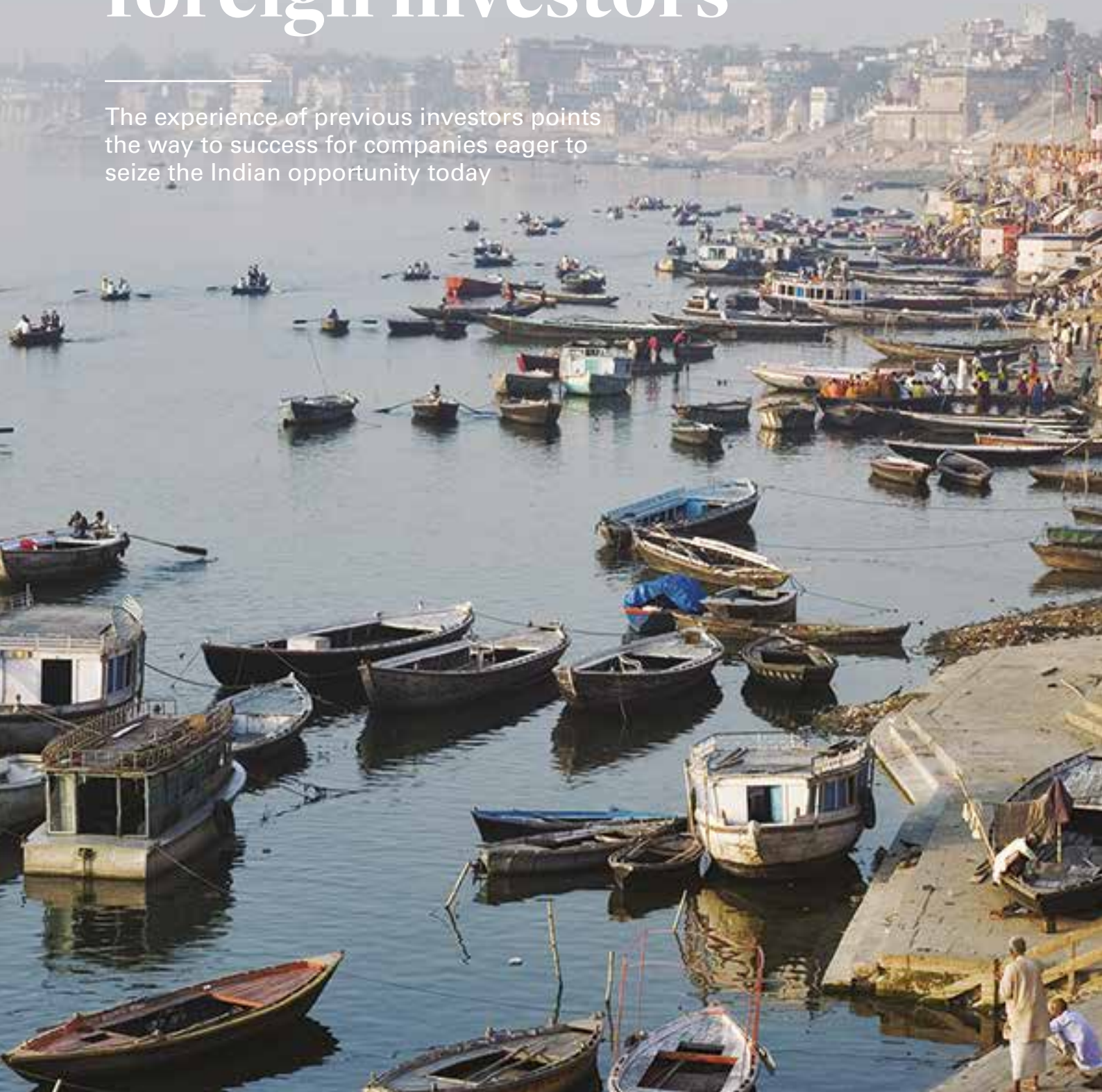


# Navigating India: Lessons for foreign investors

The experience of previous investors points the way to success for companies eager to seize the Indian opportunity today





Indian Prime Minister Narendra Modi

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# Paths to success in India

Foreign companies that learn from the experience of previous investors can navigate the challenges of investing in India

**O**ptimism for doing business in India is rising. Enthusiasm rocketed when Narendra Modi was elected prime minister on a business-friendly reform agenda in May 2014, but positive signs were evident before the election. A survey conducted last summer by Ernst & Young (EY) found that 53 percent of more than 500 business leaders around the world planned to enter or expand their operations in India within the following 12 months.

Indeed, the list of multinationals that are making long-term investments in India includes heavyweights such as Diageo, Etihad Airways, GDF SUEZ, GlaxoSmithKline, IKEA, Singapore Airlines, Starbucks, Tesco, Unilever, Vodafone and Volkswagen.

