FDI in retail trading, particularly multi brand retail trading (MBRT) remains one of the most contentious policy issues. This article goes beyond the MBRT sector and seeks to examine FDI in single brand product retail trading (SBRT) policy as well, with takeaway lessons. At the outset, some key pertinent issues are identified, after which the adequacy of the current FDI regime to effectively address them is analysed. The law and policy implications (the ex-ante analysis) will be highlighted by anticipating future problems due to the restrictions placed in FDI in both these sectors. This paper also suggests normative improvements to the current retail FDI policy, proposing creative solutions for each of the law and policy problem discussed, thereby enhancing efficacy of the retail FDI policy in achieving its objectives. This paper provides a critical analysis so that necessary policy improvements can be systematically carried out, keeping in mind the interests of the stakeholders and the nation as a whole.

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I. INTRODUCTION

Indian Government’s enormously contentious and highly debated policy enabling Foreign Direct Investment (FDI) in Multi brand Retail Trading (MBRT) Sector received praises and brickbats in equal measure. The economic implications of this policy were intensely debated in the Indian Parliament in December, 2012 apart from touching upon some legal aspects as well. Outside the Parliament, the opinions expressed by various interested stakeholders on the discussion paper floated by the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India deserve special mention,1 apart

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from other publications. Previously, the FDI policy in Single brand Retail Trading (SBRT) was also a debated issue and it still should not be neglected during the examination of the FDI in the retail sector in India.

The legal complexities and ramifications of the Retail FDI Policy — both in SBRT and MBRT — requires deeper examination. This article seeks to do just that by examining certain pertinent legal and constitutional issues after delineating them. The following are some of the issues and claims made in several parts of this article. Firstly, an effort is made to understand certain problematic complexities existing in the form of sectoral conditionalities in the regulation of the FDI in both single brand and multi brand retail trading sector in India and their anticipated adverse implications. This has created a lot of vagueness in the whole investment environment in the sector. Secondly, the issue of sporadic changes carried out in the retail sector FDI policy is raised, which creates unpredictability and consequently adversely affects the stakeholders despite apparently leading to liberalisation; Thirdly, a consequential legal problem is highlighted in anticipation which may arise due to inconsistency in the relevant FEMA notification viz., FEMA 20 and the consolidated FDI policy; Fourthly, some constitutional law and administrative law problems which may arise in future in the MBRT FDI policy’s implementation particularly due to the unprecedented involvement of the prior states’ consent before implementation of the MBRT FDI policy in the states are

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3 See e.g., Rasul Bailay and Chaitali Chakravarty, Global Retailers not Buying India Story: Not a Single FDI Proposal has Come in so Far, ECONOMIC TIMES (Mumbai), (Feb. 1, 2013), at 1.

4 See, e.g., Dilasha Seth, Walmart Egg on Face, Govt may serve Tesco Omelette, ECONOMIC TIMES (Mumbai), (Oct. 11, 2013), at 13 (citing a Tesco spokesperson saying: "We are excited about the India opportunity and await policy clarity before we can take further decisions on the matter."). This was after several amendments and a clarifications have been carried out already to the MBRT FDI Policy introduced last year. The ‘Tesco Omelette’ has been served, as the only FDI in MBRT sector in India so far has been purchase of 50 per cent of issued and paid-up equity share capital of Trent Hypermarket Ltd. (THL) by the British retail major Tesco (Tesco Overseas Investments Ltd., TOIL) and which has been cleared by the Competition Commission of India (CCI) under its combinations review jurisdiction, see First FDI transaction in multi-brand retail: Tesco gets CCI nod for Trent Hypermarket stake buy, THE INDIAN EXPRESS, (May 28, 2014), available at: http://indianexpress.com/article/business/economy/first-fdi-transaction-in-multi-brand-retail-tesco-gets-cci-nod-for-trent-hypermarket-stake-buy/; and Order under Section 31(1) of the Competition Act, 2002 in Combination Registration No. C-2014/03/162 (CCI, May 22, 2014), available at: http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2014-03-162.pdf.


6 FEMA 20 is the short hand reference for the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 on basis of it notification no. FEMA 20/2000-RB, dated May 3, 2000.
discussed. Though the identification of these legal issues is a major contribution of this article, solutions to many of these problems are also proposed. This article concludes in summing up the aspects discussed in the preceding parts and raising some other imperatives.

II. DECODING THE FDI POLICY IN SINGLE-BRAND PRODUCT RETAILING

There is no FDI limit in Single-Brand Product Retailing currently (i.e., limit as per the FDI Policy is 100%). Earlier, the proposals came under the Government Route requiring prior approval of the government after FIPB recommendation. In August 2013, the government chose to extensively change the sectoral policy, permitting up to 49% FDI under the automatic route and remaining 51% under the government route. The following section discusses and analyses the contentious extant sectoral conditions which are imposed on FDI in SBRT:

“(a) Products to be sold should be of a ‘Single Brand’ only.”

Notably, the term ‘single brand’ is not defined in the FDI Policy. This apparently does not however pose much problem, as the contours of the term can be easily culled out from clauses (b) and (c) which are reproduced below:

“(b) Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.

(c) ‘Single Brand’ product-retail trading would cover only products which are branded during manufacturing.”

Thus, products which are branded as such during the manufacturing stage and later on sold under the same brand in one or more countries other than India comprise ‘single brand’ products. Notably as per clause (b) above, sale of goods under the same brand under which you intend to sell in India, in just one other country is a sufficient criterion.

