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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 383/2017 & I.A.No.9460/2017

UNION OF INDIA ..... Plaintiff

Through Mr. Sanjay Jain, Senior Advocate with Mr. Sanjeev Narula, CGSC and Mr. Abhishek Ghai, Ms. Adrija Thakur, Mr. Ashutosh Kumar, Ms. Rhea Verma and Ms. Anumita Chandra, Advocates.

versus

VODAFONE GROUP PLC
UNITED KINGDOM & ANR ..... Defendants

Through Mr. Harish Salve, Senior Advocate with Ms. Anuradha Dutt, Ms. Fereshte D. Sethna, Ms. Ekta Kapil, Ms. Gayatri Goswami, Mr. Harrish Fazili, Mr. S Ghosh, Mr. Kunal Dutt and Mr.Anirudh Bakhru, Advocates.

Amicus Curiae
Mr. Sumeet Kachwaha, Advocate

Reserved on : 08th March, 2018
% Date of Decision: 07th May, 2018

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

1. Present matter raises important and interesting issues of law with regard to Bilateral Investment Protection Agreement. In fact, in recent years

there has been rapid increase in bilateral investment treaty arbitrations, but there is limited authority on the jurisdiction and approach of National Courts or on the nature of arbitrations under such treaties.

2. It is pertinent to mention that present suit has been filed by the Plaintiff-Union of India against Vodafone Group Plc ('VG'), i.e., Defendant No.1 and Vodafone Consolidated Holdings Ltd ('VCHL'), i.e., Defendant No.2 (hereinafter referred to as "Defendants") seeking reliefs of declaration and permanent injunction. The prayers sought in the present suit are reproduced hereinbelow:-

> *"(a) Declare that notice of dispute dated 15.06.2015 and the notice of arbitration dated 24.01.2017 issued to the Plaintiff by the Defendant and the proceedings initiated by Defendant Nos. 1 and 2 in furtherance of the said notice of dispute dated 15.06.2015 and the notice of arbitration dated 24.01.2017 under India UK Bilateral Investment Protection Agreement are an abuse of process and null and void;*
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> *(b) pass a decree of permanent injunction in favour of the plaintiff and against Defendant Nos. 1 and 2 restraining the defendants, their servants, agents, attorneys, assigns from taking any action in furtherance of the notice of dispute dated 15.06.2015 and the notice of arbitration dated 24.01.2017 and from initiating arbitration proceedings under India-UK Bilateral Investment Protection Agreement or continuing with it as regards the dispute mentioned by the Defendants in the Notice of Arbitration dated 24.01.2017.*
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> *(c) Award costs of the suit in favour of the Plaintiff and against the Defendants;*
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> *(d) Pass such other and further order(s) and/or direction(s) as may be deemed fit and proper in the facts and circumstances of the case."*

3. On 09th January, 2018, the learned senior counsel for the parties stated that they did not wish to lead any evidence in the present case. Thereafter, at the request of the learned senior counsel for the parties, the matter was heard finally on the paper book and after treating all the documents filed by the parties as admitted documents.

4. Since the Defendants were objecting the jurisdiction of this Court to hear the present suit, they were asked to commence the arguments.

SUBMISSIONS OF MR. HARISH SALVE, SENIOR COUNSEL FOR DEFENDANTS-VODAFONE GROUP

5. At the outset, Mr. Harish Salve, learned senior counsel for Defendants clarified that the Defendants did not, by their appearance in Court, accede to the jurisdiction of Indian Courts generally or this Court in particular, and had entered appearance without prejudice to their rights and contentions.

6. He submitted that the National Courts of India inherently lacked the jurisdiction to entertain any dispute arising out of a Treaty between two sovereign countries. He stated that the Union of India was a party to the Bilateral Investment Protection Agreement (hereinafter referred to as 'BIPA'), a Treaty between two sovereign governments (the Government of the United Kingdom of Great Britain and Northern Ireland & the Union of India), and the obligations under such treaties were not subject to domestic laws and disputes arising out of such treaties were not subject to the jurisdiction of the National Courts. He emphasised that the Courts could not interpret and/or enforce the provisions of Bilateral Investment Treaties as the law made such issues non-justiciable.

7. He emphasised that the Divisional Court of the Queen's Bench Division in ***The Campaign for Nuclear Disarmament v. The Prime Minister of the United Kingdom, [2002] EWHC 2777 (Admin)*** has held, *"ordinarily speaking, English Courts will not rule upon the true meaning and effect of international instruments which apply only at the level of international law...."*

8. He also pointed out that the interplay of the jurisdiction of National Courts and international law had been considered at some length in the *Tin Council Case* ***[J.H. Rayner (Mincing Lane) Ltd. Vs. Department of Trade & Industry & Ors., [1990] 2 AC 418 (House of Lords)]***. The relevant portion of the said judgment relied upon by him is as under:-

> *" .....if there existed a rule of international law which implied in a treaty or imposed on sovereign states which enter into a treaty, an obligation....to discharge the debts of an international organisation established by that treaty, the rule of international law could only be enforced under international law. Treaty rights and obligations conferred or imposed by agreement or by international law cannot be enforced by the Courts of the United Kingdom.....The Courts of the United Kingdom have no power to enforce at the behest of any sovereign state or at the behest of any individual citizen of any sovereign state rights granted by treaty or obligations imposed in respect of a treaty by international law.... there is no analogy between private international law which enables the courts of the United Kingdom to resolve differences between different laws of different states, and a rule of public international law which imposes obligations on treaty states.....However, one approaches the problem, the obligations sought to be imposed on the respondents....stem from the treaty and have no separate existence in domestic law without it.....One has only to envisage a dispute, possibly between the member states and the I.T.C. or possibly between the member states inter se, as to the scope and*

consequence of the authority so agreed to be granted. This must necessarily be a question of the effect of the treaty on the plane of international law and a domestic court has not the competence so as to adjudicate upon the rights of sovereign states.... Thus your Lordships are invited directly to embark upon the exercise of interpreting the terms of the treaty and ascertaining, on the basis of that determination, the rights of the members in international law and the consequences in municipal law of the rights so determined. I see no escape from Mr Pollock's submission that this directly infringes the principle of non-justiciability."

9. He pointed out that in ***SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, (ICSID Case No.ARB/01/13) Procedural Order No.2 dated 16 October 2002***, the Arbitral Tribunal has held as under:-

"....However, although the Supreme Court Judgment of July 3, 2002 is final as a matter of the law of Pakistan, as a matter of international law, it does not in any way bind this Tribunal....

It is clear that SGS has a prima facie right to seek access to international adjudication under the ICSID Convention. It has consented to submit its claim to arbitration under Article 9(2) of the Bilateral Investment Treaty....

It is essential for the proper operation of both the BIT and the ICSID Convention that the right of access to international adjudication be maintained. In the Tribunal's view, it has a duty to protect this right of access and should exercise such powers as are vested in it under Article 47 of the ICSID Convention in furtherance of that duty....

.....The right to seek access to international adjudication must be respected and cannot be constrained by an order of a national court. Nor can a State plead its internal law in defence of an act that is inconsistent with its international obligations. Otherwise, a Contracting State could impede access to ICSID arbitration by operation of its own law....

> *For the foregoing reasons, the Tribunal issues the following recommendations:*
>
> *First, the Tribunal recommends that the Government of Pakistan not take any step to initiate a complaint for contempt. It recommends further that, in the event that any other party, including the Supreme Court of Pakistan sua sponte, were to initiate a complaint, the Government of Pakistan take all necessary steps to inform the Court of the current standing of this proceeding and of the fact that this Tribunal must discharge its duty to determine whether it has the jurisdiction to consider the international claim on the merits. The Government of Pakistan should ensure that if contempt proceedings are initiated by any party, such proceedings not be acted upon..."*

10. Mr. Salve submitted that the Indian National Courts had neither the jurisdiction over the subject matter of the dispute (which is a dispute arising out of an alleged breach of a Treaty by the Union of India), nor did they have jurisdiction *Ratione Personae* (i.e. over the Defendants).

11. Learned senior counsel for the Defendants further submitted that domestic law was not a defence to non-performance of the obligations under a treaty. In support of his submission, he relied upon Articles 26 and 27 of the Vienna Convention on the Law of Treaties, which are reproduced hereinbelow:-

> *"**Article 26. "PACTA SUNT SERVANDA"***
>
> *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*
>
> ***Article 27. INTERNAL LAW AND OBSERVANCE OF TREATIES***
>
> *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."*

12. According to him, the obligations of a State, under a bilateral or multilateral international treaty, are owed by a Sovereign State to one or more other Sovereign States. He submitted that a breach of treaty obligations was a violation of international law and the remedy for this wrong had to be found in international law. He contended that the two principles which had been unanimously accepted are that a State cannot plead provisions of its municipal law to escape international responsibility, and legislative, judicial as well as executive acts are all capable of giving rise to State responsibility.

13. He submitted that even when the obligations under a treaty overlapped with domestic law (for example the procedure under the internal criminal law, or specific laws enacted as measures to give effect to Treaty Obligations) and the domestic law involved the actions of National Courts, the action of the Courts themselves could be considered as a violation of the Treaty. In support of his submission, he relied upon Articles 3 and 4 of the Responsibility of States for Internationally Wrongful Acts (ARSIWA) which are reproduced hereinbelow:-

Articles 3 and 4 of ARSIWA

"Article 3
Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II
ATTRIBUTION OF CONDUCT TO A STATE

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

14. Mr. Salve submitted that Article 9 of the BIPA laid out the procedure to be followed in the case of a dispute between an investor of one Contracting Party (in this case the United Kingdom) and the other Contracting Party (in this case, the Plaintiff-Union of India). According to him, the dispute resolution procedure was an element of the bilateral treaty, and thus any conduct by a State whether by legislation, executive action or resort to a National Court which interfered with this process would in itself be a violation of the Treaty.

15. He pointed out that the BIPA specifically provided for the UNCITRAL Arbitration Rules 1976 to apply and Article 21 incorporated the principle of *kompetenz kompetenz.* Article 21 reads as under:

"1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

> *2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part..."*

16. Mr. Salve also submitted that the Plaintiff-Union of India's reliance in the plaint upon the ***Orascom TMT Investments S.a r.l. v. People's Democratic Republic of Algeria [ICSID Case No.ARB/12/35, Award dated 31st May 2017*** to apply for an injunction had been dealt with in the Order of the India-Netherlands BIPA Tribunal dated 22nd August 2017. He stated that the Award in *Orascom* infact established that it was the Tribunal that was seized of an arbitration that should decide the issue of abuse of process.

17. Learned senior counsel for the Defendants stated that the conduct of the Plaintiff-Union of India was also significant in the context of the nature of the arbitration. He pointed out that the Plaintiff-Union of India had sought relief on the same ground (i.e. the second arbitration by the present Defendants being an abuse of process) from the tribunal constituted under the India-Netherlands BIPA. He pointed out that the Plaintiff-Union of India had also requested the President of the International Court of Justice (hereinafter referred to as "ICJ") to refrain from taking any action by way of appointment of an arbitrator on the ground that the invocation had been an abuse of process. Responding to the queries of the President of ICJ on 07th August 2017, the Plaintiff-Union of India suggested "*...an outside date of 31 August 2017 for awaiting the outcome of the application, at which time India would be prepared to make the appointment if the application has not been decided...".* The President of the ICJ, by his letter of 11th August 2017, accepted the request of the Plaintiff-Union of India.

18. Mr. Salve emphasised that the Plaintiff-Union of India had elected to seek relief from the India-Netherlands BIPA tribunal, but without awaiting its orders, and without seeking its leave, moved the present Court for the same relief on the same grounds. A conduct such as this, according to him, disentitled the Plaintiff-Union of India, under the principles of Indian national law, to relief by way of an interim injunction.

19. He also stated that on 01st September, 2017, the President, ICJ informed the Plaintiff-Union of India that, as he was not bound by the order of this Court dated 22nd August, 2017, he would proceed with the appointment of an arbitrator if the Plaintiff-Union of India failed to appoint one by 07th September, 2017. On the same date, the Plaintiff-Union of India appointed its arbitrator for the arbitration. These facts, according to him, established not only lack of *bona fides*, but also that the Plaintiff-Union of India had obstructed a remedy of dispute resolution which in itself was a continuation of violation of the BIPA. Mr. Salve prayed that the suit be dismissed on the ground of suppression.

20. Learned senior counsel for Defendants, without prejudice to the rights and contentions of the Defendants, offered that should the Plaintiff-Union of India bring the challenge of abuse of process before the India-United Kingdom BIPA Arbitration tribunal, they along with the Claimants in the India-Netherlands BIPA arbitration would apply to the United Kingdom Tribunal to consolidate the two arbitrations and with consent of parties both arbitrations could be conducted before the same tribunal.

