade payables*), **M/s TCL India Holdings Private Limited**<sup>61</sup> (*shares against dealing with completely assembled consumer electronics like colour TV, Washing Machines etc.*), and **M/s Maharishi Solar Technology (P) Limited**<sup>62</sup> (*shares against the arbitration award*).

44. Issues of shares for other than cash consideration require a much more deeper look and probably with their increasing numbers, some objective norms would have to be evolved soon. Though that Board has been by and large liberal to facilitate the industry, this route for FDI cannot be allowed to become a norm rather than exception it is supposed to be.

*As a general rule, exemptions from minimum capitalization norms were not granted even in the wake of global downturn*

## 2.8 On Press Note 2 of 2005 – Real Estate Proposals

45. The year saw few requests from developers for relaxations from the FDI policy in view of economic slowdown. In view of volatile nature of the sector and its impact on the economy, the Board was very cautious in dealing with such requests. In the proposal of **M/s Vatika Limited, New Delhi**<sup>63</sup>, the Board did not permit infusion of FDI as some of the projects of the company

<sup>54</sup> Item No. 10 of 146th FIPB meeting held on October 30, 2009

<sup>55</sup> Item No. 1 of 147th FIPB meeting held on November 20, 2009

<sup>56</sup> Item No. 3 of 148th FIPB meeting held on December 18, 2009

<sup>57</sup> Item No. 15 of 145th FIPB meeting held on October 9, 2009

<sup>58</sup> Item No. 32 of 143rd FIPB meeting held on August 28, 2009

<sup>59</sup> Item No. 10 of 134th FIPB meeting held on March 20, 2009

<sup>60</sup> Item No. 35 of 145th FIPB meeting held on October 9, 2009

<sup>61</sup> Item No. 14 of 146th FIPB meeting held on October 30, 2009

<sup>62</sup> Item No. 22 of 146th FIPB meeting held on October 30, 2009

<sup>63</sup> Item No. 30 of 131st FIPB meeting held on January 9, 2009

were not in compliance with provisions of Press Note 2 of 2005. However, in the proposal of **M/s Keystone Realtors Private Limited, Mumbai**<sup>64</sup>, it allowed the proposal of infusion of FDI only through subsidiaries/Special Purpose Ventures (SPVs)/Joint ventures (JVs) created/acquired for FDI compliant projects.

46. In the proposal of **Mr Gagan Verma, USA (PIO)**<sup>65</sup>, the applicant rather than investing directly in real estate wanted to invest through a holding company. The Board disallowed the proposal as it would amount to bypassing Press Note 2 of 2005. The Board clarified in the proposal of **M/s Supreme Infrastructure India Limited, Mumbai**<sup>66</sup>, that there is no need of compliance with Press Note 2 of 2005 where applicant is not a developer but only a service provider to developer.

47. In the proposal of **M/s Information Technology Park Limited**<sup>67</sup>, the applicant has constructed the IT Park and sold the units to STPI registered units in accordance with an FC approval. Subsequently, the developer company intended to buy back the built-up space from the STPI units because of lack of response. The Board ruled that this would not be construed as a real estate business since the company has constructed and developed the IT Park in the first place and approved the proposal.

## 2.9 Requirement of FVCI

48. The Board has taken a consistent position that Foreign Venture Capital Investor registration, in cases where foreign contributions is in the form of units in a Fund, would ensure that funds coming to India are compliant with KYC norms and relaxation from FVCI registration is not to be encouraged. It insisted so in the proposals of **M/s Ventureast Trustee Company Private Limited**<sup>68</sup>, **M/s Indium IV(Mauritius) Holdings Limited, Mauritius**<sup>69</sup>, **M/s Ventureast Trustee Company Private Limited**<sup>70</sup> and **M/s ICICI Investment Management Company Limited, Mumbai**<sup>71</sup>.

## 2.10 Civil Aviation Sector

49. The Board reconsidered the approval granted to **M/s Qatar General Petroleum Corporation**<sup>72</sup> and observed that post issuance of Press Note 7 of 2008, a separate category for 'helicopter service' has been created and therefore, the applicant and Ministry of Civil Aviation may be advised to delink the helicopter services and accordingly change the company's license to make it compliant as per the Press Note.

*The Issue of shares for other than cash consideration should not become a norm since purpose of FDI gets defeated. Appropriate guidelines will shortly be notified in this regard*

<sup>64</sup> Item No. 50 of 131st FIPB meeting held on January 9, 2009

<sup>65</sup> Item No. 33 of 145th FIPB meeting held on October 9, 2009

<sup>66</sup> Item No. 32 of 145th FIPB meeting held on October 9, 2009

<sup>67</sup> Item No. 24 of 137th FIPB meeting held on May 22, 2009

<sup>68</sup> Item No. 25 of 139th FIPB meeting held on June 19, 2009

<sup>69</sup> Item No. 30 of 140th FIPB meeting held on July 10, 2009 and Item No. 38 of 146th FIPB meeting held on October 30, 2009

<sup>70</sup> Item No. 34 of 143rd FIPB meeting held on August 28, 2009

<sup>71</sup> Item No. 6 of 144th FIPB meeting held on September 11, 2009

<sup>72</sup> Item No. 24 of 143rd FIPB meeting held on August 28, 2009

50. The CCEA, on the recommendation of FIPB, approved the proposal of **M/s Jet Airways**<sup>73</sup> for offering to and participation by eligible Foreign Institutional Investors to raise capital upto US\$ 400 million through the Qualified Institutions Placements (QIP) route. The approval was subject to the following: a) that past regulatory approvals being in order, b) Airline must come within the sectoral cap within a period of 3 years, and c) control of the company must not shift to foreign investors in violation of the FDI policy.

## 2.11 Satellite Radio

51. The Board returned the proposal to the applicant in the case of **M/s WorldSpace India Private Limited**<sup>74</sup>, with the advice that they may prefer to apply afresh after the Government policy on satellite radio service is suitably notified.

## 2.12 Mergers & Acquisitions

52. Regulation 7 of FEMA 20 permits an Indian company to issue shares to a non resident person(s) as part of a court approved scheme of merger or amalgamation of 2 or more Indian companies or a reconstruction by way of demerger or otherwise of an Indian company, subject to conditions mentioned therein. In the proposals of **M/s GE Capital Services India**<sup>75</sup> and **M/s Geomysore Services (India) Private Limited**<sup>76</sup>, the Board noted the Mergers. However, the final position is yet to emerge and likely to be crystallised in 2010.

## 2.13 Compendium of Important Decisions

53. The Board has, during the period under review, given decisions in individual proposals which are likely to act as a precedent for similarly placed proposals that may come before it in future. A list of such important decisions is tabulated below.

*The Board approached real state investment proposals with requisite caution and insisted on compliance with the extant Press Notes*

*In order to create safeguards where Foreign contribution is to be received in form of a fund, FIPB insisted on registration of foreign entity as FVCI*

