

Vodafone tax case is a litmus test for NDA government; Contrary to what lobbyists for the British telco say, allowing it to violate laws would hamper investment environment in India

No foreign investor should be kept in the dark about the enforceability of applicable Indian laws. If tomorrow Vodafone exits India for a consideration of USD \$ 1 Trillion, and receives the funds in Cayman Island from, say, Hutch in Hongkong, would the revenue generated in the transaction continue to elude the coffers of India's exchequer? No way! It is high time for India to enforce the rule of law without fear or favour. Collecting legitimate tax revenue is the bounden duty of the Government. Foreign investors will ultimately prefer and respect a destination committed to the rule of law, rather than a regime that subverts it

Last week India's Prime Minister Narendra Modi warned its newly elected MPs and ministers not to come under influence of lobbyists. India's lobbyists are, however, undeterred. Even before the MPs took oath in the Parliament, the lobbyists had already spread the word that the investor confidence in India was at its lowest due to retrospective tax law in Vodafone case.

On the contrary, investor confidence in India will boost if Vodafone follows Indian laws and pays legitimate tax. **In a brilliant article on this issue in The Statesman, on June 5, senior advocate and former additional solicitor general of India Bishwajit Bhattacharyya says that it is high time for India to enforce the rule of law without fear or favour.** Collecting legitimate tax revenue is the bounden duty of the Government. Foreign investors will ultimately prefer and respect a destination committed to the rule of law, rather than a regime that subverts it.

Following is the complete text of the article titled "Allowing Vodafone to escape a tax demand in India would amount to subversion of law, argues Bishwajit Bhattacharyya"

As the rupee gains strength, signalling arrival of Mr. Narendra Modi, Vodafone's tax liability in acquisition of Hutch Essar exceeds three billion dollars; it may soon swell to four billion dollars if the rupee continues to induce bullish sentiments. This liability was less than three billion dollars in March 2012 when Parliament amended Section 9 of the Income Tax Act, 1961 retrospectively to create Vodafone's tax liability. Since then, Vodafone's inaction has been stunning and brazen.

Vodafone has neither paid tax, nor filed any appeal, not even challenged the new law. Which tax assesse in India would enjoy such a privilege? For 26 months the recovery machinery under the IT Act remained inert vis-a-vis Vodafone. As recently as 18 February 2014, outgoing Finance Minister P. Chidambaram made a startling statement, that it was up to the Revenue Department to enforce the Rs.20,000 crore tax notice on Vodafone, as if to suggest that the Revenue Department is controlled by a Finance Minister of another planet.

UPA II only flirted around with Vodafone after amending the law without any desire to enforce it. It would be interesting to observe how the new Finance Minister, Mr. Arun Jaitley, himself an eminent Senior Advocate, proceeds in the matter.



What does Vodafone want? It wants the matter to be adjudicated by international law, not by Indian law. According to Vodafone, Indian courts have no territorial jurisdiction, as held by the Supreme Court on 20 January 2012. Vodafone wishes to switch back to the verdict of the Supreme Court and ignore the subsequent law enacted by Parliament in March 2012. Can this be allowed in any civilised democracy without Vodafone challenging the law enacted in March 2012?

It all started on 7 May 2007 when FIPB (Foreign Investment promotion Board), a wing of the Department of Economic Affairs, Ministry of Finance, conveyed its approval to Vodafone to purchase Hutch Essar operations in India subject, inter-alia, to compliance of laws and regulations in India. Mark the words “compliance”, “laws”, “regulations” and “in India”. The parties, therefore, knew ab initio that the transaction would be subject to territorial jurisdiction of India and its laws.

On the very next day, 8 May 2007, Vodafone remitted USD\$. 11 billion to Hutch. Funds travelled swiftly from Cayman Island to Hongkong. Why did Vodafone approach FIPB in India, and not Cayman Islands or Hongkong? Why did India and its laws come into the picture? By its conduct, Vodafone has conceded territorial jurisdiction to India. Consequently, the jurisdiction of Income Tax Department in India could not have been questioned. **The judgment of the Supreme Court, holding that India has no territorial jurisdiction was flawed.** Parliament had to correct/amend this erroneous interpretation of law. Such amendments are always carried out retrospectively to save tax already collected since Supreme Court judgments have retrospective operations. This is a well settled principle of law.

Vodafone has been wishing its tax liability to be adjudicated either by (a) Conciliation or by (b) International Arbitration by invoking Bilateral Investment Promotion Agreement (BIPA) with Netherlands or by (c) International Court of Justice (ICJ), as reported in the press last week.

The first option – conciliation – does not help Vodafone since Section 61 of the Arbitration & Conciliation Act, 1961 is subject to “as otherwise provided by any law”. “Otherwise” has been provided under the IT Act, which does not provide for any conciliation against a tax demand.

