Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies

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India is one of the fastest growing economies in the world and is predicted to become the third largest economy in the world after the United States and China. India's economic transformation has allowed Indian firms to gain significant attention in the world economy, particularly as acquirers of non-Indian firms. For example, when Tata Motors bought Jaguar and Land Rover from Ford in 2008, it received worldwide recognition for its acquisition of a well-known international brand. The transaction was celebrated in India with newspapers heralding the acquisition of two marquee British brands. Tata Motors' $2.3 billion acquisition of Jaguar and Land Rover was only one among many high-profile overseas acquisitions that Indian multinationals have carried out since the late 1990s. Indian conglomerates such as the Tata group and the Birla group have made overseas acquisitions in numerous sectors,

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including, among others, consumer products (such as Tata Tea's acquisition of major UK tea manufacturer Tetley Tea), steel (Tata Steel's $12 billion acquisition of its much larger rival, the Anglo-Dutch firm Corus), and aluminum (Hindalco's acquisition of the U.S.-Canadian Novelis, the world's leading producer of aluminum rolled products). Moreover, in the past decade, other Indian companies have launched multimillion and multibillion dollar deals to acquire companies around the globe, with a significant concentration of targets in developed economies, in particular the United States and the United Kingdom.

Finance and business scholars have addressed outbound acquisitions by Indian multinationals, emphasizing the business and economic motivations for such transactions. However, there has been little analysis from a legal perspective of the significance of India's legal norms and rules, including recent shifts in the country's regulatory and legal regimes, in the rapid expansion of Indian multinationals. This Article fills this void by analyzing the role of India's post-liberalization legal reforms in outbound acquisitions by Indian companies. This examination not only presents a more complete picture of the legal environment and legal rules that have facilitated outbound acquisitions by Indian multinationals, but also reveals how limitations in India's legal reforms have constrained these deals.

This Article argues that Indian corporate law plays a number of important roles in the emergence of Indian multinationals. First, legal reforms since economic liberalization have set the stage for outbound acquisitions by Indian multinationals. Second, Indian legal reforms and legal history have shaped outbound acquisitions both in terms of transaction structure and transaction size. Third, legal constraints on Indian firms' mergers and acquisition activity impose substantial restrictions not only on the methods that Indian multinationals use in pursuing outbound acquisitions, but also on the future potential of Indian multinationals.

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INTRODUCTION

India is one of the fastest growing economies in the world and is predicted to become the third largest economy in the world after the United States and China.[1] India's economic transformation has allowed Indian firms to gain significant attention in the world economy, particularly as acquirers of non-Indian firms.[2] For example, when Tata Motors bought Jaguar and Land Rover from Ford in 2008, it received worldwide recognition for its acquisition of a well-known international brand.[3] The transaction was celebrated in India with

[1] *See infra* notes 18-24 and accompanying text.

[2] *See* Ruth David, *Indian M&A Deals Set Yearly Record — by May*, FORBES, June 12, 2007, http://www.forbes.com/2007/06/12/india-mergers-record-markets-equity-cx_rd_0611markets39.html.

[3] *Tata to Buy Jaguar, Land Rover for $2.3 Billion*, N.Y. TIMES DEALBOOK (Mar. 26,

newspapers heralding the acquisition of marquee British brands.[4] Tata Motors' $2.3 billion acquisition of Jaguar and Land Rover was only one among many high profile overseas acquisitions that Indian multinationals have carried out since the late 1990s.[5] Indian conglomerates such as the Tata group and the Birla group have made overseas acquisitions in numerous sectors, including consumer products (such as Tata Tea's acquisition of major UK tea manufacturer Tetley Tea), steel (Tata Steel's $12 billion acquisition of its much larger rival, the Anglo-Dutch firm Corus), and aluminum (Hindalco's acquisition of the U.S.-Canadian Novelis, the world's leading producer of aluminum rolled products).[6] Moreover, in the past decade, as part of their globalization efforts, other Indian companies have launched multimillion and multibillion dollar deals to acquire companies around the globe, with a significant concentration of targets in the West, particularly in the United States and the United Kingdom.[7]

2008, 8:22 AM), http://dealbook.blogs.nytimes.com/2008/03/26/tata-to-buy-jaguar-land-rover-for-23-billion/.

[4] *See, e.g.*, Hasan Suroor, *Tata Motors Acquires Jaguar, Land Rover*, HINDU, Mar. 27, 2008, http://www.hindu.com/2008/03/27/stories/2008032750100100.htm ("Tata Motors on Wednesday announced its entry into the international luxury car market with some style as the company snapped up two of Britain's most famous names in automobile manufacturing, Jaguar and Land Rover, in a $2.3 billion deal with Ford, their American owners."); *Tata Acquires Jaguar, Land Rover for $2.30 Bn*, TIMES INDIA, Mar. 26, 2008, http://timesofindia.indiatimes.com/Tata_acquires_Jaguar_Land_Rover_for_23_bn/articleshow/2902216.cms (reporting on purchase of Jaguar and Land Rover); *Tatas to Drive Away Jag; Ford Accepts $2.05 Bn Offer*, ECON. TIMES, Dec. 21, 2007, http://economictimes.indiatimes.com/articleshow/2639193.cms ("The Tatas are all set to emerge as the winning bidder for Ford's iconic British brands, Jaguar and Land Rover.").

[5] Ravi Ramamurti & Jitendra V. Singh, *Indian Multinationals: Generic Internationalization Strategies*, *in* EMERGING MULTINATIONALS FROM EMERGING MARKETS 110, 110-21 (Ravi Ramamurti & Jitendra V. Singh eds., 2008).

[6] NIRMALYA KUMAR WITH PRADIPTA K. MOHAPATRA & SUJ CHANDRASEKHAR, INDIA'S GLOBAL POWERHOUSES: HOW THEY ARE TAKING ON THE WORLD 3, 163 (2009) [hereinafter GLOBAL POWERHOUSES]; *see also Tetley Bagged by India's Tata*, BBC NEWS, Feb. 27, 2000, *available at* http://news.bbc.co.uk/2/hi/business/658724.stm; Press Release, Hindalco Indus. Ltd., Hindalco Indus. Ltd. and Novelis Inc. Announce an Agreement for Hindalco's Acquisition of Novelis for Nearly US$ 6 Billion (Feb. 11, 2007), *available at* http://www.hindalco.com/media/press_releases/200702feb/hindalco_and_novelis.htm; Press Release, Tata Steel, Tata Steel Completes £6.2bn Acquisition of Corus Grp. Plc (Apr. 2, 2007), *available at* http://www.corusgroup.com/en/news/news/2007/2007_tata_steel_acquisition_complete.

[7] The increase in merger and acquisitions (M&A) activity by Indian firms is in line with similar activity by emerging multinationals from other emerging economies, such as China, Brazil, and Russia. *See* BOS. CONSULTING GRP., THE 2009 BCG 100 NEW GLOBAL CHALLENGERS: HOW COMPANIES FROM RAPIDLY DEVELOPING ECONOMIES ARE CONTENDING FOR GLOBAL LEADERSHIP 7-8, 11 (2009) [hereinafter NEW GLOBAL

Companies from emerging economies have long been involved in foreign direct investment ("FDI") activities. The internationalization of firms from emerging economies has been a significant theme of scholarly focus since the 1970s and 1980s.[8] However, since the 1990s and particularly in the first decade of the twenty-first century, foreign investment by emerging economies has reached unprecedented levels.[9] Furthermore, unlike their earlier forays outside of their home countries, emerging multinationals have engaged in extensive mergers and acquisitions ("M&A") activity as part of their internationalization plans.[10] With respect to India, "the expansion of foreign direct investment . . . has, in a sense, been led by mergers and acquisitions abroad."[11]

Finance and business scholars have addressed outbound acquisitions by Indian multinationals, emphasizing the business and economic motivations for such transactions.[12] Indian multinationals'

CHALLENGERS], *available at* http://www.bcg.com/documents/file20519.pdf; *see also* Suma Athreye & Sandeep Kapur, *Introduction: The Internationalization of Chinese and Indian Firms — Trends, Motivations and Strategy*, 18 INDUS. & CORP. CHANGE 209, 209-21 (2009); Karl P. Sauvant, *The Rise of TNCs From Emerging Markets: The Issues*, *in* THE RISE OF TRANSNATIONAL CORPORATIONS FROM EMERGING MARKETS: THREAT OR OPPORTUNITY? 3, 3-8 (Karl P. Sauvant ed., 2008) [hereinafter RISE OF TRANSNATIONAL CORPORATIONS]; Jaya Prakash Pradhan, *Emerging Multinationals from India and China: Origin, Impetus and Growth* 1, 2 (Munich Personal RePEc Archive, Working Paper No. 18210, 2009) [hereinafter, Pradhan, *Emerging Multinationals*], *available at* http://mpra.ub.uni-muenchen.de/18210/1/MPRA_paper_18210.pdf.

8 *See, e.g.*, SANJAYA LALL, DEVELOPING COUNTRIES AS EXPORTERS OF TECHNOLOGY (1982) (discussing impact of foreign direct investment in developing countries); SANJAYA LALL, THE NEW MULTINATIONALS: THE SPREAD OF THIRD WORLD ENTERPRISES (1983) (describing foreign investment case studies from Brazil, Hong Kong, India, and Argentina).

9 *See* Athreye & Kapur, *supra* note 7, at 209-10.

10 *See* D. Nayyar, *The Internationalization of Firms from India: Investment, Mergers and Acquisitions*, 36 OXFORD DEV. STUD. 111, 111-31 (2008); Nirmalya Kumar, *How Emerging Giants Are Rewriting the Rules of M&A*, HARV. BUS. REV., May 2009, at 115, 116 [hereinafter *Emerging Giants*].

11 Nayyar, *supra* note 10, at 113.

12 *See, e.g.*, J.P. PRADHAN, INDIAN MULTINATIONALS IN THE WORLD ECONOMY: IMPLICATIONS FOR DEVELOPMENT (2008) (explaining that Indian firms have undertaken outbound acquisitions in order to access international markets and to acquire foreign knowledge); Ravi Kant, *The Rise of TNCs From Emerging Markets: Challenges Faced by Firms From India, in* RISE OF TRANSNATIONAL CORPORATIONS, *supra* note 7, at 23, 24-25 (explaining that Indian firms have engaged in outward M&A in order to gain access to new markets, products, technology and raw material, and to overcome constraints of the India market); Nayyar, *supra* note 10 (positing that internationalization of Indian firms has been "driven by a wide range of factors such as market access for exports, horizontal or vertical integration, delivery of services, capturing international brand names, access to technology, sourcing raw materials and global leadership

outbound acquisitions are affected not only by these considerations, but also by legal norms and rules. However, there has been little analysis from a legal perspective of the significance of India's legal norms and rules, including recent shifts in the country's regulatory and legal regimes, in the rapid expansion of Indian multinationals.[13] This Article fills this void by analyzing the role of India's post-liberalization legal reforms in outbound acquisitions by Indian companies. This examination not only presents a more complete picture of the legal environment and legal rules that have facilitated outbound acquisitions by Indian multinationals, but also reveals how limitations in India's legal reforms have constrained these deals.

This Article argues that law plays a number of important roles in the emergence of Indian multinationals.[14] First, legal reforms since economic liberalization have set the stage for outbound acquisitions by Indian multinationals. Second, Indian legal reforms and legal history have shaped outbound acquisitions both in terms of transaction structure and transaction size. Third, legal constraints on M&A activity by Indian firms and the traditional governance of Indian firms impose substantial restrictions not only on the methods used by Indian multinationals in pursuing outbound acquisitions, but also on the future potential of Indian multinationals. As the largest emerging economy with significant non-government-controlled public firms, India has the potential to become an important player in cross-border M&A.[15] Understanding the limitations placed by Indian law on

aspirations"); Ramamurti & Singh, *supra* note 5 (same); Karl Sauvant, *New Sources of FDI: The BRICs Outward FDI from Brazil, Russia, India and China*, 6 J. WORLD INVESTMENT & TRADE 639, 652 (2005) (explaining that firms from the BRIC countries have undertaken outbound M&A to enter new markets, gain access to resources abroad, and to exploit their ownership-specific advantages in manufacturing and services).

[13] *See, e.g.*, Vineet Aneja, *Cross-Border M&A in India*, 19 INT'L L. PRACTICUM 53 (2006) (reviewing Indian laws applicable to cross-border M&A); Raghav Sharma & Rajeev Vidhani, *Law Relating to Cross Border Mergers Under Companies Act, 1956*, 89 SEBI CORP. L. (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1288526 (reviewing Indian courts' jurisdiction over mergers and acquisitions).

[14] Indian companies wanting to acquire companies abroad may have to comply with various aspects of The Companies Act of 1956, the Foreign Exchange Management Act of 1999, The Securities Exchange Board of India Act of 1992, and the various regulations imposed by the Reserve Bank of India. Moreover, the corporate and takeover laws and regulations of the jurisdiction of the target company would also govern the transaction.

[15] *See* Bala N. Balasubramanian, Bernard S. Black & Vikramaditya S. Khanna, *The Relation Between Firm-level Corporate Governance and Market Value: A Case Study of India*, 11 EMERGING MARKETS REV. 319, 319 (2010).

outbound M&A acquisitions is important because without legal reforms such potential may be narrowed.

This Article proceeds as follows. Part I provides an overview of the increased use of acquisition strategies by Indian firms as they embark on an internationalization path. It illustrates the rapid expansion of Indian multinationals in developed countries and argues that Indian multinationals should be of particular interest given their significance in the world economy. Part II details the role of legal norms, legal history, and recent legal reforms in facilitating outbound acquisitions by Indian multinationals. Part II then argues that legal reforms have not only permitted outbound acquisitions, but they also have affected the places and ways in which Indian multinationals undertake such transactions. Part II also argues that, while recent legal reforms in India have undoubtedly made possible the internationalization of Indian firms, legal norms and legal rules will continue to impose challenges for Indian multinationals. Part III then discusses the complicated function of Indian corporate governance in outbound acquisitions. It demonstrates that although India's concentrated ownership model may allow easier decision-making in M&A transactions, it may also present significant limitations for Indian multinationals as they continue with their internationalization strategies. A brief conclusion follows.

I. OUTBOUND M&A ACTIVITY BY INDIAN MULTINATIONALS

Along with China, India is one of the fastest growing economies in the world and is predicted to become the third largest economy in the world after the United States and China.[16] The strength of the Indian economy is now widely recognized, and foreign investors are rushing to direct capital into India.[17]

India's economy has undergone a much discussed transformation since 1991.[18] Following decades of economic stagnation — a period in which India experienced what is often dubbed "the Hindu Rate of Growth" — the Indian economy has exhibited impressive growth rates, particularly in the first decade of the twenty-first century.[19] In

[16] *See* Jayashankar M. Swaminathan, *Sea Change in Indian Economy*, *in* INDIAN ECONOMIC SUPERPOWER: FICTION OR FUTURE? 1, 3 (Jayashankar M. Swaminathan ed., 2009).

[17] *See* Vikas Bajaj, *India Finds Itself Awash in Foreign Investment*, N.Y. TIMES, Oct. 14, 2009, at B8, *available at* http://www.nytimes.com/2009/10/14/business/global/14rupee.html?emc=eta1.

[18] For an excellent account of India's economic transformation, see ARVIND PANAGARIYA, INDIA: THE EMERGING GIANT 107 (2008).

[19] *Id.* at 16, 259; *see also India's Economy: India on Fire*, ECONOMIST, Feb. 3, 2007,

2006 and 2007, India's economy grew over 9% annually.[20] Moreover, even with the commencement of the global financial crisis in 2007, India's economy continued to grow, with a growth rate of 6.7% in 2008 that increased to over 7.0% in 2009.[21]

Indian firms have benefited greatly from this economic transformation. Indian firms, in particular large companies, have experienced and advocated for a rise in inbound foreign investment, including foreign institutional investment.[22] In addition to seeking outside capital, they are aggressively undertaking their own foreign investments.[23] Indian firms have long been active in outside investments; however, they are now able to compete with the strongest of developed country multinationals.[24] Not only do some high profile Indian firms generate a substantial percentage of their revenues outside of India, but they are engaged in significant acquisitions of foreign companies and assets that will ensure their continued presence outside of India.[25]

This section provides an overview of the increase in outbound M&A by Indian firms. It then discusses the business motivations for these transactions.

A. Overview of the Rise in Outbound M&A Activity

1. The Increase in M&A Activity

India's economic transformation has included substantial M&A activity by Indian firms.[26] For example, in 2005, Indian firms

at 65, *available at* http://www.economist.com/node/8625681?story_id=8625681.

[20] *See* PANAGARIYA, *supra* note 18, at 5.

[21] *See India FY10 GDP Growth at Around 7.75%: Pranab Mukherjee*, ECON. TIMES, Feb. 10, 2010, http://economictimes.indiatimes.com/India-FY10-GDP-growth-at-around-775-Pranab-Mukherjee/articleshow/5555010.cms; *India Manages to Clock 6.7% Growth in 2008-09*, HINDU, May 30, 2009, http://www.hindu.com/2009/05/30/stories/2009053054191300.htm.

[22] *See* Dhammika Dharmapala & Vikramaditya S. Khanna, *Corporate Governance, Enforcement, and Firm Value: Evidence from India* 31 (Univ. of Mich. Law Sch., Olin Working Paper No. 08-005, 2007), *available at* http://ssrn.com/abstract=1105732; *see also* Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 NAT'L L. SCH. INDIA REV. 1, 8-9 (2009) [hereinafter Varottil, *A Cautionary Tale*].

[23] Nayyar, *supra* note 10, at 114-15.

[24] *See id.* at 126; Pradhan, *Emerging Multinationals*, *supra* note 7, at 1.

[25] *See* Javier Santiso, *The Emergence of Latin Multinationals*, 95 CEPAL REV. 7, 9 (2008), *available at* http://ssrn.com/abstract=1316778.

[26] *See* Rajesh Chakrabarti, Do Indian Acquisitions Add Value? 1 (Dec. 25, 2007)

completed a total of 467 M&A deals, totaling at about $18.2 billion, compared to only 360 deals in 2004.[27] Indian M&A activity peaked in 2007, with deal volume reaching $50 billion.[28] Given the advent of the global credit crisis, Indian M&A activity has slowed considerably, although most analysts expect it to pick up "as India moves into a new decade with an increased sense of economic stability and an increasing GDP growth rate."[29] Moreover, given that emerging economies are generally recovering from the financial crisis more quickly than the developed economies, it is likely that outbound M&A deals will continue to materialize.[30]

The rise in general M&A activity has included a rapid expansion of outbound acquisitions by Indian firms.[31] Once excluded from discussions about cross-border M&A, Indian firms' outbound M&A activity is now well documented in the business news.[32] Rarely a week

(unpublished manuscript), *available at* http://ssrn.com/abstract=1080285.