<sup>73</sup> Item No. 21 of 146th FIPB meeting held on October 30, 2009

<sup>74</sup> Item No. 43 of 137th FIPB meeting held on May 22, 2009

<sup>75</sup> Item No. 11 of 146th FIPB meeting held on October 30, 2009

<sup>76</sup> Item No. 12 of 146th FIPB meeting held on October 30, 2009

**Table 3: Important Decisions**

S. No	Name of Proposal	Meeting No. & Date	Item No.	FIPB Decision
1.	M/s GSR Sugars Private Limited, Hyderabad	131st FIPB meeting held on January 9, 2009	44	<p>“Options” are not “share warrants”, as contemplated under Section 114 of the Company’s Act. The issuance of share options is based on a mutual agreement, subject to call &amp; put option and the commercial agreement.</p> <p>Observing that the ‘share option’ proposal of the company is a form of optionally convertible instrument which does not fall within the purview of the extant instruments eligible for FDI, the Board rejected the proposal.</p>
2.	M/s Continental Air Express Private Limited, New Delhi	131st FIPB meeting held on January 9, 2009	46	<p>Proposal of the courier service cleared with the following rider:</p> <p>(a) The JV company should confine its express parcel delivery in the ‘Business to Business’ segment, subject to the only condition that the average weight per piece handled by them would be more than 2 Kg.</p> <p>(b) The JV company will not handle conveyance of letters and postal parcels and any other articles which are defined by Universal Postal Union as reserved matters of the local postal operators;</p> <p>(c) The JV company shall abide all rules and regulations of the India including the Indian Post Office Act, 1898 and any amendment made thereto.</p>
3.	M/s Banswara Syntex Limited, Banswara, Rajasthan	134th FIPB meeting held on March 20, 2009	11	Company to access automatic route where non convertible security was in nature of External Commercial Borrowing prior to issue of guidelines on Preference Shares of 30 April 2007
4.	M/s Oriflame India Private Limited	134th FIPB meeting held on March 20, 2009	29	The company intended to import, from Sweden, various dietary and nutritional supplements and sell these products through direct sales method. The Board disallowed the request as the contemplated activity is not allowed as per extant policy.
5.	M/s BNP Paribas Securities Services Limited, France	134th FIPB meeting held on March 20, 2009	39	Undertaking of the business of providing registrar and share transfer agency services (including for mutual funds) and other ancillary securities services in India, is in compliance with applicable laws.
6.	M/s NSK Holdings Private Limited, Mumbai	134th FIPB meeting held on March 20, 2009	48	The Board distinguished between investing company as stated in Press Note 4 (2009 Series) and an Investment Company. The Board held that the applicant, in the instant proposal, is an ‘Investing Company’ and not an ‘Investment Company’, since it is only holding investment of its downstream subsidiary companies and it is not in the normal course trading in such holdings. The Board approved the proposal subject to subject to obtaining regulatory clearance from RBI.
7.	M/s Barclays Investments & Loans (India) Private Limited, Mumbai	135th FIPB meeting held on April 20, 2009	2	The proposed activities included direct marketing of financial products, i.e. Information Technology (IT) enabled services and back office processing. The Board advised the applicant to approach regulator RBI for clarification whether the financial services viz. Collection and recovery, Direct marketing, IT enabled services, Back-office processing, Estate and trust planning, Trusteeship and administration services, Advisory and financial solutions & IT services, advisory service can be undertaken within an expanded ambit of 18 NBFC activities “Investment Advisory” / “Financial Consultancy”.
8.	M/s Nomura Financial Advisory and Securities (India) Private Limited, Mumbai	137th FIPB meeting held on May 22, 2009	8	The Board held that proprietary trading by a NBFC is part of stock broking which is a permitted NBFC activity and further that a distinction need to be made between a Bank and a NBFC. It would however, be subject to appropriate disclosures / guidelines specified in the SEBI Stock Brokers Regulations, 1992 (as amended up to date).
9.	M/s Morgan Stanley Mauritius Company Limited	137th FIPB meeting held on May 22, 2009	28	The Board ruled that Press Note 2 (2001 Series) deals only with Operating subsidiaries and not Holding cum Operating subsidiaries.
10.	M/s Blaser Swisslube India Private Limited	139th FIPB meeting held on June 19, 2009	21	Prior approval given to the applicant was subject to the condition of simultaneous setting up of manufacturing facilities. The applicant now sought approval for the continuance of cash and carry wholesale trading and exemption from carrying out manufacturing activity. Board refused the request on the grounds that the company has not fulfilled the condition of ‘test marketing’.



S. No	Name of Proposal	Meeting No. & Date	Item No.	FIPB Decision
11.	M/s Dish TV India Limited	141st FIPB meeting held on July 24, 2009	19	The Board approved the proposal subject to the condition that the foreign shareholding in the company subsequent to the conversion of Bonds, shall remain within the ceiling of 49% of its paid up capital, and that within this limit of 49%, FDI by entities other than FIIs shall not exceed 20% of its paid up capital, at any point of time and that ECB/FCCB guidelines will be followed.
12.	M/s The Coles Cranes Group Limited, UK	142nd FIPB meeting held on August 21, 2009	2	The company, TIL offered/issued convertible warrants only to Indian promoters (of which A. Mazumdar was one) vide EGM on November 28, 2007. Since this was preference issue, warrants were convertible in 18 months viz., May, 2009. The foreign promoter was not offered warrants. One of the Directors (A. Mazumdar) in fact, Chairman, TIL offered to sell his own warrants. The conversion of warrants into shares and transfer to M/s Coles Crane was held up as shares were available at a cheaper price and so warrants lapsed. The Board ruled that this is not a transaction for FIPB to approve.
13.	M/s Clivet TF Air Systems (P) Limited, Bangalore	142nd FIPB meeting held on August 21, 2009	6	The DoR clarified to the Board that the issue of Dividend Distribution Tax does not arise when shares are issued by companies for consideration other than cash.
14.	M/s Simulmedia Inc., USA	143rd FIPB meeting held on August 28, 2009	6	Where applicant had not started operations (not an operating company as yet), but its proposed field of activity/business was clearly defined and was on the automatic route, it is outside the ambit of para 5 of Press Note 4 of 2009 <sup>83</sup> .
15.	M/s Network 18 Media & Investments Limited, Delhi	143rd FIPB meeting held on August 28, 2009	7	Network 18 is engaged in foreign investment under 'automatic route' without any sectoral cap but holds shares in M/s TV 18 India Limited & M/s IBN 18 Broadcast Limited, which have been permitted to uplink news and current affairs TV channels from India. As per Press Note 2 (2009 series), the foreign investment in Network 18 would not be considered for calculation of the indirect foreign investment in M/s TV 18 India Limited, & M/s IBN 18 Broadcast Limited, as long as it remains owned & controlled by resident Indian shareholders. The Board noted that out of the entire activities undertaken by the company, 75% constituted investment and sports and entertainment comprised the remaining 25 %, the latter being on the automatic route. Though the quantum of operations to be considered for an 'operating cum investing' company has not been laid down, this company could be considered as one and could proceed on the automatic route, subject of course to compliance by the company with the NBFC regulatory framework of RBI, including compliance of capitalization norms. The applicant was advised to access automatic route subject to the above conditions.
16.	M/s Omega Foundry Machinery Limited, UK	143rd FIPB meeting held on August 28, 2009	18	FDI upto 100% is permitted for SSI units subsequent to the MSME Act 2006 and which has since been notified in Press Note 6 (2009 Series).
17.	M/s Housing Development Finance Corporation Limited	143rd FIPB meeting held on August 28, 2009	29	The Board directed the applicant to approach RBI with regard to the issue of secured redeemable non-convertible debentures.
18.	M/s General Motors Acceptance Corporation (GMAC) Financial Services India Limited	144th FIPB meeting held on September 11, 2009	11	The Board allowed winding up of NBFC operations, subject to all mandatory prior regulatory approvals/clearances, due surrender of the certificate of NBFC registration, licence, etc., and settlement or payment of all the existing liabilities, which the firm owe to its Indian stakeholders as well as to its retailers and dealers including tax.
19.	M/s Sahajanand Medical Technologies Private Limited, Surat	145th FIPB meeting held on October 9, 2009	27	The proposal involved the Indian shareholders of the Indian Company swapping their shares for a shareholding in the Canadian Company. Normally resident Indians can affect remittances abroad for Current/Capital account transactions under the Liberalized Remittance Scheme and that arrangement is envisaged only against remittance and not in consideration of shares swap. The Board accordingly rejected the proposal.

S. No	Name of Proposal	Meeting No. & Date	Item No.	FIPB Decision
20.	M/s Futuristic Diagnostic Imaging Centre Private Limited	145th FIPB meeting held on October 9, 2009	28	The Board allowed the proposal for manufacturing of medical radioisotopes & Nuclear Medicine/ Cancer Imaging Centre (PETCT) even if not specifically covered under the clauses of annexure to the Schedule – I of the FEMA regulations.
21.	M/s Southern CNG Automobiles Private Limited	148th FIPB meeting held on December 18, 2009	10	FDI by Bangladesh person without approval. Proposal for enhancement rejected. Existing FDI to be investigated by RBI.
22.	M/s Shree Meenakshi Food Products Private Limited	148th FIPB meeting held on December 18, 2009	17	Proposal involved Gutka product. The Tobacco policy is currently under review. Proposal rejected on account of opposition from Health Ministry.
23.	M/s Verint Systems India Private Limited	148th FIPB meeting held on December 18, 2009	20	The Board rejected the request to delete the condition that “Sale, stock, demonstration and maintenance & repair of surveillance and monitoring equipment shall be carried out by the company only after prior permission, on prescribed Performa from DoT and MHA”. Rejection was on account of objection from MHA and DoT.
24.	M/s Premiere Conferencing (Ireland) Limited	148th FIPB meeting held on December 18, 2009	21	The Board hold that audiotax activity is on the FIPB route



## 3. In Focus

The DIPP has, in the course of the month of February 2009, issued a series of Press Notes outlining the revised FDI guidelines. Press Notes 2 and 3 of February 13, 2009 deals with calculations of foreign investment in downstream entities and requirement for FIPB approval in relation to transfer of ownership or control in sectoral cap companies. These Press Notes raised certain issues regarding the clarity of their content. In response to some of these, Press Note 4 was issued on February 26, 2009. The Press Notes have replaced the conventional proportionate method of computing foreign indirect equity by the parameter of beneficial ownership and control of entities at each stage of investment.

