Investment

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India Minister: Confident of Reaching Political Consensus on FDI in Multi-Brand Retail

Rumman Ahmed, Dow Jones International News

Bangalore, 21 June 2012: Indian Commerce and Industry Minister Anand Sharma said Thursday he is confident of a political consensus emerging on allowing foreign direct investment in multi-brand retail in coming weeks.

The minister was speaking to a group of political and business leaders during a visit to Russia, according to an Indian government statement.

India had late last year shelved a plan to allow international supermarkets and department stores to enter the country, disappointing retailers and damaging the government's credibility.

The federal government had suspended a decision to allow 51% foreign direct investment in multi-brand retail, which includes companies such as Wal-Mart Stores Inc., Carrefour SA and Tesco PLC, until an agreement on how to do it is reached among the main political parties.

The government had, however, allowed 100% foreign investment in single-brand retail. Single-brand foreign retailers such as Nike Inc. previously could only hold 51% of an Indian joint venture.

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Taking notice of investment treaties

Santosh Tiwari, Business Standard

June 14, 2012, New Delhi: It is almost a reflection of the current business climate that the United Progressive Alliance should had received no less than six notices under various Bilateral Investment Promotion and Protection Agreements (BIPAs) and Comprehensive Economic Cooperation Agreement (CECA) to resolve issues between foreign investors and the government over laws and regulations and other government decisions.

Taken together, this is the highest number of such notices the central government has faced at any one time ever since the first BIPA was signed in 1994. Not surprisingly, the bulk of these notices are in telecom, the fallout of the Supreme Court's cancellation of 122 telecom licences in February following a controversy over allotment.

BIPAs and CECAs intend to provide fair and equitable treatment to the investors of either country in the territory of the other country. So, in a sense, the outcome of these notices will be significant for foreign investors.

What does a notice under BIPA or CECA entail? As a first step, most such agreements provide for amicable negotiations in the event of a dispute — under Article 10 of India's model text for BIPAs, the time frame is typically six months.

If negotiation fails, the disputants can refer the matter to a three-member arbitration tribunal, in which each party appoints one member, and both must select the national of a third state as chairman. If neither can agree on the latter, the President of the International Court of Justice can be invited to appoint someone. Arbitration is decided by a majority of votes.

So far, India has lost the one case that went to arbitration. This involved White Industries of Australia and the Government of India (specifically, the ministry of coal) under the Indo-Australian BIPA that was signed in 1999 but came into force in 2000.

The case concerned a 1989 dispute between government-owned Coal India and Australia's White Industries that resulted in a nine-year legal battle. Finally, in 2010, White Industries filed a claim against India under the Australia-India agreement.

In 2011, the International Chamber of Commerce tribunal in Paris awarded White Industries A$4.08 million on grounds that Coal India had breached its obligations to grant White Industries "fair and equitable treatment" and "effective means of asserting claims" (the latter an oblique reference to the long-
drawn Indian judicial process).

Given this history, the big question is this. The telecom company notices against licence cancellation and auctioning of spectrum, the airwaves that enable mobile telephony, invoke the right to protect their

investments under bilateral agreements. In effect, they challenge a Supreme Court order, which the government is following. If we make the extreme assumption that negotiations fail, arbitration follows and India loses, is the government obliged to reverse the judgment of the country's highest court?

The overarching view among experts is no; Indian laws or Supreme Court decisions, they said, would prevail over BIPA-type agreements. Cyber law expert and Supreme Court advocate Pavan Duggal points out that Article 3 of the Indian model text for BIPA says as much. Section 2 of the Article reads, "…nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis."

Meanwhile, there is some question over whether Vodafone's notice qualifies under the BIPA signed with the Netherlands in 1995 and which came into force from December 1, 1996.

Vodafone's notice has to do with a $2.6 billion withholding tax demand that the Indian government claims it should have deducted when it bought a controlling stake in telecom company Hutchison Essar from Hong-Kong-based Hutchison in 2007. The case here is more complex since the British company has a Supreme Court ruling in its favour but the government amended tax rules in the last Budget to make capital gains on offshore deals liable to tax with retrospective effect.

After Vodafone served the notice under BIPA in April, the government set up an inter-ministerial group headed by Finance Secretary R S Gujaral to frame its responses. The panel has said the issue is not covered under the agreement and has informed Vodafone accordingly. Duggal confirms that the BIPA did not have an arbitration clause for taxation.

But it is possible, that BIPA can be invoked in this case. Arun Chawla, assistant secretary general of the Federation of Indian Chambers of Commerce and Industry (Ficci), points out that "taxation per se would not come under BIPA but taxation on account of accruing of shares is covered under BIPA".

The notice filed by The Children's Investment Fund (TCI), on the other hand, is against the actions of the majority shareholder in Coal India, the government.TCI holds a little over one per cent in Coal India through two companies based in the UK and Cyprus. In March, it served a notice under agreements between India and the United Kingdom (1994), and India and Cyprus (2002). The notice said, "The Republic of India's recent conduct with respect to CIL has seriously impaired business activities and operations of CIL and has contravened each of the treaties." If a settlement is not reached within six months, the fund said, international arbitration would begin under the terms of the treaties.

TCI's omnibus grievances include pricing of coal up to 70 per cent below international market prices, allocation of coal blocks to the private sector below market prices, those blocks remaining undeveloped, loss-making underground mines continuing to be operated and the government generally controlling and issuing directions to the company in a manner abusive to minority shareholders. TCI also cited interference by the ministry of environment and forests in delaying approvals to develop new coal mines.

Given the fact that local laws and court orders prevail in trade and investment agreements, why have companies rushed for cover under BIPAs and CECAs? Vodafone's contention is that under the BIPA, the Indian government is obliged to accord fair and equitable treatment to investors; provide full protection

and security; not breach the legitimate expectations of investors in making investments; not deny justice or breach previously provided assurances; and not take steps to indirectly expropriate the investment.

Clearly, there's great deal of complex negotiation ahead in the corridors of power.

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U.S. Envoy Seeks Lift in Trade with India

Amol Sharma, The Wall Street Journal

28 April 2012, NEW DELHI -- In her first public remarks since taking over as U.S. ambassador to India, Nancy Powell said the two countries can expand their commercial ties by negotiating a bilateral investment treaty and reducing barriers American businesses face.

"I firmly believe the partnership between the U.S. and India can deepen in every sense in coming years," Ms. Powell told a meeting of the American Chamber of Commerce in India on Friday. "The business of the U.S. mission in India is business."

Ms. Powell's stint as ambassador comes as U.S. companies and investors are becoming skittish about India's regulatory environment, especially proposed capitals-gains tax liabilities for transactions involving foreign companies, some retroactive to 1962.