[27] Raghuriv Badrinath, *India Inc. Clocked in at $18.2 Billion M&A Deals Last Year*, REDIFF, Jan. 5, 2006, http://www.rediff.com///money/2006/jan/05india1.htm; *Total Value of M&A, PE Deals in 2005 at $18b*, HINDU BUS. LINE, Jan. 3, 2006 [hereinafter *Total Value of M&A*], http://www.thehindubusinessline.com/2006/01/04/stories/2006010403460900.htm. A caveat needs to be made regarding these numbers. Undoubtedly, it is difficult to gather systematic data regarding outbound M&A by Indian multinationals. Thus, the discussion in this Article draws primarily from other scholarly sources and from studies used in those papers, most importantly a 2006 study by the Federation of Indian Chambers of Commerce and Industry (FICCI) on acquisitions abroad by Indian firms, and a study by the Centre for Monitoring the Indian Economy (CMIE) of foreign acquisitions by Indian companies. *See* Nayyar, *supra* note 10, at 10.

[28] *See* Matt Miller, *The Kids Are All Right*, DAILY DEAL, Nov. 13, 2009, http://www.thedeal.com/newsweekly/features/cover-stories/the-kids-are-all-right.php.

[29] *See* Anuj Chande & CG Srividya, *Cross-Border M&A Looking to Increase in 2010*, GRANT THORNTON (Jan. 21, 2010), http://www.grant-thornton.co.uk/thinking/emergingmarkets/index.php/emergingmarkets_templates/article/ma_articles/ ("The total number of M&A deals announced during 2009 stands at 267, with a total announced value of $10.03 billion, compared to 454 deals with a total announced value of US$30.95 billion in 2008 and 676 deals with a total announced value of US$51.11 billion in 2007.").

[30] *See* Miller, *supra* note 28.

[31] *See* Nirmalya Kumar, *India Unleashed*, 20 BUS. STRATEGY REV. 8, 13 (2009) [hereinafter Kumar, *India Unleashed*].

[32] *See, e.g.*, Rob Garretson, *India Inc. Goes Shopping*, EYES ON WORLD MARKETS: INDIA, Fall 2007, at 11, *available at* http://www.gt.com/staticfiles/GTCom/files/Industries/Private%20equity/GrantThornton_TheDeal_EyesonIndia_Fall2007.pdf (commenting on the rise of M&A activity in India); Anand Giridharadas, *Celebrating a Takeover: India Euphoric over Economic Power*, INT'L HERALD TRIB., Feb. 2, 2007 (discussing jubilation over Tata Group's acquisition of Anglo-Dutch firm, Corus); Ashling O'Connor, *India's Future — Out of the Back Office and into the Shop Window*, TIMES (London), July 27, 2007, at 14 (discussing expansion of Indian corporations

goes by without an item in the business news about yet another Indian multinational purchasing an entity or assets outside of India.

Indian firms' outbound M&A activity gained traction beginning around 2000 and gained considerable speed in 2005.[33] By 2005, Indian firms' outbound M&A deals generated $9.5 billion, representing 58% of the country's deal value for the year.[34] Of the outbound deals in 2005, the majority of Indian firms' acquisitions were concentrated in Europe and North America.[35] However, most of the outbound deals were lower mid-market transactions, ranging in the millions rather than billion dollar deals.[36]

As Professor Nirmalya Kumar summarized in a recent book titled *India's Global Powerhouses*:

> As late as 2001, Indian outward investment was less than $1 billion. Instead, India, like all developing countries, was actively courting foreign investment into the country. By 2006, India had reached the tipping point. For the first time, Indian outward investment of $10 billion had outstripped foreign investment into India. The spending spree continued unabated in 2007. Indian companies arranged or concluded $21 billion in forty foreign investment deals in January and February of 2007 alone. Moreover, Indian foreign investment in the financial year closing March 31, 2007, exceeded the cumulative total foreign investment by Indian companies in the fifty-eight years between its independence in 1947 and 2005![37]

into UK and other Western markets); Damian Whitworth, *The Empire Strikes Back; The Tata Dynasty*, TIMES (London), May 27, 2006 (commenting on Tata Group's acquisition of Tetley, UK's leading tea-bag brand).

33 *See* PRADHAN, *supra* note 12, at 21. The wave of outbound M&A by Indian multinationals was part of a larger steep increase in cross-border M&A activity generally, especially by firms from developing countries. *See* Ole-Kristian Hope, Wayne B. Thomas, & Dushyantkumar Vyas, The Cost of Pride: Why Do Firms from Developing Countries Bid Higher? 1 (Jan. 8, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1081298.

34 *See* Badrinath, *supra* note 27; *Total Value of M&A*, *supra* note 27.

35 *See* Badrinath, *supra* note 27; *KPMG Reports Upsurge in Indian M&A Activity*, HINDU BUS. LINE, June 29, 2005, http://www.blonnet.com/2005/06/30/stories/2005063001630900.htm; *Total Value of M&A*, *supra* note 27.

36 Some commentators have suggested that Indian firms entered the global market carefully by attempting to minimize risks. *See* Badrinath, *supra* note 27.

37 GLOBAL POWERHOUSES, *supra* note 6, at 2; *see also* Nayyar, *supra* note 10, at 111-31; Ramamurti & Singh, *supra* note 5, at 1-2.

India's outbound M&A deals and value skyrocketed in 2007 with the rise of cross-border mega-deals.[38] In 2007, six of India's top ten outbound M&A deals totaled at more than $35 billion in value, representing growth five times that of the previous year.[39] Mega-deals by Indian firms included such high-profile deals as Tata Steel's acquisition of Corus for $12.2 billion, Hindalco's acquisition of Novelis, Inc. for $6 billion, and Suzlon Energy's purchase of 33.85% stake in RE Power for $1.7 billion.[40] In fact, there is some evidence that in 2007 and 2008, outbound acquisitions by Indian firms exceeded inbound investment by foreign multinationals into India.[41]

Outbound M&A activity by Indian firms has continued despite the global economic crisis, although at significantly lower levels.[42] Indian companies continue to have global aspirations. For example, in late 2008, Tata Consultancy Services, one of India's largest software exporters, acquired Citigroup Global Services, Citigroup's India-based business processing outsourcing ("BPO") business, for $505 million, and Indian outsourcer HCL purchased the Axon Group for approximately $674 million, after a bidding war with another well-known Indian firm, Infosys Technologies.[43] In addition, arguably the

[38] *See* Pradhan, *Emerging Multinationals*, *supra* note 7, at 12-14; *Proactive M&A Approach Foreseen*, HINDU BUS. LINE, Dec. 4, 2008, at 9, *available at* 2008 WLNR 23233863.

[39] Sundeep Tucker, *China and India Deliver on M&A Promise*, REDIFF, Dec. 21, 2007, http://rediff.com///money/2007/dec/21india.htm.

[40] *Corporate India Logs over 48 Bn Dlr M&A Deals in '07*, ECON. TIMES, Sept. 26, 2007, http://www.westlaw.com/ (click "Newsroom with Reuters" tab; click "International News with Reuters" link; search "Terms and Connectors" for "Corporate India logs over 48 bn dlr M&A deals in 07"; then follow "Corporate India logs over 48 bn dlr M&A deals in '07" hyperlink).

[41] *See* Ramamurti & Singh, *supra* note 5, at 110; *see also* Chande & Srividya, *supra* note 29; *India Inc's M&A Bill Crosses $50 Bn in 07*, FIN. EXPRESS, Dec. 10, 2007, http://www.financialexpress.com/news/India-Incs-MA-bill-crosses-50-bn-in-07/248736/.

[42] *See* Suresh P. Iyengar, *M&A Deals Lack Lustre on Slowdown Blues*, HINDU BUS. LINE, Dec. 25, 2008, at 3, *available at* 2008 WLNR 24671995; *Crisis Puts Brakes on India's Outbound M&A*, FIN. EXPRESS, Nov. 18, 2008, http://www.financialexpress.com/news/crisis-puts-brakes-on-indias-outbound-m&a/387276/0; *M&A Deals Lack Lustre on Slowdown Blues*, INDIA BUS. INSIGHT, Dec. 25, 2008, 2008 WLNR 24873185; *RIL May Fuel India Inc's Overseas M&A Drive*, REDIFF, Nov. 23, 2009, http://business.rediff.com/report/2009/nov/23/reliance-may-fuel-india-incs-overseas-m-and-a-drive.htm; *see also* Jaya Prakash Pradhan, *Indian FDI Falls in Global Economic Crisis: Indian Multinationals Tread Cautiously*, COLUM. FDI PERSP., Aug. 17, 2009, http://www.vcc.columbia.edu/content/indian-fdi-falls-global-economic-crisis-indian-multinationals-tread-cautiously (providing recent M&A data for 2008 and first half of 2009).

[43] Kumar, *Emerging Giants*, *supra* note 10, at 116; John Ribeiro, *HCL Completes Acquisition of Axon*, PCWORLD, Dec. 15, 2008, http://www.pcworld.com/businesscenter/article/155489/hcl_completes_acquisition_of_axon.html; Antony Savvas, *Indian*

highest-profile deal of 2008 was Tata Motors' acquisition of Jaguar and Land Rover for $2.3 billion.[44]

There is also a general consensus that outbound M&A activity will increase in 2010 from the lows the market experienced in 2008 and 2009.[45] C.G. Srividya of Grant Thornton, a leading accountancy and business advisory firm in India, points to an "increase in liquidity in the market, better economic indicators and better financial performance from most sectors" to support predictions of increased outbound activity.[46] Moreover, India's basic economic growth remains strong, with the International Monetary Fund predicting growth in the 9% range for 2010.[47] The predictions seem to be coming true. India and other emerging economies "have rebounded quicker and more strongly from the problems which continue to haunt western economies."[48] As of February 2010, outbound acquisitions were already at $11.1 billion, compared to the $11.4 billion for the entirety of 2009.[49] In addition, the Export-Import Bank of India is "increasing

Outsourcers See Their Share Price Hit as They Start Bidding War for British SAP Consultancy, COMPUTERWEEKLY.COM (Sept. 29, 2008), http://www.computerweekly.com/Articles/2008/09/29/232481/indian-outsourcers-see-their-share-price-hit-as-they-start-bidding-war-for-british-sap.htm; *see generally* ERNST & YOUNG PVT. LTD. & FED'N OF INDIAN CHAMBERS OF COMMERCE & INDUS., INDIA CONTRIBUTES TO EMPLOYMENT, CAPITAL GROWTH AND TAX REVENUES IN THE US (2009) [hereinafter ERNST & YOUNG LTD. & FICCI], *available at* http://ficci.com/EY-FICCI-Report-direct-investments-US-Indian.pdf (documenting outbound US centric deals by Indian firms in 2007-2009).

[44] *India, Inc.: Events that Shaped 2008*, REDIFF, Dec. 31, 2008, http://www.rediff.com/money/2008/dec/31bcrisis-events-that-shaped-2008.htm.

[45] *See* Amol Sharma, *Deal Maker Sees Potential in Quiet India*, WALL ST. J., Jan. 5, 2010, at 17, *available at* http://online.wsj.com/article/SB10001424052748703580904574637962960219866.html; Jyothi Datta, *Small Outbound Drug Deals Likely This Year*, HINDU BUS. LINE, Jan. 5, 2010, http://www.blonnet.com/2010/01/05/stories/2010010552010300.htm; *Key Themes for M&A in 2010*, HINDU BUS. LINE, Dec. 31, 2009, http://www.blonnet.com/2009/12/31/stories/2009123151400700.htm; Julius Melnitzer, *Firms Jockey for Indian Business; Effort, Time and Money Required to Develop Ties*, FIN. POST, June 2, 2010, http://www.financialpost.com/Firms+jockey+Indian+business/3100712/story.html.

[46] Suresh P. Iyengar, *Mergers, Acquisitions Likely to Improve in 2010*, HINDU BUS. LINE, Jan. 1, 2010, http://www.blonnet.com/2010/01/01/stories/2010010151861500.htm.

[47] *See* IMF, WORLD ECONOMIC OUTLOOK OCTOBER 2010, at 2, 63 (2010); *see also* Steve Waters, *The Outlook for M&A in 2010*, 7 BOARDROOM BRIEFING 38, 38 (2010).

[48] Sundeep Tucker, *Emerging Markets Deals Surge*, FIN. TIMES, Mar. 15, 2010, http://www.ft.com/cms/s/0/78a68bb8-2fd2-11df-9153-00144feabdc0.html (quoting Ian Gomes of KPMG); *see also* IMF, supra note 47, at 62-63

[49] Nisha Gopalan, *Asian M&A Makes a Comeback*, WALL ST. J., Feb. 22, 2010, at C3, *available at* http://online.wsj.com/article/SB10001424052748704454304575081314229089850.html. This figure does not include the recent $10.7 billion acquisition of Zain Africa by Bharti Airtel. *See infra* notes 67-69. Moreover, in February 2010,

its thrust on supporting the outward investment efforts of Indian companies," recently sanctioning loans for approximately $800 million to ten Indian companies, and processing another $500 million in loans.[50]

2. The Buyers and Sellers

The popular press began to focus on India's potential in the global arena in the early part of this decade as small and mid-cap companies sought to purchase foreign assets, primarily in information technology ("IT") sectors from western nations.[51] However, a diverse group of Indian firms has been active in outbound M&A. Indian acquirers have consisted primarily of private sector firms, ranging from large, diversified, business houses such as the Tata Group, to small and mid-cap companies.[52]

In general, Indian firms have purchased foreign companies that are much larger than they are in size.[53] Moreover, the foreign firms that they have purchased are in a range of industries including IT, pharmaceuticals, manufacturing, energy, steel, and automotive, to name a few.[54] According to a Federation of Indian Chambers of Commerce and Industry ("FICCI") study of outbound deals from 2001 to 2006, "more than 40% of the acquisitions — pharmaceuticals,

Reliance Industries Ltd., one of India's largest companies and owner of the world's largest oil-refining complex, raised its offer for bankrupt LyondellBasell Industries AF to about $14.5 billion, which will increase outbound deal value for 2010 dramatically if the deal closes this year. *See* Jonathan Keehner & John Duce, *Reliance Said to Raise Lyondell Bid to $14.5 Billion*, BLOOMBERG NEWS, July 19, 2005, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTGwUVJgZekA. However, it appears unlikely that this transaction will in fact be completed since Lyondell has rejected Reliance's bid, and Reliance has stated that it would not raise its bid. *See* Eric Yep & Rakesh Sharma, *Reliance Not Raising Lyondell Bid*, WALL ST. J., Mar. 4, 2010, http://online.wsj.com/article/SB10001424052748703862704575100732529529678.html.

[50] *See* K. R. Kumar, *Exim Bank Sees Scope in Financing Outbound Buys*, HINDU BUS. LINE, May 24, 2010, http://www.thehindubusinessline.com/2010/05/24/stories/2010052450400800.htm.

[51] *See* Statish John, *Outbound M&A Deals Beat Inbound Ones*, DAILY NEWS & ANALYSIS, Sept. 17, 2006, http://www.dnaindia.com/money/report_outbound-m-and-a-deals-beat-inbound-ones_1053589.

[52] *See* Athreye & Kapur, *supra* note 7, at 211; Dee Rajpal & Sheel Parekh, *India Looks Outward: Cross-Border M&A by Indian Corporations — Canadian Considerations*, *in* NORTH AMERICAN FREE TRADE & INVESTMENT REPORT 3-5 (2008); Ramamurti & Singh, *supra* note 5, at 123.

[53] *See* Rajpal & Parekh, *supra* note 52, at 4.

[54] *See* GLOBAL POWERHOUSES, *supra* note 6, at 2, 6-7; *see also* PRADHAN, *supra* note 12, at 21.

automotive, consumer goods, chemicals, fertilizers and metals — were in the manufacturing sector, while information technology, software, and business process outsourcing accounted for almost 30%."[55]

In their more recent acquisitions, Indian firms have continued to court targets in a variety of sectors.[56] In an article asking senior bankers which sectors of the Indian economy will be active in outbound M&A, the responses were typically telecom, natural resources, pharmaceuticals, and IT.[57] C.G. Srividya of Grant Thornton predicts activity in commodities, telecom, healthcare, and pharmaceuticals because of "the size of the operations, large ticket sizes and in most cases growing domestic demand."[58]

An interesting development in this wave of outbound acquisitions is the geographic destination of M&A activity by Indian multinationals.[59] Indian multinationals have often sought to expand to markets in developed economies by acquiring western companies, primarily in the United States, the United Kingdom, and throughout Western Europe.[60] The trend toward M&A activity by Indian companies in developed economies is significant even when compared to other emerging economies, such as China, and certainly significant when compared to developing countries in general.[61] Overall, while "an

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[55] Nayyar, *supra* note 10, at 116.

[56] *See generally* Pradhan, *Emerging Multinationals*, *supra* note 7 (describing acquisitions by Indian firms since 1980s in sectors such as manufacturing and services).

[57] *Telecom, Oil & Gas, Pharma May Create Maximum Buzz: Senior Bankers*, ECON. TIMES, Dec. 24, 2009, http://economictimes.indiatimes.com/Opinion/Money-Banking/Telecom-oil-gas-pharma-may-create-maximum-buzz-Senior-Bankers-/articleshow/5367985.cms.

[58] Iyengar, *supra* note 46.

[59] *See* Nayyar, *supra* note 10, at 114-15; Pradhan, *Emerging Multinationals*, *supra* note 7, at 12-13; Jaya Prakash Pradhan & Karl P. Sauvant, *Introduction: The Rise of Indian Multinational Enterprises: Revising Key Issues*, *in* THE RISE OF INDIAN MULTINATIONALS 57, 63-70 (Karl P. Sauvant et. al., eds., 2010) [hereinafter, THE RISE OF INDIAN MULTINATIONALS].

[60] *See* Peter J. Buckley, Nicolas Forsans & Surender Munjal, Foreign Acquisitions by Indian Multinational Enterprises: A Test of the Eclectic Paradigm 2 (Sept. 24, 2009) (unpublished manuscript), *available at* http://www.ifm.eng.cam.ac.uk/cim/symposium2009/proceedings/2_peter_buckley.pdf (reporting that fifty-four percent of all publicly announced outbound acquisitions by Indian multinationals in 2000-2007 period were in US and UK); *see also* BOS. CONSULTING GRP., *supra* note 7, at 21; Ramamurti & Singh, *supra* note 5, at 112.

[61] *See* Nayyar, *supra* note 10, at 8-9 ("[T]he evidence available for India, which has significant limitations, suggests that . . . during the early 2000s, nearly 75% of outward foreign direct investment was in industrialized countries. In comparison, during the period 2001-04 . . . more than 80% of outward foreign direct investment

overwhelming proportion of outward foreign direct investment from developing countries was intra-regional[,] . . . much of India's outward foreign direct investment was inter-regional."[62] According to a FICCI study of outbound acquisitions by Indian multinationals from 2000 to 2006, almost 80% were in developed economies, with over 30% of transactions involving U.S. firms, 13% UK firms, and almost 26% other Western European firms.[63]

Of course, Indian firms have also sought acquisitions elsewhere in the world.[64] By the end of 2006 and throughout 2007 to 2010, large Indian firms had launched multibillion dollar acquisitions in many different countries, including those in newer emerging economies in Africa and Asia.[65] Moreover, there are some predictions that Indian firms will veer away from targets in developed economies to targets in emerging economies, as well as in the other BRIC countries, Brazil, Russia, and China.[66] According to one commentator in mid-2010, "[a]lthough recovery in developed market [sic] is lagging, valuations

from developing countries was in developing countries and transition economies whereas less than 20% was in the industrialized countries."). For example, while Chinese companies have also targeted developed countries as part of their M&A strategy, Indian multinationals are even more actively engaged in acquiring target firms in developed economies. *See* Pradhan, *Emerging Multinationals*, *supra* note 7, at 13. Furthermore, unlike Indian acquirers, most of the Chinese companies involved in outbound M&A were at least partially government owned. *See* BOS. CONSULTING GRP., *supra* note 7, at 10.

