



International Association of Tax Judges

Interpretation of Tax Treaties The use of the Vienna Convention

IATJ 3rd Assembly in Munich

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I. The Vienna Convention on Treaties (VCLT) - Facts

- Adoption and Signature: 22nd May 1969
- Depository: United Nations (<http://treaties.un.org>)
- Entry into Force: 27 January 1980
- Current Status: Signatories = 45, Parties = 111 (Ratification), 15 states have signed **but have not ratified the convention**. These countries are: Afghanistan, Bolivia, Cambodia, El Salvador, Ethiopia, Ghana, Iran, Ivory Coast, Kenya, Madagascar, Nepal, Pakistan, Trinidad and Tobago, **United States**, Zambia
- Germany: Ratification as of August 20, 1987

I. The Vienna Convention on Treaties (VCLT) - Content

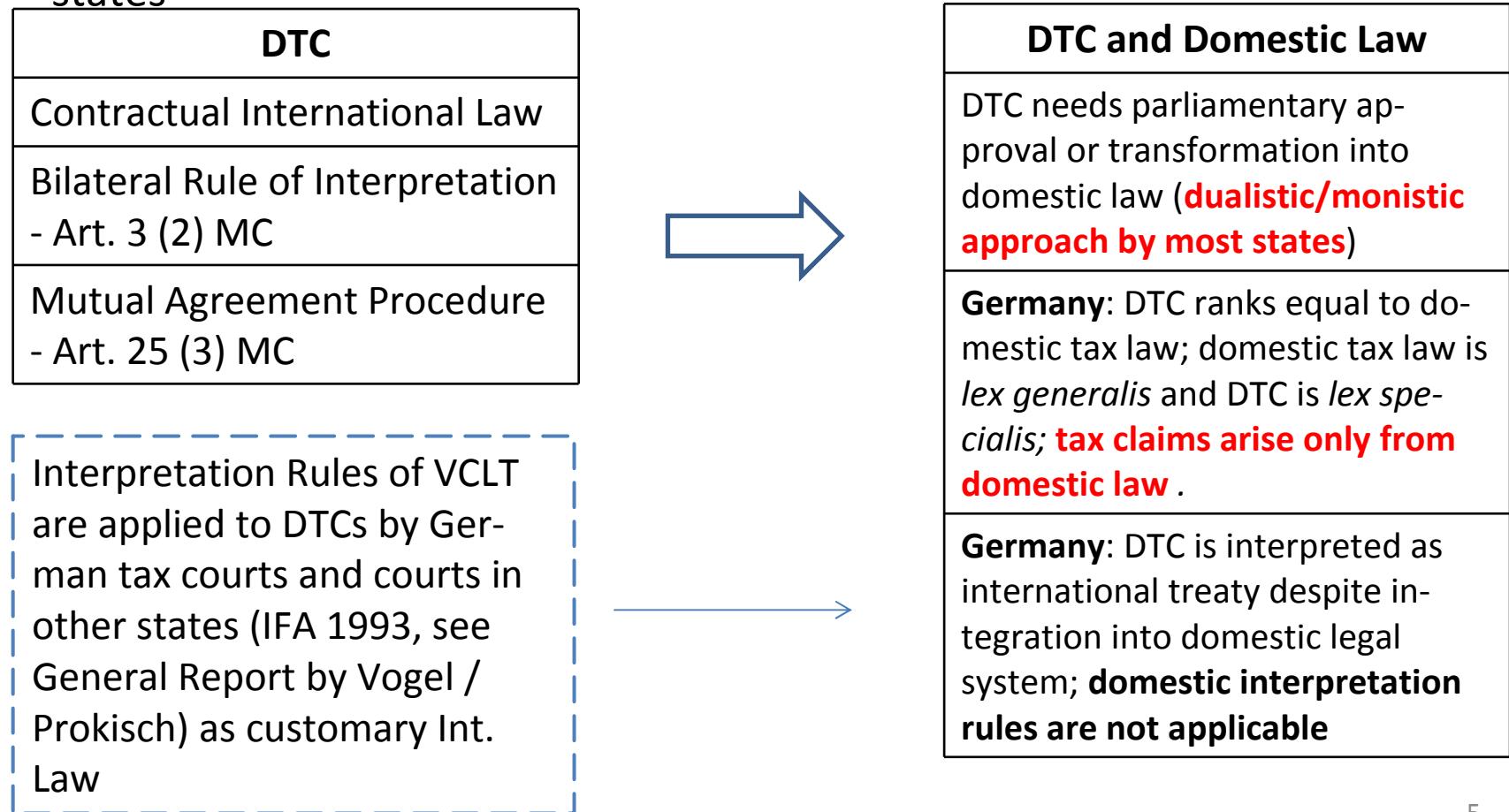
- **Scope:** Bilateral Treaties between States (including Double Tax Conventions – DTC) = Art. 1
- **Legal Effect:** Treaties concluded by contracting states of the VCLT after entry into force (Art. 4), but **interpretation rules** (Art. 31 to 33 VCLT) are qualified as customary international law.
- **Structure of the VCLT:**
 - Conclusion and entry into force of treaties (Art. 6 to 25);
 - Observance / Application / Interpretation: *pacta sunt servanda* – principle and „no internal law as cause for observance“-rule (Art. 26 and 27), **interpretation rules** (Art. 31 to 33);
 - Amendment and Modification (Art. 39 – 41), Termination and Suspension (Art. 42 – 45, 54 - 64); Invalidity of a treaty (Art. 46 to 53, 65 - 72);
 - Miscellaneous (Art. 73 – 75); Notifications (Art. 76 – 80); Final Provisions

