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Vienna Convention on the Law of Treaties

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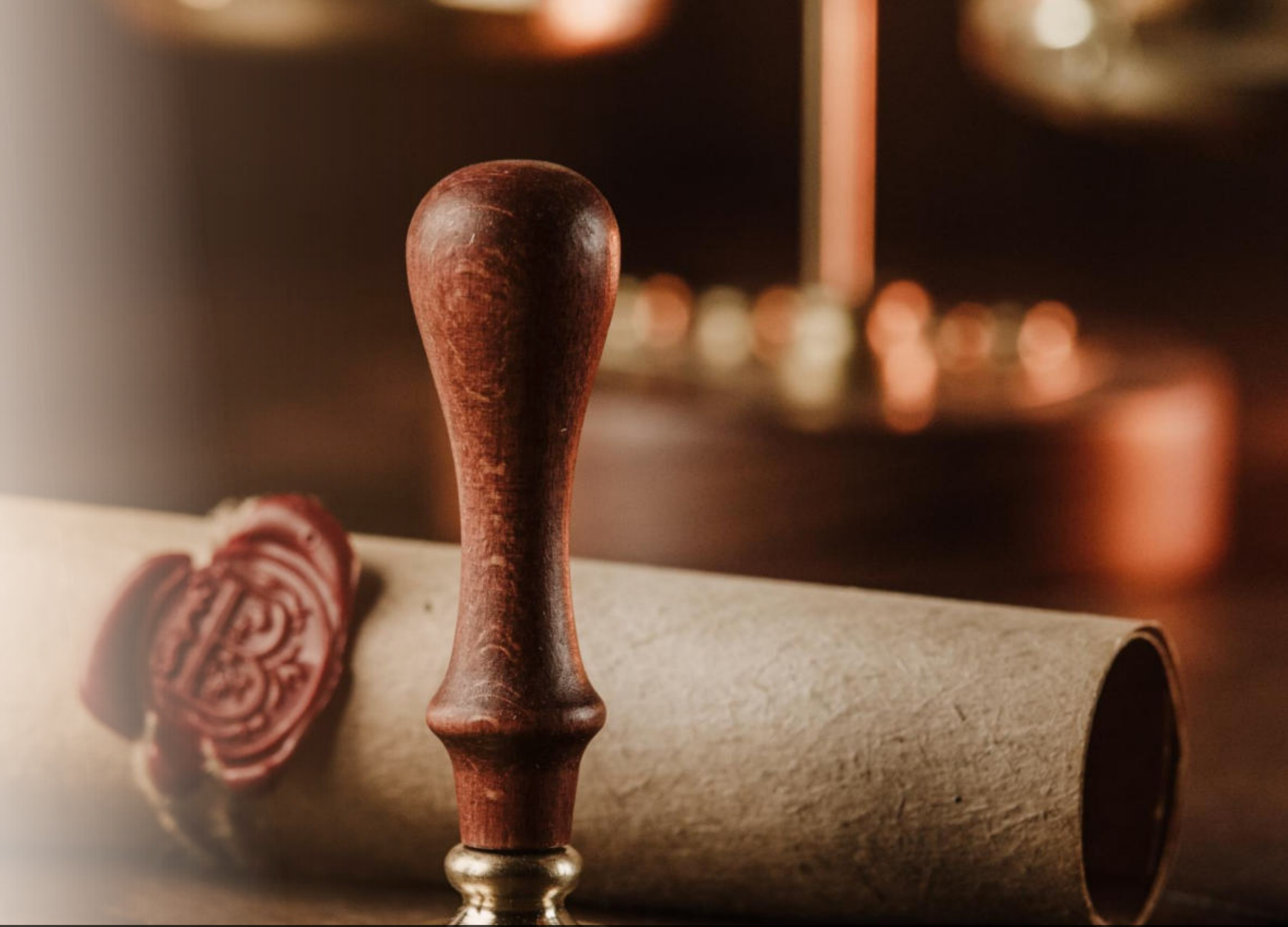

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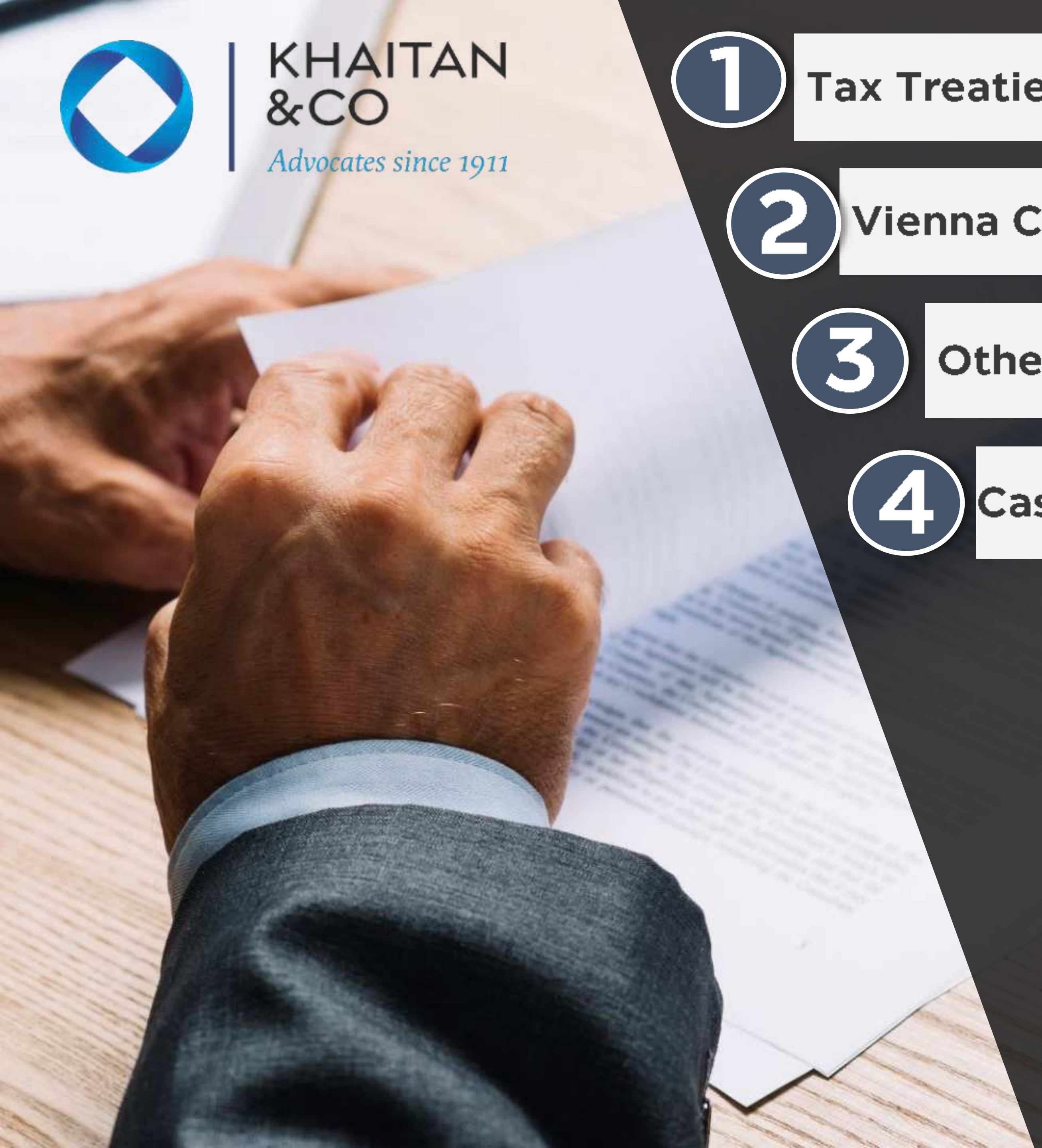

