

MFN Dilemma in India's DTAAs Post Concentrix Ruling: A Ticking Time Bomb

Saurabh Sharma and Rawat Mukesh

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Abstract

Treaty interpretation has always been an arduous task for courts and scholars alike. The subject becomes even more confounding and contentious in the wake of the imprecise drafting of the terms within certain treaties. In one such instance, India was on the receiving end when the Most-Favour-Nation (MFN) clause in the Convention between the Republic of India and the Kingdom of Netherlands (Member States) for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital (Dutch-India DTAA or subject DTAA) was at the core of the adjudication in a Writ Petition namely the *Concentrix* ruling before Delhi High Court.

Concentrix's ruling had sent a strong shockwave in the corridors of power when the High Court summarily rejected India's Income Tax Department submission regarding the interpretation of the MFN clause of Dutch-India DTAA and ruled in favour of the taxpayer. The deconstruction of the condition, as provided for in the MFN clause, regarding the membership of a third state in the Organization of Economic Cooperation and Development either at the time of claiming the MFN benefit by the petitioner or at the time of treaty negotiation was the apple of discord. Many scholars have criticized the Concentrix ruling as the Delhi High Court, on the one hand, buttresses the principle of Common Interpretation for decrypting the given issue and, on the other, relies on the unilateral declaration made by the Directorate-General for Tax Affairs, International Tax Affairs (Netherlands Tax Department). The ruling also falls short of adherence to the principles entrenched within the Vienna Convention on the Law of Treaties (VCLT), 1969.

The ruling has challenged the normative underpinnings of the MFN clause under the Dutch-India DTAA, which has the potential to open the floodgates to litigation against the Department and an impending threat of erosion of India's tax base due to treaty shopping. It may have spillover effects on many developing countries following source-based tax principles and would warrant a reassessment of their DTAA's with developed nations. The present paper will reflect upon these issues by critically analyzing the Concentrix

Ruling, rationalizing its legal consequences, and addressing the concerns it gives rise to by suggesting ways to narrow these legal gaps. It concludes by acknowledging the growing jurisprudence in this domain.

[Keywords: BEPS, MFN, DTAA, India, International Tax Law, Treaty interpretation, and Source-based taxation]

1. Introduction

The genesis of the MFN clause was found in Friendship, Commerce, and Navigation Treaties and MFN treatment was the core obligation the commercial policy parties undertook.¹ The principle requires the parties to uphold parity amongst the traders or investors of the trading partners by accentuating the commitment to ensure equitability for traders and investors.² In other words, the principle serves as an antidote to discriminatory measures undertaken by offering more favourable treatment to traders or investors of a particular nation(s) vis-à-vis others. With the growing acceptability of the MFN clause, it became a general practice to engrain the principle within bilateral, regional, and multilateral investment and trade-related agreements.³

Although a bit nuanced, the MFN clause has found its place within various Double Taxation Avoidance Agreements (DTAAs). In this context, it has captured the understanding amongst the relevant parties of DTAAs, which requires them to extend the same benefits (of the lower rate of withholding tax or a scope more restricted) to each other as those being offered to a third party under another tax treaty. That said, the scope of MFN in the given DTAA is subject to the benefits provided regarding specific income, the date of

¹ OECD (2004) Most-Favoured-Nation Treatment in International Investment Law, OECD Working Papers on International Investment 2004/02, OECD Publishing. Available at: <http://dx.doi.org/10.1787/518757021651> (last accessed: 9 April 2022).

² METI website, Most-Favoured Nations Treatment Principle, p. 3, in WTO Report: 2016. Available at: https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_02.pdf (last accessed: 11 April 2022).

³ Sharmin (2020), pp. 37-41.

the relevant tax treaty, an association of a third party to a particular organization, etc.⁴ It also purports that provisions pertaining to MFN are usually the result of the negotiations carried out between parties to the DTAA and should not be construed as an obligation of customary international law.⁵ It is apparent that the benefits of the MFN obligation inscribed in DTAA are restricted, though not legally, to capital-exporting countries, while developing countries are capital-importing countries seeking investment in their countries. Conversely, the duty to provide such benefit lies on countries following the source-based tax principle.⁶ Due to variations in articulating such commitments, the obligations under the MFN clause could be effectuated through various mechanisms depending upon their wording. It could be a self-triggered clause which would entail automatic activation of the MFN clause, or a publication of a specific notification (with or without any intimation to another party) or carrying out necessary amendment through bilateral consultation/negotiations, or such DTAA being silent as to the procedure for the application of the MFN clause.⁷

Besides all its gradations, the interpretation of the MFN clause under Dutch-India DTAA (subject DTAA) became a bone of contention in the Writ Petition titled *Concentrix Services Netherlands B.v. & Others vs Income Tax Officer (TDS) & Anr.* (Concentrix Ruling or ruling)⁸ before the Delhi High Court (High Court). In the said ruling, Concentrix Services B.v. is a parent company registered in the Netherlands and having its subsidiary company in India registered by the name Concentrix Services India Pvt. Ltd. The provision of Clause IV (2)⁹ of the Protocol appended to Dutch-India DTAA contains the principle of MFN. The major

⁴ For e.g., Convention Between The Government Of The Republic Of India And The Government Of The French Republic For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income And On Capital (India-France DTAA), Clause 7 of the appended Protocol. Available at: <https://www.taxsutra.com/sites/taxsutra.com/files/dtaa/France%20DTAA.pdf> (last accessed: 12 April 2022).

⁵ Nikièma (2017), p.2.

⁶ In a source-based tax principle, a country taxes the income, of its resident and non-resident alike, which have its source in that country itself. If such nations conclude a DTAA with a capital-exporting country having an MFN clause, then benefits of such less rate or restricted scope of tax are usually enjoyed by the taxpayers who are residents of capital-exporting countries at the expense of countries following source-based taxation. Due to this, there is growing scepticism regarding the prevalence of the MFN clause in DTAA as it may entail unforeseen obligations.

⁷ Kapoor (2021), p.7.

⁸ W.P.(C) 9051/2020, W.P.(C) 882 /202 1, CM Appl. 2302/2021, Delhi High Court, (2021).

