Consultation paper
on

Foreign investment limits for broadcasting sector

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Response of Essel Group Companies

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(Referred to as 'Zee Network' in the response)

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Comments on the Consultation paper on FDI

Introduction: We welcome the release of the consultation paper on FDI in various services. The diverse recommendations of the TRAI itself, such as those in TV Terrestrial broadcasting (FDI 49%), Mobile TV terrestrial broadcasting (74%), Cable TV(49%), IPTV(74%) had become entirely untenable owing to the prescription of different caps for the same service.

While welcoming the consultation paper, we regret that the TRAI has chosen to take a simplistic view of the extremely important and interdisciplinary subject of FDI. The consultation paper makes us believe that if a consensus is arrived at a common level of FDI in various services and there are no disparities, the same should form the basis of recommendations on this matter. Various advantages and disadvantages have also been mentioned on the subject of FDI relating to in flow of foreign funds and consequent development of the sector. A brief mention is also made of the OECD policies.

However it is regretting to note that the TRAI has chosen to ignore the real factors which drive FDI in different sectors such as media, telecoms, spectrum and broadcasting and the fact that foreign ownership in each of the sectors can indeed be different and still be consistent with national policies and needs. The fact of the matter is that in all major economies, regions, and countries, the issue of foreign investment is looked at separately for the different fields of media, printing & publishing, broadcasting and again independently for holding of assets such as spectrum or landing rights.

Hence we beg to submit that any attempt towards such oversimplification of different fields to strive at common levels of FDI, independent of the national trade interests in the competitive field of foreign trade negotiations is inappropriate.

1. Sensitivity of the Media Sector

At the outset, we would like to point out that the suggestions of TRAI in standardizing the limits of foreign investments to a uniform level across various delivery platforms in broadcasting sector is fraught with danger as media is a sensitive sector and **DTH, Cable TV, Mobile TV, IPTV, FM radio, etc. being the media content carriers, are a part & parcel of media establishment.** Accordingly treating them as indistinguishable & integral part of media, well deliberated & carefully thought out restrictions have been stipulated in this sector by the Govt., keeping in view the overall policy and interest of the country. The existing restrictions of foreign investments in these platforms was a well considered & carefully thought out decision on the part of the Govt. which is consistent with the overall policy of Government of India to limit the foreign investment in Media Sector.

In this context, kind attention is invited to the following:

- The media whether print or electronic, is one of the most important tools for influencing political, cultural & social environment all over the world. It may be appreciated that impact of Electronic Media (viz. Television) on the society is more immense. It tends to influence the minds and opinions of people in a big way across all sections of society. Whereas a newspaper can influence only educated persons i.e. those who can read and write, Electronic Media on the other hands can carry information, news and entertainment etc. to masses and even to those who are illiterate.

- It may be pointed out that television content whether news and current affairs content or general entertainment content have a direct and long lasting impact in minds of the people especially on the younger generation. Realizing and recognizing its utmost importance, in most of the countries, the Electronic Media is heavily regulated so far as the foreign investment in the sector is concerned in the interest of Nation's security and other allied matters.

- In 1955, the Cabinet Committee headed by Pt. Jawhahar Lal Nehru adopted a resolution prohibiting the entry of foreign media in the newspaper industry. This resolution laid the foundation of independent India's policy with regard to the Print Media. All the successive Governments have been consistently following it. **The same equally applies to Electronic Media and the content delivery platforms associated with it viz. DTH, Cable service, Mobile TV and IPTV.**

- The underlying rationale for restricting FDI in media sector both at content creation level and carriage level is to prevent the foreigners from gaining management control of the media entities. It is a well known fact that media plays a very crucial role in shaping public opinions. Through skilful presentation of news & views in a particular manner, the electronic media can manipulate viewers mind. A country like India, which has lot of diversity and socio-economic disparities, is always vulnerable to negative influences. **Giving controlling stake in a media business whether in content or in distribution platform to the foreigners may lead to the danger of gradual manipulation of the public views and ultimately can destroy the delicate fabric of composite culture, value system and secular nature of the country. It is for these reasons even the Parliamentary Standing Committee on Information & Technology had also rejected the proposal to increase the FDI in Media Sector.**

- The TRAI itself has recognised the said aspects in Para 4.6 and 4.7 of the consultation paper which read as under:

Quote

> *4.6 ……………. Countries in general have been cautious in relaxing restrictions of Foreign Ownership in the media sector for a number of reasons and important ones among them include nationalist explanations (i.e. preserving cultural knowledge/ practices, social and cultural values) and national security concerns. Primary concern of the host country in justifying FDI restrictions is that foreign owned/ controlled firms may serve as an indirect route through which foreign governments could influence the host country. Countries therefore use these arguments to raise barriers to foreign firms from entering the home markets.*
>
> *4.7 Though foreign ownership restrictions have been eased in many countries, they continue to exist even in liberalized markets mainly on account of the concerns regarding national identity, security, economic espionage, damage to law enforcement interception capabilities etc. It is noteworthy that such restrictions on foreign ownership may be direct as well as indirect.*

Unquote

1.1 Issues pertaining to Reciprocal commitments, Trade barriers, WTO.

We would like to submit that the issue of FDI to be permitted in India cannot be viewed in isolation as it is intrinsically linked with the investments permitted on a reciprocal basis to Indian companies overseas. Developing a strong multinational presence for an Indian company is dependent on what investment climate it faces in India as against what kind of investment opportunities are offered to Indian Companies for providing and undertaking similar services in other countries and acquiring similar assets overseas.