Yet, GDP growth, which peaked at 10.3 percent in 2010, was at 5 percent in 2013. Moreover, FDI was down by more than 30 percent from its 2008 historical high of US\$43 billion. While both are expected to increase in 2014 and 2015, virtually everyone agrees that India continues to fall short of its tremendous potential.

Why? The challenges of doing business in India are well-documented. In the World Bank's 2014 "Ease of Doing Business" index, India placed 134th out of 189 countries, behind Pakistan and Yemen. It ranked 158th on ease of paying taxes and fell almost to the bottom of the list on ease of enforcing contracts.

Persistent corruption compounds the challenges. Sixty-nine percent of respondents to a 2013 EY survey of global executives said fraud is an inevitable cost of doing business in India.

Many foreign investors may be motivated as much by fear as by optimism—compelled by the belief that they must invest in India to achieve their ambitions, even though they know the risks are great and the outcome is highly uncertain.

As a global law firm, we believe in India's potential, and we are optimistic about its future. But we know that even if Prime Minister Modi is wildly successful in his reform efforts, change will take time. Many companies can't afford to wait for improved conditions before developing a stronger presence in India. Competition for the best opportunities is already fierce and will only intensify as the business climate improves.

Fortunately, investing in India today is no longer a step into the dark. Many multinationals have invested in India over the past two decades, and their experiences—good and bad—offer important lessons for companies that wish to enter or expand their activities in the country today.

We identified four guidelines for helping companies navigate India's complex business and regulatory landscape:

- Understand the regulatory regime
- Interpret regulations conservatively
- Evaluate joint venture opportunities in forensic detail
- Build in commercial protections

All companies that operate in India face unique challenges, and there are no easy rules for success. But every company can benefit from the experience of others. We offer these guidelines in the belief that those who learn from the past and strive to understand the present are most likely to succeed in the future.



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## Understand the regulatory regime

India's business laws and regulations are constantly evolving. That's true for all countries, but changes are more frequent and unexpected in emerging economies than in developed ones.

That does not mean that rules change arbitrarily. India's laws and regulations reflect the political compromises required to balance the complex and conflicting demands of multiple constituencies. In the realm of foreign investments, authorities must balance competing imperatives, such as the need to attract foreign capital, while ensuring that local businesses continue to thrive; facilitate the transfer of foreign technology and know-how while protecting legitimate

business and property rights; create jobs while recognizing the demands of labor unions; and promote industrial growth while supporting the agrarian economy and the rights of small farmers.

In India, the necessary compromises often emerge from a process of trial and error and are often reflected in loosely drafted policies, press notes, circulars, clarifications, pronouncements on digital bulletin boards, amendments and occasional policy reversals. The resulting rules often have unintended consequences, and some are so convoluted as to be impracticable.

But the history of why and how these compromises were made reveals the intentions of

the legislators and the regulators who drafted them. This is key to navigating India's legal and regulatory landscape. Companies that understand the motivations driving policies are more likely to understand how the rules will be interpreted in the future—and they will be better able to position themselves for success.

The challenge for foreign companies is illustrated by the difficulties many have faced in navigating the government's evolving rules for Foreign Direct Investment (FDI) in single-brand and multi-brand retailing. The regulatory landscape for FDI in these segments has been uncertain since 2006, when the government first permitted foreign access to the wholesale and single-

### The rocky road for multi-brand retailers

India's FDI policy for retail trade has taken numerous twists and turns in the last decade. In 2006, foreign companies were given permission to own 100 percent of a wholesale cash and carry business in India. However, to prevent foreign-owned wholesalers from engaging in retail trade, the government prohibited them from generating more than 25 percent of their sales from "group companies" (companies that are owned or controlled by the same corporate parent or individual). Several foreign retailers pursued strategies that relied on apparent loopholes opened up by unclear language in the regulations. Many of them formed joint ventures with Indian partners to become back-end wholesale suppliers to their partners' retail businesses. This effectively enabled the foreign partner to reap economic benefits as if it owned the retail businesses directly. Unsurprisingly, the Indian government eventually determined that these structures violated the intentions of the regulations, and many of the foreign partners had to exit these joint ventures.

In 2006, the government issued regulations permitting foreign companies to own 51 percent of a single-brand retail operation; this was increased to 100 percent in 2011. Also in 2011, the government permitted foreign companies to own 51 percent of a multi-brand retail operation (e.g., a supermarket or department store). But later that year, in response to intense political opposition, the multi-brand regulations were revoked, only to be reintroduced in 2012. The new regulations introduced onerous and ambiguous conditions, including that:

- Foreign ownership of multi-brand retail stores was allowed only in towns with a population of at least one million people, and each state was given full discretion to impose further restrictions, including outright bans
- Foreign companies were required to invest US\$100 million in their businesses, and 50 percent of that sum had to be invested in back-end infrastructure within the first three years of operation
- Thirty percent of the products foreign companies sold had to be sourced from Indian suppliers

Each of these conditions has a clear rationale, but in practice they make it very difficult for foreign companies to own multi-brand retailers. Few major players have opened stores in India as a result.



