INTERNATIONAL

Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties

Edwin van der Bruggen*

1. INTRODUCTION

Article 3(2) of the OECD Model Tax Convention on Income and Capital (OECD Model) occupies a prominent place in every study on the interpretation of tax treaties. At present, it reads as follows:

> As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

The meaning and function of this provision has been the subject of intense debate and study.[1] There are several interpretative questions concerning Art. 3(2), most of which are not the focus of this article.[2] In this contribution, the issue raised is the relationship between domestic renvoi and the normally applicable rules of treaty interpretation enshrined in Arts. 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT or the Vienna Rules).

According to the OECD Commentary, Art. 3(2) is a "general rule of interpretation".[3] It does not mention the rules of interpretation of the VCLT, or Art. 3(2)'s relationship to those rules. There are authors who assume that Art. 3(2) is *lex specialis* vis à vis Art. 31 and 32 of the VCLT. Vogel opines, for example, that "art 3(2) is a special rule of interpretation in relation to the general rules governing interpretation of DTCs and as such takes precedence over those general rules".[4] Shannon addresses the relationship between Art. 3(2) and Arts. 31 and 32 of the VCLT directly by arguing that "Art. 3(2) [...] is a special rule of interpretation with respect to the general rules of interpretation of the Vienna Convention and has priority over those rules".[5] Lang, on the other hand, argues that Art. 3(2) by and large only repeats the otherwise applicable rules on treaty interpretation, and can therefore be omitted.[6] The American Law Institute (ALI) places the domestic meaning at the bottom of the interpretation hierarchy. It recommends that in addition to the text of the agreement and of contemporaneous agreements, unilaterally published material, domestic court decisions and the OECD Commentary should be used first to "adequately resolve an interpretative question".[7] It "has taken the position that

* Tax Lawyer.

1. To mention only some of them: Avery Jones et al., "The Interpretation of Tax Treaties with Particular Reference to Art. 3(2) of the OECD Model, *British Tax Review* (BTR) (1984), pp. 14 et seq. and 90 et seq.; J.F. Avery Jones, "Art. 3(2) of the OECD Model Convention and the Commentary to it: Treaty Interpretation", 33 *European Taxation* 8 (1993), pp. 252-257; I. Sinclair et al., "Interpretation of Tax treaties", 40 *Bulletin for International Fiscal Documentation* 2 (1986), p. 75; H. Shannon, "US income tax treaties, reference to domestic law for the meaning of undefined terms", *Intertax* (1989), p. 453; K. van Raad, "1992 Additions to Articles 3(2) and 24 of the OECD Model", *Intertax* (1992), p. 671; American Law Institute, *Federal Income Tax Project, International Aspects of US Income Taxation II*, pp. 40-45 and 61-62; K. Vogel and R. Prokisch, IFA General Report, "Interpretation of Double Taxation Conventions", *Cahiers de Droit Fiscal International*, Vol. 78a (Deventer: Kluwer, 1993), and the country reports included in the same issue; M. Lang (ed.) *Tax Treaty Interpretation* (The Hague: Kluwer Law International, 2001) (featuring country reports from most European countries); Vogel, *Double Taxation Conventions*, 3rd. ed. (The Hague: Kluwer Law International, 1997), pp. 208-216; J.A. Townsend, "Tax treaty interpretation", 55 *Tax Lawyer* 1, p. 219 et seq. and pp. 264-269; G. Gest and G. Tixier, *Droit Fiscal International*, 2nd ed. (Paris: Presses Universitaires de France, 1990), pp. 85-107; Michael Edwardes-Ker, *Tax Treaty Interpretation* (Dublin: In-Depth Publishing, 1995)(loose-leaf), Chapter 7; Baker, *Double Taxation Conventions and International Tax Law*, 2nd ed. (London: Sweet & Maxwell, 1994), pp. 31-39.

2. Some other issues related to Art. 3(2) include that of intertemporal interpretation, the relevance of municipal non-tax law and the possibility to apply municipal doctrines related to the interpretation of tax rules and avoidance.

3. OECD Commentary on Art. 3, Para. 11; Lenz called it "the general renvoi clause", R. Lenz, "General Report on the Interpretation of Tax Treaties", *Cahiers de Droit Fiscal International*, Vol. 42 (Basel: Verlag für Recht and Gesellschaft, 1960), p. 296; Baker calls it "the definitional rule", see note 1, p. 31.

4. Vogel, see note 1, p. 209. As Arts. 31 and 32 of the VCLT are included in what Vogel meant by general rules, it is in theory not reconcilable with the view defended here that it is not necessary or appropriate to give Art. 3(2) precedence over Arts. 31 and 32 of the VCLT. In practice, however, as that author also proposes a wide notion of "context" in Art. 3(2), and coined the term "international tax language", the results of both approaches may in fact be very similar.

5. Shannon, see note 1, p. 455; Galli/Miraulo, "Interpretation of double taxation conventions – Italy", *IFA Cahiers 1993*, see note 1, p. 396.

6. Lang in Gassner et al. (eds.), *Aktuelle Entwicklungen im Internationalen Steuerrecht. Das neue Musterabkommen der OECD* (Vienna: Linde Verlag Wien GmbH, 1994), p. 35 et seq.; IFA (ed.) Studies, p. 209; See also Heinrich and Moritz, "Interpretation of Tax Treaties", 40 *European Taxation* 4 (2000), p. 149.

7. American Law Institute (ALI), *Federal Income Tax Project – International Aspects of United States Income Taxation II* (Philadelphia: The American Law Institute, 1992), pp. 43-46.

reference to domestic law ordinarily should be made only when other interpretative techniques do not support a treaty interpretation".[8] Along the same lines, perhaps, Avery Jones et al. conclude that "context" in Art. 3(2) could include "all of the items which may be taken into account, or to which one may have recourse, in interpreting treaties generally".[9] The question as to the relationship between Art. 3(2) and other rules of interpretation can also be put in terms of the hierarchy between different meanings of tax treaty terms, or of different ways to establish such a meaning.

2. THE NATURE OF ARTICLE 3(2) UNDER TREATY LAW

2.1. Article 3(2) as an interpretative clause

Before discussing the interpretation of Art. 3(2), it is perhaps useful to recall that this type of provision is, in international law, referred to as an "interpretative clause".[10] Such a clause "*a pour objet de définir un terme jurisdique, de donner à un terme un sense particulier, de limiter la portée d'une expression*".[11] In its simplest form, an interpretative clause can consist of a list of definitions or terminology. In any event, the parties include an interpretation clause in a treaty to give meaning to one or more treaty terms. It is a dependent norm, because its operation is essentially to refer to other, substantial norms.[12]

2.2. The role of interpretative clauses in providing "context"

Under the VCLT, interpretative clauses provide a particular breed of "context" to the treaty term that needs interpretation. Their operation does not normally result in a "special meaning" in the sense of Art. 31(4) of the VCLT.[13] Context serves to qualify the ordinary meaning of a treaty term. An agreed interpretation provides, as Fitzmaurice notes, context wherever it is found (unilateral instruments, conference minutes, etc.).[14] Treaty terms, as Art. 31 of the VCLT provides "must be given their ordinary meaning in their context", and not in isolation from the rest of the treaty text, related agreements and other instruments and elements that are included in "context" or must be taken into account together with context. Context is thus a relative concept, not an absolute one.[15] It is something that must be used to illuminate or influence the meaning of a term or a phrase. Put another way, a treaty term, phrase or provision provides "context" in relationship to some other treaty term. Article 3(2) therefore provides "context" to many other terms of the treaty, except of course with respect to the interpretation of Art. 3(2) itself.

Interpretative clauses provide a special form of context because, unlike other (i.e. substantive) provisions of the text of the treaty, a reasonable connection with every substantive term of the treaty is normally present. There is thus no need to establish whether or not a certain other part or provision of the treaty may be invoked to give meaning to the term that needs interpretation. One may safely assume that the condition of a reasonable connection[16] has been fulfilled.

3. QUESTIONS RELATED TO THE "ORDINARY MEANING" OF TERMS EMPLOYED IN ARTICLE 3(2)

3.1. In general

The starting point for the interpretation of Art. 3(2) is obviously the text used. The literature on this provision demonstrates that it is difficult to understand Art. 3(2) purely on the basis of its "ordinary meaning". Several questions remain after reading the language of the provision, only some of which concern us here.

3.2. "Unless the context otherwise requires"

One question concerns the hierarchical place assigned to the domestic renvoi law compared to possible other elements for the purpose of treaty interpretation. As was stated above, this is reflected in the phrase "unless the context otherwise requires". What is meant by "context", is one of the recurring questions surrounding the debate about Art. 3(2). In its most narrow sense, "context" is the text immediately preceding and following the term that needs interpretation, preferably in the same sentence. For example, in most authentic Netherlands language versions of tax treaties, "context" is (perhaps incorrectly) translated as "*zinsverband*".[17] Another possibility has been discussed, particularly in light of the definition of "context" offered by the VCLT. Perhaps "context" must (at least at present)[18] be understood as limited to the description given in Art. 31(2) of the VCLT.[19] Internationalists would perhaps observe that "unless the context otherwise requires"

8. Id.
9. Avery Jones et al., note 1, p. 104.
10. Ioan Voicu, *De l'interprétation authentique des traités internationaux* (Paris: A. Pédone, 1968), p. 147; R. Sacco, *I1 concetto di interpretazione del diritto* (Torino: Libreria Scientifica G. Giappichelli, 1945), p. 17; note that definitional rules are not uncommon in treaties, but a reference to domestic law of the kind included in Art. 3(2) is, to my knowledge, unique to tax treaties. See also Avery Jones, ET, note 1, pp. 252-257.
11. Yasseen, "L'Interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des Cours*, 151 (1976-III), p. 34.
12. H. Kelsen, *Theorie pure du droit* (fr. transl.) (Paris, 1962), pp. 74-78.
13. See 8.: "Article 3(2) and an intended special meaning".
14. Fitzmaurice, "The law and procedure of the International Court of Justice", 28 British Yearbook of International Law (BYIL) 1951, p. 13.
15. De Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Paris: Pedone, 1963), p. 59.
16. De Visscher, note 15, p. 59.
17. G. de Bont, "Tax Treaty Interpretation", in Lang (ed.), see note 1, p. 252; O. Bertin, "Tax treaty interpretation in Belgium", in Lang (ed.), note 1, p. 53; Note in this respect that Art. 33 of the VCLT provides that, except where a particular text prevails, where a difference in meaning between the two authentic versions of the text exists that is not removed by Arts. 31 and 32, the meaning which best reconciles the texts shall apply, having regard to the object and purpose of the treaty.
18. Under Art. 31(3)(c) of the VCLT, the interpretation of treaty terms may evolve over time under the influence of "relevant rules of international law in force between the parties", which in any event include rules of customary international law that are deemed "in force" for all nations (Yasseen, note 11, p. 63)
19. This is Galli and Miraulo's understanding in "Interpretation of double taxation conventions – Italy", see note 5, p. 395; Most tax scholars, however, find the definition of what comprises context in Art. 31(2) of the VCLT "too narrow"; Shannon, note 1, pp. 459-461; Vogel, IFA, note 1, p. 81-82 (who deems the definition in Art. 31 of the VCLT "unsuitable" for tax treaties); Prebble, "Interpretation of double taxation conventions-New Zealand", in *IFA cahiers 1993*, see note 1, pp. 476-477 and p. 488.

in Art. 3(2) may lead to an absurd result if "context" is taken to have the same meaning as in Art. 31 of the VCLT, because Art. 3(2) is part of what international law considers "context" (to the term in dispute) in the first place. Yet another possibility is that "context", as used in Art. 3(2), comprises more elements and instruments than in Art. 31(2) of the VCLT.[20] After all, even identical terms in different treaties with an entirely different object and purpose may well deserve a very different interpretation.[21] In that respect, it seems quite acceptable that the meaning of the term "context" in a bilateral tax treaty would differ from that of the same term in a multilateral convention that codified and further developed the international law of treaties.[22] It is also true that "context" at times comprises more elements than those listed in Art. 31(2) of the VCLT,[23] especially in English jurisprudence with respect to statutory interpretation.[24] Some see the historical background of Art. 3(2) in English law thus as confirmation of this possibility.[25]

The same two meanings of context (a strict one and a more extended one) are found in *Black's Law Dictionary*: "the surrounding text of a word or passage used to determine the meaning of that word or passage; setting or environment".