### 3.1 The New Regime

1. Under Press Note 2 of 2009, foreign investment in an Indian company shall include all types of foreign investment, namely FDI, investments by non-resident Indians (NRIs), portfolio investment by foreign institutional investors (FIIs)/NRIs, American depository receipts (ADRs)/global depository receipts (GDRs), foreign currency convertible bonds (FCCBs), and convertible preference shares/convertible debentures. This Note provides for a framework for calculation of total foreign investment (direct and indirect) in Indian companies, which is based on ownership and control of such firms
2. According to the new FDI policy, Indian companies (which are owned and controlled by Indian resident citizens directly or through Indian companies) will be considered “pure” Indian companies. Accordingly, any downstream investments made by such companies will not be considered as having any flow-through foreign investment (compared with a view in the earlier regime of having pro rata foreign investment). However, this methodology for computation of foreign investment does not apply to sectors that are governed specifically by a separate statute such as the insurance sector. If, however, there is an Indian company that is either foreign-owned or controlled (as opposed to owned *and* controlled); the downstream investment therein will be subject to sectoral caps.
3. For this purpose, an Indian company owned and controlled by resident Indians may be taken as being:

*Government has taken a number of steps to simplify the FDI regime to make it easily comprehensible to foreign investors. For the first time, both ownership and control have been recognised as central to the FDI policy, and methodology for calculation of indirect foreign investment in Indian companies has been clearly defined. A consistent policy on downstream investment has also been formulated*

- (i) 'owned' shall mean more than 50% of the equity interest in such Indian company is beneficially owned by resident Indian citizens and Indian companies, which are owned and controlled ultimately by resident Indian citizens and
- (ii) 'controlled' shall mean resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, have the power to appoint a majority of its directors.
- (iii) Further, if the above condition is not satisfied or if the investing company is owned or controlled by 'non-resident entities', the entire investment by the investing company into the subject Indian company would be considered as indirect foreign investment.

4. Press Note 3 of 2009 applies to all proposals involving transfer of ownership or control from Indian resident citizens to non-resident entities in sectors/activities that either have an FDI cap or require prior FIPB approval. In these sectors, FIPB approval will now be required for transfer of ownership or control of Indian companies either directly to foreign entities or to an Indian company set up with foreign investment and which is owned or controlled by non-resident entities, irrespective of whether such a transfer is taking place through merger, amalgamation, acquisition, etc.

5. Press Note 4 seeks to clarify compliance with foreign investment norms in terms of downstream investments by Indian companies that may have foreign investment. The first paragraph refers to the guiding principle, which is that downstream investment by companies owned or controlled by non-resident entities would require to follow the same norms as a direct foreign investment.

6. The Press Note divides downstream investments into three categories:

- i. Only operating companies: Here, the usual foreign investment rules apply, as there is no downstream investment involved.
- ii. Operating-cum-investing company: Here, the usual foreign investment rules apply depending on the relevant sectors in which the company is operating. As regards downstream investments by such investing companies, that would also "have to comply with the relevant sectoral conditions on entry route, conditionalities and caps" in respect of the sectors in which the downstream Indian company is operating.
- iii. Investing companies: Foreign investment in such companies will require prior FIPB approval. Further, downstream investments would have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

7. There is also an additional fourth category, which is non-operative and non-investing companies. This requires prior FIPB approval, and as and when business or investment commences, such company has to comply with relevant conditions on entry route, conditionalities and caps.

### 3.1.1 Ownership and Control

8. The interpretation of ownership and control was reckoned in different ways by DIPP and the administrative ministry/department in some proposals. These are accounted as follows.

*The Press Note 4 has given categories of downstream investments and has laid down the situations calling for FIPB approval*

9. In the proposal of **M/s EADS Deutschland GmbH, Germany & Larsen & Toubro Limited, Mumbai**,<sup>77</sup> the total FDI which is coming directly is below 26%, but the remaining equity is being routed through another Services JV in which the same Foreign collaborator has 49% stake. As the proposal was of defence sector, it was considered essential that letter and spirit as embodied in Press Note 2 of 2009 is strictly adhered to. The Board directed Department of Defence Production and DIPP to verify and confirm to FIPB that the ‘control and ownership’ of L&T in the two JVs namely, the manufacturing JV and the services JV is absolute and complete as per the Press Note 2 of 2009 and should remain so forever.

10. DIPP supported the proposal subject to:

- (i) The shareholders/JV agreements incorporating the change that the Manufacturing JV would now have five directors, out of which one each will be nominated by EADS and L&T respectively. The remaining three directors will be nominated by the Services JV. Out of the three directors nominated by the Services JV, the power to nominate two directors would vest with L&T and the power to appoint one director would vest with EADS. As such, in effect, the Manufacturing JV would now have three directors nominated by L&T and two nominated by EADS.
- (ii) The Articles of Association and the Memorandum of Understanding will incorporate the above.
- (iii) The Services JV is ‘owned and controlled’ by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, in terms of Press Note 2 of 2009. The power to ‘legally direct the actions of the company’ vests with resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, in terms of Press Note 2 of 2009.
- (iv) The Manufacturing JV is also ‘owned and controlled’ by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, in terms of Press Note 2 of 2009. The power to ‘legally direct the actions of the company’ vests with resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, in terms of Press Note 2 of 2009.

11. MoD did not support the proposal on the grounds that ownership pattern of the proposed JV is violative of the sectoral cap of 26% in defence by adding a new dimension to the concept of ownership and control by maintaining that “ownership and control issues go beyond the Board Room in the day to day functioning of any company. The foreign partner in this case is bringing into the partnership the bargaining power, both of technology and investment, and it would not be easy for the Indian partner to carry forth its views in the day-to-day functioning of the company”.

12. The Board had a difficult choice. Though technically one could not have found fault with the architecture proposed by the applicant and recommended by DIPP with certain changes, yet, this being the first case testing the Press

*The Press Notes have been interpreted differently in some proposals by the administrative ministries, as compared to the interpretation of the DIPP*

<sup>77</sup> Item No. 15 of 147th FIPB meeting held on November 20, 2009

Notes in a sensitive sector, it decided to honour the apprehensions of the administrative ministry and rejected the proposal.

13. In other proposal also, the Board has been very cautious. In order to ensure that Press Note 2 and 4 of 2009 are scrupulously followed, it imposed additional condition in the proposals of **M/s Scorpios Beverages Private Limited**<sup>78</sup>, **M/s AG Mercantile Company Private Limited**<sup>79</sup> and **M/s Telecom Investments India Private Limited**<sup>80</sup>, by insisting that if any director is nominated in Vodafone Essar Limited, the power to nominate such Director should be with resident shareholders of the company.

### 3.1.2 Ownership and Control of a Trust

14. DIPP had the occasion of examining the issue of ownership and control for a trust in the context of Press Note 2 of 2009 with respect to the proposal of **M/s India Rizing Fund**. As per the proposal, M/s India Rizing Fund is a trust formed under the Indian Trusts Act and is also a Domestic Venture Capital Fund registered with SEBI. The fund has obtained FIPB approval for receiving foreign contribution in the form of units for launching a Defence SME Scheme<sup>81</sup>. This approval was subject to certain conditions applicable to the Defence Sector, as incorporated in para 7 of the approval letter. The said para stipulated that all the investments to be made by the trust are subject to adherence to the sectoral caps of the FDI Policy in Defence Sector.

15. M/s India Rizing Fund requested for deletion of the para 7 on the following grounds:

- (i) Domestic Venture Capital Funds and other mutual funds in India are structured as trusts and so is the Fund. The Fund anticipates foreign as well as domestic investors to subscribe to the units issued by the fund from time to time. These units are rupee denominated. Since, the Fund is issuing “units” and not “equity shares” to its foreign and domestic investors, such units cannot partake the functionalities of the equity shares and therefore neither foreign investors nor domestic investors will have ownership or any other rights in the Fund for example. by investing in a unit of SBI Mutual Fund, the unit-holder does not have any rights, either ownership or control, on the operations of the mutual fund or in the companies where downstream investments are made by the mutual fund.
- (ii) The fund has also furnished undertaking to the Indian Government that it shall maintain necessary registration as a Domestic Venture Capital Fund under the SEBI (Venture Capital Funds) Regulation 1996, and comply with all applicable provisions of the SEBI (Venture Capital Funds) Regulations 1996.

16. The DIPP responded as follows:

- i. It is seen that the control of trust can be at any of the 4 levels viz. the Settler, Board of Trustees, Asset Management Company (AMC)

<sup>78</sup> Item No. 23 of 147th FIPB meeting held on November 20, 2009

<sup>79</sup> Item No. 24 of 147th FIPB meeting held on November 20, 2009

<sup>80</sup> Item No. 25 of 147th FIPB meeting held on November 20, 2009

<sup>81</sup> Item No. 16 of 120th FIPB meeting held on June 4, 2008

*The manner of application of the Press Notes to trusts registered in India could not be conclusively resolved. This aspect would require further attention*

and the unit holders. Trusts are essentially largely unregulated bodies and the trust deed and inter-se agreements between the unit holder and other entities decide the control. In this proposal Rs. 550 Crore is to be sourced from international investors, through issue of units, but the Settler of the Trust, the Board of Trustees and the AMC (which is controlled by resident India citizen settler) are all Indian owned and controlled. Since the unit holders' investment is equity-like, with a desire for high returns, even though the other three entities are fully Indian owned and controlled, the unit holders exercise tremendous influence over all fiduciary decision making.