The IT Act provides for an appeal under the IT Act. Therefore triggering conciliation proceedings against a tax demand is ab initio illegal and ultra vires the Acts (IT as well as Arbitration). So, without amending the IT Act, Vodafone’s conciliation wish cannot be

fulfilled. UPA II needlessly gave hope to Vodafone by its offer of non-binding conciliation talks which means nothing in law.

As regards International Arbitration arising out of Bilateral Investment Promotion Agreement (BIPA), one needs to analyse the extant law on the subject. Treaty obligations arise in India under article 51 (c) of the Constitution, which stipulates that the State shall endeavour to foster respect for international law and treaty obligations. Article 51 (d) further stipulates that the State shall endeavour to encourage settlement of international disputes by arbitration. Significantly, these obligations find place in Part IV of the Constitution pertaining to Directive Principles of State Policy, which are not enforceable; but it shall be the duty of the State to apply these principles in making laws. Therefore, making laws is the crux of the issue. Unless a law is actually enacted by a competent legislature in India, such agreements (BIPA) cannot be enforced.

The judiciary in India has, however, been playing a creative role to enable the State to honour treaty obligations. In the case of *Research Foundation for Science, Technology* (2012) 7 SCC 764, the Apex Court declared Basel Convention adopted by the Central Government to be followed in aid of a clean and pollution free maritime environment before permitting entry of any vessel suspected to carry toxic and hazardous material into Indian territorial waters. Similarly, in the case of *T.N. Godavarman* (2012) 4 SCC 362, the Apex Court reiterated that provisions of treaties and conventions which are not contrary to domestic laws are deemed to have been incorporated in domestic law.

It is thus clear that any treaty obligation has to be in harmony with domestic legislation. A tax demand cannot be stretched to be given “national treatment”, “most favoured treatment” etc. to a foreign investor through the gateway of Article 4 of India-Netherlands BIPA, bypassing the IT Act or in conflict with it. Even the Union Cabinet cannot go against the law. Therefore, this wish of Vodafone is also un-implementable in India.

It is also necessary to recognise that bilateral treaty obligations constitute international law. Public international law governs relations between two States. So, when two sovereign States enter into an agreement seeking to determine their rights and obligations, the terms of the agreement are called Public international law. But through such agreements, rights and obligations of private parties and corporates are also determined/affected which fall within the ambit of private international law. Therefore, private or public, treaty obligations constitute international law.

It is a settled law in India, as also in most countries across the world, that in case of a conflict between international law and domestic law, it is the domestic law that prevails. International law may still prevail, if not in conflict with domestic law. In the United States, however, treaty obligations override domestic laws.

Substantially same is the situation in England. Since the terms of India-Netherlands Bilateral Investment Protection Agreement (BIPA) are in clear conflict with domestic law, namely Income Tax (IT) Act, 1961, the domestic law has to prevail in India. Vodafone's triggering BIPA is thus misconceived.

And now Vodafone's final wish: to trigger the jurisdiction of ICJ (C). The ICJ Charter of 1946 mandates consent between litigating States to confer jurisdiction on ICJ. No State can be dragged to ICJ unless the State consents to be so dragged. I don't think India will ever give such a consent in contravention of the IT Act, and in negation of the law declared by the Supreme Court. So, the last wish of Vodafone is also illusory.

Foreign investor countries wishing to enter into any Bilateral Investment Protection Agreement (BIPA) with India would do well to ensure that BIPA terms are not in conflict with any law in India. Similarly, India wishing to enter into BIPA with foreign investee countries must ensure that BIPA terms do not conflict with laws of the foreign country.

Otherwise, such agreements would remain unenforceable, and the sufferers would only be the investors across the world. It is in this context that one hopes Mr. Jaitley would review all BIPAs to give a fillip to foreign investments.

Vodafone would thus not be able to escape from tax demand in India. Allowing Vodafone to escape would amount to subversion of rule of law.

Vodafone and Government of India must accept this reality forthwith. Conciliation, arbitration, and invoking international law are all alien to Income Tax Act in India. No foreign investor should be kept in the dark about the enforceability of applicable Indian laws. If tomorrow Vodafone exits India for a consideration of USD \$ 1 Trillion, and receives the funds in Cayman Island from, say, Hutch in Hongkong, would the revenue generated in the transaction continue to elude the coffers of India's exchequer? No way! It is high time for India to enforce the rule of law without fear or favour. Collecting legitimate tax revenue is the bounden duty of the Government. Foreign investors will ultimately prefer and respect a destination committed to the rule of law, rather than a regime that subverts it.

[About Us](#) | [Advertise](#) | [Contact Us](#) | [Feedback](#)

Copyright © Telecomtiger 2007-2008 [Terms of use](#)

This site is best viewed in Internet Explorer 6.0 and higher versions, at a resolution of 1024 x 768 pixels