



Greetings from the Executive and Board of the IATJ.

Dear Colleagues:

The IATJ is looking forward to another successful annual Assembly, this being the 8<sup>th</sup> Assembly to be held in Helsinki, Finland on October 6 and 7, 2017. Registration particulars can be found on our website, as well as information on suggested accommodations. I am sure you will find the attached program of interest. As the date is quickly approaching, I encourage your early registration so that the organizers can finalize plans accordingly.

I attach for your information an interesting article by Judge Michael Beusch of the Federal Administrative Court in Switzerland entitled "Tax Treaty Interpretation and "Entscheidungsharmonie" – the Swiss Approach", prepared for a commemorative book celebrating the 80<sup>th</sup> Anniversary of the Mexican Tax Court.

Thank you for your continued support of the IATJ.

*E.P. Rossiter, President*

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# Tax Treaty Interpretation and "Entscheidungsharmonie" – the Swiss approach<sup>1</sup>

Michael Beusch

## Introduction

It is the prerogative of the Courts to interpret the law. This interpretation, however, does not happen "out of the blue"; it follows well established rules. Whereas in Switzerland, for domestic law, these rules are set forth by case law and legal doctrine,<sup>2</sup> in international matters, they are laid down in the Vienna Convention on the Law of Treaties (VCLT),<sup>3</sup> a multilateral Convention more than 120 sovereign States have signed.<sup>4</sup> This means that the interpretation of an international treaty follows – or at least should follow – the same rules all over the world.<sup>5</sup> This extends as well for Double Tax Conventions (DTC) and any other tax-related treaty. It is thus consistent to focus on this truly global topic in this commemorative book in order to celebrate the 80<sup>th</sup> Anniversary of the Mexican Tax Court together with the 20<sup>th</sup> Anniversary of the Iberoamerican Association of Administrative or Tax Courts (AITFA).

Many distinguished scholars have already focused on the interpretation of treaties, such as – to name but a few – Corten/Klein<sup>6</sup>, Linderfalk<sup>7</sup> and Villiger<sup>8</sup> in general or Engelen<sup>9</sup> and Lara Yaffar<sup>10</sup> with regard to Tax Treaties.

It is, hence, not the purpose of this contribution to add another generic overview on how treaties have to be interpreted. The goal of this contribution is rather to show how Swiss Courts are handling these questions with regard to DTCs in their everyday-work, particularly focusing on the aspect of the so called "Entscheidungsharmonie", a term initially established by Klaus Vogel that could be translated as "(requirement for a) common application and interpretation". Do Swiss Courts look at other Court's decisions when interpreting a DTC? How do they get to know these exist and how far are they to be taken into account in the Court's reasoning? In order to answer these questions, we shall start with a brief look on the Organization of the Swiss Fiscal Judiciary, subsequently recall as concisely as possible the main guidelines of tax treaty interpretation to conclude with evaluating the significance of the "Entscheidungsharmonie" by looking at its prerequisites and challenges.

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<sup>1</sup> This article was written as a contribution to the commemorative book on the occasion of the celebration of the 80<sup>th</sup> Anniversary of the Federal Tax Court of Mexico and the 20<sup>th</sup> Anniversary of the Iberoamerican Association of Administrative and Tax Courts in August 2016.

<sup>2</sup> Cf. Michael Beusch, in Zweifel/Beusch et al. (eds.), *Kommentar Mehrwertsteuer* (Basel: Helbing, 2015), Auslegung n. 9 et seq.

<sup>3</sup> Vienna Convention on the Law of Treaties [authentic texts: English, French, Chinese, Russian and Spanish] (into force as of 27 January 1980); Wiener Übereinkommen vom 23. Mai 1969 über das Recht der Verträge (Classified Compilation of Swiss Law 0.111). Note: As English is not an official language of Switzerland, no official documents concerning domestic law are available in English and as a consequence legal doctrine in general is usually published in German, French or sometimes Italian. In order to ensure traceability, the official German title of any official document cited will hereinafter be mentioned as well.

<sup>4</sup> For States such as e.g. Bolivia or the United States that have signed, yet not ratified the VCLT, its content is considered to be customary international law; cf. Federal Administrative Court, 21 January 2010, A-7789/2009 (= BVGE 2010/7) section 3.3. and 3.5; decision in German, website available in German, French and Italian at: [www.bvger.ch](http://www.bvger.ch) (click on Rechtsprechung -> Entscheiddatenbank BVGer, search: A-7789/2009; all quoted judgements of the FAC are available the same way by a search with processing number).

