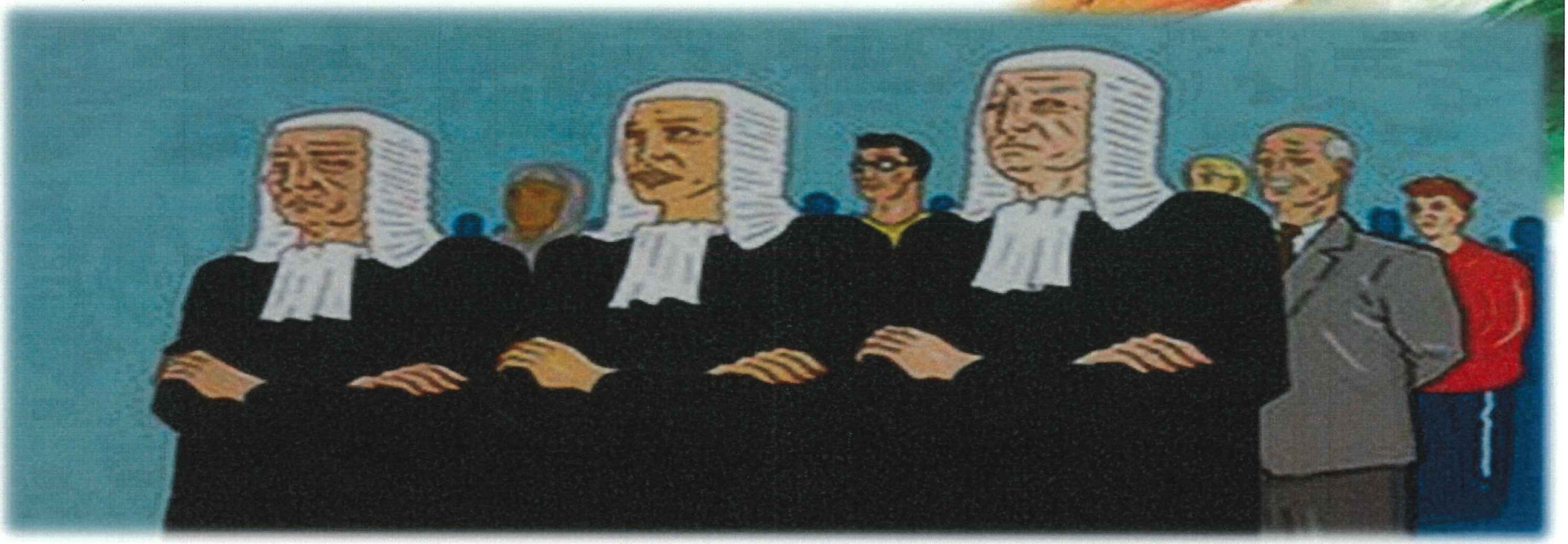
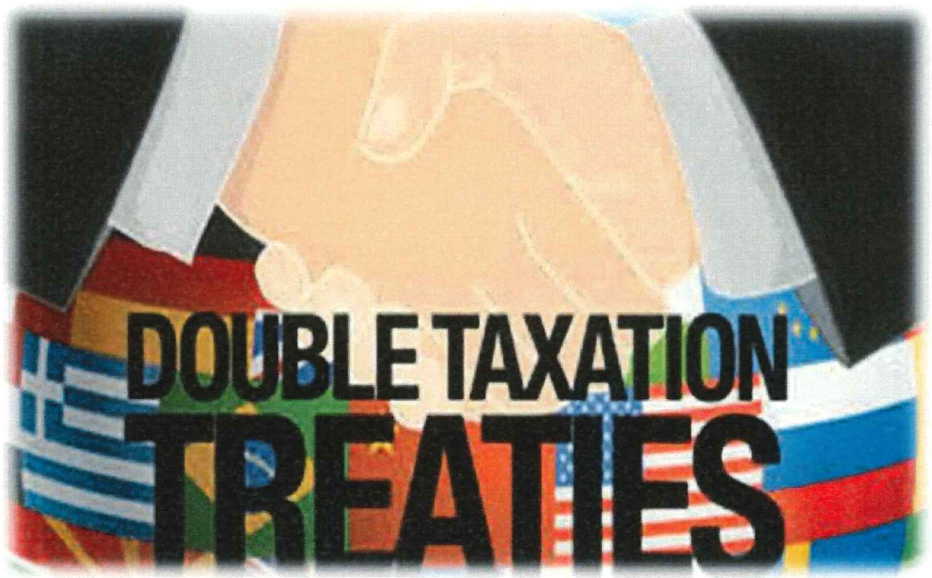
Dr. Justice Vineet Kothari, 58, is presently a Judge of Karnataka High Court, India, after having practiced as a Tax Lawyer in Rajasthan High Court and Supreme Court of India for about twenty years from 1984 till 2005 when he was appointed as Judge of Rajasthan High Court, in June 2005. He has dealt with several Tax cases and decided such cases in both the High Courts. He has done Ph.D. on Tax Laws after acquiring the professional qualifications of Chartered Accountants and Company Secretaries from ICAI and ICSI, India. His various Articles have been published in Tax Journals regularly in India & Abroad and for the last five years, he has been regularly contributing papers on International Taxation on the Forum of International Association of Tax Judges (**I.A.T.J.**) of which he is now a nominated Director and International Fiscal Association (**I.F.A.**) and has been invited to contribute papers by **T.P. International**, London and **I.B.F.D.**, Amsterdam.

