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The Strange Saga of Compensatory Taxes: Charting a Way Out of India's Maze of Doctrinal Uncertainty

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ABSTRACT

The 'doctrine of compensatory taxation' ('DCT') – that is, the levy of supposedly non-restrictive taxes by States on account of facilitation of trade, commerce, and intercourse ('TCI') – has been central to India's constitutional jurisprudence on TCI. At the same time, its actual development presents what Chandrachud J rightly calls "a maze of doctrinal uncertainty". This essay closely analyzes the rise and fall of the DCT to reveal underlying conflicts between its two referents which explain the 'maze of doctrinal uncertainty' around it. It then argues that the DCT was rightly rejected, but that the conceptual confusions introduced by it have not been fully extirpated and have even figured in some of the grounds used to reject the DCT. In the process, several key mistakes in Indian constitutional jurisprudence are revealed, including a conflation of two different and contrary doctrines under the common label of DCT, the rejection of the older 'direct and immediate impact' doctrine due to conflation with DCT, and the mislocation and misapplication of the fee-tax distinction. More broadly, the strange saga of the DCT serves as a warning against over-emphasis in TCI jurisprudence on textual factors to the exclusion of conceptual (particularly economic and logistical) ones.

Keywords: Indian Constitution; taxation; trade and commerce; federalism; compensatory taxes

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I. Introduction

The 'doctrine of compensatory taxation' ('DCT') – that is, the levy of supposedly non-restrictive taxes by States on account of facilitation of trade, commerce, and intercourse ('TCI') – is "a topic that has defined the Indian constitutional experience on inter-State trade, commerce, and intercourse."[1] The purpose of this essay is to assess the nature of the DCT, to assess the implications of these findings for the Indian constitutional jurisprudence on TCI, to evaluate the validity of the DCT in light of such implications, and finally to draw some general analytic and normative conclusions on Indian constitutional jurisprudence on TCI.

Section II of the essay briefly surveys the text and context of the constitutional scheme which gave rise to the controversy. Section III closely analyzes the rise and fall of the DCT to reveal underlying conflicts between its two referents which explain the 'maze of doctrinal uncertainty' around it. Section IV argues that the DCT was rightly rejected, but that the conceptual confusions introduced by it have not been fully extirpated and have even figured in some of the grounds used to reject the DCT. Section V concludes with reflections on the foregoing.

II. The Original Tensions

Part XIII of the Indian Constitution runs from Articles 301 to 307 and regulates 'trade, commerce and intercourse within the territory of India' ('TCI'). Intended to foster the economic unity of India while still carving out space for regional interests in general and the greater needs of underdeveloped regions in particular, it attempts to strike a delicate balance between the powers of the States and the Union.[2] It is thus one of the chief sites for the conflicts that shape federalism in India, and is the origin of the present issue.

Article 301 provides: "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

Article 304 provides:

> Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—

[1] AP Datar, 'Inter-State Trade, Commerce, and Intercourse' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 489.

[2] ibid 488.

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

The competences of the Union and the States with respect to levy of taxes and fees are specified in the Seventh Schedule of the Constitution of India. Significantly for the present purpose, it includes Entry 52, List II ("taxes on the entry of goods into a local area for consumption, use or sale therein"); Entry 57, List II ("Taxes on vehicles … suitable for use on roads […] subject to the provisions of entry 35 of List III ["Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied"]"); and Entry 66, List II ("Fees in respect of any of the matters in this List, but not including fees taken in any court").

One more element of the context bears mentioning. S. 92, Commonwealth of Australia Constitution Act ('CACA') provides: "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." Article 301 was inspired from S. 92, CACA; and, by the time the DCT came to be considered in Indian law, the Australian Courts had settled on two ideas on what would constitute a violation of the freedom of TCI: firstly, the violation would have to be 'direct and immediate'; and, secondly, 'compensatory measures for the purpose of regulating commerce' would not be considered violations of TCI.[3] While Australian TCI jurisprudence has been often referred to by Indian Courts, it has expressly not been dispositive, and has served primarily as a repository of advice rather than as a source of law or precedent.[4] Consequently, it has had a rather unclear and attenuated influence, and shall not be examined here at any length.

With this context, it is now possible to analyze the evolution of the DCT.

