# JOINT VENTURE

A foreign company, depending upon its nature of business activities in India, may operate through an Indian company in any of the following manners:-

- As a joint venture with Indian partner
- As a wholly owned subsidiary ( a company where 100 per cent share holding is held by the foreign company)

A joint venture company in India is like any other company for the purposes of Indian Companies Act, Indian Income-tax Act and other applicable laws, rules and regulations. Where the foreign party does not confine itself only to the transfer of technical know-how to the Indian party but also agrees for financial participation with the Indian party, the parties conclude joint venture agreement.

**Collaboration Agreements:**

The foreign entrepreneur would normally enter into an agreement with its Indian partner for carrying on business operations in India. Such agreements are called collaboration agreements. The rights and obligations of the foreign party will be primarily contained in the collaboration agreement. It is therefore, recommended that the collaboration agreement should be made to form a part of the Articles and Memorandum of Association of the joint venture company. Furthermore, the collaboration agreement should be specifically approved in the meeting of the Board of Directors of the joint venture company.

**Board Meetings:**

The Articles of Association should be properly drafted to provide for appropriate representation of the foreign enterprise in the Board of Directors of the company. All important resolutions should be made, as far as possible, to have consent from the directors representing the foreign party.

**Alternate Directors:**

The foreign company may also consider appointment of alternate directors to represent them. Because, at times, it may not be possible for the foreigners to regularly visit India to oversee the Indian company's operations.

**Statutory Auditor:**

The auditor should be appointed with the prior consent of the foreign company. This can be ensured through the collaboration agreement as well as specific understanding with the Indian partner.

**Transfer of shares:**

There should be an adequate provision both in the collaboration agreement and if necessary, in the Articles of Association placing appropriate restrictions on transfer of shares by the Indian partners.

## FOREIGN COLLABORATION

There are two types of foreign collaboration:

a. financial collaboration (foreign equity participation) where foreign equity alone is involved ;

b. technical collaboration (technology transfer) involving licensing of technology by the foreign collaborator for appropriate compensation.

There are three relevant approving authorities:

1. the Reserve Bank of India (RBI); and
2. the Department of Industrial Development in the Ministry of Industry, Government of India.
3. Foreign Investment Promotion Board (FIPB): The FIPB is the nodal, single window agency for all matters relating to foreign direct investment (FDI) as well as promoting investment into the country. Secretary, Industry (Department of Industrial Policy and Promotion) chairs it.

Its objective is to promote Foreign Direct Investment into India: -

[I] by undertaking investment promotion activities in India and abroad,

[ii] facilitating investment in the country by international companies, non-resident Indians, and other foreign investors,

[iii] through purposeful negotiation/discussion with potential investors,

[iv] early clearance of proposals submitted to it, and

[v] review policy and put in place appropriate institutional arrangements, transparent rules and procedures and guidelines for investment promotion and approvals.

The Foreign Investment Promotion Board considers proposals which are put to it after processing by the Secretariat for Industrial Assistance (SIA) and the recommendation of the FIPB up to Rupees 6 billion is sent to the Industry Minister who finally grants the approval and in case of investment proposals above Rupees 6 billion is sent to the Cabinet Committee on Foreign Investment (CCFI) who then grants the approval. The approvals so granted are then communicated by the SIA to the applicant. As such there is no fixed time frame but as far as possible the total process usually takes six weeks. A list of industries has been notified by the Government of India in which investment can be made within the ceilings specified without seeking the approval of the Government of India and the powers for granting the automatic approval have been vested in the Reserve Bank of India, which grants such approval after ascertaining whether the proposal meets the parameters laid down for the industries as prescribed by the Government.

**Validity of foreign collaboration approval:**

Government approval for foreign collaboration is valid for an initial period of two years, which may be extended for one more year. In case any further extension is needed, beyond the period of three years, it will be considered by the Foreign Investment Promotion Board on the recommendation of the administrative ministry.

A representation on the foreign collaboration approval of the Government, if any required to be made, may be sent to the concerned department with reference to the item of manufacture along with a copy of the same to the Secretariat for Industrial Assistance. The administrative ministry will examine the request keeping in view the various steps taken by the applicant for implementation of the foreign collaboration approval and make suitable recommendation for consideration by the appropriate authority.

**Execution of foreign collaboration agreement:**

The Indian party and the collaborator should execute an agreement on foreign collaboration within the validity, or extended validity, period strictly in conformity with the terms prescribed by the Government. The letter of approval issued by the Secretariat for Industrial Assistance will be made a part of the foreign collaboration agreement to be executed between the Indian company and the foreign collaborator and any provision of the agreement which is not covered by the said letter or is at variance with the provisions of that letter shall be void and be not binding on the Government of India.

This agreement will be scrutinised by the concerned ministry/department. If it is found to be in accordance with the terms specifically approved by the Government, a letter approving the terms of the agreement will be issued to the party. A copy of the agreement will be sent to the Reserve Bank of India (RBI) through the Department of Economic Affairs to enable the RBI to authorise remittances to the foreign collaborator.

## Government Policy

The Government of India's policy on foreign private investment is based mainly on the approach adopted in 1991. The Industrial Policy 1991 is based on the view that while freeing Indian industry from official controls, opportunities for promoting foreign investments in India should also be fully exploited. It is felt that foreign investment can bring attendant advantages of technology transfer, marketing expertise, the introduction of modern managerial techniques and new possibilities for the promotion of exports.

## Areas of Foreign Collaboration

From time to time, the Government of India issues a list of industries indicating 'where foreign investments may be permitted'. The lists are illustrative only. Although a broad technology base has been achieved in the country, nevertheless a need to update the production technology may arise due to constant technological advance in the developed countries. The Government of India (Foreign Investment Promotion Board) also considers import of technology in industries of the industrial policy in which foreign investments and technical collaborations are freely allowed.

