OECD/International - Tax Treaty Interpretation – A Response to John Avery Jones

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In this article, Michael Lang comments on, and presents his own arguments in relation to, some of the treaty interpretation issues raised by John Avery Jones.

1. Cultural Background

John F. Avery Jones is one of the great luminaries of international tax law. His academic work has contributed significantly to the advancement of this field. What is particularly impressive is his interest in other legal cultures. The International Tax Group, of which he has been a prominent member for decades, has authored a plethora of comparative law analyses on issues touching upon tax treaties. Especially in the field of double taxation conventions, no other expert can afford to ignore the theses John has put forward and substantiated. I myself belong to those who support differing approaches on many issues. Yet the contributions of John have always stimulated me, and they provided the incentive for me to develop my counter-theses or to better and more accurately substantiate my own opinions. One of his human strengths is that scientific controversies do not prevent him from seeking and maintaining friendly contacts to his fellow scholars. I am very happy and thankful that he has accompanied my own work with great favour and support for many years now. What truly distinguishes him is that, especially on a subject like the importance of domestic law for the interpretation and application of double tax conventions, on which we have been poles apart for many years, he still seeks the conversation, asks about resemblances, and ponders on the reasons for our different approaches. Therefore, it is with great pleasure and appreciation that I accept the invitation to discuss John's latest deliberations.

John resorts to the domestic law of the source state for the interpretation of treaty terms, whereas I give preference to the autonomous interpretation, which seeks to find a solution from the context of the convention that would ensure a common understanding in the Contracting States. At the core of this debate is the interpretation provision of article 3(2) of the OECD Model, [1] which we both consider a reinforcement of our respective diametrically opposed views. John has now raised the question as to which extent these differences of opinion between him and some German-speaking academics, including myself, can be attributed to our growing up in a different cultural environment: John lives in the United Kingdom, and his first language is English, whereas I am Austrian and, therefore, speak German. The United Kingdom concludes double taxation agreements that primarily provide for the application of the credit method, whereas the exemption method continues to be dominant in Continental Europe.

Although our publications deal with the interpretation of conventions regardless of the respective method for the avoidance of double taxation, it may be that we – just like other tax academics in our respective countries and language regions – are, indeed, very much influenced by the language of these conventions we are dealing with on a daily basis, and by the method they stipulate for the avoidance of double taxation. I find these questions extremely exciting, though I must admit from the outset, that I ultimately have no answer to them: Just like every other academic, I strive for objectivity and seek to find results that apply regardless of space and time, and, therefore, I claim for myself that I would not arrive at different results if I were to carry out my research, or had been socialized in London or anywhere else and not in Vienna. But, of course, I do not know if that is true. After all, each and every one of us is in many ways influenced by the cultural and social contexts in which we live, and even if we strive to prevent this from having any impact on our academic work, we cannot easily shrug off these cultural influences. Maarten Ellis, a colleague who unfortunately left us too soon, once mentioned in a tax context the story of Baron Munchausen, who was able to pull himself out of a swamp by his own hair. [2] If I were able to do that, I would take a bird's eye view and attempt to determine to which extent my research findings are conditioned by my own cultural background. I myself fail to do so. Nevertheless, I will try to address the discussion on article 3(2) of the OECD Model once again, summarize the arguments which are important to me and make a few remarks on some of the cultural issues raised by John.

2. When Is a Term Not Defined in the Treaty?

If one sees – as John does – in article 3(2) of the OECD Model a reference to the domestic law of the state applying the tax treaty, this can only be valid in case the term is not defined in the treaty itself. It is often not clear, however, when a definition does exist. We both discussed this already on the basis of the term "enterprise", which is of essence for the application of article 7 of the OECD Model. [3] On the face of it, the term is even defined twice, i.e. in article 3(1)(c) and (d). The definition of article 3(1)(c) of the OECD Model, however, is circular with regard to the term "enterprise". It merely explains that the phrase "enterprise of a Contracting State" refers to the state in which the person carrying on the enterprise is resident. Yet article 3(1)(d) of the OECD Model does not help much either: it must be understood in conjunction with the definition of "business" in article 3(1)(h). Both provisions together make it clear that the income previously falling under article 14 of the OECD Model before its deletion, must now be attributed to article 7. [4] This is why article 3(1)(h) of the OECD Model uses the phrase "professional services". The definition of this term previously contained in article 14(2) of the OECD Model – albeit not conclusive either ("includes") – thus, remains relevant for the interpretation of the tax treaty. From that John draws the conclusion that one is not prevented from searching for the meaning under national tax law. However, is it really so easy to ignore that the whole article 3 of the OECD Model, and, therefore, also article 3(1)(c) and (d) are under the "General Definitions" heading?

