

Chapter 2

How Can the Government Affect My Business?

All businesses are subject to legal and regulatory framework, and it is the job of the government to ensure that businesses are conducted within that framework. We are talking of only those businesses which would like to be on the right side of law. There are a number of businesses—smuggling, drugs, arms, etc.—which do not care to be on the right side of the law. These businesses are conducted brazenly and with impunity by being on the wrong side of law.

Before proceeding further with this discussion, it is important to understand what the government is. To govern a country means to control or direct public affairs of a country. Collectively, the group of people responsible to do so it can be called the government. Interestingly, it is said that in Great Britain the sovereign reigns but does not govern. As we normally understand and experience in our day-to-day life, the government in any country, to say loosely, makes the rules for proper conduct of everyday life, which includes businesses, and is supposed to take care of most of the things for the people.

Three Arms of the Government

There are three main powers of the government: legislative, executive and judicial. In most of the modern and evolved jurisdictions there has been an effort not to converge all the three powers into one department or organ of government or individual or group of individuals. It is based on the doctrine of ‘separation of powers’, which was propounded by Montesquieu, a French gentleman. The basic idea of this doctrine is that in case all the powers are combined together, there is a tendency of misuse and abuse of such power. Hence, the three powers should be vested in three different organs of the state with no overlapping functions and persons.

Lord Acton had said, ‘Power tends to corrupt, and absolute power corrupts absolutely’. Thus, it is important that the three powers are separated. It serves the dual purpose: first, the powers are separated, and second, powers with different organs provide the necessary checks and balances in the system.

India

The Constitution of India provides for separation of powers. Legislature is vested with legislative powers and its job is to 'make' the law. The Executive is vested with the power to 'implement' the law made by the Legislature. The role of the judiciary is to 'interpret' the law, and also uphold the rule of law.

The Constitution of India exhibits certain characteristics of federalism, however, it is not strictly federal. The Constitution further provides in the Seventh Schedule, the three lists: List I—Union List, List II—State List, and List III—Concurrent List. There is a distribution of powers between the Central government and the State government and certain powers are covered by the concurrent list and, hence, both the Central as well as the State governments have jurisdiction. In case the laws made by the Central government and the State government on the same subject in the concurrent list are conflicting, the Central law prevails.

At the Central level, the Legislature comprises the two houses of Parliament—*Lok Sabha* and *Rajya Sabha*—and the President of India. The Chief Executive of the country is the President of India, who works at the advice of the Council of Ministers which is headed by the Prime Minister. A smaller group of the Council of Ministers is called the Cabinet, and another still smaller group may be called, informally, as the kitchen cabinet or the coterie. The President of India is the *de jure* head, whereas the Prime Minister is supposed to be the *de facto* head. All major executive decisions are taken in the name of the President of India. The judiciary at the highest level is the Supreme Court of India, which comprised the Chief Justice of India and the puisne (pronounced puny) judges, who are in no way inferior or subordinate to the Chief Justice as far as judicial competence and powers are concerned. The Chief Justice is simply *primus inter peres*—first among equals.

Interestingly, the President is common in both the Legislature and the Executive, making them overlap, rather than being disjoint sets. Further, each minister of the Council of Ministers has to be a member of either of the houses; and in case he is not, he must become a member within a period of 6 months. Thus, it is very clear that there is further overlap between the Legislature and the Executive. On closer observation, we can also say that the Executive—as far as persons concerned—is a subset of the Legislature. Therefore, we can conclude that in India the doctrine of separation of powers is not followed strictly as far as the Legislature and the Executive are concerned. There is, however, no overlap between the judiciary and either the Legislature or the Executive. No judge can be a member of either of the houses, or a Minister. The same is true in the states as well, where a judge of any of the High Court cannot be a member of either of the Houses in the State Legislature or a Minister in the State Government.

The Executive comprising the *de facto* head, the Prime Minister, and the Council of Ministers is very powerful. They are the persons who are responsible for execution of all the laws made by the Legislature. Interestingly, they are persons who initiate the process of law-making as they are the driving force of any government. Rarely a bill initiated by a private member has become a law. The same is true in different states where the ministers in the government are the most powerful persons.

Executature

It has been said by Lord Hailsham for the Westminster model, that the most powerful people are the ‘Executature’—an amalgam of the Executive and the Legislature. As India follows very closely the Westminster model, the same applies to the Indian polity and the most powerful body is the Executature—the overlap of the executive and the legislature. In other words, we can say that the most powerful individuals are the members of the Council of Ministers. Still powerful are members of the Cabinet; and the ultimate power lies with the individuals who belong to the inner circle called the coterie or the kitchen cabinet. These are the individuals who initiate most of the lawmaking processes, formulate government policies, manoeuvre the entire government machinery and are the real driving force of the entire country. They are the people who can get almost anything done—making a new law, amending an existing law, getting the rules and bylaws made under the power of delegated legislation, etc.