⁹ Convention between the Republic of India and the Kingdom of Netherlands (Member States) for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital, 1989 [Dutch-

thrust of this ruling lay in unravelling the phrase “*third State, which is a member of the OECD*”¹⁰ as provided in the above-mentioned clause. For the petitioners, who favoured the literal interpretation¹¹, the meaning of this phrase was axiomatic, while the Income Tax Department (Department), in its argument, furthered purposive interpretation.¹² The High Court, in its reasoning, relied on the tool of “common interpretation”¹³ and gave primacy to the unilateral decree issued by Netherlands Tax Department.¹⁴ It is pertinent to discuss these principles of interpretation in the context of the ruling and this will be dealt with in detail during later sections of this article.

1.1. Elucidating the Syntax of MFN within DTAA

Against this backdrop, the thematic analyses of the given subject were quite discernible. The available literature suggests that the relevance of the MFN clause under DTAA is intrinsic within the contours of this ruling. The discourse has also directed attention towards the role of tools for interpreting tax treaties.

With great emphasis, Prof. Sanja Djajic conveys the importance of MFN – which, although not referred to in the VCLT, has emerged as a separate topic at the UN International Law Commission and is extensively used in the realm of economic and trade liberalization.¹⁵ From the perspective of DTAA, MFN intends to maintain the equilibrium between treaty partners vis-à-vis third parties.¹⁶ Therefore, the principle of MFN

India DTAA]. Clause IV (2) of Dutch-India DTAA provides that: ‘*If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD 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*’.

¹⁰ Ibid.

¹¹ Reddy (2011), pp. 1-7. See also: Chawla (2012), pp. 1-9.

¹² Awana (2020), p. 46.

¹³ Vogel (1986), p. 37.

¹⁴ Decree of 28 February 2012, No. IFZ 2012 / 54M, Tax Treaties. India February 28, 2012 No. IFZ 2012 / 54M (hereinafter Unilateral Decree/Decree).

¹⁵ Djajic et al. (2015)), p. 323.

¹⁶ Ghosh et al. (1998), p.1.

is integrated within various DTAA's signed between India and other nations and it can be considered to be a core obligation of such treaties.

As opposed to this, a different perspective is postulated by Deepak Kapoor in his paper describing the MFN clause as an onerous obligation on developing nations.¹⁷ The authors earmark the perils of the MFN clause, which encircles the possibility of reduced taxation, and developing countries following the principle of source-based taxation will always be at risk of losing a potentially significant part of their tax base.¹⁸ Accordingly, author Dhruv Janssen-Sanghavi while critiquing the ruling in his research paper, brought a novel dimension wherein he submits that the High Court does not express cogent reasoning in its adoption of the “rule of common interpretation”.¹⁹ He further contended that the High Court has misconstrued the application of common interpretation by giving preeminence to this tool and overlooking Article 3(2) of the Dutch-India DTAA requiring reference to internal laws for interpreting those terms that remained undefined.²⁰ Aside from this critical assessment, others lauded the *Concentrix* ruling and hailed it as a landmark judgment²¹ rationalizing the real intent of negotiators by affirming that the Protocol to the India-Netherlands DTAA forms an integral part of the DTAA and no separate notification is required to apply the MFN clause under the Protocol.²²

The evolving literature on this subject is noteworthy; nevertheless, to fully appreciate it, there is a dire need to probe into five intricate issues specifically. Firstly, it is germane to study the need for the High Court to opt for the rules of common interpretation instead of purposive interpretation in its ruling. The topic assumes greater significance in light of the recent circular issued by the Central Board of Direct Taxes

¹⁷ See supra fn. 7.

¹⁸ Shah and Shah (2021), p.4

¹⁹ See supra fn. 18.

²⁰ See supra fn. 18.

²¹ Bheda et al. (2021), p.1.

²² JMP Advisors (2021), Tax Matters, Issue no. 2021/05, (JMP Advisors, 1 May 2021). Available at: http://www.itsgnetwork.com/pdf/taxNews/JMP_Tax.Matters-2021.05.pdf (last accessed: 12 April 2022).

(CBDT)²³ clarifying India's stand on the MFN clause annexed within the protocols of its DTAA's. Secondly, the MFN clause dealt with under the Dutch-India DTAA must be perused meticulously to articulate the specific suggestions for addressing the legal anomalies arising from its drafting. Thirdly, the present deliberation evaluates the interplay between MFN and treaty shopping, which is crucial in a fair analysis of the vitality of MFN provisions in DTAA's. This interaction becomes all the more pertinent in the wake of the application of the Principal Purpose Test on Covered Tax Agreement as contained in Article 7 Paragraph 15(a) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).²⁴ Fourthly, after as many as 135 countries have participated in a new apparatus of international tax policymaking, i.e. Base Erosion and Profit Shifting,²⁵ involving rigorous negotiations, it necessitates those interpretations of tax treaties which invigorate full tax norms. The present research focuses on finding the policy to bridge the gap between the judiciary and diplomats by sensitizing them to the implication of tax base erosion in our country. In addition, these policies would be equally helpful for other countries currently facing the menace of tax-base erosion. Fifthly, the existing literature is silent on the delicate issue of tax disputes, often culminating in Investor-State Disputes.²⁶ The government of India must take a cautious approach to avoid any friction that results in the invocation of Investor-State Dispute Settlement clauses under Bilateral Investment Treaties.²⁷ These novel issues arising from the ruling shall be delved into in detail in other sections of this paper.

1.2. Research Methodology and Framework

²³ Government of India, Ministry of Finance, Department of Revenue Central Board of Direct Taxes, Circular No. 3/2022. Available at: <https://www.incometaxindia.gov.in/communications/circular/circular-3-2022.pdf> (last accessed: 11 April 2022).

²⁴ OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (OECD). Available at: <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> (last accessed: 14 May 2022). It provides that "For paragraph 1 not to apply to its Covered Tax Agreements on the basis that it intends to adopt a combination of a detailed limitation on benefits provision and either rules to address conduit financing structures or a principal purpose test, thereby meeting the minimum standard for preventing treaty abuse under the OECD/G20 BEPS package; in such cases, the Contracting Jurisdictions shall endeavor to reach a mutually satisfactory solution which meets the minimum standard".

