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Would Vodafone comply with Delhi high court order?

The Delhi high court has passed an ex-parte order restraining Vodafone from proceeding with arbitration under the India -UK BIPA

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Vodafone, faced with a multi-billion-dollar tax bill on account of a retrospective amendment of laws by India, had in 2012 initiated arbitration under the India-Netherlands Bilateral Investment Promotion and Protection Treaty. Photo: Hemant Mishra/Mint

The Delhi high court has passed an ex-parte order restraining Vodafone Group Plc. from proceeding with arbitration under the India-UK Bilateral Investment Protection Agreement (India-UK BIPA). However, it remains to be seen whether Vodafone would comply with this order of the court.

After the White Industries judgment went against India, the government has taken an aggressive stance against investment treaty claims. India has already terminated a significant number of bilateral investment treaties (BITs). It has also released a new model BIT that is being used for negotiating fresh treaties. This model BIT reduces the scope of protection for investors. It further excludes taxation matters. This aggressive approach of the government may have a negative impact on investments in India.

Vodafone, faced with a multi-billion-dollar tax bill on account of a retrospective amendment of laws by India, had in 2012 initiated arbitration under the India-Netherlands Bilateral Investment Promotion and Protection Treaty. While this arbitration was pending, in 2017, Vodafone Group commenced a separate arbitration under the India-UK BIPA, in respect of the same retrospective amendment of the tax law.

India has objected to the initiation of second arbitration as being 'abuse of process', considering that arbitration under India–Netherlands BIT was pending in respect of the same claim. Following its objection, the government filed a civil suit before the Delhi high court to restrain Vodafone from proceedings with the second BIT claim.

The Delhi high court, reproducing the reliefs claimed in the two investment arbitrations, noted that the reliefs sought are almost identical i.e. restraining India from enforcing the retrospective amendments made through Finance Act, 2012. It further observed that Vodafone Group and its subsidiary Vodafone International Holdings BV constituted a single economic entity. On the basis of the observation, the court found initiation of parallel arbitration proceedings an abuse of process of law and creating a risk of inconsistent decisions. Accordingly, the court proceeded to temporarily restrain Vodafone from continuing with the second arbitration under the India–UK BIPA.

This is not the first time that an Indian court has restrained a party from proceeding with its investment treaty claim against the state. In 2014, the Calcutta high court, in the Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armaturs SAS & Ors case, restrained Louis Dreyfus from proceeding with an investment treaty claim against the Port Trust.

In fact, there are cases internationally where a domestic court has been called upon to issue injunction against investment treaty arbitration. However, practice has also shown that such orders of domestic courts have not necessarily restrained tribunals constituted under investment protection treaties. A contentious situation arose in the case of S.G.S. v. Pakistan. Therein the Supreme Court of Pakistan restrained the Claimant from pursuing or participating in an ICSID arbitration. However, the Tribunal proceeded to hold that it has jurisdiction to hear the dispute and moved to the merits phase of the ICSID arbitration.

Thus, the Delhi high court decision may not cease the arbitration proceedings. In fact, it may just happen that Vodafone could approach the arbitral tribunal, once constituted, for directions restraining India continuing any such proceedings in its own court.

Furthermore, the reliance by the Delhi high court on the award delivered in an investment arbitration, may not be sufficient to validate its stand. Multiple claims under different BITs from a single fact pattern is not uncommon under the investment arbitration regime. In Ampal-American Israel Corporation and others v. Arab Republic of Egypt the tribunal did not find initiation of two parallel proceedings an abuse of process; instead it allowed the claimant to select the forum before which it wishes to pursue its claims.

Thus, even the possibility of initiation of multiple arbitrations under different bilateral treaties needs to be further analysed. However, the debate on whether such tactics, which clearly favour the investor, constitutes abuse of process is gaining momentum internationally.

Cairn Energy Plc. and Vedanta Resources Plc. have also initiated two separate arbitrations against India due to the same retrospective amendment of tax law. On 31 March 2017, the tribunal in arbitration initiated by Cairn had rejected India's request for stay of arbitration while the other was pending. It now remains to be seen what Vodafone's next course of action will be. However, it should not be assumed that the Delhi high court's judgment would lead to cessation of the arbitration.

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