# Is India losing the Litmus Test on Investor Protection by Preventing Vodafone from Invoking Arbitration under UK-India BIT?

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India's dispute with Vodafone has been one of its most publicized and long pending disputes with a foreign investor. Despite attempts at conciliation, parties remain locked in international arbitration under the relevant BIT. It may not be hyperbole to suggest that India's approach to this dispute effectively defines its attitude to investor protection, at least so is the perception Therefore, when it recently chose to obtain an ex-parte injunction against Vodafone from starting an arbitration under UK-India BIT from a domestic municipal court (Delhi High Court), it came as a surprise to many.

The Delhi High Court decision is far from being the last word on the issue. It is capable of being modified by the same court after hearing Vodafone's objections. Yet, the order has attracted substantial attention and for good reasons.

Three questions immediately arise: first, is India's action to move a domestic court to restrain arbitration under an international treaty in bad faith? Second, under what jurisdictional basis did the Delhi High Court entertain such action? Third, does the *Orascom* award hold that multiple claims by companies in a vertical structure under different treaties against same State measure will always be an abuse of rights?

Before considering this, a short recap of what led to this dispute. Vodafone (Netherlands) bought a Cayman Island entity of Hutchison (Hong Kong) group, in order to acquire controlling interest in the Indian entity Hutchison – Essar Ltd. The entire transaction was outside India and did not involve transfer of shares of any Indian entity. As the Indian tax statute then stood, it did not specifically provide that if the effect of a transaction was change in control of an Indian entity, it would be taxable in India. The Indian Supreme Court in January 2012 rejected the Indian government's contention that the text of the statute as it then stood could be interpreted to include such a tax demand.

To overcome this decision, India amended the statute to bring such transactions within the tax net and made it retrospective in application. Considering this to be in breach of India's commitment under India-Netherlands BIT, Vodafone (Netherlands) notified disputes in April 2012 and invoked arbitration in April 2014. Subsequently, in June 2015, Vodafone (UK) sent a notice of dispute under the UK – India BIT and invoked the arbitration January 2017.

In the arbitration under Netherland – India BIT, India had raised a preliminary jurisdictional objection.

In June 2017, the tribunal decided to consider the issue with the merits of the case. Soon thereafter, Indian government filed a suit before the Delhi High Court, seeking a declaration and permanent injunction against Vodafone (UK) from initiating arbitration under the India – UK BIT. From information available in public domain, it seems India contends that Vodafone (UK) seeks to claim the same reliefs arising out of the same cause of action (i.e. the same measures) with respect to which Vodafone (Netherlands) is already engaged in an arbitration with India. Therefore, the duplication of claim amounts to abuse of process and is oppressive and vexatious.

There may be valid grounds for the India to contend, even successfully, that Vodafone's action of initiating multiple arbitration at multiple times under different treaties with respect to the same measures is an abuse of rights. But, India cannot legitimately contend that this is an issue that is capable of being determined by an Indian court. It would be absurd to suggest that a State can commit to resolving all disputes with foreign investors by a specific dispute resolution mechanism under international treaties and then seek to restrain the invocation of such right by recourse to its domestic courts. If nothing else, such act would be in breach of its good faith performance of international treaty, contrary to the principle enshrined in Article 26 of the Vienna Convention.

It is not as if India would have no remedy. It would be an issue fully capable of being addressed in the arbitration itself. It is well established that an arbitral tribunal has the competence to determine its own jurisdiction – including any issues of abuse of such jurisdiction. Additionally, there might be a remedy available through the court of the seat of arbitration, as selected under Article 18.1 of UNCITRAL Rules, 2010.

As to the basis to exercise jurisdiction, the Delhi High Court merely observes that Indian courts have "natural jurisdiction" to adjudicate the disputes in question. Seen strictly from a municipal law point of view, it may not sound very strange for an Indian court to *prima facie* suggest that it would be the 'natural court' for resolution of a tax demand raised by Indian authorities. The issue in question is, however, not a municipal law dispute – it is a claim for breach of an international investment treaty – rooted in public international law.

To block access to arbitration under such treaty, which itself is an international law guarantee by the State, by invoking municipal legal principles of the State party is problematic to say the least. If this was permissible, would it not be the very antithesis of an investor protection treaty – allowing the State party to prevent access to arbitration under the treaty by moving its domestic court? Application of common law principles relating to anti-suit injunction by the Delhi High Court is itself erroneous in the present case, let alone the fact that in the final analysis, even the threshold prescribed by those principles are not likely to be met in the present case. One of the fundamental principles of international law, as provided in Article 27 of the Vienna Convention, is that a State cannot invoke its domestic law to justify breach of a treaty. India cannot reason that the Delhi High Court action is valid under its laws (if it is eventually so held to be). It will still fail the test of meeting its international law obligations, particularly that of good faith observance of treaties.

This brings us to the award in *Orascom TMT Investments S.a.r.l v. Algeria*. India has placed reliance on it to convince the Delhi High Court that its request for injunction is well founded in investment treaty jurisprudence. The *Orascom* award has been interpreted to suggest that invoking multiple treaties at multiple times with respect to the same measures by vertically structured corporations is *of and by itself* an abuse of rights. It is difficult to derive such a wide proposition from the *Orascom* award.

It is true that the last sentence of paragraph 543 of the *Orascom* award records what appears to be a widely worded proposition and capable of being misread. However, when read in context and as a whole – as any judicial determination must be read – what *Orascom* establishes is far from this. The award expressly notes that abuse of right in the investment jurisprudence has previously only been

considered in situations where an investment was restructured to attract BIT protection after a dispute arose. *Orascom*, therefore, is the first award to consider the issue in case of multiple actions from vertically structured entities.

In its analysis, the *Orascom* tribunal does not simply find that as a matter of law raising multiple claims under multiple treaties amounts to abuse of right resulting in the rejection of claim. It painstakingly considers each claim, with the assistance of extensive fact and expert evidence, to determine that they overlap with the claims made under a previous settled arbitration. It is only after such factual determination that the tribunal finds *Orascom's* actions to be in abuse of the right to invoke arbitration.

Therefore, what *Orascom* establishes is that multiple claims under multiple treaties at different times by companies in a vertical chain *might* amount to an abuse of the right to invoke arbitration under the investment treaty. It also, in the process, shows that to arrive at such a conclusion, it might become necessary to consider the claims in detail, including with the assistance of relevant evidence. It cannot be read as an authority to support an action to restrain the very invocation of the arbitration in which such question ought to be decided.

Vodafone now has time until end of October to respond to the injunction and raise its objections. While it could be a valid strategic call to refuse to appear on grounds that it would not voluntarily submit to the jurisdiction of Indian courts, it will be a difficult choice given it operates a massive telecom operations in India and cannot simply ignore an Indian court's order – even one that may appear to be without jurisdiction. This dispute is India's litmus test in its approach to investor protection and this new innings that it has been ill advised to start will be closely watched – and to its disadvantage.