

**Vienna Convention on the Law of Treaties  
(VCLT)**

**Bombay Management Association  
(BMA)**

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# Vienna Convention

## 1. God Loves Lawyers.

2. In India, Chartered Accountants are also lawyers - they have taken up tax practice just like Lawyers.

So in India, God loves Lawyers & Chartered Accountants.

3. He has ensured that people will always interpret the same words in hundred different ways.

Bible & Gita (and all religious scriptures) are interpreted in infinite ways.

The Man-made law and treaties are bound to be interpreted in hundred different ways.

4. This ensures the tax practice forever.
5. Or does he really ....!

# Tower of Babel

BMA Slide 3

The "Tower of Babel" is the name of the building mentioned in Genesis 11:1-9.



Since all the people in Babylonia spoke in terms which no one understood; their target of building the Tower of Babel had to be abandoned.

**Rashmin**

## Mr. Michael Edwards Ker

### Extract:

Article 31 - Chapter 4 - Page 1 -

“Nothing is absolutely clear in itself.”

“As a rule, both the parties, while putting forward diametrically opposed contentions, claim that the disputed provision is clear.”

Chapter 4 - Page 2 -

“No clarity is so absolute as not to admit of a proof to the contrary.”

Comment by Rashmin -

Isn't it proof of the “Babel” in existence even today!

**Rashmin**

## **Interpretation of a Tax Treaty.**

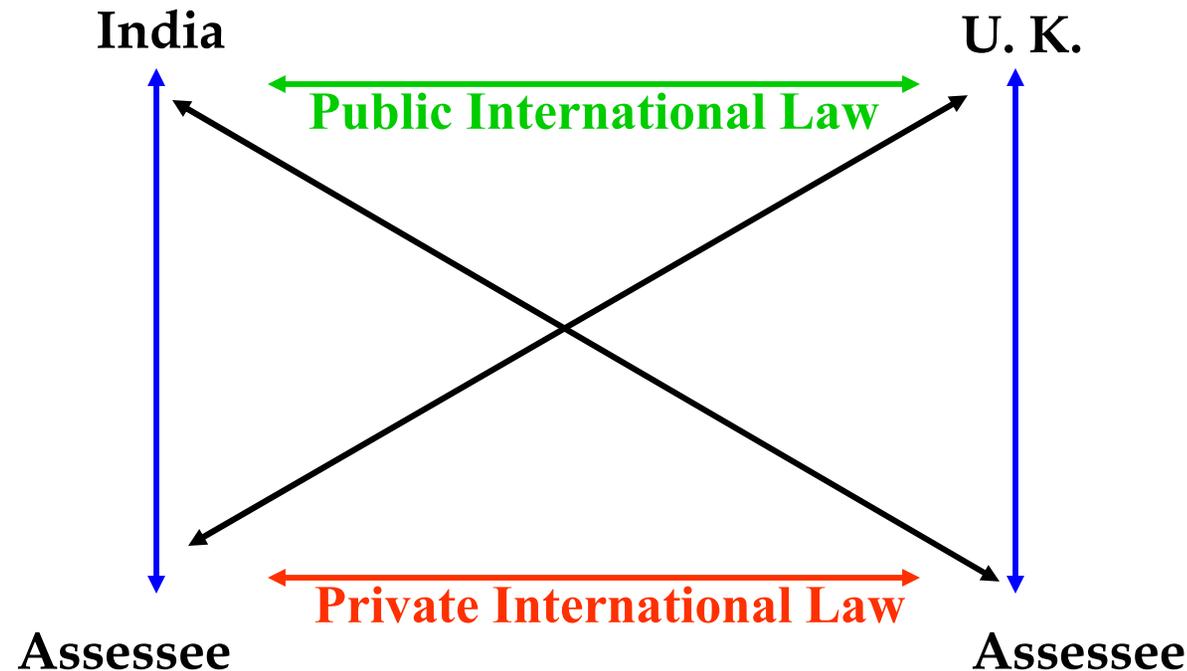
### **Important Themes.**

- 1. Treaty Override  
(Domestic Law vs. International Law.)**
- 2. OECD Commentary & its applicability.**
- 3. Vienna Convention (VCLT).**
- 4. Other DTAs signed by the same  
Government.**

**There are several issues that arise in  
interpretation of Tax Treaties.**

**I am concentrating on VCLT.**

## Treaty Interpretation Differences.



There can be differences of opinions between -  
 COS & Assessee, Domestic Law  
 COR & Assessee, Domestic Law  
 COS & Payer to the assessee, (T.D.S.) Domestic Law

**Two Assesseees - Private International Law.**

**Two Governments - Public International Law.**

## What is Public International Law!

**'Public'** This is the part of the law which deals with relations between Governments

**'Law'** What is law!

Within a country, we are used to the Knowledge that with the law; there is also a power to enforce the law.