²⁵ Brauner (2014), p.57.

²⁶ Dumbery et al. (2020), p.225.

²⁷ Gazzini (2021), p.14.

The present research proposes to bring to the fore the detrimental effect of the not-so-precisely drafted MFN clause in the Dutch-India DTAA, which has remained unbridled for far too long. The trajectory of this research would also suggest the bearing of VCLT, 1969, on the DTAA's and various interpretative tools.²⁸ The focal point being the Concentrix ruling, it is also imperative to explore the outcomes reached when applying these interpretative tools in the ruling. To that end, the paper adopted non-empirical research for analyzing the ruling and lacing it with doctrinal analysis for identifying the role of relevant provisions of VCLT, 1969 in the selection of tools of interpretation and deriving argumentative support through a collection of secondary sources for theorizing the ramifications of shoddy drafting of tax treaties. The paper is bifurcated into four parts, wherein the first section was a prelude to the discussion explaining the fundamentals of the MFN clause in DTAA's; followed by the second section dealing with a thorough examination of the Concentrix ruling- particularizing certain legal greys; the third section underscores the legal consequences arising from poor drafting of the terms in the subject DTAA and the ruling; the fourth section, promulgates several submissions for going-forward in this regard, and the final section, acknowledges the growing jurisprudence to stimulate more scholarly work and academic discussion in the given regime.

2. Deconstructing the *Concentrix* Ruling

The ruling is a Writ Petition filed by deductees, namely *Concentrix Services Netherlands B.v. and Optum Global Solutions International B.v.*²⁹ (petitioner or deductees), which challenged the issuance of impugned certificates by the department stipulating a withholding tax rate/participation dividend rate of 10% on dividends receivable by the petitioners. The petitioners' argued that their request to the department was rejected for the issuance of a certificate at a lower withholding tax rate of 5%. The deductees are the ultimate

²⁸ Linderfalk (2007), pp.133-159.

²⁹ See supra fn. 8.

beneficiary of dividends, and the remitters are the Indian subsidiaries of the above-said deductees, respectively. The moot legal question which arose for consideration was what should be the withholding rate of tax in respect of the dividend. In light of that, the consequential relief requested by the petitioners was the quashing of the impugned certificate, whereby the withholding rate of tax was pegged at 10% and the issuance of a new certificate at the rate of 5%.

The treaty partners signed the Dutch-India DTAA on 21 January 1989. It was contended by the petitioners that as per the MFN clause, they are entitled to the same rate of withholding rate of tax as applicable in DTAA's between India and other OECD members, such as Slovenia³⁰, Lithuania and Colombia³¹. By placing its reliance on the MFN clause, the petitioners argued that the aforementioned DTAA's aid deductees by entitling them to lower withholding tax or scope more restricted on a certain income if India offers similar benefits in another DTAA to a nation being a member of OECD. Since India had signed DTAA's with other countries which were members of the OECD, the lower rate or the restricted scope in the DTAA executed between India and such a country would automatically apply to the subject DTAA.

The reasons advanced on behalf of India's Income Tax Department primarily counters, in defence of the impugned certificate, by terming the petitioners' argument regarding membership of OECD as being completely misconceived. The Department endorses that the notion of OECD membership should be construed from the standpoint of the date on which the DTAA was signed. In other words, if the third state with which a DTAA is signed, on which reliance is made, has been a member of the OECD or becomes a member of OECD on the date when the subject DTAA was signed, then the benefits of MFN shall accrue and not otherwise.

³⁰ Convention Between The Government Of The Republic Of India And The Government Of The Republic Of Slovenia For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income, 2009 (India-Slovenia DTAA).

³¹ Agreement Between The Government Of The Republic Of India And The Republic Of Colombia For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income, 2005.

To further its stance, the Department claimed that since there were many instances when amendments were made to DTAA in question and therefore if the benefits of a lower rate of withholding tax or scope more restricted as provided in DTAA between India and members of the OECD is to be extended it could be done by amending the subject DTAA followed by the issuance of a notification. It is hard to side with the Department concerning this view as the High Court was accurate in bringing the appended protocol within the gamut of the Dutch-India DTAA. The idea that the protocol forms an integral part is well endorsed within the text of the subject DTAA itself, and as a result, it extinguishes the need for the issuance of a separate notification to carry out any such amendments.

The dispute would remain undecided until it is judicially established that when a third state offered a lower rate of tax or a scope more restricted on a certain income, it is expected to be a member of the OECD. It would then be contextualized with the date on which the Dutch-India DTAA was signed to render any benefit under the MFN clause. As the benefits of MFN were made conditional upon the determination of such date, the legality of the impugned certificate issued by the Department to the taxpayer providing for the higher rate of tax was also at stake.

In its judgment, the High Court sided with the taxpayers, which resulted in the quashing of impugned certificates and the issuance of new certificates providing for a lower tax rate. The High Court, in its reasoning, opined that for the application of the principle of parity as provided for under the MFN clause, three conditions must be fulfilled: first, the third State with whom India signs a DTAA should be a member of the OECD; second India should have, in its 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 DTAA; and third, if both the above are satisfied then the benefits of MFN treatment under subject DTAA shall accrue from the date the DTAA relied upon has come into force. Taking into account these parameters, India had a DTAA with Slovenia, which entered into force on 17 February 2005. Subsequently, it became a member of the OECD on 21 July 2010, providing for a lower tax rate compared to the subject DTAA, i.e., 5% under India-Slovenia DTAA as opposed to 10% under Dutch-India DTAA.

It demanded the retrospective operation of benefits accrued under the MFN clause with effect from 21 July 2010 at the rate of 5% to the participation dividend paid by Indian subsidiaries of such deductees. The forthcoming parts of this section shall deal broadly with this aspect of the judgment for the present paper.