SUBMISSIONS OF MR. SANJAY JAIN, SENIOR COUNSEL FOR PLAINTIFF-UNION OF INDIA

21. Per contra, Mr. Sanjay Jain, learned senior counsel for Plaintiff-Union of India submitted that the initiation of arbitration proceeding under the India-United Kingdom BIPA was an abuse of process because it was aimed at avoiding the consequence of the election of remedy under the India-Netherlands BIPA and sought to multiply arbitration proceedings to maximise the chances of success for Defendants.

22. He stated that in April 2012 the Defendants issued a notice of dispute to Union of India under the India-Netherlands BIPA. According to him, this action amounted to an election of remedy under the India-Netherlands BIPA by Defendants and the consequence of such election was that Vodafone International Holdings B.V. (hereinafter referred to as 'VIHBV') had to limit its remedy to the one available under the India-Netherlands BIPA. He submitted that to permit otherwise would be contrary to the principle of good faith and the doctrine of election which were recognized by domestic and international law. [***Arts. 26, 31(1) of the Vienna Convention on the Law of Treaties 1969; Inceysa Vallisoletana, S.L. v. Republic of El Salvador (ICSID Case No. ARB/03/26); Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24); Phoenix Action, Ltd. v. The Czech Republic (ICSID Case No. ARB/06/5); IOAN Micula v. Romania (ICSID Case No. ARB/05/20)***].

23. Mr. Sanjay Jain pointed out that in June 2015, Defendants had issued a second notice of dispute to Union of India under the India-United Kingdom BIPA, but as Union of India had termed the second notice as an

abuse of process, Defendants had not issued a notice of arbitration to Union of India under the India-United Kingdom BIPA for almost eighteen months.

24. He stated that in January 2017, Defendants after realising that their chances in the arbitration proceedings under the India-Netherlands BIPA were bleak, issued a notice of arbitration to Union of India under the India-United Kingdom BIPA. He contended that the purpose of the arbitration proceedings under the India-United Kingdom BIPA was to provide a second chance to Defendants to pursue the same claim before a different tribunal. According to him, Defendants were always aware of such jurisdictional objection and they merely used such jurisdictional objection to mask their real purpose - to get two chances at pursuing the same claim. He stated that to further such purpose, the Defendants not only did not agree to bifurcation of the arbitration proceedings under the India-Netherlands BIPA but also opposed the application dated 22nd December, 2017 by Union of India to the tribunal under the India-Netherlands BIPA for an early determination of the jurisdictional objection.

25. Learned senior counsel for Plaintiff-Union of India pointed out that the UK entities and the Netherlands entity were in the same vertical corporate chain (all under the control of the Vodafone Group) and they complained of the same measures and the disputes notified to India as well as relief sought were identical in both the arbitrations. According to him, this was a clear abuse of process. In support of his contention, he relied upon the following:-

(A) ***Article on Abuse of Process in International Arbitration by Prof. Emmanuel Gaillard[1] delivered at The Paris Court of Appeal as the opening lecture of the 2015 Session of Arbitration Academy,*** wherein he states, *"a claimant will commit an abuse of process when it initiates more than one proceeding to resolve the same or related dispute in order to maximize its chances of success"* and that *"This strategy is highly prejudicial to a respondent, who is forced to defend multiple sets of claims before different arbitral tribunals rather than in a single arbitration."*

(B) ***Award in Orascom*** case *(supra)*, wherein it was held, *"....an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state.....does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm....Where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established."*

26. Mr. Sanjay Jain submitted that the jurisdictional objection raised by Plaintiff-Union of India related to the admissibility / maintainability of specific claims under the India-Netherlands BIPA and such an objection was

[1] Professor of Law, Sciences Po Law School, Paris, France; Visiting Professor, Yale Law School.

not a technical objection but in fact related to the substantive rights/scope of investor protection provided by the India-Netherlands BIPA. He stated that by commencing arbitration proceedings under the India-United Kingdom BIPA, Vodafone was not seeking to overcome a simple defect in jurisdiction, but was attempting to use the arbitration proceedings under the India-United Kingdom BIPA to get a second chance at pursuing the same claim in spite of a serious jurisdictional defect. This, according to him, was a case of *'textbook treaty shopping'* and should not be permitted.

27. Learned senior counsel for Plaintiff-Union of India submitted that the argument that Defendants should still be permitted to pursue arbitration proceedings under the India-United Kingdom BIPA as a *'failsafe'* was flawed as there was no basis to assume that Defendants were entitled to pursue additional arbitration proceedings if they were to lose the arbitration proceeding under the India-Netherlands BIPA, due to a jurisdictional objection. He contended that if Defendants had elected to pursue a remedy under a specific treaty, then they must be held to proper consequence of such election and if Defendants were to lose the arbitration proceedings under the India-Netherlands BIPA on a jurisdictional objection or otherwise, then such an outcome should be the end of the matter. He contended that if Defendants were not restrained through an appropriate injunction, Union of India may face further arbitration proceedings under other investment treaties without any end in sight.

28. Learned senior counsel for Plaintiff-Union of India further submitted that commencement of any other arbitration proceedings under the India-United Kingdom BIPA was unnecessary and pre-mature at this stage. According to him, this Court should not *'second guess'* the outcome of the

arbitration proceedings under the India-Netherlands BIPA and conjecture as to the need for a *'failsafe'* at present. He pointed out that it is entirely possible for Defendants to be heard on merits in India- Netherlands BIPA arbitration proceedings and if that were to happen, it would obviate the need for arbitration proceedings under the India-United Kingdom BIPA. Consequently, according to learned senior counsel for Plaintiff-Union of India, the obvious and prudent route for both parties would be to conclude the arbitration proceedings under the India-Netherlands BIPA and then decide if further arbitration proceeding under a separate treaty was required at all.

29. Mr. Sanjay Jain stated that consolidation of arbitration proceedings would only legitimise an inherent abuse of process on the part of Defendants and would not provide any succour to Union of India since there would remain two claims under two different treaties and Union of India would still have to defend two claims on merits by filing separate pleadings and advancing separate arguments.

30. He further submitted that there would be no finality attached to even the consolidated arbitration proceedings as Defendants could exploit their corporate structure to ignite a third treaty claim. He emphasised that this Court, being a court of equity and good conscience, should not permit Defendants to take advantage of their own wrong by first electing to pursue remedies under the India-Netherlands BIPA, and then igniting further arbitration proceedings under the India-United Kingdom BIPA on the apprehension of losing the legal battle in the first arbitration proceedings. He stated that there was no seamless merger possible between the two

arbitration proceedings, and hence he repudiated the proposal to consolidate the two arbitration proceedings.

31. Learned senior counsel for Plaintiff-Union of India prayed that this Court should exercise its inherent jurisdiction to prevent abuse of process and grant an anti-arbitration injunction restraining Defendants from continuing with the arbitration proceedings as was done by Calcutta High Court in ***The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors., 2014 SCC OnLine Cal 17695.***

32. Learned senior counsel for Plaintiff-Union of India submitted that a National Court is required to exercise its jurisdiction in accordance with applicable domestic laws. In support of his submission, he relied upon the Supreme Court judgment in ***World Sport Group (Mauritius) Limited Vs. MSM Satellite (Singapore) Pte Limited, (2014) 11 SCC 639*** wherein it has been held as follows:-

> *"22. We are unable to accept the first contention of Mr Venugopal that as Clause 9 of the Facilitation Deed provides that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties, the Bombay High Court had no jurisdiction to entertain the suit and restrain the arbitration proceedings at Singapore because of the principle of comity of courts.....*
>
> *23. In the present case no decision of a court of foreign country or no law of a foreign country has been cited on behalf of the appellant to contend that the courts in India out of deference to such decision of the foreign court or foreign law must not assume jurisdiction to restrain arbitration proceedings at Singapore. On the other hand, as has been rightly submitted by Mr Subramanium, under Section 9 CPC, the courts in India have jurisdiction to try all suits of a civil nature excepting suits of*

> *which cognizance is either expressly or impliedly barred. Thus, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders in the suit by virtue of Section 9 CPC and Clause 9 of the Facilitation Deed providing that the courts in Singapore or any other court having jurisdiction over the parties can be approached for equitable relief could not oust the jurisdiction of the appropriate civil court conferred by Section 9 CPC....."*

33. Mr. Sanjay Jain contended that as this Court has the jurisdiction under Indian law to prevent abuse of process, it cannot limit its jurisdiction or refuse to exercise its jurisdiction. He submitted that Article 21 of the UNCITRAL Rules did not stipulate a negative formulation of the *kompetenz kompetenz* principle that precluded a competent court (such as this Court) from exercising its jurisdiction to prevent abuse of process. He submitted that the Supreme Court in ***Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. & Others, (2013) 1 SCC 641*** has rejected the concept of negative *kompetenz kompetenz* in the following terms:-

> *"85. This is the position of law in France and in some other countries, but as far as the Indian law is concerned, Section 45 is a legislative mandate and does not admit of any ambiguity. We must take note of the aspect of Indian law that Chapter I of Part II of the 1996 Act does not contain any provision analogous to Section 8(3) under Part I of the Act. In other words, under the Indian law, greater obligation is cast upon the courts to determine whether the agreement is valid, operative and capable of being performed at the threshold itself. Such challenge has to be a serious challenge to the substantive contract or to the agreement, as in the absence of such challenge, it has to be found that the agreement was valid, operative and capable of being performed; the dispute would be referred to arbitration. (State of*

Orissa v. Klockner and Co. [(1996) 8 SCC 377 : AIR 1996 SC 2140].

xxxx xxxx xxxx xxxx

121. ....Where the Chief Justice or his designate actually decides the issue, then it can no longer be prima facie, but would be a decision binding in law. On such an issue, the Arbitral Tribunal will have no jurisdiction to redetermine the issue.....

122. ....The issues in regard to validity or existence of the arbitration agreement, the application not satisfying the ingredients of Section 11(6) of the 1996 Act and claims being barred by time, etc. are the matters which can be adjudicated by the Chief Justice or his designate. Once the parties are heard on such issues and the matter is determined in accordance with law, then such a finding can only be disturbed by the court of competent jurisdiction and cannot be reopened before the Arbitral Tribunal....."

34. Mr. Sanjay Jain, learned senior counsel for Plaintiff-Union of India submitted that this Court had the subject-matter jurisdiction to grant an anti-arbitration injunction under Section 9 read with Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 and Section 38 of the Specific Relief Act, 1963, subject to the limitations contained in Section 41 of the Specific Relief Act, 1963. In support of his submission, he relied upon ***V.O. Tractoroexport, Moscow Vs. Tarapore & Company & Another, (1969) 3 SCC 562***; ***Oil and National Gas Commission Vs. Western Company of North America, (1987) 1 SCC 496*** and ***Modi Entertainment Network & Another Vs. W.S.G. Cricket Pte Ltd., (2003) 4 SCC 341***.

35. Mr. Sanjay Jain stated that Defendants are subject to the personal jurisdiction of this Court pursuant to Section 20(c) of the CPC. In support of his submission, he relied upon the judgment of the Supreme Court in ***Lalji***

Raja and Sons Vs. Firm Hansraj Nathuram, (1971) 1 SCC 721 wherein the Court has held as under:-

> *"8. The above remarks of the Board indicate that even a decree which is pronounced in absentem by a foreign court is valid and executable in the country of the forum by which it was pronounced when authorised by special local legislation. A decree passed by a foreign court to whose jurisdiction a judgment-debtor had not submitted is an absolute nullity only if the local Legislature had not conferred jurisdiction on the domestic courts over the foreigners either generally or under specified circumstances. Section 20(c) of 'the Code' confers jurisdiction on a court in India over the foreigners if the cause of action arises within the jurisdiction of that court.....The board itself had noticed that this rule of Private International Law is subject to special local legislation. Clause (c) of Section 20 of 'the Code' provided at the relevant time and still provides that subject to the limitations mentioned in the earlier sections of 'the Code', a suit can be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. There is no dispute in this case that the cause of action for the suit which led up to decree under execution arose within the jurisdiction of Bankura Court. Hence it must be held that the suit in question was a properly instituted suit. From that it follows that the decree in question is a valid decree though it might not have been executable at one stage in courts in the former Indian States."*

36. Mr. Sanjay Jain, learned senior counsel for Plaintiff-Union of India pointed out that the Defendants were no stranger to Indian jurisdiction and, according to him, the Defendants could not contend that exercise of personal jurisdiction by this Court would be unfair or unreasonable in any manner.

37. He submitted that the present judicial action was not a breach of treaty obligations as it did not prevent Vodafone from pursuing its elected remedy under the India-Netherlands BIPA, but only prevented Vodafone from

perpetrating an abuse of process by pursuing parallel, vexatious and oppressive proceedings under the India-United Kingdom BIPA.

38. Mr. Sanjay Jain submitted that judicial actions could not amount to a breach of international law on the part of the concerned State, unless such judicial actions constituted denial of justice.

39. He submitted that this Court must exercise its jurisdiction based on principles of Indian law and not on considerations relating to any alleged breach of International law.

40. Mr Sanjay Jain stated that the plaint was prepared by 01st August, 2017 and the letters dated 07th August and 11th August, 2017 were not made available to the local lawyers before the filing on 11th August, 2017 and re-filing on 16th August, 2017.

