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The Tax Quandary

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Investment and tax-related disputes increased significantly due to the gradual evolution of contours of international laws on Trading, Investments, and Taxation. One such conundrum which has been subjected to criticism and condemnation was the amendment of the Finance act in 2012, adding the Retrospective tax collection clause. Major conglomerates like Vodafone group, Cairn energy, Devas multimedia ltd, etc. were retrospectively and arbitrarily taxed. The Finance Ministry of India imposed capital gains tax to the tune of INR 22,000 crore (approx.) on the acquisition of Hutchison Essar ltd by Vodafone group. When Vodafone appealed against the levy in the Supreme Court of India, the court decided in favour of the telecom giant, but the Finance Ministry circumvented the judgment by introducing an amendment in the Finance Act to go after indirect transfers of Indian assets retrospectively. After the amendment, the Vodafone group decided to go for international dispute-settlement, in which it won. In a similar case, Indian authorities levied a capital gains tax on the Cairn energy merger to the tune of INR 24,500 (approx.) with interests and penalties. This case suffered the same fate as the Vodafone case in international tribunals. Several cases have been decided, contributing to the evolution of International theories and doctrines related to Arbitration and International Dispute-settlement. This article talks about various facets of International law related to the fields of Investment, Arbitration, and taxation; the effect of retrospective taxation amendment, and the disputes that arose due to the amendment; Sovereign right of taxation with special emphasis on Cairn Energy and Vodafone BV disputes.

Keywords: *tax, international law, taxation.*

INTRODUCTION

"Collecting more taxes than is absolutely necessary is legalized robbery."

- Calvin Coolidge

Bilateral Investment Treaties

Bilateral investment treaties or BIT is a widely used tool to promote trade and investment and promote globalisation. As the word 'Bilateral' suggests, BIT is signed between two countries to promote and safeguard foreign investment and promote trading. A bilateral investment treaty provides a roadmap for future foreign investments and lays out terms and conditions that parties follow. The main features of a BIT are protection from arbitrary actions, fair and equitable treatment, and procedure for dispute resolution. Today, India has eight treaties with the United Arab Emirates, Lithuania, Latvia, Bangladesh, Senegal, Libya, Sudan, and the Philippines.[1] Rest stand terminated. Parties of the treaties can resort to arbitration for infringement of rights. It is called an investor-state dispute settlement. As the matter involves two different nations having different jurisdictions, an international tribunal like The International Centre for Settlement of Investment Disputes (ICSID), Permanent Court of Arbitration (PCA), Singapore International Arbitration Centre (SIAC), etc. tackle the dispute. Bilateral investment treaties promote a country as a 'favourable investment destination' directly affecting its Foreign Direct Investment (FDI) flows.

India has terminated most of its Bilateral investment treaties due to the introduction of Model BIT as a base for negotiating new treaties and re-negotiating the old ones. The introduction of Model BIT was due to many disputes and arbitration proceedings arising out of previous treaties. Model BIT has not sent a positive signal towards prospective investors due to its narrow and protectionist approach. E.g., Model BIT narrowed down its exposure by only protecting direct investments or FDIs. It has specified a condition of exhausting all the domestic remedies before proceeding for arbitration (which itself is a tedious procedure as

[1] 'India | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*, 2020) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> accessed 08 August 2021

evident by India's rank in 'Ease of business doing report 2020' in which India ranked 163 in 'Enforcing Contracts' which shows that on an average it takes 1445 days to resolve a dispute, counted from the moment the plaintiff decides to file the lawsuit in court until payment. It has imposed several conditions before aggrieved parties can approach arbitration and international dispute resolution. Its article 15.5 read as:

"In the event that the disputing parties cannot settle the dispute amicably, a disputing investor may submit a claim to arbitration pursuant to this Treaty, but only if the following additional conditions are satisfied:

(i) not more than six (6) years have elapsed from the date on which the disputing investor acquired, or should have first acquired, knowledge of the measure in question and, the knowledge that the disputing investor with respect to its investment, had incurred loss or damage as a result; or

(ii) where applicable, not more than twelve (12) months have elapsed from the conclusion of domestic proceedings pursuant to 15.1.

