STRESS TEST

THE BATTLE BETWEEN VODAFONE AND THE GOVERNMENT SERVES AS A PRESSURE GAUGE FOR THE COURTS IN INVESTMENT TREATY DISPUTES. **REBECCA ABRAHAM** REPORTS ON RECENT DEVELOPMENTS

The collapse of the Dabhol power project in 2001 resulted in the government settling nine disputes related to bilateral investment treaties (BITs). Then came a claim by an Australian company, White Industries, which resulted in a 2011 arbitral award of US$4million against India for breaching its treaty obligation to provide "effective means of enforcing claims and enforcing rights".

The award was the first instance of India being found in breach of its BIT obligations and set the ball rolling for foreign investors who sought compensation for roadblocks they faced in India. The country is being sued by around 15 companies, and their BIT-related claims are under arbitration.

The most recent is a US$776 million claim by Nissan against India alleging a breach of the 2011 India-Japan Economic Partnership Agreement. The Japanese car maker alleges non-payment of incentives promised by the Tamil Nadu government under a 2008 agreement for building a car plant in the state. An injunction is being sought in India against the arbitration.

SHOT IN THE ARM

These claimants and others who are mulling going down the BIT arbitration route were likely emboldened by a 7 May ruling in *Union of India v Vodafone Group Plc United Kingdom and Anr* in which Delhi High Court refused an injunction sought by the Indian government against an arbitration initiated by Vodafone under the India-UK bilateral investment promotion and protection agreement.

Vodafone had earlier initiated arbitral proceedings on the same issue under the India-Netherlands BIT. But the Indian government cried foul when the India-UK BIT arbitration was initiated, and accused the company of abusing the process. The court observed that Vodafone had offered to consolidate the proceedings under the Netherlands treaty with the arbitration under the India-UK BIT, thus avoiding the possibility of relief being granted twice, as well as conflicting awards.

The ruling by Justice Manmohan said it cannot be presumed that "filing of multiple claims by entities in the same vertical corporate chain with regard to the same measure is per se vexatious".

International lawyers watching from the sidelines have applauded this decision.

"Once again, a prominent Indian court has shown explicit support for the arbitration process and referred the substantive questions raised before it (in this case as to the alleged abuse of process) to the arbitral tribunal for decision," says Nicholas Peacock, a London-based partner and head of the India arbitration practice at Herbert Smith Freehills.

The firm has been advising Vedanta Resources on its US$3 billion claim against India under the India-UK BIT arising from the imposition of a retrospective tax. Arbitration of this dispute was initiated in 2015 and final hearings are scheduled for August.

Viren Mascarenhas, a New York-based partner at King & Spalding who has represented energy and mining companies in investment treaty arbitration claims against several countries, says investors "should take comfort in this decision".

"The judgment is a step forward in developing India's image as an increasingly pro-arbitration and investor-friendly jurisdiction," adds Sherina Petit, head of the India practice at Norton Rose Fulbright.

Lawyers in India have echoed similar sentiments. "It recognizes investment treaty arbitration as a legitimate and accepted adjudicatory mechanism for investors' grievances under international law," says Atul Sharma, managing partner of Link Legal India Law Services.

Ganesh Chandru, an executive partner at Lakshmikumaran & Sridharan, who heads the firm's international arbitration practice,

Nicholas Peacock
Partner
Herbert Smith Freehills

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sees the ruling as "a welcome step for foreign investors as it boosts their confidence in Indian courts vis-à-vis treaty disputes".

BLOWING HOT AND COLD

Be that as it may, India has long had an ambivalent relationship with foreign investors. Since starting in 1994, India has entered into 84 BITs, but not all have been enforced.

Following the White Industries award, the government sought to water down some of the investor protections provided in the BITs, which had been expansive until then. White Industries had made its claim against India by using a most-favoured-nation clause in the India-Australia BIT.

Soon after the new model BIT was published, more than 50 countries were notified of the government's intention to terminate existing BITs and negotiate new agreements. As a result, more than 20 were terminated, and currently only 52 BITs are in force.

