Winter November 15, 2012

51% FDI in Multi Brand Retail: After the Inevitable

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LIKE all great events which are criticised initially but later on when they bring in unheard of prosperity everybody hails them as great visionary acts post facto. But whether this act is such an act is still in the womb of time. But, still it is pertinent to discuss it threadbare

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DONE AND DUSTED?
The government has finally shown its resoluteness. The Indian market is now open for the investment in multi brand retail. The immediate reactions of various stakeholders are along expected lines. The left is afraid of the farmers being arm-twisted in the long run; the industry is happy; the government basking in the glory of having overcome its “policy paralysis” and the political opponents have reasons to celebrate as they have unique “opt-in” leverage.

Beyond the celebrations by the “pro – FDI in retail camp”, there are huge challenges for the aspiring multinationals like Tesco and Walmart. The fragmented permission to enter only in 10 states poses challenges in any acquisition they might plan of the current multi brand retailers. Therefore, we are likely to witness a policy push by these stakeholders to include the entire nation in the “go-zone” for foreign held multi brand retailing entities.

One hopes that this gives the foreign investors a deeper commitment to fulfill the expectation of the Indian people that have been aroused in the run-up to the liberalisation of investment norms of this sector.

In an earlier article on the issue in Lex Witness, I had submitted that a calibrated approach to opening up this sector ought to be taken and the protagonists of the liberalisation in this sector ought to be made accountable for the representations about the benefits that will accrue as a result of this change in policy.

An evaluation of the FDI policy is not the subject of this article. What I propose here is to reflect on the issue of accountability of the government and the investors in walking all the talk that has preceded Press Notes 4 & 5 of 2012.
**THE FEAR OF UNFULFILLED PROMISES**

It is noteworthy that most justifications given in favour of FDI in multi-brand retail are medium to long-term benefits. The realisation of these benefits justifies that these investments will depend on government’s institutional memory being effective and government’s continued and sustained ability to enforce the commercial commitments of business houses.

Experience suggests that FDI in India has been a story of promises made to the people and broken. Pepsi and Coca Cola are the iconic case studies in this discourse. Frontline magazine has carried an illuminative article on them in its Volume 20, Issue 19 but I do not wish to revisit those.

In the light of experience, therefore, the fears of those who think that investors will not walk the talk are real or at least not unfounded. The national leadership collectively has the obligation to enforce the “conditions and warranties” of the contract at the time, the FDIs are allowed into India.

If we look at Pepsi’s example, one of the key obligations imposed upon them to earn foreign exchange for the country and to make the investment a foreign positive investment for India, was relaxed on the ground, inter alia, that the sector had been liberalised per se. Therefore, Pepsi’s argument reportedly was that it was iniquitous for it to be subjected to harsher conditions, when its competitors and other were allowed more liberal terms.

However, what was missed or over worked was the fact that Pepsi enjoyed an earlier entry to Indian market on the basis of those very conditions. Assuming that the reverses would have happened in the policy paradigm, and the government of India would have declared more stringent conditions on future FDIs, had Pepsi not taken up the cudgels for the government? Cases are abound in high courts, where entrepreneur claim that they should be protected from adverse consequences of policy change as their investment was predicated on the favourable policy declarations.

Coal allocation, tax relief and electricity tariff concessions are the key comparable areas that have seen such battles in the courts. If the CBI investigations have any basis, the so called “coal-gate” in part would have turned out into a saga of undertakings given by companies to take benefit from the policy to open up the sector and then delaying and diluting the policy requirement to cash in on the “early movers’ advantage”. So why should FDI entities not be held accountable in a similar manner? It might be helpful to recall that Vodafone threatened international arbitration in the wake of the government’s plan to re-open taxation on its acquisition deal in India.

**VOICE**

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**FORESEEABLE ADMINISTRATIVE HURDLES IN THE IMPLEMENTATION OF THE POLICY**
- In addition to FIPB approval, there are a plethora of local and state level permissions and approvals for setting up multi brand retail outlets (MBRT) given the bureaucracy and corruption levels, obtaining these in a timely manner may prove to be a challenge.
- The Agricultural Produce Market (Regulation) Act has long outlived its purpose but continues to be valid in many states, proving to be a barrier to seamless farm to fork experience for agricultural products. Direct procurement from farmers is restricted under this Act under the illusory guise of protecting farmers.
- While the FDI policy envisages self certification for complying with the various conditions imposed on MBRT’s with foreign investment, meticulous record keeping will be required
- A change in political power in the states or centre may mean that the local government that initially supported MBRT may be very non-cooperative and hostile after the investments have been made and retail outlets set up (when the previous regime was favourable). The impact of these political changes is yet to be fully understood.