- ii. The regulatory control of SEBI over the trust structure is minimal and there are no norms for diversified unit holding, limits on individual unit holding etc. As such, trusts remain unregulated entities for all practical purposes. Thus, until and unless proper regulations are made to exercise control over such entities, it will not be appropriate to permit them to invest in sectors where there are FDI caps and conditionalities. Alternatively the entire downstream investment should be taken as indirect foreign investment as per Press Note 2 of 2009.
- iii. In view of the above, it is extremely difficult to clearly define the ownership and control of the trust in the way it is defined for a company and, therefore, the analogy for trusts, on the pattern of Press Notes 2, 3 and 4 of 2009, is extremely difficult to lay out.

17. DIPP, therefore, recommended that the conditions incorporated in para 7 of the approval letter should continue and not be deleted.

18. The Board could not deliberate the issue as M/s India Rizing Fund withdrew their proposal but the inputs of DIPP will serve as a valuable aid for deciding such issues, if they arise in future.

19. As the discussion in proposals highlighted above shows, there has been a yawning gap in the intention of the statute and its actual working in corporate structures. This explains why protagonists in sectors like defence, telecom have raised apprehensions about the ability of corporates to violate the cap/ceiling fixed for these restricted sectors. The defenders have argued otherwise - the so called extended window given by these Press Notes was always there and was anyway available through other means, so the entire controversy on who controls and who manages is an attempt, they argue, to halt the process of progressive liberalisation. It is expected that in the coming months, the requisite clarity will be imparted to the issues raised in the context of the Press Notes.

### 3.1.3 Para 8 and Grandfathering<sup>82</sup>

20. Paragraph 8.0 of Press Note 2 of 2009 states that "any foreign investment already made in accordance with the guidelines in existence prior to issue of this Press Note would not require any modification to conform with these guidelines. All other investments, past and future, would come under the ambit of these new guidelines."

<sup>82</sup> The retrospectively of grandfathering is discussed in the note on compounding.

*It is extremely difficult to clearly define the ownership and control of the trust in the way it is defined for a company and therefore, the analogy for trusts, on the pattern of Press Notes 2, 3 and 4 of 2009, is extremely difficult to layout*

21. In the proposal of **M/s Sandur Power Company Limited**<sup>83</sup>, in the year 2006, the applicant's subsidiary, viz., M/s Carmel Asia, had subscribed to 80.53% equity of Jagati Publications, engaged in the business of printing and publishing of newspapers. As per the extant policy prevailing at that time, the company should have obtained prior approval of FIPB for this acquisition. However, the Board held, that in view of Press Note 2 and 4 of 2009, the past downstream investments (made during 2005-2007) by the company would not need any *ex-post facto* approval. The company was advised to access the automatic route.

22. In the chequered proposal of **M/s Seagram India Private Limited (now Pernod Ricard India (P) Limited)**<sup>84</sup>, the Board considered the past investment made by Seagram India Private Limited in Oceanic Distilleries Private Limited in 1997, without FIPB approval. The Board ruled that the instant proposal is covered by para 8 of Press Note 2 of 2009 whereby no approval is now required for downstream investment made in the past. The Board also noted the downstream investment made in the proposal of **M/s Caparo Engineering India Private Limited**<sup>85</sup>, Similarly, the Board, in the proposal of **M/s Out-of-Home Media (India) Private Limited, Mumbai**<sup>86</sup>, held that *ex-post facto* approval can be granted without compounding since the violation of making downstream investment without FIPB approval now stands condoned because of Para 8 of Press Note 2 of 2009. In the proposal of **M/s Efkon India Private Limited**<sup>87</sup>, dealing with downstream made in Oct 2002, the Board reiterated that para 8 of Press Note 2 of 2009 has grandfathered the previous violations.

23. Another dimension of the grandfathering was considered by the Board in the proposal of **M/s United Breweries (Holdings) Limited, Bangalore**.<sup>88</sup> The Board ruled that since United Breweries (Holdings) Limited was compliant to the regime prevalent vide Press Note 9 of 1999, it was not a violator in terms of Press Note 2, 3 and 4 of 2009 even though foreign investor's percentage exceeded the sectoral cap of 49%. This was due to para 8 of Press Note 2 of 2009.

24. Grandfathering introduced through para 8, though intended to facilitate the transition from Press Note 9 of 1999 to Press Notes 2 to 4 of 2009 has had its own share of ambiguity. Interpretations of what was intended will continue to differ but slowly proposals grandfathered will begin to dwindle with the sheer passage of time as the new regime consolidates. Interestingly, the consolidation of the new regime ushered by the Press Notes of 2009 itself has been the most contentious of issues last year and has given ample food for thought to policy makers, bankers and consultants alike.

### 3.1.4 Internal Accruals

25. Press Note 9 of 1999 dealing with downstream investment was silent on downstream investment by internal accruals. The Board, therefore, allowed it

*Where as per the extant policy prevailing at that time, the company should have obtained prior approval of FIPB, in view of para 8 of Press Note 2 of 2009, the past downstream investments would not need any ex-post facto approval*

<sup>83</sup> Item No. 1 of 135th FIPB meeting held on April 20, 2009

<sup>84</sup> Item No. 35 of 139th FIPB meeting held on June 19, 2009

<sup>85</sup> Item No. 12 of 144th FIPB meeting held on September 11, 2009

<sup>86</sup> Item No. 23 of 147th FIPB meeting held on November 20, 2009

<sup>87</sup> Item No. 7 of 148th FIPB meeting held on December 18, 2009

<sup>88</sup> Item No. 15 of 141st FIPB meeting held on July 24, 2009



on merits of individual proposals. Press Note 9 of 1999 stands superseded but nothing is mentioned about internal accrual in para 6 of Press Note 4 of 2009 as well. The Board had taken a constructive view in allowing downstream investments through internal accruals while considering such proposals under Press Note 9 of 1999. The Board continued the same constructive approach even under Press Note 4 of 2009. It has approved such requests in the proposals of **M/s Intertoll India Consultants Private Limited, New Delhi**<sup>89</sup>, **M/s Matrix Laboratories Limited. (Matrix)**<sup>90</sup>, and **M/s Hind Terminals Private Limited**<sup>91</sup>. In the proposal of **M/s Intelenet Global Services Private Limited**<sup>92</sup>, the Board held that Internal accrual for downstream investment can be permitted only through CCRPS, as per Ministry of Finance letter of April 30, 2007 and not through NCRPS, as asked by the company. The Board, however, in the proposal of **M/s GTI Mediventures, Mauritius**<sup>93</sup>, ruled that downstream investment by utilization of the Management/License Fees earned in India is not permissible.

### 3.2 Compounding of FEMA Contraventions

26. To understand compounding, it is important to highlight the distinction between Foreign Exchange Regulation Act, 1973 (FERA) and the Foreign Exchange Management Act, 1999 (FEMA). Under the FERA nothing was permitted unless specifically allowed. The tenor and tone of the FERA was very sharp. It provided for imprisonment of even a very minor offence and a person was presumed guilty unless he proved himself innocent. Under FERA, the penal powers were vested in the Directorate of Enforcement (ED). This qualitatively changed with the introduction of FEMA which is primarily a civil legislation and more progressive in its penal intent.

27. The FEMA, for the first time, in law of foreign exchange, contained the provision of compounding of contraventions. Chapter IV of FEMA provides for the Contraventions and Penalties, and for the procedure to be followed. As per the extant provisions contraventions is to be dealt in two ways. One is Compounding of contraventions and another is Adjudication of contraventions. The RBI has been authorized to compound but it is not competent to adjudicate the contraventions.

28. Compounding of contraventions can be understood as a lay man to be a method to compromise or settle the matter either before or after adjudication, but certainly before enforcement of the order of the court.

29. Contravention, legally speaking, means a breach of regulatory requirement. Under FEMA, penalty for any kind of contravention has been specified as thrice the amount involved, where it is quantifiable, and otherwise, up to Rs. 2 Lakhs + Rs. 5000 per day for continuing contravention.

30. Compounding of contraventions allows the contravener to settle an offence through imposition of a monetary penalty without going in for litigation

*The Board had taken a positive view in allowing downstream investments through internal accruals while considering such proposals under Press Note 9 of 1999*

<sup>89</sup> Item No. 19 of 134th FIPB meeting held on March 20, 2009

<sup>90</sup> Item No. 23 of 137th FIPB meeting held on May 22, 2009

<sup>91</sup> Item No. 42 of 137th FIPB meeting held on May 22, 2009

<sup>92</sup> Item No. 15 of 148th FIPB meeting held on December 18, 2009

<sup>93</sup> Item No. 14 of 132nd FIPB meeting held on January 22, 2009

after the contravener acknowledges having committed the contravention. Once a contravention has been compounded by compounding authority, no proceeding can be further initiated against the contravener. Compounding is a summary procedure, which can be used effectively for saving the time of adjudicators, investigating officers and citizens.