A. SUB-BRANDING IN SBRT

One problem recently arose due to inadequacy in the definition of “single brand”. As seen above, the ingredients of the definition have to be culled out on basis of the conjoint reading of clauses (b) and (c). However, it is common practice that the retailers in SBRT sell goods in various product lines under certain

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7 See DIPP Press Note No. 6 of 2013, Review of the policy on Foreign Direct Investment-caps and routes in various sectors, (Aug. 22, 2013). This introduced changes in the extant FDI Policy, 2013. Earlier, changes were brought in the previous FDI policy, 2012, supra note 1, in the sectoral conditions governing single-brand product retail trading by Press Note No. 4 (2012 Series) (DIPP, Min. of Commerce & Industry, Govt. of India, Sep. 20, 2012) which amended ¶ 6.2.16.4 of FDI Policy, 2012.

8 See FDI Policy, 2014, supra note 1, at ¶6.2.16.3.
“sub brands,” though they are sold from their own “brand” outlets. In absence of a clear norm permitting or prohibiting sale under various “sub brands,” a term which is still undefined, the business practice ran into trouble. A recent example is that of Marks & Spence (M&S), who are retailing through their stores labels like Autograph, North Coast, Portfolio and Per Una. 9 An objection to this practice was raised by the Department of Economic Affairs (DEA), Ministry of Finance when a reference about M&S was sent to the DIPP. This is presumably on the basis of viewing such sale of goods under different “sub brands” as MBRT in the guise of SBRT for which alone the permission was obtained. 10 As an objection to this reference of the finance ministry, it can be said that so far as the pertinent sectoral clauses are met, no more restrictions should be imposed. It appears to be nobody’s case that M&S brand was not reflected in the merchandise sold. So the distinctiveness was clearly present. Since there is no restriction on the sub branding, it is clearly unreasonable to restrict it as it helps in product differentiation for the convenience of the different customers according to their different needs. 11 When the government seeks to promote India as an attractive investment destination, it certainly should not assume that the foreign investors in single brand retailing will indulge in vanilla marketing leading them to lose their competitiveness. Such parochialism has no place in an enabling FDI policy.

Thankfully, the then Commerce Minister resisted the DEA’s view by clearly opining that along with the flagship brand, the single brand retailers can sell their sub-brands from their stores in India. 12 The only restriction now is that the logo of the retailer has to be on the every product being sold by such a retailer. Though this controversy has been put to rest, such inconsistency between different government departments and regulators is damaging not only to investments but the country’s reputation as a conducive host state welcoming foreign investment. A comprehensive drafting envisaging future problems and scenarios is perhaps one effective solution.

B. LOCAL SOURCING IN SBRT

The local sourcing condition prescribed in clause (c) is one of the most problematic ones. A part of this clause reads:

11 See id.
In respect of proposals involving FDI beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of five years’ total value of the goods purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.

Where there is ‘ownership’ of the Indian target entity, with holding beyond 51% in the capital of the target company in the hands of the non-resident investing entity, clause (e) is triggered. This clause when triggered requires a mandatory 30% local content sourcing. A careful observer of Indian FDI Policy in SBRT will observe a relaxation of the similar condition in the previous version. Though it does not currently mandatorily prescribes sourcing from “MSMEs, village and cottage industries, artisans and craftsmen” it explicitly makes it preferable for them to do so. It is silent on the (pragmatic, if not legal) incentives attached for doing so or disincentives for non-compliance, which is a matter of speculation. It is precisely this reason that undermines its presence and purpose. Compliance with this seemingly directory provision has its own problems, discussed later.

Another restriction contained in clause (e) reads:

“For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of FDI for the purpose of carrying out single-brand product retail trading.”

13 See FDI Policy, 2014, supra note 1, at ¶2.1.28: “A company is considered as ‘Owned’ by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and / or Indian companies, which are ultimately owned and controlled by resident Indian citizens”. It should be noted that corresponding definition of a company owned by non-resident entities does not exist in the present FDI policy. The only reasonable assumption is that the similar standard as laid down for the resident ownership should apply for non-resident ownership of the Indian company is adopted here. Further, notably, clause (e) should not be triggered for proposals for holding more than 50% up to 51% of the capital of the target Indian company. Is this reasonable interpretation of cl.(e) or, can such a proposal form a bone of contention; a potential case for dispute? This will be an interesting scenario where a non-resident owner of a target company can claim exemption from application of the onerous clause (e) restriction.

It again becomes ambiguous so far as its applicability is concerned. Whether it applies on the investing non-resident entity when the non-resident investor has “ownership” of the target Indian company or irrespective of the stake in the target company, restricting the choice of vehicle for carrying on single-brand product retailing in India viz., only through an Indian (target) company? Whatever version is accepted, at least some unnecessary restriction is essentially present. If it is said that setting up a target “company” is only required in case of majority stake be held by non-resident investor, it also poses some problems. If the business model is LLP, Partnership firm or proprietorship before having more than 50% FDI it would require conversion into company once the threshold limit of 50% is crossed. Why is it that the “monitoring of local content requirement” clause is not countenanced for other forms of business associations? This also appears to be discriminatory on the ground that SBRT can be carried out by other forms of Indian business entities like Partnerships, Limited Liability Partnerships (LLPs) or sole-proprietorship firms in India if they do not wish to have any FDI.

C. Restriction on E-Commerce and other issues

When retailing through e-commerce is becoming the norm, imposing restrictions on retail trading by e-commerce does not make much sense, as it may not be profitable for the retailers to trade only through their stores. The reach of e-commerce is phenomenal in a country like India. The relevant restrictive clause reads:

“(f) Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of single-brand retail trading.”

