A CHRONOLOGICAL ANALYSIS OF *VODAFONE* AND *CAIRN* – A BIT-TER SAGA

Aayushi Singh[*]

Abstract: *In 2012, India's retrospective taxation amendment culminated in an unfortunate torpedo of investment arbitrations against it, nestling India's journey with bilateral investment treaties in unrest. India's subsequent termination of BITs with multiple countries and conclusion of a protectionist model bilateral investment treaty also garnered critique. Retrospective taxation may be supported by State sovereignty, State practice and discretion however it becomes imperative to understand the nuances of individual investment arbitrations to appreciate the concerns of the investors and the state's unfettered and almost unchecked power to frame and amend taxation laws. The paper chronologically appreciates the findings in Vodafone International Holdings v. Government of India and Cairn Energy Plc v. Republic of India – two landmark disputes, while trying to draw the common thread of retrospective taxation vis-à-vis violations of fair and equitable treatment/most-favoured nation clauses and other similar themes. The paper attempts to critically analyse the Tribunal's approaches in the disputes, while also balancing the concerns of the stakeholders involved and cementing a more reformed investment treaty regime in India.*

I. INTRODUCTION

Crossing out the usage of retrospective taxation by the present administration, Arun Jaitley, the Finance Minister of India from 26th May, 2014 to 30th May, 2019, had stated that a permanent law in this regard would not be possible and that the cost would be 'too heavy' if any future government indulged in such a 'misadventure.'[1] The comment was almost clairvoyant considering the Indian Government's fate. Still coming back to its feet from the aftermath of *White Industries,*[2] India's subsequent journey with bilateral investment treaties (**'BITs'**) has been nestled in chaos –

[*] Lecturer, Jindal Global Law School (JGLS), O.P. Jindal Global University. B.A., LL.B. (Hons.) (Class of 2018), Symbiosis Law School (SLS), Symbiosis International University, Pune. LL.M. (Class of 2019), National University of Singapore. Geneva LL.M. in International Dispute Settlement (MIDS) (Class of 2020), Geneva Center for International Dispute Settlement.

[1] 'Misadventure" of retrospective taxation will be costly: FM' *Hindustan Times* (New Delhi, 18 April 2015) <www.hindustantimes.com/business/misadventure-of-retrospective-taxation-will-be-costly-fm/story-SQDjYNdui14KduR97onn3I.html> accessed 18 October 2021.

[2] *White Industries Australia Ltd. v Republic of India* (2010) UNCITRAL, Final Award.

culminating in a torpedo of investment arbitrations against it in the last few years. The legal and factual disputes in these arbitrations may be multifaceted but the underlying theme is not entirely disjunct: the misadventure of *retrospective taxation.*

In December, 2015, India terminated its existing BITs with fifty-seven countries with which investment agreements had already expired or were soon to expire[3] and further concluded to approve a draft Model BIT.[4] In a treaty, the definition of investment is pivotal since it determines whether investors may force host states into binding arbitration. Ideally, two such definitions may exist, 'enterprise-based' (i.e., where investments may be considered establishments of an enterprise in the host state) or 'asset-based' (i.e., including resources or capital which may have crossed borders) – the latter naturally being broader in its context. While also providing a very narrow definition of '*investment*', seemingly tilted towards enterprise-based investment rather than asset-based one,[5] the Model BIT also utilised vague terminology as the requirement of enterprises to satisfy '*certain duration*' of existence[6] without specifying how much and made a blanket exclusion of meting out the most-favoured nation treatment. Naturally, such restrictions limit the scope of subsequent challenges. A rather protectionist Model BIT also represents a change in the tectonics of India's foreign investment policy in the aftermath of the numerous investor-state arbitrations initiated against India.

The Model BIT specifically excluded regulatory measures relating to taxation from the purview of the treaty. Article 2 of the Model BIT[7] provided that the host state's regulatory measures relating to taxation cannot be adjudicated by an investment tribunal. The host state's decision as to whether a particular regulatory measure is related to taxation (whether made before or after the commencement of arbitral proceedings) shall be non-justiciable. No arbitral tribunal shall be able to review such a decision, hence also limiting challenges under Double Taxation Avoidance

[3] 'India takes steps to reform its investment policy framework after approving new model BIT' (*Investment Treaty News*, 10 August 2016) <https://www.iisd.org/itn/en/2016/08/10/india-takes-steps-to-reform-its-investment-policy-framework-after-approving-new-model-bit/m> accessed 18 October 2021.

