11. Can law regulate its own interpretation? Relevance and meaning of Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT) and Article 3 para. 2 of the Model Convention of the Organisation for Economic Co-Operation and Development (OECD MC) for the interpretation of double-taxation conventions

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1. CAN INTERPRETATION BE REGULATED BY PROVISIONS?

One of the tasks of legal professionals has always been to determine the meaning of legal provisions. We take the wording of a provision as the starting point, we ponder the various meanings of this wording, we consider it within its context, we question the object and purpose of the provision, and take into account how this provision came into being. Legal science reflects on the methods used for interpretation and contributes to their refinement. In essence, however, we take the same approach as if we were to determine the meaning of a message we receive from another individual in our everyday life: the objective is to apply the rules of linguistic conventions in order to determine what the other individual—be it another conversation partner in our everyday life or the legislator—must accept as being meant.[1] Interpretation is a "holistic exercise."[2]

We do not need any separate provisions for this purpose, which determine the approach we must take in the interpretation of legal provisions. In many legal systems or fields of law, specific interpretation provisions do not exist at all. However, in some fields of law—such as the field of international law treaties—such provisions do exist. This raises the question as to whether the interpretation of provisions can be legally regulated at all. In this discussion, the question whether interpretation means cognition within the meaning of an exact concept of science, the method of which depends exclusively on the subject of the cognition (the interpretation) and not on positive specifications such as national

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[1] See Oliver Dörr, 'Article 31 General Rule of Interpretation' in Oliver Dörr and Kristen Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (Springer Verlag, 2018) art. 31; Arnold D. McNair, *The Law of Treaties* (repr., Oxford: Clarendon Press, 1986) 365.

[2] Cf. WTO Appellate Body *China—Publications and Audiovisual* WT/DS363/AB/R (2009), para. 399.

laws, is of key significance.[3] The paths leading to the interpretation objective are often regarded as the subject of specific hermeneutics which, in turn, can hardly be regulated in legal terms: the fact that the will of the legislators is interpreted above all on the basis of the words they used, on the basis of the purposes they aimed at achieving, on the rules they laid down elsewhere, or on the statements they previously made, does not result in itself from a rule but is part of the inherent laws of communicating and understanding, which are not subject to human standardization.[4]

Furthermore, even interpretation rules require interpretation and, quite logically, they cannot provide any clues as to their own reading.[5] On the other hand, unless there are other interpretation rules for their interpretation, their interpretation will definitely not be subject to regulation. Occasionally, consideration is given to testing the understanding obtained from the interpretation rules about the approach to be followed in interpretation on the basis of the reading of the interpretation rules.[6] Ultimately, however, this constitutes circular reasoning. It is not possible to regulate the interpretation of every provision. The reading of interpretation provisions, for which there is no other relevant interpretation provision for their interpretation, definitely evades regulation.[7]

One should not overlook the fact that the creation of interpretation rules is usually a highly political act. The purpose of interpretation rules is to limit the power of judges. The concern of the legislators was that the powers of judges in interpreting the meaning of legal provisions would otherwise be boundless. Monarchs feared a loss of power if the interpretation and thus the powers of judges were not regulated.[8] Later, interpretation provisions became important from the perspective of the separation of powers between the legislative and judicial power. Judges should by no means have the authority to correct the meaning of the laws created by the legislators by way of interpretation. Numerous interpretation principles in the area of common law—such as the plain meaning rule—are only understandable in the light of the principle of the separation of powers.[9] Some occasionally voiced demands calling for the creation of interpretation provisions under European Union law, or at least for putting a greater emphasis on the development of a European methodology,[10] can only be understood against the background of curtailing the seemingly unlimited power of the European Court of Justice (CJEU) to interpret and, *de facto*, also shape Union law. Therefore, the objective is not—just—to increase legal certainty, but also to restrict the apparent omnipotence of the CJEU. Hence, the creation

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[3] See Dietrich Vollmer, *Auslegung und "Auslegungsregeln"* [*Interpretation and Interpretation Rules*] (Duncker & Humblot, 1988) 27f.

[4] See, *e.g.*, Christiane Wendehorst, 'Methodennormen in kontinentaleuropäischen Kodifikationen' [Methodological Standards in Continental European Codifications] (2011) *RabelsZ* 730, 734.

[5] See Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* [*Legal Methodology and Legal Concept*] (2nd edn, Springer Verlag, 2011) 80.

[6] Ferdinard Kerschner and Johannes Kehrer, 'Zu §§ 6 und 7 ABGB' in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch (eds), *Großkommentar zum ABGB—Klang Kommentar* [*Commentary on the ABGB—Klang Commentary*] (3rd edn, Verlag Österreich, 2014) para. 4.

[7] See Dörr, 'Article 31 General Rule of Interpretation,' *supra* note 1, art. 31.

[8] See Christiane Wendehorst, 'Methodenlehre und Privatrecht in Europa' [Methodology and Private Law in Europe] in Clemens Jabloner *et al.* (eds), *Vom praktischen Wert der Methode* [*On the Practical Value of the Method*] (Manz Verlag, 2011) 833.

[9] See Wendehorst, 'Methodenlehre und Privatrecht in Europa' *supra* note 8, at 834.

[10] See *ibid.* 827.

of interpretation provisions is never of a non-political, merely technical or scientific nature, it is about the distribution of power.[11]

The interpretation provisions of the Vienna Convention on the Law of Treaties (VCLT) must also be seen against this background.[12] When they attach importance to subsequent agreements between the parties or to the subsequent practice in the interpretation of the treaty,[13] the states and their governments are attempting to protect their interpretation sovereignty over the contents of the treaties they conclude. The restraint expressed in Article 32 of the VCLT *vis-à-vis* "preparatory work of the treaty and the circumstances of its conclusion" fits into this picture: the states and their governments do not necessarily wish to commit themselves to a specific interpretation of a rule at the time of the conclusion of the agreement, but want to be able to exert an influence on the meaning of the agreement thereafter as well.