Thus, Clause (f) imposes another onerous anti-business condition prohibiting the target Indian company carrying on single brand retail trading to indulge in retail trade by use of e-commerce. This puts these companies at a significant disadvantage in the Indian markets, particularly in view of increasing retail trade in India on e-commerce platform. Similar restriction will not be faced by an Indian company indulging in SBRT without having FDI.

15 The Companies Act, 1956 (and now the Companies Act, 2013, to the extent notified) applies to Indian Companies, with all the prescribed compliance with attendant costs, which every foreign investor may not prefer. Currently, FDI policy permits, subject to prescribed conditions, non-residents to invest in inter alia LLPs, capital of a partnership firm or a proprietorship concern or any association of persons in India, see FDI Policy, 2014, supra note 1, at ¶3.2.

16 See, e.g., ASSOCHAM & COMSCORE, STATE OF ECOMMERCE IN INDIA 8 (2012), available at: http://www.assocham.org/arb/general/Comscore_%20ASSOCHAM-report-state-of-ecommerce-in-india.pdf (Retail category penetration has increased to 60% reach and has grown to 37.5 million unique visitors a month, an overall growth of 43% annually. The growth has come across all retail categories and most of them show promising transactions and conversion rates along with growth in visitors. The top retail sites shown above in India have each seen a growth of
Under Clause (3), *inter alia*, the applications seeking permission for FDI in SBRT exceeding 49% is required to be made to the Secretariat for Industrial Assistance (SIA) in the DIPP\(^\text{17}\) for determining whether the proposed investment satisfies all requirements of the sectoral policy notified. It will then be processed by the Foreign Investment Promotion Board (FIPB) under the Ministry of Finance, where the product/product categories which are proposed to be sold under a “Single Brand are to be specifically stated, as required in all FDI proposals seeking ‘government approval.’” Any addition to the product/product categories to be sold under “Single Brand” would require a fresh approval of the Government. Further, in case of automatic route applications, the RBI has to be provided this products list, while a similar list has to be provided to Secretariat of Industrial Assistance (SIA) for the applications under the government route.

As seen, Clause (3) does not allow addition to products or product categories sold without obtaining a fresh government approval. This restriction is reminiscent of the regressive licensing regime under the Industries (Development and Regulation) Act, 1951 [I(D&R)A] which was largely done away with by the Government of India way back in its Industrial Policy in 1991; there is no reason why in the extant FDI policy the government should have such restrictive and discriminatory clause. Other clauses merely highlight the procedure to be followed and the manner in which governmental approval can be obtained for the FDI proposal.

### III. MORE COMPLEXITIES AND GREATER RESTRICTIONS IN THE FDI IN MBRT POLICY

#### A. ENTRY-BARRIER AND ‘BACK-END’ INFRASTRUCTURE INVESTMENT PROBLEMS

After examining the restrictive conditions in the SBRT FDI policy, it is appropriate to now focus on the restrictions in perhaps the most contentious sector in Indian FDI policy—the multi brand retail trading (MBRT). In the year 2012, the Indian Government decided to review its policy and open up this sector

\(^{17}\) It has been reported, that DIPP has, under the current government, due to its criticism for delaying processing of the FDI in SBRT applications in certain cases, has now prescribed ninety days as the time limit to process applications pending before it, see Dilasha Seth, *Single-brand retail: DIPP sets maximum time frame of 90 days to process all pending applications*, THE ECONOMIC TIMES, (July 30, 2014), available at http://articles.economictimes.indiatimes.com/2014-07-30/news/52237959_1_dipp-time-frame-20-days.
inviting foreign equity to the extent of 51 per cent under the Government route. The initial hurdle to foreign equity in the multi-brand retail trading sector comes in form of minimum threshold requirement of investing at least USD 100 million. This works to the detriment of a foreign investor in two ways. First, it is an entry barrier for small foreign retailers who may not have either the resources to commit or may not be in a position to risk so much investment in a nascent sector in India. Second, it is discriminatory when compared to an Indian retailer, who is allowed to do business in this sector without any such minimum investment restriction. A major concern against having FDI in this sector was to protect small businesses and retailers running small shops; which the Indian government rubbished.

The second discriminatory condition is the restrictions imposed in clause (iii) on end uses of half of the FDI inflow. It reads:

At least 50% of total FDI brought in the first tranche of US $100 million shall be invested in ‘backend infrastructure’ within three years, where “back-end infrastructure” will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure. Subsequent investment in the backend infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements.

The expression “first tranche of US $100 million” presumes that the investment is of more than USD 100 million and comes in tranches, either or both of which

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19 See AT KEARNEY’S 2014 GLOBAL RETAIL DEVELOPMENT INDEX™ (GRDI): FULL STEAM AHEAD FOR GLOBAL RETAILERS, 12, available at: http://www.atkearney.in/documents/10192/4600212/Full+Steam+Ahead+for+Global+Retailers+2014+Global+Retail+Development+IndexTM.pdf/6f55a59b-e855-4236-96eb-464e2ca01e91(discussing the fall of India by six spots, from the previous year, to its lowest-ever GRDI ranking viz., 20th. This should be a matter of concern for the Indian Government which should seek to remove market entry barriers for foreign retailers).


