FDI in Multi-brand Retail Trade and the Safeguards

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27 February 2013

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Effectiveness of regulations depends not only upon the regulations themselves, but also on the regulator and the regulated and the environment in which they are implemented. Emergence of regulations can in turn be dependent upon these three. Will and wherewithal on part of the regulator on one hand and public pressure on the other are critical for successful implementation. Half-hearted, negligent and poor implementation of regulations can benefit some at the cost of others who are less influential, less vocal or devoid of adequate resources. Equally importantly, if the regulator does not have the requisite information or is constrained by factors beyond his control, then again, the regulations may not achieve the desired objectives.

After a long and winding process spanning nearly one and a half decades starting from permitting 100% FDI in Cash & Carry Wholesale Trade (CCW) through the approval route in 1997, the government finally allowed FDI up to 51% in multi-brand retail trade (MBRT) in September 2012, albeit with some caveats. In between, in February 2006, entry into CCW was eased from approval route to the automatic route. It was also for the first time that FDI up to 51% was allowed in single brand retail trade (SBRT), through the approval route. Though Metro of Germany (Ranked 4th globally in 2011) entered in 2001 into CCW business as a 100% foreign owned entity and there was the case of Hong Kong-based Dairy Farm International joining hands with Spencer's, and Shoprite's (South Africa) franchise arrangement with the Nirmal Lifestyle group, the ball really started rolling since 2006 and led to the entry of Wal-Mart of USA and Carrefour of France in 2007, respectively ranked No 1 and 2 globally, the former as a 50:50 joint venture with India's Bharti group and the latter as a 100% foreign subsidiary. Another major global retailer, Tesco of UK (Global Rank 3) preferred to follow the franchise route. Similarly, Spar of Netherlands entered into a franchise agreement with the landmark group.

Arguments For & Against FDI in MBRT

Opening up multi-brand retail trade for FDI (RFDI for short) has not been a smooth ride because of fierce opposition from various quarters – not just from *kirana* stores which are perceived to be the ones that would be affected the most. Broadly speaking, the proponents, including the government, see the merit of RFDI in the following forms.

$ Published in *Alternative Economic Survey 2012-13: Neo-liberal Economic Policies – 'Gods' that Failed,* Alternative Survey Group, Indian Political Economy Association, Yuva Samvad Prakashan, Delhi, 2013.

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- Vastly reduces/eliminates the role of multiple intermediaries thereby helping farmers to get better prices for their produce
- Promotes investment in supply chain which is important for minimising post-harvest wastages which are estimated to be extremely large at present. Retailers will help farmers to adopt better farm management practices thereby contributing to modernisation of agriculture.
- Entry of new players will increase competition both for procuring goods as also for selling to the consumer. Consumers benefit through lower prices and this in turn will help fight inflation.
- Worldwide large and small retailers are seen to co-exist. Competition in fact, forces the traders and other retail outlets to upgrade and become more efficient, thereby providing better services to consumers and better remuneration to the producers. Consumers also benefit from the imposition of better quality and safety standards by the retailers.
- Both farmers and local small and medium enterprises will gain access to larger market -- not just domestic but international as well
- The economy would see infusion of large amount of foreign investment which is needed both for its technology and management practices but also to help bridge the large and sustained current account gap
- Creates large scale quality employment both in the front end retail as also in the supply chain.
- Better revenue collection for the government.
- Better ambience and shopping experience for the consumers.

Those opposing RFDI emphasise that

- Rather than creating jobs it will destroy employment and result in loss of livelihood for millions of Indians directly through closure of *kirana* shops and indirectly through pressure on domestic suppliers to cut costs. Imports will inundate the market and kill local small industries just as they did in America, again resulting loss of employment.
- Prices may come down initially, but once the global retail giants acquire control over both ends of the market they will start dictating terms -- procurement and marketing. Thus both producers and consumers will lose ultimately. The initial predatory pricing will eliminate many small stores. The existing supply chains will be destroyed beyond repair leaving the farmers to the mercy of the large retailers.
- The proponents not only highly exaggerate the post-harvest losses, they also ignore the huge amount of wastages by retail chains.
- In spite of cold storages being open for FDI for a long time, no worthwhile investment has been made so far.
- The so-called low prices for the consumers are often made possible through denying the minimum benefits to the employees (of retail chains as also of the suppliers) thereby transferring the burden to the state. Subsidies to farmers in the developed world indirectly contribute to the chains' low prices of farm produce.
- Western large retailers are focusing on newer markets due to the difficulties their home economies are facing. Helping Indian farmers, producers and consumers is the last thing on their minds though such arguments are used as carrots to gain entry.
- Some see it as abrogation of its responsibility by the government to build agricultural infrastructure. Investment in backend infrastructure to the