2.1. Application of VCLT, 1969 & Principles of Interpretation in the Concentrix Ruling

The VCLT, 1969 represents the codification of customary international law and is tempered on the touchstone *pacta sunt servanda*, i.e., fulfilling international commitments as assumed under treaties in good faith.³² As the cornerstone of treaty interpretation, it ingresses a lot of significance in coagulating various rules of interpretation that seeks a balance among the main schools of interpretation.³³

To formalize the discussion on tools of interpretation substantially, Articles 31-32 of VCLT, 1969³⁴ must be relied upon. For brevity, Article 31 of VCLT, 1969³⁵ stipulates general rules of interpretation wherein the terms of the treaty should be interpreted, in good faith, by giving it an ordinary meaning and considering the object and purpose of such treaty. It also emphasizes that any subsequent agreements/instruments made between parties relating to such treaties, preamble and annexes, subsequent practices existing amongst parties, and relevant rules of international law applicable amongst them as suitable material for interpretation. While Article 32 of VCLT, 1969³⁶ put forth supplementary means to be utilized for

³² Binder et al. eds. (2019), pp. 671-672.

³³ Gardiner (2015), p.2.

³⁴ Vienna Convention on the Law of Treaties (VCLT), 1969, 1155 UNTS 331, Articles 31-32.

³⁵ Article 31 of VCLT, 1969 titled *General Rules of Interpretation* provides that:

“1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. *There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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

4. *A special meaning shall be given to a term if it is established that the parties so intended.”*

³⁶ Article 32 of the VCLT titled *Supplementary means of interpretation* provides that

interpretation, such as *travaux préparatoires*, etc., when interpretation under Article 31 yields obscurity or manifestly absurd results.

Under VCLT, 1969, the above-said provisions provide a particular type of context to the treaty terms that require interpretation.³⁷ As opposed to an orthodox view where the parties' intent was given precedence, these provisions require an extensive perusal of the text of the treaty. Put in other words, the intent of the parties has to be gathered from the text of the treaties.³⁸ Nevertheless, the principle enshrined under Article 31(1) of VCLT, 1969 should not be projected as sacrosanct, given that it would cater to any situation. The orientation of this provision in its subsequent clause gives space to the special intent of the parties if it is established that the parties so intended.³⁹

Within the broader scheme of things, DTAA's are international agreements wherein the concerned parties undertake obligations. The evolution and consequences of DTAA's are discerned through the lens of the VCLT, 1969, which act as a guiding force in the interpretation of DTAA's. The operational objective of any DTAA is to eliminate double taxation and foster an environment where global trade and investments could thrive.⁴⁰ Bearing in mind the object of the DTAA's, the purpose of interpreting the terms of the treaties is to identify the parties' common intention and for which reference must be made to the language of the treaty itself. The special intent of the parties, as propagated by Klaus Vogel, in the DTAA's could be authenticated from notes and letters exchanged at the time the treaty was signed along with subsequent agreements and state practices so developed amongst the parties.⁴¹

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

(a) leaves the meaning ambiguous or obscure; or

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

³⁷ Van der Bruggen (2003), p.142

³⁸ See supra fn. 13.

³⁹ See supra fn. 34 and Article 31(4) VCLT.

⁴⁰ Arnold (2020), p.10.

⁴¹ EU-Chi, par. 7.94, QURESHI, Asif H., op. cit., p. 9, note 15 as cited in Mag. Dr. Manuel L. Hallivis Pelayo, 'Using The Vienna Convention On The Laws Of Treaties For Interpreting Tax Treaties'(Revista

The *Concentrix* ruling presented an enthralling opportunity for the High Court to revisit the interface between the terms of DTAAAs and the VCLT, 1969. In a highly contentious setup, the High Court grappled with the phrase “*third State which is a member of the OECD*”⁴² under Clause IV (2) of Dutch-India DTAA, and to be even more specific, the interpretation of the word “is” was indispensable to glean the intent of the parties. In contrast to an autological word having an obvious connotation, the word “is” imbibes a wide array of meanings and, thus, heterological. It paves the way for a holistic reference to OECD membership as the High Court described the word “is” as a state of affairs that should exist not necessarily at the time when the subject DTAA was executed but when the taxpayers or deductees make a request for issuance of a lower rate withholding tax certificate. Even though petitioners vouched for literal interpretation, which gave an unadorned meaning to the word “is”, without subjecting it with an underlying intent as well as objectives of DTAAAs and other phrases of Clause IV (2) of subject DTAA⁴³. In effect, both the High Court and the petitioners in their reasoning were aligned with the unilateral declaration made by the Netherland Tax Department.

The justification of the High Court’s stance lies in applying Common Interpretation⁴⁴, which necessitates consistency in the interpretation of the provisions by the tax authority and the courts by adopting a fair and efficient approach. Although its precepts are more protrusive within the domain of Private International Law, courts in various jurisdictions apply it in interpreting tax treaties. As such interpretation is backed by mutual acceptance of the parties.⁴⁵ In this ruling, the High Court cited some precedents and dictums⁴⁶ to legitimize the application of common interpretation.

Direito Tributário Internacional Atual). <https://www.ibdt.org.br/RDTIA/en/1/using-the-vienna-convention-on-the-laws-of-treaties-for-interpreting-tax-treaties/>. Accessed 17 April 2022.

⁴² See supra fn. 9.

⁴³ See supra fn. 18, p. 1034.

⁴⁴ See supra fn. 8, p. 19.

⁴⁵ Number 630 v. M.N.R., 59 D. TAX 300, 303 (1959); *Canadian Pacific Ltd. v. The Queen*, 76 D. TAX 6120, 6135 (1976); *Donroy, Ltd. v. United States*, 301 F.2d 200, 9th Cir. (1962).

⁴⁶ *Corocraft Ltd. vs. Pan American Airways Inc.*, 3 W.L.R. 1273, 1283 (1968); *Fothergill vs. Monarch Airlines*, 3 W.L.R. 209, 224 (1980).

As a result, it examined the unilateral decree issued by the Netherlands Tax Department, which updated the policy decision on the consequences of the MFN clause in the subject DTAA by juxtaposing it with India's commitments under the India-Slovenia DTAA and examining Slovenia's membership of the OECD. On a bare perusal of this decree, the Netherlands' interpretation of Clause IV (2) of the Dutch-India DTAA allows a lower rate of withholding tax as set out in the DTAA between India and other OECD members to be applicable under the subject DTAA.⁴⁷ The High Court deems it in the fitness of things to apply the principle of common interpretation to maintain comity and ensure consistency and equal allocation of tax claims between the treaty partners.