<sup>5</sup> With regard to the perpetual fact that the rules of interpretation have to be interpreted themselves as well (in accordance with the rules set forth by them), cf. Federal Administrative Court, 21 January 2010, A-7789/2009 (= BVGE 2010/7) section 3.5.

<sup>6</sup> The Vienna Conventions on the Law of Treaties (Oxford: Oxford 2011).

<sup>7</sup> Ulf Linderfalk, *On the Interpretation of Treaties* (Berlin: Springer 2007).

<sup>8</sup> Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden/Boston: Nijhoff, 2009).

<sup>9</sup> Frank Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD, 2004).

<sup>10</sup> Armando Lara Yaffar, *Interpretación de los Tratados para Evitar la Doble Tributación* (Ríos Granados ed., UNAM-Porrúa 2010).

## Organization of the Swiss Fiscal Judiciary

Switzerland is a federal republic consisting of 26 Cantons. Each Canton is divided in Communes, or municipalities. The Federal Constitution states that Cantons are sovereign except to the extent that their sovereignty is limited by provisions explicitly attributing powers to the Federal State (Confederation).<sup>11</sup> In other words: Whereas the Cantons exercise all rights that are not vested by the Constitution, the Confederation fulfils all of the duties that are assigned to it by the Constitution.<sup>12</sup> As a consequence, the Confederation may only levy those taxes that are expressly assigned to it.<sup>13</sup> This has implications for the organization of the Swiss Fiscal Judiciary. Every Canton has its own tax administration that is competent to levy cantonal taxes as well as federal direct tax on behalf of the Confederation. The federal tax administration is competent to levy all other federal taxes. With regard to appeals, decisions of the Cantonal tax administrations can be appealed to the Cantonal courts. Decisions of the federal tax administration can be appealed to the Federal Administrative Court (Bundesverwaltungsgericht/Tribunal administrative federal/Tribunale amministrativo federale). Its decisions can be brought before the Federal Supreme Court (Schweizerisches Bundesgericht/Tribunal federal suisse/Tribunale federale svizzero).<sup>14</sup> It is the noble duty and prerogative of the Federal Supreme Court to ensure a uniform application of the law all over the country.<sup>15</sup> Nevertheless, all Courts are entitled and obliged to interpret domestic as well as international law; there especially is no requirement to submit questions with regard to the interpretation of a tax treaty to the Federal Supreme Court prior to the decision of the Lower Court.

## Swiss Tax Treaty interpretation at a glance

As it has been explained initially, Swiss Courts follow a pragmatic pluralistic approach in interpreting domestic law, taking into account especially the wording, in all Swiss national languages, the relevant systematic context, object and purpose, and the (parliamentary) history. With regard to the interpretation of tax treaties, the approach of the Federal Supreme Court is similarly pragmatic, even if it is clear that the interpretation follows the rules of the Vienna Convention of the Law of Treaties (VCLT).<sup>16</sup> Therefore, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (art. 31 para 1 VCLT). The Federal Supreme Court, however, does unfortunately not always act “*lege artis*”. (Too) often, for the interpretation of a (tax) treaty, unilateral “*travaux préparatoires*” are taken into account as a primary mean of interpretation.

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<sup>11</sup> Art. 3 of the Federal Constitution (Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999; Classified Compilation of Swiss Law 101).

<sup>12</sup> Cf. Patricia Egli, Introduction to Swiss Constitutional Law (Zurich: Dike, 2016); Walter Haller, The Swiss Constitution in a Comparative Context<sup>2</sup> (Zurich: Dike, 2016).

<sup>13</sup> Michael Beusch, Switzerland, in Lang et al. (eds.), Procedural Rules in Tax Law in the Context of European Union and Domestic Law (Alphen an den Rijn: Wolters Kluwers 2010) p. 632 et seq.

<sup>14</sup> Since Switzerland is a State with four national languages (German/French/Italian/Rhaeto-Romanic), it is noteworthy that the Federal Courts work in all languages. As a rule, the rulings are rendered in the language of the decision being contested. However, the parties to the proceeding are free to draft their petitions in one of Switzerland’s four national languages; the petitions are not translated. Swiss Judges are thus supposed to be business fluent in all those languages, except though with regard to Rhaeto-Romanic, which is hardly ever used in Court. A sound knowledge of English – although crucial in an international (tax) context – is, however, not formally required.