41. Learned senior counsel for Plaintiff-Union of India lastly stated that the Union of India had never communicated its voluntary willingness to join the proceedings for the appointment of an arbitrator under the India-United Kingdom BIPA but had participated in such proceedings only under compulsion.

SUBMISSIONS OF AMICUS CURIAE

42. Mr. Sumeet Kachwaha, the learned Amicus Curiae submitted that the agreement to arbitrate as mentioned in the investment treaty was like making a contract from an advertisement and such an advertisement constituted a binding unilateral invitation to invite offers that could be accepted by anyone who performed its terms. Consequently, according to the learned Amicus Curiae the provisions in the bilateral investment treaty had given rise to the formation of a contract along the lines of reasoning adopted in

Carlill v. Carbolic Smoke Ball Co. [1891-94] All ER. Re 127 and that it was this contractual right to arbitrate which the court needed to examine.

43. In support of his submission, he relied upon the judgment of the Caribbean Court of Justice, Appellate Jurisdiction in ***British Caribbean Bank Limited v. The Attorney General of Belize [2013] CCJ 4 (AJ)***, wherein it has been held, "*Thus BCB, the investor, is not a party to the treaty but Article 8 makes a free standing offer which is accepted on submission of the dispute to arbitration and becomes a binding contract between the investor and the State party. The provision is clear and unambiguous. It evidences the intention of the State parties to provide private investors with the right to have the specified disputes settled by international arbitration. The plain wording of the article also demonstrates that there are no preconditions to the right to submit the dispute to international arbitration....."*

44. Learned Amicus Curiae submitted that it was a part of the inherent jurisdiction of the court to prevent abuse of process of court. He pointed out that the Caribbean Court of justice in ***British Caribbean Bank Limited v. The Attorney General of Belize*** (supra) has held that the concepts of 'oppression', 'vexation', 'inequity' and 'abuse of process' have been known to the common law and equity for centuries, being the primary theories used by the court to regulate its process pursuant to its inherent jurisdiction. He clarified that the enabling provision in the aforesaid case empowering the courts to issue an anti-arbitration injunction (including in relation to offshore arbitrations) on the ground of the same being oppressive, vexatious, inequitable or an abuse of the process, did not make any change in the common law principles applicable prior to its passage. Consequently,

according to him, the court has inherent jurisdiction to restrain BIT Arbitrations which are oppressive, vexatious and / or an abuse of process of law.

45. But, Mr. Sumeet Kachwaha, contended that the reason for Defendants commencing the arbitration proceedings under the India-United Kingdom BIPA was the jurisdictional objection raised by Plaintiff-Union of India in the arbitration proceedings under the India-Netherlands BIPA in January 2017. He stated that the proceeding under the India-United Kingdom BIPA had been initiated by the Defendants as a direct consequence of Union of India's position in India-Netherlands BIPA Arbitration that the said Tribunal lacked jurisdiction to decide tax issues. He drew this Court's attention to the following paragraph in the Notice of Arbitration issued by the Defendants under the India-United Kingdom BIPA:-

> *"5. The Claimants and Claimants' subsidiary are not seeking double recovery by way of the two claims which are being brought. Indeed, at present, they only seek damages as an alternative remedy - the Claimants' primary requests for relief are merely for declaratory and injunctive relief and an award of their costs. The Respondent has asserted that the Tribunal constituted to determine VIHBV's claim under the Netherlands-India Treaty lacks jurisdiction; these proceedings under the UK-India Treaty are a direct consequence of the Respondent's position in that arbitration."*

46. Learned Amicus Curiae contended that Defendants merely sought one route to arbitration and did not seek double recovery and therefore there was no abuse of process. He emphasised that the absence of double recovery by Vodafone excluded the possibility of abuse of process.

47. He referred to three letters of Defendants dated 17th May, 2017, 17th June, 2017 and 25th July, 2017 to contend that *"even before the suit was filed, the Defendants were always ready and willing and on their own made several offers for consolidation".*

48. Mr. Sumeet Kachwaha stated that Plaintiff-Union of India's suggestion that both the parties should first finish the arbitration proceedings under the India-Netherlands BIPA and then decide if further arbitration proceeding under a separate treaty was required at all was not a *'prudent route'*. He contended that this solution would probably constitute a greater abuse of process as in parallel proceedings there can be at least some coordination between the two tribunals (say for instance for recording of evidence; selection of seat etc.), whereas in sequential arbitration, the second tribunal would neither be like an appellate forum nor would it be bound by the first award. Both the awards were likely to be challenged (perhaps in different forums) as well as parties would be able to approbate and reprobate at the same time and it would unfairly delay the judicial process for the claimants.

49. The learned Amicus Curiae submitted that BIPA arbitrations have resulted in emergence of an international administrative law that regulates the conduct of States through a private adjudicative mechanism. He emphasised that the BIPA arbitrators are a fairly small and select group of specialised professionals from United States of America and Europe with experience in commercial law rather than in policy making. In support of his contention, he referred to the following parts of the speech of Mr. Justice Sundaresh Menon, Chief Justice of Singapore on *International Arbitration:*

*The Coming of New Age for Asia (and Elsewhere) delivered at ICCA Congress 2012***:-**

> *"18. Investment treaties were designed to encourage foreign direct investment by providing an additional safeguard of a foreign investor's commercial interests and protecting this from being adversely affected by government action in the host State. What was contemplated, at least initially, was unlawful taking by expropriation or damage through unfair and inequitable treatment. In signing these treaties, the State typically gives its broad and advance consent for arbitration to be deployed as a mechanism to resolve individual claims from a potentially indeterminate class of investors and this holds good for a significant length of time.*
>
> *19. But more than just a procedural mechanism for resolving investment disputes, investment treaty arbitration has come to set standards against which the exercise of public authority by the contracting States are going to be reviewed. In that sense, it mirrors the role of administrative law in reviewing governmental action in the domestic context - hence the suggestion made elsewhere that what we are witnessing is the emergence of an international administrative law that regulates the conduct of States through a private adjudicative mechanism.*
>
> *20. This is exciting at several levels. But it also gives cause for concern. While those practising in this field have a general understanding that "indirect expropriation" refers to any Government measure that has the effect of eroding the value of an investment, it is probably not settled whether legislative or policy changes, which have a legitimate public interest purpose, will also be caught by the principle.*
>
> *xxx xxx xxx*
>
> *22. The arbitrators, men and women often schooled and experienced in commercial law, find themselves having an unexpectedly weighty hand in shaping economic and monetary policy, tax incentives and perhaps even employment laws. From*

the perspective of the government, national policy and legislation will now have to be assessed for legality vis-a-vis the State's international treaty obligations, as interpreted by an autonomous, privately funded adjudicative body usually consisting of foreign nationals. This has the potential to constrain the exercise of domestic public authority in a manner and to a degree perhaps not seen since the colonial era.

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32. But who are the arbitrators to whom such important tasks have been entrusted? They tend mainly to come from a fairly small and select group of specialised and arbitrators principally from Europe and the United States with experience in commercial law rather than in policy making. They are often unlikely to be attuned to the nuances of domestic public interest of the countries affected by their awards. This private model of international adjudication has allowed a select few individuals drawn from narrow specialities within international and commercial law to rule on issues of public policy and legality of state regulatory actions, with little or no accountability to the constituency. Such an adjudicative mechanism bypasses the traditional protections and the often delicate and carefully arranged balance of interests that are built into the domestic administrative law framework.

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39. Specifically as regards investment treaty arbitration, there have been assertions either of a perceived pro-investor bias on the part of commercial arbitrators or perhaps less frequently, a pro-state bias on the part of some public international lawyers active in this field. In relation to the former, it is, after all, in the interest of the entrepreneurial arbitrator to rule expansively on his own jurisdiction and then in favour of the investor on the merits, because this increases the prospect of future claims and is thereby business-generating. This hints of a modern-day uber-sophisticated ambulance-chasing plaintiffs' lawyer. The pro-investor attitude has even been cited as the reason arbitrators

from the developing world often rule in favour of investors from traditionally capital-exporting countries, this being the "price" that has to be paid to gain credibility and access to the privileged club of elite international arbitrators.

40. Unbridled criticisms of how arbitrators are invariably profit-driven and biased, or that they always act strategically so as to be repeat players, are undoubtedly overstated. However, it is undeniable that the typical conditions that assure impartiality in the judicial sphere are lacking in arbitration. Whereas judges are segregated from the rest of the legal professional community, arbitrators are largely drawn from precisely the same pool of professionals. The "usual suspects" in the industry may be arbitrator in one case and lawyer in the very next, often trading places in the process with another in the same select group. And while forum shopping is frowned upon in the judicial context, parties actively seek out arbitrators whom they believe would be pre-disposed to rule in their favour. The self-correcting mechanism of disclosure of interest is also open to criticism because of the inherent "conflict within a conflict" problem. Because disclosure depends on self-diagnosis, the decision to make such a disclosure may itself be against the self-interest of the arbitrator, if it were likely to result in foregoing a substantial fee.

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77. Fourth, we should examine the normative justification for arbitration providing a form of governance through its providing the platform for the emergence of substantive legal norms that govern states. In the field of investment arbitration, it might perhaps be justified on the basis that exposing States to such liability promotes transparency and accountability, as well as the enhanced protection of individual rights. But there is a need for a serious debate to take place as to whether the concepts of expropriation and fair and equitable treatment, which is what the treaties set out to protect in the first place, should extend as far as they now do. If we were all convinced that this global administrative law is fundamentally beneficial, then the next step would be to develop a rich jurisprudence to add flesh and texture

> *to various aspects of the law. The principles of good governance, fair and equitable treatment and respect for individual investor rights need to be more clearly rationalised and articulated. This cannot be the sole province of a small group of arbitrators. Thought leaders from government agencies, practitioners and the academic community must engage in an on-going dialogue to generate an overarching set of legal norms that will govern treaty interpretation."*

RESPONSE OF UNION OF INDIA TO ARGUMENTS ADVANCED BY AMICUS CURIAE

50. In response to the arguments advanced by the learned Amicus Curiae, Mr. Sanjay Jain, learned senior counsel for Plaintiff-Union of India denied that Defendants had commenced proceedings under the India-United Kingdom BIPA in response to a jurisdictional objection raised by Union of India in January, 2017. He pointed out that Defendants were aware of such jurisdictional objection as far back as May, 2012.

51. He submitted that the assumption that Defendants were somehow entitled to a decision on merits of their case–notwithstanding the election of remedies under the specific BIPA by Vodafone was untenable in law. He submitted that if Defendants had elected to pursue the remedies under a specific treaty, then they must be held to the proper consequence of such election. According to him, to permit otherwise would be contrary to principles of good faith and doctrine of election which were recognized by domestic and international law.

52. Mr. Sanjay Jain stated that the learned Amicus Curiae's reliance on the decision in ***British Caribbean Bank Limited*** (supra) to contend that commencement of parallel proceedings was not per se vexatious, failed to

consider that in the said case there were parallel proceedings before the National Courts under Municipal Laws and before an arbitral tribunal under an investment treaty. He pointed out that in the ***British Caribbean Bank Limited*** (supra) the relevant investment treaty did not contain an exhaustion of local remedies requirement and thereby contemplated parallel proceedings to such an extent.

53. Mr. Sanjay Jain stated that the Defendants' letters dated 17th May, 2017, 17th June, 2017 and 25th June, 2017 did not support the contention that Vodafone had made an offer to consolidate arbitration proceedings. He stated that on the contrary these letters proved Defendants' intention to unfairly maximise its chances of success by multiplying proceedings and by reiterating its indefensible demand that India should withdraw its jurisdictional objection in the arbitration proceedings under the India-Netherland BIPA or face multiple proceedings.

54. Learned senior counsel for Plaintiff-Union of India reiterated that consolidation of arbitration proceedings would not prevent abuse of process, but would simply mask such abuse to the advantage of Defendants. He submitted that Union of India had not consented to defending multiple claims relating to same cause of action--whether before one tribunal or multiple tribunals. According to him, consolidation of arbitration proceedings would ensure that arbitration proceedings under the India-United Kingdom BIPA could be used to pursue the same claims relating to the same cause of action pertaining to the same economic harm.

55. Mr. Sanjay Jain stated that there was no contradiction between the positions taken by the Plaintiff-Union of India in the arbitration proceedings under the India-Netherlands BIPA and before this Court. He stated that the

contention that the claimant in India-Netherlands BIPA had not made a qualifying investment did not suggest that Defendants had not made any investment in India at all or that Vodafone had no economic interest in India at all or that Vodafone did not carry on business in India at all.