62 Nayyar, *supra* note 10, at 9.

63 *See* Prema-chandra Athukorala, *Outward Foreign Direct Investment from India*, 26 ASIAN DEV. REV. 125, 134 (2009).

64 *See* Pradhan, *Emerging Multinationals*, *supra* note 7, at 11-14; Press Release, Indian Sch. of Bus. & Vale Columbia Ctr. on Sustainable Int'l Inv., The Growth Story of Indian Multinationals 10-15 (Apr. 9, 2009), *available at* http://www.vcc.columbia.edu/content/growth-story-indian-multinationals.

65 *See, e.g.*, *Axis-Led Consortium Readies Funds for Fortis' Parkway Deal*, ECON. TIMES, July 18, 2010, http://economictimes.indiatimes.com/news/news-by-industry/healthcare/biotech/healthcare/Axis-led-consortium-readies-funds-for-Fortis-Parkway-deal/articleshow/6183475.cms (reporting on proposed acquisition of Singapore corporation Parkway Holdings by India corporation Fortis); *Bharti Completes Acquisition of Zain's Africa Business for $10.7 Bn*, ECON. TIMES, June 8, 2010, http://economictimes.indiatimes.com/articleshow/6023805.cms (discussing India corporation Bharti Airtel's acquisition of Kuwait-based Zain's business in fifteen African countries); *Bharti-Mt. Deal Biggest M&A Activity in India's History*, ECON. TIMES, May 25, 2009, http://economictimes.indiatimes.com/news/news-by-industry/telecom/Bharti-MTN-deal-biggest-MA-activity-in-Indias-history/articleshow/4576365.cms (reporting on Bharti Airtel's attempt to buy South African corporation MTN).

66 Datta, *supra* note 45; *Key Themes For M&A in 2010*, *supra* note 45; *Rising Consumer Demand Sees More Private Equity Deals: E&Y*, HINDU BUS. LINE, May 28, 2010, http://www.blonnet.com/2010/05/28/stories/2010052851820500.htm.

in emerging markets are coming cheap leading to a lot of deals happening."[67] For example, in 2010, Bharti Airtel acquired the African assets of Zain for approximately $10.7 billion, the second largest Indian outbound acquisition, right behind Tata Steel's $12.2 billion dollar deal with Corus.[68] Facing a still-challenging economic climate, Bharti was able to raise over $8 billion in financing for its acquisition of Zain's African assets.[69]

B. *Business Motivations for Outbound M&A*

Scholars and economists have identified several key business and economic factors as contributing to the rise of outbound acquisitions by emerging Indian multinationals.[70] They argue that acquisitions of foreign corporations have provided Indian multinationals with many practical benefits, such as access to overseas markets and consumers, necessary to expand their business operations.

In the post-liberalization period, Indian corporate communities have realized the need to become competitors in the global arena and have viewed overseas expansion as necessary for global competitiveness.[71] The vision to expand has created a snowball effect among Indian corporations to prioritize access to international markets.[72] As one commentator notes, "[the] boom [of] IT outsourcing [into India], pharmaceuticals, and other 'knowledge' industries, particularly since 2000," has fueled much of this need to expand globally.[73] Additionally, India's economic boom has created a "new class of high-income

[67] *Zain Deal Takes India's Outbound M&A Tally to $15 Bn in 2010*, ECON. TIMES, Mar. 30, 2010, http://economictimes.indiatimes.com/news/news-by-industry/telecom/Zain-deal-takes-Indias-outbound-MA-tally-to-15-bn-in-2010/articleshow/5744239.cms.

[68] *See* Press Release, Bharti, Airtel Connects with Africa — To Become the First Indian Brand to Go Truly Global (June 8, 2010), *available at* http://bharti.com/index.php?id=75&tx_ttnews[tt_news]=388&cHash=1952e93fb06bd3d36fd55ea13a80e025.

[69] *See* Press Release, Bharti, Bharti Airtel Ties up Financing for Proposed Acquisition of Zain Africa BV (Mar. 21, 2010), *available at* http://bharti.com/index.php?id=75&tx_ttnews[tt_news]=382&cHash=dc52ede1061fd125c077b7217aaffdd3; *see also Is Zain Deal a Stretch for Bharti*, N.Y. TIMES DEALBOOK (Feb.16, 2010, 3:14 AM), http://dealbook.blogs.nytimes.com/2010/02/16/is-zain-deal-a-stretch-for-bharti/.

[70] *See supra* note 12.

[71] *See* Gubbit et al., *Do International Acquisitions by Emerging-Economy Firms Create Shareholder Value? The Case of Indian Firms*, 41 J. INT'L BUS. STUD. 397, 407, 413 (2010).

[72] *See* Garretson, *supra* note 32, at 10.

[73] Sundeep Tucker & Joe Leahy, *Corporate India is Finding Confidence to Go Global*, FIN. TIMES, Oct. 3, 2006, http://www.fgiworldwatch.com/october_06/articles/ft_india.php.

professionals" who are eager and willing to expand their businesses globally.[74]

Many Indian multinationals have remarked that gaining access to overseas markets has been an important motivating factor for outbound M&A activity.[75] "Unlike Western companies, which use M&A primarily to increase size and efficiency, emerging [multinationals] acquire firms to obtain competencies, technology, and knowledge essential to their strategy."[76] This approach is in marked contrast to traditional theories, such as the ownership-location-internalization theory, which attributes the internationalization of multinationals to attempts to "extend their ownership advantages (e.g., proprietary access to a superior production technology or a valuable brand) to overseas markets by exploiting locational advantages (locating abroad to access low cost inputs or better serve local markets)," and, thus, to achieve acquisition-related gains from increased economies of scale and integration.[77]

For Indian firms, acquiring established companies provides the firm with a consumer base and market shares in competitive markets, the ability to consolidate manufacturing costs, and allows for diversification of products.[78] For example, Tata Tea's acquisition of Britain's leading tea bag brand, Tetley, was motivated in large part by the desire to capture a well-known international brand name that resonated with Western consumers.[79] Furthermore, acquiring established businesses in developed economies provides Indian multinationals with access to other necessary business resources, such as raw materials, technology, and intellectual property.[80]

A major motivation behind Indian acquisitions of Western companies is the desire to gain "complementary competencies."[81] Indian firms seek to learn how to acquire emerging technologies and innovation skills, how to develop brands, and how to expand business

[74] *Id.*

[75] *See* Athreye & Kapur, *supra* note 7, at 214.

[76] Kumar, *Emerging Giants*, *supra* note 10, at 116; *see also* Nayyar, *supra* note 10, at 216 ("A recent survey of the literature on the subject suggests that transnational corporations from developing countries are motivated by market-seeking, efficiency-seeking, resource-seeking, or created-asset seeking behavior.").

[77] Athreye & Kapur, *supra* note 7, at 213.

[78] Garretson, *supra* note 32, at 10.

[79] *See* GLOBAL POWERHOUSES, *supra* note 6, at 169.

[80] *See* Athreye & Kapur, *supra* note 7, at 213-217.

[81] GLOBAL POWERHOUSES, *supra* note 6, at 190.

models so that they can become global market leaders.[82] An excellent example of a firm that is successfully employing this technique is Hindalco Industries Limited ("Hindalco"), the flagship company of the Aditya Vikram Birla Group, one of India's largest and oldest conglomerates, and India's largest aluminum manufacturing company.[83] Hindalco began acquiring smaller domestic companies and then expanded its acquisitions to foreign companies.[84] It knew that selling value-added aluminum products required attention to quality, services, and brands; product development skills; and ability to create customer relations.[85] These were all capabilities Hindalco lacked.[86] Hindalco identified its weaknesses and targeted companies that could offset these weaknesses.[87] Similarly, Hindalco designed its acquisition of the much larger U.S.-Canadian aluminum company Novelis in May 2007 to extend Hindalco's "product portfolio to higher-priced and more sophisticated products."[88] Although the stock market reaction was not particularly favorable, Hindalco continued to stress its long-term goals over short-term market value.[89]

Other Indian companies faced similar circumstances as Hindalco. Tata Steel faced a global credit rating watch after it announced its foreign acquisitions.[90] Suzlon's stock prices immediately fell when it publicized its cross-border deals.[91] The companies' motivations to gain long-term growth outweighed their desires to see immediate market value increases.[92]

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[82] *Id.*

[83] *See id.* at 109.

[84] *Id.*

[85] *Id.* at 119.

[86] *Id.* at 114.

[87] *Id.* at 112-13.

[88] *Id.* at 190.

[89] *Id.* at 119. The day after Hindalco announced its deal with Novlis, a Canadian aluminum company, its scrip price dropped by thirteen percent and its market capitalization declined by $600 million. *Id.* at 115.

[90] Nirmalya Kumar, *Cross Border Acquisition: The Difficulties*, ECON. TIMES, Mar. 28, 2009, http://economictimes.indiatimes.com/articleshow/4321542.cms [hereinafter Kumar, *Cross Border Acquisition*].

[91] *Id.*

[92] *See* GLOBAL POWERHOUSES, *supra* note 6, at 5, 115, 202.

II. THE BENEFITS AND CHALLENGES OF INDIAN LAW FOR OUTBOUND ACQUISITIONS

While Indian firms have many business reasons for engaging in outbound M&A transactions, the role of law and legal reforms in these transactions has largely been unexplored. The goal of this Article is to analyze the many roles that India's legal system has played in Indian multinationals' outbound M&A. Section A begins with an overview of India's legal system. India's legal system reflects British common law traditions, creating familiarity for Indian firms with regulatory and legal issues surrounding cross-border acquisitions in the West. This familiarity is a potential explanation for why Indian firms chose to target their M&A activity at companies residing in developed nations such as the United States and the United Kingdom. Section B examines the extensive post-liberalization legal reforms in India. Without these legal reforms, Indian firms could not have undertaken the extensive M&A activity that ensued in the twenty-first century. Section C then evaluates the role of Indian corporate law specifically in Indian multinationals' outbound M&A. Indian corporate law has largely shaped the destination and structure of outbound M&A transactions. Moreover, Indian firms gained considerable expertise in M&A transactions by first working on domestic M&A deals, and then expanding to M&A transactions in western developed countries, such as the United States and the United Kingdom.[93] This section argues that familiarity with corporate law and legal culture, including the regulatory framework with respect to takeovers in the United States and the United Kingdom, has helped facilitate outbound acquisitions in these developed economies and furthered the advancement of Indian multinationals. However, while recent legal reforms in India have undoubtedly made possible the internationalization of Indian firms, legal norms and legal rules continue to impose challenges for Indian multinationals.

A. The Benefits of the Indian Legal System

Colonized by the British for almost two centuries, India is generally viewed as a common law country with an Anglo-American legal tradition.[94] For example, the Companies Act, as codified in 1956[95] and

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93 *See Id.* at 4-5.

94 *See* Andreas Buss, *Dual Legal Systems and the Basic Structure Doctrine of Constitutions: The Case of India*, 19 CAN. J.L. & SOC'Y 23, 24 (2004); Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 421 (1998).

amended thereafter — which provides the general legal framework for companies in India and governs the incorporation, functioning, and winding up of Indian companies — draws heavily from the UK Companies Act of 1948.[96] Moreover, following independence, English has become the language of Indian legal systems, higher education, pan-regional administrative networks, science and technology, and trade and commerce.[97] For example, Indian corporate law is codified in English, and for the lawyers and business people involved in corporate law, English is the dominant language. In addition, many Indian lawyers are trained in law schools that have been heavily influenced by U.S. legal education, allowing them great ease in advising clients on cross-border acquisitions in the West.

India's common law system, coupled with a complex regulatory structure and the extensive use of English as the language of law in India, have undoubtedly affected outbound acquisitions by Indian multinationals. Several studies by economists suggest that a common language, cultural familiarity, and lower informational costs have a positive effect on the size and direction of cross-border M&A flows.[98] Cross-border M&A transactions can involve high informational and transactional costs, including legal costs. These legal costs can be more pronounced when firms are required to work in, and learn about, a new culture and new legal system. Thus, there may be a number of benefits for firms to acquire targets in a legal system with which they have some familiarity.

1. Common Law Origins and Regulatory Complexity

Indian firms are accustomed to operating in a legal landscape that involves not just the legislators, but also includes the extensive involvement of the judiciary.[99] While India traditionally has been viewed as a common law country, post-independence, India's common law tradition was overlaid by extensive legislation, particularly during

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[95] The Indian Companies Act, No. 1 of 1956, INDIA CODE (1993).

[96] *See* Priya Lele & Mathias Siems, *Diversity in Shareholder Protection in Common Law Countries*, 5 J. INST. COMPARISONS 3, 4 (2007), *available at* http://ssrn.com/abstract=988409.

[97] Annika Hohenthal, *English in India: Loyalty and Attitudes*, 3 LANGUAGE IN INDIA (May 5, 2003), http://www.languageinindia.com/may2003/annika.html.

[98] Julian Di Giovanni, *What Drives Capital Flows? The Case of Cross-border M&A Activity and Financial Deepening.*, 65 J. INT'L ECON. 127, 127-49 (2005).

[99] *See generally* NR SRIDHARAN & PH ARVINDH PANDIAN, GUIDE TO TAKEOVERS AND MERGERS (2d ed. 2006) (discussing significance of courts' rulings regarding mergers and demergers).

the 1947–1991 pre-liberalization period.[100] Similar to other common law countries, such as the United States, corporate transactions in India, particularly securities and M&A transactions involving public companies, are often subject to significant legal complexity, including regulatory oversight.[101] One need only look at any basic explanation of U.S. M&A to appreciate the important role that the judiciary, statutes and regulations, and federal agencies play when purchasing a public company in the United States.[102] Thus, Indian multinationals, many of whom gained M&A transaction expertise by first completing domestic acquisitions, entered the cross-border acquisition market with considerable appreciation for the complexities of the judicial, regulatory, and political oversight involved in acquiring a company in the United States, for example. As discussed in more detail in Section B below, many of the domestic rules governing Indian M&A transactions reflect the same type of complexities.

2. English as the Language of Business and Law

A number of commentators have stated that Indian firms have targeted western-based companies, in part, because of cultural familiarity with respect to law and business.[103] Because English is

[100] *See* John Armour & Priya Lele, *Law, Finance, and Politics: The Case of India*, 43 LAW & SOC'Y REV. 491, 499 (2009). During this time, the Indian government extensively regulated Indian companies, including significant restrictions on both domestic and outbound M&A transactions. *See infra* notes 121-30 and accompanying text.

[101] *See* Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NW. J. INT'L L. & BUS. 335, 353-59 (2009) [hereinafter Afsharipour, *Corporate Governance Convergence*]. For an extensive discussion of the growing importance of codification and the rise of the regulatory state in common law systems, see generally Mark J. Roe, *Legal Origins, Politics and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006) (documenting erosion of differences between common law and civil law systems).

[102] *See* Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 WM. & MARY L. REV. 2007, 2015-34 (2009); *see also* Lou R. Kling et al., *Summary of Acquisition Agreements*, 51 U. MIAMI L. REV. 779, 781 (1997) (explaining corporate and regulatory reasons for delay between signing and closing acquisition transaction, including stockholder approval by Seller's and/or Buyer's shareholders, antitrust filings under Hart-Scott-Rodino Antitrust Improvements Act of 1976 or other needed regulatory approvals, and time needed to line up financing, if necessary). For an overview of U.S. laws related to acquisitions, see generally THERESE H. MAYNARD, MERGERS AND ACQUISITIONS (2d ed. 2009).

[103] *See* GLOBAL POWERHOUSES, *supra* note 6, at 4; Vijay Gurav, *M&A Hungry India Inc Takes European Trek*, ECON. TIMES, Oct. 4, 2007, http://economictimes.indiatimes.com/news/news-by-company/corporate-trends/MA-hungry-India-Inc-takes-European-trek/articleshow/2428100.cms.

India's official language in business and law, Indian corporate leaders do not face barriers to communication when negotiating with western target companies.[104] The lack of communication barriers can help lower transaction costs between negotiating companies.

The use of English and the familiarity with the legal system has also aided Indian firms in their post-acquisition integration activities.[105] Thus far, Indian firms have been particularly adept at their post-acquisition integration activities.[106] While, like most acquirers, they have encountered some integration difficulties, particularly with respect to labor issues, Indian companies have a "reasonably good track record in integrating overseas acquisitions."[107] For example, in a recent discussion regarding outbound acquisitions, the general counsels of two of India's largest business conglomerates, the Tata Group and the Aditya Birla Group, both emphasized integration,

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[104] *See* Rajpal & Parekh, *supra* note 52. Indian companies, particularly its large multinationals, primarily use English as the official corporate language. Logistical and neutrality reasons facilitate this decision. India has nearly 60 regional languages, "122 languages spoken by at least 10,000 speakers, and another 234 spoken by a smaller number." *See* Sophie Petitjean, *EU / India: Joint Declaration Signed on Multilingualism*, EUROPOLITICS, Mar. 12, 2009, at 17, http://www.samgonguraduneyti.is/media/adobe-skjol/Europolitics_3709_09.03.2009.pdf, *available at* 2009 WLNR 7829085. Most citizens do not know Indian languages other than their own. Adopting an Indian language would likely cause difficulty for companies looking to communicate with other regions of India. Because English is the most widely spoken second language, companies have adopted it as a means of communicating with other regions within India and the world at large.

[105] Anil K. Gupta & Haiyan Wang, *Indian, Chinese Businesses Face Off on Global Scale*, ECON. TIMES, Feb. 8, 2008, http://economictimes.indiatimes.com/articleshow/msid-2765869,prtpage-1.cms.

[106] *See also The New Masters of Management*, ECONOMIST, Apr. 17, 2010, at 11; *Outbounds Cos: 4 Big Guns Who Have Put Their Footprints Out There,* ECON. TIMES, Apr. 4 2010, http://economictimes.indiatimes.com/articleshow/5759650.cms. *But see Grow, Grow, Grow*, ECONOMIST, Apr. 17, 2010, at 7 (stating that in some outbound acquisitions, Indian companies paid too much and were driven by "a combination of hubris and frontier mentality"); Aneel Karnani, *Dubious Value of International Acquisitions by Emerging Economy Firms: The Case of Indian Firms* 13-14 (Univ. of Mich., Working Paper No. 1140, 2010), *available at* http://ssrn.com/abstract=1586852 (arguing that large foreign acquisitions from India have not created shareholder value). *See generally* GLOBAL POWERHOUSES, *supra* note 6 (documenting integration practices undertaken by Indian acquirers).