Ultimately, though, the courts call the shots: they must also interpret the interpretation provisions, and they decide on the influence that the understanding of the interpretation provision will have on the meaning of the provision to be interpreted by them. Therefore, the significance of interpretation provisions lies above all in reminding the judges of the limits of their powers, and that it is not up to them to correct the meaning of provisions, at least not without any recourse to the intrinsic values of the rule to be interpreted. Even in those cases in which the legislators appoint the judges as substitute legislators, as is the case with Swiss civil law,[14] the corresponding interpretation provision does at the same time emphasize the limits of this power.

All this means that, as a rule, interpretation provisions do not by any means intend to finalize the interpretation process. This would be impossible because this process of cognition is not subject to a detailed regulation. Therefore, they can merely provide indications, which must in any event be taken into account during interpretation, or to which little or no importance must be ascribed. They serve to highlight individual aspects. But the thinking process of interpretation cannot be conclusively regulated. Understanding always means more than the attempt to portray or explain it retrospectively.[15]

2. CAN THE INTERPRETATION PROVISIONS OF THE VCLT BE APPLIED TO THE INTERPRETATION OF DOUBLE TAXATION CONVENTIONS?

Courts and authorities frequently consult the interpretation principles codified in the VCLT for the interpretation of double taxation conventions (DTCs). However, one should consider what the legal basis is for this. The VCLT itself is also an international law treaty and, as such, is on the same level as the DTCs from the perspective of international law. As a rule, the various international law treaties are also on the same level in national legislation.

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[11] Franz Reimer, *Juristische Methodenlehre* [*Legal Methodology*] (Nomos, 2016) 40ff.

[12] See James Crawford, *Brownlie's Principles of Public International Law* (OUP, 2012) 379.

[13] VCLT, art. 31, para. 3.

[14] See Wendehorst, 'Methodennormen in kontinentaleuropäischen Kodifikationen,' *supra* note 4, at 742.

[15] Heribert Franz Köck, 'Zur Interpretation völkerrechtlicher Verträge' [On the Interpretation of International Contracts] (1998) *Zeitschrift für öffentliches Recht* 217, 221.

Therefore, as an international law treaty, the VCLT is not superior to a DTC. As a result, the Contracting States are definitely not bound by the VCLT on an international treaty law level to provide for the application of the interpretation rules in the VCLT to their DTCs.

If one wishes to clarify the relation between these international law treaties (*i.e.*, the VCLT as a multilateral international law treaty on the one hand and DTCs as bilateral international law treaties on the other), one must distinguish between different constellations: a case group relates to those DTCs concluded before the VCLT entered into force. In this context, Article 4 of the VCLT itself stipulates that without prejudice "to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention," the VCLT does not apply to the above. The German Federal Tax Court, for instance, ruled "that the Vienna Convention (according to its Article 4) only applies to treaties that were concluded by states after the convention entered into force for them—and therefore, without the need for any further examination, on the merits of the case, does not apply to the 1971 DTC with Switzerland."[16]

It is clear that the application of the VCLT as an international law treaty can only come into play for a DTC if the VCLT had already been in force for both Contracting States at the time of the conclusion of the DTC.[17] Therefore, it will not suffice for the VCLT to be in force only for one Contracting State. This understanding emanates from Article 4 of the VCLT itself. After all, any other reading would lead to a "divided" understanding, inconsistent with the objective and purpose of the treaties. Were the interpretation rules of the VCLT to be used for the application of the law in one state but not in the other state, this could lead to a situation in which the same provision, interpreted in one case by applying Article 31 of the VCLT and in another by referring to other interpretation principles, would have a different meaning in the two states.[18]

This leaves us with those DTCs which were concluded between states after the VCLT had entered into force for both states. Under Article 4 of the VCLT, the VCLT is applicable to these DTCs. Yet it also remains true in this case that, as a multilateral treaty, the VCLT is by no means superior to international law treaties concluded at a later stage. A DTC may stipulate that the interpretation provisions of the VCLT do not apply to that particular DTC. Although an express provision of this kind hardly exists in a DTC, the question arises as to whether such an explicit rule is necessary at all. It is conceivable, for instance, that the set of rules contained in a DTC results in the need for a certain interpretation that is different than the one stipulated in the VCLT.[19] Even if one were to demand an explicit rule, the treaty provisions modelled on Article 3 para. 2 of the Model Convention of the Organisation for Economic Co-Operation and Development (OECD MC) may be considered to be such rules.[20] Against this background, it could at least be

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[16] Literal translation of BFH 10.6.2015, I R 79/13, para. 24.

[17] See for the general principle of non-retroactivity in Article 4 VCLT, Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984) 7ff.

[18] See for the *lex specialis* character of Article 3 paragraph 2 OECD MTC and its relation to Article 31ff VCLT, Frank Engelen, *Interpretation of Tax Treaties Under International Law* (IBFD Doctoral Series, 2004) 549.

[19] See also Reimer, *supra* note 11, at 46.

[20] See for the *lex specialis* character of Article 3 paragraph 2 OECD MTC and its relation to Article 31ff VCLT, Engelen, *supra* note 18, at 549; Edwin van der Bruggen, 'Unless the Vienna Convention Otherwise Requires: Notes on the Relationship Between Article 3(2) of the OECD

considered that by adopting Article 3 para. 2 of the OECD MC, the Contracting States signing a DTC create a rule with which they exclude the application of the interpretation rules of the VCLT for the respective DTC.[21]

The VCLT itself expressly addresses the relation between international law treaties: according to Article 30 para. 4 subpar. a of the VCLT, Article 30 para. 3 of the VCLT applies between states which are Contracting Parties of both treaties when the parties to the later treaty do not include all the parties to the earlier one—and this is the constellation in case of the VLCT entering into force earlier for both states and the DTC concluded between them thereafter. According to Article 30 para. 3 of the VCLT, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." It is questionable, however, whether these rules can be binding in regulating the relation between the multilateral treaty VCLT already entered into force for two states, and the DTC concluded later between the same states. Again, the following applies: as a multilateral treaty, the VCLT is not superior to the other international law treaties—and thus not to DTCs.[22] What the VCLT is lacking is the jurisdiction to conclusively and bindingly regulate the relation between itself and a later treaty.