[4] 'Model Text for the Indian Bilateral Investment Treaty' (*Department of Economic Affairs, Government of India*) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 18 October 2021 ('**Model Indian BIT 2016**').

[5] Model Indian BIT 2016, arts 1(4)(c), 1(4)(h).

[6] Model Indian BIT 2016, art 1.4.

[7] Model Indian BIT 2016, art 2.4(ii).

Agreements.[8] DTAAs enjoy a two-fold utility: *first*, avoidance of double taxation by taxpayers in their source and residence country; and *second*, opting for the Mutually Agreed Procedure under such DTAAs to resolve cross-border disputes. Even without the exclusion of taxation measures, the Model BIT was seen as an inward-looking and protectionist treaty.

The heavily debated decision to preclude taxation from future BITs is presumably in response to the multitude of claims against India regarding the retrospective application of taxation law. While arguments regarding state sovereignty and discretion may be meted out - it becomes imperative to understand the nuances of these arbitrations individually to appreciate the concerns of the investors and the state's unfettered and almost unchecked power to frame and amend taxation laws.

The paper shall chronologically appreciate the findings in (Part II) *Vodafone International Holdings* v. *Republic of India,* (Part III) *Cairn Energy Plc* v. *Republic of India*. Lastly, the paper attempts to critically analyse the approaches in the disputes while balancing the concerns of the stakeholders involved (Part IV).

II. UNEARTHING INDIA'S TAX 'MISADVENTURE': VODAFONE INTERNATIONAL HOLDINGS V. GOVERNMENT OF INDIA

Vodafone's journey in India has been entrenched in heavy litigation, be it due to the infamous retrospective tax amendment or Vodafone's contentious revenue-sharing model.[9] The Vodafone Saga arose when Vodafone International Holdings BV ('**Vodafone**') acquired CGP Investments from Hutchison Telecommunications International Ltd. ('**HTIL**'). CGP controlled 67% of Hutchison Essar Limited ('**HEL**') based in India. Subsequently, Vodafone also acquired all subsidiaries of CGP including 67% stake of HEL based in India. This acquisition enabled Vodafone to indirectly control a prominent Indian telecom company, HEL.

In 2007, a show-cause notice under Section 201 of the Income Tax Act ('Consequences of failure to deduct or pay') was issued to Vodafone and HEL, now Vodafone Essar Ltd ('**VEL**') to treat Vodafone as an "*assessee in default*" for its failure to deduct taxes as required under Section 195

[8] ibid.

[9] Himanshi Lohchab, 'Telcos, ILDOs spar over international termination rate revenue share' *Economic Times* (New Delhi, 4 February 2020) <https://economictimes.indiatimes.com/industry/telecom/telecom-news/telcos-ildos-spar-over-international-termination-rate-revenue-share/articleshow/73913901.cms?from=mdr> accessed 18 October 2021.

of the Income Tax Act. The legal issues in the case revolved around whether the transfer of shares between two foreign companies resulting in a transfer of the interest held by a foreign company to another foreign company amounted to a transfer of capital assets in India (since this transfer had the effect of essentially *transferring* Indian assets). Vodafone challenged the validity of these notices by filing a writ petition before the Bombay High Court questioning the jurisdiction of the Income Tax Department. The Bombay HC deemed the writ to be non-maintainable as Vodafone had an effective alternate remedy under the Income Tax Act which Vodafone failed to exhaust.