REJOINDER SUBMISSIONS OF THE DEFENDANT

56. In rejoinder, Mr. Harish Salve submitted that the CPC did not create jurisdiction of a domestic Court. According to him, in disputes where the Defendant was a resident outside India, the jurisdiction of an Indian Court would have to be established under principles of private international law. He submitted that the relief of an injunction was an action *in personam* and under the well established rule of private international law all personal actions had to be filed in the Courts of the country where the Defendant resided. In support of his submission, Mr. Salve relied upon the judgment of the Supreme Court in ***The Andhra Bank Ltd. Vs. R. Srinivasan & Others, (1962) 3 SCR 391*** wherein it has been held *"....it would be relevant to recall the five cases enunciated by Buckley, L.J. in Emanuel v. Symon [1908] 1 KB 302 in which the Courts of England would enforce a foreign judgment. "In actions in personam", observed Buckley, L.J., "there are five cases in which the Courts of this country will enforce a foreign judgment : (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained".*

57. He reiterated that the Courts were bound to follow domestic law and not respect international obligations, was based on the fundamental proposition that *"Courts apply domestic law and not international treaties."* In support of his submission, he relied upon ***Re Barcelona Traction, Light and Power Co. Ltd., (Belgium v Spain) (second phase) [1970] ICJ Rep 4 at 44, LaGrand (Germany v United States) (1999) ICJ Rep 9, Buttes Gas and Oil Co. v Hammer (Nos.2 & 3) [1981] 3 All ER 616.***

58. Learned senior counsel for Defendants emphasised that the Courts of India are a part of the constitutional architecture of the Republic of India and it is for this reason that the action of the Courts are attributable to the State. According to him, no organ of the State could act in a manner that would deny a foreign investor the right to invoke the remedy by way of arbitration, which remedy in itself was a right under the treaty. He submitted that the Republic of India - the respondent in the arbitration that would commence – could not act in its own interest and 'injunct' a potential Claimant from bringing a claim.

59. He further submitted that a National Court could not interdict the invocation of treaty arbitration - for that would constitute preventing a national of a foreign state from invoking the provisions of a treaty.

60. Mr. Harish Salve lastly submitted that the decisions relied upon by the learned Amicus Curiae were cases where the Courts had exercised jurisdiction based on the curial law of the arbitration agreement. He submitted that once the tribunal was constituted, the Courts of the seat of the tribunal would have competence to decide the issue of jurisdiction.

FACTS

61. Before proceeding further, this court is of the view that it is necessary to state the facts of the present case, which are as under:-

(i) On 20th January, 2012, the Supreme Court of India vide its judgment and order in Civil Appeal No.733/2012 discharged VIHBV of the tax liability imposed on it by the Income Tax Department of the Plaintiff. The Supreme Court held that sale of share in question to Vodafone did not amount to transfer of a capital asset within the meaning of Section 2(14) of the Income Tax Act. The Apex Court not only quashed the demand of Rs. 12,000 crores (Rupees Twelve Thousand Crores) by way of capital gains tax but also directed refund of Rs. 2,500 crores (Rupees Two Thousand Five Hundred Crores) deposited by the Vodafone in terms of the interim order dated 26th November, 2010 along with interest @4% p.a. within two months.

(ii) Pursuant to the above judgment, the Parliament passed the Finance Act 2012, which provided *inter alia* for the insertion of two explanations in Section 9(1)(i) of the Income Tax Act. The first explanation clarified the meaning of the term "*through*", stating, "*For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included 'by means of', 'in accordance of' or 'by reason of'*. The second explanation clarified that *"an asset or a capital asset being any share or interest in a company or entity registered or incorporated*

outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India". The 2012 Amendment also clarified that the term *"transfer"* includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights had been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

(iii) On 17th April, 2012, the VIHBV, a company incorporated in The Netherlands, served upon the Plaintiff a '*Notice of Dispute*' under the India-Netherlands BIPA inveighing the tax liability cast upon it.

(iv) Union of India vide letter dated 20th February, 2014 stated that "*disputes relating wholly or mainly to taxation are excluded from the scope of the [Netherlands] BIPA" and that "the notices of dispute served by VIHBV to the Government of India under Article 9 of the BIPA are not valid as the alleged 'disputes' are outside the scope of the BIPA".*

(v) On 13th March, 2014, the VIHBV in its reply stated, "*We note your view that the BIT excludes issues wholly or mainly related*

to taxation. We have advice from both Indian and International legal experts to the contrary. This difference of view is clearly of significance in seeking to find an amicable solution to the dispute. In the context of this dispute, the only body capable of resolving the issue would be an arbitration panel constituted according to the BIT. It would of course be entirely open to the Government of India to argue its point of view on the exclusion of taxation from the BIT, as on any other issue, before such a panel".

(vi) On 17th April, 2014, the VIHBV served upon the Plaintiff a '*Notice of Arbitration'* under the India-Netherlands BIPA so as to commence arbitration proceedings in respect of the aforesaid tax liability.

(vii) On 15th June, 2015, Defendants served a Notice of Dispute on the Plaintiff under the India-United Kingdom BIPA.

(viii) On 24th January, 2017, Defendants served upon the Plaintiff-Union of India a 'Notice of Arbitration' under the India-United Kingdom BIPA.

(ix) On 12th April, 2017, the Defendants, in view of non-appointment of an arbitrator by the Plaintiff-Union of India, requested the Appointing Authority, President of the ICJ, to make a default appointment.

(x) The Plaintiff-Union of India in its letter of the same date stated that it considered the attempt to institute the second arbitration as a "*flagrant abuse of the arbitral process*".

(xi) On 17th April, 2017, Defendants' advocate stated that the proceedings were not an abuse and the second arbitration had been initiated in light of Union of India's objection to the jurisdiction of the tribunal under the India-Netherlands BIPA. The Defendants clarified, for the avoidance of doubt, *"double recovery is in no way being sought".*

(xii) On 12th May, 2017, the Plaintiff-Union of India wrote to the Appointing Authority (Judge Ronny Abraham, President, ICJ) that the India-United Kingdom BIPA Arbitration concerned exactly the same subject matter as the India-Netherlands BIPA Arbitration and that in both cases, members of the Vodafone Group under common control had the same complaint about the imposition of tax. The Plaintiff-Union of India further stated: "*The Vodafone Group has also taken steps to ensure that the two arbitrations cannot be consolidated. VIHBV resisted the Republic's attempt to avoid having a UK national appointed in the Dutch Arbitration despite knowing that the India-UK BIPA precludes a UK national from being the Presiding Arbitrator. In addition, VG and VCHL appointed a different arbitrator (David Caron) in the UK Arbitration than in the Dutch Arbitration (Yves Fortier)".*

(xiii) On 17th May, 2017, Defendants responded to Union of India's letter dated 12th May, 2017 and denied any abuse of process. The Defendants reiterated that their rights under the India-United Kingdom BIPA could be determined only in an arbitration under the said treaty. It reiterated that Defendants

were not seeking double recovery and sought "*only declaratory relief at this stage*" which had been brought about in view of India's jurisdictional objection to the claims under the India-Netherlands BIPA. Regarding consolidation, the letter stated *"questions of potential consolidation are a matter for future discussion between the parties and not the Appointing Authority"* and the same could only be addressed after the formation of the Tribunal under the India-United Kingdom BIPA.

(xiv) On 08th June, 2017, Plaintiff-Union of India replied to President, ICJ and stated that the Vodafone Group *"wants you to brush aside any abuse of process concerns....so that they may implement their abusive litigation strategy*".

(xv) On 17th June, 2017, Defendants filed their detailed submission before the President, ICJ, placing reliance on the Orascam award and stated that the India-United Kingdom BIPA had been filed only because India took the position that the India-Netherlands BIPA provided no protection. The Defendants stated that the second arbitration was only to obtain at least "*one route to an arbitral forum",* in circumstances where India was *"intent on blocking both routes completely"*. It reiterated that the Defendants did not seek double recovery. As to consolidation, the letter stated, *"The claimants remain amenable to discussing potential consolidation of the claims. Or if India is prepared to accept jurisdiction under one of the two BITs, the Claimants would welcome that as a means to*

avoid parallel proceedings. But these are substantive issues that will need to be addressed by the parties and the respective tribunals, in due course".

(xvi) On 27th June, 2017, the President, ICJ wrote to the parties stating that after reviewing their submissions, *"...I intend to proceed with the requested designation in accordance with the applicable rules..."*

(xvii) On 21st July, 2017, the Plaintiff-Union of India informed the President, ICJ that they had now filed an interim measures application for the same relief on the same grounds before the India-Netherlands BIPA tribunal and asked the President, ICJ to defer any action.

(xviii) Responding to the aforesaid letter of Plaintiff-Union of India, Defendants on 25th July, 2017 informed the President, ICJ that the two arbitrations sought to protect different rights under different bilateral treaties and that the Defendants were not seeking double recovery. As to consolidation, the letter stated *"India has refused to accept the Claimants' invitation to accept jurisdiction under one BIT or the other as a means to avoid parallel proceedings. India has also remained silent in response to the Claimants' stated willingness to discuss potential consolidation."*

(xix) On 26th July, 2017, the President, ICJ wrote, *"...I take note of the fact that you asked the Tribunal to "grant [the Application] on an expedited basis" but, in order to take an informed decision on your request, I would need to know at which date to*

expect a decision from the Tribunal. I understand that you may need to consult with the members of the Tribunal to obtain such information, and request that you do so without delay and come back to me in this respect in any event before August 4, 2017."

(xx) On 07th August, 2017, the Presiding Arbitrator in the India-Netherlands BIPA arbitration wrote to President, ICJ, to the effect that the written submissions between the parties would be completed by 12th August, 2017 and the Tribunal would thereafter proceed to give a decision on the application for interim measures as soon thereafter as circumstances permitted.

(xxi) On 07th August, 2017, the Plaintiff-Union of India's lawyers wrote to President, ICJ suggesting an outside date of 31st August, 2017 (or earlier if the India-Netherlands BIPA Tribunal decided before) for awaiting the outcome of the aforesaid application. It was agreed by the Plaintiff-Union of India that if the request was not accepted, *"India will be forced to proceed itself with the appointment in this proceeding, reserving its position on the abuse of process issue and also on jurisdiction"*.

(xxii) On 11th August, 2017, President, ICJ, informed the parties of his decision to defer any action regarding the appointment of a second arbitrator until 31st August, 2017 or till the decision of the India-Netherlands BIPA Tribunal (whichever was earlier).

(xxiii) On 11th August, 2017, the Plaintiff-Union of India filed the present Civil Suit inter alia seeking declaration that the Notice of Arbitration dated 24th January, 2017 under India-United Kingdom BIPA and the proceedings initiated thereunder were

an abuse of process and null and void. In para 60 of the plaint, it was averred, "*It is, therefore, apprehended from the letter dated 2nd August, 2017 of the President, ICJ, that he is likely to proceed to appoint an arbitrator if India continues to persist in its decision not to participate in the proceedings. Therefore, it is likely that eventually the full tribunal may be constituted without India being represented and may proceed to decide the case contrary to the stand taken by India regarding abuse of process.*"

(xxiv) On 22nd August, 2017, this Court passed an interim order inter alia restraining the Defendants from taking any further action under the Notice of Arbitration dated 24th January, 2017.

(xxv) Later that day, i.e., on 22nd August, 2017, the India-Netherlands BIPA Tribunal declined the abovementioned application filed by the Plaintiff-Union of India. The tribunal held that *'The Respondent's Application hinges entirely on the alleged abuse of process which is said to consist in the bringing of separate and parallel proceedings by the Vodafone UK claimants under a different investment treaty. Without the need to enter into the merits of that allegation, or the prejudice claimed to follow if the requested measure is either granted or refused, it seems obvious to the Tribunal that, as the conduct alleged is not conduct in the present Arbitration at all but rather in the UK arbitration, the natural remedy is for the Republic of India to raise its argument before the tribunal in that arbitration once that tribunal is established. Not only*

would all the necessary parties be before the tribunal, but they would also all be subject to the authority of the tribunal, which would then be competent to decide, with binding effect on the parties to those proceedings, whether the proceedings before it constituted an abuse of process in the light of the fact that the present Arbitration was already under way. Nothing in the present Decision should be interpreted as reflecting in any way on the merits of any such future application."

(xxvi) On 01st September, 2017, the President, ICJ informed the parties, "*The Claimants indicated, in a letter sent to me on 25 August, 2017, that they had "made all their submissions on the matter of the appointment, and [that] it is their understanding the matter is pending now for orders by the Appointing Authority"; consequently, I note that the Claimants have not withdrawn their Request. Furthermore, I note that the decision issued by the High Court of Delhi is by itself without legal effects on the exercise of my functions as Appointing Authority. I hereby decide that, unless the Republic of India notifies the Claimants by Thursday 7 September, 2017 at the latest, with a copy to myself, of its appointment of an arbitrator in the case opposing Vodafone Group Plc and Vodafone Consolidated Holdings Limited to the Republic of India, I intend to proceed with the requested designation and will be likely to do so at any moment after the fixed time-limit."*

(xxvii) On 07th September, 2017, the Plaintiff-Union of India appointed its arbitrator for the India-United Kingdom BIPA Arbitration.

(xxviii) On 27th September, 2017, the Defendants filed their response under protest to contest jurisdiction of this Court.

