Shifting Bit Landscape of India

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In furtherance of the economic reform and liberalization drive initiated in 1991, India entered into Bilateral Investment Promotion and Protection Agreement, generally referred to as Bilateral Investment Treaties (hereinafter referred to as BIT) with the Government of the United Kingdom of Great Britain and Northern Ireland on the 14th day of March, 1994. India's atypical economic growth and the distinct requirements thereof fuelled this romance with BITs and the same becomes evident when we see that as on 31st March, 2011, India's BIT portfolio had 72 in-force BITs and several others had already been signed and were in the pipeline to be enforced. Nevertheless, it is an undeniable fact that in the last half of this decade, India has been in troubled waters with BITs.

THE WHITE INDUSTRIES AUSTRALIA LIMITED SETBACK

Post 30th November 2011, the same being the date of passing of the Final Award against Republic of India in the White Industries Australia Limited Vs. The Republic of India (hereinafter referred to as White case), the BIT landscape in India changed substantially. Post White case loss, which arguably also happens to be the first known Investment Treaty Arbitration (hereinafter referred to as ITA) ruling against India, there have been an exceeding intensification in the quarter of BIT disputes.

A CASE FOR NEW MODEL BIT

The White case fiasco called for replacement of the Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA) by the New Model BIT. At this stage, although it would be an extreme presupposition to comment about the New Model BIT, even the draft of which is not yet in public domain, certain informal and inclusive parameters might be pitched in keeping in mind the recent legal hurdles faced by India in BIT claims.

DEFINE "INVESTMENT" AND "INVESTOR" WITH PRECISION

The prevailing definition of "investment" and "investor" in the Indian Model Text of BIPA and also the existing in-force BITs is highly inclusive and all-encompassing in nature. It's high time that investment should be defined in an extremely precise and streamlined manner to only include financial investments directly made by an investor by incorporating an entity in India or at least by considering only financial investments made by an investor which has substantial business ties in its nation of incorporation.

PREVENT "NATIONALITY PLANNING" BY INVESTORS

It is imperative that the government should make all necessary arrangements in the New Model BIT to restrict foreign companies having presence in multiple countries to pick and choose the most favourable BIT to invest in India.

BE MISERLY WITH THE "MOST FAVOURED NATION" (MFN) CLAUSE

The MFN clause has perhaps troubled India the most in the White case. White Industries quite successfully argued for the use of MFN clause to draw advantage from the "effective means" provision of India-Kuwait BIT which was otherwise absent in the India-Australia BIT under which the claim was raised by White Industries.

BROADEN SCOPE OF EXPROPRIATION

The present Indian practice of expropriating foreign investments are in accordance with the international values. However, the growing complexity of BIT claims presents a strong case for expansion of the scope expropriation by adding categories of exceptions to justify the need for expropriation.

EXPRESSLY BARRING FEDERAL SUB-CONSTITUENTS BEING MADE PARTY TO ITAS

There must be express provisions in the New Model BIT to bar foreign investors from unnecessarily serving Notice of Claims on the federal sub-constituents of India and making federal sub-constituents of India party to ITAs. The reason being that the federal sub-constituents are never party to BITs and

hence the ITA clauses does not bind the federal sub-constituents to be a party to such arbitrations and bear the ramifications of its award. The legal standpoint on this issue has been a grey area till 2014, until Hon'ble Justice Soumen Sen of the Calcutta High Court, in Board of Trustees of the Port of Kolkata vs. Louis Dreyfus Armaturs SAS & Ors., allowed an anti-arbitration injunction application sought against the investor and BIT claimant Louis Dreyfus Armaturs SAS and restrained it from continuing ITA proceedings against Board of Trustees of the Port of Kolkata. Louis Dreyfus Armaturs SAS had initiated a BIT claim under the 1997 India-France BIT and had named State of West Bengal and the Board of Trustees of the Port of Kolkata as Respondents apart from the Republic of India. The Court in this first of its kind judgement has held that the India-France BIT under which Notice of Claim has been served and whose ITA clause has been invoked, was only between France and India, i.e. two sovereign states, and does not include Board of Trustees of the Port of Kolkata as a Contracting Party to the BIT. The Court recognized that the actions of Board of Trustees of the Port of Kolkata, as an organ of State, could be attributed to the Indian State but it could be named as a party in the BIT Arbitration.

RAISE THRESHOLD BARS FOR INVOCATION OF ITA CLAUSE

There is a considerable need for India to increasingly thrust upon the necessity for the foreign investor to exhaust all legal remedies in India before initiating ITA. However there is also a dire need to make the entire process time bound, to avoid repetitions of similar conditions as existed in White case.

SUBJECT TAXATION ISSUES EXCLUSIVELY TO DOUBLE TAX AVOIDANCE AGREEMENTS

On 20th January, 2012, the Supreme Court of India delivered its judgement in favour of Vodafone with regard to the issue of the taxation of 2007 share-purchase agreement. Thereafter Vodafone filed a Notice of Dispute, under the India-Netherlands BIT, claiming that the Indian government's decision to enact the Indian Finance Bill 2012 sought to retroactively tax the 2007 Agreement notwithstanding the favourable Supreme Court ruling and this, to Vodafone would have been a failure to accord "fair and equitable treatment" under Article 4 of India-Netherlands BIT. The New Model BIT should thus exclude taxation related disputes altogether and let the taxation related matters be instead dealt only under the Double Taxation Avoidance agreements.

THE ROAD AHEAD

The hurdles for India with regard to BITs are not going to scale down in the forthcoming days. Nevertheless, the consequent corrective action from India's end, being the much discussed and speculated New Model BIT should never be a knee jerk reaction to the wakeup call of the adverse White case ruling. The cardinal consideration for India in the New Model BIT should be striking the critical balance between the conflicting interests of all the stakeholders.

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