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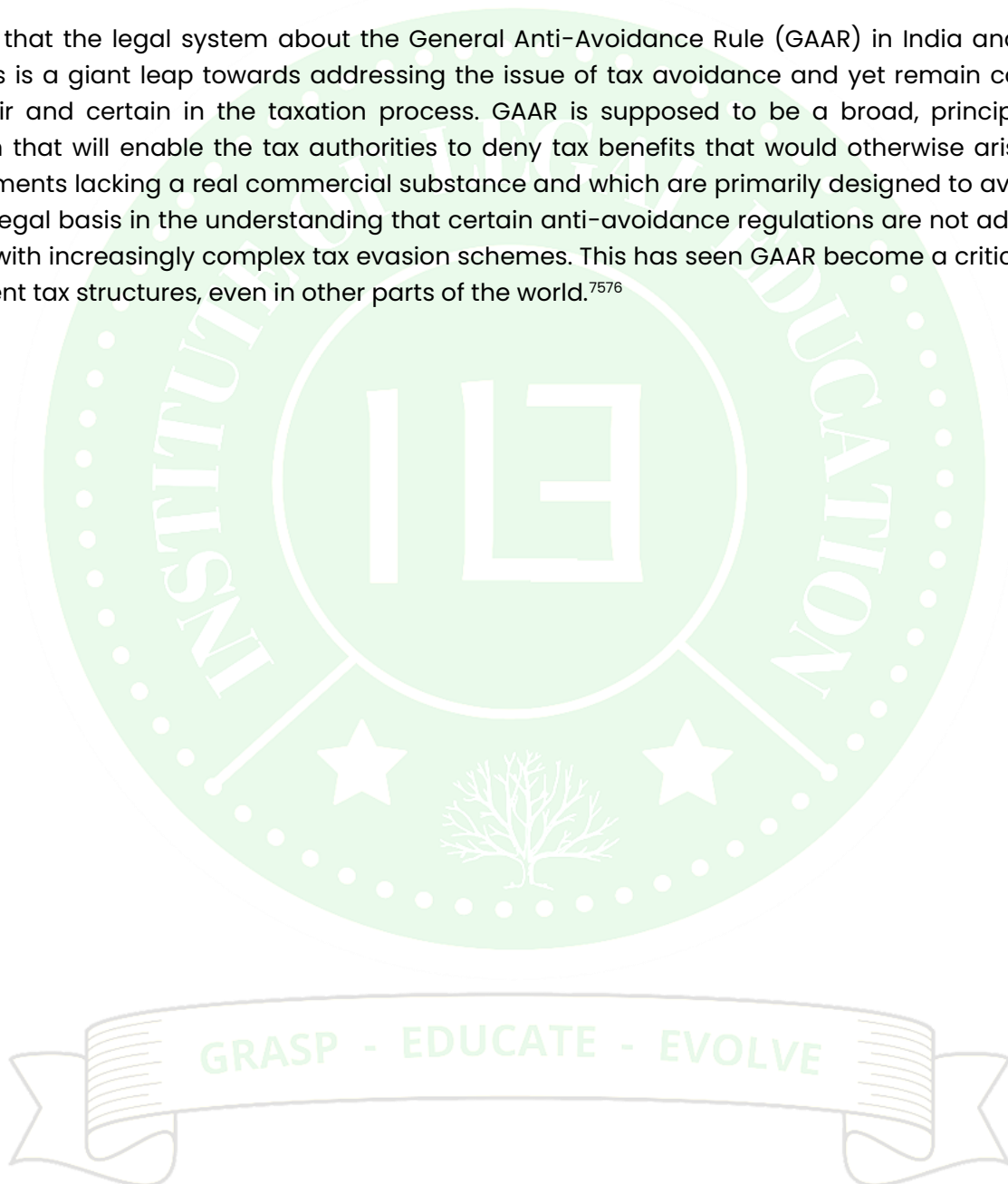
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GAAR AND TREATIES LEGAL FRAMEWORK