II. The Vienna Convention on Treaties (VCLT) – Art. 31 to 33 VCLT as interpretation rules of international law

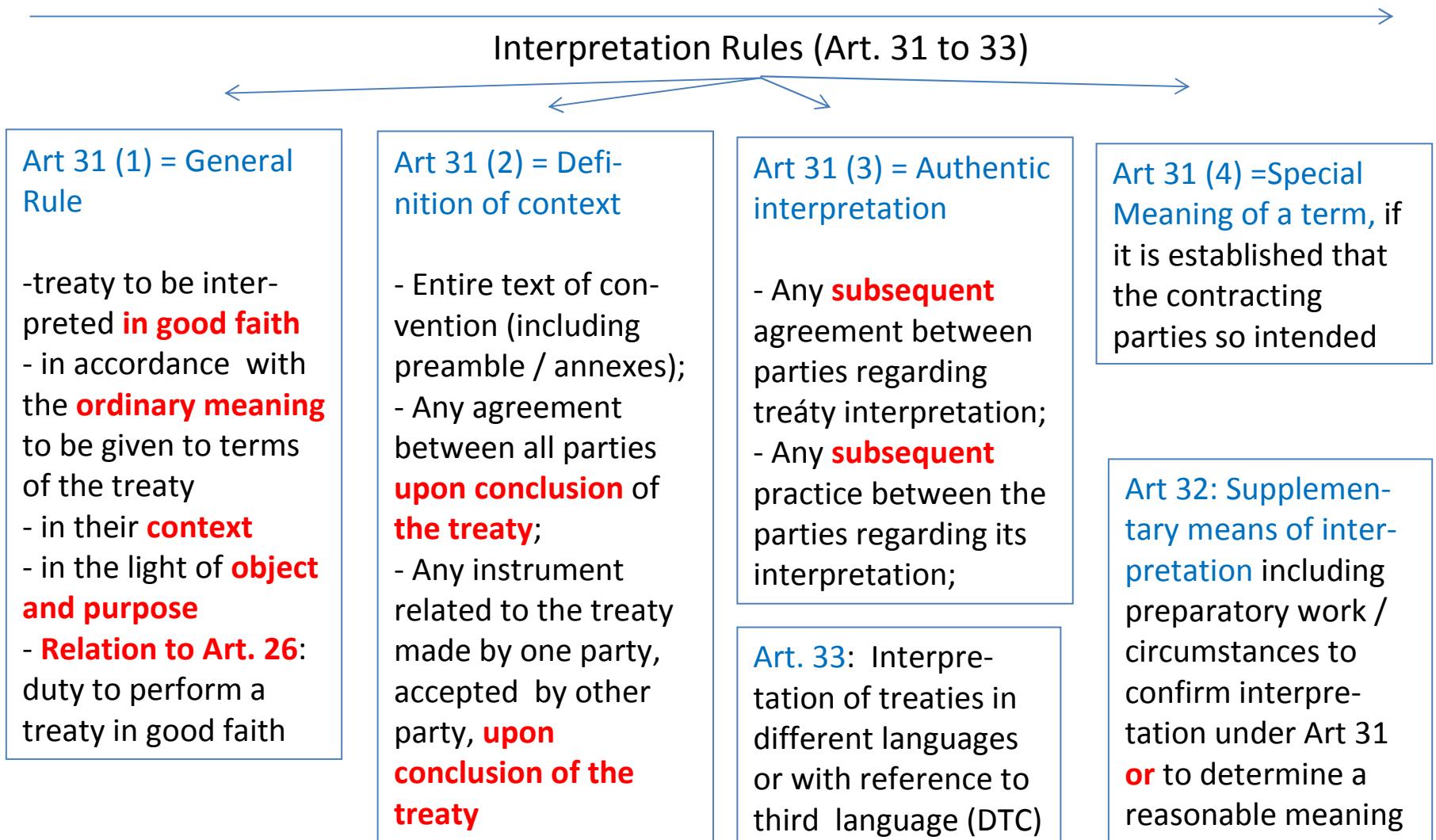
- Standard problems in treaty practice are
 - questions of **interpretation of a DTC**, e.g. a treaty term is construed differently by the contracting states; **qualification conflicts** as extreme form of deviating interpretation.
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 - **treaty overrides**, interpretation of the treaty is clear but one of the contracting states intentionally violates a treaty obligation by a provision in his domestic tax law [e.g., non application of a tax exemption according to the treaty] – **not addressed here**.
- Art. 31 to 33 VCLT contain **binding interpretation rules of international law** for parties of the VCLT.
- Application of these interpretation rules can be evoked
 - (1) between parties of a DTC (the states) in a trial **before the ICJ (bindingness of the OECD commentary is binding on grounds of estoppel ?)** - [see also Pijl].
 - (2) by domestic tax authorities and courts applying domestic tax law and treaty provisions (**practice**)

