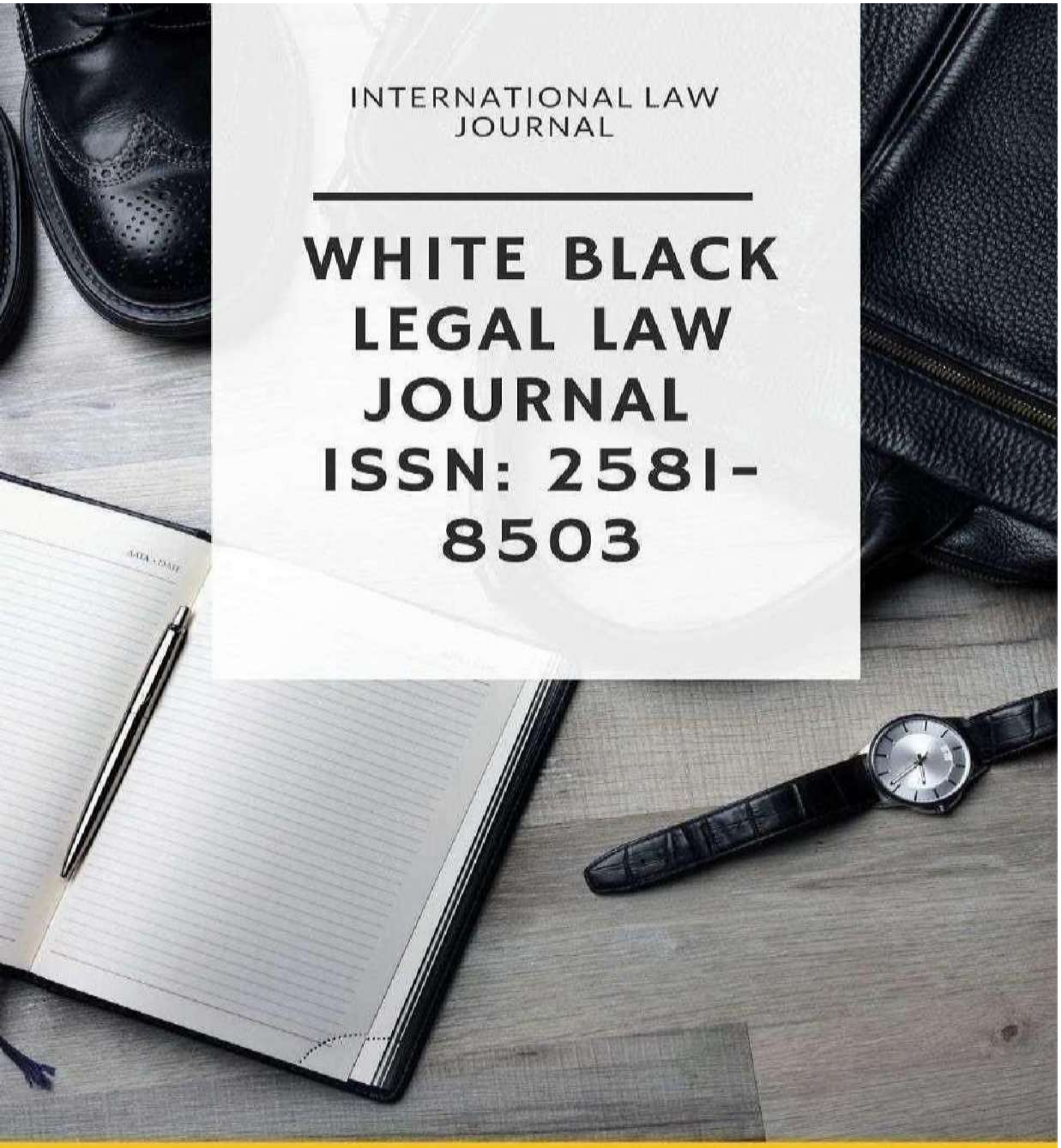

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

DUAL MANDATES, DIVERGING PATHS: ANALYZING DTAAs INTERPRETATION IN INTERNATIONAL LAW AND DOMESTIC COURTS

AUTHORED BY - RIYA SHARMA

Abstract:

