The Mauritius India saga – A modern tale of David and Goliath…with countless twists!

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During the years 1849 to 1923, a half million indentured labourers passed through the immigration depot known as the Apravasi Ghat to work the sugar plantations at Mauritius. Hard work it was for their lot but they chose it voluntarily because their conditions were better than in India.

Mauritians of Indian origin today constitutes the largest ethnic group on the island. Many of the professionals who today work in the Global Business (a.k.a offshore) sector are the descendents of these indentured labourers. They have come up the social ladder though sheer hard work, education and because the Global Business sector has afforded them the medium through which to pitch and hone their skills *via* interaction with world class businessmen, investors and consultants. They are today accountants, lawyers, company secretaries, investment managers, financial analysts, graduates and so on. The Global Business financial services sector has acted as a social leveller of some sorts by enabling Mauritius of all walks of life to climb up the social and business ladder.

Hundred years' on, the descendents of the Indians who walked through the docks of Apravasi Ghat then along with fellow Mauritians now are about to face a formidable challenge to their livelihood from none other than our very own friendliest nation of them all, Bharat Mata, India!

The Indian Ministry of Finance tabled a white paper on black money in the Lok Sabha, India's lower parliament, on 21 May, 2012 (the "Paper") where the Minister of Finance, Pranab Mukherjee explains that "*…a perception has been created that the Indian Government's response to address this issue [of black money] has been piecemeal and inadequate…*"

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Sadly Mauritius appears to have been implicitly singled out to rebuke this perception. Arguably the Paper does mention other jurisdictions where the Indian Government suspects the occurrence of money laundering but for some very obscure and yet "voyeuristic" reasons, Indian press reads only Mauritius in this Paper.

The Paper explains that "*the illicit money transferred outside India may come back to India though various methods such as hawala, mispricing, foreign direct investment (FDI) through beneficial tax jurisdictions, raising of capital by Indian companies through global depository receipts (GDRs), and investment in Indian stock markets through participatory notes. It is possible that a large amount of money transferred outside India might actually have returned through these means*". Save for the method of hawala and perhaps mispricing, all the other means of repatriation of money back to Indian are perfectly legal and are governed by adequate legislation. It seems absurd to even mention these investment routes. On the issue of hawala, it is essential to explain to readers that all banking transactions in the offshore sector occur, by law, in electronic format/ drafts. Furthermore, the anti money laundering laws of Mauritius limits the amount of any one cash transaction to Mauritius ₹ 500K or about USD18K. So even if millions of dollars do find their way to Mauritius's shores though hawala, there is no way to inject these funds into the banking system in Mauritius to be routed back to India!

The paper goes on to describe tax havens as jurisdictions having the following main characteristics: strong confidentiality or secrecy policies, opaque existence and no meaningful commercial activity. The rest of the explanation merely draws unfounded conclusions and express the uninformed opinion of the writer of the Paper.

A quick glance at section 87 of the Financial Services Act, 2007 of Mauritius ("FSA") is sufficient to dispel misconceptions of the prevalence of undue confidentiality or secrecy policies or opaque existence of entities in Mauritius. Section 87 entitled "**Exchange of information and mutual assistance"** states the following at sub-sections (3) and (4):

(3) The Commission [*i.e.* the Financial Services Commission or the FSC] may in furtherance of its objects and functions, enter into any agreement or arrangement for the exchange of information with a public sector agency, a foreign supervisory institution, a law enforcement agency or an international organisation, where the Commission is satisfied that the public sector agency, the foreign supervisory institution, the law enforcement agency or the international organisation, as the case may be, has the capacity to protect the confidentiality of the information imparted, in case such a condition of confidentiality is imposed by the Commission.

(4) Subject to the Mutual Assistance in Criminal and Related Matters Act, 2003, any agreement or arrangement between the Commission and a foreign supervisory body may provide that the Commission shall provide such assistance to the foreign supervisory institution as may be required for the purposes of its regulatory and supervisory functions.