When, however, there is undisputedly a defined term in the treaty, the question arises as to how to deal with the terms which are used in such a definition. The obvious answer would be that these terms must not be interpreted by reference to domestic law, but should be given an autonomous meaning from the treaty. [5] This is because, by creating a definition, the authors of the treaty were clearly stating that they under no circumstances want the term to be interpreted according to the standards of domestic law. Therefore, it would contradict the objective and purpose of the treaty provisions if the individual parts of the definition were yet again understood according to domestic law, and, as a consequence, the content of the definition would again depend on domestic law. Besides, almost unresolvable interpretation issues would arise if one were to see also in such situations in article 3(2) of the OECD Model a reference to

domestic law: For instance, the definition of "international traffic" in article 3(1)(e) of the OECD Model uses the terms "ship" and "aircraft", without defining them. According to what was said previously in this section, they must be interpreted autonomously. These two terms, however, can also be found in other treaty provisions such as article 8(1), article 13(3) and article 22(3) of the OECD Model. The meaning these terms have in article 3(1)(e) of the OECD Model should be the same as in the other provisions. So, should these terms have the meaning they have in domestic law? [6] Those who – like myself – already interpret undefined terms autonomously, have absolutely no doubt that this is not the case.

3. What Is the Appropriate Term in Domestic Law?

Another problem ensues when one understands article 3(2) of the OECD Model as a reference to domestic law: which terms must be interpreted according to domestic law in the first place? After all, the terms used in the tax treaty must be understood in the languages which were declared authentic in the respective tax treaty. There are often several languages involved, and, if no express instruction is given, they exist next to each other on an equal footing. Although, as John reports, there is a natural tendency for courts to rely primarily on their own language version of a tax treaty, [7] this is not acceptable from an international law point of view. John speaks also in favour of declaring English the "prevailing" language in all tax treaties. [8] Even if one were to do so, one would still have to carefully study the relevant treaty provisions in the other languages. Besides, Jones' proposal would merely mean that the English version would prevail in case of conflict. In order to establish whether a conflict exists in the first place, however, one cannot avoid having to study the texts in the other language or languages. Vice versa, however, English is – next to French – already a particularly important language for a different reason: when Contracting States use the template of one of the OECD Models to conclude their tax treaties, it must be assumed that, by adopting the formulations in the OECD Model, they also accepted their meaning. Their meaning, however, is derived from the English and French original version. [9] For those treaty provisions that were amended by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "Multilateral Instrument", or the MLI), [10] English and French are also the authentic treaty languages. [11] Therefore, for the correct interpretation and application of a tax treaty, it is first necessary – before taking any further interpretation steps – to read the tax treaty provisions in all authentic languages, especially in English and French, even if none of these two languages is an authentic language of the tax treaty. In many states, however, the domestic tax laws are not written in English or French, and, in most cases, not in all languages declared as authentic under the tax treaty and sometimes not even in a single one of these languages.

An example for the last case mentioned is the Austria-Tunisia Income and Capital Tax Treaty (1977). [12] Its only authentic language is French. The German translation is unofficial, not legally binding at all, and, therefore, cannot be used for the interpretation of the treaty. If it becomes necessary to establish the meaning of an undefined term in the treaty, and, if Austria is the source state and one follows the thesis proposed by John, according to which Austrian domestic law should be relevant for the application of the treaty in Austria and Tunisia: which criteria does one apply to determine the meaning of a specific French term under the domestic law of Austria? As a rule, French language terms are not used in the Austrian legal system, so that, strictly speaking, there is no meaning for the terms used in this tax treaty in the Austrian legal system. Anyone who subsequently begins translating the treaty provisions into German has, in reality, already interpreted these by giving them an autonomous meaning from the treaty: a reasonably appropriate term in the national language can only be found if one already has an idea about the meaning of the term in the treaty. Translation is not a mechanical process – it must be done in the

respective context in which a term is used. This begs the question, however, why the treaty term should not already be understood in the meaning given to it through autonomous interpretation, so as to then be able to translate it at all. Legal practitioners in the United Kingdom might have an easier job: Their tax treaties have been concluded in English, and often English is the only authentic treaty language. The UK's domestic tax laws are also written in English. Therefore, a term used in the treaty but not defined therein will often be used in domestic law, so that the problem described here does not even arise, at least superficially. One will often find an identical term in domestic tax law to which they can resort to. I guess one grows more sceptical vis-à-vis an opinion that favours interpreting treaty terms according to domestic law when one is often confronted with situations in which the respective domestic law language is only one, or even none of the authentic treaty languages of the tax treaty. However, John does not ignore that such situations might occur:

> As domestic law will not be written in the third (or sole other) language, there will never be an identical word in domestic law and it is essential to give a meaning to 'term' that conveys the equivalent concept. [13]

But how can one determine whether such a concept is "equivalent"? The concept has to be equivalent to the treaty term and has to be derived from the treaty, anything else would be circular. So again, an interpretation from the treaty context is inevitable.