All said, an examination of the phrase "unless the context otherwise requires" on the basis of its "ordinary meaning" taken in isolation is not very productive. There is a clear indication that there is some kind of limitation on the operation of domestic renvoi, but the extent of that restriction remains unclear.

3.3. "As regards the application of the convention by a contracting state"

Another question that is raised by the text of Art. 3(2) as it stands, is what purpose the parties served by including it in the tax treaty. This question is related to the fact that Art. 3(2) starts with the phrase "as regards the application of the convention at any time by a contracting state". Is this an indication that Art. 3(2) was never intended to be read as a general rule of interpretation, to replace the Vienna Rules, but operates much more restrictively? Does it directly relate to the intent of the parties in respect of this particular provision, insofar as it is captured by the wording of the text?[26]

According to Shannon, "application means each decision of a fiscal authority or court in a contracting state in a matter involving a treaty".[27] Avery Jones et al. suggest a more narrow interpretation of the word "application", where the state of residence applies the treaty only in granting an exemption or credit under the rules for avoiding double taxation, while the source state applies the treaty under the classification and distributive rules.[28] Dery and Ward refer to the *Oxford English Dictionary* and suggest that "application" means "the bringing of a law or theory or of a general or figurative statement to bear upon a particular case or upon matters of practice generally".[29]

Without addressing the meaning of the term "application", the phrase "application by a contracting state" does seem to lend more support to a reading of Art. 3(2) as something other than a general rule of interpretation. The use of the word "application" and not (also) of "interpretation" is certainly uncommon for general interpretative clauses.[30] It suggests to the author that the purpose of Art. 3(2) is not really the general interpretation of treaty terms, but that contracting states intend it to have a more limited function.

The strongest argument is, however, found in the fact that Art. 3(2) refers to "application by *a contracting state*", and not by *both contracting states*. This is very unusual in respect of interpretative clauses. In fact, to refer to only

20. Gest and Tixier, note 1, pp. 91-95 ("*le contexte lato sensu*").

21. South West Africa cases, *ICJ Reports*, 1962, p. 336; Young Loan Arbitration, 59 *International Law Review* (ILR) 541; Opinion, 1/91 [1991] ECR I-6079 (Opinion on the interpretation of the 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"); ECJ, 1 July 1993, Case C-312/91, *Metalsa* [1993] ECR I-3751, Paras. 15 and 16 (the ECJ decided along the same lines that the interpretation of Art. 90 EC Treaty could not simply be transposed to Art. 18 of the Free Trade Agreement between EEC and Austria because "the objective of the establishment of a common market does not form part of the free trade agreement"); A GATT Panel decision on the interpretation of the term "like product" in the narrow definition of the Antidumping Agreement is unsuitable for the purpose of GATT Article III:2; *EC v. Japan Imported Wines and Alcoholic Beverages, WTO Basic Instruments & Selected Documents* (BISD), 34th Suppl., (1986-1987), p. 115.

22. Vogel, IFA General Report, note 1, p. 82 ("the function of the term in the two provisions is completely different").

23. See 5.3.: "What comprises context in Article 3(2) versus Article 31(2) VCLT?".

24. In English law, it is an "elementary" (Viscount Simonds, *AG v. HRH Prince Ernest Augustus*, (1957) 1 All ER 49, p. 55 (HL) rule that statutes must be read in their context. "Context" as used by English courts most often indicates the statute as a whole, so that "every clause of a statute is construed with reference to the context and other clauses of the Act" (Lord Davey, *Canada Sugar Refining Company v. R*, (1898) AC 735, p. 742). However, the same term may be employed to refer to the intention of the legislature (*Associated Newspapers v. Registrar of Restrictive Trading Agreements* (1964) 1 All ER 55 (HL); *CIC Insurance v. Bankstown Football Club* (1997) 187 CLR 384, p. 408, other statutes *in pari materia* (Viscount Simonds, p. 53 – Lord Tucker agreeing), the "general scheme of the relevant rules" (*Chandrachud, OP Singla v. Union of India* (1984) 4 SCC 450, p. 461 or even "relevant extraneous matters" (Lord Somervell, *AG v. HRH Prince Ernest Augustus*, p. 61); see also E. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), p. 83 et seq. (who includes in "external context" social context, the general body of law of the statute, language context (including dictionaries), etc.).

25. Art. 3(2) (or its predecessor) reportedly first made its appearance in the 1945 UK–US tax treaty; Avery Jones et al., note 1, p. 93; Vogel, "Doppelbesteuerungsabkommen und ihre Auslegung" 11 *Steuer und Wirtschaft* (1982), pp. 286-287; Vogel, IFA General Report, note 1, p. 82.

26. As Starke notes: "What must be ascertained is the *ostensible* intention of the parties, as disclosed in the four corners of the actual text (emphasis in original)", p. 479; see also Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, *ICJ Reports*, 1992, [pp. 717-719 S.O. Torres Bernardez] Para. 189.

27. Shannon, note 1, p. 457.

28. Avery Jones et al., note 1, pp. 21-22.

29. Dery and Ward, "Interpretation of Double Taxation Conventions, Canada", in *IFA Cahiers 1993*, note 1, p. 281.

30. See the overview and comparison made by H. Blix and J. Emerson, *The Treaty Makers Handbook* (Stockholm: Oceana Publications, 1973), pp. 117-131 (which shows that only tax treaties have a domestic referral); Dery and Ward, note 29, p. 279.

one state while authentic interpretation clearly must involve and engage both, is so irregular and out of step with several general principles of international law and rules of treaty interpretation[31] that it at least sheds considerable doubt on the view that Art. 3(2) operates as a general interpretative clause.

4. ARTICLE 3(2) AND THE PRINCIPLE OF GOOD FAITH

4.1. General remarks

The principle of good faith has a particular role to play in relation to Art. 3(2). First, it must be pointed out how important the duty to observe and interpret a treaty in good faith is under international treaty law. One can scarcely find a principle that is more fundamental. The International Law Commission almost immediately agreed that the principle of good faith should also govern treaty interpretation, as is also the case with respect to treaty observance.[32] It is thus undisputed that good faith plays a crucial role in the interpretation of treaties.[33] In fact, one can easily say that the principle of good faith overrules many or even all other rights and obligations of treaty law. It is not necessary that the treaty explicitly refer to the duty to interpret in good faith. Consequently the explicit mention of one element of interpretation without explicit reference to "good faith" by no means excludes it.[34] To study the many different implications of the principle of good faith in accordance with its importance for the law of treaties is beyond the scope of this article, but it is appropriate to make some selected observations.

4.2. Abusive and unilateral treaty interpretation

One of the duties of states that is associated with interpreting in good faith is derived from the prohibition of abuse of rights, which is thus an application of the principle of good faith.[35] International law is not imposed by a "higher order", but is created by its subjects. In the same vein, states must also interpret the treaties they conclude themselves ("auto-interpretation").[36] It becomes thus crucial in this process that states do so without taking advantage of the fact that they usually have to interpret their own obligations. It is a breach of good faith to reduce one's obligations intentionally by interpreting them more restrictively. It is of no consequence, from the standpoint of international law, that this unilateral interpretation is somehow legitimized under the municipal law of that contracting state. In the matter of the Jews of Romania, for example, the treaty of Berlin of 1878 established certain non-discrimination obligations on Romania for the benefit of its inhabitants of the Jewish faith. By characterizing the protected Jews no longer as "inhabitants", but as foreigners, Romania could not "interpret away" its own obligations.[37] From the decisions of international courts and tribunals it is clear that even where a contracting state has the explicit right or the implicit possibility of modulating the depth and scope of its treaty commitments with reference to its own domestic law, it does so subject to the duty to interpret and observe the treaty in good faith, i.e. without abusing its rights.[38] It is also appropriate to refer to Art. 27 of the VCLT in this respect.[39]

However, as Kolb notes "*l'action du principe est constante et ne vise pas uniquement a eliminer les interpretations les plus manifestes dolosives*".[40] In other words, even if states do not intentionally reduce their treaty obligations by changing their domestic laws or regulations, the principle of good faith protects the legitimate expectations of the parties.[41] The function of good faith in this respect is thus to temper the state's discretion to exercise that right.[42] According to Villiger, this is even the primary function of good faith in treaty interpretation.[43]

This particular implication of the principle of good faith can be associated with Art 3(2).[44] The system of referral to domestic law for treaty interpretation and application