<sup>15</sup> Thomas Stadelmann, Tax Litigation before the Swiss Supreme Court, Bulletin for International Taxation (BIT) 2016, p. 65 et seq.

<sup>16</sup> Thomas Stadelmann, Tax Litigation before the Swiss Supreme Court, Bulletin for International Taxation (BIT) 2016, p. 66; Peter Hongler, Hybride Finanzierungsinstrumente im nationalen und internationalen Steuerrecht der Schweiz (Zürich: Schulthess 2012), p. 195 et seq.

Acting as if it were domestic law, the Federal Supreme Court does hence not respect the interpretation hierarchy set forth in the Vienna Convention of the Law of Treaties. Legal doctrine has blamed the Court already several times for doing so,<sup>17</sup> without any success though.

The same is happening with regard to the Commentary of the OECD Model. Swiss Courts, at least those dealing thoroughly with the issue, are quite reluctant to acknowledge its importance in law. Referring to its earlier case law, the Federal Administrative Court e.g. emphasizes that it considers the Commentary according to art. 32 VCLT to be only a supplementary means of interpretation.<sup>18</sup> This can be explained by the fact that the Commentary has – as opposed to the DTC itself – not been approved by parliament and therefore has no democratic legitimation. This is an aspect which cannot be overestimated in a setting involving Switzerland. And indeed, in this context, it is appropriate to remember that neither the Model Tax Convention nor its Commentary can have a binding effect on the Courts of the States involved.<sup>19</sup> It has to be said, however, that the Federal Supreme Court in its pragmatism does not follow this line clearly (enough). Although it doesn't consider the OECD Model and its Commentary as being directly binding either, the latter is in practice often used as an aid to the interpretation of terms, at least as far as the wording of the OECD Model is identical to the tax treaty in question. On top of it, the judgements of the Federal Supreme Court are typically not specific as to the version of the OECD Model or the Commentaries on the OECD Model used.<sup>20</sup> It is self-explaining that such an approach does not provide any guideline at all, neither for the Lower Courts nor for the tax administration or the taxpayer. This has to be particularly stressed with regard to the taxpayers, for – even though they are not a party to a tax treaty – the treaty has a major impact on their rights and positions that can be seriously jeopardized by an unreflecting application of the OECD Model.<sup>21</sup>

## "Entscheidungsharmonie"

"Where's the problem?" one might ask. Since the VCLT is to be applied, the interpretation rules are uniform. There should thus not be any impediment to a common interpretation. Unfortunately, though, obstacles remain due to several reasons.

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<sup>17</sup> Michael Beusch, Die Bedeutung ausländischer Gerichtsentscheide für die Auslegung von DBA durch die schweizerische Justiz, Festschrift für Markus Reich (Zürich: Schulthess, 2014), p. 401 et seq.; Peter Hongler, Hybride Finanzierungsinstrumente im nationalen und internationalen Steuerrecht der Schweiz (Zürich: Schulthess 2012), p. 196 et seq.

<sup>18</sup> Michael Lang, Schweizer Grundsatzurteil zum Beneficial Owner nach Schweizer Recht, Steuer und Wirtschaft International (2012), p. 226; see as well Michael Beusch/Martin Zweifel, Zum Verhältnis von nationalem Verfahrensrecht und materiellem Staatsvertragsrecht – dargestellt am Beispiel des Steuerrechts, Festgabe für Prof. Dr. Ulrich Cavelti (St. Gallen: 2012), p. 65.

<sup>19</sup> Federal Administrative Court, 10 January 2011, A-6053/2010 (= BVGE 2011/6) section 7.3.1, 21 January 2010, A-7789/2009 (= BVGE 2010/7) section 3.6.2; see as well Michael Beusch, Die Bedeutung ausländischer Gerichtsentscheide für die Auslegung von DBA durch die schweizerische Justiz, Festschrift für Markus Reich (Zürich: Schulthess, 2014), p. 406 et seq.; Jacques Sasseville, Court Decisions and the Commentary to the OECD Model Convention, in Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), p. 192 et seq.; Moris Lehner, in Vogel/Lehner (eds.), Doppelbesteuerungsabkommen<sup>6</sup> (München: Beck, 2015), Einleitung n. 124b; Michael Beusch, Switzerland: Beneficial ownership issues in the light of Art. 10, in Tax Treaty Case Law around the Globe 2013 p. 206 et seq. (M. Lang et al. eds., Wien, Linde 2013); Hans Pijl, Beyond Legal Bindingness, in Douma/Engelen (eds.), The Legal Status of the OECD Commentaries (Amsterdam: IBFD, 2008), p. 95 et seq.

