International tax conventions and treaties under the Constitution

M.A. (International Taxation)

NALSAR

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Overview

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4. *Nestle* (SC): The latest saga!

Constitutional Framework *vis-à-vis* International Treaties

Constitutional provisions

51. Promotion of international peace and security.

The State shall endeavour to—

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

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

(d) encourage settlement of international disputes by arbitration.

[*Part IV— Directive Principles of State Policy*]

Constitutional provisions (cont.)

73. (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

[*Part V – The Union*]

Constitutional provisions (cont.)

- 10. Foreign affairs; all matters which bring the Union into relation with any foreign country.
- 13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
- 14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

[*Schedule VII > List I (Union List)*]

Constitutional provisions (cont.)

253. Legislation for giving effect to international agreements.

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

[*Part IX— Relations between the Union and the States*]

Judicial Interpretation

Judicially evolved doctrines

- Dualist Doctrine
- Primacy of Union (over States)
- Comity Doctrine

Dualist Doctrine

"It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal courts. That being so, it would be legitimate to hold that the effect of s. 86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal of India with the consent of the Central Government and when such consent is granted as required by s. 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, s. 86(1) is not merely procedural; it is in a sense a counter- part of s. 84. Whereas s. 84 confers a right on a foreign State to sue, s. 86(1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it. That is the effect of s. 86(1)."

[*Mirza Ali Akbar Kashani v. United Arab Republic* AIR 1966 SC 230]

Dualist Doctrine (cont.)

Article 253 "deals with legislative power thereby power is conferred upon the parliament which it may not otherwise possess. But it does not seek- to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power. It may be recalled that cl. 3(iv) of the Agreement included a covenant that the decision of the Tribunal shall be binding on, both the Governments. The power of the executive to enter into that covenant cannot also be challenged, and was not challenged. It was conceded that if the contention based on Article 253 was not accepted, the award of the Tribunal by majority of two was binding upon the Government of India. It was accepted that as an international agreement between the two States represented by their executive Governments it became binding between the two States as expressly undertaken."

[*Maganbhai Ishwarbhai Patel v. Union of India* (1970) 3 SCC 400]

Dualist Doctrine (cont.)

"India follows the doctrine of dualism and not monoism. We may, however, hasten to add that this Court, however, at times for the purpose of interpretation of statute has taken into consideration not only the treaties in which India is a party but also declarations, covenants and resolutions passed in different International Conferences. The Act as also the treaties entered into by and between India and foreign countries are admittedly subject to our municipal law. Enforcement of a treaty is in the hands of the Executive. But such enforcement must conform to the domestic law of the country. <u>Whenever, it is well known, a conflict arises between a treaty and the domestic law or a municipal law, the latter shall prevail</u>."

[*Bhavesh Jayanti Lakhani v. State Of Maharashtra* (2009) 9 SCC 551]

Primacy of Union (over States)

Environmental Protection Act, 1986, enacted to implement the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972 would be covered under Entry 13 of List I and Article 253. Accordingly, "shall have overriding effect and shall prevail over the law made by the legislatures of the States."

[*S. Jagannath v. Union of India* (1997) 2 SCC 87]

Comity Doctrine

"Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law.

In the case of *Jolly George Varghese v. Bank of Cochin* (1980) 2 SCC 360, the Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights.

India has ratified the above mentioned covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization.

But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions."

[*National Legal Services Authority v. Union of India* (2014) 5 SCC 438]

Comity Doctrine (cont.)

"Article 51, as already indicated, has to be read along with Article 253 of the Constitution. If the parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian Law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law.

In *Apparel Export Promotion Council v. A. K. Chopra* (1999) 1 SCC 759, it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. Reference may also be made to the Judgments of this Court in *Githa Hariharan v. RBI* (1999) 2 SCC 228, *R.D. Upadhyay v. State of A.P.* (2007) 15 SCC 337 and *PUCL v. Union of India* (2005) 2 SCC 436.