APPLICABILITY OF FOREIGN DECISIONS AND INTERPRETATION OF TAX TREATIES IN INTERNATIONAL TAXATION



DR. JUSTICE VINEET KOTHARI, INDIA
Judge, High Court of Karnataka, India

World trade is going barrierless for the last several years and except the very recent trend of "**Look Inwards**" in **Trump Era** and **Brexit**, international trade and taxation has developed the area of several **Double Taxation Avoidance Agreements** (DTAAs).



INTRODUCTION

This contribution examines various **Top Court decisions** of different countries on the questions of **interpretation of Taxation Treaties** and application of various decisions by such courts.

Supreme Court of India

Union of India
vs.
Azadi Bachao Andolan

(movement for saving Independence) dealt with **Indo-Mauritius Double Taxation Avoidance Convention, 1983 ('DTAC')** [10 Supreme Court Cases 1 (2004)]

In the case of ***McDowell and Company Limited vs. Commercial Tax Officer , [3*** *Supreme Court Cases 230 (1985)].*
the Supreme Court of India
applied the following House of Lords decision from United Kingdom and the judgments from The United States of America.

ENGLISH DECISIONS:

Relying on **Lord Sumner in** **IRC vs. Fisher's Executors**, [1926 AC 395 at p.412]

&

Lord Tomlin in IRC vs. Duke of Westminster, [1936 AC 1] & [All ER p.267 I]

In these decisions the "right of the taxpayer to arrange his affairs in a manner as not to attract taxes imposed by the Crown," was upheld.

United States Federal Court decision in the case **Perry R.Bas Vs. Commissioner of Internal Revenue,** [(1968) US 50 TC 595]

&

Barber Greene Americas Inc. Vs. Commissioner of Internal Revenue [(1960) 35 TC 365, 383, 384]

Here, the principle that "motive of tax avoidance is irrelevant," was upheld.

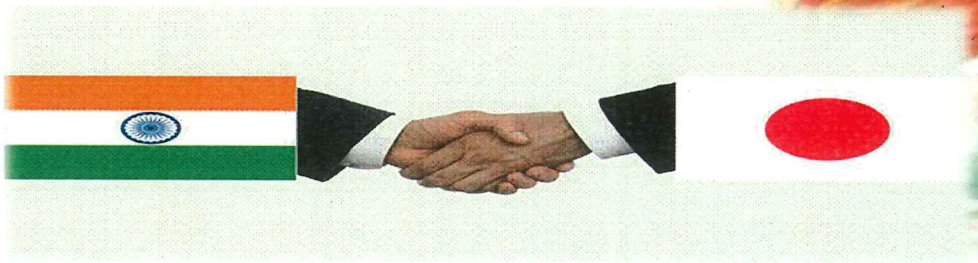
In **Vodafone International Holdings B.V. vs. Union of India and anr,** [2012] 341 ITR 1 (SC) = 6 SCC 613 (2012) Indian Supreme Court developed the principles of **"Look At"** and not **"Look Through"** the Tax Treaties and held that on **indirect transfers of shares offshore, no capital gains tax** could be demanded by the Indian Tax Authorities.