1. Tax Treaties
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Tax Treaties

What are Tax Treaties?

Introduction

- DTAAs are bilateral contracts between two states, drafted on the basis of trade negotiations.
- It is an international agreement that incorporates the domestic laws of multiple jurisdictions, on provisions pertaining to international taxation.
- Many countries have entered into tax treaties with other countries to avoid or mitigate double taxation.
- When an individual or business invests in a foreign country, the issue of which country should tax the investor's earnings may arise.
- Both countries may enter into a tax treaty to agree on which country should tax the investment income to prevent the same income from getting taxed twice.
- Some countries are seen as being tax havens; these countries typically do not enter into tax treaties.

Types of Tax Treaties

Bilateral Treaties

- Treaties involving two entities are bilateral treaties. It is not necessary that the treaty can only have 2 parties; there may be more than two parties, however, there should be only two states involved.
- For example, the bilateral treaties between Switzerland and European Union (EU) have 17 parties, which are divided into two parts, the Swiss and the EU and its member states. It is important to note that by virtue of this treaty, obligations, and rights arise between the two entities to it, i.e., the EU and the Swiss. This treaty does not give rise to obligations between the EU and its member states..

Multilateral Treaties

- Treaties between three countries or more are multilateral treaties. They give rise to rights and obligations among all parties, i.e., each signatory has obligations towards all the other signatories. Treaties with a higher number of participating states gain more international significance since it reflects the importance of the treaty.

Kinds of Tax Treaties

Law Making Treaties

- These are multilateral treaties which stand for a common cause.
- In the case of a multilateral treaty, this type of treaty can be broken down and thought of as a number of bilateral treaties, each of which are independent of one another and have to follow the obligations inherently.
- As for bilateral treaties, they can simply be viewed as dependent on each other as existence. Here, each party does not join to provide another party something it might require, but rather to stand for a mutual cause or support a rule binding on all.

Contractual Treaties

- They are usually applicable to treaties having a small number of parties and are most commonly seen in bilateral treaties.
- These are treaties where parties are mutually dependent on each other for specific treatment to gain benefits, and have rights and obligations towards each other.
- The scope of treaties is mostly perceived in a contractual framework.. Here, one party agrees to provide the other party something it needs for something else in return, thereby forming a system like barter.

Composition of a comprehensive Tax Treaty

Article No.	Heading	Content
1	Scope of the Convention	To whom applicable?
2	Taxes covered	Specific taxes covered
3	General Definition	Persons, company enterprises, international traffic, competent authority
4	Resident	'Residence' of a contracting state who can access treaty
5	Permanent Establishment	What constitutes P.E.? What does not constitute P.E?
6	Income from immovable property	Immovable property and income there from
7	Business Profits	Determination and taxation of profits arising from business carried on through P.E.
8	Shipping, Inland waterways & Air Transport	Place of deemed accrual of profits arising from activities and mode of taxation thereon
9	Associated Enterprises	Enterprises under common management and taxation of profits owing to close connection (other than transactions of arm's length nature)
10	Dividend	Definition and taxation of dividends; Concessional rate of tax in certain situations;
11	Interest	Definition and taxation of interest; Concessional rate of tax in certain situations; Taxation of interest paid in excess of reasonable rate, on account of special relationship;

Composition of a comprehensive Tax Treaty

Article No.	Heading	Content
12	Royalties	Definition of Royalties- what it includes and covers, and its taxation; Treatment of excessive payment of royalties due to special relationship; Country where taxable.
13	Capital Gains	Definition- Taxation aspect; Concessional rates/exemption from tax if any; Country where taxable.
14	Independent Personal Services	Types of services covered; Country where taxable.
15	Dependent Personal Services	Definition of Country where taxable.
16	Directors Fees and Remuneration for Top Level Managerial official	Definition Mode of Country where taxable.
17	Income earned by entertainer and athletes	Types of activities covered; Mode of Country where taxable.
18	Pension and social security payments	Country where taxable.
19	Remuneration and pensions in respect of government services	Types of remuneration and Country where taxable.
20	Payment received by students and apprentices	Taxation / Exemption of payments received by student and apprentices.
21	Other income	Residual Article to cover income not covered under other 'Articles', mode of taxation and country where taxable

Composition of a comprehensive Tax Treaty

Article No.	Heading	Content
22	Capital (Tax on wealth)	Definition – made – and country where taxable
23	Method of elimination	Exemption Method / Credit Method
24	Non-Discrimination	(Equitable) Basis of taxing Nationals and citizens of foreign state
25	Mutual Agreement Procedure	Where taxation is not as per provisions of the convention, a 'person' may present his case to Competent Authorities of respective states. Procedure in such cases
26	Exchange of Information	Competent Authorities to exchange information for carrying out provisions of the convention. Methodology.
27	Assistance in collection of Taxes	
28	Diplomatic Agents and consular corps	Privileges of this category to remain unaffected
29	Territorial Extension	
30	Entry into Force	Effective date from which convention comes into force; Assessment year from which it comes into force.
31	Termination	Time – Notice period – Mode.