Subsequently, Vodafone moved to file a special leave petition before the Supreme Court. The Supreme Court held that Hutchison-Vodafone was not chargeable under Section 9(1)(i) of the Income Tax Act as a reading of the provision did not include taxation of indirect transfers.[10] Chief Justice S.H. Kapadia, Justice Swatanter Kumar and Justice K.S. Radhakrishnan declared that the taxpayer, Vodafone International Holdings BV, a company resident in the Netherlands, was not liable to be taxed in India. Justice Radhakrishnan went ahead to note that the Income Tax authorities' demand for capital gains tax would "*amount to imposing capital punishment for capital investment since it lacks the authority of law.*"[11]

Considering CGP Investments being based in the Cayman Islands, the Supreme Court observed how interposing investment in Indian companies through a foreign holding company based in Cayman Islands or Mauritius was common for tax and business purposes - primarily for avoidance of approval and registration processes required for direct transfers. It must be understood that this may inevitably lead to hydra-headed evils such as double tax avoidance issues, evasion or avoidance of tax. Thus, the taxation and nature of the holding structure needs to be astutely examined by courts.[12] The Supreme Court further distinguished between the concepts of tax evasion and tax planning and observed this was a case of genuine strategic planning.[13] Instead of this, HTIL's CGP shares to VEL amounted to the transfer of capital assets under Section 2(14) of the Income Tax Act and were thereby not chargeable as capital gains for the purposes of the Act.

[10] The Income Tax Act 1995, s 9(1)(i):
"*Any income accruing or arising outside India due to a business connection in India is deemed to accrue or arise in India and shall be taxable in case of all assessees irrespective of their residential status.*"
[11] *Vodafone International Holdings BV v Republic of India (I) (India-Netherlands BIT)* (2020), UNCITRAL, PCA Case No. 2016-35, Final Award [188].
[12] ibid [68].
[13] ibid [63].

Looking at older cases, in *Azadi Bachao*,[14] the Apex Court upheld Circular 789[15] which stated that a Certificate of Residence issued by Mauritian authorities would suffice to establish tax residence and beneficial status under the Mauritius-India Double Tax Avoidance Agreement. The Vodafone ruling was iconic more so because it settled the lurking questions regarding the correctness of the Supreme Court's decision in *Azadi Bachao* and its departure from *McDowell*.[16] While relying on a 1972 ruling,[17] the Supreme Court in *McDowell* had stated that "*colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods.*"[18]

The Income Tax Department's understanding was that *McDowell* hinted at a departure from the Westminster Doctrine/Principle which states that a person is entitled to make any lawful arrangement of his affairs that he sees fit to reduce liability to tax.[19] The Supreme Court in *Vodafone International Holding* clarified that it is incorrect to assume from McDowell that all tax planning is illegal, illegitimate, or impermissible,[20] thus ruling out the insinuation that the Income Tax Department had made regarding legitimate tax planning which was well within the realm of law. *Vodafone* reconciled *McDowell* and *Azadi Bachao* and clarified that in the context of forum, treaty shopping or tax, evasion/avoidance, the two cases are not at loggerheads.

In 2012, Section 9(1)(i) of the Income Tax Act was amended[21] and retrospective tax was imposed on earlier transactions. The amendment provided for the insertion of two explanations of the contents of Section 9(1)(i). The meaning of '*through*' in the section was to be construed as 'by means of', 'in accordance with' or 'by reason of.' The Income Tax Department shrewdly utilising the amended law, imposed Vodafone with a tax demand of INR 14,200 crore including taxes worth INR 7,990 crore with interest but held back on imposing any additional penalties. In 2016, the Tax Department updated the demand to INR 22,100 crore plus interest.

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[14] *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1 (Supreme Court of India)

[15] Circular No. 789, dated 13-4-2000.

[16] *McDowell and Co Ltd v CTO* (1985) 3 SCC 230 (Supreme Court of India).

[17] *Commissioner of Income Tax, Gujarat v Vadilal Lallubhai* (1973) 3 SCC 17 (Supreme Court of India).

[18] ibid [15].

[19] *The Commissioners of Inland Revenue v His Grace the Duke of Westminster* [1936] AC 1, 19 (UK House of Lords).

[20] Vodafone (n 11) [64]

[21] "(i) *all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India 4 or through the transfer of a capital asset situate in India*."

The legality of the same was challenged by VGP's subsidiary Vodafone BV who invoked Article 4(1) of the India-Netherlands BIT (National Treatment and Most-Favoured National Treatment) claiming a breach of the Fair and Equitable Treatment ('**FET**') standard. India's natural defence was of course a challenge to the jurisdiction of the investment tribunal primarily on the ground that the BIT expressly excluded domestic tax legislation from the ambit of the FET protection. However, more than Article 4(1) of the BIT, the heavily debated portion of the BIT was Article 4(4) which stated that the:

> "*Provisions of paragraphs 1 and 2 <u>in respect of the grant of national treatment and most favoured nation treatment</u> shall also not apply in respect of any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation or arrangements consequent to such legislation relating wholly or mainly to taxation*." (emphasis supplied).[22]

Such drafting was ambiguous and questionable on multiple counts.

