

# Chapter III

## On Conflicts and Other Interactions between Double Taxation Agreements and Non-Tax Treaties

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### 1. Introduction

The post-world war II development of international affairs has been characterized by an exponential growth of bilateral and multilateral treaties and conventions. The landscape of international relations has become increasingly governed by codified rules of international law. States operate in this landscape as one entity, as one person if you will, being equally bound by all the obligations that emanate from the treaties it is a party to. In actual fact, states are a complicated and often inconsistent body of organs with different or even contradictory objectives and concerns on the international playing field. In terms of transactions with other states, this is reflected in the fact that the treaties concluded by one and the same state as one subject of international law<sup>178</sup> may often seem to be in conflict with each other at a first glance. A treaty for the promotion of investment may seem difficult to reconcile treaties for the protection of the environment, for example. What is more, the international coverage of many treaties can be quite varied. Obviously, not all states are parties to all treaties and conventions. A state can in the performance of its treaty-commitment towards A be breaking its commitments towards B.

Somewhere in this maze of different but intertwined, conflicting or complementing international rights and obligations, is the global tax treaty system. As is the case with most treaty-regimes, it is unavoidable that tax treaties will “touch” in some way upon other treaties. Of course, within the constraints of a brief study as this one, it is not feasible to fully examine the entire spectrum of possible conflicts between DTAs and all non-tax treaties in depth. The purpose of this contribution is not to discuss what the result is of any particular conflict with any particular

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<sup>178</sup> Art. 29 of the VCLT provides for example that unless otherwise provided, a treaty shall apply to the entire territory of the concluding state; On the unity of a state from the international perspective see Starke, p. 58-71.; Jennings and Watts., “Oppenheim’s International Law”, Ninth edition vol. 1 parts 2 to 4, Longman, 1992, pp. 246-254.

non-tax treaty, but rather to explore and illustrate the international rules that govern the resolution of real or apparent conflicts involving one DTA. Particular attention is also paid to the effect non-tax treaties may have on the *interpretation* of tax treaty terms.

An examination of these questions starts from the international law of treaties. Particularly the rules of the Vienna Convention on the Law of Treaties of 1969 (“VCLT”) with respect to “successive treaties related to the same subject matter”<sup>179</sup> are relevant in this respect, but we will also see that the rules on interpretation, the modification and the termination of treaties play an important role.

## 2. Sources of *Prima Facie* Treaty Conflicts Involving a DTA

In order to get a better overview of possible conflicts between DTAs and other treaties<sup>180</sup>, one can first start by trying to place DTAs in the broader context of all treaties that may be relevant in this respect. It may be useful to further detail and categorize the spectrum of potential conflicts as described below<sup>181</sup>. Note however that this is just a largely artificial categorization to help outline the subject matter. A multilateral “composite” treaty-regime such as in connection with the EC or the WTO, governs many different subject matters and those composite regimes could thus be considered as falling into several categories at once. In terms of treaty conflicts involving a DTA, the following categories can be distinguished.

(1) *Conflicts between DTAs and other DTAs*. In which situations may more than one DTA apply simultaneously, and which rules will in that case determine which treaty shall apply? There may be different reasons for more than one DTA being applicable to a

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<sup>179</sup> Art. 30 of the VCLT opened for signature 23 May 1969, 1155 UNTS 331.

<sup>180</sup> In this examination, DTAs are the only type of tax treaty which is taken into account. However, not all treaty conflicts that are somewhat related to taxation will necessarily involve a DTA. If tax crimes are considered to be “tax related”, for example, a treaty on administrative assistance and exchange of information, a treaty on extradition and a convention on human rights may all have an impact on an international VAT-fraud. Conflicts on tax matters between two non-DTAs fall outside of the scope of this contribution.

<sup>181</sup> The difference between categories 2 and 3 is also made by Qureshi (Asif H. Qureshi, “The Public International Law of Taxation Text, Cases and Materials”, Graham & Trotman Limited, 1994, p. 3).

certain taxpayer<sup>182</sup>, income<sup>183</sup>, state or territory<sup>184</sup>. This type of conflicts is not discussed in this contribution.

(2) *Conflicts between DTA's and other treaties whose main purpose is to regulate international taxation.* This would include treaties on sales taxes or VAT, stamp duties, customs duties or tariffs and estate taxes. With the exception of the widely known multilateral treaties on international tariffs, these are much less common than DTAs. In relation to international transport there is a substantial practice to conclude specific agreements for the avoidance of double taxation on income derived from those activities<sup>185</sup>. Worth mentioning is also the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties<sup>186</sup>.

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<sup>182</sup> In so-called “triangular” situations (partner, partnership and source of income are located in different countries) where a partner of a partnership is taxed on his income allocation from the partnership in his state of residence, and the partnership is taxed as a resident of the state in which it is established as well, then the partnership as well as the partner may invoke the DTAs their countries concluded with the source state of the income. In that case, the OECD Commentary notes, “the state of source may not impose taxation which is inconsistent with the terms of either of the Conventions” (OECD Commentary 1/6.5 (added in 2000)). See also Lang, M., “The Application of the OECD Model Tax Convention to Partnerships”, p. 31-40.

<sup>183</sup> Income may resort under two DTAs at a time. This issue is among other things associated with the article on other income of the DTA (art. 21 OECD Model DTA). As Vogel notes (Vogel, K., “Double Taxation Conventions” Kluwer, Deventer, 1997, p. 1074): “Special cases arise when one or both of the contracting states have concluded a DTA with the third state. [...] As a result, the contracting states cannot exercise the taxation attributed to them under art. 21, otherwise than is provided for in the DTAs with the third state. It is thus conceivable that a contracting state [...] be authorized to impose tax on [the income] but may under its DTA with the third state be simultaneously obliged to exempt them from tax”.

<sup>184</sup> Many of the DTA-conflicts that are sometimes perceived to be territorial in nature are actually conflicts related to sovereignty and state succession rather than territory. Notable examples are the fate of the DTAs concluded by the former USSR, the German Democratic Republic and Yugoslavia. On the effect of state succession on treaties, see “the 1978 Draft Convention on the Succession of States in Respect of Treaties”; ILC, Yearbook ILC, 1950, vol. II, p. 206-18; International Law Association, “The Effect of Independence on Treaties”, 1965; O’Connell, D.P., “The Law of State Succession”, p. 15-70. (on the effect of state succession on personal and multilateral treaties). Pragmatic solutions are found in matters of DTAs with reference to the scope of the treaty in terms of taxes covered (see Baker, Ph., “Baker’s comments and references in Double Taxation Conventions and International Tax Law”, p. 56-57.) Nothing excludes however that DTAs can also come into conflict with each other when several states lay claim to the same territory.

<sup>185</sup> Provisions to that effect can alternatively be included in the more general air services agreements.

<sup>186</sup> 13 December 1979. On 31 December 1999, this convention had 3 signatories and 7 parties. It is not yet in force.

(3) *Conflicts with treaties that have incidental but specific provisions on international taxation.* These are bilateral or multilateral treaties that do not have as their primary purpose to regulate international tax matters, but they do include some provision on the international tax-aspects of its main subject matter. Good examples are the 1961 Convention on Diplomatic Relations<sup>187</sup> and the 1963 Convention on Consular Relations<sup>188</sup>. The constituting treaties of international organizations (or later agreements associated therewith) also often provide in domestic tax exemptions for officials and other personnel of those organizations<sup>189</sup>. Investment treaties may also include specific provisions on taxation<sup>190</sup>. Certain agreements between states and international organizations such as the IMF may contain obligations (“commitments”) on tax matters.

(4) *Conflicts with treaties that do not have any specific provisions on international taxation* form by far the largest and what will be the most complicated category. Even though they do not specifically address tax issues, they may nevertheless have various

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<sup>187</sup> Of April 18, 1961. In article 34 this convention provides as follows: “A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except: (a) indirect taxes of a kind which are normally incorporated in the price of goods or services; (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39; (d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State; (e) charges levied for specific services rendered; (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23”.

<sup>188</sup> Of April 24, 1963. See particularly art. 32 (on the exemption of taxation for the consular premises), art. 49 (tax exemptions for consular officers and consular employees and members of their families, which to a large extent correspond with those for diplomatic agents quoted above) and 50 (customs duties and inspection). Usually DTAs contain an explicit reference to treaties on diplomatic or consular relations in force between the parties. Art.28 OECD Model (numbering post-insertion of the article on the assistance in the collection of taxes).

<sup>189</sup> See for example art. 14 of the Protocol on the privileges and Immunities of the EC of 8 April 1965 (OJ No. 152/13); art. 6 of the NATO- Agreement on Privileges and Immunities - September 20, 1951; For an overview, Christiaanse, J.H., “De Inkomstenbelastingvrijstelling voor de Internationale Ambtenaren”, 1960.; Muller, S., “International organizations and their officials: to tax or not to tax”, 6 *LJIL*, 1993, pp. 42-72.; Schermers, H., Blokker, N., “International Institutional Law”, 1995, p. 355-359.

<sup>190</sup> See below, part 5.

relationships with DTAs. This may result in real or apparent incompatibilities. There are quite a few types of treaties that may have an impact on international taxation and DTAs in this respect. One should consider human rights treaties<sup>191</sup>, bilateral or multilateral treaties on territorial delimitation, on the law of the sea<sup>192</sup>, on the use of outer space<sup>193</sup>, on telecommunications<sup>194</sup>, on investment<sup>195</sup>, on transnational crimes<sup>196</sup>, on police cooperation<sup>197</sup>, on extradition, of most-favored nation status<sup>198</sup>, on commodities<sup>199</sup>, on the settlement of disputes<sup>200</sup>, international financial and monetary cooperation<sup>201</sup> etc. Free trade agreements and agreements for regional economic integration will almost always have some bearing on the international taxation of income as well<sup>202</sup>.

### **3. Conflicts Between Successive Treaties in International Law**

#### **3.1. General comments**

In international public law, there is no formal hierarchy for (types of) treaties other than with respect to *jus cogens*<sup>203</sup>. All treaties are based on

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<sup>191</sup> See below, part 6.

<sup>192</sup> UN Convention on the Law of the Sea, 10 December 1958; Convention on the Continental Shelf, 29 April 1958.

<sup>193</sup> Agreement governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1979.

<sup>194</sup> Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 21 May 1974.

<sup>195</sup> See below, part 5.

<sup>196</sup> UN Convention against Transnational Organized Crime, open for signature since its adoption by the UN in Palermo, 12 December 2000 (UN Document A/55/383 add. 1; Scope of application art. 3); European Convention on Assistance in Criminal Matters, 20 April 1959 (note that art. 2A of this convention previously excluded tax matters. However, the Protocol of 17 March 1978 (art. 1) has removed this ground for refusal); US-Swiss Treaty on Criminal Assistance of 25 May 1973, par. 2.; De Saugy, J. and Chapuis, P., "Banking secrecy and tax law in Switzerland", quoted in Campbell, D, (ed) International Tax Planning, Kluwer, Deventer, p. 136.

<sup>197</sup> See below

<sup>198</sup> See the references in Jennings and Watts, *ibid* ft. 178, 1992, p. 1326.

<sup>199</sup> There are international agreements in this respect on olive oil, coffee, sugar, pepper, cocoa, rice, tin, tea, tropic timber, rubber, jute, wheat, nickel, copper, grains, etc.

<sup>200</sup> See this author's contribution "About the jurisdiction of international courts to settle tax treaty disputes" in *Settlement of Disputes in Tax Treaty Law* (Lang and Zuger ed.) Linde Verlag 2002, p. 501-533 with references to the ICJ and the European Court of Justice.

<sup>201</sup> Qureshi, *ibid* ft. 181, p. 5.

<sup>202</sup> See below

<sup>203</sup> Seidl-Hohenveldern, I., "Hierarchy of treaties" in *Essays on the Law of Treaties*, (Klabbers and Lefeber ed.), 1998, p. 7-18.; Reuter, P., "Introduction to the Law of

the consent of equal states. Multilateral treaties do not necessarily have priority over bilateral ones. In and on itself, treaties on human rights do not have priority over treaties that organize more mundane matters such as taxation. Conflicts can thus not be resolved with reference to some kind of hierarchy based on “importance”.

### 3.2. Art. 30 of the Vienna Convention and “Lex Posterior”

Lacking conventional conflict rules, one can turn to conflict rules in customary international law and since the 1969 Vienna Convention on the Law of Treaties (“VCLT”), to its codification in art. 30 of that convention<sup>204</sup>.

Art. 30 of the VCLT reads as follows:

- “1. Subject to article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
  - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
  - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from

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Treaties”, 1989, p. 100.; Rousseau, C., “De la comptabilité des normes juridiques contradictoires dans l’ordre international”, 39 *RGDIP*, 133, p.150-151 (1932).

<sup>204</sup> It is generally accepted that art. 30 VCLT was a successful and uncontroversial codification of international customary law (I. M. Sinclair, “The Vienna Convention on the Law of Treaties”, Oceana, 1973, p. 10-21.; J.B. Mus, “Verdragsconflicten voor de Nederlandse rechter”, W.E.J. Tjeenk Willink Zwolle, 1996, p. 213.; ILC, Yearbook ILC 1966 vol. I, II, p. 95 and p. 103.; Waldock, “Sixth Report ILC Yearbook”, vol. II, 1966, p. 74.

the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.”

Par. 2 of this provision begins (“when a treaty specifies”) by asserting that conventional conflict rules are the preferred way of solving *prima facie* incompatibilities between treaties. As Mus notes, prevention is the best cure<sup>205</sup>.

In case no conventional conflict clause is agreed or implied, and provided the earlier treaty is not implicitly terminated by the conclusion of the later treaty<sup>206</sup>, it is assumed that the provisions of the later treaty shall prevail in case of a conflict that cannot be resolved through interpretation (“to the extent that its provisions are compatible with...”). This is referred to as the *lex posterior*-rule. As no more precise information is available, the most recent expression is deemed to represent the currently applicable rule between the parties. However, the *lex posterior*-rule is not to be considered absolute. In first instance, it only applies to the extent that *all* parties to the earlier treaty are also parties to the later treaty. In addition, art. 59 provides that a treaty may be deemed terminated when the same parties conclude a later treaty on the same subject-matter, and if it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by the later treaty. The same article also states that the earlier treaty may be deemed terminated if the provisions of the later treaty are so far incompatible with those of the earlier one that the two are not capable of being applied at the same time. The reference to “so far incompatible” may be taken to indicate that if it is at all possible, the provisions of both treaties should be explained so that both treaties can continue to remain operative<sup>207</sup>. The limits of this operation are formed by the principle of good faith and its components or implications “*pacta sunt servanda*” and the principle of reasonableness<sup>208</sup>.

When the later treaty does not include all the parties to the earlier treaty, art. 30 (4) VCLT applies. This provision essentially stipulates that as between the parties which are the same to both treaties, the *lex posterior*-rule is used. The later treaty will thus have priority over the earlier treaty insofar there are indeed incompatibilities. Not so with respect to the relationship between a state that is a party to both treaties and a state that is not a party to both treaties. In their case, only the treaty to which both

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<sup>205</sup> Mus, J.B., “Conflicts between treaties in international law”, Martinus Nijhoff, NILR Vol. XLV-issue 1, 1998, p. 214.

<sup>206</sup> Art. 59 VCLT.

<sup>207</sup> See below. Part 3.3.

<sup>208</sup> See below. Part 3.5.

are a party applies. This is a direct consequence of the *pacta tertiis-r*ule<sup>209</sup>. It is thus possible for two parties to a multilateral treaty to change the treaty as it applies between them *inter se* although there may be repercussions in terms of state responsibility<sup>210</sup>. In their relationship, the later treaty shall prevail, but in their relationship with the original parties to the multilateral convention, the convention's provisions continue to apply.