In doing so, it rejected India's Income Tax Department's submissions that confronted the view of expanding the denotation of the word "is" within the MFN clause of the Dutch-India DTAA. The Department characterized the MFN clause as a contingent contract, and its benefits could be extended to deductees on the satisfaction of two conditions, which were (i) the other country should be a member of the OECD on the date when the subject DTAA was executed and when a claim for the lower rate of withholding tax is made by deductees; and (ii) the more beneficial provisions should have been extended to the residents of countries who are members of the OECD post the execution of the subject DTAA. As Slovenia, Lithuania and Colombia had never been a member of the OECD when the subject DTAA was signed, the fact that these countries apply for the membership of OECD should not obliterate India's Income Tax Department in issuing a certificate for a participation dividend tax at the rate of 10%. It also vindicated the Department's stance that it was a deliberate decision to have a lower participation dividend rate under the India-Slovenia DTAA and not intended to have a spillover effect after taking the MFN clause under the subject DTAA into consideration.⁴⁸ It is evident that the above-said criteria point to the Department's inclination towards purposive interpretation, as it instils flexibility without disregarding legislative intent and permeates collective intentionality.⁴⁹ The Department, for one, advocated focusing attention on the object and purpose

⁴⁷ See supra fn. 14.

⁴⁸ See supra fn. 7, p.8.

⁴⁹ Ammann (2020), p.208.

of the treaty to delineate the overall goals intended to be achieved through the MFN clause under the Dutch-India DTAA.

2.2. Putative Legal Gray Areas: A Critical Analysis of the High Court's Reasoning

The ruling has become the subject of scholarly/academic discussion primarily due to the various shortcomings and legal gaps left in the judgment. It would validate critical analyzes of the reasoning offered by the High Court, and in this part, such apprehensions shall be irradiated. The analysis of this ruling shall be limited to the principles of interpretation and other legal aspects required to be considered in respect of the reasoning made by the High Court.

As far as interpretation is concerned, the High Court surprisingly referred to common interpretation in discerning the ordinary meaning of the MFN clause by relying on a unilateral decree issued by the Netherlands Tax Department. Generally speaking, the principle of common interpretation warrants that courts of one contracting state should look at decisions made by courts of the other contracting state when confronted with problems of interpretation and that they test whether their interpretation can be transferred. Any reference to this approach must be made cautiously, as it does not entail going a long way to acquiesce to the judgment and reasoning of a foreign court/authorities, much less that it is considered a binding authority on courts.⁵⁰ One of the significant problems that arise with common interpretation is that the judge may feel obliged to accept the decisions of the foreign court which are adduced before him by the parties. However, it must be factored in that the parties providing these decisions will be inclined to provide decisions that are favourable to their position.⁵¹ With deference, there is some semblance of dichotomy in the High Court's reasoning as it applied to the tool of common interpretation by advertently accepting a unilateral decree issued by the Netherland Tax Department, without any critical review, to ensure equitable allocation of taxes between treaty partners. A contradiction lies in applying this supplementary means of

⁵⁰ *Ulster-Swift, Ltd. v. Taunton Meat Haulage Ltd.*, 1 W.L.R. 625, 631 (1977).

⁵¹ Sixdorf (2016), pp. 590-607.

interpretation without delving too deeply into the object and purpose of the subject DTAA as enshrined within Article 31(1) of the VCLT, 1969.⁵² These means only have a persuasive value that could be applied when a manifestly absurd or unreasonable result ensues⁵³ and does not substitute the judiciary's role in interpreting the ordinary meaning of the terms used in such DTAA in light of the object and purposes of the treaty. On top of this, accepting a unilateral decree issued by the executive arm of the state and not involving any judicial adjudication appears to be a flawed approach, as it does not reflect the shared understanding between the parties to subject DTAA.⁵⁴ In other words, since the judicial authorities or the domestic court of the Netherlands have not deciphered the issue at hand, by providing an opportunity to hear both parties, this executive decree seems to manifest an opinion of the Dutch government regarding the relief from taxes that must be paid in India.⁵⁵

The other problematic facet of the Concentrix ruling was the High Court abandoning the tool of purposive interpretation and, consequently, turning a blind eye to the basic objective and purpose of the MFN clause embodied within the Dutch-India DTAA. It ruled that the date on which Slovenia joined the OECD was the relevant date for the accrual of the benefits of MFN under the Dutch-India DTAA to the petitioners. If at the time of negotiating the India-Slovenia DTAA, India had been aware that Slovenia was vying to be a member of the OECD, it is highly improbable that India would have agreed to a lower rate of withholding tax. Also, in the case of the India-Slovenia DTAA India being a net exporter of capital, it perceptibly envisioned an advantage for its resident taxpayers, and therefore the offering of a lower rate participation dividend tax was consciously included in the treaty.⁵⁶ Such a broad interpretation may have even violated the principle of good faith and the High Court failed to deliberate upon the principle of *pacta sunt servanda*,

⁵² See supra fn. 36.

⁵³ Polish Postal Service in Danzig Case (1967) Series B, No. 11, (1925) p. 39; McDougal et al. (1969), pp.226-242.

⁵⁴ Mondaq Website, India: CBDT Clarifies The Legal Interpretation Of The MFN Clause. Available at: <https://www.mondaq.com/india/tax-authorities/1159610/cbd-t-clarifies-the-legal-interpretation-of-the-mfn-clause> (last accessed: 2 February 2023).

⁵⁵ Kumar (2022), pp. 4-6.

