



**TREATY DESIGN, REVENUE SOVEREIGNTY AND INVESTMENT FACILITATION:
A CRITICAL EVALUATION OF INDIA'S DOUBLE TAXATION AVOIDANCE
AGREEMENTS, WITH SPECIAL REFERENCE TO THE INDIA–MAURITIUS TREATY**

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Abstract:

Double Taxation Avoidance Agreements (DTAAs) occupy a central position in the building of international tax law and in the investment strategy of capital-importing economies. This paper undertakes a critical evaluation of India's treaty framework, examining the rationale for entering into DTAAs, their reconciliation with the domestic income-tax regime, and the structural weaknesses through which treaty benefits are diverted from their future beneficiaries. The study adopts a doctrinal and analytical methodology, drawing on secondary sources, statutory provisions and judicial statements, and employs the India–Mauritius treaty as an extended case study. The analysis finds that treaties enhance certainty, protect cross-border investment and strengthen administrative co-operation, but that the same instruments, when drafted without suitable anti-abuse safeguards, facilitate treaty shopping, double non-taxation and erosion of the source-country tax base. The paper concludes that India's interests as a capital-importing developing economy are better served by a source-oriented treaty policy associated with the United Nations Model Convention, supported by anti-abuse provisions and periodic renegotiation clauses.

Keywords: *double taxation; DTAA; treaty shopping; double non-taxation; India–Mauritius treaty; foreign direct investment; model conventions*

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Introduction:

Taxation policy is a principal element of a country's economic development, and in an era of globalized capital flows the fiscal choices of one State convey direct consequences for the trade and investment of others. The difficulty becomes acute when two or more sovereigns assert the right to tax the same income. Such claims arise from two challenging connecting factors: the *source* principle, under which the State in which income is engendered may tax it, and the *residence* principle, under which the State in which the taxpayer is resident may tax worldwide income (Kumar, 2015). Their concurrent application produces the spectacle of international double taxation (Sharma, 2015).

The problem is determined through unilateral relief or through bilateral treaties, the latter being designated Double Taxation Avoidance Agreements. The primary purpose of a DTAA is to release the taxpayer of multiple



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burdens, and thereby to endorse cross-border investment and confidence in the taxation of one State's nationals by another (ICAI, 2013). DTAAs deal principally with direct taxes. Because a treaty entails the partial surrender of a sovereign right to tax income arising within a state's jurisdiction, it is resolved at the level of the executive. India presently maintains inclusive tax treaties with more than ninety jurisdictions (Chowdhury, 2016); their structure follows, with variations, the Model Conventions of the Organisation for Economic Co-operation and Development (OECD) and the United Nations (UN).

The integration of national tax systems has, however, generated well-documented pathologies, including tax havens, treaty shopping and double non-taxation. The India–Mauritius treaty is the most prominent illustration, and the controversy it provoked ultimately compelled renegotiation of the treaty and the portrayal of domestic anti-avoidance legislation. This paper therefore analyses not only the benefits of treaty networks but also the conditions under which they undermine the fiscal interests of the State that accomplishes them.

1. Research Questions:

- RQ1. Why do States enter into double taxation avoidance agreements?
- RQ2. How are such agreements reconciled with the domestic law of India?
- RQ3. What are the structural deficiencies in the treaty mechanism, and how may they be remedied?

2. Hypotheses:

The study proceeds on three working hypotheses:

- (i) that States enter into DTAAs principally to release taxpayers and thereby to attract foreign investment;
- (ii) that treaty provisions must be interpreted in harmony with the Income-tax Act, 1961; and
- (iii) those treaties, if inadequately drafted, enable avoidance of tax and significant revenue loss to the source economy.

3. Objectives:

- (1) To observe the concept of double taxation and the methods of releasing it;
- (2) To review the existing literature on the machinery of DTAAs;
- (3) To analyse the connection between Indian law and India's tax treaties;
- (4) To recognize deficiencies in India's treaty practice and propose policy reforms; and
- (5) To contribute to the scholarship on double taxation avoidance.

4. Methodology:

The study is doctrinal and analytical, so a quantitative-cum-qualitative mixed-methods research design is used for the same. It relies on secondary sources, namely treatises, commentaries, journal articles, institutional publications and official materials, together with statutory provisions and judicial decisions. The India–Mauritius treaty is examined as a case study, as it illustrates in concentrated form both the investment-facilitating and the revenue-eroding potential of treaty networks. The paper has been organized within constraints of time and resources; its conclusions are accordingly presented as analytical findings rather than as empirical evaluations.