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The fact that the legal system about the General Anti-Avoidance Rule (GAAR) in India and in other countries is a giant leap towards addressing the issue of tax avoidance and yet remain capable of being fair and certain in the taxation process. GAAR is supposed to be a broad, principle based provision that will enable the tax authorities to deny tax benefits that would otherwise arise due to arrangements lacking a real commercial substance and which are primarily designed to avoid taxes. It has a legal basis in the understanding that certain anti-avoidance regulations are not adequate in dealing with increasingly complex tax evasion schemes. This has seen GAAR become a critical part of the current tax structures, even in other parts of the world.⁷⁵⁷⁶



⁷⁵ Income Tax Act, 1961, Chapter X-A, ss 95–102, inserted by Finance Act, 2012; effective from 1 April 2017 vide Notification S.O. 1188(E). See also Parthasarathi Shome Committee, 'Report on General Anti-Avoidance Rules (GAAR) in Income Tax Act, 1961' (Ministry of Finance, 2012).

⁷⁶ Judith Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament' (2007) 123 Law Quarterly Review 53, 72; John Tiley, 'Revenue Law' (7th edn, Hart Publishing, 2012) 96–112.

The tax avoidance laws on GAAR in India are found in the Income Tax Act, 1961, which amended the act to enhance the capacity of the nation in dealing with aggressive tax avoidance. Effective as of April 1, 2017, GAAR was the result of a massive deliberation and consultation with stakeholders. The framework has been designed in terms of what is known as an impermissible avoidance arrangement, which is any arrangement that has the primary aim of acquiring a tax benefit and meets some of the conditions specified. These circumstances encompass those in which the arrangement gives rise to rights or liabilities that are not normally established between parties that are at arm-length, have no commercial substance or lead to misuse or abuse of tax provisions. This definition constitutes the foundation of GAAR in India and it is on this that the application of GAAR is based.⁷⁷⁷⁸

Another important aspect of the Indian GAAR system is the focus on the protections to avoid arbitrary application. The legislature understood the wide and discretionary nature of GAAR, so procedural measures are provided to make it fair and transparent. Application of GAAR goes through several steps of scrutiny, starting with the assessing officer, who identifies a possibly impermissible arrangement. Higher authorities review the matter including the Principal Commissioner or Commissioner of Income Tax and refer the matter to an approving panel. The panel that reviews the case is an approving panel that consists of professional members who are experienced and independent members who decide whether or not GAAR should be invoked. The multi-tiered procedure is created to make sure that the usage of GAAR is limited to relevant situations and the taxpayers are not subject to excessive discretion.

⁷⁷ Finance Act, 2012, inserting Chapter X-A in the Income Tax Act, 1961; CBDT Circular No. 7/2017, dated 27 January 2017 (providing detailed guidelines on the application of GAAR).

⁷⁸ Income Tax Act, 1961, s 96(1): 'An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit.' See also s 97 (circumstances in which an arrangement lacks commercial substance).

The other Indian legal system that is of a great significance is the threshold to invoke GAAR. The provisions only apply in situations where the tax benefit exceeds a specified monetary threshold, thus, removing small-scale cases of avoidance and focusing on large cases of avoidance. In addition, taxpayers get an opportunity to be heard and give an explanation to GAAR prior to its implementation. These protections allude to the middle ground position that tries not to allow misuse and still retain the confidence of taxpayers. The other element of the framework is the review of appellate in which the taxpayers can appeal against the GAAR decisions to a higher court of law.⁷⁹⁸⁰

Interaction between GAAR and tax treaties can be found in the Indian system of law. Regardless of the cases that might be benefiting under the treaty, the GAAR can be applied under some conditions as stated by law. This is in agreement with the fact that the provisions of a treaty cannot be applied as an avenue of evading taxation. Meanwhile, the framework recognises the significance of complying with international obligations and tries to enforce GAAR in a way that would be consistent with the object and purpose of tax treaties. The most crucial matter of the success of GAAR concerning the international taxation is its balance.⁸¹

GAAR legal framework in the international arena can be described as a blend of a domestic law, bilateral tax treaties and multilateral initiatives. Countries have construed GAAR provisions differently based on the legal traditions and policy priorities of countries. It is possible to have jurisdictions that have long tradition of GAAR regimes and those that have been implemented slightly more recently so that they will not be left behind in the international trend.