31. See 10.: "Towards an interpretation of Article 3(2) in accordance with Articles 31 and 32 VCLT".
32. The one necessitates the other: "Performance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally. As the ascertainment of this mutual understanding, i.e. the real and common intention of the parties, is a matter of interpretation, it is also said that treaty interpretation is governed by the principle of good faith" (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, 1953), p. 115); along the same lines Voicu notes: "Guidée par la bonne foi, l'interprétation d'une norme contribuera à son application correcte" ("Guided by good faith, the interpretation of a norm will contribute to its correct application"), note 10, p. 18.
33. *Guinea-Bissau Maritime Frontier Delimitation Arbitration Award* of 14 February 1985, Para. 46, 89 RGDIP 484, 508 (1985); M. Jokl, *De l'interprétation des traits normatifs d'apres la doctrine et la jurisprudence internationals* (Paris, 1936), p. 104; Bin Cheng, note 32, p. 115; Voicu, note 10, p. 45; Kolb, *La Bonne Foi en Droit International Public* (Paris: PUF, 2000), p. 273; H. Lauterpacht, 43 *Annuaire de l'Institut de Droit International* I (1950), p. 413.
34. A.D. McNair, *The Law of Treaties* (Oxford, 1961), p. 466 (footnote 1).
35. *North Atlantic Fisheries Arbitration Award* by the Permanent Court of Arbitration, XI RIAA 167, pp. 186-188; *US nationals in Morocco case*, *ICJ Reports*, 1952, p. 176; "Rainbow Warrior", *Revue Générale Droit International Public* 94 (1990), p. 843, Group dissenting opinion Lauterpacht, Wellington Koo and Spender, *Aerial incident case* (preliminary objections), *ICJ Reports*, 1959, p. 189.
36. J. Verhoeven, *Droit International Public* (Brussels: Larcier, 2000), p. 420; Kolb, note 33, p. 264.
37. Zoller, *La bonne foi en droit international public* (Paris: Pedone, 1977), p. 82; Kolb, note 33, p. 266.
38. *North Atlantic Fisheries Arbitration*, Award by the Permanent Court of Arbitration, XI RIAA 167, pp. 186-188; *US nationals in Morocco case*, *ICJ Reports*, 1952, p. 176; Kolb, note 33, p. 270.
39. "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"; See also I. Sinclair, "Interpretation of tax treaties", 40 *Bulletin for International Fiscal Documentation* 2 (1986), p. 75.
40. Kolb, note 33, pp. 266-267.
41. Fisheries Jurisdiction ("In consequence, the exercise of jurisdiction by the Court to entertain the present application would fall within the terms of the compromissory clause and correspond exactly to the intentions and *expectations* of both parties when they discussed and consented to that clause"), *ICJ Reports*, 1973, pp. 57-58, Paras. 22-23 (emphasis added); *India- Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. No. WT/DS50/R, pp. 47-49, Paras. 7.18-7.22, 10 World Trade and Arb. Mat., 35, 84 (1998); Yearbook of the ILC, 1965, p. 91 (Para. 41); Tammes (Netherlands), GAOR, 20th session, 6th Cmtee, 974th mtg, p. 199 (referring to good faith and the expectations that parties have while drafting an instrument, as noted by V.S. Mani, *Basic Principles of Modern International Law* (Lancers Books, 1993), p. 205); Diaconsecu (Romania), GAOR, 21st session, 6th Cmtee, 932nd mtg., p. 201; M.E. Villiger, *Customary International Law and Treaties* (The Hague: Martinus Nijhoff, 1985), p. 321, Para. 469; *Amco v. Indonesia*, International Centre for Settlement of Investment Disputes Reports 1, p. 431.
42. Kolb, note 33, p. 269; Zoller, note 37, pp. 88-89; Bin Cheng, note 32, pp. 114-115; Yasseen, note 11, p. 23.
43. Villiger, note 41, p. 343.
44. Dery and Ward, note 29, p. 282.

makes tax treaties vulnerable to unilateral intentional dodging and unintentional hollowing out of tax treaty obligations by the contracting states, as was already pointed out above.[45] That concern is also expressed, to mention but one source, in the OECD Commentary with respect to Art. 3(2) of the OECD Model:

> A state should not be allowed to empty a convention of some of its substance by amending afterwards in its domestic law the scope of terms not defined in the Convention.[46]

Unfortunately, it is not above states to reduce the scope of their tax treaty commitments by means of Art. 3(2). As Bartlett noted, "[I]n recent years, however, concern has been expressed about a worrying development whereby changes in the terms of a treaty have been made unilaterally through new tax legislation in the partner country".[47] De Bont cites a Memorandum by the Netherlands Ministry of Finance that quite openly admits to unilateral treaty adjustments with reference to Art. 3(2).[48] Other examples can also be found.[49]

4.3. Effectiveness

The principle of effectiveness includes two distinguishable rules.[50] The first is that all provisions of the treaty are intended to have significance.[51] The second is that the treaty as a whole must be taken to have been concluded to achieve some intended effect, a consideration closely related to the "object and purpose" of the treaty.[52] This rule is also commonly referred to with the adage *ut regis magis valeat quam pereat*, which Schwarzenberger describes as "the battle-cry of functional treaty interpretation".[53] The World Court has held that a state is obliged to take all measures, including those of a legislative or regulatory nature, to ensure the effective application of a treaty.[54] The ILC found that the implications of this principle are actually included in the principle of good faith, which is mentioned explicitly; a statement to that effect was made in the ILC Explanation.[55]

Although the principle of effectiveness thus supports an interpretation of Art. 3(2) that would give full effect to the elimination of double taxation, it must also be said that the ICJ refused to "repair a fault in the mechanics of a treaty" even though this meant that the treaty could not have the effect the drafters intended.[56] This dictum by the ICJ illustrates the "organic defects" Brownlie sees in the principle of effectiveness.[57] It is, as Stone noted, difficult to balance the common intent of the contracting states on the one hand and give the treaty an unforeseen operation on the other hand.[58] Treaty provisions must be given their full, real effect by states, but an oversight or a fault in the treaty should not be repaired on the basis of the principle of effectiveness.

5. ARTICLE 3(2) AND THE (OTHER) CONTEXT OF TREATY TERMS

5.1. In general

As was discussed above, the notion and function of "context" is crucial for the interpretation and application of Art. 3(2). The context of the term that is subject to interpretation needs to be taken into account, and may even take precedence. Article 3(2) constitutes "context" for any treaty term that needs interpretation, but many other treaty terms, phrases and perhaps even extraneous elements and instruments will be a part of that context as well. The "context" of a treaty term can be any other word(s) in the same sentence, paragraph, chapter or part of the treaty,[59] or found in any other instrument described in Art. 31(2) of the VCLT. Of course, not every word in a treaty relates to every other word to such an extent that a valid interpretation of the one cannot be established without reference to the other.

5.2. Role of "context" in Article 3(2) versus Article 31 VCLT

The reference Art. 3(2) makes to "context" is in accordance with the basic rule of Art. 31 of the VCLT, namely that the "natural" context of a treaty term shall be taken into account for the purpose of interpretation, and it connects directly to the phrase "unless the context requires otherwise" in Art. 3(2). It must be kept in mind that "context" in this phrase is not necessarily equated with the definition of what comprises context in Art. 31(2) of the VCLT.

45. With respect to unilateral interpretations, Voicu, note 10, (on p. 118) draws the interesting distinction between unilateral treaty interpretation before and after the conclusion of a treaty. He points out, among other things, that unilateral treaty interpretations in the course of concluding the treaty may, under certain circumstances, become authentic.
46. Commentary on Art. 3, Para. 13 (added in 1992); see also *OECD Report on Tax Treaty Override*, 1992 (particularly case 2 at Para. 12); the legal basis for these assertions by the OECD, or its proper denomination under international law, is the principle of good faith. The domestic renvoi is subject to the requirement of good faith, which sanctions states that abuse the discretion given to them under Art. 3(2).
47. See also the comments of Bartlett, "The Making of Double Taxation Agreements", *BTR* (1991), p. 83.
48. De Bont, note 17, p. 258.
49. See, for example, the Austrian ministerial ordinance BGBl II 1997/287 quoted by Hofbauer, *Tax Treaty Interpretation* (The Hague: Kluwer Law International, 2001), p. 32; B. Peeters, Interpretation of double taxation conventions, "Belgium", *IFA Cahiers 1993*, note 1, pp. 244-245.
50. Berlia, Contribution a l'interprétation des traités, *Recueil des Cours* 114 (1965-1) p. 306; H. Thirlway, "The Law and Procedure of the International Court of Justice", 62 *BYIL* (1991) p. 44.
51. *Corfu channel case*, *ICJ Reports*, 1949, p. 24; *Anglo-Iranian oil case*, *ICJ Reports*, 1952, p. 105; Thirlway, note 50, p. 44.
52. *Interpretation of the peace treaties case*, *ICJ Reports*, 1950, p. 229; *Ambatielos case*, *ICJ Reports*, 1952, p. 45.
53. Schwarzenberger, *International Law*, I, 3rd ed. (London: Stevens, 1986), p. 520.
54. Advisory opinion on *Exchange of Greek and Turkish populations*, *PCIJ Reports*, Series B, No. 10, p. 20; Zemanek, in Neuhold/Hummer/Schreuer, *Österreichisches Handbuch des Völkerrechts*, 3rd ed. (Vienna: Manz Verlag, 1997), p. 65; D.J. Harris, *Cases and Materials on International Law* (Sweet and Maxwell, 1991), pp. 71-72.
55. Yearbook ILC 1966, II, Para. 6.
56. The principle of effectiveness could not be used by the ICJ to attribute to the provisions of the Peace Treaties a meaning that would be contrary to their letter and spirit (*Interpretation of peace treaties* case, *ICJ Reports*, 1950, p. 221, 17 ILR, p. 318; Shaw, *International Law* (London: Butterworths, 1970), p. 658).
57. I. Brownlie, *Principles of International Public Law* (Oxford University Press, 1966), p. 636.
58. Julius Stone, *Of Law and Nations Between Power Politics and Human Hopes* (William S. Hein & Co., Inc., 1974), pp. 180-181.
59. Yasseen, note 11, p. 34; Arthur D. Watts, *Oppenheim's International Law*, 9th ed. (London: Langman), p. 1273.

In any event, it must thus be accepted that resort to Art. 3(2) cannot exclude an examination of the other "context" of the tax treaty term that needs interpretation. How else could it be established that the context indeed "requires otherwise" in the sense of the provision?[60] At least in this respect, therefore, it is fair to say that Art. 3(2) does not displace the by and large contextual approach of the VCLT. Elements of "the context" must continue to find their way into the crucible of factors that play a role in giving meaning to a term to determine if indeed "they require otherwise". In the final analysis, therefore, Art. 3(2) must interact with contextual information from different sources. This means first of all that a tax treaty term may not be isolated from the rest of its sentence, the rest of the paragraph, or the rest of the article. Article 7(2) is, for example, clearly relevant context for Art. 7(3). The same goes for the effect terms in other articles may have on the meaning of the term in dispute. Article 25(3) is, in that sense, relevant context for Art. 7(3) as well. Finally, definitions or other relevant information included in instruments connected to the treaty must also be taken into account. In addition, as will be discussed further below, the other elements and instruments of Art. 31 of the VCLT, namely good faith, the object and purpose of the treaty and the elements and instruments must in the author's view be taken into account together with the context.