The reader may be surprised to learn that the FSC has signed memorandums that cover exchange of information with the Securities and Exchange Board of India (SEBI), with the Mauritius Revenue Authority and with the Bank of Mauritius etc. to enable it to fulfil its regulatory objectives of effectively and legally exchange information with competent authorities. The anti money laundering laws of Mauritius have also been assessed & rated highly by international watch dog bodies like the IMF, the Financial Stability Board and the OECD. Mauritius may be small but it is fully compliant with norms prescribed by international bodies like IOSCO, IAIS, and Basel Committee. It should now be abundantly clear that opaqueness and secrecy is both alien to the regulatory framework of Mauritius.

The FSC is the integrated regulator in Mauritius for the financial services sector other than banking and global business. FSC grants licences to applicants for business who wish to operate in the Mauritius International Financial Centre ("IFC") and the conditions of issue of the licences are spelt out in the FSA. Section 71(4) of FSA states the following:

"*In determining whether the conduct of business will be or is being managed and controlled from Mauritius, the Commission shall have regard to such matters as it may deem relevant in the circumstances and without limitation to the foregoing, may have regard to whether the corporation –*

I. *shall have or has at least 2 directors, resident in Mauritius, of sufficient calibre to exercise;*

II. *independence of mind and judgment;*

III. *shall maintain or maintains at all times its principal bank account in Mauritius;*

IV. *shall keep and maintain or keeps and maintains, at all times, its accounting records at its registered office in Mauritius;*

V. *prepare or proposes to prepare its statutory financial statements and causes or proposes to have such financial statements to be audited in Mauritius;*

VI. *provides for meetings of directors to include at least 2 directors from Mauritius.*

An FSC licencee must also apply for a tax residence certificate ("TRC") if it wishes to avail of the benefits of the treaty network of Mauritius. The TRC spells out the conditions that must prevail annually for the grant of the certificate on an annual renewable basis. These are minimum substance TRC conditions that must prevail in Mauritius under the law. FSC licencees must therefore have meaningful commercial activity in Mauritius to be able to fulfil the substance conditions imposed by the FSA and the TRC. The level of substance may however vary depending on the type of activity being conducted.

It is pertinent to remember that Circular No. 789, issued in 2000 by the Central Board of Direct Taxes of India, clarified that a certificate of residence (*i.e.* the TRC) issued by the Mauritius tax authorities will constitute sufficient evidence for accepting residence status, as well as beneficial ownership, for purposes of applying the treaty. The Supreme Court of India, in the famed Azadi Bachao Andolan case, further upheld the validity of the above circular and confirmed that residents of Mauritius would not be liable to tax in respect of capital gains derived in India. The court also held that an attempt by a resident of a third country to take advantage of the provisions of the treaty is not illegal and that the CBDT circular is binding on the Indian tax authorities.

Up to the 2012 Indian budget, the judicial consensus in India has been that section 90 of the Indian Income-tax Act, 1961, is specifically intended to enable and empower the Central Government [of India] to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. Circular No. 789 is a circular within the meaning of section 90. Therefore, it must have the legal consequences contemplated by sub-section (2) of section 90. In other words, the Circular 789 shall prevail even if inconsistent with the provisions of Income-tax Act, 1961 insofar as assessees covered by the provisions of the DTAA are concerned.

Despite the changes to Section 90 by the 2012 Indian budget, a senior CBDT officer, Government of India, confirmed at the recently held International Fiscal Association in Mauritius that Circular 789 stands on a unique pedestal and continues to be valid despite the amendments to the Income-tax Act, 1961 until specifically revoked. This sheer fact places the Indo Mauritius treaty well above treaties that India has signed with other jurisdictions. In the absence of a colourable device, as envisaged by the learned judges in the Vodafone case, the TRC remains sufficient to avail the benefits of the Indo Mauritius treaty.

Notwithstanding the substance measures and conditions prescribed by the FSA and the TRC, criticisms with regard to the alleged establishment of shell companies, companies with PO Box address or companies operating from lawyer's address are regularly being levelled at Mauritius entities. These are unwarranted and baseless. As explained above, all entities operating in the financial services sector in Mauritius are required to be licensed by the FSC and the provisions relating to substance are enshrined in the regulatory framework. The Association of Trusts and Management Companies ("ATMC"), the single most substantial body in Mauritius representing the larger numbers of management companies and corporate trustees, has taken the initiative to encourage its members to adopt its Guidelines on "Internationally Accepted Best Practices on Substance" which it has issued long time back with a view to enhancing the service level and provide value added services from within Mauritius.