<sup>20</sup> Thomas Stadelmann, Tax Litigation before the Swiss Supreme Court, Bulletin for International Taxation (BIT) 2016, p. 68 et seq.; Peter Hongler, Hybride Finanzierungsinstrumente im nationalen und internationalen Steuerrecht der Schweiz (Zürich: Schulthess 2012), p. 212 et seq.

<sup>21</sup> Cf. – focusing on the legitimate expectations of the taxpayer – Dirk M. Brockhuijsen/Koen M. van der Velde, The retroactive effect of Changes to the Commentaries on the OECD Model, Bulletin for International Taxation (BIT) 2015, p. 623 et seq.

Firstly, although there are “interpretation-guidelines” in the VCLT, these standards are – as said before – to be interpreted as well and thus can have different shades in a single notion.<sup>22</sup> Besides, interpretation as such is not an exact science with only one solution.<sup>23</sup> Several authors have convincingly shown the challenges and myths of interpretation.<sup>24</sup> To summarize it very briefly: Interpretation is about language. As already mentioned, language, as form of communication, is not (always) unambiguous, perfect.<sup>25</sup> On the contrary: “Language is wonderfully bizarre”.<sup>26</sup> Besides, all communication (in the tax area) is performed by human beings, this as an intuitive human activity. Hence, language is purposive and content based.<sup>27</sup>

At this place, it is time to open a bracket: The aforementioned statements as well as those to come are basically equally valid for all languages. It has to be noted in this context though that linguistic aspects can become even more complicated when communication takes place in another language than the mother tongue, i.e. in English as the “lingua franca” of International Tax Law. Swiss treaties for instance are often in the national languages of the Contracting States and in English. As an example, the treaty between Switzerland and Argentina exists in three authentic versions, i.e. in French, Spanish and English. In case of different interpretation, though, the English Version shall be predominant.<sup>28</sup>

Secondly, and additionally to the prior generic statement, the treaties are applied by National Courts. In Tax Law, there is no supranational institution as for example the European Court of Human Rights or the European Court of Justice that could – for its Member States – bindingly decide on how provisions are to be understood.<sup>29</sup> Furthermore, tax treaties generally only make sense in the context of a domestic tax system.<sup>30</sup> This finding is emphasized by a look at the procedural rules to be applied. Given that DTCs rarely contain such rules, it is the domestic law that governs the procedure.<sup>31</sup> Since, as a consequence, this means that National Courts have to look at their domestic law anyway, this constitutes quite large an incentive to remain within the national legal framework over all. In other words: National judges, especially if they are

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<sup>22</sup> Brian Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, Bulletin for International Taxation (BIT) 2010, p. 8.

<sup>23</sup> Jan Wouters/Marten Vidal, *Non-tax Treaties: Domestic Courts and Treaty Interpretation*, in Maisto (ed.), *Courts and Tax Treaty Law* (Amsterdam: IBFD, 2007), p. 11 et seq.

<sup>24</sup> Cf. Klaus Vogel, *Klaus Vogel on Double Taxation Conventions*<sup>3</sup> (London: Kluwer Law International, 1997), p. 32 et seq.; Klaus Vogel/Rainer Prokisch, *Interpretation of double Taxation Convention*, Cahiers de droit fiscal international (Deventer: Kluwer, 1993), p. 58 et seq.; Brian Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, Bulletin for International Taxation (BIT) 2010, p. 2 et seq.

<sup>25</sup> Cf. René Matteotti, *Steuergerechtigkeit und Rechtsfortbildung. Ein Rechtsvergleich zwischen der Schweiz und den Vereinigten Staaten von Amerika unter besonderer Berücksichtigung der wirtschaftlichen Betrachtungsweise* (Bern: Stämpfli 2007), p. 76 et seq.; René Matteotti, *Struggling with Words in Tax Jurisprudence - The Revival of Textualism in the Supreme Court of the United States of America*, *Intertax* 34 (2006), p. 314 et seq.

<sup>26</sup> Brian Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, Bulletin for International Taxation (BIT) 2010, p. 3.

<sup>27</sup> Brian Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, Bulletin for International Taxation (BIT) 2010, p. 2.

<sup>28</sup> Abkommen vom 20. März 2014 zwischen der Schweizerischen Eidgenossenschaft und der Republik Argentinien zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen (Classified Compilation of Swiss Law 0.672.915.41).