Review of Literature:

The literature may be organized around four questions: the origin of double taxation, the manner of its relief, the legal status of treaties in India, and the economic consequences of treaty networks.

- 1. Origin of the Problem:** The United Nations Committee of Experts on International Cooperation in Tax Matters (2011), in its manual on negotiating bilateral tax treaties, classifies source and residence as the two principles around which the international tax regime is organised. A State asserts source jurisdiction over income produced from resources inside its territory, and residence jurisdiction over the income of persons having close economic, social and political ties with it. The struggle between the two yields double taxation, and the manual presents bilateral agreement as its principal remedy. Barbuta (2015) develops the causes and effects of the phenomenon, and Rajan (2013) offers a systematic primer on its typology.
- 2. Methods of Relief:** The Institute of Chartered Accountants of India (2013) differentiates unilateral relief, granted by a State to its residents without reciprocal arrangement, from bilateral relief under treaty. Relief may take the form of release, whereby the residence State forgoes taxation of foreign-source income, or of credit, whereby the residence State taxes the income but credits the tax paid at source, so that only the differential is collected. Avi-Yonah (2013) observes that unilateral relief is comparatively rare because it requires a State to bear the entire fiscal cost of the concern.
- 3. Evolution and Model Conventions:** Lang (2013) traces the development of the international law of income taxation and argues that the uniform architecture of treaties has produced a body of near-customary rules. The OECD and UN Model Conventions codify that architecture and contribute to homogeneity and confidence among astringent States; the principal distinction is that the UN Model gives greater weight to source-State taxing rights and thereby to the interests of developing countries. Rajaratnam and Venkataramaiah (2007) provide the standard Indian observation on the treaties in force.
- 4. The Indian Legal Position:** Datar (2016) explains that the Constitution vests the power to tax entirely in the State, that section 90 of the Income-tax Act governs the entry into and interpretation of bilateral agreements, and that, in the event of conflict, the treaty provision prevails over the general law. The judicial approach to treaty interpretation, including the decision in *Union of India v. Azadi Bachao Andolan* (2003), is discussed in Chakraborty (2014) and Khurana (2015).
- 5. Economic Consequences:** Jaiswal (2016) argues that the attraction of foreign direct investment (FDI) depends significantly on tax treatment, and that treaty partners with low or nil taxation serve as conduits for investment routed through tax havens. Because most treaties apply the more favorable treatment, such routing erodes legitimate tax collection and may enable the conversion of untaxed funds into seemingly legitimate capital. Kotha (2017) and Khanijow (2012) examine the Mauritius route and its implications for unaccounted income, and Khurana and Karundia (2015) analyse informational disputes over treaty benefits.
- 6.** The literature is thus well developed on the mechanics of relief and on the legal status of treaties, but less so on the *design* of Indian treaty policy as a whole. This paper addresses that gap by connecting the typology of conflicts, the relief mechanisms and the Mauritius experience to a consolidated set of reform suggestions.



Double Taxation: Concept, Typology and Historical Development

1. Juridical and Economic Double Taxation

Globalisation has combined national economies, so that income earned in one economy frequently increases to a resident of another. Each State through which such income flows may claim tax, resulting in the multiple taxation of a single stream of income (Barbuta, 2015). Double taxation is predictably divided into two categories (Agrawal, 2016). *Juridical* double taxation arises where the same income is taxed twice in the hands of the same taxpayer; a dividend that suffers concealment tax in the source State and is again assessed in the shareholder's State of residence is the standard illustration. *Economic* double taxation arises where the same income is taxed in the hands of two different taxpayers. Since income unavoidably passes from one person to another, economic double taxation cannot be wholly eliminated, though it remains a substantial obstacle to economic interaction between States and a source of unwarranted loss of value to the income earner.

2. Sources of Conflict

The fundamental cause of double taxation is the clash of residence and source claims, which may be classified into four categories (Pickering, 2013; Rajan, 2013), set out in Table 1.

Table 1: Typology of jurisdictional conflicts

Conflict	Nature	Illustration
Residence–Residence	A person is treated as resident by two States because their domestic tests of residence contrast.	A company is resident in India by virtue of effective management and in Malaysia by virtue of merger.
Source–Residence	One State taxes on the basis of residence and another is based on source.	A US company earns income in India; the US taxes worldwide income, with that earned in India.
Source–Source	Two States apply the source principle but define the source of income otherwise.	One State locates source at the place of sale, the additional at the place of production.
Triangular cases	A source–residence conflict with one State coexists with a source–source conflict with another.	A State A company with an office in State B sells into State C; A taxes on residence, B and C on source.

