2023 INSC 928

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 1420 OF 2023

ASSESSING OFFICER CIRCLE (INTERNATIONAL TAXATION) 2(2)(2) NEW DELHI **…APPELLANT(S)**

VERSUS

M/S NESTLE SA **…RESPONDENT(S)**

WITH

Civil Appeal No. 1423/2023, Civil Appeal No. 1421-1422/2023, Civil Appeal No. 1424/2023, Civil Appeal No. 1425/2018, Civil Appeal No. 1426/2023, Civil Appeal No. 1427/2023, Civil Appeal No. 1428/2023, Civil Appeal No. 1429/2023, Civil Appeal No. 1430/2023, Civil Appeal No. 1431/2023, Civil Appeal No. 1432/2023

J U D G M E N T

S. RAVINDRA BHAT, J.

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1. The present batch of appeals arise from decisions of the Delhi High Court involving interpretation of the Most Favoured Nation (MFN) clause contained in various Indian treaties with countries that are members of the Organisation for Economic Cooperation and Development (hereafter 'OECD'). This clause provides for lowering of rate of taxation at source on dividends, interest, royalties or fees for technical services (hereafter 'FTS') as the case may be, or restriction of scope of royalty/FTS in the treaty, similar to concession given to another OECD country subsequently. The bilateral treaties in question are between India and Netherlands, France, and Switzerland, respectively. Broadly, the issues arising are whether there is any right to invoke the MFN clause when the third country with which India has entered into a Double Tax Avoidance Agreement (hereafter 'DTAA') was not an OECD member yet (at the time of entering into such DTAA); and *secondly* whether the MFN clause is to be given effect to *automatically* or if it is to only come into effect after a notification is issued.

I. Facts

2. One of the first judgments[1] challenged, in this batch of appeals by special leave, relates to Steria India. Before the Authority for Advance Ruling ("AAR"), Steria contended that having regard to Clause 7 of the Protocol to the India-France DTAA the more restrictive definition of the expression 'fees for technical services' appearing in the India-UK DTAA, must be read as forming part of the India-France DTAA as well. The AAR, by the impugned order, disagreed with

1 By judgment dated 28.07.2016 passed by the Delhi High Court in W.P.(C) 4793/2014.

Steria. It ruled that the Protocol could not be treated as forming part of the DTAA itself. It further held that restrictions imposed by the Protocol were only to limit the taxation at source for the specific items mentioned therein; the restriction was only on the rates. Further, the 'make available' clause found in the India-UK DTAA could not be read into the expression 'fee for technical services' occurring in the India-France DTAA unless there was a notification under Section 90 of the Income Tax Act, 1961 issued by the Union Government to incorporate the more restrictive provisions of the India-UK DTAA into the India-France DTAA. In other words, Steria's plea that Clause 7 of the Protocol did not require any separate notification and could straightway be operationalised, was not accepted by the AAR. Upon challenge in a writ petition before the High Court, this was reversed; the court accepted Steria's contention, and held that a Protocol is considered as part of the treaty itself and does not have to be separately notified for the purposes of application of the MFN clause. Therefore, in *Steria,* the question for the interpretation of the MFN clause in the Protocol to the India-France DTAA, was whether a separate notification by the Union was required for application of the MFN clause. The AAR had concluded that even though the conditions set out in the MFN clause were satisfied, the benefit could not be availed unless there was a specific notification by the Government of India effectuating the benefit under the MFN clause, which the High Court reversed.

3. The next set of facts, relate to the India-Netherlands DTAA which was entered into on 21.01.1989, and notified on 27.03.1989. This DTAA was amended by a subsequent notification dated 30.08.1999. The respondent assessees (writ petitioners before the High Court[2]) were Concentrix Services Netherlands BV, and Optum Global Solutions International BV, and their Indian counterparts (in which the former held 99.99% share respectively) which

2 Judgment dated 22.04.2021 passed by the Delhi High Court in W.P.(C) No.9051/2020 and connected matters.

remitted dividends. In 2020, Concentrix India and Optum India each applied under Section 197 of the Act in the prescribed form, seeking a certificate that authorized them to deduct withholding tax at a lower rate of 5% in consonance with the subject DTAA read with the Protocol. In both cases, certificates were issued on 16.09.2020 and 04.01.2021 respectively by which the stipulated withholding tax rate was shown as 10%. In both cases, the certificates were valid till 30.03.2021. The validity period of the certificates came to an end on 31.03.2021 in both cases. By communication dated 17.09.2020, Concentrix, through its accountants, sought permission of respondents to inspect the files as well as copies of order sheet(s) which concerned processing of its application preferred under Section 197 of the Act. It also sought reasons why the certificate did not grant the withholding rate at 5%. The respondent sought to justify its certificate on 01.10.2020, and applied seeking reasons from the appellant (hereafter "the revenue"). A similar request was made by Optum Netherlands; the revenue furnished reasons to justify the withholding tax rate which was pegged at 10% by its communication dated 22.01.2021. Feeling aggrieved, both Concentrix Ne and Optum Ne approached the Delhi High Court, in proceedings under Article 226 of the Constitution.

4. In both cases, the assessees contended that regard being had to the phraseology of the DTAA and the subsequent Protocol, the relevant event relied upon – the provisions of the DTAA and the Protocol, obliged the revenue to extend the lower rate of 5%. It was urged that since India had entered into DTAAs with other countries which were members of OECD, the lower rate or the restricted scope in the DTAA executed between India and such a country automatically applied to the India-Netherlands DTAA. This was based on the provision made in the preface of the Protocol which inter alia stated that the Protocol "*shall form part an integral part of the Convention*" i.e., the subject DTAA. It was argued that application of provisions of the DTAA (which

followed subsequent to the India-Netherlands DTAA), contrary to the revenue's stand, no fresh notification was required. In support, reliance was placed upon the rulings in Court in *Steria (India) Ltd. v. Commissioner of Income-Tax*[3], the judgment of the Karnataka High Court in *Apollo Tyres Ltd. v. Commissioner of Income Tax, International Taxation*,[4] and of another judgment of the Delhi High Court in *EPCOS Electronic Components S.A. v. Union of India*[5].

5. By the impugned judgment, the Delhi High Court, allowed the writ petitions, *inter alia,* reasoning that:

> *"15. A bare perusal of Clause IV (2) shows that it incorporates the principle of parity between the subject DTAA and the Conventions/DTAAs executed thereafter qua the rate of withholding tax or the scope of the Conventions in respect of items of income concerning dividends, interest, royalties, fees for technical services, or payments for use of equipment [in short "subject remittances"].*
> *16. However, the principle of parity kicks-in, only if the following conditions are fulfilled:*
> *i. First, the third State with whom India enters into a Convention/DTAA should be a member of the OECD.*
> *ii. Second, India should have, in its Convention/DTAA, executed with the third State, limited its rate of withholding tax, on subject remittances, at a rate lower or a scope more restricted, than the rate or scope provided in the subject Convention/DTAA.*
> *17. Once the aforementioned conditions are fulfilled, then, from the date on which the Convention/DTAA between India and a third State comes into force, the same rate of withholding tax or scope as provided in the Convention/DTAA executed between India and the third State would necessarily have to apply to the subject DTAA.*
> *17.1. Therefore, the argument advanced on behalf of the revenue, that the beneficial provisions contained in the Conventions/DTAAs, executed both prior to or after the coming into force of the subject DTAA, i.e., 21.01.1989, could not be made applicable to the recipients of remittances covered under the subject DTAA even though the concerned third State was a member of the OECD is, to our minds, completely misconceived and contrary to the plain terms of Clause IV (2) of the protocol appended to the subject DTAA.*
> *17.2. Although it must be said in favour of the revenue, the construct of Clause IV (2) is such that in certain cases there could be a hiatus between the dates on which the Convention/DTAA is executed between India and the third State and the date when such third State becomes a member of OECD. The limit on the lower rate of tax or the scope more restricted contained in the*

3 [2016] 386 ITR 390 (Delhi): .
4 [2018] 92 Taxmann.com 166 (Karnataka)
5 2019 SCC OnLine Del 9113

Convention/DTAA executed between India and the third State can only apply when the third State fulfils the attribute of being a member of the OECD.
17.3. We must point out that a lot of emphases is laid on behalf of the revenue on the word "is" mentioned in the following part of Clause IV (2) in the context of the aforementioned third States with which India has entered into Conventions/DTAAs after the execution of the subject DTAA "... which is a member of the OECD...".
17.4. In our view, the word "is" describes a state of affairs that should exist not necessarily at the time when the subject DTAA was executed but when a request is made by the taxpayer or deductee for issuance of a lower rate withholding tax certificate under Section 197 of the Act. The word 'is'- is both autological and heterological. An autological word is one that expresses the property that it possesses. Opposite of that is a heterological2 word, i.e., it does not describe itself. The examples of autological words are expressions such as "English", "Noun", or "Word". Heterological words as indicated above are those which do not describe themselves or have the potential of developing into several forms or supporting multiple interpretations. An example of a heterological word is the word "long". The word long does not describe itself because it is not a long word.
17.5. Therefore, bearing the aforesaid in mind, the best interpretative tool that can be employed to glean the intent of the Contracting States in framing Clause IV (2) of the protocol would be as to how the other contracting State [i.e., the Netherlands] has interpreted the provision."

The judgment then considered the executive decree issued by Netherlands, pursuant to the Protocol, as a method of interpretation of how the event, i.e. entry of another country into OECD, which had a previous DTAA with India (or where a country which was in OECD and subsequently entered into DTAA with India) had to be dealt with.

6. The judgment in *Concentrix* was followed subsequently, in the case of *Nestle SA v. Assessing Officer Circle (International Taxation)*[6] which is also under challenge. In the revenue's appeals[7] in Nestle what was considered by the Delhi High Court, were provisions of the India-Switzerland DTAA and its three protocols. The other judgments impugned before this court have similar facts, and the decisions by the High Court have followed the position laid out in *Steria* and *Concentrix.*

6 W.P. (C) No. 3243 of 2021 decided on 04.06.2021
7 Petition for Special Leave to Appeal (C) No. 5360/2022

II. Arguments of parties

A. Revenue's contentions

7. The revenue argues, through the Additional Solicitor General, Shri N. Venkatraman (hereafter "ASG") that the impugned judgments are unsustainable. The revenue points out that under the Indian Constitution, especially by operation of Articles 253 (read with Entries 13, 14 and 15 of List I of the Seventh Schedule) of the Constitution of India, Parliament has exclusive power to legislate in respect of any treaty or convention, entered into by India, with any other nation; such treaty can only be entered into in exercise of executive power of the Union. It was urged that without Parliamentary legislation, such treaties are unenforceable, having regard to the express terms of Article 253[8] which clothe Parliament alone with the power to make laws "*notwithstanding"* other provisions in that chapter- which delineates and distributes legislative power between the Union and States. Counsel submitted that India follows the "dualist" practise, which means that international treaties and conventions are not, upon their ratification, automatically assimilated into municipal law (i.e. the national legal system) but would require enabling legislation. This is in contrast to those countries which are "monist", wherein the treaty provisions are enforceable like municipal law, and are to be given equal weight by courts.

8. The ASG relied upon the decisions in *Gramaphone Co. of India Ltd v. Birendra Bahadur Pandey & Ors.*[9] and *Union of India (UOI) & Ors. v. Azadi Bachao Andolan & Ors.*[10] to urge that the position in India is entrenched that without enabling legislation, any convention or event flowing from a convention, as in creation of rights and liabilities of third parties to conventions

8 Article 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.* "
9 1984 [2] SCR 664
10 2003 (Supp 4) SCR 222

or treaties, do not operate on their own, and needs an intervening action by the Union, giving effect to such obligation.

9. The ASG relied on Section 90 which requires the issuance of a notification, to give effect to any treaty or convention. It is argued that in the absence of any law, mere entering into a treaty or convention or protocol cannot give rise to any right under the taxation laws having regard to the structure of Section 90. Therefore, in the present case, the trigger to the MFN clause can occur at a later point in time when India enters into a treaty or convention with other nations which happens to be a member of the OECD at the time it enters into treaty or convention with India and if the DTAA with such country provides for taxation at rate lower than or benefit over and above conferred upon the parties of the existing DTAA between India and the other nation. However, it would still require issuance of a notification to give effect to such consequence. The incident involved in the present case – i.e., the mere fact that India entered into DTAAs with Slovenia, Lithuania, and Columbia at certain points in time and that some of them gained membership of OECD, *ipso facto* could not lead to claims by the respondents assessees that similar or identical treatment had to be extended to them as tax residents of Netherlands, France, and Switzerland respectively.

