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# TAX TREATY CASE LAW AROUND THE GLOBE 2017

Series on International Tax Law, Michael Lang (Ed)

Lang et al (Eds)

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Tax Treaty Case Law around the Globe 2017

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Univ.-Prof. Dr. Dr. h.c. Michael Lang (Editor)
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# Tax Treaty Case Law around the Globe 2017

edited by
**Michael Lang**
**Alexander Rust**
**Jeffrey Owens**
**Pasquale Pistone**
**Josef Schuch**
**Claus Staringer**
**Alfred Storck**
**Peter Essers**
**Eric C.C.M. Kemmeren**
**Daniël S. Smit**

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# Preface

Both the OECD Model Tax Convention on Income and Capital (OECD Model) and the United Nations Model Double Taxation Convention (UN Model) often serve as a basis for tax treaty negotiations between different jurisdictions worldwide. At the same time, however, and for a number of reasons, the interpretation of a particular tax treaty provision may still differ from country to country. Therefore, the risk of double or even multiple (non-) taxation is not fully eliminated. In order to promote a uniform interpretation of tax treaties worldwide and, hence, to reduce the risk of double or multiple (non-) taxation, basic knowledge is needed on how various tax treaty issues are solved in different jurisdictions. It is widely known that a unified approach to interpretation and application of international tax treaty rules can benefit not only the countries which are parties to the tax treaty in question but also their taxpayers, as well as international trade and investment in general. Therefore, this topic is of ongoing concern to many tax scholars, practitioners, representatives of international organizations and public officials.

On 27-29 April 2017, the conference "Tax Treaty Case Law around the Globe" was held at the WU (Vienna University of Economics and Business). This international conference took place for the seventh time (for the fourth time in Vienna) and was jointly organized by the Institute for Austrian and International Tax Law of the WU and the European Tax College of Tilburg University. The conference was dedicated to the analysis of the most important cases on international tax treaty law decided in different tax jurisdictions across the world in 2016. 42 cases were presented by outstanding tax experts from 28 countries. Each presentation was followed by an intensive and fruitful discussion. The participants in the conference compared interpretation approaches existing in both the OECD and non-OECD Member countries and came up with comprehensive conclusions and suggestions. The main scientific results of the conference are presented in this book.

Each report in this book is dedicated to a court case or a number of cases from 2016 on a particular article of the tax treaty at issue (often based on the OECD Model or UN Model) in a certain jurisdiction. Every report is structured in a similar way: facts of the case, the decision and reasoning of the court and the author's observations, including the possible impact of the decision on international tax law development in the respective country and in other jurisdictions. This clear

and concise structure enables a solid and accessible overview of the 2016 case law on tax treaty application. The systematic structure of each report, allows for different tax treaty case law to be studied and compared in a simple and efficient way.

The editors believe that the reports presented in this book are of high value and, therefore, will be of particular interest for academics, tax consultants, judges, public officials and all those interested in international tax law. The fact that many domestic decisions are otherwise available only in the respective national languages makes the materials contained in this book even more valuable.

The editors would like to express their sincere gratitude to the Linde Publishing House for their cooperation and swift realization of this publishing project. Ms. Eleanor Campbell contributed greatly to the completion of this book by editing and polishing the texts for authors, for whom English is – for the most part – a foreign language. Furthermore, we are most grateful to Rita Julien and Selina Siller who helped with the preparation and realization of the conference and assisted in editing the book. Finally, special thanks go to Renée Pestuka who was responsible for the organization of the conference in Vienna and who also worked on the publication of this book.

Vienna, October 2017 The Editors

*Michael Lang*
*Alexander Rust*
*Jeffrey Owens*
*Pasquale Pistone*
*Josef Schuch*
*Claus Staringer*
*Alfred Storck*
*Peter Essers*
*Eric C.C.M. Kemmeren*
*Daniël S. Smit*

# List of Contributors

## Philip Baker

Philip Baker QC began practice in 1987, having been a full-time lecturer in law at London University from 1979 until then. He has maintained some links with academia, and is now Visiting Professor at the Law Faculty of Oxford University and a Senior Visiting Fellow at the Institute of Advanced Legal Studies, University of London. He took silk in 2002. He specializes primarily in international aspects of taxation, which covers both corporate and private client matters. He has advised and represented several governments on tax matters, and appeared as an expert witness in a number of cases around the world. He has a particular interest in taxation and the European Convention on Human Rights, is the author of a book on Double Taxation Conventions, and the editor of the International Tax Law Reports. He has appeared in cases before courts and tribunals at virtually every level from the Special Commissioners (now the Tax Tribunal) to the House of Lords (now the Supreme Court), Privy Council and European Court of Justice.