If one were to be guided by the values emanating from Article 30 para. 3 and 4 of the VCLT, the interpretation rules set out in Article 31 of the VCLT are far from being established as fully relevant. For instance, the provisions of Article 31 para. 3 of the VCLT, according to which subsequent agreements between the parties and the subsequent practice in the application of the treaty must also be taken into account, could be regarded as being incompatible with the nature of DTCs: in many states, DTCs are subject to strict legal requirements, so that a further development of the content of a DTC shaped by administration authorities may not seem appropriate.[23] This example was not chosen randomly because in many states jurisprudence in the field of DTCs is quite reserved toward Article 31 para. 3 subpara. a and b of the VCLT.[24] If we continue on this train of thought: the treaty provisions modelled on Article 3 para. 2 of the OECD MC may allow

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Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (2003) *European Taxation* 142, 142.

[21] Cf. *Fowler* v. *Revenue & Customs Commissioners* (2016) UKFTT 234 (TC) paras. 99–100: 'Article 3(2) of the Treaty is a special rule of interpretation within Article 31(4) of the Vienna Convention, as opposed to the general rules of interpretation contained in Articles 31(1)-(3) of the Vienna Convention . . . As a special rule of interpretation Article 3(2) has priority over such general rules.'

[22] See Manfred Zuleeg, 'Vertragskonkurrenz im Völkerrecht Teil I: Verträge Zwischen Souveränen Staaten' [Contractual Competition in International Law Part I: Contracts Between Sovereign States] in Jost Delbrück, Rainer Hofmann and Andreas Zimmermann (eds), *German Yearbook of International Law* (Duncker & Humblot, 1977) 246ff; see also Hans Aufricht, 'Supersession of Treaties in International Law' (1951/52) *Cornell Law Review* 655, 656.

[23] See Dieter Blumenwitz, 'The Interpretation of International Law Contracts' in Klaus Vogel (ed.), *Doppelbesteuerungsabkommen und nationales Recht* [*Double Taxation Treaties and National Law*] (C. H. Beck Verlag, 1995) 85ff; see also Walter Barfuß, 'Rechtsstaat und völkerrechtlicher Vertrag Verfassungsrechtliche Überlegungen zum zollrechtlichen "Accordino-Fall" 1987 und zur Interpretationsregel des Art 31 Abs 3 lit b WVK' [Rule of Law and International Contract. Constitutional Consideration on the Customs Law "Accordino Case" 1987 and the Interpretation Rule art. 31 para. 3 lit b of the VCLT] in Heinz Mayer, Clemens Jabloner and Kucsko Stadlmayer (eds), *Staatsrecht in Theorie und Praxis* [*Constitutional Law in Theory and Practice*] (Manz Verlag, 1991) 33.

[24] See, *e.g.*, BFH 11.7.2018, I R 44/16; BFH 1.2.1989, I R 74/86; BFH 21.8.1996, I R 80/95; BFH 15.9.2004, I R 67/03.

for a DTC to be interpreted according to Article 31 para. 1, 2, and 4 and Article 32 of the VCLT, yet not according to Article 31 para. 3 subpara. a and b of the VCLT. Article 31 para. 3 subpara. a and b of the VCLT could not be regarded as being "compatible with the later treaty." Yet it would also be conceivable to regard the treaty provisions modelled on Article 3 para. 2 of the OECD MC as conclusive interpretation provisions which leave no room for the application of Article 31 of the VCLT. As a result, Article 31 of the VCLT as a whole would be incompatible with the later treaty, the DTC.

The interpretation provisions in the VCLT, however, are often also regarded as codified customary international law.[25] This reasoning may help to attach importance to Article 31 of the VCLT in those cases in which the VCLT is not applicable as an international law treaty. This applies, for instance, to DTCs with states that did not ratify the VCLT. Even based on this reasoning, however, it is not yet certain that the interpretation rules of the VCLT are relevant for the interpretation of DTCs. Even if the rules of the VCLT were to be considered as customary international law, they are not superior to an international law treaty such as a DTC.[26] It is undisputed that international law treaties can independently regulate their own interpretation—even in derogation from the interpretation provisions of the VCLT. Therefore, a specific DTC and the provisions contained therein can have precedence over other interpretation rules applicable in customary international law, just as over other applicable interpretation rules of a multilateral international law treaty.[27]

In this context, the judgment of the Bundesfinanzhof (BFH), Germany's highest tax court, is of interest. In its judgment of July 7, 2015, the BFH ruled that there is no room for general rules of international law in the interpretation of an international law treaty:

> Nor can the appeal argue against this interpretation . . . using the general legal principle of the prohibition of abusive behaviour or the "venire contra factum proprium" (referred to as the "estoppel principle" in international law, also see Friede, Das Estoppel-Prinzip im Völkerrecht, ZAOERV 1935, 517) . . . And it is in line with the case law of the Federal Constitutional Court that general rules of international law are not capable of cancelling international treaty

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[25] See *Kasikili/Sedudu Island (Botswana/Namibia)* (1999) I.C.J. Rep. 1045 (concerning the interpretation of a treaty between Botswana and Namibia that was originally concluded between Germany and the United Kingdom in 1890. The ICJ first determined 'that neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but that both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law.'); see also *LaGrand (Germany* v. *United States)* (2001) I.C.J. Rep. 466, para. 99; *Avena and Other Mexican Nationals (Mexico* v. *United States)* (2004) I.C.J. Rep. 12, para. 83; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) I.C.J. Rep. 136, para. 94; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (2007) I.C.J. Rep. 43., para. 160; *Dispute Regarding Navigational and Related Rights (Costa Rico* v. *Nicaragua)* (2009) I.C.J. Rep. 213, para. 47; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* (2010), I.C.J. Rep. 14, para. 65; further sources that the VCLT is considered to be customary international law: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* (2011) ITLOS case no. 17, para. 57; see also BFH 25.10.2006, I R 81/04, para. 20; BFH 11.11.2009, I R 15/09, para. 26. Additionally, see also Michael Lang, 'Auslegung und Anwendung von Doppelbesteuerungsabkommen' [Interpretation and Application of Double Taxation Treaties] in Klaus-Dieter Drüen and Johanna Hey and Rudolf Mellinghoff (eds), *Festschrift 100 Jahre Bundesfinanzhof* [*Commemorative 100 Years Federal Financial Court*] (Otto Schmidt Verlag, 2018) 986.