extent it happens through RFDI will be private and the benefits too will remain private and thus not reach the broader farmer community which is dominated by small holders.

- The retail chains are yet another mechanism through which global agribusiness interests come to extend their control.

Safeguards

India allowed FDI in multi-brand retail trade with certain safeguards which are expected to adequately address the perceived ill effects and ensure delivery of the expected benefits. The main conditions RFDI would be subjected to are the following:

(i) Limit on foreign equity at 51%.
(ii) Fresh agricultural produce may be unbranded.
(iii) Minimum inflow of $100 million.
(iv) 50% of the inflow to be invested in backend infrastructure.
(v) At least 30% of the value of procurement of manufactured/processed products to be sourced from Indian 'small industries'.
(vi) Self-certification by the company, to ensure compliance of the conditions at serial nos. (iii), (iv) and (v) above, which could be crosschecked, as and when required.
(vii) Retail outlets can only be set up in municipal limits of cities with at least 1 million population (states not having such cities will have the freedom to permit RFDI outlets in other locations); individual states retain the right to permit or prohibit RFDI.
(viii) Government will have the first right to procurement of agricultural products.
(ix) Retail trading by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading.

Effectiveness of these conditions will depend upon the manner in which the guidelines are drawn. Having crossed the major hurdle of getting the basic change made in India's policy towards RFDI, unlike in 2011 when the policy had to be kept in abeyance for want of 'consensus', the foreign retail majors can bargain further. Indeed, they are already engaged in seeking clarifications regarding these conditions from the government. For instance, representatives of Wal-Mart and Tesco met India's Minister for Commerce & Industry at the World Economic Forum meeting in Davis towards the end of January 2013 wherein the Minister was reported to have promised to do the necessary 'handholding'. Tesco is also using the visit of the British Prime Minister to India during February 2013 to bolster its case. While the final shape of the operational guidelines cannot be foreseen now, we shall briefly describe what we perceive as shortcomings of the above conditions and the possible ways these could be rendered ineffective.

Retail under the Garb of CCW

There has been extensive debate and consultation, a dominant feature of the discussion India has been that it revolved around Wal-Mart, the world's largest retailer, directly or indirectly. Indeed, the entry of Wal-Mart is the most talked about cases of foreign investment in India after Enron because of various reasons including the already existing large amount of literature on Wal-Mart's operations at home and globally, sustained intense lobbying by the company both in USA and India and finally the nature of arrangement it had entered into with the Bharti group. While it can be said that the policy could not have been meant exclusively for Wal-Mart, in effect, due to the intensive lobbying made by the company, and it being at the centre of controversy for its practices and the impact at home and abroad, one cannot deny the fact that the company could be the main beneficiary if not the only beneficiary from the opening up of MBRT. On their part, the opposition, who see in Wal-Mart's disclosure of lobbying in USA including discussions related to FDI in India, the possibility of 'educating' Indians *a la* Enron, forced the government to appoint a committee which is named as Wal-Mart Inquiry Committee. We too necessarily refer to the company repeatedly in the following.