Source: Compiled from Pickering (2013) and Rajan (2013).

3. Modes of Relief

Relief is of two principal kinds. *Unilateral* relief is granted through the domestic law of a State, which modifies its own rules to avoid double taxation of definite incomes. It need not form part of a treaty, and may result from tax reforms designed to attract investment, but it is uncommon because the granting State bears the entire fiscal cost (Avi-Yonah, 2013). *Bilateral* relief is conferred by treaty, in which two sovereign States agree to limit or allocate their taxing rights. Bilateral treaties diminish the risk of double taxation by



prescribing the minimum level of economic activity that a resident of one Contracting State must conduct in the other before the latter may tax the resulting business profits, and by allocating primary taxing jurisdiction over income derived through a branch or permanent establishment (Rajan, 2013). They may likewise specify which State may tax income from services performed in one State by a resident of the other.

4. Historical Development

The problem of double taxation is of long standing, having been reported as early as the thirteenth century in relations between France and Italy, where property was positioned in one State but owned by a resident of the other (Chaudhary, 2013). The first modern double taxation agreement is generally attributed to Prussia and the Austro-Hungarian Empire in 1899. In India, the first concrete measure was the Income-tax (Double Taxation Relief) (Indian States) Rules of 1939 (Sharma, 2014).

The quest for consistency led to the development of model conventions, which supply ready-made structures that contracting States adapt to their circumstances. The League of Nations produced the first model in 1928, followed by the Mexico (1943) and London (1946) drafts.

The OECD Model, first published as a draft convention in 1963 and revised periodically since, is mainly used by developed economies; the UN Model, first issued in 1980, was designed for treaties between developed and developing States and preserves greater source-State taxing rights (Rajaratnam and Venkataramaiah, 2007).

Benefits, Mechanisms and Procedure:

1. Benefits of Treaty Entry

Treaty negotiation entails real costs, including negotiating effort, administrative co-operation and the surrender of a measure of fiscal self-sufficiency. States nonetheless admit them because of four principal benefits.

- 1. Increased Foreign Investment:** A clear, transparent, non-discriminatory and predictable tax environment encourages foreign investment (Gupta, 2008). Although there is limited empirical evidence quantifying the investment effect of treaty entry, a link between the assumption of a treaty and increased FDI is plausible for developing countries, particularly where the source State grants tax incentives and the residence State agrees to *tax sparing*, so that the encouragement is not neutralised by taxation at home.
- 2. Increased Certainty:** Investors, and the tax administrations of their home States, value the constancy that treaties provide. Even between neighboring developing countries with little cross-border investment, treaties can resolve specific problems and simplify trade and economic activity (Taxmann, n.d.).
- 3. Protection of Investment Abroad:** Treaties are typically of long duration, often fifteen years or more (Pickering, 2013). A developing country with little outbound investment at the time of negotiation therefore secures defense against tax discrimination and relief from double taxation for the outbound investment that may arise as its economy matures.
- 4. Prevention of Fiscal Evasion:** Treaties assist tax administrations to ensure that taxpayers do not escape taxation by unstable capital abroad, failing to declare foreign income, or participating in abusive schemes.



Exchange of information and support in the collection of tax debts protect revenue and the truthfulness of the system in both States (Pickering, 2013).

2. Methods of Relief under Treaty

The assistance of a treaty varies from agreement to agreement, as do the methods by which relief is afforded. Table 2 sets out the principal methods with numerical illustrations.

Table 2: Principal methods of relieving double taxation

Method	Operation	Illustration
Exemption	The residence State excuses income that has been taxed in the source State, which alone taxes it at the agreed rate.	A resident of X earns income in Y. Only Y taxes it; X levies no tax on that income.
Exemption with progression	The residence State exempts foreign income but takes it into account in determining the rate appropriate to the taxpayer's remaining income.	Foreign income of 50 is exempted in X, but is added to domestic income of 50 to fix the rate on the latter.
Credit	The residence State taxes worldwide income but permits credit for tax paid at source, so that only the differential is collected.	Income of 100; Y taxes at 8; X's rate is 10. X collects 10 less credit of 8, i.e. 2.
Credit with tax sparing	The residence State grants credit for tax that would have been payable in the source State but for an incentive, so that the incentive is preserved.	Y's normal rate is 20, but an incentive reduces tax to 5. X credits 20, not 5, so the taxpayer retains the full benefit.