## India's laws and regulations reflect the political compromises required to balance the complex and conflicting demands of multiple constituencies.

brand retail segments. In 2011, the regulators expanded access to single-brand retailing and opened access to multi-brand retailing. But the government also took steps to reinforce limits on foreign access to retail trade, particularly to protect the vast number of small domestic retailers that might have been threatened by an influx of large foreign competitors. A number of foreign retailers suffered setbacks when the regulators interpreted the rules—or changed them—in ways that the retailers didn't expect. Yet, the regulators' intentions were fairly clear all along, and the change in direction probably would not come as a surprise to those familiar with the historical and political forces at work (for details, see the sidebar "The rocky road for multi-brand retailers").

Similarly, the new Companies Act, which was enacted in 2013, illustrates why it is important to understand the motivations of the regulators. While many foreign investors were disappointed that the Companies Act, 2013 did not simplify corporate governance rules and follow many international precedents, Indian legislators appear to have been motivated instead by a desire to address several high-profile corporate scams that have occurred in India in recent years.

Foreign exchange regulations, which affect every cross-border

### Convertible securities and put options

Indian companies can borrow in foreign currency only in accordance with very restrictive conditions prescribed by India's bank regulator, the Reserve Bank of India (RBI). However, equity investments are subject to more liberal rules. Many investors, in keeping with their practices in other countries and driven by commercial imperatives, made equity investments in the form of debt or preferred securities that were convertible into equity securities under certain circumstances or repayable or redeemable like debt obligations. Initially, RBI viewed such convertible debt and preferred securities as equity securities and did not subject them to the rules applicable to foreign currency loans. However, in 2007, RBI viewed them as a way to circumvent the restrictions on foreign currency loans and closed the door on such convertible securities except where such securities could not be repaid or redeemed like true debt obligations and were always required to be converted into equity securities.

To mitigate downside risks, foreign investors tried to get around those restrictions by negotiating put options to sell equity shares to Indian promoters at pre-agreed prices that assured minimum expected returns to investors. Indian authorities, including RBI, initially turned a blind eye toward such structures, but later raised questions about their validity. When the investors were not deterred, RBI completely prohibited such structures, but then revoked the prohibition within months. Recently, the Indian regulators have expressly permitted put options subject to specific conditions that restrict assured returns. In each instance, the rationale behind the rules were clear—namely, debt or debt-like obligations are not favored—but many foreign investors took advantage of the loopholes only to find that subsequent regulatory pronouncements rendered their structures unenforceable.

transaction involving India, offer another case in point. The core of these regulations is contained in the Foreign Exchange Management Act (FEMA), 1999. But a blizzard of additional rules, regulations, circulars, notifications, press notes and clarifications have been issued since then, and even the most diligent professional may have difficulty keeping up with them. As with the FDI policy, FEMA is teeming with complexity and ambiguity.

There is an underlying logic to these regulations, however. They are best understood in the context of the 1991 foreign exchange crisis that nearly caused India to default on its foreign currency obligations. That experience left the country and its regulators with a deeply ingrained aversion to foreign debt, particularly short-term debt that could be swiftly repatriated out of the country, and it has remained reluctant to permit

free repatriation of foreign exchange out of the country.

To counter the crisis, India underwent a process of economic liberalization that expanded opportunities for foreigners to invest in the country. India's foreign exchange reserves now stand at approximately US\$320 billion (up from less than US\$1 billion at the height of the country's balance of payments crisis in 1991). However, the country's strong aversion to foreign debt and its tendency to restrict free repatriation of foreign exchange out of the country persists to this day (for more details on the approach of Indian regulators to debt and debt-like instruments, see the sidebar "Convertible securities and put options").

## Interpret regulations conservatively



**When the economics of a deal depend on an aggressive, technical interpretation of the law, companies should think twice.**

It is particularly difficult for companies from developed economies to understand regulators' intentions—and not just because foreign companies often do not understand the rationale behind India's rules. In developed countries, with some exceptions, authorities are more likely to apply commercial laws as written, prioritizing an understanding of what the law actually states over what the lawmakers intended. In India, rules are often more loosely articulated, leaving more room for authorities to account for rule makers' intentions when the rule is applied.

Faced with regulatory ambiguities, foreign investors often rely on technical interpretations that open up attractive commercial opportunities. But even the most elegant technical solutions are vulnerable when they conflict with the regulators' underlying objectives, regardless of what the regulation in question explicitly states.

The lesson is clear: When regulations are ambiguous, foreign companies should hew to conservative interpretations that do not leave them vulnerable to later decisions by authorities that could compromise their business models. Indeed, many foreign investors that have taken creative approaches have subsequently had the regulatory rug pulled out from under them, sometimes destroying the economics of their deals.