He is a former member of the Council of the Chartered Institute of Taxation and remains a member of several of its committees. He is also a member of the International Tax Sub-Committee of the Law Society, a member of the UK Committee of the International Fiscal Association and a former member of the Permanent Scientific Committee of IFA. In 1997 he was awarded an OBE for work with Chinese political refugees in the United Kingdom.

## Tomas Balco

Tomas Balco has more than 16 years of practical experience in both the private and public sectors and previously worked as Director of Central Asian Tax Research Center and Associate Professor at KIMEP University in Kazakhstan (2010–2014), where he established a tax specialization programme – both at Bang College of Business and also at the School of Law. While in Kazakhstan, he also worked as a senior manager in the Tax & Legal Department of PricewaterhouseCoopers in Kazakhstan (2006–2010) and during the years 2008–2014 he served as Chair of various Tax Working Groups of the American Chamber of Commerce in Kazakhstan, where he was engaged in initiatives aimed at improving the investment climate and held regular meetings with the investment community in the major cities of Kazakhstan (Almaty, Astana, Aktau and Atyrau). Tomas was also

involved in several tax policy projects with the Ministry of Finance of Kazakhstan, including a project on tax administration reform sponsored by the World Bank, the drafting of the Kazakhstani Tax Code sponsored by the European Union and other projects. He is currently working as General State Counsel at the Ministry of Finance of the Slovak Republic, where he is responsible for transfer pricing, provision of assistance with International Taxation issues and for the representation of Slovakia at the OECD, European Union and United Nations, including the coordination of the tax policy aspects of the Slovak Presidency of the EU Council (SK PRES 2016). Tomas is involved as a faculty member and teaches in academic programmes at different Universities and Institutes including the University of Leiden (International Tax Center – LL.M. Programme), the University of Lausanne (MASIT Programme), the University of Pretoria (African Tax Institute) and the IBDT in Sao Paulo (Brazil).

### Ilan Benshalom

Ilan Benshalom is a Professor of Law and Deputy Dean at The Hebrew University of Jerusalem Faculty of Law. Professor Benshalom's primary research interests lie in International Taxation, Tax Policy, Distributive Justice and Tax Base Theory.

### Yariv Brauner

Yariv Brauner is the Hugh Culverhouse Eminent Scholar Chair in Taxation and is a Professor of Law with the Levin College of Law at the University of Florida. He joined the Florida faculty in 2006, after teaching at NYU, Northwestern and ASU. He is the 2017 Visiting Chair of Excellence at Universidad Carlos III de Madrid. He has been a Visiting Professor or a guest speaker in various universities in the United States and abroad. He is the author of several articles published in professional journals and law reviews, and a co-author of U.S. International Taxation – Cases and Materials (with Reuven S. Avi-Yonah and Diane M. Ring), now in its 3rd edition. He has taught multiple courses in the fields of Taxation, Corporate Taxation, International Taxation, International Trade Law, and the Law of Multinational Corporations.

### Slavka Dimitrova Slavcheva

Slavka Dimitrova Slavcheva is a researcher and tax law lecturer at the Complutense University of Madrid, Spain. She holds LL.M. degrees in Human Rights (2011) and in EU Law (2013) and a postgraduate diploma in International and EU Tax Law (2015). Her doctoral thesis concerns the tax implications of investment protection in the EU area, within the global trade system.

### Michael Dirkis

Michael Dirkis is Professor of Taxation Law at the University of Sydney. He has been engaged with taxation law for over 35 years through roles in academia, govern-

ment and the private sector. He is a noted researcher having authored or co-written over 630 publications and papers. Michael is a member of the Australian Treasury's Tax Treaties Advisory Panel. On 21 January 2010 he was awarded the Australasian Tax Teachers Association's Graham Hill medal in recognition of his "outstanding contribution to the teaching of taxation law and policy".