Even when the treaty and the domestic tax law are using the same language, one must seriously ask the question whether one will obtain arbitrary or at least completely coincidental results if one understands a treaty term exactly like the same word in the context of domestic law. We do know that, even within every national legal system, one and the same term, especially when it is not specifically defined, may have completely different meanings in different legal areas. The meaning of a term can only be derived from the respective context in which it stands. In every legal system, terms may have a completely different meaning in different legal areas. Why should one then interpret a term used in the context of the treaty the same way it was used in a completely different context?

Let me explain this again using an example: the term "enterprise" or "*entreprise*" used in article 7 of the OECD Model is translated as "*Unternehmen*" in those tax treaties in which German is one of the authentic languages – as already mentioned previously in this section, the Austria-Tunisia Income and Capital Tax Treaty (1977) is not one of them. In Austrian tax law, however, this term is well-known as a central term especially in VAT law, where it has its own meaning. The term will also be frequently encountered in income and corporate tax law, although a reference is usually made therein to the meaning of the term in trade and company law, that is, outside tax law. From a formal point of view, it is thus a term used by the "applicable tax laws", yet it makes absolutely no sense to use the meaning of these terms as the basis for a treaty term**.** Those who understand article 3(2) of the OECD Model primarily as a reference to domestic law – in Austria, these are predominantly tax experts linked to the tax administration [14] – usually equate "*Unternehmen*" with "*Gewerbebetrieb*", although already from a linguistic point of view these two terms have nothing in common. In Austria, the scope of income from "*Gewerbebetrieb*" has become increasingly narrower over the decades. Why? This is because those individuals who received such income for income tax purposes were also additionally subject to a separate trade tax. Many professional groups tried to escape this trade tax obligation by asking to be exempted from the application of income from "*Gewerbebetrieb*" and to have their income attributed to a different income category also for income tax purposes. [15] For instance, the income of business consultants, journalists,

or translators and interpreters is no longer covered by income from "*Gewerbebetrieb*" because their lobbying efforts proved effective. Their income falls under a different type of income. Does it make any sense that this result of domestic lobbying activities becomes relevant for a treaty and that subsequently these individuals cannot fall under article 7 of the OECD Model either (unless they must be necessarily covered by article 3(1)(h) as a result of the treaty definition therein)?

In addition, there are terms used in treaties that do not exist at all in domestic law. According to John, the term "enterprise" itself is an example for this, since it does not even exist in the English legal system. [16] If, in such cases, there is no other option but to go back to the treaty and look for a solution there from the context of the treaty, it begs the question as to why one should not, in all cases, already try to find a solution first in the treaty itself. It seems peculiar to make this dependent on whether an identical term can be found in domestic law.

John, however, also proposed going even a step further in such cases, that is, beyond the wording of article 3(2) of the OECD Model:

> It seems difficult to restrict the application of Art. 3 (2) to the use of the exact term in internal law. There is little connection between the treaty categories of income and internal law categories. For example, 'salaries, wages and other similar remuneration... in respect of an employment' is not a term found in internal law since the internal law tax charge is on the emoluments of an office or employment. But if, as suggested by the Commentary, one regards the treaty words as a concept equivalent to whatever income is taxed as employment income, the items fall within that category. [17]

The train of thought proposed by John, however, already requires an interpretation from the treaty itself, at first without any consideration of domestic law: To find out whether one can consider "the treaty words as a concept equivalent to whatever income is taxed as employment income", one must first establish the meaning of the treaty concept of "employment income", so as to then proceed to the second mental step of searching for an appropriate category of domestic law. But if an autonomous interpretation from the treaty was already necessary, it begs the question as to why one should not leave it at that and interpret the term exclusively on treaty level.