[3] ibid 489; *Automobile Transport (Rajasthan) Ltd v State of Rajasthan* MANU/SC/0065/1962 [41] (Das J).

[4] Datar (n 1) 489-492.

III. 'Compensatory Taxation' Before The Courts

A. Baby steps

The Court came to confront this issue first of all in the case of *Atiabari Tea Co Ltd v State of Assam* (1961)[5], which involved a challenge under Article 301 to the Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act, 1954 ('Assam Act'). This law imposed a weight-based tax on tea and jute carried through Assam.[6] All the judges agreed that the construction of the 'freedom' of TCI guaranteed by Article 301 as not including freedom from taxation at all would be unsound on the grounds: that taxes are capable of restricting trade[7]; and that the text of other Articles within the Part, in particular the framing of Articles 304 and the (repealed) Articles 306 as an exception to Article 301, indicates that taxation was within the ambit of Article 301.[8]

Gajendragadkar J (writing for himself, Wanchoo J and Das Gupta J) ('*Atiabari* majority') and Sinha J held that interpreting Article 301 as freedom from all taxation would impermissibly disempower States both against the Union and against the Judiciary.[9] Sinha J also contended that "all taxation is not necessarily an impediment or a restraint" and "may, on the other hand, provide the wherewithals also to improve different kinds of means of transport".[10] On the other hand, Shah J held that Article 301 hits all taxes because "between discriminatory tariffs and trade barriers on the one hand and taxation for raising revenue on commercial intercourse, the difference is one of purpose an[d] not of quality".[11]

The *Atiabari* majority held that it is only "such taxes as directly and immediately restrict trade that would fall within the purview of Art. 301"[12], and Sinha J similarly held that Article 301 protects only "freedom from taxation which has the effect of directly pending the free flow of trade, commerce and intercourse".[13] Finally, the *Atiabari* majority and Shah J struck down the Assam Act as violative of Article 301 and not saved by Article 304(b) due to lack of presidential

5 *Atiabari Tea Co Ltd v. State of Assam* MANU/SC/0030/1960.
6 ibid [22] (Sinha J).
7 ibid [18] (Sinha J), [59] (Gajendragadkar J), [76] (Shah J).
8 ibid [18] (Sinha J), [56]-[58] (Gajendragadkar J), [83]–[85] (Shah J).
9 ibid [60] (Gajendragadkar J), [15] (Sinha J).
10 ibid [16] (Sinha J).
11 ibid [76] (Shah J).
12 ibid [60] (Gajendragadkar J).
13 ibid [19] (Sinha J).

assent.[14] The dissenting opinion by Sinha J upheld the tax as non-violative of Article 301.[15]

Soon though, the Court took a very different position in *Automobile Transport (Rajasthan) Ltd v State of Rajasthan* (1962) ('*Automobile*')[16], which involved a challenge to The Rajasthan Motor Vehicles Taxation Act, 1951 ('Rajasthan Act'), which imposed taxes on vehicles used or owned in the State of Rajasthan, to the extent of denying entry to vehicles not paying such tax.[17]

Das J (writing for himself, Kapur J, and Sarkar J) and Hidayatullah J (writing for himself, Mudholkar J, and Ayyangar J): rejected the view that Article 301 hits all taxes on the ground that the freedom of TCI must be interpreted so as to afford the States reasonable autonomy to carry out their duties and raise finances therefor[18]; and rejected the view that Article 301 hits no taxes on largely the same grounds as the *Atiabari* majority.[19] These two extreme views were also rejected by Subba Rao J, but on the basis of a comprehensive interpretation of Part XIII with a view to harmonious construction.[20]

Thereafter, Das J laid down that "compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301" and that

> a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities.[21]

On the other hand, Hidayatullah J and Subba Rao J both adverted to the 'direct and immediate impact' test ('DDII') for when a measure, fiscal or otherwise, becomes a restriction.[22] Subba Rao J held that freedom of TCI "is not impeded, but, on the other hand, promoted, by regulations creating conditions for the free movement of trade … with or without compensation."[23] Hidayatullah J held that a levy would have to be more like a fee (that is, *quid pro quo* for some service) than a tax (that is, a levy aimed at revenue generation) to be compensatory.[24]

14 ibid [71] (Gajendragadkar J), [88] (Shah J).
15 ibid [30] (Sinha J).
16 *Automobile* (n 3).
17 ibid [5]-[6] (Das J).
18 ibid [18] (Das J), [186] (Hidayatullah J).
19 ibid [20] (Das J), [190] (Hidayatullah J).
20 ibid [62]-[63] (Subba Rao J).
21 ibid [21] (Das J), [27] (Das J).
22 ibid [54] (Subba Rao J), [186] (Hidayatullah J).
23 ibid [62] (Subba Rao J).
24 ibid [194] (Hidayatullah J).