In *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, this Court under Article 141 laid down various guidelines to prevent sexual harassment of women in working places, and to enable gender equality relying on Articles 11, 24 and general recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on TGs and the International Conventions, including Yogyakarta principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country."

[*National Legal Services Authority v. Union of India* (2014) 5 SCC 438]

Comity Doctrine (cont.)

"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."

[*Ram Jethmalani v. Union of India* (2011) 8 SCC 1]

Positioning Tax Treaties in Constitutional Scheme

Understanding Tax !!!

"A neat definition of what 'tax' means has been given by Latham C. J. of the High Court of Australia, in *Matthews v. Chicory Marketing Board* (60 C.L.R. 263). A tax, according to the learned Chief Justice, 'is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered'. This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of *quid pro quo* between the taxpayer and the public authority. Another feature of taxation it; that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay."

[*Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282]

General propositions

- International law not directly applicable in a country absent a domestic law [*CIT v. H.E.H. Mir Osman Ali Khan* AIR 1966 SC 1260]
- Courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of taxation law of another country. [*Government of India v. Taylor* 1955 AC 491 (HL)]
- There is no prescription against double taxation under the Constitution. [*Avinder Singh v. State of Punjab* (1979) 1 SCC 137]*

[**Read more at* https://ssrn.com/abstract=2509069]

Key pivot of Tax Treaties

"An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and entered into at a political level and have several considerations as their bases. Commenting on this aspect of the matter, *David R. Davis* in *Principles of International Double Taxation Relief*, points out that the main function of a Double Taxation Avoidance Treaty should be seen in the <u>context of aiding commercial relations between treaty partners and as being essentially a bargain between two treaty countries as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions</u>. It is observed (vide para 1.06):

> "The benefits and detriments of a double tax treaty will probably only be truly reciprocal where the flow of trade and investment between treaty partners is generally in balance. Where this is not the case, the benefits of the treaty may be weighted more in favour of one treaty partner than the other, even though the provisions of the treaty are expressed in reciprocal terms. This has been identified as occurring in relation to tax treaties between developed and developing countries, where the flow of trade and investment is largely one way.
>
> Because treaty negotiations are largely a bargaining process with each side seeking concessions from the other, the final agreement will often represent a number of compromises, and it may be uncertain as to whether a full and sufficient quid pro quo is obtained by both sides."

And, finally, in paragraph 1.08:

> "Apart from the allocation of tax between the treaty partners, tax treaties can also help to resolve problems and can obtain benefits which cannot be achieved unilaterally."

[*Union of India v. Azadi Bachao Andolan* (2003) 263 ITR 706 (SC)]

Mechanism to domestically legislate Treaty

- The enactment of a parliamentary law is an essential aspect for incorporating a bilateral or multilateral treaty as applicable law in India. However, there is no mechanism either prescribed or insisted upon under the Constitution for this purpose.
- The Parliament may choose to enact a specific legislation to effectuate a bilateral or international treaty in India. Alternatively, depending upon the need for flexibility, the Parliament may enact an umbrella legislation enabling the Government to notify the treaties thereunder in its discretion and thus conferring upon them force of law in India.

Tracing domestic law …

90. Agreement with foreign countries or specified territories.

(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—

(*a*) for the granting of relief in respect of—

(*i*) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(*ii*) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(*b*) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, [**without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory)**,] or

(*c*) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(*d*) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

[*Income Tax Act, 1961*]

Tracing domestic law … (cont.)

5. Levy of a lower rate of duty under a trade agreement.

(1) Whereunder a trade agreement between the Government of India and the Government of a foreign country or territory, duty at a rate lower than that specified in the First Schedule is to be charged on articles which are the produce or manufacture of such foreign country or territory, the Central Government may, by notification in the Official Gazette, make rules for determining if any article is the produce or manufacture of such foreign country or territory and for requiring the owner to make a claim at the time of importation, supported by such evidence as may be prescribed in the said rules, for assessment at the appropriate lower rate under such agreement.

[*Customs Tariff Act, 1975*]

Tracing domestic law … (cont.)