Before proceeding further it may be useful to briefly narrate the experience with CCW, which was a precursor to RFDI as this, in our opinion, will have a bearing on the policy with regard to RFDI. CCW was meant to pass on the benefits of large scale procurement and efficient supply chain to neighbourhood shops instead of replacing them. In practice, however, the CCW companies were engaged in retail sales too. Protests to this effect were made even as early as 2003 in respect of Metro's operations. Wal-Mart went even further. Besides forming a 50:50 joint venture by name Bharti Wal-Mart Pvt Ltd (BWM) with the Bharti group for CCW, it entered into a franchise agreement with Bharti Retail Ltd (BRL), the retail arm of Bhartis. From the very beginning this arrangement was interpreted as a way of getting around India's restrictive FDI policy. What made the issue even more controversial was that instead of restricting to a mere franchise agreement, Wal-Mart indirectly contributed financially to the retail operations by subscribing to the compulsorily convertible debentures (CCDs) of Cedar Support Services Ltd, the parent company of BRL. Interestingly, at around the same time the criteria for calculating indirect foreign equity was changed. A perusal of the company's documents filed with the Ministry of Corporate Affairs suggests that the agreement between the collaborating parties could have been drawn keeping in view the forthcoming new criteria. Thanks to the efforts of a Member of Parliament, Shri M.P. Achyutan, the matter is now under investigation.

On the other hand, the fact of retail sales by CCW companies never seems to have been addressed in spite of the Parliamentary Standing Committee on Commerce pointing out to the practice. The Committee underlined that CCW was nothing but backdoor entry of foreign companies into retailing as these were selling goods for personal consumption also, whereas they were allowed for business purposes only. In fact, the new policy was notified on September 20, 2012, even while a PIL was under consideration of the Delhi High Court consequent to which the PIL was dismissed as withdrawn. The timing of the policy may thus not only be a response to the criticism of policy paralysis. Interestingly, the initial deadline for conversion of the CCDs was to end by September 30 2012.

The close coordination between Wal-Mart and Bharti Retail Ltd (i.e., between CCW and retail) can be seen from the following. BRL has more than 200 outlets (called *easyday*) in different states some of which did not express their readiness to allow RFDI in their respective states and some are located in places with less than 1 million population. *Easyday*s essentially sell goods procured from Wal-Mart and e*asyday*s' merchandise also consist of private labels of Wal-Mart including its top selling 'Great Value' food and 'George' clothing brands. It was noted that this was the first time that Wal-Mart's private labels were being sold in stores not owned by it and that it would help Wal-Mart as its brands would gain familiarity with Indian consumers by the time it was allowed direct entry in MBRT giving Wal-Mart head start over its rivals. Possibly in response to the criticism about the heavy dependence of the *easyday* outlets on the Bharti Wal-Mart's CCW, in April 2010 the government was reported to have come out with the stipulation that wholesale trading companies cannot derive more than 25% of their sales from group companies and such sales should be for the internal use of group companies. But due to 'inter-departmental tussle' on the definition of 'group', this could never become effective. While the *easyday* trademark is owned by Bharti Enterprises Holding Pvt Ltd, it also contains the upper three rays of Wal-Mart's sun logo. In April 2012, BRL appointed Wal-Mart Mexico's Michell Slape as Chief Operating Officer in place of Andrew Levermore of South Africa.

Responsibility & Response

In the context of on-going enquiries into Wal-Mart's funding of BRL and its lobbying efforts to gain entry into India's MBRT, the investigations the company is facing at home and its response could be extremely relevant. Apart from the allegation that the company headquarters had failed to inform Mexican and American authorities and took refuse under internal investigations, the fact is that its lukewarm response to Ranking Members of the US House of Representatives – one belonging to the Committee on Oversight and Government Reform and the other to Committee on Energy and Commerce, as shown in the accompanying box indicate the difficulties which India might face if it really wishes to dig deep into the lobbying controversy. The following extracts from a *New York Times* report sound a warning bell and one is not sure how the process adopted by the company in India falls into a similar pattern as far as opening up the MBRT and gaining the first mover advantage. Possible bribing of local authorities, if any, is of much less significance.

> … Wal-Mart de Mexico was not the reluctant victim of a corrupt culture that insisted on bribes as the cost of doing business. Nor did it pay bribes merely to speed up routine approvals. Rather, Wal-Mart de Mexico was an *aggressive and creative corrupter, offering large payoffs to get what the law otherwise prohibited*. It used bribes to subvert democratic governance — *public votes, open debates, transparent procedures*. It used bribes to circumvent regulatory safeguards that protect Mexican citizens from unsafe construction. It used bribes to outflank rivals. *(emphasis added)*[1]

Interestingly, the house democrats are trying to unearth the role of Wal-Mart in the on-going efforts to 'weaken' the Foreign Corrupt Practices Act (FCPA) by making use of its membership in Retail Industry Leaders Association (RILA) and US Chamber of Commerce.