[107] *Indian Companies Face Pre-Merger Issues in Overseas Buyouts*, ECON. TIMES, Apr. 4, 2010, http://economictimes.indiatimes.com/news/news-by-company/corporate-trends/Indian-companies-face-pre-merger-issues-in-overseas-buyouts/articleshow/5758638.cms; *Key Themes for M&A in 2010*, *supra* note 45. *See generally* CG Srividya, *M&As Abroad Now Part of India Growth Strategy*, ECON. TIMES, Apr. 4, 2010, http://economictimes.indiatimes.com/articleshow/5758616.cms (describing some of India's recent outbound acquisitions).

specifically focusing on assessing the "intangibles" pre-merger, including culture, management style, and labor relations.[108]

3. India's Legal Training and Corporate Lawyers

Indian corporate lawyers have also played an important role in facilitating outbound M&A transactions. Not only have these lawyers been trained in a legal system that has made them familiar with corporate law rules outside of India, but their extensive experience with inbound M&A transactions into India has also permitted them to become familiar with the transactional intricacies of high-value M&A transactions.

India post-independence based its legal education on British and U.S. law school systems.[109] Between the 1950s and the early 1970s, the U.S. Ford Foundation promoted American based legal education in India and worked with Indian legal scholars to establish strong law schools.[110] Although Ford stopped its projects in India from 1975 to 1977, relationships between American professors and Indian academics continued.[111] These connections gave Indian scholars the opportunity to create their own legal system, utilizing certain aspects of the American system while changing others to meet India's needs.[112] It also allowed training of high caliber Indian lawyers, who are actively involved in outbound M&A transactions by Indian firms.[113]

In addition to their legal training, the rush of FDI and inbound acquisitions in India by foreign companies since 1991 has brought Indian lawyers, as well as business managers, in close contact with their counterparts in the acquirer companies and their lawyers, primarily in the United States and the United Kingdom.[114] As a result, Indian industry and the legal profession have become familiar with deal process, such as legal due diligence, documentation contents and

[108] *See* Rachel Evans, *Tata's Outbound Strategy*, 29 INT'L FIN. L. REV. 30, 30 (2010).

[109] *See* Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447, 448 (2005).

[110] *See id.* at 448, 473.

[111] *Id.* at 472-73.

[112] *Id.* at 447-48, 473-75, 480.

[113] *See* *Corporate/M&A: India*, CHAMBERS & PARTNERS (2010), http://www.chambersandpartners.com/Asia/Editorial/30987; Kian Ganz, Indian M&A League Table Q3 2010: Firms Harvest Busiest M&A Year on Record, LEGALLY INDIA (Oct. 8 2010), http://www.legallyindia.com/201010081390/Corporate-/-MA/indian-maa-league-table-q3-2010-firms-reap-harvests-in-highest-maa-year-on-record-so-far.

[114] I thank Umakanth Varottil for his insights regarding this point.

drafting styles outside of India.[115] Equipped with this knowledge and experience, Indian companies and their advisors could more easily engage in outbound acquisitions. In fact, due in part to the cost-conscious nature of their client and in part to cultural familiarity, many Indian corporate lawyers serve as the primary counsel in outbound M&A deals.

B. Economic Liberalization and Access to Global Capital

The feasibility of outbound acquisitions by Indian firms can be traced to an economic liberalization process that largely commenced in the early 1990s.[116] Economic liberalization coupled with globalization have resulted in Indian multinationals having relatively easy access to multiple sources of funding, including both domestic and foreign capital markets. Legal reforms during the liberalization period involved "the wholesale scrapping of legislation facilitating government intervention in markets and the introduction of a more market-facilitative legal infrastructure."[117] During liberalization, the Indian government facilitated the upsurge of overseas acquisitions by relaxing regulations for the outbound flow of capital.[118] Relaxed regulations enabled Indian corporations to sell securities and raise financing abroad with more ease.[119] Further, the government lowered India's import tariffs, creating domestic competition which in turn compelled corporations to access markets abroad.[120] The significance of the transformation of India's regulatory and legal regime in the post-liberalization period can only be understood when one considers the severe restrictions imposed on Indian businesses by the pre-liberalization legal regime.

[115] *See generally* Conference Program, Int'l Bar Ass'n, Globalisation of Mergers and Acquisitions – an Indian Perspective (Feb. 22–23, 2010), http://www.int-bar.org/conferences/conf297/binary/Mumbai%20M&A%20programme.pdf (listing conference topics concerning the Indian perspective on mergers and acquisitions).

[116] *See* GLOBAL POWERHOUSES, *supra* note 6, at 3, 35-49; Ramamurti & Singh, *supra* note 5, at 115; Jørgen Dige Pedersen, *Political Factors Behind the Rise of Indian Multinational Enterprises: An Essay in Political Economy*, *in* THE RISE OF INDIAN MULTINATIONALS, *supra* note 59, at 53, 63-70.

[117] Armour & Lele, *supra* note 100, at 500.

[118] *See* Ramamurti & Singh, *supra* note 5, at 115.

[119] Sonali Sharma & Anahita Irani, *Acquisition Financing in India*, *in* GLOBAL SECURITISATION AND STRUCTURED FINANCE 105, 107 (2008), *available at* http://www.globalsecuritisation.com/08_GBP/GBP_GSSF08_105_108_India.pdf.

[120] *See id.* at 108.

1. The "License Raj"

During much of the period following India's independence in 1947, the government implemented a set of socialist policies that resulted in a slow growth rate often called the "Hindu rate of growth."[121] Between 1950 and 1990, the Indian government imposed a system of strict licensing and "red tape" regulations, commonly referred to as the "License Raj,"[122] to govern business development in India.[123] The License Raj has been described as "the socialist-era system of regulations and quotas that shielded selected domestic businesses from outside competition."[124] These regulations, which effectively isolated India's business community from the world, have been described as an inward-looking set of policies calling for centralized planning, complex industrial licensing requirements, bank nationalization, substantial public ownership of heavy industry, tight restrictions on the operations of foreign companies, high tariff barriers, tight restriction of imports and exports, and high bureaucratic control.[125] With respect to outbound transactions, the government only permitted entering into minority-owned joint ventures, and government approval was needed for any overseas joint venture proposal because the "government policy toward overseas investment was formulated on the basis of the foreign exchange earning capacity of proposed ventures."[126] Moreover, receiving cash remittances for equity participation was restricted.

Although the License Raj has been traditionally viewed as shackling the Indian economy, some commentators have recognized its positive impacts in the overall scheme of India's outbound acquisitions.[127] One argument in its favor is that the protections provided by the License Raj period set the stage for the success of Indian multinationals in cross-border acquisitions. Because Indian firms were shielded from the rest of the world, Indian corporations faced little outside competition in the domestic market for roughly forty years.[128] As a result, Indian firms were able to sustain domestic growth, increase corporate earnings, and strengthen their balance sheets.[129] Thus, the abundance

[121] *See* PANAGARIYA, *supra* note 18, at 16.
[122] *See* GLOBAL POWERHOUSES, *supra* note 6, at 29-34.
[123] *Id.*
[124] Tucker & Leahy, *supra* note 73.
[125] *See* PANAGARIYA, *supra* note 18, at xvii, 47-77.
[126] Athukorala, *supra* note 126, at 128-29.
[127] *See* Garretson, *supra* note 32, at 10.
[128] *Id.*
[129] *See id.*

of cash rich firms and the dismantling of the License Raj created the backdrop for Indian corporations to acquire foreign companies. Furthermore, the License Raj system largely excluded services and software firms, so that once economic liberalization took place, these firms were in a strong position to undertake outbound acquisitions.[130]

2. Economic Liberalization

In 1991, India faced the "Balance of Payments" crisis which almost led the country into bankruptcy.[131] This crisis created the need for government reform and led to the dismantling of the License Raj.[132] Initially, Dr. Manmohan Singh — the Finance Minister in the early 1990s and India's current Prime Minister — guided the government through a process of systematic economic reforms that were radically different from the License Raj period.[133] Subsequent administrations in the 1990s continued such reforms, furthering economic liberalization by opening the economy to foreign and direct competition and introducing significant privatization of various public sector enterprises.[134] Since then, the government has been more proactive in promoting international activity.[135] A number of scholars have argued that the current global competitiveness of Indian firms "can be traced

[130] *See* Armour & Lele, *supra* note 100, at 496-97.

[131] "The balance of payments is a statistical statement" "that summarizes economic transactions between residents and nonresidents during a specific time period." IMF, BALANCE OF PAYMENTS AND INTERNATIONAL INVESTMENT POSITION MANUAL 7, 9 (6th ed. 2010), *available at* http://www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf. India's balance of payments crisis has been described as follows:

> By the end of the 1980s, deteriorating government finances had resulted in a significant widening of the current account deficit, an accumulation of government and external debt, and rapidly rising debt service. As concerns about the external position mounted, and with a renewal of domestic political tensions, India's credit rating was downgraded, access to external borrowing dried up, and nonresident deposits were withdrawn. By early 1991, foreign exchange reserves were almost depleted, and India was on the verge of default.

Nouriel Roubini & Richard Hemming, *A Balance Sheet Crisis for India?*, *in* A SUSTAINABLE FISCAL POLICY FOR INDIA 114, 114 (Peter S. Heller & M. Hovinada Rao eds., 2006), *available at* http://www.imf.org/external/np/seminars/eng/2004/fiscal/pdf/hemrou.pdf.

[132] In the 1980s, the government made some tentative moves towards economic liberalization, although most of the government's reforms policies were piecemeal and uncoordinated. *See* PANAGARIYA, *supra* note 18, at 78-94.

[133] *See id.* at 100-03.

[134] *See* JOS MOOIJ, THE POLITICS OF ECONOMIC REFORMS IN INDIA 19-22 (2005).

[135] *Id.*

back to this [liberalization] process. In particular, the capacity to compete with foreign firms and face import competition in the domestic market was instrumental in building Indian firms' confidence to compete with foreign firms in world markets."[136]

While the reforms begun in 1991 were critical in familiarizing Indian firms with M&A transactions and promoted an influx on inbound M&A, it was not until early 2000s when outbound M&A transactions took off as a result of a transformation of the overseas investment laws. In essence, with respect to M&A transactions, the post-liberalization period can be divided into two phases: (i) one from 1991 until 2000 when FDI and acquisitions were almost entirely inbound; and (ii) another from 2000 when outbound acquisitions began to increase in importance. The section below addresses the significance of the laws enacted beginning in the year 2000 in facilitating outbound M&A transactions.

3. Transformation of Overseas Investment Laws

Significant reforms related to overseas investment have facilitated the wave of India's current outbound acquisitions.[137] Starting in early 2000, the Indian government took several steps that overhauled its foreign exchange regime.[138] Enactment of these legal reforms has been critical to the ability of Indian firms to carry out outbound acquisitions.[139]

In June 2000, the government passed the Foreign Exchange Management Act ("FEMA"),[140] making outward remittances of overseas

[136] Athukorala, *supra* note 63, at 129; *see also* GLOBAL POWERHOUSES, *supra* note 6, at 35-36; Ramamurti & Singh, *supra* note 5, at 115; Pradhan, *Emerging Multinationals*, *supra* note 7, at 8, 26-27.

[137] For a more detailed discussion of the enactment of permissive policy reforms with respect to overseas investments, see generally Shyamala Gopinath, Deputy Governor, Reserve Bank of India, Overseas Investment by Indian Companies: Evolution of Policy and Trends, Keynote Address at the International Conference on Indian Cross-Border Presence/Acquisitions (Jan. 19, 2007), *available at* http://www.bis.org/review/r070122c.pdf.

[138] *See* Matthew Sweeney, *Foreign Direct Investment in India and China: The Creation of a Balanced Regime in a Globalized Economy*, 43 CORNELL INT'L L.J. 207, 225-26 (2010).

[139] Nandita Dasgupta, *Indian Companies Investing in the United States: An Inquiry into Recent Patterns and Trends*, *in* THE RISE OF INDIAN MULTINATIONALS, *supra* note 59, at 187, 204.

[140] The Foreign Exchange Management Act, 1999, No. 42, Acts of Parliament, 1999 (India), *available at* http://finmin.nic.in/the_ministry/dept_eco_affairs/america_canada/fema_acts/index.htm; Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, Gazette of India,

acquisitions possible.[141] FEMA was heralded as a great change in Indian law.[142] It replaced the Foreign Exchange Regulation Act ("FERA") of 1973, an action one commentator described as moving away from a "suspicion control" regime toward a "trust-based self regulation."[143] Scholars have described FEMA as "more than a legislative rewrite of rules procedures."[144] Instead, FEMA has been described as facilitating the global economic transformation of Indian firms.[145]

FEMA grants quite a bit of flexibility to adapt to market conditions with discretionary powers exercised by the government and the Reserve Bank of India ("RBI"), India's central bank.[146] For example, the RBI has been able to continuously relax regulations pertaining to joint ventures and wholly owned subsidiaries.[147] FEMA gives the RBI the power to specify which capital account transactions are permissible and to provide a limit on the amount of foreign exchange that will be admissible.[148]

In addition to the enactment of FEMA, in March 2003, the government significantly revised the "Automatic Route" (i.e., without prior government approval) for overseas investment, thus enabling Indian corporations to fund 100% of their net worth abroad.[149] Later, Indian firms were able to fund overseas investments with up to 200% of their net worth, and they no longer needed prior approval from the RBI.[150]

section II(3)(i) (May 3, 2001).

[141] *See* Gopinath, *supra* note 137, at 1-2.

[142] *See* Suresh Thakur Desai, *From Permissions to Regulations: An Analysis of F.E.M.A. 1999*, CHEMICAL BUS., Mar. 2000, at 82, 82.

[143] K. Ramesh, Op-Ed, *FEMA: From 'Regulating' to 'Facilitating' Exports*, HINDU BUS. LINE, May 18, 2005, http://www.thehindubusinessline.com/2005/05/18/stories/2005051800520900.htm.

[144] Sumit K. Majumdar, *Institutions in Transition: Property Rights Regime Changes and the Saga of Foreign Firms in India*, 6 INDIA REV. 91, 97 (2007).

[145] *Id.*

[146] *Big Step Forward*, BUS. ASIA, Sept. 7, 1998, at 12, 12; Ramesh, *supra* note 143.

[147] *See* Priyanka Rathi, Cross Border Merger and Acquisitions in India with Special Reference to FEMA (unpublished manuscript), *available at* http://www.taxmann.com/taxmannflashes/flashart9-2-10_12.htm.

[148] The Foreign Exchange Management Act, 1999, No. 42, Acts of Parliament, 1999 (India), *available at* http://finmin.nic.in/the_ministry/dept_eco_affairs/america_canada/fema_acts/index.htm.

[149] *Id.*

[150] *See* Athukorala, *supra* note 63, at 129; Memorandum from Sandeep Mehta et al., O'Melveny & Myers LLP on Merger and Acquisition Transactions in India 1 (Feb. 2010), *available at* http://web.omm.com/files/upload/MA%20Transactions%20in%20Asia.pdf.

By 2010, Indian firms were permitted to invest up to 400% of the companies' net worth.[151] While the ability to invest up to 400% of an Indian company's net worth is certainly a benefit for conducting outbound M&A, it is also a restriction on an Indian company's investment activity abroad.[152] This limitation, along with an inability to pledge Indian assets for guarantees or debt financing without RBI approval (which is rarely given in practice), is an important limitation on size and scope of outbound M&A from India.

As part of the legal reforms regarding foreign exchange, the Indian government has also liberalized the amount of remittances that could be sent to India from foreign acquired companies.[153] These reforms allow Indian companies to invest abroad either through automatic route or with the approval of the RBI.[154] Interestingly, the number of Indian banks establishing branches abroad has also increased with the rise of outbound M&A activity.[155] Thus, Indian corporations became able to "borrow offshore specifically for cross-border investments and without government approval."[156]

International regulatory changes have also enhanced feasibility for Indian firms to acquire companies abroad.[157] For example, "World Trade Organization rules governing quotas on the importation of textiles into developed countries were lifted in 2005."[158] This enabled Indian companies to manufacture apparel for markets internationally,

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151 RESERVE BANK OF INDIA, RBI/2010-11/ 5 MASTER CIRCULAR NO. 05/2010-11, MASTER CIRCULAR ON DIRECT INVESTMENT BY RESIDENTS IN JOINT VENTURE (JV) / WHOLLY OWNED SUBSIDIARY (WOS) ABROAD 4 (July 1, 2010) [hereinafter RBI MASTER CIRCULAR], *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/5MCDIR290610.pdf. This ceiling is not applicable if the investment is made out of an Exchange Earners' Foreign Currency account or from funds raised through ADRs/GDRs. *See id.*

152 *See* Madhurendra Nath Jha, Paras Kuhad & Assocs., Cross Border Mergers and Acquisitions: The Legal Landscape (2008), http://www.paraskuhad.com/files/CROSS%20BORDER%20MERGERS%20&%20ACQUISITIONS.ppt.

153 *See* ECON. INTELLIGENCE UNIT, COUNTRY COMMERCE INDIA 56-57 (Tom Ehrbar et al. eds., 2009).

154 *See* Gopinath, *supra* note 137, at 2.

155 *See id.* at 5.

156 Garretson, *supra* note 32.

157 Ramamurti and Singh also attribute reforms in the international economic policy context which required greater openness by developing countries as contributing to the internationalization of Indian firms and reducing "the scope for the Indian government to pursue industrial policies to promote national champions in specific industries." Ramamurti & Singh, *supra* note 5, at 115.

158 *Indian Companies Are on an Acquisition Spree: Their Target? U.S. Firms*, KNOWLEDGE@WHARTON (Dec. 13, 2006) [hereinafter *Acquisition Spree*], http://knowledge.wharton.upenn.edu/article.cfm?articleid=1627.

leading both to increased wealth and familiarity with foreign nations.[159]

4. Access to Global Capital

Although Indian multinationals have engaged in numerous outbound acquisitions, the vast majority of the transactions have been structured as friendly, all-cash acquisitions of the target company, with few using company shares as consideration.[160] Economic and business incentives influence these transaction structures, but are not the only determinatives. As this Article demonstrates in Part II.C., a number of regulatory restrictions imposed by Indian law limit the ability of Indian firms to alter the structure of their acquisitions from all-cash transactions.[161]

The use of cash as the primary form of consideration is not surprising because many of the largest Indian companies are cash rich.[162] Many Indian firms are "underleveraged" and do not "have much debt."[163] In addition to existing cash reserves and relatively low leverage, some Indian firms have been able to obtain additional cash from global capital markets to complete their outbound acquisitions because of relaxed regulations that have allowed Indian firms to sell securities and raise financing abroad.[164]

Traditionally the access to capital, particularly when undertaking acquisitions abroad, has been significantly easier for Indian firms outside of India. Because Indian firms are cash rich and have strong balance sheets, experts suggest that Indian companies have been able to "easily raise capital to fund these acquisitions — whether by debt or equity" both domestically and through international fund raising.[165] Some Indian firms have been able to list on foreign exchanges to

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159 *Id.*

160 *See, e.g.*, Karnani, *supra* note 106, at 13-14 (showing that Indian acquisitions are typically financed by cash rather than stock swaps); *How Indian Companies Fund Their Overseas Acquisitions*, INDIA KNOWLEDGE@WHARTON. (Dec. 14, 2006), http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4131 ("Unlike most international M&A transactions that typically feature stock swaps in the financing arithmetic, Indian acquirers have for the most part paid cash for their targets, helped by a combination of internal resources and borrowings.").