4. Which Domestic Law Is Relevant?

John understands article 3(2) of the OECD Model as a reference to the law of the source state, to which the residence state would also be bound for the purposes of the interpretation of the tax treaty. The meaning of the word "applies" is central to that. [18] Here, one should concede a priori that the English and French version of article 3(2) of the OECD Model are relevant for this question and not, for instance, a translation into German or any other language. This is also the case even if a double taxation convention declares German or another language to be one of the authentic languages or the exclusive language of the treaty. When Contracting States use the template of one of the OECD Model Conventions to conclude their tax treaties, it must be assumed that, by adopting the formulations in the OECD Model, they also accepted their meaning. [19] In order to establish the meaning of article 3(2), it is necessary to carefully examine its wording in English and French, i.e. the two original languages for the OECD Model.

John assumes that a treaty provision is only "applied" when it limits a Contracting State in the application of its domestic law. The state whose taxation right is confirmed by the tax treaty will only read the tax treaty. [20] The objection – which I personally consider very justified – has often been raised that the taxation right of the residence state is also limited, as this is provided under article 19 of the OECD Model [21] or even from the method articles, which oblige the residence state to refrain from taxation or – in the case of the credit method – at least reduce it. [22] Having said this, there are other separate legal questions as to the role of the method article, which need to be discussed later (*see* section 5.). In any event, the understanding of the word "applies" is not without controversy among academics whose first language is English: Philip Baker does not share John's opinion: [23] "The literal meaning of the words in Article 3 (2)... appears to require each state to apply its own domestic law". As someone whose first language is not English, I lack the competence to participate in this internal language debate.

Recently Richard Resch argued in the same direction, however, using different arguments. He referred to the "temporal logic of tax treaties" in that sense that it were always the source state which applies the treaty first, [24] "even if only by logical second". [25] This line of reasoning does not convince me either: it is the same factual situation which is relevant for both countries, and which, therefore, happens at the same time. In my view, it is not the case that "income [is] generated first at the source and then [flows] from the source to the recipient". [26] However, it is true that at first sight one might get the impression that under the credit method the source state comes first: the tax authorities in the residence state need the information about the foreign tax which is to be deducted from the tax levied in the residence state. However, it is clear that, even under the credit method taxes may be calculated separately in both states and if the tax in the source state is calculated or levied later, the assessment in the residence state has to be adjusted. Experts who are used to apply the exemption method not even get the idea that source state comes first: both countries do not rely on each other and can calculate and assess their taxes completely separately.

5. Does the View Held in the Commentary on Article 23 of the OECD Model (2000) Onwards Have an Impact on the Discussion?

John presumes that "the conflict of qualification issue has gone way (at least in relation to treaties made after 2000 – or am I being optimistic?)". [27] Unfortunately, I have to disappoint him. In the Commentary on Article 23 of the OECD Model, the OECD does actually take the view that, according to article 23 of the OECD Model different qualifications of incomes in the residence and source states can be solved by making the qualification of the source state relevant for the residence state. [28] The OECD, thus, obviously opposes the opinion held by John on article 3(2) of the OECD Model. According to him, such qualification conflicts cannot even exist: article 3(2) of the OECD Model already declares the law of the source state as being exclusively relevant. If the OECD assumes that a conflict to be solved by article 23 of the OECD Model is at hand, it must also assume that article 3(2) also regards each of the two states as a state that applies the treaty.

The wording of article 23 of the OECD Model, however, does not provide any basis at all for the view held in the OECD Commentary. From a linguistic point of view, there is absolutely no indication that the formulation "income... which may be taxed in the other Contracting State in accordance with the provisions of the Convention" suggests that the other Contracting State – who is that: its legislator, the administrative authorities, or courts? – may also decide which income may be taxed in that other

Contracting State. [29] Article 23 of the OECD Model refers to the state of residence, whose authorities are to guarantee the avoidance of double taxation through crediting or exemption. Article 23 of the OECD Model does not stipulate the standards those authorities must apply to determine the income "which may be taxed in the other Contracting State". In any case, there is no indication that it is up to the tax authorities of the source state to decide.

Therefore, it is difficult to imply that at least those tax treaties which were concluded on the basis of the OECD Model (2000) [30] onwards, could be applied in light of this position. In the end, it is the tax treaties that must be applied and not the Commentaries on the OECD Model. The OECD Commentaries can only explain which motives played an essential role in formulating a certain provision in a specific way, and which meanings should be attributed to it. If, however, there is no indication in the wording of the provision to support the opinion held in the OECD Commentaries, the OECD Commentaries do not have any significance in the interpretation of the treaty either. We are often facing the same predicament in domestic law, when the intentions of the legislators that transpire through parliamentary debates or documents are not reflected accordingly in the wording of the provisions: They must simply be ignored. In the case of the Commentaries on the OECD Model (2000), [31] we face the additional problem that the OECD Commentaries declare that a provision whose wording is unchanged must suddenly be understood in a completely different manner than was previously the case. So, this is not about the OECD Commentaries trying to explain a provision that was just recently created, but about the OECD Commentaries attempting to reinterpret a long-standing provision. I wish to admit, however, that I find the opinion of the OECD Commentaries, based on the groundwork laid by John, to be creative and extremely original. [32] Due to the aforementioned reasons, however, I do not see any possibility of interpreting the tax treaties concluded as of 2000 along these lines, [33] let alone any treaties concluded before that. [34]