(iii) the disputing investor or the locally established enterprise have waived their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.

(iv)where the claim submitted by the disputing investor is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls, that enterprise has waived its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.

(v) At least 90 days before submitting any claim to arbitration, the disputing investor has transmitted to the Defending Party written notice of its intention to submit the claim to arbitration ("notice of arbitration"). The notice of arbitration shall:

a. attach the notice of dispute and the record of its transmission to the Defending Party with the details thereof;

b. provide the consent to arbitration by the disputing investor, or where applicable, by the locally established enterprise, in accordance with the procedures set out in this Treaty;

c. provide the waiver as required under Article 15.5 (iii) or (iv), as applicable; provided that a waiver from the enterprise under Article 15.5 (iii) or (iv) shall not be required only where the Defending Party has deprived the disputing investor of control of an enterprise;

d. specify the name of the arbitrator appointed by the disputing investor.

Currently, only 3 countries (Brazil, Kyrgyzstan, and Belarus) have 'agreed' to negotiate/re-negotiate as per the new Model BIT. The treaties are not in force as of now."

RETROACTIVE TAXATION

Recently, Lok Sabha passed the Taxation Laws (Amendment) Bill 2021 to nullify the effect of the notorious retrospective tax amendment done in 2012[2]. In 2012, the finance ministry amended section 9(1)(i) of the Income Tax act 1961 to cover all the transactions from 1961-2012 and tax the income arising from the said transactions. The amendment faced criticism for being arbitrary and investment-unfriendly, but the authorities claimed that it was within their domains to-do-so as revenue generation and tax-collection is a 'sovereign right' of the country, and no one can interfere. The amendment bill read as:

"In section 9 of the Income-tax Act, in sub-section (1), —

[2] Finance Bill 2012

(a) in clause (i), after Explanation 3, the following Explanations shall be inserted and shall be deemed to have been inserted with effect from the 1st day of April 1962, namely: —

'Explanation 4. —For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".

Explanation 5. —For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.';

(b) in clause (vi), after Explanation 3, the following Explanations shall be inserted and shall be deemed to have been inserted with effect from the 1st day of June 1976, namely: —

'Explanation 4. —For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included the transfer of all or any right for use or right to use computer software (including granting of a license) irrespective of the medium through which such right is transferred.

Explanation 5. —For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property, or information, whether or not—

(a) the possession or control of such right, property, or information is with the payer;

(b) such right, property, or information is used directly by the payer;

(c) the location of such right, property, or information is in India.

Explanation 6. —For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-

linking, amplification, conversion for down-linking of any signal), cable, optic fiber or by any other similar technology, whether or not such process is secret".[3]

India suffered significant damage. Several disputes arose. Awards were passed by tribunals, including the famous ones; Vodafone[4] (EUR 4,327,294.50 or USD 50,68,343.68 or INR 37,71,71,692.09), Cairn Energy[5] {$1.2 billion (approx.) or INR 8000 crore (approx.) or EUR 900 Million (approx.)}.

The new amendment[6] made the following changes:

1. Retrospective tax clause abolished. {Before 28 May 2012 (when finance bill amendment 2012 received the assent of the president)}

2. Already raised demands should be nullified.

3. Refund of already recovered tax without any interest.

"Conditions for the refund are as follows:

(i) where the said person has filed an appeal before an appellate forum or any writ petition before the High Court or the Supreme Court against any order in respect of said income, he shall either withdraw or submit an undertaking to withdraw such appeal or writ petition, in such form and manner as may be prescribed;

(ii) where the said person has initiated any proceeding for arbitration, conciliation or mediation, or has given any notice thereof under any law for the time being in force or under any agreement entered into by India with any other country or territory outside India, whether for protection of investment or otherwise, he shall either withdraw or shall submit an undertaking to withdraw the claim, if any, in such proceedings or notice, in such form and manner as may be prescribed;

