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Cross-Disclosure In Parallel Investment Arbitrations: Perspectives For States

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The recent Singapore Court of Appeal judgment in *Republic of India v. Vedanta Resources PLC* provides a relevant backdrop for revisiting the often-competing themes of confidentiality and consistency in investment arbitrations and their effect on cross-disclosure of evidence (witness statements or documentary exhibits) and pleadings in parallel arbitral proceedings over a common substantive issue-in-dispute. Cross-disclosure of pleadings and written submissions particularly help a tribunal to appreciate the overall case theory since it gains access to all the legal arguments submitted by parties in connected parallel proceedings. Thus, cross-disclosure may be of assistance in the tribunal's decision-making process.

The *Vedanta* decision arose out of an application by India for cross-disclosure of documents in two parallel and related investment-treaty arbitrations with the Cairn Group ("Cairn Arbitration"), on one hand, and Vedanta Resources plc ("Vedanta Arbitration") on the other. Both arbitrations emanated out of the same taxation measures taken by the Indian government with respect to the restructuring of Cairn Group's India business (which was subsequently acquired by Vedanta Group). The Cairn Arbitration has been discussed on this blog previously here and here. Moreover, both arbitrations were invoked under the India-UK BIT, conducted in accordance with UNCITRAL Arbitration Rules 1976, and administered by the PCA. The Cairn Arbitration was seated in the Netherlands, while the Vedanta Arbitration was seated in Singapore.

In view of the potential overlap between the two separate but related arbitrations and the possible risk of inconsistent positions on questions of law and/or inconsistent presentations or accounts of the facts, taken by counsel in both the arbitrations, in-turn leading to inconsistent awards, India made cross-disclosure applications before both the tribunals. Although, the relevant procedural orders ("POs") issued by the Cairn and Vedanta tribunals eventually permitted cross-disclosure of documents with the consent of the opposing party or with the permission of the tribunal, there was significant departure between the underlying premise of the two POs.

The key premise of the Cairn PO was that the parties to an investment-treaty arbitration were not subject to a general obligation of confidentiality under Dutch law. The Cairn PO was, therefore, based on a regime of open document disclosure, and expressly stated that the Cairn tribunal would uphold objections to disclosure only rarely. [1] On the other hand, the Vedanta PO was premised on the notion that parties to an investment-treaty arbitration are subject to a general obligation of confidentiality under Singapore law. [2] Thus, the Vedanta tribunal declined to grant the parties a

general license to make cross-disclosures, in favour of a case-by-case approach.

Subsequently, India pursued applications before the Singapore High Court and the Singapore Court of Appeal seeking declaratory relief that India would not be in breach of any obligation of confidentiality or privacy if it discloses Vedanta Arbitration documents in the Cairn Arbitration.

Confidentiality, Transparency and Cross-Disclosure – States' Probable Concerns

Irrespective of the merits of these Singapore court decisions, they provide useful context to discuss the practical issues that States face due to strict confidentiality requirements in arbitrations and potential issues that may arise therefrom in parallel investment arbitrations.

Parallel investment arbitrations are essentially multiple arbitrations between States and investors of the same constructive identity, which concern a State-measure's compliance with the State's international investment law obligations. There can be several variants of parallel proceedings. For instance, different shareholders may raise separate disputes arising out of a single factual scenario due to the existence of different treaties based on the shareholders' home States. Similarly, a claimant may raise the same dispute under different treaties because differences in treaty-texts mean that substantive protections thereunder may vary.

If we adhere to strict confidentiality norms (as held by the Singapore courts) in such arbitrations, we may face the prospect of inconsistent decisions from different tribunals. *CME Czech Republic B.V. v. The Czech Republic* and *Ronald S. Lauder v. Czech Republic* are illustrative in this regard. Conflicting awards of this nature are undesirable not only because they raise concerns about the legitimacy of the investment arbitration system, but because they may cause difficulties at the enforcement stage and encourage future litigants to forum-shop. For instance, where it is open to an investor to bring a claim under more than one treaty, an investor may initiate proceedings under one treaty, assess how its legal arguments are being received and strategize accordingly before initiating a second proceeding under another treaty in the hope that it will succeed in at least one proceeding. This creates inequity from a State's perspective, but also leaves open the possibility of several inconsistent and conflicting decisions. Inconsistent decisions, in turn, may lead to several issues at the stage of enforcement. Where there are two inconsistent awards, the enforcement of one decision would invariably lead to an implicit violation of the other. These issues may undercut the finality of awards and significantly delay the resolution of disputes. The potential for inconsistent decisions is also a feature of the larger ongoing debate concerning the so-called 'legitimacy crisis' in ISDS. Minimising the risk of inconsistent decisions is therefore of broader systemic importance and has a key role to play in enhancing the overall effectiveness of the ISDS mechanism.