[26] See, *e.g.*, Michael Potacs, *Rechtstheorie* [*Legal Theory*] (UTB, Facultas, 2015) 65.

[27] See also Engelen, *supra* note 18, at 35.

> law . . . and therefore, an alleged abusive behaviour by a Contracting State does not convey a different meaning to the content of applicable law.[28]

The BFH did not consider the general legal principle of the prohibition of abusive behaviour as being enshrined in the treaty to be interpreted, and therefore did not deem it possible that this principle would gain significance for the interpretation of the international treaty by way of general international law.[29] This reasoning, however,—when thought through to the end—does have far-reaching consequences: when rules found in general international law cannot be drawn from the international law treaty to be interpreted, they cannot be taken into account for the interpretation of this treaty either. If they can be drawn from the international law treaty itself, however, they are significant for this reason—and not because they belong to general international law. Ultimately, only the international law treaty itself is thus relevant. General international law is irrelevant for the interpretation of the international law treaty. Therefore, there is no room for the assumption that the interpretation rules of the VCLT may be of importance for the interpretation of DTCs—at least according to the standards developed in this judgment.

3. THE MEANING OF THE INTERPRETATION PROVISIONS OF THE VCLT AND THE INTERPRETATION OF DTCS

The legal basis for the application of Article 31 of the VCLT in the interpretation of DTCs is therefore questionable. The relevance of this question, however, also depends on the illegal significance these rules have altogether. In other words: interpretation does not necessarily require regulation. In many legal systems, codified interpretation rules only exist in some fields of law or not at all. Therefore, if Article 31 of the VCLT cannot be directly applied to the interpretation of DTCs, must DTC provisions then be interpreted in a different way? This will require an answer to the question which dispositions Article 31 of the VCLT make.

The objective of interpretation is to determine the meaning of a provision. The task of the interpreter is to determine what the legislators must accept as being meant according to the rules of (linguistic) conventions.[30] Interpretation is by no means a process that can be formalized.[31] Therefore, it is ultimately not subject to a regulation covering every detail. Interpretation rules can only highlight certain aspects which must necessarily be taken into account for interpretation. It is not possible to define a general exhaustive ranking of the individual interpretation criteria, so the various interpretation methods cannot be mechanically applied one after the other. It is not possible to generally and definitively determine the order of priority of the interpretation criteria. Only a few, non-exhaustive

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[28] Literal translation of BFH 7.7.2015, I R 38/14, para 27.

[29] See also Lang, 'Auslegung und Anwendung von Doppelbesteuerungsabkommen,' *supra* note 25, at 986.

[30] See Heinz Peter Rill, 'Juristische Methodenlehre und Rechtsbegriff' [Legal Methodology and Legal Concept] (1985) *Zeitschrift für Verwaltung* 461, 461ff.

[31] See Richard Gardiner, *Treaty Interpretation* (OUP, 2008) 29.

rules can be established in this regard.[32] Therefore, legal requirements for interpretation will inevitably reach a limit.[33] Hence, Article 31 of the VCLT—like all other codified interpretation rules—must not be understood as provisions that conclusively determine the thinking process of interpretation.[34]

According to Article 31 para. 1 of the VCLT, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31 para. 1 of the VCLT thus underlines important aspects which otherwise also play a role in interpretation: when the BFH regularly takes into account the "wording, the context of the provisions, and the purpose of a treaty for the avoidance of double taxation,"[35] it takes the same approach with regard to DTC interpretation as in other fields of law.

On the other hand, at first glance historical interpretation seems to carry little weight according to the VCLT.[36] According to Article 32 of the VCLT, recourse may be had to supplementary means of interpretation:

> including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 [. . .] leaves the meaning ambiguous or obscure or . . . leads to a result that is manifestly absurd or unreasonable.

The development of law, however, may also acquire significance through Article 31 para. 4 of the VCLT: "A special meaning shall be given to a term if it is established that the parties so intended."[37] Even courts like the German BFH do not hesitate to include the "history of origin" in the interpretation of DTCs.[38] Therefore, no particularities become apparent here either.

However, Article 31 para. 3 subpara. a and b of the VCLT cannot be readily reconciled with conventional approaches to interpretation. According to these provisions, in addition to the context, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions [and] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[39] must be equally taken into account. Courts appear reluctant toward the application of these provisions in the interpretation of DTCs.

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[32] See Georg Kodek, '§ 6' in Peter Rummel and Meinhard Lukas (eds), *ABGB Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* [*ABGB Commentary on the General Civil Code*] (4th edn, Manz Verlag, 2015), para. 128.

[33] *Ibid.* para. 6.

[34] See Heribert Franz Köck, *Vertragsinterpretation und Vertragsrechtskonvention: Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969* [*Contract interpretation and Contract Law Convention: On the Meaning of Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969*] (Duncker & Humblot, 1976) 96f.

[35] Literal translation of BFH 21.8.2015, I R 63/13.

[36] See Andreas Arnauld, *Völkerrecht* [*International Law*] (3rd edn, C. F. Müller Verlag, 2016) 96.

[37] See also Huge J. Ault, 'The Role of the OECD Commentaries in the Interpretation of Tax Treaties' in Herbert H. Alpert and Kees van Raad (eds), *Essays on International Taxation: To Sidney I. Roberts* (Kluwer, 1993) 65.

[38] See BFH 11.11. 2009, I R 15/09; See also *Ambatielos (Greece* v. *United Kingdom)* (1952) I.C.J. Rep. 28, at 44.

[39] VCLT, art. 31, para. 3, subpara. a and b.

