Foreign Investors May Not Be Treated on a Par with Locals

Level playing field only for overseas investors who establish a business in the country

India is likely to stop treating overseas investors on a par with domestic ones until they establish a business in the country, marking a significant change in stance on comprehensive trade and investment agreements from the previous government. Such a move would be of a piece with the finance ministry--concerned that India has given too much away in such accords--gaining a role in the negotiation of investment agreements.

In technical terms, the government is unlikely to allow what is known as `pre-establishment national treatment' in trade and investment agreements. With the government looking to overhaul the country's strategy for trade engagement, the view is that this level playing field should be available to foreign investors only once they have a presence--`post-establishment'--not when they're still considering investment.

“The thinking is that only post-establishment treatment entailed in the bilateral investment promotion agreements should be offered in such trade deals,” said a government official.

Trade experts welcomed what they described as a course correction.

“There was an unnecessary rush to formalise trade deals and India offered pre-establishment national treatment in many of them,” said Biswajit Dhar, trade expert and professor at Jawahar Lal Nehru University. “Pre-establishment national treatment gives foreign investors far more rights than domestic investors.”

Dhar said such treatment allows foreign investors to pursue international arbitration against the government on regulatory clearances such as environmental approvals, something domestic investors can't do.

“FDI-related pre-establishment rights to foreign investors can scuttle a government's sovereign policy-making space vis-a-vis foreign investment inflows,” said Ram Upendra Das, professor, Research and Information System for Developing Countries. “While these should not be compromised with respect to the MFN [most-favoured nation] principle, a sector-based `positive list' approach may be adopted but with due diligence in the realm of `national treatment'.“ FDI refers to foreign direct investment.

FINANCE MINISTRY'S ROLE

The finance ministry had been against allowing pre-establishment national treatment under the India-Asean trade deal but was overruled by the Manmohan Singh Cabinet.

Most countries don't allow pre-establishment treatment as it takes away government flexibility in regulating foreign investments. The argument in its favour is that it increases investor comfort. The finance ministry, which is the administrative agency in charge of all forms of investment, will now be part of the country's team negotiating investment agreements beginning with the Regional Comprehensive Economic Partnership (RCEP).

The finance ministry handles all bilateral investment promotion agreements that give post-establishment national treatment to foreign investors. The commerce department has thus far been negotiating bilateral trade and investment pacts.

CHEQUERED HISTORY

The debate over post and pre-establishment treatment of investment brought to the fore sharp differences between the ministries of finance and com merce and industry over this crucial aspect of the country's engagement with the world in the United Progressive Alliance government.

A fierce turf war ensued between the departments of industrial policy and promotion (DIPP) and economic affairs as the latter was not consulted before commitments were made regarding the investment component in the India Asean Comprehensive Economic Promotion Agreement. DIPP is part of the commerce ministry while the economic affairs department is in the fin min.

A formal Cabinet note on the issue was forwarded to the finance ministry by the Prime Minister's Office after its views weren't found in the note.

The Asean deal was passed by Cabinet after overruling the finance ministry's concerns. Subsequently, the DIPP claimed authority to negotiate bilateral investment promotion agreements that had been under the domain of the finance ministry, citing administrative control of the foreign direct investment policy. It even sought control of the Foreign Investment Promotion Board (FIPB), housed in the finance ministry.

After taking over in May, Prime Minister Narendra Modi decided that the inter-ministerial body would continue to be part of the finance ministry and finance ministry will have the mandate with regard to bilateral investment promotion agreements (BIPAs).

Concerns have been expressed in multiple quarters over the country getting a raw deal in a number of trade agreements, denting its manufacturing sector. The government has already tasked chief economic adviser Arvind Subramanian to study various trade agreements that India has signed, how they have benefited the country and whether any course correction is required.

(Economic Times)