Hence at the outset we would like to state that the premises on which the consultation paper is based are inadequate and the ambit of the consultation paper should be widened to include international trade issues, India's commitments under GATT and WTO and the reciprocal offers, Indian companies receive in respect of FDI from various countries.

As the MIB is not the sole ministry, which deals with such issues, which in fact fall under the ministries of Commerce and Foreign affairs, which deal with trade concessions day in and day out, a reference should also be sought from them as to whether they would like to broaden the scope of consultation by including any other issues in the current limited set prepared by the TRAI. Further, organizations such Federation of Indian Export Organizations (FIEO) and the CII which are also involved in bilateral trade negotiations be specifically invited to present their views on reciprocal treatment meted to Indian commitments overseas.

To summarize our comments, we would like to state that the scope of consultation paper should be expanded to include the following:

(i) What are the commitments of India as well as other countries in the fields relating to media ownership, Spectrum, Telecommunications and broadcasting in Fora such as the WTO, GATT and others?

(ii) What are the offers given by major countries such as USA, Canada, Australia, China and the EU in respect of opening up of their markets in each of the fields i.e. media ownership, Spectrum, Telecommunications and broadcasting in International trade fora?. For example India has given the landing rights to a Chinese Channel CCTV9 under down linking policy however no Indian Channel has been given landing rights in China.

(iii) How do the regulations in various other countries permit foreign investment as compared to the FDI in different sectors opened up in India?

(iv) What are the commitments sought by the Ministry of Commerce in regard to trade concessions for bilateral trade opening up including maintaining balance of payments with each country?

(v) What bilateral provisions are required by Indian companies such as Indian broadcasters in each of the fields of media ownership, Spectrum, Telecommunications, broadcasting and content delivery platforms like DTH, Cable, IPTV, Mobile TV etc. in foreign countries to operate without discrimination, before granting such concessions to these companies in India?

(vi) What is the approach taken by foreign regulators such as FCC, Ofcom etc, in each of the individual fields of media ownership, Spectrum, Telecommunications, broadcasting , content delivery platforms like DTH, Cable, IPTV, Mobile TV etc and correspondingly what should be the approach of the Indian regulator?

We feel that unless the scope of consultations is expanded to include these factors, the entire exercise of consultation on FDI will remain incomplete as it is being held in an environment and targeted to affect areas which fall within the domain of various other Ministries such as Commerce, External Affairs, Home and accordingly have wide ramifications

1.2 Spectrum versus service license. The DoT in its recent public announcements and the submissions before the Hon'ble courts has maintained that the spectrum and the licenses will be delinked in future. Hence a company can have a service license but needs to bid for spectrum, which may or may not be made available. Hence we are surprised that the TRAI has chosen to remain silent on this important matter. **In other countries as well, such as USA and as detailed below by us, spectrum is not allowed to be bid or held by any foreign company**.

Hence it would have been appropriate if the TRAI had also delinked the spectrum and services which are the subject of its examination under the FDI guidelines as otherwise there will be a dichotomy between the recommendations and implementations in the field.

2. Foreign Investments Permitted in other countries:

2.1 USA

As one of the issues for consultation is the FDI in the Cable TV and Telecom sectors, we would like to begin the discussion by citing the example of USA where any ownership of Telecommunications Assets is governed by Section 310 of the US Telecommunication Act.

As per Section 310 of the US Telecommunications Act, no Broadcast or Common carrier or Radio license will be granted to be held by:

(i) Any alien.
(ii) Any Corporation organized under the laws of any foreign government.
(iii) Any US corporation where more than 20% of the Stock is held by any alien or any foreign entity

Effectively the sections 310 (b) (1) to 310 (b) (3) prohibit any foreigner or a foreign company from obtaining any license or even holding more than 20% share in any corporation in the US which has a broadcasting or a common carrier license. Section 310(b) (4) sets a benchmark of 25% holding by foreign individuals or entities in companies in the US which control radio licenses. The above restrictions imply that the Indian broadcasters have to solely depend on a US company for broadcasting of content. However the said approach is not easy owing to the monopolistic holdings in the US markets.

The situation in regard to the bidding for spectrum is the same as no foreign citizen or company can bid for spectrum in the US spectrum auctions.

2.2 European Union:

The European Union regulations for broadcasting have been liberalized since the "Television Without Frontiers" directive (TVWF Directive). The TVFW directive seeks to create a European Common Market in Broadcasting. However while regulations on broadcasting are country specific, in regard to content there are common elements which place certain restrictions on foreign content (Non-EU content).

As per the "**Television Without Frontiers Directives"** all states of the EU must permit reception of content broadcast by other signatories to the EU (45 signatories).

However the directive seeks to promote the local production of television programs specifying that a majority should be made in Europe.