Consider the rules for foreign investments in real estate development activities. India's FDI policy requires foreign companies investing in real estate development activities to invest at least US\$10 million in wholly owned businesses, or US\$5 million in local joint ventures that they enter into with Indian partners. In both cases, regulations required that the "original investment" be locked in for three years.

However, the guidelines were unclear about what constituted a

local joint venture and what was meant by original investment. Many foreign firms took a liberal approach in following the rules. They often overlooked important policy objectives, such as helping Indian parties to acquire new skills and capabilities in partnership with foreign investors, and limiting speculative short-term investments.

Indian regulators eventually took the position that the lock-in period began only on the last day on which the foreign investor infused its capital in the business, and that only partnerships in which an Indian party took a meaningful equity stake qualified as a local joint venture. What was meaningful remained unclear, but anything less than a 10 percent interest by an Indian partner in the joint venture entity was likely to attract close scrutiny by the RBI. These determinations dramatically changed the exit options for foreign investors.

Companies that are adept at evaluating commercial risks are not always skilled at evaluating the legal risks that can determine whether an investment will be permitted. When the economics of a deal depend on an aggressive, technical interpretation of the law, companies should think twice. In such instances, caution may be the better part of valor.





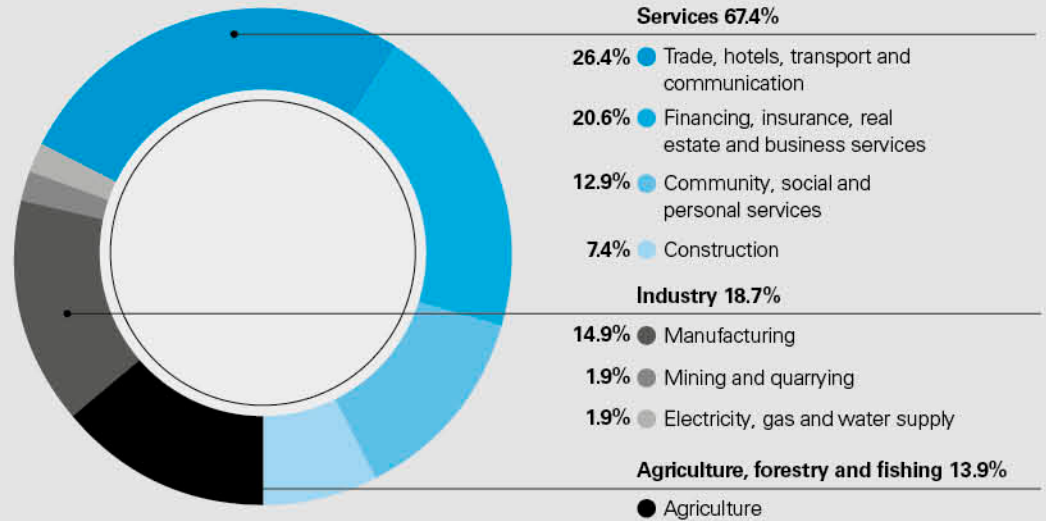
# India: Investment landscape

## Top 15 FDI source countries by number of investments



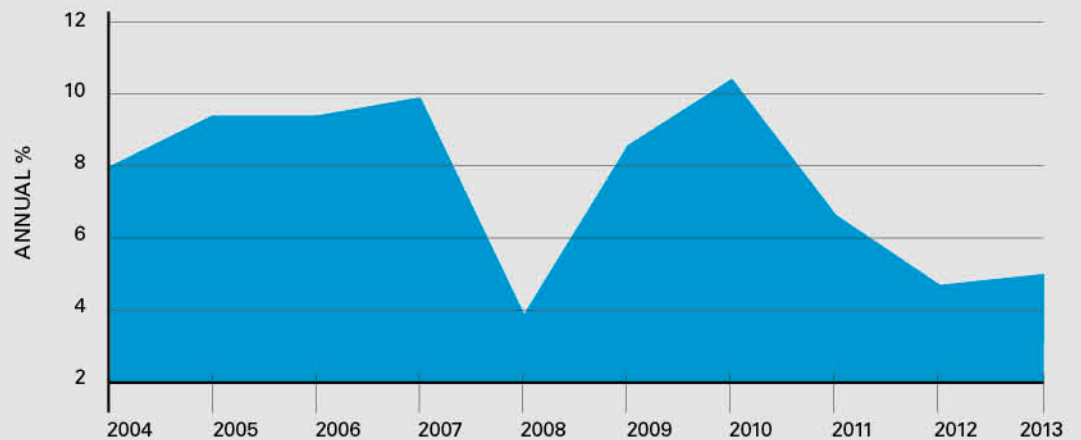
Source: FDI Intelligence, from the *Financial Times*