The interpretation of DTAAs lies between international treaty law and domestic statutory regime. This article analyses how Indian courts, as well as courts in various comparative jurisdictions, deal with interpretive problems arising from the hybrid nature of these instruments. Building off the principles of the Vienna Convention on the Law of Treaties, the paper contrasts the purposive, object-and-purpose-driven methodology applicable to treaties vis-a-vis the strict scientific approach of the domestic taxing statutes. Through analysis of landmark Indian cases such as Azadi Bachao Andolan, Morgan Stanley, and Concentrix Services, as well as comparative jurisprudence from the United Kingdom, United States, Australia, and the European Union, the article demonstrates how judicial approaches vary between literalism, purposivism, and anti-abuse doctrines. Particular attention is paid to the statutory framework under Section 90 of the Income-tax Act, 1961, the introduction of GAAR, and the influence of the OECD's BEPS Project and Multilateral Instrument. The article argues that India's trajectory reflects a gradual but firm movement toward harmonizing internationalist interpretation with domestic sovereignty. By situating DTAAs within both global and national contexts, this article provides a comprehensive framework for understanding their role in contemporary tax governance.

Keywords

Double Taxation Avoidance Agreements (DTAAs), International Tax Law, Treaty Interpretation, Vienna Convention on the Law of Treaties (VCLT), Income-tax Act, 1961 (India), General Anti-Avoidance Rule (GAAR), OECD BEPS & Multilateral Instrument (MLI).

Introduction

By way of example, the so-called Double Taxation Avoidance Agreements (DTAAs) are generally bilateral treaties formed for the prevention of double taxation of the same income within two jurisdictions. These treaties are rather peculiar in nature because they belong to the realm of public international law and also appear to fit within each contracting state's domestic framework of law. This conception of duality in nature generally leads to challenges in interpreting such treaties: would one look at the DTAA through the principles embodied in international treaty law, or should the interpretation be dominated by domestic rules of statutory interpretation?

Matters are not purely in society. Globalization and cross-border transactions are fast growing, and interpretation of DTAA holds much more importance now for taxpayers and revenue authorities alike. In India, the Income-tax Act, 1961 interacts with over ninety DTAAs.

Therefore, the critical role of the judiciary has been to attempt to weld together the international treaty obligations with their interpretation of domestic taxation. This topic has, thus, been made even hotter with the advent of international options such as the OECD's Base Erosion and Profit Shifting (BEPS) project and the Indian enactment of GAAR.

This article examines the interpretive approaches to DTAAs from the perspectives of international law and domestic law. It draws upon Indian and comparative jurisprudence to highlight how courts reconcile these approaches, especially when conflicts emerge. The analysis is structured around the following themes: (i) DTAAs as international treaties subject to the Vienna Convention on the Law of Treaties (VCLT); (ii) the incorporation of DTAAs into domestic law and their hierarchical status; (iii) interpretive canons applied to DTAAs versus statutes; (iv) conflicts and resolutions between treaties and statutes; (v) the impact of anti-avoidance principles; and (vi) comparative case studies. By engaging with both Indian and foreign case law, this article demonstrates how the interpretation of DTAAs reflects a broader dialogue between international obligations and domestic sovereignty.