The U.S. government also is concerned about India's purchases of oil from Iran despite international sanctions on the country. Iran supplies 12% of India's crude.

India, for its part, is expected to lodge a complaint soon in the World Trade Organization about a U.S. law that nearly doubled fees for skilled-work visas, according to a senior Indian official. That U.S move hit the bottom lines of Indian outsourcing firms.

Ms. Powell said her priorities in India during her tenure are to bolster trade relations as well as defense and counterterrorism cooperation, and to work closely with India to enhance its roles in the Indian Ocean region and international and multilateral groups.

"It is an incredibly important agenda for both countries," she said.

She noted that trade has grown substantially between the countries in recent years. U.S. goods exports to India jumped to $21 billion from $3 billion since 1995. "It can only go up," Ms. Powell said.

Among the most promising areas of cooperation for the U.S. and India are defense, infrastructure, homeland security, nano-technology and bio-technology, she said.

But U.S. firms and institutional investors are among the foreign players put off by a spate of proposals recently in Delhi—including a tax on international mergers in which Indian assets are transferred. They also are frustrated by New Delhi's slow pace of opening sectors such as retail, insurance and defense to boost foreign investment.

Ms. Powell said she has heard such concerns from U.S. executives and said the Indian policy moves have "dampened sentiment about India's investment climate."

She said the two nations could "enhance transparency and predictability" by striking a bilateral investment treaty. Washington recently announced a new model for such pacts.

The Indian tax proposals will come to Parliament for final passage next month as part of a budget package, and foreign investors from around the world have been lobbying India to relax the measures.

Addressing the same event on Friday, C. Rangarajan, chairman of the economic advisory council to Indian Prime Minister Manmohan Singh, said that India "must continue to make an environment where foreign capital will be coming into the country" and that the government will "allay the fears and concerns" of foreign investors.

Ms. Powell presented her credentials to India's president on Tuesday. She has previously served as U.S. envoy to several South Asian countries, including Pakistan, Bangladesh and Nepal, and had diplomatic positions in New Delhi and Kolkata. Coming to India "feels like a homecoming," she said.

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India-EU trade deal runs into liberalization hurdle

Asit Ranjan Mishra, Mint

The deal may not happen unless govt eases foreign investment rules in banking, legal, postal services, say analysts

May 6, 2012, New Delhi: The proposed free trade pact between India and the European Union is stuck because India has failed to open up sectors such as legal and postal services for foreign investment and further liberalize sectors such as banking, insurance and pension, besides the contentious multi-brand retail.

Admitting this for the first time, a top commerce ministry official said the deal is unlikely to materialize unless India allows higher foreign investment in some of these sectors. "The future of the deal is now at the hands of the politicians," the official said, requesting anonymity.

After the ongoing Parliament session is over on 22 May, the deal could still be sealed if the government pushes through some of the reforms till it gets busy with the presidential elections in July, he said. After that, the assembly elections in Himachal Pradesh and Gujarat by the end of the year may limit the scope of any significant policy decision, he said.

The government has become even more cautious in carrying out key economic reforms after it had to postpone its decision to allow 51% foreign direct investment in multi-brand retail following protests from opposition parties and some key allies such as the Mamata Banerjee-led Trinamool Congress. A decision on a less politically contentious issue of allowing FDI in the beleaguered aviation sector by foreign airlines has also been delayed even after open support from key ministries within the government.

Talks for the bilateral trade and investment agreement between the two sides started in 2007. Both sides have missed at least five deadlines, the latest being in April, to complete the negotiations. They held the 14th round of talks in the last week of April.

According to the EU, India is expected to gain €5 billion and the EU at least €4 billion in the short-term alone. The EU as an economic bloc is India's largest trade partner. In 2010, it imported goods valued at €33.2 billion from India and exported goods worth €34.7 billion. Services exports to India stood at €9.8 billion and imports at €8.1 billion.

The deal is not making headway because India does not have the laws in place, according to Arpita Mukherjee, professor at the Indian Council for Research on International Economic Relations, a Delhi-based think tank.

“India’s approach of ‘give nothing and get nothing’ in trade negotiations does not work with the EU,” Mukherjee said. “They want a solid package which they can sell to their domestic stakeholders, especially when their economy is not doing well.”

She said India is also not able to derive a good package in services from the EU because it has nothing to offer in return.

Joao Cravinho, EU ambassador and head of delegation to India, told reporters last week that he expects the negotiations to be concluded by the end of this year.

However, he said clarity on issues such as duty concessions on wines and automobiles from the Indian side and liberalizing the visa regime for Indian professionals from the European side needs to be worked upon.

Cravinho hoped that greater clarity is expected on the pact during the scheduled June visit to Brussels by trade minister Anand Sharma.

“We hope when minister Sharma goes to Brussels, there will be an occasion for some clarity on the horizons,” Cravinho said. “When the political leadership meets in June, perhaps we can have a breakthrough.”

On the visa issue, Cravinho said: “We can liberalize the visa regime. I hope we can significantly improve the opportunity for India to send people to EU to send people to send services to European companies.”

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For FDI, India more liberal but China more positive

Economic Times

14 April, 2012: India allows higher levels of foreign direct investment in most sectors as compared to China but the neighbouring country draws much more FDI.

A striking feature of China's FDI regime is its focus on agriculture and basic raw materials.

A number of bills and measures to improve India's investment environment have been introduced in Parliament, but they are making little progress amidst lack of sufficient consensus for immediate reforms.

Paris-based think tank OECD said its leading indicator of economic activity in India rose to 98.6 per cent in February from 98.4 per cent in January. This was the fourth straight monthly increase.

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India decides in principle to allow FDI from Pakistan

Elizabeth Roche, Livemint

Move represents a break from current rules that prohibit Pakistani citizens from directly investing in India

April 13, 2012: India has taken an “in-principle” decision to allow Pakistani firms to invest in the country, trade minister Anand Sharma said, one of several moves announced Friday aimed at infusing more content into fast-deepening commercial ties between the often hostile neighbours.

“Procedural requirements of the processes are under way. It will be notified soon,” Sharma said after talks with visiting Pakistani trade minister Makhdoom Amin Fahim. The move represents a break from current rules that prohibit Pakistani citizens from directly investing in India.

“This is a welcome declaration of intent,” said Charan Wadhva, an economist with the Centre for Policy Research in New Delhi. “Many Pakistanis have the resources to invest in India and there are enough areas for cooperation. But we will need to wait and watch,” he cautioned, noting that fragile ties shared by the two have often been rocked in the past by Islamist militant attacks that India blames on Pakistan-based groups.