⁷⁹ Income Tax Act, 1961, s 144BA read with Rule 10U of the Income Tax Rules, 1962; CBDT Circular No. 7/2017, para 3 (threshold: tax benefit exceeding INR 3 crore in the relevant previous year).

⁸⁰ Income Tax Act, 1961, s 144BA(3) and s 144BA(7); see also Principles of Natural Justice as applied in tax proceedings: Maneka Gandhi v Union of India (1978) 1 SCC 248.

⁸¹ Union of India v Azadi Bachao Andolan (2004) 10 SCC 1; Vodafone International Holdings BV v Union of India (2012) 6 SCC 613; Income Tax Act, 1961, s 90(2A) (GAAR overrides treaty where arrangement is impermissible).

Notwithstanding these disparities, the morals that guide GAAR are coming together even further in the emphasis of the result-driven method as opposed to the shapes and in the necessity to be abuse free.⁸²

The effects of international efforts to combat tax avoidance have been immensely influential in the legal practice of GAAR. These efforts to counteract the consequences of the bases erosion and profit translocation have given rise to the emergence of common standards and guidelines, based on which domestic laws are established. The largest consequences of such activities are the fact that the anti-abuse provisions currently belong to tax treaties.⁸³⁸⁴

The Multilateral Instrument (MLI) is the other महत्वा/mahatmapooran innovation in the international legal system. Under the MLI, countries are free to amend their existing tax treaties to include anti-abuse provisions and other requirements to them without necessarily renegotiating the individual tax treaties. This has improved the rate of implementing global standards and performance of the treaty networks when it comes to the treaty avoidance. The MLI supplements the general structure of the fight against international tax avoidance, by introducing anti-abuse provisions to the treaties.⁸⁵

The other element of the legal framework of GAAR is the interaction between the domestic law and the international commitments. The countries are expected to make sure that their anti-avoidance provisions are in line with the requirements of the treaty and the international standards. This involves cautious drafting and interpretation of legislations to prevent any

conflict and assuring that the application of GAAR does not interfere with sovereignty and international cooperation of nations. Such conflicts can only be solved through judicial interpretation which offers some level of assurance on the application of GAAR in cross-border situations.⁸⁶

The other significant factor of legal environment is the administrative guidance and regulatory practice. To make the implementation of GAAR transparent and so that they are able to offer feasible guidance to tax payers, the tax authorities usually provide guidelines, circulars as well as explanatory notes. These documents are useful to minimize the uncertainty and encourage common interpretation of the law. Guidelines have been provided in detail in India to expound or expand on the scope, applicability and the procedural aspects of GAAR. This kind of guidance is critical in making the law applied in a foreseeable and open manner.⁸⁷⁸⁸

Legal framework also has to address the issues of the digital economy and the new business models. The conventional provisions of taxation such as permanent establishment and source of income might be inadequate to capture the economic activities of digital business. This has also increased the debate on new strategies that should be employed in taxation such as redistribution of the taxing rights and the global minimum tax norms. The effect of these developments on the use of GAAR can be predicted as follows; it is that the anti-avoidance rules are influenced by the context in which they are applied.⁸⁹⁹⁰

⁸² OECD, 'Model Tax Convention on Income and on Capital' (2017 Update, OECD Publishing, Paris); Brian Arnold and Michael McIntyre, 'International Tax Primer' (3rd edn, Kluwer Law International, 2014) 1–25.