For more examples see Michael Beusch, *Die Bedeutung ausländischer Gerichtsentscheide für die Auslegung von DBA durch die schweizerische Justiz*, *Festschrift für Markus Reich* (Zürich: Schulthess, 2014), p. 398 et seq.

<sup>29</sup> Wim Wijnen, *Some thoughts on Convergence and Tax Treaty Interpretation*, Bulletin for International Taxation (BIT) 2013, p. 575; Michael Beusch, *Der Einfluss «fremder» Richter - Schweizer Verwaltungsrechtspflege im internationalen Kontext*, *Schweizer Juristen Zeitung* (SJZ) 2013, p. 352 et seq.; Michael Beusch, *Die Bedeutung ausländischer Gerichtsentscheide für die Auslegung von DBA durch die schweizerische Justiz*, *Festschrift für Markus Reich* (Zürich: Schulthess, 2014), p. 401 et seq.

<sup>30</sup> Brian Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, Bulletin for International Taxation (BIT) 2010, p. 9.

<sup>31</sup> Cf. Michael Beusch, in Zweifel/Beusch et al. (eds.), *Kommentar Internationales Steuerrecht* (Basel: Helbing, 2015), Einleitung n. 234 9 et seq.; Michael Beusch/Martin Zweifel, *Zum Verhältnis von nationalem Verfahrensrecht und materiellem Staatsvertragsrecht - dargestellt am Beispiel des Steuerrechts*, in Staatskanzlei und Verwaltungsgericht Kanton St. Gallen (ed.), *Festgabe für Prof. Dr. Ulrich Cavelti* (St. Gallen: 2012), p. 50 et seq.

not exclusively sitting in the field of tax law and have “but” a national education and a respective background, might thus (too) often refer to the methods they know best, thus neglecting the common interpretative base set forth in VCLT. Still, it could be worse than solely applying national methods of interpretation: Judges could even be (and sometimes are) tempted to escape into domestic law at all, using art. 3 para 2 OECD-Model<sup>32</sup>; a thing that should absolutely be avoided interpreting DTC.<sup>33,34</sup>

As it has been shown, although being of great value, the interpretative rules set forth in the VCLT cannot ensure a uniform application of tax treaties, this irrespective of the fact as to whether those are based on the OECD-Model and of the existence of its Commentary. The outcome of an identical case can therefore differ from jurisdiction to jurisdiction. A possible way to avoid such an unsatisfactory result might consist in applying the already mentioned “Entscheidungsharmonie”, the common interpretation. Its goal is to strive for the interpretation that is likely to be accepted in both Contracting States.<sup>35</sup> Yet, before looking a bit more at its substantive aspects, it has to be clarified where the principle comes from. Most authors would base it foremost on art. 31 VCLT.<sup>36</sup> As an additional base, art. 38 of the Statute of the International Court of Justice<sup>37</sup> comes into line. According to its paragraph 1 let. d “judicial decisions (and the teachings of the most highly qualified publicists of the various nations)” are to be taken into account.<sup>38</sup> Irrespective of where the principle is anchored in, one has to be aware that there are different notions. Certainly, there is a common origin with regard to all content that can be quite precisely dated to the IFA-Congress 1993 in Florence: “This principle means that courts... of one Contracting State should look at decisions made by courts... of the other Contracting State when confronted with problems of interpretation and that they test whether their interpretation can be transferred. If they are plausible and if their application may lead to the avoidance of double taxation, they should at least be considered and any deviation from them should be explained explicitly and convincingly.”<sup>39</sup> Scholars though distinguish between several notions of the common interpretation requirement. The most far reaching idea states that Courts of one Contracting State (of a tax treaty) should imperatively follow practice and decisions of the other Contracting State. This approach resembles the so called

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<sup>32</sup> “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.”

<sup>33</sup> Note: The context in art. 3 para 2 OECD-Model is much wider than “the context” in art. 31 VCLT. Tax treaties in general require an autonomous interpretation, the fallback of the domestic law can hence not be but the ultimate resort; Federal Administrative Court, 30 November 2010, A-4911/2010 (= BVGE 2010/64) section 4.3.