## GDP composition, by sector of origin 2013 – 14



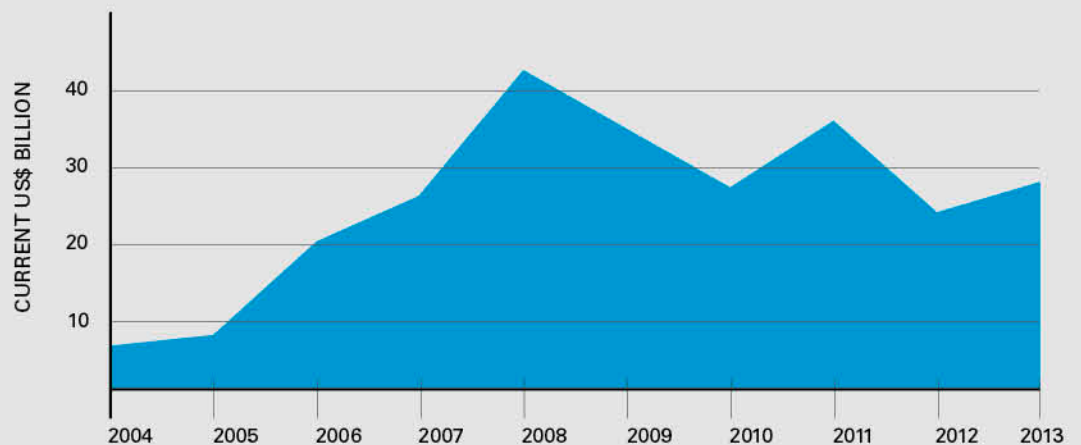
Source: Reserve Bank of India

## GDP growth



Source: The World Bank

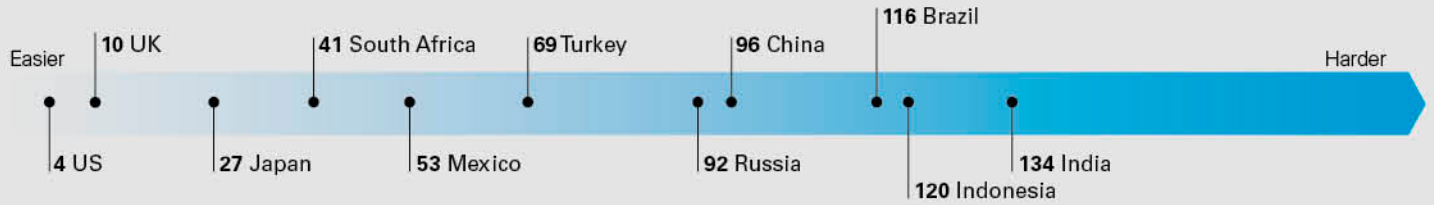
## Foreign direct investment, net inflows