Art. 30 VCLT does not resolve all treaty conflicts. It includes no guidance on what should be done in case state A, all said, must perform a treaty with state B but also a conflicting treaty with state C. The classic legal doctrine that a later treaty which conflicts with an earlier one must be null and void, was the basis of the first two reports of Lauterpacht<sup>211</sup> to the International Law Commission ("ILC"). But after the contribution of Special Rapporteur Waldock to the ILC and considerable discussion, it was decided to cover some of this debate with the article on modification of multilateral treaties<sup>212</sup> and to refer to the law of state responsibility in paragraph 5 of art. 30 VCLT. A treaty concluded in conflict with another treaty may entail state responsibility, but it is normally not void between the concluding parties. Under international law, the validity of a treaty, including a treaty that conflicts with another treaty, may only be challenged with reference to the rules found in the VCLT. These are *limited* to the following causes: violation of certain fundamental rules of

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<sup>209</sup> Art. 34 VCLT

<sup>210</sup> Ibid ft. 209.

<sup>211</sup> Lauterpacht First Report, ILC Yearbook 1953, vol. II, p. 90-166.; Second Report, ILC Yearbook, 1954 vol. II, p.123-139.

<sup>212</sup> Mus, J.B., *ibid* ft. 205, p. 224.

internal law with respect to the competence to conclude treaties<sup>213</sup>, error, fraud, corruption, coercion and treaties conflicting with *jus cogens*<sup>214</sup>.

The primary contribution of art. 30 VCLT is that it confirms some fundamental principles on which treaties will continue to govern state relations in cases where not all the parties are the same. This presupposes however that two or more treaties are indeed in conflict with each other, a conflict that may then be resolved with the *lex posterior*-rule. The question thus remains unanswered when this rule actually comes into action. In other words, what is “incompatibility”?

### 3.3. Conflict clauses

As was said above, the search for a solution to a treaty conflict is in international law largely a matter of finding the intent of the parties. The most obvious and preferred expression of intent may be found in the treaty itself. One or both treaties that came into conflict may include a provision that establishes the intent of the parties as to which treaty shall give way. Such provision is called a conflict clause. The ILC defined a conflict clause as “a clause in a treaty intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals”<sup>215</sup>. The principle of *pacta sunt servanda* requires that such a clause is observed in determining the priority of one treaty over another.

The phrase “when the treaty specifies” of art. 30 (2) VCLT must be given a wide interpretation. “Specifies” does not mean “stipulate explicitly” or even “in writing”. It does not exclude that the intent of the parties on this matter is not explicit and can only be established by using the general rule

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<sup>213</sup> Apart from the rather unlikely case of states actually ceasing to exist or becoming a true federal state (Jennings and Watts, *ibid.*, ft. 178, p. 1215.), treaties that are concluded or observed in contravention of another treaty remain legally in force under international law. This is also the case with DTAs concluded or applied in violation of the EC Treaty. It is at best questionable if an appeal on art. 46 VCLT can be used in such a case to invalidate the DTA (Compare, Vogel, *Double Taxation Convention*, 3rd ed, p. 75; Hinnekens, L., “Compatibility of bilateral tax treaties with EC Law. The Rules”, *EC Tax Review*, 1994, p. 162., where the author briefly argues in his footnote 49 that when a non-EC member concludes a treaty with an EC member that may or may not violate EC law, the principle of good faith prevents the EC member from invoking that violation of EC law under art. 46 VCLT); It will be difficult to argue that there is indeed a violation of the state’s *internal* law regarding *competence* to conclude treaties. Moreover, the violation regarding competence must be manifest, i.e. objectively evident to any state conducting itself in the matter in accordance with normal practice and good faith. As long as direct taxation is not harmonized, how “manifest” will the violation be in the eyes of third states?

<sup>214</sup> See art. 46-53 VCLT.

<sup>215</sup> Reports of the ILC, *Yearbook ILC*, 1966, Vol. II, p. 214.

of interpretation or even supplementary means of interpretation. As was said above, one of the main forces at play here is the presumption in international law against conflicts: insofar as possible, treaty obligations must be interpreted and applied so that they are not incompatible with other obligations. This principle can be concluded from the genesis of art. 30 VCLT<sup>216</sup> and from the debates in the ILC<sup>217</sup>. It can also, and perhaps more importantly, be concluded from the combined operation of art. 30 par 2 and art. 31 (3) c) VCLT (treaty interpretation in accordance with relevant rules of international law)<sup>218</sup> and from the case-law of the ICJ<sup>219</sup>. Therefore, not only explicit conflict clauses can satisfy the conditions of Art. 30 (2) VCLT<sup>220</sup>. As Waldock pointed out, the *lex posterior*-rule<sup>221</sup> essentially has a residual nature, a last resort which only comes into play if treaty interpretation has failed to determine priority<sup>222</sup>. That is why art. 31 and 32 of the VCLT itself, for example, cannot be seen as “in conflict with” other earlier or later treaties. From its language and its object and purpose, it is namely clear that the VCLT is not intended to “compete” with other treaties concluded between states that signed the VCLT, but rather applies to those other treaties. There is thus no real conflict that should be resolved by art. 30 VCLT<sup>223</sup>.

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<sup>216</sup> Special Rapporteur Waldock’s second draft proposal read “Whenever it appears from the terms of a treaty, the circumstances of its conclusion or the statements of the parties that their intention was that its provisions should be subject to their obligations under another treaty, the first mentioned treaty shall be applied so far as possible in a manner compatible with the provisions of the other treaty. In the event of a conflict, the other treaty will prevail.” Subsequently, but without wishing to change the meaning of the text, the references to the “circumstances of the conclusion”, and the “statements of the parties” were dropped in an attempt to render the provision more concise. ILC, Yearbook, 1964, vol. 1, p. 127 and 131.; See also J.B. Mus, J.B., *ibid* ft. 205, p. 218.

<sup>217</sup> ILC Yearbook, 1964, vol. I, p. 121-124, p. 127 and p. 131.

<sup>218</sup> See below. Part 3.3.

<sup>219</sup> Rights of Passage over Indian Territory, Preliminary Objections (judgment) ICJ Reports 1957, p. 142.; See also Repertory of International Arbitral Jurisprudence, vol. III, p.121.; Panel Report US-Tax Treatment for FSCs, 4.689.

<sup>220</sup> With respect to the relationship between extradition treaties and other treaties (on the status of refugees, political rights and torture), for example, Mus takes into account that “In de Raad van Europa lijkt de gemeenschappelijke rechtsovertuiging te zijn gegroeid dat het Vluchtelingenverdrag voorrang heeft boven deze uitleveringsverdragen” (p. 149). He also mentions the decisions of international bodies created to oversee the interpretation of these other treaties, such as the European Commission of Human Rights.

<sup>221</sup> See below

<sup>222</sup> UNCLOT, second session, Vienna April 9<sup>th</sup>-May 22<sup>nd</sup> 1969, Official Records, 1969, p. 253; Pauwelyn, J., “The role of public international law in the WTO: how far can we go?”, *AJIL*, Vol. 95:535, p. 542 and p. 550 (who uses the phrase “presumption against conflict”).

<sup>223</sup> Contra: Reimer, E., *Tax Treaties Interpretation*, p. 123.

One type of conflict clause found in treaties provides that it gives priority to one or more other treaties between the same parties. In fact, the operation of the one treaty is in that case in its entirety subjected to the provisions of the other one. Put another way, it is stipulated in one treaty that nothing in that treaty may be deemed to affect the operation of a certain other treaty between the same parties. Unless such a clause would stipulate otherwise, it does not matter which treaty was concluded earlier.

Art. 27 (2) of the OECD/COE Multilateral Convention on Mutual Administrative Assistance in Tax Matters is an illustration of such a conflict clause. It gives priority to the EC Treaty and rules which are based thereupon<sup>224</sup>. The UK-US DTA of 2001 provides a general conflict clause which gives priority: “This Convention shall not restrict in any manner any benefit now or hereafter accorded b) by any other agreement between the Contracting States”<sup>225</sup>. Some conflict clauses explicitly provide that in case of inconsistency, one treaty shall prevail. Such is the case with the North American Free Trade Agreement, *vis a vis* “tax conventions”. In case of inconsistency, the tax convention shall prevail over the NAFTA<sup>226</sup>.

A related issue presents itself when parties decide to exclude a certain treaty with a third party from being able to produce an effect under another treaty between the parties. With respect to DTAs that is often the case in bilateral investment treaties, for example. In such a treaty, the contracting states agree on a most favored nation treatment, but they often stipulate that DTAs with third countries may not be invoked in that regard<sup>227</sup>. In effect, such a clause lends priority to the DTA over the mfn-provision of the investment treaty, although it is perhaps difficult to regard such an exception as a genuine conflict clause. A similar clause, excluding DTAs from the effect of an mfn-clause in another treaty is found in GATS<sup>228</sup> and in NAFTA<sup>229</sup>.

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<sup>224</sup> “Notwithstanding the rules of the present Convention, those Parties which are members of the EEC shall apply in their mutual relations the common rules in force in that Community”.

<sup>225</sup> UK-US DTA of 24 July 2001, art. 1 (2).

<sup>226</sup> NAFTA art. 2103.2; See also art. 2107, on the definition of “tax convention” ...argues that even the OECD and UN Model Agreements would resort under this term: International tax obligations under the Nafta: investor rights and remedies”, *Tax Notes International*, 96 p. 237-8.

<sup>227</sup> Sacerdotti, G., “Bilateral treaties and multilateral instruments on investment protection”, Hague Recueil, 1977, vol. 269, p. 354.; See also below part 5.4. c).

<sup>228</sup> Art. II of GATS establishes the mfn-principle but art. XIV (e) provides in an exception for a “difference in treatment which is the result of an agreement on the avoidance of double taxation”.

Art. 28 of the OECD Model is another example of a conflict clause that lends priority. It provides that nothing in the DTA shall affect the fiscal privileges of members of diplomatic missions or consular posts under special agreements on that subject matter.

Art. 307 EC Treaty<sup>230</sup> has the appearance of a conflict clause that gives priority, -and it is one, in a way- but its operation is actually a little more elaborate as it involves third states. Art. 307 establishes that the EC Treaty does not affect the rights and obligations from agreements before 1 January 1958 or, for acceding states, before the date of their accession. The article only stipulates so, however, for agreements between one or more EU-members on the one hand, and one or more non-members on the other hand. Now, that a treaty does not change the rights and obligations the treaty partners have towards third states (without their consent) need not be pointed out by this provision in the EC Treaty. It is namely a well-established principle of the law of treaties, known as the *pacta tertiis*-rule and is enshrined in art. 34-37 VCLT. It seems that the novelty and perhaps main purpose of 307 EC Treaty is to point out that the observance of these agreements by the EU-members are not *ipso facto* breaches of the EC Treaty. They can be, of course, because par. 2 and 3 of 307 EC Treaty go on to impose an obligation upon the members to “take steps to eliminate the incompatibilities”. In other words, one could say that 307 EC Treaty is, from the perspective of international public law, more remarkable for its effect on the responsibility of the members than for its confirmation of the *pacta tertiis*-rule. Some authors also deduce from 307 à contrario, that Community Law has priority over bilateral tax treaties among Member States<sup>231</sup>. The ECJ itself already confirmed in 1986 that certain rights under the EC Treaty “are unconditional and a Member State cannot make respect for them subject to the contents of an agreement with another state”, referring to a DTA<sup>232</sup>.

Alternatively, a conflict rule in a treaty can determine that it claims priority. The most notorious example of that kind of conflict rule is found in art. 103 of the UN Charter<sup>233</sup>. With regard to DTAs, the US Model includes a clause that gives priority to other agreements between the

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<sup>229</sup> NAFTA, art. 2103.4 c); See on this and other income-tax related aspects of NAFTA, Kerrzner, D., “International tax obligations under the Nafta: investor rights and remedies”, 96 *TNI* 237-8.

<sup>230</sup> Formerly art. 234 EC Treaty.

<sup>231</sup> J.M. Terra and J. Wattell, “European Tax Law”, FED, third edition, 2001, p. 474 and p. 112.; Vogel, *ibid* ft. 213, p. 75.

<sup>232</sup> C-270/83 (Avoir Fiscal), par. 26.

<sup>233</sup> “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

contracting states, but *claims* priority with respect to art. 26 and art. 24 of the DTA<sup>234</sup>.

Finally, a conflict clause can at the same time claim and give priority such as art. 27 of the OECD/COE Multilateral Convention on Mutual Administrative Assistance in Tax Matters<sup>235</sup>. Art. 15 of the Arbitration Convention has the same characteristics. It lends priority to “obligations ...resulting...from other conventions to which the contracting states are or become parties”, but does so only insofar they are “wider”<sup>236</sup>. In cases where the protection for the taxpayer is available under the DTA but not under the Arbitration Convention, for example because the latter’s time limit has passed, the DTA may not be deemed abrogated by the Arbitration Convention<sup>237</sup>. Hinnekens concludes from art. 15 of the Convention *a contrario* that “where the European Convention provides for wider obligations, it has priority on the [DTA]-rule”<sup>238</sup>.

### 3.4. The heart of the matter: when are the provisions of different treaties incompatible with each other?

#### *a) No definition of incompatibility*

The *lex posterior*-rule found in art. 30 VCLT is not of any help if problems arise as to determine if the provisions of different treaties are in conflict with each other. There is no definition of an “incompatibility”. As was noted above, art. 30 VCLT only comes into play when it is already established that two treaties are indeed incompatible. This determination is the result of the combined operation of art. 30 and art. 31-32 VCLT. In other words, by referring to treaty interpretation it must be established if any of the situations described in art. 30 VCLT do indeed exist. Put yet another way, the purpose of the interpretation-

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<sup>234</sup> Art. 1 (2) b) and (3) US Model.

<sup>235</sup> “The possibilities of assistance provided by this Convention do not limit, nor are they limited by, those contained in existing or future international agreements between the Parties concerned or other instruments which relate to cooperation in tax matters”.

<sup>236</sup> The full text is as follows: “Nothing in this convention shall affect the fulfillment of wider obligations with respect to the elimination of double taxation in the case of an adjustment of profits of associated enterprises resulting either from other conventions to which the contracting states are or will become parties or from the domestic law of the contracting states”.

<sup>237</sup> Hinnekens, L., “Legal sources and interpretation of European tax arbitration convention and its recognition of the taxpayer, in Resolution of Tax Treaty Conflicts by Arbitration”, IFA Seminar Series, 18a, p. 19.

<sup>238</sup> Ibid.

exercise is thus to ascertain if and how art. 30 VCLT must be applied, given the elements included or referred therein. Which elements of art. 30 VCLT need to be regarded in this respect? Art. 30 VCLT includes different terms that all seem to be closely related when it comes to describing when treaties may conflict with other treaties. In the title of art. 30 VCLT and in par. 1, reference is made to “successive treaties relating to the same subject matter”. Par. 2 refers to treaties being “subject to” or “not incompatible with”. Par. 3 uses the term “compatible” and art. 59 VCLT (which is referred to in Par. 3) mentions “so far incompatible”. Par. 5 of art. 30 VCLT finally, eludes to the concept of breach in state responsibility and to art. 41 VCLT which includes the terms “incompatible with the effective execution of the object and purpose of the treaty as a whole”.

*b) Do the treaties “relate to the same subject-matter”?*

As was said above, the title of art. 30 VCLT refers to “treaties relating to the same subject-matter”. The VCLT or the ILC reports and debates do not present a clear definition of when two treaties “relate to the same subject matter”. Waldock noted that the idea behind the *lex posterior*-rule is the principle that states entering into a new agreement are presumed to intend that its provisions shall apply between them rather than those of an earlier agreement between them regarding the same matter”<sup>239</sup> which only confirms that the *lex posterior*-rule is conditioned by the preliminary issue of treaties being related to the same subject-matter. Indeed, as Jennings and Watts observe, the whole issue is in risk of becoming an unhelpful begging of the question<sup>240</sup>. Sinclair, followed by Mus<sup>241</sup>, suggests that one should not lightly assume that two treaties indeed “relate to the same subject-matter”<sup>242</sup>.