In a language that would do Goliath proud, the Paper further states that "*Mauritius and Singapore with their small economies cannot be the sources of such huge investments and it is apparent that the investments are routed through these jurisdictions for avoidance of taxes and/or for concealing the identities from the revenue authorities of the ultimate investors, many of whom could actually be Indian residents, who have invested in their own companies, though a process known as round tripping*."

It is worth clarifying that India itself does not have any anti round tripping legislation currently. In good faith, Mauritius has voluntarily introduced licencing conditions to counter round tripping. We have explained earlier in this article the laws and channels that exist in Mauritius to facilitate exchange of information with India where *prima facie* proof of wrong doings exist. We wish to however draw attention to the fact that the right to legitimate confidentiality protection is enshrined in Mauritius relevant laws fishing expeditions by foreign authorities are not condoned.

India seems to only now notice the small economy of Mauritius but it does not hesitate to seek the vote of the same "Chota Bharat" or little India as the late Indira Gandhi once described Mauritius as, in its favour when it comes to the United Nation Security Council matter. India seems to have also forgotten that it was ONLY Mauritius along with Bhutan who supported New Delhi on the Comprehensive Test Ban Treaty issue in 1996. Mauritius has been India's loyal friend and did not back out even in May 1998 when India carried out the Pokhran II nuclear tests on 11 May, 1998!

As explained earlier, a whole arsenal of measures and protocols exist between Mauritius & India & other countries to prevent the illegal concealment of identities of applicants for business. Mauritius was one of the first centres in the Indian Ocean region to establish a Financial Intelligence Unit ("FIU"). This is one of the key requirements of the Financial Action Task Force. Readers would be interested to know that Mauritius was in 2007 the official sponsor of India in its own initiative to join the Egmont Group, the peer membership body of all FIU's! The Egmont Group is a grouping of FIUs for the purpose of facilitating international cooperation and free exchange of information.

We also learn from the Paper that the Income Tax Overseas Unit (ITOU) at Mauritius has been very useful in discharging the functions outlined in the document. The Paper explains that "*…so far, 49 pieces of information have been received from these countries. It may also be pointed out that the activities listed in para 4.4.4 [of the Paper] have assumed great significance in the past few years. Opening of the new ITOUs and presence of tax officers in the ITOUs also acts as effective deterrence against tax evasion*".

The competent authority of Mauritius in this case, i.e. the Mauritius Revenue Authority, has publicly confirmed that the process of exchange of information with India is effective and very few requests are outstanding to date. As the Paper confirms that the ITOU in Mauritius is indeed effective against tax evasion, we are very tempted to ask: "so why is India still unhappy"?

Inspite of the ready availability of heavy artillery in terms at bilateral agreements, protocols, memorandums, the ITOU between India and Mauritius and above all a great dose of goodwill and good faith on Mauritius's part, not a single case of unacceptable activity has been proven against Mauritius based entities. While the Paper highlights the 44% of FDI rooted though Mauritius, it does not provide even one example of a proven case of money laundering or round tripping or the existence of Indian black money in Mauritius. Boxes 4.1 – 4.3 of the Paper detail some instances where black money has been unearthed by India due to enhanced exchanges of information. The reader will note that Mauritius is not mentioned anywhere in the examples provided. Doesn't this strike an odd chord when, on one hand, the outcry is that because 44% of India's FDI is processed in the small economy of Mauritius before benefiting India, hanky panky things MUST therefore be happening in Mauritius but the Paper could not conjure up even one small instance of wrong doing in Mauritius?

The BIG question that often gets asked is why Mauritius is then so successful in attracting such huge India bound funds?

In this age of globalisation, internet, instant movement of funds and post the 9/11 events, the fundamental ways of doing business globally has changed. Fund providers now seek comfort and security in the internationally rated macro-economic indicators of jurisdictions rather than in the size of countries which really do not mean much. Mauritius has always been on the white list of the Organisation for Economic Co-operation and Development. It is also true that financial services business is still a people's business and without trust in the people and comfort in the type and quality of the services provided, no businessman or investor would move a single penny, no matter how low any tax cost may be. The boundaries and manner of doing business have shifted.