Another decision announced by Sharma was the setting up of an India-Pakistan joint business council. He noted the increase in interaction between businessmen of both countries, stating that this is “clearly indicative of business looking at opportunities and potential”. He listed infrastructure, manufacturing, pharmaceuticals, healthcare and energy besides tourism as areas for closer business ties.

To facilitate trade, talks between the central banks—the Reserve Bank of India (RBI) and the State Bank of Pakistan —are underway to allow banks from both the countries to open branches in each other’s territory, Sharma said, with Fahim concurring that progress had been made in this area.

“In-principle we have agreed (on this),” Fahim told reporters at a joint news conference in New Delhi with Sharma hours before the two ministers left for the Wagah-Attari land crossing between the two countries to open a second gate through which commercial trucks will cross carrying goods from both countries. The new gate will have the capacity to handle about 600 trucks a day and is expected to increase trade from the present $2.7 billion (Rs. 13,880 crore today). The opening of the new gate is expected to reduce “processing time, paving the way for enhanced people-to-people contact and expansion of trade between the two countries”, the government said in a release.

Both countries are also close to signing a liberalized visa pact that will allow businessmen greater freedom to travel in the other country. Currently, businessmen can visit only three cities in the other country and have to report to police authorities during their stay on single-entry visas. Trade is being seen as the driver of efforts to forge peace between the neighbours, who have fought three of their four wars over the Himalayan region of Kashmir since independence from British rule in 1947. Ties between

the neighbours have been mired in suspicion with India pressing Pakistan to clamp down on Islamist militant camps in its territory. India blames the militants for attacks in Kashmir and elsewhere in the country including the planning and execution of the 2008 Mumbai attacks. India had frozen peace talks after the Mumbai attacks and dialogue was renewed only last year. Pakistan, on its part, has insisted that it will normalize ties with India, including commercial and cultural links, only after the Kashmir dispute is resolved.

But Pakistan last year agreed to grant India Most-Favoured Nation (MFN) status under World Trade Organization rules, a move towards normalizing trade. In February this year, Pakistan announced a trimmed down negative list of items that it would not allow to be imported from India despite pressure from some hardline quarters.

“It is extremely heartening, this (foreign direct investment announcement) is certainly a confidence-building measure between the two countries” said Sushant Sen, principal adviser at the Confederation of Indian Industry. “If two countries want a durable relationship, commerce has to be more than just trade in goods. There has to be bonding between the people business communities,” said Sen.

Biswajit Dhar, director general at the Research and Information System for Developing Countries think-tank in New Delhi, described Friday’s announcement as “unprecedented”. As the bigger economy, the onus was on India to make the gesture, he said.

“The more we allow Pakistan a stake in India, they will ensure their investments are safe” and thereby help thwart possible attacks against India, he said. “If they (Pakistanis) see that their future is interlinked with India, it will give them the incentive not to wreck it,” Dhar said, adding better India-Pakistan ties will improve the commercial and economic climate of South Asia as a whole.

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Pak may be allowed to invest in India

Richa Mishra, Businessline (Hindu)

Islamabad, FEB 16: As a goodwill measure, India may allow investments from Pakistan into the country. Government sources said the Commerce Ministry has proposed to the Finance Ministry to exempt Pakistan from FEMA regulations.

This is being seen as a move to strengthen bilateral economic relations between the two countries. The issue was also discussed during the three-day trade talks that ended on February 15. However, the buck on the subject stops with the Finance Ministry.
The source said that this does not require an amendment to the Foreign Exchange Management Act (FEMA), but can be done by way of notification. Currently, Pakistan is the only country under this regulation.

Once the go-ahead comes, foreign direct investment (FDI) from Pakistan will be possible through the Foreign Investment Promotion Board (FIPB) route on case-to-case basis, the source added.

Asked whether the security issues would also be considered, the source said, the Home Ministry views are being taken into account. The Home Ministry's main concern was about security.
On whether investments will be allowed through the automatic route, the source said, it will be based on the current mechanism, sector-specific and case-to-case basis by the FIPB. At present, the trade between India and Pakistan is tilted in favour of India.

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Australia looking to strengthen trade relations with India

Elizabeth Roche, Livemint

Jan 30, New Delhi: Australia is bullish on trade prospects with India and is looking at renewable energy, automobiles, infrastructure, farm businesses and education to expand investments.

"Indian companies will be looking at the clean-tech space, renewables in the next few years," Grayson Perry, commercial counsellor at the Australian high commission, told reporters on Monday. Australian firms are also interested in investing in Indian automotive and infrastructure space, Perry said.

Trade between the two nations is expected to touch A$40 billion in three years, according to Perry. India, Asia's third largest economy, mainly imports coal, gold, copper ore, lead, wool and farm products from Australia.

India needs at least $1 trillion in the next five years to spruce up its infrastructure, which is slowing growth in one of the world's fastest growing major economies, according to commerce and industry minister Anand Sharma.

Australia is well placed to partner India in the infrastructure space, with the country boasting of a number of mid- and large-sized companies with expertise in partnering with the government, Perry said.

"If you are looking at another opportunity for India and Australia, it is in the auto sector," he said. "We have a very open auto sector. Australia is only one of 13 countries across the world that can build a car from the drawing board to rolling the car out of the factory."

"We have an auto mission coming out to India at the end of February, 18 companies in the auto space, all of them have a whole lot of good products," Perry said, adding that the companies are looking at sharing technologies with Indian partners.

Ties between India and Australia have been buffeted in recent years by many factors that included Australia's refusal to sell uranium to India and a spate of alleged racial attacks in 2009 on Indian students studying in Australia. But a move by Prime Minister Julia Gillard's ruling Labor Party to overturn the ban on selling uranium that fuels nuclear power plants has led to a thaw.

Education, which involves vocational training, executive management service, retail services or hospitality, continue to be an area of interest to Australian firms, Perry said. "There is a massive gap in training that India needs and the capacity it has at present, so that is probably the number one big-ticket item for Australia," Biswajit Dhar, director general at Research and Information System for Developing Countries, a New Delhi-based think tank, welcomed the idea of increased joint ventures between Australian and Indian firms.

“In trade, Australia maintains a surplus in goods and services. Their investments here could help address this. One of the issues before India was that we were not getting access to the Australian market and that is why we started free trade talks” with Australia last year.

“Right now, we don’t have any substantial presence in the Australian market, so joint ventures are a good way to address this,” Dhar said.

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Not worried on WTO fallout in single brand FDI: Virbhadra

PTI

New Delhi, January 13: Government today said that it is not unduly worried on any WTO implications of the decision to make 30 per cent sourcing compulsory from domestic small firms by foreign single brand retailers.

"When government takes a decision, it is after due consideration and after taking views of all the concerned departments," Minister of Micro, Small and Medium Enterprises (MSME) Virbhadra Singh told PTI.