Source: Compiled from Rajan (2013) and Jain (2011); figures are illustrative.

3. Procedure for Concluding a Treaty

The conclusion of a bilateral tax treaty ordinarily passes through five stages (Jain, 2011). First, *negotiation*, the most significant stage, determines the taxes covered, the rates of tax and the factors to be considered. Second, *drafting of articles* gives the negotiated outcome concrete form, with States relying on the OECD and UN Models; divergences between treaties arise chiefly from differences in the definition of terms. Third, *signing* records the assent of the executive of each State to the text. Fourth, *ratification* completes the inside procedures required to give effect to the international responsibility. Fifth, *notification* brings the treaty into force in domestic law; in India, treaties are given effect by notification under section 90 of the Income-tax Act, 1961.



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The Indian Legal Framework:

Article 265 of the Constitution of India provides that no tax shall be charged or collected except by authority of law, and the power to levy income tax and to enter into treaties lies with the Union. To avoid conflict between domestic law and international obligations, section 90 of the Income-tax Act, 1961 empowers the Central Government to enter into agreements for the avoidance of double taxation and for the exchange of evidence. Where a taxpayer is subject to tax both in India and in a treaty partner State, the treaty prevails over the general provisions of the Act to the extent of any contradiction (Datar, 2016; Khurana, 2015).

Section 90(2) provides that where the Central Government has agreed, the requirements of the Act apply to the assessee only to the extent that they are *more beneficial* to him than the treaty. The taxpayer may therefore choose whichever regime is more favorable, and may do so separately for different categories of income (Chakraborty, 2014). This principle of beneficial application is central to the statement of treaties and domestic law.

As regards model conventions, India has historically relied on the OECD Model in treaties with developed economies, and the Supreme Court has referred to the Model and its commentaries in interpretation treaty text. More recent Indian practice, however, reflects a growing tendency to draw on the UN Model, which better accommodates the interests of a developing economy (Rajaratnam and Venkataramaiah, 2007).

To claim treaty benefits, a non-resident must first establish the country of residence and identify the relevant provisions of the treaty between that State and India. He or she must then substantiate eligibility for exemption or credit by furnishing documents to the Indian tax authorities, ordinarily a Tax Residency Certificate issued by the tax authority of the State of residence, a self-declaration and identity form, a copy of the Permanent Account Number card, and a copy of the passport and visa (Income Tax Department, 2016). Possession of a Tax Residency Certificate is a statutory precondition under section 90(4), complemented by the prescribed particulars under section 90(5).

Case Study: The India–Mauritius Treaty

1. Background and Investment Effect

Of India's double taxation avoidance agreements, the most distinguished, and at times the most notorious, is that with Mauritius. The treaty was signed at Port Louis on 24 August 1982 and took effect on 1 April 1983 in India and 1 July 1983 in Mauritius (*Union of India v. Azadi Bachao Andolan*, 2003).

The treaty became the basis of a major part of India's FDI inflow. FDI from Mauritius was estimated at **INR 37.5 million in 1993** and rose to **INR 30,933 million by 2000**. For the period April 2000 to September 2016, Mauritius was the largest single source of FDI, accounting for INR 5,194,995 million, or 32.81 per cent of total inflows (Kotha, 2017). In *Azadi Bachao Andolan*, the Supreme Court upheld the validity of the Central Board of Direct Taxes' Circular 789 of 2000, under which a Mauritian Tax Residency Certificate was acknowledged as sufficient evidence of residence and beneficial ownership, and experimental that treaty shopping was not in itself illegitimate.



2. Mechanism of the Advantage

The surge in FDI is attributable principally to Article 13, under which capital gains arising from the disposal of shares were taxable only in the State of residence of the transferor. As Mauritius did not tax capital gains, investors routed through Mauritian entities realised gains that were effectively untaxed in both States. The arrangement attracted investment, but it also eroded the Indian tax base; it enabled investors of third-country origin to enjoy treaty benefits not projected for them, and it fostered the perception of Mauritius as a conduit through which funds of indefinite provenance could be introduced into the Indian economy (Khanijow, 2012; Kotha, 2017).