<sup>34</sup> John F. Avery Jones, Tax Treaties: The Perspective of Common Law Countries, in Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), p. 70 et seq.; Michael Lang, in Danon et al. (eds.), Modèle de Convention fiscale OCDE concernant le revenu et la fortune (Basel: Helbing 2014), art. 3 n 61 et seq.; Peter Hongler, Hybride Finanzierungsinstrumente im nationalen und internationalen Steuerrecht der Schweiz (Zürich: Schulthess 2012), p. 205 et seq.; Moris Lehner, in Vogel/Lehner (eds.), Doppelbesteuerungsabkommen<sup>6</sup> (München: Beck, 2015), Einleitung n. 152d et seq.; Jens Schönfeld/Nils Häck, in Schönfeld/Ditz, Doppelbesteuerungsabkommen – Kommentar, (Köln: Otto Schmidt 2013), Systematik n 84 et seq.

<sup>35</sup> Jens Schönfeld/Nils Häck, in Schönfeld/Ditz, Doppelbesteuerungsabkommen – Kommentar (Köln: Otto Schmidt 2013), Systematik n. 92; Moris Lehner, in Vogel/Lehner (eds.), Doppelbesteuerungsabkommen<sup>6</sup> (München: Beck, 2015), Einleitung n. 115.

<sup>36</sup> Peter Hongler, Hybride Finanzierungsinstrumente im nationalen und internationalen Steuerrecht der Schweiz (Zürich: Schulthess 2012), p. 201 et seq.; Steffen Lampert, Doppelbesteuerungsrecht und Lastengleichheit (Baden-Baden: Nomos 2010), p. 75 et seq.

<sup>37</sup> Statuts des Internationalen Gerichtshofs vom 26. Juni 1945 (Classified Compilation of Swiss Law 0.193.501).

<sup>38</sup> Hartmuth Hahn, Gedanken zum Grundsatz der sog. Entscheidungsharmonie, Internationales Steuerrecht (IStR) 2012, p. 941; Hans Pijl, Beyond Legal Bindingness, in Douma/Engelen (eds.), The Legal Status of the OECD Commentaries (Amsterdam: IBFD, 2008), p. 98 et seq.

<sup>39</sup> Klaus Vogel/Rainer Prokisch, Interpretation of double Taxation Convention, Cahiers de droit fiscal international (Deventer: Kluwer, 1993), p. 62 et seq.

“Qualifikationsverkettung”. Alternatively, it is propagated that the Courts of both Contracting States interpret treaties without looking at their domestic law with the consequence that with regard to their common tax treaty a convergent interpretation should result. Lastly, it is stipulated that Courts should orient their reasoning at the interpretation (in decisions) of the majority of the States having concluded DTCs (based on the OECD-Model).<sup>40</sup> With the exception of alternative 1, no type contains a coercive obligation to follow the decisions of (the) other (contracting) State(s),<sup>41</sup> reason why the latter are sometimes labelled as “Entscheidungsharmonie light”.<sup>42</sup> It is no surprise that this is the least disputed variant. In other words: There is an obligation to look at other countries decisions, yet without those having any binding effect.

The Swiss Courts generally would follow this line as well. Similarly to the OECD Model and the Commentaries on the OECD Model, the judgements of foreign (highest) courts, especially of the other contracting state to a tax treaty, are taken into account as aid to interpretation.<sup>43</sup> This implies that the “obligation to look around” does not only extend to decisions of the other Contracting State but as well to decisions of other Courts with regard to a “ceteris paribus” treaty, i.e. a treaty that follows the OECD model as well and contains the same wording and the same background.<sup>44</sup>

Even if it is only about such an „Entscheidungsharmonie light”, some prerequisites must be met in order to achieve the result of a convergent interpretation. As mentioned before, people involved must have an excellent command of English as the lingua franca of the tax community. A sound linguistic knowledge, yet, is not enough. Judges must be aware of the decisions rendered by their colleagues in the other countries.<sup>45</sup> Hence, they must have access to specialized libraries and data collections such as those hosted by the International Bureau of Fiscal Documentation, as well as to international journals such as the International Tax Law Reports ITLR.<sup>46,47</sup> Furthermore, there must be a place for an exchange of views among judges (and academics), platforms that are offered by international organizations such as the International Association of Tax Judges (IATJ) or the Iberoamerican Association of Administrative or Tax Courts.<sup>48</sup>

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<sup>40</sup> David Ward, Use of foreign court decisions in interpreting tax treaties, in Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), p. 175 et seq., referring to Philip Baker, Double taxation Conventions and International Law (London: Swett & Maxwell 1994).