31. The compounding proceedings are governed by Foreign Exchange (Compounding Proceedings) Rules, 2000, for short the Rules. RBI has been empowered to compound the contraventions of all sections of FEMA, except clause (a) of section 3 of the FEMA, dealing essentially with Hawala transactions, where the powers of compounding lie with the ED.

32. The Rules came into effect from February 1, 2005. The RBI as on November 30, 2009, has received at Central Office 877 applications for compounding of all kinds of contraventions under FEMA including ECB<sup>94</sup>. The Bank has disposed of 614 applications within the specified time of 180 days.

33. In FIPB, the system of compounding by RBI was started in late 2007. The first such proposal was of **M/s Manipal Universal Learning Private Limited (Manipal)**<sup>95</sup>. The FIPB noted that this was the first case of its kind as it had not accorded post facto approval in the past. In fact, the issue arose because Manipal applied for post facto approval. FIPB accordingly deferred the proposal to seek the advise of RBI.

34. In the 106th FIPB meeting held on September 20, 2007 the FIPB considered the advise of RBI<sup>96</sup>. The RBI informed FIPB that applicant may be asked to apply for compounding. Accordingly, the Board directed that the matter be referred to RBI so that RBI can initiate appropriate action under FEMA, for the violation already committed and that once the process of compounding or other suitable action as RBI deems fit, is completed, Manipal may approach FIPB for approval of the status as operating cum holding company. In the same meeting, FIPB gave the same advise in one more proposal of violation of Press Note 9 of 1999<sup>97</sup> and in one proposal of issuance of shares for consideration other than cash<sup>98</sup>.

35. In the 109th meeting, the FIPB revised its position and approval was granted with the rider that it will be effective from the date RBI compounds the violation<sup>99</sup>.

36. Manipal again approached FIPB as RBI wanted it to first obtain approval from FIPB. RBI informed that, as per legal position<sup>100</sup>, the procedure of compounding provides that unless approval from the concerned authority is obtained, the contravention would not be compounded by RBI. Accordingly, FIPB started granting approvals with compounding.

*Compounding of contraventions can be understood as a lay man to be a method to compromise or settle the matter either before or after adjudication, but certainly before enforcement of the order of the court. Contravention, legally speaking, means a breach of regulatory requirement*

<sup>94</sup> Few Regional Offices have been delegated powers to compound the contraventions. Their information could not be provided by RBI.

<sup>95</sup> Item No. 8 of 101st FIPB meeting held on July 13, 2007

<sup>96</sup> M/s Manipal Universal Learning Private Limited, Bangalore (Item No 18)

<sup>97</sup> Devas Multimedia Private Limited( Item No 16)

<sup>98</sup> M/s IBSS Techno Park Limited (now M/s Taksheel Solutions Limited)(Item No. 23)

<sup>99</sup> M/s Georgia-Pacific Kemrock International Private Limited, Vadodara (Item No. 2)

<sup>100</sup> RBI Circular No. 31 dated February 1, 2005 ( Para 9 of annexure II of the circular)



37. So far, FIPB has directed compounding in 70 proposals. The list is at Annexure IV and includes DIPP proposals and proposals where the companies applied to FIPB on advise of RBI. This is 5.20% of total proposals and 8.70% of the approved proposals of FIPB during the said period. If we consider applications of FEMA contraventions with the Central Office of RBI, the share of FIPB directed applications is not very significant.

38. The details of the proposals where compounding was directed by FIPB is at Table 4.

39. This data shows that 51.5% of proposals relates to violation of Press Note 9 of 1999 whereas 15% proposals were of post facto approval of issuance of warrants. Other violations of some significance are violations of Press Note I of 2005, issuance of partly paid up shares, issuances of shares for pre incorporation expenses and instances where FDI was brought in a sector on approval route without FIPB's approval like telecom, specialty magazine etc.

40. The list of RBI and FIPB needs reconciliation. The applicant in FIPB and in before RBI Compounding Authority needs not be the same. Yet 34 companies out of 70 companies find place in the Central Office list of RBI of 877 companies. It is a possibility that some companies directed by FIPB to get the violation compounded by RBI might not have approached them. It is only recently that FIPB has started sending to the RBI minutes of proposals where FIPB either imposes the condition of compounding or decides representation about the deletion of the condition.

*Compounding provisions of FEMA are by and large, in the interest of investors. However policy clarity should be pursued so as to mitigate compounding references due to inadvertant mistakes and omissions*

**Table 4: Proposal where compounding was directed by FIPB**

S. No.	Nature of Violation	Number
1	Change of status from operating company to operating cum holding company.	35
2	Issuance of Warrants	10
3	FDI brought on approval route without FIPB	7
4	Violation of Press Note I of 2005	4
5	Partly paid shares	4
6	Miscellaneous	4
7	Issuance of shares for consideration other than cash	3
8	Issuance of shares against pre incorporation expenses	3

41. The concept of compounding is a distinguishing feature of FEMA. It provides comfort to the corporate entity, minimizing transaction costs and avoiding penal provisions of law. It is seen that companies do not have any problem with respect to FIPB directed compounding. Many in fact come to FIPB for regularization to make their record straight. The *resentment* is because of gaps and ambiguity in FDI policy resulting in a situation where a Press Note is open to more than one interpretation. As many proposals fell on the wrong side of Press Note 9 of 1999, as interpreted by FIPB, in consultation with DIPP, the disquiet in the industry came to the fore. More than 50% of FIPB decisions on compounding were related to Press Note 9 of 1999. It is interesting to recall that FIPB in its first review in November

2007, just at the time when it started the concept of compounding, flagged the issue of ambiguity in Press Note 9 of 1999 and resultant interpretation issues therefrom.<sup>101</sup>

42. After the new series of Press Notes 2 to 4 of 2009, the issue of compounding has come into sharp focus because of para 8.0 of Press Note 2 of 2009 which states that “any foreign investment already made in accordance with the guidelines in existence prior to issue of this Press Note would not require any modification to conform with these guidelines. All other investments, past and future, would come under the ambit of these new guidelines.” DIPP prefer to refer to para 8 as the grandfathering provision in the nature of general amnesty.

43. First case involving the application of para 8 which was examined in FIPB Secretariat was the request of **M/s Radhakrishna Hospitality Services Limited** for deletion of condition of compounding imposed for violation under Press Note 9 of 1999. It was decided, with the approval of FS that “The Press Note 2 and 4 of 2009 cannot take effect, in point of time, before they were issued. They cannot retrospectively change the legal consequences of acts committed or the legal status of facts and relationships that existed prior to their enactments.”

44. Subsequently the matter was taken to the Board in its 139th Meeting on June 19, 2009. The Board agreed that these Press Notes will not have retrospective effect. The Board accordingly rejected the request of **NTT Docomo Inc**<sup>102</sup>, Japan for deletion of the condition of compounding. In the same meeting, the Board took similar view in rejecting the proposals of **M/s Nagarjuna Construction Company Limited**<sup>103</sup>, **M/s Bharti Telemedia Limited**<sup>104</sup> and **M/s SKR BPO Services Private Limited**<sup>105</sup>.

45. The comparative position, as we understand, with respect to various possibilities under Press Note 9 of 1999 and Press Notes 2 to 4 can be presented as under:

**Table 5: Comparative Position**

Position under Press Note 9 of 1999	Position under Press Note 2-4 of 2009	Response by FIPB as on date
If no FIPB Approval was needed	If no FIPB Approval needed	No Action
If FIPB Approval was needed	If no FIPB Approval needed	No Action/ Noting without compounding
If no FIPB Approval was needed	If FIPB Approval needed	Approval
If FIPB Approval was needed	If FIPB Approval needed	Approval with Compounding

*There is divergence in the list of proposals referred by FIPB to RBI for compounding and the proposals actually compounded by RBI. They require reconciliation*

<sup>101</sup> Para 9 of the first review document dealing with “FDI in Holding Company”

<sup>102</sup> Item No. 29 of 139th FIPB meeting held on June 19, 2009. Another application involving approval given to NTT Docomo Inc was made by Tata Teleservices Limited ( Item No. 27) which was also rejected

<sup>103</sup> Item No 41 of 139th FIPB meeting held on June 19, 2009

<sup>104</sup> Item No 28 of 139th FIPB meeting held on June 19, 2009

<sup>105</sup> Item No 24 of 139th FIPB meeting held on June 19, 2009

46. The concept of compounding, on direction of FIPB, is a healthy intervention for better corporate practices. It is ultimately to the advantage of the contraveners, lest they have a brush with ED at some later point of time. It also promotes equity as it acts as a strong motivator for compliance with FDI Policy.