Let us discuss a few cases from different countries.

Chinese Government Made Mattel to Eat Crow (2007)

In 2007, Mattel—one of the largest toys makers in the world—had to apologise to the manufacturers in China and the people of China, due to enormous bargaining power of the Chinese government, and its ability to exercise it. It so happened that Mattel used to get, and still gets, a large number of its toys manufactured in China, which were later sold in the United States and several other countries in the world. There were complaints in the US that Mattel toys contained lead in paint, which was and is not permitted in the US and many other countries, and also used very small magnets.

As we all know, magnets have two poles—north and south—and similar poles repel each other, whereas opposite poles attract each other. While a child was playing with the toys, she mistakenly, and which is quite possible for a small child, swallowed two tiny magnets and later, as per doctors’ diagnosis, opposite poles attracted each other inside the intestine, resulting in her death. Mattel, in all probability anticipated expensive and damaging legal claims, recalled a large number of similar toys from the market and at the same time shifted the entire blame on the Chinese manufacturers.

Within a short period of time the Chinese manufacturers, backed by the Chinese Government, reacted sharply and counter-alleged that they had manufactured the toys as per the designs provided by Mattel, and hence, it was not their fault if lead paint or small magnets were used in the toys. They shifted the entire responsibility on the toys company.

Mattel had not expected that there would be such a serious counterattack. Realizing that it would not be prudent for Mattel to snap ties with Chinese manufacturers—as there were and are huge benefits of getting toys manufactured in

China, not wrongly named as ‘factory of the world’—Mattel made a quick decision of withdrawing its earlier statement. Mattel was made to eat crow.

A senior official, Mattel’s executive vice president for worldwide operations, Thomas Debrowski flew to Beijing, met the Chinese product safety chief Li Changjiang, apologised for his company’s own weak safety controls in the presence of the global media—widely reported by BBC, Reuters, Time, etc.—and said:

Our reputation has been damaged lately by these recalls ... And Mattel takes full responsibility for these recalls and apologizes personally to you, the Chinese people, and all of our customers who received the toys. ...The vast majority of those products that were recalled were the result of a design flaw in Mattel’s design, not through a manufacturing flaw in China’s manufacturers. ... We understand and appreciate deeply the issues that this has caused for the reputation of Chinese manufacturers.¹

Governments can have immense influence on the business. In a global economy it is not only the government of one’s own country but also the governments of other countries with whom one has a business connection, can have an impact on one’s business.

In this case, it is quite obvious that had Mattel decided to pursue the matter either legally or diplomatically or both, it would have been a very uncertain situation as no one would have been able to provide any tentative time frame for the resolution of such a dispute. Was Mattel on weak ground due to the bargaining power of manufacturers? Not exactly. Mattel could have managed the manufacturers but managing the Chinese government was not possible. Hence, there was no option left for Mattel but to own up and apologise.

It is next to impossible to continue to fight a battle in which a party is backed by the government, and, that is true, without even the slightest doubt, about Chinese government in this matter. But, that may not be true for all business parties and all governments. The symbiotic relationship between the business and government, and the influence the government has on the business will determine the backing given by the government to any business. Moreover, higher the volume of business and monetary value, higher the interest of the government in supporting any domestic company or business.

Iraq and Exxonmobil (2011)

In December 2011, the Iraqi Government refused to pay \$50 m to ExxonMobil, one of the largest oil companies in the world, headquartered in Irving, Texas in the US. Officially, it was said only to be a bureaucratic delay in making the payment, however, it was well known that the Iraqi Government in Baghdad was flexing its muscles and arm twisting ExxonMobil for engaging in south-eastern part of Iraq

¹Why Mattel Apologized to China, Time, Friday, Sep. 21, 2007, by Jyoti Thottam, <http://www.time.com/time/printout/0,8816,1664428,00.html>, last accessed September 14, 2016.

with the leaders of the semi-autonomous Kurdistan region, which was considered to be illegal by Baghdad.

Earlier, Iraq had entered into a contract with ExxonMobil and it simply refused to honour the contract for certain unconnected reasons. It was under dictatorship for a very long time and its conversion into a democratic system starting sometime in the recent past could not be instantaneous. For a democratic system to function—which includes a proper judicial system—nurturing democratic principles, tolerance, maturity, free speech, and being responsible for decisions made are necessary. And, all these did not necessarily visibly exist in Iraq.

Oddly just at that time, President Obama in a meeting with Iraqi Prime Minister Maliki had praised the Government in Iraq and said that Iraq as a country had become,

...sovereign, self-reliant and democratic.²

But, sovereign governments can be whimsical and arbitrary, as has been in the case of the Iraqi Government. The role of government in honouring a contract, and that too, an international contract, is extremely important and must be exemplary. In only extreme cases of violation of certain clauses of contract or situations of violation of public policy, principles or anything against public interest, any sovereign should exercise the power not to honour a contract. And, this needs to be done only in exceptional circumstances. The Government of Iraq did not make a payment of \$50 m, a small amount both for Iraq and ExxonMobil. Ironically, it was not based on any legal provisions in the contract. One has to accept that this is how the governments of certain countries work when it comes to their business and political interests.