"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income- tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC."

[*Union of India v. Azadi Bachao Andolan* (2003) 263 ITR 706 (SC)]

Consequences of absence of domestic law

There must be a clear legislative framework for grant of exemption from tax and nothing can be derived from inference even from international treaties to which India is a party.

- *Colgate Palmolive (India) Ltd. v. Commissioner of Customs* (2016) 339 ELT 161 (SC)
- *Karan Dileep Nevatia v. Union of India* 2001 Bom CR 588 (Bom)
- *Bhatinda Chemicals Ltd. v. Union of India* 2005 ILR 2 Del 559 (Del)

Consequences of absence of domestic law (cont.)

"The contention that OECD guidelines have to be taken into consideration requires a closer scrutiny. The Organisation for Economic Cooperation and Development (OECD) is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. India is not a member of this grouping; it has an observer status. She has, however, of late been actively co-operating with the organization. The Guidelines of OECD therefore, have only persuasive status; they do not have any legal sanction- unlike, for instance Double Taxation Avoidance Agreements which courts are duty bound to interpret and implement, in terms of municipal law, given the compulsion of provisions of the Income Tax Act. Secondly – and more importantly- the provisions of the Constitution compel a national legislation, to embody the terms of a treaty, for it to be enforceable in courts in India. <u>This is because of Article 253 of the Constitution and the dualist tradition (of International law) followed by India, whereby treaties by themselves are legally unenforceable in courts, but are to be assimilated through municipal (or national) legislation</u>. Our Supreme Court has, in the area of human rights – particularly in personal liberty, been emphasizing that to the extent the provision of any treaty is in consonance with provision of the Constitution (such as Article 21) it would be read along with such provision or right (*Jolly George Varghese v. Bank of Cochin* AIR 1980 SC 470, *Apparel Export Promotion Council v. A.K. Chopra* AIR 1999 SC 625; *Kubic Dariusz v Union of India AIR 1990 SC 605*). Thus, the Courts are primarily bound by the law on the subject in India; if the law is clear and unambiguous, there is no question of resorting to extrinsic sources. The only rider is that if the terms of such conventions or treaties are similar to the law applicable in India, courts may consider precedents in that regard; however those are only of persuasive value."

[*Chryscapital Investment Advisors (India) Pvt. Ltd. v. Deputy Commissioner of Income Tax* (2015) 376 ITR 183 (Del)]

Impact on interpretation of Treaties

"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.

It is in the light of these principles that we must now examine the statute in question."

[*Commissioner of Customs v. G.M. Exports* (2015) 324 ELT 209 (SC)]

Domestic law overriding Tax Treaty

- Section 94A, Income Tax Act - *Special measures in respect of transactions with persons located in notified jurisdictional area*
  - *T. Rajkumar v. Union of India* (2016) 383 ITR 385 (Mad)
- Chapter XA, Income Tax Act - *General Anti-Avoidance Rules*
- Chapter VAA, Customs Act – *Administration of Rules of Origin under Trade Agreement*
  - *Purple Products Pvt. Ltd. v. Union of India* [WP 2831/2018 dt. 09.07.2019 – Bom]

Nestle (SC): The latest saga!

Different classes of MFN clauses?

India France DTAA

7. In respect of articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989, between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later.

India Finland DTAA

It is agreed that if after coming into force of this Agreement, any agreement or convention between India and a Member State of the Organisation for Economic Cooperation and Development provides that India shall exempt from tax dividends, interest, royalties or fees for technical services (either generally or in respect of specific categories of dividends, interest, royalties or fees for technical services) arising in India, or limit the tax charged in India on such dividends, interest, royalties or fees for technical services (either generally or in respect of specific categories of dividends, interest, royalties or fees for technical services) to a rate lower than that provided for in paragraph 2 of Article 10 or paragraph 2 of Article 11 or paragraph 2 of Article 12 of the Agreement, such exemption or lower rate shall be made applicable to the dividends, interest, royalties or fees for technical services (either generally or in respect of those specific categories of dividends, interest, royalties or fees for technical services) arising in India and beneficially owned by a resident of Finland and dividend, interest, royalties or fees for technical services arising in Finland and beneficially owned by a resident of India under the same conditions as if such exemption or lower rate had been specified in those paragraphs. The competent authority of India shall inform the competent authority of Finland without delay that the conditions for the application of this paragraph have been met and issue a notification to this effect for application of such exemption or lower rate.