⁸³ OECD/G20, 'Action Plan on Base Erosion and Profit Shifting' (OECD Publishing, Paris, 2013); OECD/G20, 'Explanatory Statement: 2015 BEPS Final Reports' (OECD Publishing, Paris, 2016).

⁸⁴ OECD, 'Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 — 2015 Final Report' (OECD Publishing, Paris, 2015); OECD Model Tax Convention, Art 29 (Entitlement to Benefits), inserted by the 2017 Update.

⁸⁵ Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, OECD, opened for signature 24 May 2017 (entered into force 1 July 2018); India signed the MLI on 7 June 2017. See also OECD, 'Explanatory Statement to the MLI' (2016).

⁸⁶ Vienna Convention on the Law of Treaties, 1969, Arts 26–27 (pacta sunt servanda; domestic law cannot justify non-performance of treaty obligations); Michael Dagan, 'The Tax Treaties Myth' (2000) 32 New York University Journal of International Law and Policy 939.

⁸⁷ CBDT Circular No. 7/2017 (27 January 2017); CBDT Circular No. 10/2018 (26 December 2018); Ministry of Finance, Press Release on GAAR (29 August 2012). These circulars provide procedural guidance on the invocation and processing of GAAR.

⁸⁸ Income Tax Act, 1961, s 119 (power of CBDT to issue instructions to subordinate authorities); CIT v Anjum M H Ghaswala (2002) 1 SCC 633 (circulars of CBDT are binding on income tax authorities).

⁸⁹ OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1 — 2015 Final Report' (OECD Publishing, 2015); OECD/G20 Inclusive Framework on BEPS, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (8 October 2021).

Although major strides have been taken to develop an entire legal framework, there remain concerns to implement GAAR in India and other countries. One of the challenges is the risk of uncertainty that may be established by the general and principle-based nature of GAAR. The taxpayers will not be aware of the rules application and this will increase the cost of compliance and there will be a possibility of dispute. To solve this problem, it is recommendable to have a clear direction, consistency and sufficient line of communication between the taxpayers and the tax authorities.

The second is that there is a need to strike a balance between the interests of not taxing and creating economic growth. Although GAAR is significant in ensuring the safety of tax base, it should not cause excessive uncertainty environment and neither should it make honest business practice unappealing. The policymakers will be required to design and introduce GAAR in such a way that it can fulfill its goals without straining the taxpayers with high taxes. This will involve a fine balancing act between rules, procedures and administrative practices.⁹¹

The other feature to cause equity and fair taxation problems is the GAAR legal structure. GAAR is also concerned with arrangements that take advantage of the loopholes in the law and therefore a more fair tax burdening. The regulations should however be applied in a similar and fair manner so that all tax payers can be treated equally. This is where the transparency, accountability and oversight in the management of GAAR comes in.^{92,93}

⁹⁰ OECD/G20 Inclusive Framework, 'Two-Pillar Solution' (October 2021): Pillar One (reallocation of taxing rights) and Pillar Two (global minimum tax of 15% — GloBE Rules). See also OECD, 'Tax Challenges Arising from Digitalisation — Report on Pillar Two Blueprint' (2020).

⁹¹ Patel, K. (2021). 'GAAR and Its Impact on Foreign Investment Decisions.' *Global Tax Journal*, 2(3), 145–167; Kumar, P. (2020). 'Challenges in Implementing GAAR in Emerging Economies.' *World Tax Journal*, 12(3), 201–228 (IBFD).

⁹² McDowell and Co. Ltd. v. Commercial Tax Officer (1985) 3 SCC 230 (the Supreme Court emphasised that tax avoidance through colourable devices is impermissible and burdens honest taxpayers); Chinnappa Reddy J (minority) at 271: 'It is the obligation of every citizen to pay taxes honestly without resorting to subterfuges.'