### Ana Paula Dourado

Ana Paula Dourado is a professor of tax law at the University of Lisbon and vice-president of IDEFF. She has been a visiting professor at several European Universities, the University of Florida, and MOFTI, Taipei. She has served as an expert in the legal department of the IMF, has been a delegate for Portugal for EU direct taxes and at the OECD. A Founding member of GREIT, she has edited books on European and comparative tax law and has published several articles and book chapters on those legal areas; she is a correspondent for several national and international tax law journals. In addition, she is a member of the editorial board of Intertax, RFPDF of the Executive Board of the EATLP and of the EU Tax Good Governance Platform.

### David G. Duff

David G. Duff is Professor of Law at the University of British Columbia Faculty of Law (UBC Law), where he teaches and writes in the areas of tax law and policy, environmental taxation, comparative and international taxation, and distributive justice. Prior to joining UBC Law, Prof. Duff was a member of the Faculty of Law at the University of Toronto from 1996 to 2009. Before that, he was a tax associate at the Toronto office of Stikeman, Elliott. He has been a visiting scholar at the law faculties at Auckland University, Bar-Ilan University, McGill University, Oxford University and the University of Sydney, and is an International Research Fellow of the Oxford University Centre for Business Taxation. Prof. Duff has published numerous articles on tax law and policy, is the lead author on a textbook/casebook on Canadian income tax law, and was cited in the Supreme Court of Canada's most recent decision on the Canadian General Anti-Avoidance Rule in Copthorne Holdings Ltd. v. Canada, 2011 SCC 63: http://scc.lexum.org/en/2011/2011scc63/2011scc63.html.

### Tsutomu Endo

Tsutomu Endo is an attorney at law at Nagashima, Ohno and Tsunematsu, a law firm in Tokyo. In 2009, he received his Juris Doctor from the University of Tokyo School of Law. In 2016 he received his Master of Corporate Law (MCL) from the University of Cambridge and in 2017, was awarded his LL.M. in International Tax Law from Vienna University of Economics and Business (Wirtschaftsuniversität Wien).

### Eivind Furuseth

Eivind Furuseth is an associate professor at BI Norwegian Business School in Norway. In 2006, he received his LL.M. in International tax Law from ITC Leiden in the Netherlands and in 2016 his Ph.D. from the University of Oslo. Eivind is a board member of the Nordic Tax Research Council, editor of the Norwegian tax journal “Skatterett” and member of the editing board of the Nordic Tax Journal. Previously Eivind has worked with the Norwegian tax authorities and KPMG Law.

### Ricardo André Galendi Júnior

Ricardo André Galendi Júnior holds an LL.B. from the University of São Paulo and is currently studying for a master of science degree at the University of São Paulo. He works as a Lawyer in São Paulo.

### Werner Haslehner

Werner Haslehner is full professor and holder of the ATOZ Chair of European and International Taxation at the Faculty of Law, Economics and Finance and the Director of the LL.M Programme in European and International Tax Law at the University of Luxembourg. Before coming to Luxembourg in 2013, he held full-time academic positions at Johannes Kepler University Linz and the London School of Economics and Political Science. His primary research interests lie in EU tax law, international tax law and tax policy. He is a Member of the Scientific Committee of the Luxembourg branch of the IFA, a Member of the ECJ Task Force of the CFE and a Member of the Academic Committee of the EATLP.

### Marjaana Helminen

Marjaana Helminen works as a full-time tax professor at the University of Helsinki. She specializes in international taxation and EU tax law. She has also worked as a justice at the Supreme Administrative Court of Finland and as a tax adviser at Loyens&Loeff in Amsterdam.

### Eric C.C.M. Kemmeren

Eric C.C.M. Kemmeren is Professor of international tax law and international taxation at the Fiscal Institute Tilburg of Tilburg University, the Netherlands. He is also a member of the board of the European Tax College, Deputy Justice of the Arnhem Court of Appeals (Tax Division), and counsel to Ernst & Young, Tax Advisers in Rotterdam, the Netherlands.

### Na Li

Na Li is a post-doctoral researcher and lecturer at East China University of Political Science and Law (Shanghai) and is also a Chinese lawyer and US (New York State) lawyer practising in cross-border investment and international taxation.

She obtained an LLB from Fudan University (Shanghai) in 2001, an LL.M. in tax law from Boston University in 2009 and a Ph.D. from Vienna University of Economics and Business (WU) in 2015.