III. The Vienna Convention on Treaties (VCLT) – Application of Art. 31 to 33 VCLT by national courts

- Relationship between a DTC and domestic tax law of the contracting states



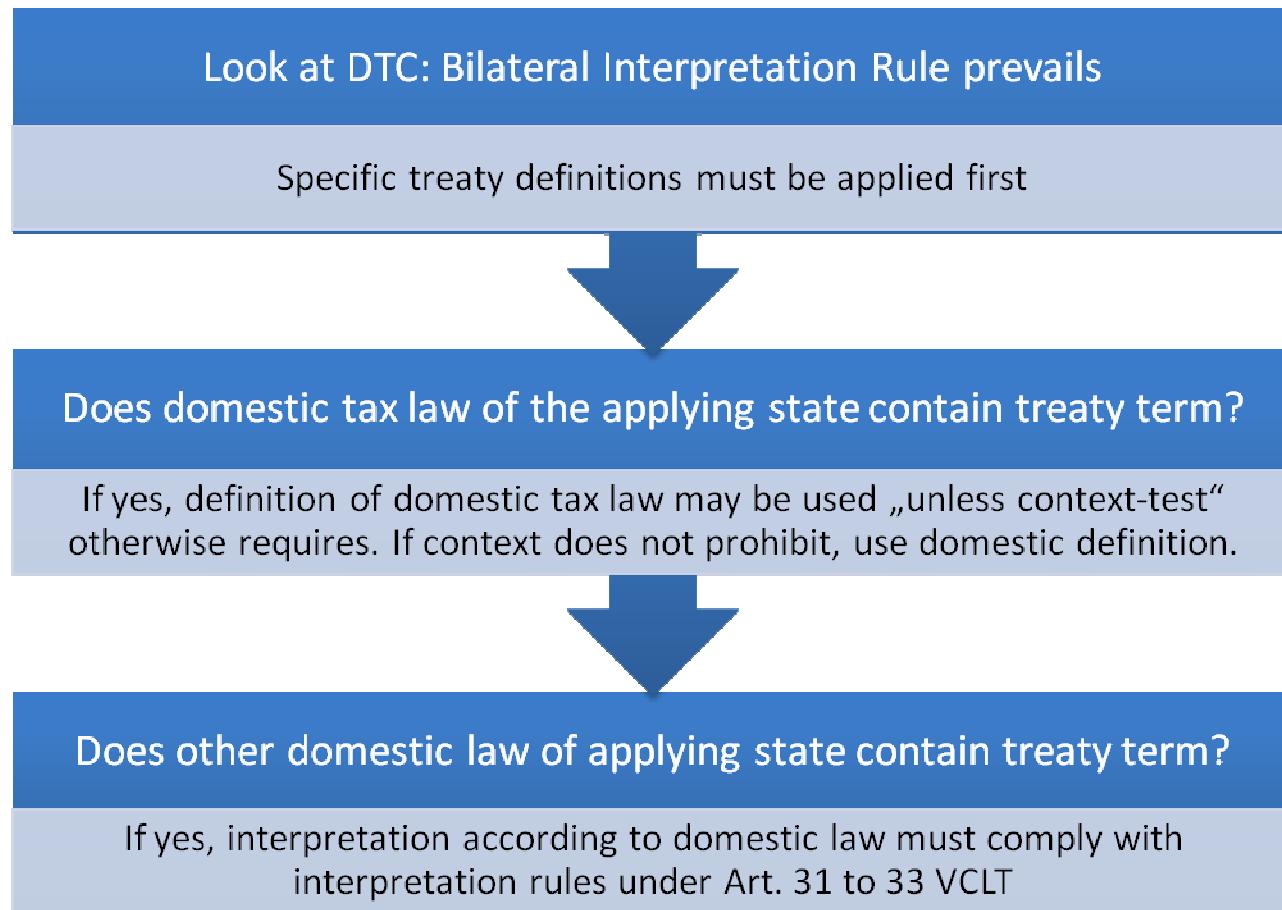
III. The Vienna Convention on Treaties (VCLT) – Application of Art. 31 to 33 VCLT by national courts



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- **Art. 31 (1)** = Combination of literal / textual (*ordinary meaning*), teleological (*object an purpose*) and systematic (*context*) methods of interpretation without preference for a method
 - **historically**: achievement of Art. 31 to 33 VCLT is to accept a variety of methods instead of the prevailing literal interpretation method;
 - **now**: the interpretation rule needs interpretation: What does Art 31 (1) VCLT require?
- **Interpretation rule in DTC is *lex specialis* to interpretation rules in Art. 31 to 33 VCLT.**
 - if bilateral interpretation rule is similar to Art. 3 (2) MC, a treaty term may be interpreted by meaning of a term under domestic tax law *concerning the taxes governed by the treaty* [e.g. Germany: income / corporation and trade taxes];
 - relevant is meaning in domestic law at the date of application, not at the date when the treaty entered into force.

III. The Vienna Convention on Treaties (VCLT) – Application of Art. 31 to 33 VCLT by national courts



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- **The Context test:**

- (1) Starting point ist the **literal interpretation** of treaty term to explore the ordinary meaning (Bundesfinanzhof); ordinary meaning prevails over intentions of contracting states;
- (2) **Duty to consider the term in context of the whole treaty** (entire text plus preamble, annexes, exchanged letters, no unilateral materials) and with respect to object and purpose of the DTC (fair distribution of revenues among Contracting States, to avoid double taxation) **and requirement to find a common (reciprocal) interpretation, if possible.** The interpreter in each contracting state has therefore to consider interpretations by courts / authorities of the other contracting state; this may be difficult in court due to **procedural rules** [foreign application of domestic law and treaty is question of fact or law?].