If, as was argued, the domestic tax legislation is only excluded from review in respect of claims founded on the national treatment and MFN treatment standard in paragraph 2, the reference to paragraph 1 (which deals with the FET standard) in Article 4(4) would essentially be redundant. To draw in principles of interpretation enshrined in Article 31(1) of the Vienna Convention on Law of Treaties, "good faith" principles can be extended to give full meaning to the effect of the treaty (*effet utile*). This automatically should also extend to paragraph 1 – thus, excluding domestic tax legislations from the net of fair and equitable treatment and full protection and security standards.

If India had to deliberate the exclusion of taxation measures from investment treaty jurisdiction, then it needs to contemplate the dire need of incorporating much broader treaty provisions which further the same objective as well – something which Article 4(4) of the BIT failed to do.

[22] Agreement between the Republic of India and the Kingdom of the Netherlands (India-Netherlands) (adopted 6 November 1995), art 4(4).

The substantive question is whether a retrospective amendment to the tax legislation would lead to a violation of the legitimate expectation of an investor. If we were to adopt the approach established by *Occidental*[23] and *Enron*,[24] there ideally should not be such significant changes in the legislation as to affect the very core of legitimate expectation. In *Enron*, by 'dismantling' the regulatory framework, Argentina had failed to provide a stable framework as required by the BIT, thereby acting unfairly and inequitably.[25] Consequently, an interesting line of argument can be developed if the tribunal's reasoning in *Enron* is applied to Vodafone. Imposing a retrospective tax amendment needs to be weighed against a state's sovereign exercise of power and that legislative power shall and must not cease at the whims of investors. Thus, *Enron* can be distinguished from *El Paso*[26] and *Continental* which stated that "*it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose.*"[27]

The retrospective tax amendment was also not specifically targeted at Vodafone since it was a generic amendment; however, the thoughtfully calibrated timing of the legislation made the underlying legal intention seem extremely dubious. An investor may often make an investment in reasonable reliance on the stability of the regulatory framework of the host state,[28] so that in certain circumstances a reform of the framework can breach the investor's legitimate expectation. Legitimate expectations may also be created when the state provides specific representations, assurances, or commitments directly to the investor,[29] at the time of making the investment upon which the investor places reliance for making the investment.[30]

According to the award, the government needed to reimburse Vodafone 60 per cent of its legal costs and half the cost borne by it for appointing an arbitrator on the panel. Hence, the

[23] *Occidental Exploration and Production Company v Ecuador* (2004), UNCITRAL, LCIA Case No. UN 3467, Final Award [185].
[24] *Enron Corporation Ponderosa Assets v Argentina* (2007), ICSID Case. No. ARB/01/3, Award.
[25] ibid [251]-[268].
[26] *El Paso Energy International Company v Argentina* (2011), ICSID Case No. ARB/03/15, Award.
[27] *Continental Casualty Company v Argentina* (2008), ICSID Case No. ARB/03/9, Award [258].
[28] *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain* (2020), ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum [596].
[29] *Glencore International AG and CI Prodeco SA v Republic of Colombia* (2019), ICSID Case No. ARB/16/6, Award [1368].
[30] *Mobil Cerro Negro Holding Ltd, Mobil Cerro Negro Ltd, Mobil Corporation and others v Bolivarian Republic of Venezuela* (2014), ICSID Case No. ARB/07/27, Award [256].

government's liability in the case would have come to around INR 75 crores.[31] In parallel of the same, Cairn Energy Plc and Vedanta Resources Plc filed separate arbitrations challenging the retrospective amendment of taxation laws, aggravating the chaos.