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<sup>239</sup> Waldock, *ibid* ft. 204, p. 76.

<sup>240</sup> “It is not clear what limitation [the same subject matter] this involves, since in a sense if a course of conduct is such as to attract the application of two different treaties they can be said to relate the same subject matter. Since such a view would deprive the phrase ‘the same subject matter’ of its significance, a broader view as to what constitutes the same subject matter must probably be taken. But this in turn means that there may be conflicts between successive treaties not relating to the same subject matter, and the regulation of such conflicts is thus outside of the scope of art. 30 VCLT”. Jennings and Watts, *ibid* ft. 178, p. 1212. (in their footnote 2 on that page); Vierdag made essentially the same observation: “if an attempted simultaneous application of two rules leads to incompatible results, it can safely be assumed that the test of sameness is satisfied” (Vierdag, “The time of conclusion of a multilateral treaty: art. 30 of the Vienna Convention and related provisions”, *BYIL*, 1988, p. 100).

<sup>241</sup> Mus, “Verdragsconflicten voor de Nederlandse rechter”, p. 49-50.

<sup>242</sup> “It would seem that the expression ‘relating to the same subject matter’ must be construed strictly. It will not cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty. Accordingly, a general treaty

It is noteworthy in my view that the VCLT does not stipulate that the two conflicting treaties *have* the same subject matter. It suffices that they *relate to* the same subject matter. A situation where one treaty includes the subject matter of another treaty is thus also meant. In addition, there is no need for the two treaties to be mainly dedicated to the same topic. This is well illustrated, I believe, by the Arbitral Award in connection with the *Ambatielos* case. The Commission of Arbitration, in its award of 6 March 1956, reflected upon the mfn-clause in the Anglo-Greek Treaty of Commerce and Navigation. The Commission considered that the mfn-clause “can only attract matters belonging to the same category of subject as the clause itself relates”, but also held that “the administration of justice, when viewed in isolation, is a subject matter other than commerce and navigation, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders”<sup>243</sup>.

All this to say that the phrase should not be used to exclude the application of rules on treaty conflicts of art. 30 VCLT on incompatible treaties or provisions. One must admit for the possibility that to effectively regulate one subject matter, some aspects belonging to what is normally another subject matter must be deemed involved. This is in essence the difference between “*having* the same subject matter” and “*relating* to the same subject matter”.

In the end, this discussion does not have much practical value if it is seen in isolation from the notion of “incompatibility” itself. Giving a narrow scope to “related to the same subject matter” *and* to “incompatibilities” instead of *only* to “incompatibilities” will thus result in much the same operation by art. 30 VCLT. Put another way, as Vierdag notes, when two rules in different treaties are both applicable to the same situation, one may readily assume that both “relate to the same subject matter”<sup>244</sup>.

### *c) Role of treaty interpretation to determine incompatibility*

On which basis must be decided if treaties or provisions of those treaties are incompatible with each other? To answer this question, the residuary character of the *lex posterior*-rule comes fully into play<sup>245</sup>. Based on the

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on the reciprocal enforcement of judgments will not affect the continued applicability of particular provisions concerning the enforcement of judgments contained in an earlier treaty dealing with third-party liability in the field of nuclear energy.” I. M. Sinclair, *ibid* ft. 205, p. 68-69.

<sup>243</sup> UN, RIAA, vol. XII, p. 106-107.

<sup>244</sup> Vierdag, *ibid* ft. 240, p. 100.

<sup>245</sup> See above, point 3.1.

text, structure and genesis of art. 30 VCLT<sup>246</sup> it can be concluded, in the words of Mus, that “treaty interpretation to resolve conflicts is included in the text”<sup>247</sup>.

Indeed, the phrase “when a treaty specifies that ...” in art. 30(2) VCLT not only admits for explicit conflict clauses in the treaty text, but also for establishing what parties agreed through interpretation of the agreement as a whole. This idea also finds support in the case law of the World Court<sup>248</sup>, as well as in art. 31 (3) c) VCLT<sup>249</sup>. As far as possible (actually: as far as is reasonable<sup>250</sup>) *prima facie* conflicting treaty provisions should be brought in accordance with each other by using interpretation. In fact, this duty can be seen as an implication of the principle of good faith which, among other things, in case of international obligations that may conflict to a certain extent, demands that insofar as is possible, both obligations are honored simultaneously. As Schwarzenberger noted “the rule [to apply to conflicts in treaties with the same parties] enjoins the parties to interpret and apply each treaty in a spirit of reasonableness and good faith<sup>251</sup>”. Put yet another way, conflicts should be as far as possible “interpreted away”<sup>252</sup>.

#### *d) Method of interpretation in case of prima facie conflict in general*

The interpretation-exercise that takes place to establish if and how provisions of different treaties can be kept from conflicting with each other will be carried out under the general interpretation rule of art. 31 VCLT and possibly with reference to supplementary means of interpretation of art. 32 VCLT<sup>253</sup>.

In addition to the text, among other things, annexes must be included in the context. This also applies to any agreements relating to the treaty

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<sup>246</sup> As was already pointed out above, an earlier draft of art. 30 VCLT referred explicitly to interpretative elements for par. 2; See on this issue also Mus J. B., “Conflicts between treaties in international law”, p. 217-219.; Observation by Tunkin, Yearbook, vol. I, 1964, p. 310.

<sup>247</sup> J. B. Mus, *ibid* ft. 246, p. 217.

<sup>248</sup> *Minority Schools in Upper Silesia case*, 1928, Series A 15, p. 33; *Mavrommatis Palestine Concessions (jurisdiction) 1924*, Series A 2, p. 31.

<sup>249</sup> Relevant rules of international law (including treaties) applicable in the relations between the parties must be taken into account together with the context for the purpose of treaty interpretation. See on this issue below, part 4.

<sup>250</sup> I refer to “reasonable” as an implication of the principle of good faith.

<sup>251</sup> Schwarzenberger G., “International law”, Stevens & sons, Vol. 1, 1957, p. 474.

<sup>252</sup> Pauwelyn J., *ibid* ft. 222, p. 550.

<sup>253</sup> Mus J. B., *ibid* ft. 246, p. 218.

which was made between all the parties in connection with the conclusion of the treaty. Note 59 relating to the Subsidies and Countervailing Measures Agreement stipulates for example that “paragraph e is not intended to limit a Member from taking measures to avoid double taxation of foreign source income earned by its enterprises or the enterprises of another member”<sup>254</sup>.

e) *Lex specialis*?

Maxims as *lex specialis derogat legi generali* (“*lex specialis*”) can certainly be helpful when interpreting treaties to verify if they are compatible, as the Official Records of the VCLT point out<sup>255</sup>. The maxim finds support in the decisions of the ICJ as well<sup>256</sup>. But does this mean that more general treaties may never be deemed to conflict with specialized treaties on subject matters they encompass? Is it impossible for parties to create a treaty that, to be effective, requires a revision of a broad scope of earlier treaties, unless the parties actually name those treaties in a conflict clause? Such a position would surely create many uncertainties in the case of treaties for regional economic integration and multilateral human-rights law-making. And, incidentally, which one is the more general treaty and which one the specialized? Compare for instance a human rights convention with a DTA. Is the DTA the more specialized because it deals only with income tax and not with “general” matters? Or is the human rights convention the more specialized treaty because it deals with fundamental human rights whereas the DTA deals with less fundamental matters as, eliminating double taxation, investment and exchanging information? Or, should *lex specialis* be seen in terms of the states that are a party to the convention? Is a bilateral treaty then always *lex specialis* compared to a multilateral one?<sup>257</sup>

Except when the treaties clearly address the same subject matter and one deals with a “sub-part” of the other, one will realize that both treaties are “special” in their own right.

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<sup>254</sup> Referring to Annex I of the SCM-Agreement, which lists examples of export subsidies, including “e) the full or partial exemption remission a deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises”.

<sup>255</sup> Statements in the Official Records, second session, by Sinclair (85<sup>th</sup> meeting) and Waldock (91<sup>st</sup> meeting); See also Sinclair, *ibid* ft. 204, p. 69.

<sup>256</sup> *Gabcikovo-Nagymaros Project case*, ICJ Reports 1997, p. 76; *Ambatielos case* (jurisdiction) ICJ Reports 1952, p. 28.

<sup>257</sup> Villiger, M., “Customary International Law and Treaties”, Martihus Nijhoff, 1985, p. 36.

In my view, that another treaty is special and thus not incompatible (which comes down to using the maxim *lex specialis*) may often be a dangerous simplification. It may not be forgotten that in view of the introduction of the general rule of interpretation in the VCLT in 1969<sup>258</sup> and in view of the fact that the International Court of Justice deemed art. 31 VCLT declaratory of customary international law in the 1990ies<sup>259</sup>, the value that is contributed to most maxims for interpretation purposes by scholars has significantly decreased<sup>260</sup>. Whatever the reliance that has been put upon the maxim *lex specialis* to solve treaty conflicts in the past, it needs at present to be formulated in terms of art. 31 VCLT to have effect. It is doubtful whether the general rule of interpretation, with all the different elements and instruments it takes into account, is easily reduced to such a simple notion as *lex specialis* across the board. A clear and undoubted application of the maxim would be when a DTA without special rules for income from international air transport is followed or preceded by a treaty to avoid double taxation on air transport. In absence of an air transport tax treaty, income from such activity resorts under the rule of art. 8 of the DTA (shipping, inland waterways and air transport). This changes when parties also conclude an air transport tax treaty. Even when the parties “forget” to include a conflict clause, the air transport tax treaty shall govern income out of such activities.

Perhaps Schwarzenberger offers a more realistic approach than a radical emphasis on *lex specialis*:

“Whether clauses of a prior or subsequent treaty between identical parties have precedence over each other, or special obligations of one treaty prevail over more general ones of another, depends on the circumstances of each individual case”<sup>261</sup>

It follows from all this that the intent of the parties must be established, by the operation of the general rule of interpretation and if appropriate by supplementary means of interpretation. If it can be established in good

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<sup>258</sup> Or at least the codification of the customary rules on the subject.

<sup>259</sup> First, in 1991, the ICJ proceeded to explicitly recognize art. 31 and 32 VCLT in these terms: “These principles are reflected in art. 31 and 32 of the VCLT, which may in many respects be considered as a codification of existing customary international law on the point” (Arbitral Award of 31 July 1989, *ICJ Reports*, 1991, p. 70, par. 47); Between 1993 and 1997, the Court later dropped all qualifications, and stated that art. 31 and 32 VCLT must be considered as reflections of customary international law, without any reservations. See on this issue, Bernardez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in *Liber Amicorum*, Kluwer, 1998, p. 737.

<sup>260</sup> Vallat, “The Vienna Convention on the Law of Treaties”, 40 *Annuaire de l’AAA* 1970, p. xxiv.; Mus, J. B., *ibid* ft. 205, p. 218.

<sup>261</sup> Schwarzenberger, G., *ibid* ft. 251, p. 474.

faith that the ordinary meaning of the treaty terms, taken in their context and in the light of the object and purpose of the treaty, the intent of the parties must have been that a later general treaty was to change the relationship created by an earlier more specialized one, so be it. Similarly, when a later specialized treaty falls under the scope of an earlier more general treaty, the provisions of the earlier one may stand (and the later treaty will be applied subject to the provisions of the earlier treaty) if it can be established that this is what parties must have agreed. Both interpretations may be derived on the basis of less than an explicit conflict clause naming the other treaty. All the elements and instruments named in art. 31 VCLT and if appropriate in art. 32 VCLT may or must be called upon.

*f) Special attention for ‘object and purpose’*

In my view, obviously besides the terms of the treaty and their context, the *object and purpose*<sup>262</sup> of a treaty may be quite important for trying to establish if there is indeed an incompatibility. After all, par. 1 of art. 30 VCLT and par. 1 of art. 59 (to which art. 30 VCLT refers in its par. 3) put the subject-matter of a treaty center-stage, and this is obviously closely related to the object and purpose of a treaty. The object and purpose of a treaty also qualifies the ordinary meaning of treaty terms, and has a recognized impact on tax treaty interpretation<sup>263</sup>. It must therefore also play an important role in the interaction between interpretation and conflict, between art. 30 VCLT and art. 31 VCLT<sup>264</sup>. The object and purpose of a treaty may make it possible that a *prima facie* overlap in language is resolved through interpretation, because it allows to give the language of the treaty a qualified meaning in the light of its object and purpose. The opposite is also true. In view of the object and purpose of a treaty, it may be required to give its terms such a meaning that a conflict with an earlier or later treaty can hardly be avoided. Chances of that happening are of course greater involving law-making multilateral conventions that create a composite system of rules that is to be

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<sup>262</sup> Yasseen notes that the object is what parties agreed, the norms they created etc., while the “purpose” is what parties actually tried to achieve. The fact that the VCLT reads “object and purpose” and not “object or purpose” seems to indicate that there may indeed be a difference, but the case law of the World Court has often used the words as synonyms (De Visscher, “Problèmes D’Interprétation Judiciaire en Droit International Public”, Paris, 1963, p. 62). In the Young Loan Arbitration (59 *ILR* 540) and in the Guinea Bissau Arbitration (77 *ILR* 665), the tribunals held that there was indeed a difference between the “object” of a convention and its “purpose”.

<sup>263</sup> *Thiel v. Federal Commissioner of Taxation* (1990) 171 CLR 338 FC 90/034, Judge McHugh, consideration 13.

<sup>264</sup> Slotboom, M., “Do different treaty purposes matter for treaty interpretation?”, *J.I.E.L.*, 2001, p. 557-579.

interpreted and applied over a long time, such as human rights conventions and treaties for regional economic integration. The same can, depending on the circumstances, perhaps be said for treaties that were concluded to bring about a definite but far-reaching goal, such as the “establishment of a free market” or the “settlement of disputes in a peaceful manner”. It is in this respect interesting to note that several authors base themselves on the differences in “object and purpose” between DTAs on the one hand and the EC Treaty on the other hand, to reject the notion that the principle of non-discrimination in both treaties should be given the same meaning<sup>265</sup>.

The importance to be attached to the object and purpose of treaties with respect to assessing *prima facie* incompatibilities is confirmed by the jurisprudence of the ECJ. In an Opinion delivered upon request by the Commission related to European Free Trade Association and the creation of the European Economic Area, the ECJ held that

“the fact that provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically.[...] With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the contracting parties. In contrast, as far as the Community is concerned, [...] the objectives go far beyond that of the agreement. It follows [...] that the divergences which exist between the aims and context of the agreement, on the one hand, and the aim and context of Community law, on the other, stand in the way of the achievement of the objective of homogeneity in the interpretation and application of the law of the EEA”<sup>266</sup>

In the *Metalsa* case the ECJ decided along the same lines that the interpretation of art. 90 EC Treaty<sup>267</sup> could not simply be transposed to art. 18 of the Free Trade Agreement between EEC and Austria<sup>268</sup> because

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<sup>265</sup> Vogel, K., “Double Taxation Conventions”, 3ed, Kluwer, 1997, p.1283.; Avery Jones, “Tax Treaty Interpretation”, *Cah. Dr. Fisc. Int.*, Vol. 1, p. 361-362.; Ward, J., “Tax Treaty Interpretation”, *Cah. Dr. Fisc. Int.*, Vol. 1, p. 179.; See also below part 5.