The **"Important Events" directive** requires that stipulates that each Member State may take measures to ensure that broadcasters do not broadcast on an exclusive basis events which are regarded as being of major importance for society in such a way as to deprive a substantial proportion of the public of the possibility of following such events on free television. Member States may draw up a list of events that must be broadcast unencrypted (not scrambled) even if pay-TV stations have bought exclusive rights.

These events may be national, or international, such as the Olympic Games, the European Football Championship or the World Cup. This impacts the rights holders and Pay TV operators who have exclusive rights to certain content.

The “**European Content Directive**” requires that a majority of the programs broadcast should be of European origin, rather than imports. Article 4 of the EU Directive and Article 10 of the Council's Convention both require that Member States shall “ensure where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time” In France, 60% of television programs must be European, including at least 40% made in France. Switzerland, a member of the Council of Europe but not of the EU, requires satellite broadcasters serving Switzerland to broadcast at least an hour of Swiss programming a week, and to contribute to a fund used to subsidize Swiss film production. The average of European works broadcast by the major channels varied from about 53% to 82% in the EU.

The above directives create an Open EU market in broadcasting, but one, which is closed to outside content providers including the USA. Jack Valenti, chairman of the Motion Picture Association of America, told Congress:

> *“The Directive will stifle growth in existing TV markets, and impose severe limits on emerging markets, including private TV and satellite broadcasters. The real impact may not be felt so much in existing markets as in markets just beginning to develop.” The House of Representatives unanimously passed a resolution denouncing the Directive and deploring the damage that could be inflicted on the U.S. broadcasting and film industries. Congressmen argued that the local content rules are not, as Europeans claim, a matter of cultural sovereignty, but instead an attempt to protect European industries from foreign competition, particularly from the United States. The impact on developing countries is even more severe.*

In comparison, the Indian market provides no such restrictions on content and its source of production.

2.3 Canada

The Canadian Radio and Television Commission (CRTC) is responsible for the regulations of the broadcasting Sector in Canada. The regulations laid down by the CRTC for media ownership and broadcasting are very stringent. The Legislative Act of 1993 and the Broadcasting Act of 1991 form the policy framework of the Canadian broadcasting field. Canadian Broadcasting Corporation (CBC) is the country's National public service Radio and TV Broadcaster. Customers can get local cable, Starchoice and ExpressvU are the DTH Platforms.

In the area of **DTH, only Canadian companies are allowed to operate DTH platforms** using Canadian Satellites. The cross-border availability of DBS platforms form USA is a big problem and the dishes remain illegal. In fact the CRTC is heavily biased towards allowing content which is of Canadian origin.

In regard to the ownership of broadcast systems the ownership should be held by Canadians and CRTC has been given this mandate to implement along with licensing predominantly Canadian content to be shown in Canada.

The above factors provide a very difficult operating environment for Indian Broadcasters in Canada and any new channels need to start with a Canadian company and ownership.

3. Mode of Control of Foreign investment in other countries:

We next turn our attention to how the FDI is permitted in different areas of telecommunications and broadcasting and what are the factors which weigh in granting such concessions and which agencies get involved in such decisions.

3.1 USA

(i) As already pointed out by us, effectively the sections 310 (b) (1) to 310 (b) (3) of US Communication Act prohibit any foreigner or a foreign company from obtaining any license or even holding more than 20% share in any corporation in the US which has a broadcasting or a common carrier license. Section 310(b) (4) sets a benchmark of 25% holding by foreign individuals or entities in companies in the US which control radio licenses. Hence while the FDI can be a total of upto 45% including 20% direct, the owner of the company needs to be a US Citizen as per Article 310. This effectively places a restriction that Indians can only invest in companies owned by US Citizens as pointed out by us.

The US terrestrial broadcasting market is effectively closed to foreigners as no alien can make a bid for spectrum in the US. Hence the provisions of 20% FDI are applicable for companies owned by a US citizen as the business involves acquisition of spectrum.

As against this the TRAI seeks to recommend 74% FDI in Mobile Terrestrial TV, which is essentially the License for spectrum as the TRAI has already permitted the UASL and CMTS licensees to offer Mobile TV as a “service” if they “hold” the spectrum such as 2G.

The action of TRAI in permitting 74% holding in spectrum by foreign companies is thus arbitrary, does not take into account bilateral trade

issues and has been taken based on limited facts which do not reflect the entire picture.

Reverting now to the conditions against which permission are granted by the regulators (FCC in USA) to foreign entities in the USA, the position can be briefly stated as below.

(ii) Determination on the basis of "No harm to American Interests" and "Necessity":

First of all, the statute overriding and any proposals need to be made on a case by case basis, which are considered individually in regard to ownership. Secondly they are examined by FCC on the basis and in particular whether they harm the interests of any American company. Moreover pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission "must" determine whether the applicants involved with each proposed transaction have demonstrated that the respective proposed acquisition, assignments and transfers of control of licenses and authorizations would serve the public interest, convenience, and necessity.