The BFH, for instance, stated that it does not see any ground in them to take into account mutual agreements concluded between the administration authorities or the version of the OECD commentary published after the conclusion of a DTC beyond the mere wording for the interpretation of DTCs.[40] Both constellations present considerable constitutional problems, since mutual agreements, just like the OECD commentary, come into being without the participation of the legislators.[41]

Admittedly, there are substantial arguments in favour of attaching very limited or no importance to these documents, also on the basis of Article 31 para. 3 of the VCLT:[42] The OECD commentary is the outcome of the deliberations of the OECD Fiscal Committee, which usually results in a—legally non-binding—recommendation of the OECD,[43] but is not an agreement between the Contracting Parties.[44]

Similarly, an OECD decision or the conclusion of a mutual agreement do not lead to the creation of "practice" according to Article 31 para. 3 subpara. b of the VCLT.[45] Instead, this requires a common, comprehensive practice by the responsible bodies (*i.e.*, generally the tax offices and courts, which is based on legal conviction and is legally undisputed).[46] When a question is pending before the courts, this is an indication that such a practice does not exist.

Moreover, the VCLT distinguishes between the interpretation and the amendment of the international law treaty.[47] Article 31 para. 3 of the VCLT deals with the interpretation,

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[40] See, *e.g.*, BFH 1.2.1989, I R74/8. Compare also, in particular against the background of § 2 Abs 2 AO. Moris Lehner, 'Die autonome Auslegung von Doppelbesteuerungsabkommen im Kontext mit Art 3 Abs 2 OECD-MA' [The Autonomous Interpretation of Double Taxation Treaties in the Context of Art. 3, para. 2 OECD-MA] in Jürgen Lüdicke, Jörg M. Mössner and Lars Hummel (eds), *Das Steuerrecht der Unternehmen: Festschrift für Gerrit Frotscher zum 70. Geburtstag* [*Corporate Tax Law: Commemorative Publication for Gerrit Frotscher on his 70th Birthday*] (Haufe-Lexware, 2013) 391.

[41] See Michael Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht* [*Double Taxation Treaties and Domestic Law*] (Verlag Orac, 1992) 86f; Michael Lang, 'Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen' [Article 3 para. 2 OECD-MC and the Interpretation of Double Taxation Treaties] (2011) *Internationales Steuer- und Wirtschaftsrecht* 281, 284.

[42] See Blumenwitz, *supra* note 23, at 87.

[43] See Michael Lang, 'Die Bedeutung des Kommentars und des Musterabkommens der OECD für die Auslegung von Doppelbesteuerungsabkommen' [The Importance of the OECD's Commentary and Model Convention for the Design of Double Taxation Agreements] in Wolfgang Gassner, Michael Lang and Eduard Lechner (eds), *Aktuelle Entwicklungen im Internationalen Steuerrecht* [*Current Developments in International Tax Law*] (Linde Verlag, 1994) 13.

[44] See Lang, 'Die Bedeutung des Kommentars und des Musterabkommens der OECD,' *supra* note 43, at 25f; Lang, 'Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 41, at 283; see with particular reference to German treaty practice: Klaus Vogel, *Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD-, UN-, and US Model Conventions for the Avoidance of Double Taxation on Income and on Capital* (3rd edn, Kluwer Law International, 1997) 32ff; Klaus Vogel, 'The Influence of the OECD Commentaries on Treaty Interpretation' (2000) 54 *Bulletin for International Taxation* 612; Maarten J. Ellis, 'The Influence of the OECD Commentaries on Treaty Interpretation—Response to Prof. Dr Klaus Vogel' (2000) 54 *Bulletin for International Taxation* 617.

[45] See also Engelen, *supra* note 18, at 14.

[46] See also Michael Lang, 'Wer hat das Sagen im Steuerrecht? Die Bedeutung des OECD-Steuerausschusses und seiner Working Parties' [Who Is in Charge in Tax Law? The Importance of the OECD Tax Committee and Its Working Parties] (2006) *Österreichische Steuerzeitung* 203, 203ff.

[47] See Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht* [*Treaty and Subsequent Practice in International Law*] (Springer-Verlag, 1983) 45f; and Georg Ress, 'Die Bedeutung der nachfolgenden Praxis für die Vertragsinterpretation nach der Wiener Vertragsrechtskonvention (WVRK)'

which already sets limits to the meaning of later agreements or practices.[48] Article 31 para. 3 of the VCLT also allows for a differential application: therefore, it can make a difference whether it involves a legal question that merely affects the relation between the two states, or whether the answer to the question also has an impact on third parties, as this is typically the case in tax law.[49]

Finally, one should also not ignore the fact that the "agreements" and the "practice" mentioned in Article 31 para. 3 of the VCLT must only be "taken into account." This also allows for the arguments to be weighted according to their persuasive power in each case and, if necessary, to attribute only limited or no importance to these.[50] All in all, it becomes evident that the question as to whether and for which DTC the interpretation rules codified in the VCLT must be used, is of minor importance. That is to say, the interpretation provisions laid down therein are not substantially different from the approach otherwise required for interpretation. Their objective is always to determine what the legislators must accept as being meant.[51] In addition to the wording, systematics, teleology, and the development of law must be used to this end.

Against this background, it is also more convincing not to speak of the "application" of the interpretation rules enshrined in the VCLT. Both against the background of international treaty law and customary international law, it is questionable as to whether and in which cases a legal basis exists for this at all. In fact, the VCLT must be understood as a document that has been known to the DTC negotiators since 1969.

It seems quite likely that, ever since, DTCs have been concluded with the expectation that their interpretation will align itself with the principles mentioned in the VCLT with regard to the interpretation of international law treaties. For those involved in the conclusion and application of the DTCs, the description of these principles in Article 31 of the VCLT was a confirmation that the same approach would be taken in the interpretation of DTCs as with the interpretation of other provisions. The aspects mentioned in the VCLT regarding the interpretation of DTC can thus be taken into account—also legally justified—without, however, imposing the obligation on the legal practitioners to "apply" the individual provisions and to thus have to explain which paragraph of Article 31 of the VCLT was consulted for the use of a specific argument and what the relation is between the individual paragraphs of these provisions to each other. Therefore, an

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[The Importance of the Subsequent Practice for the Interpretation of Contracts According to the Vienna Convention on the Law of Treaties (VCLT)] in Roland Bieber and Georg Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts – The Dynamics of EC-law* (Nomos, 1987) 62.