Ultimately, Das J and Subba Rao J upheld the Rajasthan Act as compensatory or regulatory[25]; whereas Hidayatullah J struck it down as a presidentially unsanctioned restriction because it imposed a 'condition precedent' for the entry of vehicles into the State without any mechanism to ensure that the State obtained a 'fair recompense'.[26]

B. GROWING PANGS

GK Krishnan v. State of Tamil Nadu (1975) held that "any method of taxation which has a direct bearing upon or connection with the use of the highways is apparently valid", provided that "the very idea of compensatory tax is service more or less commensurate with the tax levied."[27]

However, in *International Tourist Corporation v. State of Haryana* (1981) ('*ITC*'), the Court argued that "If the tax were to be proportionate to the expenditure on regulation and service it would not be a tax but a fee."[28] Thus, given the supposed impracticability of calculating the exact expenditure incurred by the government or the benefits provided to the trader, it held that a levy would be saved by the DCT so long as there existed "a specific, identifiable object behind the levy and a nexus between the subject and the object of the levy".[29] The Court also explicitly allowed for the compensatory tax to be mingled with the other kinds, and to be higher than expenditure or benefits.[30]

In *Maharaja Tourist Service v. State of Gujarat* (1991), the Court relied on *ITC* to hold that "what is necessary [to uphold a tax under the DCT] is existence of a nexus between the subject and the object of the levy and it is not necessary to show that the whole or substantial part of the tax collected is utilised".[31]

In *Bhagatram Rajeevkumar v. Commissioner of Sales Tax, Madhya Pradesh* (1995) ('*Bhagatram*'), the test was elaborated as "substantial or even some link between the tax and the facilities extended to such dealers directly or indirectly", and thus upheld a State tax because "augmentation of their finance would enable them to provide municipal services more efficiently, which would help or ease free flow of trade and commerce".[32] Similarly, in *State Of Bihar v. Bihar Chamber Of Commerce* (1996) ('*BCC*'), the Court held that "some connection", whether direct or indirect,

25 ibid [31] (Das J), [64] (Subba Rao J).
26 ibid [195], [205] (Hidayatullah J).
27 *GK Krishnan v. State of Tamil Nadu* MANU/SC/0315/1974 [22], [29].
28 *International Tourist Corporation v. State of Haryana* MANU/SC/0331/1980 [9].
29 ibid [10].
30 ibid.
31 *Maharaja Tourist Service v. State of Gujarat* MANU/SC/0377/1991.
32 *Bhagatram Rajeevkumar v. Commissioner of Sales Tax, Madhya Pradesh* MANU/SC/0959/1995 [8].

"established between the tax and the trading facilities provided" would be sufficient to characterize the tax as compensatory.[33]

Later, in *Jindal Stainless Ltd v. State of Haryana* (2006) ('*Jindal*-2006'), the Court struck down *BCC* and *Bhagatram* as *per incuriam* the law laid down in *Automobile*[34], although it appears to have missed that the criterion of commensurability was effectively rejected as far back in 1981, in *ITC*.[35]

In *Jindal*-2006, the Court laid out a set of distinctions between taxes and fees proper, with compensatory tax being a hybrid of the two, but closer to the latter. The Court held that: (i) taxes proper are based on "the ability or the capacity of the taxpayer to pay"; whereas fee and compensatory taxes are based on the "principle of equivalence""; (ii) "The main basis of a fee or a compensatory tax is the quantifiable and measurable benefit" whereas taxes proper have no direct, identifiable, measurable benefit; (iii) "A tax can be progressive. However, a fee or a compensatory tax has to be broadly proportional and not progressive."; and (iv) fees are levied on "an individual as such" whereas compensatory taxes are levied on "an individual as a member of a class".[36]