**INSTITUTIONAL FAILURE IN EXERCISING OVERSIGHT OVER EXECUTIVE POLICYMAKING**

Now the question that stares us all today is why has successive government failed to hold the foreign investors to the conditions on which they were permitted to enter the giant Indian market whereas, the foreign investors have been able to get around these restrictions with ease, if not impunity.

The immediate thought that comes to one’s mind is that even if the phenomenon might be complex, it is symptomatic of the failure of parliamentary oversight of the executive, the failures of bureaucratic conscience keeping and an inherently selective response mechanism of the judicial institutions.

Let us look at each of the above institutional failures one by one.
Parliamentary oversight appears to be overwhelmed. A comparison of the time and human resources put to use by strategic teams of big corporations with that of the standing committees of the Parliament or MPs will give an indication of how resources starved the parliamentary supervision mechanism is. So far as bureaucratic conscience-keeping is concerned, the key strength of any bureaucracy is its institutional memory, institutional reflection and response.

With almost negligible protection of tenure at particular station/post, all of these elements on which bureaucratic conscience-keeping can take roots and be nurtured are themselves threatened.

So far as judicial oversight is concerned, there are two key impediments; one, a non-intervention in "policy matters" and the reactive framework of justice delivery in our country. The diffuse interests of the common man are left to individual Samartians and "crusader benches" to raise, argue and settle, in opposition to the might of the industry that can afford the finest talent at the Bar and support them with all expertise, research and materials that are needed. And interestingly, judicial decisions that come post facto are dubbed as "damaging market sentiments".

It is interesting to note that a PIL has been filed by Mr. M.L. Sharma, advocate, challenging the notifications permitting the FDI in retail and aviation sectors. The matter is fixed for further hearing in December but if one looks at the balance of strength, an individual advocate is pitted against the mighty state and none else than the Attorney-General G.E. Vahanvati himself.

CONCLUSION
So, in the backdrop of this landscape, is there a way forward that can provide greater assurance for safeguard of the public good? Perhaps it is the time to reform in the oversight mechanism, at least in the big ticket reform and "incentive-spurred" investments that can monitor the reality against the rhetoric in a proactive and transparent manner. I do not propose any definitive answers but do wish to share some thoughts.

• A commission of inquiry should be set up under the Commission of Inquiries Act, 1952 to inquire into the past FDIs and "policy-pliances" and relaxations gone to big-ticket investor still now. The commission should have a clear mandate to draw up lessons for future rather than do a witch-hunting about the past.

• The National Legal Services Authority could set up a public policy advocacy cell/panel to look into those matters where inchoate interests are pitted against huge lobbying with decision makers on behalf of private interests. Such a public policy practice with aid of the best law schools of the country could achieve three goals: One, it would sensitize young minds towards taking interest in the big picture of the life as against the immediate interest of "a good job and a good salary to pay off the education". Two, it would give opportunity to the generation next to safeguard their interest in a policy matter that is being decided in their best interest. Three, it would provide the interested Samaritans of public interest and the oversight mechanism including the courts with and "equality of arms" and true access to justice.

• A regulatory authority, which is more participatory and transparent than the current Foreign Investment Promotion Board (FIPB), should take over the function of monitoring investment commitments going forward on a regular basis and report the same.

• The scheme of "independent civil service" and bureaucratic conscience-keeping under the constitutions ought to be revisited and changes made in view of the changing times and how the scheme has worked so far.

• The scheme of political/parliamentary oversight over government actions also needs to be revisited and some realism infused in it in view of the vast expanse of governmental action and limited time and resources available to our parliamentarians. A tighter mandate of evaluating long term outcomes proposed and achieving of projected outcomes in 5 and 10 years window might be better suited to such a body.

• As things stand today, the actual investors could claim to be an outsider to the various expectations that have been aroused in and representations that have been made to the public. On a technical view, they can very well rely on the fact these representations and expectations are not a part of the policy formulation. As such, a section should be added to the press note and a note added that any investment being made is subject to following the letter and spirit of these commitments. This could also be part of the form for proposal for an FDI.

• Greater transparency should be introduced in the foreign investment proposals, approvals and agreements.

ABOUT AUTHOR
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