III. The Vienna Convention on Treaties (VCLT) – Application of Art. 31 to 33 VCLT by national courts

- **The main function of Art. 31 to 33 VCLT :**
 - Art. 31 (1) VCLT has been cited by the Bundesfinanzhof as a supporting legal argument for the findings
 - that an interpretation against „*the ordinary meaning*“ of a treaty term is prohibited;
 - that a careful interpretation of a term in the context of the treaty is mandatory prior to use domestic tax law definition.
 - Different meanings of the term „*context*“ in Art. 31 VCLT and Art. 3 (2) MC [**see Hallivis – Pelayo**]. Which definition prevails and which materials may be used?
 - If there is no corresponding term in domestic **tax** law but in domestic law of the applying state then the interpretation must comply with Art. 31 to 33 VCLT; only „*context-definition*“ in Art. 31 (2) VCLT is relevant.

III. The Vienna Convention on Treaties (VCLT) – Application of Art. 31 to 33 VCLT - questions arising under Art. 31 VCLT

- Interpretative mutual agreements by tax authorities (Art. 25 (3) MC) of the contracting states
 - are subsequent agreements / later treaty practice (Art. 31 (3) VCLT). Art. 31 (3) thus leads to a binding interpretation agreement according to **international law**.
 - However, the agreement is only binding for the Courts **under German Law**, if it is either
 - (1) approved by parliament or
 - (2) the interpretation complies with the ordinary meaning of the respective treaty term (*„no treaty alteration by interpretation“*).

III. The Vienna Convention on Treaties (VCLT) – Application of Art. 31 to 33 VCLT – OECD Model and Commentary

- If and how the OECD – Commentary according to Art. 3 (2) MC and Art. 31 to 33 VCLT can be /must be used interpreting a DTC is discussed intensively: [see Pijl and Wattel]
- Approaches to consider the Commentary as legally binding instrument of interpretation
 - OECD – Model and Commentary as „context“ under Art. 31 (2a) VCLT, e.g., *„an agreement between the parties upon conclusion“* at least if Contracting states are OECD Member Countries?
 - Meaning of Term in the OECD-Model and Commentary as term of „*ordinary meaning*“ [as part of an international tax language] under Art. 31 (1) VCLT or as term with a „*special meaning*“ under Art. 31 (4) VCLT ?
 - OECD- Model and Commentary as „*supplementary means of interpretation*“, e.g. „*preparatory works*“ under Art. 32 VCLT?
- Static or Dynamic Interpretation? If OECD-Model and Commentary are applicable under Art. 31 (1) or 31 (4) VCLT, the meaning of a term in the Commentary **upon conclusion** of the treaty is decisive. The approach to hold the commentary binding on grounds of estoppel is also limited to the meaning upon conclusion. Restrictions of domestic constitutional law have further to be considered in dualistic countries.

III. The Vienna Convention on Treaties (VCLT) – Application of Art. 31 to 33 VCLT – Key findings

- Art. 31 VCLT is applicable on any DTC as an interpretation rule of customary international law. There is no binding method of interpretation according to the rule [literal / teleological / systematic method]. It has limited legal effect.
- The interpretation rule of a specific DTC is the starting point. Art. 31 VCLT is integrated into the „*context-test*“ within this specific interpretation rule.
- Interpretative mutual agreements by the tax authorities of the contracting states may be binding according to Art. 31 (3) VCLT; but not under domestic law if these agreements exceed a literal interpretation of the term (Bundesfinanzhof).
- Art. 31 to 33 VCLT do not prescribe that the OECD Commentary must be used as a tool of interpretation in its current version [dynamic interpretation]

Thank you !

Key Material:

- Internet
- Interpretations of double taxation conventions (General Report by Vogel / Prokisch), Cahiers de droit fiscal international, IFA, Volume LXXVIIla, Subject I [1993];
- The Legal Status of the OECD Commentaries, Volume 1, by Dourma / Engelen, IBFD, March 2008.
- Case Law of the Bundesfinanzhof.
- German Textbook on International Tax Law: Schaumburg, Int. Steuerrecht, 3rd edition, 2011, Verlag Dr. Otto Schmidt, Cologne.
- Vogel / Lehner, Commentary on the OECD Model and Commentary [DBA / Doppelbesteuerungsabkommen], 5th Edition, 2008 [in German], Beck Verlag, Munich