### Hanna Litwińczuk

Hanna Litwińczuk is Ordinary Professor at the Faculty of Law and Administration of Warsaw University and the Chair of Financial Law. Hanna's main fields of research are direct taxation, especially business taxation, as well as accounting law, international and EC tax law. She is a member of EATLP and IFA.

### Adolfo Martín Jiménez

Adolfo Martín Jiménez (Ph.D., European University Institute, Florence Italy, 1997; LL.M. University of Wisconsin, 1995) is Tax Law Professor, Jean Monnet Chair (EU Commission) and director of the Master in Tax Law at the University of Cádiz, Spain. He specializes in International Taxation and EU Tax Law and has authored and co-authored several books and more than sixty articles on the topic both in Spanish and English (published in several countries). He also has broad experience in advising public and private entities on international and EU tax law and is a member of the EU Joint European Transfer Pricing Forum. Adolfo has been a visiting professor and scholar at other Spanish and foreign universities and often participates in conferences on international and EU tax law in Spain and abroad.

### Danuše Nerudová

Danuše Nerudová is an Associate Professor and the Head of the Department of Accounting and Taxes, Faculty of Economics and Business, Mendel University Brno, Czech Republic, and a researcher at the Research Center of Faculty of Economics and Business, Mendel University Brno.

### Helen Pahapill

Helen Pahapill obtained her Bachelor's degree in Law from Tartu University in Estonia and studied International Tax Law at Leiden University during the academic year 2003-2004 graduating with a Master's degree in 2004. She has worked in the Tax Policy Department in the Ministry of Finance of Estonia since the year 2000. Her responsibilities include negotiating of tax treaties and drafting income tax legislation.

### Lysandre Papadopoulos

Lysandre Papadopoulos works as a Law Clerk in the Tax Chamber of the Swiss Federal Administrative Tribunal. His fields of expertise cover Tax Law, International Law, as well as Administrative Law. He also served at the European Court of Human Rights (Swiss division), after qualifying as a Lawyer (ranked 2nd at the

Bar Exam). He studied Law at the University of Geneva, University of Zurich and Harvard Law School.

### Pasquale Pistone

Pasquale Pistone is a Professor at the Institute for Austrian and International Tax Law at the WU (Vienna University of Economics and Business), associate professor of Tax Law at the University of Salerno (Italy), Academic Chairman IBFD, the Editor-in-Chief of the IBFD Doctoral Series, the Editor-in-Chief of the World Tax Journal, the Executive Editor of the IBFD Global Tax Treaty Commentaries, member of the Editorial Board of other distinguished international tax journals and author and editor of numerous publications on European and international tax law, published in several languages.

### Isabelle Richelle

Isabelle Richelle is a Professor at the University of Liege where she also co-chairs the Tax Institute. She holds a Ph.D. from the University of Brussels. Her research and practice focuses on European and international tax law in relation to companies and individuals. She is regularly invited as speaker at conferences and seminars and is the author of numerous publications. She is also a member of the Fiscal Committee of the CFE. She worked for several years for an international tax consultant firm and she currently practices as a lawyer at the Brussels Bar.

### Alexander Rust

Alexander Rust is Professor of Tax Law at the Institute for Austrian and International Tax Law of WU (Vienna University of Economics and Business). He previously worked as Professor of Tax Law and Director of the Master Program in European and International Tax Law at the University of Luxembourg, as Acting Assistant Professor at New York University, as an assistant at the University of Munich. He has also held positions as an assistant judge and public prosecutor at the High Court of Munich, a law clerk at the Ministry of Finance and a tax adviser in private practice.

### Luis Eduardo Schoueri

Luis Eduardo Schoueri is a Professor of Tax Law at the University of São Paulo and a partner at Lacaz Martins, Pereira Neto, Gurevich & Schoueri Advogados. He is also Vice President of the Brazilian Tax Law Institute and has been visiting professor at a number of foreign universities.

### Mirna Solange Screpante

Mirna Solange Screpante graduated in Accounting from Universidad de Buenos Aires, holds a Specialization in Tax Law from Universidad Austral and holds an LL.M. in Corporate and International Taxation from Universität zu Köln. She

served as a Teaching Assistant at Universidad de Buenos Aires and Universidad Austral. Currently, she is Research and Lecturer Fellow at the Institute for Austrian and International Tax Law, WU Vienna and Visiting Professor at Universidad Austral in the Master in Tax Law. She is member of the Argentine Association of Fiscal Studies (AAEF). She has participated in conferences in Argentina and abroad and is the author of several articles published in Argentina and in international journals.