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[3] *Ibid*
[4] *Vodafone International Holdings BV v Government of India [I*] PCA Case No 2016-35 (Dutch BIT Claim)
[5] *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v Government of India* PCA Case No 2016-7
[6] Taxation laws (Amendment) Bill 2021

(iii) the said person shall furnish an undertaking, in such form and manner as may be prescribed, waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the said income which may otherwise be available to him under any law for the time being in force, in equity, under any statute or under any agreement entered into by India with any country or territory outside India, whether for protection of investment or otherwise; and

(iv) such other conditions as may be prescribed"

The amendment is a good move, but its effect will depend on other policy decisions and may take time to culminate in reality.

VODAFONE BV DISPUTE

In 2007, Vodafone Group Plc acquired the Indian Hutchison Essar (Hong-Kong-based Company) for USD 11 billion (approx.)[7]. It was the largest telecom deal in that year. It came under the radar of the Indian Tax Department; the Government of India imposed a retrospective capital gains tax to the tune of INR 22,000 crore (approx.) with penalties and interests. Vodafone challenged the levy in many national and international tribunals and courts, including the Indian Supreme Court and Hague's Permanent Court of Arbitration.[8]

When Bombay High court received the matter, it dismissed the petition by the Vodafone group on the basis of its merit. The main contention of the Vodafone Group was that it was an offshore merger as it took place indirectly through a Cayman-Islands company that has its stake in the Hutchison Essar in India, and the Indian Tax department lacked jurisdiction over the matter. On this point, the judgment read[9]:

[7] *Vodafone International Holdings BV v Government of India* PCA Case No 2016-35

[8] FE Bureau, 'International Arbitration: Vodafone Wins Rs 22,000-Crore Retrospective Case Against Tax Department' (*Financial Express*, 2020) <https://www.financialexpress.com/industry/international-arbitration-vodafone-wins-rs-22000-crore-retrospective-case-against-tax-department/2091905/> accessed 10 August 2021

[9] *Vodafone International Holdings v Union of India & Anr* Writ Petition No 1325/2010

"Chargeability and enforceability are distinct legal conceptions. A mere difficulty in compliance or in enforcement is not a ground to avoid observance. In the present case, the transaction in question had a significant nexus with India. The essence of the transaction was a change in the controlling interest in Hutchison Essar Limited, which constituted a source of income in India. The transaction between the parties covered within its sweep, diverse rights, and entitlements. Petitioner by the diverse agreements that it entered into has a nexus with Indian jurisdiction. In these circumstances, the proceedings which have been initiated by the Income Tax Authorities cannot be held to lack jurisdiction."

After this, the Vodafone group appealed to the Supreme Court (SC). The SC reversed the judgment[10] of the Bombay HC and concluded: "I, therefore, find it difficult to agree with the conclusions arrived at by the High Court that the sale of CGP share by HTIL to Vodafone would amount to transfer of a capital asset within the meaning of Section 2(14) of the Indian Income Tax Act and the rights and entitlements flow from FWAs, SHAs, Term Sheet, loan assignments, brand license, etc. form an integral part of CGP share attracting capital gains tax. Consequently, the demand of nearly Rs.12,000 crores by way of capital gains tax, in my view, would amount to imposing capital punishment for capital investment since it lacks the authority of law and, therefore, stands quashed."

After this judgment, the agitated Finance ministry in 2012 amended the Finance act to reverse the Supreme Court judgment by amending the Income Tax act in its part (A) by adding the retrospective clause and the reason stated was, "Certain judicial pronouncements including the Supreme Court judgment in the case of Vodafone International Holdings have created doubts about the scope and purpose of sections 9 and 195. Further, there are certain issues in respect of income deemed to accrue or arise where there are also conflicting decisions of various judicial authorities. Therefore, there is a need to provide a clarificatory retrospective amendment to restate the legislative intent in respect of scope and applicability of section 9 and 195 and also to make other clarificatory amendments for providing certainty in law".

