Tax Treaty Interpretation

The Meaning and Application of Article 3(2)

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Dedicated to John Avery Jones and the memory of Klaus Vogel.

There can only be one true interpretation of a treaty.

— Lord Steyn*

* *R v Secretary for the Home Department, Ex Parte Adan*, [2001] AC 477

Contents

Abbreviations

AO	*Abgabenordnung* (German general tax act)
BEPS	Base erosion and profit shifting
BFH	*Bundesfinanzhof* (German federal fiscal court)
BMF	*Bundesministerium der Finanzen* (German federal ministry of finance)
BStBl	*Bundessteuerblatt* (German federal fiscal gazette)
BVerfG	*Bundesverfassungsgericht* (German federal constitutional court)
BVerfGG	*Bundesverfassungsgerichtsgesetz* (German federal constitutional court act)
ECJ	European Court of Justice
ECHR	European Court of Human Rights
EStG	*Einkommensteuergesetz* (German income tax act)
FG	*Finanzgericht* (German fiscal court of first instance)
FGO	*Finanzgerichtsordnung* (German fiscal procedure act)
GG	*Grundgesetz* (German constitution)
ICJ	International Court of Justice
ILC	International Law Commission
ITAT	Income Tax Appelate Tribunal (India)
ITG	International Tax Group
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
PCIJ	Permanent Court of International Justice
PCA	Permanent Court of Arbitration
PE	Permanent establishment
RFH	*Reichsfinanzhof* (German imperial court 1918–1945)
UK	United Kingdom
UN	United Nations
US	United States
VCLT	Vienna Convention on the Law of Treaties

Editorial Notes

i. **Punctuation and Style**. Punctuation and style follow suggestions in the *Oxford Style Manual*, the *Chicago Manual of Style*, Butcher's *Copy-editing*, and Strunk-White.[1] For purely stylistic reasons, third person singular is used exclusively in male form unless it refers to a specific person.

ii. **Spelling and Grammar**. Spelling follows Fowler's *Dictionary of Modern English Usage* and the Oxford Dictionary.[2]

iii. **Quotations**. Quotations follow British practice in using single quotation marks for verbatim quotations, double quotation marks for nested quotations, and no quotation marks for block quotations.[3] Square brackets indicate interpolations. Verbatim quotations of tax treaty provisions quote the English authentic text by default, if one exists. Translations on my part are marked as such.

iv. **Citations**. Citations are rendered in full note format, based on the *Bluebook* style.[4] For repeated reference to the source cited in the preceding note, the abbreviation *ibid.* for the Latin *ibidem* is used.[5] The abbreviations Ch. and Chs. refer to chapter and chapters, para. and paras. to paragraph and paragraphs, and s. and ss. to section and sections. In order to indicate that a citation applies to various places throughout the cited source, the Latin *passim* is used.[6] Tax treaties are cited as Country-Country (year) or, when the other country is obvious from the context, Country (year). The Vienna Convention on the Law of Treaties (1969) is cited as VCLT,[7] and the Draft Articles on the Law of Treaties with commentaries (1966) are cited as VCLT Commentary.[8] Sim-

[1] E. M. Ritter (ed.), The Oxford Style Manual (Oxford: Oxford University Press, 2003); R. D. Harper (ed.), The Chicago Manual of Style (16th ed., Chicago, IL: University of Chicago Press, 2010); J. Butcher, Butcher's Copy-Editing: The Cambridge Handbook for Editors, Copy-Editors and Proofreaders (3rd ed., Cambridge: Cambridge University Press, 1992); W. Strunk Jr., The Elements of Style (4th ed., Harlow, Essex: Pearson Education Limited, 2014).

[2] R. W. Burchfield (ed.), The New Fowler's Modern English Usage (3rd ed., Oxford: Oxford University Press, 1996); https://www.lexico.com/en.

[3] *See* Ritter (ed.), The Oxford Style Manual (2003), 148, s. 5.13; 194, s. 8.1.2

[4] Columbia Law Review, Harvard Law Review, University of Pennsylvania Law Review, and Yale Law Journal (Compilers), The Bluebook: A Uniform System of Citation (20th ed., Baton Rouge, LA: Claitors Pub Div, 2015).

[5] https://www.lexico.com/definition/ibid.

[6] https://www.lexico.com/definition/passim.

[7] UN, Vienna Convention on the Law of Treaties, Series I–18232 (United Nations, 1969).

[8] ILC, Draft Articles on the Law of Treaties with commentaries 1966: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly, A/CN.4/SER. A/1966/Add.1, Year-

ilarly, the OECD Model Tax Convention on Income and on Capital is cited as OECD Model or, when obvious from the context, as Model; likewise, its commentaries are cited as OECD Commentary or Commentary (a reference to the year will be added when earlier versions are implied).[9] Subsequent references to Klaus Vogel's Commentary on Double Taxation Conventions are cited as Vogel Commentary, indicating the edition referred to.[10] With regard to synoptic observations, I refrain from pleonastic referencing throughout chapter ten and the epilogue; only verbatim quotations as well as points not previously quoted will be referenced.

v. **Legal References**. Unless otherwise noted, references to Articles 26, 27, 31, 32, and 33 (including paragraph numbers and letters in parenthesis) refer to Articles 26, 27, 31, 32, and 33 of the VCLT. Likewise, references to Article 3(2) and 23 refer to Articles 3(2) and 23 of the OECD Model as well as corresponding clauses in other Model Conventions or tax treaties. In order to avoid cluttering the text, I refrained from adding 'VCLT' or 'OECD Model' to these articles every single time. Occasional exceptions are made for purposes of disambiguation.

vi. **Translations**. Unless otherwise noted, translations are my own. In accordance with the methodology of this study,[11] I have enriched my analysis in

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book of the International Law Commission 1966, vol. ii (United Nations, 1967).

[9] OECD, Model Tax Convention on Income and on Capital (Paris: OECD Publishing, 2017).

[10] K. Vogel, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (1st ed., München: C.H. Beck, 1983); K. Vogel, Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (2nd ed., München: C.H.Beck, 1990); K. Vogel, Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD, UN and US Model Conventions for the Avoidance of Double Taxation of Income and Capital with Particular Reference to German Treaty Practice (3rd ed., London: Kluwer, 1997); K. Vogel and M. Lehner (eds.), Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (4th ed., München: C.H. Beck, 2003); E. Reimer and A. Rust (eds.), Klaus Vogel on Double Taxation Conventions (4th ed., The Netherlands: Wolters Kluwer Law & Business, 2015); K. Vogel and M. Lehner (eds.), Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (5th ed., München: C.H. Beck, 2008); M. Lehner (ed.), Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (begründet von Klaus Vogel) (6th ed., München: C.H. Beck, 2015).

[11] *See* Introduction, s. 1.5.

some chapters with literal quotations of critical passages to help the reader understand the historical course of the debate on tax treaty interpretation. Where this required translation from German, I have taken great care to accurately portray the meaning of what was said, keeping as close as possible to the original wording; however, where necessary, I have adjusted for readability because the style of German academics and courts is very different from that of their Anglo-Saxon colleagues. Literal translations often lead to impossible English, and in some cases they are simply not feasible because of the extensive use of neologisms by way of compounding nouns that is typical for German but impossible to translate into English unless one resorts to noun-verb constructions.

vii. **Formatting**. Quotations in other languages are italicised. For common Latin expressions, only the first instance is italicised. Otherwise, italic font is used to add emphasis.

Preface

This book is dedicated to John Avery Jones and Klaus Vogel because my intellectual development in international tax owes a great deal to both. During my university studies, I had the opportunity to attend courses on tax treaty interpretation held by them, which has been a privileged experience. Meeting Klaus Vogel still in person and discussing tax treaties with him is a most treasured memory. John Avery Jones later became my co-supervisor at Leiden University. From this, an exchange on treaty interpretation beyond the subject of my PhD developed that has greatly benefited this book. That I have come to partly disagree with both their views concerning the meaning of Article 3(2) would not have been possible without the insights I have gained from their teachings, the discussions I had with them, and the questions their theories have raised for me. Hence, should the reader agree with my views as presented here, it must be added that 'If I have seen further it is by standing on the sholders [sic] of Giants'.[12]

[12] Newton, I., *Letter from Sir Isaac Newton to Robert Hooke*, 5 February 1676 [O.S.] (15 February 1676 [N.S.]), Historical Society of Pennsylvania.

Acknowledgements

I would like to thank John Avery Jones for engaging in a critical discussion with me that has made it easier to understand his views, for broadening my horizons with respect to common law, and for taking the time and effort to read and comment on a first draft of this book. In addition, I would like to thank Jörg Manfred Mössner for our discussions about German cases and Vanessa Arruda Ferreira for her help with texts in French. Last but not least, I would like to thank the two anonymous peer reviewers who reviewed my article '*May Be Taxed for Whatever Reason – Conflicts of Qualification: The Discussion Is Finished*',[13] the research for which has supplied parts of chapters six and seven.

[13] R. X. Resch, *May Be Taxed for Whatever Reason – Conflicts of Qualification: The Discussion Is Finished*, Intertax 2 (Alphen aan den Rijn: Kluwer Law International, 2020), 177–194.

1 Introduction

1.1 Scientific Contribution

This study clarifies the meaning and application of Article 3(2) and corresponding articles in tax treaties that are modelled on the OECD or UN Models.[1] It maps the entire historical debate on the provision, illuminates flawed assumptions and misunderstandings that have happened in its course, and outlines how these continue to fuel the current controversies. In addition, it provides a comprehensive analysis of German case law concerning the interpretation of tax treaties and examines the extent to which the German Federal Fiscal Court[2] has been influenced by erroneous views developed in doctrine. Finally, it clarifies the relationship between Article 3(2) and the VCLT rules on treaty interpretation, the meaning of 'context', and how the condition 'unless the context otherwise requires' is to be applied. Thereby, an approach is submitted that is firmly based on public international law principles and transcends the current controversies into a holistic synthesis.[3]

1.2 Research Question

Interpretation is an essential activity in the operation of tax treaties. Article 31–33 of the Vienna Convention on the Law of Treaties lay down the rules on the interpretation of treaties in general. In addition, tax treaties commonly contain their

[1] The analysis in this study is based on the wording before the 2017 update of the OECD Model. As part of the latter, a reference to agreements made by the competent authorities of the contracting states has been added to Article 3(2). This amendment, which is not part of Article 3(2) of the 2017 UN Model, does not affect any of the conclusions drawn in this study, and a detailed analysis of its effects is left to a future publication.

[2] Henceforth referred to by the official German acronym BFH for *Bundesfinanzhof*, which is translated as 'Federal Fiscal Court' by the BFH for publication of information on its website in English, *see* https://www.bundesfinanzhof.de/content/information-english (last viewed 26 Aug 2019). Occasionally, the more contextual 'Federal Tax Court' or the more literal 'Federal Finance Court' are used in literature. All three are interchangeable and refer to the same court, i.e., Germany's supreme tax court.

[3] Throughout, the term 'synthesis' is used in a Hegelian sense as 'the final stage in the process of dialectical reasoning, in which a new idea resolves the conflict between thesis and antithesis', *see* https://www.lexico.com/definition/synthesis.

own interpretation rule in the form of Article 3(2). Its application has provoked many controversies, some of which have not been resolved to date. This state of affairs is more than unfortunate: since interpretation drives application, one's reading of the provision is of immense practical impact. Therefore, the overarching research question of this study concerns the correct interpretation and application of Article 3(2). Over the course of this study, the answer to this question will be approached by discussing the competing views in order to transcend the controversies and arrive at a synthesis position that is firmly based on public international law principles.

1.3 Motivation

Article 3(2) is a rule of interpretation contained in all important model conventions and most effective tax treaties.[4] Because of its function to attribute meaning to terms not otherwise defined in the treaty and the particular drafting of tax treaties in relatively few general terms, its application is of high impact on both the contracting states with respect to the implemented balance of taxing powers and the taxpayer in respect of how much tax he has to pay where and overall. Despite the article's importance, the Commentary comprises merely five paragraphs that do not explain in detail how it be interpreted and applied.[5] In consequence, the international debate on Article 3(2) has been intense. With respect to tangible results, it has led to an update of the OECD Commentary on Article 23 concerning how to treat qualification conflicts.[6] Unfortunately, this update has not put the controversies to rest, some of which are not resolved to this day. This has plenty of adverse consequences. In academia, the debate continues to be divided into diametrically opposed positions, and the approach implemented by the Commentary update is outright rejected even by the courts of some OECD countries. Particularly the views of academics and courts in German-speaking countries (and to some extent in countries with related languages such as Swedish and Dutch) are different from those of the English-speaking world,[7] with neither side accepting any merit in the other side's view.

Historically, Germany has been an influential country concerning the development of tax treaties and their interpretation. The first tax treaties recorded were concluded between the German and Austro-Hungarian Empire before the first

[4] *See* IBFD, *Tax Treaties Database* (Amsterdam: IBFD, 2020).
[5] OECD, Model Convention (2017), Commentary on Article 3, paras. 11–13.2.
[6] *See ibid.*, Commentary on Articles 23A and 23B, paras. 32.1–32.7.
[7] *See* terminology 'German/English View' below.

world war.[8] Their roots can be traced back to the Prussian industrial code of 1845,[9] in which the concept of permanent establishment (*Betriebsstätte*),[10] one of the core concepts in international tax law today, first appeared.[11] Also German scholars have been influential. The English edition of Vogel's seminal commentary[12] is quoted all around the world by academics and courts.[13] The German editions of both Vogel's and Wassermeyer's[14] commentaries are quoted not only by German scholars and courts, but also by those of the other German-speaking countries. In addition, as we shall see in the following chapters, Helmut Debatin's scholarly views have influenced German jurisprudence and continue to live on academically in the New Vienna School, which is currently one of the most influential centres of international tax law scholarship and education in Europe.

[8] *See* IBFD, *Tax Treaties Database* (2020).

[9] Preußische Gesetzessammlung 1845, 41.

[10] Henceforth referred to as PE.