[48] See Blumenwitz, *supra* note 23, at 85ff; vgl. auch Michael Thaler, 'Enthält das Wiener Übereinkommen über das Recht der Verträge verfassungsändernde Bestimmungen?' [Does the Vienna Convention on the Law of Treaties contain constitutional changing provisions?] in Heinz Mayer *et al.* (eds), *Staatsrecht in Theorie und Praxis, Festschrift für Robert Walter* [*Constitutional Law in Theory and Practice, Commemorative for Robert Walter*] (Manz Verlag, 1991), 693f.

[49] See Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht*, *supra* note 41, at 86f.

[50] See Blumenwitz, *supra* note 23, at 87; and Michael Lang, 'Die Bedeutung von Verständigungsvereinbarungen nach Art 3 Abs 2 OECD-Musterabkommen 2017' [The Meaning of Mutual Agreements According to Art. 3 para. 2 OECD Model Convention 2017] in Roland Ismer *et al.* (eds), *Territorialität und Personalität, Festschrift für Moris Lehner zum 70. Geburtstag* [*Territoriality and Personality, Commemorative for Moris Lehner on his 70th Birthday*] (Otto Schmidt Verlag, 2019) 210.

[51] See Rill, *supra* note 30, at 461ff; see also Klaus Vogel and Rainer Prokisch, 'Interpretation of double taxation conventions' in IFA, *Cahiers de Droit Fiscal International ICDFI Vol. LXXVIIIa* (Kluwer, 1993) 66ff; see also Engelen, *supra* note 18, at 57.

"interpretation" of the rules enshrined in the VCLT themselves becomes superfluous. This makes it even easier for one to attach considerable significance to the history of origin of a DTC rule—given a sufficient strength of the argument derived from it—"despite" Article 32 of the VCLT and, vice versa, not to let Article 31 para. 3 subpara. a and b of the VCLT prevent one from adhering to the conventional interpretation principles.

4. IS ARTICLE 3 PARA. 2 OF THE OECD MC A SPECIAL INTERPRETATION PROVISION?

The treaty provisions modelled on Article 3 para. 2 OECD MC have been largely excluded from the previous analysis. Those who see Article 3 para. 2 of the OECD MC as a hardly qualified or absolutely unqualified reference to national law must ask themselves several questions; to begin with, it is controversial as to which of the two Contracting States is considered the "applying state."[52] According to the opinion substantiated by *Avery Jones*, the source state should always be understood as the applying state.[53] He assumes that it is only or primarily the source state that applies the convention and that the other state—the state of residence—is therefore bound to the qualification of the source state. The opinion, however, according to which only the source state applies the convention, is not very convincing: when the state of residence applies the method article of the convention (Article 23 of the OECD MC), it must also resort to the distribution rules of the convention, and ultimately also apply the distribution rules of the convention. As a result, both states apply the convention.[54]

The question arises as to which approach to follow when the convention law term is not used in the national tax legislation at all. In this case, there is no other alternative than to nonetheless look for a solution in the context of the convention. However, the following question then arises: why not search for an interpretation result from the context of the convention in the first place?

Another difficulty results from the fact that DTCs are often concluded in several authentic treaty languages. If only one national language exists in a Contracting State, the national legislation will probably not contain any term at all that corresponds to the convention terms in the other authentic languages. One may pose the critical question as to whether it would suffice for the purposes of Article 3 para. 2 of the OECD MC to

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[52] See Vogel, *Klaus Vogel on Double Taxation Conventions, supra* note 44, at 208ff.

[53] See John F. Avery Jones *et al.*, 'The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model—I' (1984) *British Tax Review* 14, 50; John F. Avery Jones *et al.*, 'The Definition of Dividends and Interest in the OECD Model: Something Lost in Translation?' in Heinrich Beisse, Marcus Lutter and Heribald Närger (eds), *Festschrift für Karl Beusch zum 68. Geburtstag* [*Commemorative Publication for Karl Beusch on his 68th Birthday*] (De Gruyter, 1993) 47ff.

[54] See Lang, 'Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 41, at 288; see also Klaus Vogel, 'Doppelbesteuerungsabkommen als Anwendungsgebiet des allgemeinven Völkervertragsrechts' [Double Taxation Treaties as a Field of Application of the General International Contract Law] in Ulrich Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt* [*Law Between Change and Preservation, Commemorative for Rudolf Bernhardt*] (Springer Verlag, 1995) 1155f; Daniel Dürrschmidt, 'OECD-MA 2014 Artikel 3. Allgemeine Begriffsbestimmungen' in Klaus Vogel and Moris Lehner (eds), *DBA-Kommentar* [*DTC Commentary*] (6th edn, C. H. Beck Verlag, 2015) para 65f.

use just one of the authentic languages. It becomes even more difficult in the case of a DTC when, for example, the two national languages are authentic treaty languages, but in case of differences in the interpretation of the text in these languages, for instance, the English language text prevails. When English is not a national language, the question then becomes even more pressing as to whether it is admissible to resort to the national tax legislation of a state due to the perhaps coincidentally identical term in the version of a DTC in the one national language and in the national law of this state.