Two questions arise: first, the issue of sovereignty and how international businesses should deal with sovereign nations, and, second, how risky is it in doing business with nascent and unstable democratic countries?

International businesses, with strong hold on their domestic governments, as is the case with Texan Oil companies, are in a much better position as far as dealing with governments of other countries is concerned, however, sovereign nations, theoretically, are not commanded by anyone, and until and unless they are cornered for any reason—most common being financial, military, natural resources like oil and gas, etc.—there is every possibility of them not paying any heed to the foreign firm's grievances, howsoever genuine and legitimate they may be. Thus, dealing with a sovereign is always tricky. And, if the entire decision-making is in the hands on one individual, the business, realistically, depends on the whims and fancies of that individual. There can be no escape from the mood swings of the leader, who may be a dictator, autocrat, or benevolent ruler at different points of time.

²Exxon Spars With Iraq Over Lack of Payment, NYT, December 22, 2011, http://www.nytimes.com/2011/12/23/business/energy-environment/exxon-mobil-and-iraq-clash-over-payment.html?_r=1&ref=business, last accessed September 14, 2016.

Sovereignty of the nation, in such a situation, means the sovereignty of that individual only.

It may be better in a democratic set-up, with decision-making in the hands of elected representative(s). However, in nascent democracies, which mostly are unstable in the beginning and gain stability with the passage of time with tolerance and free speech practised regularly, expecting instant shift in the mind set from personal welfare to public welfare is like asking for the moon. It does not happen overnight and the biggest hindrance is being overzealous in exhibiting patriotism and working towards public welfare by ignoring international contractual obligations. Keeping the masses happy and playing to the galleries cast a shadow on rational decision-making, which often is myopic and detrimental in the long run.

It is, therefore, quite risky doing business in nascent democracies. Businesses must factor it in while formulating the strategy for entry any such market and if already there, how to continue to get superior return on investment. Exit option must be thought about to mitigate the pain of leaving a well-established profitable business.

India: Lavasa and HCC (2010)³

Lavasa is a serene hill station near Pune, in the state of Maharashtra, India. One of the biggest construction companies in India—Hindustan Construction Company (HCC)—was building a private city in Lavasa and it was well reported in the media that several of its plans were sanctioned by the Maharashtra Government without much objection or delay. It had also been reported that a senior politician—Sharad Pawar, former Maharashtra Chief Minister and who at one point of time was a Prime Ministerial aspirant, a fact which helps us to gauge his position in the political pecking order—had an interest in the project, and that was why it had been smooth sailing for HCC as far as government permissions were concerned.

His closeness was reported in the media:

The former Maharashtra chief minister, who has also held the defence portfolio in the early 1990s, has not hidden his proximity to the Lavasa project. In an interview to a newspaper in early November, the agriculture minister said he had selected the site for the project and introduced the site to his friend Ajit Gulabchand, the chairman of Hindustan Construction Company, Lavasa's parent.⁴

³Lavasa gets Jairam Ramesh blow: All work in lake city illegal; DNA; Nov 27, 2010; by Harish Gupta; <http://www.dnaindia.com/india/report-lavasa-gets-jairam-ramesh-blow-all-work-in-lake-city-illegal-1472750>, last accessed September 14, 2016.

⁴Pawar, Jairam face off on Lavasa showcase notice; The Economic Times; Dec 1, 2010; http://articles.economictimes.indiatimes.com/2010-12-01/news/27569811_1_lavasa-corporation-lavasa-project-ajit-gulabchand, last accessed September 14, 2016.

The role of the government can never be underestimated, and it can never be certain, as HCC experienced. In 2009, when the United Progressive Alliance (UPA) government, with Dr. Manmohan Singh as the Prime Minister started its second term, Jairam Ramesh was made Minister of State in the central government and was given independent charge of the Environment Ministry. For certain reasons, he made up his mind to scrutinise the Lavasa project in great detail. There were a number of lapses found and it was estimated that the city project would be clearly detrimental to environment. All of a sudden the Environment Ministry took a tough stand and ordered to stop work in Lavasa. HCC was hurt badly. The company had planned an Initial Public Offering (IPO) to raise about Rs. 2000 crores (almost equivalent to \$400 m at that time), but could not go ahead due to the orders passed by the Ministry against the company resulting in enormous negative publicity. There couldn't have been a worse time for the IPO. Political intervention even by Pawar did not yield the desired result for HCC.