5.3. What comprises "context" in Article 3(2) versus Article 31(2) VCLT?

Tax treaties do not normally define what comprises context as used in Art. 3(2). Some authors have, based on the origins of Art. 3(2) in Anglo-Saxon legal terminology, taken the position that "context" in Art. 3(2) has a wider scope than that established in Art. 31(2) of the VCLT.[61] Others, in an attempt to use the language of Art. 3(2) itself to prevent changes in the domestic laws of one of the contracting states from undermining its treaty commitments,[62] argue that the domestic tax laws of each of the contracting states also belong to the "context".[63] The OECD Commentary on Art. 3 states that "the context is determined in particular by the intention of the contracting states when signing the convention ...", which is difficult to understand from the perspective of the Vienna Rules.[64] Skaar argues that the OECD Commentary is also part of the "context" of a tax treaty.[65]

Turning our attention to general international law, it is fair to say that "context" has at times been given a scope that exceeds the current definition of what comprises context in Art. 31(2) of the VCLT.[66] The ICJ has, for example, not hesitated to take into consideration materials not explicitly included in the context of Art. 31(2) of the VCLT. An example of such a decision, where it is hard to doubt the correctness of the ICJ's view, is the *Fisheries Jurisdiction* case. The ICJ held in that case that a unilateral resolution of the Icelandic government constituted context because the treaty referred to it.[67] With reference to several recent cases of the ICJ, Bernardez notes "the Court is beginning to be less wary of resorting to the so-called wide-context, including the context extrinsic to the treaty".[68] The case law of other international courts and tribunals seems to follow the same trend Bernardez observes. In the *Other Treaties* case before the Inter-American Court of Human Rights, for example, the court included in the context "the inter-American human rights system as a whole".[69] In the *Air Transport Arbitration*:

> the tribunal tested that judgment [derived from an interpretation of the agreement as a whole] in the light of the *overall context* of international civil aviation in which the agreement was negotiated and the practice of the parties as they operated under the agreement ... Finally, the tribunal undertook a limited examination of practice under air service agreements similar to the France–US one, for the sole purpose of ensuring that this practice did not suggest a wholly dissimilar approach from the tribunals tentative judgment .[70] [emphasis added]

The issue of a "wide" context can perhaps be associated with the fact that it is not entirely clear if Art. 31(2) actually defines context or only defines what the context is comprised of for the purposes of interpretation.[71] The German text of the VCLT ("*Für die auslegung eines Vertrages bedeutet der Zusammenhang ...*") seems to indicate the first solution, while the French ("*Le contexte comprend ...*") and English ("The context ... shall comprise ...") versions seem to support the second solution. It seems that it would be adding to the VCLT to read Art. 31(2) as meaning that "the context for the purpose of the interpretation of a treaty shall *only* comprise". For most practical purposes, Art. 31(3) solves this problem because it lists instruments and elements that are "taken into account together with the context". Nevertheless, a court may feel that it is not exactly prevented from considering other material or circumstances to be "context" in the sense of Art. 31(1). Indeed, as Thirlway puts it "[Art. 31(2)] does not cover all possibilities".[72] Even if a debate ensued over the admissibility of such material one could consider it a "supplementary means" rather than an element of the general rule. Articles 31 and 32 by no means prevent an interpreter from using the material anyway in order to confirm the interpretation of the general rule, or to shed light on a term that remains unclear.

60. Vogel, IFA General Report, note 1, pp. 79-82; Ker, note 1, Chapter 7, p. 8.
61. Shannon, note 1, p. 459; Avery Jones et al., note 1, p. 93.
62. Which is actually safeguarded, in any event, by the principle of good faith.
63. Dery and Ward, note 29, p. 285; OECD Commentary on Art. 3(2), Para. 12; A. Xavier, *Direitto Tributario Internacional*, p. 134; M. T. Soler Roch and A. Ribes Ribes, "Tax Treaty Interpretation –Spain", in Lang (ed.), note 1, p. 312.
64. OECD Commentary on Art. 3(2), Para. 12; with respect to a bilateral treaty the "intention of the parties" is almost to be equated with the "object and purpose of the treaty" (Thirlway, note 50, pp. 40-44) which would mean that in view of the OECD, the domestic renvoi is most often subject to the treaties' aim to eliminate double taxation.
65. Skaar, *Permanent Establishments* (Deventer: Kluwer Law and Taxation, 1991), pp. 45-48.
66. De Visscher, note 15, p. 60.; Stone, note 58, p. 186.
67. *ICJ Reports*, 1973, p. 8, Para. 13.
68. S. Bernardez, note 26, p. 745; See also the contention by Honduras in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening), *ICJ Reports*, 1992, [pp. 582-584] Para. 375.; case concerning Kasilili/Sedudu island, ("present-day state of scientific knowledge"), Para. 20.
69. *Other treaties* case, Advisory Opinion OC-1/82, 24 September 1982, Inter-Am. Ct. H.R. No. 1 (1982), Para. 19.
70. 54 ILR 1979 p. 327.
71. Compare Yasseen, note 11, pp. 33-34 ("*Cette définition n'est pas une définition générale mais une définition adoptée aux fins de l'interprétation du traité*").
72. Thirlway, note 50, p. 31.

6. ARTICLE 3(2) IN LIGHT OF THE OBJECT AND PURPOSE OF THE TAX TREATY

The object and purpose of a tax treaty has important implications for the interpretation of Art. 3(2) itself and its application to other tax treaty provisions. Under Art. 31(1) of the VCLT, the meaning of treaty provisions shall be established in light of the object and purpose of the treaty.[73] The ICJ's (recent) decisions in the *Aerial Incident* case[74] and the *ICAO* appeal[75] confirm that the object and purpose of a treaty, as Thirlway notes, must increasingly be reckoned with.[76] The object and purpose of a treaty is what the parties sought to bring about.[77] The question must be asked "why did the parties conclude this treaty". As a function of obtaining the answer, the text of the treaty must be read. Thus, the object and purpose of a treaty is closely associated with the intention of the parties.[78] It must be noted, however, that Art. 31 of the VCLT refers to the object and purpose "of the treaty". The claimed intent of one party is of little consequence, but it is also true that the implication of intent may suffice.[79]

Although it is accepted that a treaty can have more than one purpose,[80] Art. 31 does encourage the interpreter to see treaty provisions in light of the object and purpose of the whole treaty.[81] In addition, as Starke notes: "what must be ascertained is the *ostensible* intention of the parties, as disclosed in the four corners of the actual text" (emphasis in original).[82] Or in the words of Judge Bernardez:[83]

> What constitutes the object and purpose of the interpretation process today is *the elucidation of the intentions of the parties as expressed in the text of the treaty*, presumed to be the authentic expression of the intention of the parties. In this objective environment, the object and purpose of the interpretation is not the "words" but the "intentions" of the parties as reflected in the terms used in the text of the treaty. [emphasis added]

This idea of ostensible object and purpose finds support in the proceedings of the ILC as well.[84] For that reason, among other things, the author disagrees with the idea that Art. 3(2) reflects an intention of the contracting states to "retain their own scheme of taxation".[85] As was said above, Art. 3(2) should first and foremost be read in light of the prevailing object and purpose of the treaty, namely to eliminate double taxation. Furthermore, in the author's view, attaching such an explanation to Art. 3(2) is not supported by the language of the provision. It also comes down to adopting a principle of interpretation that holds that obligations upon the state should be interpreted in a way that limits the state sovereignty the least.[86] This approach has, however, been all but abandoned in international law,[87] among other reasons because it is self-contradictory.[88]

A literal interpretation of a treaty provision that disregards the object and purpose of the treaty, is not in accordance with international law. For certain treaties the role of the object and purpose is given even more emphasis.[89] Without raising the question as to whether, for the purpose of interpreting tax treaties, the object and purpose should be given relatively more weight than for other treaties, it is true that a tax treaty imposes clear obligations upon the state that constitute enforceable rights, most often in favour of subjects of the other contracting state. There are few – if any – "soft obligations". What parties intended to achieve at the technical level is quite well defined and structured in the treaty, complete with a dispute settlement mechanism and a widely used technical commentary. This confirms the importance of the object and purpose of a tax treaty for the purposes of interpretation. Reference is made here to a dictum of the ICJ in the *Oil Platforms* case:

> The spirit and intent set out in this article give meaning to the entire Treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its overall objective [...][90]

The primary purpose of a tax treaty is to eliminate double taxation as an obstacle to international trade and investment. The interpretation of both Art. 3(2) itself and the treaty terms that it applies to, must take this object and purpose into account. If a treaty provision, including Art. 3(2), can be interpreted in several prima facie valid ways

73. Rights of Nationals of the United States of America in Morocco, *ICJ Reports*, 1952, p. 176 at 196; *Asylum (Colombia/Peru) case*, *ICJ Reports*, 1950, p. 266 at 282; see Paras. 19 and 20, the Beagle Channel Arbitration, 1977; Wetter, *The International Arbitral Process*, 1979, Vol. 1, p. 276 at 318-319.; Yasseen notes that the object is what the parties agreed to, the norms they created, etc., while the "purpose" is what the parties actually tried to achieve. The fact that the VCLT states "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 synonymously (De Visscher, note 15, p. 62).
74. See Thirlway, note 50, pp. 31-44.
75. Thirlway, note 50, pp. 31-44.
76. Thirlway, note 50, p. 19.
77. Yasseen, note 11, p. 55 et seq.
78. Schwarzenberger, note 53, pp. 518-520.
79. *Continental Shelf* case, *ICJ Reports*, 1985, p. 23, Para. 19.
80. Yasseen, note 11, pp. 55-59; Katz, IFA, note 1, p. 634.
81. Avery Jones, IFA, note 1, p. 602; The opposite (to view every treaty provision in respect of "its own" object and purpose) would come close to a teleological approach to interpretation, which was not adopted by the VCLT. This does not mean that certain provisions drafted with an object and purpose in mind that is not the same as the general object and purpose of the treaty, should not be interpreted in the light of that specific purpose. (The ICJ has done so on several occasions, including for example in the *Oil Platforms* case (preliminary objections).) But, intention must first and foremost be established from the treaty text in its context, and not by taking one provision in isolation.
82. Avery Jones, note 1, p. 479; Villiger, note 41, p. 344.
83. *Land, Island and Maritime Frontier* Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, *ICJ Reports*, 1992, [pp. 717-719 S.O. Torres Bernardez], note 1, Para. 189.
84. Commentary ILC Yrb ILC ii 219, Para. 6 and 220, Para. 11.
85. *Samann v. Commissioner*, 313 F. 2d 461, 462, (1963); Vogel, IFA General Report, note 1, p. 81 ("Art. 3(2) expresses the idea that the tax sovereignty of contracting states should as far as possible be left untouched").
86. H. Lauterpacht, "Restrictive interpretation and the principle of effectiveness", 26 BYIL 1946, p. 48.
87. See, for example, the *Arbitral Award of 31 July 1989* case, *ICJ Reports*, 1991, p. 69, Para. 47 (on which Bernardez commented: "[the ICJ responded] to old theories about a so-called a priori principle concerning restrictive interpretation ...", note 1, p. 731); Conforti, *International Law and the Role of Domestic Legal Systems* (The Hague: Martinus Nijhoff), p. 106; McNair notes on the subject of this maxim: "It is believed to be now of declining importance and the time may not be far distant when it will disappear from the books" (in J.L.F. van Essen, *Symbolae Verzijl* (The Hague: Martinus Nijhoff, 1958), p. 235.
88. In international law, each restriction of an obligation of one state leads to the corresponding restriction of a right of another state. On this contradiction within the canon of restrictive interpretation, see Stone, note 58, p. 181.
89. *Reparations* case, *ICJ Reports*, 1949, p. 174; *Certain expenses* case, *ICJ Reports*, 1962, p. 151; See D.W. Greig, *International Law*, 2nd ed., 1976, p. 484.; Shaw, *International Law*, note 56, pp. 658-660.
90. *Oil Platforms* case, 12 December 1996, *ICJ Reports*, 1996 II, p. 820.

only one of which is in accordance with the object and purpose of the treaty (or one of which is clearly more in accordance with that object and purpose than the other ways), that one should be chosen, in otherwise equal circumstances.

