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State Courts and BIT Arbitrations: Cautious Optimism in the Vodafone v. India Saga?

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A key issue that has assumed importance in BIT arbitrations today is the role of state courts vis-à-vis investment tribunals. Two aspects of this issue become particularly relevant when courts are faced with claims of vexatious BIT arbitrations: (i) the law applicable in the court's supervisory capacity, and (ii) the extent to which courts can intervene in such arbitrations. On 7 May 2018, the Delhi High Court addressed these issues from the Indian perspective in Vodafone's long-running retrospective taxation dispute with the Indian authorities. Its judgement is significant for the 20 plus investment disputes India is currently embroiled in.

Factual Background

On 17 April 2014, the Dutch company, Vodafone International Holdings B.V., initiated an arbitration under the Netherlands-India Bilateral Investment Promotion and Protection Agreement (BIPA), now terminated, disputing its tax liability under Indian statute. Several years later, on 24 January, 2017, Vodafone UK initiated an arbitration under the UK-India BIPA. The Indian government approached the Delhi High Court seeking an anti-arbitration injunction since both arbitrations were related to the same question. The Court dismissed the Indian government's plea (CS(OS) 383/2017 & I.A.No.9460/2017).

The Ruling of the Delhi High Court

The Court adopted a pro-arbitration outlook while declining to issue the anti-arbitration injunction. It held that the UK-India tribunal was the appropriate authority to decide on the question of abuse of process caused by a multiplicity of proceedings under different BITs. Three related questions were adjudicated upon by the Court: (1) the jurisdiction of state courts to deal with BIT arbitrations, (2) the law applicable to such arbitrations, and (3) multiplicity of BIT proceedings.

Firstly, as regards the jurisdiction of national courts in investment arbitrations, the Court recognised that a signatory to the ICSID Convention would agree to completely negate the jurisdiction of national courts as made clear by Article 26 of the Convention. Countries such as India which are not signatories to the Convention are therefore not bound by this requirement. Hence, a national court in an ICSID non-

signatory state such as India has the power to intervene in a BIT arbitration to decide jurisdictional questions if the subject matter of the dispute was in that country. In other words, there is no *threshold* bar to the jurisdiction of state courts in BIT arbitrations. However, due to the *kompetenz-kompetenz* principle, courts should exercise this power only in exceptional circumstances such as when no alternative efficacious remedy is possible.

Secondly, on the nature of an investor state arbitration, the Court drew a distinction between an international commercial arbitration and an investor state arbitration. It overruled India's first investment arbitration court case (*Board of Trustees of the Port of Calcutta v. Louis Dreyfus*, decided by the Calcutta High Court), holding that commercial arbitrations are born out of the consent of private parties, while the latter is based on state guarantees arising out of treaties. Consequently, a BIT arbitration would not be subject to domestic arbitration statutes but to international law.

The third issue which the Court ruled on was the initiation of separate arbitration proceedings under a different treaty by an entity in the same vertical structure, in this case the U.K. based parent company. It observed that since such multiple proceedings would not per se be vexatious or oppressive, this was not an extraordinary circumstance warranting the court's intervention. Therefore, this question was ultimately left to the India-UK tribunal.

Analysis

The judgement in Vodafone is certainly a step forward in making India a more preferred seat for investment arbitrations. The court rightly recognised the competence of the UK-BIPA tribunal in being better placed to rule on its own jurisdiction.

However, a number of crucial issues merit clarification and improvement. For instance, the judgement does not define the extent to which international law would be applicable to a BIT arbitration, given specific choice of law clauses now common in a number of BITs. It also implicitly indicates a differential standard of scrutiny for intervention by a state court (whether the proceeding is abusive per se) as opposed to a tribunal. This requires clarity on what constitutes this *prima facie* standard of abuse of process on which the state court itself could intervene.

Furthermore, the Delhi High Court relied on international investment law cases instead of relying on the domestic Arbitration and Conciliation Act of India. This approach takes the distinction between investment and commercial arbitration too far by completely precluding the application of the Act. This is so *because solely for the purpose of supervisory jurisdiction of a state court*, an investment arbitration should not be treated differently from a foreign seated commercial arbitration. There is a need to draw a distinction between the substance of a country's treaty obligations and the procedural aspects of a BIT arbitration. A state court should not intervene in questions such as whether an entity qualifies as an 'investor' under a treaty. These are matters that should be left entirely to the domain of a tribunal. However, the characteristic of a BIT proceeding as an arbitration should allow a state court to consider questions such as the granting of provisional measures, assisting in the

taking of evidence or injunct vexatious BIT proceedings, as in this case. Adopting an entirely deferential stance towards international investment tribunals (especially problematic when the country in question is not a signatory to the ICSID Convention) would render courts unable to aid parties during BIT proceedings.

Therefore, while the substance of a BIT dispute may be governed by both public and private international law, procedurally it must be looked at from the lens of domestic law of the state court as if it were a commercial arbitration. As a consequence, Part II and Sections 9, 27 and 37 of Part I of the Arbitration Act (provisions applicable to foreign seated commercial arbitrations) would apply even to an investment arbitration with a foreign seat or no designated seat as in this case. Similar powers can be invoked under the statutes of other jurisdictions, most notably Sections 12A and 44 of the Singapore and UK arbitration legislations respectively. Furthermore, if the Act were to not be applicable, several practical issues would arise when invoking the supervisory jurisdiction of a state court. For instance, there would be no statutory scheme for the granting of interim measures by a court or execution of an investment award.

Courts have routinely applied domestic statutes while deciding on the recognition and/or enforcement of investment treaty awards. In both *Sanum Investments v. Laos* (PCA Case No. 2013-13) and *Ecuador v. Occidental Exploration Company* (LCIA Case No. UN3467), courts in Singapore and the U.K. respectively determined whether to set aside BIT awards based on provisions in their domestic arbitration statutes.

Lastly, while the court recognises the power of Indian courts to restrain/annul vexatious BIT arbitrations, it refuses to exercise its inherent power in this case on the ground that since Vodafone had offered to consolidate proceedings, there is no question of a double remedy (a view also taken by the *CME v. Czech Republic* Tribunal). However, there are other reasons apart from multiple awards as to why such arbitrations initiated by companies in the same vertical structure on the same facts are vexatious. The host state is put under a more onerous obligation of defending all of these arbitrations simultaneously while the investor need succeed in just one. However, as the Delhi High Court concurs, the abovementioned tactic is not per se unlawful and has been used in a number of arbitrations such as *OI European Group BV v. Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25). It is yet to be seen if Indian courts remain similarly cautious when called upon to exercise their powers to restrain such claims.

Takeaways

This decision has important consequences for the 51 countries India has BITs with at present. It firmly establishes that there is no threshold bar to the jurisdiction of Indian courts to issue anti-arbitration injunctions in investment arbitrations. The wide jurisdiction granted by Section 9 of India's Civil Procedure Code and recognised by the court can potentially lead to greater court scrutiny of investment awards.

The Delhi High Court's position on international law being applicable highlights another aspect of non-ICSID investment arbitrations. Article 42 of the Washington Convention provides for parties to agree on the applicable law failing which the law of

the host state (including Conflict of Laws Principles) and international law become applicable. Since India is not an ICSID signatory, the BIT provisions must be relied upon. Most Indian BITs, including the UK-India BIPA, contain a clause to the effect that the dispute is to be decided in accordance with the provisions of the BIT. The judgement gives an indication that the interpretation of BIT provisions or any investor-state contracts which contain similar arbitration clauses will now take place in accordance with international principles and will not be subject to the same kind of grounds for annulment as in domestic law.

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