The charges were serious; mostly for irreparable damage to environment. The decision on any such project needs the exercise of discretion in a judicious manner, and it typically depends on the individual who is making such a decision. Ramesh, in his wisdom, made a decision—and which was the decision of the Ministry, and of the government—to get the work stopped at Lavasa. According to HCC, it was suffering a loss of more than Rs. 2 crore (almost equivalent to \$400,000 at that time) per day. It was a very serious matter and a business leader like Ajit Gulabchand, Chairman and Managing Director of HCC, faced this dilemma—to try to get the matter resolved through negotiation, or to take the matter to the court.

Later on the matter was resolved through a combination of both—a petition filed in the court and political negotiations. There was pressure from the Prime Minister's Office (PMO) on Ramesh to clear the project. With certain ifs and buts, the project was cleared. A fine of Rs. 100 crores (almost equivalent to \$20 m at that time) was imposed on the company. Perceiving Ramesh as a potential threat to any such project, there was strong lobbying to get him shifted from the Environment Ministry. And, he was indeed shifted to an insignificant Ministry—as compared to Ministry of environment—Ministry of rural development, drinking water and sanitation.

But in the process, HCC also suffered—the project got delayed and had to be shrunk and HCC could not come up with its IPO at the scheduled time.

Who suffered?

May be both, but the loss for HCC has been much more as compared to that of the minister, who was shifted to an insignificant ministry. Moreover, ministers are always there till the time of the confidence of the Prime Minister and even the government continues till the time of next elections, and in case it is re-elected, the same person may or may not be given a ministerial berth, and even if given, any particular ministry is also a matter of chance. Hence, for the minister Ramesh, there was very little to lose. HCC, however, lost significant time, reputation, earnings in the form of new investments and the steam to go ahead with everything rosy. Any

business leader detests such a situation. Whether it was the personal rivalry between two political giants, can merely be a subject of speculation. Exercise of discretion by the minister wreaked havoc for the business. It was not something which could not have been anticipated by a top business leader.

There has always been a debate between protection of environment and the need for growth and development. With burgeoning population, it was and is becoming difficult to protect the environment fully, and hence, it has been left to the discretion of the government—particularly the Ministry of Environment and Forests—to see that minimum damage is caused to environment while any project is planned and later executed. One of the most important principles to be followed in the decision-making process is: ‘polluter pays’, which means that it is the duty of the person or the company—which has to carry out the unavoidable development work resulting in certain amount of damage to environment—must pay for restoration, in the form of tree plantation, relocation, rehabilitation, using technology to lessen the impact of degradation of environment, etc. A very fine balance has to be achieved between environment on the one hand and development on the other.

For a business leader, one question is very obvious and needs to be answered. Were the environmental clearance requirements so vague that multiple interpretations could be made? It can easily be inferred from the events that the difference in the interpretation of the ministry and the company was so much that it was not possible to converge and reconcile. Now, another question: how could the company continue the project for so long with the impression that it had complied with all the environment clearance norms? There are many such questions which need to be answered before taking up any such project. One must understand that even if clearance has been granted by the government, it can possibly be withdrawn with a new person in command, or change in circumstances.

Google in Germany; Privacy Issues (2013)

In April 2013, Google—a large company by any standards—was fined by the German privacy regulator, responsible for supervising data protection, a sum of €145,000 for collecting personal data without approval. Earlier, Google had collected data for its Street View around the world with the help of its fleet of automobiles by covering almost 8 million km in about 50 countries. While doing this exercise, Google had collected from Wi-Fi routers in Germany and elsewhere personal details of emails, photographs and other unencrypted data, which obviously was a breach of privacy of any person owning the data.

The Telegraph had reported:

The data protection office in the northern city of Hamburg said it had imposed a 145,000-euro (\$189,000) penalty on Google for privacy violations on what it called a nearly unprecedented scale.... ‘In my opinion this case constitutes one of the biggest known data protection violations in history’, said the office’s chief, Johannes Caspar. The company, which cooperated with the probe, was also ordered to delete the data

immediately. Caspar complained that under German law his office was not able to impose a more painful penalty on a major multinational company, noting that the maximum fine for an accidental violation was 150,000 euros. Hamburg prosecutors had abandoned a criminal case against Google in November, when the data protection office picked it up as an administrative offence. It found that the company had inadvertently assembled the data, but noted this constituted 'a significant lapse of Google's internal control mechanisms'. ... Authorities in Germany, where privacy concerns are particularly sharp due to gross violations under the Nazi and communist dictatorships, had already imposed restrictions on Google after a protracted dispute over Street View.⁵

Google had taken the stand that the collection of entire personal data was inadvertently done and the company had no intention of using that data, or even having a look at that data. This was not the first time Google had faced the problem of breaching privacy and collecting data of personal kind. Last month, Google had settled a lawsuit filed by 38 US states and agreed to monitor its own employees in a strict manner so that the data collected from and about any person was given due respect, and was not used without proper authorisation and approval.