6. Differences between the Effects of the Credit and Exemption Methods

I find the references made by John to the application of the credit method in the United Kingdom and the predominant use of the exemption method in Continental Europe to be interesting. At least prima facie, it really seems that an opinion, according to which interpretation is primarily dependent on the law of the source state, is well in conformity with the effects of the credit method: the state of residence has the taxation right, and the taxation right of the source state merely comes in addition to that. If the source state can impose taxes to a smaller or larger extent on the basis of the relevance of its qualification, only the amount of the creditable tax in the state of residence will change. The overall tax burden relevant for the taxpayer remains the same.

This, however, is only true if the residence state is the state with the higher tax level. Otherwise, a comprehensive taxation right of the source state will also lead to a higher tax altogether. Yet even if the state of residence is the state with the higher taxation, the amount of the creditable tax will have an impact on the tax revenue in the state of residence. After all, the state of residence is not obliged to credit any tax levied by the source state, but only the tax levied on income, for which the source state has a taxation right. If the source state itself were able to determine how comprehensive its taxation right is by creating the corresponding national definitions, the treaty barrier ("income... which may be taxed in the other Contracting State in accordance with the provisions of the Convention") would become de facto obsolete.

Against this background, the questions that arise in connection with the exemption method are not fundamentally different from those of the credit method: if the source state expands its taxation right by invoking the view expressed by John on article 3(2) of the OECD Model, or by the OECD on article 23, this will be to the detriment of the state of residence. In the case of the credit method, the tax amount that remains for the state of residence will decrease as a result of the crediting of the higher foreign tax. It is understandable, however, that the taxpayers concerned are significantly more relaxed toward different qualifications in the two Contracting States under the scope of the credit method than in the case of the exemption method. If the state of residence is the state with the higher taxes, their overall tax burden will not change. In the case of the exemption method, however, at first sight the tax administration will be more relaxed. They may collect their revenues, irrespective of the treatment in the source state. Nevertheless, the question as to which state has the taxation right is typically not irrelevant for the taxpayers: if they have different tax rates, the taxpayer will have an interest in having the state with the lower taxes exercise its taxation right. Therefore, under the scope of the exemption method, it is more likely that taxpayers will go to the courts to oppose an expansion of the source state's taxation right which they deem unjustified. In the case of the credit method, this will only happen if the source state imposes higher taxes than the state of residence, or when the tax administration of the state of residence refuses to credit taxes of the source state which the source state levies on income that they believe should not be taxed by it, so that double taxation will ensue.

In any event, these considerations show that the underlying concern behind these questions is not only to avoid double taxation, but also to ensure the appropriate distribution of taxation rights between the two states. [35] It is notable that even those tax administrations which per se share the view expressed by the OECD, according to which the residence state is bound to the qualification in the source state, do not agree when source states excessively expand their taxation right. For instance, the Austrian tax administration accused Belarus of introducing domestic law under which gambling machines belong to immovable assets, only to be able to tax Austrian companies that operate such machines there without founding permanent establishments (PEs). [36] Even during a mutual agreement procedure, the Austrian tax administration was not willing to waive the right to tax such income that it believes it is entitled to. Ironically enough, this did not even involve a case of application of article 3(2) of the OECD Model, but the definition of immovable property provided in article 6(2) by reference to the state of situs. In my opinion, Belarus rightly exercised its taxation right in this case because the reference contained there is much more comprehensive than that of article 3(2) of the OECD Model. [37]

More generally, the reformulated preamble of the OECD Model should not make us lose sight of the fact that the purpose of double taxation conventions is not only the avoidance of double taxation and – in certain cases – the prevention of double-non-taxation. It is also about the distribution of taxation rights between the Contracting States. So, it is understandable and one should not expect states of residence to waive their tax revenue. Neither in the scope of application of the credit method nor that of the exemption method will states of residence content themselves with grabbing just the remaining part of the tax cake left to them by the source states. The taxpayers should also be able to expect that the allocation of taxation rights between the two countries remains stable for the time the treaty is in force, and does not depend on changes of domestic law. In particular, under the exemption method, taxpayers should be able to anticipate which of the two states will levy tax on which part of the income.