Ultimately, *Jindal*-2006 affirmed the 'working test' for compensatory tax developed in *Automobile* and the doctrine of 'direct and immediate effect' developed in *Atiabari*, and even contended that the former is rooted in the latter.[37] It also placed the burden on the State to show the "quantifiable"/"measurable" benefit provided, either in the legislation or before the Court.[38]

Finally, the question of compensatory taxes, along with several others pertaining to TCI, were referred to a nine-judge bench for authoritative resolution.[39]

C. An inevitable demise

The nine-judge bench in *Jindal Stainless Limited v. State of Haryana* (2016) ('*Jindal*-2016') was convened to deal with four questions, which were framed thus:[40]

1. Can the levy of a non-discriminatory tax per se constitute infraction of Article 301 of the Constitution of India?

33 *State Of Bihar v. Bihar Chamber Of Commerce* MANU/SC/0959/1995 [12].
34 *Jindal Stainless Ltd v. State of Haryana* MANU/SC/2085/2006 [45].
35 ibid [12].
36 ibid [34]–[38].
37 ibid [30], [45].
38 ibid [39].
39 See *Jaiprakash Associates Ltd v. State Of M.P.* MANU/SC/8437/2008; *Jindal Stainless Ltd v State of Haryana* MANU/SC/0260/2010.
40 *Jindal Stainless Limited v. State of Haryana* MANU/SC/1475/2016 [9] (Thakur J).

2. If answer to Question No. 1 is in the affirmative, can a tax which is compensatory in nature also fall foul of Article 301 of the Constitution of India?
3. What are the tests for determining whether the tax or levy is compensatory in nature? and
4. Is the Entry Tax levied by the States in the present batch of cases violative of Article 301 of the Constitution and in particular have the impugned State enactments relating to entry tax to be tested with reference to both Articles 304(a) and 304(b) of the Constitution for determining their validity?

However, in any event, even judges who answered the first question in the negative pronounced on the second and third queries (indeed, often before the first query), and thus they can be considered independently.

Chief Justice Thakur speaking for himself, Sikri J, and Khanwilkar J, rejected the theory of compensatory taxes on the grounds that: firstly, all taxes are compensatory in "the broader sense" given that they are "meant to serve larger public good and for running the governmental machinery and providing to the people the facilities essential for civilized living"; second, "the concept of compensatory tax obliterates the distinction between a tax and a fee" given that both integrate the element of *quid pro quo*; and third, the application of compensatory tax theory is infeasible in practice.[41]

Singh J agreed with Thakur J and invalidated the DCT on essentially similar grounds.[42] Ramana J agreed with "the consideration, reasoning and conclusion in the judgment of the learned Chief Justice" with respect to compensatory taxes, and further adds that the Constituent Assembly at no point appears to have contemplated the DCT.[43] Bobde J also concurred with Thakur J on the question of compensatory tax.[44]

Chandrachud J struck down the DCT on the ground that it was "vague and indefinite and has produced a maze of doctrinal uncertainty, if not chaos in constitutional litigation", and further because it could be interpreted to mean that even discriminatory taxes could be upheld so long as apparently 'compensatory'.[45]

Bhushan J invalidated the DCT on the grounds that it aims to be effectively a judicially innovated exception to Article 301, whereas "the exceptions laid down

41 ibid [63]–[65] (Thakur J).
42 ibid [153]–[159] (Singh J).
43 ibid [167.26] (Ramana J).
44 ibid [144]–[152] (Bobde J).
45 ibid [470]–[472] (Chandrachud J).

in the constitutional scheme [from Articles 302 to 306] are self-contained and no new exception can be added by judicial interpretation".[46]

Only Banumathi J upheld the DCT, on the ground that overruling it would prejudice the interests of the States in revenue, while taking issue with the 'nomenclature' of the DCT.[47] She also voted to overrule *Jindal*-2006 and upheld *BCC* and *Bhagatram* as being the correct interpretation of the DCT enunciated in *Automobile*.[48]

By a majority of eight to one, the Court in *Jindal*-2016 rejected the DCT, and this is the position that holds in Indian law today. Yet, as the history told above and analyzed below demonstrates, and as judgments have often noted, it was never a coherent, uncontroversial entity to begin with.

D. *IN MEMORIAM*

In fact, it is submitted that the judiciary had evolved two essentially different doctrines under the common name of 'compensatory taxes'. These may be labelled: D_1, which was conceived in *Automobile* and reached its most thorough formulation in *Jindal*-2006; and D_2, which was conceived in *ITC*, and reached its most thorough formulation in *BCC* and *Bhagatram*.