⁵⁶ See supra fn. 7, p. 6.

given such an interpretation exceeded the mandate of the parties collated under the concerned DTAA.⁵⁷ In this way, it also squandered an opportunity to appreciate the arrangement of the word “is” in Clause IV (2) of the subject DTAA being placed after the phrase “*after the signature of this convention*”, suggesting limiting the effect of MFN from the date when subject DTAA was signed. Thus, the High Court’s interpretation gave leeway for defeating the object and purpose of the MFN clause under subject DTAA.⁵⁸

The High Court failed to pay any heed to Article 3(2)⁵⁹ of the Dutch-India DTAA, which is instrumental in interpreting the provisions by defining terms with reference to the member state’s internal laws, including tax laws, applying the VCLT, 1969. As per OECD commentary, the above-said provision provides for a general rule of interpretation applicable only if the context of an undefined term does not require an alternative interpretation, which then permits the application of common interpretation, and such context must be determined in accordance with the intention of the contracting parties.⁶⁰ It is pertinent to note that the member state’s legislation concerning laws in force existing at the time of application of the Convention shall be applied to interpret the undefined terms. The High Court observed that tax treaties are negotiated and drafted by diplomats, and such treaties are an outcome of the bargaining process.⁶¹ It is coupled with the fact that the indirect incorporation of those treaties into an Act of Parliament would impinge upon the treaty’s terms and would create unnecessary hardship, hence, it did not even consider it fit to analyze the application of Article 3(2) of the subject DTAA. No persuasive reason was laid down for the non-application of this provision with statutory drafting.⁶² Under the pretext of differences in the principles of interpretation of the treaty and act/statute, to give the context to contentious issues embedded within the

⁵⁷ See supra fn. 53.

⁵⁸ Taxsutra (2021), Applicability of MFN Clause on Dividends- Does Delhi HC settles the Dust. Available at: <https://www.taxsutra.com/dt/experts-corner/applicability-mfn-clause-dividends-does-delhi-hc-settle-dust>. (last accessed 20 April 2022).

⁵⁹ Article 3(2) of Dutch-India DTAA provides that “*As regards the application of the Convention by one of the States any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.*”

⁶⁰ OECD (2017) Commentaries on the Articles of the Model Tax Convention 2017, Commentary on Clause IV (2). Available at: <https://www.oecd.org/berlin/publikationen/43324465.pdf> (last accessed: 20 April 2022).

⁶¹ Davis (1985), p. 4.

⁶² Bennion (1992), p. 461.

MFN clause; the High Court directly opted for common interpretation,⁶³ which altered the dynamics of the above-said contested phrases.

The MFN clause in DTAAAs has portrayed itself as a potential tool for treaty abuse.⁶⁴ In the context of tax treaties, Treaty abuse involves a taxpayer, though complying with the wording of a given tax treaty provision(s), attempting to obtain advantages that are beyond the rationale of that or those provision(s).⁶⁵ There are many arrangements through which foreign-based taxpayers utilize the benefit of a lower rate of withholding taxation under different DTAAAs and distort their tax obligations under the garb of the MFN clause mentioned in their respective DTAA.⁶⁶ It results in either escaping taxation altogether or being subject to inadequate taxation in a way the member states did not intend and modifies the balance of concessions that the parties to such a treaty made.⁶⁷ The decisive factor that needs to be gauged in such a distortion is the exploitation of inter-jurisdictional tax arrangements by investors.⁶⁸ It would not have been out of context in the given Writ Petition for the High Court to adjudicate whether deductees exploit the MFN clause as a tool for treaty abuse by claiming treaty benefits and thereby undermining tax sovereignty.

3. Familiarization with Potential Legal Consequences: On the Brink of a Disaster

The erratic interpretation made ominous signs evident, as the writing was on the wall that serious ramifications for the Department should ensue. The present section seeks to account for the potential unintended and unforeseen consequences of this judgment. The most obvious effect of this ruling in

⁶³ See supra fn. 8, p. 10.

⁶⁴ West (2020), MFN dangers: The (potential) unravelling of tax treaty policy, Leiden law blog. Available at: <https://leidenlawblog.nl/articles/mfn-dangers-the-potential-unravelling-of-tax-treaty-policy> (last accessed: 19 April 2020).

⁶⁵ Ribeiro (2020), pp. 252-264.

⁶⁶ Sascha Åkerman (2016) Does the LOB clause in BEPS Action 6 violate the principle of MFN treatment in EU law? <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOID=8897833&fileOID=8901304> . Accessed 20 April 2022.

⁶⁷ Blum and Seiler (2006), p.5.

⁶⁸ Sung Je Park et al. (2021), p.1.

posterity is the binding value of this precedent on the courts or tribunals or quasi-judicial bodies lower in the hierarchy than the High Court. It will open the floodgates for numerous actions against the Department by taxpayers who, under their respective DTAA, are paying a higher rate of taxes. The possibility of new member states, with whom India has a DTAA, joining the OECD cannot be ruled out, and if India has signed a DTAA at a lower rate of withholding tax or scope more restricted, it will become a massive challenge to mitigate the claims made by taxpayers from another jurisdiction.

To build more upon this impending threat, it is equally important to highlight that the ruling has sown the seeds for the triggering of the MFN clause under other DTAA's by Multinational Enterprises (MNEs). MNEs leverage their omnipresence, as their structure allows them to reduce their tax burden.⁶⁹ In other words, an MNE could have its taxable presence in a particular nation with which India has signed a DTAA containing the provisions of the MFN clause, and through calculated tax planning, it will end up paying less tax.⁷⁰ To put it succinctly, through these arrangements, taxpayers such as MNEs indulge in treaty shopping leading not only to an erosion of the tax base but multilateralization of bilateral tax treaties⁷¹, and constrain states' fiscal autonomy.⁷²

The financial and economic disparity amongst the parties is contributing to mounting skepticism towards MFN clauses in DTAA's. In the context of the Dutch-India DTAA, the Netherlands, being a developed and capital-exporting country⁷³, is at an advantage as its resident taxpayers would generally accumulate the benefits arising from the MFN clause vis-à-vis India. On the other hand, India follows the source-based taxation principle,⁷⁴ which would, in essence, require them under the subject DTAA and present ruling to forgo its taxing rights in favour of Dutch-based petitioners. Adding another dimension, losing out on such

⁶⁹ Arel-Bundock (2017), p. 349.

⁷⁰ Streng (1992), p.6.

⁷¹ Schill (2009), pp. 121-196.

⁷² See supra fn. 71.

⁷³ Embassy of India in Netherlands (2021) Brief on India-Netherlands Bilateral Trade and the Investment. <https://indianembassyinthe Netherlands.gov.in/page/overview-of-indian-economy/#:~:text=The%20Netherlands%20is%20the%20third,36.28%20billion%20over%20the%20period.> Accessed 19 April 2022.