[11] The terminology, indicating the total space used for the conduct of a business, was introduced in order to distribute the taxing rights between Prussian municipalities, eliminate double taxation, and decrease the administrative burden on local tax authorities, *see* Preußische Gesetzessammlung (1885), 327. This was followed by the Law of the North-German Federation to Eliminate Double Taxation in 1870, *see* Gesetz wegen Beseitigung der Doppelbesteuerung, Bundesgesetzblatt des Norddeutschen Bundes (1870), 119. The tax treaty Prussia-Austria/Hungary (1899) for the first time mentioned criteria defining a permanent establishment, structured as a positive list with a generic catch-all clause at the end. It was followed domestically by the German Double Tax Law of 1909, *see* Doppelsteuergesetz, Reichsgesetzblatt (1909), 332, and internationally by several treaties before and after the first world war, *see* R. X. Resch, *The Taxation of Profits Without a Permanent Establishment*, in M. Lang, M. Züger, and H.-J. Aigner (eds.), Permanent Establishments in International Tax Law, vol. 29 (Wien: Linde Verlag Ges.m.b.H., 2003), 475–500; J. D. Kolck, Der Betriebsstättenbegriff im nationalen und im internationalen Steuerrecht (Münster: Universität, Fachbereich Rechtswissenschaft, 1974), *passim*; F. Wassermeyer (ed.), Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen, vol. I (München: loose-leaf; C.H. Beck, 2016), MA, Vor Art. 1, 41–44, paras. 71–80; C. von Roenne, *The Very Beginning – the First Tax Treaties*, in T. Ecker and G. Ressler (eds.), History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties (Vienna: Linde, 2011), 19–39. For a compilation of all the historical documents drafted in preparation of the 1963 OECD Model and the older convention drafted under the auspices of the League of Nations after the second world war, *see* http://www.taxtreatieshistory.org (last viewed 11 Oct 2019).

[12] Vogel, Commentary (3rd ed., 1997); Reimer and Rust (eds.), Vogel Commentary (4th ed., 2015).

[13] *See*, e.g., *O'Brien v Quigley (Inspector of Taxes)*, [2013] IEHC 398, para. 41, in which the Irish High Court proposed to focus (in addition to the OECD Model) on the 3rd edition of Vogel's Commentary, which it found to be the academic work 'most helpful of all of the documents put before the court by the parties'.

[14] Wassermeyer (ed.), Wassermeyer Commentary, vol. I (2016).

At the same time, it is fair to say that the views of the English-speaking world exert the biggest influence on international tax law today. One reason is certainly the distribution of political power and economic weight in the post–war global order, accompanied by the rise of English as de facto *lingua franca* for tax treaties.[15] Although tax treaties have their roots before the second and even first world war, they are largely a post–second world war phenomenon: their growth in numbers did not take off until the 1960s after the adoption of the OECD Model, and their big expansion only happened by the 1990s alongside the growing interdependence of the world's national economies and their integration into a globalised world economy.[16] In consequence, although today's global tax treaty network has emerged in the era of 'linguistic nationalism',[17] in which it became custom to conclude international instruments in several languages instead of universally accepted ones such as Latin and French for the preceding eras,[18] tax treaties (like other bilateral treaties[19]) show a higher tendency than multilateral treaties to employ a third language as lingua franca in form of a prevailing text. In some cases, linguistic nationalism has been fully overcome and unilingual treaties in a third language are concluded. As of today, English dominates as widely accepted lingua franca: slightly more than three-quarters (77%) of all unilingual treaties – which make up roughly one-quarter of the global tax treaty network – as well as the overwhelming majority (95%) of all prevailing texts of plurilingual treaties are in English; in total, almost two-thirds (65%) of the global tax treaty network use English as language for unilingual treaties or prevailing texts.[20]

[15] *See* R. X. Resch, The Interpretation of Plurilingual Tax Treaties: Theory, Practice, Policy (Hamburg: tredition, 2018), Chs. 8, 9. I use the term lingua franca because it is commonly understood, *see* J. K. Gamble and C. Ku, *Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice*, 3 Indiana International and Comparative Law Review 2 (Indianapolis, Indiana: Indiana University Robert H. McKinney School of Law, January 1993), 233–264, 236, 10n. The Oxford Dictionary defines it as 'A language that is adopted as a common language between speakers whose native languages are different', https://www.lexico.com/en/definition/lingua_franca. Here it is used in a broader sense, not only to imply cases in which two countries adopted a third language for a prevailing text or unilingual treaty, but also cases in which two countries concluded a treaty with a prevailing text in one party's official language.

[16] *See* P. Dicken, Global Shift: Mapping the Changing Contours of the World Economy (7th ed., Thousand Oaks, California: Sage Publications Ltd., 2014), *passim*.

[17] J. Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 The British Year Book of International Law (Oxford: Oxford University Press, 1961), 73–155, at 72.

[18] *See also* H. P. de Vries, *Choice of Language*, 3 Virginia Journal of International Law (Chicago, Illinois: The Virginia Journal of International Law Association, 1963), at 26.

[19] *See* Gamble and Ku, *Choice of Language in Bilateral Treaties* (1993), at 241 et seq.

[20] Surprisingly, aside France, mainly the major English-speaking countries have resisted this global

As regards legal scholarship, English is undeniably the lingua franca of international tax law, and anybody who wants reception of his arguments beyond national borders has to employ it. Therefore, it should come as no surprise that scholarly writings from the Anglosphere play an influential role around the world,[21] which is attributable also to the fact that global reception is helped by the reduced language barrier and the importance of English as language for global commerce, permeating also all other social dimensions such as diplomacy and science.[22] Already at the beginning of this century, *The Economist* pointed out that English

> is everywhere. Some 380 million people speak it as their first language and perhaps two-thirds as many again as their second. A billion are learning it, about a third of the world's population are in some sense exposed to it and by 2050, it is predicted, half the world will be more or less proficient in it. It is the language of globalization – of international business, politics and diplomacy.[23]

In the most relevant institutions for the architecture of the international tax law regime, the OECD, G20, and EU, English is the de facto working language on a multilateral level.[24] The UN, which is also relevant because of the UN Model, originally established English and French as working languages and later added Ar-

trend by continuing to conclude plurilingual treaties without prevailing text. Overall, the non-English-speaking parts of the world are by far more ready to use English as lingua franca than the Anglosphere. In consequence, English permeates the global tax treaty network as authentic language only up to 84%, which indicates unused potential for English prevailing texts, *see* Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 9.

[21] Although the OECD approach to qualification conflicts has been developed by a group of experts from various countries, the influence exerted by its Anglo-Saxon members cannot be overlooked, *see* Chapter 6.

[22] See, e.g., D. Crystal, English as a Global Language (2nd ed., Cambridge; New York: Cambridge University Press, 2012); A. Johnson, *The Rise of English: The Language of Globalization in China and the European Union*, 22 Macalester International (Berkeley, California: Berkeley Electronic Press, 2009), 131–168; T. Neeley, *Global Business Speaks English*, 90 Harvard Buisness Review 5 (Brighton, Massachusetts: Harvard Business Publishing, May 2012).

[23] *A World Empire by Other Means: The Triumph of English*, The Economist (London: The Economist Newspaper Limited, 20 December 2001).

[24] According to Dor, 'Ninety nine per cent of European institutions cite English as their working language', D. Dor, *From Englishization to Imposed Multilingualism: Globalization, the Internet, and the Political Economy of the Linguistic Code*, 16 Public Culture 1 (Durham, North Carolina: Duke University Press, 2004), 97–118, at 103; according to Sasseville, 'The practical reality is that, nowadays, the OECD work on tax treaties is primarily carried on in English and the French version is usually a translation', J. Sasseville, *The OECD Model Convention and Commentaries*, in G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD, 2005), 129–134, at 130. Notwithstanding, the recent multilateral instrument combatting base erosion and profit shifting, which will modify a large number of tax treaties, has been concluded as bilingual treaty with equally authoritative English and French

abic, Chinese, Russian and Spanish. Apart from the reference to mutual agreement added to Article 3(2) of the OECD Model in 2017, the wording in the UN Model is equivalent.[25] Like the OECD Model, the UN Model contains no final clause suggesting a policy concerning lingual form; however, in a recent publication concerning the negotiation of tax treaties, a paragraph has been included that may be read as a recommendation to add a prevailing English text when concluding a treaty.[26]

It is no exaggeration to say that the ongoing confusion and discord about the interpretation and application of Article 3(2) is one of the central issues plaguing the international tax system, because it is one of the main reasons why unintended double taxation and double non-taxation has persisted over the decades.[27] Double taxation is economically harmful because it creates both a burden on and a barrier to cross-border economic activity, negatively affecting global economic growth. Resolving unintended but persistent double taxation requires costly and time-consuming mutual agreement procedures. Although theoretically appealing because of their emphasis on the reciprocal character of treaties, they trade speed of decision for targeted resolution of differences in interpretation. Mutual agreement procedures take time, which is never a good thing for the taxpayer engaged in economic activities requiring financial liquidity and certainty. In the worst case, excessive reliance on mutual agreement procedures may lead to treaty negotiators muddling through to some vague compromise that does not resolve the issues at stake but postpones agreement into the future.

texts, OECD, Multilateral Convention to Implement Tax Legal Related Measures to Prevent Base Erosion and Profit Shifting (Paris: OECD Publishing, 2016), Article 39. There are signs of simultaneous drafting in both languages, *see* OECD, Explanatory Statement to the Multilateral Convention to Implement Tax Legal Related Measures to Prevent Base Erosion and Profit Shifting (Paris: OECD Publishing, 2016), para. 80, which seems to confirm the OECD's earlier statement that 'The multilateral instrument is being negotiated in English and French', OECD, *Development of a Multilateral Instrument to Implement the Tax Treaty Related BEPS Measures: BEPS Action 15*, Public Discussion Draft, 31 May – June 30 (Paris: OECD Publishing, 2016), 3, para. 9; *see* R. X. Resch, *The OECD BEPS Multilateral Instrument and the Issue of Language*, Intertax 6/7 (Alphen aan den Rijn: Kluwer Law International, 2019), 563–572, at 572; J. Schuch and J.-P. V. West, *Authentic Languages and Official Translations of the Multilateral Instrument and Covered Tax Agreements*, in M. Lang (ed.), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (Wolters Kluwer, 2018), 67–87, at 85.

[25] *See* UN, United Nations Model Double Taxation Convention Between Developed and Developing Countries (United Nations, 2017), Article 3(2).

[26] UN, Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries (New York: United Nations, 2014), at 130.

[27] The German-English divide has proven to be particularly problematic in this respect because it roughly corresponds to the division of the world into exemption and credit countries. In a tax credit system, double taxation is the normal starting point; the treaty provides relief by referral to domestic law, and double exemption is not normally possible.

Opportunities for double non-taxation, on the other hand, have fuelled a thriving global base erosion and profit shifting industry, which is socially and politically harmful because it accelerates growing wealth inequality and negatively affects the budgetary situation of states, which in turn spurs rising national debt across the globe and may cause serious social and political repercussions resulting from the cutting of social welfare systems by states in response. Persistent unintended double non-taxation is now laboriously addressed by the OECD BEPS initiative[28] and multilateral instrument,[29] which will result in a multiplication of administrative efforts and costs for the contracting states as well as economic agents operating cross-border. Systemic evolution to address the challenges of a changing world is essential, however, problematic if, because of political realities, it comes in the form of mere patches to fix unintended results caused by an inconsistent application of fundamental principles. The potential outcome of such course of action is systemic regression in the form of ever new problems that require ever new solutions, which leads to a heavily patched and complex system that is burdensome to administer and navigate. Therefore, it is advisable to focus first on the formulation of the fundamental principles and their consistent application in order to cut down on the number of required adjustments and keep systemic complexity in check.

In this context, the main purpose of this study is twofold: First, to refute theories on tax treaty interpretation that build on flawed assumptions and lead to adverse results which, in turn, lead to unnecessary system patches. Second, to clarify the correct interpretation and application of Article 3(2). In the course of this study, an approach will be submitted that is firmly based on the VCLT and transcends the current controversies, in particular concerning the relationship between Article 3(2) and the VCLT, the meaning of 'context', and the application of the wording 'unless the context otherwise requires'.[30] The latter is where the front line currently runs between the German and English views. In my opinion, this is the wrong battle and merely a result of the historical development of the debate, which has progressed without having succeeded in putting the ultimate issue at its core to rest. The result of this is an international barrage of conflicting arguments from all sides without common starting and vanishing point – a maelstrom of complex controversies in which the unsuspecting novice must drown. Therefore, this study has the additional purpose of mapping the debate from its origins until today, in order to illuminate the misunderstandings that have happened along the way and

[28] https://www.oecd.org/tax/beps (last viewed 23 Apr 2020).

[29] OECD, Multilateral Convention to Implement Tax Legal Related Measures to Prevent Base Erosion and Profit Shifting (2016).

[30] OECD, Model Convention (2017), Article 3(2), henceforth referred to as the unless condition.

continue to fuel the unresolved controversies in place. Although this book is not intended and written as an introductory textbook, it is certainly meant for students who find themselves at a loss in the midst of the ongoing debates.

1.4 Structure

Conceptually, this study is divided into several parts. Chapters one and two introduce the project and outline key differences between the legal traditions that are relevant for the issues discussed. Chapters three to five outline and refute the German view on Article 3(2). Chapters six and seven deal with the English view, the official OECD approach to qualification conflicts derived from it, and the arguments submitted by its critics. Chapters eight and nine outline the meaning and application of Article 3(2). Chapter ten aggregates the most important conclusions in order to derive some general policy recommendations, while the epilogue takes a final look on the matter from a broader perspective. The following list provides a more detailed overview:

- Chapter 2 describes relevant differences between the civil and common law traditions in order to enable the reader to place the issues under discussion in a broader context and view them from a broader perspective. In particular, differences regarding the roles played by case law and doctrine are examined to illuminate the consequences for the respective approaches to interpretation.

- Chapter 3 outlines the views on Article 3(2) developed by German doctrine, in order to illuminate the assumptions and arguments on which they are based. It shows that there are two schools of thought; however, because they build on the same assumptions, they arrive at similar conclusions.

- Chapter 4 analyses the BFH's case law in order to assess the extent to which the views discussed in Chapter 3 have influenced practice. It shows that there are two conflicting sets of decisions which contradict each other in respect of their approaches to treaty interpretation.

- Chapter 5 refutes the German view on Article 3(2), which has contributed to the contradictory case law of the BFH. Moreover, it investigates the role of German language idiosyncrasies that may have helped its formation. In this context, the German tax treaty network is analysed with respect to its linguistic properties in order to infer the position of the German authorities.