DTAAs as International Treaties and Their Interpretation

They are, in the first place, treaties entered into between sovereign states. Hence such DTAAs are to be interpreted in accordance with the principles of international law. The Vienna Convention on the Law of Treaties (VCLT) codifies the general rules relative to treaty

interpretation. Although India is not a signatory to this convention, its provisions are widely regarded as customary law and have been referred to by Indian Courts.[1]

Article 31 thus lays down the guiding rule: treaties are to be interpreted in good faith, in accordance with the ordinary meaning of their terms in context, and in light of their object and purpose.[4] This purposive orientation is an important differentiator of treaty interpretation from domestic statutory interpretation, which often favors textual or literal readings. The Indian Supreme Court had emphasized this distinction when it remarked in Union of India v. Azadi Bachao Andolan that the interpretation of treaties "is not the same as that of statutory legislation."[5] Unlike statutes, treaties are negotiated and involve a degree of compromise, and, consequently, they should receive an interpretation reflecting the agreed intentions of the contracting states.

Interpretation focuses chiefly on object and purpose. Ideally, a DTAA allocates taxing rights and avoids double taxation and fiscal evasion.[4] Courts have preferred a more purposive approach so that treaties remain an effective tool and are not undermined by an overly literal construction. Indian courts have also enunciated a basic principle known as ut res magis valeat quam pereat—an instrument must be interpreted either so as to make it effective rather than to void it.[5]

From an international tax perspective, the common interpretation exists as the concept that the parties must construe a treaty term in a manner consistent with one another.[6] The Delhi High Court went into this in Concentrix Services Netherlands B.V. v. Income Tax Officer, considering not only Indian law but also the interpretations of the Dutch government while applying the Most-Favoured-Nation clause of the India–Netherlands DTAA.[7] This is in line with the VCLT which recognizes the "subsequent practice" of the states as a relevant tool for interpretation.[8]

Additionally, courts often rely on model conventions and commentaries, especially of the OECD and the UN. Though not binding, they furnish persuasive guidance if, for example, the treaty provisions are drafted straight from the model.[9] The courts in India and elsewhere have used them to read-through ambiguous words and make interpretations in sync with international consensus.

In sum, when seen as international instruments, DTAAs got interpreted under a strong purposive approach in conformity with VCLT principles and with an eye toward that consistency between the contracting States. This is to underscore, and this is what sets them well apart from the literalist approach, which is commonly attributed to domestic tax law.

Incorporation of DTAAs into Domestic Law

Though the DTAAs emanate from international law, their enforceability depends on the basis of domestic law. Various jurisdictions may have sharply contrasting constitutional approaches to treaties and usually fall under the observation of either monist or dualist systems. Under the monist theory, treaties being international law are by their very definition also domestic law; thus, automatic application of treaties occurs upon ratification. Dualist theories do not regard treaties as domestic laws unless they are specifically incorporated by legislation for the given effects. India considers this dualist perspective.[10]

Implementing Articles 253 of the Indian Constitution grants Parliament power to legislate to implement treaties.[11] Section 90 of the Income-tax Act was thus enacted to empower the Central Government to enter into DTAAs and notify them in the Official Gazette.[12] Notification renders such treaties part of domestic law and thus govern the taxation of income covered by the provisions thereof. Importantly, Section 90(2) provides that taxpayers could apply the provisions of either the Income-tax Act or of such treaty whichever is more beneficial.[13]

Indian courts have consistently held to this principle. In CIT v. Visakhapatnam Port Trust, the Andhra Pradesh High Court held that treaty provisions would override those provisions of the Income-tax Act which are in conflict with each other.[14] This standpoint was affirmed by the Central Board of Direct Taxes, through Circular No. 333.[15] Later, the Supreme Court confirmed in the Director of Income Tax v. PVAL Kulandagan Chettiar case that treaty provisions, so notified, prevail over domestic enactments so far as they are inconsistent with them.[16]

By way of contrast, the U.S. follows the theory of "later-in-time": if a statute and a treaty are in conflict, whichever of the two is enacted later will prevail domestically.[17] The United Kingdom being a dualistic state demands tax treaties to be given effect through Orders in Council issued under the Taxes Acts, but once implemented, treaties prevail over the domestic provisions.[18] Australia implements treaties through the International Tax Agreements Act, and

its High Court in Thiel v. Commissioner of Taxation held that a treaty provision prevails to the extent of any inconsistency with the domestic tax code.[19]

