

# Investment in India After Press Note 18

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In January 2005, Indian Prime Minister announced scrapping of the contentious Press Note 18 pertaining to foreign financial or technical collaboration under the automatic approval route with effect from January 2005. The scrapping of restrictive Press Note 18 was hailed as, and has proved to be, a positive step towards further liberalising foreign direct investments regulations in India.

## A. Press Note 18:

In terms of Press Note 18, the automatic route (which requires no prior regulatory approval) for foreign investment was not available to foreign investors having an existing or previous venture or technology transfer/trade mark agreement in the same or allied field in India. Investors having a previous or existing venture or technology transfer/trade mark agreement in the same or allied field in India required prior Foreign Investment Promotion Board (FIPB) approval for such investment.

To obtain FIPB approval, the foreign investor had to give detailed circumstances in which they found it necessary to setup a new joint venture/enter into new technology transfer (including trade-mark) and the onus was on such investors/technology suppliers to provide the requisite justification as also proof to the satisfaction of the FIPB that the new proposal would not in any way jeopardize the interests of the existing joint venture or technology/trade-mark partner or other stakeholders.

In implementing Press Note 18, the Indian Government, in practice, required a letter/certificate from the existing Indian joint venture partner that it had no objection to the foreign partner's new investment proposal in the same or allied field.

Press Note 18 was issued in the wake of the liberalization policy of the Government of India which allowed 100% foreign direct investment in almost all sectors of the economy without prior regulatory approval. Prior to the "opening up" of these sectors to 100% foreign direct investment, joint ventures were the popular mode of foreign investment in India in view of ceilings on foreign investment in several sectors. The objective of Press Note 18, it appears, was to protect the Indian joint venture partner against the prospect of the foreign joint venture partner walking out of the existing joint venture and joining hands with another Indian party or establishing its wholly-owned Indian subsidiary.

## B. Scrapping of Press note 18:

In terms of Press Note 1 of 2005, new JVs and technical collaborations will no longer be governed by the provisions of Press Note 18.

Pursuant to scrapping of Press note 18, the above restrictive provisions of Press Note 18 have been done away with for all future joint ventures in India between Indian and their foreign partners. In the new dispensation, new joint ventures and collaborations are being based on the free will of partners without any Government interference.

An interesting development of Press Note 1 of 2005 is the acknowledgement that Indian companies as well as their foreign partners may contractually safeguard their interests in JVs through provisions in JV/collaboration agreements which tackle 'conflict of interest' situations, for example, where a JV partner decides to invest in another JV or a fully-owned subsidiary in the same field of activity.

## C. Non-Applicability on Existing JVs:

The joint venture existing at the time of scrapping of Press Note 18 however continues to be protected by a few provisions of Press Note 18. Venture capital funds have however been exempted from the requirement of having to obtain a no-objection certificate from local partners for new investments. Similar freedom has been extended to sick companies and joint ventures where either the domestic or foreign venture partner hold less than 3% shareholding. International Finance Institutions and foreign direct investment proposals in the Information Technology sector had been exempted from the applicability of Press Note 18 in the year 2001 and 2000, respectively.

The need for consent from both domestic and foreign venture partners will apply in the case of existing JVs only if the proposed sector of investment is the 'same' as the existing JV. Earlier, the need for consent also applied to proposed investments in an 'allied' sector as the existing JV. For purposes of Press Note 18, 'same' field means those activities, which are covered under the same four digit National Industrial Classification 1987 (NIC) code, while 'allied' field refers to those activities covered under the same three digit NIC code. Alishan Naqvee has substantial experience in areas of transactional law and foreign investment in India and he regularly authors articles on Indian legal issues.