[10] *Vodafone International Holdings v Union of India & Anr* Civil Appeal No 733/2012

The tussle did not end here. After the amendment, the Vodafone group approached the Permanent Court of Arbitration against the tax imposition. Representatives from the Vodafone group side invoked the 'Fair and Equitable Treatment and 'Safeguard from expropriation' clauses of the India-Netherlands BIT.

"The Permanent Court of Arbitration decided in favour of the Vodafone group and held:

(1) The Tribunal has jurisdiction, under the terms of the Agreement between the Kingdom of the Netherlands and the Republic of India for the Promotion and Protection of Investments, done at The Hague on 6 November 1995, to consider the Claimant's claims for breach of the Agreement.

(2) The Claimant is entitled, in respect of its investments in mobile telecommunications in India, to the protection of the guarantee of fair and equitable treatment laid down in Article 4(1) of the Agreement.

(3) The Respondent's conduct in respect of the imposition of the Claimant of an asserted liability to tax notwithstanding the Supreme Court Judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4 (1) of the Agreement, as is the imposition of interest on the sums in question and the imposition of penalties for non-payment of the sums in question.

(4) The finding of a breach in paragraph (2) entails the obligation on the Respondent to cease the conduct in question, any failure to comply with which will engage its international responsibility.

(5) The Respondent will reimburse to the Claimant the sum of £ 4,327,294.50 or its equivalent in USD, being 60% of the Claimant's costs for legal representation and assistance, and € 3,000 or it is equivalent in USD, being 50% of the fees paid by the Claimant to the appointing authority."[11]

[11] *Ibid*

However, India has approached a Singaporean court to reverse the decision as Singapore was the arbitration seat during the proceedings. The principal basis of the appeal is; Lack of jurisdiction and the sovereign right of revenue generation. Finance Ministry has said that deliberations are going on between the representatives of India and the Vodafone group.

CAIRN ENERGY DISPUTE

During 2005-6, Cairn energy made different arrangements in the company by selling and buying shares of companies and shifting capital. India imposed a capital gains tax to the tune of INR 24,500 crore.[12]Cairn energy filed cases in various tribunals (Income Tax Appellate Tribunal (ITAT)), High courts, and the Permanent Court of Arbitration under the India-UK Bilateral investment treaty (BIT) in 2015. In 2017, Cairn decided to merge with the mining giant Vedanta. The Indian government took several measures to prevent the takeover by impeding the procedure, freezing assets to recover outstanding tax payments, etc.

In, Cairn Energy PLC & Cairn UK Holdings Limited v. The Republic of India, the Permanent Court of arbitration held India Guilty of failing to uphold the 'Fair and Equitable Treatment' clause of the BIT. The court observed: "The tax measures were applied to certain share transfers following an amendment made in 2012 to Section 9(1)(i) of the Income Tax Act 1961 (the "ITA 1961" or "ITA") (the "2012 Amendment"). The Claimants maintain that the corporate reorganisation and the initial public offering (the "IPO") were at all times conducted with due adherence to the then-applicable Indian tax laws and that by applying retroactively the 2012 Amendment to the 2006 Transactions, and subsequently taking enforcement measures against Cairn's investments, the Respondent breached its obligations under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments (the "UK-India BIT", the "Treaty", or the "BIT"). Cairn claims that the Respondent's actions have

[12] *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India* PCA Case No 2016-07

caused them significant damage". The court ordered India to compensate Cairn the 'full damages' with 'interest' to the tune of USD 1.2 Billion (approx.).[13]