India's approach is distinctive because it codifies a taxpayer-friendly hierarchy through Section 90(2). Yet, the legislature has created exceptions as well. In 2012, Section 90(2A) was inserted to provide that the beneficial treaty option under Section 90(2) does not apply where General Anti-Avoidance Rule (GAAR) is invoked.[20] Hence, while treaties are generally given primacy in India, the state reserves the right to deny treaty benefits in abusive cases.

Treaty Interpretation vs. Domestic Law Interpretation

One of the overriding concerns in tax jurisprudence is to reconcile interpretative approaches used for treaties with those deployed for statutes. Domestic tax law is interpreted strictly: taxing provisions are construed narrowly in favor of the taxpayer, and exemption clauses construed liberally.[21] Treaties, on the other hand, are interpreted under principles of international law, which rely on context, purpose, and common intention.[22]

The Indian Supreme Court in Azadi Bachao Andolan observed this distinction, stating that treaty interpretation was "distinct and separate" from statutory interpretation.[23]

One important, practical cosmopolitan issue arises in the treatment of undefined terms in DTAAs. Most treaties have a "reference to domestic law" clause, usually based upon Article 3(2) of the OECD Model Convention, which states that any term not defined in the treaty shall have the meaning that it has under the law of the state which is applying the treaty, **"unless the context otherwise requires."**[24]

The UK Supreme Court decision in Fowler v. HMRC is instructive.[25] Under UK domestic law, a professional diver's employment income was considered trading income. The question raised was whether, under the UK–South Africa DTAA, the income came within the treaty's "employment income" or "business profits" article. The Court held that the treaty context demanded the international meaning of "employment," thereby ruling out the domestic fiction.[26]

In an analogous vein, Indian courts have also stressed context. In DIT v. Morgan Stanley & Co.

Inc., the Supreme Court, relying on the OECD Commentary to interpret "permanent establishment," stated that treaty terms should not be confined to narrow domestic meanings.[27] Generally, treaty interpretation evolved through flexibility, purposive construction, and international consensus, while domestic statutory interpretation continued a tradition of strict textualism.

Conflict and Resolution Between Treaties and Domestic Law

Because the DTAAs coexist with the domestic tax statutes, conflicts occasionally arise between the two. In India, the rule is codified in Section 90(2), which explicitly provides that a taxpayer may apply the provisions of either the Act or the applicable treaty, whichever is more beneficial.[28] However, after the insertion of Section 90(2A) in 2012, where GAAR applies, treaty benefits may be denied.[29]

On the other hand, the late-in-time rule exists in the U.S., while in the UK and Australia treaties usually take precedence once incorporated.[30] An interesting angle emerged in Satyam Computer Services Ltd. v. Commissioner of Taxation, where the Australian Federal Court concluded that the India–Australia DTAA itself might deem an income taxable in Australia, when domestic law alone may not have done so.[31] So, in that way, treaties can be swords as well as shields.

Anti-Avoidance - International Norms vs. Domestic Measures

The matter of tension between treaty obligations and domestic anti-avoidance measures is one of the most dynamic areas of interpretation under a Double Taxation Avoidance Agreement (DTAA). While the treaties encourage cross-border investment and avoid double taxation in genuine cases, they can equally be misused to facilitate double non-taxation or treaty shopping. The problem is to prohibit abuse without impacting the certainty that treaties seek to provide. Traditionally, the courts had stayed away from injecting anti-avoidance doctrines into the interpretation of treaties. While upholding the India-Mauritius treaty in Union of India v. Azadi Bachao Andolan, the Supreme Court held that the treaty has to be applied as it is negotiated where there is no express anti-abuse clause.[32] It thus held that policy considerations relating to treaty misuse could not be allowed to override the explicit provisions of the treaty.