21 The underlined portion viz., the first tranche of US $100 million is one of the crucial inclusions in the clause (iii) vide Press Note No. 5 (2013 Series) (DIPP, Min. of Commerce & Industry, Govt. of India, Aug. 22, 2013). This has curtailed the ‘backend infrastructure’ investment obligation of the foreign investor which was earlier to the tune of 50% of the entire FDI brought in by the investor.
could be fallacious in a particular case, and thus furnishes one more instance of bad drafting. These restrictions are substantially milder than the previous version. However, these restrictions are discriminatory towards foreign investors as it requires no such commitment from an Indian multi-brand retailer without foreign equity regardless of the Indian retailer’s size. Additionally, this condition may be detrimental to the commercial interests of the foreign investors. Notably, despite the concession, barring a few of them, hardly any foreign retailer appears to have committed to make investment in MBRT in near future. This clause tantamounts to a rent extracted by the host state for its infrastructure development in return of granting permit for foreign investment. A sizeable part of the investment has to be utilised for activities which may not be a priority as per the foreign retailer’s business strategy, to begin with, which it intends to adopt in India.\(^{22}\) This clause may be a fait accompli for some retailers culminating in their business failures due to huge losses and ultimately making it unfeasible for them to continue their business presence in India, within extreme competition which prevails in multi-brand retail sector today including, the organised sector.\(^{23}\)

It should be noted, that even after the closure of businesses by foreign retailers in India the back-end infrastructure is going to remain for use by the Indian entities, contributing to the Indian GDP and infrastructure.

Furthermore the distinction between “back-end” and “front-end” infrastructure is not absolutely clear.\(^{24}\)

**B. THE PROBLEMATIC LOCAL CONTENT REQUIREMENT**

A controversial ‘local content’ requirement in clause (iv) is also imposed as a precondition on the intended foreign direct investment in multi-brand retail sector. The same is reproduced below:

> At least 30% of the value of procurement of manufactured/ processed products purchased shall be sourced from Indian micro, small and medium industries,\(^{25}\) which have a total

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\(^{22}\) See DIPP, *Clarification on queries of prospective investors/stakeholders on FDI policy for Multi-brand Retail Trading* (June 2013), available at: [http://pib.nic.in/archieve/others/2013/jun/d2013060602.pdf](http://pib.nic.in/archieve/others/2013/jun/d2013060602.pdf) [hereinafter DIPP Clarification] (precluding from the infrastructure investment conditions, *inter alia*, acquisition of ‘supply/chain/back end assets or stakes from an existing entity’, and franchisee model).


\(^{24}\) See FDI Policy, 2014, *supra* note 1, at ¶6.2.16.4(ii): “back-end infrastructure” will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure.” The (inclusive) ‘enlarging definition’, as can be observed, does not exclude any other thing(s) which can be commonly attributed to the term defined.

\(^{25}\) Prior to amendment by Press Note No. 5 (2013 Series), instead of the italicised portion 'small industries' was the expression used. The current terms is more in accordance with the MSMED Act, 2006, though the exact term used there is 'enterprise'. In fact, the expressions micro, small and
investment in plant & machinery not exceeding US $ 2.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. The ‘small industry’ status would be reckoned only at the time of first engagement with the retailer and such industry shall continue to qualify as a ‘small industry’ for this purpose, even if it outgrows the said investment of US$ 2.00 million, during the course of its relationship with the said retailer. Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as a ‘small industry’ for this purpose. Sourcing from agricultural co-operatives and farmer co-operatives would also be considered in this category. This procurement requirement would have to be met, in the first instance, as an average of five years’ total value of the manufactured/ processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.

Does this exclude from valuation the raw materials used for production in the manufacturing carried out by the MBRT retailer itself? Despite the relaxations provided in Aug. 2013, there are still likely negative ramifications of clause (iv) on a potential foreign investor. This restriction diminishes the utility of the established supply chains of the foreign retailer and adds to the costs by compelling them to create new supply chains with the Indian small industries. The identification of a suitable ‘local content’ supplier is an onerous exercise apart from the fact that procurement from the Indian MSME sector may not be suitable for the business demands of the retailer. A succour in the form of allowing sourcing from agricultural and farmer co-operatives may help the investor, but the size of the relevant products segment may not constitute a sizeable proportion of

medium need not qualify the 'industries', as the investment limit is prescribed in the clause, which is distinct from the limits prescribed for micro, small and medium enterprises under law.

26 Prior to amendment by Press Note No. 5 (2013 Series), the relevant condition read: "[f]urther, if at any point in time, this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose." Thus, the current position gives considerable relaxation to the investors. Further retaining the expression "small industry" in the latter part of the clause, while substituting it in the earlier part, see id., causes an anomaly, and amounts to bad drafting. Notably, the 'total investment' limit has also been increased from USD 1 million to 2 million.

27 This condition has been added vide Press Note No. 5 (2013 Series), id.

28 See, e.g., SME Sourcing Clause in Retail FDI could Change: Rule for Single-brand Retail Already Eased, THE FINANCIAL EXPRESS 1 (Mumbai), (Feb. 22, 2013). Also, it may contravene the National Treatment obligations under the GATT and TRIMs Agreement, see Ajay Sharma, Examining the Indian Multi brand Retail Sector FDI Policy’s (In)Consistency with the WTO National Treatment Norms, 53 IND. J. INT’L L. 242–64 (2013).

29 DIPP further unreasonably restricts the utilization of the goods sourced from 'small industries' to be utilized by the 'company owned and company operated' front end stores in MBRT sector only and not for any other purpose like, cash & carry activities (in India) or SBRT or exportation done by the foreign investor, see DIPP, Clarification, supra note 22. These clarifications apparently introduce more restrictions than are currently present in the FDI policy, and may be amenable to judicial review. Clarifications should not lead to norm creation, and thus this press release requires to be incorporated in the FDI policy through the press note route after suitable amendments.
total sale. Furthermore, procurement from large Indian industrial houses does not count. This compels the retailers to sell the merchandise produced by the ‘Indian small industries’ irrespective of their market demand making them uncompetitive in this highly competitive market. It may not be financially viable also to procure from the existing Indian small industries. To deal with this problem, at the very onset, the retailers may have to set up modern manufacturing units in India for maintaining their quality standards while satisfying the above investment ceiling restriction to produce several of the commodities it intends to sell through their superstores. Indian MBRT firms in organised retail like Reliance are already manufacturing many of their products sold through their outlets like Reliance Fresh. This may not be a bad strategy in long run, particularly after you have established yourself in the market after a few years. However, at the beginning, this results in compelling overheads for a foreign investor as they may need to undertake manufacturing activities in India to satisfy their local sourcing requirements. If manufacturing units are indeed set up by the foreign retailers, they may trigger FDI sectoral norms governing that sector because of foreign investment, apart from the requirements of obtaining other requisite licenses and permissions. None of the restrictions in clause (iv) applies to the domestic multi-brand retailers without any FDI.