India has not given in to the demand yet and has appealed further in the Dutch Courts of Appeal to protect its 'sovereign right' of revenue generation.[14] Cairn Energy is also fighting with its full efforts and force as it has filed pleas in various courts of different countries to seize Indian assets and recover the compensation cost. Cairn has filed cases in the United Kingdom, the United States of America, the Cayman Islands, the Netherlands, France, Canada, Singapore, Japan, Mauritius, and the United Arab Emirates.[15] The main force behind the appeals is that these countries are signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1980. Article 1[16] read as follows:

1. "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying, or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of

[13] *Ibid*
[14] 'India Petitioned Against Arbitration Award in Dutch Court of Appeal: Cairn Energy' (*Cnbctv18.com*, 2021) <https://www.cnbctv18.com/business/india-petitioned-dutch-court-of-appeal-to-set-aside-arbitration-award-cairn-energy-8762691.htm> accessed 18 August 2021
[15] 'Cairn Energy Tax Dispute India: All You Need to Know | India Business News - Times of India' (*Times of India*, 2021) <https://timesofindia.indiatimes.com/business/india-business/retro-tax-and-cairn-energy-india-dispute-all-you-need-to-know/articleshow/84263612.cms> accessed 22 August 2021
[16] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1980, art 1

legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

It's a tedious way forward as Cairn is using various techniques to recover the costs. It has acquired Indian assets as a French court (Tribunal judiciaire de Paris) ordered freezing of real estate owned by the Indian Government in Paris. The court in the ex-parte order favoured Cairn Energy and allowed for the seizure to the tune of Euros 20 Million (approx.)."[17] There have been meetings between Indian officials and Cairn energy representatives, but no amicable solution has been carved out, evident by the successful seizure of Indian assets in foreign countries.

ALTER EGO DOCTRINE

Cairn energy group sued Air India in a New York court to recover the compensatory amount, principally relying on the theory of 'alter ego' as Air India is a wholly-owned subsidiary of the Government of India. The doctrine of 'alter ego' is a widely used corporate doctrine. In the case of Shapoorji Pallonji and Co. Pvt. vs Rattan India Power Ltd & Anr[18], the Delhi High court described the 'alter ego theory' as:

"Definitions of "alter ego" vary materially in different legal systems, and are applied in a number of different contexts. Nonetheless, the essential theory of the "alter ego" doctrine in most jurisdictions is that one party so thoroughly dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity. In the context of arbitration agreements, demonstrating an "alter ego" relationship under most developed legal systems requires convincing evidence that one entity dominated the day-to-day actions of another and/or that it exercised this power to work fraud or other injustice or inequality on a third party or to evade statutory or other legal obligations. The "alter ego" doctrine differs from

[17] Jyoti Seth and Dilasha Seth, 'French Court Allows Cairn to Seize 20 Indian Govt Properties in Paris' (*Business-standard.com*, 2021) <https://www.business-standard.com/article/economy-policy/french-court-allows-cairn-to-seize-20-indian-govt-properties-in-paris-121070800744_1.html> accessed 29 August 2021

[18] *Shapoorji Pallonji and Co Pvt Ltd v Rattan India Power Ltd & Anr* TARB P 716/2019

principles of agency or implied consent in that the parties' intentions are not decisive; rather, the doctrine rests on overriding considerations of equity and fairness, which mandate disregarding an entity's separate legal identity in specified circumstances."

The doctrine found its place in the judgments in Fletcher vs Atex, Inc[19], and Gorrill vs. Icelandair/Flugleidir.[20] Lord Viscount in Lennard's Carrying Co., Ltd. vs. Asiatic Petroleum Co.[21], Ltd said, "My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego, and center of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies, it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company".

In layman terms, 'alter ego' refers to the agent (subordinate/subsidiary) of the master (Principal organisation/superior) and is vicariously liable and vice versa. Determination of a subsidiary as an 'alter ego' depends on the economic control, nature of the operation, and degree of independence the subsidiary possesses. These happenings are a grim reminder of a declining international image of India in the eyes of foreign investors and tribunals that will affect the FDI flows in the country.