EXPANDING JURISPRUDENCE

Even as India faces an increasing number of BIT arbitrations, there is little clarity on the jurisdiction and approach of Indian courts to such arbitrations.

Justice Manmohan's ruling of 7 May sought to correct this. According to Sumeet Kachwaha, managing partner of Kachwaha & Partners, who was amicus curiae in the case, this "is the first time

Viren Mascarenhas
Partner, King & Spalding

[Investors] should take comfort in this decision [of Delhi High Court]

It had used this clause to take advantage of an "effective means of enforcement" obligation in an India-Kuwait BIT and held India liable for failing to provide an effective means for the investor to enforce a commercial arbitration award obtained almost a decade earlier against its Indian partner, Coal India.

The government in late 2015 published a new model BIT that among other things protects against denial of justice, fundamental breach of due process, targeted discrimination, and manifestly abusive treatment. It does not, however, protect against measures by a local government or any law or measure regarding taxation, nor does it include a most-favoured-nation clause.

Rob Wilkins and Clea Bigelow-Nuttall, at the London office of Pinsent Masons, say that the model BIT gives "an indication that India is uncomfortable with its position as a frequent respondent in investment treaty cases and may be seeking to find ways of minimizing its exposure to such cases".

that Indian courts have ruled on the status of investment treaty arbitration and whether it is to be governed under the Arbitration Act or otherwise".

While Vodafone had argued that Indian courts lacked the jurisdiction to hear disputes arising out of a treaty between two countries, the court disagreed. It categorically held that "there is no threshold bar" insofar as such disputes are concerned.

It went on to say that while a national court would "generally not exercise jurisdiction where the subject matter of the dispute would be governed by an investment treaty", it would do so when "there are compelling circumstances and the court has been approached in good faith and there is no alternative efficacious remedy available".

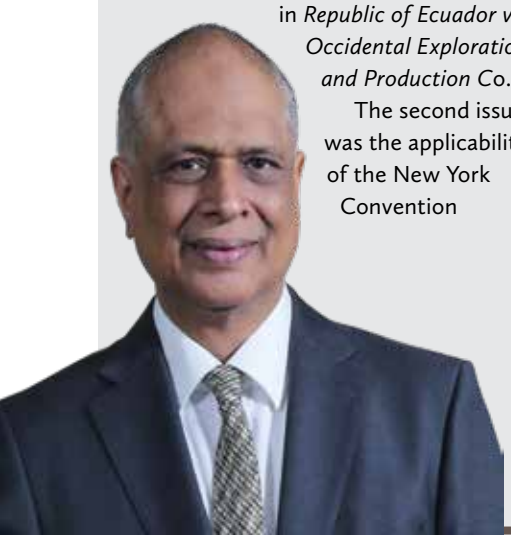
As the ruling points out, India is not a signatory of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (the ICSID Convention), a cornerstone of which is to exclude the jurisdiction of courts. Accordingly,

OVERCOMING OBSTACLES

SUMEET KACHWAHA, THE MANAGING PARTNER OF KACHWAHA & PARTNERS, SPEAKS TO *INDIA BUSINESS LAW JOURNAL* ON THE COURT'S DECISION IN THE VODAFONE DISPUTE AND HIS ROLE AS AN AMICUS CURIAE.

Q. What were some of the key strands of the decision in *Union of India v Vodafone Group Plc United Kingdom and Anr*?
A. There were three issues before the court. The first was whether national courts have jurisdiction in relation to an investment treaty arbitration. The defendant argued that the court does not and indeed the mere fact of entertaining the suit by the court constituted a breach of a treaty obligation.

I disagreed and referred to a decision of the Caribbean Court of Justice, Appellate Jurisdiction, (*British Caribbean Bank Limited v The Attorney General of Belize*), which had the occasion to look into the same issue and said that an agreement to arbitrate that flows from a treaty is not itself a treaty. The Caribbean Court decision followed a 2006 English Court of Appeal decision in *Republic of Ecuador v Occidental Exploration and Production Co.*



The second issue was the applicability of the New York Convention [Convention on the Recognition and Enforcement of Foreign Arbitral Awards], which India is a party to, in terms of which, if a dispute comes up before a court and the parties have an arbitration agreement, then the court must refer the parties to arbitration unless it finds the agreement to be null and void, inoperative or incapable of being performed.