- Chapter 6 outlines the English view on Article 3(2), which has found its way into the OECD Commentary on Article 23 as endorsed OECD approach to qualification conflicts.[31] In addition, it starts to outline the controversies that have accompanied the English view and OECD approach, in particular with respect to misunderstandings that underlie the arguments of its critics.
- Chapter 7 re-examines the main critique outlined in Chapter 6 and shows that, contrary to its submission, the OECD approach resolves all qualification conflicts.[32]
- Chapter 8 shows that the OECD approach to qualification conflicts must be considered merely a clarification of what the OECD Model always intended to implement, wherefore it applies to all tax treaties modelled on it unless they expressly prescribe a different approach.
- Chapter 9 further clarifies the application of Article 3(2), in particular with respect to its relationship with the VCLT, the meaning of 'context', and the application of the unless condition. Thereby, it transcends the current controversies into a holistic synthesis.
- Chapter 10 provides a brief summary of the most important conclusions in order to derive some general policy recommendations.
- The epilogue takes a final look from a broader perspective against the background of the broader context introduced in Chapter 2.

[31] Parts of this chapter have been peer reviewed and published in Resch, *May Be Taxed for Whatever Reason – Conflicts of Qualification* (2020).

[32] Parts of this chapter have been peer reviewed and published in *ibid.*

1.5 Methodology

The main methods applied by this study are the same as those applied by my earlier study on the interpretation of plurilingual tax treaties, namely, logic, *hermeneutics*,[33] and quantitative analysis.[34] Given the purpose of this study, an additional method is applied, namely, the dialectical reconstruction of the discourse on Article 3(2) from its origin until today in a Hegelian sense.[35] The aim of this method is to extract and map the thought processes that have created the dispute between the German and English views and shaped its evolution, in order to illuminate the underlying assumptions, retrace the course, identify flaws, and derive a synthesis from the opposing positions.[36]

True to its task, the book is written in the form of a critical discussion. Its goal is not to amass encyclopedic information about the interpretation and application of Article 3(2) by the academics and courts of all countries, but to critically evaluate the two prevailing, in their core antagonistic views about the article's meaning in light of its true intention. In consequence, the conclusions of this book are a natural part of the flow of argument as it evolves over the chapters, not something to present on top at the end. Hence, the purpose of the final chapter will not be to submit or reproduce all the conclusions of this study, but only to give a brief summary of the most important ones, in order to derive some general policy recommendations.

[33] In the sense of the Oxford Dictionary, the American Heritage Dictionary of the English Language, and the Merriam-Webster Dictionary, respectively, as 'The branch of knowledge that deals with interpretation', 'The theory and methodology of interpretation', and 'the study of the methodological principles of interpretation', not in the sense of an ontological theory of understanding, cf. M. Heidegger, Ontology – the Hermeneutics of Facticity (Bloomington, IN: Indiana University Press, 1999), at 6–16. As pointed out by the Merriam-Webster and Oxford Dictionaries, 'hermeneutics' is 'plural in form but singular or plural in construction' and 'usually treated as singular'.

[34] For a detailed discussion of what precisely is implied, *see* Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 2. In line with the scope of this study, the quantitative analysis conducted is restricted to the linguistic properties of Article 3(2) in Germany's tax treaties.

[35] *See* J. E. Maybee, *Hegel's Dialectics*, in E. N. Zalta (ed.), The Stanford Encyclopedia of Philosophy (Winter ed., online; Stanford University, 2019), https://plato.stanford.edu.

[36] *See* T. Schönwälder-Kuntze, Philosophische Methoden zur Einführung (2nd ed., Hamburg: Junius Verlag GmbH, 2006), at 53.

1.6 Terminology

1.6.1 Established Misnomers

Academics have imported the terms *lex fori*, 'qualification', 'conflict of qualification', and 'common interpretation'[37] from private international law into the debate on Article 3(2); however, the meanings of these terms in their private international law context do not transfer to public international law because tax treaties do not contain conflict of law rules.[38] Nevertheless, the terminology has established itself as standard adopted by academics and courts alike. Hence, it makes little sense to start developing a better suited nomenclature unilaterally, wherefore I will just continue to use these terms while assuming that their meanings as intended will be understood from the context. What they mean precisely in the context of the subject at hand will become clear in due course. At this point, it is only important to register that their private international law meanings are not implied, and drawing too close analogies may not be useful. Moreover, it should be noted that the term 'conflict of qualification' is used by the OECD in a particular sense. The OECD Commentary distinguishes between cases in which the source state has taxed (or refrained from taxation) with recourse to its domestic law in accordance with the treaty and cases in which there is disagreement about the facts or what a particular treaty rule instructs; the latter do not constitute conflicts of qualification in the OECD sense but disagreements that can be resolved only by mutual agreement procedures.[39] Some authors and courts appear to apply the terminology indiscriminately to all types of mismatches in interpretation. Such indiscriminate use should be abstained from in order to avoid misunderstandings.

1.6.2 German/English View

The term 'German view' and similar terminology is not intended to imply only Germany but used as a proxy for a particular interpretation of Article 3(2) that has been developed initially by German scholars and partly adopted by German courts; however, similar views have been adopted by scholars and courts from other coun-

[37] *Entscheidungsharmonie* in German, *see* P. H. Neuhaus, Die Grundbegriffe des internationalen Privatrechts (1st ed., Berlin: de Gruyter, 1962), at 38. *Entscheidungsharmonie* may be translated literally as harmony between judicial decisions.

[38] *See* Reimer and Rust (eds.), Vogel Commentary (4th ed., 2015), at 76–78, paras. 119–123.

[39] OECD, Model Convention (2017), Commentary on Article 23A and 23B, paras. 32.3, 32.5.

tries,[40] which are implied as well.[41] Likewise, the term 'English view' stands for the views predominantly supported by prominent Anglo-Saxon scholars without implying only them or any country in particular. The English view has been developed in response to the German view by a group of international tax scholars henceforth referred to under the acronym ITG for 'International Tax Group'. Therefore, throughout this book, the English view is mostly referred to as 'ITG view' or 'ITG approach'. The reader should bear in mind that this is a generalisation. Even though the ITG has published articles that combine views of members published separately in between publications by the ITG as a collective, certain views may be attributable more to some members than to others or the group as a whole. I have tried to attribute important arguments to their correct sources and isolate views of members in their individual capacity from group views; however, since I am not a member, I might not have been successful in all cases. As we shall see, the German view is also more diverse in substance than suggested by the terminology; however, since its proponents do not publish as a collective, the individual arguments can be attributed more easily to their respective authors.

1.6.3 Lex Fori/Autonomous/Contextual Approach

The term 'lex fori approach' implies interpretation with recourse to the domestic law of the contracting state that carries out the taxation at issue in the dispute to be decided by the court presiding. Conversely, 'autonomous approach' implies interpretation autonomous from domestic law, based on the rationale that tax treaties must be interpreted from within themselves, whereas domestic law may be had recourse to only as an additional aid if otherwise no sensible construction is possible. Finally, 'contextual approach' implies interpretation based on considerations from the treaty's context, because the latter 'otherwise requires'. Whereas the first two are diametrically opposed and mutually exclusive, the last two share similarities in their practical application. Unlike the second, however, the third does not contradict the first, but only suggests that an interpretation from the context over recourse to domestic law was required in the particular case at issue.

[40] *See*, e.g., Bundesgericht/Tribunal fédéral, 2A.239/2005 (28 November 2005); Regeringsrätten (since 2011 Högsta förvaltningsdomstolen), 1169–1987, ref. 162 (23 December 1987), as discussed by J. F. Avery Jones, *Treaty Interpretation*, in Global Tax Treaty Commentaries (online; IBFD, 2018), s. 5.1.2.2.5, and P. Sundgren, *Interpretation of Tax Treaties: A Case Study*, British Tax Review 9 (London: Sweet & Maxwell, 1990), 286–302, 286.

[41] This is done exclusively in service of the reader – the sole intention is to avoid cumbersome formulations and maintain readability; I apologise to everyone whose cultural or political sensitivity is violated by this choice.

1.6.4 Text(s)

The standard nomenclature employs the plural 'texts' to refer to multiple authentic language versions of a treaty. This is misleading in view of the treaty as one set of terms, because it may inspire the idea that there could be more than one text. During the drafting period of the VCLT, the International Law Commission (ILC) discussed use of this plural extensively, and several voices argued in favour of 'versions' in order to refer to the different language versions of the one treaty text; however, use of 'texts' prevailed while 'version' and 'versions' were reserved for texts of non-authentic status.[42] This convention has been implemented in Article 33(2) and is adhered to here: throughout, 'text' refers to an authenticated language version of the text while 'texts' refers to more or all authenticated language versions. Occasionally, however, the singular will refer to the treaty text in the abstract as one set of terms, not to any language text in particular and irrespective of the total number of language texts. Such double meaning is unavoidable because of the ILC terminology; I trust the intended meaning will be obvious from the context. Despite its own convention, the ILC frequently adds the adjective 'authentic'.[43] Even the VCLT does so in paragraphs (3) and (4) of Article 33. Most commentators adopt this superfluous terminology. I shall not follow the example but refrain from adding 'authentic' every single time. Occasional exceptions are made to benefit a sentence with precision or the reader with ease of understanding.

[42] *See* F. A. Engelen, Interpretation of Tax Treaties Under International Law: A Study of Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties and Their Application to Tax Treaties (Amsterdam: International Bureau of Fiscal Documentation, 2004), at 351, 356, 358–359; R. K. Gardiner, Treaty Interpretation (2nd ed., Oxford: Oxford University Press, 2015), at 414–419.

[43] ILC, VCLT Commentary (1967), 195, para. 1; 224, paras. 1, 3–4; 225, paras. 6–8; 272, para. 5; 273, para. 9.

2 Preliminary Considerations

2.1 Introduction

The discussion on tax treaty interpretation is a global discourse with contributors from all the world's jurisdictions. Hence, to maintain a fruitful dialogue, awareness about the different points of departure is as important as the focus on common goals. One of the main dividing lines in the debate is the cultural difference between civil and common law[1] because coming from a certain legal tradition affects the way we think and argue. To quote Klabbers, we all start out from belonging to a certain 'interpretive community', and our 'understanding will often be based, to quite a large extent, on the sort of assumptions and understandings "in force" in that particular community'.[2] Consequently, both self-awareness and awareness of the other are crucial to avoid misunderstanding, wherefore this chapter aims to outline some important differences between the civil and common law traditions in order to enable readers on both sides to place the issues under discussion in a broader context and look at them from a broader perspective.

Concerning this, readers should keep in mind that, given deviations within the families of legal systems, it would be wrong to conceive of unified civil or common law traditions. Even though the common law tradition is more unified than the civil

[1] It is important to distinguish between legal systems and legal traditions in this regard. According to Merryman and Perez-Perdomo, a legal system is constituted by 'an operating set of legal institutions, procedures, and rules', whereas a legal tradition may be defined as a 'set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught', J. Merryman and R. Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America (Stanford University Press, 2007), 1–2. The common law tradition prevails in North America and the Commonwealth of Nations while the civil law tradition prevails throughout Europe, Latin and Middle America, and the Commonwealth of Independent States. The University of Ottawa World Legal Systems Research Group has classified all the world's legal systems and published a respective map, *see* http://www.juriglobe.ca/eng/index.php (last viewed 9 Sept 2019).

[2] J. Klabbers, *Virtuous Interpretation*, in M. Fitzmaurice, O. A. Elias, and P. Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (Leiden; Boston: Martinus Nijhoff Publishers, 2010), 15–38, at 2010, 6–7.

law tradition because of the shared heritage of the British Commonwealth, there exist significant differences between the common law countries.[3] On the other hand, the distinction between the two traditions may be less pronounced in practice than drawn in the abstract. To some extent, their differences may lie in more elusive cultural factors and philosophical perspectives whereas their substantive laws are both rooted in Roman law, albeit in different periods.[4] In addition, there is an element of convergence, attributable to mutual influences on each other over the course of history.[5] As a result, many countries today have mixed systems.[6] Hence, the intention of the following paragraphs is merely to sketch some fundamental differences that are relevant to the issues discussed, stressing the point at the expense of oversimplification. Such necessarily superficial review must suffice for purposes of the current study.

[3] *See* N. MacCormick, R. S. Summers and D. N. MacCormick, Interpreting Precedents: A Comparative Study (Aldershot: Dartmouth Publishing Co. Ltd., 1997), at 3–4. The US in particular has diverged more from English law than, say, Australia or Canada. For example, the US Supreme Court has a more liberal approach to using extraneous materials in interpretation, *see* E. J. Criddle, *The Vienna Convention on the Law of Treaties in US Treaty Interpretation*, 44 Virginia Journal of International Law 2 (Charlottesville, Virginia: The Virginia Journal of International Law Association, 2004), 431–500, *passim*. With respect to the historical analysis submitted here, emphasis is given to the common law in England, and the focus regarding civil law will be on Germany, in line with the subject of this study.

[4] *See* K. F. Röhl, Allgemeine Rechtslehre. Ein Lehrbuch (Köln: Heymanns Verlag GmbH, 1995), s. 70; L. Macmillan, *Two Ways of Thinking*, in L. Macmillan (ed.), Law and Other Things (Cambridge: Cambridge University Press, 1937), 76–101, at 79; F. Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 Boston College International and Comparative Law Review 2 (Newton, Massachusetts: Boston College Law School, 1981), 257–281, at 257–261; A. Watson, *Legal Change: Sources of Law and Legal Culture*, 131 University of Pennsylvania Law Review 5 (Philadelphia, Pennsylvania: University of Pennsylvania Law School, 1983), 1121–1157, at 1121–1157; C. Siac, *Mining Law: Bridging the Gap Between Common Law and Civil Law Systems*, 11 Mineral Resources Engineering 2 (Singapur: World Scientific, 2002), 217–229, at 217–18.

[5] *See* V. O'Connor, *Common Law and Civil Law Traditions: Practitioner's Guide* (International Network to Promote the Rule of Law, 2012), at 33–35; Berkeley School of Law (Boat Hall), *The Robbins Collection: The Common Law and Civil Law Traditions* (online; University of California at Berkeley, 2018), https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html, at 4; J. N. Frank, *Civil Law Influences on the Common Law: Some Reflections on 'Comparative' and 'Contrastive' Law*, 104 University of Pennsylvania Law Review 7 (Philadelphia, Pennsylvania: University of Pennsylvania Law School, 1956), 887–926, at 887–926; Röhl, Allgemeine Rechtslehre (1995), s. 70.