10. The learned ASG pointed out to the treaty practice between India and each of the three countries (France, Netherlands and Switzerland). He also referred to the fact that after Slovenia had entered OECD (in 2010) a Protocol has been signed between India and France. This Protocol was notified sometime in 2012. This, it was argued, is a clear pointer to the fact that entering into membership of OECD *per se* does not result in automatic grants of benefits to a country which had entered into DTAA with India because the later Protocol with France and the consequent notification omitted to extend any benefit on the basis that Slovenia had entered OECD membership in 2010.

11. The learned ASG likewise pointed out that the Protocol executed between India and Netherlands was notified on 30.08.1999. The plain reading of that notification shows that the Protocol itself was triggered by the benefit granted to the United States - with which India entered into a DTAA in 1990; Germany with which India entered into a DTAA in 1996; Sweden with which India entered into a DTAA in 1997 and the U.K. with which India entered into a DTAA in 1993. The notification issued on 30.08.1999 (notifying the Protocol between India and Netherlands), conferred benefits based upon the concessions given to different countries, with effect from different dates depending on the nature of the benefits, rate of tax withholding, definition etc.; this too, it is argued, showed that the triggering event itself (here, mere entering into DTAA with a country which was or became a member of the OECD) did not result in grant of any benefit or advantage to Netherlands. It was after bilateral negotiations that the Protocol was entered into, and yet later a notification under Section 90 was issued, bringing it into effect.

12. These practices were in consonance with the mandate and requirements of Section 90. The learned ASG also submitted that without the benefit of any notification, any tax administrator, an Assessing Officer or revenue authority would find it hard to verify the claim of any assessee. The learned ASG argued that the impugned order is erroneous in as much as it relied upon executive orders and decrees issued by the Swiss, Dutch and French authorities; such executive decrees or orders could not possibly bind Indian Revenue Authorities and had in fact been issued unilaterally. They were bound to be implemented by the concerned revenue authorities in Netherlands, Switzerland and France, which in fact was done. The judgment in *Concentrix* relied heavily upon such orders or decrees, and to the extent is unsustainable.

13. The learned ASG also highlighted that if the impugned judgment is left undisturbed the interpretation by it as well as the judgments which followed it,

would preclude enquiry into whether any DTAA or international instrument was in fact assimilated in municipal law under Section 90 or any like provision.

14. Learned counsel highlighted that in the case of Nestle in fact, a plain and straightforward review of the first and second protocols (of the India-Switzerland DTAA) demonstrates that without notification in accordance with Indian law, they could not have applied which was in fact, the occasion for the notifications dated 07.02.2001 and 27.02.2001 respectively. Counsel particularly highlighted the concerned provision, i.e. Section 90 (1) of the Act.

15. The learned ASG cited *Ram Jethmalani v. Union of India*[11], referring to the General Rule on Interpretation of Vienna Convention on Law of Treaties, 1961 (hereafter "VCLT"), stated that though India is not a party to the VCLT, the convention contains many principles of customary international law and the principle of interpretation in Article 31 provides a broad guideline as to what should be an appropriate manner of interpreting a treaty in the Indian context as well. This court also observed that the broad principle of interpretation, with respect to treaties, and provisions therein, would be that ordinary meaning of words be given effect to, unless the context requires otherwise. That such treaties are drafted by diplomats, and not lawyers, also implies that care has to be taken to not render any word, phrase, or sentence redundant, especially where rendering of such word, phrase, or sentence redundant would lead to a manifestly absurd situation, particularly from a constitutional perspective. This principle of interpretation was applied by the Andhra Pradesh High Court in the case of *Sanofi Pasteur Holding SA v. Department of Revenue*[12].

16. It was argued thus, that a treaty should be interpreted ordinarily, and the ordinary meaning of the words be given effect to apart from ensuring that the interpretation should not render any word, phrase, or sentence redundant. The grammatical and literal meaning of the India-Netherlands MFN clause reveals that the

11 [2011] 339 ITR 107 (SC)
12 [2013] ITR 354 (AP HC)

benefit of reduced rate mentioned therein would be available only in case of such *subsequent* Indian treaties wherein the other State is an OECD member as on the date of the treaty entering into force. Any other interpretation would render the words "*then as from the date on which the relevant Indian Convention or Agreement enters into force*" redundant or otiose, which is not permissible as per the above cited decisions of this court.

17. Responding to the linguistic interpretation of "is" by the impugned judgments, it is urged that the assessees had cited Article 10 and other Articles of the DTAAs to advance a view that "is" signifies the time when the provisions of treaty are to be applied. They have also relied on dynamic interpretation of Article 3(2) which allows taking into account the definition in domestic law when a particular term is not defined in the DTAA. The ASG urges that such arguments ignore the discussion which clearly states that the word "is" can have present, past, or future meaning depending on the context in which it is used. In fact, Article 3(2) of the DTAAs also gives prominence to the context, as it clearly talks about meaning of a treaty term in accordance with domestic tax law at the time of applying the tax treaty unless the context otherwise requires. Counsel contends that the MFN clause clearly demonstrates that the other country is required to be an OECD member *as on the date of the signing of the treaty and not on any future date*. Thus, when Slovenia, Lithuania, or Columbia entered into respective DTAAs with India, they had to have been members of OECD at that time, for Netherlands, France, and Switzerland to claim parity of treatment.

18. It was lastly argued that the notifications, which amended existing DTAAs in respect of the three countries, reveal two aspects: *one,* that they were issued because of benefits granted to countries, other than Netherlands, France and Switzerland; *two,* that such subsequent notifications were triggered by the lowering of rate, or treatment of certain kinds of income (dividends, interest and royalties and fee for technical services) and their definitions. These notifications

were preceded by negotiations, communications and letters, exchanged between India and the other country. In many cases, the amending notification granted one benefit, while denying other benefits (granted to other, third countries, whose DTAAs conferred such benefits after Netherlands or France or Switzerland's DTAAs were entered into). This clearly showed that such notifications were necessary, and that there could not be any automatic applicability of such benefits given to other OECD members.

B. Contentions of the assessees/Respondents

19. Mr. Poros Kaka, Mr. P. Chidambaram, Mr. S. Ganesh and Mr. Percy Pardiwala, learned senior counsel; Mr. Lovkesh Sawhney, and Mr. Mukesh Bhutani, learned counsel, appeared for the respondent assessees. It was submitted that when the DTAA and the Protocols – including the MFN clause contained in the concerned Article of the Protocol was already notified under section 90(1) and it has come into force, there is further no legal requirement to notify any subsequent amendment to the DTAA which becomes operative *automatically* as a consequence of the trigger of the MFN clause to the DTAA. Counsel urged that Section 90 only requires notification of a treaty or protocol, and does not mandate each clause of such agreement to be further notified separately. A plain reading of Section 90 of the Act demonstrates that it does not require each article or paragraph thereof of an already notified agreement to be further notified separately if the amendment is as a consequence of a *self-operative* MFN clause. Undoubtedly if the amendment is as a consequence of a bilateral negotiation, then, a separate notification is required. To ascertain if any such requirement exists or otherwise, one will have to refer to the respective clauses itself. It is urged that the subject MFN clause in the Protocol to India-Netherlands DTAA has no such requirement.

20. The contrast between India's DTAAs with Netherlands and Switzerland, is that the relevant MFN clause in the India-Switzerland DTAA originally

required initiation of negotiation, to apply the beneficial provision agreed with other OECD member. This was repealed by notification No. SO 2903(E), dated 27-12-2011 and both India-Switzerland agreed on the present MFN clause which does not require negotiation to give the benefit of reduced rate of tax, and it was argued applies automatically just like the India-Netherlands MFN. Counsel also highlighted that the MFN Clause in the Protocol to the India-Finland DTAA also clearly requires India to immediately inform the Finland authorities and notify such beneficial provision whenever the MFN clause gets triggered. Counsel also referred the MFN clause in the Protocol to the India-Philippines DTAA, to say that that too clearly requires the countries to inform each other and review the provisions with a view to extend the beneficial provisions.

21. Learned counsel submitted that the difference in language, is unimportant, because Article 7(3) of the India-Netherlands DTAA shows that treaty partners are same; yet the instrument uses different language to denote the same terms. Article 7(3) specifically notes that where the expense limit is relaxed for computing the profits attributable to the permanent establishment in any other convention, the competent authority of one state would notify such competent authority of the other state, and at the request of that competent authority which is notified, the terms of the treaty shall be amended by Protocol to reflect such beneficial terms. Naturally, once that amendment is agreed pursuant to bilateral negotiations, it has to be notified. This language, it is pointed out, is absent in the MFN clause.

22. There is no requirement in the subject MFN clause to issue any notification to bring into force the beneficial provisions from subsequent DTAAs or by way of a notified protocol or negotiation. The MFN clause simply states that the reduced rate as extended to an OECD country "*shall also apply*" under this current convention and, hence, such clause is automatic in operation.

The use of different language in the DTAA by the two contracting states is indicative of their intent and cannot be disregarded whilst interpreting their terms. Likewise, in the case of the India-Switzerland DTAA, the nature of the existing MFN clause is such that no negotiation is needed but for change in scope, for which requirement for negotiation has still been retained by the treaty partners. Obviously, these differences in the language of the clauses bear significance.

23. This court was shown the observations of the Income Tax Appellate Tribunal (ITAT) Mumbai in *SCA Hygiene Products AB v. DCIT*[13], and the ITAT Delhi decision in *Mitsubishi Electric India Pvt Ltd v Commissioner of Income Tax* [14] where the tribunal has noted the difference in triggers of the MFN clause such as one which is (a) automatic (India-Sweden) (b) requiring notifying authority of other state (India-Philippines) (c) requiring negotiation. It was urged that the tribunal adopted the same interpretation as was done in the judgment impugned. It was submitted also, that the Karnataka High Court in *Apollo Tyres Ltd.* (supra) had similarly considered the same Protocol to the India-Netherlands DTAA; which as the revenue did not challenge - had, attained finality.

24. The assessees refute the revenue's argument that treaties with other OECD countries did not have a triggering consequence of the MFN clauses with the three countries in the present case. On the revenue's reference to the unilateral notification dated 30.08.1999, where the restricted scope of FTS is only given by India w.e.f. 01.04.1997, whereas the limited scope of FTS was agreed in the India-USA DTAA which came into force from 18.12.1990 - it is urged that this notification is unilateral and not a bilateral amendment by both states. The assessees highlight, in this regard that the notification nowhere

13 ITA No. 7315/Mum/2018
14 ITA No. 3336/Del/2018

clarifies that *both states had agreed to its contents.* In contrast Notification No. GSR 382(E)/ Notification No.2/2013 dated 14.1.2013 which notified the Protocol to India-Netherlands dated 10.5.2012 bilaterally amending the DTAA and states

> *"India and Netherlands... Desiring to conclude a Protocol (hereinafter referred to as "Amending Protocol") to amend the Convention....have agreed as follows"*

25. It is submitted that every bilateral amendment to treaty always has a date of entry into force agreed by both states. But the said Notification dated 30.08.1999 does not have one. Contrast this with the 2012 bilateral amendment made in the India-Netherlands DTAA by the Protocol which entered into force on 02.11.2012 and was notified vide Notification No. 2/2013.

26. The purpose of this unilateral notification by India is clear from the Dutch communication dated 18.11.1999 which states that messages were exchanged and there was a difference of understanding between Indian and Dutch authorities on the limited aspect as to whether the MFN clause would be applicable from the date of entry into force of the beneficial DTAA, or w.e.f. 1st April of the following fiscal year, since India follows the financial year (April-March) pattern. This limited aspect was agreed by the Dutch authorities. It is argued that no such reservation was noted by India for MFN in clause IV of Protocol.