Hence the decisions of the commission are not based on any commercial considerations or business objectives of the foreign company. Any foreign proposal must demonstrate "Public interest" and "necessity". What can be the necessity of providing a broadcast service in the USA? How can an entity prove that it will not harm the interests of any US company? The fact is that any major initiative by an Indian broadcaster in the US involving IPTV or triple play services would challenge the comfortable monopoly or oligopoly situations being permitted to be carried on by the FCC and will challenge established American companies engaged in the business of broadcasting, IPTV or common carrier services such as voice or data. Hence the American companies interests will be directly challenged. FCC accordingly has absolutely no leeway by virtue of provisions of sections 214(a) and 310(d) of the Communications Act to grant any concessions to any foreign company.

(iii) DTH Licensing in USA:

The TRAI has raised the issue of FDI cap of 20% in the area of DTH (49% total Foreign Investment holding) perhaps as a prelude to liberalization of this sector to higher FDI such as HITS where it has permitted 74% FDI and chosen to include Ku band as well in the permissible spectrum.

In USA, DTH is permitted to only US companies owned by US Citizens. There are only two major DTH networks in the USA, i.e. Echostar and DirecTV. The transfer of DirecTV to NewsCorp was done only under very special conditions as follows. The case involved was the transfer of control application in the matter of *General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited*, Memorandum Opinion and Order, MB Docket No. 03-124, 19 FCC Rcd. 473 (2004) (*January 2004 Order*). As per this order the satellite network assets of Hughes including satellite earth station and terrestrial frequencies was transferred to News Corp. The application was submitted pursuant to Sections 214 and 310 of the Communications Act of 1934. Section 214 of the Communications Act and the FCC's rules require prior FCC approval of transfers of control or acquisitions of both domestic and international common carrier authorizations.

Despite the fact that Australia, is a close U.S. ally, the Executive Branch nonetheless required commitments from Hughes that post-closing, company policies related to U.S. national security and law enforcement would be under the exclusive jurisdiction of a company committee that is comprised entirely of U.S. citizens, and that Hughes would make a yearly report to the government on company policies related to national security. (See Petition of U.S. Department of Justice and Federal Bureau of Investigation to Adopt Conditions to Authorizations and Licenses, Application General Motors Corporation and Hughes Electronics Corporation, Transferors, and The NewsCorporation Limited, Transferee, FCC MB Docket No. 03-124, November 18, 2003).

(iii) We now revert to t**he ownership of cable assets such as su**bmarine cables and ISP infrastructure where FDI of 100% has been permitted by the TRAI. In USA, Hutchinson Whampoa, a Hong Kong company, decided to abandon its effort to acquire 61.5% of Global Crossing Ltd. along with Singapore Technologies Telemedia Pte Ltd ("ST Telemedia", a Singapore carrier controlled by the Singapore Government), when it became clear that CFIUS (Committee on Foreign Investment in the United States) would not approve the transaction based on perceived connections between Hutchinson's principals and the regime of the People's Republic of China. Even after the deal was restructured with ST Telemedia acquiring the 61.5% stake, the transaction faced significant scrutiny from CFIUS. This was despite the fact that Singapore is among the U.S. government's closest Asian allies, with the strongest security cooperation arrangements with the U.S. and growing U.S. trade links capped by the recent U.S.-Singapore Free Trade Agreement.

Nonetheless, DOD and HSD opposed the acquisition until the point when a recommendation was to be made to the President, and the U.S. National Security Advisor brokered a compromise that allowed the transaction to proceed with the U.S. President's approval. However it was not with the original shareholders but with Singapore as a major partner. Moreover the assets in question were much less sensitive in nature i.e. not involving spectrum or satellites but optical fibers. India permits 74% FDI on automatic basis in such cases and all fiber optic systems in India had originated as foreign owned ones. Hence USA is quite behind other countries globally in according due trade to proceed without undue hindrances and there is a need for a appropriate trade gestures from the US before any concessions are sought from other countries.

(iv) All substantial transfers of control and assignments of cable landing licenses for transoceanic submarine cables require FCC consent, as well as the explicit consent of the U.S. Department of State and other Executive Branch agencies as a condition of FCC review and approval. If the seller also has domestic common carrier radio licenses, in addition to its fiber facilities, Section 310(d) of the Communications Act of 1934 requires Commission consent to the assignment or transfer of control of the licenses. The FCC coordinates its review of transfers of control and acquisitions of U.S. telecoms with various agencies of the Executive Branch. After an application for assignment or transfer of control is filed with the FCC involving a non-U.S. buyer, if the Executive Branch has potential national security or law enforcement concerns with a deal, DOJ and FBI may ask the FCC to stay action on the application until these concerns can be assessed. After this the process needs to await any intervention by the CFIUS.

(v) Acquisitions of stock or assets from another company often implicate American antitrust law under Section 7 of the Clayton Act, which prohibits such acquisitions if they may result in a substantial lessening of competition in a line of commerce. The HSR Act was enacted to eliminate so-called “midnight mergers” and give antitrust authorities ample time to review a proposed acquisition before consummation. As discussed above, the Act requires that parties to the acquisition of voting securities or assets worth at least $50 million first file a detailed Pre-merger Notification Form with the FTC and DOJ. Acquisitions of voting securities or assets worth over $200 million require a pre-merger filing regardless of the size of the parties. For U.S. telecom transactions involving foreign buyers, the key question tends to be not so much whether a particular acquisition raises competitive concerns, but whether the HSR thresholds are met in addition to all other conditions.