### D.P. Sengupta

D.P. Sengupta joined the Indian Revenue Service in 1975 and has now retired from his post as Chief Commissioner of Income Tax (Central), Delhi. He served as Joint Secretary in the Tax Policy and Legislation Division of the Ministry of Finance. He was also the former Joint Secretary of the Foreign Tax Division in the Ministry of Finance and was the Competent Authority for India. He is currently the Principal Consultant to the National Institute of Public Finance and Policy, New Delhi.

### Danil V. Vinnitskiy

Danil V. Vinnitskiy is Head of the Department of tax and financial law, the Ural State Academy of Law; Head of the Research Centre for Comparative and International Tax Law (Ekaterinburg, Russia); member of the Academic Committee of the European Association of Tax Law Professors and of the Presidium of the International Association of Financial Law (which unites scholars from CIS countries); author of more than 180 publications, including eleven monographs and seven textbooks on tax and financial law (including those prepared with co-authors). He is also the editor of collections of articles on the topical issues of financial and tax law, general editor of the Russian Yearbook of International Tax Law, member of the scientific councils of a number of the Russian Federation state bodies and has acted as an expert for the RF Constitutional Court.

### Bertil Wiman

Bertil Wiman is currently Professor of Fiscal Law at Uppsala University, Sweden, and director of the Uppsala Centre for Tax Law. He has been the chairman of the Swedish IFA branch for many years, and is now Vice President of IFA. He was one of the founding members of the European Association of Tax Law Professors (EATLP) and has served EATLP as Treasurer and as President. Wiman focuses his teaching and publications on Swedish and international corporate tax law and on EU tax law.

### Billur Yalti

Billur Yalti is Tax Law Professor at the Faculty of Law of Koç University in Istanbul, Turkey. She has focused her research on international and EC Tax Law. She is working as the country correspondent for the International Bureau of Fiscal Doc-

umentation. She is a member of the European Association of Tax Law Professors and the founding president of the Turkish Branch of International Fiscal Association.

### Xeniya Yeroshenko

Xeniya Yeroshenko is a Ph.D. candidate at the University of Ferrara, Italy. Her Ph.D. research focuses on a comparison of the EU treaties with the fundamental treaty on the creation of the Eurasian Economic Union (EAEU) and studies the relevant EU experience on selected issues in the sphere of tax harmonization for potential further implementation in the EAEU region.

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# Personal and Substantive Scope (Art 1, 2 and 4 OECD Model)