27. Counsel submit that the absence of a unilateral notification which may have in the past been issued as an administrative practice cannot override the clear language of an MFN clause which provides for automatic application. The assessees refer to *Union of India of India v. Agricas LLP*[15], which held that the State cannot breach a treaty to which it is a party by referring to domestic law-be it legislative, executive, or judicial decision. The decision in *Engineering Analysis Centre of Excellence P.*

15 [2020] 14 SCR 372

Ltd. v. CIT[16] applied the principle in *Director of Income Tax v New Skies Satellite BV*[17] wherein the Delhi High Court held that mere executive position cannot alter the law under the DTAA.

28. Learned senior counsel submit that Netherlands' position has been clear as early as from 1998. The Dutch decree of 22.06.1998 issued by the Secretary of Finance clarifies that the MFN clause in Clause IV of Protocol is automatic; for every favourable provision as a consequence of a DTAA with another OECD country, Netherlands was of the view that the amendment would apply with effect from date of entry into force of that relevant convention. Similarly, the decree by Netherlands on 28.02.2012 maintained that beneficial provision of the USA-DTAA on restricted scope of FTS should apply with effect from 01-04-1991 (1st April of the fiscal year following the date of entry into force of the India-USA DTAA).

29. Counsel argue that the revenue's arguments are unfounded because even in Netherlands, a notification is required for MFN benefits to extend to the India-Netherlands DTAA. These decrees of 1998, 1999 and 2012 have been issued by executive-decree states in order to avoid ambiguity. Issuing such decrees are not akin to notifications statutorily required to give effect to automatic amendments but just represents the understanding of the Dutch authorities. Under Netherlands law to give effect to a DTAA, parliamentary approval under Article 91 of the Netherlands Constitution is required. The process is that it has to be signed by the government, after which it has to be approved by both houses of Parliament and then, ratified. After such approval and ratification, nothing remains, and consequently, formal decrees follow. Similar arguments were advanced in respect of French orders and Swiss decrees and orders, which gave effect to the DTAAs and Protocols. It is highlighted that

16 (2021) 432 ITR 471(SC)
17 (2016) 382 ITR 114

the entry of the three countries: Lithuania, Slovenia, and Colombia, into OECD were duly noted in subsequent orders and given effect to, wherever necessary.

30. Next, the assessees dealt with the argument that Lithuania, Columbia, etc. were not OECD members at the time of signing of the India-Netherlands DTAA, or the India-Switzerland Protocols in question, or the India-France DTAA and Protocol. The following chart is extracted, from the assessees' submissions:

Country	**DTAA signed**	**DTAA Entry into force**	**Date Notified**	**OECD Members**	**Dividend Tax**	**Art. 10**
Slovenia	13.01.2003 (pg.512 of revenue's Compilation-Vol. III, pdf pg.16)	17.02.2005 (pg.501 of revenue's compilation-Vol. III), pdf pg.5)	31.05.2005 (pg.501 of revenue's Compilation-Vol. III, pdf pg.5)	21.07.2010	5%	Art 10(2)(a) has 10% beneficial ownership requirement (pg.505 of revenue's Compilation-Vol. III, pdf pg.9)
Lithuania	26.07.2011 (pg.534 of revenue's Compilation-Vol. III), pdf pg.38	10.07.2012 (pg.534 of revenue's Compilation-Vol. III, pdf pg.38)	25.07.2012 (pg.534 of revenue's Compilation-Vol. III, pdf pg.38)	05.07.2018	5%	Art 10(2)(a) has 10% beneficial ownership requirement (pg.538 of revenue's compilation-Vol. III, pdf pg.42)
Columbia	13.05.2011 (pg.90 Assessee's Common Comp.-Vol. VI, pdf pg.93)	07.07.2014 (pg.90 Assessee's Common Comp.-Vol. VI, pdf pg.93)	23.09.2014 (pg.90 Assessee's Common Comp.-Vol. VI, pdf pg.93)	28.04.2020	5%	Art 10(2) (pg.91 Assessee's Common Comp.-Vol. VI, pdf pg.94)

31. Learned counsel argued that the assessees are entitled to the benefit of the lower tax rate of 5% provided for in the DTAAs between India and Lithuania, Slovenia, and Colombia respectively, by relying on the MFN clause in the treaty/protocol to the India-Netherlands, India-Switzerland and India-France

DTAAs in terms of which after the signing of the DTAA with these countries (and other protocols), if India entered into a DTAA with an OECD member where India has agreed for a rate of tax on dividend lower than the rate provided for in each of the DTAAs with Netherlands, Switzerland and France respectively, such lower rate also applies to those DTAAs. It is urged that the MFN clauses in the three DTAAs and their protocols clearly oblige Indian revenue officers to grant the benefit that is given to countries which subsequently entered into DTAAs with India, and were given favourable benefits, upon their entry into OECD.

32. On the OECD membership issue, it was argued that the revenue's only reason in the order denying the applicability of the lower rate of withholding tax at 5% - which was challenged by the assessee in the relevant impugned decision, was that the benefit of the MFN clause cannot be given as Lithuania, Columbia, etc, were not OECD members *at the time of signing* of the India-Netherlands DTAA. OECD membership requirement for the third country at the time of signing of its own DTAA was not the reason given for rejection in the order impugned before the High Court.

33 Counsel submitted that the word "is" appearing in Article 10(1) of the India-Netherlands DTAA is in fact a complete answer to the revenue's objection that Slovenia/Lithuania/Columbia ought to be members of OECD both at the time of signing of the India-Netherlands DTAA or at the time of execution of their own DTAA, and also at the time claim for lowering withholding by the assessee is made. Hence, the revenue is alluding that “is a member of OECD” appearing in the MFN clause means membership of OECD is a continuous requirement. Thus, if the argument, of the revenue that the phrase "is a member of OECD" is literally interpreted, it would mean Slovenia, Lithuania, and Columbia ought to be members of the OECD *at the time of signing of India-*

Netherlands DTAA, at the time of execution of their own DTAA, and also the time when the assessee invokes the MFN clause is to be accepted; then, the consequence would be that while interpreting Article 10(1) of India-Netherlands DTAA which also uses the same word "is" ("is a resident") the same meaning ought to be given. However, it is undisputed that while claiming the benefit of Article 10, the assessee needs to be a resident of India/Netherlands only for the year in which the benefit of Article 10 is sought by an assessee. Therefore, when for Article 10, "is" does not postulate continuous requirement of residence, the same word "is" when it appears in the MFN clause can only mean that Slovenia etc. need to be OECD members only when the benefit of the MFN clause is invoked.

34. Learned senior counsel appearing for Nestle argued in addition, that the third Protocol, between India and the Swiss Confederation[18], by Article 11(5) required that if India entered into agreement with another OECD country, providing for lower rate of taxation on dividends, interest and royalties at FTS, the same lower rate of taxation was to be given to Swiss tax entities.[19] It relies on the fact that India and Lithuania-DTAA was signed on 26.07.2011; the date of its notification was 25.07.2012. Lithuania became an OECD member on 05.07.2018. Likewise, the India-Colombia DTAA was signed on 13.05.2011 and notified on 23.09.2014; Colombia entered OECD on 28.04.2020. These two DTAAs provided lower rates of taxation, as compared with the India-Switzerland DTAA. It was argued that the purpose of amending the relevant provisions of the DTAA, by the third Protocol was to automatically provide the

18 Notified by the Indian government on 13.08.2011

19 Article 5 of the third protocol which amended Articles 10, 11, 12 and 22 *inter alia,* read as follows:

"in respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services), if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD signed after the signature of this Amending Protocol, India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower than the rate provided for in this Agreement on the said items of income, the same rate as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply between both Contracting States under this Agreement as from the date on which such Convention, Agreement or Protocol enters into force."

same treatment to Switzerland; counsel relies on the expression that the lower rate given to the later OECD member by India *"shall also apply between both Contracting States under this Agreement as from the date on which such Convention, Agreement or Protocol enters into force"*. Counsel contrasts this with similar provisions in the third Protocol. The latter require the contracting states to enter into negotiations. Nestle underlines that the first and second Protocol, were worded differently. Earlier, in respect of the same event, i.e. India's entering into an agreement with another contracting state, granting lower rate of tax, parties had to enter into negotiations ("*shall enter into negotiations without undue delay"*). It was emphasized that the object of changing the terminology in the third Protocol, was to assure to Swiss entities, that the treatment extended to entities of the other state, automatically afforded a lower rate of taxation.

35. Learned senior counsel also referred to the opinions of Professor Dr. Robert J Dannon and Prof. Dr. Stef Van Weeghel on the history of treaty provisions and the applicable rules of interpretation, to support the assessees' arguments.

III. Relevant statutory provisions

36. Section 90[20] of the Income Tax Act reads as follows:

> ***"90. Agreement with foreign countries or specified territories.***[1]
>
> *(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*

20 Section 90 (1) was substituted with effect from 010.10.2009. The earlier provision was amended three times. Section 90 (2A) was inserted with effect from 01-04.2013 and amended with effect from 01-04-2016. It was later omitted by Act 17 of 2013. Section 90 (4) substituted, by Act 17 of 2013, the *"a certificate, containing such particulars as may be prescribed, of his being a resident"* (w.e.f. 1-4-2013) to the present provision. Section 90 (5) was inserted by w.e.f. 1-4-2013.Explanation 3 was inserted by Section 32 of Act 23 of 2012, s. 32 (w.e.f. 01-10-2009) and Explanation 4 was inserted by Act 7 of 2017, Section 39 (w.e.f. 1-4-2018).

(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, 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.

(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless [4] a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed.

Explanation 1.- *For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.*
Explanation 2.—*For the purposes of this section, "specified territory" means any area outside India which may be notified as such by the Central Government.*
Explanation 3.—*For the removal of doubts, it is hereby declared that where any term is used in any agreement entered into under sub-section (1) and not*

> *defined under the said agreement or the Act, but is assigned a meaning to it in the notification issued under sub-section (3) and the notification issued thereunder being in force, then, the meaning assigned to such term shall be deemed to have effect from the date on which the said agreement came into force.*
> ***Explanation 4.**—For the removal of doubts, it is hereby declared that where any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement; and where the term is not defined in the said agreement, but defined in the Act, it shall have the same meaning as assigned to it in the Act and explanation, if any, given to it by the Central Government."*

37. The relevant extracts of the DTAAs and the MFN clause contained within them, are extracted in Part IV.C below.

IV. Analysis

A. General

38. Treaty making power vests exclusively with the Union, *per* Article 253 of the Constitution, and the relative entries in the Union List (List I, VII[th] Schedule). Entering into a treaty is an attribute of sovereignty, and the power to do vests solely in the Union executive - as opposed to the states, or the shared (concurrent) domain within the distribution of administrative powers under the Constitution; thus, it can be traced to Article 73 of the Constitution. The structure and phraseology of Article 253 leaves one in no doubt, that *it is when a treaty is* enacted by law, or enabled through legislation, which assimilates it, that *such provisions* are enforceable in India.

39. Duncan B. Hollis[21], in a paper describes that

> *"The treaty lives a double life. By day, it is a creature of international law, which sets forth extensive substantive and procedural rules by which the treaty must operate [....] By night, however, the treaty leads a more domestic life. In its domestic incarnation, the treaty is a creature of national law, deriving its force from the constitutional order of the nation state that concluded it."*

21 Duncan Hollis: *Executive Federalism : Forging New Federalist Constraints on the Treaty Power" Legal Studies Research Paper Series* available at

40. In *State of W.B.* v. *Jugal Kishore More*[22], this court held that the executive may make treaties with foreign States for the extradition of criminals, but those treaties can only be carried into effect by Act of Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign power. Likewise, in *State of Gujarat v. Vora Fiddali Badruddin Mithibarwala*[23] this court observed that in India, unlike some other countries the stipulations of a treaty duly ratified do not by virtue of such event (i.e. signing the treaty alone) have the force of law and Article 253 of the Constitution of India recognises this position. If a treaty either requires alteration of or addition to existing law, or affects the rights of the subjects, or are treaties on the basis of which obligations between the treaty-making state and its subjects have to be made enforceable in municipal courts, or which, involves raising or expending of money or conferring new powers on the government recognizable by the municipal courts, a legislation will be necessary.