<sup>41</sup> Christopher Pleil/Stefan Schwibinger, Entscheidungsharmonie und Qualifikationsverkettung als Methoden der Abkommensauslegung – eine Reflexion anlässlich der von der EU/OECD geführten Diskussion zur Einführung eines Korrespondenzprinzips im internationalen Steuerrecht, Steuern und Wirtschaft (StuW), 2016 p. 17.

<sup>42</sup> Hartmuth Hahn, Gedanken zum Grundsatz der sog. Entscheidungsharmonie, Internationales Steuerrecht (IStR) 2012, p. 947.

<sup>43</sup> Thomas Stadelmann, Tax Litigation before the Swiss Supreme Court, Bulletin for International Taxation (BIT) 2016, p. 69; Federal Administrative Court, 21 January 2010, A-7789/2009 (= BVGE 2010/7) section 3.7.11.

<sup>44</sup> Michael Beusch, Die Bedeutung ausländischer Gerichtsentscheide für die Auslegung von DBA durch die schweizerische Justiz, Festschrift für Markus Reich (Zürich: Schulthess, 2014), p. 406.

<sup>45</sup> Wim Wijnen, Some thoughts on Convergence and Tax Treaty Interpretation, Bulletin for International Taxation (BIT) 2013, p. 577 et seq.; John F. Avery Jones, Tax Treaties: The Perspective of Common Law Countries, in Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), p. 76.

<sup>46</sup> Michael Beusch, Die Bedeutung ausländischer Gerichtsentscheide für die Auslegung von DBA durch die schweizerische Justiz, Festschrift für Markus Reich (Zürich: Schulthess, 2014), p. 407; Wim Wijnen, Some thoughts on Convergence and Tax Treaty Interpretation, Bulletin for International Taxation (BIT) 2013, p. 577 et seq.

<sup>47</sup> Cave: The databases usually contain the documents both in its original version as well as in an English translation. Although the latter usually is very well made, it has to be born in mind that the translation might still have some (minor) incoherencies jeopardizing its value for the interpretation.

<sup>48</sup> Wim Wijnen, Some thoughts on Convergence and Tax Treaty Interpretation, Bulletin for International Taxation (BIT) 2013, p. 579.

## Conclusion

The contribution has revealed three major aspects. First of all, being in a truly global context, tax treaty interpretation should necessarily encompass a look cross-border. Certainly, it is still up to the National Court to find a way and it remains its prerogative to state on its State's interpretation. Therefore, there has not to be any fear about a loss of State sovereignty. Nevertheless, Courts can but learn from taking into account (and dealing with) other Court's decisions.<sup>49</sup>

Secondly, the importance of linguistic knowledge has become more than evident. The more jurisdictions a language links, the more important it is. Hence, languages such as German, French and obviously Portuguese and Spanish are a very important, a statement that is even more true for English. Whether one likes it or not, it cannot be emphasized enough that an excellent command of English is the clue to cope with the challenges of tax treaty interpretation.

Last but not least, it has become obvious that organizations such as the International Association of Tax Judges (IATJ) or the Iberoamerican Association of Administrative or Tax Courts, globally accessible databases, conferences and books reuniting contributions from all over the world are invaluable for "the international Tax Community", giving access to the knowledge of many learnt people. Thus, thank you for having enabled this book and congratulations to the anniversary!

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<sup>49</sup> Again and as mentioned before, this does not mean that such decisions are to be followed blindly, unreflectedly; Michael Beusch, Die Bedeutung ausländischer Gerichtsentscheide für die Auslegung von DBA durch die schweizerische Justiz, Festschrift für Markus Reich (Zürich: Schulthess, 2014), p. 408; Moris Lehner, in Vogel/Lehner (eds.), Doppelbesteuerungsabkommen<sup>6</sup> (München: Beck, 2015), Einleitung n. 117.