[6] *See* World Legal Systems Research Group, 'JuriGlobe' (University of Ottawa); O'Connor, *Common Law and Civil Law Traditions* (2012), at 33.

2.2 Civil Versus Common Law

2.2.1 Case Law

As has been pointed out by Franz Wassermeyer, author and editor of the seminal Wassermeyer commentaries on the OECD Model and all German tax treaties as well as judge and presiding judge of the fourth and first senates of the BFH from 1984 to 2005,[7] the BFH has not yet outlined its fundamental approach to tax treaty interpretation in a comprehensive way.[8] Its attitude may be deduced only from individual decisions; however, since they have been rendered by different senates and generations of judges, they may contradict one another with respect to fundamental questions.[9]

This state of affairs may puzzle readers coming from common law countries, where judicial opinions are (or at least traditionally were) the principal source of law.[10] Statutes, on the other hand, constitute only secondary sources: they are not used to codify complete branches of law and implement general principles, but merely to address particular issues,[11] implement uniformity, and complement or correct judge-made law.[12] Case law as principal source of law creates precedents

[7] The first senate normally deals with international cases.

[8] F. Wassermeyer, *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Bundesfinanzhofs*, Steuer- und Wirtschaft International 6 (Wien: Linde Verlag Ges.m.b.H, 1992), 171–176, at 171. According to Mössner, this may not necessarily be a reason for criticism, because the task of courts is not to present treatises on methodological principles but to apply the pertinent methods of interpretation; however, one should be able to discern the methods and comprehend the reasoning on their basis from the elaborations of the court, *see* J. M. Mössner, *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Bundesfinanzhofs*, in M. Lang (ed.), Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und Österreichs, vol. 6 (Wien: Linde, 1994), at 23. This attitude may mark a difference to the common law tradition, which regards it as the task of higher courts to assist future decisions by lower courts, with the latter being bound to preceding case law (see below).

[9] The same still applies, *see* Chapter 4.

[10] Although judges are bound by statutes, they have the power to make law, *see* O'Connor, *Common Law and Civil Law Traditions* (2012), at 23; Siac, *Mining Law* (2002), at 218.

[11] For example, the law of partnerships in the UK Partnership Act of 1890.

[12] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 14, 23; J. Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 The American Journal of Comparative Law 3 (Oxford: Oxford University Press, 1966), 419–435, at 425; W. Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)*, 4 Uniform Law Review 3 (Oxford: Oxford University Press, 1999), 591–618, at 614. The number of statutes has increased over time, however, common law is dominated by case law and must be characterised as uncodified, *see* P. S. Atiyah, Pragmatism and Theory in English Law (London: Stevens & Sons, 1987), 28 et seq.; R.

and has led to the principle of *stare decisis*[13] in common law: higher court decisions are binding for lower courts.[14] This guards legal certainty through a uniform basis of case law rather than codification with a focus on comprehensiveness as well as logical and systematic structure.[15]

Conversely, the principal source of law in civil law is hierarchically structured legislation intended to comprehensively codify all areas of law in a logical and systematic manner according to general principles.[16] Case law does not function as a primary source of law; judges are supposed to apply not create law, based on the strict separation of powers between legislature and judicature.[17] Cases are to be decided based on legislation not precedent, and previous case law is generally non-binding but courts are only bound by codes of law.[18]

Of course, any clear-cut distinction between strict reliance on precedent in common law countries versus complete disregard for it in civil law countries would be an oversimplification. Depending on the legal system in question, the situation today is a lot more complex.[19] In Germany, for example, decisions by courts in-

C. van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History (Cambridge: Cambridge University Press, 2008), at 39. Certain areas of law have remained constituted almost entirely by case law, e.g., the law of contracts in the UK, *see* Siac, *Mining Law* (2002), 217 et seq.

[13] Short for *stare decisis et non quieta movere* (to stand by decisions and not to disturb settled matters).

[14] *See* J. F. Avery Jones, *Tax Treaties: The Perspective of Common Law Countries*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), ss. 3.1.1 and 3.1.7; D. A. Ward, *Use of Foreign Court Decisions in Interpreting Tax Treaties*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 7.3; *R v Comeau*, [2018] SCC 15, para. 26: 'Common law courts are bound by authoritative precedent. This principle – stare decisis – is fundamental for guaranteeing certainty in the law. …Without this foundation, the law would be ever in flux – subject to shifting judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the status quo'.

[15] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 14; Dainow, *The Civil Law and the Common Law* (1966), at 424–425; Tetley, *Mixed Jurisdictions* (1999), at 614; W. Schön, *Tax Law Scholarship in Germany and the United States*, Working Paper (München: Max Planck Institute for Tax Law; Public Finance, May 2016), *passim*.

[16] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 11–14; Dainow, *The Civil Law and the Common Law* (1966), at 424; Siac, *Mining Law* (2002), at 217.

[17] *See* Tetley, *Mixed Jurisdictions* (1999), at 613; N. Foster, German Legal System and Laws (2nd ed., London: Blackstone Press, 1996), at 4; D. J. Piltz, *Macht im Steuerrecht*, in F. Klein et al. (eds.), Unternehmen Steuern: Festschrift für Hans Flick zum 70. Geburtstag (Köln: Dr. Otto Schmidt Verlag KG, 1997), 499–518, at 506.

[18] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 11–12; Dainow, *The Civil Law and the Common Law* (1966), at 426; R. Mellinghoff, *The German Federal Fiscal Court: An Overview*, 70 Bulletin for International Taxation 1 – 2 (Amsterdam: International Bureau of Fiscal Documentation, December 2015), s. 4.5.

[19] For a comparative study of several civil and common law countries, *see* MacCormick, Summers, and MacCormick, Interpreting Precedents (1997).

cluding the BFH only bind the parties to the particular dispute.[20] Nevertheless, BFH decisions published in the federal fiscal gazette[21] establish a persuasive 'ruling opinion' that is generally followed by the lower courts to avoid the risk of being overruled.[22] Fundamental changes of well established views in BFH case law that lead to a disadvantage for the taxpayer may, for reasons of protecting legitimate expectations, only apply non-retroactively to facts that have arisen after publication in the BStBl.[23] Although the Federal Ministry of Finance[24] may limit application of a BFH decision beyond the particular dispute it decided by issuing an explicit non-application decree once the BFH has issued its decision for publication in the BStBl, it can do so only to avert legal uncertainty and safeguard the uniformity of taxation with respect to the interplay of the decision with other tax laws, not for purely fiscal reasons.[25] Generally speaking, together with the development of the law by adapting its jurisprudence to improved legal knowledge, the primary mandate of the BFH is to preserve unity in the application of the law, that is, to ensure legal correctness and certainty through the consistency and continuity of case law.[26] In addition to this role of the BFH, the decisions of the Federal Constitutional Court[27] bind all courts – including the BFH – by law.[28] Decisions of the BFH cannot be appealed against but may be challenged only by way of constitutional complaints at the BVerfG, which may overrule them if it considers them to be in conflict with constitutional law.[29] The BVerfG, however, is not entirely free in its decisions; its mandate is to apply the German constitution,[30] that is, concerning taxes, the review of tax laws and BFH decisions in terms of their compatibility with the GG.[31]

[20] Article 110(1) FGO; see Deutscher Bundestag, Nichtanwendungserlasse im Steuerrecht, Drucksache 15/4614 (Berlin: Bundesanzeiger Verlagsgesellschaft mbH, 3 January 2005), at 1.

[21] Henceforth referred to by the official German acronym BStBl for *Bundessteuerblatt*.

[22] *See* Ward, *Use of Foreign Court Decisions in Interpreting Tax Treaties* (2007), s. 7.4.2; K. Vogel, *Über Entscheidungsharmonie*, in F. Klein et al. (eds.), Unternehmen Steuern: Festschrift für Hans Flick zum 70. Geburtstag (Köln: Dr. Otto Schmidt Verlag KG, 1997), 1043–1056, at 1055–1056.

[23] *See* Mellinghoff, *The German Federal Fiscal Court* (2015), s. 4.5.

[24] Henceforth referred to by the official German acronym BMF for *Bundesfinanzministerium*.

[25] *See* Deutscher Bundestag, Nichtanwendungserlasse im Steuerrecht (2005), at 1; Wissenschaftliche Dienste des Deutschen Bundestages, Der Nichtanwendungserlass im Steuerrecht, Ausarbeitung WD 4–3000–080/09 (Berlin: Fachbereich Haushalt und Finanzen, 13 May 2009).

[26] *See* Mellinghoff, *The German Federal Fiscal Court* (2015), ss. 2.2–2.3, 3.2, 3.4, 4.5.

[27] Henceforth referred to by the official German acronym BVerfG for *Bundesverfassungsgericht*.

[28] Article 31(1) Act of the Constitutional Court, henceforth referred to by the official German acronym BVerfGG for *Bundesverfassungsgerichtsgesetz*.

[29] *See ibid.*, s. 4.5.

[30] Henceforth referred to by the official German acronym GG for *Grundgesetz*.

[31] *See* Piltz, *Macht im Steuerrecht* (1997), at 503.

Like the BFH in Germany, the French *Conseil d'Etat* will rely on principles as developed by precedent in line with its mandate to foster consistency of case law, and the lower courts will treat its decisions as if they were binding.[32] But, they are not legally binding, and lower courts run the risk of having their decisions rejected on appeal if they are based only on precedent.[33] Although in theory not being binding, precedent plays a considerable role also in Italy: the decisions of the *Corte di Cassazione* establish a 'prevalent view' that is generally followed by lower courts, which are obliged to comprehensively justify any deviation.[34] In the Netherlands, it is the statutory task of the *Hoge Raad* to secure the uniform application of the law. Notwithstanding, there is no principle of stare decisis and precedents are not binding. In practice, however, lower courts rely on decisions by the *Hoge Raad* for their reasoning.[35] A more comprehensive survey of country practices in this respect lies beyond the scope of this study, for which it is sufficient to appreciate the issue in principle.[36]

[32] *See* P. Martin, *The French Supreme Administrative Tax Court*, 70 Bulletin for International Taxation 1 (Amsterdam: International Bureau of Fiscal Documentation, January 2016), s. 3; P. Martin, *Courts and Tax Treaties in Civil Law Countries*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 4.3.4.2; Avery Jones, *Tax Treaties* (2007), s. 3.1.7; Ward, *Use of Foreign Court Decisions in Interpreting Tax Treaties* (2007), s. 7.4.1.

[33] W. Wijnen and T. Pagone, *Special Issue – Introduction*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 382–383, at 382; E. Cortot-Boucher, *An Overview of the French Judicial System and the Rule of Stare Decisis*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 390–393, at 391–392.

[34] *See* Ward, *Use of Foreign Court Decisions in Interpreting Tax Treaties* (2007), s. 7.4.3.

[35] W. Blokland, C. Maas and P. Wattel, *The Role of Precedents in Netherlands Tax Litigation*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 384–389, at 386–389.

[36] Concerning the situation in some more countries on top of the ones discussed, *see* J. Davies, *Precedent and Law – Australia*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 402–407; S. Holloway and L. Lamarre, *Evolution and Harmonization of International Taxation Within the Global Tax Community: The Canadian Experience*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 423–427; P. Darák, *The Uniform Application of Tax Law in Hungary*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 394–401; E. Lee and M. Yoon, *Precedent Versus Change in Case Law: The Korean Perspective*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 428–431; C. Endresen, *Exciting Times, but Business as Usual for the Judges*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 408–416; M. Gammie, *Judicial Precedent in the English Legal System*, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 417–422; P. Marvel, *Tax Litigation in the Federal Courts of the United States: The Role of Precedent in a Changing Legal*

As regards reliance on precedent in common law countries, one must not underestimate the readiness of judges to distinguish new cases from previously decided ones whenever they see fit, even if the facts appear to be similar.[37] Such is not necessarily seen as contradicting the principle of stare decisis but naturally flows from the common lawyer's focus on pragmatic solutions with respect to the concrete facts and issue at hand rather than general principle.[38] Historically speaking, binding precedent between hierarchically structured courts is a relatively modern development in common law: in the middle ages, all common law judges in England were members of the king's unified judiciary, wherefore the question of binding precedent between higher and lower courts could not even arise and was more an issue of striking the balance between flexibility and coherence of adjudication.[39]

All in all, neither does the common law judge refrain entirely from reasoning based on principles nor the civil law judge from taking previous case law into account; the difference is rather one of point of departure and way of thinking, which may result in a different appreciation of similar factual situations between jurisdictions belonging to the two traditions.[40] Practicalities also play a role. Tax appeals above the First-tier Tribunal require 'permission of either the court appealed from or to' in the UK, and the House of Lords is selective concerning the cases it will hear.[41] The number of relevant cases is much smaller in consequence, which makes consideration of precedent more feasible in comparison to civil law countries such as Germany, where the requirement for all courts to fully reason their decisions leads to a proliferation of reasoned judgements that cannot all be taken into account because of sheer numbers alone.[42]

Environment, 73 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2019), 432–437.

[37] *See* Avery Jones, *Tax Treaties* (2007), s. 3.1.7; K. Zweigert and H. Kötz, An Introduction to Comparative Law (3rd ed., Oxford; New York: Clarendon Press, 1998), at 269.

[38] *See* Atiyah, Pragmatism and Theory in English Law (1987), at 26 et seq.

[39] *See* Röhl, Allgemeine Rechtslehre (1995), s. 70.

[40] *See* Dainow, *The Civil Law and the Common Law* (1966), at 432; Röhl, Allgemeine Rechtslehre (1995), s. 70; Macmillan, *Two Ways of Thinking* (1937), at 67–101; Atiyah, Pragmatism and Theory in English Law (1987), *passim*.

[41] *See* Avery Jones, *Tax Treaties* (2007), s. 3.1.2.