I personally fail to see the consequence demonstrated by John in his case examples about the "Wide Employment State" and the "Narrow Employment State", namely that source states are running the risk of not exhausting the taxation right allocated to them by a treaty if they are not allowed to introduce their

domestic income categories into the treaty: neither German nor Austrian domestic law by any means provide that non-residents may only be taxed on income from "*Gewerbebetrieb*" if they have a PE in Germany or Austria. Meanwhile, for a considerable part of these incomes, it suffices for the activity to be carried out within the country to allow for taxation under domestic law. According to domestic law, the self-employed doctors and associates in law firms mentioned by John do not fall under "*Gewerbebetrieb*" at all and, in case they are not residents, they are subject to taxation simply by exercising their activities within the country. I fail to see any taxation gaps, however, because just like other states, Austria and Germany have expanded their relevant domestic taxation regimes for non-residents in recent years and decades, precisely so as to be able to exhaust the taxation rights allocated to them by the treaties.

7. The Meaning of the Phrase "Unless the Context Otherwise Requires"

John clearly points out to the English roots of the phrase "unless the context otherwise requires" and it is definitely a remarkable argument for the interpretation of article 3(2) of the OECD Model that this formulation has little relevance in English law texts but is obviously inserted so as to provide judges with a corrective in case the primarily applicable legal consequence does not make any sense in a specific individual case. The use of this formulation in article 3(1) of the OECD Model also points in the same direction, for one can hardly imagine any situations in which the definitions contained there are to be thrust aside in the interpretation of those treaty provisions which are using these defined terms, although it is a bit striking that this phrase is not used in the definitions of articles 6(2) or 10(3): under the logic explained by John one would have expected to find this phrase in these provisions as well. Especially the comparison between article 3(1) of the OECD Model and article 3(2), however, also suggests that the formulation "unless the context otherwise requires" can have a different meaning depending on the context in which it stands: in the case of article 3(2), an interpretation according to which terms should be readily understood according to the respective domestic law of the two applying states (if one rejects as unconvincing the additional thesis by John, according to which only the source state "applies" the treaty) [38] would bring about double taxation or double non-taxation, thus failing to achieve the objective and purpose of the treaty. Therefore, the "context" will play an important role here, so as to prevent such a non-satisfactory result.

John also raises the question as to whether German-speaking authors, when interpreting the phrase "unless the context otherwise requires", are influenced by the established German translation of the word "unless" as "*wenn*" and not, for instance, as "*es sei denn, ausgenommen dass*, *außer*, or *außer wenn*". Based on my feeling for my own language, I am not sure whether these alternative formulations would put an even stronger emphasis on the fact that the provision defines an exception. I find these formulations much clumsier, so it seems natural that the translators decided to content themselves with a simple "*wenn*" for "unless". But most importantly, it is after all the English and the French version that have to be considered in the interpretation of the OECD Model. Even when German is one of the authentic treaty languages in a tax treaty and the provision is based on the OECD Model, the English and French versions are primarily relevant. [39] Even academics whose first language is neither English nor French may occasionally use a version of the OECD Model in their own language as a working aid, but they must base their interpretation work exclusively or primarily on the English or French texts. One must give John great credit for pointing out himself that the Commentaries on the OECD Model on this provision do not necessarily emphasize the exception element: "the domestic law meaning of an undefined term applies

only if the context does not require an alternative interpretation...". In my opinion, however, it makes no difference whether the formulation "unless the context otherwise requires" in article 3(2) of the OECD Model emphasizes its exception role or not. In all of the available language versions, the formulation in article 3(2) of the OECD Model makes it clear that an interpretation requiring the context of the treaty has priority over any recourse to domestic law: domestic law may only be taken into account unless the context otherwise requires. Under the logical order of article 3 (2) of the OECD Model, treaty definitions come first, context comes second and domestic law last.

This becomes even more unequivocal when one considers the words inserted in article 3(2) of the OECD Model (2017): in addition to the insertion of "unless the context otherwise requires", it also contains the following formulation, which takes precedence over the use of domestic law: "or the competent authorities agree to a different meaning pursuant to the provisions of Article 25". This formulation clearly indicates that an interpretation from the context of the treaty takes precedence over a solution through mutual agreement procedures. If, however, a solution was found by way of mutual agreement, one can hardly assume that, as a result of the word "unless", this mutual agreement may only be considered in a rare exceptional case, and as a rule, the mutual agreement has to be ignored because in almost all cases the domestic meaning prevails. Therefore, under the article 3(2) of the OECD Model (2017) it is even less likely that the consideration of the context of the treaty, which precedes the mutual agreement, may only apply in exceptional cases. Therefore, one must firstly resort to definitions of the treaty, secondly to the context (in the broadest sense), thirdly to mutual agreements and only thereafter to domestic tax law.