All the hullabaloo in the world cannot negate the fact that the success of Mauritius as a centre for the provision of financial services owes much to its long standing values of integrity and probity. The jurisdiction prides itself in having a robust regulatory framework and just legal system. These are the reasons why Mauritius attracts business of the magnitude mentioned in the Paper. The obsession with tax reasons is not of our doing.

To illustrate why Mauritius is an attractive destination to do business, please consider the self explanatory comparison of a few key international benchmarks:

Index	Global Rank (Mauritius)	Africa Rank (Mauritius)	Global Rank (India)
2012 Heritage Foundation Index of Economic Freedom	8th out of 183 countries	1st	123
Forbes Survey of Best Countries for Business 2011	19th out of 134 countries	1st	94
World Bank Ease of Doing Business 2012	23rd out of 183 countries	1st	132
Mo Ibrahim Index of African Governance 2011	N/A	1st	N/A
Global Competitiveness Index 2011-2012	54th out of 142 countries	2nd	56
Africa Competitiveness Index 2011	N/A	2nd	N/A
Corruption Perceptions Index 2011 (Transparency International)	46th out of 178	2nd	95

It would be pure heresy to even try to interprete the benchmarks above, so crystal clear are their implacable story!

A listing of the other reasons why Mauritius is so successful would look like this:

1. Political stability, confidentiality, cost competiveness, offer of a wide range of services, certainty in tax and regulatory laws and compliance with world class anti money laundering laws while maintaining a flexible approach to doing business are

prime considerations for international investors and businesses when planning their entry and exit strategies. Mauritius offers all these benefits and more.

2. Non-tax strengths include modern physical and telecommunication infrastructures, highly educated work force, an efficient domestic banking system coupled with an extensive network of 37 tax treaties and the availability of local legal and accounting expertise. Several international law firms have set up law corporations in Mauritius and the big 4 global accounting firms along with medium size firms also offer their services in Mauritius.

3. Mauritius had enabled local and international arbitration laws in 2008 to make it a favourable venue for arbitration of international commercial disputes. A new platform has been created by the Government of Mauritius for international commercial and investment arbitration which is the culmination of five years of co-operation between Mauritius and the leading institutions in the field in the course of which Mauritius has adopted in November 2008 a legislation based on the UNCITRAL Model Law, adapted to best serve the interests of international users among others.

4. Mauritius provides certainty of fiscal and regulatory laws coupled with the absence of foreign exchange control laws and the rule of law which all businessmen and investors look for primarily.

5. Other significant benefits of using Mauritius to access India are the considerable expertise and knowledge of Indian foreign institutional investment and portfolio laws among others that Mauritius professionals have acquired over time, the commonality of language & culture, lesser costs & greater ease of doing business and very importantly an impartial judiciary system of high standard & relative quick delivery of justice.

6. Tax is indeed an important consideration as it often is a material cost of doing business but is not and cannot ever be the driving force. If tax was indeed the paramount reason then metaphorically speaking, this would amount to the tail wagging the dog!

The 2011 GDP of Mauritius in United States Dollars was approximately $20billion. The Global Business sector contributes approximately 5% to the GDP of Mauritius and there are about 10,000 Category 1 Global Business Licence companies in Mauritius. These are the types of companies that may benefit from tax treaties. Let us assume that 100% of these entities invest in India and let's do a simple maths exercise to determine how much each of these companies contribute to the Mauritius economy, by divide the Mauritius GDP into 10,000. This gives us USD100,000 per company! How can a company have a Mauritius expense bill of USD100,000 per annum if it, as is often alleged, does nothing in Mauritius besides paying Government fees of about USD2,000 per annum, pays for some services and only has a PO Box address or lawyer's address in Mauritius? Elementary my dear Watson! The answer is of course a resounding NO simply because to generate a contribution of USD100,000 to the GDP of Mauritius, the company must have an active business activity in Mauritius for which it is incurring costs!...something that they call substance! Does this now ring a bell?