[42] *See* Röhl, Allgemeine Rechtslehre (1995), s. 70. As enumerated by Avery Jones, the total number of tax appeals at the House of Lords amounted to six direct tax and three indirect tax cases in 2005, *see* Avery Jones, *Tax Treaties* (2007), s. 3.1.2. In comparison, the eleven senates of the BFH concluded 2,166 procedures in 2018, while 1,819 remained pending, *see* BFH, *Jahresbericht* (München: online; Bundesfinanzhof, 2018), https://www.bundesfinanzhof.de, 17. As of 2018, a total of 69,820 decisions of the BFH had been recorded in the *juris* database, *see ibid*, 12. Despite having only half the population, the civil law countries France, Germany, Italy, and the Netherlands have together in total almost six times more tax cases than the common law countries Australia, Canada, and

2.2.2 Doctrine

The role played by doctrine also differs between civil and common law. In part, this is attributable to their historical formation. Civil law had several influences, the main one being Roman law in form of the *Corpus Juris Civilis*, a collection of imperial enactments, textbooks, and writings of Roman lawyers compiled by order of Emperor Justinian I of Constantinople from A.D. 529 to A.D. 534. Additional influences came from local customs, canon law developed by the Christian church and taught by medieval scholars alongside Roman law, and commercial law emerging in Italy to regulate European trade.[43] The political and economic environment on the European continent of scattered territories, unifying states, and growing trade fuelled initiatives of scholars educated in Roman law to rationalise and systematise the law during the early modern period. Growing together politically and economically required a more uniform law, and such could come only from abstract legal theory, not any existing legal system based on local customs, of which there were too many because of territorial fragmentation. In consequence, the role of local customs gradually diminished in favour of general principles borrowed from Roman law.[44]

For common law, the historical development has been different.[45] After the Norman conquest of England in 1066, William the Conqueror and particularly Henry II[46] established a corps of judges to adjudicate disputes and uphold local order. Juries were introduced to represent the local interests of the populace in order to ensure their obedience.[47] In contrast to the continent, England always had a centralised legal system with a king's high court since the middle ages, hence there

the United States combined (roughly 246,000 versus roughly 42,000), and whereas the numbers differ considerably between the individual civil law countries, differences between the common law countries never exceed a factor of 1.5, *see* W. Wijnen, *No Taxation Without Litigation – How Tax Courts Survive This Adage*, in Obra Conmemorativa. 80 Aniversario de la Promulgación de la Ley de Justicia Fiscal (Mexico City: 2016), ss. 4.1–4.3.

[43] *See Code of Justinian*, in Encyclopædia Britannica (Chicago: online; Encyclopædia Britannica Inc., 2020), https://www.britannica.com; O'Connor, *Common Law and Civil Law Traditions* (2012), at 9–10; Merryman and Perez-Perdomo, The Civil Law Tradition (2007), at 13; Berkeley School of Law (Boat Hall), *The Robbins Collection* (2018), at 2.

[44] *See* Berkeley School of Law (Boat Hall), *The Robbins Collection* (2018), at 2; Röhl, Allgemeine Rechtslehre (1995), s. 70; Caenegem, Judges, Legislators and Professors (2008), at 100 et seq.

[45] *See* Caenegem, Judges, Legislators and Professors (2008), at 114 et seq.; Röhl, Allgemeine Rechtslehre (1995), s. 70; Macmillan, *Two Ways of Thinking* (1937), at 79.

[46] Reigned 1154–1189.

[47] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 11; Berkeley School of Law (Boat Hall), *The Robbins Collection* (2018), at 3.

was no comparable need to unify locally fragmented legal systems. The point of departure for the development of the law was the king's judiciary (to which all common law judges belonged), not necessarily abstract principles, because the essential task was to guard the coherence of adjudication, not to unify differing local legal systems and adjudication by independent provincial courts.[48] Consequently, rather than formulating generally applicable legal principles in a comprehensive code, the traditional focus of common law has been to resolve the dispute at hand on a case-by-case basis,[49] which may be traced back in spirit to the medieval 'system of writs, or royal orders, each of which provided a specific remedy for a specific wrong'.[50]

In summary, common law is genetically judge-made law by the royal judiciary, whereas the influence of academic research and theory has been marginal.[51] Since 'The common law is a historical development rather than a logical whole'[52] and 'A case is only authority for what it actually decides',[53] scholarly doctrine does not play an important role in common law systems. Rather than to theorise about legislation on the basis of general principles, the role of doctrine is to track the evolution of the law by way of compiling, classifying, and analysing case law.[54] Conversely, doctrine as developed by legal scholars plays an influential role in civil law systems – especially in areas the law is unsettled – because of the weight given to the logical and systematic structure of legislation. For every code there exist regularly updated commentaries by scholars that summarise doctrine and case law, and it is common for courts to cite the opinions of academics.[55] Historically, doctrine is inextricably interwoven with the formation of civil law and, although not a source of law, has retained its influence on the development of the law through its role in legal education and recourse by lawyers, judges, and legislators.[56]

[48] *See* Röhl, Allgemeine Rechtslehre (1995), s. 70; Caenegem, Judges, Legislators and Professors (2008), at 4–6.

[49] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 13–14.

[50] Berkeley School of Law (Boat Hall), *The Robbins Collection* (2018), at 3.

[51] *See* Caenegem, Judges, Legislators and Professors (2008), at 53; Atiyah, Pragmatism and Theory in English Law (1987), at 34 et seq., 131 et seq. The historical development as such may be half the story: beneath it lies a strong cultural sentiment in favour of pragmatism over principle, in particular concerning law, which is considered a practical affair and domain of the practitioner, *see* Macmillan, *Two Ways of Thinking* (1937), 80; *ibid.*, at 1–42.

[52] *Best v Samuel Fox & Co. Ltd.*, [1952] AC 716, at 727, per Lord Porter; *see also* O. W. Holmes, The Common Law (Toronto: University of Toronto Law School Typographical Society, 2011), at 5.

[53] *Quinn v Leatham*, [1901] AC 45, at 506, per Lord Halsbury; *see also Lochner v New York*, 198 U.S. 45 (1905), at 76, per Oliver Wendell Holmes: 'General propositions do not decide concrete cases'.

[54] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 13–14; Dainow, *The Civil Law and the Common Law* (1966), at 428.

[55] *See* O'Connor, *Common Law and Civil Law Traditions* (2012), at 14, 22.

[56] *See ibid.*, at 30–31; Dainow, *The Civil Law and the Common Law* (1966), at 428; Schön, *Tax Law*

2.2.3 Interpretation

These historical factors fuel the cultural differences with respect to interpretation. Civil law codes require a liberal approach to interpretation that applies the underlying principles to actual fact patterns.[57] The civil law judge 'reasons from principles to instances, …silently asking himself as each new problem arises: "What should we do this time?" '[58] He applies the law by way of subsuming the facts of a case under the codified principles with the help of syllogisms, and his point of departure will be the search for the fundamental principle governing the subject matter.[59] In this context, the *travaux préparatoires* traditionally play a significant role as an indispensable source to help clarify the principles enshrined in the codes.[60]

Contrary to their civil law counterparts, common law judges frown upon syllogistic logic but reason 'from instances to principles …asking aloud in the same situation: "What did we do last time?" '[61] Their point of departure will be the search for a similar previous case unless a statute applies the text of which is clear, requiring the judge to give effect to it.[62] Therefore, in contrast to civil law countries, a strict interpretation has been called for traditionally in common law countries because common law statutes compile specific instructions.[63] In the words of Maxwell and Jackson:

Scholarship in Germany and the United States (2016), *passim*.

[57] Dainow provides a good general account of the difference between codes and statutes: 'A code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves the highest level of generalization based upon a scientific structure of classification. A code purports to be comprehensive and to encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise. …[S]tatutes are usually not formulated in terms of general principles but consist rather of particular rules intended to control certain fact situations specified with considerable detail', Dainow, *The Civil Law and the Common Law* (1966), at 424–25.

[58] T. M. Cooper, *The Common and the Civil Law: A Scot's View*, 63 Harvard Law Review 3 (Cambridge, Massachusetts: The Harvard Law Review Association, 1950), 468–475, at 470.

[59] *See* Zweigert and Kötz, An Introduction to Comparative Law (3rd ed., 1998), at 259; Avery Jones, *Tax Treaties* (2007), s. 3.1.7; Dainow, *The Civil Law and the Common Law* (1966), at 431.

[60] *See* Dainow, *The Civil Law and the Common Law* (1966), at 424. In Germany, for example, clarification of the legislator's intentions is part of the historical and teleological methods of interpretation, for which recourse to preparatory materials may be had, *see* Foster, German Legal System and Laws (2nd ed., 1996), 64; E. Reimer, *Tax Treaty Interpretation in Germany*, in M. Lang (ed.), Tax Treaty Interpretation (Wien: Linde Verlag Ges.m.b.H., 1998), 119–152, at 125–127.

[61] Cooper, *The Common and the Civil Law* (1950), at 470.

[62] *See* Zweigert and Kötz, An Introduction to Comparative Law (3rd ed., 1998), at 259; Avery Jones, *Tax Treaties* (2007), at 11; Dainow, *The Civil Law and the Common Law* (1966), at 431; Atiyah, Pragmatism and Theory in English Law (1987), at 10–13.

[63] *See* Röhl, Allgemeine Rechtslehre (1995), s. 70; Vogel, Commentary (3rd ed., 1997), at 33, para. 62.

> A statute is the will of legislature, and the fundamental rule of interpretation, to which all others are subordinate, is, that a statute is to be expounded, according to the intent of those who made it. …The fundamental maxim of sound interpretation is: *ita scriptum est*, and it is not the business of courts to be wiser than the laws and to mould them with judicial views of what is just or unjust. The letter of the law is the law itself.[64]

Consequently, investigations into preparatory materials beyond the letter of the law are discouraged; the *travaux préparatoires* have little relevance and, as a recent development, may be used only within strict limits, when the interpretation of a statute otherwise remains ambiguous or obscure or leads to an unreasonable or absurd result.[65] This disregard partly has historical reasons: common law judges have guarded their law making powers versus parliament by way of denying value to the *travaux préparatoires* and adopting strict methods of statutory interpretation in order to minimise parliamentary infringement on their stewardship of the law.[66]

In summary, the intentions of the drafters are decisive both in civil and common law, however, the perspective on their transposition differs. According to the civil law view, the intentions behind the principles enshrined in the legal text may be investigated via preparatory materials, whereas the common law view requires the interpreter to consider only the intentions as expressed in the written text and disregard the preparatory materials as far as possible. It is clear how the latter follows from common law statutes being a set of specific instructions, not a codification of general principles. Once it is time to enact specific instructions, the process of reflecting on the principles behind them has already been concluded; it is only necessary to establish what exactly the specific instructions instruct, so reference to preparatory materials is justified only in case the instructions turn out to be ambiguous, obscure, unreasonable, or absurd.

2.3 Conclusions

From the aforesaid, readers should take away the following: Although case law should be consistent in both civil and common law countries, such may not be the case in practice because of the development of the law and different interpretations

[64] P. B. Maxwell and G. H. B. Jackson, The Interpretation of Statutes (9th ed., London: Sweet & Maxwell, 1946), at 1.

[65] *See Pepper v Hart*, [1993] AC 593, at 617, per Lord Griffiths, and 634, per Lord Browne-Wilkinson; Caenegem, Judges, Legislators and Professors (2008), at 17; Avery Jones, *Tax Treaties* (2007), s. 3.3.3.

[66] *See* Dainow, *The Civil Law and the Common Law* (1966), at 426.

by different courts or the same court in different cases. This applies to both civil and common law countries but, attributable to the outlined differences between the two traditions, may be the case more often in the former. Particularly but not exclusively with respect to the development of the law, it is important to keep the role of doctrine in mind.

As regards the discussion on interpretation, it is important to recognise that the VCLT implements a compromise between the two approaches: although its textual approach is generally more purposive and permissive concerning use of supplementary means than the common law approach, it is at the same time more restrictive than the civil law approach.[67] The VCLT Commentary reiterates and stresses the primacy of textual interpretation,[68] and it almost seems as if the drafters of the VCLT would have preferred to deny recourse to the *travaux préparatoires* altogether unless interpretation under Article 31 would lead to an ambiguous, obscure, unreasonable, or absurd result.[69] They only conceded a more permissive use in view of the varied international practice, which made such restrictiveness feel 'unrealistic and inappropriate',[70] however, not without restricting the more permissive use at the same time to a merely confirmatory role concerning the meaning arrived at under a textual interpretation (subject only to limited exceptions) while emphasising the subordinate character of 'supplementary' means.[71] Thus, it may be fair to say that the VCLT approach to supplementary means, although being more permissive, gravitates towards a common law approach, and recourse to supplementary means should be handled more restrictively than the average civil lawyer would be inclined to have.[72]

[67] *See* UN, Vienna Convention on the Law of Treaties (1969), Article 32. According to Avery Jones, 'This makes little difference in practice since supplementary materials hardly exist in relation to tax treaties', Avery Jones, *Tax Treaties* (2007), s. 3.3.1.

[68] ILC, VCLT Commentary (1967), at 223, paras. 18–19.

[69] A relevant factor may have been that all four special rapporteurs on the law of treaties came from a common law background; only Hersch Lauterpacht had received some of his legal training in Lviv and Vienna, *see* M. Waibel, *Principles of Treaty Interpretation: Developed for and Applied by National Courts?*, in H. P. Aust and G. Nolte (eds.), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (Oxford; New York: Oxford University Press, 2016), 9–33, at 11.

[70] ILC, VCLT Commentary (1967), at 223, para. 18.

[71] *See ibid.*, at 223, para. 19. A proposal by the US chief delegate against implementation of this strict hierarchy and in favour of a more liberal use of supplementary means was decisively rejected by the Vienna Conference, *see* Criddle, *The Vienna Convention on the Law of Treaties in US Treaty Interpretation* (2004), 441–442.

[72] *See* Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 4, s. 4.4.