41. In the judgment reported as *V.O. Tractoroexport v. Tarapore & Co*[24] this court underlined that

> *"16. We may look at another well-recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well-*

22 1969 (1) SCR 320
23 1964 (6) SCR 461
24 (1969) 3 SCC 562

established sense which they had in municipal law. (See Barras v. Aberdeen Steam Trawling & Fishing Co. Ltd. [(1933) AC 402])"

42. This court, in *Maganbhai Ishwarbhai Patel & Ors. v. Union of India & Ors.*[25] followed the ruling of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario & Ors.*[26] (which had made some observations in the context of a rule applicable within the British Empire). This court's ruling in *Maganbhai Ishwarbhai* (supra) is the most significant, on this aspect. The relevant observations are as follows:

"It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.... .Parliament, no doubt, ...has a Constitutional control over the executive : but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default."
These observations are valid in the context of our Constitutional set up."

43. The issue was more pointedly dealt with by the concurring judgment of J.C. Shah, J (who relied on Oppenheim's International Law, 8th Edition):

"...Such treaties as affect private rights and, generally, as required for their enforcement by English Courts a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament. To that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the Legislature.
****
The binding force of a treaty concerns in principle the contracting States only, and not their subjects. As International Law is primarily a law between States only and exclusively, treaties can normally have effect upon States only. This Rule can, as has been pointed out by the Permanent Court of International

25 1970 (3) SCR 53
26 [1937] A.C. 326

Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise, if treaties contain provisions with regard to rights and duties of the subjects of the contracting States, their Courts, officials, and the like, these States must take steps as are necessary according to their Municipal Law, to make these provisions binding upon their subjects, Courts, officials, and the like."

Shah, J also referred to Articles 73 and 253 and further commented:

"80...By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The Executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty."

In *Gramaphone Co. of India Ltd. v. Birendra Bahadur Pandey & Ors.*[27] it was observed as follows:

"The doctrine of incorporation also recognises the position that the Rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it."

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

(i) The terms of a treaty ratified by the Union do not *ipso facto* acquire enforceability;

(ii) 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

27 [1984] 2 SCR 664

Schedule to the Constitution of India] and Parliament, holds the exclusive power to legislate upon such conventions or treaties.

(iii) 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*.

(iv) The application of such treaties is binding upon the Union. Yet, they *"are not by their own force binding upon Indian nationals"*.

(v) 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*.

(vi) 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.

(vii) 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.

45. The clearest enunciation of law, on Section 90 can be found in *Union of India (UOI) & Ors. v Azadi Bachao Andolan & Ors*[28]. Apart from noticing the decisions of various High Courts (i.e. *Commissioner of Income Tax v. Visakhapatnam Port Trust*[29], *Commissioner of Income Tax v. Davy Ashmore India Ltd.*[30], *Leonhardt Andra Und Partner, Gmbh* v. *Commissioner of Income Tax*[31], *Commissioner of Income Tax v. R.M. Muthaiah*[32] and *Arabian Express Line Ltd. of United Kingdom & Ors. v. Union of India*[33]) this court held as follows:

> *"The provisions of Sections 4 and 5 of the Act are expressly made "subject to the provisions of this Act", which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the*

28 2003 (Supp4) SCR 222
29 [1983]144ITR146(AP)
30 [1991]190 ITR 626 (Cal)
31 [2001] 249 ITR 418 (Cal)
32 [1993]202 ITR 508 (KAR)
33 [1995] 212 ITR 31 (Guj)

Income Tax Act and a notification issued Under Section 90, is no longer res integra.

********** **********

26. 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.

27. The contention of the respondents, which weighed with the High Court viz. that the impugned circular No. 789 is inconsistent with the provisions of the Act, is a total non-sequitur. As we have pointed out, Circular No. 789 is a circular within the meaning of section 90; therefore, it must have the legal consequences contemplated by sub-section (2) of section 90. In other words, the circular shall prevail even if inconsistent with the provisions of Income Tax Act, 1961 insofar as assessees covered by the provisions of the DTAC are concerned.

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29. In our view, the contention is wholly misconceived. Section 90, as we have already noticed (including its precursor under the 1922 Act), was brought on the statute book precisely to enable the executive to negotiate a DTAC and quickly implement it. Even accepting the contention of the respondents that the powers exercised by the Central Government under section 90 are delegated powers of legislation, we are unable to see as to why a delegate of legislative power in all cases has no power to grant exemption. There are provisions galore in statutes made by Parliament and State legislatures wherein the power of conditional or unconditional exemption from the provisions of the statutes are expressly delegated to the executive. For example, even in fiscal legislation like the Central Excise Act and Sales Tax Act, there are provisions for exemption from the levy of tax. (See Section 5A of Central Excise Act, 1944 and Section 8(5) of the Central Sales Tax Act, 1956). therefore we are unable to accept the contention that the delegate of a legislative power cannot exercise the power of exemption in a fiscal statute."

46. The legal position discernible from the previous discussion, therefore is that upon India entering into a treaty or protocol does not result in its automatic *enforceability* in courts and tribunals; the provisions of such treaties and protocols do not therefore, confer rights upon parties, till such time, as appropriate notifications are issued, in terms of Section 90(1).

47. The various DTAAs, their relative Protocols and the date(s) of their notification under Section 90 of the Income Tax Act, based on the submissions of parties, and the materials placed on the record, are summarized in a tabular chart:

SUMMARIES OF DTAAs, PROTOCOLS & NOTIFICATIONS IN TABULAR FORMAT

Contracting State #2	signing of/ entry into treaty	date of entry into force	Notification, if any	Date of signing relevant amending protocol	Effective date of said amendment/ protocol	Notification if any	Whether member of OECD
Netherlands	Treaty & Protocol - 13.07.1988	21.01.1989	27.03.1989	13.08.1999[34]	01.04.1997 or 01.04.1991 or 01.04.1998 or 01.04.1995 (based on the provision, in relation to the concerned country)	30.08.1999	Yes (13 November 1961)
				10.05.2012	02.11.2012	14.01.2013 - giving effect from 02.11.2012	
USA [earlier agreement dated 15.06.1989; also see instruction dated 28.04.2003 and 23.10.2007]	Treaty & Protocol: 12.09.1989	18.12.1990	20.12.1990	No amendment. [Note – USA does not have an MFN clause]	NA	NA	Yes (12 November 1961)
UK [had an earlier agreement dated 30.06.1956; see also instruction dated 19.03.2004]	Treaty & Protocol: 25.01.1993	26.10.1993	11.02.1994	30.10.2012	27.12.2013	10.02.2014 - to be given retrospective effect from 27.12.2013	Yes (2 May 1961)
Belgium	26.04.1993 (protocol)	01.10.1997	31.10.1997		01.04.1998 (for India)	19.01.2001	Yes (13 September 1961)
France	Treaty & Protocol - 29.09.1992	01.08.1994	07.09.1994		01.04.1995 or 01.04.1997 (based on the provision)	10.07.2000	Yes (07 August 1961)
					12.08.2009	12.08.2009	
Switzerland	Treaty and Protocol - 02.11.1994	19.10.1994/ 29.12.1994 01.01.1995 (Switzerland	21.04.1995	Protocol amending 1994 Treaty (2000) - 16.02.2000	In force from 20.12.2000 1 January 2001 (Switzerland)	07.02.2001	Yes (28 September 1961)

34 13/30.08.1999 (date of signing mentioned as 13.08.1999 in Protocol, but as 30.08.1988 in amending notification dated 30.08.1999).

Contracting State #2	signing of/ entry into treaty	date of entry into force	Notification, if any	Date of signing relevant amending protocol	Effective date of said amendment/ protocol	Notification if any	Whether member of OECD
		) and 01.04.1995 (India)			; 1 April 2001 (India)		
				Protocol amending 1994 Treaty (2010) - 30.08.2010	In force from 10.10.2011 1 January 2012 (Switzerland) ; 1 April 2012 (India)	27.12.2011	
Germany [replaced older agreements notified on 13.09.1960, 27.04.1979 and 02.03.1990]	Treaty & Protocol: 19.06.1995	26.10.1996	29.11.1996	No amendment [Note – Germany does not have an MFN clause]	NA	NA	Yes (27 September 1961)
Philippines	Treaty & Protocol: 12.02.1996	21.03.1994[35]	02.04.1996			02.02.2005	No
Sweden	24.06.1997	25.12.1997	17.12.1997	Protocol amending the Convention and Protocol - signed on 17.02.2013	16.08.2013	14.08.2013 - to be given effect to from 16.08.2013	Yes (28 September 1961)
Portuguese Republic	Treaty and Protocol: 11.09.1998	30.04.2000	16.01.2000 (correction by notifications dated 25.08.2000 and 20.09.2005)	24.06.2017	08.08.2018	11.09.2018 - to have effect from 08.08.2018 (Art. 26 says 10.08.2018 in the footnote)	Yes (4 August 1961)
Slovenia	13.01.2003	17.02.2005	31.05.2005	Protocol amending the Convention and Protocol - signed on 17.05.2016	date of entry into force is 21.12.2016	Notification dated 27.10.2017 - to have effect from 01.03.2017	Yes (21 July 2010)
Finland	Treaty & Protocol: 15.01.2010	19.04.2010	20.05.2010 - with effect from 01.04.2011	-	NA	NA	Yes (28 January 1969)
Lithuania	Treaty & Protocol: 26.07.2011	10.07.2012	25.07.2012: to have effect from 01.04.2013	-	NA	NA	Yes (05 July 2018)
Colombia	Treaty & Protocol: 13.05.2011	07.07.2014	23.09.2014	-	NA	NA	Yes (28 April 2020)

35 Unclear if there is perhaps a typographical error in the Notification produced before this court.

C. <u>The interpretation of the term "is"</u>

48. The High Court had interpreted the term "is" occurring in the DTAAs [see Clause IV(2)[36] of the India-Netherlands DTAA – the other two clauses in relation to France and Switzerland being similar], which according to it *"describes a state of affairs that should exist not necessarily at the time when the subject DTAA was executed but when a request is made by the taxpayer or deductee for issuance of a lower rate withholding tax certificate under Section 197 of the Act. The word 'is'- is both autological and heterological. An autological word is one that expresses the property that it possesses. Opposite of that is a heterological word, i.e., it does not describe itself".* According to that interpretation of 'is, when the request for parity is made by a party seeking aid of the DTAA and the Protocol containing a "same treatment" or in other words, a *pull in clause,* the court has to consider whether *at that time the third party state is enjoying better benefits.* Integral to this interpretation is whether the "is a member" means the present tense, which is that the third party state should be a member of OECD when it enters into DTAA with India. This is relevant, because the India-Lithuania DTAA was signed on 26.07.2011; and notified on 25.07.2012[37]. The date of membership of Lithuania into OECD was 05.07.2018. The India-Colombia DTAA was signed on 13.05.2011; its date of Notification was 23.09.2014. Colombia was admitted to membership of OECD on 28.04.2020. Slovenia signed a DTAA with India on 13.01.2003; this was notified on 31.05.2005, and Slovenia became a member of OECD on 21.07.2010. An amending Protocol was entered into, between India and Slovenia, on 16.05.2016, which was notified on 27.10.2017.

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36 "*If after the signature of this convention under any Convention or Agreement between India <u>and a third State which **is** a member of the OECD</u>, India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."* [emphasis supplied]

37 Notification No. 28/2012 [F. No. 503/02/1997-FTD-1]/S.O. 1693(E), dated 25-7-2012

49. Thus, in all three cases, the three "third party" nations: Lithuania, Colombia and Slovenia, were initially not members of OECD when they entered into treaties and protocols with India; they became members later.