The primary purpose of tax treaties is to protect subjects of states from double taxation in the hope of stimulating international trade, investment and employment. Most of the provisions of a tax treaty are designed to create rights and benefits for taxpayers where none would otherwise exist. The operation or application of those provisions consists of the "restriction" of certain income tax provisions of the contracting states, chiefly – but not exclusively – to reduce the chances of double taxation.

In this respect, it has often been observed that exclusive reliance on the referral to domestic law might lead to results that are not in accordance with the object and purpose of a tax treaty.[91] As Baker comments, the result would be that the convention would mean two different things in two contracting states and this may result in a reduced effectiveness of the tax treaty.[92] Lifting domestic characterizations to the international level without any controls or limitations allows states to minimize their obligations under the treaty. Avery Jones and the other members of the "International Tax Group" suggested that, to remedy this problem, the residence state would be required to follow the characterization of the source state.[93] Others have criticized this solution as "difficult to derive from the language utilized".[94]

In this respect, the phrase "as regards the application of the convention by a contracting state" may be an important indication of the operation of Art. 3(2).[95] If looked at in light of the primary object and purpose of a tax treaty, the phrase "application of a convention by a contracting state" for most provisions (namely those that relate to the primary purpose of a tax treaty) means the restriction of a state's income tax provisions. Tax treaties can namely only operate if their terms and provisions are indeed phrased in such manner that it is apparent what income, tax and taxpayer are meant to be restricted. Incompatibility in the relationship between treaty terms and domestic terms would result in ineffectiveness.

7. GENERAL PRINCIPLES OF INTERNATIONAL LAW

Of the other elements and instruments that are to be taken into account together with the context, general principles of international law deserve special consideration. These principles are resorted to under Art. 31(3)(c)[96] and must, as an element of Art. 31 of the VCLT, at least be taken into account in interpreting Art. 3(2) and its application to other tax treaty terms. Among those principles can be included the primacy of international law with regard to municipal law, the principle of reciprocity and the fundamental equality of nations. It can be argued that unrestricted reference to domestic law, especially if it authorizes the contracting states to auto-interpret the depth and scope of their treaty obligations, is not in accordance with any of these principles. Although none of the principles mentioned exclude treaty derogations, it can be argued that a derogation should be evident beyond any doubt from the text. If this is not the situation, these principles will be allowed to affect the interpretation of Art. 3(2).

8. ARTICLE 3(2) AND AN INTENDED "SPECIAL MEANING"

There seems to be a certain eagerness among tax scholars to make use of Art. 31(4) of the VCLT[97] with respect to tax treaty terms. This can be associated with the urge to declare tax treaties a "special kind of treaty" that would merit some sort of deviation from the rules that apply to "normal" international treaties.[98] Some deem the terms of a tax treaty as having a "special meaning" because the treaty refers to taxation.[99] Others argue that Art. 3(2) establishes a "special meaning" in terms of Art. 31(4) of the VCLT.[100] The ALI wrote that a term can have a special meaning "when it has been the subject of a significant body of international jurisprudence".[101]

Notwithstanding the "pleasantness"[102] of this approach to tax practitioners, however, interpretation with reference to a "special meaning" in the sense of Art. 31(4) of the VCLT should be exceptional. It should not be resorted to with reference to the meaning of a term within its technical context, as such is covered by Art. 31(1) of the VCLT. A technical or otherwise qualified meaning of a term (so employed in domestic laws or regulations, court decisions and administrative practice) must be established by its context, as the ILC Commentary points out.[103] The technical meaning is the "ordinary" meaning. That terms have a special meaning must be proven by the party invoking that meaning, a matter which is not easily accepted by the ICJ.[104] Indeed, as Shaw notes, "the standard of proof is fairly high".[105] There was therefore some discussion in the ILC as to whether Art. 31(4) of the VCLT should be

91. Avery Jones et al., note 1, pp. 48-54.
92. Note 1., p. 32; along the same lines Vogel, *Double Taxation Conventions*, note 1, p. 208: ("[...] one negative consequence of reference to domestic law is that in many instances the two contracting states attach different meanings to terms in applying the treaty").
93. Avery Jones et al., note 1, ft. 124.
94. ALI, note 7, p. 62.
95. B. Klebau, *Einzelprobleme bei der Auslegung von Doppelbesteuerungsabkommen*, 21 *RIW* (1975), p. 126.
96. Yasseen, note 11, p. 63.
97. "A special meaning shall be given to a term if it is established that the parties so intended".
98. Gest and Tixier, note 1, p. 96; Reimer, "Tax Treaty Interpretation – Germany" in Lang (ed.), note 1, pp. 123-124; Avery Jones et al., note 1, p. 17 ("Tax treaties have a greater connection with internal law than most other types of treaties").
99. Reimer in Lang (ed.), note 1, pp. 123-124.
100. Timmermans, "Interpretation of double taxation conventions, The Netherlands", *IFA Cahiers 1993*, see note 1, p. 457; Dery and Ward, note 29, p. 273.
101. ALI, note 7, p. 60.
102. "Pleasantness" was the term employed by A. Steichen, "Tax treaty interpretation – Luxembourg", in Lang (ed.), note 1, p. 235 (who does not agree with equating tax meaning with special meaning).
103. Para. 17 of the Commentary to Arts. 31, 32 and 33 ("technical or special use of the term normally appears from the context and the technical or special meaning becomes as it were the ordinary meaning in the particular context").
104. See, for example, the *Western Sahara* case, *ICJ Reports*, 1975, p. 52, Para. 116.
105. Shaw, note 56, p. 660.

adopted at all. Those supporting the inclusion suggested it would emphasize that the burden of proof lies on the party invoking the special meaning of the term, a matter that was already the subject of a noted decision of the Permanent Court of International Justice (PCIJ).[106]

With respect to tax treaties, which can be taken as technical treaties in their entirety, it would not be appropriate to see tax terminology as ordinary words with a "special meaning" in the sense of Art. 31(4) of the VCLT. Their ordinary meaning is so qualified by the entire context, object and purpose and good faith, that the ordinary meaning is the technical meaning, as the ILC Commentary clearly indicates.[107] There is nothing "special" about a term in a tax treaty having something to do with taxation. That does not mean that a special meaning may never emerge in a tax treaty, but it would have to be much more than just a tax treaty meaning. Ker, in the same vein, believes that "Art. 31(4) should rarely apply in a tax treaty context".[108]

Can the domestic renvoi be seen as establishing a "special meaning"? First of all, it is not at all excluded that in a particular situation, the contracting states employ a term that is intended only to have the meaning it has under the domestic law of one of the states. Such is often the situation when tax treaties refer to a particular type of taxpayer, entity, income or tax in only one of the contracting states. Even if the tax treaty does not say so explicitly (in most circumstances it does), those terms must be explained with reference to the law of that state only. With respect to Art. 3(2), however, which applies to practically all words in the treaty, the "high standard of proof" required for a special meaning in deviation from Art. 31(1)-(3) has, in the author's view, not been met by the proponents of the idea that Art. 3(2) leads to a "special meaning". Its application to almost all the terms of the treaty is in sharp contrast with Art. 31(4) of the VCLT's exceptional character.[109] Moreover, from the language of Art. 31 of the VCLT and its *travaux préparatoires* it can be concluded that if a qualified ordinary meaning can be established on the basis of Art. 31(1)-(3) of the VCLT, no special meaning is in order.[110] Put another way, one would first have to prove that Art. 3(2) cannot or should not be explained in accordance with Art. 31(1)-(3) of the VCLT before it can be accepted that there is indeed the need to apply a "special meaning".[111] In the author's view, Art. 3(2) can and should actually be explained in accordance with Art. 31(1)-(3) of the VCLT (see 10.); this therefore ipso facto means that the author does not believe that Art. 3(2) establishes a special meaning.

9. ARTICLE 3(2) AND (CERTAIN) SUPPLEMENTARY MEANS OF INTERPRETATION

Avery Jones et al. noted in their authoritative article that "laws of that state concerning taxes to which the treaty applies" may include the other tax treaties that state has concluded with third states.[112] The context of the treaty requires, however, according to the authors, that reference only be made to domestic tax law. This observation is associated with the relationship between Art. 3(2) and supplementary means of interpretation, namely parallel treaties. Parallel treaties are treaties on a similar subject matter as the one needing interpretation but that were concluded between third states, or between one of the same parties and a third state.[113] 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 referring to similar treaties for the purpose of treaty interpretation.[114] 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.[115] More recently, the ICJ has invoked similar treaties to interpret treaty terms in the *Oil Platforms* case,[116] in the *Territorial Dispute between El Salvador and Honduras*,[117] and in the *Military and Paramilitary Activity in Nicaragua* case.[118]

As is the situation with other supplementary means of interpretation, recourse to similar treaties is, inter alia, permitted by Art. 32 of the VCLT if the general rule of interpretation leaves the meaning ambiguous, obscure or unreasonable. What is more, supplementary means may always be resorted to for the purpose of confirming an interpretation obtained by application of Art. 31 of the VCLT. It is not the aim of the VCLT to exclude extrinsic evidence that may reasonably shed light on the understanding of a treaty term by the parties. As Bernardez noted "invoking the 'clear meaning' aphorism of Vattel, in order to avoid the taking into account in the interpretation process of intrinsic elements or means of evidence of the common intention of the parties as expressed in the treaty, does not correspond to the system of the Vienna Convention".[119] It seems unlikely that Art. 3(2) must be interpreted in such a way that it would exclude all recourse to supplementary means of interpretation. Shannon seems to suggest that "context" in Art. 3(2) should be read in such a way that recourse to e.g. *travaux préparatoires* remains possible.[120]

106. *Legal status of Eastern-Greenland* case, PCIJ, series A/B, No. 53, p. 49 (The Permanent Court did not accept the Norwegian contention that the word "Greenland" had a special rather than an ordinary meaning.).
107. ILC Commentary (17).
108. Ker, note 1, Chapter 19, p. 3.
109. ILC Commentary on Arts. 31, 32 and 33, Para. 17.
110. See note 103.
111. Voicu, note 10, pp. 107-108.
112. Avery Jones et al., note 1, pp. 24-25.
113. Paul Reuter, *Introduction to the Law of Treaties*, 2nd ed. (London: Kegan Paul International, 1995), p. 98 ("groups of treaties covering similar subjects").
114. F. Matscher, "Vertragsauslegung durch Vertragrechtsvergleichung in der Judikatur internationaler Gerichte", in *Festschrift für Hermann Mosler*, 1983, p. 545.
115. As quoted by Yi-Ting Chang, *The Interpretation of Treaties by Judicial Tribunals* (New York: Columbia University Press, 1933), p. 74.
116. *ICJ Reports*, 1994, pp. 813-814 (even referring to a "US Model treaty").
117. *ICJ Reports*, 1992, p. 585, Para. 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").
118. 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.
119. S. Bernardez, note 26, pp. 732-733.
120. Shannon, note 1, pp. 459-460.