The Indian GAAR legal regime and that of the rest of the world is a dynamic and changing way of tackling the problem of tax avoidance in a global economy. Though there has been enormous progress in enhancing this framework, uncertainty, coordination as well as economic impact challenges are still yet to be overcome. The fact that the domestic laws are not violated by the international principles and that the success of the implementation will allow the countries to make the taxation system more authentic and contribute to the establishment of a more impartial and sustainable path in the sphere of taxation.⁹⁴

Tax treaties legal framework is a fundamental component of international taxation because it provides the framework according to which countries must organize their rights to tax, and prevent any conflict that could occur because of the economic interaction across the borders. Tax treaties or Double Taxation Avoidance Agreements (DTAAs) are bilateral or multilateral treaties signed by sovereign states to allocate taxation powers, to avoid the occurrence of two taxation and to promote international trade and investment. The provisions of the international law support these treaties and they collaborate with the system of domestic taxation, creating a complex, but also an important system of taxation of global income.

At the centre of the legal framework of tax treaties is mutual agreement between sovereign states. Economic interests, fiscal policies and diplomatic considerations influence the countries to negotiate and sign treaties based on their interests. When these treaties are concluded they are an obligation to the international law and must be applied in good faith. The process of treaty making generally involves the negotiating, signing, ratification and integration into the domestic

⁹³ Income Tax Act, 1961, s 144BA (multi-tier review: Assessing Officer → Principal Commissioner → Approving Panel); Nair, S. (2022). 'Administrative Challenges in Implementing GAAR and Treaty Provisions.' *Revenue Law Journal*, 32(1), 89–110.

⁹⁴ Verma, S. (2023). 'GAAR and BEPS: A Global Perspective on Anti-Avoidance.' *Tax Research Journal*, 15(1), 78–99; Gupta, R. (2022). 'Comparative Study of Anti-Avoidance Rules in Selected Jurisdictions.' *International Tax Review*, 33, 1–25.

law. In a majority of jurisdictions, including India, tax treaties are given legal effect under some clauses of local laws, and so may be applied directly to calculate tax burdens.⁹⁵⁹⁶

To a large extent, tax treaties assume and are contained in the form and style that is informed by models that are globally accepted and more specifically OECD Model Tax Convention and UN Model Double Taxation Convention. These models provide identical provisions and commentary on which countries rely in treaty-making and interpretation. Whereas OECD Model is more popular among the developed countries, UN Model gives more emphasis on the rights of source countries, which is an expression of the interests of developing countries. The models as applied promote homogeneity and predictability in treaty design, even though the specific treaty may vary based on specific negotiations between states.⁹⁷

The second important provision of the legal framework is the term permanent establishment (PE) that establishes the boundary of taxation of business profits in country of source. A PE is usually a fixed business site where an enterprise conducts its operations e.g. an office, branch or factory. The existence of PE creates a sufficient connection between the enterprise and the country of origin whereby the country is able to impose taxes on profits accredited to the PE. The division of taxing rights deals with it and it has been the subject of numerous debates and reforms, particularly in the context of the digital economy, where physical location may not be a factor.⁹⁸

The clauses of the tax treaties are also geared towards eradication of discrimination and equal treatment of taxpayers. The non-discrimination sections prevent the countries to impose heavier taxation on foreign organizations as compared to the ones located within the country in the same circumstances. This promotes fairness and discourages discriminative tax policies as it removes the opportunities of them. As well, treaties typically contain the provision of information exchange among the tax authorities, which helps to enhance the transparency and follow up the tax laws. This type of cooperation is highly essential when it comes to combating problems such as tax evasion and tax avoidance, particularly in globalized economy.⁹⁹¹⁰⁰

The other significant aspect of the legal framework of treaties is that, it has anti-abuse considerations which limits the misuse of the benefits of treaties. Over the years, it has been identified that the application of tax treaties is subject to abuse such as treaty shopping whereby taxpayers direct their transactions in jurisdictions with favorable treaty treatment but may not necessarily have economic activity in such jurisdictions.¹⁰¹