50. In *Jagir Kaur v. Jaswant Singh*[38] Section 488 of the erstwhile Criminal Procedure Code read as follows:

> *"Proceedings under this Section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."*

This court considered the meaning of "is" in the above provision:

> *"The crucial words of the sub-Section are, "resides", "is" and "where he last resided with his wife". Under the Code of 1882 the Magistrate of the District where the husband or father, as the case may be, resided only had jurisdiction."*

The court then emphasized that the term "is" was fact dependent, and had to be read *contextually:*

> *"The purpose of the statute would be better served if the word "resides" was understood to include temporary residence. The juxtaposition of the words "is" and "last resided" in the sub-Section also throws light on the meaning of the word "resides". The word "is", as we shall explain later, confers jurisdiction on a Court on the basis of a casual visit and the expression "last resided", about which also we have something to say, indicates that the Legislature could not have intended to use the word "resides" in the technical sense of domicile. The word "resides" cannot be given a meaning different from the word "resided" in the expression "last resided" and, therefore, the wider meaning fits in the setting in which the word "resides" appears."*

In *P. Anand Gajapati Raju v. P.V.G Raju*[39] in the context of the Arbitration and Conciliation Act, 1996, this court explained that "is" normally has present signification:

> *"the phrase which is the subject of an arbitration agreement does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the Court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending. Blacks Law Dictionary has defined the word is as follows:*
> *"This word, although normally referring to the present, often has a future meaning, but is not synonymous with shall have been. It may have, however, a past signification, as in the sense of has been."*

38 (1964) 2 SCR 73
39 (2000) 4 SCC 539

Again, in *Vijay Kumar Prasad v. State of Bihar*[40] this court reiterated the same view, that "is" refers to the present:

> *"Although the expression normally refers to the present, often it has a future meaning. It may also have a past signification as in the sense of "has been". (See F.S. Gandhi v. CWT [(1990) 3 SCC 624 : 1990 SCC (Tax) 364 : AIR 1991 SC 1866] .) The true intention has to be contextually culled out."*

51. From the above discussion, it is clear that the expression "is" has a present signification and it derives meaning from the context. Given this interpretation, the conclusion is that when a third-party country enters into DTAA with India, it should be a member of OECD, for the earlier treaty beneficiary to claim parity.

D. Treaty practice of India, in relation to DTAAs and their Protocol, and practices of Netherlands, France and Switzerland

52. The DTAA which India entered into with the Kingdom of Netherlands, was signed on 13.07.1988. Article IV of the Protocol (of the same date), to the DTAA provided that

> *"if after the signature of the aforesaid Convention under any Convention or Agreement between India and a third State which is a member of the Organisation for Economic Co-operation and Development, India, should limit 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 or scope provided for in this Convention on the said items of income "then, as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention"*

53. The DTAA between India and Germany entered into force on 26.10.1996; the DTAA between India and Sweden entered into force on 25.12.1997, the India-Swiss Confederation DTAA entered into force on 19.10.1994, and the DTAA between India and the United States of America entered into force on 18.12.1990. These states were members of the OECD. The Union limited the taxation at source on dividends, interest, royalties, fees for technical services

40 (2004) 5 SCC 196

and payments for the use of equipment to a rate lower or a scope more restricted than that provided in the DTAA between India and the Netherlands on the said items of income. Consequently, the notification dated 30.08.1999, provided the following benefits expressly on different dates, having regard to the fact that India entered into DTAAs with OECD members and gave them effect, *subsequently*:

> *"Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that the following modifications shall be made in the Convention notified by the said notification which are necessary for implementing the aforesaid Convention between India and the Netherlands, namely:*
> *I. With effect from April 1, 1997, for the existing paragraph 2 of article 10 relating to dividends the following paragraph shall be read :*
> *"2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed 10 per cent. of the gross amount of the dividends."*
> *II. With effect from April 1, 1997, for the existing paragraph 2 of article 11 relating to interest the following paragraph shall be read :*
> *"2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent. of the gross amount of the interest."*
> *III. With effect from the April 1, 1997, for the existing article 12 relating to royalty, fees for technical services and payments for the use of equipment the following article shall be read :*
> *"Article 12*
> *ROYALTIES AND FEES FOR TECHNICAL SERVICES*
> *1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
> *2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State ; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed :*
> *(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 4 and fees for technical services as defined in this article (other than services described in sub-paragraph (b) of this paragraph):*
> *(i) during the first five taxable years for which this Convention has effect,--*
> *(A) 15 per cent. of the gross amount of the royalties or fees for technical services as defined in this article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company ; and*
> *(B) 20 per cent, of the gross amount of the royalties or fees for technical services in all other cases ; and*

(ii) during the subsequent years, 15 per cent. of the gross amount of royalties or fees for technical services ; and
(b) in the case of royalties referred to in sub-paragraph (b) of paragraph 4 and fees for technical services as defined in this article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 4(b) of this article, 10 per cent. of the gross amount of the royalties or fees for technical services.
3. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2.
4. The term "royalties" as used in this article means:
(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including motion picture films and works on film or video-tape for use in connection with television, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience ; and
(b) payments of any kind received as consideration for the use of, or the right to use industrial, commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of articles 8 and 8A (shipping and air transport) from activities described in paragraph 2(a) of article 8 or paragraph 4(b) of article 8A.
5. For purposes of this article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :
(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this article is received ; or
(b) make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or technical design.
6. Notwithstanding paragraph 5, "fees for technical services" does not include amounts paid:
(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 4(a) ;
(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;
(c) for teaching in or by educational institutions;
(d) for services for the personal use of the individual or individuals making the payment; or
(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in article 14 (independent personal services) of this Convention.
7. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of one of the States, carries on business in the other State, in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base

situated therein, and the royalties or fees for technical services are effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.

8. Royalties or fees for technical services shall be deemed to arise in one of the States when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of one of the States or not, has in one of the States a permanent establishment or a fixed base in connection with which the contract under which the royalties or fees for technical services are paid was concluded, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

9. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of royalties or fees for technical services, having regard to the royalties or fees for technical services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payment shall remain taxable according to the laws of each State, due regard being had to the other provisions of this Convention."

IV. With effect from April 1, 1995, for paragraph 6 of article 12 relating to royalties and fees for technical services referred to in paragraph III above the following paragraph shall be read:

"6. Notwithstanding paragraph 5, 'fees for technical services' does not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property ;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals, making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in article 14 (independent personal services) of this Convention."

V. With effect from April 1, 1997, for paragraph 2 of article 12, relating to royalties and fees for technical services referred to in paragraph III above the following paragraph shall be read :

"2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent. of the gross amount of the royalties or the fees for technical services."

VI. With effect from April 1, 1998, for paragraph 4 of article 12 relating to royalties and fees for technical services referred to in paragraph III above the following paragraph shall be read :

> *"4. The term "royalties" as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, for information concerning industrial, commercial or scientific experience."*
> *VII. The memorandum of understanding and the confirmation of understanding, dated September 12, 1989, with reference to paragraph 4 of article 12 of the Indo-USA Double Taxation Avoidance Convention (DTAC), will apply mutatis mutandis for the purpose of paragraphs III, IV, V and VI above."*

54. It is therefore, clear that the *date on which the relief of rate of taxation for interest and dividends* was specified to be 01.04.1997; different dates (01.04.1995 and 01.04.1998) were applied as applicable to the definition of fees and technical services and other details; the rates, too varied, depending on the period(s). The second aspect, is that *the notification under Section 90 was issued on 30.08.1999.* The third, and most significant aspect is that the favourable or beneficial treatment was given to other OECD nations on 26.10.1996 (India-Germany); the DTAA between India and Sweden entered into force on 25.12.1997, the India-Swiss Confederation DTAA entered into force on 19.10.1994 itself. These earlier dates, *did not result in* India automatically extending benefits of Article IV of the India-Netherlands DTAA Protocol to Netherlands. The relevant phrase in that provision (Article IV) obliged India to grant to the Netherlands, the same benefit to it, as was granted to the other nation in that third party state's DTAA or Protocol with India:

> *"as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also. apply under this Convention"*

55. Clearly, therefore, so far as India-Netherlands DTAA goes, there is established and clear precedent, of behaviour, in relation to treaty practise and interpretation. This was uncontested, and is a matter of record.

56. In relation to France, the India-France DTAA and Protocol came into force on 01.08.1994, after the notification by the contracting states to each other of the completion of the procedures required under their laws to bring them into

force. Article 7 of that DTAA (which dealt with principles of taxation of Business profits), provided by Article 7(3)(a) that:

> *"Provided that where the law of the Contracting State in which the permanent establishment is situated imposes a restriction on the amount of the executive and general administrative expenses which may be allowed, and that restriction is relaxed or overridden by any Convention, Agreement or Protocol signed after 1-1-1990 between that Contracting State and a third State which is a member of the OECD, the competent authority of that Contracting State shall notify the competent authority of the other Contracting State of the terms of the corresponding paragraph in the Convention, Agreement or Protocol with that third State immediately after the entry into force of that Convention, Agreement or Protocol and, if the competent authority of the other Contracting State so requests, the provisions of that paragraph shall apply under this Convention from that entry into force."*

57. The DTAA between India and USA had been entered into force, on 18.12.1990; the DTAA between India and Germany had been entered into on 26.10.1996. These DTAAs gave benefits or more favourable treatment to USA and Germany, in respect of income on dividends, interest, royalties, definition of royalties and fees for technical services. In the light of these, India notified changes in the applicable provisions to the India-France DTAA and Protocols through a notification in July, 2000[41]. The recital to the said notification of 2000 reads as follows:

> *"And whereas in the Convention between India and Germany which entered into force on the 26th October, 1996, and the Convention between India and the United States of America which entered into force on the 18th December, 1990, which States are members of the Organisation for Economic Co-operation and Development, the Government of India has limited the taxation at source on dividends, interest, royalties, fees for technical services and payments for the use of equipment to a rate lower or a scope more restricted than that provided in the Convention between India and France on the said items of income."*

58. The amending notification again followed the same pattern, as in the case of the India-Netherlands DTAA, of defining the rate and nature of relief on interest, and dividends and the rates applicable, and different definition for different dates for *"fees on royalties and technical services"*, i.e. 01.04.1995

41 Notification No. S.O. 650(E), dated 10-7-2000

and 01.04.1997 for Articles 11, 12, and 13. This notification again reinforced India's practise and conduct of giving effect of the subsequent event of a more beneficial arrangement with a third country, to the country which had entered into a DTAA previously, on the basis of a treaty provision, *through an express action i.e., a notification under Section 90.* Another aspect is that the India-UK DTAA and India-Portugal DTAA had a condition, i.e., that by Article 4, technical services (for the purpose of levying tax on income from fees for technical service) applied a condition that the taxpayer could

> *"make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design"*

59. Steria's argument in addition, was that the India-Portugal DTAA was signed on 11.09.1998 (after 29.09.1992 when India-France DTAA was signed). The Portuguese Republic is a member of OECD. Similarly, India - UK DTAA was signed on 25.01.1993 (after 29.09.1992) and the UK is a member of OECD. Hence, the scope of India-France DTAA is less restrictive than these two DTAAs (India-Portugal and India-UK). The provisions of the latter two DTAAs enabling such acts to get benefits, too should have applied. The revenue argues that for the more restrictive definitions in the DTAAs in India-Portugal and India-UK treaties, to be automatically imported into India-France DTAA there is need for a notification, before its scope could be imported. It is pointed out that the Protocol, of 10.07.2000 did not extend the expanded definition, and instead confined the benefits to definition and treatment of income from dividends, interest, and royalties. The "make available" condition, in other DTAAs was consciously omitted from the notification.

60. The omission of certain benefits (available to other member countries of OECD who had entered into DTAAs with India) in the subsequent notification, dated 10.07.2000, is another indication that a "trigger" event such as India granting favourable relief to a country *per se* does not cover all the benefits

granted through the later instrument. Therefore, the benefit which India granted France, was *within the framework of its treaty originally negotiated.* In the case of the other country (granted benefits later, through a convention, by India), a different trajectory of negotiations might have led to different kind of benefits to the third country (UK and Portugal, in the case of France). In other words, the structure of the main DTAA, and its phraseology, based on negotiations with the countries concerned, i.e., Netherlands, France and Switzerland, also plays a role in the *kind of benefits that are assured through it.* The structure and terms of other DTAAs might be different; the coverage and definition of certain terms (FTS, permanent establishment, etc.) might be dissimilar. The revenue's argument that grant of *automatic* benefits based on the other country's entry into OECD, as unfeasible, has merit.