10. TOWARDS AN INTERPRETATION OF ARTICLE 3(2) IN ACCORDANCE WITH ARTICLES 31 AND 32 VCLT

10.1. Preliminary considerations

A first preliminary consideration stems from the fact that "treaty interpretation by domestic courts and administrative agencies takes place against a general background of international law and practice".[121] Keeping this in mind, the fundamental precept remains that international instruments must be interpreted using international law and not the domestic law of one of the states.[122] In addition, a state may not invoke the provisions of its internal law to justify not giving a treaty its full effect.[123] A state that contends otherwise, namely that a term in the treaty must be given the meaning it has under domestic law, must offer proof of this unusual circumstance.[124] Ironically, even "domestic law" may not be interpreted with reference only to domestic law.[125] Of course, recourse to concepts from the world's major municipal legal systems occurs regularly in international law,[126] but as the ICJ has held "it is to rules generally accepted by municipal legal systems ... and not to the municipal law of a particular state" that reference must be made.[127] In terms of bilateral treaties, what is more, international courts and tribunals are sometimes reluctant to accept that the meaning must be found with reference to only the two contracting states instead of "rules generally accepted by most municipal legal systems". This was recalled, for example, in the *Exchange of Greek and Turkish Populations* case,[128] where it had been suggested that the term "*établis*" must be interpreted in light of the relevant Turkish and Greek legislation. The PCIJ rejected this contention, stating that it could find no indication of that at all.

It is not open to one party of an agreement "to impose an interpretation unilaterally".[129] As a rule, domestic courts should, as a point of international law, resist the temptation to interpret treaties "guided by nationalistic concerns or corresponding exclusively to legal concepts of its legal system".[130] Put another way, domestic judges must, as Conforti notes, "model their approach on that of international judges. They must therefore seek the international meaning of the legal terms, relying on the convention itself and possibly on *traveaux préparatoires*, successive interpretative agreements, subsequent practice, and any other relevant rule of law applicable to the parties".[131] Especially when a treaty was meant to lend protection to individuals and to be invoked before the municipal courts of the contracting states, those courts must employ the international rules of treaty interpretation to give a uniform meaning to the treaty.[132] Under the Restatement of the Law (Foreign Relations of the United States) promulgated in 1987: "treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems".[133]

That does not mean that the contracting states are not at liberty to deviate from the general rule of interpretation of treaties found in Art. 31 of the VCLT,[134] although it is clear that Arts. 31 and 32 of the VCLT are not typical residual rules.[135] But the question is if Art. 3(2) must indeed be interpreted as an exception to the Vienna Rules.[136] That question was at the core of this contribution. While it would not be an actual violation of the VCLT to deviate from its rules of interpretation, it is good to keep in mind that "it is a 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".[137]

Another point to be recalled at this stage is that most international treaties restrict the domestic law, regulations and other measures of the contracting states.[138] Contrary to what some may believe, there is nothing special about tax treaties in this regard. An explicit renvoi to domestic law is certainly not *a conditio sine qua non* for the effective

121. ALI, note 7, p. 43.
122. *Fisheries Jurisdiction*, *ICJ Reports*, 1998, p. 460; *Military and Paramilitary Activity in Nicaragua*, *ICJ Reports*, 1986, p. 141; *ELSI* case, *ICJ Reports*, 1989, p. 74.
123. Art. 27 VCLT; I. Sinclair, note 39, p. 75.
124. In the ELSI case, the United States argued that the term "arbitrary" in the US–Italian Treaty of Amity meant whatever would be classified as arbitrary by a domestic court of one of the parties. However, the US failed to deliver the proof for this contention: *ELSI* case, *ICJ Reports*, 1989, p. 74, Para. 124 et seq. See also Thirlway, note 50, p. 29.
125. Inter-American Court of Human Rights, Advisory Opinion, OC-6/86 of 9 May 1986, 7 HRLJ 231.
126. Art. 38(1)(c) Statute of the ICJ; As Helminen puts it correctly: "The starting point of the VCLT is a universal meaning of a tax treaty term and not necessarily the domestic meaning of the same term" (Tax Treaty Interpretation in Lang, see note 1, p. 82).
127. *Barcelona Traction*, *ICJ Reports*, 1970, p. 37, Para. 50; See also Philips Arbitration, Entscheidung IV, pp. 207-230 ("it is a principle of international law that, where a legal text is the work of several states with different systems and concepts of law, the legal terms contained therein must be interpreted so as to be, as far as possible, in keeping with the concepts of *all* the signatory states") [emphasis added].
128. *Exchange of Greek and Turkish Populations* case, Series B, No. 10, pp. 20 and 26.
129. *Dispute between El Salvador and Honduras*, *ICJ Reports*, 1992 p. 585 (contention of Honduras that was not rejected by the Chamber).
130. Conforti, note 87, p. 105.
131. Conforti, note 87, p. 107.
132. L. Sohn, "Settlement of disputes relating to the interpretation and application of treaties", 150 *Hague Recueil des Cours* (1976), pp. 204-205; *Ottoman Debt* Arbitration, 18 April 1925, RIAA, p. 544 ("L'arbitre a pour mission d'assurer par sa sentence ... l'uniformité"); Voicu, note 10, p. 211 ("A même de concourir à l'uniformité de l'interprétation des traités et de sauvegarder le principe de la reciprocité, ..."). In this respect it is thus difficult to see why Avery Jones et al. considered that "it seems to be implied rather than stated specifically that in applying art 31 (1) one is looking for what might be called a universal meaning, so that the treaty means the same in both or all countries which are parties to the treaty" (note 1, p. 15).
133. Restatement of the Law, The Foreign Relations of the United States, 1987, p. 197.
134. In the debates before the ILC, the Special Rapporteur ... remarked that although states are at liberty to deviate from Art. 31, such would be highly unlikely as the rules were "eminently logical"; Villiger also noted that state practice shows that the interpretation rules of Arts. 31 and 32 have been unanimously followed (Customary International Law and Treaties, note 41, p. 345).
135. Compare with, inter alia, Arts. 22(1), 24(2), 25(1)(a) and 30 of the VCLT.
136. Shannon, note 1, p. 455.
137. *Rights of Passage* case, *ICJ Reports*, 1957, p. 142.
138. Many of them, although not all, are self-executing as well. For an opposite view see Reimer in Lang (ed.), note 1, p. 124; In addition, the large majority of international treaties (self-executing or otherwise) are concluded to create rights for the subjects of states rather than for the states themselves. Rare exceptions are, for example, peace treaties, treaties on political and military alliances and territorial delimitation treaties.

operation of such treaties.[139] As a principle, such an operation follows naturally and necessarily from their object and purpose, from their language and from the general principles of international law. Any treaty on fishing rights will surely limit the relevant laws and regulations of the contracting parties to that treaty (usually in a self-executing manner), but it is neither necessary nor customary to refer to their domestic laws to define "engage in fishing", "natural resources", "fish processing" or any other term found in treaties on fishing rights. Treaties for the promotion and protection of investments clearly have a restrictive impact upon many laws and regulations of the host state that may affect the property of aliens, and may be invoked before the municipal courts of the host state. But even terms such as "know-how", "semiconductor maskworks" and "spot transactions"[140] are interpreted without the benefit of a renvoi to any particular legal system. A free trade agreement will have a severe impact upon the tariff and non-tariff barriers found in the domestic law and regulations of the contracting states, but terms and classifications used in such agreements are interpreted without having to refer to the domestic law of the state applying the agreement.

Finally, without wishing to point out the obvious, it is also noteworthy that the international rules on treaty interpretation by no means need confirmation in the actual text of a treaty in order to apply. By the same token, the explicit mention of some but not all elements or instruments used in interpretation does not necessarily exclude the others. The same applies for the general principles of international law.

10.2. Art. 3(2) is not "absolute"

Turning our attention to Art. 3(2), first it must be established whether Art. 3(2) excludes all other (means of) interpretation. Put another way, does Art. 3(2) have an absolute character?

In that respect it is first noted that the text of Art. 3(2) does not read "any term not defined therein shall *only* have the meaning it has under the laws of that state ...". It is at least not explicitly stated that all other usual means of interpretation, which incidentally constitute customary international law, are thereby excluded.[141]

It has been demonstrated above that the ordinary meaning of the language "as it stands" may give rise to different valid interpretations regarding the relationship between the domestic renvoi and other possible interpretations or ways to establish interpretations. As the quoted literature allowed the author to conclude, depending on the content given to the notion of "context" in "unless the context otherwise requires", the placement of domestic renvoi in the hierarchy may vary significantly. Another uncertainty in respect of the scope and function of Art. 3(2) is associated with the use of the words "as regards the application of the convention by a contracting state". As was said above, this phrase is at least somewhat inconsistent with the establishment of a general rule of interpretation. It could be taken as an indication that the function of Art. 3(2) is more limited, and linked to an operation that must be inferred from its context, the principle of good faith and the object and purpose of the treaty.

Under international law, the duty to qualify the actual terms of a treaty provision by its context, the object and purpose of the treaty and the principle of good faith is clear in any event, but in a situation where several prima facie valid interpretations can be inferred, these elements are absolutely crucial to establishing the true meaning of the provision. The analysis above shows that all of these elements support a restrictive interpretation of Art. 3(2), and normally all of these elements must be taken into account under international law.[142] They offer much less support for the thesis that Art. 3(2) is a general rule of interpretation. The notion and function of context in international law forbids the interpreter from applying Art. 3(2) in isolation from the rest of the treaty, related agreements and general principles of international law. The object and purpose of the treaty supports that the phrase "as regards the application of the convention by a contracting state" establishes a specific function for Art. 3(2) rather than a general rule of interpretation. That function is to ensure that double taxation is also eliminated in cases where there is discordance between treaty terminology and terms of the domestic income tax law that is meant to be restricted by the operation of the treaty. It does not support the interpretation that under Art. 3(2) contracting states are at liberty to lift their own qualifications up to the treaty level, regardless of the fact that such could render the treaty ineffective.