<sup>266</sup> Opinion, 1/91[1991] ECR I-6079; See also *Polydor v. Harlequin Record Shops* c-270/80 ECR 1982 P. 348 Par 15.

<sup>267</sup> Ex-article 95 EC Treaty on the prohibition to impose internal taxes.

<sup>268</sup> EEC No. 2836/72 of 19 December 1972, OJ 1972, 31 December –JO L 300, p. 3. Art. 18 of that treaty differs in wording somewhat with art. 90 but essentially provides in a prohibition of ‘measures or practice of internal fiscal nature’ which discriminates

“the objective of the establishment of a common market does not form part of the free trade agreement”<sup>269</sup>.

The object and purpose of a treaty may also bring treaties into conflict with each other over time. It may namely require an evolutive interpretation of treaty terms, and thus it may infringe upon the scope of other treaties gradually. That two treaties do not conflict at present does not necessarily mean that they never will. Even modest treaty systems may by the operation of subsequent agreements and practice become quite ambitious and overlap other treaties<sup>270</sup>.

The object and purpose of a treaty is to be taken into account to determine if a difference in operation between two treaty regimes is to be considered complementary or if the one excludes or restricts the other. Many treaties, including DTA's, are concluded to create and maintain certain rights for the benefit of the nationals or residents of states which usually translate in a limitation of the domestic rules of the other state<sup>271</sup>. If the object and purpose is indeed the protection of individuals, this should be reflected in the interpretation-exercise that takes place in case of a possible conflict between two treaties. Provided the parties did not indicate another intention<sup>272</sup>, the different protection-measures of two seemingly conflicting treaties should in that case most probably be seen as complementary and not as restrictive or exclusive in the light of the object and purpose of both treaties.

*g) Subsequent agreements and practice*

Another element that may play an important role to resolve treaty conflicts by interpretation is the effect of subsequent agreements and practice. As treaty conflicts will almost always occur between treaties whose conclusions are separated from each other in time, the question is raised what relations the parties maintained in the meantime. Have both, conflicting treaties been applied at once by the parties during their simultaneous existence? If so, can it be concluded that there is an

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between domestic products and those originating in the territories of the other contracting party.

<sup>269</sup> *Metalsa* [1993] ECR I-3751 par. 15 and 16.

<sup>270</sup> See below part 4.

<sup>271</sup> The same can be said of bilateral or multilateral investment treaties, human rights treaties, etc.

<sup>272</sup> Which should be established by means of art. 31 VCLT and possibly art. 32 VCLT.

agreement between the parties or a practice which establishes the agreement of the parties regarding its interpretation?<sup>273</sup>

### 3.5. Conclusions as to the definition of “incompatibility”

As there is a duty to interpret *prima facie* conflicting provisions as far as possible in such manner that they become compatible, it is fair to say that true incompatibility only occurs when provisions are to such an extent *irreconcilable that interpretation does not suffice*, but that a revision is needed. The most obvious example of this situation is that of mutually exclusive provisions. By following the one, you necessarily violate the other because they are *opposites*. They cannot exist besides each other. Such incompatibility is beyond repair through interpretation and the *lex posterior*-rule may have to be called upon to determine priority. If the earlier treaty determined that only mediation may be used for the settlement of disputes and the later treaty provides that only arbitration shall be used for the same disputes, it is clear that by satisfying the one provision the other is necessarily breached. In this case, therefore, the later provision shall prevail.

Another situation occurs when two treaties related to the same subject matter create rights and obligations that do not necessarily exclude one another. They may be complementary, even if it is unclear if the parties to the treaties realized that this would be the effect of the combined operation of the earlier and the later treaty. Whether the treaties complement or exclude each other must be derived from the terms of the treaty in their context, and –perhaps most importantly- in the light of the object and purpose of the treaty and in good faith. If an earlier treaty provides in a mediation for settlement of disputes, for example, and the later treaty in an arbitration procedure, there is no reason why both would not apply provided no conventional conflict clause would explicitly or implicitly indicate otherwise. The later treaty does not *ipso facto* displace the earlier in this case, and there is no need to call upon the *lex posterior*-rule.

One could say therefore that two provisions from different treaties are incompatible in the sense of art. 30 VCLT if <sup>274</sup>:

- (1) There are two provisions from different treaties providing in different rights and/or obligations for the contracting states, *and*

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<sup>273</sup> Art. 31(3) VCLT.

<sup>274</sup> In the same sense: Jenks, W., “The conflict of law making treaties”, *BYIL*, 1953, p. 426; Vierdag, *ibid* ft. 240, p. 100.

- (2) They both apply to the same situation at the same time *and*
- (3) Observance of at least one ipso facto results in the non-observance of the other *and*
- (4) The difference cannot be resolved by interpretation but requires revision of at least one of the treaties.

#### **4. The Effect of Non-Tax Treaties on the Interpretation of Double Taxation Agreements**

The issue of treaty conflicts is, as was already discussed above, intrinsically linked with that of treaty interpretation. This association is in the general rule of interpretation established by the duty to take treaties in force between the parties<sup>275</sup> into account when interpreting another treaty. Those are namely included in “any relevant rules of international law applicable in the relations between the parties” of art. 31(3) c) VCLT<sup>276</sup>. Such a treaty may alternatively be comprised in the context or is at least to be taken together with it, as the first sentence of art. 31 (3) VCLT states<sup>277</sup>. The European Court of Human Rights, for example, defined the term “forced or compulsory labor” in the ECHR, with reference to the International Labor Convention No. 29<sup>278</sup>. International courts often

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<sup>275</sup> It must be deemed that “the parties” refers in this subparagraph to the parties of a treaty, and not, as Palmetier and Mavroids suggest, only to the parties of a dispute on the interpretation of the treaty (Dispute Settlement in the WTO Practice and Procedure, p. 57).

<sup>276</sup> Yasseen, “L’Interprétation des traités d’après la Convention de Vienne sur le droit des traités, *Recueil des Cours*, 151 (1976-III), p. 63. It also includes all sources of international law including treaty-rules, customary law and general principles of international law; This element of treaty interpretation is in part prompted by the jurisprudence of the World Court which asserts that treaties should for as much as possible be interpreted in accordance with more general rules of international law (See De Visscher, *ibid* ft. 86, p. 92-97); The international legal order is, as it were, the system of reference for treaty interpretation (Verzijl, in the G.Pinson arbitrage, *Receuil ONU des sentences arbitrales*, vol. V, p. 422).

<sup>277</sup> In the *Territorial Dispute case* (*ICJ Reports* 1994, p. 26), the ICJ referred to a treaty between the same parties that was concluded on the same day as the treaty in dispute. The ICJ mentioned this as “context of the treaty” in order to “reinforce” the conclusions which the Court had reached. This seems consistent with art. 32 VCLT although the Court did not say explicitly whether it was referring to the other treaty as a supplementary means of interpretation or as part of the general rule on interpretation. See also the *Aegean Sea case*, *ICJ Reports* 1978, p. 23 par 55.

<sup>278</sup> VanderMussele, Series A No. 70 par 32 and 33 (for other examples, see Merrills, J.G., “The Development of international law by the European Court of Human Rights”, Manchester university press, Second edition, 1993, pp. 218-219).

consider a term that needs interpretation against its background, namely another treaty in force between the party<sup>279</sup>.

According to the ICJ “it is a general rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it”<sup>280</sup>. Schwarzenberger even observes that “the necessity of interpreting a treaty against the whole background of the treaty relations between the same parties is an unavoidable judicial duty”<sup>281</sup>.

Practically, Aust cites as an example that today a reference in a treaty (including, so it seems, a tax treaty) to the continental shelf would have to take into account the UN Convention on the Law of the Sea of 1982<sup>282</sup>. Harris raises similar questions with respect to the definition of “warship” in the High Seas Convention and in the Territorial Sea Convention<sup>283</sup>. For examples relating to DTAs we need not look far. DTAs commonly use several terms which are the subject of definitions or descriptions in other international treaties, namely in multilateral conventions to which both DTA-states may be a member. Terms such as ‘stateless person’<sup>284</sup>, ‘continental shelf’<sup>285</sup>, or “nationality”<sup>286</sup> would certainly benefit greatly from being interpreted in line with the relevant rules on international law

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<sup>279</sup> Thirlway, H., “The Law and procedure of the international court of justice 1960-1989”, 62 *BYIL* 1991, p. 66.

<sup>280</sup> Rights of Passage over Indian Territory, Preliminary Objections (judgment) ICJ Reports 1957, p. 142; *Fisheries case* (jurisdiction), *ICJ Reports* 1998, p. 460 (“the Court shares [...] the view that an international instrument must be interpreted by reference to international law”).

<sup>281</sup> Schwarzenberger G., “International law”, Vol. 2, Stewens, London, 1968, p. 528.

<sup>282</sup> Anthony Aust, “Modern treaty law and practice”, Cambridge university press, 2000, p. 195.

<sup>283</sup> Harris D.J., “Cases and Materials on International Law”, Fifth edition, Sweet & Maxwell, 1998, p. 815.

<sup>284</sup> 1961 Convention on the Reduction of Statelessness; Convention relating to the Status of Stateless Persons, UNTS, 360, p. 117.; Certain treaties on the status of refugees and right of asylum also define or describe a “stateless person”.

<sup>285</sup> Convention on the Continental Shelf, 29 April 1958.

<sup>286</sup> The term ‘national’ is defined in the OECD Model art. 3, but ‘nationality’ is not. See on this issue for example the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws, which among other things regulates that if a person has more than one nationality he shall, within a third state be treated as if he had only one; or the one where he is habitually resident or the one with which he appears in fact to be the most closely connected (art. 5).; However, in *Avery Jones v CIR*, the UK High Court accepted that the term “citizen” in the UK-US DTA only referred to US nationals and not to UK nationals as the term “citizen” itself was unrecognized in UK law [1976] STC 290.

in force between the parties<sup>287</sup>. From the perspective of international law, which is usually strongly opposed to interpretations of treaty terms according to the domestic law of one of the states<sup>288</sup>, it would in my view be very difficult to justify to use art. 3(2) OECD Model to establish the meaning of such terms if perfectly acceptable “international” definitions are in force between the parties.

More controversial, perhaps, is the example I discuss below on discrimination in DTAs and BITs evokes obvious questions of interpretation as well as compatibility<sup>289</sup>. May or must the DTA’s non-discrimination rule be interpreted as the BIT’s national treatment-provision because the latter constitutes a “relevant rule of international rule” for the former?<sup>290</sup> Essentially the same issue presents itself with respect to the notion “treatment no less favorable” in art. 24 DTA and art. 8 (ex art. 6) of the EC Treaty<sup>291</sup>.

Note that this rule is not to be confused with the interpretation of treaty terms based upon *parallel treaties*. Parallel treaties are treaties on a

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<sup>287</sup> See below.

<sup>288</sup> Ottoman Public Debt Arbitration of 18 April 1925, RIAA, Vol. I, p. 544.; *North Atlantic Fisheries Arbitration*, Award by the Permanent Court of Arbitration, XI RIAA 167, p. 186-8.; *US nationals in Morocco case*, ICJ Reports, 1952, p. 176.; *Rainbow Warrior*, RGDIP 1990 94, p. 843, Group dissenting opinion Lauterpacht, Wellington Koo and Spender, *Aerial incident case* (preliminary objections), ICJ 1959, p. 189.

<sup>289</sup> See below. Point 3.3.

<sup>290</sup> Of course, in isolation from all other rules of interpretation, the opposite could also be said.

<sup>291</sup> According to Vogel, there are several reasons that militate against applying the ECJ case law regarding art. 6 EC Treaty to the interpretation of art. 24 OECD Model. “Whereas non-discrimination plays a central part in helping the EC advance towards its economic goal of reaching a single market, art. 24 is one of the special rules of the OECD Model which is not necessary to achieve the primary treaty goal of avoiding double taxation and preventing fiscal evasion. This leads to a more narrow interpretation of the rule” (Vogel, K., “Double Taxation Conventions”, *ibid* ft.183, p. 1283.; See also Ward, J., *ibid* ft. 265, p. 179.). Avery Jones believes, along the same lines that “EU law on discrimination is too different from the treaty non-discrimination rule to have any effect on the interpretation of the tax treaty provision (*ibid* ft. 265, p. 361-362).; Adonnino, P., CDFI LXXXVIIIb, p. 19 does not share Vogel’s view. According to Helminen, the anti-discrimination article of the EC Treaty must be taken into account when interpreting tax treaties and “Therefore, not only discrimination based on nationality but also discrimination based on other factors, which means indirect discrimination based on nationality (...) is forbidden” (Tax Treaty Interpretation, p. 81); See also Bizoli, G., Tax Treaty Interpretation, p. 207.; The duty to interpret DTAs in line with EC law was accepted by the Italian Supreme Court decision 8 May 2000, No. 5768 at point 3.4. and 2 February 2000, No. 1122 at point 4.6.; Lehner, M., Interpretation of Tax Treaties according to German Theory and Practice, in Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany, Vogel (ed.), Kluwer, 1998, p. 95.

similar subject matter as the one needing interpretation but that were concluded between third states, or between one same party and a third state<sup>292</sup>. Without wishing to discuss this interesting matter in-depth, it may in any event be said that there is much authority in the jurisprudence of the World Court to refer to similar treaties for the purpose of treaty interpretation<sup>293</sup>. As Chang noted, in the *Oder case*, the *Venezuelan bond case* and the *Decision regarding interest on awards*, to name but a few examples from the classics of international jurisprudence, the disputed terms were interpreted in conformity with principles and practices followed by nations in similar treaties<sup>294</sup>. More recently, the ICJ has invoked similar treaties to interpret treaty terms in the Oil Platforms case<sup>295</sup>, in the Territorial Dispute between El Salvador and Honduras<sup>296</sup>, and in the Military and Paramilitary Activity in Nicaragua case<sup>297</sup>. But, whatever the authority to use similar treaties for interpretation purposes (or similar terms in different instruments)<sup>298</sup>, under art. 31 (3) c) VCLT only treaties between the same parties can be considered<sup>299</sup>.

Asserting that non-tax treaties shall be “taken into account” for the interpretation of DTAs is however still a long way from making any practical determination. How can be determined exactly what influence a non-tax treaty should be given in giving a meaning to tax treaty terms? There is not much guidance available on this issue in case law or scholarly writings. A couple observations can however perhaps be of some use.

First of all, it must be recognized that the text of art. 31(3) c) VCLT makes it at least *possible* that one treaty does indeed affect the interpretation of another. Art. 31 (3) c) VCLT has an obligatory character,

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<sup>292</sup> Reuter, P., *ibid* ft. 203, p. 98 (“groups of treaties covering similar subjects”).

<sup>293</sup> Matscher, F., “Vertragsauslegung durch Vertragsrechtsvergleichung in der Judikatur internationaler Gerichte”, in *Festschrift für Hermann Mosler*, 1983, p. 545.

<sup>294</sup> As quoted by Chang Yi-Ting, “The Interpretation of Treaties by Judicial Tribunals”, 1933, p. 74.

<sup>295</sup> *ICJ Reports*, 1994, pp. 813-814 (even referring to a “US Model treaty”).

<sup>296</sup> *ICJ Reports*, 1992, p. 585, par. 580 (“In considering the ordinary meaning to be given to the terms of the treaty, it is appropriate to compare them with the terms generally or commonly used in order to convey the idea that a delimitation is intended”).

<sup>297</sup> Where the ICJ compared a clause in the US-Nicaraguan Treaty of Amity (on the protection of essential interests) with a similar clause from GATT *ICJ Reports* 1986, p. 116.