Issues of confidentiality and consistency are more acute for States such as India, that have not yet adopted the ICSID Arbitration Rules (which have an in-built transparency mechanism, e.g., in the form of Rule 48(4) dealing with publication of awards) – and instead participate in ad-hoc investment arbitrations., mostly under UNCITRAL Arbitration Rules. Nevertheless, even outside the ICSID framework, some States have ratified the UN Convention on Transparency in Treaty-based Investor-State Arbitration, also known as the Mauritius Convention, which extends the application of the UNCITRAL Rules on Transparency to arbitration proceedings commenced under treaties concluded after 1 April 2014. The Mauritius Convention requires, among other

things, the publication of information regarding the names of disputing parties, economic sector involved and treaty under which the claim is being made, the potential for a "third person" to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute, and that hearings for the presentation of evidence or for oral argument be made to the public.

Considering the issues with parallel proceedings, it is relevant to note that the Singapore High Court, in its judgment, stated that investment-treaty arbitrations concern crucial issues of public interest and public policy involving a sovereign which is accountable to its people and "*considerations which apply to a private arbitration do not apply with equal force to investment-treaty arbitrations*." According to the Singapore High Court, "*a different approach may well be warranted in investment-treaty arbitration, given the different stakeholders and the sovereign and public interests implicated*." Whilst there may, therefore, be a general obligation of confidentiality under common law, that obligation may not extend to investment-treaty arbitration, which requires consideration of broader issues of public policy and sovereignty. A similar view has also been taken by other investment arbitration tribunals. For example, the tribunal in *Vivendi* v. *Argentina*, noted that nearly all investment treaty arbitrations involve matters of public interest because the international legal responsibility of a State is in question.

However, given the lack of a uniform global standard of confidentiality in investment arbitrations, States should carefully consider taking adequate steps before or at the stage of initiation of an investor-State arbitration to ensure that they would be able to obtain cross-disclosure of documents if required at a subsequent stage.

Practical Steps for States seeking Cross-Disclosure

States should ideally consider addressing this issue at a treaty-level, for instance by ratifying the Mauritius Convention (or incorporating similar provisions into the BITs) and/or administering arbitrations under the ICSID framework – both of which have enhanced transparency and disclosure provisions, as opposed to usual ad-hoc arbitrations. This would obviate the need to have a separate cross-disclosure regime, given that the main submissions of the parties would anyway be in the public domain. Ratifying such treaties would also build a positive perception in favour of the States as it would indicate they are committed to the broader idea of transparency and full disclosure of ISDS proceedings, rather than being perceived as taking a selective approach to cross-disclosure only when it advances their case theory in a subsequent arbitration.

Given that treaty adoption is a time-taking process (which requires wider consensus building), States should also explore means to ensure cross-disclosure on a case-by-case basis for its existing ISDS proceedings. For instance, in the case of UNCITRAL Arbitration Rules governed and/or other forms of non-ICSID arbitrations, States should give considerable thought in agreeing to a specific seat of the arbitration. Although multiple strategic factors would inform this choice, for the purpose of enhancing the possibility of the tribunal granting cross-disclosure, States would be better placed opting for civil law jurisdictions (eg, the Netherlands, Germany, France, etc.) which do not impose a rigid duty of confidentiality in arbitrations compared to common law jurisdictions like England & Wales, Singapore and India. This is because Claimants usually resist cross-disclosure by stating that it breaches the inherent duty of confidentiality in arbitrations. As can be observed from the Vedanta and Cairn POs, the difference in the standards of confidentiality under the Dutch and Singapore legal systems led to significantly different scales of cross-disclosure

permitted in the Vedanta and Cairn arbitrations.

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References

?1 Republic of India v. Vedanta Resources PLC [2020] SGHC 208, para. 20
?2 Republic of India v. Vedanta Resources PLC [2020] SGHC 208, para. 22

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