3. Subsequent Response

India's response has proceeded on some fronts. The Protocol to the treaty, signed in 2016, replaced exclusive residence-based taxation of share gains with source-based taxation for shares attained on or after 1 April 2017, grandfathered earlier investments, provided a transitional concession during the intervening two years, and introduced a limitation-on-benefits clause directed at shell and conduit entities. Domestically, the General Anti-Avoidance Rule in Chapter X-A of the Income-tax Act has applied since 1 April 2017, and India has joined the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which incorporates a principal-purpose test. The incident demonstrates that the revenue and integrity costs of an under-protected treaty are finally borne by the source State, and that the remedy lies in renegotiation and anti-abuse legislation, instruments that this paper's recommendations seek to build into treaty design from the start.

Critical Issues in Treaty Practice:

The Mauritius experience directs attention to the costs related to treaty entry (Khurana and Karundia, 2015). Four are examined here.

1. **Treaty Shopping:** Treaty benefits intended for residents of the contracting States may be accessed by residents of a third State who invest in or control an entity established in a treaty partner State (TaxGuru, n.d.). This creates international conduit jurisdictions through which investment flows are routed, and it reduces the revenue of the source State.
2. **Double Non-Taxation:** Where a treaty allocates taxing rights to a State that does not tax a particular category of income, for example, capital gains, income from that source escapes taxation altogether because no authority is positioned to tax it (Khanijow, 2012). The objective of a DTAA is the avoidance of *double* taxation, not the attainment of *no* taxation.
3. **Initial loss of Revenue:** Treaties limit source-State taxation of certain income derived by non-residents. If the treaty rate of withholding tax is materially lower than the domestic rate, the source State suffers an immediate revenue loss. The loss may be less significant where the income, such as profits from mobile activities in the absence of a permanent establishment, would have been difficult to collect on any occasion.
4. **Constraints on Domestic Policy:** Treaties modify or displace domestic law, restrict the rates at which a State may tax in future, impose non-discrimination rules that limit events designed to protect the domestic market,



and constrain the definition of concepts such as permanent establishment, person and income. These constraints promote the cost of treaty entry and diminish the policy space of the State concerned.

These considerations indicate that the benefits of treaties are restricted on careful design, and that existing treaties require amendment where they confer benefits on unintended beneficiaries.

Conclusion and Policy Recommendations:

1. Principal Findings

The study finds that DTAAAs provide the legal substance for cross-border economic activity in a multilateral and globalised economy. The problem of double taxation is longstanding; what is novel is the proliferation of treaties and the development of model conventions. The need for treaties arises from the coexistence of source and residence claims over the same income. Relief may be unilateral or bilateral, the latter being more prominent, and treaties allocate relief through exemption, credit, and credit with tax sparing. Two model conventions, the OECD and UN Models, dominate treaty drafting, and India has factually leaned towards the former. Treaties are beneficial where they secure fair reciprocal arrangements, since they increase FDI, curb fiscal evasion, provide certainty, and strengthen international relations. They also carry inherent costs, namely treaty shopping, double non-taxation and loss of revenue, which require thoughtful management.

2. Policy Recommendations

- **Orientation towards the UN Model.** As a developing and capital-importing economy that hosts substantial processes of foreign enterprises, India benefits from a source-oriented allocation of taxing rights. The OECD Model tends to allocate greater taxing rights to the State of residence. India should therefore consistently adopt the UN Model as the basis for negotiation, particularly with capital-exporting partners.
- **Anti-abuse and minimum-taxation clauses.** Future treaties should incorporate limitation-on-benefits and principal-purpose provisions, together with subject-to-tax clauses requiring that income relieved in one State be taxed in the other at a minimum effective rate, to preclude both double non-taxation and treaty shopping and to restrain benefits to their intended users.
- **Renewal and renegotiation clauses.** New forms of income generation and new methods of tax collection emerge over time, and a rigid treaty of long length may become obsolete. Treaties should provide for periodic review and renegotiation at medium-term intervals so that flexibility is preserved in the tax regime.
- **Strengthened information exchange.** Exchange of information and assistance in collection should be made operational and routinely used, since these provisions are the principal safeguard against evasion and the misappropriation of conduit jurisdictions.

3. Concluding Observations

The expansion of a treaty network is not, of itself, evidence of sound tax policy. Its value depends on the equality of the bargain struck and on the integrity of the safeguards embedded in the text. The Indian experience with Mauritius shows that a treaty drafted for investment promotion alone may yield short-term



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capital inflows at the price of long-term fiscal erosion. A treaty policy that is source-oriented, anti-abuse by design and open to periodic review offers the most credible means of reconciling investment facilitation with revenue sovereignty. Future research could usefully quantify the revenue effects of India's principal treaties and appraise the impact of the recent anti-avoidance improvements.

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