<sup>298</sup> *Laguna Arbitration*, 113 *ILR* 72, par. 144 (referring to similar material being treated in a similar manner)

<sup>299</sup> According to Yasseen (p. 80) relevant rules of international law that are *not* applicable between the parties, which would include third party similar treaties, is included in art. 32 VCLT.

although its binding character in practical terms is limited by the notion of reasonableness as an element of good faith<sup>300</sup>. That the parties did not exactly foresee the combined operation or interpretation of both treaties is not relevant in this regard<sup>301</sup>. In the eyes of the VCLT, the treaty relationship between two parties is not always static. One must thus at least be prepared to consider the possibility.

Secondly, as was already pointed out above, art. 30 and art. 31 VCLT may, so far as is possible without becoming contrary to good faith, have the combined effect of interpreting an earlier treaty in a way that would not have been considered appropriate before. This evolution, if you will, may take place in order to avoid that the earlier treaty would have to be deemed incompatible with a later treaty relating to the same subject matter. Of course, this evolution is only possible if the later interpretation is in accordance with the other elements and instruments of art. 31 VCLT.

Thirdly, because the “relevant rules of international law” are mentioned in art. 31 VCLT and not in art. 32 VCLT, it would not be in accordance with the VCLT to invoke supplementary means of interpretation (alone) to reject the effect a treaty between the parties may have on the interpretation of a DTA.

Fourthly, art. 31 (3) c) VCLT does not only address relevant rules of international law that became in force between the parties *following the treaty that needs interpretation*<sup>302</sup>. The same principle applies therefore undoubtedly for rules derived from non-tax treaties concluded before the DTA was concluded. The treaty include terms that were meant to be affected by change, such as “territorial sea”<sup>303</sup>

Fifthly, most importantly so it seems, it is clear that the adjective “relevant” in art. 31 (3) c) VCLT must be seen as a serious qualification of the rule that other treaties in force between the parties must be taken into account together with the context. According to Villiger, “relevant” means that “it must concern the subject-matter in question”<sup>304</sup>. Yasseen, in what seems to be a less strict understanding of the term, argues that “la

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<sup>300</sup> See below. Point 3.3.

<sup>301</sup> Obviously, a “second” treaty that was concluded as an amendment to the tax treaty, or to add a clause of interpretation, will definitely affect the interpretation of that tax treaty but it would be considered as a “subsequent agreement”.

<sup>302</sup> Higgins, R., “Some observations on the inter-temporal rule in international law, in Theory of International Law at the Threshold of the 21st Century”, p. 173.; Pauwelyn, J., *ibid* ft. 222, p.574.

<sup>303</sup> Waldock, Yearbook ILC, 1964, vol. I, p. 316.

<sup>304</sup> Villiger, M., *ibid* ft. 257, p. 268.

règle de droit international devrait avoir un certain rapport avec ce traité”<sup>305</sup>. According to the WTO Panel Report on the FSCs, there should be some “indication of the drafters of the treaty” to establish if another treaty is relevant<sup>306</sup>.

Treaties in force between the parties that are not relevant to the treaty that needs interpretation should thus not be taken into account together with the context. In the *La Bretagne Arbitration*, for example, the tribunal took into consideration the consequent conclusion of the Convention on the Law of the Sea (in relation to a fishing regulation on filleting at sea introduced by Canada allegedly in contravention with a treaty with France), it noted that that Convention did not address *the specific subject of the treaty dispute*<sup>307</sup>. The WTO Panel Report on US Restrictions on Imports of Tuna is another example of a decision of an international tribunal with a limited interpretation of what can be considered “relevant” in these matters<sup>308</sup>.

What is “relevant” is a determination that must be made in good faith, which entails the principle of reason. In accordance with the discussion of relevance, the maxim *lex specialis* can in this respect be of some use to characterize certain relationships, but it is certainly not absolute<sup>309</sup>. The notion and function of relevance in art. 31 (3) c) VCLT is reminiscent of the notion “related to the same subject matter” in art. 30 VCLT but art. 31 (3) c) VCLT does by no means explicitly limit the invocable treaties to those which have the same subject matter as the one that needs interpretation. The VCLT itself, for example, though it certainly has a different subject matter than a DTA, is still more than “relevant” to tax treaty interpretation. Perhaps it would be more useful to consider the (related) notion of “object and purpose” in this regard. The object and purpose of a treaty is closely related with its subject-matter, but it is more wide in its implications for treaty interpretation, as was already discussed above. It is true that the closer the two treaties (between the same parties) are in terms of subject-matter, the higher the likelihood that the other treaty has a bearing on the meaning of tax treaty terms. An agreement on mutual assistance in the collection of income tax debts, for example, is in theory in a much better position to influence the interpretation of a tax treaty than the provisions of GATT. The Arbitration Convention’s art.

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<sup>305</sup> Yasseen, *ibid* ft. 276, p. 63.

<sup>306</sup> Panel Report FSC, 4.751 (on whether the OECD Guidelines on Transfer Pricing may be applied to explain the SCM Agreement).

<sup>307</sup> *La Bretagne Arbitration*, 82 *ILR*, p. 629-630.

<sup>308</sup> Although the decision here concerned subsequent agreements and practice “relating” to GATT, and not relevant rules of international law; Tuna Panel Report, 33 *ILR* 1994, p. 892.

<sup>309</sup> See above. Point 3.3.

3(2) is just an explicit illustration of this<sup>310</sup>. It refers, for the purpose of interpretation of the Arbitration Convention in matters of taxation and transfer pricing, to the clearly relevant provisions of DTAs.

But it need not always be so. Many of the DTA's terms that have little direct relationship to its technical rules on taxation may greatly benefit from taking into account other treaties between the parties as well as rules of customary international law. As was said above, this is the case, *inter alia*, with 'continental shelf'<sup>311</sup>, 'nationality'<sup>312</sup>, 'stateless person'<sup>313</sup>, 'sea bed'<sup>314</sup>, 'air transport', 'home port', 'ratification', 'certificate of ratification', 'diplomatic channels', "diplomats and consular personnel" etc. The interpretation of *these* DTA terms in accordance with other treaties and conventions in force between the parties will perhaps be quite acceptable to most states and scholars. It seems much less certain if that is also the case for terms with a proper tax meaning. How about the notion of "discrimination" or "no less favorable" of art. 24 OECD Model in view of the national treatment article of BITs, for example, or even the prohibition of discrimination found in the EC Treaty<sup>315</sup>?

In summary, however, as the language of art. 31 (3) c) already indicates, this is no hard and fast rule. The relevance of another treaty for the interpretation of a DTA always depends on all facts and circumstances of the case, especially on the object and purpose of the two treaties<sup>316</sup>. There must be a valid reason for applying the norms of the one treaty on the other. Caution is always advisable, as De Visscher noted<sup>317</sup>. Voicu also reflects that it is telling that the ILC did not include a reference to treaties between the same parties *in pari materia* explicitly in the definition of context<sup>318</sup>. The same author continues:

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<sup>310</sup> "Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the *double taxation convention* between the states concerned".

<sup>311</sup> Convention on the Continental Shelf, 29 April 1958.

<sup>312</sup> See for example the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws, which among other things regulates that if a person has more than one nationality he shall, within a third state be treated as if he had only one; or the one where he is habitually resident or the one with which he appears in fact to be the most closely connected (art. 5).

<sup>313</sup> 1961 Convention on the Reduction of Statelessness; Convention relating to the Status of Stateless Persons, UNTS, 360, p. 117.; Certain treaties on the status of refugees and right of asylum also define or describe a 'stateless person'.

<sup>314</sup> UN Convention on the Law of the Sea, 10 December 1958.

<sup>315</sup> See below Part 5 and above text accompanying footnotes 108-115.

<sup>316</sup> See above Point 3.3.

<sup>317</sup> De Visscher, *ibid* ft. 262, p. 104.

<sup>318</sup> Voicu, I., *De l'interprétation authentique des traités internationaux*, A. Pédone, 1968, p. 57-58.

“[...] l’utilité du recours aux traités *in pari materia* dépend largement de chaque cas d’espèce, et l’invocation des traités *in pari materia* est censé rester sujet à caution. Il est douteux qu’on puisse, en toute hypothèse, avoir recours à ce procédé”<sup>319</sup>

## **5. Double Taxation Agreements and a Investment Treaties: Non-Discrimination vs. National Treatment<sup>320</sup>**

By way of illustration and application of the regulation on treaty conflicts that was discussed above, I now take the example of the *prima facie* conflict between the DTA’s non-discrimination article and the rule of national treatment in bilateral investment treaties.

### **5.1. Describing the issue**

DTAs almost invariably include a rule that forbids certain kinds of tax-related discrimination. This rule is found in the OECD Model art. 24. Actually, the non-discrimination article of DTAs has very little to do with eliminating double taxation and much more with the historical development of commercial treaties and DTAs. Before DTAs became widespread, treaties on friendship, commerce and navigation were among the few treaties that had any tax-provisions. As these treaties included a standard of treatment for foreign investment, possibly the standard of national treatment, the concept was borne that also in terms of tax-treatment, foreign investment or commerce should not be treated less favorably than that of the state’s own nationals. As more and more treaties were being concluded specifically for taxation, it seemed to make more sense to include that part of national treatment in the new tax treaties<sup>321</sup>. In fact, the historical background to the non-discrimination

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<sup>319</sup> Voicu, I., *ibid* ft. 318, p. 57 (referring to treaties between the same parties).

<sup>320</sup> For the purpose of convenience, with the term “bilateral investment treaty” I also mean the somewhat older “treaties of friendship, commerce and navigation”, and so-called “treaties of amity”. As to the bilateral character of these investment treaties, an OECD initiative for a Multilateral Agreement on Investment stalled in 1997. The ASEAN Multilateral Agreement for the Protection of Investment excludes taxation in its art. 5.

<sup>321</sup> With reference to the fact that the DTA’s non-discrimination article is virtually the only article that does not only apply to the taxes mentioned in the treaty, but to all taxes, it can be argued that a DTA is not the ideal place for this provision. Australia and New Zealand reject the inclusion of a non-discrimination rule in double taxation agreements on a matter of principle. They argue, correctly, that such a clause is not necessary to pursue the elimination of double taxation. Accordingly, they have reserved their position to art. 24 of the OECD Model (Commentary 24/64). See also Gordon, R., *Cahiers Dr. Fisc. Int.*, lxxviii b, p. 273.; Fiscal Committee of the OEEC,

rule of the DTA is an indication as to any possibly incompatible rules in other treaties. Many bilateral investment treaties (“BITs”) currently include a national treatment-standard (possibly with certain exceptions<sup>322</sup>) for foreign investments made by the nationals or companies of the one state (home-state) in the territory of the other (host-state). As is recalled in more detail below, this standard simply means that the host-state may not treat the nationals or companies of the other state less favorably than its own nationals. The question is thus raised if these two provisions are always compatible and if not so, if and how this incompatibility can be resolved with reference to art. 30 VCLT.

## 5.2 The standard of national treatment in bilateral investment treaties

It is appropriate to first recall some basics on the standard of national treatment in BITs. A typical clause on national treatment in a BIT reads as follows:

“Neither contracting state shall in its territory subject investments or returns or nationals or companies of the other contracting state to treatment less favorable than that which it accords to investments or returns of its own nationals or companies...”<sup>323</sup>

Essentially, as was noted above, national treatment is a treatment not less favorable than that granted to domestic investors in every way<sup>324</sup>. Put another way, a state may not discriminate on the basis of nationality<sup>325</sup>. This standard does not only apply to the property itself, but also to the business activity involved in the operation of an investment to conduct business effectively<sup>326</sup>. Some questions arise as to how absolute national

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Report 1958, par 31-33 (“tax discrimination has no connection with problems of double taxation”).

<sup>322</sup> Common exceptions are treatment related to membership of a free trade area, reserved sectors and activities, state enterprises, etc. See on the exception for DTAs below.

<sup>323</sup> Art. 3 of the UK Model Agreement for the promotion and protection of investments (I have omitted the mfn-reference here that is often included in the same article, paragraph or sentence in BIT’s).

<sup>324</sup> Sacerdotti, G., *ibid* ft. 227, p. 348.; Harris, D. J., *ibid* ft. 283, p. 520.

<sup>325</sup> Sornarajah, M., “The international law on foreign investment”, Cambridge university press, 1994, p. 251.

<sup>326</sup> See for example the Protocol to the Model BIT of Germany, ad art. 3 (a), which mentions unrestricted buying of raw materials and fuel, marketing of products, etc.

treatment must be interpreted. Is every difference in treatment *ipso facto* illegal? In the light of the object and purpose of the BIT, which is to lend protection to investors and not to decrease their protection, it may be assumed that formally differential treatment that is still substantially equivalent may be deemed compatible with national treatment<sup>327</sup>. After all, sometimes a foreign investor is *de facto* or *de jure* in such a position that an excessively formal equality in treatment as a national may cause him more harm than good<sup>328</sup>. It is noteworthy that the US Model BIT, for example, adds in the standard of treatment that only “like situations” (between foreigners and nationals) are targeted<sup>329</sup>. A material difference in situation may warrant a difference in treatment<sup>330</sup>. On the whole, however, as Sornarajah notes, “the existence of an economically valid reason for the discrimination between nationals and foreign investors may not provide a justification for the discrimination”<sup>331</sup>. Any difference in treatment to the detriment of a foreign investor is thus always suspect, and almost always contrary to the standard of national treatment.

As was already noted above, the prohibition of discrimination is the essence of “national treatment”. In this respect, it is important to note that under international law, covert or indirect discrimination is assimilated with overt or direct discrimination. As the World Court has held in its cases on the minorities-treaties<sup>332</sup>, equality in fact is all that matters. In its *Advisory Opinion on the German Settlers in Poland*, the Court held that “[the Treaty] guarantees to racial minorities the same treatment and security in law and in fact as to other Polish nationals. [...] There must be equality in fact as well as ostensible legal equality in the sense of absence of discrimination in the words of the law”<sup>333</sup>. In the *Minority Schools in*

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Along the same lines, Sacerdotti notes (on p. 348), mentioning operating companies, making contracts, borrowing funds, granting of rights, importing equipment. See for example US-Russian BIT, art. I e).

<sup>327</sup> Sacerdotti, G., *ibid* ft. 227, p. 349.

<sup>328</sup> Suppose that in order to submit the annual return of the company, its foreign director is required to supply a copy of official home-state document relating to his person that simply does not exist in his country.

<sup>329</sup> Art. II of the US Model Treaty Concerning the Encouragement and Reciprocal Protection of Investment (Feb. 1992); See also UN Centre on Transnational Corporations, *Bilateral Investment Treaties*, p. 34, par. 132 (noting that some treaties explicitly limit the national treatment to circumstances where the foreign and the domestic investor find themselves in similar situations).

<sup>330</sup> Jennings and Watts, *ibid* ft. 178, p. 932.

<sup>331</sup> Sornarajah, M., *ibid* ft. 325, p. 251.

<sup>332</sup> It is true that the text, context and object and purpose of those minorities-treaties allowed the Court to conclude that discrimination in fact was (also) prohibited. The same can however be said of investment treaties.

<sup>333</sup> *Advisory Opinion on the German Settlers in Poland*, 1923, Series A/B 64, p. 18.

*Albania case*, the Court recalled that “the notion of substantial equality cannot be applied in the abstract”<sup>334</sup>.

### 5.3. Difference in terms of indirect discrimination

Notwithstanding the close resemblance in approach between the DTA’s non-discrimination rule and the BIT’s national treatment, differences can be distinguished even when only tax matters are considered<sup>335</sup>. Prof. Van Raad already noted that:

“the scope of the commercial treaty nondiscrimination clause is different (in some respects broader and in other respects narrower) from that of a tax treaty clause”<sup>336</sup>.