There are thus a series of hurdles in any acquisition of any assets which involve radio spectrum.

(vi) Teleports

TRAI has proposed that 74% cap in (FDI + FII) against the prevalent level of 49% in Teleports. In case of HITS it has gone out of its way to recommend even uplinking from foreign teleports. The corresponding situation in USA is quite different. Companies can not acquire US Teleports without complying with section 310 and also seeking the clearance under the CFIUS. In a recent case of RRSAT, an Israel teleport company acquired a Teleport in the USA, which is awaiting approval and the company has had to make the following filings:

> *Our ability to establish or acquire our own teleports in countries other than Israel may be restricted by laws prohibiting or limiting foreign ownership.*
>
> *In countries other than Israel, the teleports we use are owned and operated by third parties. Our customers and these third parties are responsible for obtaining any necessary licenses, approvals or operational authority for the reception of data from the satellites that we, via our suppliers, use. Failure by our customers or suppliers to obtain and maintain some or all regulatory licenses, authorizations or approvals could have a material adverse effect on our business.*
>
> *We intend to expand our presence in markets in which we currently have hosted facilities by acquiring or establishing our own teleports and production facilities. The United States has restrictions on direct and indirect foreign ownership of companies holding common carrier wireless licenses that could prevent us from acquiring or owning our own teleports in the United States to the extent we seek to operate the teleports on a common carrier basis. In the event that we seek to operate the teleports on a common carrier basis, U.S. law prohibits more than 20 percent of the capital stock of a common carrier wireless licensee to be directly owned or voted by non-U.S. citizens or their representatives, by a foreign*

government or its representatives or by a foreign corporation. Additionally, no more than 25 percent of the capital stock of an entity that controls a common carrier wireless licensee may be owned or voted by non-U.S. citizens or their representatives, by a foreign government or its representatives, or by a foreign corporation, if the Federal Communications Commission, or FCC, finds that prohibiting such indirect foreign ownership of the licensee would serve the public interest. The FCC, however, may allow indirect foreign ownership levels in excess of 25 percent, and even up to 100 percent, if it finds that the higher levels are consistent with the public interest. Although the FCC has adopted a rebuttable presumption in favor of allowing indirect foreign ownership in excess of 25 percent by investors from World Trade Organization member countries, including Israel, there can be no assurance that we will be able to obtain a favorable ruling from the FCC in the future. In addition, the Department of Justice, the Department of Homeland Security and the Federal Bureau of Investigation review license applications and can require the applicant to enter into an agreement addressing any national security concerns before the license is granted. Restrictions on foreign ownership of teleports may also exist in other countries in which we would at some future date like to establish or acquire teleport facilities. If we are not able to acquire our own teleports in the United States or other countries, our ability to expand our presence in those markets may be adversely affected.

(vii) Conditions for Grant of approvals in the USA:

As outlined by us earlier, any concessions or grants for public licenses in USA are **granted not in a simplistic manner as FDI caps and automatic approvals**.

These are granted on the basis of assessment of :

- No commercial harm to US companies or interest
- Whether the corresponding company belongs to a country with bilateral WTO offerings
- Whether the company belongs to a country which is a US ally

The Commission then employs a balancing test weighing any potential public interest harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest. The applicants involved with each transaction bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest".

Further we note that "Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications".

Concessions are granted to a country which fulfills the requirements of the "Foreign Participation Order" of FCC. This order of FCC mandates opening up of foreign telecom markets and is applied unilaterally without any concern that the individual countries can have their own telecommunications requirements. It seeks concessions for US companies on a reciprocal basis in total disregard to competitive access to other carriers.

The CFIUS intervention in the US is beyond judicial review. Hence if an applicant's request for acquisition or license is rejected, there is no recourse to law. Decisions of CFIUS and ultimately the President are driven by political and foreign policy considerations, in addition to national security ones. Ultimately, successful navigation of the process may be dependant on a significant lobbying campaign involving the highest levels of the U.S. government, that of the buyer's home country, and even the U.S. Congress.

4. World Trade Organization (WTO):

Before reverting to the specific questions raised by the TRAI, we would like to revert to the trade offers by different countries in this field.

In case of India the position of the country has been the one which has been endorsed by the Cabinet Committee on WTO (CCWTO). The offers under the WTO are always made by the ministry of Commerce after consultation with the MIB, Ministry of Finance and Ministry of External affairs. One of the important WTO meeting was the **Doha Round** (July/ Aug 2005) where the following approach was outlined by the Prime Minister Manmohan Singh acting as the Chairman of the CCWTO:

"India would be guided by the range and depth of the improved offers that would be made by the developed countries."

The Commerce Department had prepared the revised offer after duly consulting the Ministry of Information Broadcasting, Department of Telecommunications and Ministry of Finance in services related sectors that come **under each one of the Ministries**.

India’s official position was that while making the revised offer at the WTO trade talks, India would be guided by the range and depth of the improved offers that would be made by the developed countries in the modes and sectors of interest to India.