Process of Interpreting DTAAs

- Determine if the issue is within the scope of the convention
- Check that the treaty applies to the tax in issue and is in operation
- Apply the relevant definitions
- Determine which of the substantive provisions apply
- Apply the substantive article or domestic tax laws, whichever more beneficial
- Apply the provisions for the elimination of double taxation

General Principles for Interpretation of DTAAs

Text of the DTAA is of primary importance

Wording of individual provisions are not to be read in isolation, but together with entire agreement and in the context to be considered

Reasonableness and consistency

Principle of effectiveness

Objective of tax treaty to be considered – UOI v. Azadi Bachao Andolan 263 ITR 706 (SC)

Principle of Common Interpretation

CONSISTENT APPLICATION

Tax treaties are born out of trade negotiations and are meant to reduce double taxation and allocate tax claims equally between the contracting states.

FOREIGN COURT RULINGS

Reliance on such rulings is made based on similar facts of the case or even where concepts have been borrowed [anti-abuse provisions in India]

(Aberdeen Asia Pacific v DCIT, Bombay HC)

NO UNILATERAL POSITIONS

Uniform understanding of both contracting states has persuasive value, and not unilateral decrees or official positions.

(NGC Network Asia LLC v. DDIT, Mumbai Tribunal)

SUBSEQUENT PRACTICE

Article 31, VCLT, subsequent practice can determine common intention , but only if it is uniform

SUBJECT TO REVIEW

Common interpretation does not mean that the case law of the other state must be accepted without review *(Klaus Vogel and Prokisch)*

EXISTING OFFICIAL RESERVATIONS

The same will have to be considered

Vienna Convention on Law of Treaties (VCLT)

VCLT History - 1949 to 1980

The law of treaties was one of the topics selected by the International Law Commission ('ILC') at its first session in 1949 as being suitable for codification

James Brierly was as Special Rapporteur. He resigned in 1952 and two of his successors, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, each of whom had started the work a new. They were elected to the International Court of Justice before they could finish the work

The last Special Rapporteur, Sir Humphrey Waldock, appointed in 1961, oriented the work again towards the preparation of draft articles capable of serving as a basis for an international convention.

The last Rapporteur's six reports enabled the Commission in 1966 to submit a final draft to the General Assembly

By resolution 2166 (XXI) of 5 December 1966, the General Assembly endorsed the recommendation in principle

Decided to convene the first session of the conference in 1968 and adopted on 23 May 1969 in Vienna

Entered into force on 27 January 1980

What is VCLT?

What is VCLT?

1. *The Vienna Convention on the Law of Treaties (VCLT) is an international agreement* ***regulating treaties between states****.. It is known as the "****treaty on treaties****".*
2. *VCLT* ***establishes comprehensive rules, procedures, and guidelines*** *for how treaties are defined, drafted, amended, interpreted, and generally operated.*
3. ***Pacta sunt servanda*** *is regarded as the most important principle of the convention and obligates the States to act in good faith states while interpreting the Tax Treaty*
4. *VCLT is the* ***most comprehensive set of rules governing treaties****, which constitute the most important source of international law. The VCLT is considered a codification of customary international law and state practice concerning treaties.*
5. *The fact that the Vienna Convention* ***reflects previous customary law has been confirmed by the International Court of Justice (ICJ) several times****. ICJ has established that the convention shall be applicable to agreements that have entered into force before the convention has, because the latter reflects customary law.*
6. *It has been* ***ratified by 116 states*** *as of January 2018.*
7. ***India is a non-ratifying party****, however Indian courts have acknowledged the VCLT principles from time to time depending upon the facts and circumstances as the principles are part of customary international law. The Supreme Court of India has also recognised the customary status of the convention.*

VCLT Preamble

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 cooperation 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*

Recalling *the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained*

Having in mind *the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all*

Believing *that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations*

Affirming *that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,*

VCLT Content

Part I - Introduction

Part II - CONCLUSION AND ENTRY INTO FORCE OF TREATIES

Section 1. CONCLUSION OF TREATIES
Section 2. RESERVATIONS
Section 3. ENTRY INTO FORCE AND PROVISIONAL, APPLICATION OF TREATIES

Part III - OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

Section 1. OBSERVANCE OF TREATIES
Section 2. Application of Treaties
Section 3. INTERPRETATION OF TREATIES
SECTION 4. TREATIES AND THIRD STATES

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

Part V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Section 1. GENERAL PROVISIONS
Section 2. INVALIDITY OF TREATIES
Section 3. TERMINATION AND SUSPENSION
Section 4. PROCEDURE
Section 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Part VI. MISCELLANEOUS PROVISIONS

Part VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Part VIII. FINAL PROVISIONS

Important Parts of VCLT

Defines the terms and scope of the agreement

Part 1
Introduction

Part 2
Conclusion and Entry into Force of Treaties

Lays out the rules for the conclusion and adoption of treaties, including the consent of parties to be bound by treaties and the formulation of reservations

The third part deals with the application and interpretation of treaties, and the fourth part discusses means of modifying or amending treaties

Part 3 & 4
Observance, Application and Interpretation of Treaties and Amendment and Modification of treaties

Part 5
Invalidity, Termination and Suspension of the Operation of Treaties

Delineates grounds and rules for invalidating, terminating, or suspending treaties and includes a provision granting the International Court of Justice jurisdiction in the event of disputes arising from the application of those rules

Articles - Part I - Introduction

Article 1 - Scope of the present Convention

The present Convention ***applies to treaties between States****.*

Article 2 – Use of terms

1. For the purposes of the present Convention:

(a) ***"treaty"*** *means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;*

(b) ***"ratification", "acceptance", "approval" and "accession"*** *mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;*

(c) ***"full powers"*** *means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;*