A common misconception about the perceived lack of substance in Mauritius may be due to the lack of knowledge about how the business model of "management companies" works. A Management Company (MC) is a business service provider licenced by the FSC and whose main activity is to set up, administer, manage and provide corporate, nominee, trust and other services to a corporation which proposes to apply for, or holds, a Global Business Licence ("GBL"). MCs are required to perform, for all their client applicants for a GBL, comprehensive Customer Due Diligence (CDD) procedures which should also be periodically reviewed. Such CDD documents and information are then filed with the FSC. In short, MCS are specialised service providers that employ high calibre professionals and are strictly regulated. Management & control of the client entities under The MC's administration however remain with the board of directors of those client entities. Critical and strategic decisions on taken at board meetings held in Mauritius and enforced locally. This business model creates a win-win situation for the client entity and the MC. The client entity gets the high level professional services that it requires from its MC in a one stop shop business model. This model exists throughout the world including in India. For example, a conglomerate like Reliance Industries or Tata will not set up brick and mortar offices for each of its subsidiaries!!

The success of Mauritius has been aptly and beautifully summed up by Senator Hillary Clinton when she recently said "*Mauritius has taken steps in recent years to attract investment by enacting reforms that protect investors and promote business. They've made it easier to launch start-ups, to access credit, and to register property. They've demonstrated a commitment to transparency, accountability, and good governance. Now, the people of Mauritius have been the primary beneficiaries of these reforms; it does help to unlock human potential and to create conditions where people feel that their hard work will actually be rewarded*."

Let's now cast our attention to the Indian Budget 2012 which was presented in the Indian Parliament in March 2012. As we are all aware, some of the budgetary measures, specifically the proposed introduction of the General Anti Avoidance Rules (GAAR) and the taxation of indirect transfer of shares, have raised concerns amongst the international investor community. Many observers, government officials, investors, and other institutions have expressed their views on the budgetary measures. The ATMC recognizes the fact that the introduction of GAAR or even the DTC, in due course, is an Indian domestic matter. The matter of concern is however that the retrospective application of new tax measures goes against international law and GAAR is loosely formulated, critical terms are subjectively defined and safeguards are inadequate. Shri Pranab Babu has since announced welcome changes to GAAR which hopefully would be public knowledge by the time this article is published.

Nevertheless concerns about GAAR are genuine and even the Standing Committee on Finance of the Indian Lok Sabha (the "Finance Committee") recognised these when it stated, among others that "*the GAAR confers vast and discretionary powers to the tax authorities to disregard any business transactions including for instance, a tax neutral merger, or holding company structures, especially those which involve countries with which India has entered into favourable tax treaties. This would lead to significant uncertainty with respect to conducting business in India*."

The requirement of "commercial substance" under GAAR has further given rise to unsubstantiated rumours about business relocating to Singapore from Mauritius. It is worth noting that Singapore does not allow migration of entities both inward and outward. Thus for business to move, they would need to wind up all their positions held by the Mauritius entity and reacquire them in Singapore. This is clearly impractical and certainly not an experience worth trying in the current bear market! Furthermore, based on the interaction of several of our ATMC members with their international tax advisors and their feedback, **the ATMC strongly believes that any proposed migration in any way is likely to be detrimental to the interest of the entity**.

The Finance Committee made several recommendations including the fact that "*uncertainties with regard to applicability of tax treaty provisions should be removed so that India's credibility as a reliable treaty partner is not affected*." We submit that indirect treaty override is nothing but a backdoor measure to renege the obligations imposed on a treaty partner. This position is untenable under international law. Our deep concerns are valid and are shared widely globally including, to cite a few, by large US International investor and interest groups. It has been widely reported in the international press that several powerful US trade and industry bodies including the US Chamber of Commerce and the US India Business Council have requested the US Treasury Secretary, Timothy Geithner, to discuss the proposed Indian tax amendments with India's Finance Minister Pranab Mukherjee during the latter's visit to the annual World Bank-IMF meeting. The US trade and industry bodies take the view that "*Such amendments are inconsistent with India's specific obligations to the U.S under the current bilateral tax treaty. Furthermore, the unilateral definition of treaty terms may significantly alter the benefits* *and burdens of the existing Income Tax Treaty to the detriment of the U.S*".