This approach of India, then is the binding approach on all trade related matters of which FDI is an important part. **TRAI by attempting to de-link the two issues is undermining and weakening India’s position in seeking better offers from its trading partners**.

Hence we would like to seek the following information from the TRAI:

- What are the specific offers of other countries in areas of interest to India such as Broadcasting including content delivery platforms, Acquisition of Spectrum, Operation of Teleports and operating other assets relating to communications and broadcasting?

- On what basis is the TRAI gearing up to recommend relaxation in foreign investment or offer Spectrum (such as in 3G, 2G and terrestrial spectrum in Mobile TV) to foreign companies (read as more than 49% FDI plus FII) without corresponding offers which goes against India's stated position at the WTO and undermines its position in extracting trade concessions?

In the year 2007, the US made the following filings against the USTR1377;

Likewise, access to foreign satellites by Indian telecommunications and broadcast operators is currently restricted. India's 1999 TelecomPolicy allows for the use of satellite capacity from either domestic or foreign satellites, "in consultation with the Department of Space" (DOS). However, in practice, the "consultation" to be carried out by the DOS results in the requirement that foreign satellite operators sell their satellite capacity to the India Space Research Organization (ISRO), for resale to the target customer in India. ISRO, which forms part of the DOS, operates the domestic Indian satellite system INSAT and, thus, is a direct competitor to foreign satellite operators.

Access to the potential VSAT, video distribution and Direct to Home markets in India has been hampered by these policies. First, selling through ISRO decreases efficiencies of being able to deal directly with a customer who uses satellite capacity. Second, ISRO gains valuable customer information by serving as the "middleman" to the transaction. Finally, approval of the contracts often appears to be conditioned on the *inclusion of contractual terms which allow for renegotiation if enough satellite capacity becomes available on an INSAT satellite.*

Greater access to satellite capacity from foreign satellites would be beneficial to the growth of both the Chinese and the Indian satellite services markets. USTR will continue to address these issues with both countries.

However while seeking access to Indian markets, the US failed to make any offer against opening its own markets. Not only that, but where the WTO had mandated opening up of certain market segments based on mutual agreements, the US failed to comply with the same and faces huge penalties running into hundreds of million dollars on this account.

5. Comments on Specific Points of Consultation raised by the TRAI

The TRAI has proposed enhanced limits in FDI in different sectors as follows:

S. No.	Segment	Existing limit	Proposed limit
1.	Teleport (Hub)	49% (FDI+FII)	74% (FDI+FII)
2.	DTH	49% (FDI+FII) Within the composite limit, the FDI component not to exceed 20%.	74% (FDI+FII)
3.	Satellite Radio	No Policy as on date*	74% (FDI+FII)
4.	HITS	No Policy as on date **	74% (FDI+FII)
5.	Cable Network	49% (FDI+FII)	49% (FDI+FII)
6.	FM Radio	20% (FDI+FII)	24% (FDI+FII)
7.	TV Channels (News & Current Affair channel)	26% (FDI+FII)	26% (FDI+FII)

* Approval to one foreign Satellite Radio operator given through FIPB route.

** Permission for HITS operation given to two Teleport licensees (49% foreign investment limit).

A review of the recommendations reveals at a glance that the FDI plus FII recommended is 74% in DTH, Teleports and Satellite radio. For some reason, for the terrestrial broadcasting the **TRAI had recommended an FDI cap of 49% in 2005 which** has not been mentioned in the above table as is the case for Mobile TV spectrum for which the FDI recommended was 74% in the recommendations released on Jan 28, 2008.

We would at the outset like to reiterate our comment made under para 1-Sensitivity of the Media Sector and in Para 1.2, about delinking the spectrum from the license as outlined in our introductory comments. By permitting 74% FDI in Mobile TV spectrum, the Govt is allowing a foreign company to hold 74% in spectrum- as the service itself can be provided by any UASL licensee over its 2G networks. Hence the license for mobile TV is only for spectrum and the question arises why a foreign entity be allowed to hold 74% in spectrum?

Issues for Consultation:

In the abovementioned background our response to the main issues for consultation is as under:-

5.2.1. Whether the foreign investment limits need to be revised as proposed.

- The Zee Network would like to propose that the Foreign Investment levels need not be revised to 74% as proposed but be retained at 49%(FDI+FII) in all media related services such as Cable TV, DTH, Teleports and be also extended to new media services such as IPTV and Mobile TV.

- It may be mentioned that mere increase in the FDI cap is not going to bring additional/new investment in this sector. In this context, it is pertinent to point out that at present the cable sector is totally unorganized and fragmented. There is neither any transparency in the system nor any well-defined revenue share mechanism at each stage of the distribution chain because of lack of transparency. Most of the cable plants are analogue and result is the poor cable quality transmission. The main issue because of lack of addressability is ARPUs i.e. the amount payable by a subscriber (which is on lump sum basis) for availing cable services, which vary from state-to-state, city-to-city and even locality-to-locality in the same state. All these factors act as deterrent in attracting the FDI. The solution lies in initiating the process to organize the sector rather than increasing the FDI limits.