161 *See* ERNST & YOUNG LTD. & FICCI, *supra* note 43, at 7; *see also infra* notes 291-327 and accompanying text.

162 *See* Kumar, *Emerging Giants*, *supra* note 10, at 116.

163 *Acquisition Spree*, *supra* note 158.

164 *See* Rajpal & Parekh, *supra* note 52; Karnani, *supra* note 106, at 13.

165 Garretson, *supra* note 32.

increase their ability to raise debt.[166] Indian firms have been able to use American Depository Receipts to ease access to foreign capital markets and to use Global Depository Receipts to facilitate M&A activities in foreign markets.[167] Banks have also become somewhat comfortable funding Indian multinationals' cross-border M&A because of the growing success of India's outbound acquisitions.[168]

While Indian firms have been able to raise acquisition financing abroad, they have faced difficultly in raising acquisition financing in India as Indian regulations restrict the ability of Indian banks to provide acquisition financing.[169] The RBI prevents banks from providing loans for the purchase of shares to ensure the safety of Indian banks.[170] The RBI has allowed banks to provide financing for some outbound acquisitions, but these are subject to RBI guidelines and require the bank to ensure that such acquisitions are beneficial to the borrowing company.[171] The RBI prevents a bank's total exposure to the capital market to 5% of its total outstanding advances.[172] These restrictions "make it virtually impossible for a financial investor to finance a LBO" using an Indian bank.[173]

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166 *See* Manoj Kumar, *Factors Influencing the Indian Firms' Foreign Listing Decisions: A Survey Based Approach* 27 (Indian Inst. of Mgmt., Working Paper No. 951390, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951390.

167 *See id.* at 27-28.

> " 'Depository Receipt' (DR) means a negotiable security issued outside India by a Depository bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as deposit by a Custodian bank in India. DRs are traded on Stock Exchanges in the US, Singapore, Luxembourg, etc. DRs listed and traded in the US markets are known as American Depository Receipts (ADRs) and those listed and traded anywhere/elsewhere are known as Global Depository Receipts (GDRs)."

DEP'T OF INDUS. POL'Y & PROMOTION, MINISTRY OF COMMERCE & INDUS., GOV'T OF INDIA, CONSOLIDATED FDI POLICY 8-9 (2010) [hereinafter CONSOLIDATED FDI POLICY], *available at* http://siadipp.nic.in/policy/fdi_circular/fdi_circular_1_2010.pdf.

168 *With Growing Appetite for Funds, More Players Plan Market Entry*, ECON. TIMES, July 14, 2010, http://economictimes.indiatimes.com/articleshow/6164894.cms.

169 Sharma & Irani, *supra* note 119, at 105; *Domestic Acquisition Financing Faces Hurdles*, FIN. EXPRESS, Jan. 1, 2007, http://www.financialexpress.com/news/domestic-acquisition-financing-faces-hurdles/188304/.

170 Narendra Chokshi, Challenges Faced in Executing Leveraged Buyouts in India the Evolution of the Growth Buyout 1, 15 (Apr. 2, 2007) (unpublished manuscript), *available at* http://w4.stern.nyu.edu/glucksman/docs/Chokshi.pdf.

171 *Id.* at 15.

172 *Id.* at 16.

173 *Id.*

Thus, most Indian multinationals who have used the LBO structure[174] to raise bank financing use the laws of the jurisdiction of the target company. Many Indian companies, including Tata Tea, Tata Steel, UB Group, Suzlon Energy, Essar Steel Holdings, and Tata Motors, have used leveraged buyouts in making foreign acquisitions by setting up offshore special purpose vehicles ("SPV") and obtaining financing abroad.[175] The typical structure is for the Indian acquirer to set up an SPV by providing some equity financing and then to raise large amounts in the SPV through senior debt and mezzanine financing for which the target company's assets will be provided as security.[176] Thus, Indian multinationals are able to avail themselves of funding structures to carry out outbound acquisitions, when such structures are not available for domestic acquisitions.[177]

C. Legal Rules Governing M&A Transactions

It bears repeating that the outbound M&A boom by Indian firms was part of a general rise in Indian firms' M&A transactions activity.[178] Many of the firms that eventually participated in outbound M&A began with extensive domestic M&A activity.[179] For example, Hindalco began its M&A activities with small takeovers in India prior to casting its net abroad.[180] Thus, one could argue, that the

[174] In a typical leveraged buyout, the company's assets are used as collateral and the company's income is used to service the debt. Jeffrey Blomberg, *Private Equity Transactions: Understanding Some Fundamental Principles*, BUS. L. TODAY, Jan./Feb. 2008, at 51, 51-52. The Indian prohibition on LBOs arises out of Section 77 of the Companies Act, which prohibits a company from providing financial assistance in connection with the acquisition of its own shares. Hence, an Indian target company is unable to provide security that is essential in a typical LBO structure, which makes LBOs impossible in India.

[175] *See Corus Buy: Tatas May Go for Leveraged Buyout*, ECON. TIMES, Oct. 11, 2006, http://economictimes.indiatimes.com/articleshow/2143115.cms; *Essar Global to Take Leveraged Buyout Route for Algoma Buy*, ECON. TIMES, Apr. 17, 2007, http://economictimes.indiatimes.com/News/News-By-Company/E-Companies/Essar-Group/Essar-Global-to-take-leveraged-buyout-route-for-Algoma-buy/articleshow/1917707.cms?curpg=1; *India Inc's Large Leveraged Buyouts a Concern*, HINDU BUS. LINE, June 17, 2007, http://www.thehindubusinessline.com/2007/06/17/stories/2007061701920200.htm; *How Indian Companies Fund Their Overseas Acquisitions*, *supra* note 160.

[176] *See Domestic Acquisition Financing Faces Hurdles*, *supra* note 169.

[177] The question that scholars need to explore further is whether the dichotomy in financing regulations provides incentives for Indian multinationals to undertake outbound acquisitions instead of domestic acquisitions. *See id.*

[178] *See supra* notes 26-29 and accompanying text.

[179] *See* GLOBAL POWERHOUSES, *supra* note 6, at 4-5.

[180] *See* Kumar, *Emerging Giants*, *supra* note 10, at 117.

experienced gained by Indian firms in undertaking domestic acquisitions prepared these same firms to launch outbound acquisitions.

There is also some suggestion that Indian firms may have targeted companies in jurisdictions with merger rules and takeover regulations that parallel those found in India in part to lower transaction costs. An analysis of merger rules takeover law and regulations in India demonstrates that the legal rules governing domestic M&A transactions were in large part derived from UK and U.S. models.[181] In fact, "[t]he primary forms of business combinations in India resemble those found in the United States: mergers and tender offers."[182] For example, similar to U.S. corporate law, Indian corporate law differentiates between mergers (i.e., transactions in which the target company is usually subsumed and loses corporate identity) and acquisitions (i.e., transactions in which the target or its business is acquired, but the target entity continues to maintain its legal entity status).[183] Domestically, India's legal regime with respect to merger transactions and takeovers has numerous similarities to the U.S. and UK system. Thus, Indian companies were already familiar with the type of merger rules and takeover regulations that they encountered when purchasing firms in these countries.

While this familiarity has undoubtedly been helpful for Indian firms acquiring companies in the United Kingdom or the United States, Indian law continues to place significant burdens on firms that attempt M&A transactions, whether domestic or outbound. Such burdens may both drive Indian firms to undertake acquisitions abroad, where they may be able to escape the confines of Indian corporate law, but also may limit the ability of Indian firms to be creative in undertaking different types of acquisition structures.

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[181] Indian corporate law derives from the Joint Stock Companies Act, 1850, which was modeled on the English Joint Stock Companies Act, 1844, and continued to emulate English law even after India achieved independence in 1947. P.M. Vasudev, Capital Stock, Its Shares and Their Holders: A Comparison of India and Delaware 16-17 (Mar. 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913282. The Bhabha Committee, whose recommendations ultimately formed the basis for the Companies Act, convened partly in response to the report of the United Kingdom's Cohen Committee, which recommended far-reaching changes to the English Companies Act. GOV'T OF INDIA, MINISTRY OF FIN., REPORT OF THE COMPANIES ACT AMENDMENT COMMITTEE 2 (1957).

[182] *See* Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, 2007 COLUM. BUS. L. REV. 800, 806 (2007).

[183] *See* Nishith Desai Assocs., Mergers and Acquisitions in India 3-5 (Feb. 2010) (unpublished manuscript), *available at* http://www.nishithdesai.com/Research_Paper2010/MA%20Paper%202010.pdf.

The sections below provide a general overview of the corporate law framework for M&A transactions and discuss the challenges that continue to be posed by Indian corporate law.[184]

1. The Companies Act

Merger transactions in India are governed by the Companies Act, 1956.[185] The Companies Act sets forth a complex set of procedures for merger transactions enumerated in Sections 390–395 of the act.[186] For Indian companies aiming to undertake a cross-border acquisition, if they determine to undertake a merger structure, they may be subject to the rules of the Companies Act, along with the merger rules of the target entity's jurisdiction. The cumbersome merger process under the Companies Act has come under criticism.[187] Moreover, due to the complexities involved in effecting a merger under the act, outbound acquisitions using the merger structure are rarely undertaken. The section below discusses these complexities.

a. Merger Transactions Under the Companies Act

In order to undertake a merger transaction, the Companies Act requires the acquirer company to prepare a scheme of amalgamation under Section 393 of the act. Under the Companies Act, a merger is considered to be a scheme or arrangement made between the company and its members.[188] To effect a merger, each of the merging companies must submit an application calling for a meeting of each company's creditors and shareholders to the relevant regional high court with

[184] The sections below do not address the limitations set forth by the Competition Act, 2002, under which the Competition Commission of India (CCI) has been established to control anticompetitive agreements, abuse of dominant position by an enterprise, and for regulating certain combinations.

[185] The Companies Act, No. 1 of 1956, INDIA CODE (1956). For an overview of the processes involved in a merger transaction under the Companies Act, see Ashish S. Joshi, *Mergers and Acquisitions in India: A Primer*, MICH. BUS. L.J., Summer 2008, at 43, 43-50.

[186] The term merger is not used in the Companies Act. Instead, the Companies Act addresses amalgamation. The Companies Act, § 390-95. For the purposes of this paper, the two terms are used interchangeably.

[187] *See* Memorandum from Sandeep Mehta et al., *supra* note 150, at 4-5.

[188] An "arrangement" includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods. The Companies Act, § 390. The members include every person holding share capital of a company and whose name is entered as beneficial owner of record.

jurisdiction over the company.[189] The rather exhaustive and cumbersome procedures for the court process are contained in the Companies (Court) Rules 1959.[190] Generally, the courts will permit a single joint application for convening a meeting by the two merging companies involved in the scheme, although the application will need to be filed in court by way of two separate petitions, one for each company.[191] If the companies are incorporated in different states, then the filings may have to be made in different high courts.[192]

Similar to the U.S. system, the Companies Act requires that merger transactions be approved by the shareholders of each of the constituent firms.[193] Under the Indian Companies Act, this would technically include shareholders of both the acquirer Indian company and the foreign target entity. In addition to shareholder approval, creditor approval is also needed for any creditors of either of the merging firms.[194] The Act requires class meetings for each of the classes of shares, as well as each of the classes of creditors (e.g., secured, unsecured, and trade are separate classes of creditors).[195] Under Section 391(2) of the Companies Act, a majority in number representing three-fourths in value of the creditors and shareholders of the company present and voting at the meeting must vote in favor of the transaction. Under some circumstances, however, the court can dispense with the meeting.[196]

Overall, a merger process involves not only the shareholders of each of the merging companies but also the courts and each company's creditors.[197] This "mandatory judicial and creditor approval over a merger descends from British company law, and continues to be a fixture among many Commonwealth nations and several European nations."[198] Due to these procedures, the merger approval process can

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189 *See* Nishith Desai Assocs., *supra* note 183, at 7.

190 *See* Joshi, *supra* note 185, at 45; Nishith Desai Assocs., *supra* note 183, at 7.

191 *See* AVTAR SINGH, COMPANY LAW 612 (15th ed. 2007).

192 *See id.* at 614.

193 *Compare* The Companies Act, § 391-395 (providing framework for compromises and agreements with members and providing for amalgamation of companies), *with* DEL. CODE ANN. tit. 8, § 251 (West 2010) (requiring that merger schemes be submitted for stockholder approval).

194 Joshi, *supra* note 185, at 45.

195 *See* SETH DUA & ASSOCS., JOINT VENTURES AND MERGERS AND ACQUISITIONS IN INDIA — LEGAL AND TAX ASPECTS 256 (2006).

196 *See id.* at 257-58.

197 Joshi, *supra* note 185, at 44-45.

198 Mathew, *supra* note 182, at 806 n.17.

be quite lengthy, ranging from six months to one year.[199] In addition, "shareholder or creditor objections can significantly lengthen the process."[200] Some commentators have stated that the court's jurisdiction under Section 394 of the Companies Act is supervisory; the court is not allowed to second-guess the economic wisdom of the deal.[201] While the duties of the sanctioning court are largely procedural, the sanctioning court can prevent a deal that runs contrary to the public interest.[202] Some commentators have argued that this public interest test seems to have more strength when a foreign company attempts to acquire an Indian firm, suggesting that the court is more comfortable with Indian firms acquiring foreign assets.[203] However, the courts have not to date explicitly made such pronouncements.

With respect to merger transactions, the Companies Act places severe restrictions on the surviving entity from the merger transaction.[204] While a cross-border merger of a foreign body corporate into an Indian company is permissible, although rare in practice, the cross-border merger of an Indian company into foreign body corporate is not permissible under the Companies Act.[205] An Indian company can, however, merge with the Indian establishment of a foreign company.[206] The Companies Act's provisions governing amalgamation

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[199] *See* GLOBAL LEGAL GRP., THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: MERGERS AND ACQUISITIONS 2009, at 128 (2009), *available at* http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=91&chapters_id=2543.pdf.

[200] Mathew, *supra* note 182, at 806 n.17.

[201] *See* Sharma & Vidhani, *supra* note 13, at 2; *see also* SINGH, *supra* note 191, at 627-30; Memorandum from Sandeep Mehta et al., *supra* note 150, at 4 (stating that while "[t]he court has to conclude that the scheme is beneficial to both companies and is not detrimental to the shareholders of either company or against the public interest," it generally does not probe into commercial viability of merger).

[202] *See* Sharma & Vidhani, *supra* note 13, at 2-3.

[203] *Id.* at 8-9.

[204] *See* Aneja, *supra* note 13, at 53-54.

[205] Nishith Desai Assocs., *supra* note 183, at 8; *see also* Moschip Semiconductor Technology, (2004) 120 Comp. Cas. 108 AP (Andhra Pradesh H.C.), *available at* http://www.indiankanoon.org/doc/898834/. In the *Moschip* case, which involved the merger of an Indian company and a California company, the Andhra Pradesh High Court held that under section 1108 of the California Corporation Code and in contrast to the provisions of Indian law, the surviving company could be either a domestic company or a foreign company. The court stated, however, that "in these days of globalization, a liberal view is expected to be taken enabling such scheme of arrangement for amalgamation between a domestic company and a foreign company and there is every need, in my considered view, for suitable modification of the law in that direction." *Id.* at ¶ 16.

[206] *See* SETH DUA & ASSOCS., *supra* note 195, at 239.

may be applicable to cross-border amalgamations. Section 394(4)(b) of the Companies Act requires that the "transferee company" be a company within the meaning of the Companies Act (i.e., an Indian company); however, a "transferor company" may be any body corporate, whether or not it is a company within the meaning of the Companies Act. A "body corporate" is defined in Section 2(7) of the Companies Act to include a company incorporated outside India.[207]

b. Attempts to Reform the Companies Act

Over the past decade, the Ministry of Company Affairs (MCA) (previously the Department of Company Affairs within the Ministry of Finance) has undertaken several attempts to effect overarching amendments to modernize India's company law. As a result of over five years of comments and review, a legislative overhaul of the Companies Act is currently pending in the Indian Parliament.

The first significant effort to reform the Companies Act was launched in December 2004 when the MCA convened the Irani Committee.[208] The committee was led by J.J. Irani, a director of Tata Sons, Ltd.,[209] the primary shareholder in the large business conglomerate, the Tata Group.[210] In its report, the Irani Committee "observed that the process of mergers and acquisitions in India is a court-driven, long and drawn-out process that is problematic."[211] The committee made a number of recommendations with respect to the merger process, including: (1) allowing for contractual mergers (i.e., without court intervention); (2) allowing for cross-border M&A transactions that would permit an Indian company to merge into a foreign company and vice-versa; and (3) allowing for the Indian shareholders to receive foreign securities or securities in lieu of Indian shares (especially in listed companies), so that they would become

[207] Aneja, *supra* note 13, at 53.

[208] JAMSHED J. IRANI ET AL., EXPERT COMM. ON CO. LAW, REPORT OF THE EXPERT COMMITTEE TO ADVISE THE GOVERNMENT ON THE NEW COMPANY LAW 3 (2005) [hereinafter IRANI REPORT], *available at* http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf. In addition to the recommendations of the invited experts, a concept document was made available to the general public, along with a system for collecting opinions and recommendations from corporations, organizations, and individuals. *Id.* at 3-4, 36.

[209] *Tata Group: Profiles: JJ Irani*, TATA, http://www.tata.com/aboutus/articles/inside.aspx?artid=/hpowkTjf1o= (last visited Oct. 2, 2010).

[210] *Tata Group: Our Businesses: Tata Sons*, TATA, http://www.tata.com/company/profile.aspx ?sectid=DpOT+Lbrdvg= (last visited Jan. 8, 2009).

[211] Aneja, *supra* note 13, at 55.

members of the foreign company or holders of a security with a trading right in India.[212] According to the Irani Committee:

> A forward looking law on mergers and amalgamations needs to also recognize that an Indian company ought to be permitted with a foreign company to merger. Both contract based mergers between an Indian company and a foreign company and court based mergers between such entities where the foreign company is the transferee, needs to be recognized in Indian Law. The Committee recognizes that this would require some pioneering work between various jurisdictions in which such mergers and acquisitions are being executed/created.[213]

Despite much publicity regarding the Irani Committee's recommendations, the Indian government has been unable to translate the committee's recommendations into legislation.[214] After years of delay, the Companies (Amendment) Bill was introduced in the Indian Parliament in October 2008.[215] However, the bill failed to become law in 2008. In August 2009, the Companies Bill, 2009[216] was introduced in the Lok Sabha, the directly elected lower house of the Indian Parliament, in the same form in which it was presented in 2008.[217] However, passage of the bill has been deferred, and it is expected that the Companies Bill will be further amended as a result of an August 2010 report by the Standing Committee on Finance of Parliament which examined the 2009 bill in great detail.[218] In addition, while the

[212] *See* IRANI REPORT, *supra* note 208, ch. X, paras. 21-22.