The uncertainties related to GAAR are still very much prevalent till date in all the countries that have adopted GAAR in any form in their domestic tax legislation. It has often been said that India's GAAR is partly modelled on the South African model. A senior representative of a very large and prominent law firm in South Africa confirmed publicly at the recent Mauritius IFA conference that South Africa has itself not yet tested GAAR in a court of law several years after the introduction of its GAAR legislation. In such case, it is critical to restore certainty through the India Mauritius treaty itself. The discussions of the Joint Working Group ("JWG") must therefore take place at the earliest possible time following the first round of talks that took place in December 2011 in Mauritius. To this effect, the Ministry of Finance of Mauritius issued a press communiqué on 17 April, 2012 which states, amongst others, that "*Mauritius has requested from the Indian authorities an early meeting of the Joint Working Group on the India-Mauritius Double Taxation Avoidance Convention (DTAC)*."

Accordingly, we fail to understand the basis of the response given by the Honourable Minister Shri Palani Manickram on 4 May, 2012 to the Indian Parliament to the effect that "*there was unwillingness on the part of Mauritius to cooperate in addressing this problem*" despite the repeated requests made by the Mauritian Government to India to resume talks after the December 2011 meeting in Mauritius of the JWG!

It is both in India and Mauritius that the treaty trade does not become as extinct as the dodo!

However, while Mauritius awaits the next round of the JWG talks in good faith, it is steadily diversifying its financial services sector towards becoming THE hub for accessing Africa and increasing its offerings of new products like the limited partnership, new types of trusts and the foundation among others. On Monday 7th May 2012, Mauritius signed a Double Taxation Avoidance Agreement (DTAA) and an Investment Promotion & Protection Agreement (IPPA) with Kenya. With this new development, Mauritius has extended further its network of DTAAs and IPPAs in Africa. As at date, Mauritius has signed a total of 16 DTAAs and 18 IPPAs with its African counterparts. With its growing number of DTAAs and IPPAs, Mauritius is positioning itself as a safe, trusted and well-established international financial centre and at the same time, as the business and investment gateway into Africa.

The strategic location of Mauritius allows it to rightly position itself as the hub for investment in India and Africa. Africa has great unexploited potential and has steadily been attracting billions of FDI. India's FDI into Africa by end of 2011 amounts to about USD91billion while China's was already about USD190 billion at that time! India is lagging behind already.

Mauritius has several well established tax treaties with 13 African countries namely Tunisia, South Africa, Botswana and Swaziland and awaits ratification with Egypt, Kenya, Zambia, Malawi and Nigeria. Mauritius and India are both founding members of the Indian Ocean Rim. Mauritius is also a member of the Common Market for Eastern and Southern Africa (COMESA) and the South African Development Community (SADC). We can therefore be and indeed are becoming India's favourite platform to do business in or invest in African market. Similar to China, India is also expected to have increasing demands for raw materials, energy and commodities which are plentiful in African countries like Nigeria (Oil), Zambia (Copper, Cobalt, Zinc), Namibia (Uranium, Diamonds), South Africa (Uranium, Chromium), Niger (Uranium), Botswana (Diamonds) and Senegal (Phosphates). Several Indian Multinational Companies are already accessing Africa through Mauritius to draw benefit from its treaty and other network with such African countries.

Another attractive reason for using Mauritius is the Investment Promotion and Protection Agreements (IPPAs) that Mauritius has signed with 17 African countries. Given the risks of doing business in Africa, the benefits of the IPPAs such as free repatriation of investment capital and returns, guarantee against expropriation, most favoured nation rule with respect to the treatment of investment, compensation for losses in case of war or armed conflict or riot and arrangement for settlement of disputes between investors and the contracting states are of paramount importance to investors.

The Mauritius India treaty works both ways and can be equally highly beneficial to India if used judiciously. It is in both India's and Mauritius interests to ensure that their mutual interests are safeguarded. India has truly emerged as a powerhouse in the world but as Phil Knight, co-founder and chairman of Nike, Inc once said: *"It's alright to be Goliath, but always act like David"*.

Sources:

- The White Paper on Black Money tabled in the Lok Sabha in May 2012
- Information freely available on the internet
- ATMC communiqué issued to Mauritius media in May 2012
- Website of Income Tax India