He asserted this, when asked whether the decision can be challenged in the World Trade Organisation (WTO).

"Nobody can stop anybody from challenging it, they can challenge it. We will cross the bridge when it comes," he said.

The government has notified 100 per cent foreign direct investment (FDI) in single-brand retail paving the way for foreign brands like Reebok and Nike to have complete stake in their retail outlets in India.

But, the decision has a rider for compulsory sourcing of at least 30 per cent of goods from domestic small and cottage industries by the foreign retailers who want to have more than 51 per cent holding in their Indian ventures.

Singh also sought to allay concerns of the domestic small industries over implementation of the decision on FDI in single brand retail.

Immediately after the notification on January 10, the Federation of Indian Micro, Small and Medium Enterprises (Fisme) had expressed doubts whether domestic MSEs would benefit.

According to the government, the sourcing from local industry would help generate jobs and add value to Indian products.

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A European pill best avoided

S. Srinivasan, Business Line (The Hindu)

The proposed India-EU FTA will compromise our generics segment and health security.

January 3: Even as India's generic pharma industry establishes itself as a major supplier for developing countries, barriers are being put up to inhibit the free flow of trade. The WTO was set up to ensure that trade flows “as smoothly, predictably and freely as possible.” Its multilateral dispute-settling mechanism has been functioning reasonably well, though it has its share of critics.

All this is set to change with bilateral free trade agreements (FTAs). Secret negotiations have been on — since 2007, with early 2012 as the deadline — between the Government of India and EU for finalising the India-EU FTA. Indeed, one needs to ask why these negotiations are conducted without consulting Parliament and State Governments.

PROPOSED TRIPS REGIME

The basis of bilateral FTAs is reciprocity, but reciprocity between unequal partners never works — well, it always works against the interests of the less equal party. To illustrate how unequal: India's GDP is 3 per cent of the EU's GDP; while India accounts for just 1.8 per cent of the external trade of EU, the EU accounts for 20 per cent of India's trade; India's largest source of FDI is EU, while India accounts for 1 per cent of EU's total FDI.

The India-EU FTA aims to liberalise “substantially all trade” between the two trading blocks on a “reciprocal” basis and apart from trade in goods, the FTA will have substantive provisions on services, investment, public procurement, intellectual property (IP) rights and some other areas.
The proposals on IP are likely to create new hurdles for generic medicine manufacturers in particular. The IP measures demanded are ‘TRIPS Plus' — that is beyond what is mandated by TRIPS/WTO. These include data exclusivity, patent term extensions, enforcement measures, border measures, increase criminalisation of IP infringement under the guise of acting against “counterfeit” medicines.

Acceding to data exclusivity measures would delay entry of generics in India. It will require generic manufacturers to repeat the clinical trials already done by the originator company. Such an act would be a violation of human rights, where proving bio-equivalence to the originator's products would have sufficed.

In Guatemala, a study published in 2009 in *Health Affairs* concluded that IP measures on data exclusivity and patents of the CAFTA (Central American Free Trade Agreement) were “responsible for the removal of several lower-cost generic medicines from the market in Guatemala and for the denial of entry to a number of others.”

Another way to delay entry of generics — and this was being demanded earlier in the EU-India FTA talks — is the extension of patent term beyond the TRIPS-mandated 20 years, calculated usually from the

date of filing of the patent. The move is to “compensate” for the time taken by the patent office to examine the patent and by the Drug Controller General of India to approve for marketing and manufacture.

BROADER PUNITIVE STEPS

Closely allied to these are IP enforcement measures: injunction provisions, border measures, and third party liability. Border measures in the proposed FTA legitimise the seizure of goods on visual inspection/mere suspicion of IP infringement, and even destroy seized goods — this is what happened in the several seizures of medicine exports from India to Africa/South America while transiting Amsterdam. This interferes with India's freedom to export generic medicines to countries in need and the right of such countries to import such medicines.

TRIPS allows for seizure only on violation of copyright/trademark and, that too, at the border only. The proposed TRIPS-Plus border measures applies not only to import, but to export, re-export, goods in transit and the duty of intermediaries to disclose information.

Also on the anvil is a proposal — called third party liability — to hold to task everybody involved in the supply, sale and manufacture of “counterfeit” goods. And this would make liable those in the trade chain as well as suppliers of bulk medicines and excipients used to make the medicine.

Injunction provisions being suggested in the FTA will make it incumbent on the Indian judiciary to give preference to IP status of medicines over the health rights of the poor, sometimes giving injunctions even before patent validity is established.

INVESTMENT PROPOSALS

Investment in EU-India FTA is being sought to be defined to include “IP rights, goodwill, technical processes and know-how as conferred by law.” Foreign investors, if the investment proposals go through, would be able to sue the Government of India if any measures (say price control or compulsory licensing) taken by the Government, are seen not to protect their investments (read IP / patent rights, or profits or “goodwill”).

The resulting arbitration will be before secret arbitral tribunals in places like London or Singapore. The decisions arrived at are binding and cannot be challenged under national laws.
Till date, at least 81 governments have been sued in more than 400 investment treaty arbitration claims. Millions, and in some cases billions, have been paid by governments to investors, as a result of such arbitration. Chapter 11 of the North American Free Trade Agreement (NAFTA) has helped North American investors sue Mexico, a developing country, and of course helped US investors sue the Canadian government and the other way around.

Investment proposals, first conceived in then West Germany, in 1957, are a “legal monster” that refuses to go away. Finally, the chickens have come home to roost with recent news of Germany's nuclear phase-out being challenged by the Swedish energy company, Vattenfall.
A Government of India that is reluctant to issue compulsory licenses will be further inhibited, when such draconian investment proposals are in place, to use TRIPS flexibilities for public health reasons.

Additional investment proposals are being sought in the name of “fair and equitable treatment” and “full protection and security” to investors. These terms are undefined as the case law on this is still a work in progress and it is left to the arbitral tribunals to determine what is “fair and equitable”. Arbitral decisions often aren't concerned with the public health motivations behind any regulatory action.

A related requirement that is being put forward is granting European investors the same treatment as domestic investors. This isn't fair, as governments giving preferential treatment to local stakeholders, say SSIs, can be sued. Indeed, some of the proposed “performance requirements” provisions make it illegal to ask foreign investors to use local inputs and local personnel.

At stake is access to low-priced medicines for millions of poor patients in Africa and Latin America who source medicines from India's generic medicine industry.