One of the crucial elements of the legal framework is the interaction between the domestic law and the tax treaties. In many jurisdictions, treaties may prevail over home tax regulations to the extent that it is more favorable to taxpayers. In India, e.g., the law of Income tax provides a taxpayer with an option between domestic law provisions and treaty provisions, whichever would be more beneficial. However, the interaction can be complex where

⁹⁵ Vienna Convention on the Law of Treaties, 1969, Art 26 (pacta sunt servanda); Klaus Vogel, 'Double Tax Treaties and Their Interpretation' (1986) 4 International Tax and Business Lawyer 1; Roy Rohatgi, 'Basic International Taxation' (2nd edn, Taxmann, 2007) Vol. 1.

⁹⁶ Income Tax Act, 1961, s 90(1) (power of Central Government to enter into agreements with foreign countries); s 90(2) (treaty provisions prevail over Act where more beneficial to assessee); Azadi Bachao Andolan v Union of India (2004) 10 SCC 1.

⁹⁷ OECD, 'Model Tax Convention on Income and on Capital: Condensed Version 2017' (OECD Publishing, 2017); United Nations, 'Model Double Taxation Convention between Developed and Developing Countries' (2021 Update, UN, New York). India generally follows the UN Model in treaty negotiations.

⁹⁸ OECD Model Tax Convention, Art 5 (definition of Permanent Establishment); OECD Commentary on Art 5 (2017 Update); Formula One

World Championship Ltd v CIT (2017) 394 ITR 80 (SC) (PE constituted by access and control over a fixed place of business in India).

⁹⁹ OECD Model Tax Convention, Art 24 (Non-Discrimination); UN Model Convention, Art 24; Arvid Skaar, 'Permanent Establishment: Erosion of a Tax Treaty Principle' (Kluwer Law International, 1991) 457–475.

¹⁰⁰ OECD Model Tax Convention, Art 26 (Exchange of Information); OECD, 'Standard for Automatic Exchange of Financial Account Information in Tax Matters' (Common Reporting Standard — CRS) (OECD Publishing, 2014); Foreign Account Tax Compliance Act (FATCA), USA, 2010; Income Tax Act, 1961, s 90(1)(b) (exchange of information under DTAA).

¹⁰¹ OECD, 'Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances' (2015 Final Report); Conduit Companies Report (OECD, 1987); Union of India v Azadi Bachao Andolan (2004) 10 SCC 1 (SC upheld India-Mauritius treaty route as valid planning at that time).

the application of domestic anti-avoidance provisions, such as GAAR, is used to evade the treaty benefits. These conflicts must be solved through a comprehensive use of the domestic and international law and these conflicts are mostly solved by use of judicial intervention.¹⁰²

The significant feature of tax treaties is the dispute resolution mechanism, by which the conflicts between countries can be settled and the regularity of the treatment of the provisions of the treaty ensured. MAP allows qualified authorities of the states that are signatories to the treaty to negotiate and resolve any disputes that can emerge as a result of the interpretation or implementation of the treaty. The effectiveness of dispute resolution has been in the limelight in the last couple of years with some treaties having arbitration mechanisms. This kind of action brings about a level of confidence to the tax payers and reduces the possibility of paying a double tax.¹⁰³¹⁰⁴

International initiatives towards addressing tax evasion and equitable taxation have also influenced legal system of treaties. The base erosion and profit shifting treatment has led to tremendous changes in designing and treatment of treaties. Among the major shifts in this regard has been the adoption of the Multilateral Instrument (MLI) that allows the countries to modify their existing treaties to deliver anti-abuse and other instruments without the need to renegotiate each treaty individually. This has increased the international standardization and the overall framework of international taxation.¹⁰⁵

¹⁰² Income Tax Act, 1961, s 90(2): 'Where the Central Government has entered into an agreement with the Government of any country outside India... the assessee shall be entitled to relief under such agreement.' See CIT v P V A L Kulandagan Chettiar (2004) 267 ITR 654 (SC).