United States Supreme Court decision in
United States v. Bestfoods, 524 US 51 (1998)
&
Adams v. Cape Industries Plc., (1991) 1 All ER 929 (CA)
were applied by **Indian Supreme Court**.

"Look Through"

Principles were left to be decided by the State as a matter of State Policy. Its not for Courts.

Indo-Japan Double Taxation Avoidance Agreement



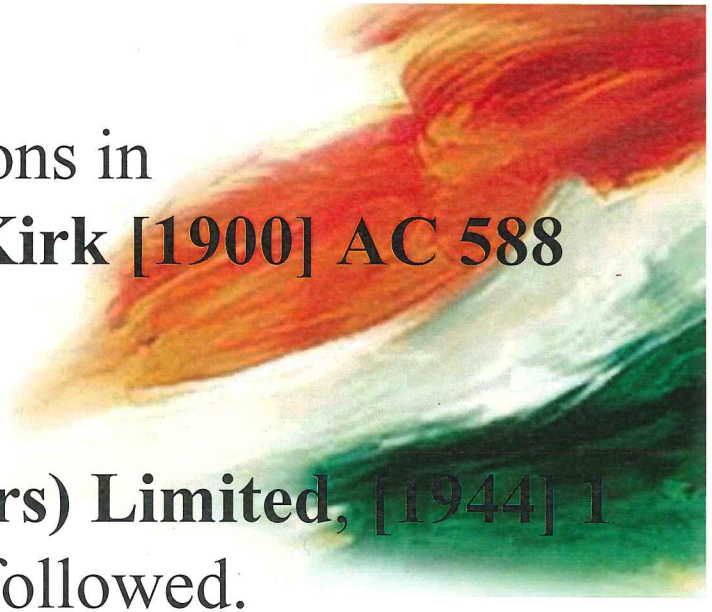
In the case of

Ishikawajima-Harima Heavy Industries Limited

V/s

Director of Income Tax, Mumbai, [2007] 288 ITR 408 (SC)

the Court explained the difference between existence of "**Permanent Establishment**" but **absence of "Business Link**" and held that in the absence of "Business Link", the Indian tax could not be imposed.



The English decisions in
Commissioner of Taxation vs. Kirk [1900] AC 588 HL
and
Love vs. Norman Wright (Builders) Limited, [1944] 1 K.B. 484 (CA), were followed.

DIT (International Taxation) vs. Morgan Stanley and Co. Inc. [2007] 292 ITR 416 (SC)

the Indian Supreme Court dealing with the **Indo-US DTAA** held that mere providing of **back office operations to US Company** in India by Morgan Stanley Advantages Services Private Limited Company, did **not amount to setting up of a *permanent establishment* of United States company in India**.

CHINA:

Beijing Secondary Court of Appeal in **China-US Treaty**, where **PanAmSat of USA** provided the vide distribution services to **China Central Television (CCTV)**, the Chinese Court upheld the imposition of 7% tax thereon by China under Article 11 of **DTAA** on the basis of Open Distribution Rules in the Treaty.

AUSTRALIA:

The New South Wales Supreme Court of Australia ***Unisys Corporation Inc. Vs. FC of T***, 2002 ATC 5146 = [2002] NSWSC 1115,

Dealt with **US – Australia DTAA** and held that the **Unisys (USA)** who received royalty payments from Australian Company, Unisys Licensing Partnership **("ULP")** was liable to bear 30% of withholding tax in Australia under International Tax Agreements Act, 1953.