The EU Parliament routinely instructs the European Commission on what stands are to be taken on various contentious issues in the FTA. We would wish our Parliament and our courts take *suo moto* action to take the India-EU FTA out of the closet and put it in public domain, before letting the Government sign on the dotted line — and sign away, perchance, our health security, and the livelihoods of the poorest. *(The author is associated with LOCOST, Medico Friend Circle and All India Drug Action Network.)*

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Indian government in U-turn on retail reform

Ben Sheppard, AFP

New Delhi, December 7, 2011: India on Wednesday suspended plans to open its $470 billion retail sector to foreign supermarkets such as Wal-Mart, in a major U-turn forced by an outcry from small shopkeepers and opposition MPs.

The climbdown was a grave embarrassment for Prime Minister Manmohan Singh's government, which had announced the retail reform with great fanfare just two weeks ago.

The arrival of international chains such as Wal-Mart, Carrefour and Tesco in India was expected to herald a consumer revolution with shoppers moving from small, neighbourhood stores to large, out-of-town supermarkets.

But anger over the planned reforms united "mom and pop" store owners, trade unions, influential state leaders and opposition lawmakers who have paralysed parliament over the issue.

"The decision to permit 51 percent (foreign direct investment) in multi-brand retail will be suspended till a consensus is developed through consultations," Finance Minister Pranab Mukherjee told parliament.

The Federation of Indian Chambers of Commerce and Industry (FICCI), the country's leading business body, described the government's reversal as "deeply disappointing".

"It is a highly regressive move," it said in a statement. "For the economy as a whole it is imperative that the reforms like these should take place."

Observers added that the capitulation would fuel criticism of indecision and policy drift within Singh's administration amid worsening economic data and a series of corruption scandals.

"This is a huge setback and will not go down well with foreign investors," said P. Phani Sekhar, fund manager with Mumbai's Angel Broking.

Sushma Swaraj, parliamentary leader of the main opposition Bharatiya Janata Party (BJP), which had spearheaded opposition to the reform, mocked the government benches as she welcomed Mukherjee's announcement.

"Bowing down to the popular sentiment is not a defeat for the government," Swaraj said. "That the government bowed down before popular sentiment is a great victory for democracy."

The U-turn was confirmed earlier Wednesday at an all-party meeting aimed at breaking the parliamentary logjam.

In his statement to parliament, Mukherjee said he hoped the house would now make the most of the 10 remaining days of the current session to pass a host of pending bills, including key legislation on corruption and food subsidies.

The suspended reform would have allowed foreign firms to hold a 51 percent stake in "multi-brand" chains, posing the threat of sharp competition to traditional shops.

Kishore Kharawala, general secretary of the National Association of Small Traders which helped organise a one-day strike against the reforms last week, welcomed the government's retreat.

"Any decision which goes towards protection of national interests is welcome," Kharawala told AFP in Mumbai. "We will continue to oppose the policy if the government tries to introduce it again."

Premier Singh and many industry leaders had argued that a modern retail system would benefit consumers, create new jobs and enable farmers to reduce wastage.

The sector is worth an estimated $470 billion in annual sales, with high growth potential as India's 1.2 billion people move towards a more Western-style consumer economy.

An Associated Chambers of Commerce and Industry of India (ASSOCHAM) survey, published at the weekend, had suggested that 90 percent of consumers believed the measure would lead to more choice and lower prices.

More than 75 percent of farmers said direct dealings with retailers would cut out middle-men, help to get better value for products and lessen huge losses of perishable items.

But the poll of 2,000 people in 10 major cities also indicated that 80 percent of convenience store owners were opposed, saying that "big box" stores were not as flexible in terms of home delivery and credit services.

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RBI for stable FDI inflow to gap current account deficit

Press Trust of India

Mumbai, November 30, 2011: The Reserve Bank of India (RBI) prefers a stable foreign investment flow to gap the current account deficit, Deputy Governor HR Khan said here today.
"We have capital scarcity and our current accout deficit (CAD) continues. Thats why, we look forward to have stable FDI inflow. We will not like Indian economy to have too much of exposure on the debt sector," Khan said.

A recent report by the Prime Minister's Economic Advisory Council had said the CAD will be around 2.7% of the GDP in the current fiscal. However, with the decline in exports and rising import bill, it is being feared that the deficit will widen further.

Inflows through the FDI route are more stable while foreign institutional investors' money is more fickle.

Citing the East Asian crisis of 1997, Khan said RBI has adopted a stance of going slow on opening the debt market for foreign investment.

He pointed out that some East Asian nations were in trouble in the past due to opening up their debt market too soon.

Referring to global FDI flow, he said, "Post-crisis, there was a lull in investment. It (global FDI flow) was almost stagnated $1.1 trillion in 2010. But, in 2011 first half, there is slight increase. But, there can be bit of issue due to happenings in the world."

He, however, pointed out that despite occasional hiccups, India remains one of the most preferred investment destinations in the world.

On impact of ongoing debt crisis in Europe on India, Khan said that recent developments had created major concerns across the world, which is certainly going to affect investors' apetite.

"We have been certainly insulated (in the past), but we can't be totally decoupled (from the global economy). The more and more, we globally integrate, we derive the benefits and also have to pay the price of this," he said.

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FDI Policy in Multi Brand Retail

Ministry of Commerce Press Release

28 Nov 2011, New Delhi: Government's attention is drawn to reports in some section of media on various elements of FDI policy in Multi brand retail:

The policy cleared by Union Cabinet on 24th November stipulates that FDI in multi brand retail will be allowed upto 51% foreign equity through the government approval route, subject to adequate safeguards for domestic stakeholders.

The policy rollout will cover only cities with a population of more than 1 million(As per 2011 census, there are only 53 such cities whereas there are 7935 towns and cities in India)

The policy mandates a minimum investment $ 100 million with at least half the amount to be invested in back end infrastructure, including cold chains, refrigeration, transportation, packing, sorting and processing. This is expected to considerably reduce the post harvest losses and bring remunerative prices to farmers.

Sourcing of a minimum of 30% from Indian micro and small industry having capital investment of not more than $ 1 million has been made mandatory. This will provide the scales to encourage domestic value addition and manufacturing, thereby creating a multiplier effect for employment, technology up gradation and income generation.

India has a federal structure of government. The FDI policy is an enabling framework and it remains the prerogative of the states to adopt it. On ground implementation of policy will clearly be within the parameters of state laws and regulations.

A strong legal framework in the form of Competition Commission is available to deal with any anti competitive practices including predatory pricing.

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FDI: Sourcing from small units will benefit exporters: FIEO

Special Correspondent ,The Hindu

The move will help establish backward-forward linkage, says Consortium of Indian Farmers Associations

November 29,2011: The Federation of Indian Export Organisations (FIEO) and the Consortium of Indian Farmers Associations (CIFA) have welcomed the decision of the UPA-II Government to allow 51 per cent foreign direct investment (FDI) in multi-brand retail sector stating it would increase exports and benefit the farmers.