(d) ***"reservation"*** *means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;*

(e) ***"negotiating State"*** *means a State which took part in the drawing up and adoption of the text of the treaty;*

Article 2 - Continued

*(f) **"contracting State"** means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;*

*(g) **"party"** means a State which has consented to be bound by the treaty and for which the treaty is in force;*

*(h) **"third State"** means a State not a party to the treaty;*

*(i) **"international organization"** means an intergovernmental organization.*

*2. The provisions of paragraph 1 regarding the use of terms in the present Convention are **without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State**.*

Part I - Introduction

<u>Article 3 - International agreements not within the scope of the present Convention</u>

*The fact that the present Convention **does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect**:*

a) ***the legal force** of such agreements;*

b) ***the application to them of any of the rules** set forth in the present Convention to which they would be subject under **international law independently of the Convention**;*

c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

- The Convention does not govern agreements between states and international organizations or between international organizations themselves.
- Nevertheless, the Convention itself entails that the fact that it regulates only relations between states shall not prejudice the legal effect that it has on agreements that states conclude with other subjects of international law.
- Agreements between states and international organizations or between international organizations themselves are governed by the 1986 Vienna Convention on the Law of Treaties. The said convention is yet to come into force.
- The Convention does not apply to unwritten agreements

Part I - Introduction

<u>Article 4 – Non-retroactivity of the present Convention</u>

*Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention **applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States**.*

<u>Elements of Article 4</u>

(a) Rules of the convention reflecting customary law

(b) Rules not reflecting customary law

(c) Non-retroactivity of the Convention

(d) Timeline: Conclusion and Entry into Force

Part I - Introduction

(a) Rules of the convention reflecting customary law

- There is **no clear reference** in the Convention which of its rules constitute a codification of customary international law and which have a progressive character.
- In contrast, the **3rd recital of the Preamble** refers to the principle of **free consent, good faith and pacta sunt servanda, all principles of international treaty law explicitly noted as "universally recognized" (Art 26, Art 31 para 1, Art 34, Art 42).**
- The Convention's approach not to identify customary treaty law **leaves room for the future transformation of 'progressive rules' into settled customary law**.
- Many rules of customary treaty law have already existed prior to the VCLT, while others have emerged after 1980 in the light of the Convention's slow growth into a universally accepted instrument. Even if States such as the United States and France abstain from acceding for some reason or another,16 most of the Convention's provisions are today universally accepted

(b) Rules Not Reflecting Customary Law

- Most procedural rules of the Convention to be observed by State Parties when invoking certain legal effects under the Convention cannot be regarded as a codification of customary law (Art 20 para 5 MN 54; Art 65 MN 7–9; but see Art 67 MN 4), even though some aspects may reflect principles which are based on an obligation to act in good faith.

Part I - Introduction

(c) Non-retroactivity of the Convention

- It is a settled general principle of international law and an essential requirement of legality that, as a rule, a fact or act has to be judged in the light of the valid rules in force at the time the fact or act occurred It is, however, no matter of course to apply the non-retroactivity principle to continuous legal relations established by past treaties.
- If, for example, a treaty was concluded due to fraudulent conduct of one State Party prior to the entering into force of the VCLT, the question arises whether the injured State may invoke after the fraud as invaliding its consent pursuant to Art 49. As stated by the modern doctrine of inter-temporal law, legal rights acquired in a legally valid manner at the time of their creation must be maintained according to the evolution of international law.
- Stressing the non-retroactivity of the VCLT, Art 4 clarifies that the provisions of the Convention cannot be invoked in order to effectuate the modern evolution of treaty law at the expense of established treaty rights.
- The question whether or not it is permissible to retroactively apply a customary rule of treaty law to treaties concluded prior to the emergence of that rule in customary law has to be answered on the basis of the established principle of international law.
- The non-retroactivity rule is dispositif. A past treaty can be subsequently subjected to the VCLT provisions, either ad hoc in case of a dispute or by another form of subsequent consent.

Part I - Introduction

(d) Timeline: ‘Conclusion’ and ‘Entry into Force’

- The VCLT entered into force on 27 January 1980. Consequently, the Convention is applicable to all treaties concluded by State Parties after that date.
- The usage of the term ‘concluded’ in the Convention is far from clear, given that Art 2 does not provide for a definition.
- With view to Part II of the Convention, a treaty is ‘concluded’ if at least two States express their consent to be bound by a treaty irrespective of whether the treaty has entered into force that very moment. It therefore follows that the Convention is applicable to treaties whose parties have expressed their consent to be bound after 27 January 1980 irrespective of whether treaty’s text was already adopted before 27 January 1980.
- In contrast, the Convention is not applicable to treaties that entered into force after 27 January 1980 when the parties have expressed their consent to be bound before that date. The number of treaties that falls within this legal gap is negligibly small.

Part I - Introduction

<u>Article 5 - Treaties constituting international organizations and treaties adopted within an international organization</u>

*The present Convention **applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organizatio**n without prejudice to any relevant rules of the organization.*

Part II - Conclusion and Entry into Force of Treaties

Article 6 – Capacity of States to conclude treaties

*Every State **possesses capacity** to conclude treaties*

Article 7 - Full powers

1. *A person is considered as representing a State **for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State** to be bound by a treaty if:*

(a) *he produces appropriate **full powers**; or*

(b) ***it appears** from the practice of the States concerned or from other circumstances **that their intention** was to consider that person as representing the State for such purposes and to dispense with full powers.*

*2. In virtue of their functions and without having to produce full powers, **the following are considered as representing their State:***

*(a) **Heads of State, Heads of Government and Ministers for Foreign Affairs**, for the purpose of performing all acts relating to the conclusion of a treaty;*
*(b) **heads of diplomatic missions**, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;*
*(c) **representatives accredited by States to an international conference or to an international organization** or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.*

Part II - Conclusion and Entry into Force of Treaties

Article 8 – Subsequent confirmation of an act performed without authorization Capacity of States to conclude treaties

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9 - Adoption of the text

1. The adoption of the text of a treaty ***takes place by the consent of all the States*** *participating in its drawing up except as provided in paragraph 2.*

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10 - Authentication of the text

The text of a treaty is established as ***authentic and definitive****:*

(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Part II - Conclusion and Entry into Force of Treaties