⁷⁴ Rao (2008), pp. 75-82.

a substantial tax base might prompt India to counter the ill-effects of this ruling with an austerity measure, like those seen in the Cairn Energy⁷⁵ and Vodafone Ltd⁷⁶. These measures run the risk of being subjected to judicial scrutiny in Investor-State Investment Dispute (ISDS) arbitration under Bilateral Investment Treaties (BITs). The foreign taxpayer, usually from developed nations, have deployed this strategy which allows them to challenge such measures for being in violation of the Fair and Equitable Treatment clause, or other clauses, under the respective BIT.⁷⁷ In hindsight, the MFN clause under these DTAA's might seem counterproductive for India, as there is hardly any bilateral obligation on its counterparts, i.e. to offer similar benefits to Indian taxpayers; rather, it cast a huge financial implication upon the Department.

Last but not least, the need for redrafting the MFN clauses is quintessential as its cascading effects are not just limited to subject DTAA but are also ostensible in India's Conventions with France, Switzerland⁷⁸ other European states, and OECD Members. To consolidate their stand, and High Court's reliance on the unilateral decree issued by the Netherlands Tax Department in the ruling⁷⁹ giving much impetus, the tax department of other nations also published notifications⁸⁰ concerning the interpretation of the MFN clause *ex-post facto*. After the *Concentrix* Ruling, the Indian Income Tax Department was not much behind its counterpart in notifying a non-binding circular that clarifies the MFN clause in the protocol to certain DTAA's.⁸¹ It vehemently disagreed with those decrees/official bulletins/notifications issued by Netherlands, France, and Switzerland, as they stand in derogation of the rules of international treaties and should desist

⁷⁵ Vora (2021), p. 287.

⁷⁶ Goel and Goel (2020), p. 243.

⁷⁷ International Tax Review (2014), *Indian Dispute Resolution Under Bilateral Investment Treaties*. Available at: <https://www.internationaltaxreview.com/article/2a698axyv1rz4d0lg1qf4/indian-dispute-resolution-arbitration-under-bilateral-investment-treaties> (last accessed: 25 April 2022).

⁷⁸ Convention Between The Government of The Republic of India and The Government of the French Republic for the Avoidance of Double Taxation and The Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (1994). Agreement Between The Republic Of India and The Swiss Confederation for The Avoidance Of Double Taxation with Respect to Taxes on Income (1994).

⁷⁹ See *supra* fn. 14.

⁸⁰ For such notification, 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; Direction Générale Des Finances Publiques (2016), Official bulletin of public finances-taxes (Legal ID: BOI-INT-CVB-IND-20161104), France on November 4, 2016.

⁸¹ CBDT Circular (2022), Clarification regarding the MFN Clause in the Protocol to India's DTAA's with certain countries (Circular No. 3/2022), India on 3 February 2022.

from selective import of concessional rates under the MFN clauses of the respective DTAAAs. These notifications are unilateral as they echo any mutual understanding amongst the parties of such DTAAAs and profess only the viewpoint favourable to such a nation. It even relegates the vitality of Article 31(3)(b) of VCLT, 1969,⁸² which acts as a guiding beacon for uniform interpretation of international treaties by bestowing relevance on subsequent practices establishing mutuality amongst the parties. It is safe to infer that unless the ruling is overturned on appeal before the Supreme Court of India (Supreme Court), the existing scenario is a disaster in waiting as it would deter the achievement of the objectives and purposes of the subject DTAA.

4. The Way Forward

The incongruity and dichotomy in applying the tools of interpretation call for measures that would ameliorate these errors. The present section lists such measures along with their contours for remedying these concerns. These measures can be effectuated at the level of adjudication when the India's Income Tax Department files an appeal before the Supreme Court or during the comprehensive analysis by carrying out the impact assessment of the subject DTAA.

As per the hierarchy of the Indian judiciary, the Department still holds a chance to ensure that the High Court's decision in this ruling be reversed by filing an appeal with the Supreme Court.⁸³ The Supreme Court being an apex court of India could well be a torch-bearer in culling out the ordinary meaning of the MFN clause in the light of the objects and purposes of the subject DTAA. Going by the limited precedents available on the interpretation of DTAAAs, the obiter dictum of the Supreme Court in the *Azadi Bachao*

⁸² See supra fn. 35.

⁸³ In accordance with Article 133 of the Constitution of India, 1950, if there is any substantial question of law or it is wrongly decided and it needs to be decided by the Court. In such cases, the High Court grants the certificate to make appeals to the Supreme Court. The appeal can only be made within 60 days from the grant of certificate of the High Court.

Andolan case⁸⁴ has gained a lot of traction when it reiterated the observation of the Federal Court in *John N. Gladden v. Her Majesty the Queen*⁸⁵:

“Contrary to an ordinary taxing statutes..... A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned.”

Not only does the subject DTAA explicitly mentions the need for the elimination of double taxation, but at the same time it also augurs the commitments of the parties towards fiscal evasion. The reasoning of the High Court is found wanting on the aspect of fiscal evasion which forms part of the theme of the subject DTAA. This putative contention could reinforce the underlying intent of the treaty partners to ensure that taxpayers do not advance a mechanism to subvert their tax obligations under the guise of the MFN obligation of the treaty partners.⁸⁶

The Department’s representation can also reflect upon the principle of full taxation, which furthers its viewpoint. The over-compliance with the non-double taxation principle has created a huge possibility for non-taxation of income.⁸⁷ In return, it creates an opportunity for harmful tax competition wherein developed and developing countries lobby for corporate capital through their lenient tax policies.⁸⁸ Post the formulation of the Base Erosion and Profit Shifting (BEPS), various action plans to address such concerns have been brought under this framework. These action plans promoted certain minimum standards aiming for tax transparency and allowing for the growing acceptance of full taxation norms.⁸⁹ In an abstract sense, the principle serves as an antithesis to non-double taxation by requiring nations to prevent abusive and aggressive tax planning and closing loopholes or gaps in tax treaties.⁹⁰ The Indian Income Tax Department

⁸⁴ *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1.