In a statement issued here, Chengal Reddy, Secretary General CIFA, said he believed that this move of the government would help in establishing backward-forward linkage. It will help farmers in establishing producer groups and supplying to retailers directly leading to elimination of middlemen at four or five different levels.

Mr. Reddy said currently 30-40 per cent of all farm produce gets wasted due to an efficient link between the farm and the consumers. Infusion of new technology and funds would enable farmers to get inputs on best practices and help them in getting extension services.

The statement said producer groups would be able to get assured price as they have to enter into agreement with the retailers for continuous supply and said the fears of small traders being affected were unfounded as large retail outlets would be established only in mega cities covering perhaps 10-15 per cent of the population.
He said CIFA felt that this move would encourage farmers to become producer groups and have better bargaining power in future and competition among Indian and foreign retailers would increase competitiveness and fetch better price and services to farmers.

He said crop holiday and farmer suicides were directly related to failure of marketing which was a glaring failure of the agriculture sector. FDI in multi-brand retail will help in finding a solution.
On the other hand, Ramu S. Deora, FIEO President, said the 30 per cent sourcing from domestic small units, artisans, craftsmen and cottage units would provide further boost to exports. Units supplying to large retailers will achieve requisite quality and price competitiveness to graduate to exports. This will largely benefit exporters of textiles, leather, gems and jewellery, handicrafts, jute, coir and other lifestyle products. “This will also create jobs in these sectors and enhance their capabilities as retail buyers buy in bulk for their global re-distribution. Chile has been largely benefited with multi-brand retail in pushing its exports of wine and fruits across the globe,” he said.

He said farmers would be able to access the world market as efficient producers-sellers linkage would be established which would be more remunerative for producers. Indian farmers receive only 30 per cent of the price paid by consumers as compared to 50-70 per cent in developed markets. A structured retail would, therefore, enable better price discovery, he said.

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Retail, local sourcing & WTO

Amit Sen, Economic Times

Nov 29, 2011: *WHAT IS LOCAL CONTENT REQUIREMENT & IS IT PROHIBITED BY WTO?*

Local content clause makes it must for foreign cos to source a certain percentage of their inputs from the host country. Local sourcing is prohibited under the Trade Related Investment Measures, or TRIMs, Agreement, introduced during the Uruguay Round of WTO in 1995.

HAS ANY NATION EVER LOST A DISPUTE RELATED TO LOCAL CONTENT?

In 1997, the US, Japan and the EU filed a case against Indonesia for granting luxury tax exemption to auto-makers who sourced 60% of inputs locally. The WTO ruled that the exemption could not be allowed under TRIMs. Japan has also filed a case against Canada for making local sourcing must for green projects.

HOW IS THE GOVT DEFENDING ITS DECISION ON SME SOURCING NOW?

The commerce department has said that it has already made domestic sourcing compulsory under the Jawaharlal Nehru National Solar Mission. So, this won't be the first instance of compulsory local sourcing

CAN INDIA HOPE FOR ANY RELIEF IF IT IS TAKEN TO THE WTO NOW?

One possible argument that India could use in its defence is that the TRIMs agreement applies to goods and retail is actually a service. But the possible counter argument to this could be that sourcing by foreign investors in retail would ultimately affect trade and hence could not be subjected to different rules.

HAS INDIA EVER GOT INTO TROUBLE FOR MAKING DOMESTIC BUYS MUST?

India has got into trouble at the WTO with the US and the EU complaining that the local sourcing provision in the solar mission violates the TRIMs Agreement. However, no formal case has been filed yet.

WHY IS INDIA TAKING A CHANCE THEN?

It takes a long time for a WTO dispute settlement panel to be constituted even after a formal complaint. Even after the panel is formed, it takes years for a verdict to be reached. Confronted with political turmoil, the govt is safer taking on a distant body.

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India, Russia to set up public-private investment fund for key projects

Vinay Shukla, PTI

Moscow, Nov 18, 2011: India and Russia Friday decided to set up a joint public-private investment fund for financing key projects in the two countries.

With Russia's imminent accession to the World Trade Organisation (WTO), New Delhi and Moscow are gearing up to take several key steps to further strengthen economic ties and achieve a bilateral trade target of USD 20 billion by 2015.

The decision to set up the fund was taken at the 17th session of the Indo-Russian Inter-governmental Commission on Trade, Economic, Technological, Scientific and Cultural Cooperation (IRIGC-TEC).
The meeting was co-chaired by External Affairs Minister SM Krishna and Russian Vice-Premier Sergei Ivanov.

The size of the fund, for setting up projects in Indian states and Russian regions, and other modalities are yet to be worked out by the two sides.

Krishna was here on a three-day visit to finalise the political and economic agenda of Prime Minister Manmohan Singh's summit talks here on December 16, with Russian President Dmitry Medvedev and Prime Minister Vladimir Putin.

Several key agreements including those on on energy are expected to be signed during Singh's visit.
"Both sides have agreed on four important sectors to galvanize the bilateral trade and for fructifying cooperation," Ajay Bisaria, Joint Secretary (Eurasia) External Affairs Ministry, told the reporters after the IRIGC-TEC session.

The two countries are plan to form a joint study group to examine the possibility of a comprehensive Economic Cooperation Agreement (CECA) with the Russia, Belarus, Kazakhstan Customs Union.
Under the Customs Union that came into operation in July 2010, Belarus, Russia and Kazakhstan agreed to remove tariffs and customs controls.

The two sides are also to work on enhancing connectivity through International North-South Corridor linking India with Russia via Iran and Central Asia, to ensure speedy movement of goods and cargo.
Special emphasis is being given to set up a Joint Working Group on Modernisation to boost bilateral and multilateral technological interaction with BRICS.

The meeting noted the progress in areas, including energy (conventional and civil nuclear), IT and telecom, metallurgy, automobile industry, pharmaceuticals, gems and jewellery, banking and financial services, construction of roads and underground metro, science and technology, tourism.

Cooperation in mining, railways, water transport, aviation and ship building, bio and nano-technologies, production of fertilisers and chemicals, agriculture and textiles have been identified as the promising areas of bilateral cooperation.

The Ministry of Chemicals and Fertilisers and the Ministry of Industry and Trade of Russia have signed a memorandum on cooperation in pharmaceuticals and bio-pharmaceuticals, details of which were not immediately available.

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Govt shelves plan to allow FDI in multi-brand retail

Anjali Prayag & Shishir Sinha, Business Line (The Hindu)

22 October 2011:The Government is learnt to have dropped its plan to open up FDI in multi-brand retail thereby derailing the Indian foray of global retail players such as Wal-Mart, Tesco and Carrefour.