(xxix) On 26th October, 2017, Defendants gave a *suo moto* proposal in Court stating they were agreeable to the same arbitrators who constituted the India-Netherlands BIPA Tribunal being appointed as the arbitrators in the second Tribunal, so as to secure efficiency and coordination between the two arbitrations. However, this offer was rejected by the Plaintiff-Union of India.

(xxx) On 26th October, 2017, this Court, without prejudice to the rights and contentions of the parties, clarified that the representatives/counsel for the parties were free to participate in the proceedings for appointment of a Presiding Arbitrator.

(xxxi) The aforesaid order was challenged by the Plaintiff-Union of India before the Supreme Court by way of a Special Leave Petition being SLP(Civil) No.33885/2017. On 14th December, 2017, the Apex Court disposed of the aforesaid Special Leave Petition filed by the Plaintiff-Union of India by way of a reasoned order. The said order is reproduced hereinbelow:-

> *"Since the respondents have appeared on caveat, we have heard both the parties at length.*
>
> *The impugned order dated 26.10.2017 has been passed by the learned Single Judge of the High Court of Delhi, without prejudice to the rights and contentions of the petitioner which are taken by the petitioner in the Suit filed by it. Therefore, we are of the opinion that it is*

not going to adversely affect the petitioner in case the modalities of that order are worked out for the time being. Ultimately, if the petitioner succeeds, the impugned order would have no effect. Copy of order dated 17.11.2017 passed by the learned Single Judge is placed before us, as per which the matter is listed now for hearing on 8th, 9th and 10th of January, 2018, when the High Court is going to hear and decide the matter.

Going by the totality of the circumstances, let the parties go ahead as per the orders dated 26.10.2017 and the Chairman be appointed and the Arbitral Tribunal be constituted. However, since the matter is coming up before the learned Single Judge of the High Court for arguments from 08.01.2018 as mentioned above, the Tribunal so constituted, if any, shall not commence hearing before 10.01.2018.

Needless to mention, we have not made any observations on the merits of the contentions raised by the parties in the Suit including the contention of the plaintiff that such proceedings are abuse of the process of law and the claims of the respondent that the Courts in India have no jurisdiction to deal with the issue.

We also expect the hearing to take place before the learned Single Judge on the dates fixed and it would be for the learned Single Judge to pass any further orders.

The special leave petition stands disposed of."

(xxxii) On 09th January, 2018, Defendants made another *suo moto* submission before this Court that should the Plaintiff-Union of India bring the challenge of abuse of process before the second tribunal, they along with the Claimants in the India-Netherlands BIPA arbitration would apply to the United Kingdom Tribunal to consolidate the two arbitrations and with consent of parties

both arbitrations could be conducted before the same tribunal. However, this offer too was rejected by the Plaintiff-Union of India.

(xxxiii) Thereafter, at the request of the learned senior counsel for the parties, the matter was heard finally on the paper book and after treating all the documents filed by the parties as admitted documents.

(xxxiv) On 09th January, 2018, the learned senior counsel for the parties stated that they did not wish to lead any evidence in the present case. As a matter of abundant precaution, it was clarified vide order dated 08th March, 2018, that the present case had been heard on the following issues:-

1) Whether this court has jurisdiction over the defendant and over the subject matter of dispute?

2) Whether there is a threshold bar or inherent lack of jurisdiction with this Court to deal with BIT Arbitrations?

(i) Whether the BIT arbitration agreement between the plaintiff and the defendant is itself a treaty?

(ii) What is the court's approach to treaty obligations and how an international treaty is to be interpreted?

3) Whether the BIT Arbitrations and suits relating to BIT Arbitrations are governed by private international law or any other system of law including domestic law?

4) Whether the courts in India can restrain Bilateral Investment Treaty Arbitrations, which are

oppressive, vexatious, inequitable or an abuse of the legal process?

(i) Whether filing of multiple claims by entities in the same vertical corporate chain with regard to the same measure is per se an abuse of the legal process or vexatious?

(ii) Whether consolidation of arbitration proceedings is an adequate answer to abuse of process by Vodafone?

5) Whether the plaintiff under the doctrine of kompetenz–kompetenz, has to raise the plea of multiple claims constituting an act of oppression before the same arbitral tribunal ?

6) Whether the injunction order dated 22nd August, 2017 is vitiated on the ground of suppression?

7) Whether in view of the events leading upto the constitution of the arbitral tribunal or any other attending circumstances, the present suit has become infructuous?

BACKGROUND

62. According to United Nations Conference on Trade and Development [UNCTAD], the number of BIPAs increased from 385 at the end of the 1980s to a total of 2,926 by the end of 2014. Further, by the end of 2014, the number of known treaty-based investor - State cases had reached 608--approximately ten times the figure as it stood at 2000.

63. As the number of investment treaty arbitrations have grown, concerns over the investment treaty system have arisen. These concerns include a perceived deficit of legitimacy given that States are being judged on their conduct by private non-elected individuals. Concerns have also arisen in

respect of inconsistent arbitral awards, the independence and impartiality of arbitrators, and the delays and costs of arbitral procedures. These concerns have resonated in some scholarly publications.

64. Commenting on Growth in Investment Treaty Arbitration, Mr. Justice Sundaresh Menon, Chief Justice of Singapore in his speech on *International Arbitration: The Coming of New Age for Asia (and Elsewhere)* (supra) stated as under**:-**

> *"14. This is a comparatively recent phenomenon, and its most significant impact has been that national governments have increasingly found their freedom to act in their own domestic space being curtailed by the interpretations placed by arbitral tribunals on investment treaties. These treaties would often have been entered into at a time when States never expected to encounter such a flood of treaty based claims nor the sorts of interpretations being place upon these treaties. Striking examples of this include recent claims brought by tobacco companies against countries such as Australia and Uruguay in relation to the alleged indirect expropriation of intellectual property rights said to arise out of plain packaging legislation. Yet more recently, in While Industries Vs. India, a tribunal seated in Singapore held that pursuant to the MFN clause that was found in India's BIT with Australia, the Australian investor could take advantage of an "effective means of enforcement" obligation found in India's BIT with Kuwait and on that basis held India liable for failing to provide an effective means for the investor to enforce a commercial arbitration award it had obtained some ten years earlier against its local partner, an Indian state-owned enterprise.*
>
> *15. This development has a real economic impact on the States. By way of illustration, after Argentina's economic collapse in 2001, the Government decided to allow the peso to decline in value against the dollar. By 2004, the peso stabilised and the economy began to recover. But as a result of this decision, claims were brought against Argentina founded on the investment treaties it had concluded in the 1990s. By 2006, more than 30 claims were*

pending for a staggering estimated sum of $17 billion in claimed compensation, an amount equivalent to the entire annual budget of the national government.

16. Similarly, in 2001, a tribunal constituted in Sweden ordered the Czech Republic to pay amounts totalling approximately USD 353 million to a Dutch company, owned by an American, that had invested in a TV broadcasting business. The tribunal found that the broadcast licensing regime and media policies of the Czech Government's Media Council, which eventually prompted the Dutch company to divest itself of a TV station, had violated the country's bilateral investment treaty with the Netherlands. The amount of damages ordered was roughly equivalent to the country's entire health care budget. These cases illustrate that an entirely new source of state accountability and liability has emerged. The potential size and impact of such awards mean that government agencies just cannot afford to ignore the seemingly expansive treaty obligations they have undertaken.

xxx xxx xxx

33. The broad and open-textured way in which treaty commitments are defined, coupled with the length of time over which they are expected to operate without any supervision or control by electoral mechanisms, mean that the discretion vested in private arbitrators to interpret these rules is likely to have a considerable impact on States. This shift of power from the States to the arbitral tribunals, has resulted in jurisprudence that has been colourfully described as "a house of cards built largely by reference to other tribunal awards and academic opinions", "unconstrained by the discipline of the treaty parties' practice of expectations".

34. This evolving body of substantive investment arbitration law also suffers from a lack of coherence and consistency because its development has been piecemeal. With no central organising structure or unifying appellate control and no doctrine of binding precedent, the results are often conflicting. Any attempt by the courts to provide oversight is fragmentary and restricted:

fragmented because enforcement of awards can be sought before the courts of any of the many signatories to the New York Convention, and restricted because of the principle of minimal curial intervention."

(emphasis supplied)

65. Needless to state, these concerns have to be kept in mind by the Plaintiff-Union of India.

COURT'S REASONING

WHETHER THIS COURT HAS JURISDICTION OVER THE DEFENDANT AND OVER THE SUBJECT MATTER OF DISPUTE?

66. Section 20 CPC is the residuary clause which deals with the *'place of suing'*. The said Section reads as under:-

> *"**20. Other suits to be instituted where defendants reside or cause of action arises**.— Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—*
>
> *(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or*
>
> *(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or*
>
> *(c) the cause of action, wholly or in part, arises."*
>
> (emphasis supplied)

67. A Division Bench of this Court in ***Banyan Tree Holding (P) Limited Vs. A. Murali Krishna Reddy & Anr., 2009 SCC OnLine Del 3780*** sought to balance its jurisdiction under Section 20(c) of the CPC against concern of

fairness by adopting the test of *'purposeful availment'*. The relevant portion of the said judgment is as under:-

> *"38. Having surveyed the law as it has developed in different jurisdictions, this Court is of the view that the essential principles developed as part of the common law can be adopted without difficulty by our courts in determining whether the forum court has jurisdiction where the alleged breach is related to an activity on the internet....*
>
> *xxxx xxxx xxxx xxxx*
>
> *40. .....It appears to this court that for the purposes of a passing off action or an action for infringement where the Plaintiff is not carrying on business within the jurisdiction of the forum court, and where there is no long arm statute, the Plaintiff would have to show that the Defendant purposefully availed itself of the jurisdiction of the forum court.....*
>
> *xxxx xxxx xxxx xxxx*
>
> *42. ....For the 'effects' test to apply, the Plaintiff must necessarily plead and show prima facie that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state....."*
>
> (emphasis supplied)

68. Similarly, the Supreme Court of United States in ***Iain Calder and John South Vs. Shirley Jones, 465 US 783 (1984) : 104 S.Ct. 1482 : 79 L.Ed. 2d 804*** has held *"Petitioners argue that they are not responsible for the circulation of the article in California. A reporter and an editor, they claim, have no direct economic stake in their employer's sales in a distant State. Nor are ordinary employees able to control their employer's marketing activity. The mere fact that they can "foresee" that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction..... Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere*

untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article..... An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California."

69. Even the *'jurisdiction'* in the international sense i.e. under private international law has been viewed from the point of view of internal competency of the Court and also competency in the eyes of international law by Justice M. Hidayatullah (as he then was) of the Indian Supreme Court in ***R. Viswanathan and Others vs. Rukn-ul-Mulk Syed Abdul Wajid (Since deceased) & Others, (1963) 3 SCR 22*** has held as under:-

> *" The first point to decide is whether the Mysore courts were competent to decide the controversy which they decided. What is meant by competency can be looked at from two points of view. There is the internal competency of a court depending upon the procedural rules of the law applicable to that court in the State to which it belongs. There is also its competency in the eye of international law. The competency in the international sense means jurisdiction over the subject-matter of the controversy and jurisdiction over the parties as recognised by rules of international law. What is meant by competency in this context was stated by Balckburn, J., speaking for the Judges in answer to the question referred by the House of Lords*

in Castrique v. Imrie [(1870) LR 4 HL 414]. Relying upon Story's Conflict of Laws, the learned Judge observed:

> *"We may observe that the words as to an action being in rem or in personam, and the common statement that the one is binding on third persona and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the enquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."*

Story's exact words are to be found in para 586 of his book, and this is what the learned author said:

> *"In order however to found a proper ground of recognition of any foreign judgment in another country, it is indispensable to establish that the court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either it is ... treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals. And this equally true, whether the proceedings lie in rem or in personam or in rem and also in personam."*

The opinion expressed by Story here is, in its turn, based on that of Boullenois in his Traite et de la Personnalite et de la Realite des Lois Coutumes ou Status, (1766) Vol. I, pp. 618-620.
The law stated by Blackburn, J., has been universally accepted by all the Courts in the English speaking countries and it was quoted with approval recently by the Privy Council in Ingenohl v. Wingh on & Co....

70. Concurring on this point, the majority (per Justice J.C. Shah and Justice S.K. Das) has held, *"An action in personam lies normally where the defendant is personally within the jurisdiction or submits to the jurisdiction or though outside the jurisdiction may be reached by an order of the court....."*

71. It is pertinent to mention that the Defendants have themselves claimed in India-United Kingdom BIPA arbitration notice that they made a qualifying investment *"in the territory of India"* by virtue of their indirect majority shareholding in Vodafone India Limited as well as certain option rights in the said Company held through another indirect subsidiary. The Defendants have further claimed that they themselves and their *"subsidiaries"* have continued to invest extensively in the development *"of their telecommunication network in India"* through Vodafone India Limited and the said capital investments in India exceeded US$17 billion and the Defendants have added 169 million subscribers since 2007 and now directly employ 19,471 people in India.