⁸⁵ *The Estate of the late John N. Gladden (Plaintiff) v. Her Majesty the Queen (Defendant)* 85 DTC 5188, Federal Court, (1985).

⁸⁶ Dürschmidt (2006), p.3.

⁸⁷ OECD (2013), p.18.

⁸⁸ Rixen (2011), p. 197.

⁸⁹ OECD (2019), pp.16-17.

⁹⁰ Parada (2018), p. 971.

in its submission should reiterate the commitment of the judiciary towards the prevention of fiscal evasion and should also argue for an interpretation of the preamble of the subject DTAA that would enhance the implementation of full tax norms.

Apart from that, the OECD progress report on an ‘Inclusive Framework on BEPS’ while institutionalizing the norms of full taxation required nations to modify treaties to address treaty-shopping abuses under the second minimum standard.⁹¹ The causal link between full tax norms and measures for the avoidance of treaty shopping lies in the dissuasion of third countries endeavoring for access to treaty benefits that are otherwise not available to them.⁹² To materialize these efforts, under the auspices of the BEPS framework, the MLI aids governments in reducing these gaps in existing international tax rules by transposing the results from the OECD/ G20 BEPS Project into DTAA worldwide.⁹³ The Department would relish taking advantage of the fact that India and the Netherlands being a signatory to MLI brings subject DTAA⁹⁴ within the ambit of the Covered Tax Agreements, thereby permitting the application of the Principle Purpose Test to it. Under Article 7 (15) (a) of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting,⁹⁵ the nations are justified in acclimating to the Principle Purpose Test to keep a check on those arrangements whereby taxpayers intend to take a benefit that is not in accordance with the object of such Covered Tax Agreements.

Under this scenario, it is no gainsaying that there exists a divide between the two primary organs of the Indian government, i.e. the judiciary and the executive. This was self-evident when the High Court deciphered the terms of the treaty without gleaning the intent of the member states in reference to the object and purpose of the subject DTAA, which makes it self-evident that it intends to narrow down the instances

⁹¹ See supra fn. 89.

⁹² OECD (2017), p.17.

⁹³ See supra fn. 24 (MLI).

⁹⁴ OECD (2022), Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Status as of 10 May 2022). Available at <https://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf> . Accessed on 14 May 2022.

⁹⁵ See supra fn. 24.

of double non-taxation and further full-tax norms. The need to sensitize the judiciary about the working of the executive, while drafting and negotiating international agreements, is the need of the hour.⁹⁶ Although in sovereign states executives are free to enter into such international treaties, in the case of taxation, these treaties automatically become part of the domestic or municipal law.⁹⁷ This galvanizes the role of the judiciary to interpret those treaties and to give prominence to the real intent of its negotiators.

In the contemporary era, the content of international agreements frequently evolves. This allows the parties to carry out amendments and even issue joint notes concerning the interpretation of specific terms of such agreements.⁹⁸ This function reduces friction amongst parties and fosters mutual respect for the same. In the present context, it is pertinent that since the subject DTAA is more than three decades old, there is a dire need to revisit its terms by the member states. The impact assessment of the MFN clause in subject DTAA can be carried out to critically appreciate its relevance and curtail its spillover effects.

5. Conclusion

The *Concentrix* ruling has captured the imagination of academicians, lawyers, tax scholars, and policymakers alike. More than the ruling it is the interpretation that became the talking point as it sets a unique precedent for the lower judiciary. The High Court has acknowledged the jurisprudence of tax treaty interpretation yet its application has been off the mark. But before inferring the consequences of the ruling, it is equally important to highlight the detrimental effect of the poor drafting of the MFN clause. The word “is” should have been originally qualified with a clearer temporal qualifier so that it could not have become an apple of discord amongst the member states. It is obvious that the OECD being open to new members

⁹⁶ Schrawat (2021), p.4.

⁹⁷ CBDT (2019), Notification No. So 2887(E) [Notification No. 57/2019/F.No. 500/71/2015-Ftd-I], Section 90 Of The Income-Tax Act, 1961 - Double Taxation Agreement - Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting, India on 9 August 2019.

⁹⁸ Moloo (2021), pp. 261-264.

would have various nations applying for its membership and it could also be expected that such nations would have a DTAA with India.

Moving forward, the debilitated reasoning offered by the High Court in the application of the tool of common interpretation was a point of inflexion. Not only does the very application seem faulty but the validation in the form of a unilateral decree passed by the Netherlands Tax Department⁹⁹ was quite problematic. The deviation from the objects and purposes of the subject DTAA as entrenched within its text while reference being made to supplementary means cannot be in line with Article 31-32 of the VCLT, 1969,¹⁰⁰ and was somewhat paradoxical.

Though this paper aimed to explore the daunting effects of poor drafting of the MFN clause from the context of the Concentrix Ruling, it would be fitting to visualize, those aspects related to the MFN clause within a DTAA, that go beyond the scope of the present paper. In this way, an intriguing discussion could be initiated to acknowledge the growing jurisprudence in the given domain and stimulate the contribution of more scholarly work. The dearth of academic work in the given realm makes it quite challenging to critically analyze this ruling and at the same time, it presents an opportunity to explore this domain by carrying an interdisciplinary approach, empirical research, critical analysis, comparative analysis, impact assessment study, etc.

The present research due to its limited scope did not delve into the basis behind the need for renegotiating the MFN clause in the subject DTAA as negotiation is inundated with several policy considerations of the member states including the interest of resident taxpayers. The drafting of the text of the DTAA is seemingly tedious but its revival would truncate the procedure to renegotiate the similarly drafted MFN clauses of other DTAA's that India has signed. Empirical research could be carried out to justify the growing usage of the MFN clause under DTAA's by Developed countries. The study can focus not only on the ins

⁹⁹ See supra fn. 14.

¹⁰⁰ See supra fn. 35.

and out of such an emerging trend but could well be a tool for fostering the capacity building of developing nations. Eyeing the MFN clause with suspicion could be counterproductive for rapidly advancing developing countries. Despite recent experience, there should be no rush towards abandoning the standard MFN clause without careful analysis and reflection. These issues can instill a fresh perspective in the debate pertaining to the north-south divide and the pragmatic application of such laws for north-south economic integration.

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