III. CAIRN ENERGY PLC AND CAIRN UK HOLDINGS LIMITED (CUHL) V. GOVERNMENT OF INDIA

The underlying dispute that erupted in the Cairn PCA arbitration[32] dates to 2006. The two parties involved were Cairn Energy Plc ('*CEP*') and its British subsidiary, Cairn UK Holdings Limited ('**CUHL**'). The line of transactions arose from the reorganization of CEP's shares in its Indian subsidiaries, which were subsequently transferred to CUHL, making CUHL the direct owner of all twenty-seven of CEP's Indian subsidiaries. Subsequently, CUHL transferred these shares to its subsidiary incorporated in Jersey, Cairn India Holdings Limited ('**CIHL**'). Cairn India Limited ('**CIL**') was subsequently incorporated as a CUHL subsidiary in India and CUHL's shares in CIHL were transferred to CIL, i.e., (CUHL->CIHL->CIL). Cairn India Limited divested 30% of its shares in an initial public offering, managing to raise $931 million in December 2006. Vedanta UK purchased 59% of the remaining shares and transferred them to their Indian wholly-owned subsidiary Vedanta Limited. ('**VL**') CIL later merged with Vedanta Limited in 2017, making Cairn Energy receive a 5% shareholding in VL.

After an investigation of CIL's office regarding capital gains incurred in the above transactions, in 2015, the Income Tax Department imposed a tax liability of $1.6 billion on CIL for failure to deduct withholding tax on the transactions. Subsequently, CUHL (the parent body) initiated arbitration under Article 9 (3)(c) of the UK-India BIT, while proceedings before tax authorities were ongoing. Without prejudice to the arbitration proceedings, an appeal against the proceedings was also initiated before the Income Tax Appellate Tribunal which upheld the tax demand against CUHL in 2017 but dismissed the imposition of interest thereupon. In the subsequent months of 2017, the Tax Department engaged in the forced sale of CUHL's shares in CIL, selling 98.72

[31] Dilasha Seth, 'India challenges Vodafone arbitration award, plans the same in Cairn case' *Business Standard* (New Delhi, 25 December, 2020) <https://www.business-standard.com/article/companies/india-challenges-vodafone-arbitration-award-plans-the-same-in-cairn-case-120122401064_1.html> accessed 20 April 2022.

[32] *Cairn Energy Plc and Cairn UK Holdings Ltd. v Republic of India* (2020), UNCITRAL, PCA Case No. 2016-07, Final Award.

percent of CUHL's shareholding in CIL/VL and other preference shares and seized dividends due to CUHL.

Before the Permanent Court of Arbitration, India's primary argument hinged on its sovereign power to amend taxation laws and their non-arbitrability under a BIT or otherwise. India relied on an implied exclusion of taxation disputes from the BIT based on state practice.[33] In the alternative, India relied on both transnational public policy and Indian and Dutch (Netherlands being the seat of the arbitration) public policy to argue that even if both parties were consenting to the present arbitration, taxation matters are not arbitrable under law. Transnational public policy transcends state boundaries and may arise from an international consensus regarding universal standards in "civilised nations" (an extended reference to Article 38 of the International Court of Justice[34] may be drawn) such as corruption, bribery, slavery, terrorism, etc.[35] To draw such a high-handed argument over a theme where international consensus[36] is as divided as taxation was a tricky move indeed.

The Tribunal also drew a distinction between a tax-related investment dispute and a tax dispute, where the former must relate to a BIT violation by a host state's measures related to taxation, the latter relates to the taxability of specific transactions and the amount thereunder.[37] The former would squarely fall within the ambit of "*any dispute between an investor of one Contracting Party and the other Contracting party*" as stipulated under Article 9 of the UK-India BIT. A tax dispute would concern the domestic laws of a country and possibly the laws of several countries as far as international transactions were concerned, falling under the ambit of a country's domestic laws and double taxation avoidance treaties with other countries.[38] The Tribunal adjudicated the present

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[33] ibid [765].

[34] Statute of the International Court of Justice, art 38: "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

1. *international custom, as evidence of a general practice accepted as law;*
2. *the general principles of law recognized by civilized nations*."

[35] RB Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51(4) American Journal of International Law 734–53.

[36] 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series*, vol 3 (Kluwer Law International 1987) 258 – 318.

[37] *Cairn Energy* (n 32) [793].