# Germany: Consequences of a Treaty Override?[1]

*Alexander Rust*

**1. Introduction**

**2. Facts of the case**

**3. The Court's Decision**

**4. Comments on the Court's Reasoning**

**5. Conclusion**

**6. Facts of the Case**

---

1 This chapter deals with two distinct cases. The first one decided by the German Bundesverfassungsgericht and the second one decided by the German Bundesfinanzhof. Both cases analyze the effect of a treaty override.
First case: DE: BVerfG [Bundesverfassungsgericht], 15 Dec. 2015, 2 BvL 1/12, IStR, 217 (2016); see also the remarks by U. Fastenrath, *Anmerkung zur Entscheidung des BVerfG vom 15.12.2015 (Az: 2 BvL 1/12) – „Zur Frage der Zulässigkeit der Überschreitung von Völkervertragsrecht durch innerstaatliches Gesetz"*, JZ, 636 (2016); W. Haarmann, *Ist der Treaty Override nicht doch verfassungswidrig?*, BB, 2775 (2016); L. Hummel, *Anmerkung zum Beschluss des BVerfG vom 15.12.2015 – 2 BvL 1/12*, IStR, 335 (2016); C. Jochimsen, *§ 50d Abs. 8 Satz 1 des Einkommensteuergesetzes in der Fassung des zweiten Gesetzes zur Änderung steuerlicher Vorschriften vom 15.12.2003 (Steueränderungsgesetz 2003, BGBl. I, 2645) ist mit dem Grundgesetz vereinbar*, ISR, 125 (2016); G. Kofler & A. Rust, *Verfassungskonformität von „Treaty Overrides"*, SWI, 144 (2016); E. Krüger, *Warum ein treaty override nicht verfassungswidrig ist und die möglichen Auswirkungen des BVerfG-Beschlusses*, DStZ, 790 (2016); M. Lampe, *Anmerkungen zum Treaty-Override-Beschluss des BVerfG*, BB, 1373 (2016); M. Lehner, *Treaty Override ist nicht verfassungswidrig*, IStR, 217 (2016); W. Mitschke, *Anmerkung*, DStR, 376 (2016); Musil, *Treaty Override nach der Entscheidung des BVerfG*, FR, 297 (2016); T. Scherer, *Treaty Override und Unionsrecht – ein Versuch*, IStR, 741 (2016); M. Payandeh, *Grenzen der Völkerrechtsfreundlichkeit – Der Treaty Override-Beschluss des BVerfG*, NJW, 1279 (2016); M. Stöber, *Zur verfassungs- und europarechtlichen (Un-) Zulässigkeit von Treaty Overrides*, DStR, 1889 (2016); N. Zorn, *Doppelbesteuerungsabkommen und Grundrechtsschutz*, RdW, 389 (2017).
Second case: BFH [Bundesfinanzhof], 25 May 2016, I R 64/13, IStR, 770 (2016); see also the remarks by P. Brandis, *§ 50d Abs. 8 EStG 2002 (i.d.F. des StÄndG 2003) – Kein Verdrängen durch zeitlich nachfolgendes Doppelbesteuerungsabkommen*, BFH/PR, 343 (2016); Hagemann, *Zum Besteuerungsrückfall nach § 50d Abs. 8 EStG bei Doppelansässigkeit*, IStR, 816 (2016); M. Kempermann, *Anmerkung zu einer Entscheidung des BFH, Urteil vom 25.05.2016 (I R 64/13) – Zum Anwendungsvorrang des § 50d Abs. 8 EStG in der Fassung vom 15.12.2003 gegenüber einem zeitlich nachfolgenden Doppelbesteuerungsabkommen*, ISR, 361 (2016); W. Mitschke, *Anmerkung*, IStR, 773 (2016); M. Schütz, *Anwendung des § 50d Abs. 8 EStG bei zeitlich nachfolgendem DBA*, SteuK, 461 (2016).

## 7. The Court's Decision

## 8. Comments on the Court's Reasoning

## 9. Conclusion

## 1. Introduction

The OECD Committee on Fiscal Affairs (CFA) defines treaty override in its recommendation of 2 October 1989 as "the enactment of domestic legislation which is intended to nullify unilaterally the application of international treaty obligations".[2] The OECD discourages its Member countries from enacting legislation which would have effects that are in clear contradiction to international treaty obligations.

A treaty override constitutes a clear violation of the *pacta sunt servanda* principle enshrined in article 26 of the Vienna Convention on the Law of Treaties (VCLT) which states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." According to article 60(1) of the VCLT, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

Although a country which enacts treaty overriding legislation clearly violates its public international law obligation such violation does not automatically lead to the invalidity of the legislation. Each country has the sovereign power to decide whether a domestic law that is contrary to a treaty remains applicable or not. The validity of domestic law in violation of a treaty is a question for the constitutional law of each country. In some countries treaty overrides do not lead to the invalidity of the domestic law, in other countries a treaty override is not possible as a domestic law which violates a treaty is invalid.[3]

For instance, in the United States and in the United Kingdom a domestic law can override a treaty. According to article VI cl. 2 of the US constitution, treaties and the laws of the United States are "the supreme law of the land". This means that federal legislation and treaties have the same rank. As a consequence, federal laws can invalidate or violate a treaty, and this later law has a binding effect domestically. In *Whitney v. Robertson* (1888), the Supreme Court held that "if the two are inconsistent, the one last in time will control the other".[4] In the United Kingdom the doctrine of parliamentary sovereignty allows parliament to enact legislation which prevails over a treaty in domestic law.[5]

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2 See the recommendation of the Council of 2 Oct. 1989, http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=83&Lang=en&Book=False (last retrieved August 2017).

3 For a good country overview see e.g. M. Mikic, *Selective Bibliography on Tax Treaty Override*, ET, 475 (2013); S. Sachdeva, *Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches*, Intertax, 180 (2013).