Some of these differences are quite obvious while others are far less prominent or even certain. One important feature of art. 24 (1) of the OECD Model is that it has generally been interpreted as only forbidding direct discrimination on the basis of nationality. A discrimination on the basis of residence is apparently not forbidden by the provision, at least not according to a significant portion of municipal court decisions and doctrine<sup>337</sup>. This is based on the standard of comparison that is to be applied to determine whether discrimination occurs. Under the language of the provision, the taxation and connected requirements must be “other or more burdensome than [...] nationals of that other state which are in the same circumstances”. In the tax systems of most countries, non-residents are indeed not in the same circumstances as residents for almost all tax purposes. This was confirmed in a 1992 addition to the OECD Model, which now reads “in the same circumstances in particular with respect to residence”, thus confirming the prevailing case-law quoted above and seemingly closing the debate.

When this feature of the non-discrimination rule of the DTA is confronted with the national treatment of a BIT, it is impossible not to reflect upon

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<sup>334</sup> *Minority Schools in Albania case* 1935, Series A/B 64, p. 19.

<sup>335</sup> As will be demonstrated below, BITs do as a matter of principle also address the investment-related tax measures of the host-state, unless specifically excluded.

<sup>336</sup> Van Raad, K., “Nondiscrimination in International Tax Law”, Kluwer, 1986, p. 252.

<sup>337</sup> See the examination by Van Raad, K., *ibid* ft. 336, p. 88-96.; Vogel, K., *ibid* ft. 291, p. 1282-1297.; Baker, Ph., “Taxation and the European Convention on Human Rights”, *BTR*, pp. 385-390.; Friedlander, L., “The role of non-discrimination clauses after GATT 1994”, *BTR*, 2002, pp. 78-81.; *Commissioner of Inland Revenue v. United Dominions Trust Ltd.*, 1973, 2 NZLR 555 (NZ CA); It seems that the Dutch Hoge Raad is more willing to include de facto discrimination in art. 24 OECD Model. See for example HR, 27,843, BNB 1993/71.

the different interpretation that “discrimination” is given in general international law. More precisely, the assimilation of indirect or covert discrimination with overt discrimination for the purposes of the standard of national treatment is pertinent for the comparison with the DTA’s non-discrimination rule. In view of the case law of the World Court above, and its emphasis on equality *in fact*, it can hardly be denied that there are many circumstances where a discrimination on the basis of residence can for all practical purposes be equated with a discrimination on the basis of nationality<sup>338</sup>. The same approach was followed by the European Court of Justice<sup>339</sup>, although the ECJ also recognizes that residents and non-residents are as a rule not in “comparable situations” for income tax purposes<sup>340</sup>.

Provided there is indeed a conventional rule that forbids discrimination<sup>341</sup>, such as the national treatment article in a BIT, indirect tax-discrimination may be within the scope of such a provision. This is particularly true for international investment (the subject of BITs) by *corporations*, because they are much less likely to modify the relationship between nationality and residence (given that both are identical to start with) than individuals. In the relationship between a foreign investor and a host-state, a tax-discrimination on the basis of residency is nearly always *in fact* a discrimination on the basis of nationality as well, or even predominantly. Avery Jones *at al.* noted and deplored this difference as well but decided

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<sup>338</sup> I do not suggest that general international law is blind to the fact that residents are taxed on their worldwide income and non-residents are taxed on their local income only. In the large majority of the cases, however, the fact of the matter is that a foreign investment in a host-state will generate almost all of its income within the territory of the host-state. The situation and assessment would be different in the case of a foreign investment in the host-state that generates income in third states. Because such an investment would in effect be free from taxation in most host-states, but domestic enterprises would be taxed on this foreign income, in that investor’s (unlikely) case, tax-discrimination based on residency perhaps does not amount to tax-discrimination on nationality. From the perspective of a BIT’s national treatment-standard the actual result of the individual set of facts is determinative; See on art. 24 OECD Model and tax-discrimination *de facto*: Vogel, K., *ibid* ft. 291, p. 1290.; Friedlander, L., *ibid* ft. 337, p. 80.

<sup>339</sup> Case C-330/91 *The Queen v. Inland Revenue Commissioners*, ex parte Commerzbank [1993] ECR I-4017, par. 14.

<sup>340</sup> Case C-279/93, (Schumacker) par. 31; C-80/94 (Wielocbx), par. 28.

<sup>341</sup> Customary international law does not impose upon states to tax residents and non-residents equally; *Burnet v. Brooks*, 288 U.S. 378 (1933); Noor, "Jurisdiction to Tax and International Income," 17 *Tax L. Rev.* 431 (1924). For a discussion of tax jurisdiction in general, see R. Martha, “The Jurisdiction to Tax in International Law”, Kluwer law, 1989.

that the wording of art. 24 (1) OECD Model does not leave any room for addressing indirect discrimination<sup>342</sup>.

Even if –explicitly or implicitly- a reference is found in the BIT to both investors being in “the same circumstances” it would seem that a tax-discrimination which is supposedly based on residence instead of nationality may be regarded an indirect discrimination of foreign investors in many circumstances. The notion “the same circumstances” in the context of national treatment refers to the business activity that was invested in<sup>343</sup>. It does not normally refer to the characterization of a foreign investor or investment for tax purposes by the host-state. However, the parties to a BIT *can* of course stipulate that residence must be taken into account in this regard. The Protocol to the German Model BIT provides for example:

“It is understood that [the national treatment and mfn-treatment] do not oblige a contracting party to extend to persons resident in the territory of the other contracting party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to nationals and companies resident in its territory”,<sup>344</sup>.

If the analysis above is correct, there is often a considerable difference in depth between the article on national treatment in a BIT and the non-discrimination article in a DTA. *This* difference at first glance results in a wider protection under the BIT than under the DTA. The application of the one rule or the other does not lead to the same result on this issue. Assuming for the sake of argument that this is indeed the case, this raises the question as to how this difference between the two kinds of treaties will play out.

#### 5.4. Solution to the difference relating to indirect discrimination

##### *a) General approach*

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<sup>342</sup> Avery Jones et al, “The non-discrimination article in tax treaties”, *BTR*, 1991, p. 451-453.; Vogel, K., “Double Taxation Conventions”, p. 1282. (both drawing comparisons with the interpretation the European Court of Justice gives to nationality-based discrimination, and not the standard of national treatment found in investment treaties, but both concern the issue of covert discrimination, or discrimination in fact.); *concurring*: Couzin, R. “Taxation and the Multilateral Agreement on Investment”, 12 *Tax Notes International*, p, 2049.; Jefferey R. J., “The impact of state sovereignty on global trade and international taxation”, Kluwer, 1999, p. 91-93.

<sup>343</sup> See the Protocol to the German Model BIT, and the BIT between UK and Belize.

<sup>344</sup> Ad art. 3 (c).

In what follows, it is assumed that there is indeed a prima facie conflict between a DTA and a BIT concluded between the same parties in terms of indirect discrimination. It may be recalled that, to establish the relationship between the national treatment-article in a BIT and the non-discrimination rule of a DTA, the *lex posterior*-rule only has a residuary character. Only in last instance will the date of conclusion of the treaties be allowed to govern the relationship between the two contracting states.

*b) Do a BIT and a DTA “relate to the same subject matter”?*

A preliminary question, of doubtful nature and function as was noted above, is if the two treaties “relate to the same subject matter”<sup>345</sup>. It is clear that both treaties do not *have* the same subject matter. It is also beyond dispute that since world war II, there is an international trend to regulate less tax matters by investment treaties<sup>346</sup>. However, it would go too far to say that DTAs and BITs do not even *relate to* the same subject matter, as art. 30 VCLT specifies. The subject matter of the BIT covers the host-state treatment of foreign investment and it is generally accepted in international law that this encompasses the tax-treatment of this investment<sup>347</sup> unless parties provide otherwise. Excessive taxation, for

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<sup>345</sup> As was discussed above, it is not certain if “relating to the same subject matter” may indeed be interpreted as a preliminary condition for applying art. 30 VCLT.

<sup>346</sup> The comments of Guttentag with respect to the tax aspects of the MAI (see above) are interesting in this respect: Joseph Guttentag, international tax counsel, U.S. Department of the Treasury, however, took a determined stance in enunciating U.S. policy on the MAI. According to Guttentag, the key issue is “the relationship between the MAI and our double tax agreements.” Although he said the United States is “strongly supportive of the MAI,” and favors reducing tax barriers to investment, Guttentag maintained that the United States is “fully convinced that the bilateral tax treaties are the way to resolve the major tax issues affecting investors.” Guttentag stressed that the United States recognizes that protecting investors is a high priority within the U.S. government, but argued that the nondiscrimination provisions in tax treaties offer the best solution to such issues. As far as dispute settlement is concerned, again tax treaties are the optimal way to resolve tax issues. Guttentag conceded, however, that expropriation and taxes used for expropriatory purposes should be covered by the MAI (Fernandez, A. M. and Lyon, S., “The Transatlantic Tax Outlook: European and U.S. Tax Relations”, 12 Tax Notes International 1923).; Easson, A.J., “Taxation of Foreign Direct Investment”, p. 150.; As the work and negotiations on the Mai were (temporarily?) abandoned, tax aspects were excluded from the treatment of foreign investment, but were included in terms of expropriation; See also below.

<sup>347</sup> Albrecht, A.R., “The taxation of aliens under international law”, 29 *BYiL* (1952), p. 173.; Whiteman, M., “Digest of International Law”, Washington DC, Department of State Publications, 1973, p. 1016.; Wortley, B., “Expropriation in Public International Law”, Cambridge University Press, 1959, p. 50-51.; See also the decision of the Iran-US Claims Tribunal, Award No. 460-880-2 of 29 December 1989, reprinted in 23 *Iran-US C.T.R.*, 378-8.

example, may constitute the equivalent of an expropriation in the sense of international investment law<sup>348</sup>. Several investment treaties mention explicitly that the levying of taxation may amount to indirect expropriation<sup>349</sup>. There are also many BIT's that explicitly acknowledge that treatment in terms of taxation is addressed by the national treatment or the mfn-standard<sup>350</sup> or falls under the scope of some other obligation found in the BIT, such as the free transfer of earnings<sup>351</sup>. There are even DTAs which acknowledge that the operation of BITs (or their predecessors) encompasses tax matters<sup>352</sup>. Finally, the ICSID tribunal decision in the case *Goetz vs. Burundi* clearly acknowledged that tax disputes are also investment disputes<sup>353</sup>. From the perspective of international law, therefore, taxation of aliens is definitely related to the international protection of foreign investment although states can of course choose to organize this protection exclusively by means of a DTA's non-discrimination article rather than by an investment treaty<sup>354</sup>.

<sup>348</sup> Shihata, I., "The World Bank Guidelines", 1993, Martinus Nijhoff Publishers, p. 88.; Brownlie, I., "Principles of public international law", 6<sup>th</sup> ed, Oxford University, 2003, p. 535.

<sup>349</sup> Dolzer, R., "Indirect expropriation of alien property", *ICSID Review*, 1986, p. 55.; Vandeveld, K., "United States Investment Treaties Policy and Practice", 1992, p. 216-222.; Art. 1110 NAFTA (including a reference to taxation in the expropriations-article).

<sup>350</sup> Art. 4 NL Model BIT 1993; See also *Jeney Claim*, US Foreign Claims Settlement Commission, *ILR*, vol. 26, p. 312-313 (on taxes in Hungary during world war II having a discriminatory nature –not held).

<sup>351</sup> Art. XI US Model BIT 1992; Vandeveld, K., *ibid* ft. 349, p. 218.

<sup>352</sup> Exchange of Notes to the UK-US DTA of 2001, second paragraph; Thai-US DTA, art. 2.

<sup>353</sup> ICSID Tribunal Decision of 2 September 1998; The earlier jurisprudence of ICSID already indicated strongly that tax disputes related to the investment are also "legal disputes that arise directly out of the investment", for which the ICSID Tribunal may have jurisdiction. In *AMCO v Indonesia*, the Tribunal observed that tax matters may well be covered by ICSID's jurisdiction (As quoted by Schreuer, C., *The ICSID Convention*, p. 119, par. 76). In *Kaiser Bauxite v Jamaica*, the government had agreed to a tax-stabilization clause, and the Tribunal asserted that a dispute over increased taxes would fall under the scope of art. 25 par. 1 of the ICSID Convention: "the dispute concerned the alleged rights and obligations stemming from the particular provisions in the agreements between Kaiser and Jamaica and was therefore a legal dispute" (*Kaiser Bauxite v Jamaica*, 1 ICSID Reports, p. 303.; It should be noted that in that case, taxation was explicitly mentioned in the investment contract between the parties). A similar situation and decision is found in *Alcoa Minerals v. Jamaica* (See Schmidt, J.T., "Arbitration under the auspices of ICSID: Implications of the decision on jurisdiction in *Alcoa Minerals v. Jamaica*", *Harv. Int.'l Law Journ.*, vol. 17, p. 98 (1976)).

<sup>354</sup> See the Exchange of Letters of 27 February 1985 accompanying the Agreement for the Promotion and Protection of Investments between The Netherlands and The Philippines, stating that "tax matters are generally covered by an agreement for the avoidance of double taxation and the prevention of fiscal evasion, hence are not the

At least the nondiscrimination rule of the DTA can therefore in my view be regarded as “related to the same subject matter” as the BIT<sup>355</sup>.

*c) Did the parties agree on a conflict clause?*

#### DTA merely excluded as a source

After having established that the two treaties indeed “relate to the same subject-matter”, it must be verified whether the parties provided for a conventional conflict clause. With respect to possible conflicts between DTAs and BITs, this is an important issue because in practice such clauses often exist. Any incompatibility between the DTA and the BIT will then be governed by the conflict clause, regardless of the date of conclusion of either treaty. However, the exact scope of the clause must be examined to establish which incompatibilities it actually addresses. Many BITs do mention DTAs but usually only to exclude them from being invoked in the context of the mfn-treatment provided under the BIT. In other words, when a host-state treats foreign investors from a third state more favorably than investors of the BIT-partner as the result of the operation of a DTA, the foreign investor of the BIT-partner is not entitled to the same treatment under the mfn-article<sup>356</sup>. Sometimes mfn- and national treatment are found in the same article and the exception for DTAs applies to both<sup>357</sup>.

When a DTA is excluded from the mfn- and/or national treatment clause in the BIT, there is no real incompatibility. This simply means that the foreign investor cannot invoke a privilege open to domestic investors that is derived from a DTA with a third party. An example of the latter exception is when a domestic enterprise in country A may have tax benefits as the result of a DTA between A and country B, which are normally not available to a branch C has opened in A. If there is a BIT between C and A, C’s investor cannot invoke the national treatment article to ensure that his branch in A receives the same treatment as domestic enterprises of A, which are able to invoke the DTA with B,

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proper subject matter in an investment agreement”; Parties are of course free to organize tax-aspects of investment protection in another treaty, but the statement that it is not the ‘proper subject matter’ for a BIT is difficult to understand.

<sup>355</sup> According to the OEEC, art. 24 (3) was intended to “give firms greater security in expanding their international business” (OEEC Report 1958, par. 31-33). This is exactly the reason why BITs are concluded.

<sup>356</sup> The Hong Kong-NL BIT (art. 7) takes the unusual step of excluding every privilege resulting from a “reciprocal arrangement” with any third state from national and mfn-treatment. It would seem that any DTA concluded by The Netherlands is thus also excluded.

<sup>357</sup> Art. 4 NL Model BIT.

provided that this exception for DTAs with third countries is indeed included in the BIT<sup>358</sup>. Generally, the exception for DTAs found in the mfn- and national treatment article of BITs just excludes tax treaties as the *source* of the benefit that the foreign investor claims for himself. It certainly does not exclude taxation altogether from the national treatment-standard, nor does it indicate that the non-discrimination rule of the DTA must be deemed to replace the national treatment-article of the BIT on the subject of taxation. The US Model DTA, however, does exactly that. It stipulates that only the non-discrimination article of the DTA shall apply between the parties insofar “the measures are within the scope” of the DTA<sup>359</sup>.