[1] "The Bribery Aisle: How Wal-Mart Got Its Way in Mexico", New York Times Online Edition, December 17, 2012.

Excerpts from House Ranking Members' Letters
to the CEO of Wal-Mart Stores Inc.

April 23, 2012

Earlier this week, the New York Times published a detailed article outlining the results of its investigation revealing that *top Wal-Mart executives covered-up the actions of company officials in Mexico* who "orchestrated a campaign of bribery to win market dominance."…

The New York Times report, which is based on the review of thousands of documents and interviews with multiple company officials, raises serious questions about potential violations of United States law, including the Foreign Corrupt Practices Act. It also *raises significant questions about the actions of top company officials in the United States* who reportedly tried to disregard substantial evidence of abuse.

For these reasons, we are initiating an investigation into these matters and request a meeting with company officials who can respond to these allegations no later than April 27, 2012. (emphasis added)
http://democrats.energycommerce.house.gov/sites/default/files/documents/Duke-Wal-Mart-Bribery-Mexico-2012-4-23.pdf

August 14, 2012

We are writing to give you a final opportunity to respond to our requests for information about allegations that your company violated the Foreign Corrupt Practices Act. Although you have stated on multiple occasions that you intend to cooperate with our investigation, *you have failed to provide the documents we requested, and you continue to deny us access to key witnesses*. Your actions are preventing us from assessing the thoroughness of your internal investigation and from identifying potential remedial actions.

During the course of our investigation, we have learned that Wal-Mart's concerns about potential violations of the Foreign Corrupt Practices Act *are not limited to operations in Mexico, but are global in nature*. …

In addition, we have obtained internal company documents, including internal audit reports, from other sources suggesting that *Wal-Mart may have had compliance issues relating not only to bribery, but also to "questionable financial behavior" including tax evasion and money laundering* in Mexico.

To date, however, *you have not produced a single document we have requested. You have refused to provide Committee staff with copies of any internal reports or specific information* about the findings and recommendations of your worldwide assessment….

We would like to *give you an opportunity* to respond to allegations against your company before releasing any investigative report and *before making public any documents* we have obtained as part of the investigation. (emphasis added)
http://democrats.energycommerce.house.gov/sites/default/files/documents/Duke-Wal-Mart-Violation-Foreign-Corrupt-Practices-Act-2012-08-14.pdf

January 10, 2013

We are writing regarding new allegations that Wal-Mart systematically bribed officials throughout Mexico in order to evade zoning, environmental, and permitting laws at the company's Bodega Aurrera store in Teotihuacan, Mexico. *We are concerned that your company's public statements that the company was unaware of the allegations appear to be inconsistent with documents we have obtained through our investigation.*

These documents and e-mails call into question your company's statement that "[n]one of the associates we have interviewed, including people responsible for real estate projects in Mexico during this time period, recall any mention of bribery allegations related to this store." It *would be a serious matter if the CEO of one of our nation's largest companies failed to address allegations of a bribery scheme*.

The e-mails also cast a new and unfavorable light on Wal-Mart's *continued unwillingness* to provide our investigators with access to Ms. Munich, who appears to be a key witness who would know about your knowledge of the Teotihuacan bribes. On *June 13, 2012*, your attorneys informed us that you were in the process of working through a protocol that would allow Ms. Munich to speak with our investigators. *Since then, however, we have received no additional information from Wal-Mart* about when you intend to make Ms. Munich available to our investigators. *This ongoing delay frustrates our investigation.* (emphasis added)

http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter-Wal-Mart-Official-Bribery-Allegations-2012-1-10_0.pdf

Elijah E. Cummins, Ranking Member, Committee on Oversight & Government Reform and Henry A Waxman, Ranking Member, Ranking Member, Committee on Energy & Commerce

Some Operational Aspects of Safeguards

Given the manner in which foreign investors secure their rights, often reducing the Indian collaborator to just a sleeping partner, one is not sure how the 51% cap can help. In fact, keeping in view the strong opposition, foreign retailers were even prepared to accept a 'minority' share of 49%. The Indian partner can neither share the brand name nor the knowledge embedded in the databases of the foreign retailers and their global supply chains which is their main strength. From many indications and past experience this is going to be an intermediate stage and the limit could be raised progressively. In fact, the 51% limit may provide the foreign investor an opportunity to tap more local risk capital than otherwise.