John has the merit of having pointed out that the United Kingdom-United States Income Tax Treaty (1945) [40] was the first tax treaty worldwide to introduce a provision similar to article 3(2) of the OECD Model. [41] Eventually, the provision found its way into the OECD Draft (1963). [42] The introduction of this provision into the United Kingdom-United States Income Tax Treaty (1945) and into the OECD Draft (1963) was unspectacular. This suggests that it was not the intention of article 3(2) of the OECD Model to implement a completely different interpretation concept than the one otherwise provided for international treaties. In general, international law treaties must be interpreted from within themselves without any recourse to domestic law. The interpretation principles enshrined in the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention (1969)") [43] confirm this. [44] If article 3(2) of the OECD Model had not been included at all in the OECD Model, there would be no doubt at all that the rules of the OECD Model must be interpreted from within themselves. This is self-evident in any other international law treaty: the term "civil rights" in article 6 of the European Convention on Human Rights (ECHR) does not have the meaning understood in the respective Contracting State, but the one required for the provision to fulfil its purpose and objective. [45] Similarly, legal provisions in the European Union are interpreted autonomously, and terms are not accorded the meaning they have in the respective Member State. [46] If the authors of the United Kingdom-United States Income Tax Treaty (1945) and those of the OECD Draft (1963) had intended to turn the general understanding of treaty interpretation completely on its head by inserting article 3(2) of the OECD Model, this would certainly not have happened without any ado. Therefore, much suggests that article 3(2) of the OECD Model should not be understood as an exception to the interpretation rules of the Vienna Convention (1969), but as their confirmation: [47] one must first ask the question about what the context requires. Article 3(2) of the OECD Model merely points out that in those rare exceptional cases in which nothing can be derived from the context, it is admissible to resort to domestic law.

Another argument in favour of this can be drawn from the explicit references to the law of the source state, as these are provided, for instance, in article 6(2), or article 10(3), of the OECD Model. If article 3(2) of the OECD Model meant that recourse should be immediately made to domestic law, these special interpretation provisions would be redundant. [48] Although some of these definitions also contain parts requiring an autonomous approach, it is not reasonable to assume that especially these provisions referring to domestic law were actually intended to define those rare exceptions in which an autonomous interpretation is admissible.

For this reason, I do not share the presumption of John that the reluctance to assume that article 3(2) of the OECD Model primarily refers to domestic law can be attributed to the methods that countries like Germany or Austria use to incorporate tax treaties into domestic law. In both states, tax treaties are on an equal footing with the domestic tax laws: they may replace domestic tax law, but they are also replaced by domestic law where appropriate. [49] All this has no impact on the importance of domestic law for their interpretation. Of course, every international treaty may rule that a certain term should be understood according to the domestic law of one of the Contracting States. This is undoubtedly the case in article 6(2), or article 10(3), of the OECD Model. This is not disputed in its merits anywhere – and, of course, not in Germany or Austria either. The fact that numerous academics in different countries do not consider article 3(2) of the OECD Model as a primary reference to domestic law has nothing to do with the method of incorporation of international law treaties.

Ultimately, article 3(2) of the OECD Model, therefore, points out to the fact that an interpretation from the context is required. This calls for an autonomous interpretation. I agree with John that the context under article 3(2) of the OECD Model is not identical with the context referred to in article 31 of the Vienna Convention (1969). It goes beyond. Under article 3(2) of the OECD Model, all interpretative material which is permitted under the Vienna Convention (1969) has to be taken into account. However, it would go too far to include domestic law as context. Since domestic law is mentioned separately in article 3(2) of the OECD Model, this would not make sense. The Commentary on Article 3 of the OECD Model is not helpful at all: [50] it refers to "the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to reciprocity on which the Convention is based)". Not only it is not understandable that for the application of the treaty in the source state obviously the domestic law of the residence state should be relevant, the position taken by John is in no way supported by these phrases. He himself criticized the Commentary on Article 3(2) of the OECD Model (1992) [51] as not helpful. [52]