- It may be mentioned that in DTH sector also at present 49% of Foreign Investment is permitted with a further restriction on FDI component at 20%. This has not deterred the inflow of foreign investment in DTH sector. It is pertinent to point out that two DTH operators are already functional and another two are shortly going to launch their services. In addition, it is reported that three more entities have applied for DTH license. This is an ample proof that this sector is continuously growing despite caps on foreign investments. The investors these days are not very particular about the “management & control”. They are more concerned with the security of their capital investment and a reasonable return thereon in the long run. Thus in our view FDI limit of 49% is adequate to take care of the investment required in DTH & HITS.

5.2.2. Whether the proposed limits are acceptable for the reasons given in the reference or there are some other reasons? Any other reasons in favor of the proposed limits may please be elaborated.

As detailed by us, the revised limits proposed can not be justified for the following reasons:

(i) Media is a sensitive sector and **DTH, Cable TV, Mobile TV, IPTV, FM radio, etc. being the media content carriers, are a part & parcel of media establishments.** Accordingly treating them as indistinguishable & integral part of media, well deliberated & carefully thought out restrictions have been stipulated in this sector by the Govt, keeping in view the overall policy and interest of the country. The existing restrictions of foreign investments in these platforms was a well considered & carefully thought out decision on the part of the Govt. which is consistent with the overall policy of Government of India to limit the foreign investment in Media Sector.

The underlying rationale for restricting FDI in media sector both at content creation level and carriage level is to prevent the foreigners from gaining management control of the media entities. It is a well known fact that media plays a very crucial role in shaping public opinions. Through skilful presentation of news & views in a particular manner, the electronic media can manipulate viewers mind. A country like India, which has lot of diversity and socio-economic disparities, is always vulnerable to negative influences. **Giving controlling stake in a media business whether in content or in distribution platform to the foreigners may lead to the danger of gradual manipulation of the public views and ultimately can destroy the delicate fabric of composite culture, value system and secular nature of the country. It is for these reasons even the Parliamentary Standing Committee on Information & Technology had also rejected the proposal to increase the FDI in Media Sector.**

The attention in this regards is invited to para 1 above, the contents whereof are reiterated.

(ii) These FDI relaxations amount to trade concessions

(iii) These concessions do not take into account India's reciprocal demand for trade concessions for identical services

(iv) These are being treated in isolation without the potential impact on the media sector

(v) These are completely irrational, arbitrary and without any basis such as 24% FDI in terrestrial radio and 74% in satellite radio which deliver same programming to similar devices.

5.2.3 If the proposed limits are not acceptable then the reasons for non-acceptance may be given. In such a case, the comments should also indicate the appropriate foreign investment limits.

We have elaborated in detail the reasons why these should not be accepted. These reasons inter alia include a reciprocal treatment to Indian companies in the same field as well as the ownership of scarce and valuable assets such as spectrum which is not permitted in other countries. The TRAI has failed to delink spectrum from service and "content" from "carriage".

Just because a network is capable of carrying content (such as a UASL network) does not entitle it to enable a service.

5.2.4. Whether the foreign investment limits could be revised to some other level with sub limits for FDI and FII within these limits.

As stated above by us, we prefer the retention of 49% as FDI (FDI+FII) limits and also enforcing the same on existing operators who have begun to offer media related services..

5.2.5. Whether the foreign investments should be permitted through the automatic route or should there be a sub limit beyond which foreign investments would need FIPB approval?

As already detailed by us, no country permits Foreign Investments in Media Sector through automatic route. These need to be examined from different angles including sensitivity, national security, social and cultural issues, reciprocity of treatment, public interest, development of monopolies or oligopolies and must have case by case approval by FIPB.

5.3.1 Whether it will be more reasonable to classify the different segments of broadcasting sector in terms of carriage services (such as Cable Services, Headend In The Sky (HITS), DTH, Teleport etc.) and content services (such as Private FM radio, Television Broadcasting etc.) for the purposes of laying down foreign investment limits (FDI limits, FII limits and composite foreign investment limits). Such a classification would enable liberal foreign investment limits for one category and more conservative limits for the other category of services.

- As Zee has elaborated extensively in its earlier submissions, the only reasonable manner to segregate the sector is to relate to content Vs carriage. Hence media sector needs a different regulation than the sector which provides only carriage such as a UASL network, a Teleport or a CMTS network. These networks may have capability to carry media related services, but if they wish to offer these services on their own, they must have the appropriate media license with separate FDI guidelines. In essence this means extending licenses as a “universal broadcaster” Vs a universal access service license.

- As already submitted, the underlining rationale for restricting FDI in media sector both at content creation level and carriage level is to prevent the foreigners from gaining management control of the media entities. It is a well known fact that media plays a very crucial role in shaping public opinions. Through skilful presentation of news & views in a particular manner, the electronic media can manipulate viewers mind. A country like India, which has lot of diversity and socio-economic disparities, is always vulnerable to negative influences. Giving controlling stake in a media business whether in content or in distribution platform to the foreigners may lead to the danger of gradual manipulation of the public views and ultimately can destroy the delicate fabric of composite culture, value system and secular nature of the country. It is for these reasons even the Parliamentary Standing Committee on Information & Technology had also rejected the proposal to increase the FDI in Media Sector.