72. While this remains a matter for the arbitral tribunal to rule upon, for the present purposes, as the Defendants have not rejoined on these assertions, this Court proceeds on the basis of the statement made by the Defendant before the arbitral tribunal. In fact, from the aforesaid statements, this Court is of the view that the cause of action for the present suit partly arose within the jurisdiction of this Court and Defendants had purposefully availed of Indian jurisdiction, *inter alia*, by making an investment in India, holding economic interests in India and carrying on business in India and from a reasonable and holistic perspective, Defendants

have to be considered as working for gain within the jurisdiction of this Court.

73. Moreover, even if it is taken that a corporation that is incorporated under the laws of another state would, under the established principles of international law, have its rights and obligations governed by the domestic law of the state of its incorporation, then also the test of residence would be satisfied by applying the principles of "*single economic entity*"– which principle is applicable even under the English law. This Court in ***Pankaj Aluminium Industries Pvt. Ltd. Vs. M/s. Bharat Aluminium Company Ltd., 2011 IV AD (Delhi) 212*** after relying upon ***DHN Food Distributors Ltd. and Others v. London Borough of Tower Hamlets [1976] 3 All ER 462 at Page 467*** has recognised the doctrine of single economic entity. In ***DHN Food Distributors Ltd.*** (supra), it has been held as under:-

> *".....We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says : 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdworth & Co. (Wakefield) Ltd. v. Caddies. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as*

> *one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it."*

74. Accordingly, the Defendants No.1, 2 and VIHBV as well as its Indian subsidiary are one single economic entity.

75. Consequently, this Court has jurisdiction over the Defendants *in personam* and over the subject matter of the dispute. In ***Modi Entertainment Network*** (supra), the Supreme Court has held, *"It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in personam....."*

WHETHER THERE IS A THRESHOLD BAR OR INHERENT LACK OF JURISDICTION WITH THIS COURT TO DEAL WITH BIT ARBITRATIONS?

(i) *WHAT IS THE COURT'S APPROACH TO TREATY OBLIGATIONS AND HOW AN INTERNATIONAL TREATY IS TO BE INTERPRETED?*

(ii) *WHETHER THE BIT ARBITRATION AGREEMENT BETWEEN THE PLAINTIFF AND THE DEFENDANT IS ITSELF A TREATY?*

AND

WHETHER THE BIT ARBITRATIONS AND SUITS RELATING TO BIT ARBITRATIONS ARE GOVERNED BY PRIVATE INTERNATIONAL LAW OR ANY OTHER SYSTEM OF LAW INCLUDING DOMESTIC LAW?

76. It is settled law that the jurisdiction of the Civil Courts in India is all embracing except to the extent it is excluded by an explicit provision of law or by clear intendment arising from such law. The ouster of the jurisdiction of a Civil Court is not to be lightly inferred and can only be established if

there is an express provision of law or is clearly implied. [See: ***Dhulabhai Vs. State of M.P., 1968 (3) SCR 662***].

77. Though Article 253 of the Constitution empowers the Indian Parliament to make a law to give effect to International Treaties, yet the Parliament has not passed any specific legislation to give effect to BIPA Agreements. However, there is no statutory bar or case law relating to treaty obligation which creates an ouster of jurisdiction or threshold bar for Indian courts in relation to a bilateral investment treaty arbitration. Accordingly, there is no explicit or implicit ouster of jurisdiction of National Courts.

78. Further, India has not acceded to the position that in matters of bilateral investment treaty arbitrations, there is an ouster of jurisdiction of National Courts as is apparent from Union of India's refusal to accede to the five decades old *'Convention on the Settlement of Investment Disputes between States And Nationals of Other States, 1965*. This Convention sets up an International Centre for Settlement of Investment Disputes (for short *"ICSID"*). About 161 States have signed the ICSID Convention and 153 have ratified it till date. However, Union of India has not signed it and the main reason seems to be that the ICSID Convention completely negates the role of National Courts. Consequently, there is no threshold bar insofar as the dispute is concerned.

79. Even if, one were to examine this issue dehors the Code of Civil Procedure, this Court is of the view that the India-United Kingdom BIPA holds out to investors on a standing basis the right to choose to submit the disputes for settlement by binding arbitration. The said treaty expressly provides the consent of the Indian State to submit any investment dispute for

settlement by binding arbitration. [***See: British Caribbean Bank Limited*** (supra)].

80. However, there is a distinction between an Inter-State arbitration and an Investor-State arbitration. Investors like the Defendants are not enforcing rights given to the United Kingdom, but are pursuing the rights in their name and for themselves claims against the other State party. The subject matter of the dispute between an investor and the host State is not the same as any dispute that may exist between two States.

81. If the agreement to arbitrate between a private foreign investor and the host State is held to be a treaty, it would amount to *'lifting the status'* of the private investor to the *'pedestal of a foreign State'*. In fact, the assumption underlying the investment treaty regime is clearly that the investor is bringing up a cause of action based upon the vindication of its rights rather than those of its national State.

82. It is pertinent to mention that the India-United Kingdom BIPA provides for two disputes resolution mechanisms. One between the foreign State and the Indian State and the other between the private investor and the Indian State. Articles 9 and 10 of the Agreement between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the promotion and protection of investments are reproduced hereinbelow:-

"ARTICLE 9

Settlement of Disputes between an Investor and a Host State

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) Any dispute which has not been amicably settled within a period of six months from written notification of a claim may be submitted to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law, if the parties to the dispute so agree.
(3) Where the dispute is not referred to international conciliation, or where it is so referred but conciliation proceedings are terminated other than by the signing of a settlement agreement, the dispute may be referred to arbitration as follows:….

xxxx xxxx xxxx xxxx

(c) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976. In respect of such arbitration proceedings, the following shall apply:

(i) The Arbitral Tribunal shall consist of three arbitrators. Each party shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a third arbitrator, the Chairman, who shall be a national of a third state. The arbitrators shall be appointed within two months from the date when one of the parties to the dispute informs the other of its intention to submit the dispute to arbitration within the period of six months mentioned earlier in paragraph (2) of this Article;
(ii) If the necessary appointments are not made within the period specified in sub-paragraph (b) (i), either party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments;.....

ARTICLE 10

Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through negotiation.

> *(2) If a dispute between the Contracting Parties cannot thus be settled within six months from the time the dispute arose, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.*
> *(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members….."*

83. This Court is of the opinion that the agreement to arbitrate between an investor and the host State which results by following the treaty route is not itself a treaty but falls in a *sui generis* category. In the present BIPA Arbitration, a contractual obligation and a contractual right is involved and therefore, there is no bar as to the subject matter of the dispute or as to the jurisdiction of the court to hear the present case.

84. The argument with regard to non-justiciablity of unincorporated treaties in the context of a private investor and host State has not been accepted by even the Courts in the United Kingdom. In ***Republic of Ecuador v Occidental Exploration and Production Co [2005] EWCA Civ 1116***, the Republic of Ecuador brought a claim under Sections 67 and 68 of the Arbitration Act 1996 of England and Wales seeking to set aside the award of an arbitral tribunal dated 01st July, 2004 given largely in favour of the Defendants, Occidental Exploration and Production Company, a Californian corporation. The dispute arose in relation to an investment agreement between the parties entered into pursuant to a bilateral investment treaty between the Republic of Ecuador and the United States of America.

The arbitration was provided for by the terms of the treaty and Occidental raised a preliminary objection that any challenge to the award would involve an interpretation of an unincorporated treaty which made the claim non-justiciable by an English court. Justice Aikens on 29 April, 2005 ([2005] EWHC 774 (Comm), [2005] 2 Lloyd's Re 242) found in favour of the Republic of Ecuador on the objection and Occidental appealed. The Court of Appeal in the said case after considering the judgments cited by Mr. Salve including the **Tin Council** Case (supra), ***Re Barcelona Traction, Light and Power Co. Ltd., (Belgium v Spain)*** (supra)***, LaGrand (Germany v. United States)*** (supra), ***Buttes Gas and Oil Co. v Hammer (Nos.2 and 3)*** (supra), ***Campaign for Nuclear Disarmament*** (supra), rejected the argument that the Courts have no jurisdiction to interpret or apply unincorporated International treaties between an investor and a host State.

85. The decision of ***Société Générale de Surveillance SA v Islamic Republic of Pakistan*** also does not offer any assistance to the Defendants as it is a decision not of a Court, but of an ICSID arbitral tribunal to which the State had on any view agreed. This Court is of the opinion that an arbitral tribunal award passed by an Investment Treaty Tribunal does not carry the status of a precedent. There are several instances of an arbitral tribunal not considering itself bound by an award passed by another investment tribunal. Consequently, there is no reason for the National Courts to accord them the status of precedent.

86. Also as stated hereinabove, ICSID Tribunal decision is under auspices of ICSID convention, cornerstone of which is to exclude jurisdictions of the Courts. India has not acceded to this convention and it does not wish to dilute or surrender the National Courts jurisdiction which it may otherwise

have. This being India's position, it would be fundamentally incorrect to embrace the ICSID jurisprudence of non-interventions by Courts, for that would be bringing in by the *'back door'*, when the *'front door'* has been shut! In these circumstances, this Court is of the opinion that it will not accept an ICSID or Investment award as having precedentary value.

87. Further, if the argument of lack of jurisdiction canvassed by learned senior counsel for Defendants is accepted, then this Court would be powerless to execute a BIPA award against the State, even if the foreign investor were to approach this Court for its enforcement and execution!

88. Consequently, this Court does not agree with the submission that the National Court has no jurisdiction or should refrain from exercising its jurisdiction with regard to BIPA Arbitrations. However, this Court is of the view that recourse to a Court, when and if permissible, would be to correct any error rather than to perpetuate or introduce one.

89. Also, though the BIPA constitutes an arbitration agreement between a private investor on the one side and the host State on the other, yet it is neither an International Commercial Arbitration governed by the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") nor a domestic arbitration.

90. The Act, 1996 including Sections 5 and 45 thereof, do not apply *proprio vigore* to a BIPA. Section 5 does not apply as this is not a Part I arbitration and Section 45 does not apply as Section 44 makes it clear that Part II of the Act, 1996 will apply to an arbitration considered to be commercial under the Indian law. Indeed, India, while acceding to the New York Convention, made a reservation that it will apply the Convention *"only*

to differences arising out of legal relationship..... that are considered commercial under the national law".

91. Investment Arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances (and are not commercial in nature). The roots of Investment Arbitrations are in public international law, obligations of State and administrative law.

92. This Court is of the view that before the Calcutta High Court in ***The Board of Trustees of the Port of Kolkata*** (supra), neither any argument was raised nor the applicability of the Act, 1996 to relationships arising out of international treaties was considered. With respect, the Calcutta High Court assumed that the Act, 1996 applied. To this extent the said judgment is *sub silentio*. The Supreme Court in ***State of U.P. and Another vs. Synthetics and Chemicals Ltd. and Another (1991) 4 SCC*** 139 has held as under:-

> *"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p.153). In Lancester Motor Company (London) Ltd. V. Bremith Ltd., the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this*

principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry, it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

(emphasis supplied)

93. As far as India's approach to treaty obligations is concerned, Article 51(c) of the Constitution of India (appearing under Part IV, Directive Principles) states:-

*"**51. Promotion of international peace and security.**—The State shall endeavour to—*

xxxx xxxx xxxx xxxx

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another;"

94. The aforesaid Article recently came up for interpretation before the Indian Supreme Court in ***Commissioner of Customs, Bangalore Vs. G.M. Exports and Ors., (2016) 1 SCC 91*** wherein it has held as under:-

"23. A conspectus of the aforesaid authorities would lead to the following conclusions:

(1) Article 51(c) of the Constitution of India is a directive principle of State policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law and international law, domestic law will prevail.

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

(4) In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations."

95. In ***Vishaka and Others Vs. State of Rajasthan and Others, (1997) 6 SCC 241*** the Supreme Court has held that in the absence of a suitable legislation in any sphere, international convention and norms so far as they are consistent with constitutional spirit, can be relied upon.

96. Hence, even where India is not a party to an international treaty, rules of international law which are not contrary to domestic law are followed by the courts in this country. Further, where India is signatory and a statute is made pursuant to the said treaty, the statue would be given a "*purposive*" construction in favour of the treaty. Even if there is a difference between the language in the statute and the corresponding provision of the treaty, the statutory language should be construed in the same sense as in the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations.

97. The aforesaid observations of the Supreme Court are relevant not only for interpreting the India-United Kingdom BIPA, to which India is a signatory, but also the Vienna Convention on the Laws of Treaties (for short "VCLT") - to which India is not. The latter treaty is important as it is a treaty for the interpretation and approach towards international treaties.

98. The following provisions of the VCLT have a bearing in relation to interpretation and approach of this Court towards any dispute under the India-United Kingdom BIPA:-

(i) The Preamble to the VCLT inter alia states :-

"Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems.

Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized.

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law....."