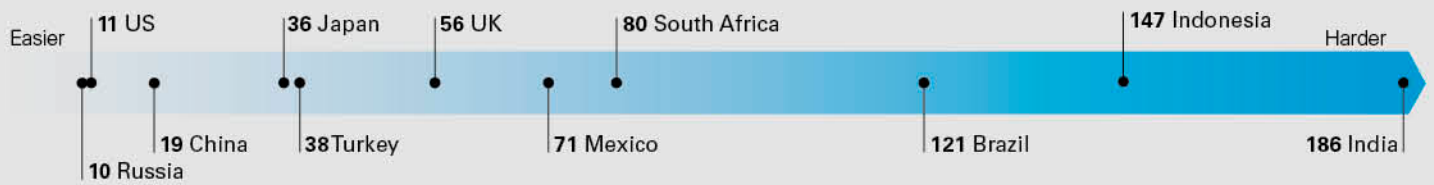
Source: The World Bank



### Ease of doing business in selected G20 economies\*

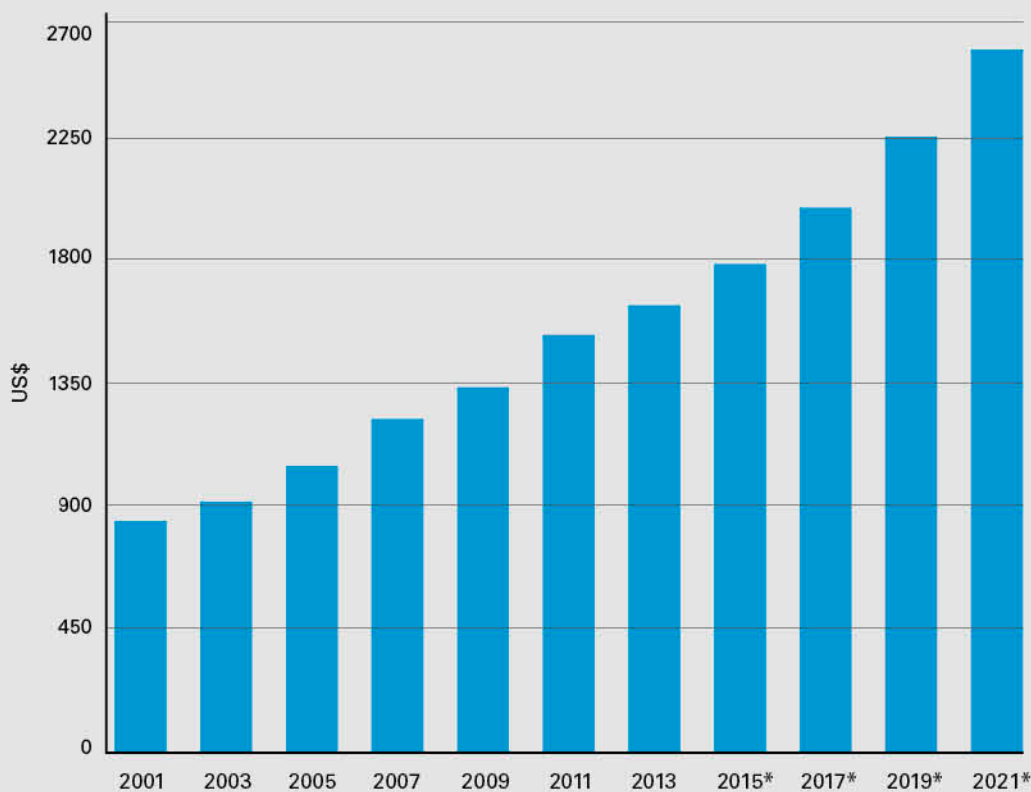


### Ability to enforce contracts in selected G20 economies\*



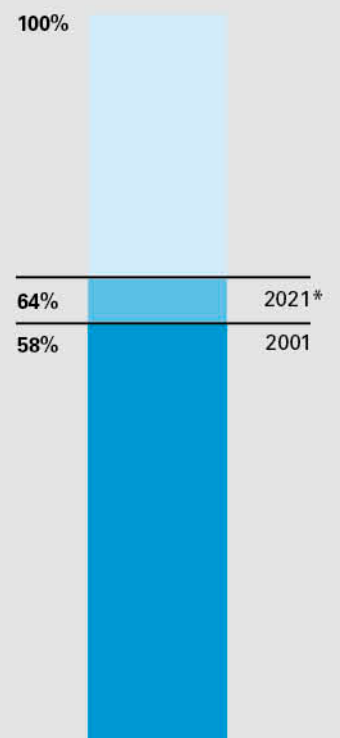
\*economies are ranked from 1 to 189.  
Source: The World Bank

### Per capita income (in 2010 dollars)



\*projected per capita income  
Source: US Department of Agriculture Economic Research Service

### Working age population



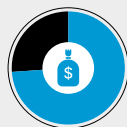
\*projected working age population  
Source: Ministry of Finance, Government of India

## Evaluate joint venture opportunities in forensic detail

### Certain sectors in which FDI is capped



26%  
Insurance



74%  
Private banking



20%  
Public sector banking



51%  
Multi-brand retail



49%  
Defense



26%  
Print media



49%  
Commodity exchanges

The benefits of partnering with locals can be significant. Domestic partners often understand the market and culture better than foreign firms. They usually have strong relationships with Indian authorities and other important Indian businesses, and are likely to have the necessary infrastructure in place to produce, distribute or sell products in the country.

But the downside of joint ventures can also be significant, particularly if they require investors to yield too much control over their businesses. Haier, the large Chinese home appliance and consumer electronics maker, had more success in India without a partner than it did with one. In 1999, it launched its first Indian venture with a local partner, but the venture quickly came apart after it became clear that the partners had different strategic objectives. In 2004, Haier reentered the market on its own, and it now offers more than 250 products in India.

When investors have no choice but to pair up with a local partner for regulatory or commercial reasons, they should investigate their options in granular detail to ensure they understand how potential partners operate at every level of their organizations. This includes engaging in a rigorous analysis to assess cultural fit and conducting due diligence into the background, style and capabilities of potential partners.

Remember also that India's many family-owned businesses (which still constitute a significant portion of corporate India) often take very different approaches to running their companies compared to large foreign, independently managed, companies. Foreign companies that enter into partnerships with family-owned businesses must take care to ensure that the venture meets their operating and performance expectations, particularly in areas such as corporate governance, accounting and regulatory compliance. Partnerships with

family-owned businesses depend on the ability of foreign investors to establish close working relationships with the promoters and family members—particularly because their priorities may be different from the priorities common among nonfamily businesses. For example, family-owned businesses tend to plan on longer time horizons, and they may rank certain nonfinancial objectives as high as financial ones. Moreover, their leaders often have strong emotional investments in the business and may be reluctant to relinquish control. This can be the source of an extraordinary will to succeed, but it may also make compromise difficult.