4 See US: Supreme Court, 9 Jan. 1888, *Whitney v. Robertson*, 124 US 190 (194); see also sec. 7852(d)(1) IRC.

5 See UK: PC [Privy Council], 29 April 1970, *Woodend Rubber Antiques Co. Limited v. CIR*, [1971] AC 321, PC; 1 Jan. 1987, Padmore v. IRC, [1987] STC 36; see also J. Schwarz, *Schwarz on Tax Treaties*, 4th edition, p. 40 et seq (CCH 2015).

By contrast, in both Japan and the Netherlands, the constitution grants the treaty priority over domestic law.[6] In these countries a treaty override is not possible.

In Germany, the legal status of a domestic law which violates a treaty has remained unclear for a long time. Germany is a dualist country. Treaties have to be implemented into domestic law. The internal applicability of a treaty is achieved through enactment of implementing legislation.[7]

The German constitution states in article 25 that the general principles of public international law have priority over domestic law. However, whether one can conclude that *e contrario* treaties do not have priority over domestic law has been disputed. Section 2 of the General Tax Act states that treaties trump over domestic law. However, as this provision only has the rank of domestic law, the legislature can easily modify it. A treaty overriding law can be regarded as an implicit modification of this provision. In the past, German courts have come to different results. While the Bundesfinanzhof (BFH) has held on several occasions that a treaty override was possible, the Finanzgericht of Cologne has concluded that a treaty overriding law was void.[8]

In the case at hand, the Court of First Instance regarded the treaty overriding law as domestically valid.[9] However, the BFH was convinced that the law violated the German constitution, namely the rule of law principle, the principle of equality, the idea that obligations of international public law have to be respected and the general freedom of action. It therefore asked the Constitutional Court for a preliminary ruling.[10] In German law, only the Constitutional Court is entitled to invalidate a domestic law if it is contrary to the constitution.[11]

## 2. Facts of the case

An individual resident in Germany earned income from employment in both Germany and Turkey. According to the first sentence of article 23(1)(a) in connection with article 15(1) of the Germany-Turkey Income Tax Treaty (1989), Germany had to exempt the income earned in Turkey. However, section 50d of

6 See art. 98(2) of the Japanese constitution and art. 94 of the Dutch constitution.

7 See K. Vogel & A. Rust, *Klaus Vogel on Double Taxation Conventions A Commentary to the OECD-, UN and US Model Conventions for the Avoidance of Double Taxation on Income and Capital With Particular Reference to German Treaty Practice*, 4th edition, Introduction m.no. 44 (Kluwer 2015); see art. 59(2) German Constitution.

8 DE: BFH, 13 July 1994, I R 120/93, BStBl. II, 129 (1995); BFH, 21 May 1997, I R 79/96, IStR, 432 (1997); FG Köln [Finanzgericht Köln], 14 March 2000, 8 K 543/99, EFG, 1006 (2000): „Nach Auffassung des Senats ist eine auf einem nicht rechtmäßigen, d.h. gegen ein DBA verstoßendes Gesetz beruhende Besteuerung ihrerseits rechtswidrig."

9 DE: FG Rheinland-Pfalz [Finanzgericht Rheinland-Pfalz], 30 June 2009, 6 K 1415/09, EFG, 1649 (2009).

10 DE: Bundesfinanzhof, 10 January 2012, I R 66/09, DStR, 949 (2012).

11 See art. 100 of the German Constitution.

the German Income Tax Act (ITA) states that the exemption can only be granted if the taxpayer has either paid the taxes due or proves that the income is not taxable under the law of the other state. In the case at hand, the taxpayer did not furnish this proof. He considered that the treaty overriding provision of section 50d was unconstitutional and, therefore, invalid.

## 3. The Court's Decision

The German Constitutional Court held that a treaty override does not violate the German constitution. In Germany, treaty implementing legislation has the same rank as domestic law. As a consequence, the treaty implementing legislation can be overridden by other domestic law.

As its main argument, the court referred to article 25 of the German constitution according to which the general principles of public international law have priority over domestic law while article 59(2) of the German constitution states that treaties are implemented into domestic law. The court concluded that the constitution provides for a hierarchy of norms. This hierarchy should not be reversed by relying on the rule of law or other constitutional principles.

