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Vodafone's Legal Notice Against India Could Be Followed by Others

By **NEHA THIRANI**

Dhiraj Singh/Bloomberg News A woman sits outside a Vodafone India retail store in Mumbai, Maharashtra, Nov. 15, 2011.

CREDIT CAPTION

British telecom giant Vodafone Group's [legal proceedings](#) against the Indian government, announced Tuesday in reaction to a recent proposed tax change, have little precedent in India, legal experts say.

Historically, India has had a limited number of bilateral trade treaties, which kept the country from being named in disputes in international courts, said Vyapak Desai, head of international dispute resolution at Nishith Desai Associates.

Since 2011, though, the potential for these cases has increased, he said, following a few years of increased financial investment in the country, and a flurry of trade agreements. India has 80 bilateral treaties in place, and there are several international cases pending involving Indian companies, he said. However, Mr. Desai said it is difficult to estimate the number of such cases because they are usually kept under wraps and only become public knowledge when they are part of a larger dispute.

So far, the international courts have ruled against the Indian government only once in such a case.

This February, an international arbitration panel said the government of India breached its obligations toward Australian mining company White Industries, under the [India-Australia Bilateral Investment Treaty, which was signed on Feb. 26, 1999](#). A dispute between White Industries and Coal India had been pending for eight years, and [White claimed the judicial delays](#) amounted to an infringement of rights of an investor. India was ordered to pay damages of \$4.2 million plus \$84,000 for the fees and expenses of arbitrators and \$520,100 for arbitration expenses (converted from Australian dollars at current rates) to White Industries. The payments have to be made with additional annual interest of 8 percent from March 24, 1998 until the date of payment.

The [Dabhol power project in Maharashtra](#) triggered the first-ever invocation of international arbitration to solve an investment treaty dispute in India. The project's case was ultimately resolved out of court.

Companies which could call for international arbitration against the Indian government in the future include Norway's Telenor, Russia's Sistema and London's The Children's Investment Fund, which is also battling with Coal India, lawyers say.

"If you are attracting investors to the country by signing bilateral treaties, the government has to ensure that their legitimate expectations are met," Mr. Desai said. "If the government acts unreasonably, people will explore their options."

The Indian government said in this year's budget that it plans to retroactively [collect capital gains taxes](#) on offshore acquisitions involving Indian assets, after India's Supreme Court ruled that Vodafone was not liable for capital gains taxes related to an \$11 billion acquisition in 2007.

Vodafone said Tuesday it has served a "notice of dispute" that asks the Indian government to

abandon retrospective aspects of the proposed legislation. Vodafone said the legislation, which is expected to be taken up by Parliament next month, would violate the international legal protections granted to Vodafone under an investment treaty between Netherlands and India.

“If the legislation as drafted is made law, Vodafone will take whatever steps are necessary to protect our shareholders’ interests,” the company said in a statement Tuesday explaining its suit.

The next step is a three-month period of negotiations between the Indian government and Vodafone, said Dinesh Kanabar, chairman of KPMG’s tax practice in India. After that, the issue can be referred to the United Nations Commission on International Trade law, if both parties agree, he said. If they don’t, the matter will be referred to a three-member arbitration board.

“Invoking of an international arbitration is a serious step in the process of dispute resolution,” Mr. Kanabar said. “This is, indeed, a very strong message and is not merely a means of mounting pressure on the government.” India’s finance minister, Pranab Mukherjee, [said the government would examine](#) the notice. “It is their (Vodafone’s) prerogative and we will examine the notice. As a legal entity, they are entitled to legal recourse,” Mukherjee said on Tuesday.

According to Nishith Desai Associates investment arbitration has become a global trend in the past two years, with a jump in the number of cases. In 2011 and 2012 alone there have been 120 cases of investment arbitration initiated or pending, while previously there have been 450 recorded cases of investment arbitration since the inception of international arbitration in bilateral investment treaties.