Mr Thomas Varghese, Chairman, CII's National Committee on Retail, told Business Line that according to the latest developments in the Government, "the matter has been put on ice," adding that it's unlikely to "happen." The Indian retail sector is estimated to be worth about $500 billion.
Foreign direct investment is not permitted in multi-brand retail in India. However, single-brand outlets are allowed up to 51 per cent foreign investment. In wholesale, or 'cash and carry', trade, up to 100 per cent FDI is allowed.

It may be recalled that at a recent luxury brands summit organised by the CII in Delhi, the Minister of Commerce and Industry, Mr Anand Sharma, made an announcement that the 51 per cent FDI cap on single brand outlets would be hiked.

Industry sources termed it as a step to appease retail trade as the Government had more or less made up its mind not to open multi-brand FDI.

An official in the Ministry of Consumer Affairs, Food and Public Distribution said that after the Committee of Secretaries gave its recommendation on opening up of multi-brand retail, it was up to Department of Industrial Policies and Promotion (DIPP) to circulate the note to the Cabinet and "they have not heard anything from there".

On Thursday, the Chairman of the Economic Advisory Council to the Prime Minister (PMEAC), Dr C. Rangarajan, turned down the view of the Inter-Ministerial Group (IMG) on opening up multi-brand retail. The IMG had advocated opening up of FDI in multi-brand retail to contain inflation, but Dr Rangarajan questioned as to "how many aspirant multinational companies will be interested in setting up contact point for the farmers".

With the Government dragging its feet over the issue for about seven years now, Mr Arvind Singhal, Chairman of consulting firm Technopak Advisors, said he "would be surprised if FDI opens up now".

The Government should have an articulated view on opening up FDI whether it is single-brand or multi-brand retail, he felt.

Mr Varghese, who is the CEO of Aditya Birla Retail that operates the 'More' chain of retail supermarkets and hypermarkets, said that industry was now looking forward to FII investments in the sector.

"We are okay with a foreign institution investing in our company because large chains like ours don't need a name. We can outperform foreign retail brands."

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India pledges 'early' decision on foreign retail

Agence France Presse

3 August 2011: India will make an early decision on whether to allow foreign direct investment in its vast retail market, which would be one of the country's biggest economic reforms, a minister said Wednesday.

Multi-brand global companies such as US-based Wal-Mart currently operate as wholesalers but cannot sell directly to the Indian public, amid fears that big international retail chains could swamp small family-run stores.

"Once recommendations formally reach my table, we will take an early and appropriate policy decision," Commerce Minister Anand Sharma told parliament, hinting that the decision would be in favour of loosening restrictions.

The decision will be in "supreme" national interest and create millions of jobs across the country, Sharma said.

India's tight foreign investment rules are aimed at protecting small "mom-and-pop" stores in the sector where less than 10 percent of consumers shop in bigger, well-known department stores.

The minister's statement came after a panel of top government bureaucrats approved a plan to liberalise the retail sector whose annual sales are estimated at around $450 billion annually.

The policy change would mean foreign retailers could start selling to Indian shoppers through partnerships with Indian retailers and be allowed to hold up to a 51 percent stake in local joint ventures.

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Special treatment to telecom equipment companies violation of WTO rules: Commerce Ministry

Joji Thomas Philip, ET Bureau

Mar 20, 2012: The commerce ministry has warned that India's plans to give preferential access and tax cuts to indigenously manufactured telecoms equipment, and also mandate that mobile phone companies buy a bulk of the networks hardware from domestic companies, violates multilateral agreements and international commitments made by the country.

It has said that plans to give preferential market access to domestically manufactured products was against the provisions of the Trade Related Investment Measures (TRIMs) agreement under the World Trade Organization trade treaty, of which India was a signatory. The commerce ministry has further said that providing subsidies to use domestically manufactured equipment was against the principles of the Agreement of Subsidies and Countervailing Measures (ASCM).

Trade Related Investment Measures, the rules that restrict preference of domestic firms and thereby enable international firms to operate more easily within foreign markets, is amongst the four principal legal agreements of the World Trade Organization trade treaty. Subsidies are also not prohibited under WTO unless there is evidence of injury or damage to the importing country. The Agreement on Subsidies and Countervailing Measures is aimed at preventing countries from giving their firms an unfair competitive advantage through trade distorting subsidies.

The telecoms department (DoT) has already approved sector regulator's recommendations that mobile phone companies be mandated to source 80% of their network equipment and other related infrastructure from domestic manufacturers by 2020. But this also includes network and other hardware produced by the manufacturing units of foreign vendors located in India. Trai had also recommended that companies owned by Indians and located here get 65% of all telecom network orders by 2020. Put simply, the regulator had sought that manufacturing arms of international vendors such as Ericsson, Alcatel-Lucent, Nokia Siemens, Huawei and ZTE mongst others to account for only 15% of all equipment orders by 2020. These new rules, aimed at making the country a mobile equipment manufacturing hub, will be part of the new telecoms policy that is set to be unveiled in April. The DoT has also agreed to Trai's proposal that the new rules be implemented in phased manner. For instance, by 2015, mobile phone companies be mandated to source 45% of all telecoms equipment domestically, and Indian companies must account for 25% of this.

"To suggest that domestically manufacturing 35% or even 80% of the telecoms equipment, security concerns like protection from malwares , denial of service software can be achieved, is an argument that may be difficult to sustain. Clearly, the purpose of Trai's recommendations, stands out as promoting domestic manufacture and not security," the commerce ministry communication (dated March 12) to telecoms secretary R Chandrasekhar added.

The commerce ministry has also suggested that the telecoms department refer this issue back to Trai, 'pointing out the potential violation of international commitments if these proposals were converted into law'.

The proposed new rules also states that mobile phone companies that fail to secure network related hardware domestically will be subject to financial penalties equivalent to certain percent of their imports.

Domestic telecom equipment makers are also slated to get loans for five-year period on subsidized terms in addition to a 10-year income tax holiday and concessions on excise duty and VAT. The government also plans to set up a Rs 10,000crore telecom R&D fund and a Rs 3,000crore mobile equipment manufacturing fund to support local hardware manufacturers.

The European Union, Japan and US has already raised concerns on the proposed policy and has objected to clauses that mandate sourcing from Indian-owned companies. ET had recently reported that US Assistant Trade Representative (south & central Asia) Michael J Delaney in a communication to the telecoms department had said that it was not pragmatic to create the entire supply chain of telecom gear in India, given the globalised nature of the industry.

"With the growing scale of a globally distributed and complex supply chain with interconnected sets of organisations, people, processes, services, products and components, it is not practical to assume the eventual establishment of an entire supply chain of ICT products in India," the US trade envoy wrote in an internal note to the department's security wing chief Ram Narain.