Clause (vi) is another discriminatory clause which makes the FDI norms in multi-brand retail unattractive for all potential foreign retailers except for perhaps extremely large global players like, Walmart, Carrefour and Tesco. Of course, Tesco has already gone forward with its deal. This clause imposes ‘locational restrictions’ on the market presence of the foreign retailers restricting them to only one million plus population cities (as per 2011 census), and to such cities in states where the governments have given prior permission to set up the multi-brand retailing. There is a slight relaxation for those other cities (i.e., having population

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30 See, e.g., Anandita Singh Mankotia & Rishi Raj, Reliance Fresh chops fruit & veg, THE FINANCIAL EXPRESS, (October 9, 2007), available at: http://www.financialexpress.com/story-print/226345. Strangely, the DIPP in its June, 2013 ‘clarification’, id., had categorically stated, that “[p]rocurement of fresh produce is not covered by this condition.”; but in Aug., 2013 has now relaxed the same to the extent discussed above. This policy flip-flops are not new, but problematic.

31 Walmart which seemed to be the most prospective entrant in Indian MBRT Sector seems to be most unlikely in the near future. The FCPA proceedings and the recent breakup of the Walmart-Bharti JV in Cash & Carry segment are also important reasons for this apprehension, see Rasul Bailay and Chaitali Chakravarty, Wal-Mart to take a call on its India plans by Month-end, ECONOMIC TIMES. 8 (Mumbai) (Sep. 12, 2013); Rasul Bailay, Marriage over: Biggest democracy loses biggest retailer’s vote, ECONOMIC TIMES I (Mumbai) (Oct. 10, 2013).

32 The state of Himachal Pradesh was not included in the initial list of states/Union territories listed in ¶6.2.16.5 (2) of the FDI Policy, 2013 which gave their consent to allow FDI in MBRT as per the FDI policy in their territories, as required under ¶6.2.16.5(1)(viii) of the FDI Policy, 2013 discussed above, but was included later vide Press Note No. 1 (2013 Series) (June 3, 2013), available at: http://dipp.nic.in/English/acts_rules/Press_Notes/pn1_2013.pdf. As per the DIPP, the back end infrastructure investments can however be made in the states which do not permit FDI in MBRT currently, see DIPP Clarification, supra note 22.
up to 1 million) where the state government has specifically permitted the same. This clause is *per se* discriminatory as it restricts market access of the foreign retailers. Furthermore, restricting the setting up of businesses only to the states which have given prior permission is discriminatory compared to the Indian traders who have free access to set up their business presence in any state subject to compliance with the local and state laws applicable. To justify it legally in the name of making a permissive or enabling policy as the state governments ultimately give permissions to set up the MBRT outlets and shops under the state and local laws is unacceptable.

A counterargument can be that similar licenses by the state government authorities would be required by retailers in single brand retailing business but no such locational restrictions clause and prior permission of a state government to permit retail is there in the governing sectoral policy. Despite giving the general consent to allow FDI in MBRT in a state, it does not translate to any relaxations in grant of licenses/permits under various state and local laws. This undermines the prior consent sought from the state governments by the central government. Instead, a possibly insurmountable barrier, in case such permission is not given by a particular state government in which the investor wants to set up its business is created. Furthermore, FDI in different sectors including manufacturing sector may require mandatory adherence to various local and state laws including obtaining licenses and permissions but at the onset, primacy is not given in the FDI policy to the states to preclude an investor from setting up its project in a state altogether.

The list of discriminatory restrictions seems unending, as clause (ix) (which has a similar clause in the single-brand retail policy) imposes a restriction on use of e-commerce which could be a medium to transgress the borders of the Indian states. The negative impact of this restriction can be more pronounced compared to the similar restriction in single brand retailing due to several reasons. First, as seen above, the restrictions on FDI in MBRT are more pervasive and several compared to single brand retail sector. Second, the competition in MBRT is expected to be much more relatively, at least to begin with, due to a large number of existing players in the market, in both organised and unorganised retail. Third, the brand loyalty would be much more accentuated in single brand retail compared to the customer loyalty to a particular MBRT player. This restriction makes foreign retailers’ business proposition extremely uncompetitive. Thus, *prima facie*, the discriminatory conditions discussed above cause severe detriment to the foreign investors, manipulating marketplace competition in favour of the domestic investors.

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33 See the FDI Policy, 2014, *supra* note 1, at ¶6.2.16.5 (viii).

Furthermore, since downstream investment norms in FDI Policy ignore, subject to exceptions, a downstream investment by an investing Indian company ‘owned and controlled’ ultimately by the resident Indian citizens, the importance of ‘ownership’ and ‘control’ assumes much importance. The application of the highly restrictive clauses discussed above, regardless of whether the non-resident investor has target’s ‘ownership’ and/or ‘control’ seems to be even more unjust.\textsuperscript{35}

\textbf{IV. UNCERTAINTY IN THE FDI RETAIL POLICY}

The uncertainty with which changes are introduced in the FDI Policy in the retail sector may pose difficulties for stakeholders both foreign and domestic. FDI policy in the single-brand retail trading sector furnishes an excellent example.