<u>Article 11 – Means of expressing consent to be bound by a treaty</u>

*The consent of a State to be bound by a treaty may be expressed by **signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means** if so agreed.*

<u>Article 12 - Consent to be bound by a treaty expressed by signature</u>

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

*(a) the **treaty provides** that signature shall have that effect;*

*(b) it is **otherwise established** that the negotiating States were agreed that signature should have that effect; or*

*(c) the **intention of the State** to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.*

2. For the purposes of paragraph 1:

*(a) the **initialling of a text constitutes a signature** of the treaty when it is established that the negotiating States so agreed;*

*(b) the **signature ad referendum** of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.*

Part II - Conclusion and Entry into Force of Treaties

<u>Article 13 – Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty</u>

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

*(a) **the instruments provide** that their exchange shall have that effect; or*

*(b) **it is otherwise established** that those States were agreed that the exchange of instruments should have that effect.*

<u>Article 14 - Consent to be bound by a treaty expressed by ratification, acceptance or approval</u>

1. The consent of a State to be bound by a treaty is expressed by ratification when:

*(a) **the treaty provides** for such consent to be expressed by means of ratification;*

*(b) it is **otherwise established** that the negotiating States were agreed that ratification should be required;*

*(c) **the representative of the State has signed** the treaty subject to ratification; or*

*(d) the **intention of the State** to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.*

*2. The consent of a State to be bound by a treaty **is expressed by acceptance or approval** under conditions similar to those which apply to ratification.*

Part II - Conclusion and Entry into Force of Treaties

Article 15 – Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(a) ***the treaty provides*** *that such consent may be expressed by that State by means of accession;*

(b) it is ***otherwise established*** *that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or*

(c) all the parties have subsequently agreed that ***such consent may be expressed by that State*** *by means of accession.*

Article 16 - Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) ***their exchange*** *between the contracting States;*

(b) their ***deposit*** *with the depositary; or*

(c) their ***notification*** *to the contracting States or to the depositary, if so agreed.*

Part II - Conclusion and Entry into Force of Treaties

Article 17 – Consent to be bound by part of a treaty and choice of differing provisions

1. *Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective **only if the treaty so permits or the other contracting States so agree**.*
2. *The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective **only if it is made clear to which of the provisions the consent relates**.*

Article 18 - Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

*(a) **it has signed the treaty or has exchanged instruments** constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or*

*(b) **it has expressed its consent to be bound by the treaty**, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.*

Part II - Conclusion and Entry into Force of Treaties

Article 19 - Formulation of reservations

*A State may, when signing, ratifying, accepting, approving or acceding to a treaty, **formulate a reservation unless**:*

*(a) the reservation is **prohibited by the treaty**;*

*(b) the **treaty provides that only specified reservations**, which do not include the reservation in question, may be made; or*

*(c) **in cases not failing under subparagraphs (a) and (b), the reservation is incompatible** with the object and purpose of the treaty.*

Part II - Conclusion and Entry into Force of Treaties

Article 20 - Acceptance of and objection to reservations

*1. A reservation **expressly authorized** by a treaty **does not require any subsequent acceptance** by the other contracting States **unless the treaty so provides**.*

*2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety **between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties**.*

*3. When a **treaty is a constituent instrument of an international organization** and unless it otherwise provides, a reservation **requires the acceptance of the competent organ** of that organization.*

*4. **In cases not falling under the preceding paragraphs** and unless the treaty otherwise provides:*

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

*5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, **a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.***

Part II - Conclusion and Entry into Force of Treaties

Article 21 - Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) **modifies for the reserving State in its relations with that** other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies **those provisions to the same extent for that other party** in its relations with the reserving State.

2. **The reservation does not modify the provisions of the treaty** for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Part II - Conclusion and Entry into Force of Treaties

<u>Article 22 - Withdrawal of reservations and of objections to reservations</u>

*1. Unless the treaty otherwise provides, **a reservation may be withdrawn at any time** and **the consent** of a State which has accepted the reservation **is not required** for its withdrawal.*

*2. Unless the treaty otherwise provides, **an objection to a reservation may be withdrawn** at any time.*

3. Unless the treaty otherwise provides, or it is otherwise agreed:

*(a) **the withdrawal of a reservation becomes operative** in relation to another contracting State **only when notice of it has been received by that State**;*

*(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State **which formulated the reservation**.*

Article 23 - Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation ***must be formulated in writing and communicated to the contracting States*** *and other States entitled to become parties to the treaty.*

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a ***reservation must be formally confirmed by the reserving State when expressing its consent*** *to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.*

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation ***must be formulated in writing****.*

Part II - Conclusion and Entry into Force of Treaties

<u>Article 24- Entry into Force</u>

1. A treaty enters into force in such manner and upon such date ***as it may provide or as the negotiating States may agree****.*

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the ***treaty has been established for all the negotiating States****.*

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, ***the treaty enters into force for that State on that date, unless the treaty otherwise provid****es.*

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Part II - Conclusion and Entry into Force of Treaties

Article 25 - Provisional application

*1. A treaty or a part of a treaty is **applied provisionally** pending its entry into force if:*

*(a) the **treaty itself so provides**; or*

*(b) the negotiating States have in some **other manner so agreed**.*

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Part III - Observance, Application and Interpretation of Treaties

<u>Article 26 - "Pacta sunt servanda"</u>

*Every treaty in force is **binding upon the parties to it and must be performed by them in good faith**.*

- The principle of 'Pacta Sunt Servanda' **(promises to be kept)**, based on the **principle of good faith**, is reiterated in Article 26 of the Convention.