[213] *Id.*

[214] Umakanth Varottil, *Companies Bill Reintroduced in Parliament*, INDIAN CORP. L. BLOG (Aug. 4, 2009, 2:44 PM), http://indiacorplaw.blogspot.com/2009/08/companies-bill-reintroduced-in.html [hereinafter *Companies Bill Reintroduced*].

[215] Press Release, Ministry of Corporate Affairs (India), Bill Intends to Modernize Structure for Corporate Regulation in This Country (Oct. 23, 2008), *available at* http://www.pib.nic.in/release/release.asp?relid=44114.

[216] *See* The Companies Bill, 2009, No. 59 of 2009, *available at* http://www.mca.gov.in/Ministry/acts_bills.html; *see also* Press Release, Ministry of Corporate Affairs (India), Companies Bill, 2009 Introduced in Lok Sabha (Aug. 3, 2009), *available at* http://www.pib.nic.in/release/release.asp?relid=51386.

[217] *See* Chakshu Roy & Avinash Celestine, *Legislative Brief: The Companies Bill, 2009*, PRS LEGISLATIVE RESEARCH 2 (2009), http://www.prsindia.org/uploads/media/Company/Legislative%20Brief--companies%20bill%202009.pdf.

[218] *See* STANDING COMMITTEE ON FINANCE (2009-2010), MINISTRY OF CORPORATE AFFAIRS (INDIA), THE COMPANIES BILL, 2009, TWENTY-FIRST REPORT 9-46 (2010); Umakanth Varottil, *Parliamentary Standing Committee on Companies Bill, 2009*, INDIAN CORP. L. BLOG (Sep. 5, 2010, 2:25 PM), http://indiacorplaw.blogspot.com/2010/09/

Irani committee had indicated that it would recommend allowing transaction structures whereby a non-Indian company could be the surviving entity, it appears that the government in its proposed amendment of the Act "decided not to allow the merger of Indian companies with foreign companies," concluding that "[a]lthough this is an international best practice in the laws relating to mergers and acquisitions, . . . merger of an Indian company with a foreign company would lead to a situation where shareholders of the Indian company hold shares . . . in the foreign company," which the government saw as a migration of an Indian company to other jurisdictions.[219]

2. The Takeover Code

Prior to 1991, various legislative burdens and licensing requirements in Indian law restricted takeover proceedings.[220] The creation of the Securities and Exchange Board of India ("SEBI") in 1992 brought with it the passage of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1992, to govern the securities market and protect investors in the securities market.[221] In 1994, SEBI adopted the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1994, which laid down procedures for acquirers in takeover situations, thereby structuring a market for corporate control.[222] Following numerous amendments, SEBI replaced the 1994 Regulations with the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 ("Takeover Code").[223] Since its adoption in 1997, SEBI has made significant revisions to the Takeover Code,[224]

parliamentary-standing-committee-on.html.

219 Umakanth Varottil, *Cross Border Mergers*, INDIAN CORP. L. BLOG (Sep. 13, 2008, 9:04 AM), http://indiacorplaw.blogspot.com/2008/09/cross-border-mergers.html.

220 Mahesh Kumar Tambi, Indian Takeover Code: In Search of Excellence (A Case Study Approach) 2 (Apr. 15, 2005) (unpublished manuscript), *available at* http://129.3.20.41/eps/mac/papers/0504/0504021.pdf.

221 *See generally* J. R. Varma, V. Raghunathan & M.C. Bhatt, *Comments on SEBI's Draft Takeover Code* (Indian Inst. of Mgmt., Ahmedabad, Working Paper No. 1010, 1992), *available at* http://www.iimahd.ernet.in/~jrvarma/papers/WP1010.pdf (discussing need for regulation of takeovers).

222 *See* SEC. & EXCH. BD. OF INDIA, REPORT OF THE TAKEOVER REGULATIONS ADVISORY COMMITTEE UNDER THE CHAIRMANSHIP OF MR. C. ACHUTHAN 6 (2010) [hereinafter TRAC REPORT], *available at* http://www.sebi.gov.in/commreport/tracreport.pdf.

223 Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, Gazette of India, section III(2) (Feb. 20, 1997) [hereinafter Takeover Code], *available at* http://www.sebi.gov.in/acts/act15a.html.

224 For a list of amendments to the 1997 Takeover Code, see Sec. & Exch. Bd. of India, *Regulations*, SEBI.GOV.IN, http://www.sebi.gov.in/Index.jsp?contentDisp=SubSection&sec_id=5&sub_sec_id=5 (last visited Oct. 1, 2010). The April 13, 2010

and in 2010, SEBI took steps to reform the code further by appointing the Takeover Regulations Advisory Committee ("TRAC") in order to develop an updated code.[225]

While the provisions of the Takeover Code do not apply directly to outbound acquisitions, the code has had significant indirect influence of Indian companies. On the one hand, Indian firms launched outbound deals with a deep understanding of the complexities of takeover rules, since most Indian firms that undertook outbound M&A gained considerable experience in M&A transactions generally by first undertaking domestic acquisitions.[226] On the other hand, in part due to the Takeover Code's extensive restrictions on hostile acquisitions, Indian firms have been reluctant to undertake hostile outbound acquisition.[227]

a. General Overview of the Takeover Code

The Takeover Code, which applies to both direct and indirect shareholding in listed companies, provides important disclosure requirements as well as a complex set of procedures to govern tender offers.[228] The Code's disclosure requirements are triggered when an acquirer[229] accumulates holdings in an Indian company in excess of

amendments to the Takeover Code list twenty-one prior amendments to the 1997 Takeover Code.

[225] Umakanth Varottil, *The Year That Was: A Round-Up of 2009*, INDIAN CORP. L. BLOG (Dec. 31, 2009, 11:12 AM), http://indiacorplaw.blogspot.com/2009/12/year-that-was-round-up-of-2009.html [hereinafter Varottil, *The Year That Was*].

[226] *See* GLOBAL POWERHOUSES, *supra* note 6, at 4-5.

[227] *See* id. at 189.

[228] Many of the post-1997 amendments to the Takeover Code relate to the various trigger points for disclosure and compulsory tender offers. *See* Sandeep Parekh, *Indian Takeover Regulation — Under Reformed and Over Modified* 3 (Indian Inst. of Mgmt., Working Paper No. 2009-11-06, 2009) [hereinafter Parekh, *Indian Takeover Regulation*], *available at* http://ssrn.com/abstract=1517017.

[229] The Takeover Code defines an acquirer broadly as "any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer." Takeover Code, *supra* note 223, § 2(1)(b). The term "persons acting in concert" include:

> persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.

Id. § 2(1)(e)(1).

5%, 10%, 14%, 54%, or 74%.[230] The disclosures required by the Code must be made at each ownership stage "to the target company, and the stock exchanges where shares of the target company are listed" within two days of such acquisition.[231]

> This disclosure requirement serves as an early warning system to both the target corporation and its public shareholders, alerting the corporation to a potential threat and signaling to shareholders that in anticipation of a potential change of control they should demand a control premium for sales of their shares on the open market prior to any tender offer.[232]

In addition to its disclosure requirements, the Takeover Code sets out a set of procedures relating to mandatory tender offers which are triggered when an acquirer acquires 15% or more of a company's shares.[233] A mandatory open offer forces an acquirer of 15% or more of a company's shares to make a public tender offer for at least an additional 20% of the company's shares.[234] Additionally, the offer price must be the highest of either: (i) "the average of the weekly high and low of the closing prices of the shares of the target company . . . during the twenty-six weeks or the average of the daily high and low of the prices of the shares . . . during the two weeks preceding the date of public announcement" of the offer; or (ii) any price paid by the acquirer or persons acting in concert during the twenty-six week period prior to the announcement.[235] The mandatory offer ensures that public (minority) shareholders are not shut out of receiving some of the control premium that the acquirer offers as consideration.[236] It also serves to deter bidders that might not have the liquidity to conduct a large-scale acquisition. Moreover, Regulation 16 of the Takeover Code requires that the acquirer must identify itself, its reason for acquisition, and its plans for the shares.[237]

Despite the mandatory offer requirement, the Takeover Code permits "creeping acquisitions" by holders of a company's stock so

[230] *Id.* § 7(1).

[231] *Id.* § 7(1)(A).

[232] Mathew, *supra* note 182, at 807.

[233] The Code's trigger points and various exemptions with respect to the mandatory offer have been described as "unnecessary and convoluted." *See* Parekh, *Indian Takeover Regulation*, *supra* note 228, at 6.

[234] Takeover Code, *supra* note 223, §§ 10, 21.

[235] *Id.* § 20(4).

[236] Mathew, *supra* note 182, at 808.

[237] Takeover Code, *supra* note 223, § 16.

long as they hold between 15% and 55% of the company's shares.[238] The creeping acquisition provision in the Takeover Code allows such shareholders to acquire up to 5% of the company's stock each year without making an open offer.[239] If the shareholder acquires more than 5% in a year, a mandatory open offer for at least another 20% of the company's shares is triggered.[240] The creeping acquisition provision is especially useful to promoters[241] because it allows them to slowly increase their shareholdings (and as a corollary, their control over the corporation) by up to 5% each year without having to pay any premium for these shares.[242]

b. Criticism of the Takeover Code and Its Amendment Process

After adoption of the Code in 1994, SEBI subjected the legislation to extensive piecemeal amendments.[243] In 1997, SEBI replaced the 1994 regulations with the current Takeover Code. The SEBI Regulations, 1997, and its many amendments, constitute the current Takeover Code.[244] Reactions to the takeover code and its various amendments have varied.[245] While most agree that the takeover code was necessary

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238 *Id.* § 11.

239 *Id.*

240 *Id.*

241 "Promoter" and "promoter group" are defined to include: (i) the person or persons who are in overall control of the company, (ii) the person or persons who are instrumental in the formulation of a plan or program pursuant to which securities are offered to the public, and (iii) the person or persons named in the prospectus as promoters. *See* Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, Gazette of India, section III(4), subsecs. 2(1)(za)-2(1)(zb) (Aug. 26, 2009), *available at* http://www.sebi.gov.in/Index.jsp?contentDisp=Section&sec_id=1.

242 Mathew, *supra* note 182, at 808.

243 *See Sebi Redefines Promoter in Takeover Code*, BUS. STANDARD, June 2, 2006, http://www.business-standard.com/india/news/sebi-redefines-promoter-under-takeover-code/250856/; Press Release No. 239/2008, Sec. & Exch. Bd. of India, Consolidation of Holdings Under Takeover Regulations (Oct. 27, 2008), http://www.sebi.gov.in/press/2008/2392008.html; *Bloody Battles: Messy Takeovers that Spilled from Corporate India's Boardrooms*, CAPITAL MARKET, Feb. 24, 2004, http://www.capitalmarket.com/CMEdit/SFArtDis.asp?SFSNO=89&SFESNO=7; *see also* SRIDHARAN & PANDIAN, *supra* note 99, at 519-20.

244 *Genesis of Takeover Code*, TAKEOVERCODE.COM, http://www.takeovercode.com/genesis.php (last visited Oct. 1, 2010).

245 *Compare* Varma, Raghunathan & Bhatt, *supra* note 221 (expressing overall agreement with guidelines, but worried about interests of small shareholders), *and* Tambi, *supra* note 220, at 3 (stating that takeover codes are improving gradually), *with* Parekh, *Indian Takeover Regulation*, *supra* note 228 (stating that glaring problems have not been fixed while minor issues are constantly modified), *and* Conference Paper,

in light of developments in the Indian and world economies, many have criticized the specific provisions, or lack of provisions, throughout the code and the manner in which SEBI approaches and enforces the code.[246] Commentators have suggested that the Substantial Acquisition of Shares and Takeover Regulation were SEBI's "most controversial regulations."[247] News reports have deemed the reforms pro-corporate, critiquing that the code's "gaping loopholes" have created a "goldmine for the corporate sector."[248] Others comment on the code's lack of regulations geared towards small companies. In an early commentary on the code, the legislation's drafting came under intense attack: "Although the [takeover] committee has as its members professionals and experts from various fields, one wonders how important aspects affecting the very existence of small companies have been overlooked while drafting the regulations. Or was it 'willful omission?' "[249]

Numerous parts of the code itself have been criticized in the years following its adoption.[250] After coming under criticism that the

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Jairus Banaji, Thwarting the Market for Corporate Control: Takeover Regulation in India, Oxford's Queen Elizabeth House Conference (July 4–5, 2005), http://www.qeh.ox.ac.uk/dissemination/conference-papers/banaji.pdf (documenting various criticisms of takeover code by business press).

[246] *See generally* Parekh, *Indian Takeover Regulation*, *supra* note 228 (arguing that complexity in disclosure and tender offer rules lack philosophy and that "simple structure [needs to be] introduced [to make] compliance of the regulations straight forward and easy to understand by management of listed companies"); *see also Web Portal on M&A Laws Launched*, BUS. STANDARD, July 1, 2008, http://www.business-standard.com/india/storypage.php?tp=on&autono=41254.

[247] Sucheta Dalal, *Five Years On, Sebi Makes Amends*, FIN. EXPRESS, Sept. 16, 2002, http://www.financialexpress.com/printer/news/57019/.

[248] Sucheta Dalal, *Takeover of the Takeover Committee*, FIN. EXPRESS, May 12, 2002, http://www.financialexpress.com/news/takeover-of-the-takeover-committee/46336/.

[249] *Takeover Regulations: Empowering the Raiders?*, HINDU BUS. LINE, March 11, 1997, http://www.westlaw.com/ (click "Newsroom with Reuters" tab; click "International News with Reuters" link; search "Terms and Connectors" for "Takeover Regulations: Empowering the Raiders"; then follow "Takeover regulations: Empowering the raiders?" hyperlink).

[250] *See, e.g.*, M.Y. Khan, *It's Time Retail Shareholders Had Their Say*, HINDU BUS. LINE, Aug. 2, 2007 (showing retail shareholders' lack of power); *Laws Governing Corporate Sector Must Be Remodeled*, HINDU BUS. LINE, Apr. 27, 2005 (stating that remodelling takeover code is necessary for uninhibited growth of domestic industry); Krishnan Thiagarajan, *Fine-Tuning the Takeover Code: Better Bargain for Shareholders*, HINDU BUS. LINE, Jan. 30, 2005 (delisting is difficult for companies with equity about 75% and some companies are getting differential treatment); Krishnan Thiagarajan, *Takeovers: Time to Review Change in Control*, HINDU BUS. LINE, Apr. 27, 2003, http://www.thehindubusinessline.com/iw/2003/04/27/stories/2003042700530600.htm (stating that "the concept of 'change in control' continues to defy lucid explanation

Takeover Code did not address the interests of minority and retail investors, SEBI made further changes to the code. In response, commentators have criticized the implications that these reforms may have on corporate sector flexibility.[251] They have further argued that new regulations may lead to increases in the costs of acquisitions.[252]

Commentators have also criticized how SEBI applied and enforced the Takeover Code. The three major criticisms of SEBI's actions are lack of objectivity, inconsistent application, and lack of transparency. This seemed to be particularly true in the early 2000s, while the Takeover Code was undergoing major reforms. SEBI's actions have been said to demonstrate a "flip flop attitude," which may lead to doubts as to its objectivity.[253] Further, SEBI's inconsistent enforcement has led to criticisms of the council's "highly pathetic" implementation.[254] The most cited criticism of SEBI's actions, however, is a lack of transparency in decision-making proceedings. As one author stated, "Despite several attempts and a whole lot of regulatory powers available to it, transparency is one important factor which is conspicuous by its absence in the operation of the capital market regulator, Securities and Exchange Board of India."[255]

c. Proposed Revamp of the Takeover Code

In response to the criticisms discussed above, SEBI took a significant step to reform the Code in 2009 by "commissioning a review of the Takeover Code by a newly appointed Takeover Regulations Advisory Committee ("TRAC") in order to overhaul the oft-amended and unduly complex set of norms that govern takeovers of Indian listed companies."[256] It is expected that the Takeover Code will be significantly amended as a result of TRAC's recommendations.

In July 2010, TRAC issued a TRAC's 2010 report recommending a comprehensive rewrite of the Takeover Code, with a number of

under the Takeover Code").

[251] *Sebi's Moves: Focused on the Smaller Shareholder*, MINT, Aug. 10, 2009, http://www.livemint.com/2009/08/09220410/Sebi8217s-moves-focused-on.html.

[252] Editorial, *Better Rules Take over*, FIN. EXPRESS, Sept. 24, 2009, http://www.financialexpress.com/news/fe-editorial-better-rules-take-over/520675/.

[253] *The Janus Face of Sebi*, FIN. EXPRESS, Sept. 23, 2002, http://www.financialexpress.com/news/the-janus-face-of-sebi/59401/0.

[254] Rajiv Goel, *Case by Case Decisions Send Confusing Signals*, ECON. TIMES, June 27, 2000, http://www.westlaw.com, 2000 WLNR 2960181.

[255] Oommen A. Ninan, *Market Regulation: Lack of Transparency*, HINDU, May 11, 2003, http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2003051100721500.htm&date=2003/05/11/&prd=th&.

[256] Varottil, *The Year That Was*, *supra* note 225.

important proposed changes to the code.[257] While a comprehensive overview of the TRAC report is beyond the purview of this Article, a few important recommendations are worth noting. The committee has recommended amending the requirement to launch an open offer so that it will be triggered upon the acquisition of 25% of a target company's shares, rather than the existing 15% threshold.[258] The committee has offered a number of rationales for this amendment including: (i) there are few BSE-listed companies where promoter shareholding is between 15% and 25%; (ii) the standard trigger point in a number of other jurisdictions outside of India, such as the UK, Singapore and Hong Kong, is 30% or greater; and (iii) in the Indian context, 25% is the level at which a shareholder would be capable of exercising de facto control, especially since the "the Companies Act recognizes any holding in excess of 25% as the threshold at which special resolutions can be blocked."[259]

The most controversial aspect of the TRAC proposal is the requirement that an open offer must be for 100% of the outstanding shares, up from the existing 20% requirement.[260] The committee's rationale for this amendment is that: (i) most offers have in fact been substantially higher than the 20% requirement; (ii) a 20% requirement may give "rise to inequity — a substantial shareholder would get superior treatment by way of a complete exit as opposed to the public shareholder who would get to exit only partially if the response to the open offer is larger than the size of the open offer" meaning that the public shareholder may be "unable to exit fully and realize the full premium, if any, on his entire share holding"; and (iii) several other countries also require that upon a change of control, the acquirer must make an offer for 100% of the outstanding shares of a company.[261] "The philosophy of equitable and fair treatment of *all* shareholders should have a primacy over other considerations," said the report.[262]

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[257] *See* TRAC REPORT, *supra* note 222, at 8-11.