Steria: Automatic (self-operational) MFN clause

(2016) 386 ITR 390 (Del)

"16. The AAR appears to have failed to notice that the wording of Clause 7 of the Protocol makes it self-operational. It is not in dispute that the India-France DTAA was itself notified by the Central Government by issuing a notification under Section 90 of the Act. It is also not in dispute the separate Protocol signed between India and France simultaneously forms an integral part of the Convention itself. The preamble in the Protocol, which states "the undersigned have agreed on the following provisions which shall form an integral part of the Convention", makes this position clear. Once the DTAA has itself been notified, and contains the Protocol including para 7 thereof, there is no need for the Protocol itself to be separately notified or for the beneficial provisions in some other Convention between India and another OECD country to be separately notified to form part of the Indo-France DTAA.

18. The Court is, therefore, unable to agree with the conclusion of the AAR that the Clause 7 of the Protocol, which forms part of the DTAA between India and France, does not automatically become applicable and that there has to be a separate notification incorporating the beneficial provisions of the DTAA between India and UK as forming part of the India-France DTAA."

Nestle: Summary of Legal position

Civil Appeal No. 1420/2023 - 19.10.2023

"44. The holding in the decisions discussed above may thus be summarized:

1. The terms of a treaty ratified by the Union do not *ipso facto* acquire enforceability;
2. The Union has exclusive executive power to enter into international treaties and conventions under Article 73 [read with corresponding Entries - Nos. 10, 13 and 14 of List I of the VIIth Schedule to the Constitution of India] and Parliament, holds the exclusive power to legislate upon such conventions or treaties.
3. Parliament can *refuse* to perform or give effect to such treaties. In such event, though such treaties bind the Union, *vis a vis* the other contracting state(s), leaving the Union *in default*.
4. The application of such treaties is binding upon the Union. Yet, they *"are not by their own force binding upon Indian nationals"*.
5. Law making by Parliament in respect of such treaties is required if the treaty or agreement restricts or affects the rights of citizens or others *or modifies the law of India*.
6. If citizens' rights or others' rights are not unaffected, *or the laws of India are not modified,* no legislative measure is necessary to give effect to treaties.
7. In the event of any ambiguity in the provision or law, which brings into force the treaty or obligation, the court is entitled to look into the international instrument, to clear the ambiguity or seek clarity."

Nestle: Notification is mandatory

88. In the light of the above discussion, it is held and declared that:

a) A notification under Section 90(1) is necessary and a mandatory condition for a court, authority, or tribunal to give effect to a DTAA, or any protocol changing its terms or conditions, which has the effect of altering the existing provisions of law.

b) The fact that a stipulation in a DTAA or a Protocol with one nation, requires same treatment in respect to a matter covered by its terms, subsequent to its being entered into when another nation (which is member of a multilateral organization such as OECD), is given better treatment, does not *automatically* lead to integration of such term extending the same benefit in regard to a matter covered in the DTAA of the first nation, which entered into DTAA with India. In such event, the terms of the earlier DTAA require to be amended through a separate notification under Section 90.

Further reading

- *Agricas LLP* (2021) 14 SCC 341 – FTDR Act and WTO GAAT
- *Ashwini Kumar* (2020) 13 SCC 585 – UN Convention on Custodial Torture
- *K.S. Puttaswamy* (2017) 10 SCC 1 – UDHR & Right to Privacy
- *Marie-Emmanuelle Verhoeven* (2016) 6 SCC 456 – binding nature of pre-independence treaties
- *Charu Khurana* (2015) 1 SCC 192 – CEDAW and right of women in employment

Thank You !!!