(ii) Article 2(1)(a) defines treaty as an international agreement *"and governed by international law."*

(iii) Article 31(3)(c) provides as to the general rules for interpretation and states that a treaty shall be interpreted in *"good faith"* and in accordance with the *"relevant rules of international law."*

(iv) Article 27 states: *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."*

99. It may further be stated that though India is not a signatory to the VCLT, several Indian decisions have referred to and relied upon the provisions of the same and the Supreme Court of India has held that the principles thereof *"provide broad guidelines as to interpretation of a treaty in the Indian context."* Some of the relevant decisions in this regard are as under:-

a) In ***Ram Jethmalani & Ors. Vs. Union of India & Ors., (2011) 8 SCC 1*** the Supreme Court has held as under:-

"69. Article 31, "General Rule of Interpretation", of the Vienna Convention on the Law of Treaties, 1969 provides that a "treaty

shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also."

b) In ***Director of Income Tax Vs. New Skies Satellite BV, (2016) 382 ITR 114 Delhi High Court*** a Division Bench of this Court has held as under:-

"Finally, States are expected to fulfill their obligations under a treaty in good faith. This includes the obligation to not defeat the purpose and object of the treaty. These obligations are rooted in customary international law, codified by the VCLT, especially Article 26 (binding nature of treaties and the obligation to perform them in good faith); Article 27 (Internal law and observance of treaties, i.e provisions of internal or municipal law of a nation cannot be used to justify omission to perform a treaty); General rule of interpretation under Article 31 (1) (i.e that it shall be interpreted in good faith, in accordance with ordinary meaning to be given to the terms of a treaty) and Article 31 (4) (A special meaning shall be given to a term if it is established that the parties so intended)."

100. The Government of India in its Model Text for the Indian Bilateral Investment Treaty dated 16th December, 2015 has referred to the VCLT vide Articles 14.9, 31 and 32 thereto stating *inter alia* that an investment treaty shall be interpreted in accordance with the Vienna Convention on Law of Treaties and *"customary international law"*.

101. Consequently, a treaty is to be interpreted in accordance with *"the relevant rules of international law"* [Article 31(3)(c) VCLT] and a party

may not invoke its internal laws as justification for non-performance of a treaty (Article 27, VCLT). Also, principles of customary international law can be invoked for interpretation of a BIPA (Preamble, VCLT).

102. This Court is of the view that the intent of the BIPA is to afford protection to investors and such a purpose is better served if the arbitration agreement is subjected to international law rather than the law of the State. After all the rationale behind the bilateral investment treaty is primarily to afford protection to private investor from expropriation by the foreign State (which normally takes place through State Legislation). The treaty also involves a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and this is an aim to which the National Courts should, in an internationalist spirit and because it has been agreed at an international level, aspire to give effect. Even the Court of Appeal in ***Republic of Ecuador*** (supra) has held as under:-

> *"[33] Further, as Mr Greenwood* [learned counsel for Occidental] *accepts, the agreement to arbitrate which results by following the treaty route is not itself a treaty. It is an agreement between a private investor on the one side and the relevant state on the other. The question may then arise: under what law is that agreement to arbitrate to be regarded as subject, applying the principles of private international law of the English forum?.....All this being so, we would be minded to accept that, under English private international law principles, the agreement to arbitrate may itself be subject to international law, as it may be subject to foreign law. That possibility also appears to us to have been embraced as long ago as 1962 by Megaw J in the Orion Compania Espanola de Secguros case. And, if one assumes that this is possible, then that is the view that we would, like the judge, take of this particular arbitration agreement. Although it is a consensual agreement, it is closely connected with the international treaty which contemplated its making, and*

> *which contains the provisions defining the scope of the arbitrators' jurisdiction. Further, the protection of investors at which the whole scheme is aimed is likely to be better served if the agreement to arbitrate is subject to international law, rather than to the law of the state against which an investor is arbitrating."*
>
> (emphasis supplied)

103. Consequently, the agreement to arbitrate between an investor and a host State is contractual inasmuch as it is not itself a treaty but flows from the treaty provisions which is justiciable in accordance with the principles of international law and there is no threshold bar or inherent lack of jurisdiction in the court to deal with BIPA Arbitrations.

WHETHER THE COURTS IN INDIA CAN RESTRAIN BILATERAL INVESTMENT TREATY ARBITRATIONS, WHICH ARE OPPRESSIVE, VEXATIOUS, INEQUITABLE OR AN ABUSE OF THE LEGAL PROCESS?

104. In the opinion of this Court, there is no unqualified or indefeasible right to arbitrate. The National Courts in India do have and retain the jurisdiction to restrain international treaty arbitrations which are oppressive, vexatious, inequitable or constitute an abuse of the legal process.

105. As pointed out by the learned Amicus Curiae, the concepts of 'oppression, 'vexation', 'inequity' and 'abuse of process' have been known to the common law and equity for centuries, being the primary theories used by the court to regulate its process pursuant to its inherent jurisdiction. The Caribbean Court of Justice, Appellate Jurisdiction in ***British Caribbean Bank Limited*** (supra) has held as under:-

> *"33. The concepts of vexation and oppression are derived from the old common law cases of McHenry v Lewis, Peruvian Guano Co v Bockwoldt, and Hyman v Helm and are elucidated*

by two examples from Jessel MR in the Peruvian case; namely, one of pure vexation where the proceedings are so absurd that they cannot succeed, and the other where there is no intention to harass or annoy but the litigant seeks some fanciful advantage by suing in two courts at the same time under the same jurisdiction. But it would not be vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. There is no presumption that a multiplicity of proceedings is vexatious or that proceedings are vexatious merely because they are brought in an inconvenient place.

34. Proceedings may be restrained not only because they are vexatious in the sense of being frivolous or useless but also because they are oppressive. An example of oppression occurs where a litigant may be encouraged to pursue proceedings in a forum, having no connection with the subject matter of the dispute, by inducements of enhanced remedies including punitive damages. In normal circumstances, the widely recognized principle of forum non conveniens will apply but the court will restrain proceedings where a party acting under the colour of seeking justice acts in a way which necessarily creates injustice to others: see Castanho v Brown & Root and Spiliado Maritime Corporation v Consulex Ltd."

(emphasis supplied)

106. Broadly speaking, the doctrine of abuse of rights is founded upon the notion that a party may have a valid right, including a procedural right, and yet exercise it in an abnormal, excessive or abusive way, with the sole purpose of causing injury to another or for the purpose of evading a rule of law, so as to forfeit its entitlement to rely upon it. The theory of abuse of rights has its origins in private law and is recognized in the great majority of national legal systems. In France, a general theory of abuse of rights was developed by legal theorists and came to be applied by the French courts as early as the mid-nineteenth century. The principle of abuse of rights is also

enshrined in several provisions of the French Code of Civil Procedure. Other civil law jurisdictions recognize a general theory of abuse of right, including Switzerland [Swiss Civil Code, art 2], Germany [German Civil Code, art 226], Austria [Austrian Civil Code, art 1295(2)], Italy [Italian Civil Code, art 833], Spain [Spanish Civil Code, art 7], The Netherlands [Dutch Civil Code, Property Law, art 13(2)] and Quebec [Civil Code of Quebec, art 7] and Louisiana in the United States.

107. While common law systems do not recognize any general principle of abuse of right, English courts have long upheld their inherent jurisdiction to sanction a party's exercise of its procedural rights in an abusive manner. For instance, in ***Hunter Vs. Chief Constable of the West Midlands Police, [1982] AC 529 at 536***, Lord Diplock elaborated on "*[the] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."*

108. The principle of abuse of rights also forms part of public international law, and occurs where *'a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by legitimate considerations of its own advantage'*. The notion of abuse of process is considered an application of the abuse of rights principle, and *'consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established'*. These principles have frequently been recognized by the International Court of Justice (ICJ) (See United Kingdom Vs.

Norway, [1951] ICJ 3, France Vs. Norway, [1957 ICJ Rep 9], Liechtenstein Vs. Guatemala, [1955] ICJ 1 and Hungary Vs. Slovakia [1997] ICJ Rep 7). [See Article on *Abuse of Process in International Arbitration by Professor Emmanuel Gaillard, published by Oxford University Press on behalf of ICSID, 2017]*.

109. Similarly, the Indian Supreme Court in ***Modi Entertainment Network*** (supra) has held, *"The courts in India like the courts in England are courts of both law and equity. The principles governing grant of injunction — an equitable relief — by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction...."*

110. Being principles common to many national legal systems and recognized under public international law, the prohibitions of abuse of rights and abuse of process are recognized as general principles of law that are applied by courts and arbitral tribunal, irrespective of the seat of the arbitration or the applicable law.

111. There is also no legal basis to support the wide proposition that a State, after agreeing to resolve its disputes with foreign investors under a specific dispute resolution mechanism in an international treaty, cannot restrain invocation of such rights by recourse to its National Courts. In ***Excalibur Ventures LLC v. Texas Keystone Inc. & Others [2011] 2 Lloyds Law Report 289***, the English Court recognised that the Court had a limited power to intervene under the provisions of its Arbitration Act, 1996 but nevertheless, in exceptional cases, *"for example, where the continuation of the foreign arbitration proceedings may be oppressive or*

unconscionable....the court may exercise its power under Section 37 of the Senior Courts Act, 1981" to grant an injunction. In fact, the said judgment cites seven cases which have upheld the Court's jurisdiction to restrain foreign seated arbitrations.

112. Undoubtedly, under the International law, "*the State"* includes the national judiciary; but under the Indian Constitution the State excludes the judiciary because it is independent of the other organs of the State.

113. Further, all actions and orders passed by National Courts are not per se violative of the fair and equitable treatment guaranteed by the BIPA as suggested by the Defendants.

114. However, the jurisdiction to grant an anti-arbitration injunction must be exercised with caution and granted only if the arbitral proceedings are vexatious or oppressive or inequitable or abuse of process. After all, one must not lose sight of the fact that a legislation or action that is perfectly lawful under the national law could nonetheless trigger a successful investment claim under the bilateral investment treaty.

115. In fact the approach to arbitration agreements contained in investment treaties is for the court to support, so far as possible, the bargain for international arbitration. It is *"only with extreme hesitation"* that the Court would interfere with the process of arbitration.

116. The jurisprudence of non-intervention by National Courts is a fundamental feature of international arbitration as is apparent from Article 21 of UNCITRAL Rules 1976, which incorporates the principles of *kompetenz-kompetenz*. The Indian Arbitration Act is largely based on the UNCITRAL Rules and the Model Law. Section 16 of the Act, 1996 incorporates Article 16 of the Model Law.

117. India has taken a far more restrictive approach in the context of International Commercial Arbitrations and in ***McDonald's India Private Limited Vs. Vikram Bakshi and Ors., 2016 (4) ArbLR 250 (Delhi)*** a Division Bench has held that the Courts do not have inherent power to issue anti arbitration injunction where Act, 1996 applies. In the opinion of this Court, the ratio in ***McDonald*** (supra) that there is no inherent power to Court to issue an anti arbitration injunction is clearly in the context of Act, 1996. In fact, last para of the said judgment makes it clear that the Court's ruling is in the context of Sections 5, 8 and 45 of Act, 1996. In a situation where the Act, 1996 does not apply, the Court's inherent powers are not circumscribed by anything contained in the Act and the ratio in ***McDonald*** (supra) will not apply. As this is not a commercial arbitration, the New York convention will not apply.

118. The Caribbean Court of Justice, Appellate Jurisdiction in ***British Caribbean Bank Limited*** (supra) has correctly held as under:-

> *"39 .....But once the validity of the arbitration bargain has been established the court will only grant an injunction to restrain the arbitration if it is positively shown that the arbitration proceedings would be oppressive, vexatious, inequitable, or an abuse of process. The burden is on the party seeking the injunction and he must discharge that burden to a higher level than that required to restrain foreign proceedings which do not involve a contract to litigate in the foreign court.*
>
> (emphasis supplied)

119. Consequently, as a matter of self-restraint, a National Court would generally not exercise jurisdiction where the subject matter of the dispute would be governed by an investment treaty having its own dispute resolution mechanism, except if there are compelling circumstances and the Court has

been approached in good faith and there is no alternative efficacious remedy available.

WHETHER FILING OF MULTIPLE CLAIMS BY ENTITIES IN THE SAME VERTICAL CORPORATE CHAIN WITH REGARD TO THE SAME MEASURE IS PER SE AN ABUSE OF THE LEGAL PROCESS OR VEXATIOUS?

AND

WHETHER CONSOLIDATION OF ARBITRATION PROCEEDINGS IS AN ADEQUATE ANSWER TO ABUSE OF PROCESS BY VODAFONE?

120. There is no presumption or assumption that filing of multiple claims by entities in the same vertical corporate chain with regard to the same measure is per se vexatious. The Caribbean Court of Justice, Appellate Jurisdiction in ***British Caribbean Bank Limited*** (supra) has also held as under:-

> *"40. In applying these principles to the instant case, the factual basis for the finding of vexation or oppression was that there were a multiplicity of proceedings and that those in the domestic courts should be completed first. The case law has elucidated that there is no presumption that the pursuit of multiple proceedings is vexatious or oppressive or an abuse of process in itself, nor is there vexation or oppression if there is an advantage to the party seeking the arbitral proceeding: Lee Kui Jak...."*
>
> (emphasis supplied)

121. It is pertinent to mention that the UNCTAD World Investment Report 2016, states that more than forty percent of foreign affiliates are owned through complex vertical chains with multiple cross-border links involving on an average three jurisdictions.