[258] *Id.* at 25.

[259] *Id.* at 25-26.

[260] *See id.* at 18, 20. *Compare* Jayant Thakur, *Deeply Seasoned Old Wine in New Bottle*, LIVE MINT, July 20, 2010, http://epaper.livemint.com/ArticleImage.aspx?article=20_07_2010_004_004&mode=1 (stating that 100% requirement creates balance between promoters and public shareholders), *with* Sandeep Parekh, *New SEBI Takeover Regulations*, LIVE MINT (July 19, 2010, 12:00 PM), http://spparekh.blogspot.com/2010/07/new-sebi-takeover-regulations.html [hereinafter *New SEBI Takeover*] (stating that 100% requirement makes takeovers prohibitively expensive).

[261] TRAC REPORT, *supra* note 222, at 18-20.

[262] *Id.* at 20.

Overall, while the TRAC report has been lauded by some M&A experts, others are concerned that the recommendations, if adopted, will adversely affect M&A activity by raising the costs of acquisitions.[263] Several commentators believe that the significant increase in the requirement on open offers will make takeovers expensive to complete.[264] Takeover expert Sandeep Parekh posits that the 100% figure will hurt average shareholders rather than help them because takeover activity will plummet.[265] Parekh also expresses concern that a complete revision of the code will mean that "the jurisprudence acquired over the past decade and a half will be lost and there will be new sets of court rulings."[266]

d. The Lack of a Market for Corporate Control

In addition to the criticisms discussed above, the Indian Takeover Code has come under significant criticism for its entrenchment of promoters and for its failure to provide a market for corporate control.[267] The takeover regulations were initially intended to create a market for corporate control and were modeled after the takeover-friendly UK City Code of Takeover and Mergers ("UK City Code").[268] For example, some borrowed concepts include the term "persons acting in concert," (which refers to a person, firm, or merchant banker who works together with others for the common cause of acquiring stake in a company) appearing throughout both Indian and UK provisions, and the compulsory requirement of making a public offer on acquisition of a threshold level of shares.[269]

Although SEBI modeled the Takeover Code after the takeover-friendly UK City Code, it diverges from its predecessor in some

[263] *See SEBI's Takeover Code Will Raise M&A Cost for Companies*, ECON. TIMES, July 19, 2010, http://economictimes.indiatimes.com/articleshow/6188455.cms; Thakur, *supra* note 260.

[264] Parekh, *supra* note 260; *Sebi Panel Wants Norms for Takeover Recoded*, ECON. TIMES, July 20, 2010, http://economictimes.indiatimes.com/markets/stocks/market-news/SEBI-panel-wants-norms-for-takeover-recoded/articleshow/6189367.cms; *SEBI's Takeover Code Will Raise M&A Cost for Companies*, ECON. TIMES, July 19, 2010, http://economictimes.indiatimes.com/articleshow/6188455.cms.

[265] Parekh, *supra* note 260.

[266] *Id.*

[267] *See* Banaji, *supra* note 245, at 4-6.

[268] THE CITY CODE ON TAKEOVERS AND MERGERS r. 9.1 (8th ed. 2006); *see* Mathew, *supra* note 182, at 815.

[269] Manish Agarwal & Aditya Bhattacharjea, *Mergers in India: A Response to Regulatory Shocks*, 42 EMERGING MARKETS FIN. & TRADE 46, 53 (2006).

important aspects and in its practical effect.[270] The UK City Code is generally known to be takeover-friendly because of its strong inclination to protect shareholder interests while deprioritizing management entrenchment.[271] The UK City Code is self-regulated and enforced by "reputational sanctions" that include the risk of being excluded from the London Stock Exchange.[272] This form of self-regulation in the UK City Code encourages an *ex ante* approach to problem solving and seldom engages the judiciary in contentious issues.[273] To be sure, the self-regulatory system was devised by a well-organized constituency of institutional investors that sought to protect their own interests as corporate shareholders.[274] As such, UK corporate managers are endowed with far less regulatory protections as compared to their Indian and American counterparts.[275]

Some argue that India's Takeover Code, much like the Williams Act and Delaware jurisprudence, has a distinct bias towards entrenched management.[276] India's approach to takeover dispute resolution mimics that of the United States, where takeover regulation lies with courts and regulators.[277] The SEBI Takeover Code is also similar to Delaware corporate law in that it is director-friendly and favors incumbent management.[278] However, unlike Delaware law, the Takeover Code does not impose stringent fiduciary duty standards upon promoters and allows promoters to shore up shareholdings to fend off hostile suitors at the expense of minority shareholder interests.[279] Indian corporations are also dissimilar to U.S. corporations, but akin to their UK counterparts, in that Indian corporate law renders takeover defenses like poison pills and staggered boards ineffective.[280]

Since its inception, the Takeover Code has repeatedly been proclaimed as a mechanism for founding families ("promoters") to resist foreign or hostile takeovers by consolidating their

270 *See* Mathew, *supra* note 182, at 807; Banaji, *supra* note 245, at 1-3.

271 *See* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why? — The Peculiar Divergence of US and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1729 (2007).

272 *Id.* at 1731.

273 *Id.*

274 *See id.* at 1731, 1767-76.

275 *See id.*; Mathew, *supra* note 182, at 815-17.

276 *See* Banaji, *supra* note 245, at 1-3; Tambi, *supra* note 220, at 20.

277 *See* Armour & Skeel, *supra* note 271, at 1780-84.

278 *See* Banaji, *supra* note 245, at 3.

279 *See id.* at 4.

280 *See* Mathew, *supra* note 182, at 822.

shareholdings.[281] The clear intent to shield Indian corporate management through the Takeover Code is compounded by additional factors such as: (i) the prevalence of promoters as dominant shareholders in most Indian corporations; (ii) Indian financial institutions with substantial shareholdings in Indian corporations that tend to side with promoters; and (iii) onerous government approvals required for foreign acquisition of Indian companies.[282] Indeed, while the Takeover Code does not impose any direct barriers to hostile acquisitions, it substantively encompasses elements that allow promoters preemptively to buttress their control over corporations through creeping acquisitions, preferential allotments, and share buybacks.[283] In this light, despite the Takeover Code's connections to the UK City Code and its assumed purpose in "(legitimizing) the contestability of control," it has had the contrary effect of allowing promoters to defeat almost all takeover threats thus far.[284]

The Takeover Code also diverges from the UK City Code's focus on self-regulation because of the "deeply litigious and legalistic culture of regulation in India."[285] Certainly, the inclination to engage in litigation is fueled by arbitrariness and ambiguity in the Takeover Code and the absence of a body similar to the United Kingdom's Panel on Takeovers and Mergers to provide "real time" general guidance on statutory interpretation.[286] Turning to the judiciary is, therefore, necessary in light of difficulties of interpretation and instigates an *ex post* approach to dispute resolution.

Overall, as a result of the Takeover Code's substantial restrictions on hostile takeovers, Indian firms have generally been unfamiliar with this acquisition route.[287] Thus, while Indian multinationals have significant experience in domestic M&A activity, almost all of these transactions have been friendly deals.[288] Some scholars have argued that "[g]iven that laws in India are not sympathetic to hostile takeovers, Indian firms until now have sought to make global

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[281] *See id.* at 815.

[282] *Id.* at 803.

[283] *See* Banaji, *supra* note 245, at 1-4. *But see* Mathew, *supra* note 182, at 815 (stating that "the Takeover Code presents no direct barrier to a hostile acquisition" and that "the concept of open offers and creeping acquisition limits creates a mechanism by which hostile takeovers can be accomplished while balancing the need for shareholders to be paid a control premium").

[284] *See* Banaji, *supra* note 245, at 4.

[285] *Id.* at 2.

[286] *See* Armour & Skeel, *supra* note 271, at 1729.

[287] *See* GLOBAL POWERHOUSES, *supra* note 6, at 189.

[288] *See id.*

acquisitions in a soft manner, after obtaining the buy-in of the potential target's management."[289] Of course, legal restrictions on hostile takeovers are not the sole reason for the reluctance of Indian multinationals to engage in hostile takeover activity. Some Indian M&A experts have expressed the view that culture played as significant of a role in the dearth of hostile takeover activity.[290] According to these experts, Indian firms did not want to be tainted with the hostile acquirer label and felt that they could achieve their acquisition goals more efficiently by persuading the target's management to come to the table.

3. Limitations on Stock-Swap Transactions

India's complex regulatory regime has led to much difficulty for Indian firms that use shares as consideration in an acquisition (i.e., a stock swap transaction).[291] Instead, Indian firms are relegated primarily to using cash as consideration.[292] As opposed to cash deals, stock-swap deals are more difficult and risky to implement because of the significant role of the government in such deals.[293] Lawyers

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289 *Id.*

290 *See* Ashley Coutinho, *India Inc. Readies for Hostile Takeovers*, FIN. EXPRESS, July 20, 2010, http://www.financialexpress.com/news/india-inc-readies-for-hostile-takeovers/648876/; *see also Rules of the M&A Game 5: Hostile Takeovers and Poison Pills*, FIRM, July 21, 2010, http://thefirm.moneycontrol.com/news_details.php?autono=433397.

291 A stock swap is a transaction where an acquirer acquires shares of another company and, instead of paying cash for such acquisition, discharges consideration by issuance of its own shares. In any such transaction, the Indian firm would also have to comply with the laws of the jurisdiction of the target entity. See FAQs on Overseas Direct Investment, RESERVE BANK OF INDIA http://www.rbi.org.in/scripts/FAQView.aspx?Id=17 (last visited Nov. 7, 2010) (answer to question 10) for definition of share/stock swap transaction.

292 *See* ERNST & YOUNG LTD. & FICCI, *supra* note 43, at 7.

293 Since a stock-swap transaction involves the transfer or issue of a security to persons resident outside of India, it is a:

> Capital account transaction and [the] Government of India and Reserve Bank of India regulate this under the FEMA, 1999 and its various regulations. Keeping in view the current requirements, the Government from time to time comes up with new regulations and amendments/changes in the existing ones through order/allied rules, Press Notes, etc. The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Press Notes/ Press Releases which are notified by the Reserve Bank of India as amendment to notification No.FEMA 20/2000-RB dated May 3, 2000. These notifications take effect from the date of issue of Press Notes/ Press Releases. The procedural instructions are issued by the Reserve Bank of India vide A.P.Dir. (series) Circulars. The regulatory

involved in Indian firms' outbound M&A consistently agree that the need for such approval and valuation has led to significant regulatory uncertainty in stock-swap deals.[294] Moreover, in the long term, it is neither desirable nor sustainable for Indian firms to continue to use solely cash in outbound acquisitions.[295] According to some Indian legal experts, while acquisition funding for larger Indian companies has been easier, access to capital has been much more difficult for smaller companies.[296]

Under Section 81(1A) of the Companies Act, in a stock-swap transaction, the Indian acquirer would need to pass a special resolution permitting the issuance of shares to the shareholders of the foreign target.[297] A publicly listed Indian firm issuing shares in an acquisition transaction may also trigger certain disclosure obligations under the Takeover Code, as well as the risk of triggering the public offer provisions of the code, in the event of the issuance of securities over a certain amount.[298] Publicly listed Indian acquirers using shares may also be subject to the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("SEBI DIP Guidelines") regarding pricing.[299]

In addition, acquisition by swapping the equity shares of a foreign target for the shares of an Indian company may require approval from the RBI and, for some deals, the Foreign Investment and Promotion Board ("FIPB").[300] For example, under Regulation 7 of the Foreign

> framework over a period of time thus consists of Acts, Regulations, Press Notes, Press Releases, Clarifications, etc.

CONSOLIDATED FDI POLICY, *supra* note 167, at 5-6.

[294] *See* Rajat Guha, *Easier Cross-Border Share Swaps for M&A on the Cards*, FIN. EXPRESS, June 1, 2010, http://www.financialexpress.com/news/easier-crossborder-share-swaps-for-m&as-on-cards/627461/.

[295] *See* ERNST & YOUNG LTD. & FICCI, *supra* note 43, at 7.

[296] *See* Sharma & Irani, *supra* note 119.

[297] The Companies Act, No. 1 of 1956, INDIA CODE (1956).

[298] For a detailed explanation of the Takeover Code provisions, see *supra* notes 228-42 and accompanying text. *See also* Nisheth Desai Assocs., *supra* note 183, at 13-17; Umakanth Varottil, *Depository Receipts and the Takeover Regulations*, INDIAN CORP. L. BLOG (July 8, 2009, 2:51 PM), http://indiacorplaw.blogspot.com/2009/07/depository-receipts-and-takeover.html.

[299] *See* Sayantan Gupta, Note, *Foreign Acquisitions: Taking India Global*, INDIA L.J., Apr.–June 2009, http://www.indialawjournal.com/volume2/issue_2/article_by_sayantan.html. There have been recent amendments of the SEBI DIP Guidelines, as well as discussions about further amendments. *See High Hopes for M&A*, INT'L FIN. L. REV., May 9, 2009, http://www.iflr.com/Article/2190469/High-hopes-for-M-A.html; Guha, *supra* note 294.

[300] *See* SETH DUA & ASSOCS., *supra* note 195, at 363-65. Under Regulation 7 of FEMA, once the relevant high court has approved the merger, as required under the

Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 ("FEMA regulations"), in a merger transaction, once the relevant court has approved the transaction, shareholders, and creditors, the acquirer (whether the survivor or a new company) may issue shares to the shareholders of the target entity who are not Indian residents "subject to the condition that the percentage of nonresident holdings in the company does not exceed the limits for which approval has been granted by the Reserve Bank of India (RBI) or the prescribed sectoral ceiling under the foreign direct investment (FDI) policy set under the FEMA regulations."[301] If the new share allotment exceeds such limits, the company will have to obtain the prior approval of the FIPB and the RBI before issuing shares to the nonresidents.[302] However, foreign investments in sectors or activities subject to the RBI's automatic route do not require any prior approval of the FIPB.[303]

Irrespective of the amount, transferring shares to nonresidents of India is an incredibly arduous process, which involves the need to obtain valuation of the shares along with approval of the RBI (although these powers have been delegated to an authorized dealer — a bank authorized to deal in foreign exchange).[304] The authorized dealer must be a merchant banker registered with SEBI, or an investment banker or merchant banker outside India registered with the appropriate authority (irrespective of the amount).[305]

In addition to the general requirements for government involvement in share swap transactions, there still exist impediments to FDI in

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Companies Act, the acquirer can issue shares to the non-Indian resident shareholders of the target company subject to the condition that the resulting percentage of nonresident ownership in the acquirer does not exceed the limits for which approval has been granted by the RBI or the prescribed sectoral ceiling under the FDI policy set under the FEMA regulations. In the event the share issuance exceeds such limits, the acquirer must obtain approval from the FIPB and the RBI before such issuance. *See* Aneja, *supra* note 13, at 55.

301 Aneja, *supra* note 13, at 55.

302 *Id.*

303 *See id.*

304 *See* SETH DUA & ASSOCS., *supra* note 195, at 363-65. For certain investments, no government approval may be needed and they can be made through the "automatic route." In addition, Indian firms may use ADR/GDR for share swaps only if the ADRs/GDRs are listed on a stock exchange outside of India, they are backed by fresh equity shares, the total holding of nonresidents in the Indian firm does not exceed the sectoral cap, and valuation is based on the recommendation of the investment banker or based on current market capitalization of the foreign company. *See* RBI MASTER CIRCULAR, *supra* note 151, at 6-7.

305 *See* SETH DUA & ASSOCS., *supra* note 195, at 363-65.

certain sectors in the Indian economy despite the rapid liberalization of the Indian foreign investment regime commencing in the early 1990s.[306] India's FDI regulations limit the amount of foreign investment in certain industrial sectors.[307] Some identified industry sectors remain subject to "no FDI or limited FDI" governmental restrictions on national security or political grounds.[308] Under these FDI limitations, persons residing outside of India and foreign corporations may only own or control up to a certain percentage of Indian corporations operating in identified sectors.[309] Specifically, FDI sectoral caps are in place for "defen[s]e production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites."[310] The limitations on these industries range from a 26% maximum foreign shareholding limitation in the insurance industry, to 100% foreign shareholding allowance with government approval for courier service companies.[311] The FIPB, which formulates foreign investment policy, and the RBI are the primary regulatory authorities charged with implementing and enforcing these FDI limitations.[312]

The FDI caps limit the structure of acquisition transactions for Indian firms and their ability to use their own shares as consideration in overseas acquisitions.[313] The Ministry of Commerce and Industry's 2010 Consolidated FDI policy provides that "[t]he transfer of capital instruments of companies engaged in [the above mentioned sectors] from residents to non-residents by way of sale or otherwise requires Government approval followed by permission from RBI."[314] Thus, Indian corporations subject to these regulatory hurdles that are

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[306] *See* Dr. K.C. Chakrabarty, Deputy Governor, Reserve Bank of India, Address at the Antique India Markets Conference at Mumbai (Sept. 7, 2009) (transcript available at http://www.rbi.org.in/scripts/BS_ViewBulletin.aspx?Id=10606).

[307] CONSOLIDATED FDI POLICY, *supra* note 167, at 14-15, 29. If there are no foreign investment limits designated with respect to a particular industrial sector, it is presumed that up to 100% foreign investment may be made in that sector without prior government approval.

[308] Lovejeet Singh, Legal Issues on Foreign Investments in India 2 (Jan. 25, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1566429.

[309] *See id.*

[310] CONSOLIDATED FDI POLICY, *supra* note 167, at 28.

[311] *Id.* at 45, 51.

[312] Sandeep Katwala & Scott Sonnenblick, *Foreign Direct Investment in India: A Few Key Issues*, LAW.COM, http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1196279832466 (last visited Oct. 26, 2010).

[313] Sharma & Irani, *supra* note 119, at 106.

[314] CONSOLIDATED FDI POLICY, *supra* note 167.

interested in overseas acquisitions must either obtain regulatory approval to use their shares as consideration for such transactions, limit the use of their shares in these transactions so as not to run afoul of the FDI caps, establish overseas subsidiaries to facilitate such acquisitions, or resort to cash deals. Certainly, these considerations have a deep impact on the transactional structures that Indian corporations may employ in foreign acquisitions.

The difficulty in conducting share swap transactions was recently highlighted in the proposed $23 billion merger between the Indian company Bharti Airtel and the South African company MTN Group.[315] The Bharti-MTN merger was trumpeted as an advancement in "South-South" trade, which refers to trade between emerging markets in developing countries. The deal contemplated creating a low-cost telecommunications colossus with the combination of India's largest cellular service provider and South Africa's largest telecommunications company. The combined company expected "$20 billion in annual revenues, drawn from India, Africa and the Middle East — three of the fastest growing markets in the industry."[316] However, while "[t]he deal was pretty much through from the companies' perspective[,] . . . the governments could not see eye to eye."[317] Thus, the parties were forced to call off the deal because "politics [appear] to have trumped business in emerging markets."[318]

The deal was thwarted by both the Indian and South African governments. The two companies had been in intensive negotiations for about four months, but encountered an insurmountable road block in the heavy government intervention in both countries' capital markets. The short leash on both corporations was unexpected by either party because both companies were publicly traded and controlled by investors. As *The New York Times* noted, "[striking] such agreements can be difficult because . . . hands-on government officials [in emerging markets] often keep a tighter rein on corporations than do their counterparts in developed economies."[319] The heavy government involvement in the deal was even evidenced by South

[315] *See* Guha, *supra* note 294.