SOVEREIGN POWER OF TAXATION

Taxation is a sovereign right to raise revenue for the country, but it can be restricted if arbitrary, biased, and disproportionate. ICSID in Eiser infrastructure limited and Energia solar Luxembourg s.à.r.i. vs. the Kingdom of Spain held that "The power to tax is a core sovereign power that should not be questioned lightly." This case also studied the provision of 'Fair and

[19] *Fletcher v Atex, Inc* 861 F Supp 242
[20] *Gorrill v Icelandair/Flugleidir* 761 F 2d 847 (2d Cir 1985)
[21] *Lennard's Carrying Co, Ltd v Asiatic Petroleum Co* [1915] AC 705

Equitable Treatment. Herman M. Knoeller in 'The Power to tax' quoted Judge Cooley: "Taxation is a mode of raising revenue for a public purpose. The term is ordinarily used to express the exercise of the sovereign power to raise revenue for the expenses of government...the power of taxation is an essential and inherent attribute of sovereignty belonging as a matter of right to every independent government... The power of taxation may be defined as the power inherent in the sovereign state to recover a contribution of money or other property in accordance with some reasonable rule of apportionment from the property or occupations within its jurisdiction for the purpose of defraying the public expenses.".

It is evident that taxation is a sovereign power, but it's not absolute or unrestrained. In the case of El Paso Energy International Company vs. The Argentine Republic, the ICSID held that "If general regulations are unreasonable, i.e., arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor's property rights. The need for reasonableness and proportionality of State measures interfering with private property has been stressed by the tribunal in LG&E:

"With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed".

In Renta 4 SVSA vs The Russian Federation[22], Arbitration Institute of the Stockholm Chamber of Commerce held that: "Moreover, where the value of an investment has been substantially impaired by state action, albeit a bona fide regulation in the public interest, one can see the force in the proposition that investment protection treaties might not allow a host state to place such a high individual burden on a foreign investor to contribute, without the payment of compensation, to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member."

[22] *Renta 4 SVS A v The Russian Federation* SCC No 24/2007

As India has been guilty of breaching the two main provisions of bilateral investment treaties: 'Fair and Equitable treatment and 'Safeguards from expropriation, it would be vital to understand the connection between both clauses. Arbitrator Orrego Vicuna in his dissent in the case of Burlington resources Inc. vs the Republic of Ecuador said that, "This arbitrator believes that this is where the Fair and Equitable Treatment provided for under Article II. 3 of the Treaty, specifically relied upon by the provisions on expropriation of Article III of the same Treaty, has an important role to play. Even if the measures preceding formal direct expropriation are not considered as amounting to expropriation, a conclusion that as noted this arbitrator does not share, they do not seem to be in compliance with the meaning of Fair and Equitable Treatment. Because of the link between the provisions noted expropriation cannot ignore the fact that measures that were conducive to it might be in breach on the Fair and Equitable Treatment standard, thus compounding liability".

The evolution of the international contours surrounding investment and tax disputes and the approach of international tribunals clearly shows that India violated its obligations under international and customary laws by maltreating its investors and imposing frivolous tax claims. But better late than never, India has finally passed a bill correcting the retrospective tax clause and burying the hatchet once in for all.

In her speech, Finance Minister Nirmala Seetharaman tabling the Taxation Laws (Amendment) Bill, 2021 in the Rajya Sabha, said, "The country today stands at a juncture when a quick recovery of the economy after the Covid-19 pandemic is the need of the hour, and foreign investment has an important role to play in promoting faster economic growth and employment".[23] As indicated by Nirmala Seetharaman's view, we are in dire need of FDI flows to achieve the pre-pandemic economy and increase growth.

[23] Surjit S Bhalla, 'The Repeal of the Retrospective Tax Shows Modi Government Means Business on Reforms' (*The Indian Express*, 2021) <https://indianexpress.com/article/opinion/columns/the-repeal-of-the-retrospective-tax-shows-modi-government-means-business-on-reforms-7447879/> accessed 03 September 2021