61. As far as Switzerland is concerned the earlier discussion has noticed the three different dates when DTAA and the two later Protocols were entered into. They were given effect to by three separate notifications (No. GSR 357(E), dated 21.04.1995; as amended by Notification No. GSR 74(E), dated 07.02.2001 and Notification No. S.O. 2903(E), dated 27.12.2011). The second Protocol contained a condition, which constituted the "trigger" event. That provision is extracted below:

> *"D With reference to Articles 10, 11 and 12*
> *If after the signature of the Protocol of 16th February, 2000 under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Agreement on the said items of income, then, Switzerland and India shall enter into negotiations without undue delay in order to provide the same treatment to Switzerland as that provided to the third State."*

62. Nestle had argued that this provision has been deleted, and instead, another condition added, by the 2010 Protocol, which reads as follows:

> *"ARTICLE 11*

Paragraph 4 of the Protocol to the Agreement shall be deleted and replaced by the following paragraph:
With reference to Articles 10, 11, 12 and 22
The provisions of Articles 10, 11, 12 and 22 shall not apply in respect to any dividend, interest, royalty, fees for technical services or other income paid under, or as part of a conduit arrangement. The term "conduit arrangement" means a transaction or series of transactions which is structured in such a way that a resident of a Contracting State entitled to the benefits of the Agreement receives an item of income arising in the other Contracting State but that resident pays, directly or indirectly, all or substantially all of that income (at any time or in any form) to another person who is not a resident of either Contracting State and who, if it received that item of income directly from the other Contracting State, would not be entitled under a Convention or Agreement for the avoidance of double taxation between the State in which that other person is resident and the Contracting State in which the income arises, or otherwise, to benefits with respect to that item of income which are equivalent to, or more favorable than, those available under this Agreement to a resident of a Contracting State; and the main purpose of such structuring is obtaining benefits under this Agreement.
In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services), if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD signed after the signature of this Amending Protocol, India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower than the rate provided for in this Agreement on the said items of income, the same rate as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply between both Contracting States under this Agreement as from the date on which such Convention, Agreement or Protocol enters into force.
If after the date of signature this Amending Protocol, India under any Convention, Agreement or Protocol with a third State which is a member of the OECD, restricts the scope in respect of royalties or fees for technical services than the scope for these items of income provided for in Article 12 of this Agreement, then Switzerland and India shall enter into negotiations without undue delay in order to provide the same treatment to Switzerland as that provided to the third State."

It is urged that the change in terminology is significant. The earlier Protocol had obliged *parties to enter into negotiations* to ensure that benefits extended to state parties which later entered into OECD membership, were given to Switzerland. However, the language of the third Protocol is more emphatic, in that it, states, through the second paragraph of the amended Protocol to Article 11, that in such event (of entry by third party state into OECD):

> *"the same rate as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply between both Contracting States under this Agreement as from the date on which such Convention, Agreement or Protocol enters into force."*

63. At this stage, it would also be useful to note that the second Protocol, by Article 16, had provided that:

> *"ARTICLE 16*
> *The Governments of the Contracting States shall notify each other through diplomatic channels*
> *1. that all legal requirements and procedures for giving effect to this Protocol have been satisfied. [..]"*

It could plausibly be argued that this condition is not substantive, but only diplomatic. However, what it requires is that the concerned governments have to notify *how and when* the Protocol is assimilated into the domestic legal system. Quite correctly the provision does not assign any time frame within which the Protocol has to be made effective. Therefore, inbuilt in the entire eco-system of the DTAAs is the inarticulate premise that assimilation into the domestic legal system is not always within the control of the executive wing which enters into the convention, or signs the protocol and that compelling constitutional and legal requirements have to be satisfied, before its benefits are integrated within the national *legal regimes.* This consideration, or premise, would equally apply in the case of the India-Switzerland DTAA and its amending Protocol; the requirement of notification of the protocol and a separate *amending Protocol,* (like in the case of France and Netherlands) is necessary, by reason of Section 90 of the Act. Switzerland cannot claim an exception, based only on the language of the third Protocol.

64. It would be useful to end this discussion, with one more instance of India's treaty practice, in regard to fulfilling its obligations under DTAAs and their Protocols. India had entered into a DTAA with Canada on 30.10.1985 which was notified on 25.09.1986 under Section 90. The DTAA contained provisions relating to rate of taxation, and treatment of royalties. It also

contained a provision that in the event India entered into a subsequent DTAA with a member of the OECD, and conferred better terms, as compared with Canada, then the latter would be extended similar benefits. The India-Sweden DTAA was signed on 12.12.1988, which extended more favourable benefits, than what was given to Canada; Sweden was an OECD member when the DTAA was signed with India. This constituted the "trigger" event, impelling Canada to seek parity. The Protocol (of 1985) to the India-Canada DTAA contained the following stipulation:

> *"With reference to paragraph 2 of article 13, in the event that pursuant to an Agreement or a Convention concluded with a State which is a member of the Organisation for Economic Co-operation and Development after the date of signature of this Agreement, India would accept a rate lower than 30 per cent for the taxation of royalties or fees for technical services paid by a resident of India to a resident of that State, it is understood that such lower rate will automatically be applied for the taxation of royalties and fees for technical services paid by a resident of India to a resident of Canada where the royalties or fees for technical services are paid in respect of a right or property which is first granted, or under a contract which is signed, after the date of entry into force of the first-mentioned Agreement or convention."*

65. The amendment to the DTAA was on 24.06.1992, which was notified under Section 90 on 28.10.1992; it reads *inter alia,* as follows:

> *"Subsequent to the signing of the Agreement with Canada, India has entered into Agreements with other OECD countries, wherein the rate of taxation in respect of royalties and fees for technical services has been agreed at 20% of the gross amount. The revised Agreement with Sweden, which came into force on 12th December, 1988, is the first of such Agreements. Accordingly, after consultation with the Canadian Government,"a notification has been issued on 24th June, 1992 notifying that the rate of tax of 20% will be applicable to royalties and fees for technical services paid by a resident of India to a resident of Canada. This reduced rate will be applicable to payments made in respect of the right or property which is first granted or under a contract which is signed, after the 12th day of December, 1988. A copy of the notification bearing GSR No. 635(E), dated 24th June, 1992, is enclosed.*
> *3. The Canadian Government have also passed a Remission Order dated 3rd December, 1991, making the revised rate as above applicable to Indian residents as well in respect of royalties or fees for technical services paid by a Canadian resident."*

66. It is quite clear that the Protocol, to the original DTAA was unambiguous and emphatic; it required that the trigger event would lead to *"such lower rate*

will automatically be applied for the taxation of royalties and fees for technical services paid by a resident of India to a resident of Canada where the royalties or fees for technical services are paid in respect of a right or property". In such an instance, of language, in the protocol, being as emphatic as the third Protocol to the India-Switzerland DTAA, the treaty practice of India was consistent; a separate notification was later issued.

67. The respondents had relied on decrees/decisions of each of the countries, to underline that in terms of treaty practice of the three countries, the Union government has to extend reciprocity, which means that similarly, automatic benefits have to be given to taxpayers, claiming them under DTAAs and Protocols, on the occurrence of a third-party state granted better benefits, gaining admission/membership into OECD. The decree or decision of the Directorate General of Fiscal Affairs, International Fiscal Affairs (relevant authority in the Kingdom of Netherlands), relied upon by Concentrix and Optum Global[42] reads as follows:

> *"In the treaty India agreed with Slovenia which entered into force on 17 February 2005 has entered a participation dividend rate of 5 percent. This is the case a participation dividend, if a company immediately provides at least 10 percent of the capital hold the body that pays the dividends. Slovenia joined. the OECD on 21 July 2010. Under the most-favored nation clause in the Protocol to the Convention, this event has the effect of retroactive effect to and As of July 21, 2010 a rate of 5 percent applies to participation dividends, which are paid by a body that a resident of the Netherlands to a body that is a resident of India. The text of the relevant Treaty provision from the India -Slovenia Treaty is contained in the attachment.*
>
> *The most-favored-nation clause remains on portfolio dividends (if a body is less than 10 percent of the share capital of the company that pays the dividends) in the Netherlands-India relationship a rate of 10 percent applies. This rate is taken from the treaty between India and Germany of June 19, 1995 and applies since April 1, 1997. Herein brings the treaty therefore no change between India and Slovenia."*

The decree issued by the Swiss Federation[43] provides as follows:

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42 Decision of 28 February 2012, No. IFZ 2012/54M, Tax treaties: India, issued by the Director General, Fiscal Affairs, Kingdom of Netherlands

43 The State Secretariat for International Financial Matters SIF Section Bilateral tax Issues and double taxation treaties, Swiss Federation, dated 13.08.2021

"Application of the most favoured nation clause of the protocol amending the agreement between the Swiss Confederation and the Republic of India for the avoidance of double taxation with respect to taxes on income Switzerland and India have concluded the agreement of 2 November 1994 for the avoidance of double taxation with respect to taxes on income (DTC IN-CH)1.1t was revised by the amending protocols dated 16 February 2000 and 30 August 2010.
Article 11 of the amending protocol dated 30 August 2010 contains a so-called most favoured nation clause, which stipulates that if, after the signing of the amending protocol dated 30 August 2010, India under any convention, agreement or protocol with a third State which is a member of the OECD, limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower than the rate provided for in OTC IN-CH on the said items of income, the same rate as provided for in that convention, agreement or protocol on the said items of income shall also apply between Switzerland and India as from the date on which such Convention, Agreement or Protocol enters into force.
Following the signing of the amending protocol dated 30 August 2010, India concluded two new double taxation agreements with States which are now OECD members, in which it granted lower rates with respect to dividends. These are the agreement of 26 July 2011 between the government of the Republic of India and the government of the Republic of Lithuania for the avoidance of double taxation with respect to income tax (DTC IN-L T) and the agreement of 13 May 2011 between the government of the Republic of India and the Republic of Colombia for the avoidance of double taxation with respect to income tax (DTC IN-CO).
Article 10, paragraph 2, letter a DTC IN-LT provides for a residual tax rate in the source State of 5% of the gross amount of dividends if the beneficial owner is a company (other than a partnership) that directly owns at least 10% of the capital of the company paying the dividends. Lithuania joined the OECD on 5 July 2018.
On the basis of the most favoured nation clause between Switzerland and India, lithuania's accession to the OECO has the effect of retroactively (from 5 July 2018) reducing the residual lax rate in the source State for dividends from qualified participations from 10% to 5% applicable to the relationship between India and Switzerland.
Article 10, paragraph 2 OTC IN-CO provides for a general residual tax rate of 5% in the source state. Colombia joined the OECD on 28 April 2020.
On the basis of the most favoured nation clause between Switzerland and India, Colombia's accession to the OECD has the effect of retroactively (from 28 April 2020) reducing the residual tax rate in the source Start: for dividends from 10% to 5% (dividends arising from qualified interests and portfolio dividends) applicable to the relationship between India and Switzerland.

Thus, under the provisions of DTC IN-CH, Indian tax residents receiving dividends from Swiss source as of 5 July 2018, or 28 April 2020 can claim, subject to the conditions laid down in DTC IN·CH, a refund of the (additional) withholding tax in accordance with the established procedures. The legal time limit set out in Article 32 of the Federal Act on withholding tax applies.."

68. The decree issued by the Republic of France, *inter alia,* after narrating and reciting the India-France DTAA, the amending Protocols, the date on which India-Germany DTAA was entered into, and the date on which the Protocol, amending India-France DTAA on the basis of the Indo-German DTAA, provided as follows:

> ***"I. Withholding tax rate on dividends and interest under the most-favoured-nation clause***
> *A. Dividends referred to in Article 11*
> *The rate of 15 % provided for in paragraph 2 of Article 11 of the Franco-Indian convention shall be replaced by that of 10% provided for in the tax treaty concluded by India with Germany.*
> *This rate shall be replaced by the rate of 5 % of the gross amount of dividends provided for in the tax treaty concluded between India and Slovenia if the 'beneficial owner is a company which directly holds at least 10 % of the capital of the company paying those dividends.*
> *B. Interest referred to in Article 2, Paragraph 12*
> *(a) The rate of 10 per cent provided for in paragraph 2 {a) of Article 12 of the Franco-Indian Convention applies to interest paid on loans granted by insurance companies as a result of India's tax treaty with the United States.*
> *(b) The rate of 15 % provided for in paragraph 2 (b) of Article 12 shall be replaced by that of 10 % following the tax treaty concluded by India with Germany."*

69. The context of these executive orders or decrees is to be understood in relation to each country's manner of assimilation of treaties, in municipal or national law. The Federal Council headed by the President and the Federal Chancellor exercise the executive authority, in Switzerland. The Federal Council has the authority to negotiate and sign treaties and conventions. The treaty after its signature is ratified in four different ways:

(a) In certain cases, Parliament authorizes the Federal Council in advance to sign the treaty and bring it into force as well;
(b) Some treaties require prior approval of the Parliament to be enforceable;
(c) In some cases, the treaty is subjected to optional referendum provided under Article 89 (3) of the Constitution;

(d) In some cases, the international agreement needs sanction through compulsory referendum in terms of Article 89 (5) of the Constitution[44].