The Australian Company ULP could not be said to have any "permanent establishment" in USA.

The Court relied upon, ***Vienna Convention on the Law of Treaties (VCLT)*** and also **Canadian Supreme Court** judgments,

1. In ***Minister of National Revenue*** v ***Tara Exploration and Development Co. Ltd; (1972) 28 DLR (3d) 135***
2. ***Commissioner of Taxes*** v ***Aktiebolaget Tetra Pak; [1966] (4) SA 198,***
3. ***Secretary for Inland Revenue*** v ***Downing,***

(1975) (4) SA 518]

and also judgments from Supreme Court of **South Africa** and **Rhodesian** Appellate Division of the High Court.

CANADA:

In ***Unites States of America***

Vs.

Esperanza P.Harden*, [1963] S.C.R. 366,*

The Canadian Supreme Court upheld the **Revenue Rule** and held that Canadian authorities were not liable to enforce the decree of US Courts against the assesse Harden, who lived in Canada.

Reliance was placed on its earlier decision in ***Peter Buchanan Ld. & Macharg Vs. McVey***, [1955] A.C. 516 and the House of Lords English decision in the case of ***Government of India, Ministry of Finance (Revenue Division) v. Taylor***. [1955] A.C. 491. At p. 503

Federal Court of Appeal in Canada

Took a liberal view in a recent decision in

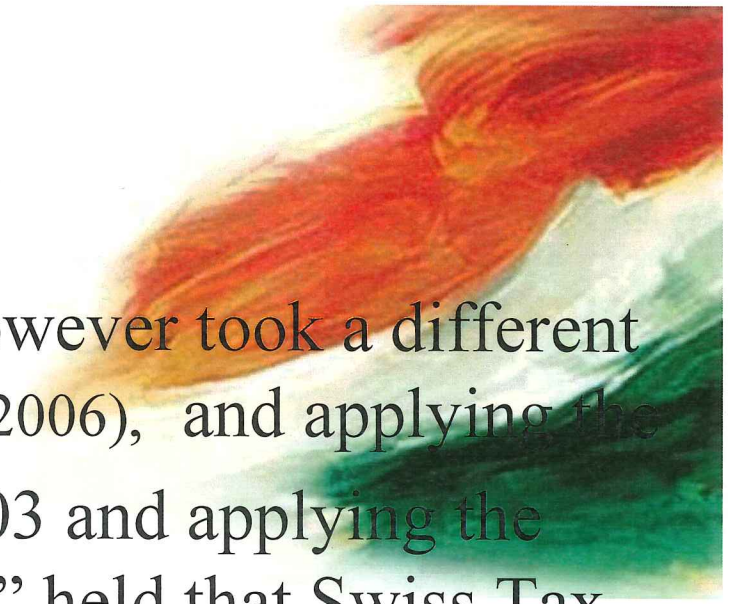
MIL (Investments), S.A.

vs.

Her Majesty the Queen. *(2007 FCA 236),*

Held that upon capital gains arising on the sale of shares by a **Cayman Islands Company**, which was controlled by its sole shareholder, Mr.Boulle, could not be taxed in Canada and the principles of **GAAR** (Domestic General Anti-Avoidance Rule) could not be invoked to levy such taxes.

SWITZERLAND:



The **Switzerland Federal Court,** however took a different view in **A Holding (ApS)**, ITLR 557 (2006), and applying the OECD model commentary of 2003 and applying the principles of "**LOOK THROUGH**" held that Swiss Tax Authorities were entitled to withholding of tax on the ground that **ApS** was only incorporated for the purpose of benefit from the advantages of the **Tax Treaty between Swiss and Denmark**.

The **'Revenue Rule'** as adopted by Canada is also very much applied in the USA and right from 1930s till 2005 in

Pasquantino

v.

United States, 544 U.S. 349 (2005).

The said principle was applied by US Court refused to enforce the foreign tax judgments & decrees.

In Bank Melli Iran

Vs.