¹⁰³ OECD Model Tax Convention, Art 25 (Mutual Agreement Procedure — MAP); OECD, 'Making Dispute Resolution More Effective — MAP Peer Review and Monitoring, Action 14 — 2015 Final Report' (OECD Publishing, 2015); Income Tax Act, 1961, s 90 read with relevant DTAA provisions.

¹⁰⁴ OECD Model Tax Convention, Art 25(5) (mandatory binding arbitration); Multilateral Instrument, Art 19 (mandatory binding arbitration for MLI signatories); Philip Baker, 'Double Taxation Conventions' (Sweet & Maxwell, looseleaf), para 25-1 et seq.

¹⁰⁵ Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), 2016, Arts 6–7 (Principal Purpose Test and Limitation on Benefits); India's MLI Position Paper (2017) covering 93 Covered Tax Agreements; OECD, 'Synthesised Texts of MLI and Covered Tax Agreements' (2018).

The administrative factors of the successful functioning of the treaty framework are also significant. Tax authorities must ensure that the treaty is implemented in the right way and that tax payers comply with the criteria of claiming benefits. This entails checking the residence, assessing qualification besides supplying necessary documents. The increased use of digital systems and data analytics has led to the increased efficiency of tax authorities in enforcing treaties and detecting potential abuse.

The legal framework of treaties also needs to be adapted to the needs of the digital economy and shifting business models. The physical presence together with source of income might not be enough to determine the economic activities of digital businesses hence loopholes in taxation. It has resulted in the negotiation of the new strategies of re-distribution of taxation powers and the introduction of global minimum taxation. Such changes will be a new definition of future of tax treaties and nature of treaty benefits.¹⁰⁶

In addition to this, the framework must incorporate the interests and concerns of the developing countries, who might have major problems in negotiating and implementing tax treaties. The developing countries may have limited resources and capabilities and it may not be easy to completely avail the treaty benefits or implement the anti-abuse measures. These issues require global cooperation, capacity building and technical assistance to assist in the even distribution of the benefits of tax treaties.¹⁰⁷