The minimum investment of $100 million is too small an amount (corresponding minimum investment in backend infrastructure will be about Rs. 250 crore) to make meaningful contribution to development of backend infrastructure especially as such infrastructure is defined to cover a wide variety of activities. Since there is no bar on accessing domestic capital market, deployment of local financial resources may further reduce the effectiveness of this requirement. Additionally, will partial or complete takeover of existing logistics operations be considered as investment for this purpose? Should the investment be on a continuing basis or, can the foreign investors withdraw from it after sometime, with or without premium on the investment? Some of these may sound farfetched but given the way things have gone so far, such possibilities cannot be ruled out. Unless the loopholes in operation of CCW operations, which have no such restrictions, are plugged, the foreign companies may now freely combine the two and avoid spending substantial amounts on backend infrastructure. Once again, given the manner in which the CCW policy has been operating, the stipulation on the location of retail outlets may not prove to be a big hurdle. Many of the '*easyday*' outlets are already in states which are not prepared to allow RFDI. It is relevant to note that Bharti and Wal-Mart have been consistently maintaining that their operations were in conformity with the official policy. Indeed expressing surprise over the Department of Industrial Policy and Promotion (DIPP) seeking public opinion on the conditions that should be placed on foreign retailers if they are allowed, through its Discussion paper, the Nag-Vidarbha Chamber of Commerce said:

> The reason why we feel so (surprised) is that your department has not been able to enforce any of the conditions which were laid down in the Licences granted for 'Cash & Carry Wholesale Trade'.... Even today the violations are continuing & in spite of that you are audaciously asking the public at large to give their views on the conditionalty to be placed on MNC retailers... It will therefore be better not to expose your department to further embarrassment on those sensitive issues.

A lot of emphasis has been placed on the requirement of sourcing a minimum of 30% requirement from Indian small industries. Going by the official criterion which identifies small industries only on the basis of investment in plant and machinery with no reference to the ownership, quite a few possibilities suggest for themselves. First of all, why the investment limit was expressed in terms of US dollars whereas the MSMED Act, 2006 defines small enterprises as those having investment in plant and machinery between Rs. 25 lakh and Rs. 5 crore? Will the investment limit for MBRT change according to the exchange rate? We do not think the policy makers would be having such a ridiculous possibility in mind. However, devoid of the ownership criteria even 100% foreign-owned companies can qualify as small industries. What one generally perceives as small need not necessarily be small at all. It can be a subsidiary/affiliate of a foreign company, a large/medium Indian company. It could just be assembling, doing some final processing or even doing repacking of a nearly finished (imported) product. The 30% requirement in any case, does not act as a safeguard against large scale imports. Will rice, flour, edible oils and split pulses be counted as processed items? The larger the basket, the less effective will be the condition. In fact, this condition might be relaxed as it was done for SBRT.

It also needs to be underlined that the franchise agreements need not be confined to knowledge of supply chains but could actually be another backdoor entry is illustrated by the arrangement between Tatas and Tesco. The essential element of the arrangement in the words of the franchisee, Trent Hypermarket Ltd., are:

> Trent Hyper entered into a franchise and wholesale supply arrangement with Tesco Plc and its wholly owned subsidiary in India respectively, in respect of the Star Bazaar business. The exclusive franchise agreement allows the Company to access Tesco's retail expertise and technical capability processes and best practices … Under the wholesale supply arrangement, Star Bazaar now sources merchandise from Tesco's wholesale business in India, benefitting from Tesco's sourcing capability and supply chain expertise. Given concerted efforts from both teams, *a significant share of merchandise retailed across Star Bazaar stores is now being sourced by Tesco Hindustan Wholesaling Pvt Ltd*.

Implications of such arrangements with obliging Indian parties for investment in backend infrastructure, sourcing from small industries and locational restrictions are obvious.

According to the official press note, compliance with the conditions is to be ensured through self-certification and certification by the auditors. This could be cross-checked as and when required. While the notification is not specific in this regard, we presume that this will be by the government. Given the manner in which official agencies behaved at various instances, it is highly debatable how much reliance one can place on this provision.