Pahlavi, 58 F.3d 1406 (9th Cir. 1995)

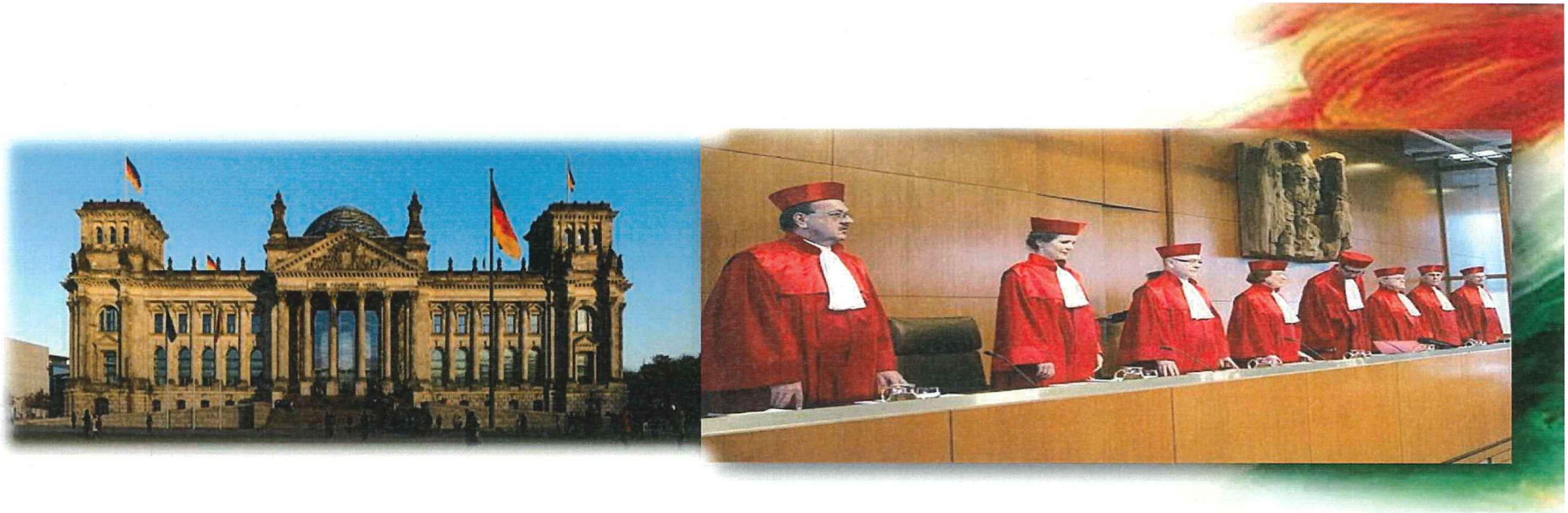
the US Court refused to enforce the Iranian judgment against one Pahlavi on the ground that Iranian Justice System lacked even in the most rudimentary due process.

After the new law **Foreign Account Tax Compliance Act (FATCA) 2010** which requires other signatory countries to provide information for financial transactions to avoid tax evasion, there is a movement in USA for relaxing the Revenue Rule. Treaties with such rules to relax the Revenue Rule are the best way out.

NETHERLANDS:

The **Dutch Supreme Court** in BNB 2007/42 considered the treatment of a capital gain realised shortly after the emigration of a Dutch BV and its sole shareholder from Netherlands to Belgium. Under 1970 **tax treaty between Netherlands and Belgium**, the taxation over capital gains was allocated to Belgium.

The court held that the treaty cannot be interpreted in such a manner that the intent of the migration nevertheless plays a role in respect to those consequences and Netherlands was not permitted to levy tax on such capital gains. The doctrine of ***Fraus Conventionis*** was not applied by **Netherlands Supreme Court.**



GERMANY:

The German Constitutional Court in its decision on **15th December 2015** in **2 BVL 1/12** upheld the **Treaty Override** by the National statutory law under German Constitution and held that Germany could impose tax on individuals who do not provide evidence of actual taxation abroad ("proof of foreign taxation"). The Court dealt with **German – Turkey DTA**.