Consequential process then follows having regard to the nature of the treaty.

70. As far as France is concerned, the French Constitution of 1958, by Article 52 empowers the President to negotiate and ratify treaties. Treaty ratification is authorized by the National Assembly and Senate when that treaty would affect the sovereignty of France or alter an existing statute, though such authorization has no normative value. A treaty affecting the rights of the citizens has to be published; after publication it prevails over French legislation. Article 55 confers upon treaties a status superior to that of domestic legislation and provides that concluded treaties do not require any implementing legislation to be enforceable.[45]

71. The Kingdom of Netherland is party to a number of treaties, international Agreements and Conventions. Such treaties have to receive approval of the Lower and Upper House of its Parliament (States General;). If a provision in a treaty is in conflict with the Constitution, a two-thirds majority of the houses is mandatory (Article 91 paragraph 3 Constitution[46]). The Netherlands government and its courts are not bound by a treaty until the States General have ratified it.

72. In the opinion of this court, the status of treaties and conventions and the manner of their assimilation is radically different from what the Constitution of India mandates. In each of the said three countries, every treaty entered into the executive government needs ratification. Importantly, in Switzerland, some treaties have to be ratified or approved through a referendum. These mean that after intercession of the Parliamentary or legislative process/procedure, the

44 Article 89 of the Federal Constitution of the Swiss Federation, available at: (accessed on 11.10.2023).

45 Title VI and Art. 56 of the French Constitution, 1958, available at: (accessed on 15.10.2023).

46 Article 91 of the Constitution of the Kingdom of Netherlands, 2018, available at: (accessed on 15.10.2023).

treaty is assimilated into the body of domestic law, enforceable in courts. However, in India, either the treaty concerned has to be legislatively embodied in law, through a separate statute, or get assimilated through a legislative device, i.e. notification in the gazette, based upon some enacted law (some instances are the Extradition Act, 1962 and the Income Tax Act, 1961). Absent this step, treaties and protocols are *per se unenforceable.*

E. International perspectives and practices

73. *Klaus Vogel*[47] (an acknowledged authority on double taxation), in the Treatise *Double Taxation Conventions,* comments - pertinently states, on the aspect of assimilation of international treaties into municipal (national) laws, that:

> ***"45.For purposes of international law**, a tax treaty comes into existence upon the declaration **of consent** by both Contracting States (Article 9(1) VCLT). Ordinarily, the Head of State is authorized to make the declaration. In Germany, the declaration under Article 59 Abs. 1 GG is made by the Federal President. In the US, under Article II, section 2, clause 2 of the Constitution, the President, as Head of State, declares the consent of the United States to be bound by the treaty under international law. This power is ordinarily delegated to the Secretary of State or a US Ambassador.*
>
> ***46.** The method by which the Contracting States declare their consent is left to the Contracting Parties (Article 11 et seq. VCLT). For important treaties, however, it is generally agreed that the conclusion of the treaty shall be given effect only through an exchange of instruments, or **'ratification'** (Article 14(1) VCLT); for multilateral treaties, it is by deposit of instruments at a location agreed upon in the treaty through corresponding notification (Articles 14(1), 16 VCLT). Ratification is to be distinguished from parliamentary consent (see above), which frequently, primarily in the language of the media, is incorrectly termed as 'ratification'. Article 31 of the OECD MC, Article 30 of the UN MC and Article 29 of the US MC each provide for ratification of tax treaties and treaties normally follow the MC in this respect. In the document of ratification, the authorized agent - the President in the US, the Federal President in Germany, Austria and Switzerland – delivers the formal declaration that the constitutional requirements necessary for internal application of the treaty have been fulfilled (see infra Article 31 at m.no. 11 et seq.).*
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> ********** **********
>
> ***47.** Upon declaration of intent to contract, whether through ratification or other means, the treaty becomes binding under international law (unless the treaty provides for a different date for entry into force). The binding force of the treaty under international law is to be distinguished from its **internal applicability.** Internal applicability is a consequence only of treaties which -*

47 *Klaus Vogel on Double Taxation Conventions*

*like tax treaties - are designed to be applied by domestic authorities in addition to obligating the States themselves (i.e., **self-executing** treaties).*[48]

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49. *In the **UK,** where parliamentary consent is not necessary for conclusion of a treaty, the treaty becomes applicable internally only when a special law to this effect is passed by Parliament after the treaty enters into force under international law.*[49] *In special, legally authorized cases, such as for DTCs under § 788 ICTA 1988, the Queen may enact an Order in Council in place of parliamentary legislation.*[50] *A special law is also required in **Canada***[51] *and other members of the Commonwealth. Under **Netherlands** constitutional law, the treaty becomes applicable domestically at the time it enters into force,*[52] *reflecting the 'monist' theory of international law. In general, the conflict between 'monistic' and 'dualist' theories has been overcome by a compromise view.*[53]

50. *The process pursuant to which a treaty acquires the force and effect of domestic law was for long referred to by German theorists as a **'transformation'** (i.e., as the promulgation of a domestic statute parallel to the treaty and incorporating the treaty text). A similar view can also be found, though often not very explicit, in other countries.*[54] *This theory, however cannot explain why, among other things, the treaty, even after parliamentary consent, becomes applicable domestically only when it enters into force under international law or why it loses its binding force internally when it is rescinded or terminated at the international level. For these reasons, the German doctrine of international law abandoned the transformation theory. Parliamentary consent is now understood as a mandate through which the treaty itself - rather than a corresponding internal legislative provision - becomes applicable within the scope of domestic law.*[55]

51. *The point in time at which a treaty enters into force internationally and the point at which it becomes applicable under domestic law must be distinguished from the point in time at which the **material consequences** of the treaty begin to take effect, or, in other words, the taxable period or the date from which taxation shall be limited by the treaty (the effective date). Usually this 'initiation of treaty effects' is established by explicit treaty rules. Various aspects may be of importance here. Treaty rules in particular often distinguish between treaty effects on assessed taxes and those on withholding taxes. In general, the material effects of tax treaties apply retrospectively, viewed from the date of*

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48 GATT has been held by the German Bundesfinanzhof not to be 'self-executing': 25 February, 1959, BStBl. III 166, 167 (1959); 15 October 1959, BStBl. III 486, 489 (1959). Direct internal applicability of GATT, however, has been advocated by Jackson, 66 Mich. L. Rev. 250 (1967).

49 McNair, A.D., *The Law of Treaties* (1961) at 81; Oliver, J.D.B., 15 *BTR* 388 (1970).

50 See Baker, P., Double Taxation Conventions and International Tax Law (1994) at 46.

51 Ward, D.A., *Ward's Tax Treaties* (1993/94), at 6.

52 Van Raad, K., 47 *MBB* 49 (1978).

53 See in general: Tunkin, G & Wolfrum, R. (eds.), *International Law and Municipal Law* (1988).

54 See, e.g., Canadian Supreme Court of 28 September 1982, The Queen v. Melford Development Inc., D.T.C. 6281 (1982), at 6285.

55 Regarding the domestic applicability of international agreements in Germany, see Partsch, J., *Die Anwendung des Volkerrechts im innerstaatlichen Recht. Uberprufung der Transformationslehre* (6 *Berichte der Deutschen Gesellschaft fur Volkerrecht* (1964)); Blechmann, A., *Begriff und Kriterien der innerstaatlichen Anwendbarkeit volkerrechtlicher Vertage* (1970); *id*., *Grundgesetz und Volkerrecht*, 277 (1975); Langbein, V.,*Intertax* 151 (1985), original German version: Langbein, V.,30 RIW 531 (1984).

entry into force under international law; detrimental retrospectivity, however, may be prohibited.

52. *Through the mandate of the legislature, treaties in most States obtain the* ***same authority as internal law****. In some States they are even considered to have priority over domestic law.*[56]*"*

F. Vienna Convention on Law of Treaties

74. Article 31 of the VCLT[57] reflects the general rules of treaty interpretation. India is not a signatory to the convention. However, the convention has been accepted by consensus as reflecting the customary international law on general rules of treaty interpretation, and is thus still relevant in the Indian context. Article 31(3) of the VCLT provides that the following shall be taken into account, while interpreting the provisions of a treaty:

(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 the interpretation of the treaty or the application of its provisions;
(c) any relevant rules of international law applicable in the relations between the parties.

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56 For e.g., Art. 94 of the Dutch Constitution, Art. 55 of the French Constitution and for Luxembourg see Cour de Cassation of 14 July 1954, Pagani, 16 Pas. 150

57 "***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 the interpretation of the treaty or the application of its provisions;

(c) any relevant rules of international law applicable in the relations between the parties."

75. In 2018, the International Law Commission (ILC) adopted its Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties ("ILC Draft Conclusions").[58] The ILC Draft Conclusions note that under the scheme of the VCLT, subsequent agreements and subsequent practice, being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation of treaties.[59]

76. The ILC Draft Conclusions define 'subsequent agreement' as an agreement between parties, reached after the conclusion of a treaty, regarding the interpretation of a treaty and its provisions.[60] A 'subsequent practice' is defined as consisting of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.[61] Such subsequent practice under Articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions,[62] and may take several forms.[63] 'Practice' includes any type of positive action, whether physical or conduct —for instance, the reliance on the provisions of a treaty to support a State's chosen course of action, or the adoption of legislation, or enforcement action based on a treaty, and abstention from action (omission) in the application of a treaty. Put simply, practice covers *'what states do in their relations with one another'*.[64] In a more dynamic sense, it represents the process of continuous interaction between States. It also covers subsequent treaties with third States[65], and patterns of treaties, for instance when considering whether the

58 ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, available at .
59 Conclusion 3, Id.
60 Conclusion 4(1), Id.
61 Conclusion 4(2), Id.
62 Conclusion 5(1), Id.
63 Conclusion 6(2), Id.
64 JL Brierly, *The Law of Nations,* 6th Ed. (Oxford University Press, 1963), 59.
65 Irina Buga, 'Subsequent Practice as a Means of Treaty Interpretation' in *Modification of Treaties by Subsequent Practice* (Oxford University Press, 2018). See also *Report of the International Law Commission covering its 2nd session*, UN Doc A/1316 (1950) II YBILC 364, 368; M. Akehurst, 'Custom as a Source of

conclusion of a large number of Bilateral Investment Treaties (BITs) could collectively amount to subsequent practice.[66]

77. The International Court of Justice (ICJ) has accepted a wide variety of activities as interpretive conduct by states. It has referred to domestic legislation[67], diplomatic correspondence[68], and the silence or inactivity of one state in the face of the conduct of another. For example, in the *Rights of Nationals* Case, the ICJ took into account the practice of local customs officials.[69] In the *Asylum* Case[70], Colombian failure to raise the Havana Convention in diplomatic correspondence was used to show that Colombia did not construe the convention as applicable. In the *Corfu Channel* Case[71], Albanian failure to challenge the court's power to fix the amount of compensation was used in interpreting the Special Agreement as not precluding the court from fixing the quantum of damages.

78. The ILC Draft Conclusions further provide that a common understanding would be required, regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.[72] Further, the number of parties that must actively engage in subsequent practice in order to establish an agreement under Article 31(3)(b), may vary. Silence on the part of one or more parties may constitute

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International Law' (1974-75) 47 BYBIL 1, 43; ME Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Brill, 1985), para 19.

66 See eg., SM Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proc 27; JE Alvarez, 'A BIT on Custom' (2009) 42 NYU J Intl L & Pol 17.

67 See *Anglo-Iranian Oil Co. Case* (U.K. v. Iran), 1952 I.C.J. 93, 106-07 (Iranian law used in interpreting the Iranian declaration acceding to the jurisdiction of the court).

68 See *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 6, 134; *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971 I.C.J. 16, 39, where, in both cases, statements by South African diplomats were used in interpreting the League of Nations Mandates. See also *Case Concerning Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 211, where letters and minutes of meetings of customs officials were used in interpreting the treaty in question.

69 *Case Concerning Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 211

70 *Asylum Case* (Colombia. v. Peru), 1950 I.C.J. 266, 286.