The function of D_1 was: to enable the State to recover the resources spent by it for the provision of trading facilities; to enable the traders to avoid paying more to the State than necessary for the benefits they collectively obtain; and to enable the judiciary to be able to evaluate challenges to TCI taxes on the basis of an objective quantifiable touchstone. At a practical level: even though it was created in the context of a judgment expanding State powers and upholding a taxation measure, D_1 was also relied upon by the dissenting judges who were striking down that measure; was recovered in *Jindal*-2006 on the basis of the prayer made by the assessee, and against the objection of the States[49]; and was again opposed by the States in *Jindal*-2016.[50]

By contrast, the function of the D_2 was: to enable the State to extract an indefinite amount of taxes from traders for any purpose directly or indirectly "connected" to TCI occurring in its territory; to convince (or coerce) the traders to not challenge taxation measures unless they could somehow show the lack of a link between the tax and facilitation of trade; and to enable the judiciary to give

46 ibid [1008] (Bhushan J).
47 ibid [169(c)] (Banumathi J).
48 ibid.
49 *Jindal*-2006 (n 34) [14].
50 *Jindal*-2016 (n 40) [27].

States vast leeway to levy taxes on TCI without having to formally revisit *Automobile*. At a practical level, it was invoked throughout in judgments that upheld States' levies, and was defended against traders by the States in *Jindal*-2006.[51] Perhaps most revealingly, after the rejection of D_2 in *Jindal*-2006, the States largely did not defend 'the DCT' at all in *Jindal*-2016.[52]

At both theoretical and practical levels, then, D_1 and D_2 are essentially different, contrary doctrines; and the "maze of doctrinal uncertainty" that Chandrachud J alluded to is explained in major part as arising out of judicial treatment as interpretations of the same entity. This manifests at the most direct level in the Court evaluating D_1 and D_2 together; evaluating D_1 primarily on its merits but D_2 on its fit with D_1; and, in *Jindal*-2016, striking down 'the DCT' partly because of the confusion or perceived unworkability caused due to a conflation of the two. However, as shown below, there are also other important (but as yet unnoticed) ways that the contest between D_1 and D_2 has shaped -- and confused -- Indian TCI jurisprudence.

At the same time, the *Jindal*-2016 rejection of the DCT requires critical scrutiny *per se*, especially given that it overrules decades of jurisprudence. Further, if the DCT is indeed indefensible, the constitutional distortions introduced to sustain it in Indian law need also to be detected and removed, including where they have been deployed in critiques of the DCT. Finally, it is fair to question whether either or both of D_1 or D_2 could stand or fall on its merits in an unclouded assessment.

IV. Idea(s) Rightly Rejected

A. To be fair

It is now possible to see that some of the criticisms adduced against D_1 and D_2 are incorrect or insufficient to reject them *in toto*. For instance, although *Bhagatram* and *BCC* are indeed *per incuriam*, D_2 could have been considered on its own merits, especially in *Jindal*-2016. Just so, D_1 cannot be held liable for 'doctrinal uncertainty' as such, since it was due to later judicial activities that such confusion arose.

The argument against D_1 that it is really a 'fee' rather than a 'tax' is also irrelevant.[53] As seen above, this argument emerged in the context of the *ITC* Court attempting to argue for D_2 against the obstacle posed by the *Automobile* 'working

51 *Jindal*-2006 (n 34) [20]–[21].

52 *Jindal*-2016 (n 40) [27].

53 For a broader overview of the interplay between the three, see Neha Pathakji, 'Slippery Slopes of Compensatory Tax and Fee' (2014) 56(1) Journal of the Indian Law Institute 78–94.

test'. It perhaps appeared to make sense due to the States' contentions in many cases that they were enacting 'taxes' under List II. However, the two invocations of 'tax' are basically unrelated – the so-called 'doctrine of compensatory tax' is purely about the scope of Article 301 of the constitution, whereas 'taxes' for the purpose of List II are about States' competences in respect of actions that are already constitutional under Part XIII. A fee could be tested on the touchstone of being 'compensatory' just as a tax could be.[54] If the DCT were differently termed (for instance, 'compensatory levy'), the 'fee, not tax' charge would be defused, suggesting that it is devoid of substance.

