PRESENTATION ON THE INDIAN MODEL BIT 2015

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Background

- Following economic liberalization in 1991, India started signing Bilateral Investment Promotion and Protection Agreement (BIPA).

- 1st BIPA with UK signed in 1994, last one in 2013 with UAE. Earlier BIPAs were based on the Model text of 1993.

- **As on 2015, 83 BIPAs were signed out of which 74 were in force.**

- Need of review was felt in light of developments in the sphere of ISDS since 1990s and the way various treaty provisions were interpreted

- After extensive review process and deliberations, the Model BIT was revised following approval of Cabinet in **December 2015.**

- The Cabinet also approved termination (and renegotiation) of existing treaties and issuance of Joint interpretative Statement (JIS) for the countries where validity not expired. Accordingly, India is renegotiating BITs with several countries based on the revised Model BIT of 2015.

Objectives of Model BIT of 2015

- Creates a balance – between the rights and obligations of both – states and investors

- It provide appropriate protections to foreign investors, in the light of the relevant international precedents and practices, whilst appropriately preserving the State's sovereign right to regulate

- The definition of investment and investors are aligned to protect only the genuine long term investments.

- The Model BIT is detailed in its provisions and its approach to substantive protections and dispute settlement to minimise too much interpretative authority in the hands of International tribunals

- The Model BIT retains the ISDS system, reinforcing its status as a powerful tool for protection of foreign investors

- The Model BIT recognises the need and promotes sustainable development goals by including a chapter on investor obligations

Key Features of the Model BIT 2015

PREAMBLE OF THE MODEL BIT

- Refers to the key objective of bilateral cooperation between Contracting Parties in matters relating to the encouragement and reciprocal protection of investments to stimulate the flow of capital.

- Use of "sustainable development" reinforces the development goals of investment in terms of the overall framework of the BIT.

DEFINITION OF INVESTMENT & INVESTOR

- The Model BIT adopts an "enterprise" based definition. An "enterprise" based approach equates "investment" with an "enterprise" incorporated in the Host State and aligns the BIT regime with the Indian FDI Policy.
- The definition also clarifies the types of assets of the enterprise which are entitled to protection of the treaty.
- Both juridical and natural persons are qualified as investors under the Model BIT. The Model BIT requires investors to have substantial business activities in the Home State.

SUBSTANTIVE OBLIGATIONS:

- **(a)** ***Standard of treatment:*** The Model it seeks to define the core elements of the MST standard as found in customary international law by replacing it with specific obligations such as denial of justice, fundamental breach of due process or targeted discrimination or manifestly abusive treatment.

- **(b)** ***Non-discrimination:*** National Treatment(NT) is the non-discrimination obligation under the Mode BIT. The Model clarifies that a violation of NT will only be found if the measure discriminates against foreign investors and if the Investments being compared are in "*like circumstances*".

SUBSTANTIVE OBLIGATIONS..(cont..)

- **(c)** ***Expropriation:*** The Model protects investors against both direct and indirect expropriation.
- For the calculation of compensation, the standard provided for is the fair market value of investment.

- **(d)** ***Transfers:*** The Model provides investors the right to transfer funds relating to their investments in and out of the country without restrictions as permitted under domestic law.
- There are broad exceptions to allow the state parties to introduce capital control measures in the event of serious balance of payment problems and financial crisis .

Investor State Dispute Settlement (ISDS):

- ISDS is a powerful tool for protection of foreign investors.

- The Model attempts to strike a balance between those potential costs and benefits of ISDS – retaining it for foreign investors while minimizing host states' undue exposure to liability by providing for various conditions precedent such as exhaustion of local remedies, dismissal of frivolous claims, etc,.

- To enhance the general awareness of state practice about the IIA system and to increase public confidence, the new Model also has provisions on transparency.

INVESTOR STATE DISPUTE SETTLEMENT (ISDS) – Some Main Features

- **(a)** ***Scope of ISDS*****:** The Model text focuses ISDS mechanisms only for an alleged breach of the substantive investor protection clauses found in Chapter II, other than the obligations of transparency and entry and sojourn of personnel. The tribunal's power has been limited to awarding monetary compensation alone.

- **(b)** ***Conditions precedent****:* The Model requires the investor to either exhaust all local remedies or at least continue in local courts for five years prior to commencing international arbitration. The investor is excused from this requirement if the Investor can show that there is no domestic remedy capable of reasonably providing any relief.

- **(c)** ***Prevention of conflict of interest of arbitrators*****:** The Model requires arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration.

- **(d)** ***Transparency***: The Model permits non-disputing States to make submissions before the tribunal. It provides for parties to make available documents relating to the arbitration to increase public confidence in the BIT regime.

INVESTOR OBLIGATIONS:

- The Model BIT adopts an approach whereby it seeks to balance investor rights with their obligations under domestic law.
- The Model has a Chapter on investor obligations which requires that foreign investors comply with domestic laws on corruption, disclosures, transparency at all times.
- Under the ISDS chapter, an investor is prohibited from submitting a claim if the investment was been made through fraudulent misrepresentation, concealment, corruption, money laundering or similar illegal mechanisms.

OUTLOOK AND WAY FORWARD

- The Indian Model BIT is based on a realistic proposition - there are no magic wands or tailor-made solutions for resolving the IIA system in an instant. Reforming the regime is a gradual process, which must be done step by step taking each treaty and action into account. The Model is merely a first *macro* level step in the overhaul of the entire system.

- The Model reflects the common international investment policy of the Government and is expected to become the basis of all BIT negotiations involving India in the future. It is also hoped that the Model BIT will become a template document worldwide for integrating sustainable development concerns in the investment treaty system and will motivate other States to reform their regimes.

- The current reforms in BIT would create more stable investment regime and minimize misuse of ISDS mechanism.

Thank you ☺