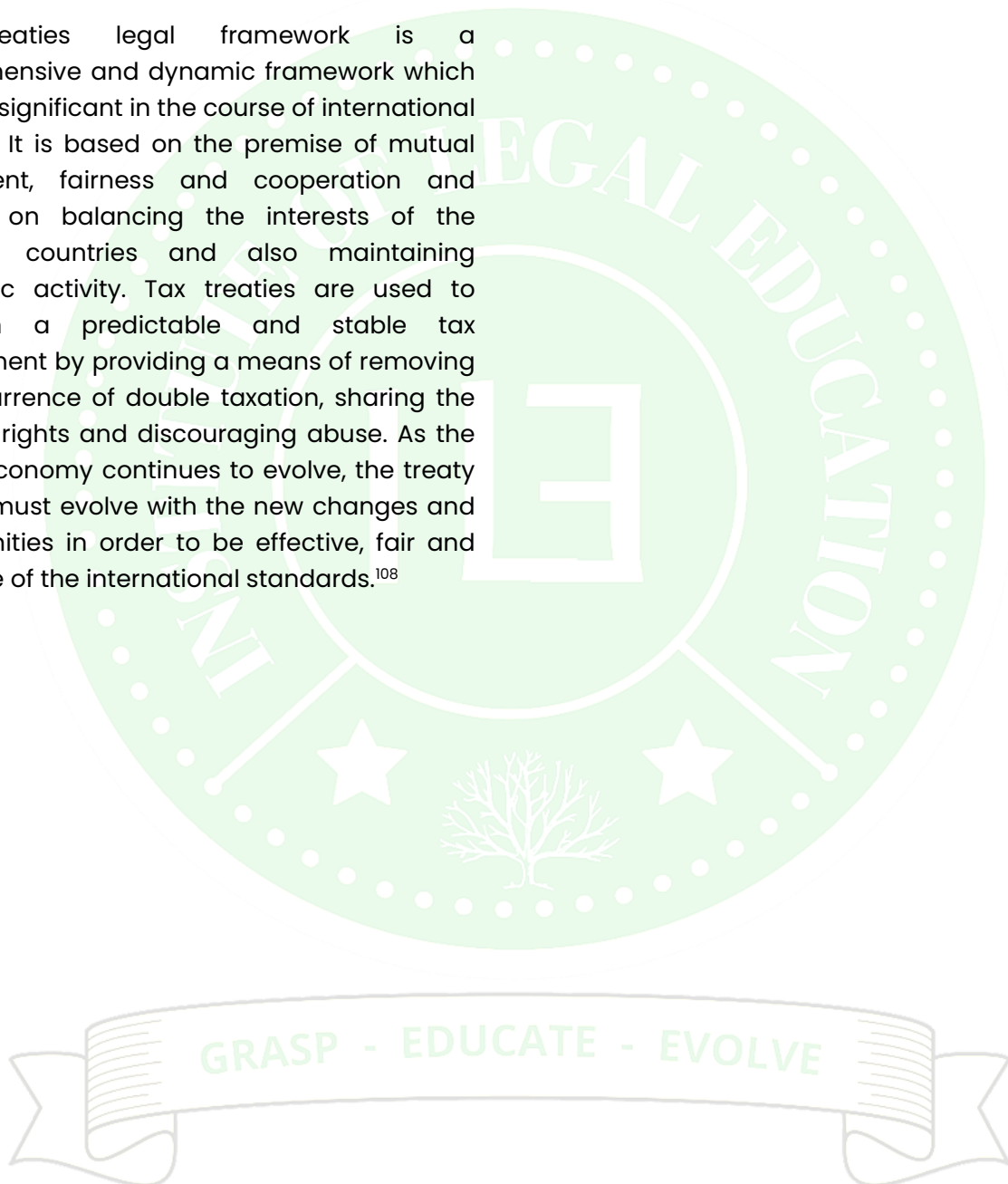
The law of treaties is not devoid of its flaws as there are very many advantages to it. Ambiguity and disagreements can arise due to such issues as uncertainty in the wording of

¹⁰⁶ OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1 — 2015 Final Report'; OECD/G20 Two-Pillar Solution (October 2021); Rao, D. (2024). 'The Economic Substance Principle and Treaty Benefits.' Indian Tax Review, 8(1), 23–46.

¹⁰⁷ United Nations, 'Handbook on Selected Issues in Protecting the Tax Base of Developing Countries' (UN, 2017); IMF, 'Spillovers in International Corporate Taxation' (IMF Policy Paper, 2014); OECD, 'Tax and Development Programme: Supporting Developing Countries' (2021).

treaties, different ways of interpreting them, and conflict with local laws. The other issue that is experiencing both the tax payers and the tax authorities is the ever growing complexity of international tax regulations. Constant revision of terms of treaties, more effective leadership and enhanced cooperation between countries is required to resolve these issues.

Tax treaties legal framework is a comprehensive and dynamic framework which is highly significant in the course of international taxation. It is based on the premise of mutual agreement, fairness and cooperation and focuses on balancing the interests of the different countries and also maintaining economic activity. Tax treaties are used to establish a predictable and stable tax environment by providing a means of removing the occurrence of double taxation, sharing the taxation rights and discouraging abuse. As the global economy continues to evolve, the treaty system must evolve with the new changes and opportunities in order to be effective, fair and reflective of the international standards.¹⁰⁸



¹⁰⁸ Mehta, A. (2021). 'The Interface of Anti-Avoidance Rules and Tax Treaties.' *Indian Journal of International Law*, 61(2), 112–134; Sharma, R. (2022). 'Using GAAR in the Modern Taxation System.' *Journal of International Taxation*, 33(4), 45–62; Iyer, N. (2024). 'Judicial Interpretation of GAAR and Treaty Benefits.' *National Law Review*, 19(2), 55–80.



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