This restrictive approach has gradually been displaced by aggressive anti-abuse regimes. India

domestically introduced a General Anti-Avoidance provision in Chapter X-A of the Income-tax Act that would empower revenue authorities to deny tax benefits where an arrangement is primarily aimed at securing a tax advantage and lacking commercial substance.[33] Section 90(2A) ensures that GAAR applies even where treaty provisions would otherwise be more beneficial.[34]

On an international level, the OECD's Base Erosion and Profit Shifting (BEPS) Project has set forth an accommodation for states to incorporate anti-abuse articles such as the Principal Purpose Test (PPT) into their existing DTAAs through the Multilateral Instrument in 2017.[35] The PPT bars treaty benefits if the obtaining of such benefits was one of the principal purposes of an arrangement, unless it is in line with the object and purpose of the treaty. This is a drift into the direct anti-avoidance treatment of treaty interpretation, thus aligning the domestic with the international in this respect.

On the comparative side, the case law seems to conform to this trend. The European Court of Justice has developed a doctrine against "abuse of rights" to prevent artificial arrangements that are wholly or almost wholly contrived for the sole purpose of obtaining tax benefits under EU law.[36] The United States, for its part, inserts detailed Limitation on Benefits articles into its treaties, supplemented by domestic anti-conduit rules.[37] Essentially, both systems look to ensure that the ends of DTAAs are met by legitimate economic activities rather than by tax arbitrage.

In India, the combined effect of GAAR and the MLI has recalibrated the balance. Courts and tax authorities are now expected to apply treaties purposively while recognizing domestic anti-abuse provisions as a legitimate limit. The principle that treaties should not facilitate avoidance is increasingly entrenched in both international law and domestic enforcement.

Comparative Case Studies

The relationships between international law and domestic law in DTAA interpretation are best understood through cross-jurisdiction case law. Several landmark decisions have shown the waxing and waning judicial approaches.

India — *Azadi Bachao Andolan*

In the Union of India v. Azadi Bachao Andolan case, the Supreme Court upheld the India–

Mauritius DTAA against allegations of treaty shopping.[38] The Court reasoned that no unwritten anti-avoidance doctrines should be read into treaty interpretation since treaties are policy instruments that have been negotiated and must therefore be adhered to unless expressly amended. This decision reflected a more deferential, versus a purposive, interpretation of treaty obligations.

India — *Concentrix Services Netherlands B.V.*

The High Court of Delhi, in Concentrix Services Netherlands B.V. v. Income Tax Officer, took a more internationalist approach toward interpreting the Most-Favored-Nation clause in the India-Netherlands DTAA.[39]The court cast its eye beyond domestic law, peering into decrees and practices of the Netherlands to ascertain the common intent in line with Article 31(3) of VCLT. This was thus one giant step on the side of harmonious interpretation.

United Kingdom — *Fowler v. HMRC*

The UK Supreme Court in Fowler v. HMRC held that a domestic deeming provision cannot alter the treaty's classification of income.[40] The Court stressed that treaty terms not defined should be given their international meaning unless context indicates otherwise. This decision represents the way courts defend the independent meaning of treaty provisions against domestic distortions.

Australia — *Satyam Computer Services Ltd.*

The Full Federal Court of Australia held in the Satyam Computer Services Ltd. v. Commissioner of Taxation that treaty provisions could extend taxing rights under deeming source rules.[41] The Court referred to the treaty as the "leading provision," and therefore effectively transformed it into an operative source of taxation on the domestic level. With this decision, the Court demonstrates that treaties may not only become shields against double taxation but may also become swords upon which new taxation claims are made.

United States — Later-in-Time Rule

In the United States, cases such as Whitney v. Robertson hold that a later statute domesticates an earlier treaty.[42] While the doctrine is not one called upon frequently in the tax context, it does express a constitutional willingness to place domestic legislation above the breach of an international commitment.