John has substantive reservations against an autonomous interpretation: "it is far from the case that an autonomous meaning of an undefined type of income solves all the problems". John is right: of course, endeavours to interpret treaty provisions from their context do not a priori guarantee a common interpretation. Interpretation is painstaking work and requires that various historic, systematic, and teleological aspects are taken into consideration. Moreover, different legal experts may eventually reach different results. Legal practitioners in both Contracting States – and, in view of the OECD Model, far beyond these – apply the same arguments and can mutually convince each other. An interpretation from the context of the treaty offers the opportunity that one and the same treaty provision is understood the same way in both states, or even worldwide. This is not different in domestic law: legal provisions are also interpreted on the basis of the respective context. Terms are often not defined in a law text, and we subsequently endeavour to determine their meaning taking into account the development of law, of the objective and purpose, and of the context. Why should we take a different approach in the case of double taxation conventions? If a new law comprising around 30 articles were to be created in our domestic legal system, we would of course be capable of interpreting this law from the context in which it stands,

without having to abort mid-air. We would by no means abandon the interpretation of the provisions of this law only because a certain term is not defined in the law itself. Why should we proceed in a different manner in treaty law and resort to definitions from completely different legal areas, simply because the same term happens to be used in a law there? Article 3(2) of the OECD Model instructs us to resort to these results obtained from the context, and only when two results are derived from the context of the treaty and it proves impossible to come up with an argument in favour of one or the other, then we can resort to domestic law to resolve the non-liquet situation. There is also indication that John finally shares my optimism that determining the content of treaty provisions is possible by using the context understood in the way I have just described it. According to him, "the Vienna Convention (1969) assumes that it is always possible to find a contextual meaning". [53]

One of the theses put forward by John, and which I fully agree with, strikes me as particularly important:

> First, and most fundamentally, it is impossible for a contract to exist (and a treaty is a form of contract) if the same term simultaneously means two different things; if that were so there would be no meeting of minds and no contract. [54]

It would be unthinkable for John and myself to accept a result according to which each of the two Contracting States would have its own understanding of the treaty and no common solution would have to be found. The two of us only disagree as to the path to follow to ensure a common understanding of the treaty in both states. Whereas I give preference to an autonomous interpretation, John ensures this common understanding by deriving the precedence of domestic law and, in addition, refers exclusively to that of the source state. Alternatively, he obviously regards article 23 of the OECD Model as a way to leverage the understanding of the source state. In my view, which I have tried to explain in the previous sections, there are strong counterarguments against these opinions. If one reflects long enough on the consequences of these opinions, doubts will eventually emerge, which are very difficult or impossible to solve. I tried to demonstrate that even John's position does not relieve one from taking into account the treaty context, for example, whenever it has to be decided if and which domestic term is the "equivalent" one. On the other hand, I see much fewer arguments against an interpretation of article 3(2) of the OECD Model which puts primary emphasis on the context and enables an autonomous interpretation, in order to achieve the goal John and I have in common, namely to ensure that each treaty provision means the same when it is applied in both contracting states.

8. Conclusions

I want to sincerely thank John once again for offering me the opportunity to reflect on his arguments and thus review my own position on article 3(2) of the OECD Model. I trust he will understand that I, nevertheless, continue to consider my long-standing opinion in favour of an autonomous interpretation of tax treaties to be the more convincing one. As to the question asked by John as to whether the particularities of the German language or the legal culture of Continental Europe may be the reasons why the concept of autonomous treaty interpretation is particularly well received here, I am sceptical whether this is the case. But I must also admit that – when I began studying treaty law for the first time in the second half of the 1980s – I was able to resort not only to John's excellent contributions and those of a few others who had written in English in treaty interpretation at that time, but also to an impressive number of top quality papers in German literature that would not have been available in English at all. I

was particularly impressed by Helmut Debatin, [55] already cited by John, who endorsed the postulate of an autonomous interpretation by presenting very structured, clear ideas. It is also for this reason that, ultimately, I cannot judge to which extent I was influenced in my opinions on article 3(2) of the OECD Model by the fact that I grew up in a German-speaking country, was socialized in the continental European legal theory, influenced by Hans Kelsen's writings [56] and, from the beginning of my career, was also able to resort to the comprehensive academic tax literature written in the German language, to which most other academics from English-speaking countries (with the exception of John who had been in dialogue with Klaus Vogel and many others already at that time for many years) had no access.

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See W. Gassner & M. Lang, *Double Non-Taxation of a Belgian Tax Law Professor Lecturing in Vienna?*, in *Liber Amicorum Honouring Luc Hinnekens* p. 227 (F. Vanistendael ed., Bruylant 2002). In such cases, Avery Jones assumes that it is the residence state that applies the treaty (*see* Avery Jones, *supra* n. 3, at sec. 4.7.1.).

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R. Resch, *Tax Treaty Interpretation – The Meaning and Application of Article 3 (2)* p. 189 et seq. (Tredition GmbH 2020).

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