The issue becomes even more complex when one takes into account that the rules modelled on the OECD MC were originally made available in English and French. The BFH, for instance, took this into account in its judgment of October 12, 2011 on the DTC Germany–France, and stated the following:

> In the version of the Complementary Convention in Federal Law Gazette II, 1990, 771, BStBl I 1990, 414, Article 13 para. 4 subpara. 1 of the DTC with France was approximated to the formulation of the 183-day rule of Article 15 para. 2 of the Model Convention of the Organisation for Economic Cooperation and Development—OECD MC—from 1977. As a result, the wording of the OECD MC was included in the passage in question ("is present in the other State for . . .") without any changes. This suggests that the Contracting States also adopted the treaty understanding expressed therein, which, based on the English language version of Article 15 para. 2 subpara. 1 OECD MC ("the recipient is present in the other state") and the French-language version ("le bénéficiare séjourne dans l'autre Etat") tends to count the days of physical presence in the country.[55]

Therefore, the BFH based its interpretation not only on the French-language version of the text but also on the English-language version, despite the fact that according to the treaty, the English-language version was not authentic. This is a compelling approach:[56] especially in the case of rules modelled on the OECD MC, it is more important to resort to the English and French versions of this treaty. Ultimately, these two languages give expression to the meaning of the provision, to which the respective bilateral treaty refers to—in case of the full adoption of the text of the provision of the OECD MC.[57] This, however, raises the question of how it is justified to take the opportunity of the translation of a term taken over from the OECD MC into another national language of one of the states—even if one of these languages is the authentic language or one of the authentic treaty languages—to understand the term not defined therein within the meaning of this tax jurisdiction.

Avery Jones recommended for the purposes of Article 3 para. 2 of the OECD MC not to insist on the term not defined in the treaty being present in the law of the applying state, but to also be content with the national legislation containing a similar term.[58]

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[55] Literal translation of BFH 12.10.2011, I R 15/11, para. 14.

[56] See Lang, 'Auslegung und Anwendung von Doppelbesteuerungsabkommen,' *supra* note 25, at 987; see also Michael Lang, 'Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen' [Interpretation of Double Taxation Treaties and Authentic Contractual Languages] (2011) *Internationales Steuerrecht* 403, 406ff.

[57] See Michael Lang, 'The Interpretation of Tax Treaties and Authentic Language' in Guglielmo Maisto, Angelo Nikolakakis and John M. Ulmer (eds), *Essays on Tax Treaties: A Tribute to David A. Ward* (Canadian Tax Foundation and IBFD, 2012) 15f.

[58] See Avery Jones *et al.*, 'The Interpretation of Tax Treaties with Particular Reference to Article 3 (2) of the OECD Model,' *supra* note 53, at 20:

> One might expect that Art 3(2) directs one to the internal law for the meaning of an identical item, but the US tax court has given it a wider meaning of that of any term achieving a similar purpose. But since there was no internal law use of the exact expression "specific exemption"

Although this does expand the possibilities, it raises the question as to what determines such a similarity. No measure exists for this. As a result, the question as to which national understanding of the term should be relevant in such a case can hardly be answered.

The aforementioned difficulties in the interpretation of the reference of Article 3 para. 2 of the OECD MC to the law of the applying state already constitute arguments in favour of understanding this reference in the strictest sense possible. The wording of the decisive passage of Article 3 para. 2 OECD MC—"unless the context otherwise requires"—is in itself in need of interpretation. The more convincing arguments suggest that great significance should be attached to this phrase and to attempt whenever possible to gain interpretation results from the context of the convention.[59] Resorting to the national law of the respective applying state is only admissible in those extremely rare exceptions, in which the context of the convention fails to provide any solution. The context of the convention referred to in Article 3 para. 2 of the OECD MC is broad enough to allow for interpretation results. It does not only include the convention systematics, but also covers the consideration of objective, purpose, and the development of law just as the interpreters do not usually fail in the interpretation of other legal provisions when, in addition to the wording, they consider systematic, teleological, and historical arguments, nothing suggests that they will fail in the interpretation of the convention and will thus have to resort to internal law as an alternative.[60] Instead, the object and purpose of the DTC provisions suggest an autonomous interpretation (*i.e.*, obtained from the convention itself). In fact, when convention provisions in the two states are understood on the basis of the respective law of the applying state, this will almost inevitably lead to different convention interpretations in the two states. When the convention provisions are

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it would have been easier for the court to have decided the case of the basis of the non-internal law meaning of whatever mechanism was provided for exempting small estates from tax. This would have been consistent with the courts finding that the context required the expression to be read in a broad sense.

[59] See Michael Lang, 'Die Einwirkungen der Doppelbesteuerungsabkommen auf das innerstaatliche Recht' [The Impact of Double Taxation Treaties on National Law] (1988) *Finanzjournal* 72, 72f; Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht*, *supra* note 41, at 109; Michael Lang, 'Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art 3 Abs 2 OECD-Musterabkommen)' [The Importance of the Original National Law for the Design of Double Taxation Agreements (Art. 3, Para. 2 OECD Model Convention] in Gabriele Burmester and Dieter Endres (eds), *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis, FS für Helmut Debatin [Auben Tax Law, Double Taxation Treaties and EU Law in Tension, Commemorative for Helmut Debatin]* (C. H. Beck Verlag, 1997) 90; Helmut Debatin, 'System und Auslegung der Doppelbesteuerungsabkommen' [System and Design of Double Taxation Treaties] (1985) *Der Betrieb* 1, 5; Jörg Manfred Mössner, *Neue Auslegungsfragen bei Anwendung von Doppelbesteuerungsabkommen [New Questions of Interpretation when Applying Double Taxation Agreements]*(Institut für ausländisches Finanz- und Steuerwesen, 1987) 15; Christian Gloria, 'Die Doppelbesteuerungsabkommen der Bundesrepublik Deutschland und die Bedeutung der Lex-Fori-Klausel für ihre Auslegung' [The Double Taxation Treaties of the Federal Republic of Germany and the Importance of the Lex Fori Clause for the Interpretation] (1986) *Recht der internationalen Wirtschaft* 970, 978; Critically: Helmut Loukota, 'Die Bedeutung der Änderungen des OECD-MA für die österreichische DBA-Anwendungspraxis' [The Meaning of the Amendments of the OECD-MC for the Austrian DTT Application Practice] in Michael Lang, Helmut Loukota and Daniel Lüthi (eds), *Die Weiterentwicklung des OECD-MA [The Further Development of the OECD-MC]* (Linde Verlag, 1995) 70.