The company had also faced problems in France. In 2011, the French National Commission on Computing and Liberty had fined Google a sum of €100,000, which at best can be called to be a token sum. Ireland and Britain had been more magnanimous and did not impose any fine after Google apologised and undertook to delete the data collected illegally.

Such is the reach and impact of cutting-edge technology that in today's world it could be easily said that there is nothing like 'privacy'. The word 'privacy' can only be found in dictionaries, as law enforcing agencies watch helplessly companies violating the data protection laws with impunity.

For companies like Google, small sums of money like €100,000, or €145,000 are tiny droplets in a large ocean. Forget about global standards, even with Indian norms—with much lower per capita income as compared to the United States or European countries—the sum of €145,000, equivalent to less than \$200,000, is about Rs. 1 crore (Indian Rupees 10 million), which may just let one buy an entry-level German luxury car in India.

The economic analysis of law very clearly states the purpose of imposition of any fine: there should be necessary deterrent effect with the quantum of fine imposed reaching to the threshold so that it really makes a dent in the account books and reputation of the company; or a token amount as a fine must produce the required impact in the form of remorse and an overwhelming sense of wrongdoing, accompanied by an unsaid statement—or at times stated clearly—that the act for which the fine has been imposed would never be repeated. In the case of Google, nothing of the two is evident.

The regulator has expressed in clear terms that the quantum of fine levied is insufficient and woefully inadequate to stop any of the large companies, or for that

⁵Germany fines Google for "unprecedented" privacy violations; The Telegraph; April 22, 2013; <http://www.telegraph.co.uk/technology/google/10010228/Germany-fines-Google-for-unprecedented-privacy-violations.html>, last accessed September 14, 2016.

matter, even small companies, to take the law regarding data protection seriously. It has been argued by regulators all over the world that the fines must increase, so that the companies at fault really feel the pinch, and it has been suggested that the fines can go up to 2 % of a company's annual sales, which in the case of Google would be about \$1 billion, based on its last year's revenue.

There has not been much unanimity in the European Union as the British government is in favour of a light touch regulatory regime—following the well-known principle that ‘the least governed is the best governed’ and the Thatcherite policy on regulation that ‘every regulation is a restriction of liberty’—whereas Germany and France, along with other continental governments, favour strict regulatory control. It would be extremely difficult, as is being foreseen, that members of the European Parliament may not see eye to eye on this issue and any enhancement in the fines to be imposed, which is in fact a national law and can be done by the national legislatures, however, for that to be done at the national level, agreement in principle is necessary at the EU level.

Google has also been in trouble regarding privacy issues in the Netherlands and Spain. In December 2014, the Dutch watchdog had threatened with a fine of €15 million, if it did not stop violating privacy of internet users.

A question arises about the efficacy of different policies being followed by different countries in the EU. Broad understanding and unanimity will surely help in achieving the goal of protecting privacy of the people of each country as well as foreigners visiting these countries. The role of government vis-à-vis humongous companies like Google is being tested.

What should the top leadership in Google do—meekly agree and comply; fight it out till the last drop of blood; try to circumvent the law; lobby with the lawmakers to mould the law to its own interest; use its deep pockets to achieve the desired result; take the moral high ground, etc.? There are many options. It depends on the top management to find a way out keeping the bigger picture in mind.

Australia: Adani and Coal Mines (2015)

In August 2015, the Federal Court in Australia had cancelled the permission granted by the Federal Government to Adani, an Indian company, for the biggest coal project Carmichael in Australia citing possibility of extinction of two species of reptile and snake.

Court's action could not be termed as shocking or unprecedented as Australia follows the same ‘Common Law’ which India does and judicial review is very well accepted as the norm. Though England believed in the supremacy of the parliament and judicial review of legislative actions was unheard of earlier, yet of late there has been acceptance to the review of even legislative actions on the grounds of public interest and welfare of the people. Judicial review of executive and administrative

decisions has never been debated and with the same legacy, Australia, as well as India, lives with the supremacy of judiciary, though there are checks and balances between the three organs of State—legislature, executive and judiciary.

Thus, legally speaking, the courts were well within their rights to decide in this manner. It is, according to the constitution, not only a right, but a duty, to safeguard the interests of the people of the country as the *sentinel on the qui vive*. Hence, for even the uninitiated in the legal fraternity, the court's decision did not come as a surprise.

However, what was surprising was the reaction of the then Australian Prime Minister, Tony Abbott. He had termed the decision as 'sabotaging' and expressed his feelings of being 'frustrated'. The Guardian reported:

Tony Abbott has reaffirmed his support for the huge Adani coalmine in central Queensland, arguing Australia has "a problem as a nation" if the courts could "be turned into a means of sabotaging" such projects. The prime minister warned against becoming "a nation of naysayers"....⁶

He had mentioned that the delay in the coal project would have meant loss of lots of jobs to Australians in Australia and a large number of people in India would have to continue living without electricity. He had even made an emotional statement of asking the Australian people and judges as to how did it feel in today's modern world to live without electricity? A lot of Indians would have been denied of the right to get clean and cheap power because of this court decision.