European Union — *Cadbury Schweppes*

In the Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue case, the European Court of Justice developed a doctrine of abuse that precludes the grant of treaty or directive benefits in respect of wholly artificial structures.[43] Though not a case dealing with bilateral treaties, it is an illustration of the supranational emphasis on abuse prevention in Europe, which permeates into the interpretation of treaties among member states.

Variously, the cases illuminate different jurisprudential philosophies: India's shift from literalism (Azadi) to purposive, Internationalist reasoning (Concentrix); the U.K.'s insistence on autonomous meanings for treaties; Australia allowing treaties to extend taxpayer rights domestically; the U.S. assertion of legislative supremacy; and the EU's anti-abuse tilt. The comparative scene thus shows both pliancy and fragility in treaty interpretation-as it comes to being at the interface of international and domestic law.

Conclusion

Interpretation of Double Taxation Avoidance Agreements holds a liminal status between international and domestic law. DTAAs, on one hand, are basically treaties governed by international law principles, notably the Vienna Convention on the Law of Treaties, stressing a treaty's good faith, object and purpose, and common intention of the contracting States.[44] On the other, they derive force from domestic enactments, namely Section 90 of the Indian Income-tax Act, dabbed-grossly-and are subject to the constitutional and statutory framework of a State.[45]

Such comparative jurisprudence shows great diversity. India has codified a more taxpayer-friendly rule acknowledging the primacy of treaty unless domestic law is more beneficial, tempered by anti-avoidance mechanisms such as GAAR.[46] In contrast, the United States follows the later-in-time rule, putting more emphasis on legislative supremacy over treaty commitments.[47] Conversely, the United Kingdom and Australia take a more integrative approach, incorporating treaties into domestic law and generally giving priority over conflicting statutes.[48] When the European Court of Justice was founded, it developed an anti-abuse doctrine that reflects the supranational character of EU law.[49]

Divergence apart, all approaches culminate in one theme: courts must balance international

comity against domestic sovereignty. The Indian experiment through the evolution of Azadi Bachao Andolan to become Concentrix Services seems to demonstrate the increasing willingness of the courts to adopt an internationalist method of interpretation while at the same time recognizing that the State has the right to prevent abuse through GAAR and the MLI.[50]

The interpretation of DTAAs is an ongoing dialogue between legal orders. Treaties cannot be applied as if they were ordinary statutes. Neither can domestic law be set aside in their operation. A fairly pragmatic application places international obligations in harmony with domestic priorities, thus promoting the true aim of the DTAAs: to avoid double taxation, prevent fiscal evasion, and foster cross-border economic activity. In that way, courts give predictability to the whole regime of international taxation and uphold the integrity of domestic fiscal policy.

Footnotes

1. *Ram Jethmalani v. Union of India*, (2011) 8 S.C.C. 1, 48 (India).
2. VCLT, May 23, 1969, 1155 U.N.T.S. 331.
3. *Union of India v. Azadi Bachao Andolan*, (2003) 263 I.T.R. 706, 744 (India).
4. OECD, *Model Tax Convention on Income and on Capital: Condensed Version* art. 1 (2017).
5. *Engineering Analysis Ctr. of Excellence (P.) Ltd. v. Comm'r of Income Tax*, (2021) 432 I.T.R. 471, 499 (India).
6. Klaus Vogel, *Double Taxation Conventions* 37 (3d ed. 1997).
7. *Concentrix Servs. Netherlands B.V. v. Income Tax Officer*, W.P. (C) 9051/2020 (Del. H.C. Apr. 22, 2021) (India).
8. VCLT, supra note 2, art. 31(3)(b).
9. *DIT v. Morgan Stanley & Co. Inc.*, (2007) 292 I.T.R. 416, 436 (India).
10. *Jolly George Varghese v. Bank of Cochin*, (1980) 2 S.C.C. 360, 367 (India).
11. India Const. art. 253.
12. *Income-tax Act, 1961*, No. 43 of 1961, § 90, Acts of Parliament, 1961 (India).
13. Id. § 90(2).
14. *CIT v. Visakhapatnam Port Trust*, (1983) 144 I.T.R. 146, 156 (A.P. H.C.) (India).
15. Cent. Bd. of Direct Taxes, Circular No. 333, Clarification Regarding Double Taxation Agreements (Apr. 2, 1982) (India).
16. *DIT v. PVAL Kulandagan Chettiar*, (2004) 267 I.T.R. 654, 660 (India).

17. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).
18. *IRC v. Collco Dealings Ltd.*, [1962] A.C. 1 (H.L.) (appeal taken from Eng.).
19. *Thiel v. Comm'r of Taxation* (1990) 171 C.L.R. 338, 355 (Austl.).
20. Finance Act, No. 23 of 2012, § 97, 2012 (India).
21. *Cape Brandy Syndicate v. IRC*, [1921] 1 K.B. 64, 71 (Eng.).
22. VCLT, supra note 2, art. 31.
23. *Azadi Bachao Andolan*, 263 I.T.R. at 744.
24. OECD, *Model Tax Convention* art. 3(2) (2017).
25. *Fowler v. Comm'rs for Her Majesty's Revenue & Customs*, [2020] UKSC 22, [2020] 1 W.L.R. 2227 (appeal taken from Eng.).
26. Id. at [42].
27. *Morgan Stanley*, 292 I.T.R. at 436.
28. *Income-tax Act, 1961* § 90(2).
29. Id. § 90(2A).
30. *Whitney v. Robertson*, 124 U.S. at 194; *Collco Dealings Ltd.*, [1962] A.C. 1; *Thiel*, 171 C.L.R. at 355.
31. *Satyam Computer Servs. Ltd. v. Comm'r of Taxation* [2018] FCAFC 172, ¶¶ 103, 112 (Austl.).
32. *Union of India v. Azadi Bachao Andolan*, (2003) 263 I.T.R. 706, 753 (India).
33. *Income-tax Act, 1961*, No. 43 of 1961, ch. X-A, Acts of Parliament, 1961 (India).
34. Id. § 90(2A).
35. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, June 7, 2017, 61 I.L.M. 667.
36. Case C-196/04, *Cadbury Schweppes Overseas Ltd. v. Comm'rs of Inland Revenue*, 2006 E.C.R. I-7995, ¶ 55.
37. U.S. Model Income Tax Convention art. 22 (2016) (Limitation on Benefits).
38. *Union of India v. Azadi Bachao Andolan*, (2003) 263 I.T.R. 706, 753 (India).
39. *Concentrix Servs. Netherlands B.V. v. Income Tax Officer*, W.P. (C) 9051/2020 (Del. H.C. Apr. 22, 2021) (India).
40. *Fowler v. Comm'rs for Her Majesty's Revenue & Customs*, [2020] UKSC 22, [2020] 1 W.L.R. 2227, [42] (appeal taken from Eng.).
41. *Satyam Computer Servs. Ltd. v. Comm'r of Taxation* [2018] FCAFC 172, ¶ 103 (Austl.).
42. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

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44. VCLT, supra note 1, art. 31.
45. *Income-tax Act, 1961*, No. 43 of 1961, § 90, Acts of Parliament, 1961 (India).
46. Finance Act, No. 23 of 2012, § 97, 2012 (India); *Union of India v. Azadi Bachao Andolan*, (2003) 263 I.T.R. 706, 753 (India).
47. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).
48. *IRC v. Collco Dealings Ltd.*, [1962] A.C. 1 (H.L.) (appeal taken from Eng.); *Thiel v. Comm'r of Taxation* (1990) 171 C.L.R. 338, 355 (Austl.).
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