- Pacta sunt servanda is regarded as the **most important principle of treaty law and entails that a treaty is obligatory to the parties which must act accordingly.**

- Pacta sunt servanda **means that treaties must be respected and applied regardless of domestic laws or developments in member states**, while also indicating that **states should not enter into new treaties that contradict the treaties that they are already part of and that they cannot arbitrarily cease the legal effects of the treaty** without respecting the provisions of the Convention in this regard. [Zejnullah Gruda, E drejta ndërkombëtare publike, p. 323, Shtëpia Botuese Furkan- ISM – Skopje]

- The principle of good faith requires parties to **act fairly and honestly with each other, to express their real intentions and not to gain unjust benefits that might come from wrong interpretations of their agreement** [Anthony D'Amato, Good Faith, Encyclopedia of Public International law, 7/1985]

- **Principles of special importance** include the principles of pacta sunt servanda, good faith, free will, equality, reciprocity, and lack of retroactivity

Part III - Observance, Application and Interpretation of Treaties

Article 26 continued…

The principle of good faith is even more **closely linked to interpretation, because the genesis of its creation comes from the narrow literal interpretation of agreements, which often resulted in their wrong application, or abuse from one of the parties**. For this reason, it was deemed important that parties included in their agreements the obligation to interpret and apply the agreement in good faith.

Article 26 of the Vienna Convention **obliges both the contracting parties to perform their obligations in good faith** and If one of the parties to the Treaty fails to provide necessary information, then such a party is in breach of the obligation under Article 26 of the Vienna Convention.

[Madras HC's observation in the case of T Rajkumar [TS-197-HC-2016(MAD)]

The treaties derives its validity from Vienna Convention on Law of Treaties to which India is not a party, unlike other developing and developed country. While **India have acknowledged the concept of "pacta sunt servanda" depending on the facts and circumstances,** however, India cannot be obliged to follow the principles of the organization to which it doesn't have a duty to be obliged, reason being not a party to such organization.

Part III – Observance, Application and Interpretation of Treaties

Article 27 – Internal law & observance of treaties

A party ***may not*** *invoke the provisions of internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.*

Part III – Observance, Application and Interpretation of Treaties

Article 28 – Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Lack of retroactivity of treaties means that **they shall regulate only relations from the moment they enter into force and on, and that they cannot apply to relations that have started prior to that moment**, unless parties agree otherwise or the treaty is considered as part of international customary law

The HC has held that these retroactive amendments to the definition of 'royalty' under the IT Act cannot override the definition of royalty in the applicable tax treaties [DIT v Nokia Networks OY]

Sanofi Pasteur Holding S.A. v. Department of Revenue - lays down the principle that unless specifically mentioned, **amendments made to the domestic tax law cannot unilaterally override the provisions of the tax treaties entered into by India as the same would be contrary to the principle of pacta sunt servanda** (i.e., interpretation of treaties in good faith) which is a corner stone of customary international law and finds pride of place in the Vienna Convention on Law of Treaties (VCLT). **Even though India is not a signatory to VCLT, the principles codified therein would still apply as they are part of customary international law.**

Part III – Observance, Application and Interpretation of Treaties

Article 29 - Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, ***a treaty is binding upon each party in respect of its entire territory****.*

Part III – Observance, Application and Interpretation of Treaties

Article 30 – Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Article 30 deals with the application of **successive treaties relating to the same subject-matter** and **therefore its relevance to the problems of the relationship between the Vienna Convention and another treaty may be limited and marginal, except perhaps as regards the "treaty-law" provisions of that other treaty - the type of provisions relating to the life of the treaty**.

Part III - Article 31: General Rule of Interpretation

Article 31 - General rule of interpretation

1. *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.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
   a. *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
   b. *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
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.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Part III - Interpreting Article 31

Clause (1) requires interpretation of agreement in 'good faith'.
The Vienna Convention provides that treaties must be interpreted in good faith from the parties, by keeping in mind the usual meaning of terms, as well as the context in which the object and purpose of the treaty have been determined

Clause (2) sets out the scope of the Treaty, It includes:

i. Preamble
ii. Annexes
iii. Agreements related to the treaty made in connection with the conclusion of the treaties
iv. Instruments made by one more party and accepted by the other as an instrument related to the treaty

This clearly assumes that interpreters do more than just establishing the meaning of a treaty according to the relevant lexicon and grammar.

Clause 3(3) provides the following external aids to interpretation:

i. Subsequent agreements between parties regarding the interpretation of the treaty – Technical Explanation
ii. Subsequent practice between parties in application of the treaty – Parties intention | Common understanding | Should be used sparingly as it may conflict with domestic laws
iii. Relevant rules of international law applicable to parties – Law's true meaning | Application must be justified

Article 31(3)(c) provides an opportunity to justify the use of commentaries if an interpretative argument on other elements of article 31 proves to be unsuccessful.

Clause 4 over-rides above clauses in the event that the parties specifically assign a meaning to the terms

Part III - Presumptions to Article 31

Positive

Parties are taken to refer to general principles of international law for all questions, which the treaty does not itself resolve in express terms or in different way.

Negative

In entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.

Part III - Article 32: Supplementary means of Interpretation

Article 32 - Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a. leaves the meaning ambiguous or obscure; or

b. leads to a result which is manifestly absurd or unreasonable.

Part III - Interpreting Article 32

Can be resorted to only if an interpretation under 31 not possible.

Allows reliance on supplementary means of interpretation, which includes ‘preparatory work’ of the treaty and ‘circumstances of conclusion’

Can only ‘confirm’ the meaning, cannot be the source of the same

Part III - Three Main Approaches to Interpretation

1.

- The **"textual"** (or "ordinary meaning of the words") approach analyses the *actual* words in the text of the treaty to ascertain the meaning of the treaty.

2.

- The **"intentions** of the parties" (or "founding fathers") approach ascertains the *parties' intentions*. The treaty is then construed to give effect to such intentions.

3.

- The **"aims and objects"** (or "technological") approach ascertains the *treaty's aims and objects*. The treaty is then construed to give effect to these aims and objects.

Part III – Observance, Application and Interpretation of Treaties

Which approach is the most appropriate?

- Article 31(1) of the Vienna Convention settles the first issue (i.e. which approach is most appropriate) by adopting the "textual" or "ordinary meaning of the words" approach as the starting point for the general rule of interpretation.

What material should a court consider?

- Article 32 of the Vienna Convention settles the second issue by permitting the use of "supplementary means of interpretation." This permits the use of a far wider range of materials and authorities than may often be permissible under domestic interpretative principles.

Part III - Observance, Application and Interpretation of Treaties

<u>Article 33 - Interpretation of treaties authenticated in two or more languages</u>

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

*3. The **terms of the treaty are presumed to have the same meaning in each authentic text**.*

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

<u>Article 34 - General rule regarding third States</u>

A treaty does not create either obligations or rights for a third State without its consent.