Most importantly, the principle of good faith must also be taken into account to give meaning to the language of Art. 3(2). Although states are in theory free to determine that a treaty meaning be established by reference to the municipal law of the contracting state that applies the treaty,[143] even that right is subject to the overriding duty to observe and interpret the treaty in good faith. It can be argued that if such a domestic referral would lead to an unreasonable, dishonest or unfair result that domestic meaning may not be adopted, despite the fact that Art. 3(2) reads "any term not defined therein *shall* have the meaning ...". The discretion of a state to interpret the treaty unilaterally is thus tempered by the effects of the principle of good faith (including the principle of effectiveness and the prohibition of abuse of rights), even where there is a treaty right to do so.

139. See, for example, the *ISS v. Iranian Copper* case before the Iran–US Claims Tribunal, taking into account the relevant corporation law when applying the provisions of the Claims Settlement Declaration, 5 IUCTR 1984-I, p. 346.

140. See US Model BIT as published in Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995), pp. 240-253.

141. Helminen notes, however, that "the term 'require' implies that there must be strong reasons in order for the contextual meaning to prevail" and that "the avoidance of double taxation should not normally be an argument.." (Tax Treaty Interpretation – Finland, in Lang (ed.), note 1, p. 86); Concurring: *Vogel, Double Taxation Conventions*, note 1, p. 214.

142. Villiger, note 41, p. 344 (who cites in addition the following references in support); Mueller, *Vertrauensschutz*, p. 130; Yasseen, note 11, p. 57; Verdross in ILC, Yrb Vol. 9 ILC 1966, i/2 186 Para. 14.

143. B. Conforti, note 87, p. 107 ("recourse may be had to municipal law or any other law if the convention expressly so provides"); note also that there is a difference between referring to municipal law for a definition of a treaty term and allowing one contracting state to unilaterally establish interpretations of treaty terms.

When general principles of international law are taken into account, the picture that has thus far emerged is confirmed again: the principles of reciprocity, equality of nations, and the primacy of international law over municipal law all support a very restrictive, purposeful interpretation of Art. 3(2). In addition, if construed as a general rule of interpretation that excludes all others, there would be no room to invoke supplementary means of interpretation, including *travaux préparatoires*, similar treaties and other relevant material.

In fact, if Art. 3(2) would indeed be interpreted as establishing a general domestic renvoi for every tax treaty term (except for the handful that are explicitly defined in the treaty without any reference to domestic law), some serious inconsistencies would surface. How would, for example, the presence and operation of Art. 25(3) OECD Model exist if Art. 3(2) does not allow for an exception for subsequent agreements? If Art. 3(2) is "absolute", how can the lack of recognition in Art. 3(2) itself of the interpretative value of authentic versions of the treaty in another language be explained?[144] Can it really be argued that terms that feature in an international treaty and which have a well-established meaning in international law, such as "continental shelf" or "ratification" may not be explained in such a manner, but must be explained by using the domestic renvoi? Can the interpretation on the basis of similar treaties, the OECD Model and the OECD Commentary, despite the many references to it by tax authorities and courts all over the world, legally be deemed irrelevant just because of the supposedly absolute character of Art. 3(2)? Does the language of Art. 3(2) really allow for an assumption that the contracting states wished to "contract out" of such fundamental notions as the principle of good faith (if that is at all possible) and the general principles of international law?[145] Can Art. 3(2) be interpreted in such a way that it excludes the import of Community law, regardless of Art. 31(3)(c) of the VCLT?[146] And finally, if Art. 3(2) is absolute, how can the term "context" ever be interpreted by using Art. 3(2) itself.[147]

Shannon argues that the reference to domestic law has practical advantages because it is easier for taxpayers, administrative authorities and courts to apply the meanings they are accustomed to using.[148] Certainly it is easier to apply one's own legal system in explaining international treaties, but that hardly makes it proper or legal. There is no harm in starting an interpretation exercise with the meaning treaty terms have in domestic law, as long as a correction mechanism is in place that allows a truly international meaning to shine through if there is a conflict. Reimer notes on this subject that "one would not have confidence to rely on a vague presumption of what the meaning of the term may be under international law".[149] It is true that unlike many other treaty regimes, tax treaties have only a limited apparatus to establish uniform, generally accepted interpretations. There does not seem to be a binding centralized interpretative function, and recourse to international courts or other bodies is at present largely theoretical.[150] But that is largely another problem, which should be resolved by improving the ways disputes or uncertainties on the interpretation of tax treaties are settled, such as by introducing expert committees with advisory opinions, creating effective arbitration, using international courts or by referring to an existing body of interpretations, such as the OECD Commentary. It is hardly a solution to prefer (domestic) clarity over (international) law.

10.3. Interpretations of Art. 3(2) in accordance with Arts. 31 and 32 of the VCLT: The theory of the rebuttable renvoi and the theory of the restrictive application

It was argued above that Arts. 31 and 32 of the VCLT do not support the view that Art. 3(2) must be understood as a "general rule of interpretation", replacing the Vienna rules with a novel and highly irregular means of interpreting tax treaties. In short, Art. 3(2) is not "absolute". As was said above, the explicit confirmation of one means of interpretation, namely the domestic renvoi, does not necessarily exclude all others, especially when there is much doubt on how to interpret the term "context" in Art. 3(2).

If this analysis is correct, the question is raised what the relationship is between the domestic renvoi and the other elements and instruments that normally produce interpretation. At least three possibilities present themselves. The first one is to assume that the domestic renvoi is just one of the elements in the crucible, having no special weight at all. Treaty drafters included it, the proponents of such a theory would say, to ensure that it would be *possible* for an interpreter to regard the domestic law of a contracting state as a legitimate source of interpretation.[151] Such an assumption would, however, be difficult to reconcile with the use of the term "shall" in the provision instead of "may".

The second theory would be to assume that the domestic renvoi is in most cases a sufficient way to give an international meaning to tax treaty terms, which explains why the drafters explicitly mentioned it. That does not mean that the Vienna Rules may be ignored, but simply that the domestic renvoi must be given proper consideration. The principle of good faith, effectiveness, subsequent agreements and practice and the object and purpose of the treaty may be called upon to disregard an interpretation based upon the domestic renvoi, provided the discordance is sufficiently clear (note the use of the word "requires" in Art.

144. Art. 33 VCLT.
145. See 4.: "Article 3(2) and the principle of good faith".
146. J. Ward, "Tax Treaty Interpretation", *IFA Cahiers 1993*, see note 1, p. 179.
147. Compare: Ker, note 1, Chapter 7, p. 7.
148. Shannon, note 1, p. 454; Steichen, note 102, p. 237.
149. Reimer in Lang (ed.), note 1, p. 123.
150. See on this subject E. van der Bruggen, "About the jurisdiction of international courts to settle tax treaty disputes", in *Settlement of Disputes in Tax Treaty Law*, Lang and Züger (eds.) (Vienna: Linde Verlag, 2002), pp. 501-533; C. van Raad, "Interpretation and Application of Tax Treaties by Tax Courts", 36 *European Taxation* 1 (1996), p. 6; Edwardes-Ker, note 1, Chapter 2, 2.03; M.P. Bricker, "Arbitration Procedures in Tax Treaties", *Intertax*, 1998, p. 97; G. Lindencrona and N. Mattson, "How to resolve international tax disputes?", *Intertax*, 1990, p. 273; M. Züger, *Schiedsverfahren fur Doppelbesteuerungsabkommen* (Vienna: Linde Verlag, 2001), pp. 193-203.
151. Tyllstrom and Bostrom, for example, wonder if it would be permitted for a state to give a treaty term the meaning that the term has in its domestic law without such a provision in the tax treaty (Bostrom/Tyllstrom, *Skattenytt* (1994), p. 652 (as quoted by M. Nelson, *Tax Treaty Interpretation* (The Hague: Kluwer Law International, 2001), p. 353).

3(2)). This means that a tax treaty term that is not explicitly defined in the treaty or its ancillary instruments must at some stage be given meaning in the usual international way, based on context that is either directly or indirectly relevant to the term in question, as the general rule of interpretation of the VCLT requires. Simultaneously, the object and purpose of the treaty and the principle of good faith must be taken into account, as well as subsequent agreements and practice and relevant rules of international law applicable between the parties. When this does not lead to a result, or leads to a result that is ambiguous or unreasonable, supplementary means of interpretation should be consulted, just as Art. 32 of the VCLT prescribes. The whole process remains essentially an international one, but the method of the domestic renvoi may be used also, or even as a starting point, provided it does not lead to a result that is clearly irreconcilable with the Vienna Rules. The domestic renvoi is under this theory no more than a "technical aid"[152] for the interpreter, which most often leads to the same result as the more laborious exercise of Arts. 31 and 32 of the VCLT. However, the meaning thus obtained is rebuttable by the operation of the Vienna Rules, which explains why it is referred to by the author as "the rebuttable renvoi". This theory is plausible but cannot explain the use of the phrase "application by a contracting state". As was said above, however, that phrase alone is not a sufficient basis to dismiss the conclusion that Art. 3(2) is a rule of interpretation. It may have been an unfortunate formulation. In the final analysis, therefore, this interpretation of Art. 3(2) can on that account alone not be dismissed.

The third theory assumes that "application by a contracting state" is not an unfortunate formulation of an interpretative clause, but that it establishes that this provision only operates in a very specific situation. For the sake of discussion, this theory could be called "the theory of the restrictive application". In that carefully qualified situation the domestic meaning is obligatory, and not just one of the factors to be taken into account. In that interpretative process, Art. 3(2) is, among other things, operative in ensuring that the elimination of double taxation is not jeopardized by the fact that the distributive and relief rules of a tax treaty can never be exhaustive in themselves. To be more precise, the effectiveness of the tax treaty may be reduced by incompatibilities in terminology in the relationship between treaty terms and domestic income characterization.[153] In these circumstances, taxpayers may fail to receive the protection that was the primary object and purpose of the treaty. After all, the treaty was chiefly concluded for the benefit of the taxpayers. That benefit may not be affected by the lack of exhaustive definitions in the treaty itself. In order to avoid this possibility, the treaty poses a certain obligation upon the states. That obligation relates to the fact that the operation or application of most provisions of a tax treaty consists of the restriction of certain income tax provisions of the contracting states, chiefly – but not exclusively – to reduce the chances of double taxation. As regards that restrictive operation of the treaty, a state is thus under an obligation to interpret the treaty terms in those restrictive rules so that they would have actual effect in restricting its domestic tax law, and so that the income is indeed treated as provided in the tax treaty. Read in that sense, Art. 3(2) constitutes an obligation (rather than a right) for the contracting state to safeguard the effectiveness of the treaty and essentially its protection of the taxpayer. It is certainly not a licence to frustrate its object and purpose by an inappropriate reference to domestic law, or to make some international obligations on the state disappear altogether.[154] The domestic referral is merely a mechanical device to ensure the effective application of the treaty.