As luck would have it, in a month's time, Abbott was voted out of power and a new government under the leadership of Malcolm Turnbull came to power. The Environment Minister Greg Hunt gave new permission to the coal mine to proceed with the 'the strictest conditions in Australian history'.⁷ It was again challenged by environment groups in the court, but this time the court dismissed it and allowed the project to go on but with highly tightened environmental conditions.⁸ This has been a big victory for the Indian company along with the Australian government. The success in courts has, however, been bitter-sweet for Adani, as it has to comply with some of the toughest environmental protection norms. The balance between the judiciary—government—business has been restored with changing times and needs of the society.

⁶Abbott warns against courts "sabotaging" projects such as Carmichael coalmine; The Guardian; August 7, 2015; <http://www.theguardian.com/environment/2015/aug/07/abbott-warns-against-courts-sabotaging-projects-such-as-carmichael-coalmine>, last accessed September 14, 2016.

⁷Adani Carmichael: Australia's largest coal mine free to proceed after Greg Hunt gives approval; The Sydney Morning Herald; October 16, 2015; <http://www.smh.com.au/federal-politics/political-news/adani-carmichael-australias-largest-coal-mine-to-proceed-after-greg-hunt-gives-approval-20151015-gk9wof.html>, last accessed September 14, 2016.

⁸Queensland court dismisses green group's challenge to Adani coalmine; The Guardian; December 15, 2015; <http://www.theguardian.com/environment/2015/dec/15/queensland-court-dismisses-green-groups-challenge-to-adani-coalmine>, last accessed September 14, 2016.

The Economic Times in India had reported:

The project has been in the centre of controversies since the start with environmentalists warning of severe damage to the Great Barrier Reef but in August it faced its biggest jolt after a federal court in Sydney revoked the environmental clearance given to the project citing that the project threatened the Yakka skink, Australia's native lizard and a species of ornamental snake found in the area. This decision was later reversed by the Australian government which gave it a green nod but imposed more conditions relating to community issues and environmental standards. Adani Group has suspended work at the mining project due to delay in approvals amid local protests.⁹

A few questions deserve honest answers:

How far did the Australian PM's commitment to the project go? Why was he going out of the way to express his frustration? Why was he so much concerned about the people in India? What should have been paramount for the Australian courts—interest of Australia or India? There were several other questions which asked about the relationship of the business and political interests, both in India and Australia.

This can easily be said to be over-reaction of the Prime Minister and an effort to tilt the power balance in favour of the executive. It cannot be accepted in any country committed to the rule of law with powers of judicial review vested in courts, whether it's India or Australia. The coal project was in trouble as neither the Australian government nor the company had gone to the court with 'clean hands'. Legal remedies were available for both. Irresponsible utterances by anyone in the government and the business organisations speak a lot about the business environment in any jurisdiction.

The relationship between the Australian government and the company appear to be too cosy for the comfort of the Australian people and that's why the judiciary had to intervene. The Australian PM need not have used the situation of people in India without electricity to his advantage. It was a lame excuse and surely would not have cut any ice with a seasoned judge.

The best route which could have been taken by the company was to comply with the legal requirements and honour the decision of the court. And, of course, the Australian government also should have thought more about honouring the decision of its own courts rather than providing electricity to the people in India.

It is interesting to note that environment requirements are being taken very seriously by the governments in the first world countries and if the government shows any slackness, courts in countries with highly evolved judicial systems put the things back on track. The doctrine of judicial review ensures that governments do not work in favour of businesses unbridled.

⁹Australia clears Adani's Abbot Point coal terminal expansion plan; The Economic Times; December 23, 2015; http://articles.economictimes.indiatimes.com/2015-12-23/news/69261351_1_gautam-adani-adani-group-queensland-government, last accessed September 14, 2016.

Royal Dutch Shell in Russia (2006)

The famous petroleum company Royal Dutch Shell, along with its Japanese partners, Mitsui and Mitsubishi, had invested a lot of money in Russia's Sakhalin Island for oil and gas exploration. The company had faced a number of problems including environmental issues and government intervention. The company's projected cost had doubled to \$20 million. In 1990s, when Russia had invited the foreign oil companies to invest in its oil and gas exploration, the country had been extremely generous and needed the cutting-edge technology in its oil-rich but frozen seas.

The company had signed in 1990s a production sharing agreement (PSA) with conditions perceived as unfairly generous by Russians. State-owned Gazprom had already started negotiations for controlling a stake, however, delay in the completion of project was not taken kindly, both by the Russian government and the people. With the passage of time Royal Dutch Shell, along with its partners, and other companies had brought in the latest in technology by putting in a lot of time, effort and money to make the entire exercise financially viable. Finally, in 2006, it was time to reap the fruit of its labour. At that moment, when the company was just looking forward to profits, the Russian government, led by Vladimir Putin as president, told the company in unambiguous terms that it would not be possible for Shell to continue in that manner, and majority stake would be taken over by Gazprom. It was a big blow for Shell and its Japanese partners. But, there was hardly anything they could do.