Countless Indian joint ventures between foreign and domestic partners have collapsed in acrimony as a result of insufficient due diligence and preparation prior to launch. Foreign companies must take great care in advance to ensure all participants agree on the details of their business plans, and determine up front the manner in which day-to-day operations, corporate governance and government relations will be conducted.

Even if the joint venture parties have agreed on principal issues such as the business plan, sharing of control and profits and exit plans, disharmony can arise from even seemingly minute issues like reimbursement of ordinary expenses and stylistic differences. While it is impossible to anticipate every issue that could hobble a joint venture, choosing the right partner and the level of control can play a major role in determining the success or failure of a joint venture.

## Build in commercial protections

**D**espite the hurdles involved in enforcing contracts against counterparties in India, the importance of having carefully drafted commercial contracts in India cannot be overstated. Certain foreign companies may be persuaded to accept contractual arrangements in India of a lower standard than they would typically accept in developed markets. However, in our experience, when such investors find themselves in a dispute, they often find that any ambiguities and omissions in their contractual arrangements often severely compromise their ability to protect their rights.

That being said, carefully worded contracts and legal protections are not, in themselves, sufficient to protect investors. Here we highlight a number of steps foreign companies should take to build commercial protections into their dealings in India that can help them avoid, manage and resolve conflicts.

### **Create balanced and equitable contracts**

In joint ventures, it is critical to ensure that each partner has meaningful skin in the game so that each is attentive to the risks and rewards of the venture. For example, an imbalance between the amount of financial commitments of the partners could cause difficulties down the road. The partner with a small financial stake in the joint venture may be willing to take bigger risks that could lead to risky bets, delays, cost overruns and other construction and completion risks.

It is also important to ensure that benefits are allocated fairly among all participants. Agreements that disproportionately reward one partner are likely to cause conflict down the line.

More generally, foreign companies can protect themselves by developing deeper relationships with domestic partners. In our experience, foreign companies

that have been able to commit to a long-lasting, mutually beneficial arrangement that encourages all parties to think about the future of the relationship, not just short-term opportunities, are the most likely to succeed in their venture with an Indian partner. Similarly, foreign companies that engage in multiple businesses with the same domestic partner are also likely to see enhanced chances of success.

Investors should also protect themselves by including exclusivity and non-compete agreements in their contracts with partners to prevent their counterparts from abandoning their commitments if another attractive opportunity arises.

### **Trust but verify**

Companies must take steps to ensure prudent measures are established at the outset of a partnership. Investors should appoint their own independent accountants and auditors to maintain and verify the accuracy of the venture's accounts and ensure that they comply with the law and internationally recognized accounting standards. All activities undertaken in a venture—including bank transactions and receivables—must be subject to proper accounting controls.

It is also wise to secure the right to appoint and remove key officers, particularly those with a financial oversight function. And whenever possible, buttress contracts with collateral security. Unsecured commitments are risky by definition, and partners should be particularly diligent in vetting potential partners that cannot provide collateral.

### **Put feet on the ground and build a real relationship**

As is the case in many developing economies, a strong physical presence in India is critical during the life of an investment, starting with due diligence. Investors should send trusted analysts to India—or hire locals they can trust—to investigate

the finances, business dealings, management style and culture of their potential partners.

Once a relationship is up and running, leaders from the foreign party should always work closely with the management of their Indian partners. Merely securing seats on the board won't be sufficient, because most Indian boards have relatively little influence on how businesses are run. Foreign investors should negotiate contract terms that give them clear approval rights for major decisions, as well as the right to remove executives who don't meet performance or other standards.

It's not enough just to include compliance standards in business contracts. Companies must actively encourage the behaviors they want their partners and employees to adopt. In many cases, they will have to provide training to sensitize all officers, directors and employees about anti-corruption compliance, accounting standards and other crucial matters. Parties should also consider conducting regular audits to ensure that processes and behaviors are in line with their global compliance standards (for more details, see the sidebar "Preventing corruption").

### **Plan the exit**

Investors don't enter partnerships that they expect to fail, but even the best strategies can end in disappointment. Companies should plan their exit from every partnership in advance. And it is at least as important to develop plans for leaving a partnership that isn't working out as it is for cashing out on one that is successful. A little planning up front can enable companies to limit their losses, avoid or de-escalate disputes, and minimize disruption to their businesses.

At a minimum, the joint venture agreement should be clear which entity will have control of the company if the joint venture is

## Preventing corruption

Here we highlight seven important steps every company should take to prevent corruption from taking root in their India operations.

**Confirm compliance culture:** Conduct scrupulous due diligence to ensure prospective partners comply with India's laws and regulations, and the relevant laws and regulations of foreign countries (e.g., the US Foreign Corrupt Practices Act, UK Bribery Act, US sanctions).

**Track regulatory interactions:** Develop comprehensive rules for dealing with public servants, including guidelines for recordkeeping, giving gifts and offering hospitality.