The originalist arguments adduced by Bhushan J and Ramana J in *Jindal*-2016 against D_1 and D_2 can also not be assigned too much weight. Originalism, in whichever form, has never been dispositive in Indian constitutional jurisprudence, and in fact has been critiqued often by the Court.[55] Moreover, given that the theory of compensatory taxation was in vogue in Australian law when much of the language of Article 301 of the Indian constitution was borrowed therefrom, a reasonable reading of the 'original meaning' of Article 301 could include the DCT.[56]

Then there is the conflation in *Jindal*-2016 of the DDII with the DCT by a majority of the Court.[57] It is true that a majority of judges in the *Automobile* case seemed to subscribe to both the DCT and the DDII, and that *Jindal*-2006 thought that the former was a consequence of the latter. Actually, there is no reason to believe so, given that: compensatory taxes, even in the narrow D_1 sense, may well have a direct and immediate adverse impact on trade; and, just so, many taxes which have only a remote impact may not be compensatory at all. It has even been argued that *Automobile* "practically overruled" *Atiabari*, particularly in respect of the DDII.[58] In fact, it is hard to see how the *Jindal*-2016 view could survive without incorporating a version of the DDII, given that some non-discriminatory taxes surely would be so prohibitive that they would constitute restrictions on trade. The DDII need not necessarily be equated with the stringent approach taken by the *Atiabari* majority either, since it was also relied upon by Sinha J, who endorsed a more expansive view of States' power.

Chandrachud J's argument in *Jindal*-2016 that the DCT legitimates certain types of discriminatory taxation is correct only to a very limited extent, since it is possible to read a non-discrimination criterion into both D_1 and D_2 without changing the essence of either. Moreover, it is hypothetically not altogether

54 See, for example, *Automobile* (n 3) [47] (Subba Rao J).

55 See, for example, *Automobile* (n 3) [16] (Das J).

56 See *Automobile* (n 3) [87] (Hidayatullah J).

57 See *Jindal*-2016 (n 40), Order [5]–[6].

58 *Krishnan* (n 27) [12]–[13].

unreasonable to speculate that some variant of differential DCT could actually shed light on the proper construction of 'discrimination', by providing that outstate traders may be made to pay a little more for services availed given that they do not contribute in the capacity of residents.

Thus, a sharper scrutiny not only considerably problematizes the judgment in *Jindal*-2016, but also invalidates many of the arguments adduced against the DCT. However, as shown below, it also leaves many others standing and reveals new ones.

B. SHARED FLAWS

As seen above, D_1 and D_2 both have been justified on the bases: that they do not restrict TCI but merely facilitate it; that, in their absence, States would be effectively disabled from exercising their sovereign/constitutional powers to impose taxes upon TCI; and that Australian constitutional law, from which Article 301 of the Indian Constitution is inspired, also has the doctrine of compensatory taxes.

The third of these arguments is too weak to adduce any real weight. Australian constitutional law in respect of TCI is significantly removed from its Indian counterpart in both text and context. S. 92, CACA refers to TCI being "absolutely free" and provides for no list of restrictions akin to Articles 302-305.[59] CACA was adopted in the context of provinces uniting into a federation whereas the Indian Constitution was adopted in the context of a strong Central government delegating more power to weak units.[60] Finally, in any event, the doctrine of compensatory tax has now been rejected in Australian law.[61]

The second argument is not correct. The *Jindal*-2016 majority view, the DDII, or some permissive combination of the two could easily lead to an equally or more permissive view of States' powers.

The first argument is also incorrect. The invocation of 'trade' as a homogenous activity and 'traders' as a homogenous beneficiary class masks actual disparity in the impact of tax on traders and trade. The facilities provided to all traders are the same, but traders with lower absolute profit margins to begin with are bound to be disincentivized due to higher opportunity costs, whereas those with higher absolute profit margins would actually be partly incentivized due to lowered competition. Further, unless there is rational differentiation between

59 Datar (n 1).
60 ibid.
61 *Jindal*-2016 (n 40) [97]–[105] (Thakur J).

classes of goods, some types of trade are disincentivized more than others, and those with very low profit margins may be discouraged altogether. The point here is not that taxes which restrict trade are problematic *per se*. It is that there is no contradiction between a tax being compensatory and restrictive at the same time – that is, the DCT does not perform its central goal of determining when the freedom of TCI has not been breached by taxation.