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FDI in multibrand retail will not further reform agenda

Manoj Pant, Economic Times

July 13: The crisis of the euro, a current account deficit of over 4%, double-digit inflation, corruption in governance and a failing political system. It would not be unfair to say that these factors have combined in varying degrees at different times to lead to the conclusion that the globally-acclaimed India growth story seems to be heading for an unhappy ending.

Many have labelled this - unfairly, I think - as India's second crisis comparable to 1991 when the reform story began. Backed by the media, the economic reformers have argued that much of this is due to the 'incompleteness' of the 1991 reforms. Many have argued that this crisis should be used to take reforms forward.

The direction? FDI in multi-brand retail and pension funds, the general goods and service tax and the Direct Taxes Code. In this article, I will focus on multi-brand retail. This has been in particular focus because, presumably, permitting FDI in retail trade will improve the unfavourable investment climate. I will argue here that while it is true that economic reforms have been incomplete, FDI in retail trade is no solution, and is only a symptom and not the cause of incomplete reforms.

To tell my story, it is necessary to start with the economic reforms of 1991. The background of the balance-of-payments crisis is well known. The main objective then of reforms was to eliminate the administrative shackles of the licence raj. How this was achieved is crucial to understanding the story I am trying to tell. What were the main features of the 1991 reforms? It is useful to do a sectoral check.

Here, the main sectors where reforms took place after 1991 were the external sector, industry and the financial sector.

In the external sector, the two principal steps taken were to reduce tariff levels and to free the exchange rate from administrative control. In the case of tariffs, a system of quantitative, or administrative, restrictions was replaced by equivalent tariffs that were then progressively reduced under WTO agreements. In the same way, administrative restrictions on exchange rate movements were removed as the rupee was allowed to devalue in stages over the following years.

In the industrial sector, the major change was the Industrial Licensing Policy, 1991, which removed administrative control of production, the licence raj, enshrined in the 1957 policy. In the same vein, external competition was encouraged via foreign direct investment (FDI) that was given preferred status vis-a-vis portfolio investment. Finally, financial sector reforms took the form of the broadening of the market for equities and opening up the state-owned banking sector to competition from both foreign and domestic banks.

Since 1991, then, reforms have taken the form of further decontrol along the lines indicated above. The most crucial feature of these reforms was that they only required legislation by the central government. And herein lies the problem.

The major sector left out of the reform process was the agriculture sector. This is true whether one talks of corporate links to farmers, reform of the antiquated government purchase system (the APMC Acts), land-use issues and so on. This was because while the other sectoral reforms could be blamed on an uncaring central government, agriculture was a state subject. Since legislators are voted in at the state level, any reform in the agriculture sector could have major political implications. Some reforms were necessary. But who would bell the cat?

Now consider FDI in multi-brand retail. The main argument is that it would lead to creation of storage facility for food grain so that the current 40% wastage in government facilities would be ended. This would also increase market supplies and, hence, help in combating inflation. However, it is not clear why the domestic players in multi-brand retail have not developed these facilities - if profitable - over the last decade or so, and why foreign investors would suddenly jump into this high-cost activity. The ability to buy food grain for stocking would also be stymied by state APMC Acts - still applicable in most states - whereby private buyers are pre-empted by government managers as grain can only be sold in designated outlets. There is the additional problem of a ban on inter-state movement of food grain. But removal of these bottlenecks requires major reforms in the agriculture sector and this is the domain of state governments.

The bottomline? It is necessary to remove administrative controls on the agriculture sector that today benefit only the large (politically well-connected) farmers. As in the other sectors, this will create the economic conditions whereby issues like FDI in multi-brand retail will find less political resistance. The Indian growth story rests on its demographics and is alive and kicking. To argue that this needs FDI in multi-brand retail or sectors like pension funds to kick-start is poor understanding of macroeconomic fundamentals.

(The author is faculty at JNU)

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Centre mulls renegotiating bilateral investment pacts

Vrishti Beniwal, Business Standard

New Delhi, July 23, 2012: With Vodafone, Sistema and Loop Telecom, among others, serving notices on the Government of India for international arbitration on tax or licence disputes, the latter is considering renegotiating its Bilateral Investment Promotion & Protection Agreement (Bipa) with diverse countries, to introduce provisions barring investors from taking such recourse. The government also wants it stated clearly that a Bipa does not cover taxation.

The proposed move is aimed at putting an end to the confusion on whether an international court can override the decisions taken by an Indian court, especially the Supreme Court. A favourable ruling for the investor in an international court can put the government in a fix.

“A number of Bipa clauses need to be revised. If you are taking legal recourse under domestic law, then you can’t seek protection under international law. It has to be either of the two,” an official told Business Standard.

A Bipa was supposed to promote and protect, on a reciprocal basis, the interests of investors of either country. The official said taxation issues were already outside the ambit of a Bipa, but there was a need to say it more explicitly.

Inter-ministerial groups, comprising representatives from the finance, telecommunications, commerce and law ministries, are looking into all the notices served under a Bipa.

Article 4 of a Bipa agreement requires each government to treat investments from the treaty country on par with the treatment given to its own investors or investors of any other third country. It, however, says departures from this would be permissible on matters concerning taxation, among others.

The government has so far signed such pacts with 82 countries; more are being negotiated. All the new agreements are likely to have these clauses. Talks for a Bipa are currently on with Canada, Brazil, Iraq, Nepal, Norway, South Africa and the UAE.

Another official said while there was a need to review the pacts in the light of changed circumstances, the government would tread cautiously, keeping in mind the repercussions it could have on investors. The purpose of a Bipa is to increase the comfort level of investors, by assuring a minimum standard of treatment in all matters and provide for a way to settle disputes with the host country.

In April, British telecom company Vodafone’s Dutch subsidiary served a notice of dispute on the government under the India-Netherlands Bipa. It asked the government to abandon the retrospective amendments in the Income Tax Act that could make it liable to pay a tax of over Rs 12,000 crore. The government had told Vodafone the notice was premature, as it had yet to serve a notice.

When the Supreme Court cancelled spectrum licences of 11 telecom companies in February, Sistema (Russia), Loop (Mauritius) and ByCell (Cyprus) served notices alleging a Bipa breach. Telenor also sent a notice under the Comprehensive Economic Cooperation Agreement with Singapore.

Besides, notices have also been served by Devas Employees (Mauritius) and The Children's Investment Fund Management (UK and Cyprus). One case of White Industries under the Bipa between India and Australia went against the government in September 2011.

One case of White Industries under the Bipa between India and Australia went against the government in September 2011.

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