



INDIAN LEGAL AND BUSINESS UPDATE
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1. Green Tribunal to be set up shortly

The government is expected to set up the National Green Tribunal, the first judicial body to deal exclusively with environmental laws, over the next two months or so. The Chief Justice of India will help select its chairman. Lok Sabha passed the National Green Tribunal Bill on April 30, 2010. The tribunal is the first serious attempt in the country towards environmental rights. It will be the first time an individual will have the right to claim civil damages for an environment-related accident, including any adverse health impact.

A retired or current judge of the Supreme Court or the chief justice of a high court will be appointed as the chairman of the tribunal. The tribunal will have four circuit benches which will travel from place to place to deal with cases. It will deal with all environmental laws on air and water pollution, the Environment Protection Act, the Forest Conservation Act and the Biodiversity Act.

The Green Tribunal Bill was amended to make sure that individuals and not just institutions or non government organisations could appeal before the green tribunal. With some 5,000 environment-related cases pending across courts in the country, it is possible that the tribunal too may soon have an overload of cases.

2. Government bans FDI in cigarette manufacturing

India closed the doors on new foreign direct investment in cigarettes. The Cabinet Committee on Economic Affairs decided on this move. The ban applies to new proposals and will not have any impact on existing equity stakes held by overseas companies.

Under the existing policy, FDI up to 100 per cent was allowed in tobacco, with prior permission of the Foreign Investment Promotion Board (FIPB) and subject to company obtaining an industrial licence. The policy allowed 100 per cent FDI for companies which wanted to set up a manufacturing plant in a special economic zone for exports.

This policy had come under attack from the Ministry of Health, which initiated the proposal to ban FDI in tobacco altogether. It was the ministry's contention that as signatory to the Framework Convention on Tobacco Control, India had the responsibility of reducing consumption.

3. Finance Ministry's proposal to keep FII inflow out of sectoral caps

The finance ministry has suggested easing of the rules for calculating foreign investment in a company. The proposed rules, which take out sundry entries of indirect investment, will make life easier for companies which have high foreign institutional investment and face the risk of breaching sector specific caps. The ministry has said that portfolio investment by foreign institutional investors (FIIs) purchase of shares and convertible debentures by non resident Indians (NRIs) and those by persons of Indian origin (PIO) should be excluded when calculating foreign investment in a company.

Under the much debated Press Notes 2, 3 and 4 announced last year, all kinds of foreign investments are included when calculating foreign investment: Foreign direct investment (FDI), FII holdings, NRI holdings, American Depository Receipts, Global Depository Receipts, foreign currency convertible bonds, convertible preference shares and convertible currency debentures, among others. These rules apply to downstream investments by companies which foreign holding.

The finance ministry has asked the Department of Industrial Policy and Promotion (DIPP) to prepare a policy for implementation along the suggested lines. The finance ministry has been of the opinion that there is a need to resolve the contradiction between direct and indirect investments and prescribe a composite cap common to both. The proposal is to exclude FII and NRI investments from the overall cap for direct and in direct investments. The view of the finance ministry has been accepted by DIPP.

FIIs, under the regulations for portfolio investments, can include asset management companies, pension funds, mutual funds, and investment trusts as nominee companies, institutional portfolio managers or their power of attorney holders, university funds and endowment foundations, among others.

4. Government considers 100 per cent FDI in Defence

The government is considering a proposal to allow 100 per cent foreign direct investment (FDI) into the country's defence sector, despite stiff opposition from the defence ministry. India, among the world's top 10 spenders on defence, currently allows only 26 per cent FDI in the sector. The proposal has been mooted by the department of industrial policy and promotion (DIPP) which is under the commerce and industry ministry. DIPP plans to release a discussion paper soon, charting out the proposal for all stakeholders. The paper focuses, mainly, on manufacture of defence equipment and the impact it would have on India's manufacturing sector. The move to open the doors fully to FDI in defence is aimed at giving a boost to the domestic manufacturing sector. The proposal is currently being circulated to all the departments in the ministries of defence, home affairs and finance for their inputs to be converted into a policy. DIPP has argued that the move has the potential to turn India into a manufacturing hub for defence equipment. The department has already held formal discussions with the defence ministry.

5. Government may relax FDI in retail

The government is considering a proposal to ease foreign direct investment (FDI) rules in the retail sector. The commerce and industry ministry is working on a concept note to allow up to 51 per cent FDI in multi brand retail other than primary goods (foods, groceries and vegetables) but with some stiff riders.

Under the existing rules, FDI is not allowed in retail, except for trade of “single brand” products, where up to 51 per cent foreign investment is permitted. FDI up to 100 per cent is also allowed in wholesale cash and carry trade.

The Ministry is also keen to permit FDI in retail of food grain as well as other essential commodities to create a parallel network to the public distribution system, which has become notorious for its leakages. The core of the plan is to allow FDI in retail, provided the retail stores are located in cities with a minimum population of one million. The move aims to protect vendors in small cities. The ministry may also suggest minimum capitalization norms for companies investing in retail, in addition to a minimum built up area rule for their retail outlets.

6. New law to put insolvency cases on fast track in works

The government plans to introduce a separate legislation to speed up insolvency proceedings and help distressed firms wind up operations quickly. The new law will shorten the legal processes involving insolvency operations of small and medium entities. The government is keen to make bankruptcy proceedings a time bound procedure.

Liquidation process in India is fairly protracted, taking on an average 7-10 years, against 1-6 years in other countries, according to a recent survey. It often yields very little in terms of recoveries and leads to substantial waste of resources and funds.

While the proposed company law has incorporated specific provisions relating to speedy corporate insolvency, the government may go in for an independent insolvency law to make the process more effective, added, requesting anonymity. The idea is to set up a single legislation that will cater to insolvency provisions for all types of business operations like a company, partnership, sole proprietorship firms and limited liability partnership (LLPs).

Under the present framework winding up of a corporate entity is guided by provisions of the Companies Act, whereas personal insolvency is guided by other laws. The new companies bill, which is presently pending with a parliamentary standing committee, deal with only corporate insolvency.

With a large chunk of small entities in the country falling under the sole proprietorship business form, the need for a comprehensive insolvency legislation becomes more important as the proposed bankruptcy code can not easily be made applicable in such cases. On account of phenomenal rise in retail lending, experts feel that it is necessary to re look at the personal

insolvency laws to ensure that any insolvency proceedings against individuals are also expeditiously decided.

7. Tougher FDI norms for housing

The finance ministry has called for tougher foreign direct investment (FDI) norms in the housing and township sector. It has also proposed stringent monitoring to ensure FDI rules are strictly followed in this “sensitive” sector.

The ministry has said a more effective monitoring mechanism could be set up jointly with the ministries of commerce and urban development. At present, 100 per cent FDI is allowed in this sector, but with some riders. However, there have been concerns over the lack of clarity of rules, the need to tighten these and the difficulty in monitoring these. For instance, foreign companies willing to invest in this sector need to have a minimum capitalization of USD 10 million for wholly-owned subsidiaries, and USD 5 million for joint ventures. The funds have to be brought in six months of commencement of business. Also, the minimum area to be developed under each project is 10 hectares.

The government has also imposed a lock-in period of three years for repatriation of investments made in this sector after the minimum capitalization requirements are complete. Also 50 per cent of the project must be completed in five years from the date of statutory clearances and the investor is not permitted to sell undeveloped plots.