The policy conditions, as culled out from any of the 2011 FDI policies, as applicable to the single brand product retailing, prescribe 51% FDI Cap/Equity under the Government Route, as prescribed then. The FDI Cap in the ‘single brand product retailing’ was relaxed to 100% in the FDI Policy of 2012. However, more onerous sourcing requirements were brought into the sectoral policy. Two such restrictive clauses which were inserted require special mention, and are thus reproduced below: \textsuperscript{36}

\textit{(d) The foreign investor should be the owner of the brand. (e) In respect of proposals involving FDI beyond 51%, mandatory sourcing of at least 30% of the value of products sold would have to be done from Indian small industries/ village and cottage industries, artisans and craftsmen.' Small industries' would be defined as industries which have a total investment in plant & machinery not exceeding US $ 1.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose. The compliance of this condition will be ensured through self-certification by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts, which the company will be required to maintain.}

These restrictions were possibly introduced to assuage the apprehensions of domestic retailers and their benefactors who viewed foreign equity in the retail sector with suspicion by showing that the further concessions in the equity cap were counterbalanced with other restrictions including the local content requirements to benefit the Indian small industries. These restrictions however would have caused greater difficulties, and it seems were introduced in haste. Later on, they were relaxed in a phased manner, as seen above.

\textsuperscript{35} See Deepshikha Sikarwar, \textit{No conditions apply: Paving way for Walmart, Tesco…: May drop stiff riders for up to 49% stake in India venture}, ECONOMIC TIMES, (Mumbai), (Jul. 1, 2013), available at: http://epaper.timesofindia.com/Repository/ml.asp?Ref=RVRNLzIwMTMvMDcvMDEjQXIwM TUwMA==&Mode=HTML&Locale=english-skin-custom

\textsuperscript{36} See FDI Policy, 2012, \textit{supra} note, at ¶6.2.16.4, before amendment carried out by Press Note No. 4 (2012 Series), \textit{supra} note 1.
The problem is that over a period of just around two and a half years there have been four different sets of conditionalities governing the FDI policy in the single-brand product retailing. This rate of change in the sectoral policy can have potential ramifications for all stakeholders. For example, suppose an investor is planning to invest up to 51% of capital of an Indian company under the “FDI scheme,” and thus seeks legal and financial advice to structure the deal and proposal as per the consolidated FDI Policy contained in DIPP Circular 2 of 2011. However, before an application for approval under the ‘government route’ is completed, the FDI policy of 2012 comes into force on April 10, 2012, and an additional restriction of ownership of brand by foreign investor is imposed. Due to this new condition, the proposal may have to be amended after restructuring of deal or, it may become redundant in a particular case. This highlights that at least one of the onerous conditions initially imposed in the extant policy viz., on the brand ownership issue did not apply only to proposals where the equity inflow of over 51% is proposed, but also to the proposals till the 51% equity stake. The uncertainty may also be prejudicial to the domestic competitors who may not have anticipated such liberalisation and thus have to keep on changing their business strategy from time to time to match the increasing foreign players (investors) in their area/sector of business.

The chequered liberalisation history in the FDI policy in SBRT may serve as an example for carrying out a similar analysis of the changes carried out in the FDI policy in MBRT and the need for guarding against such abrupt policy changes is thus highlighted.

V. APPREHENSION OF LAW AND POLICY MISMATCH

The exchange control laws created under the FEMA, 1999 framework, comprising of the pertinent Regulations and Rules under it should be in consonance with the FDI Policy, or there is a risk of the policy coming in conflict with the law, with the former getting overridden consequentially.\(^{37}\) This lag between the FEMA laws and the FDI policy, which often exists, was usually ignored.\(^{38}\) However, this critical issue caught attention of the public when the Supreme Court of India in a matter of the public interest litigation challenging the FDI in multi-brand retail trading sector clearly stated in its order, that the relevant

37 See FDI Policy 2014, supra note 1, at ¶1.1.2 (clearly stating about the FDI policy, that “in case of any conflict, the relevant FEMA notification will prevail”). See Ajay Kr. Sharma, A Critique of the Indian FDI Law and Policy: Problems & Solutions, 2(1) NLUJ Law Review 30 (2013), for a detailed analysis of these issues, from where some portions in this part are borrowed, available at: http://www.nlujodhpur.ac.in/downloads/lawreview/AKS.pdf [hereinafter Sharma].

38 In this regard the author is reminded of a conversation with a highly experienced Indian Corporate lawyer, see Sharma, supra note 37, at note 52. His view, as emerged from our conversation was, that the more contemporary FDI policy is always looked at and preferred over the FEMA 20, which was not often updated, while tendering legal advice. Though this view may not be endorsed by majority of Indian transactional lawyers, but it is arguable that many lawyers may share it. This approach though pragmatic is fraught with danger as discussed above.
FEMA Regulation viz., Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 should permit the FDI in this sector or it will override the enabling FDI policy provision. This situation was averted by timely amendments in the FEMA 20 in this regard, which was tabled in the Parliament, and approved.

It is reasonable to assume that the RBI may find it difficult to keep on updating its FEMA regulations to keep track with the evolving FDI Policy of the Government. The mismatch may have drastic consequences on the policy implementation, and create difficult interpretative problems for the Courts who may then attempt to harmoniously interpret law and policy provisions. Attempts may be made to synchronise the FEMA 20 and FDI policy by inserting suitable clauses.