**Monitor internal activity:** Establish effective mechanisms to identify and prevent unacceptable behavior by employees and ensure that incentives do not encourage it.

**Train employees in compliance:** Sensitize employees at all levels in the organization about anti-corruption laws and the consequences of violating them.

**Develop a whistleblower policy:** Encourage employees to report illegal activities and ensure everyone knows how to do so.

**Be proactive:** Investigate reports of improper activity with appropriate resources and take disciplinary and legal action when necessary.

**Establish contractual protections:** Ensure that joint venture agreements contain viable exit options that enable partners to leave the venture if their counterparty breaks the law.



## It's not enough just to include compliance standards in business contracts. Companies must actively encourage the behaviors they want their partners and employees to adopt.

dissolved—and which partner will own each asset if the company is dissolved along with the joint venture, depending on the circumstances that lead the partners to split up. Because the Indian courts do not provide an effective and speedy bankruptcy process, the parties will need to agree upon an alternative mechanism to achieve an orderly separation. Put options were popular among foreign investors a few years ago on the assumption that they could simply force the Indian promoters to buy out their stake at agreed

prices when investors wanted to end the relationship. For reasons discussed earlier (see the sidebar on “Convertible securities and put options”), many foreign investors were unable to enforce them. Options requiring the promoter to buy out an investor's stake at fair market value should have better prospects. The right to drag along all the shareholders and cause a sale of the entire company could be a useful exit option, but its effectiveness may be blunted by a determined party who can tie up the exit in procedural and regulatory complications. While there is no silver bullet, having multiple exit options may help in avoiding a stranded investment.

### Resolve disputes offshore

Since resolving a business dispute in Indian courts can take up to a decade or more, foreign companies should make every effort to resolve conflicts through offshore arbitration or, in limited circumstances, through non-Indian courts. Even when Indian law is the basis of the contract, it is

important to agree to settle disputes through arbitration seated outside India. London has long been the venue of choice for most cross-border transactions involving India, although Singapore is increasingly popular.

Bilateral investment treaties also offer important protections, shielding companies from unfair treatment by governments and ensuring that the legitimate expectations that underpinned investments are upheld. Currently, more than 70 countries have bilateral investment treaties with India, including France, Germany, the Netherlands, Mauritius and the UK. Most companies forget to consider bilateral investment treaties when structuring their investments, and this can leave them unnecessarily vulnerable to risks in the longer term (for more detail, see the sidebar “Enforcing bilateral investment treaties in India”).

Even after structuring contracts so that the disputes are resolved offshore, foreign companies doing business in India should still be

prepared to put up with varied litigation in Indian courts and tribunals, which often follows from doing business in India. The panoply of Indian laws and regulations—both at the federal and state level—makes this virtually inevitable. While some of these litigations (particularly those relating to tax and regulatory matters) deserve close supervision and follow-up, a majority are unlikely to be significant, and foreign companies should not be unduly alarmed by them. Many are likely to be slow-moving, and experienced Indian management will be invaluable in dealing with such matters.

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Shortly after Narendra Modi was elected prime minister, Martin Wolf, chief economic commentator at the *Financial Times*, offered this view on India's prospects: "It would be very surprising to me—in a way, a disaster—if India were *not* the fastest growing big economy in the world over the next 20 years." We agree that the country's promise is tremendous, and so do many of the world's top investors and multinational corporations. But, while the risks of investing in India may diminish as its business climate improves, most companies

cannot wait for that to happen. They recognize the need to act now to enter or expand their operations in the country, and, fortunately, they can mitigate the risk of doing so by implementing lessons from those that have already entered

the market, whether successfully or not. Indeed, by building thriving businesses in India, foreign companies can help the country realize its potential, accelerate progress and fuel a virtuous cycle of economic and social returns.

### Enforcing bilateral investment treaties in India

White Industries, the Australian mining company, was the first entity to win an investment treaty award against India. In 1989, it entered into a long-term deal with Coal India Limited to supply equipment and develop a mine. A few years later, the two companies were embroiled in disputes over the quality of the extracted coal and the extent of the penalties White Industries demanded from Coal India. In 1999, White Industries began arbitration proceedings through the International Chamber of Commerce. In May 2002, the tribunal awarded White Industries US\$3.61 million in damages.

Coal India then initiated a nearly decade-long battle to have the decision overturned in Indian courts. The local courts suspended payment on the arbitral award pending the outcome. In 2010, White Industries commenced action against the Indian government, arguing that the delay violated the guarantee of effective means of enforcing legal rights set out in the bilateral investment treaty between India and Kuwait (and applicable to the Australian investors through the "most favored nation" treatment conferred under the India-Australia treaty). A three-member tribunal ruled unanimously in White Industries' favor and ordered the Indian government to pay White Industries the amount of the original award plus interest. Since the ruling, about a dozen companies have begun similar proceedings against the Indian government seeking damages for breaches of investment treaty protections.



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