47. Though ambiguity still remains even after Press Note 2 to 4 of 2009, instances of imposition of condition of compounding have come down considerably<sup>106</sup>. If we are able to put our policy on warrants and partly paid up shares in place, there will be even less possibilities of FIPB resorting to condition of compounding

*Compounding in the context of Grandfathering by Press Note 2 of 2009 is yet to be resolved and the matter will agitate the FIPB for some more time*

---

<sup>106</sup> Only 2 proposals (Sl. No. 61 & 62 of List A)

# Conclusion

1. The voyage of foreign direct investment through the FIPB route is quite an interesting one. It is not merely confined to giving approvals or rejecting applications. It is also about amendments, both procedural and substantive. This process entails discussion, debate, dialogue and interpretations within the constituents of the Board, the administrative ministries, the FIPB secretariat, the authorised representatives and, at times with the investor as well.
2. Needless to mention, such mass of thinking throws light on new ideas, leads to re-visiting old schools of thought and offers a broad panoramic view on many aspects of corporate governance - in an era of mergers and splits across boundaries, upcoming areas of investments, the risks and the failures alike.
3. The Board is in a unique position to influence FDI Policy. During the year 2009, it made a very strong intervention about the treatment of contraventions of the Policy. It adopted an approach that placed more faith in the investors and ignored their bonafide acts of commissions and omissions.
4. The Board also has the challenge of operationalising the new dispensation brought about by Press Notes 2, 3 and 4 of 2009. It did try to resolve this major shift amidst serious reservations by administrative ministries in sensitive sector. The deliberations of Board in 2009 will hopefully lead to satisfactory resolution of outstanding issues in 2010.
5. It is a matter of satisfaction and pride that no decision of Board was reversed or even modified in number of court cases in different High Courts of the country.
6. Overall the Board deserves credit for being fair, transparent, quick and objective in its decision making process - by no means a small achievement. We rest our case on this success.

# Annexure-I

## The Composition of the Board

**No.1/3/2003-FIU**  
**Government of India**  
**Ministry of Finance and Company Affairs**  
**Department of Economic Affairs F.I Unit**  
*New Delhi, the 18th February 2003*

Office Memorandum  
**Subject:** Foreign Investment Promotion Board

1. In terms of Presidential order No. Doc.CD-36/2003 dated 30-1-2003 carrying out amendments to the Government of India, (Allocation of Business) Rules, 1961 and the functions related to the Foreign Investment Promotion Board (FIPB) are now within the administrative responsibilities of Ministry of Finance and Company Affairs, Department of Economic Affairs.

2. With a view to operationalising the above order, in partial modification of the OM No.5(10)/96-FC(I) dated 11-7-1996, issued by the Department of Industrial Policy and Promotion (DIPP), Ministry of Industry, the following administrative arrangements are hereby introduced:

A. The FIPB will comprise the following Core Group of Secretaries to the Government:

- i. Secretary to Government, Department of Economic Affairs, Ministry of Finance and Company Affairs – Chairperson.
- ii. Secretary to Government, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.
- iii. Secretary to Government, Department of Commerce, Ministry of Commerce Industry.
- iv. Secretary to Government, Economic Relations, Ministry of External Affairs.

The Board would be able to co-opt other Secretaries to the Government of India and top officials of financial institutions, banks and professional experts of industry and commerce, as and when necessary.

Secretary, Economic Affairs will be Chairperson of the Group.

- B. The recommendations of FIPB in respect of the project-proposals each involving the total investment of Rs 600 crore or less would be considered and approved by the Finance and Company Affairs Minister. The recommendations in respect of projects each with the total investment of above Rs 600 crore would be submitted to the Cabinet Committee on Economic Affairs (CCEA)
- C. To service FIPB a separate Secretariat will be created and located in DEA. For this, such staff as are at present dedicated to FIPB work in DIPP will be transferred to DEA, Ministry of Finance.
- D. The Secretariat would receive and process the applications/proposals for foreign investment and place them before FIPB for consideration. Thereafter, it would submit the recommendations of the Board to the Minister of Finance and Company Affairs or CCEA, as the case may be, for decision. The Secretariat will ensure that all the applications received by it are put up before FIPB within 15 days of their receipt and that the Administrative Ministries must offer their comments either prior to and/or in the meeting of FIPB. The Secretariat would also be responsible for communicating to the applicants the decisions of the Government on their proposals and would carry on the activities relating to post-approval amendments, providing advice and guidance to the entrepreneurs and investors and investment promotion and facilitation.
- E. The objective, functions and procedures of FIPB will continue to be regulated by OM No. 5(10/96-FC (I) dated 11-7-1996, issued by the Department of Industrial Policy and Promotion (DIPP), Ministry of Industry, subject to the amendments included in the present OM.

**Dr Adarsh Kishore**

Additional Secretary to the Government of India

To

All Ministries/Departments of the Government of India and all others concerned.

# Annexure – II

## Extract from Allocation of Business Rules, 1961<sup>107</sup>

MINISTRY OF FINANCE

### A. Department of Economic Affairs

#### I. Foreign Exchange Management

1. Administration of the Foreign Exchange Management Act, 1999 (42 of 1999), other than enforcement work mentioned under the Department of Revenue, and all matters relating to combating financing of terrorist acts.
2. Policy relating to exchange rates of Rupee.
3. Management of the foreign exchange resources including scrutiny of proposals for imports from the foreign exchange point of view.
4. Foreign and Non-Resident Indian Investment excluding functions entrusted to the Ministry of Overseas Indian Affairs and Direct Foreign and Non-Resident Indian Investment in Industrial and Service projects.
5. Indian Direct Overseas Investment.
6. Matters concerning commercial borrowing from abroad, including terms and conditions thereof.
7. Matters concerning gold and silver.
8. Approval for foreign travel of Ministers of State Governments/ Union Territories, Members of State Legislature/Union Territories and State Government Officials.
9. Management of external debt.

#### II. Foreign Aid for Economic Development

10. All matters relating to -
  - (a) India Development Forum;
  - (b) loans, credits and grants from foreign countries, special agencies, non-governmental foundations agencies and voluntary bodies;
  - (c) loans and credits and grants from multilateral agencies;

<sup>107</sup> Source: The website of Cabinet Secretariat [http://cabsec.nic.in/abr/abr\\_scnd.htm](http://cabsec.nic.in/abr/abr_scnd.htm)

- (d) withdrawals and borrowings from International Monetary Fund;
  - (e) policy for private sector financing from International Finance Corporation.
11. Technical and Economic assistance received by India as under -
    - (a) Technical Cooperation Scheme of the Colombo Plan;
    - (b) The United Nations Technical Assistance Administration Programmes;
    - (c) Ad-hoc offers of technical Assistance from various foreign countries, special agencies, non-Government entities;
    - (d) United Nations Office of Project Services.
  12. Technical assistance given by India to the member countries of the Colombo Plan under Technical Cooperation Scheme of the Colombo Plan.
  13. All matters relating to the meetings of the Colombo Plan Council and the Consultative Committee of the Plan.
  14. All matters relating to credits extended by Government of India to other countries except Nepal, Bhutan and Bangladesh.
  15. Technical assistance received by India from or given to foreign governments, international institutions and organisations, except such as are relatable to subjects allocated to any other Department.
  16. All matters concerning United Nations Development Programme (UNDP) including Programmes or Projects funded out of UNDP Budget.
  17. Foreign Investment Promotion Board (FIPB).
  18. Policy issues relating to the United Nations Fund for Population Activities (UNFPA) and contributions to the specialised agencies of the United Nations and other U.N. Bodies.
  19. All matters relating to the Foreign Volunteers Programmes in India including the incoming United Nations Volunteers (UNV) but excluding programmes in India for overseas Indian Volunteers and outgoing volunteers under UNV.
  20. All funding by United Nations agencies.
  21. Commonwealth Fund for Technical Cooperation (CFTC).

### III. Domestic Finance

22. All matters relating to –
  - (a) currency and coinage including its designing;
  - (b) the Security and Currency Printing Presses, the Security Paper Mills and the Mints including the Assay Department and Silver Refinery, Gold Refinery, and Gold collection-cum-delivery centres;
  - (c) production and supply of Currency Note Paper, Currency and Bank Notes and Coins including Commemorative coins, postal stationary, stamps and various security forms/items.



- 23 (a) Policy measures for the regulation and development of the securities market and investor protection.
- (b) New Investments and Securities for mobilising resources from the Capital Markets. Investment Policy including investment policy of Life Insurance Corporation of India, and General Insurance Corporation of India.
24. Investment pattern for Employees' Provident Fund and other like Provident Funds.
25. Financial Policy in regard to the process of disinvestments including Disinvestments Proceeds Fund and Asset Management Company.
26. All matters relating to Tax Free Bonds.