[316] Rhys Blakely, *Time Is Up for Bharti Airtel and MTN Group's Merger Talks*, TIMES (London), Sept. 30, 2009, http://business.timesonline.co.uk/tol/business/industry_sectors/telecoms/article6854054.ece.

[317] Heather Timmons, *Bharti and MTN Abandon Talks on Potential Merger*, N.Y. TIMES, Sept. 30, 2009, at B3, *available at* http://www.nytimes.com/2009/10/01/technology/companies/01phone.html.

[318] *Id.*

[319] Heather Timmons, *In Failed Merger, a Lesson in Global Politics*, N.Y. TIMES, Oct. 2, 2009, http://www.nytimes.com/2009/10/02/technology/companies/02bharti.html.

African regulators and financial officials visiting India to negotiate a compromise, but to no avail.[320] The South African government under President Jacob G. Zuma sought to preserve one of its national corporate icons by pushing for a dual listing of the combined company, demanding that the combined company "maintain a listing in Johannesburg as well as on India's exchange in Mumbai."[321] South Africa's communications minister also expressed a desire to maintain MTN's national identity, commenting that "[it] would be sad if [South Africa] saw this entity move into the hands and management of foreign nationals."

A dual listing arrangement, however, would have created significant issues under Indian law. Indeed, Indian corporate law expert Umakanth Varottil notes, "[as] far as India is concerned, dual listing is a somewhat alien concept, at least in the cross-border sense."[322] Accommodating a dual listing structure would have required major amendments to key corporate laws and financial regulatory structure in India. Dual listings would require that a foreign company be listed on an Indian stock exchange, which was prohibited. To be sure, the Indian government was not principally opposed to changes in existing laws to permit dual listings, but disfavored being "pushed into a decision because of one such deal."[323] Specifically, to enable dual listings, the Indian government would have to amend the Companies Act and its proposed successor, the Securities Contracts (Regulation) Act, the SEBI takeover regulations and listing agreements. Dual listings would also require full convertibility of the rupee through liberalization of the Foreign Exchange Management Act ("FEMA") and various regulations thereunder. Such capital account convertibility would permit foreign shareholders to trade in domestic shares, and Indian shareholders to trade in foreign shares, using denominations in their country's currency or an expressed common currency.[324]

FDI sectoral caps also posed a problem for the transaction. If the merger had been completed, "foreign holding in Bharti Airtel would

[320] *See id.*

[321] *Id.*

[322] Umakanth Varottil, *The Legal Aspects of Dual Listings*, INDIAN CORP. L. BLOG (Sept. 18, 2009, 7:27 AM), http://indiacorplaw.blogspot.com/2009/09/legal-aspects-of-dual-listings.html.

[323] Subhomoy Bhattacharjee, *Learn to Love a Rupee That's Convertible*, FIN. EXPRESS, Sept. 19, 2009, http://www.financialexpress.com/printer/news/518801/.

[324] *See Dual listing: Its Implications*, ECON. TIMES, Sept. 16, 2009, http://economictimes.indiatimes.com/Analysis/Dual-listing-Its-implications/articleshow/5015937.cms.

have reached around 85%."[325] According to news reports, "Bharti executives had told MTN that they would be able to get the FDI sectoral cap waived, [but] the feedback that MTN directors were independently receiving was that it would be difficult for the sectoral cap to be relaxed."[326] Thus, for Indian companies, especially those with significant foreign shareholding that are attempting outbound acquisitions, the structuring options for these deals are limited to using cash or establishing non-Indian subsidiaries to carry out the transaction.[327]

III. CORPORATE GOVERNANCE AND M&A

Corporate governance in India has similarly played a complex role in facilitating and hindering outbound M&A. The following sections explore the role of Indian firms' ownership structure, as well as recent corporate governance reforms in outbound M&A transactions.

A. The Domination and Transformation of Family-Controlled Businesses

1. The Ownership and Management Indian Firms

In present-day India, large family-controlled groups dominate Indian businesses.[328] Family members tend to control shareholdings and manage their companies' holdings.[329] This directly affects decision-making by these companies, including their decisions to undertake outbound acquisitions.

[325] Joji Thomas Philip & Javed Sayed, *MTN Deal Talks: Decoding a Deal that Went Wrong*, ECON. TIMES, May 26, 2008, http://economictimes.indiatimes.com/MTN_deal_talks_Decoding_a_deal_that_went_wrong/articleshow/3071824.cms.

[326] *Id.*

[327] Umakanth Varottil, *Bharti-MTN: Structural Problems*, INDIAN CORP. L. BLOG (May 26, 2008, 12:52 PM), http://indiacorplaw.blogspot.com/2008/05/bharti-mtn-structural-problems.html.

[328] Kumar, *Cross Border Acquisition*, *supra* note 90; *see also* Ashok Panjwani et al., *Family Business: Yesterday, Today, Tomorrow*, 44 INDIAN J. INDUS. REL. 272, 280 (2008) (noting that in 1997 approximately seventy-five percent of largest Indian companies were family businesses); Richard Orange, *Passage to India*, ALL BUS., July 21, 2007, http://www.allbusiness.com/company-activities-management/company-structures-ownership/14579350-1.html (stating that India's long-standing giant family controlled conglomerates are companies that have seen highest "revival" and noting that this is interesting because "[b]ack in 2001, the family-run business houses that had dominated Indian industry for more than half a century seemed destined to be left behind the faster-moving IT and outsourcing crowd").

[329] Banaji, *supra* note 245, at 1.

Management of Indian family businesses is primarily based on the family's value systems and is influenced by caste, regional, and linguistic factors.[330] Indian principles of the "joint family" led to the development of family owned businesses.[331] Traditionally, the joint family consisted of a patriarch, his younger brothers, as well as his children and grandchildren.[332] The joint family would pool their resources to invest in business ventures, thus allowing each family member the opportunity to earn a living.[333] Until recently, family members dominated all aspects of the business. Family firms valued loyalty and trust over efficiency, talent, and competence.[334] They were often feudalistic and required a "powerful promoter" to approve all significant business decisions.[335] This requirement tended to frustrate professional managers and led to inefficient management.

Of course, family dominated control has begun to change in recent years.[336] Family businesses have begun to migrate from owner-management to professional management.[337] After the dismantling of the License Raj in 1991, Indian businesses began to undertake corporate restructuring attempts with hopes of strengthening management. Because the country previously had few opportunities for nonfamily involvement in Indian corporate culture, pre-1991 Indian companies saw little competitive advantage in management or managerial talent.[338] This lack of competitive advantage was reflected in the typically low salaries of professional managers in the 1980s.[339]

Post-1991, family-run businesses began to see the value in professional managers. These businesses began to recruit experienced executives from multinational companies. As a result, the demand for professional managers skyrocketed, management salaries increased substantially, the standard of living for these professionals became among the highest in the world, and companies started introducing

[330] Panjwani et al., *supra* note 328, at 285.

[331] Kumar, *India Unleashed*, *supra* note 31, at 6.

[332] *Id.*

[333] *Id.*

[334] *Id.* at 12; *see also* Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, 2007 COLUM. BUS. L. REV. 800, 840-41 (2007) (noting that "Indian managers are known to be motivated less by efficiency than by familial ties and pride").

[335] Kumar, *India Unleashed*, *supra* note 31, at 12.

[336] Panjwani et al., *supra* note 328, at 282.

[337] *Id.* at 283.

[338] Kumar, *India Unleashed*, *supra* note 31, at 12.

[339] In the 1980s, top executives could easily earn as little as $5,000 per year. *Id.*

stock compensation.[340] In turn, professional managers brought experience from their previous employers into the Indian businesses, thereby preparing businesses for global competitiveness.[341]

Such corporate restructuring helped bring confidence to Indian businesses to pursue global options.[342] This shift to professional management may have also facilitated the rise in outbound M&A. Some of the most acquisitive Indian multinationals took part in the move toward professional management. The Mahindras, Tatas, and AV Birla Group are examples of successful family-owned business houses that have entrusted the daily operation of their groups to professional managers while retaining entrepreneurial control of their companies.[343] Tata, for instance, is composed of numerous companies that are all legally separate entities with separate shareholders.[344] The Tata family does not control the operational direction. Instead, it leads "by inspiration, not . . . by command."[345] The family sets its global aspirations and helps the individual companies achieve them.[346]

However, the vast majority of Indian business houses have not shifted to professional management. Perhaps the best example of a company that has retained family control is the former Reliance Group (the company split in 2005 into Reliance Industries and Reliance Anil Dhirubhai Ambani due to sibling rivalry).[347] The family retains control over all operations through a traditional top-down approach.[348] While the company has achieved an impressive rate of growth, its top-down control system makes acquisitions difficult, although the company has recently engaged in large-scale bidding for foreign firms.[349] Reliance has not made the same types of cross-border acquisitions as Tata. "When Tata Steel buys Corus or Tata Motors buys Daewoo trucks,

340 *Id.*

341 *Id.*

342 *Id.*

343 *See* Orange, *supra* note 328.

344 *Id.*

345 *Id.*

346 *Id.*

347 *Id.*

348 *See* Orange, *supra* note 328.

349 *Id.* Reliance Group was worth $20 billion. In 2007, Reliance Industries' worth tripled to $75 billion. Reliance Anil Dhirubhai Ambani was worth $25 billion. *Id.*; *see* Johnathan Keehner & John Duce, *Reliance Said to Raise Lyondell Bid to $14.5 Billion*, BLOOMBERG, Feb. 22, 2010, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTGwUVJgZekA (noting that Reliance Industries Ltd., one of India's largest companies and owner of world's largest oil-refining complex, raised its offer for bankrupt LyondellBasell Industries AF to about $14.5 billion).

they give their new acquisitions a degree of autonomy. It is difficult to see Reliance doing the same."[350]

2. The Impact of Ownership on Outbound M&A

Some scholars have maintained that promoters' domination of Indian firms has permitted a process by which decision-making in the M&A context is quicker and more flexible. For example, Professor Nirmalya Kumar has argued that, unlike a professional manager who may be concerned with short-term stock performance because her own compensation may be dependent on stock price, "a promoter can swiftly decide to make an acquisition, knowing that the stock price may dip in the short run. . . . Furthermore, Indian promoters have considerable flexibility in negotiating postmerger autonomy issues with the managers of the acquired firms."[351]

Of course, promoter-control may not always result in successful acquisitions, particularly in the case of large cross-border acquisitions of well-known firms in the West. A recent study has indicated that the firms from developing countries such as India bid higher on average to acquire assets in developed countries (compared to companies from developed countries making similar bids).[352] The study notes that bids from developing nations are not always higher in general. Instead, the bids tend to be larger when the company from an emerging economy targets another country from a developed nation.[353] The authors argue that pride and national, political, and social considerations seem to influence decision makers.[354] Higher bids tend to occur when the company feels a sense of accomplishment from its society.[355]

With respect to Indian firms, some commentators have debated whether promoter-control has led to value-diminishing acquisitions.[356] Weaknesses in India's corporate governance regime, which give Indian managers, particularly the promoters in control of firms, considerable power to make decisions, may mean that such managers have more freedom to build an empire through cross-border acquisitions and may

[350] Orange, *supra* note 328.

[351] GLOBAL POWERHOUSES, *supra* note 6, at 5-6.

[352] *See* Ole-Kristian Hope, Wayne B. Thomas & Dushyantkumar Vyas, The Cost of Pride: Why Do Firms from Developing Countries Bid Higher? 2 (Jan. 8, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1081298.

[353] *Id.* at 4.

[354] *Id.*

[355] *Id.* at 2.

[356] *See* Karnani, *supra* note 106, at 28-30.

be overpaying for target entities in developed economies.[357] For example, the Tata Group came under considerable criticism for its acquisitions of Anglo-Dutch steelmaker Corus and British car marques Land Rover and Jaguar.[358] In light of the financial crisis, the deals faced significant difficulty, including a ratings downgrade for the acquirer, as investors found both of these transactions expensive, and the Tata Group had difficulty obtaining financing for the deals.[359] Not only have the acquisitions been difficult to finance, but Corus, Jaguar, and Land Rover have required significant capital infusions from the Tata Group.[360]

In addition, the domination of promoters may also limit the outbound M&A structuring options of Indian firms. Indian promoters may advocate for using cash, rather than stock as acquisition consideration, "because they might not wish to dilute their equity share in the company."[361] Promoter dominance in India's corporate governance regime has also led to a view that Indian corporate governance remains weak and subject to abuse by promoters.[362] Such

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357 *See* Ravi Agarwal et al., Value Propositions of Mergers and Acquisitions in India: An In-Depth Study of Select Deals 12, 17 (Apr. 12, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588008; Karnani, *supra* note 106, at 13-14. *But see* Gubbit et al., *supra* note 71, at 411 (showing that outbound acquisitions yielded abnormal shareholder returns and that Indian firms gained more by targeting larger firms in economically and institutionally advanced countries).

358 *See* Karnani, *supra* note 106, at 17, 22; *see also* Anita Shukla & Mouni G. Gekara, *Effects of Multinational Mergers and Acquisitions on Shareholders' Wealth and Corporate Performance*, IUP J. ACCT. RES. & AUDIT PRAC., Jan.–Apr. 2010, at 44, 60 (finding that Tata's "merger program was not consistent with the value maximizing behavior by the management").

359 *See* Paul Beckett, *Tata Chairman Doesn't Sweat the Timing on Global Expansion*, WALL ST. J., Nov. 19, 2009, http://online.wsj.com/article/SB100014240527487045 38404574541512335078576.html; C.P. Chandrasekhar, *Tata Rides the Recession*, FRONTLINE, June 20–Jul. 03, 2009 *available at* http://www.hinduonnet.com/fline/ fl2613/stories/20090703261303700.htm.

360 Rajesh Gajra, *Corus of Doubt*, OUTLOOK (India), Apr. 30, 2007, http://www.outlookindia.com/article.aspx?234532; Indo-Asian News Serv., *Tata Steel Resets Covenants on Corus Loan*, SILICONINDIA, May 31, 2009, http://www.siliconindia. com/shownews/Tata_Steel_resets_covenants_on_Corus_loan_-nid-57445.html.

361 Karnani, *supra* note 106, at 14.

362 *See* Afsharipour, *Corporate Governance Convergence*, *supra* note 101, at 362-65; Afra Afsharipour, *The Promise and Challenges of India's Corporate Governance Reforms*, 1 INDIAN J.L. & ECON. 33, 64-67 (2010); Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, 6 HASTINGS BUS. L.J. 281, 342-43 (2010); *see also* Karnani, *supra* note 106, at 29 (arguing that promoters may be motivated by "fame and public adulation, serving a national goal, leaving behind a legacy, and the pride of managing a large multinational company").

views may have forced M&A transactions to be all-cash deals since global investors are often loath to take an equity stake in Indian firms given the promoter-centered structure.

B. M&A and Corporate Governance Reforms

Since the mid-1990s, Indian industry groups and regulators have advocated and pushed through a series of extensive corporate governance reforms.[363] The reforms were a response to "the needs of India's expanding economy, including access to FDI, the increased presence of institutional investors (both domestic and foreign) in India, and the growing desire of Indian companies to access global capital markets by gaining listing on stock exchanges outside of India."[364] Some of the strongest advocates for corporate governance reforms were large Indian conglomerates, many of which are also the most active in outbound M&A activity.

Commentators have argued that, despite some of their shortcomings, India's extensive corporate governance reforms have contributed to the rise in outbound M&A. Indian lawyers argue that such reform

> initiatives have encouraged foreign investment and domestic consolidation in several sectors and industries. . . . Indian economic and regulatory parameters are today accepted at par on global levels. Liberalization has been providing constant boost for attracting international investment with aggressive change in policy and dynamic attitude of Indian entrepreneurs to magnetize global focus on Indian economy. Indian strong capital and debt market has made it easy to raise funds for acquisition.[365]

While India's corporate governance reforms have undoubtedly assisted Indian firms in attracting foreign capital, their role in fostering outbound transactions is difficult to measure and needs further study. India's corporate governance reforms remain somewhat aspirational.[366]

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[363] *See also* Vikramaditya Khanna, *Corporate Governance in India: Past, Present and Future?*, 1 JINDAL GLOBAL L. REV. 171, 187-89 (2009). For an overview of these reform efforts, see generally Afsharipour, *Corporate Governance Convergence*, *supra* note 101 (describing history of corporate governance reforms in India).

[364] Afsharipour, *Corporate Governance Convergence*, *supra* note 101, at 340.

[365] Rajvendra Sarswat, *Indian Acquisitions Abroad*, INDIA CORP. L. BLOG (May 5, 2009, 6:26 AM), http://indiacorplaw.blogspot.com/search/label/Mergers%20and%20Acquisitions?updated-max=2009-05-06T07%3A28%3A00%2B05%3A30&max-results=20.

[366] *See* Afsharipour, *Corporate Governance Convergence*, *supra* note 101, at 399; *see*

Despite corporate governance improvements, there is some doubt as to whether U.S. or UK investors would agree to an acquisition transaction in which they would receive substantially more equity in an Indian firm than cash.[367]

CONCLUSION

The transformation of Indian corporate law following the liberalization period has substantially contributed to the growth of Indian multinationals. Legal reforms since economic liberalization have not only set the stage for outbound acquisitions, but they have also shaped outbound acquisitions both in terms of transaction structure and transaction size. This Article analyzes the role of Indian corporate law and governance in the internationalization process; however, much more extensive research on the role of Indian law in outbound acquisitions is still needed.

While the internationalization of Indian firms, including outbound M&A activity, is a process that is expected to grow, this Article begins to analyze some of the aspects of Indian law that may need further reform in order to allow Indian firms to achieve their M&A goals. As this Article argues, some of the current legal constraints on M&A activity by Indian firms, such as roadblocks in their ability to carry out cross-border stock swap transactions, and the traditional promoter-controlled governance of Indian firms impose substantial restrictions not only on the methods used by Indian multinationals in pursuing outbound acquisitions, but also on the future potential of Indian multinationals. While it is beyond the scope of this Article to set forth detailed proposals for how best to amend aspects of Indian law to facilitate outbound M&A transactions, the goal of this Article is to explain the existing roadblocks in Indian law in hopes that scholars and regulators can begin to develop solutions.

also Khanna, *supra* note 363, at 187-89; Vikramaditya Khanna & Shaun J. Mathew, *The Role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidence*, 22 NAT'L L. SCH. INDIA REV. 35, 65 (2010).

[367] *See* ERNST & YOUNG LTD. & FICCI, *supra* note 43, at 7.