Despite the fact that common law courts have increasingly recognised and adopted a more purposive approach as implemented by the VCLT with respect to treaty interpretation,[73] the attitude towards treaty application being merely a matter of executing the wording and interpretation coming into play only if parts of the text turn out to be ambiguous is far from extinct among commentators.[74] Conversely,

[73] *See* E. Bjorge, *'Contractual' and 'Statutory' Treaty Interpretation in Domestic Courts? Convergence Around the Vienna Rules*, in H. P. Aust and G. Nolte (eds.), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (Oxford; New York: Oxford University Press, 2016), 49–71, at 62–69; Vogel, Commentary (3rd ed., 1997), at 33–34, para. 62. In the same vein, the Supreme Court of Canada has stated that 'In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties', *The Queen v Crown Forest Industries Ltd. et al.*, [1995] 95 DTC 5389, 5393, and, 'Contrary to an ordinary taxing statute a tax treaty must be given a liberal interpretation with a view of implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned', *Gladden v Her Majesty the Queen*, [1985] 85 DTC 5188, 5191. As already mentioned, the US approach resembles more that of civil law to begin with, *see*, e.g., *Maximov v United States*, 299 F.2d 565 (2d Cir. 1962), 568: 'The basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into agreement, in order to construe the document in a manner consistent with that intent. …And to give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties, it is necessary to examine not only the language, but the entire context of agreement. We must therefore examine all available evidence of the shared expectations of the parties to this Convention'.

[74] For an early justification of this doctrine, *see* E. de Vattel, The Law of Nations (Indianapolis, IN: Liberty Fund, Inc., 1797), ss. 263, 270. It is detrimental in this context when academic literature uses the adjective 'clear' as a matter of course without explicit definition. This is problematic because it may inspire a wrong understanding of 'clarity' in a colloquial sense, and the reader might read on without much reflection. The Oxford Dictionary defines clear as 'Leaving no doubt; obvious or unambiguous'. A treaty text may indeed be clear in this sense, but only *after* interpretation, not before, *see* J. Wouters and M. Vidal, *Non-Tax Treaties: Domestic Courts and Treaty Interpretation*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 1.3.2; L. Oppenheim, Oppenheim's International Law (9th ed., Harlow: Longman, 1992), at 1267; B. J. Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, 64 Bulletin for International Taxation 1 (Amsterdam: International Bureau of Fiscal Documentation, January 2010), 2–15, at 3–4; Conseil d'État, *Société Schneider Electric* (28 June 2002), per M. Austry, *commissaire du gouvernement*: 'the text of an international treaty, even when clear, must always be interpreted taking into account its object', as translated by Bjorge, *'Contractual' and 'Statutory' Treaty Interpretation in Domestic Courts?* (2016), 57. This is the essence of the VCLT general rule, which is aimed at deriving the textual meaning, not the literal sense. In the VCLT context, the scope of clarity is defined by the wording of Article 32(a) and (b): a treaty may be regarded as clear only after an interpretation under the general rule of interpretation has been conducted that did not lead to an ambiguous, obscure, absurd, or unreasonable result, *see* Engelen, Interpretation of Tax Treaties Under International Law (2004), 390; Resch, The Interpretation of Plurilingual Tax Treaties (2018), Chs. 3, 4, ss. 3.3.2, 4.4.2.

at the opposite end of the spectrum, an unbridled interpretationism may reign, advocating almost indiscriminate recourse to everything but the kitchen sink for purposes of interpretation.

Arguably, the identified cultural differences play into the discourse on Article 3(2), in particular with respect to the meaning of 'context'. This will be discussed in more detail in Chapter 9; for the moment, it is merely important to take note of the strong influence of doctrine in Germany. It is common practice for German courts to cite opinions by academics in support of their reasoning or to outline why they do not follow the opinion prevailing in literature.[75] Moreover, university professors are authorised to attend proceedings at the BFH in support of a party,[76] and their statements are regarded as pleadings of the party they accompany unless they are immediately withdrawn or corrected by the party under Article 62(7) of the German Fiscal Procedure Act.[77] Finally, academia and the judiciary are interwoven in an institutional manner: several current BFH judges have academic resumes and hold appointments as honorary professors.[78] Therefore, it should be no surprise that academic theory and judicial opinion may influence each other in an interactive way in Germany; judicial opinion may get influenced by academic theory and in turn feed back into the development of the latter, which runs the risk of flawed academic theories becoming firmly anchored both in doctrine and case law. As the following chapters will show, this has happened to a larger extent concerning the German position on Article 3(2), which to this day exerts a strong influence on international tax law and its development.

[75] *See* A. Rust, *Germany*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 11.1.1.

[76] *See* Mellinghoff, *The German Federal Fiscal Court* (2015), s. 3.2.

[77] Henceforth referred to by the official German acronym FGO for *Finanzgerichtsordnung*.

[78] *See ibid.*, ss. 5.5–5.6.

3 The German View in Doctrine

3.1 Introduction

The purpose of this chapter is to map the views developed by German doctrine, in order to illuminate the assumptions and arguments on which they are based. A critical evaluation will be postponed until Chapter 5, after an analysis of the extent to which they have influenced case law has been conducted in the following chapter. Relevant for this chapter is the observation that there are two schools of thought; however, as will be shown, they build on similar assumptions and, therefore, arrive at similar conclusions.

3.2 Autonomous Interpretation Versus Lex Fori

According to Wassermeyer, the BFH has been consistent in recognising tax treaties as an autonomous regulatory area and may be interpreted to prescribe the following logical order for their interpretation despite inconsistencies attributable to individual decisions having been rendered by different senates over different generations of judges: recourse to the treaty's wording and definitions; interpretation on the basis of the contextual relationship between the treaty's provisions; and recourse to definitions in domestic law.[1] In Wassermeyer's view, the first two are not strictly separate logically because they complement each other: although a definition in the treaty may render considerations of the contextual relationship between the treaty's provisions superfluous, such considerations are regularly required to interpret the definitions contained in the treaty, because the material scopes of treaty provisions are interlocked.[2] Regarding the third, Wassermeyer submits that 'There is in principle agreement about recourse to domestic law being a subordinate method of interpretation that intervenes only if an autonomous interpretation of the treaty is not possible or inappropriate for other reasons'.[3]

[1] Wassermeyer, *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Bundesfinanzhofs* (1992), at 171–172.

[2] *Ibid.*, at 172.

[3] *Ibid.*, at 173. Henceforth, this view will be referred to as 'autonomous approach', meaning autonomous from domestic law. For purposes of this study, this will be differentiated from mere contextual

At the time of Wassermeyer's article, Mössner arrived at a different assessment of the BFH's practice, based on a comprehensive analysis of its case law: 'As regards the method of interpretation of tax treaties by the BFH, it can be stated that the starting point is domestic law. …If the BFH always examines in advance whether the individual treaty contains indications that the contracting states wish to understand a term in a specific sense does not seem to be certain'.[4] In a recent publication, he updated his analysis and concluded that the BFH does not follow the autonomous approach exclusively but resorts to the lex fori approach on an equal basis.[5]

Dietmar Gosch, on the other hand, judge and presiding judge at the BFH from 1991 until 2016,[6] confirms Wassermeyer's view and stresses that the BFH applies the autonomous approach. In his view, the latter is prescribed by Article 3(2):

> Tax treaties are treaties under international law, to which a *prima vista* [unbiased] self-contained, autonomous understanding is inherent. Interpretation on the basis of international public law rules takes precedence. Recourse to domestic law may be had as an aid only if an interpretation under international law fails to define a term. This is impressively stated in Article 3(2) of the OECD Model. Of course, the BFH follows this methodological standard.[7]

In a consecutive article, Gosch outlined his stance in more detail.[8] Accordingly, the starting point for the interpretation of tax treaties is their character as public international law. Depending on their legal system, countries may implement them as a form of *lex specialis* domestic law via transformation acts or enforcement orders; however, this does not change the fact that treaty and domestic law are juxtaposed in two separate legal spheres independent of each other, and the primarily authoritative legal sphere for treaty interpretation is the sphere of public international law. As a corollary, he arrives at a particular interpretation of 'context' in Article 3(2) that excludes domestic law. When concluding a treaty, the contracting states

interpretation in the sense of the context otherwise requiring, henceforth referred to as 'contextual approach'.

[4] Mössner, *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Bundesfinanzhofs* (1994), at 37–38.

[5] J. M. Mössner, *Auslegung von Doppelbesteuerungsabkommen: Auf ein Neues!*, in Festschrift für Jürgen Lüdicke (2019), s. III. The next chapter will analyse German case law in detail.

[6] Ninth and first senates; from 2005 on also a member of the grand senate, which is responsible for ensuring the consistency of the BFH's case law.

[7] D. Gosch, *Entwicklungstendenzen in der Rechtsprechung des Bundesfinanzhofs zum Internationalen Steuerrecht*, Steuer- und Wirtschaft International 8 (Wien: Linde Verlag Ges.m.b.H, 2011), 324–340, s. II.1.

[8] D. Gosch, *Über die Auslegung von Doppelbesteuerungsabkommen*, 22 Internationale Steuerrundschau 3 (München: C.H. Beck, 2013), 87–95, at 87–89.

> are free to decide whether they want to attribute a domestic law meaning to a treaty term by referring to the former. …If such referral is omitted, which is the rule, it is for the interpreter to determine how far the treaty may be interpreted autonomously under international law. Only when all options have been explored or when there is no definition in the treaty and, in addition, no instruction that assistance may be obtained from a domestic legal understanding taking precedence over the domestic legal understanding of the other contracting state may be recognised, then and only then the hour of Article 3(2) of the OECD Model, the lex fori clause, strikes. …I want to take a clear position: understood correctly, 'context' points to the primacy of the original autonomous treaty context in its own conceptual construction. This alone is in line with the treaty's objective of avoiding double taxation *ex ovo* [from the start] by giving treaty terms, in respect of their 'context', an as uniform as possible meaning. …There is no doubt that recourse to domestic law is at best complementary to treaty interpretation.[9]

In summary, Wassermeyer and Gosch consider treaty and domestic law completely separate spheres in their legal essence and content. Consequently, autonomous interpretation and recourse to domestic law are pitted against each other as antagonistic approaches, and recourse to domestic law is only permitted as a supplementary aid when autonomous interpretation leads to no result. As a corollary, 'context' in Article 3(2) is understood to exclude domestic law, and the article as a whole is read as giving preference to an interpretation based as far as possible on autonomous considerations of the treaty's wording and context while recourse to domestic law is excluded to the largest possible extent.

3.3 Doctrinal Foundations

To support his submissions, Wassermeyer cites a BFH judgement in which the court had stated that 'As a guideline for the interpretation of a treaty term, the following order shall prevail: wording and definitions in the treaty, meaning within the context provided by the treaty's provisions, and definitions in domestic law'.[10] In the quoted decision, the BFH did not comment on why it holds this opinion; however, it had made the same submission in an earlier case, then citing the source of its views.[11] The cited authors, Debatin and Korn, maintain that tax treaties constitute a special form of international law because they are transformed into domestic law with the help of a transformation act. Accordingly, treaty norms are to be applied

[9] *Ibid.*, at 88.

[10] BFH, I R 179/86 (30 May 1990), BStBl II 1990, para. 10.

[11] BFH, I R 63/80 (21 August 1985), BStBl II 1986, paras 15–17, with reference to H. Debatin and R. Korn, Doppelbesteuerung, vol. 1st (München: C.H. Beck, 1994), 125–127, para. 121 et seq.

as domestic law but override other domestic legal provisions as lex specialis.[12] The fact that domestic law determines tax liability whereas treaties delimit it makes clear that, concerning their interpretation, treaties should be recognised as an independent legal sphere separate from domestic law, taking precedence. Therefore, treaty interpretation must be considered an autonomous task. According to Debatin and Korn, this constitutes the essence of Article 3(2):

> Tax treaties themselves make this clear on a regular basis by means of a specific rule stipulating that 'if the context does not otherwise require, any term not otherwise defined shall have the meaning it has under the law of the state applying the treaty', which consistently follows the OECD Model (Art. 3 para. 2). Thus, a guideline has been drawn up for treaty interpretation, according to which the following order is decisive: definitions in the treaty; context; domestic law.[13]

With respect to the first, they distinguish between definitions that define terms in a concluding manner in the treaty and definitions that define terms by specific referral to the domestic law of one contracting state. Crucially, they recognise that, 'in a strict sense, the latter does not constitute an interpretation under domestic law but an interpretation of the treaty according to the content of its own definition, which has made a concept under domestic law its own. Such a definition is therefore binding for both states'.[14] With respect to the second and third, they stress

[12] This explains the possibility of treaty override under German law. The transformation act transforming the treaty into domestic law constitutes a federal law and, therefore, may be overridden by a subsequent federal law specifically aimed at overriding it, *see*, e.g., BFH, I R 4/13 (11 December 2013), BStBl II 2014, para. 30. Translated into English, the first sentence of Article 59(2) GG reads 'Treaties that regulate the political relationships of the federal government or relate to subjects of federal legislation require the approval or cooperation of the bodies responsible for federal legislation in the form of a federal law'. Whether one must view the practical implementation via a federal act that transcribes the treaty a transformation seems debatable. Perhaps, one should consider the resulting act an 'approval act' rather than a 'transformation act', corresponding to the language of the GG; however, the BFH employs the terminology of 'transformation' and 'transformation act', *see*, e.g., BFH, I R 111/08 (2 September 2009), BStBl II 2010, paras. 12–15; BFH, I R 90/08 (2 September 2009), BStBl II 2010, paras. 16–20. In any case, the result is that, on the basis of constitutional law, the treaty has no effect unless it has been approved via a federal act by the parliamentary organs as empowered by the constitution, and such approval may be retracted again at a later stage by the same parliamentary organs via another federal act.

[13] Debatin and Korn, Doppelbesteuerung, vol. 1st (1994), at 125, para. 122. In order to transport the crucial connotation at the core of the interpretation submitted by Debatin and Korn, which is supported by the imprecise German translation of the OECD Model they quote (discussed in more detail in Chapter 5), I have translated the German original *wenn der Zusammenhang nichts anderes erfordert* literally as 'if the context does not otherwise require' instead of the OECD Model wording 'unless the context otherwise requires'.

