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Vodafone case: A BIT more arbitration-friendly

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In a setback for the Union government, the Delhi High Court has dismissed the government's proceedings seeking anti-arbitration injunction against Vodafone, i.e. continuing with the proceedings under the India-UK bilateral investment treaty (BIT). To give reference to context, a BIT is a treaty between two sovereign states for protection and benefit of investors from one state which has invested in the other state. The first example of a BIT was the one entered into between Germany and Pakistan in 1959. India signed the first BIT with the UK in 1994. Since then, India has entered into several such treaties with other sovereign states.

The investors from such sovereign states are frequently considering suing the government of India for failing to protect their investments in India or breach of other treaty provisions. Recently, White Industries had sued India under the India-Australia BIT claiming, inter alia, denial of justice, which culminated in an award against the government of India, directing it to pay approximately $4 million to White Industries—interest and other costs not included.

In a similar vein, in April 2017, Vodafone invoked the India-Netherlands BIT and filed a claim against the government of India, challenging the infamous retrospective tax amendment which had led to a tax demand of Rs 11,000 crore plus interest against Vodafone on its 2007 acquisition of a 67% stake in Hutch-Essar in India. Importantly, the retrospective amendment was carried out by the Union government after the Supreme Court decided this issue in favour of Vodafone, i.e. quashed the tax demand in 2012. While the first investment treaty arbitration proceeding under the India-Netherlands BIT was pending, Vodafone initiated a fresh arbitration, invoking the India-UK BIT. It appears that the second arbitration was commenced due to a jurisdictional objection raised by the Union government in the first arbitration.

In turn, the Union government filed a civil suit before the Delhi High Court seeking an anti-arbitration injunction against Vodafone from initiating arbitration proceedings under the India-UK BIT, i.e. the second arbitration. The Union government contended that this is an abuse of process, insofar as Vodafone has maintained two identical claims under two different bilateral investment treaties against the same subject matter. The Delhi High Court, on August 22, 2017, passed an interim order in favour of the Union government, and held that multiple claims cannot be filed by Vodafone against the same measure of the host state—under different bilateral investment treaties. The ruling restrained Vodafone from taking any further action on the second arbitration filed under the India-UK BIT. However, on October 26, 2017, the Delhi High Court allowed the parties to participate in the appointment of the arbitral tribunal pending final disposal of the proceedings filed by the Union government.

This order was subsequently challenged by the Union government before the Supreme Court, which, in turn, allowed the parties to proceed as per the Delhi High Court's order dated October 26 and participate in the appointment of the arbitral tribunal. Notably, the Supreme Court did not express any observations on the merits of the contentions in view of the fact that the final arguments were due earlier this year. The Delhi High Court has disposed of the suit filed by the Union government and granted liberty to raise the issue of abuse of process before the arbitral tribunal constituted under the India-UK BIT.

The interim order issued in September last year—which had restrained Vodafone from continuing with the proceedings under the India-UK BIT—has been vacated. The Delhi High Court reasoned the judgment on the basis that: (1) it is not an absolute proposition of law that national courts are divested of their jurisdiction in an investment treaty arbitration; (2) investment treaty arbitration is fundamentally different from commercial disputes as the cause of action is premised on state guarantees and assurances; (3) it is unknown for courts to issue anti-arbitration injunction under their inherent power in a situation where neither the seat of arbitration or the curial law has been agreed upon; and (4) national courts will exercise great self-restraint and grant injunction only if there are very compelling circumstances, the court has been approached in good faith, and there is no alternative efficacious remedy available.

This is a well-reasoned judgment by the Delhi High Court and is a step forward in improving India's image as a pro-arbitration jurisdiction. When the Delhi High Court had restrained Vodafone last year from continuing with the second arbitration under the India-UK BIT, it was perceived that the Delhi High Court acted overtly harsh in a subject matter which was to be governed under the international investment arbitration. However, the subsequent order wherein the Delhi High Court allowed the parties to continue with the process and constitute the tribunal, and finally, the decision dismissing the civil suit, is praiseworthy.

Although the civil suit has been rejected, the Delhi High Court has opined that the jurisdiction of the national courts is not completely ousted in investment treaty arbitration. This is also in line with a recent decision of the High Court of England and Wales where a partial arbitral award on jurisdiction was set aside. As sovereign states crumble with claims from investors, the courts are increasingly finding a way to retain the jurisdiction, or supervisory control even in case of investment treaty arbitration which is fundamentally different from commercial arbitration.

There appears to be a tension between the legislature and the judiciary; while the judiciary has always supported the investor in this case, i.e. Vodafone, the government is vehement on their tax demand so much so that they had to retrospectively amend the tax law to make Vodafone accountable to pay a hefty sum of money.
The United Nations Conference on Trade and Development (UNCTAD) estimates that India has BIT protection with about 50 countries, and many have been terminated or are currently not in force. The model BIT narrows the scope of the protection available and has not been perceived well as sovereign states are reluctant to agree to renegotiate the existing treaty framework. Also, the model treaty proposed, and being negotiated with several sovereign states, is not a solution especially as outbound investments from India increase, as does the need to secure adequate protection for Indian investors who invest abroad.

One may recall that last year a petition was filed before the Madras High Court restraining Nissan from continuing with investment arbitration proceedings against the Union government. There are at least 13 cases pending against the Union government arising out of several bilateral investment treaties, and perhaps many more disgruntled investors will follow soon. Rather than advocating the model treaty, the Union government needs to look at these cases seriously, and form a committee, which would then advise on the strengths of each case and ultimately take a decision to settle them as soon as possible, or defend them with the best lawyers, as also suggested in a recent document allegedly authored by finance minister Arun Jaitley.

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