[38] Reuven S Avi-Yonah and Brett Wells, 'The BEAT and Treaty Overrides: A Brief Response to Rosenbloom and Shaheen' (2018) 92(4) Tax Notes International 383.

dispute to be a tax-related investment dispute where the issue was whether the measure taken by the host state, (regardless of whether it was valid or invalid under its municipal tax laws) violated international law obligations under the BIT.[39]

India also made a rather unique argument of interpreting the UK-India BIT along with the UK-India Double Taxation Avoidance Agreement (DTAA),[40] in light of Article 31(3) of the Vienna Convention on Law of Treaties.[41] It must be impressed that a DTAA cannot be construed as a "*subsequent agreement*" between the parties to be used as a tool for interpreting the BIT under Article 31(3)(a) or Article 31(3)(b) of Vienna Convention. The DTAA was enforced in 1993, chronologically before the BIT and did not establish an agreement between the parties with respect to the BIT's subsequent interpretation.

The Tribunal also had to consider whether disputes relating to returns from an investment constituted a dispute related to the investment, since the dispute was essentially concerning the capital gains earned by the Claimants through disinvestment of their shares. *Achmea* v. *Slovak Republic*[42] established returns to be an integral part of an investment, however unlike the UK-India BIT, the investment treaty in *Achmea*[43] did not make a distinction between the terms 'investment' and 'returns'. While Article 4(2) and Article 7 of the BIT accorded protection to 'returns' from the investment, the investor's claims were made under Articles 3 and 5 of the BIT, which applied only to 'investments.' Thus, India argued that unless allegations related directly to the breach of provisions of the treaty providing substantive obligations regarding an investment, the dispute

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[39] ibid.

[40] Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (United Kingdom-India) (adopted 25 January 1993) ('**UK-India Double Taxation Convention**').

[41] Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('**VCLT**'), art 31(3):

"*(3) There shall be taken into account, together with the context:*

> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties*."

[42] *Achmea BV v Slovak Republic* (2012), UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko BV v Slovak Republic*).

[43] Agreement on Encourageent and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Netherlands-Slovakia) (29 April 1991).

would fall outside the Tribunal's jurisdiction. Article 9 of the BIT contained broad language for resolution of "*any dispute in relation*" to an investment and was overseen in the Respondent's perspective. *Siemens* v. *Argentina*[44] previously pointed out that the lack of a specific mention in the treaty provisions does not indicate an exclusion of the matter – thus, insinuating that a lack of the term 'returns' in Article 9 did not imply its exclusion.

As mentioned earlier, relying on *effet utile*, a restricted interpretation of the term 'investment' to exclude returns from the investment would be inconsistent with Article 31(1) of VCLT as well as we would be deviating from the ordinary meaning of the treaty's terms and not interpreting it in good faith. Further, it could not be established that the parties had an intention to juxtapose the two terms against each other in order for a special meaning to be assigned to 'investment', if Article 31(4) of the Vienna Convention were to be applied.

Article 3 (Fair and Equitable Treatment) and Article 5 (unlawful expropriation) of the BIT were invoked due to the retrospective application of the 2012 tax amendments and forced sale of CUHL's shares. The investors also alleged violation of Article 7 of the BIT due to restrictions on CUHL's right to transfer remaining shares in CIL. Like Vodafone, the deprivation of FET hinged on the fundamental change in taxation law which breached predictability,[45] legal stability[46] and legitimate expectations[47] of the investors – all of them being inherent components of FET. It has been acknowledged by previous tribunals and model BITs[48] that when host states make certain administrative decisions, they are obliged to offer transparent procedures and give notice to investors concerned with the decisions.[49] The arbitrariness of the tax regime did not hint at intelligible procedures being followed by the state.

The way the Income Tax Department targeted Cairn was also brought under the radar as it hinted towards a premeditated effort to prevent CUHL from selling its investment. Prejudice, preference

[44] *Siemens AG v The Argentine Republic* (2007), ICSID Case No. ARB/02/8, Final Award.
[45] *Técnicas Medioambientales Tecmed SA v The United Mexican States* (2003), ICSID Case No. ARB (AF)/00/2, Final Award.
[46] *Occidental Exploration and Production Company v Ecuador* (2004), UNCITRAL, LCIA Case No. UN 3467, Final Award.
[47] *Multipack SRL v Romania [I]* (2013), ICSID Case No. ARB/05/20, Final Award.
[48] US Model Bilateral Investment Treaty 2012, art 20.6.
[49] *Metalclad Corporation v The United Mexican States* (2000), ICSID Case No. ARB(AF)/97/1, Award [9].