SOUTH KOREA

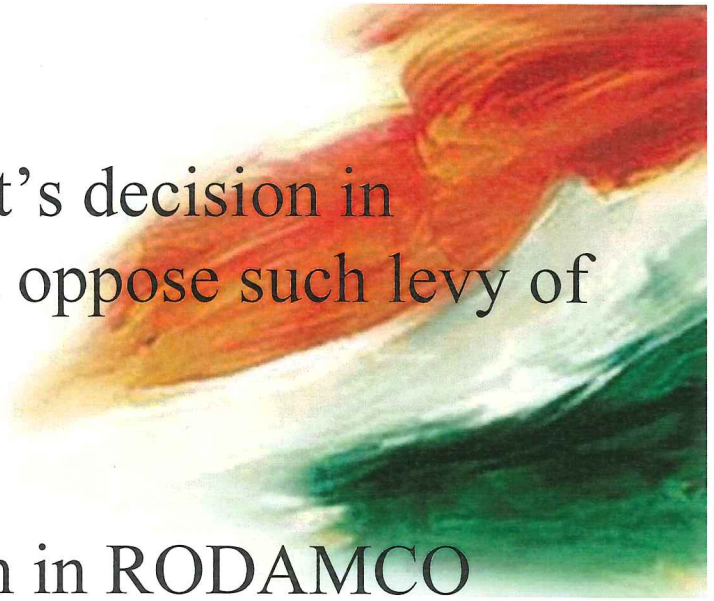
In the on-going dispute of **LSF-KEB Holdings SCA and others v. Republic of Korea** before the International Centre for Settlement of Investment Disputes (ICSID) [ICSID – The Hague Case No.ARB/12/37],

- Lone Star (US) acquiring shares in KEB (Korea Exchange Bank) to bail it out. Later on sought approval to sell part of its shareholding when the prices rose.

- Korean Authorities did not approve such sale of shares pending criminal investigation.

- Imposed Tax on Capital Gains on such sale of shares doing Treaty override.

- Supreme Court of Korea upheld the tax.

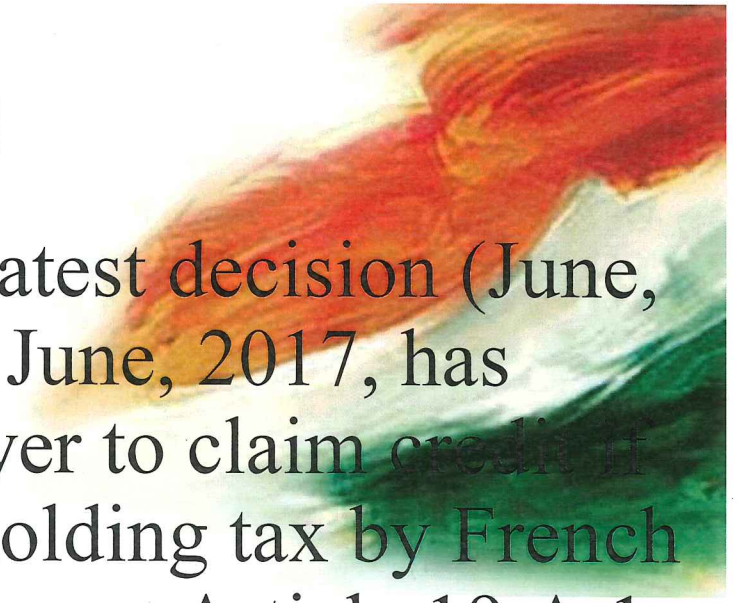


- While the Indian Supreme Court's decision in **VODAFONE** case (2012) would oppose such levy of tax on Capital Gains.