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**IATJ 8th Assembly  
October 6 and 7, 2017**

**Helsinki, Finland**

**AGENDA**

**Thursday 5 October 2017**

18:00 p.m. to 20:00 p.m. Meeting of the Executive and Board Directors

**Friday, 6 October 2017**

[Supreme Administrative Court  
Fabianinkatu 15, Helsinki]

8:00 a.m. to 9:00 a.m. **Registration**

9:00 a.m. to 9:05 a.m. **Welcome by Eugene Rossiter**  
President IATJ

9:05 a.m. to 9:10 a.m. **Welcome by Pekka Vihervuori**  
President Supreme Administrative Court

9:10 a.m. to 9:15 a.m. **Presentation Agenda by Wim Wijnen**  
Chairman PPC

9:15 a.m. to 10:30 a.m. **Substantive Session on Commercial and  
Tax Accounting**

**Chair:** Philippe Martin (France)

**Panel:** Steven D'Arcy (Canada)

Tamara Ashford (United States)

Joao Bianco (Brazil)

Pramod Kumar (India)

Susanne Tiedchen (Germany)

Yun Seok Yoon (Korea)

*t.b.c. confirmed (Sweden)*

10:30 a.m. to 11:00 a.m. Health Break– coffee/tea

11:00 a.m. to 12:15 p.m. **Substantive Session on Commercial and  
Tax Accounting**  
Continued

12:15 p.m. to 14:00 p.m. Lunch  
[Restaurant Kappeli, Eteläesplanadi 1, Helsinki]

14:00 p.m. to 15:30 p.m.  
**Case**

**Substantive Session on the Use of Foreign Law by Courts**

**Chair:** Jennifer Davies (Australia)

**Panel:** Dennis Davis (South Africa)  
Anthony Gafoor (Trinidad Tobago)  
Vineet Kothari (India)  
Thomas Stadelmann (Switzerland)  
Ange Beukers-van Dooren  
(Netherlands)

15:30 p.m. to 15:45 p.m.

Health Break– coffee/tea

15:45 p.m. to 17:15 p.m.

**Substantive Session on Tax Procedures in Finland**

**Chair:** Peter Panuthos (United States)

**Panel:** Vesa-Pekka Nuotio (Finland)  
Supreme Administrative Court  
Juhana Niemi (Finland)  
Administrative Court of Hämeenlinna  
Terttu Lepaus (Finland)  
Board of Adjustment

20:00 p.m.

**Cocktail Reception**

[Government Stateroom Smolna, Eteläesplanadi 6, Helsinki]

**Saturday, 7 October 2017**

[Supreme Administrative Court  
Fabianinkatu 15, Helsinki]

09:00 a.m. to 10:30 a.m.

**Substantive Session on Recent Case Law**

**Chair:** Malcolm Gammie (United Kingdom)

**Panel:** *to be selected by the end of May 2017*

10:30 a.m. to 10:45 a.m.

Health Break– coffee/tea

10:45 a.m. to 12:00 a.m.

**Substantive Session on VAT on Services Related to Website and Internet**

**Chair:** Friederike Grube (Germany)

**Panel:** Dagmara Dominik Ogińska (Poland)  
Csilla Andrea Heinemann (Hungary)  
Mikko Pikkujämsä (Finland)

12:00 p.m. to 14:00 p.m.

Lunch

[Restaurant Salutorget, Pohjoisesplanadi 15, Helsinki]

14:00 p.m. to 15:30 p.m.	<p><b>Substantive Session on Obtaining Evidence and Information (Common Law)</b>  <b>Chair:</b> John Owen (Canada)  <b>Panel:</b> Elaine Y. L. Liu (Hong Kong)  Paige Marvel (United States)  Moses Obonyo (Kenya)  <i>t.b.c (Ireland)</i>  <i>t.b.c.(United Kingdom)</i></p>
15:30 p.m. to 15:45 p.m.	Health Break– coffee/tea
15:45 p.m. to 17:15 p.m. and	<p><b>Substantive Session on Obtaining Evidence Information (Civil Law)</b>  <b>Chair:</b> Michael Beusch (Switzerland)  <b>Panel:</b> Edouard Crépey (France)  Clement Endresen (Norway)  Manuel Hallivis Pelayo (Mexico)  Anette Kugelmuller-Pugh (Germany)  Massimo Scuffi (Italy)</p>
17:15 p.m. to 17:30 p.m.	<b>Exotic topic</b>
17:30 p.m. to 18:00 p.m.	IATJ Business Meeting
20:30.....	<p><b>Closing Dinner</b>  <b>Guest speaker:</b> Marjaana Helminen (Finland)</p>
<b>Conference Guide</b>	Outi Siimes (Finland)

**Sunday, 8 October 2017**

**Business :**  
09:00-11:00: Meeting of the Executive and Board Directors

**Excursion**

**Permanent Program Committee**  
Friederike Grube (Germany)  
Manuel Hallivis Pelayo (Mexico)  
Philippe Martin (France)  
John Owen (Canada)  
Petri Saukko (Finland)  
Wim Wijnen (Netherlands)