or bias substitutes the rule of law.[50] It may either be a measure damaging the investor without serving any apparent legitimate purpose, or based not on legal standards but on discretion, prejudice or personal preference.[51] Commencing action against Cairn after the enforcement of the 2012 amendments, when compared to non-enforcement of tax liability imposed on Vodafone was also brought forth by the Claimant. This differential treatment naturally strengthened the violation of fair and equitable treatment. Thus, referring to the ICJ's decision in *ELSI,*[52] the Tribunal held that the retroactive taxation of the 2006 transactions was grossly unfair and breached the FET standard under Article 3 of the BIT.

IV. THE AFTERMATH OF MULTIPLE INVESTMENT ARBITRATIONS - WHERE DOES INDIA STAND?

On a more reassuring note, subject to certain conditions, the Taxation Amendment Act, 2021[53] was passed, seeking to nullify the tax assessments levied against Cairn in January 2016 and ordering the refund of INR 7,900 crore collected from Cairn. Cairn would be filing necessary documentation under Rule 11UF(3) of the Indian Income Tax Rules, 1962 intimating the withdrawal, termination and/or discontinuance of various enforcement actions. This may seem promising however there are more deep-rooted issues warranting attention.

To look at the treaty in *Vodafone* (the India-Netherlands BIT), Article 4(4) of the BIT showed a minor improvement from the carve-out in Article 4(3) of the India-UK BIT invoked in *Cairn* and *Vedanta*, the latter being immensely constrained. Article 4(3) of the India-UK BIT does not make any reference to exclusion of claims involving treaty obligations other than MFN or National Treatment (for example, expropriation or fair and equitable treatment could still be alleged in respect of taxation). The taxation carve-out in the India-Japan CEPA[54] can be drawn as an example, Article 10(1) of which was used for India's objection in *Nissan*.[55] Article 10(1) provides that "*the provisions of this Agreement shall not apply to* ***any taxation measures***." The latter three words are

[50] *Joseph Charles Lemire v Ukraine* (2011), ICSID Case No. ARB/06/18, Award [262]-[263].
[51] *EDF (Services) Limited v Romania* (2009), ICSID Case No. ARB/05/13, Award [303].
[52] *Case Concerning Elettronica Sicula SpA (ELSI)* (*United States of America v Italy*) (1989) ICJ Rep 15.
[53] Taxation Laws (Amendment) Act 2021.
[54] Comprehensive Economic Partnership Agreement between Japan and the Republic of India (Japan-India) (adopted 16 February 2011).
[55] *Nissan Motor Co Ltd v Republic of India* (2019), UNCITRAL, PCA Case No. 2017-37, Decision on Jurisdiction.

succinct and clear enough to have only one unequivocal implication. Unlike the UK-India or Netherlands-India BIT, Article 10(1) does not seek to exclude only specific types of treaty claims.

To analyse the aforementioned awards, it becomes critical to analyse the Indian Model BIT's framework. Article 2.4(ii) of India's Model BIT stipulated that the host state's regulatory measures related to taxation could not be adjudicated by an investment tribunal - making taxation measures completely outside the purview of the BIT. Further, investors would not be able to challenge any change in the country's taxation laws in any circumstances, hence also limiting challenges under Double Taxation Avoidance Agreements or Free Trade Agreements. From an investor's perspective, the exclusion is potentially problematic since it gives the state unfettered power. The exclusion ensures that if a dispute similar to Cairn arises in the future for investments pursued under the BIT, an arbitral tribunal will be deprived of the power to adjudicate. More unfortunately, the distinction between taxation disputes and tax-related investment disputes that the Cairn tribunal considered will hold no relevance in such circumstances. There exists, from an investor's point of view, a dire need to incorporate this demarcation in upcoming BITs/FTAs.

Even though India has made a peace offering through the Taxation Laws (Amendment) Bill, 2021 regarding its ill-deliberated taxation measures, much needs to be reconciled from our learnings from the adverse awards to cement a stronger investment treaty regime.