While providing access to global markets for domestic agricultural produce and local small and medium enterprises through the large foreign retailers figures in the official scheme of things, surprisingly no obligations are being placed on them to generate export revenues. The issue of employment impact studies for each store proposed by the labour ministry also do not figure among the conditions. The proposal of minimum sales requirement to local retailers by the large retailers, proposed by the official Discussion Paper is also missing from the list.

By Way of Summing Up

What concerns us more is that the case of RFDI seems to provide a classic example of large global corporations succeeding in influencing public policy of developing countries and putting the regulatory system to stupor with the backing of powerful home governments. Starting from the mid-2000s when it started seeking to expand its global operations, there have been repeated attempts by Wal-Mart to meet important relevant functionaries. Once the policy makers were convinced either on their own or due to the intense and sustained lobbying from abroad, the process has been unidirectional. It also falls into the usual pattern of blindly following others (e.g. SEZs) without caring for their essence and India's ground realities. It could also be reflective of the faith in textbook type results. Otherwise it would be difficult to explain some of the omissions and commissions. Given this background and the weaknesses already described, can one expect much from the safeguards? A lot depends upon the way the actual guidelines are framed. One cannot rule out the possibility of the guidelines being tailored to meet the foreign investors' convenience.

It also needs to be underlined that large retail chains and some foreign-owned SBRTs are going to hurt not just the *kirana* stores but a number of other trades. It would therefore have much greater adverse impact on entrepreneurship development. Equally importantly, the so-called safeguards do not address the concerns of the vast number of farmers and small traders. No company would spend millions on lobbying just to get the opportunity to serve India's interests. On the other hand, while the government took comfort from the fact that India is not a signatory to GATS and that the Bilateral Investment Promotion Agreements (BIPAs) would come into play only with regard to post-approval changes in the policy environment, one is not sure whether the existing BIPAs and Free Trade Agreements (FTAs) would leave some scope for action on part of foreign investors especially because the investors can pick and choose the provisions from among all the agreements which suit them the best.

On one hand the government extrapolates the finding that organized retail in India did not cause much negative impact on small traders and on the other it expects the opening up to be a game changer thereby implying that foreign retail majors are vastly different from Indian organized sector players. Again, the government told the Supreme Court that since RFDI will be limited to 53 cities with a minimum population of 1 million and hence only 13.3% of India's population will be covered by RFDI thereby implying that negative impact on small traders if at all would be quite limited and localized. Does this mean that the policy will remain static for all times to come. If this was to be the case why would the government put its own survival at stake and resorted to deft floor management to carry the day. It is once again obvious that the negative impact is sought to be underplayed so that the opposition will be blunted and the process of opening up can be carried further subsequently with much less opposition.

There is sufficient evidence to the effect that the trading companies use local finances, make payments to parents and other foreign affiliates on multiple counts. FDI inflows could be more than balanced by outflows on multiple counts even before the companies become profitable and start remitting dividends. For example, looking solely at Bharti Wal-Mart Pvt Ltd, it is evident that within 4 years of its formation, the inflow of Rs. 100 crore in the form of equity participation by Wal-Mart has been more than balanced by outflows on account of a variety of transactions, activities and imports (Rs. 111 crore). BWM also paid about Rs. 148 crore to WM India technical and Consultancy Services Pvt Ltd, a 100% subsidiary of the Wal-Mart group, during 2007 - 2011 on account of services and royalty. BWM's 2011 accounts show that against the total equity capital of Rs. 200 crore (of which Bharti's contribution was Rs. 100 crore), BWM depended upon as much as Rs. 1,100 crore loans from local banks. Carrefour's imports amounted to Rs. 180 crore in 2011 alone, whereas the capital inflow on its account, including premium, was Rs. 230 crore and the company declared that it had no plans for exports.

In sum, the protection offered by the safeguards is illusory. The net addition to investable capital could also be short-lived. On the other hand, an area of major concern is the support extended by the major industry associations to RFDI. It is a clear indication that they have moved far way from small businesses whether in manufacturing or in trade. Their plans to free ride on the back of FDI companies will be transitory. Worse still, some of those who are already in may even be hoping to cash out.