In case of the "International Law", the situation is different.

International treaties are essentially, hopes that the parties to the treaty will abide by the treaty.

A majority of the nations would like to stand by the treaties that they have signed. And yet they have differences of opinions.

What do they do! How to resolve the differences!

This is when the 'International Law' helps.

VCLT being a part of the International Law, is a clear direct help.

## Characteristics of VCLT

VCLT is a multi-lateral treaty signed & ratified by several countries.

It is an “Open Treaty” - meaning any nation can join the treaty any time.

A “Restricted Treaty” is one where a new member is admitted only if existing members approve the admission. (Like WTO)

# What is the Source of International Law?

Statute of the International Court of Justice.

Article 38

- 1 The Court, whose function is to decide in accordance with international law, ... shall apply:
  - a international conventions;
  - b international custom;
  - c general principles of law recognised by civilised nations;
  - d **judicial decisions** and teachings ...as **subsidiary** means for the determination of rules of law.

## International Court of Justice (ICJ)

ICJ has the authority to pass a judgement on  
- interpretation of:

- (1) A DTA between/amongst any countries;  
and
- (2) The VCLT itself.

However the Court acquires a jurisdiction only if both /all the nations being party to the dispute accept the jurisdiction of the Court, for the specific matter.

# VCLT

## 5 Basic Principles

1. Free Consent (For entering into the treaty.)
2. Good Faith (Implementation.)
3. 'Pacta Sunt Servanda'  
A treaty is binding upon the parties.
4. Interpretation or Application of Treaties -  
In Good Faith.
5. It is better to seek maintenance rather than  
the termination of a treaty. (Favor Contractus.)

# VCLT

## Part III

Section I - Observance of Treaties.

Article 26 Pacta Sunt Servanda

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

# VCLT

## Part III, Section I

Article 27 Internal Law & observance of treaties.

A party **may NOT invoke** the provisions of internal law as justification for its failure to perform a treaty.

This rule is without prejudice to Article 46.

# VCLT

## Part III, Section I

### Article 28

A treaty does not have **retroactive** application (unless otherwise intended.)

Indo - Cyprus DTA

### Article 29

A treaty is binding in respect of **entire territory** of the party (unless otherwise intended.)

## Faith (Article 31)

Faith is what we generally attribute to religion or spirituality.

When people from two religions have disputes over religion, each one will claim that he has faith in his own religion. Is it “Good Faith”?

“Good Faith is that which, when used, resolves all differences with satisfaction on both sides.”

“In Good Faith” means - “we both look at mutual interests. The result of our dialogue has to be a ‘win-win’ situation.”

**(Article 31)....**

**Interpretation in Good faith...**

**Interpretation by whom?**

**Does it apply only to the Government ...  
& not to the assessee?**

**In other words can we say that while the Government has to be fair & reasonable, the assessee can have all kinds of stretched & twisted tax planning?**

**Also, can we say that it should be interpreted in Good faith by our Government & not by the other Government!**

**Or should it be done by both the Governments being party to the treaty!**

**Answers to these questions are evident ...**

**International Law Commission Commentary, on  
article 31(1). Para 12:**

Three Principles:

“The first – interpretation in good faith – flows directly from the rule **pacta sunt servanda**. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.”

# VCLT

# Article 32

Supplementary means of interpretation:

Preparatory work of the treaty

&

Circumstances of its conclusion

Can be used when the meaning arrived at  
under article 31

(a) leaves the meaning ambiguous or obscure;

or

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

Having signed a treaty,  
can a nation change its mind?

Yes.

The treaty may be amended...  
provided all the parties to the treaty agree upon it.

VCLT Article 39, 40, etc.

# Termination of a Treaty.

## Part V, Articles 42 to 72.

VCLT provides detailed procedure & grounds for termination of a treaty.

However, VCLT is subject to the DTA itself.

OECD model - Article 30 provides that any country can terminate a treaty. There is no need to give any reasons.

This is natural for a treaty which has no enforcement agency.

Hence VCLT provisions on this subject are not considered here.

# Is VCLT an infringement on the sovereignty of a nation !

Guidance to a fair interpretation

Codification of simple & reasonable principles.

# Conclusion

**When an understanding, a treaty, a contract or a provision of law needs an enforcement agency; it means that the parties subject to the contract etc. are not yet civilised enough.**

**When a treaty etc. does not need an enforcement agency, the parties are highly civilised. Evolved.**

**When a treaty does need enforcement agency; but there is no enforcement agency...**

**that is life. (See details on Page 3.)**

**An ongoing process of Evolution.**

**THANKS**

**Rashmin Chandulal Sanghvi**