122. Proceedings could be vexatious where they are absurd. For instance, if having lost a BIPA arbitration on merits, the same investor invokes

another BIPA arbitration for the same claim without having made any investment through the second foreign State; but it would not be so held where there are substantial reasons to bring the two sets of proceedings simultaneously.

123. Since it is the case of the Plaintiff-Union of India that the claim under the Netherlands-India BIPA is without jurisdiction, invocation of another treaty by the parent company cannot be regarded as an abuse *per se*.

124. Upon an in-depth analysis of the *Orascom Award*, it is apparent that it does not hold that multiple claims by companies in a vertical structure under different treaties against same State measures will always be an abuse of rights. In fact, in the said case, the arbitral tribunal found that as a matter of fact and law raising multiple claims under multiple treaties, amounted to abuse of rights.

125. This Court is also of the view that it will not grant an injunction if by doing so it, deprives the Defendants of advantages in the foreign forum of which it would be unjust to deprive the Defendants. The fact that it may be inconvenient or expensive for Plaintiff-Union of India to litigate before the arbitral tribunal is not an issue that would justify a finding of oppression. This problem can, in the opinion of the court, be overcome by either accepting appropriate undertakings or by passing a conditional order. The Caribbean Court of Justice, Appellate Jurisdiction in ***British Caribbean Bank Limited*** (supra) has held as under:-

> *"51 The giving of undertakings of this kind is scarcely foreign in international commercial disputes. Neither does it reflect adversely upon the sovereignty of domestic judicial decision-making if it is borne in mind that the undertaking is meant to facilitate trial of the dispute in accordance with agreement of the*

> *parties. As early as the turn of the Twentieth Century an undertaking was accepted by an English court as part of the measures that facilitated a stay of English proceedings in favour of enforcing the agreement by the parties to litigate their dispute in a German Court: Kirchner & Co. v Gruban. An undertaking was accepted in Jarvis and Sons Limited v Blue Circle Dartford Estates Limited to reduce the risk that concurrent proceedings in England and in the foreign arbitration could result in the party that was resisting arbitration being mulcted in damages twice over. In light of that undertaking the court held that risks posed by the concurrent proceedings were now so low that the arbitration could not be characterized as oppressive. It is significant in the case before us that a majority in the Court of Appeal accepted that the undertaking by the Appellate nullified any vexation or oppression that might otherwise be caused by the simultaneous pursuit of the arbitration and the local claim for compensation...."*
>
> (emphasis supplied)

126. The plea that Plaintiff-Union of India will be vexed twice over in respect of identical claim or that there is a possibility of conflicting awards by two different tribunals, is resolved by accepting the Defendants' offer dated 9th January, 2018 that if the Plaintiff-Union of India gives its consent, it would apply straightaway to the UK treaty tribunal to consolidate the two proceedings. The Defendants are held bound by the said offer.

127. This Court is further in agreement with the submission made by learned Amicus Curiae that the Defendants' aforesaid offer is a better option than the *'sequential arbitrations'* suggested by learned senior counsel for the Plaintiff-Union of India. The consolidated proceedings would ensure that no relief is granted twice over and there is no conflict of awards. The consolidated proceedings would also ensure that there is no delay in rendering of the awards.

128. To conclude, the entire scheme of the BIPA is contractual and it is clear that Union of India consented to the international investment arbitration under principles of international law as the method of dispute resolution under the BIPA. Further, with the acceptance of Defendants' undertaking / offer to consolidate, the likelihood that the tribunal would make an order that would afford Defendants double relief or impose a double jeopardy on the Plaintiff-Union of India or pass conflicting awards is remote.

WHETHER THE INJUNCTION ORDER DATED 22nd AUGUST, 2017 IS VITIATED ON THE GROUND OF SUPPRESSION?

129. This Court is of the view that every litigant must plead its case with full candour and in good faith. This duty is a notch higher if a party is asking for discretionary relief and, that too, at the ex parte stage. The Supreme Court in ***Morgan Stanley Mutual Fund Vs. Kartick Das, (1994) 4 SCC 225*** has held that *"the Court would expect a party applying for ex parte injunction to show utmost good faith in making the application."* In ***Gujarat Bottling Co. Ltd. & Ors. Vs. The Coca Cola Co.& Ors, (1995) 5 SCC 545***, the Supreme Court has held that *"....Under Order 39 of the Code of civil procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault...."* Moreover, as the present

case arises from an international *'treaty route'*, the standard of disclosure has to be at its highest.

130. This Court may mention that it had passed the injunction order dated 22nd August, 2017 as it had been averred in the plaint that the injunction was necessary because Plaintiff-Union of India had refused to participate in the process of the constitution of the India-United Kingdom BIPA Tribunal and absent an injunction, Plaintiff-Union of India would be forced to participate in the process. In para 60 of the plaint it has been averred, *"...if India continues to persist in its decision not to participate in the proceedings.... the full tribunal may be constituted without India being represented...."*

131. This Court is of the opinion that if the letters dated 07th August and 11th August, 2017 had been disclosed, it would have shown that, there was no urgency to pass an interim order. Also, the fact that the Plaintiff-Union of India had made a commitment on 07th August, 2017 to appoint an arbitrator (if their application before the India-Netherlands BIPA Tribunal failed) was not disclosed to this Court.

132. However, as the learned senior counsel for Plaintiff-Union of India stated during the course of arguments that the plaint was prepared by 01st August, 2017 and the letters dated 07th August and 11th August, 2017 were not disclosed/made available to the local lawyers before the filing on 11th August, 2017 and re-filing on 16th August, 2017, this Court gives the benefit of doubt to the Plaintiff and does not record a finding of wilful suppression or a conduct vitiated by malice.

WHETHER IN VIEW OF THE CONSTITUTION OF THE ARBITRAL TRIBUNAL DURING THE PENDENCY OF THE PROCEEDINGS, THE PRESENT SUIT HAS BECOME INFRUCTUOUS?

133. The cause of action for filing the present suit was that the arbitral tribunal under the India-United Kingdom BIPA may be constituted without India being represented. The Plaintiff-Union of India has now appointed an arbitrator, and after the orders of the Supreme Court of India, the Chairman stands appointed by the two party-appointed arbitrators. The tribunal is complete. The challenge to the invocation has run its course. Any challenge to its jurisdiction [including any challenge to the validity of the invocation of arbitration on allegations of abuse] must lie before the Tribunal. This is in accord with the principle of *kompetenz kompetenz* – which is recognised and accepted even under Indian domestic law.

WHETHER THE PLAINTIFF UNDER THE DOCTRINE OF KOMPETENZ–KOMPETENZ, HAS TO RAISE THE PLEA OF MULTIPLE CLAIMS CONSTITUTING AN ACT OF OPPRESSION BEFORE THE SAME ARBITRAL TRIBUNAL?

134. The principle of *kompetenz-kompetenz*, is recognised in *Article 21* of the UNCITRAL Arbitration Rules, 1976 and the same is explicitly engrafted in the India-United Kingdom BIPA. It is generally accepted that an arbitral tribunal has the power to investigate its own jurisdiction.

135. The principle that arbitrators have the jurisdiction to consider and decide the existence and extent of their own jurisdiction is variously referred to as the *kompetenz-kompetenz* principle or the *'who decides'* question.

136. Under the doctrine of *kompetenz-kompetenz,* the arbitrators are competent to determine their jurisdiction although the effective exercise of that jurisdiction remains subject to the inherent competence of the seat-court

(i.e. the place of arbitration as stipulated in the agreement or as fixed by the arbitrators/parties) to decide, in relation to an injunction to restrain international arbitration, whether a particular dispute falls within the scope of the arbitration agreement.

137. Whether the arbitrators under the India-United Kingdom BIPA choose to stay the arbitral proceedings properly brought before them, whilst related arbitration proceedings are pending is entirely a matter for them under the doctrine of *kompetenz-kompetenz* and the circumstance that arbitrators may do so cannot form an appropriate basis for the National Court to restrain the arbitration.

138. It is pertinent to mention that the arbitral tribunal in *Orascom* case considered each claim with the assistance of expert evidence to conclude that they overlapped with the claims made under a previous settled arbitration. It was only after such factual determination that the tribunal found *Orascom's* action to be an abuse of the right to invoke arbitration. In fact the *Orascom Award* is an illustration of the competence inherent in the BIPA arbitral tribunal to determine its own jurisdiction.

139. This Court is of the opinion that it should apply the principle of *kompetenz-kompetenz* with full rigour as India-United Kingdom BIPA arbitral tribunal would be better placed to assess the scope of the two BIPA arbitration proceedings and the likelihood of parallel proceedings and abuse of process.

140. This Court is further of the view that the Plaintiff-Union of India after having elected its remedy of agitating the issue of abuse of process before the Netherlands-India BIPA Tribunal could not have approached the National Court on the same ground and, that too, without waiting for the

award being rendered by the India-Netherlands BIPA Tribunal. After all, the present suit is not and cannot be an appeal against the India-Netherlands BIPA Tribunal.

THANKS

141. Before parting with this case, the Court expresses its appreciation for the services rendered by Mr Harish Salve and Mr Sanjay Jain, Senior Advocates (as well as the team of lawyers that assisted them), for their able and lucid exposition of the law. This Court expresses its deep gratitude to the learned *Amicus Curiae*, Mr. Sumeet Kachwaha who not only spared his valuable time but who also despite the presence of eminent senior counsel, lifted the level of debate and rendered valuable assistance to the court on important questions of BIPA arbitration.

CONCLUSION

142. To conclude, investment treaty arbitration between a private investor and the host State, which results by following the treaty route is not itself a treaty, but is *sui generis* and recognized as such all over the world. It has its roots in public international law, obligations of States and administrative law. As a species of arbitrations, it is of recent origin and its jurisprudence cannot be said to be settled or written in stone; far from it. Investment Treaty jurisprudence is still a work in progress.

143. However, there is some disquiet over the spectrum of nations both developed and developing as to the spiraling consequences of investment awards and its impact on sovereign functions, as reflected in the speech of

Mr. Justice Sundaresh Menon, Chief Justice of Singapore on International Arbitration : *The Coming of New Age for Asia (and Elsewhere)* (supra).

144. It also cannot be said as an absolute proposition of law that the moment there is an investment treaty arbitration between a private investor and the State, National Courts are divested of their jurisdiction. The Court of Appeal in England in ***Republic of Ecuador*** (supra) rejected the argument that the Courts have no jurisdiction to interpret or apply unincorporated International treaties between an investor and a host State. Consequently, in the opinion of this Court, there is no legal bar over the subject matter of the suit.

145. Further, Investment Arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances (and are not commercial in nature).

146. As the present case is not a commercial arbitration, the Act, 1996 shall not apply. This Court is of the view that in a situation where the Act, 1996 does not apply, its inherent powers are not circumscribed by anything contained in the Act and the ratio in ***McDonald*** (supra) will not apply. Even in commercial arbitration, the jurisprudence of minimum intervention is relatively of recent vintage. It has its roots in Article 5 of the Model Law of 1985 which then took fifteen to twenty years to gain traction and general acceptance in the body of nations.

147. Notwithstanding, this limited intervention role, it is not unknown for Courts to issue anti arbitration injunction under their inherent power, especially when neither the seat of arbitration nor the curial law has been agreed upon. In ***Excalibur Ventures LLC*** (supra), the Court held that where

the foreign arbitration was oppressive or unconscionable, the Court may exercise its power to grant an injunction. In fact, the said judgment cites seven cases which have upheld the Court's jurisdiction to restrain foreign seated arbitrations.

148. Of course, it is a matter of practice that National Courts will exercise great self restraint and grant injunction only if there are very compelling circumstances and the Court has been approached in good faith and there is no alternative efficacious remedy available. Such a restrictive approach and jurisdiction is in consonance with any international obligation, India may have under VCLT or any other treaty.

149. However, keeping in view the aforesaid findings vis-a-vis, the abuse of process, *kompetenz-kompetenz* issues, the present suit and application are dismissed with liberty to the Plaintiff-Union of India to raise the issue of abuse of process before India-United Kingdom BIPA, that now stands constituted. The said Tribunal will decide this issue on its own merit, without being influenced by any observation made by this Court.

150. The Tribunal while deciding the said issue will take into account the Defendants' undertaking to this Court that if the Plaintiff-Union of India gives its consent, it would agree to consolidation of the two BIPA arbitration proceedings before the India-United Kingdom BIPA Tribunal. Accordingly, the ex parte interim order dated 22nd August, 2017 stands vacated. No order as to costs.

MANMOHAN, J

MAY 07, 2018
js/rn