<u>Article 35 - Treaties providing for obligations for third States</u>

*An obligation arises for a third State from a provision of a treaty if the parties to the treaty **intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing**.*

Part III - Observance, Application and Interpretation of Treaties

Article 36 – Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37 - Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation ***may be revoked or modified only with the consent of the parties*** *to the treaty and of the third State, unless it is established that they had otherwise agreed.*

2. When a right has arisen for a third State in conformity with article 36, ***the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable*** *or subject to modification without the consent of the third State.*

Article 38 - Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

Part IV -Amendment and modification of Treaties

<u>Article 39 - General rule regarding the amendment of treaties</u>

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

New Skies Satellite BV' vs. Director of Income Tax

The Court has comprehensively analysed the issue of whether an amendment made to a domestic statute can be read into a treaty. It stated that no amendment, whether retrospective or prospective, could be read in a manner that modifies the operation of the terms of an international treaty. Domestic law remains static for the purposes of a DTAA. It held said that while the Parliament may be supreme, it was 'simply not equipped with the power to, through domestic law, change the terms of a treaty. The hon'ble Delhi High Court in this judgement has observed that the provisions of the Vienna Convention on the Law of Treaties, 1969 ('VCLT') were universally accepted as a part of customary international law. Article 39 of the VCLT says that an amendment to a treaty may only be brought about by an agreement between the parties

Her Majesty the Queen v. Alta Energy Luxembourg S.A.R.L., " 2021 SCC 49 (FC - Canada)

The hon'ble Canadian Supreme Court has held that, the overarching principles of public international law continue to limit the ability of a country to unilaterally amend the treaty provisions. Pursuant to the principle of pacta sunt servanda, parties to a treaty must keep their sides of the bargain and perform their obligations in good faith owing to which treaty partners do not have the unfettered liberty to alter or redefine residence as they wish for the purposes of a tax treaty. Put differently, even GAAR cannot be the reason to rewrite or amend tax treaty provisions.

Part IV -Amendment and modification of Treaties

Article 40 – Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Part IV -Amendment and modification of Treaties

<u>Article 41 - Agreements to modify multilateral treaties between certain of the parties only</u>

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

*(a) the **possibility of such a modification is provided** for by the treaty; or*

*(b) the **modification in question is not prohibited** by the treaty and:*

*(i) **does not affect the enjoyment** by the other parties of their rights under the treaty or the performance of their obligations;*

*(ii) does not relate to a provision, derogation from **which is incompatible with the effective execution** of the object and purpose of the treaty as a whole.*

*2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question **shall notify** the other parties **of their intention to conclude the agreement** and of the modification to the treaty for which it provides.*

Part V - Invalidity, Termination and Suspension of Treaties

Article 42 – Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty ***may be impeached only through the application of the present Convention.***

2. The termination of a treaty, its denunciation or the withdrawal of a party, ***may take place only as a result of the application of the provisions of the treaty*** *or of the present Convention. The same rule applies to suspension of the operation of a treaty.*

Article 43 - Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, ***shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty*** *to which it would be subject under international law independently of the treaty.*

Part V - Invalidity, Termination and Suspension of Treaties

Article 44 – Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty ***may be exercised only with respect to the whole treaty*** *unless the treaty otherwise provides or the parties otherwise agree.*

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention ***may be invoked only with respect to the whole treaty*** *except as provided in the following paragraphs or in article 60.*

3. If the ground relates ***solely to particular clauses, it may be invoked only with respect to those clauses*** *where:*

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In ***cases falling under articles 49 and 50,*** *the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.*

5. In cases ***falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted****.*

Part V - Invalidity, Termination and Suspension of Treaties

<u>Article 45 – Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty</u>

*A **State may no longer invoke a ground for** invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:*

*(a) it **shall have expressly agreed that the treaty is valid or remains in force** or continues in operation, as the case may be; or*

*(b) **it must by reason of its conduct be considered as having acquiesced** in the validity of the treaty or in its maintenance in force or in operation, as the case may be.*

<u>Article 46 - Provisions of internal law regarding competence to conclude treaties</u>

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

*2. **A violation is manifest if it would be objectively evident to any State** conducting itself in the matter in accordance with **normal practice and in good faith**.*

The treaties must be respected and applied regardless of domestic laws or developments in member states

Part V - Invalidity, Termination and Suspension of Treaties

Article 47 – Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48 – Error

1. A State ***may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded*** *and formed an essential basis of its consent to be bound by the treaty.*

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An ***error relating only to the wording of the text of a treaty does not affect its validity****; article 79 then applies.*

Article 49 – Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, ***the State may invoke the fraud as invalidating its consent to be bound by the treaty****.*

Part V - Invalidity, Termination and Suspension of Treaties

<u>Article 50 – Corruption of a representative of a State</u>

*If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, **the State may invoke such corruption as invalidating its consent to be bound by the treaty**.*

<u>Article 51 - Coercion of a representative of a State</u>

*The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed **against him shall be without any legal effect**.*

<u>Article 52 - Coercion of a State by the threat or use of force</u>

***A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles** of international law embodied in the Charter of the United Nations.*

<u>Article 53 - Treaties conflicting with a peremptory norm of general international law ("jus cogens")</u>

***A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.** For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*

Part V - Invalidity, Termination and Suspension of Treaties

<u>Article 54 - Termination of or withdrawal from a treaty under its provisions or by consent of the parties</u>

The termination of a treaty or the withdrawal of a party may take place:

*(a) **in conformity** with the provisions of the treaty; or*

*(b) **at any time by consent of all the parties** after consultation with the other contracting States.*

<u>Article 55 - Reduction of the parties to a multilateral treaty below the number necessary for its entry into force</u>

*Unless the treaty otherwise provides, a multilateral treaty **does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force**.*

<u>Article 56 - Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal</u>

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

*(a) it is established that **the parties intended to admit the possibility** of denunciation or withdrawal; or*

*(b) a right of **denunciation or withdrawal may be implied by the nature** of the treaty.*

*2. **A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty** under paragraph 1.*

Part V - Invalidity, Termination and Suspension of Treaties

<u>Article 57 – Suspension of the operation of a treaty under its provisions or by consent of the parties</u>