### Tax-exception in the BIT

Other conflict clauses (or rather: exceptions) have a much larger operation. Art. 7 of the UK Model BIT, for example, provides as follows:

“The provisions of this Agreement relative to the grant of treatment not less favorable than that accorded to the nationals or companies of either contracting party or of any third state shall not be construed so as to oblige one contracting party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from: [...] (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation”

Taxation (and not only DTAs) is hereby in effect removed from the national and mfn-standards. Foreign investors may pursuant to this exception be taxed less favorably by the host state compared to domestic investors. That does not mean that the BIT does not apply at all in tax matters. Only the national treatment and the mfn-treatment are addressed by this exception. With respect to other obligations found in many BITs such as fair and equitable treatment, access to courts, providing security, expropriation and settlement of disputes, taxation does fall under the scope of the agreement. In case domestic tax law is excluded from the national treatment-article, tax-discrimination is no longer addressed by

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<sup>358</sup> Compare: ECJ C-330/91 Commerzbank.

<sup>359</sup> Art. 1 (3) (b) and (c) US Model DTA; In view of the fact that the non-discrimination article of the DTA is currently most often interpreted as not covering indirect discrimination, this can be seen as a serious but inconspicuous reduction in the international protection of foreign investment.

the BIT<sup>360</sup>. As tax-discrimination *is* addressed by the DTA between the parties, an incompatibility can no longer arise.

*d) In case there is no conflict clause*

When no conflict clause was provided for in either treaty, *both* provisions can in my view be applied simultaneously without one necessarily excluding the other. As both treaties aim to protect individuals it is namely not inconsistent with the treaties' object and purpose to assume that both rules are complementary<sup>361</sup>. Indeed, it is generally accepted that a state may accord a treatment in terms of taxation or connected requirement to the nationals of the other DTA-concluding state which *exceeds* the minimum required by the DTA's non-discrimination rule. As Vogel notes:

“Art. 24 (1) addresses as already identified in the title [of art. 24] ‘non-discrimination’, solely the prohibit against disadvantaging foreigners. It does not prohibit granting them an advantage”<sup>362</sup>.

Thus, if the national treatment article of a BIT happens to require a tax-treatment which goes beyond what the non-discrimination article of the DTA imposes as a minimum, the host-state does not infringe upon the DTA by observing the BIT and vice versa. As a consequence, there is no reason why the host-state should be relieved of his international obligations under both treaties. In practice, this means that the taxpayer/investor will invoke the BIT's national treatment<sup>363</sup>. No incompatibility arises and there is no need to apply the *lex posterior*-rule of art. 30 VCLT. As was noted above, establishing the compatibility or incompatibility of the operation of two different treaties is largely a question of interpretation. By using the elements and instruments provided in art. 31 and 32 VCLT one needs to ascertain what parties must be deemed to have agreed in this matter. Is it the intent of the parties as embodied in the agreement that the non-discrimination rule of the DTA should displace a better protection under the national treatment article of the BIT? As a matter of fact, the restrictive interpretation of the DTA in

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<sup>360</sup> Note however that the host state may not discriminate when carrying out expropriation measures. A taxation that may be deemed an indirect expropriation and which discriminates for example on the basis of nationality or race, is illegal under international law. In that sense, tax-discrimination is still addressed by even the UK Model BIT.

<sup>361</sup> See above. Point 3.3.

<sup>362</sup> Despite the mentioning of “other” treatment in the text of the provision; Vogel, K., “Double Taxation Conventions”, Kluwer, 1997, p. 1295.

<sup>363</sup> Van Raad, K., (ibid ft. 336, p. 252.) comes to the same result.

terms of indirect tax-discrimination is –if correct- actually an argument against excluding tax matters from the operation of a BIT’s national treatment article, provided of course the parties did not exclude tax matters explicitly. Why would parties, with respect to a treaty which is designed to protect foreign investors, agree to have the DTA govern tax discrimination exclusively, if that would actually come down to a very substantial reduction in protection for the states’ subjects? Surely, such a substantial attempt upon the object and purpose of the BIT, lacking any explicit specification by the parties to that effect, may not be assumed lightly. If both *can* be applied without necessarily contradicting the other, parties remain under obligation to do so<sup>364</sup>. Again, there is no reason to apply the *lex posterior*-rule.

### 5.5. Other differences between BITs and DTAs

There are also instances where the protection offered by the non-discrimination clause of the DTA is more elaborate than that by the national treatment-clause in the treaty. A major “flaw” in BITs is related to the issue of diplomatic protection. Based on the controversial decision of the ICJ in the *Barcelona Traction Case*, it is at best uncertain whether the foreign shareholder of a company is the host state can invoke the BIT with respect to the company’s treatment there.

Another example is the case with respect to the equal treatment for the purposes of deductibility of interests, royalties and other disbursements under 24 (4) OECD Model. Although it could be argued that disallowing the tax-deductibility of interest or royalties paid to a foreign investor (note that debentures and intellectual property-rights may count as investments in the sense of the BIT) is depending on the circumstances contrary to national treatment, such is certainly not the case with “other disbursements”. According to Vogel, this term “means payments in the nature of a consideration for goods or services received” such as rent, insurance and management- or consulting fees. From the perspective of international economic law, these transactions constitute trade and not investment. They are not protected under BITs but possibly under GATS<sup>365</sup>, free trade agreements or the EC Treaty. Again, no actual incompatibility exists between the BIT and the DTA as the BIT simply does not have a provision which applies to this situation.

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<sup>364</sup> Van Raad K., *ibid* ft. 336, p. 252.; Jefferey, R. J., *ibid* ft. 342 (on EC Treaty), p. 93. (“One set of remedies does not exclude the other: they can be relied on in the alternative”).

<sup>365</sup> Note however that GATS does not include an obligatory national treatment for services but a mfn-standard.

## **6. Double Taxation Agreements and the European Convention on Human Rights: Exchange of Information vs. Privacy and Other Human Rights**

### 6.1 General remarks

DTAs typically provide for an exchange of information between tax authorities<sup>366</sup>. Under this article, a contracting state has an obligation to provide to the other state “such information as is necessary for carrying out the provisions of this convention or of the domestic laws concerning taxes of every kind”. The information received must be treated as secret and may be only disclosed to persons or bodies “concerned with the assessment, collection, enforcement or prosecution related to taxes”, including courts. The state can refuse to provide the requested information if it would have to take “administrative measures at variance with its own law or administrative practice”, “supply information which is not obtainable under the laws or in the normal course of administration”, or if the information concerns trade or other secrets or the disclosure would be contrary to public policy<sup>367</sup>.

### 6.2. Incompatibility with the ECHR?

What happens if a state is required to supply information under the DTA, but is prevented from doing so according to another treaty with the same or another party? Several treaties here may come to mind, especially treaties relating to human and political rights<sup>189b</sup>. Since the receiving state in this situation also has an obligation not to divulge the information received except to persons involved in assessing tax, other treaty obligations may come into play as well. One could imagine that financial information state A obtained through its DTA with state B, and which may thus not be divulged to others, would nevertheless be claimable by

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<sup>366</sup> Art. 26 OECD Model

<sup>367</sup> Art. 26 OECD Model; It is noteworthy that the Commentary to art. 1 of the OECD Model Agreement on the Exchange of Information on Tax Matters does state that the domestic procedural rights and safeguards do “include any rights secured to persons that may flow from relevant international agreements on human rights (Commentary point 5).

<sup>189b</sup> Under EC Directive 95/46/EC (O.J. L281, 23/11/1995, p.0031-0050), the Member States are under obligation not to divulge certain personal and financial data unless safeguards for the protection of fundamental rights and freedoms are in place. (See par. 57 of the considerations, and art. 1, 13(e), relating to taxation). Transfer of data to other countries may also be contrary to the Directive (see art. 25 of that Directive). In addition, there is a right of access to the data by the individual concerned (art. 12-see however art. 13(e)).

state C that concluded an agreement with A for cooperation against transnational crimes.

What follows is a review of some *prima facie* conflicts between the exchange of information-article in a DTA and the ECHR.

*a) Right to privacy*

The right to privacy may be a source of tension with a state's obligation to exchange information under the DTA. Insofar the right to privacy is enshrined in a state's constitution or domestic laws, no conflict will arise as art. 26 OECD Model contains an exception to the obligation to furnish information if it would require the requested state to "carry out measures at variance with the laws" of that or the other state. There is no explicit similar exception for constraints based upon international treaties. Baker notes for example that:

"one of the areas where human rights may be relevant to the operation of DTCs is concerned with the exchange of information between revenue authorities and the right to respect for private family life contained in art. 8".<sup>368</sup>

Can it be contrary to the respect for privacy contained in art. 8 ECHR to observe the obligation contained in art. 24 OECD Model? According to a decision of the European Commission on Human Rights<sup>369</sup> the exchange of information indeed constituted an infringement of the right to privacy. However, as provided in par. 2 of art 8 ECHR, the Commission decided that this "interference by public authority is necessary in a democratic society for the economic well-being of the country". Therefore, no violation of the ECHR was found to exist. That does not mean, however, that *each* exchange of tax-information between two (ECHR-member) states will qualify for the exception of par. 2 art. 8 ECHR. The fact that there are no safeguards available, no way for the taxpayer to contest the infringement of his privacy, or to counter abuses as he is unaware that the infringement takes place, is an important consideration in view of the jurisprudence of the ECtHR<sup>370</sup>. It may be, but this issue deserves further

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<sup>368</sup> Baker, Ph., *ibid* ft. 337, p. 265.

<sup>369</sup> *FS v. Germany*, 27 November 1996, Application No. 30128/96 (available at the HUDOC electronic database; found at [echr.coe.int](http://echr.coe.int)); Note that the decision concerned the exchange of information under the European Community Directive 77/799/EEC and not art. 24 OECD Model DTA. As Baker notes, however, the implications are similar (Baker, Ph., *ibid* ft. 337, at p. 265).

<sup>370</sup> See for example *Klass and Others*, 6 September 1978, Series A no. 28, p. 23-24, par. 49-50 (with further references).

study, that *in case a state does not have such safeguards in its domestic law or regulations*, the collection and exchange of information may be a violation of privacy. When a DTA would oblige a state to provide information available, and when that information is collected in a manner contrary to art. 8 ECHR, also the exchange of information must be considered a violation of privacy. Much will thus depend on the sophistication of the laws of a state –that is a party to ECHR *and* has concluded a DTA-on taxpayer’s rights. In this respect it is recalled that exchange of information-articles also exist in DTAs with ECHR signatories that (at present) have a less than extensive body of rules limiting the intrusion tax authorities may impose upon taxpayers<sup>371</sup>. Moreover, with reference to DTA-concluding states which are not a party to the ECHR the same issue is raised to a certain extent with reference to the notion of privacy guaranteed in art. 17 ICCPR , which sanctions arbitrary *or* unlawful interference with the right to privacy<sup>372</sup>. The UN Human Rights Committee (“HRC”) held that “the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with [...] the Covenant and in any event be reasonable in the circumstances”<sup>373</sup>. In *Toonen v Australia*, the HRC held that “reasonable” implies that the interference must be necessary and proportional to the circumstances<sup>374</sup>.

#### *b) Fair play principle*

Baker argues that not “utilizing information obtained under administrative cooperation, but not making that information available to the taxpayer concerned, appears to be a prima facie breach of the principle of equality of arms”<sup>375</sup>, which is an aspect of the right to a fair trial (article 6 ECHR). He also refers to a discussion on that matter in *France*<sup>376</sup>.

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<sup>371</sup> The signatories to the ECHR include states as Latvia, Romania, Moldova and Georgia whose tax system is still in full transition.

<sup>372</sup> International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 12 December 1966. This Convention has entered into force since 1976. There were 60 signatories and 144 parties to this Convention on 31 December 1999. The same approach can be developed, with the obvious caveat that it does not precisely have a direct effect in the domestic legal order, of art. 12 of the Universal Declaration of Human Rights of 1948.

<sup>373</sup> General Comment 16[32] by the UN Human Rights Committee.

<sup>374</sup> *Toonen v Australia*, 1994 1-3 HRR, 97 par. 8.3.

<sup>375</sup> Baker, Ph., *ibid* ft.337, p. 265-266.

<sup>376</sup> Conseil d’ Etat 13 October 1999, *Revue de Droit Fiscal* 1999, No. 52, Comm 948. See however, *Ferrazzini v. Italy*, Application 44759/98, where the ECtHR decided that art. 6(1) ECHR does not apply to tax assessment cases.

### *c) Right to information*

Another instance where there may, depending on the circumstances, be a conflict between a DTA's exchange of information-article and the ECHR, is related to the fact that the information exchanged may not be disclosed to the taxpayer himself. The DTA specifies that the requesting state may only disclose the information received to persons or authorities concerned with the assessment, collection etc. of the tax such as the tax authorities, the courts and possibly the prosecutor. As Baker points out, the taxpayer does not seem to be meant here<sup>377</sup>, although the OECD Commentary assumes that "[t]his means that the information may also be communicated to the taxpayer"<sup>378</sup>. It is hard to bring this obligation in the DTA (for the receiving state not to disclose the information to the taxpayer himself) in accordance with the "right to information" which is possibly based on art. 10 ECHR on the freedom of expression<sup>379</sup>. In fact, art. 10 ECHR does not explicitly provide in a right to information, but it has been interpreted by the ECtHR in a way that authorities are under obligation to disclose certain information to the persons involved<sup>380</sup>. The issue of right to information will also come up in possible conflicts between DTAs and the EC Treaty. As Lawson and Schermers note, in EU law the notion of right of access to information is fairly well established<sup>381</sup>, although that in itself is still a long way from establishing that there is indeed a conflict with DTAs.

### 6.3. Resolution of the conflict

It is not the purpose of this contribution to analyze at great length the exchange of information-article of the DTA in view of human rights-obligations. As long as there is no authoritative case law on this issue it is hard to be certain if and when there are indeed human rights-violations as a consequence of collecting and exchanging tax information as provided in the DTA. It suffices to note here that there are indeed differences in

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<sup>377</sup> Baker, Ph., *ibid*, p. 264.; *CIR v ER Squibb & Sons*, 1992, 14 NZTC 9,146; Conseil d'Etat, 5 March 1993, 1993, 5 *Revue de Jurisprudence Fiscale* 674.

<sup>378</sup> OECD Commentary 26/12; In fact art. 26 does not prevent a requested state from informing the taxpayer if such is so provided in its domestic law. It does seem to impose upon the requesting state the duty not to divulge the information to the taxpayer, or to use it for non-tax purposes.

<sup>379</sup> "Everyone has the right to freedom of expression another possible source of conflict is the right of access for the individual under art.12 of the EC Directive 95/46/EC (see Ft. 189b).

<sup>380</sup> *Guerra v. Italy*, Application 14967/89, Report of 29 June 1996, par. 41-49.; The argument was however "in these circumstances" rejected by the ECtHR.

<sup>381</sup> *Netherlands v. Council case C-58/94* 1996 ECR p. I-2197, par. 34-36.

treatment between DTAs and human rights instruments that may very well turn out to be actual conflicts.

Assuming for a moment that art. 6, 8 and 10 ECHR would indeed apply in the sense that was evoked above<sup>382</sup>, what would be the effect of that on the operation of the DTA or on the ECHR? DTAs nor the ECHR normally include a conflict clause referring to one another. May it be assumed then that the later treaty shall prevail provided all the parties to the earlier treaty are also parties to the later, as the *lex posterior*-rule suggests?