71 *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 25.

72 Conclusion 10(1), Id.

acceptance of the subsequent practice when the circumstances call for some reaction.[73] Agreement between the parties in respect of subsequent conduct or practice may be established by acquiescence of parties not actively participating in the practice, or the absence of objections (characterized as 'passive conduct').[74]

79. ILC commentaries, such as the ILC Draft Conclusions on subsequent practice, are an influential subsidiary means for determining rules of law, within the meaning of the term in Article 38(1)(d) of the ICJ Statute. This is because these documents often record and assess state practice (as well as international jurisprudence and doctrine), and often explain whether (and to what extent) *opinio juris* exists.[75] As of 2019, the ICJ had relied expressly on the ILC's work in 22 cases (19 decisions in contentious proceedings and 3 advisory opinions).[76]

80. The provisions of the ILC Draft Conclusions on subsequent practice were drafted and adopted by consolidating the writings of eminent publicists in international law, pursuant to extensive research on evolving state practice.[77] The cumulative effect of these provisions is that state practice subsequent to the adoption of a treaty confirms and solidifies the intent of the parties to the treaty. The goal of treaty interpretation under the VCLT is to determine the meaning of the treaty viewed from the perspective of the *contemporary shared understanding of the parties to the treaties.*[78] As James Crawford has pointed out, from the perspective of international law, *'the parties…own the treaty'*[79].

73 Conclusion 10(2), Id.
74 ILC, Third Report on the Law of Treaties, UN Doc A/CN.4/167, 59 para 24; See also ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009), 431.
75 Danae Azaria, The International Law Commission's Return to the Law of Sources of International Law, 13 FIU L. Rev. 989 (2019).
76 Id.
77 See for eg., ILC, Reports on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, by Georg Nolte, Special Rapporteur, UN Doc A/CN.4/660 (2013); UN Doc A/CN.4/671 (2014); UN Doc A/CN.4/683 (2015), UN Doc A/CN.4/694 (2016), UN Doc A/CN.4/715 (2018).
78 Steven Ratner, 'International Law Rules on Treaty Interpretation' in The Law and Practice of the Northern Ireland Protocol, edited by Christopher McCrudden, Cambridge: Cambridge University Press (2022), pp. 80-91.
79 James Crawford, 'A Consensualist Interpretation of Article31(3) of the Vienna Convention on the Law of Treaties' in Georg Nolte et al (eds.), Treaties and Subsequent Practice (Oxford University Press, 2013), pp. 29, 31.

Bruno Simma further emphasizes the relevance of subsequent practice for the understanding of a treaty, noting that subsequent practice denotes the decisive consent of the parties, and acts as a cogent, peremptory means of treaty interpretation.[80]

81. It is widely accepted that however precise the treaty text appears to be, the way in which it is actually applied by the parties is usually a good indication of what they understand it to mean, provided the practice is consistent, and is common to, or accepted by, all the parties.[81] A relevant case in point is the interpretation of Article 5 of the Chicago Convention, which governs charter air services. This provision does not require a charter airline to obtain permission to land *en route*, provided it does not pick up or set down passengers or cargo. However, the practice of the parties over many years has been to require charter airlines to seek permission to land in all cases, and the article is now so interpreted.[82]

82. The work of Sir Gerald Fitzmaurice during the drafting process that eventually led to the formulation of Article 31 VCLT is also worthy of note. Taking as a reference point the ICJ's case law between 1951 and 1954, Fitzmaurice formulated the major principles of treaty interpretation that formed the basis for the ILC draft provisions on treaty interpretation. He outlined three subsidiary principles of interpretation, 'effectiveness', 'subsequent practice', and 'contemporaneity', which he saw as complementary to the three primary ones: 'actuality', the 'natural and ordinary meaning', and 'integration'. With regard to the principle of subsequent practice, Fitzmaurice remarked, as early as then, that: "Where the practice has brought about a change or development in the meaning of the treaty through a revision of its terms by conduct, it is

80 Bruno Simma, 'Miscellaneous thoughts on subsequent agreements and practice' in: Georg Nolte (ed.) Treaties and Subsequent Practice (Oxford University Press, 2013), pp 46–51.

81 Anthony Aust, Modern Treaty Law and Practice, (Cambridge University Press, 2013), at p. 194.

82 B. Cheng, 'Air Law', Max Planck Encyclopedia of Public International Law (1989), Vol. 11, pp. 8-9.

permissible to give effect to this change or development as an agreed revision..."[83]

83. The ICJ in its decision in *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador v Hondurus*)[84] considered and explained how *practice* of parties assumes significance in treaty interpretation:

> *"380. The Chamber considers that, while both customary law and the Vienna Convention on the Law of Treaties (Art. 31, para. 3(b)) contemplate that such practice may be taken into account for purposes of interpretation, none of these considerations raised by Honduras can prevail over the absence from the text of any specific reference to delimitation. In considering the ordinary meaning to be given to the terms of the treaty, it is appropriate to compare them with the terms generally or commonly used in order to convey the idea that a delimitation is intended. Whenever in the past a special agreement has entrusted the Court with a task related to delimitation, it has spelled out very clearly what was asked of the Court: the formulation of principles or rules enabling the parties to agree on delimitation, the precise application of these principles or rules (see North Sea Continental Shelf cases, Continental Shelf (Tunisia/Libyan Arab Jamahiriya) and Continental Shelf (Libyan Arab Jamahiriya/Malta) cases), or the actual task of drawing the delimitation line (Delimitation of the Maritime Boundary in the Gulf of Maine Area case). Likewise, in the Anglo-French Arbitration of 1977, the Tribunal was specifically entrusted by the terms of the Special Agreement with the drawing of the line.*
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> *389. On the underlying question of the status of the waters of the Gulf which was thus raised before the Central American Court, there were by then three matters which practice and the 1917 Judgement took account of: first, the practice of all three coastal States had established and mutually recognized a 1 marine league (3 nautical miles) littoral maritime belt off their respective mainland coasts and islands (see the passage of the 1917 Judgement quoted in paragraph 400 below), in which belt they each exercised an exclusive jurisdiction and sovereignty, though with rights of innocent passage conceded on a mutual basis; second, all three States recognized a further belt of 3 marine leagues (9 nautical miles) for rights of "maritime inspection" for fiscal purposes and for national security; third, there was an Agreement of 1900 between Honduras and Nicaragua by which a partial maritime boundary between the two States had been delimited, which, however, stopped well short of the waters of the main entrance to the bay.*
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> *410. If the Gulf is an historic bay, it is necessary to determine the closing line of the waters of the bay. The normal geographical closing line for the waters of the Gulf of Fonseca would be the line Punta Amapala to Punta*

83 G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 29 British Yearbook of International Law 8.
84 ICJR (1992) 351 - Decision dated 12-09-1992, [General List No. 75]

> *Cosigüina. This seems to have been the closing line recognized by the three coastal States in practice. It is, moreover, the closing line referred to in the 1917 Judgement (loc cit., p. 706). It had not been necessary to say more, had not El Salvador elaborated a thesis of an "inner Gulf" and an "outer Gulf", based on the reference in the Judgement of 1917, to an inner closing line from Punta Chiquirin, through Meanguera and Meanguerita, to Punta Rosario. The purpose of El Salvador's reference to this inner line, in its argument before the Chamber, was apparently to suggest that the Honduran legal interest in the Gulf waters was limited to the area inside the inner line, the remainder being left to El Salvador and Nicaragua. But there is nothing in the Judgement of the Central American Court of Justice to support this. There is no suggestion in that Judgement that Honduras was excluded from the waters between that inner line and the outer closing line subject to the régime of condominium found by the Court."*

84. In *Case Concerning Kasikili/Sedudu Island- Botswana v Namibia*[85] too, practice was given significance. The ICJ held, quoting from the commentary of the ILC, that *"(t)he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals." (Op cit., p. 241, para. 15.)"*

85. Donald Regan, in a paper "*Understanding What the Vienna Convention Says About Identifying and Using 'Sources for Treaty Interpretation' Identifying and Using 'Sources for Treaty Interpretation'*"[86] writes this, about treaty practice:

> *"Article 31 (3) (b) presents a different complication. Article 31 (3) (b) says that the interpreter shall take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. It is clear why practice is important. The point of the treaty is to direct behaviour. But the treaty is in words, and words are never perfectly clear. In contrast, behaviour is the very stuff the treaty is about. The ILC Commentary says the practice is 'objective evidence' of the understanding of the parties, and it quotes the Permanent Court of Arbitration, saying that practice is 'le plus sûr commentaire du sens' of the agreement.26 So, it is easy to see why concordant practice should be an authentic source if it is engaged in by all the parties. But Article 31 (3) (b) does not say the practice must be engaged in by all the parties; it says only that it must establish the agreement of all the parties. The ILC Commentary is very clear both that it must be the agreement of*

85 [1999] ICJ Rep 1045; (General List No. 98)

86 Donald Regan: *Understanding What the Vienna Convention Says About Identifying and Using 'Sources for Treaty Interpretation' Identifying and Using 'Sources for Treaty* Interpretation' University of Michigan (2017) < : > (accessed on 14.10.2023).

> *all, and that it need not be the practice of all.27 Now, we will see below that even if 31 (3) (b) contemplated only the practice of all the parties, a practice that was engaged in by some parties, but not all, could still be introduced under Article 32; and the interpreter would then consider how strong the partial practice was as evidence of a common understanding."*

86. The material cited in the preceding paragraphs, on the ILC Draft Conclusions and ICJ decisions, though not binding *per se* on this court, certainly offer valuable insight into treaty interpretation. In sum, whilst considering treaty interpretation, it is vital to take into account practice of the parties. There is no dispute that treaties constitute binding obligations upon their signatories. Yet, like all compacts, how the parties to any specific instrument view them, give effect to its provisions, and the manner of acceptance of such conventions or compacts are in the domain of bilateral relations and diplomacy. Much depends upon the relationship of the parties, the mutuality of their interests, and the extent of co-operation or accommodation they extend to each other. In this, a range of interests combine. The issue of treaty interpretation and treaty integration into domestic law is driven by constitutional and political factors subjective to each signatory. Therefore, domestic courts cannot adopt the same approach to treaty interpretation in a black letter manner, as is required or expected of them, while construing enacted binding law. The role of practice- which is, as the previous discussion demonstrates, not bilateral or joint practice, but practice by one, accepted generally by the international community as operating in that particular sphere, which is relevant, and at times determinative.

87. This court is of the opinion that the treaty practice of Switzerland, Netherlands and France is dictated by conditions peculiar to their constitutional and legal regimes. Could it conceivably be argued that in the event of failure of the Swiss Confederation to secure the requisite majority in a referendum or approval by the Swiss Parliament, or in the absence of approval by both houses of the States General in Netherlands, a DTAA provision or trigger event could nevertheless be assimilated into executive decrees? The answer is obviously in

the negative. Likewise, the treaty practice in India points to a consistent pattern of behaviour when the signatory to an existing DTAA, points to the event of a third state entering into OECD membership, and a resultant *trigger* event, the beneficial effect given to the later third-party state *has to be notified in the earlier DTAA, as a consequential amendment,* preceded by exchange of communication (and perhaps, negotiation) and acceptance of that position by India. The essential requirement of a notification under Section 90 *of the consequences of the trigger (or causative) event* cannot be undermined.

V. Conclusions

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.

(c) The interpretation of the expression "is" has present signification. Therefore, for a party to claim benefit of a "same treatment" clause, based on entry of DTAA between India and another state which is member of OECD, the relevant date is entering into treaty with India,

and not a later date, when, after entering into DTAA with India, such country becomes an OECD member, in terms of India's practice.

89. In view of the foregoing analysis and conclusions, it is held that the reasoning and findings in the impugned orders cannot survive; they are set aside.

The revenue's appeals, therefore, succeed and are allowed. There shall be no order on costs. Pending applications, including those seeking intervention for impleadment, are disposed of.

90. As the facts in CA No. 1428/2023 relate to the interpretation of the India-Spain DTAA, which has not been considered in the present judgment, this matter is hereby de-tagged, to be listed before the appropriate bench.

.....J.
[S. RAVINDRA BHAT]

.....J.
[DIPANKAR DATTA]

NEW DELHI,
OCTOBER 19, 2023.