As per an old KGB adage, 'give me the man, and I'll find you the crime', the Russian government was able to find minor environment lapses on the part of Shell. The sea around Sakhalin Island is frozen for half the year. A rare whale is found in this frozen sea. Offshore drilling rigs would have disturbed the environmental position as the pipelines delivering oil and gas would have to cross more than 1000 rivers and streams. The environmental regulators in Russia complained about this and took the unprecedented step of cancelling the environmental license of Royal Dutch Shell. The consortium, including the Japanese companies, faced the prospect of criminal action. This was a bit too much for Royal Dutch Shell and it felt that it was better for the company to succumb to the wishes of Vladimir Putin and sell its stake to Gazprom, rather than fight for it in a legal forum.

It was not for the first time that Russia had flexed its muscles. It had done the same earlier with its neighbours and tried to establish itself in the role of indispensable and not-to-be-taken-for-granted Big Brother. Royal Dutch Shell nursed its wounds for some time, but such is the allurements for the profits to be made by abundant oil and gas that it was back in Russia to do business in a short period of time, despite Putin being in true control of the country, whether as the President or the Prime Minister.

France: Arcelormittal Steel (2012)

ArcelorMittal Steel, with Lakshmi Niwas Mittal as the CEO, is the largest steel-making company in the world. Mittal had humble beginnings in India and rose to such position of eminence by following a model of business where he would buy sick steel mills and using his business acumen and expertise make them take a U-turn and start making profits. He followed this model in a number of countries in the world and in the process became one of the wealthiest persons in the world. He likes good living and in 2004 bought one of the mansions in London, which at that time was the most expensive house in the world. He owns several other mansions in different parts of the world.

He has business interests in France also and faced serious trouble in November–December 2012. The French government, under the new leadership of Francois Hollande, was wary of unions and protests by workers. As the going has not been good for Mittal's steel company in France, the company had decided not to operate certain blast furnaces and also reduce its workforce. Earlier, interestingly, Mittal had made a promise of investing several hundred million dollars over a period of time, however, for certain reasons, he did not keep his promise. Regarding the closure of blast furnaces and trimming workforces, there was tremendous upheaval among the workforces which, later on, turned political in nature.

French ecology Minister Delphine Batho expressed that the government had no confidence in what Mittal had said and that the government would have left no stone unturned to arm twist Mittal to make him honour his words. Arnaud Montebourg, the industrial renewal Minister, had threatened the company with nationalisation. This is quite natural as political stability depends on the sentiments of the people and in France workers' unions are quite strong. The union leaders had expressed their fears and apprehensions of Mittal closing down certain businesses that would have led to a large number of people being thrown out of the jobs. The government had no option left but to force Mittal not to take this drastic step, which otherwise might have been important for his company for long-term business and strategic reasons.

Within a few days the meeting was arranged between Mittal and the French government, and the government's view prevailed. Such is the power of the government of the day in any country that it becomes next to impossible to do business by antagonising the government. And, in a democratic country, it is imperative for the government to keep the people happy, as any government would always like to be re-elected. It is quite obvious that no government could dream of coming back to power again by displeasing the voters. The French government is no exception, and, Mittal is no novice. He, as a true business leader, must have anticipated the opposition by the workers and the government to company's plans.

Immediately thereafter, union leaders and certain political leaders voiced their concern that the government did nothing precious to safeguard workers' interests, and Mittal would have done very much the same even if the agreement had not been reached between Mittal and the government.

'Kill Mittal' Computer Game

Despite the reconciliatory moves by Mittal, such was the anger among the people at the receiving end that a computer game 'Kill Mittal' was made.

It is good to vent out anger, otherwise, it can cause a lot of psychological damage to an individual and, if the grouse is common to a large number of people, to the entire group, resulting in a perceptible adverse impact on society. But, there are a number of ways and means of doing that, and, obviously, all are not acceptable as per societal norms. These norms vary from society to society, and primarily depend on the limits of tolerance of the individuals, and are also undeniably regulated and controlled by the law of the land.

In 2013 summer, a new computer game—Kill Mittal—developed by an independent French video game maker, living at that time in Belgium, became available online and it could be downloaded for free. Mittal in this game was the steel magnate Lakshmi Mittal, the Chairman of the steel giant ArcelorMittal. Anyone playing this computer game was supposed to kill Mittal, a giant robot, to keep the steel mill open. The context of this game came from the decision made by Mittal to restructure his steel mill business in France.