#### IV. Budget

27. Ways and means.
28. Preparation of Central Budget other than Railway Budget including supplementary excess grants and when a proclamation by the President as to failure of Constitutional machinery is in operation in relation to a State or a Union Territory, preparation of the Budget of such State or Union Territory.
29. Market Borrowing Programme of Central and State Governments and Government Guaranteed Institutions.
30. Floatation of Market Loans by Central Government and issue and discharge of Treasury bills.
31. Administration of the Public Debt Act, 1944 (18 of 1944).
32. Fixation of interest rates for Central Government's borrowings and lending.
33. Policy regarding Accounting and Audit procedures including classification of transactions.
34. Financial matters relating to Partition, Federal Financial integration and Reorganisation of States.
35. Contingency Fund of India and administration of the Contingency Fund of India Act, 1950 (49 of 1950).
36. Monitoring of budgetary position of the Central Government.
37. Sterling Pensions-Transfer of responsibility of U.K. Government and actual calculations of liability involved.
38. Public Provident Fund Scheme.
39. Finance Commission.
40. Resources of Five Year and Annual Plans.
41. National Deposit Scheme, Special Deposit Schemes, Compulsory Deposit Scheme, Other Deposit Schemes of the Central Government.
42. Small Savings, including the administration of the National Savings Institute.
43. Duties and Powers of the Comptroller and Auditor General.
44. Laying of Audit Reports before the Parliament under article 151 of the Constitution.

45. Financial emergency.
46. Government guarantees.
47. Functions of the Treasurer of Charitable Endowments for India.

#### V. \*\*\*\*\*

- 48 -51. \*\*\*\*\*

#### VI. \*\*\*\*\*

- 52 -78 \*\*\*\*\*

### VII. Management of the Indian Economic Service

79. Management of Indian Economic Service – its cadre and all matters pertaining thereto.

### VIII. Economic Advice

80. Advice on matters which have a bearing on internal and external aspects of economic management including prices.
81. Credit, fiscal and monetary policies.

### IX Miscellaneous Acts

82. The Government Savings Bank Act, 1873 ( 5 of 1873).
83. Section 20 of the Indian Trustes Act, 1882 ( 2 of 1882) dealing with investments.
84. The Metal Tokens Act, 1889 (1 of 1889).
85. The Charitable Endowments Act, 1890 ( 6 of 1890).
86. The Indian Coinage Act, 1906 (3 of 1906).
87. The Indian Security Act, 1920 ( 10 of 1920).
88. The Currency Ordinance, 1940 (4 of 1940).
89. The International Monetary Fund and Bank Act, 1945 (00 of 1945).
90. The Finance Commission (Miscellaneous Provisions) Act, 1951 (33 of 1951).
91. The Government Savings Certificates Act, 1959 (46 of 1959).
92. The Compulsory Deposit Scheme Act, 1963 (21 of 1963).
93. The Unit Trust of India Act, 1963 (52 of 1963).
94. The Legal Tender (Inscribed Notes) Act, 1964 (28 of 1964).
95. The Asian Development Bank Act, 1966 (18 of 1966).
96. The Public Provident Fund Act, 1968 (23 of 1968).
97. The Small Coins (Offences) Act, 1971 (52 of 1971).
98. The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act' 1971 (56 of 1971).

\*\*\*\*\* Deleted by amendment Series No. 290 dated 28th June, 2007.

99. The Additional Emoluments (Compulsory Deposit) Act, 1974 (37 of 1974).
100. The African Development Fund Act, 1982 (1 of 1982).
101. The African Development Bank Act, 1983 (13 of 1983).
102. The Securities and Exchange Board of India Act, 1992 (15 of 1992).
103. The Administration of Securities Contracts (Regulation) Act, 1956 (42 of 1956).
104. The Depositories Act, 1996 (22 of 1996).
105. The International Finance Corporations (Status, Immunities and Privileges) Act 1958 (42 of 1958).

# Annexure - III

## Instructions for processing of proposals by FIPB

### Part-II<sup>108</sup>

In continuation of the instructions for expeditious and streamlined processing the proposals issued on 1st December 2006, following additional instructions are being issued for compliance hence forth:

1. The **proposals received for seeking amendment** to the original approval shall be processed as per the following timelines:
  - a. The proposals for amendment in existing activity shall also be received in 15 copies like the fresh proposals.
  - b. Immediately after the receipt, the proposal would be circulated to all permanent members of FIPB, all AMs (as per the list when the original proposal was considered) and any additional AMs, if required, because of the nature of proposed new activity/ transaction, within 4 (four) working days of the receipt.
  - c. Not more than five (working) working days will be taken by the FC-II section for getting the decision on (i) whether there is any shortcoming in terms of documents/ papers and communicating it to the applicant and/ or (ii) whether the proposal needs to be taken to the FIPB board meeting or the amendment can be noted on file only.
  - d. Any communication to the applicant/ consultant would be sent by e-mail (if address is available) and fax both. If the answer is not received within five days, a reminder would be sent. If the response is still not received, then the concerned Dealing Hand/ SO/US (FIPB) would also telephonically contact the company/ applicant about the requirement and note their response on file, because it has been found that sometimes the communication from the FIPB unit does not reach the intended addressee.
  - e. If the proposal requires consideration in the Board meeting, same timelines would be followed, as decided for fresh proposals.
2. In both fresh as well as amendment proposals, the **additional information/papers** received from the applicant would immediately be **circulated** to all the permanent members as well as AMs concerned.

<sup>108</sup> Notified by O.M. No. INSTR/1/07-08/FIPB dated 8th November 2007 of Department of Economic Affairs, Ministry of Finance, Government of India

It should be clarified in the communication to the applicant/ consultant (seeking clarification/additional information/ additional documents) that the information/documents have also to be submitted in 15 copies.

3. If any proposal (fresh/ amendment) is **withdrawn** by the applicant, the information of withdrawal should also be sent to all the permanent members as well as AMs concerned.
4. The copy of **Press Release** sent after approval of Minutes by FM, should also be sent by e-mail to all permanent members as well as to the AMs invited for that particular meeting.
5. The **approvals letters** for fresh/amendment proposals are to be issued within 3 (three) working days after the receipt of approved minutes. To ensure compliance of this timeline, advance action would be taken for issue of approval letters by entering the basic information in the computer latest by the date of the meeting.
6. To ensure uniformity and streamlining the process of **determining AMs, following templates** shall be observed, apart from the instruction given, time to time:

S. No.	Nature of the Proposal	Necessary AM (Apart from others depending on the nature of activity)
1	All proposals attracting Press Note I/ 2005	DIPP
2	All proposals of Telecommunication sector (UASL, Infrastructure provider, email, voice mail etc.)	MHA & MEA
3	All defence sector proposals	Deptt. Of Defence Production, MHA, MEA
4	Financial Infrastructure Companies (Stock Exchange/ Clearing Corporations/ Depositories)	DEA(CM) Division
5	Proposals involving investment by foreign companies owned by Resident Indians/ entities	Department of Revenue (International Taxation Division)

7. All proposals sent to Department of Revenue would be sent in two copies, marking them separately as
  - i. Department of Revenue (CBDT)
  - ii. Department of Revenue (CBEC)
 so that they are examined by the Department from all the angles.
8. In all proposals received from the DIPP for single brand retail, basic information related to the Brand/ Foreign investor should be collected from the website and should be attached with the briefs for internal circulation.
9. To ensure minimum of correspondence with the applicants for getting required essential information/ documents, the enclosed notice should immediately be displayed on the FIPB website ( hyperlinked with a new icon “CHECKLIST FOR INFORMATION/DOCUMENTS FOR FIPB PROPOSALS” on the home page of FIPB ) as well as pasted at the facilitation counter. SO(FC-I) shall ensure communication of this information to NIC for uploading.

These instructions shall be complied with immediate effect

*Encl.: Notice for applicants to published on website and Facilitation Counter*

**D.K. Singh**  
Director (Inv. & FIPB)

## Annexure – IV

# List of proposals where FIPB/ CCEA imposed the condition of compounding

S. No.	Meeting No.	Meeting Date	Item No.	Name of proposal	Reason for compounding
1.	106	20.09.2007	16	Devas Multimedia Private Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company <sup>117</sup> .
2.	106	20.09.2007	18	M/s Manipal Universal Learning Private Limited, Bangalore	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
3.	106	20.09.2007	23	M/s IBSS Techno Park Limited (now M/s Taksheel solutions Limited)	Issuance of shares for consideration other than cash <sup>118</sup> .
4.	109	16.11.2007	2	M/s Georgia-Pacific Kemrock International Private Limited, Vadodara	Issuance of shares against pre-incorporation expenses.
5.	110	30.11.2007	17	M/s Manipal Universal Learning Private Limited, Bangalore	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
6.	112	18.01.2008	10	M/s Elbee Express Private Limited, Mumbai	Issuance of preference shares to Non-Resident persons. The company is engaged in the business of providing courier and logistics services.
7.	112	18.01.2008	17	M/s Colorcon Limited	Non fulfilment of condition of disinvestment of 26% shares.
8.	112	18.01.208	39	M/s JSW Energy Limited, Mumbai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
9.	114	07.03.2008	30	M/s Redington India Limited, Chennai ( <b>REDIL</b> )	Downstream investment by way of acquisition of existing stake in an Indian company by way of transfer.
10.	114	07.03.2008	32	M/s Cushman & Wakefield India Limited (C&W India)	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
11.	118	09.05.2008	21	M/s Devas Multimedia Private Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
12.	119	23.05.2008	16	M/s Ager Hotels India Private Limited, Haryana	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
13.	120	04.06.2008	5	M/s Apollo Health Street Limited, Chennai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.