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

*(a) in **conformity with the provisions** of the treaty; or*

*(b) **at any time by consent of all the parties** after consultation with the other contracting States.*

<u>Article 58 - Suspension of the operation of a multilateral treaty by agreement between certain of the parties only</u>

1. *Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:*

*(a) the **possibility of such a suspension is provided** for by the treaty; or*

*(b) the suspension in question is **not prohibited** by the treaty and:*

*(i) **does not affect the enjoyment by the other parties of their rights under the treaty** or the performance of their obligations;*

*(ii) is **not incompatible with the object and purpose** of the treaty.*

*2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, **the parties in question shall notify the other parties of their intention to conclude the agreement** and of those provisions of the treaty the operation of which they intend to suspend.*

Part V - Invalidity, Termination and Suspension of Treaties

<u>Article 59 – Termination or suspension of the operation of a treaty implied by conclusion of a later treaty</u>

1. A treaty shall be considered as terminated ***if all the parties to it conclude a later treaty relating to the same subject matter*** *and:*

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty ***are so far incompatible with those of the earlier one*** *that the two treaties are not capable of being applied at the same time.*

2. The earlier treaty shall be considered as only suspended in operation ***if it appears from the later treaty or is otherwise established that such was the intention of the parties.***

Part V - Invalidity, Termination and Suspension of Treaties

Article 60 - Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State; or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Part V - Invalidity, Termination and Suspension of Treaties

Article 61 -Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62 - Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Part V - Invalidity, Termination and Suspension of Treaties

Article 63 - Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64 - Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 65 - Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

Part V - Invalidity, Termination and Suspension of Treaties

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Part V - Invalidity, Termination and Suspension of Treaties

Article 67 - Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68 - Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

Article 69 - Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Part V - Invalidity, Termination and Suspension of Treaties

<u>Article 70 – Consequences of the termination of a treaty</u>

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

<u>Article 71 - Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law Consequences of the invalidity of a treaty</u>

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Part V - Invalidity, Termination and Suspension of Treaties

Article 72 - Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Other Key Considerations

Intention of the Parties

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01 The Vienna Convention confers a specific purpose on the treaty interpretation process: to establish what is often referred to as the intention of the parties.

02 Limiting its use to the context of treaty interpretation, 'party intention' can mean many different things.

03 Party intention may mean the intended relationship between two separate instruments.

04 Party intention may mean the intended relationship between an existing document / treaty and a subsequent agreement.

05 It is the ultimate purpose of the interpretation process to establish the communicative intention of the treaty parties—the meaning that the parties intended the treaty to communicate.

06 The interpretation of a tax document is no different than the understanding of just any verbal utterance produced by a person or group of persons at a particular occasion, whether orally or in writing.

07 Interpreters can justify their use of the Commentaries based on this same law.

VCLT & OECD Commentaries

OECD Commentaries may come within the scope of application of Article 31, paragraph 2(b)

They may classify as 'relevant rules of international law', in the sense of Article 31, paragraph 3(c)

They may help establish the possible 'special meaning' of tax treaty terms, in the sense of Article 31, paragraph 4

They may come within the scope of application of Article 32 of the VCLT, whether or not they belong to any of the two means of interpretation explicitly allowed by this provision.

Key Provisions

VCLT & OECD Commentaries

View 1- Article 31

- OECD commentaries constitute 'rules of international law' under Article 31(3)(c) (albeit, non-binding rules)
- Amendments to OECD Commentary would constitute evidence of 'subsequent practice' under Article 31(3)(b), particularly so if it is between OECD Member nations
- Can also be used under Article 31(1) as good faith principle if evidence exists to demonstrate that the treaty was meant to be based on the OECD convention, particularly so if it is between OECD Member nations
- Primary source for determining the intention of the treaty
- Enjoy high persuasive value

View 2- Article 32

- OECD commentaries constitute 'preparatory work' under article 32
- Can be relied on only if recourse to Article 31 is unsuccessful. Can only be used to confirm a possible interpretation and cannot be the source of the same.
- Enjoy lower persuasive value
- Affirmed by Australian HC in Thiel vs. Federal Commissioner of Taxation, a landmark judgement routinely relied on by Indian Courts (SC included)

Case Studies

Examining some curious cases

Mashreqbank PSC v. Dy. DIT (International Taxation)

- It is clear that one of the basic principles governing the interpretation of tax treaties is that a tax treaty must be interpreted in good faith. Article 31(1) of the Vienna Convention governing the interpretation of tax treaties also lays down 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 objects and purpose'. It is, therefore, important that undue emphasis should not, in any event, be given to a legalistic and literal approach in interpreting a tax treaty; the effort should always be made to harmonise the interpretation of the words of the treaty with its object and purpose

Ram Jethmalani vs. Union of India

- The words in the treaty are to be given their general meaning, general to lawyer and layman alike.
- Although India is not a signatory to the Vienna Convention of Law of Treaties, 1969 (Vienna Convention), it is well accepted that it contains many principles of customary international law, and the principle of interpretation as enshrined in Article 31 of the Vienna Convention provides a broad guideline as to what could be an appropriate manner of interpreting a treaty also in the Indian context (Ram Jethmalani vs. Union of India, 8 SCC 1). Also reiterated in the Sanofi case.

Thiel v. Federal Commissioner of Taxation, High Court of Australia

- Reference to the OECD model commentary is backed by Article 32 of the Vienna Convention, which allows recourse to be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or leads to an absurd or unreasonable result.

Examining some curious cases

Hindalco Industries Ltd. v. Asstt. CIT

- The DTAAs are international agreements entered into between States. The conclusion and interpretation of such convention is governed by public international law, and particularly, by the Vienna Convention on the Law of Treaties of 23 May, 1969. The rules of interpretation contained in the Vienna Convention, being customary international law, also apply to the interpretation of tax treaties.

Modern Threads (I) Ltd. v. Dy. CIT

- it is declared that agreements entered into between two countries should be followed peacefully by each country and the agreements should be interpreted in good faith. The principles of the Vienna Convention in mind while interpreting the DTAA between India and Italy, which is an Agreement, not only for the avoidance of double taxation but also for the prevention of fiscal evasion.

THANK YOU

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