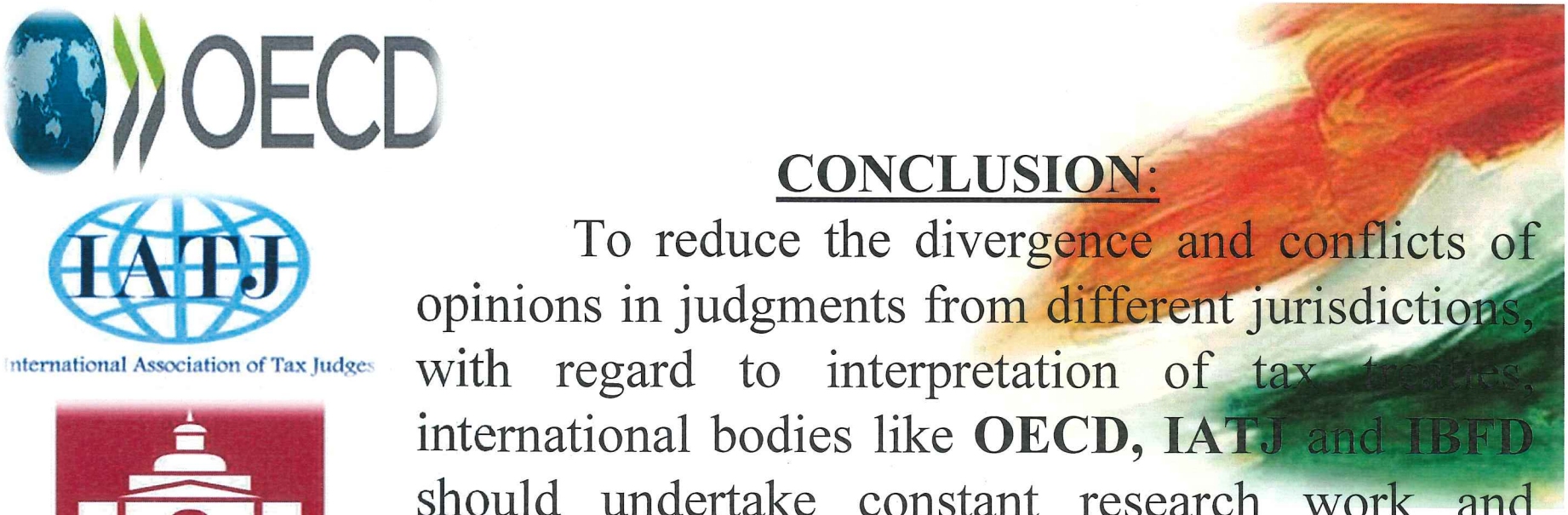
- Korean Supreme Court's decision in RODAMCO case would support such levy, applying the principle of 'substance over form'.

- What should prevail – BTT or BIT or Domestic Tax Legislation or Treaty Override?

Belgium



- Belgium Supreme Court in its latest decision (June, 16, 2017, F 15.01 02.N/1), 16th June, 2017, has upheld right of Belgium tax payer to claim credit of Foreign Tax paid as 15% withholding tax by French companies on Dividends paid as per Article 19.A.1 of French-Belgium DTAA Dated 10th March, 1964.
- Belgium Supreme Court held the DTAA will override domestic law amendment on 7/2/1988 which abolished such credit against Belgium Tax @ 25%. This judgment unsettled the previous view of Ghent Court of Appeal. Said DTAA is however under renegotiation.



CONCLUSION:

To reduce the divergence and conflicts of opinions in judgments from different jurisdictions, with regard to interpretation of tax treaties, international bodies like **OECD, IATJ** and **IBFD** should undertake constant research work and prepare a data bank of decisions of various jurisdictions, at least of their top courts, so that such decisions can be made readily available on request to the courts of other countries while deciding similar controversies. This would allow a uniformity and harmonious construction to develop in the world for the greater benefit of all the countries and different tax jurisdictions.

Like, in BEPS Project of OECD or UNIDROIT principles for Commercial Contracts that are developed by intergovernmental Organization introduce harmonization of private international law wherein 68 countries are now evolving common principles for interpretation of international taxation treaties from such data bank of judgments from top courts of different jurisdictions, which is certainly a desirable objective for which endeavor should be made at the international level.

In case you want any clarifications,
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Thank you

Jai Hind