<sup>117</sup> In this case the company had not obtained the prior approval of FIPB for conversion into foreign owned operating cum holding company, therefore Board directed that the matter be referred to RBI with intimation to the applicant so that RBI can initiate appropriate action under FEMA, for the violation already committed by the applicant. Once the process of compounding or other suitable action, as RBI deems fit, is completed the applicant may approach FIPB for approval of the status as operating cum holding company.

<sup>118</sup> In this proposal the Board observed that it would not be proper for Board to grant post facto approval of a violation of FDI policy. Accordingly, the Board recommended that the proposal be referred to RBI with intimation to the application for appropriate action under FEMA and the applicant be advised to approach RBI.

S. No.	Meeting No.	Meeting Date	Item No.	Name of proposal	Reason for compounding
14.	120	04.06.2008	15	M/s Golboot Holdings Limited, Cyprus	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
15.	121	24.06.2008	12	M/s HSBC Securities and Capital Markets (India) Private Limited, Mumbai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
16.	123	29.07.2008	19	M/s exlservice.com(India) Private Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
17.	124	08.08.2008	5	M/s Orient Green Power Company Limited, Chennai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
18.	124	08.08.2008	7	M/s JP Morgan India Property Mauritius Company II, Mauritius	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
19.	125	26.08.2008	8	M/s JRG Securities Limited, Kerala	Warrants were issued without the approval of FIPB.
20.	125	26.08.2008	15	M/s Ramky Infrastructure Limited, Hyderabad	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
21.	125	26.08.2008	22	M/s VLCC Health Care Limited, New Delhi	Warrants were issued without the approval of FIPB.
22.	125	26.08.2008	30	M/s Aditya Birla Telecom Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
23.	127	30.09.2008	2	M/s Persistent Systems Limited, Pune	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
24.	127	30.09.2008	8	M/s Rosell Tea Limited, Kolkata	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
25.	127	30.09.2008	19	M/s Shalom Communications Limited	<i>Ex-post facto</i> approval for issue of equity shares on non repatriable basis
26.	128	24.10.2008	12	M/s Etisalat Software Solutions Private Limited	Issuance of shares against the pre-incorporation expenses.
27.	128	24.10.2008	13	M/s Mahindra Holidays and Resorts India Limited, Chennai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
28.	128	24.10.2008	31	M/s Barings India Private Limited, (now known as M/s Macquarie Capital Advisers (India) Private Limited)	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
29.	128	24.10.2008	34	M/s Balaji Telefilms Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
30.	128	24.10.2008	43	M/s Tutorvista Global Private Limited, Chennai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
31.	128	24.10.2008	51	M/s Amar Ujala Publications Limited	As per scheme of amalgamation approved by the Hon'ble Court of Delhi, foreign equity participation increased from 18% to 26% in the company engaged in the publication sector.
32.	129	18.11.2008	12	A.L.L. Services Under 1 roof (India) Private Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
33.	129	18.11.2008	15	M/s ORG Informatics Limited, Gurgaon	Warrants were issued without the approval of FIPB.
34.	129	18.11.2008	28	Cholamandalam DBS Finance Limited	Warrants were issued without the approval of FIPB.
35.	129	18.11.2008	41	M/s CMA CGM Agencies Worldwide, France	Regularization of the violation of Press Note 18 of 1998 now Press Note I of 2005.
36.	130	12.12.2008	9	M/s Sona Koyo Steering Systems Limited	Warrants were issued without the approval of FIPB.
37.	130	12.12.2008	12	M/s Kolkata West International City Private Limited, Kolkata	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
38.	130	12.12.2008	40	M/s Krishnapatnam Port Company Limited, Hyderabad	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
39.	131	09.01.2009	5	M/s Alcatel-Lucent India Limited, New Delhi	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.

S. No.	Meeting No.	Meeting Date	Item No.	Name of proposal	Reason for compounding
40.	131	09.01.2009	8	M/s Rama Cylinders Private Limited, Mumbai	Warrants were issued without the approval of FIPB.
41.	131	09.01.2009	9	M/s Universal Music India Private Limited, Mumbai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
42.	131	09.01.2009	10	M/s Cambridge Technology Enterprises. Limited	Warrants were issued without the approval of FIPB.
43.	131	09.01.2009	15	M/s NTT Docomo Inc. Japan	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
44.	131	09.01.2009	16	M/s NTT Docomo Inc., Japan	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
45.	131	09.01.2009	29	M/s Bharti Telemedia Limited, New Delhi	Indirect foreign holding in the company was brought without FIPB approval in Teleport Sector.
46.	131	09.01.2009	35	M/s Morgan Stanley Mauritius Company Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
47.	131	09.01.2009	36	M/s Radhakrishna Hospitality Services Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
48.	132	22.01.2009	10	M/s Interactive Avenues Marketing Solutions Private Limited, Mumbai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
49.	133	23.02.2009	9	M/s Avendus Capital Private Limited, Mumbai	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
50.	137	22.05.2009	11	M/s Travelocity.com Private Limited, Mumbai	<i>Ex-post facto</i> approval for issue of equity shares against payments made by the parent holding company on behalf of the wholly owned Indian subsidiary.
51.	137	22.05.2009	16	M/s Era Infra Engineering Limited, New Delhi	Warrants were issued without the approval of FIPB.
52.	139	19.06.2009	40	M/s Eros International Media Private Limited, Mumbai	Regularization of the violation of Press Note 18 of 1998 now Press Note 1 of 2005.
53.	140	10.07.2009	9	M/s Krizm Hotels Private Limited, New Delhi	Warrants were issued without the approval of FIPB.
54.	140	10.07.2009	22	M/s Teesta Urja Limited	Regularization of issuance of partly paid shares without FIPB approval.
55.	141	24.07.2009	5	M/s Quattrro BPO Solutions Private Limited	<i>Ex-post facto</i> approval for issuance of sweat equity shares without FIPB approval.
56.	141	24.07.2009	15	M/s United Breweries (Holdings) Limited, Bangalore	<i>Ex-post facto</i> approval for allotment of fully paid up shares on conversion of equity warrants; change of status from operating company to operating company to make further downstream investments.
57.	142	21.08.2009	7	M/s NR Hytech Engineers Private Limited, Thane	Issuance of shares against the import payables without FIPB approval.
58.	143	28.08.2009	4	M/s Mundus Real Estates Private Limited, Margao	Violation of minimum capitalisation norms and conditions as stipulated in Press Note 2 of 2005.
59.	143	28.08.2009	9	M/s Ramboll Whitbybird Holdings Limited, UK	Regularization of the violation of Press Note 1 of 2005.
60.	143	28.08.2009	33	M/s Daimler India Commercial Vehicles Private Limited (formerly known as Daimler Hero Commercial Vehicles Limited)	Post facto approval for the increase in the foreign equity participation from 60% to 100%. Earlier proposal was approved by CCEA.
61.	144	11.09.2009	3	M/s Ramboll Singapore Pte. Limited, Singapore	Regularization of the violation of Press Note 1 of 2005.
62.	144	11.09.2009	13	M/s Strata Geosystems India Private Limited	To regularize the foreign inward remittances.
63.	144	11.09.2009	20	M/s Sistema Shyam teleservices Limited (SSTL)	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.
64.	145	09.10.2009	4	M/s UE Development India Private Limited	<i>Ex-post facto</i> approval for change of status from operating company to operating cum holding company.



S. No.	Meeting No.	Meeting Date	Item No.	Name of proposal	Reason for compounding
65.	145	09.10.2009	39	M/s Sahara One Media and Entertainment Limited, Mumbai	Regularization of foreign investment in a company engaged in the Up-linking a Non-news and Current Affairs Channel.
66.	146	30.10.2009	2	M/s Vaibhav Gems Limited	Warrants were issued without the approval of FIPB.
67.	146	30.10.2009	8	M/s Publish-Industry India Private Limited, Pune	Regularization of foreign investment in a company engaged in the publishing of specialaity magazines.
68.	146	30.10.2009	13	M/s Reliance Asset Reconstruction company Limited	Regularization of issuance of partly paid shares without FIPB approval.
69.	147	20.11.2009	1	M/s Bengal Aerotropolis Projects Limited, Kolkata	Regularization of issuance of partly paid shares without FIPB approval.
70.	147	20.11.2009	14	M/s Luxury Goods Retail Private Limited	Investment made by an Investing company without FIPB approval.