This restrictive function of Art. 3(2) is in more than one way generally concretized by stating that the operation of the provision may in relation to most tax treaty terms only be used to the advantage of the taxpayer, and not to his disadvantage.[155] Its application should lead to a restriction of the income tax provisions of the state to which the treaty applies.

Under this theory, the treaty must be interpreted internationally, using the general rule of interpretation and if necessary all supplementary means of interpretation of the VCLT. If it comes to the point where treaty protection would fail because of a conflict between domestic income characterization and the treaty, the contracting state must ensure the application of the treaty by putting the domestic meaning under the treaty-distributive rule.

11. CONCLUDING REMARKS

The debate surrounding Art. 3(2) reflects seemingly opposite poles of tax treaties: on the one hand tax treaties are international treaties that should be interpreted internationally, and on the other hand they were meant to impact upon domestic laws before domestic courts, and treaty meanings should thus at least include the domestic terms to produce that effect. It is highly unlikely that Art. 3(2) can be understood in a way that would exclude all other rules of interpretation, now codified in the VCLT. To see the domestic renvoi as a *lex specialis* which displaces the Vienna rules would not only be highly irregular (and thus a suspect interpretation), it would also lead to inconsistencies in the treaty text itself. In addition, it would mean that

152. Reminiscent of the "aid to interpretation" of H. Debatin, *Handbook on the 1954 US/German Tax Convention*, 1968, A.5.1.2.

153. Which is just another way of saying that the treaty terms that shape the obligations upon the state must be given effect in respect of the domestic laws and regulations of the contracting states.

154. As Lord McNair stated, "a condition [referring to domestic law] attached to the enjoyment of a right granted by a treaty must be construed as only regulating the exercise of that right, but cannot be justly construed as authorizing its entire extinction" (Arnold Duncan McNair, *The Law of Treaties* (Oxford: The Clarendon Press, 1961), p. 249).

155. While this is the operation of Art. 3(2) in relation to most tax treaty provisions, it should not be forgotten that this provision also constitutes context for treaty articles that were not intended to bestow a benefit on taxpayers, such as the international exchange of information provision. Undefined terms in that provision would, in the author's view, be faced with a somewhat different operation of Art. 3(2) because that particular provision corresponds with another (not primary) purpose of the tax treaty, namely the purpose of curbing tax avoidance and evasion by exchange of information between tax authorities. The influence of other elements and instruments of the crucible (that are to be taken into account when interpreting Art. 3(2), such as the principle of good faith and relevant rules of international law), remain, in the author's view, unchanged. The same reasoning applies (*mutatis mutandis*) to the effect Art. 3(2) has on the interpretation of terms found in the articles on the mutual agreement procedure, the entry into force article and other tax treaty provisions.

such fundamental notions as "good faith", the principle of effectiveness and the general principles of international law must be deemed to have been "contracted out" of the tax treaty. It would also mean that tax treaties may apparently not be explained with reference to supplementary means of interpretation. Within the text of the provision, all this can only be avoided if "context" in Art. 3(2) is given such a wide meaning that it would include all the elements and instruments of Art. 31 and 32 of the VCLT.[156] To put it more generally, it can be said that the operation of Art. 3(2) is in fact subject to the duty to find a common interpretation of the treaty term (using the elements of qualification discussed above) and to the furtherance of eliminating double taxation. This is not unreasonable or contrary to the ordinary meaning of the term.[157] Also "context" must be explained in context.[158] At the time Art. 3(2) first made its appearance, the rules of treaty interpretation were not yet codified.[159] There was no definition of what comprised "context" in the VCLT available to tax treaty drafters, and even if there was, there is a priori no reason why both terms should comprise identical materials or elements. In that regard it is true that "context" has most often been understood as referring to other textual elements of or related to the treaty ("textual context").[160] However, the same term has at times also been used to indicate non-textual background to the treaty or its provisions,[161] including elements related to the object and purpose of a treaty.[162] In addition, non-textual elements (intention of the parties, object and purpose of the treaty, subject-matter) may have to be invoked anyway to determine which documents constitute the textual context of the treaty.[163] In other words, the non-textual elements to which arguably the "context" in Art. 3(2) was not referring, must in any event be considered to determine the textual context. More importantly, however, as was said above, the fact that Art. 3(2) does not explicitly mention the principle of good faith, the principle of effectiveness, the general principles of international law, subsequent practice and the object and purpose of the treaty, does not mean that these non-textual elements must be ignored for the purpose of tax treaty interpretation.

It follows from this analysis that for all practical purposes "context" in Art. 3(2) must now actually be read as referring to the rules of interpretation under international law that in 1969 had been codified in Arts. 31 and 32 of the VCLT.[164] In that way, at present "unless the context otherwise requires" may just as well be read as "unless the Vienna Convention otherwise requires", which explains the title of this contribution. Once this is accepted, it is in the author's view of little consequence to talk about hierarchy or chronology with respect to the domestic renvoi.[165] It is merely a matter of technique whether one prefers to commence an interpretation exercise with one's own domestic meaning or whether to first establish the interpretation that is required by the Vienna Rules. The fact remains that the domestic renvoi may not be allowed to result in the establishment of a treaty meaning that is not in accordance with what ordinarily is understood by such a term in the context of international taxation, qualified by the object and purpose of the treaty, while taking into account subsequent agreements and practice as well as relevant rules of international law and if appropriate,[166] supplementary means of interpretation.

Once one accepts that Art. 3(2) does not displace the Vienna rules, this also means that it must be possible to arrive at the same result with or without Art. 3(2). This is in fact confirmed by some case law on treaties that did not have an Art. 3(2)-like provision.[167] What Art. 3(2) sets out to establish in both the theory of the rebuttable renvoi and in the theory of the restrictive application, would indeed, in the author's view, in any event follow from the Vienna rules. To take into account the (domestic tax) meaning under the laws of both the contracting states to interpret terms in a tax treaty between them, is, in the author's view, required in any event by the object and purpose of the

156. For a similar result, without, however, explicitly acknowledging that the operation of Art. 3(2) is in essence subject to the Vienna Rules: Avery Jones et al., note 1, p. 104 (on the basis of the "Vienna context" or, alternatively on the basis of the "English context", being unable to decide which one of the two is the correct approach); the ALI also comes to a similar conclusion that "reference to domestic law ordinarily should be made only when other interpretative techniques do not support a treaty interpretation" (p. 61), whereby supplementary means of interpretation are also included in "other interpretative techniques" (pp. 58-60). The recommendation is somewhat tempered by a further statement that "[the Institute is] not taking a position on the proper interpretation of Art. 3(2)" (p. 62).

157. There are those who suggest that "a priority of an international interpretation does not conform to the wording of Art. 3(2)" (as Vogel put it in his IFA General Report, note 1, p. 81).

158. Compare: Prebble, "Interpretation of Double Taxation Conventions – New Zealand", note 19, p. 488.

159. Ker, note 1, Chapter 7, p. 11.

160. De Visscher, note 15, p. 60.

161. G.Z. Capaldo, *Repertory of Decisions of the International Court of Justice*, Vol. I, p. 115 ("historical context").

162. D.W. Greig, *International law*, second edition (London: Butterworths, 1976), pp. 479-480 ("Art. 31 (1) of the VCLT, in addition to requiring that the terms of a treaty should be interpreted "in their context", provides that they should be interpreted in the light of the treaty's purpose and object. In other words, not only should the words be viewed in their context as part of the treaty, but they should be viewed in relation to the "context" or background of the treaty itself"); for an example involving a tax treaty, see Lord Chief Justice Eichelbaum in *JFP Energy*, 14 June 1990, NZTC, 6.286: ("The context in which the expression appears is in a broad sense the avoidance of double taxation – the achievement of that object.").

163. De Visscher, note 15, pp. 59-61.

164. Shannon, note 1, p. 460: "'Context' under Art. 3(2) should not be taken to mean 'context' under the Vienna Convention. It should include anything that normally could be taken into account for treaty interpretation"; Lang in Gassner et al. (eds.), note 6, p. 35 et seq.; IFA (ed.) Studies, p. 209; See also Heinrich and Moritz, note 6, p. 149.

165. Avery Jones et al., note 1, p. 108; Compare with the considerations on which meaning should be the exception and which one the "general rule" by Vogel (Double Taxation Conventions, pp. 213-214), by the ALI (note 7, p. 40) and by Baker, see note 1, p. 33).

166. An international meaning must be allowed to overrule the domestic renvoi, no matter how it was established. If it was appropriate or necessary to use supplementary means of interpretation, that meaning is also truly international and must be preferred over the domestic renvoi, provided the result of the Vienna rules is sufficiently clear.

167. This conclusion is confirmed by case law on tax treaties without an Art. 3(2). In these case, where appropriate, resort has been made to the domestic law of the contracting states (Conseil d'Etat, 22 May 1992, No. 63266, RJF, 7/92, No. 960; in an annotation, Arrighi de Casanova concluded that "reference to domestic law is also compulsory in the absence of [Art. 3(2)]", RJF, 12/99, p. 939; Ker, note 1, Chapter 7, p. 7 ("There is no evidence that tax treaties which do not contain provisions comparable to Art. 3 of the 1977 OECD Model should be interpreted any differently from those that do"). The US tax administration also took the position that Art. 3(2) is implicit in tax treaties, even when it is not explicitly included (see, for example, the US Technical Explanation to the treaty with the USSR); for an opposite conclusion, see G. Bizioli, "Tax Treaty Interpretation", in *IFA Cahiers 1993*, p. 223.

treaty, the principle of effectiveness and the concept of ordinary meaning. In addition, as the operation of a treaty is the restriction of domestic law, this effect must be given to the treaty notwithstanding the legal classifications or organization of the subject matter under domestic law. This follows again from the object and purpose of the treaty, the general principles of international law (including the primacy of international law and the equality of states) and most prominently from the principle of effectiveness (as included in "good faith").

All this does not mean, however, that Art. 3(2) is without effect or usefulness, although it can certainly be asked if this provision "does not cause more problems than it solves".[168] The idea of making it clear that domestic tax meanings must be able to play a role in tax treaty interpretation – if that is indeed what Art. 3(2) aims to establish – has merit. It cannot be denied that under the Vienna Rules on treaty interpretation, the ordinary meaning of tax treaty terms is their technical, "tax treaty meaning", and understanding the meaning those terms commonly have in the domestic tax law systems of the world is an important aspect of giving them meaning. Art. 3(2) also serves to emphasize that when a state applies the treaty "on top of" its domestic tax organization, mismatches in terminology may not be taken advantage of to reduce the effectiveness of the treaty. It is thus clear that Art. 3(2) does serve some purpose, even if one accepts that also with respect to the domestic renvoi, Vienna *rules* ...

168. Vogel/Prokisch, IFA General Report, note 1, p. 77 (recalling the words of Skaar, note 65, p. 506).