First of all, it should be tried to reconcile the two rules with each other through interpretation. In that regard, it seems that “laws of the contracting state” in art. 26 (2) a) of the OECD Model should perhaps among ECHR-states be deemed to include relevant international treaties as well. The term “law” usually does not designate international treaties if used in the sense “law of a contracting state” but it is not entirely impossible either. Treaties may in some respects be seen as a part of “the law of the land” as it were. In any event, nothing prevents DTA-states to conclude a mutual/subsequent agreement on this matter, or to establish the such an interpretation of the treaty by means of subsequent practice.

When the DTA preceded the conclusion of the ECHR, both states having concluded both treaties, the *lex posterior*-rule leads to the result that the information may only be exchanged as agreed in the DTA insofar that would be compatible with relevant provisions of the ECHR. This solution will not please the treaty partner who requests the information, but he can hardly argue that the standard of treatment found in the ECHR –which he himself also concluded- should be ignored. Unless an exception can be applied from the ECHR itself, for example art. 8 par 2 ECHR, lacking a conflict clause, there is no reason why the ECHR should not be applied to situations that are clearly within its operation just because they happen to fall under the scope of an older treaty between the same parties as well. The ECHR is the most recent expression of consent by the parties<sup>383</sup>.

If the DTA was concluded following the ECHR, a less comfortable situation presents itself. Ultimately, this situation is addressed by art. 30 par. 4 VCLT, because the parties to the later DTA do not include all the parties of the ECHR. Between the two DTA-states the duty to exchange information stands, but towards all other signatories of the ECHR only this treaty applies. However, the price to pay for the two DTA-states is a

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<sup>382</sup> See however *Ferrazzini v. Italy* Application 44759/98.

<sup>383</sup> Compare the same analysis made by Mus with respect to conflicts between earlier extradition treaties and the ECHR, p. 172-173.

high one. With reference to art. 41 VCLT the modification of the multilateral ECHR between the two states only is not permitted by that convention, and the mere conclusion or at least the observance of the obligation to exchange information under the DTA while violating human rights, entails state responsibility. This international responsibility can be avoided if the DTA is amended, possibly by subsequent agreements or by subsequent practice, so that there is no duty to exchange information in violation of human rights. On the municipal level, it is highly likely that a domestic court will be able to revoke an Administrative Act (the exchange of information) because it is in violation of a ratified treaty with direct effect. A court in the recipient state is perhaps authorised to disregard evidence obtained in violation of an international treaty.

The least satisfactory situation is however the one when a third state is involved. One such case occurs when an ECHR-state demands information under a DTA from a state which is not a party to the ECHR. If that non-ECHR state insists that the information may not be disclosed to the taxpayer, as the DTA normally states, the conflict with the ECHR becomes acute because the state that receives the information is *–ex hypothesio–* required to inform the individual concerned. There is no way to resolve this conflict without revising at least one of the two conflicting obligations. The non-ECHR state is and remains bound by the DTA to furnish the information, but the receiving state is and remains bound by the ECHR to disclose that information in contravention of the DTA. As the provisions of the ECHR by no means bind a third state<sup>384</sup>, one of the two rules has to give way.

Another example of a situation involving a third state is that of a request for information put to a non-ECHR state by an ECHR-state. Suppose the requested state carried out measures in his country that are manifestly at variance with the ECHR –to which it is not bound– to obtain the information and furnish it to the ECHR-state which asked for it. In all likelihood, the measures applied will be “at variance with the laws or administrative practice” of the requesting state in the sense of art. 24 (2) b) OECD Model, but this is not relevant if the requested state does not evoke this fact to escape from its obligations. If the requested state indeed furnishes the information, would it then be a violation of the ECHR for the requested state to use it? Surely the (even later) DTA with the non-ECHR state cannot be a legitimate basis for a ECHR-signatory to limit his obligations under that convention. The DTA is not void but non-

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<sup>384</sup> Art. 34 VCLT.; Nothing prevents however that the same conflict with the DTA cannot occur based on the ICCPR.

observance of the ECHR in this respect will entail state responsibility, even if the act happens to be required under another treaty.

## **7. Conclusions**

### 7.1. The relative effect of the *lex posterior*-rule

An attempt was made in this contribution to explore the question if DTAs would often be entangled in real or apparent treaty conflicts with non-tax treaties, and how they should be resolved under international law. Even after a superficial examination it became apparent that DTAs may be affected by a large spectrum of non-tax treaties, immediately raising questions on compatibility and interpretation. In this regard, art. 30 VCLT is clearly the most important point of reference. In a nutshell, art. 30 VCLT provides that one should first determine, by using treaty interpretation, if parties agreed that the provisions of one treaty (earlier or later) shall prevail over the other. An explicit conflict clause would be the obvious and undoubtedly most appropriate way to do that, but the intent of the parties may also be derived from other elements and instruments mentioned in art. 31 VCLT or even art. 32 VCLT. In this respect, the maxim *lex specialis* can only be of limited assistance.

As a last resort, it shall be deemed that a later treaty has priority over an earlier one between the same parties. Conflicts between the same parties can thus ultimately be resolved using the *lex posterior*-rule, but at the cost of some artificiality. The fact that a state must perform one obligation towards state A and another obligation towards state B is unresolvable if both obligations are truly incompatible. In that case, one of the obligations will be breached by that state, which will entail international responsibility.

As was noted above, it follows from the text and genesis of art. 30 VCLT, its interaction with art. 31 (3) c) VCLT and the case law of the World Court that one should as far as possible (which means reasonable) avoid by interpretation that a difference in treatment between two treaties is or becomes a true incompatibility.

### 7.2. Considerations involving DTAs

Although for obvious practical constraints just a few examples of apparent or real treaty conflicts were discussed here, this has nevertheless shown some of the particularities that may be kept in mind when examining what seems to be a conflict between a DTA and another treaty.

First some relevant circumstances. DTAs are almost always bilateral treaties. As a consequence, DTA partners do not risk to offend more than one treaty partner at a time by applying a treaty that is incompatible with the DTA. Also, DTAs are the well known cornerstone of the international organization of income taxation. Treaty negotiators of states are usually well aware of this. Many treaties, but certainly not all, that may potentially conflict with DTAs will therefore include conflict clauses that can resolve the matter. This awareness also seems to be increasing. Treaty drafters of investment and trade agreements recently pay more attention to a possible impact involving a DTA than say many years ago<sup>385</sup>. The other side of the same coin is of course that in the case of tax treaties, conflict clauses are so often necessary or at least useful because taxation touches upon so many different segments of international relations. There are thus plenty conflicts to resolve, among others with conflict clauses. Finally, which is possibly the most important circumstance when it comes to treaty conflicts, most of the provisions of a DTA are created for the protection of individuals namely taxpayers. It is also most relevant that DTAs, as many other treaties, operate by imposing restrictions upon domestic laws and regulations. They prescribe the maximum what a state may tax, not a minimum. States may and frequently do tax less in actual fact than they are allowed to under the DTA. Unless there is a treaty concluded with the same or another state providing that the first state *must* tax something that it is not allowed to tax under the DTA, treaty conflicts are not likely to occur often. However, also that kind of treaties exist<sup>386</sup>.

### 7.3. Treaty conflicts involving a DTA

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<sup>385</sup> UK Model BIT art. 7; NL Model BIT art. 4; Note also that DTAs were not the subject of a specific exception in GATT, but they are in the more recent GATS (see Qureshi, A.H., "Trade-related aspects of international taxation", *Journal of World Trade*, p. 168).

<sup>386</sup> When a trade agreement or a treaty for regional economic integration stipulates that a tax may not exempt certain activities or individuals from taxation, this comes down to imposing that state to tax. In theory, a conflict is possible between a trade agreement saying that a state should tax and a DTA which exempts a certain enterprise or income. It becomes then a matter of examining if the DTA-based exemption can be deemed, for example, a forbidden subsidy under the trade agreement. I leave this question gladly to experts in GATT law. On this issue in general, see Friedlander, L., *ibid* ft. 337, p. 98-105.; Qureshi, A.H., *ibid* ft. 385, p. 175-178.; McDaniel, P., "The impact of trade agreements on tax systems", p. 152-157.; Fisher, "GATT vs tax treaties", *Journal of World Trade*, 1987, p. 39.

The problems of treaty conflicts involving DTAs are more apparent than real. In actual fact, it is more a problem of interpretation, and I might add usually a rather tricky one, than one of genuine incompatibility. If all the elements and instruments of art. 31 and if appropriate art. 32 VCLT are taken into account, but especially the object and purpose of both treaties, any subsequent practice or agreements and the principle of reasonableness implied in “good faith”, many *prima facie* conflicts turn out to be resolvable without having to resort to the rather arbitrary *lex posterior*-rule. In this exercise, the maxim *lex specialis* is of only limited help. It can clearly be called upon for example when considering *prima facie* conflicting provisions in a DTA on the one hand and in an agreement on the elimination of double taxation on international transport on the other hand. But to regard the relationship between DTAs and all non-tax treaties, the whole maxim is –contrary to what one would perhaps expect- not always useful<sup>387</sup>.

When the object and purpose of another treaty also consists out of lending protection to an individual, as is the case with most of the provisions of a DTA as well, the protection is most probably cumulative or complementary, not mutually exclusive. DTAs and investment treaties are in most instances a good illustration of such a situation. In the relationship between two treaties that each lend protection to individuals any suggestions as to the reduction in that protection by force of the other treaty should be regarded with suspicion, and not be lightly assumed. Any difference in treatment under another applicable treaty which does not lead to a result that is forbidden by the DTA, should usually not be regarded as incompatible but as complementary. Vice versa the same goes, so that in practice, the best treatment for the individual should prevail. Such is the relationship between the non-discrimination rule in the DTA and the standard of national treatment in the BIT, provided no conflict clause exists and tax-discrimination is not excluded from the BIT in its entirety. They are, in view of both treaties’ object and purpose, complementary standards and not contradictory ones.

Unresolvable conflicts (those that will lead to international responsibility one way or another) will most likely occur when the DTA says a state must do something (for example exchange information or exempt income) and another treaty says it may not. The hypothesis I used to illustrate this situation involved the exchange of information in violation of a human rights convention. There, DTAs demonstrate the same problems that can be found with respect to other treaties. Often,

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<sup>387</sup> Compare Pauwelyn’s conclusions with respect to *lex specialis* and WTO law, *ibid* ft. 222, p. 547.

unforeseen conflicts cannot be resolved without revising at least one of the treaties involved, at least tacitly. As conflicts of this nature are more likely to occur involving law-making conventions with wide repercussions, the other treaty could very well be a multilateral convention, in our example the ECHR. The same, *mutatis mutandis* applies to GATT, GATS, and the EC Treaty, provided the convention in question does not specify otherwise. In case such a convention was concluded after the DTA, the *lex posterior*-rule guarantees in last instance the operation of the multilateral convention. However, if the DTA between the states followed the conclusion of or accession to the multilateral convention, a problem arises because their DTA is *valid inter se* but possibly still a breach of the multilateral treaty under art. 41 VCLT. Problems also occur when one state is a member of the multilateral convention and the other is not, this time because of the combined operation of the *pacta tertiis*-rule in art 34 VCLT and art. 30 VCLT. As much will depend on whether the intent of the parties on treaty priority can be “guessed” in the absence of conflict clauses, uncertainty is the obvious result.

As almost all DTAs are bilateral, and many of the treaties they may potentially come into conflict with are multilateral, obvious problems of state responsibility emerge. As a principle, namely, a DTA that was concluded in violation of a multilateral treaty to which both states are a member is valid under international law and must be performed. Unless the states had the authority under the multilateral convention to change the applicable rules *inter se* (see art. 41 VCLT), the DTA’s application or even conclusion may be a breach of the multilateral convention.

Art. 30 will here be of little use to restore or create the harmony between a multilateral convention and a bilateral DTA<sup>388</sup>. Unless the member states to the multilateral convention clearly determine the relationship of the convention to DTAs, complicated problems of interpretation and application will persist, possibly resulting in much uncertainty and questions of breach. In addition, multilateral composite systems evolve by interpretation and amendments, which only enhances potential incompatibilities. The implications of this rule may pose problematic consequences. It may lead to bilateral DTAs being interpreted differently among certain parties, depending on the other treaties in force between them. Could there be, for example, an “EC-interpretation” of the DTAs among the EC members? Where would that leave interpretations based on the OECD Model and Commentary? Obviously, there is a tension here between the various “relevant rules of international law” in force between

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<sup>388</sup> Sinclair, I.M., *ibid* ft. 204, p. 98.; Pauwelyn, J., *ibid* ft. 222, p. 545.

the parties. The convention establishing the OECD and treaties of accession namely also constitute “rules of international law applicable between the parties”.

The same, *mutatis mutandis*, goes if only one of the two states is a party to both the multilateral convention and the DTA. In that case also, but by means of the *pacta tertiis*-rule, will international responsibility be the consequence of an unresolvable treaty conflict. This underscores again the importance of conventional conflict clauses.

#### 7.4. The effect of non-tax treaties on the interpretation of DTAs

The issue of treaty conflicts involving one DTA is closely associated with that of treaty interpretation. The effect that non-tax treaties can have on the interpretation of DTAs can assume several forms.

The least problematic is the effect that other treaties and conventions may have on the interpretation of DTA-terms that are not real tax-jargon. For some of these terms there is a useful definition or description in general international law or in treaties or conventions in force between the parties. To use those definitions or descriptions comes almost “naturally”. Good examples can be found in the definition of the terms used in the article on members of diplomatic missions and consular posts, the article on territorial extension, entry into force and termination, and in terms such as “stateless persons”, “continental shelf”, and “sea bed”<sup>389</sup>.

The effect of non-tax treaties on DTAs can however also be much less obvious, and with an outcome that is more difficult to predict. Other treaties may regulate a larger subject matter which is also partly addressed in the DTA, such as international trade and investment. Other treaties will impose standards of behavior upon states the impact of which was not considered when the DTA was concluded, and which now have to be taken into account when performing DTA-obligations. To the extent that this would not require a revision, both sources of obligations should be harmonized by using interpretation. To a certain extent this may give DTA terms a novel emphasis, a new twist, or an original function, always within the constraints however of art. 31 VCLT. This is the result of the combined operation of art. 30 VCLT and art. 31 (3) c) VCLT.

In practice, to establish if a *prima facie* incompatibility can be resolved by means of interpretation will almost always require extensive, detailed knowledge of both (types of) treaties. By definition, treaty

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<sup>389</sup> See above. Part 5.

incompatibilities are not settled easily. If they would, they would not be incompatibilities in the first place. So, an approach that incorporates several branches of international law at once seems to be a *conditio sine qua non* to bring this task to successful completion. But that is easier said than done.

Finally, even without the interference of a possibly conflicting treaty, however, relevant treaties must be taken into account to interpret DTAs in accordance with the VCLT. The actual, practical effect of this operation will depend on its “reasonableness”, but in no case may such effect be dismissed out of hand.

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It is becoming increasingly difficult to see, practice or study DTAs in isolation from other treaties in force between the contracting states. Investment treaties, trade agreements, treaties for regional integration and human rights conventions do not only establish new (sometimes implied) international obligations for states and rights for their subjects in tax matters. They also interact with the familiar DTA-rules, changing their interpretation and application in the process. When interpreting and applying DTAs, the emphasis naturally lies on a “vertical approach”: the way DTA-rules interact with the domestic tax law of the contracting states. It is becoming increasingly clear, however, that this vertical relationship is intrinsically connected with the entire “horizontal relationship” between states, and not only with the isolated DTA between those states. DTAs must be understood and given effect against the background of the non-tax treaties in force between the parties, and so far as is reasonably possible in a way that will not result in a breach of any of those treaties. A more internationally integrated approach is thus often called for when interpreting tax treaties, including the interpretation that takes place when assessing real or apparent treaty conflicts.