[14] *Ibid.*, at 125, para. 124.

the importance of distinguishing interpretation according to the context – which they equate to the sense relationship between the treaty's provisions – from recourse to domestic law.[15] Because treaties constitute their own, separate body of law belonging to the sphere of internation law, the interpreter is required to construe them as such. If it is true that treaties issue their own legal statement, such must be considered definite or at least determinable. This would be contradicted by interpretations based on the domestic laws of the contracting states because such would inevitably transform the legal statement of the treaty into a state of ambiguity. On the basis of these considerations, Debatin and Korn conclude that

> treaties necessarily rest on the postulate to be interpreted as far as possible autonomously, which makes the 'context' the standard to follow, as is stated by their own rule on interpretation [Article 3(2)]. …Only once the 'context' as standard for interpretation has been fully exhausted but the treaty content still remains unidentifiable in respect of an answer pertinent for both contracting states, may one have recourse to domestic law definitions; however, the latter is nothing more than an aid to interpretation in order to provide assistance in otherwise not decidable cases.[16]

Although not stated explicitly, their argument rests on an additional assumption, namely, that the general referral to domestic law contained in Article 3(2) is fundamentally different from specific referrals to the domestic law of one contracting state found in other treaty provisions. In their view, the latter form part of conclusive treaty definitions whereas the former does not but only provides an additional fallback mechanism in case no meaning may be derived otherwise. This in turn rests on another, even more fundamental, assumption, namely, that the general referral to domestic law in Article 3(2) allows both contracting states to have recourse to their domestic laws simultaneously. That this necessarily leads to conflicting interpretations is not taken by Debatin and Korn as an indication that they should question their assumptions, but merely as another argument in support of their submission that recourse to domestic law must be restricted to the utmost by an autonomous interpretation:

> Depending on the domestic laws of the contracting states, the result may be that each state understands one and the same treaty statement differently. Such conflict of qualification results in tax distortions and double taxation. This underlines the need for an autonomous interpretation.[17]

[15] *Ibid.*, at 126, para. 125.
[16] *Ibid.*, at 126–127, paras. 125–126.
[17] *Ibid.*, at 127, para. 126.

The stance of Debatin and Korn may be traced back to Debatin's earlier writings, in which he develops his views in more detail.[18] His starting point is a consideration of the relationship between treaty and domestic law: because the former is lex specialis to the latter, its provisions take precedence. In addition, their function is different: domestic law establishes tax liability whereas treaties limit the sovereign competence of the contracting states to tax. Therefore, legal systematics demand that the legal consequences of the treaty are established first; domestic law can only apply insofar as it does not conflict with them. With this, Debatin implies a logical order, not necessarily a practical procedure. He concedes that, for practical purposes, it may be useful to first determine the extent of tax liability under domestic law before the extent to which this liability is restricted by the treaty is examined. Nevertheless, keeping the logical order in mind is essential for purposes of interpretation because from the fundamentally different function of treaties follows that they have their own normative content which is different from the normative content of domestic law. Consequently, treaty and domestic law must be considered completely separate legal spheres that have to be construed independently of each other. Otherwise,

> treaties would be without their own normative statement. What they define with their terms could be read from domestic law, the rules of which, however, are subject to the substantive legal content of treaties. Therefore, treaties cannot be viewed as being at the level of domestic law, but they set the limits to which domestic law must bend. Hence, each of the two spheres of law must be understood as a self-contained body of legal rules that makes its own statement with its own terms and definitions.[19]

According to Debatin, this distinction is obscured in practice because of coincidental use of homonymous terminology in treaties and domestic law attributable to both expressing themselves in fiscal terms for which certain similarities have developed across national borders. This fosters the misconception that treaty rules are based on domestic law concepts; however, it does not change the fact that 'treaty terms are to be regarded as having an independent propositional function to be deduced from the normative content of the treaty'.[20] In consequence, Debatin arrives at a particular conception of common interpretation as an interpretation necessarily independent from any domestic law meaning of terms used by the treaty:

[18] *See* H. Debatin, *System und Auslegung der Doppelbesteuerungsabkommen*, Der Betrieb 39 (Düsseldorf, Frankfurt: Verlagsgruppe Handelsblatt, 1965), 1–8; H. Debatin, *Auslegungsmaximen zum internationalen Steuerrecht*, 15 Außenwirtschaftsdienst des Betriebs-Beraters 12 (Heidelberg: Verl.-Ges. Recht u. Wirtschaft, 1969), 477–486.

[19] Debatin, *Auslegungsmaximen zum internationalen Steuerrecht* (1969), at 479.

[20] *Ibid.*, at 479.

> If their terms were to be given the meaning of homonymous domestic law terms, treaties would relinquish their claim to their own legal statement. As soon as the referenced domestic laws were not consistent in their definitions, the normative content of the treaty would be ambiguous; however, such is not compatible with the character of treaties as legal norms. Treaties lay claim to making a clear statement of law, which implies that the legal concepts used have their own meaning given by the treaty itself. From all this follows that treaties, like any self-contained legal system, are to be understood from themselves and their own terminology. …If, on the other hand, the interpretation of the treaty were to be carried out according to the standards of domestic law, this – in Spitaler's words – would be 'nothing but pure arbitrariness and a gross logical error because the contractual norms created by the contracting parties create, by their very nature, a common law which, of course, cannot be determined by means of a unilateral interpretation, independent of the tax law of the other contracting state'.[21]

This conception – and one may wonder why the last part of the quotation by Spitaler does not inspire Debatin to embark on considerations of whether and to what extent the domestic law of the other contracting state should be taken into account for purposes of common interpretation – leads him to the particular reading of Article 3(2) outlined above.

He goes on to elaborate that definitions provided by the treaty itself have obvious priority because the need for legal certainty requires that treaties are kept as free as possible from doubts about their meaning. Concerning this, he refers to the work of the OECD Fiscal Committee, which emphasised the importance of creating 'international definitions',[22] so that tax treaties can be interpreted autonomously.[23] Similarly, when treaty terms lack a definition, one must seek to derive an interpretation 'from the treaty itself, its ratio, its discernible evaluations and demarcations' to do 'justice to the normative content of the treaty as a self-contained legal state-

[21] *Ibid.*, at 479–480.

[22] OECD Fiscal Committee, *Report c(63)87* (Paris: online; OECD, 1963), http://www.taxtreatieshistory.org, Part I, III, para. 53: 'Meanwhile, various question remain to be examined and resolved by the Fiscal Committee. As mentioned earlier on, the Article concerning the taxation of dividends does not constitute a final solution in the case of certain countries and the Fiscal Committee proposes to pursue this particular problem. In addition, certain definitions adopted in the Draft Convention, particularly for the terms "immovable property", "dividends" and "interest", refer to the definitions employed in the domestic laws. In order, however, to remove any possible "conflict of qualification" between national laws and avoid making recourse to the mutual agreement procedure in order to find a solution, it would be necessary to have definitions independent of the domestic laws. This would, of course, be indispensable in the case of a multilateral Convention. The Fiscal Committee therefore contemplates establishing such "international definitions" wherever appropriate, in order that the Draft Convention may be interpreted as an international instrument complete in itself'.

[23] Debatin, *Auslegungsmaximen zum internationalen Steuerrecht* (1969), at 480.

ment'.[24] Conversely, the role of domestic law is confined to that of an aid in the last resort, to be had recourse to only if the treaty does not allow for a sensible construction otherwise.

That simultaneous recourse by the contracting states to their respective domestic laws necessarily leads to conflicting interpretations is not taken by Debatin as a sign that his reading of Article 3(2) might be erroneous, but rather as confirming his conclusions:

> International tax law gains a special interpretative refuge from the fact that it overlays national legal systems. In addition, treaty terminology has inevitably evolved from the categories of domestic law. Therefore, in the case of a *non liquet* [it is unclear], treaty interpretation may expect assistance from domestic law. Tax treaties take advantage of this. Their rule of interpretation [Article 3(2)] mentions domestic law as guideline in case of doubt. Its very result – interpretation of international law by means of national law – reveals an internal contradiction that can make this approach acceptable only as a last resort. . . .The claim of treaties to set an independent normative standard does not tolerate recognition of different interpretations for the same treaty concept as equally valid; however, this happens when, in the case of diverging domestic meanings, the interpretation of the agreement is tied to the domestic laws of the contracting states. This makes clear that, although expressly mentioned in treaties, recourse to domestic law can be taken only as a an interpretative aid of last resort, justified only by the lacking possibility for another interpretation with greater accuracy. Therefore, treaty interpretation according to domestic law constitutes only the last resort in case a treaty provision does not allow deduction of an independent meaning. Conversely, it follows that – insofar as no explicit definitions exist – interpretation must first of all exhaust all elements of the content of the treaty and the meaning of its provisions.[25]

Notwithstanding, Debatin recognises that it is common for tax treaties to employ domestic law definitions of terms as (part of) their treaty meaning, for example, in the case of immovable property or dividends.[26] With respect to this, he acknowledges that domestic law is not used as an aid to interpretation but that the treaty expresses a binding definition for both contracting states that is to be determined according to the domestic law of one contracting state.[27] Importantly, he draws a distinction between such specific referrals and the general referral to domestic law contained in Article 3(2), to which he does not grant the same role for purposes of establishing the treaty meaning:

[24] *Ibid.*, at 480.

[25] *Ibid.*, at 480. The concept of a non liquet originates from Roman law, in the context of which it constituted 'a legal formula by which the judge declared that he was unable to decide respecting the guilt or innocence of the accused', *see* C. T. Lewis and C. S. Short, Latin Dictionary (Oxford University Press, 1963), *liqueo*.

[26] OECD, Model Convention (2017), Articles 6(2) and 10(3).

[27] Debatin, *Auslegungsmaximen zum internationalen Steuerrecht* (1969), at 480–481.

> It is important that the meaning so established as the definition of the treaty term [by specific referral to the domestic law of one contracting state] binds both contracting states. This is the fundamental difference to the use of domestic law as an interpretative aid, in terms of which – to be consistent with the OECD Model – each contracting state may give the term the meaning it has under its own domestic law when applying the treaty. Thus, both contracting states are granted equal rights to interpret the treaty with recourse to their respective domestic laws. The interpretation applied by one of them with recourse to its own domestic law is not binding on the other. On the contrary, the latter can do the same without conversely binding the former. In contrast, a treaty definition of a term with recourse to the domestic law of one contracting state is equally binding for both contracting states.[28]

In summary, the views expressed by Debatin and Korn in their Commentary, which are quoted by BFH in support of its position, are equivalent to the views developed by Debatin in his earlier writings.

3.4 An Inner-German Schism

In contrast to Debatin, Vogel acknowledges that the wording of Article 3(2) prescribes recourse to domestic law as the rule, from which the interpreter may depart only in certain circumstances, namely, when the context so requires.[29] Nevertheless, his interpretation of Article 3(2) as allowing both contracting states to have recourse to their domestic laws simultaneously 'under what is known as the "lex fori" approach'[30] is similar to Debatin's:

> The principle of common interpretation is not applicable where tax treaties refer to the domestic law of the contracting States in such a way that each contracting State is supposed to apply its own law, independent from that of the other contracting state, to fulfil its treaty duties. A reference of this type back to domestic law is provided for by the MCs [Model Conventions] in Art. 3(2). …The MCs and the individual treaties based on the MCs accept the 'divergent interpretations' which result here from such recourse to domestic law as unavoidable.[31]

Thus, like Debatin, Vogel reads Article 3(2) as stating that 'As regards the application of the Convention by [~~a~~ each] Contracting State any term not otherwise

[28] *Ibid.*, at 481.

[29] Vogel, Commentary (1st ed., 1983), at 125, para. 53; Vogel, Commentary (2nd ed., 1990), at 155, para 59; Vogel, Commentary (3rd ed., 1997), at 208, para 59; Vogel and Lehner (eds.), Vogel Commentary (4th ed., 2003), at 386–387, para. 98, Vogel and Lehner (eds.), Vogel Commentary (5th ed., 2008), 379, para. 98.

[30] Vogel, Commentary (3rd ed., 1997), at 208, para 59.

[31] *Ibid.*, Introduction, 42, para. 77a; *see also* Reimer and Rust (eds.), Vogel Commentary (4th ed., 2015), at 63, para. 96.

defined shall, unless the context otherwise requires, have the meaning which it has under the laws of [~~that~~ each] Contracting State relating to the taxes which are the subject of the Convention'.[32] Although he sees the same problems as Debatin in the form of double taxation and double non-taxation resulting from such reading, he does not subscribe to Debatin's proposal of a restrictive approach allowing recourse to domestic law only on a subsidiary basis.[33] In Vogel's opinion, it is impossible to derive a systematic primacy of the context from Article 3(2), because in order to establish whether the context otherwise requires, one has to evaluate the domestic law meaning first. Nevertheless, since the domestic law meaning may still have to be abandoned in favour of a contextual interpretation, 'the two procedures of interpretation are in a relationship of interdependence'.[34]

Vogel stresses that limiting recourse to domestic law to cases in which interpretation according to the context is exhausted without success is incompatible with the wording of Article 3(2) because the formulation 'unless the context otherwise requires' makes clear that 'not every apparently convincing interpretation from the context should give rise to a divergence from the rule of Art. 3(2), but only those based on relatively strong arguments'.[35] He adds that the historical genesis of the provision supports the reading that an interpretation contrary to domestic law should be the exception.[36] On the basis of his deliberations, Vogel arrives at the conclusion that Article 3(2) must be read to imply that, ultimately, double taxation and double non-taxation may constitute the intended result although this is in conflict with the object and purpose of the treaty.[37] In order to resolve the

[32] OECD, Income and Capital Draft Model Convention and Commentary (Paris: OECD Publishing, 1963), Article 3(2).

[33] Vogel, Commentary (1st ed., 1983), at 126, para. 54; Vogel, Commentary (2nd ed., 1990), at 155–156, para. 60; Vogel, Commentary (3rd ed., 1997), at 208–209, para. 60; Vogel and Lehner (eds.), Vogel Commentary (4th ed., 2003), para. 99; Vogel and Lehner (eds.), Vogel Commentary (5th ed., 2008), at 379, para. 99.

[34] Vogel, Commentary (1st ed., 1983), at 129, paras. 63–64; *see also* Vogel, Commentary (2nd ed., 1990), at 160, paras. 69–70; Vogel, Commentary (3rd ed., 1997), at 213–214, paras. 69–70; Vogel and Lehner (eds.), Vogel Commentary (4th ed., 2003), at 392–393, paras. 118–119; Vogel and Lehner (eds.), Vogel Commentary (5th ed., 2008), at 384–395, paras. 118–119.

[35] Vogel, Commentary (3rd ed., 1997), at 214, para. 71.

[36] Vogel, Commentary (1st ed., 1983), at 129–130, para. 65; Vogel, Commentary (2nd ed., 1990), at 160–161, para. 71; Vogel, Commentary (3rd ed., 1997), at 214, para. 71; Vogel and Lehner (eds.), Vogel Commentary (4th ed., 2003), at 393, para. 120; Vogel and Lehner (eds.), Vogel Commentary (5th ed., 2008), at 385, para. 120.