Disgruntled French steelworkers had protested for several months against the closure of steel blast furnaces in Florange, France. Despite the intervention of the government and strong stand taken by the workers' union, Mittal went ahead. Earlier, he had promised that restructuring and modernisation of steel mills in France for ArcelorMittal would not result in job losses, however, it was not at all possible to do both the things at the same time—modernise and restructure, and also keep all the workers with their jobs intact and all the employment benefits coming along with that.

Often this is a very difficult decision for any top management in a company to be made and implemented, and, in some of the popular democratic societies, the decision-making requires a lot of courage to deal not only with the workers' union, a loosely formed informal association of persons not permanently employed, but on a contractual basis. The company might have to negotiate in one of the toughest manners with the local government and at times with the federal government also. As most of the politicians are looking for re-election, and would never like to displease the large number of voters, and that too in a manner which may exhibit apathy and indifference to loss of jobs, most of the politicians in these positions are compelled to oppose any such restructuring and modernisation, if that results in job losses. There is a direct correlation between job losses and the number of votes lost, and therefore, Mittal also faced a very tough French government. But, Mittal stood firm.

As it is obvious, the growth and development, and at times even sustainability and survival, of a company depend on changing with the times, it becomes incumbent on the top leadership to foresee and anticipate, and make the decisions so that the company remains fit for the future. It is extremely difficult for companies to guarantee the continuity of a job in difficult times; such times when global

demand is extremely low and the world economy has been hit by recession; no company—except the public sector and the government—can continue to conduct itself in the manner as it has been being doing earlier, without responding to the changed business environment, until and unless it's on a suicidal mission. Mittal, clearly, was not on any such mission.

It was a matter of serious concern that an extremely revolting, sickening and distasteful computer game had been prepared and made available online. Free speech and expression, natural corollaries of it, and extrapolation and development of any such idea, are important for evolution of mankind and development of any society, however, there are limits, which need not be transgressed, and until and unless, there is a clear cut limit defined by law, it depends on each and every individual to draw the line.

It was also vital for companies to understand that whenever any such restructuring and modernisation process has to be undertaken, all the stakeholders, particularly the workers, have to be taken into confidence, so that the entire process can be done in a smooth manner. It might not be possible to do such an exercise flawlessly and without ruffling any feathers, but efforts have to be made. Even in routine operations, it is desirable that the top and senior management creates a good understanding and rapport with the workers, so that the work is completed in a perfect manner, as envisaged. The slightest of dispute may lead to discontentment and disruption of the work as Honda, the Japanese company, learnt it the hard way in Gurgaon, and Maruti in Manesar, around the same time.

It requires tremendous negotiation skills to persuade the other party to agree to. Whatever may be the scenario, being frank helps, and communicating the true and the real picture, howsoever disturbing and unpleasant it may be, very often makes the other party look at the entire scenario in a much more realistic and acceptable manner. The sequence of events in Florange, France, leading to the development of Kill Mittal computer game, tells us that the top management in the company failed to anticipate such developments, and even if it had anticipated them, it did not take adequate measures to arrest the fast spreading discontentment and feeling of hatred. But, that did not give any credibility and acceptance to the computer game. It was heavily condemned.

Takeaway for Business Leaders

Dealing with the government in any country is not a child's play. One of the critical issues is of the certainty of the government decisions and the certainty of the continuity of government policies. These are most uncertain. A business leader cannot take a government's stand as perpetual and should not formulate business strategy with that assumption. With change in governments in democratic countries, there is often a change in the policy. Also, in monarchies, the thought process of the monarch may change anytime. Hence, how the government is going to function can at best be anticipated.

For a business leader doing business in a democratic country, keeping the ear to the ground to know the mood of the people of the country is of utmost importance. That way he can gauge the feelings and be able to anticipate the future of the government in the next elections. Also, if there a possibility of a mid-term election can best be answered by being close to the masses and powerful and well-connected persons. In a monarchy, the business leader may remain somehow close to the palace intrigues and keep himself well informed. But, closeness to the palace in any kingdom is a double-edged sword. He needs to be cautious enough not to be so close that he catches the attention of the mighty and powerful and is seen as a players in the machinations himself. Such moves need deftness and extreme caution. Along with these qualities, he must be ready to change the course of business in a jiffy, as the monarchs and dictators do change the legal environment for doing business faster than the eye blinks.

Creating practical, realistic and doable options is the key. For this, a business leader may have to develop relationships with a number of persons he may not be comfortable with, but for the sake of the business he has to do it. Everything cannot be in writing and he must understand the importance of the unwritten communication, specially in monarchies. The business leader must have absolute clarity about the outermost periphery to which he may go to save the business and himself. With tact, he should be able to communicate the same—whether orally or in writing—to the government of the day.



<http://www.springer.com/978-81-322-3680-1>

Business Leadership and Law

Agarwal, A.K.

2017, XVII, 185 p. 1 illus., Hardcover

ISBN: 978-81-322-3680-1