- Spectral cap on FDI for the production and telecast of news content is pegged @ 26%. It is a common knowledge that various content delivery platforms are in a position to create news content / produce the content by sitting in the Control Rooms/Headends and retransmit the same on their platforms. This would results in creating anomalous position with regard to the existing news channels vis-à-vis content delivery platforms in respect of FDI. The proposed amendments would vitiate / circumvent the spirit of the existing FDI policy.

5.3.2. The convergence of technologies in telecom and broadcasting sectors has made it possible to provide many broadcasting services (such as mobile television services, IPTV services) using telecom networks as well as broadcasting networks. Whether the foreign investment limits for such segments of broadcasting sector should be brought in line with the foreign investment limits for Telecom operators.

- Putting it in a holistic manner, the word convergence is used to describe the unification of transmission media for various functions and its resultant capability to handle multiple types of services. For example when the networks went digital, they could obviously carry data and digitized voice. This was the first manifestation of convergence. Later video and audio could also be carried on the same networks. However this does not mean that the licensing of services follows automatically.

  The licensing of services such as voice, long distance, broadcasting and media related services has been traditionally done independently of each other.

  Traditionally media in every country is regulated more stringently than say voice communications. The foreign equity caps may be different ranging from 0% to 25% in media against 49% to 100% in telecoms and internet.

  In case we are to accept the contention that "convergence" should also mean licensing it would imply licensing be extended by a back door route.

- The argument which is being advanced is that in Telecom the FDI has been relaxed to 74% and therefore in view of convergence, this sector also may be treated the same. **As has been pointed out earlier also, the media sector is a very sensitive sector and therefore it has been recognized that a different treatment is needed as is the case in other countries as well. As we have also pointed out that the foreign countries continue to maintain a differential policy on ownership of media assets and services such as DTH. USA which permits 100% FDI in telecom still stipulates strict controls in media sector, including the need for citizenship of USA. This should be enough to reply to foreign companies which under the garb of "convergence"**

try to seek dispensations which are not permitted in their own countries.

5.3.3. Whether the methodology for calculation of foreign investments in different segments of broadcasting sector should be standardized. If so, the comments may specifically suggest the appropriate method.

The current methodology which provides for a “see through” mechanism is appropriate as the same is necessary to ascertain the actual holding of interest by the foreign entities so as to eliminate the possibility of bypassing the stipulated limits through indirect holdings and to avoid the backdoor entry by foreign entities.

However there is a need to bring uniformity between the methodology adopted in calculating FDI for telecom sector and media sector.

5.3.4 Whether the foreign investment limits should be raised to 100% so as to permit companies incorporated in India but with 100% foreign holding to provide broadcasting services in the country with appropriate monitoring mechanism in place coupled with content regulation through programme and advertising codes. Reasons in support of the comments may be given.

In the background of what has been stated above, increasing FDI to 100% in this sector would tantamount to throwing in the towel in order to accommodate foreign companies in sensitive sectors, when their own countries do not offer such reciprocal treatment. It will weaken India’s position in all trade Fora to a non entity and throw open all our sensitive sectors to foreign manipulation and externally imposed views thus placing the nation at great risk.

Concluding Comments

We have tried to convey a complete picture of the environment in which the media and telecommunications sectors operate in the global economy and how a sectional view as being taken by the TRAI in the extant case is entirely inappropriate. We have also conveyed that the issues for discussion have a much wider ramification that those appear to be from the consultation paper and that the scope of consultation needs to be broadened and expanded to include the ministries of Commerce, finance and external affairs and their well held positions in these matters. Ignoring these will weaken India's position for reciprocal trade concessions and will be tantamount to playing in foreign hands.

We have also conveyed that unlike popular perception, other countries, which include the US (largest propagationist of FDI) do not provide a similar treatment in their own countries. We have also demonstrated that the US markets permit virtually no entry to broadcasters operating directly, as DTH operators or as triple play carriers with common carrier licenses. We have also elaborated in detail that the provisions of US Telecommunications Acts sections 214 require FCC approvals for any acquisition of telecommunications assets and Section 310 places restrictions on foreign equity. There have been virtually no exceptions to the rule and few of the cases of transfer of licenses relate to the convenience of US companies to organize their shareholdings to suit themselves better. All such decisions have happened in a manner which gives no control to any outside entity in governance of the company which acquires any US common carrier assets, with or without spectrum. All such cases related to structured equity transactions while retaining original control or go with severe terms and conditions which require American citizens to maintain total control.

We have also conveyed that the present trend of delinking of spectrum from services has not been taken into account in the consultation paper and the present concessions on FDI would tantamount to permitting the foreign companies to hold license in India as the service license is being issued separately. This is a dispensation which is not granted in most countries.

Thus the present level of FDI limits in the Broadcasting and Content delivery platforms are required to be maintained and any proposal to change these limits would need to take a holistic view by including within its ambit the issues pertaining to reciprocity, trade barriers, WTO implications, national interest and social economic and political considerations rather than a narrow sectoral approach.