## SECTOR SPECIFIC GUIDELINES FOR FOREIGN DIRECT INVESTMENT

| SECTOR | GUIDELINES |
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| **Banking** | NRI holding may be up to 40%, inclusive of equity participation by other foreign investors. Foreign Investment of up to 20% is permitted by foreign banking companies or financial Institutions. Multilateral Institutions are allowed to invest within the overall foreign direct investment cap of 40% in case of shortfall in foreign direct investment contribution by NRIs. |
| **Civil Aviation** | In the domestic Airlines sector:<br>• FDI up to 40% permitted<br>• 100% investment by NRIs/OCBs is allowed |
| **Petroleum** | • Under the exploration policy FDI up to 100% is allowed for small fields through competitive bidding; up to 60% for unincorporated JV; and up to 51% for incorporated JV with a No Objection Certificate for medium size fields.<br>• For refining, FDI is permitted up to 26% (PSU holding of 26% and balance 48% |

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| | public). In case of private Indian company, FDI is permitted up to 100%, [Press Note 7 (2000 Series) dated 14th July 2000] |
| **Housing & Real Estate** | No foreign investment is permitted in this sector. NRI/OCBs are allowed to invest. The scheme specific to NRIs and OCBs covers the following:<br><br>• Development of serviced plots and construction of built-up residential premises.<br>• Investment in real estate covering construction of residential and commercial premises including business centres and offices. |
| **Coal and Lignite** | • Private Indian companies setting up or operating power projects as well as coal or lignite mines for captive consumption are allowed FDI up to 100%.<br>• 100% FDI is allowed for setting up coal processing plants subject to the condition that the company shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing. |
| **Venture Capital Fund (VCF) and Venture Capital Company (VCC)** | • An offshore venture capital company may contribute up to 100% of the capital of a domestic venture capital fund and may also set up a domestic asset management company to manage the fund.<br>• VCFs and VCCs are permitted up to 40% of the paid up corpus of the domestic unlisted companies. Investment in a single company by a VCF/VCC shall not to exceed 5% of the paid-up corpus of a domestic VCF/VCC. |

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| **Trading** | Trading is permitted under automatic route with FDI up to 51% provided it is primarily export activities, and the undertaking is an export house/trading house/super trading house/star trading house.<br><br>However, under the FIPB route 100% FDI is permitted in case of trading companies for the following activities:<br><br>• exports;<br>• bulk imports with export/expanded warehouse sales;<br>• cash and carry wholesale trading; |
| **Power** | Up to 100% FDI allowed in relation to electric generation, transmission & distribution (other than atomic reactor power plants) [Press Note 7 (2000 Series) dated 14th July, 2000] |
| **Drugs & Pharmaceuticals** | • FDI up to 74% in the case of bulk drugs, their intermediates and formulations (except those produced by the use of recombinant DNA technology) would be covered under automatic route.<br>• FDI above 74% for manufacture of bulk drugs will be considered by the Government on case to case basis for manufacture of bulk drugs from basic stages and their intermediates and bulk drugs produced by the use of recombinant DNA technology as well as the specific cell/tissue targeted formulations provided it involves manufacturing from basic state. |
| **Roads & Highways, Ports and Harbours** | FDI up to 100% under automatic route is permitted in projects for construction and maintenance of roads, highways, vehicular bridges, toll roads, vehicular tunnels, ports and harbours. |
| **Hotels & Tourism** | i. 100% FDI is permissible in the sector<br><br>ii. Automatic route is available up to 51% |

subject to the following parameters. For foreign technology agreements, automatic approval is granted if

- Up to 3% of the capital cost of the project is proposed to be paid for technical and consultancy services including fees for architects, design, supervision, etc.
- Up to 3% of net turnover is payable for franchising and marketing/publicity support fee, and
- Up to 10% of gross operating profit is payable for management fee, including incentive fee.

**Pollution control and management**

FDI up to 100% in both manufacture of pollution control equipment and consultancy for integration of pollution control system is permitted under automatic route.

**Advertising and films**

Automatic approval is available for the following:

- Up to 74% FDI in advertising sector.
- Up to 100% FDI in film industry (i.e., film financing, production, distribution, exhibition, marketing and associated activities relating to film industry

**E-Commerce**

FDI up to 100% subject to the condition that such companies should divest 26% of their equity in favour of the Indian Public in 5 years if these companies are listed in other parts of the world. These companies would engage only in Business (B2B) e-commerce & not in retail trading. [Press Note 7 (2000 Series) dated 14th July, 2000]

**Internet service Providers (ISPs)**

Ministry of commerce and Industry vide Press Note - 9 (2000 series) dated 8th, September 2000, has allowed 100% FDI for the following activities for the telecom sector;

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| | • ISPs not providing gateways (both for satellite and submarine cables)<br>• Infrastructure Providers providing dark fibre (IP Category I)<br>• Electronic Mail; and<br>• Voice Mail |
| **Insurance** | Foreign equity up to 26% was allowed in the Insurance Sector subject to approval from SIA/FIPB. However, in a recent policy decision Foreign Equity with an investment cap of 26% will be put on the Automatic Route of Approval. |
| **Airports** | 100% FDI in Airports subject to FIPB clearance. 74% FDI through automatic route. |
| **Defence** | 26% FDI in defence production, subject to FIPB clearance. |
| **Courier Service** | 100% FDI in Courier Service through automatic route. |
| **MRTS (Mass Rapid Transport System)** | • 100% FDI in MRTS in all metro cities through automatic route.<br>• 100% FDI in development of townships subject to FIPB clearance. |