[60] See Lang, 'Die Bedeutung von Verständigungsvereinbarungen' *supra* note 50, at 216; Lehner, *supra* note 40, at 400f.

understood differently in the two states, however, the DTCs cannot achieve their purpose (*i.e.*, consistently define the states' taxation powers). This purpose of the convention can only be fulfilled when law practitioners and authorities in both Contracting States endeavour to reach a consistent interpretation based on the context of the convention.[61]

In addition, the context of the convention confirms the conclusion, according to which Article 3 para. 2 of the OECD MC must be understood as meaning that this provision in itself emphasizes the "autonomous interpretation" of the convention:[62] several convention provisions do indeed contain express references to the internal law of the applying state or the applying states. These include, for instance Article 6 para. 2 or Article 10 para. 3 of the OECD MC. The version of the 1963 OECD MC also contained such a reference to national law in Article 11 para. 3 OECD MC. Such references would be unnecessary if the relevance of internal law had generally resulted from Article 3 para. 2 of the OECD MC. Therefore, these explicit references to the internal law of the applying states can only be understood as implying that Article 3 para. 2 of the OECD MC demands the autonomous interpretation within the convention in all other cases.

In addition, historical arguments underpin the opinion that Article 3 para. 2 of the OECD MC must be understood within the meaning of an autonomous interpretation, and therefore great importance must be attached to the phrase "unless the context otherwise requires."[63] According to the literature, a convention provision similar to that of Article 3 para. 2 of the OECD MC was first found in the DTC of 1945 between the United Kingdom and the United States.[64] When this provision was introduced in this DTC for the first time, the objective was obviously not by any stretch to overturn the otherwise applicable principles of convention interpretation. The fact that this provision was tacitly introduced to the convention suggests that no great significance was attached to it.[65] For this reason, nothing suggests that the introduction of such a provision in the OECD MC disrupted the basic postulates of autonomous convention interpretation. All the above reasons lead to the conclusion that Article 3 para. 2 of the OECD MC allows a recourse to internal law only in rare exceptions.[66]

Article 3 para. 2 of the OECD MC thus confirms an interpretation from the context of the convention. Only when such an interpretation fails is it admissible to alternatively resort to the national law of the applying state. However, the wording, the context of the provisions, the objective and purpose, and the history of origin of the convention do take precedence. The convention provisions modelled on Article 3 para. 2 of the OECD MC prioritize this "context" and thus confirm the need for an interpretation similar to

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[61] See Lang, 'Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 41, at 288.

[62] See also Lang, 'Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 59, at 297; and Lang, 'Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 41, at 289.

[63] See Lang, 'Die Bedeutung des originär innerstaatlichen Rechts,' *supra* note 59, at 288.

[64] See Avery Jones *et al.*, 'The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model—I,' *supra* note 53, at 18.

[65] Lang, 'Die Bedeutung des Kommentars und des Musterabkommens der OECD,' *supra* note 43, at 35f; see also Lang, 'Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 59, at 288.

[66] See Lang, 'Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 59, at 290; Lang, 'Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen,' *supra* note 41, at 289.

the one that also results from the interpretation principles of international law. Against the background of the fact that no secured legal basis exists for all DTCs for the direct application of Article 31 of the VCLT, Article 3 para. 2 of the OECD MC can be given the role of closing this gap.

The 2017 OECD MC modified the wording of Article 3 para. 2 of the OECD MC: according to the new formulation, the law of the applying state can only be used if the context otherwise requires and when the competent authorities fail to agree to a different meaning by way of a mutual agreement procedure pursuant to Article 25 of the OECD MC. Clearly, the new version of Article 3 para. 2 of the OECD MC can only be of significance for those DTCs which adopted it. The result obtained above, however, does not change even on the basis of the new version of Article 3 para. 2 of the OECD MC: the importance of the law of the applying state will further decline because, prior to its use, consideration must still be given to a definition of the meaning of the convention term by way of mutual agreement.[67] The modified version of Article 3 para. 2 OECD MC does not alter the precedence of an interpretation from the context.[68] On the contrary, the new formulation places the mutual agreement on an equal footing as the context.[69] Therefore, this version of Article 3 para. 2 of the OECD MC states even more clearly that an interpretation result must first be sought from the wording, the context of the provisions, the objective and purpose, and the history of origin of the convention, before—if all that fails—considering the definition of the meaning of the provision by way of a mutual agreement procedure. The redrafted wording of Article 3 para. 2 of the OECD MC thus illustrates that the subsequent agreements mentioned in Article 31 para. 3 subpara. a of the VCLT are by no means part of the "context" according to this provision.

5. CONCLUDING SUMMARY

One cannot overestimate the importance of interpretation provisions. They are an attempt to put limits to the powers of judges in interpretation. In doing so, they emphasize individual aspects that need to be taken into account for interpretation. However, they by no means conclusively regulate the approach to be taken in interpretation. After all, this would have been impossible: thinking processes cannot be subjected to a detailed regulation.

Against this background, one must also relativize the interpretation rules found in the VCLT. In the case of double taxation conventions, it is already questionable as to whether a legal basis exists for regarding them as binding rules at all. In addition, they are limited to highlighting individual aspects of the interpretation of international law treaties. Moreover, they can by all means be adequately used for a given subject. Accordingly, subsequent agreements between the Contracting Parties and a subsequent practice are only of minor significance—if any—in the case of tax law treaties.

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67 See Lang, 'Die Bedeutung von Verständigungsvereinbarungen,' *supra* note 50, at 220f.
68 *Ibid.* 221.
69 *Ibid.*

The interpretation rules of the VCLT, however, are superseded by the DTC provisions modelled on Article 3 para. 2 of the OECD MC. Ultimately, this provision underlines the need for an interpretation from the context of the convention. Only an interpretation of the DTC provisions that is detached from the respective national legal systems of the Contracting States will allow for an interpretation of these rules which distributes the taxation rights between the two states without any overlapping, thus avoiding double taxation. Such an interpretation can also take into account all other arguments that are otherwise significant in determining the meaning of a provision.

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