C. Distinct errors

Then, there are certain conceptually fatal issues which afflict D_1 or D_2 specifically.

Perhaps the central argument for D_1 is that, even if it may have an uneven or 'regressive' impact on traders, it still allows the State to collect its rightful expenditure on "certain facilities for the better conduct of their business". This is submitted to be incorrect. Typically, the concept of facilities in question has been used to evoke the construction and maintenance of highways, waterways, and so forth. *Jindal*-2006 even required governments to show that their provision of trading facilities is quantifiably equivalent to tax levied. In fact, even a first-order assessment, counting only the essentials required to make any TCI through the State possible, would have to include law-and-order, medical facilities for drivers, repair shops for vehicles, and so forth. A more comprehensive assessment would likely reveal that practically any non-wasteful spending, even if purely 'domestic', increases the stability and prosperity of the State, both of which reliably stimulate TCI. Thus D_1 is unfair not only to some traders but also even to the States.

On the other hand, D_2 is essentially impracticable. D_2 may be interpreted in at least two ways, which may be called the weighted and unweighted versions respectively. The latter, which appears to be the one that the Courts actually used, would legitimate tax extraction on the ground that it is of use that such tax is contributing to the State's funds, some of which are going towards the facilitation of TCI. In practice, it is hard to see how any tax could be held invalid on such touchstone. On the other hand, a potential more sophisticated version of D_2 would legitimate extraction of an amount of tax roughly equivalent to the sum of State expenditures each weighted by its respective contribution to the facilitation of TCI. This would be theoretically sound, but likely impossible to put into practice on account of the sheer amount of required foreknowledge.

D. FINAL THOUGHTS

At this juncture, it is pertinent to explore some of the important aspects of the upshot of this inquiry with respect to the change in the Indian structure of taxation powers wrought by the GST Amendment[62], which, among other things, deletes Entry 52, List II (entry taxes).[63]

The GST Amendment is prospective, and thus the (critical, partial) support here to the *Jindal*-2016 judgment consequently supports the State collection of arrears amounting to INR 300 billion in entry taxes.[64] It also rules out the 'compensatory' framing of other frequently levied taxes on TCI, such as, for instance, the vehicles tax under Entry 57, List II.

There are also some lessons which can be inferred here as regards the operation of the GST paradigm. Firstly, the conceptual unworkability of compensatory levy must give pause to arguments grounded in the DCT for 'compensatory cess' in GST.[65] Secondly, the disentanglement of the DCT and the DDII opens the possibility of validly subjecting GST to the latter. Finally, the original causes of the judicial innovation of the DCT—the possibility of tax-caused trade barriers and unclarity on the extent of States' powers of taxation—may still persist in the GST regime[66], so that avoiding the problematic lines of theorization identified in this study remains potentially as important as ever.

V. CONCLUSION

The development of the DCT was a profound judicial misadventure, and attempting to sustain it muddled much of the Indian constitutional jurisprudence on TCI. The attempt here has been to not only argue for the invalidity of the DCT, but also to do so from a perspective extricated from the labyrinthine conceptual confusions introduced to keep the DCT afloat. These include, notably: the conflation of the DCT and the DDII; the conflation of D_1 and D_2; and the mislocation of the 'fee'-'tax' controversy in Article 301. What remains is a fatal critique of the DCT based on its conceptual unworkability, which includes not only legal but also necessarily economic and logistic aspects. In general, as evidenced

62 The Constitution (One Hundred and First Amendment) Act 2016.

63 ibid s 17(b).

64 Ashpreet Sethi, 'The Tax Case That May Cost India Inc Rs 30,000 Crore' (*Bloomberg Quint*, 26 July 2016) <https://www.bloombergquint.com/business/the-tax-case-that-may-cost-india-inc-rs-30000-crore> accessed 24 April 2022.

65 See, for example, Yash Sinha, 'GST Compensation to States: An Ineluctable Obligation on the Union' (2021) 14 NUJS Law Review 17–19.

66 Sethi (n 64).

by this study, the neglect of such aspects is especially hazardous to the interpretation of TCI-related provisions of the constitution, where law in its inderdeterminacy may legitimate any answer, but material reality will brook far fewer.