VI. SOME CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW ISSUES

A. THE CORE LEGAL ISSUES

Considering that the making of the FDI Policy falls within the purview of the Central Government, how far is the Central Govt. justified in seeking previous consent of State Governments for extending the MBRT FDI policy to different states? Is such a policy, on becoming enforceable under law, amenable to Judicial Review? No doubt that if no such prior approval of the state government

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42 DIPP, as per Schedule II of the Government of India (Allocation of Business) Rules, 1961
is taken in the FDI policy, the MBRT retailer with FDI still needs permits and licenses under various local and state laws at par with the other Indian retailers with no FDI. Could a state government’s officials deny the permissions or licenses solely on the ground that the said state government does not permit MBRT outlets in its state which are run by an enterprise having FDI? It appears that such a prejudicial decision, based on a consideration which will be extraneous to the local or state law under which the license or permission is to be granted, would be unsupportable on basis of administrative law principles and also be violative of Article 14 of the Indian Constitution. Thus on judicial review such a decision is likely to be struck down on the merits of a particular case.

Secondly, can an Indian company carrying on MBRT business, having FDI in it, claim parity with another Indian company in the same sector, which has no FDI in it, so far as the former’s challenge under Article 14 of the Constitution to the restrictive sectoral conditions imposed upon it are concerned, which allegedly discriminately apply to it and not to the latter company. Is there a reasonable classification which exists in this case to sustain such discrimination? Will it matter if both the ownership and control of the target Indian company in MBRT after obtaining FDI vests with resident Indian citizens only? These questions may arise if some MBRT Indian company with FDI in future chooses to impugn the sectoral policy in High Court(s) or the Supreme Court of India by filing a writ petition.

B. EXAMINING THE POLICY STANCE OF THE PRESENT INDIAN GOVERNMENT

This section analyses the likely implications of the National Democratic Alliance (NDA) Government, who was and still is opposed to the MBRT FDI policy, coming to power after General Elections in 2014. What will happen if the current government withdraws the current FDI policy in MBRT or imposes still more onerous sectoral restrictions? Also, what will be the legal implications if a state government which gave general permission to allow FDI in MBRT in its state chooses to withdraw its consent after a party opposing such a decision is

43 Article 14 which is entitled "Equality before law" reads: "The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India". Here, 'the State' does not refer to the state government(s), though they are included within the expansive definition of the term provided in Art. 12 of the Constitution. Thanks are due to my Law Dean Prof. I.P. Massey for enlightening discussion on this point, affirming my academic views. See I.P. MASSEY, ADMINISTRATIVE LAW 201–17, 394–98 (2008) (discussing inter alia "rule against bias"); and some common grounds of judicial review of administrative action like, “abuse of jurisdiction”, “failure to exercise jurisdiction”, and “irrationality (Wednesbury test)”, all of which will be relevant in such cases). Also see M. P. JAIN, INDIAN CONSTITUTIONAL LAW 928–37 (2010) (discussing Art. 14 of the Indian Constitution and its mandate prescribing “equality before law” and “equal protection of laws”, which is inter alia against, arbitrary exercise of power).

44 See Dilasha Seth & Deepshikha Sikarwar, Nirmala Sitharaman rules out FDI in multi-brand retail; open to foreign investment in other sectors, THE ECONOMIC TIMES, (June 24, 2014), available at: Commerce Minister reiterating government’s opposing policy on FDI in MBRT).
voted to power in that state. These are complex situations, and such abrupt changes in policy decisions, if an investment or investor gets adversely affected, may be subject to judicial review before the Indian courts including, in at least some cases, on the principle of “promissory estoppel.” In such situations, efficacious remedy of investor state arbitration (ISA) may also be available in certain cases under the international investment law particularly arising from various relevant treaties (BITs and FTAs) applicable to such investors, to which India is a contracting party, to bring action against India as a host state.

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45 In fact, the previous government of Aam Aadmi Party in Delhi and the current BJP government in Rajasthan have already withdrawn their consents, which were given by the previous Congress governments in these states. See, Mohammed Iqbal, Rajasthan withdraws permission for FDI in multibrand retail, THE HINDU, (February 1, 2014), available at: http://www.thehindu.com/todays-paper/tp-national/tp-otherstates/rajasthan-withdraws-permission-for-fdi-in-multibrand-retail/article5641357.ece.

46 See A.P. Steel Re-Rolling Mill v. State of Kerala, AIR 2007 SC 797, where the Supreme Court of India has extensively discussed the principle of “promissory estoppel”, and all landmark Indian judgments rendered by the Apex Ct., and finally concluded, that its application depends upon facts and circumstances of each case.