Here I said that by reason of a reservation that India made, the convention is to be applied only to commercial disputes, and as this is not a commercial dispute since it concerns taxation by the government, the New York Convention will not apply.

The third issue was the applicability of the Indian Arbitration Act and the bar it creates as to court intervention, save in very limited circumstances. In this context, the court had to deal with the McDonald's case [*McDonald's India Private Limited v Vikram Bakshi and Ors*], where a two-judge division bench of Delhi High Court held that a court has no inherent power to grant an anti-arbitration injunction and that its powers are circumscribed by the provision of the Arbitration Act and the limited circumstances envisaged therein for court intervention in an arbitration.

Here my argument was two-fold: McDonald's does not apply as the act applies only to commercial disputes; in addition, I submitted that investment arbitrations do not deserve the same jurisprudence or approach that has been prescribed for commercial disputes. For this, I depended heavily on Justice Sundaresh Menon, Chief Justice of Singapore's speech [on International Arbitration: The Coming of New Age for Asia]. On merits, I submitted that the plaintiff, Union of India, had not come to the court in good faith as for no just reason it declined Vodafone's offer for consolidation of both arbitrations, which would have negated any abuse of process that was complained about. This is why the suit has been dismissed, though the inherent power of intervention has been upheld in principle.

Q. What are the implications for the disputes that are currently being resolved through BIT arbitration?
A. As a result of the ruling, India has established and announced that we are not giving up the inherent powers of our court to intervene in an investment arbitration. At the same time, where intervention is called for it will be in accordance with well-established international conventions and principles, and that it will only be when a party approaches the court in good faith and when the court has jurisdiction *in personam* that the court may intervene. In practice, court intervention will be in the rarest of rare cases, and not really an escape route for the government to evade its obligations to arbitrate on investment disputes.

Justice Manmohan concluded: "It would be fundamentally incorrect to embrace the ICSID jurisprudence of non-intervention by courts, for that would be bringing in by the 'back door', when the 'front door' has been shut!"

The ruling also says that, unlike commercial disputes, investment treaty arbitrations that arise from state guarantees and assurances are not governed by the Arbitration and Conciliation Act, 1996.

"It will be interesting to see how this distinction is followed or negated in future cases and what set of rules is applied by the Indian courts when faced with investment treaty disputes," says Petit at Norton Rose Fulbright.

WAY FORWARD

The expansion of this jurisprudence will no doubt have implications for other treaty-related disputes that are being resolved through arbitration.

Cavinder Bull, a senior counsel in Singapore and CEO of Drew & Napier, advocates caution if foreign investors need to bring multiple claims under different treaties as part of their litigation strategy.

"This can be seen as an abuse of process if the sense is that this was done purely for tactical reasons," says Bull. He adds that if, however, there are substantial reasons for multiple proceedings, it would be best for the investor to articulate the reasons upfront to stave off allegations of abuse.

Cavinder Bull
Senior Counsel
& CEO
Drew & Napier

[Bringing multiple claims under different treaties] can be seen as an abuse of process

Sherina Petit
Partner
Norton Rose
Fulbright

It will be interesting to see how this distinction [between commercial and investment treaty arbitration] is followed or negated in future cases

But here, too, the ruling suggests that while the government may continue to knock on the doors of the country's courts when forced into a BIT arbitration, the courts will take an independent stand. Justice Manmohan, in his 81-page ruling, makes it clear that courts should not seek to deprive investors of the advantages of the arbitral forum. The ruling adds that the cost of arguing before a tribunal, or any inconvenience suffered by the government, should be no reason for granting an injunction.

Indian companies have also taken advantage of the large number of BITs in force to seek compensation from countries where their investments have not been adequately protected. Publicly available information suggests that there have been five BIT–related arbitrations where investors from India sued other countries. While two are pending, the investor in one such arbitration – Flemingo DutyFree Shop – which had used an India-Poland BIT to make a US$91 million claim against Poland, won a US$20 million award in 2016.