

Tax kept out of draft bilateral treaty

Move meant to prevent Vodafone, Cairn-type international arbitration

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The government has kept tax matters out of the ambit of a new draft bilateral investment treaty to avoid arbitration with multinational companies that may receive tax notices from India, as it looks to prevent situations similar to the Vodafone and Cairn tax matters.

One of the key proposals is that if India deems a certain dispute to be tax-related, companies at the receiving end cannot invoke the treaty in international arbitration to seek relief or compensation.

The new treaty is expected to replace the existing bilateral investment protection and promotion agreements. The draft is in the public domain to invite suggestions from the general public till April 10.

The new treaty, once it is complete, is expected to be signed with all the countries India has bilateral investment treaties with. India has signed BIPAs with 72 nations. It has signed but not enforced BIPAs with an additional 11 nations.

Among some other conditions, the treaty will not apply to "any taxation measure. Where a host state asserts as a defence that conduct alleged to be a breach of its obligations under this treaty is a subject matter of taxation, any decision of the host state, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review any such decision".

British telecom major Vodafone had invoked the India-Netherlands BIPA, seeking international arbitration in its long-drawn Rs 20,000-crore tax dispute with the tax department, following the cancellation of conciliation talks.

Similarly, Finnish mobile handset maker Nokia resorted to the treaty to resolve the tax department's claim of tax liability, both existing and anticipated, for seven years from 2006-07.

Cairn Energy Plc, too, recently demanded compensation under the ambit of the India-UK Bilateral Investment Promotion and Protection Agreement from India for the Rs 10,200-crore tax notice slapped on Cairn India.

Experts say from a policy perspective, India can keep tax matters outside the new bilateral treaty to protect itself from companies. "As far as the existing bilateral treaties are concerned, the question of whether tax matters are covered is a matter of international law and under certain circumstances tax and contractual matters can be covered under the scope of bilateral investment treaties," said Sriram Govind of Nishith Desai Associates.

"Any change to such interpretation would require an amendment of the BIT (bilateral investment treaty) through a bilateral process. A unilateral revocation of rights that may be available under existing treaties, as proposed, can have larger ramifications for the flow of investments into India," he added.

A SIMPLER TREATY

- Govt puts new bilateral investment treaty in public domain inviting suggestions from public
- Treaty expected to replace BIPAs India has signed with 83 nations

- Tax issues kept out of the ambit of treaty to prevent companies seeking international arbitration after receiving tax notices
 - Vodafone had invoked India-Netherlands BIPA over Rs 20,000-cr tax dispute
 - Cairn and Nokia, too, invoked BIPA in disputes with the taxman
 - Experts say India will need to ratify the new pact with counterparts
 - A revocation of rights, present under existing treaties, could affect investments
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(With inputs from Jayshree P Upadhyay)