[37] Vogel, Commentary (1st ed., 1983), at 130, para. 65; *see also* Vogel, Commentary (2nd ed., 1990), at 161, para. 71. The 3rd English edition reads 'Even if reference to domestic law were to lead to double taxation or double non-taxation, that fact alone cannot be taken as an argument in support of an interpretation which deviates from domestic law, though it is true that the treaty seeks

cognitive dissonance this causes for him, he proceeds to attribute a broad meaning to 'context'. According to Vogel, 'the fact that the undesirable consequences of recourse to domestic law are most readily held in check by such a broad interpretation' speaks for this view because to the extent such broad context provides weighty reasons, derogations may be made from the rule to have recourse to domestic law.[38] With respect to this, 'the fact that …recourse to domestic law may lead to double taxation or double non-taxation will add considerably to the weight of an interpretation from "context", if it helps to avoid such undesirably results'.[39] In consequence, Vogel arrives at the following logical order of steps he considers enshrined in Article 3(2), attributing special weight to contextual considerations that help to avoid double taxation and double non-taxation:

> (1) First, special treaty definitions, if any, or treaty rules of interpretation will be applied.
> (2) If no such special rules are applicable, the question to be asked is whether the law of the State applying the treaty (lex fori) attaches a special meaning to the term to the extent that it relates to the taxes covered by the treaty. …
> (3) If the law of the State applying the treaty uses the term, the term's meaning needs to be ascertained, in order to ask whether the context suggests a different interpretation and, in the light of the weight to be given to alternative interpretations, whether the context requires a different interpretation. Any reasons for adopting an interpretation deviating from domestic law have additional weight, …in particular where the question involves determination of the type of income, profit or capital to which the distributive rule applies, or involves the relevant tax base. This additional weight derives from the fact that in cases of interpretation by recourse to the domestic law, the latter is particularly apt to lead to inappropriate results.[40]

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to avoid double taxation and that interpretations avoiding double taxation should be preferred. …But apart from the consideration that often several different interpretations can avoid double taxation – to the detriment of one or the other state – the OECD member States, by adopting Art. 3(2) MC, accepted double taxation as a – possible – result, subject to mutual agreement procedures', Vogel, Commentary (3rd ed., 1997), 214, para. 71. As will be shown in the following chapter, this view seems to be shared by the BFH.

[38] *Ibid.*, at 214–215, para. 72; *see also* Vogel, Commentary (1st ed., 1983), at 130, para. 66; Vogel, Commentary (2nd ed., 1990), at 162, para. 73; Vogel and Lehner (eds.), Vogel Commentary (4th ed., 2003), at 394, para. 121; Vogel and Lehner (eds.), Vogel Commentary (5th ed., 2008), at 385–386, para. 121.

[39] Vogel, Commentary (3rd ed., 1997), at 215, para. 73.

[40] *Ibid.*, at 215, para. 74; *see also* Vogel, Commentary (1st ed., 1983), at 131, para. 68; Vogel, Commentary (2nd ed., 1990), at 162, para. 74; Vogel and Lehner (eds.), Vogel Commentary (4th ed., 2003), at 394, para. 122; Vogel and Lehner (eds.), Vogel Commentary (5th ed., 2008), at 386, para. 122.

In summary, although Vogel disagrees with Debatin's reasoning, which he considers to contradict the wording of Article 3(2), he arrives at a similar result because of his departure from the same premiss that Article 3(2) allows both contracting states to have recourse to their domestic laws simultaneously.

The editors of the new 4th English edition of Vogel's Commentary continue to subscribe to this view. By and large, they follow Vogel's arguments that reject Debatin's reasoning but nevertheless ascribe an ultimate prevalence to contextual interpretation.[41] The 6th German edition, which has been edited by Moris Lehner after Klaus Vogel's death, continues Vogel's project of trying to bring the wording of Article 3(2) in line with an ultimate prevalence of contextual interpretation to avoid undesirable results. Vogel's assumption of Article 3(2) allowing both contracting states to apply their domestic laws simultaneously is upheld, but recourse to domestic law, while recognised as prescribed by Article 3(2), is reinterpreted as an exception to the general precept of autonomous interpretation based on the added unless condition:

> Article 3(2) constitutes a limit to the precept of autonomous interpretation provided by the treaty itself. …This limitation is, at the same time, a confirmation of that precept because treaty terms may be interpreted with recourse to domestic law only if the conditions are met.[42]

Accordingly, the undesirable results of Article 3(2) are largely avoided in practice by a consideration of the systematic context of the treaty provisions and the treaty's object and purpose while the wording of Article 3(2) can (and must) be respected.[43] General statements concerning the logical order are not possible but the situation must be evaluated for each treaty and term in question individually:

> From a systematic point of view, the treaty context may …require otherwise when it comes to interpreting terms of provisions aimed at creating a congruent regulation for all contracting states. This applies, for example, to the terms in the so-called 'tie-breaker' rule …when they are used in domestic law. …From a teleological point of view …[t]he 'context otherwise requires' …if an interpretation under domestic law would lead to double taxation or double exemption. …By this treaty-oriented determination of 'context otherwise requires' in Article 3(2), the limit of its wording is not transgressed. Accordingly, it is also not necessary to assume that the context always requires otherwise, …but only if double taxation or double non-taxation would result in a particular case under a particular treaty. …The 'context' that, in the sense of Article 3(2), 'otherwise requires', must be determined for each individual term for each

[41] *See* Reimer and Rust (eds.), Vogel Commentary (4th ed., 2015), Commentary on Article 3, 36, para. 108, 40–41, para. 121–123.

[42] Lehner (ed.), Vogel Commentary (6th ed., 2015), at 544–545, para. 98.

[43] *See ibid.*, at 545, para. 99, and 550, para. 116b.

> (individual) treaty, taking the domestic laws of the contracting states possibly leading to double taxation or double non-taxation into account. Against this background, general statements in relation to the appropriate method of how to interpret individual terms of the Model or even individual treaties – that is, interpretation according to domestic law or the context – are, with respect to teleological considerations, not possible or possible only with difficulty because it depends on the design of the domestic laws of the respective contracting states whether double taxation or double non-taxation results.[44]

3.5 The New Vienna School

Lang agrees with Debatin's and Vogel's view that, in principle, Article 3(2) allows both contracting states to have recourse to their domestic laws simultaneously and, therefore, may lead to double taxation and double non-taxation, which must be considered to contradict the object and purpose of tax treaties. Consequently, in his opinion (which reminds of Debatin's), the unless condition must be interpreted as establishing the primacy of autonomous interpretation whereas domestic law may be had recourse to only as a subordinate aid in case no meaning can be ascertained with decisive force otherwise:

> Crucially, the importance of domestic law under this provision [Article 3(2)] depends on how the phrase 'if the context does not otherwise require' [he quotes the wording of the official German translation of the OECD Model] is to be understood, and the objectives underlying tax treaties suggest that this phrase should be given great weight. If cases of recourse to domestic law by the country applying the treaty were frequent, double taxation as well as double non-taxation would be inevitable. The meanings a treaty term has in the domestic legal systems of the two contracting states can be completely different. If the contracting states were to incorporate their respective domestic understanding of a term into the treaty, its uniform meaning would be jeopardised, as has been emphasised by Debatin. An interpretation of Article 3(2) that takes account of the object and purpose of tax treaties must therefore not allow overhasty recourse to the domestic law of the countries applying them. …Consequently, there is every reason to view Article 3(2) not as enshrining the principle of authority of domestic law, but as confirming the general international law rules of interpretation. Therefore, the reference to the domestic law of the state applying the treaty contained in Article 3(2) can be brought to bear only if no result can be obtained under an autonomous interpretation that uses all interpretative methods. With careful interpretation, this will rarely be the case in practice.[45]

[44] *Ibid.*, at 550–552, paras. 116c–116e.

[45] M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen. (Art. 3 Abs. 2 OECD-MA)*, in G. Burmeister and D. Endres (eds.), Aussensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin (München: C.H. Beck, 1997), 283–304, at 285–286, 290; *see also*

As regards the relationship between the prescription to have recourse to domestic law and the unless condition, he disagrees with Vogel's submission that the term 'requires' implies authority of contextual interpretation over recourse to domestic law only when the former is of particular weight:

> If the results obtained under international law principles of interpretation could be used only when they are invested with a special persuasive power whereas the domestic law of the respective state applying the treaty would be authoritative otherwise, the uniform interpretation of tax treaties would be undermined, leading to cases of double taxation and double non-taxation despite the applicability of a tax treaty. From this perspective, the term 'requires' should not be overemphasised.[46]

These points are repeated in Lang's chapter on qualification conflicts in the IBFD Global Tax Treaty Commentaries, stressing teleological considerations. Crucially, Lang does so not only in respect of avoiding double taxation and double non-taxation, but generally in respect of a consistent common interpretation, which he equates to an autonomous interpretation independent from any domestic law,[47] alike Debatin and Vogel did before him. In summary, to ensure a uniform interpretation by both contracting states, Lang suggests application of the unless condition

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M. Lang, The Application of the OECD Model Tax Convention to Partnerships (Wien: Linde Verlag Ges.m.b.H, 2000), at 22, 27; M. Lang, *Die Auslegung von Doppelbesteuerungsabkommen als Problem der Planungssicherheit bei grenzüberschreitenden Sachverhalten*, in S. Grotherr (ed.), Handbuch der internationalen Steuerplanung (3rd ed., Herne: NWB Verlag, 2011), 1865–1880, at 1873–1877; M. Lang, *The Interpretation of Tax Treaties and Authentic Languages*, in G. Maisto, A. Nikolakakis, and J. M. Ulmer (eds.), Essays on Tax Treaties: A Tribute to David A. Ward (Amsterdam: IBFD, 2013), 15–30, at 30: 'In my view, article 3(2) only emphasizes that the interpretation process should focus on the context of the treaty and that only in exceptional cases is reference to domestic law permitted'. Concerning the need to have recourse to domestic law in practice, he adds elsewhere that 'these cases are extremely rare if occurring at all, because the context of the treaty includes not only the treaty systematics, but also the object, purpose, and legal development. Just like the interpreter usually does not fail in interpreting legal provisions when he takes systematic, teleological, and historical arguments into account on top of the wording, there is nothing to suggest that he will fail in the interpretation of a treaty and therefore have to rely on domestic law as an aid', M. Lang, *Auslegungsgrundsätze für DBA: Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB 8 (Herne: NWB Verlag, 2011), 281–294, 288.

[46] Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (1997), at 288; *see also* Lang, *Die Auslegung von Doppelbesteuerungsabkommen als Problem der Planungssicherheit bei grenzüberschreitenden Sachverhalten* (3rd ed., 2011), at 1876; Lang, The Application of the OECD Model Tax Convention to Partnerships (2000), at 24.

[47] M. Lang, *Qualification Conflicts*, in Global Tax Treaty Commentaries (IBFD, 2018), s. 2.3.2; *see also* M. Lang, *DBA und Personengesellschaften – Grundfragen der Abkommensauslegung*, 17 Internationales Steuerrecht (München: C.H. Beck, 2007), 606–609, at 609.

to be the general rule and recourse to domestic law to constitute the exception. In his view, the concept of context in Article 3(2) includes 'all available historical, systematical and teleological aspects',[48] which must be considered before recourse to domestic law is had. Specific recourse to the domestic law of one contracting state in the distributive rules or the rules on personal scope, on the other hand, are regarded by him as part of the general context of the treaty under the VCLT,[49] which resembles Debatin's earlier conception. In such cases, 'domestic law is relevant for treaty interpretation not because "the context" does not "otherwise require", but because the context indeed requires'.[50]

3.6 Conclusions

The autonomous approach as initially developed by Debatin proceeds from the assumption that treaty and domestic law constitute strictly separate legal spheres in function and content, with treaty law prevailing over domestic law. In addition, Article 3(2) is read as stipulating that, in principle, the same term may be attributed different meanings by the two contracting states with recourse to their domestic laws. From both assumptions the conclusion is drawn that a self-contained interpretation of treaties according to their own conceptual construction separate from domestic law is required, and the latter may be had recourse to only as a subordinate aid in cases that cannot be decided otherwise, because the treaty's 'regulatory content can only be fully achieved if both contracting states interpret the conceptual content of the treaty in the same way'.[51] Therefore, context and domestic law are conceived of as mutually exclusive concepts because 'tax treaties, by virtue of their claimed "common legal statement of both contracting states", demand an autonomous interpretation kept separate from domestic law'.[52]

The views of Vogel and his followers differ from those of Debatin's, however, lead to almost the same outcome. In contrast to Debatin, they acknowledge that the wording of Article 3(2) prescribes recourse to domestic law as a rule whereas a contextual interpretation is permitted only in certain circumstances. Similar to De-

[48] Lang, The Application of the OECD Model Tax Convention to Partnerships (2000), at 27, *see also* 23–24.

[49] Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (1997), at 287–288, 296 et seq.

[50] Lang, The Application of the OECD Model Tax Convention to Partnerships (2000), at 28.

[51] H. Debatin, *Qualifikationsprobleme im Doppelbesteuerungsrecht*, 34 Finanz-Rundschau 20 (Köln: Verlag Dr. Otto Schmidt KG, 1979), 493–495, at 493.

[52] *Ibid.*, at 493.

batin, however, they read Article 3(2) as allowing both contracting states to have recourse to their domestic laws simultaneously. Therefore, they arrive at the conclusion that Article 3(2) may imply double taxation and double non-taxation as legitimate results even though this is in conflict with the object and purpose of the treaty. The problem is resolved by way of attributing a broad meaning to 'context', either in general or to be evaluated for every individual case. In consequence, similar to Debatin's suggested autonomous approach, the contextual approach suggested by Vogel and his followers aims at an exclusion of recourse to domestic law as far as possible unless it does not lead to double taxation or double non-taxation.

Lang's view resembles Debatin's. Common to all three versions is the assumption that Article 3(2) allows both contracting states to have recourse to their domestic laws simultaneously. As a corollary, the general referral to domestic law in Article 3(2) is regarded as fundamentally different from specific referrals to the domestic law of one contracting state in other treaty provisions: the latter are viewed to form part of conclusive treaty definitions whereas the former is considered to provide merely an additional fallback mechanism in case no meaning can be derived otherwise.