47 See Joachim Karl, International Investment Arbitration: A Threat to State Sovereignty?, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 225–46, 238–41, 244 (Wenhua Shan et al. eds., 2008) (arguing that states are “masters of the treaties” they conclude, and they should address sovereignty concerns in International Investment Agreements (IIAs) with respect to, both the substantive and procedural provisions. Further suggesting the dual strategy in this regard involving clarifying scope of the agreement and other treaty provisions, and also reaffirming the domestic public interests by carving out clear exceptions and exclusions. Also suggesting further, procedurally limiting access to investor state arbitration by having constraints in IIAs like, excluding certain categories of disputes, introducing certain procedural preconditions through use of appropriate provisions like, having a “fork in the road” clause, exhaustion of local remedies clause and “denial of benefits clause” for certain investors). See Leon E. Trakman, Investor State Arbitration or Local Courts: Will Australia Set a New Trend?, 46 JOURNAL OF WORLD TRADE 83 (2012) (discussing the Australian Government’s 2011 Trade Policy announcing exclusion of investor-state arbitration (ISA) clauses in its future treaties, discussing merits and demerits of this policy. Further highlighting the risks posed to by MNEs which threaten to use the weapon of ISA to erode host state’s sovereignty by undermining its public policies). But see White Industries Australia Ltd. v. Republic of India, Final Award (Nov. 30, 2011), where an Australian Multinational Corporation successfully brought claim against the Indian government. Due to the scepticism about their efficacy in attracting FDI and due to the bad experiences with initiation of many ISA actions against India in the recent past, and an inimical White industries award, some views in the Indian government particularly, that of the DIPP are now also proposing the extreme step of terminating all the Indian BITs, see Dilasha Seth, Department of industrial policy & promotion pitches for sunset clause to terminate all BIPPAs, THE ECONOMIC TIMES, (July 18, 2014), available at: http://economictimes.indiatimes.com/articleshow/38577444.cms; but see Prabhash Ranjan, Column: Get a BIT pragmatic, THE FINANCIAL EXPRESS, (July 16, 2014), available at: http://www.financialexpress.com/news/column-get-a-bit-pragmatic/1270640 (for a criticism of this extreme position, and offering more pragmatic suggestions and alternatives instead). See also Andrew Guzman, Why LDCs sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT’L L. 639 (1998); Prabhash Ranjan, Non Precluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation, 2 AJIL 21 (2008); Prabhash Ranjan, India and Bilateral Investment Treaties- A Changing Landscape, ICSID REVIEW 1 (2014) (extensively discussing characteristics and problems with the Indian proliferating BIT Program beginning from the 1994 Indo-UK BIT, and offering suggestions for improvements).
However, in spite of continuing governmental opposition to FDI in MBRT, at least at present, some instances of softening, in practice, are apparent. There has been recently in the Indian media a reporting of the FIPB approval given to certain entities ‘duty-free shop segment’ with FDI, as a U-turn of the current central government on FDI in multi-brand retail. However, the author does not view this as violating the stance of government on FDI in MBRT. The view of the government differentiating the ‘duty free shops’ from normal MBRT stores is a cogent one. Further, it is established that such approvals have been granted in past also. It is also arguable, that such duty-free shops at airports may also be construed to be part of ‘passenger facilities’ which are included in the definition of the ‘airport’ in the FDI Policy, permitting up to 100% FDI.

VII. CONCLUSION

In this critique of the extant retail FDI Policy of both SBRT and MBRT, an analysis of the sectoral conditions lent clarity on them along-with understanding of their possible implications. This article also delineated on the evolution of the retail FDI policy and demonstrated how apparent liberalisation by increase of investment limit, which catches public eye, may be accompanied with simultaneous introduction of the regressive conditions undoing more than what is sought to be achieved by the liberalisation efforts. Does this reflect the government’s ‘dependency theory’ psyche despite of the liberalisation rhetoric? After showing how discriminatory and regressive such conditions can be, this article dwelt on the uncertainty in the regulatory environment. Finally, it discussed some anticipated constitutional and administrative law issues. Do such apparently parochial and protectionist restrictions really serve the avowed purpose? Does it lead to economic development of the host state in case of FDI in the retail sector? Should we depend on the development of our backend infrastructure on FDI, or


50 Modi govt does a u-turn on FDI in multi-brand retail, (Oct. 14, 2014), available at: http://www.moneycontrol.com/news/economy/modi-govt-does-u-turn-on-fdimmulti-brand-retail_1203791.html. This report however also mentions of the refusal of the government officials in response, who state that the FDI in duty free segment was always allowed, since “technically, these shops do not fall under the ambit of Indian cutoms.” See also, PAMP to set up duty free gold shop at Indira Gandhi International Airport, ECONOMIC TIMES, (September 4, 2014), available at: http://articles.economictimes.indiatimes.com/2014-09-04/news/53563622_1_fipb-interglobe-aviation-foreign-investment-promotion-board.


52 See FDI Policy 2014, supra note 1, at ¶¶ 6.2.9.1, 6.2.9.2.
should the government develop such infrastructure, by becoming self-reliant, which will in turn attract more FDI? Does it send right signals internationally when the government imposes apparently protectionist investment conditions; and even more when it backtracks from them in due course in phases? Can we call such backtracking liberalisation or lack of proper foresight in policy formulations? These inconvenient questions need to be explored by the Indian government, sooner than later. The current Indian government in office post 2014 General Elections also appears to be currently hostile to the FDI in MBRT. The only project till date, the Tesco-Trent deal went to the regulators and could also get approval mostly due to one reason viz.,\(^5\) it sought and obtained government approval at the time of earlier central government, which had introduced this enabling FDI in MBRT policy, despite stiff resistance from most of the opposition parties including BJP in Parliament. However now, as long as the said hostile stance of the government continues no more FDI in MBRT proposals are likely to come in spite of the FDI in MBRT Policy continuing to be in existence, due to pragmatic apprehensions.\(^5\) Hypothetically, if a proposal comes in future, and the enabling sectoral FDI policy continues to be in existence, and no approval is accorded or denied because of the said policy stance it might create problems for the government as well. Will such a situation, if it escalates into a dispute, be amenable to judicial review by Indian courts and/or ISA? Though a detailed examination of this point lies beyond the scope of this article, it is the belief of the author, as has been expressed above, that they are amenable to challenge.

The pertinent FDI in MBRT policy imperatives cannot be solely examined from the legal perspective, and require a holistic approach. At least one thing seems to be clear, the Indian retail FDI policy needs greater introspection and retrospection, so that a better, clearer and more comprehensive policy can emerge in future.

\(^5\) See supra note 4.