The Constitutional Court recognized that public law obligations should generally be respected. However, it did not consider this to mean that the legislature does not have the power to deviate from public law obligations in particular circumstances. The taxpayer also relied on the rule of law principle. In his view, the principle binds all branches of government to respect the law. A government would lose its credibility if it required its citizens to abide to the law set by the legislature, while itself acting contrary to public law obligations it has agreed upon. The Constitutional Court had two counter-arguments to this reasoning. First it referred to the hierarchy of norms established by articles 25 and 59(2) of the constitution. If each treaty override were to lead to a violation of the rule of law then treaties would have the same rank as the general principles of public law; a result which was clearly not intended by the drafters of the constitution. Second, the rule of law principle has to be balanced with the principle of democracy. One legislature cannot bind future legislatures. Each parliament must have the power to legislate freely on the issues which it believes to be relevant. It must also have the power to deviate from the policy of former parliaments. If a parliament could no longer decide on issues covered by treaties concluded by a former parliament then its legislative power would be at risk.

The Constitutional Court did not acknowledge any violation of the principal of equality either. It was true that income from employment was treated in a different way to other types of income, as section 50d of the ITA only applies to income from employment. However, different treatment could be justified by valid reasons in the general interest. Here the court came to the conclusion that tax on in-

come from employment is at high risk of being evaded. It is, therefore, not unreasonable to have specific anti-evasion rules for employment income only.

## 4. Comments on the Court's Reasoning

The judgment was not decided unanimously. Judge König wrote a dissenting opinion. She argued that the legislature has to respect the rule of law. The principle of the rule of law requires that all branches of government respect the law including the general principles of international law and treaties. A breach of the treaty is not a general option available to the legislature. In each particular case the rule of law principle has to be balanced against the principle of democracy. As a result, treaty overriding legislation might be valid in some circumstances but not in other circumstances. All facts and circumstances have to be taken into account: how important the treaty overriding legislation is, how necessary it is to act immediately and whether it is possible to terminate the treaty within a reasonable time.[12]

## 5. Conclusion

The dissenting opinion of Judge König seems to be very convincing as it finds a compromise between the rule of law principle and the principle of democracy. However, the majority opinion clearly states that treaty override is domestically valid in all situations. *Karlsruhe locuta causa finita*[13]. This judgment of the Constitutional Court is certainly one of the most important decisions in the area of tax law. It is highly unlikely that the Constitutional Court will change its opinion in the coming years. As a consequence, a treaty override – while constituting a violation of public international law – will remain valid for domestic law purposes.

## 6. Facts of the Case

Only a few months after the decision of the Constitutional Court the German Bundesfinanzhof had to decide in a different case whether treaty overriding legislation only effects old treaties or whether it also has priority over treaties concluded after the enactment of the domestic law. The case concerned a taxpayer resident in Germany. In 2008, she spent more than 183 days in Azerbaijan where she worked on a mission for the Organization for Security and Co-operation in Europe (OSCE). For her work she received a daily allowance from the OSCE. The tax administration subjected her world-wide income including the daily allowance to tax. It was undisputed that the daily allowance did not benefit from any

12 See also the references to K. Vogel, *Wortbruch im Verfassungsrecht*, JZ, 167 (1997); A. Rust & E. Reimer, *Treaty Override im deutschen internationalen Steuerrecht*, IStR, 847 (2005).
13 The German Constitutional Court is based in Karlsruhe.

tax exemption in domestic law. However, the taxpayer argued that the daily allowance should be exempt from tax by reason of the first sentence of article 23(1)(a) of the Azerbaijan-Germany Income and Capital Tax Treaty (2004) in connection with article 15(1) second sentence, of the same tax treaty.[14] While the tax administration acknowledged that the treaty provisions applied to the situation at hand, it denied the exemption on the basis of a treaty overriding provision in German domestic tax law. Section 50(d)(8) of the German ITA states

> [i]f income from dependent personal services of a resident taxpayer is exempt from taxation by virtue of a tax treaty then the treaty exemption will be granted – irrespective of the treaty – only where the taxpayer proves that the income is not taxable in the other contracting state or that he has already paid the taxes due in the other contracting state.[15]

The taxpayer did not prove that the income was exempt from tax in Azerbaijan or that she had already paid her taxes in Azerbaijan. However, the taxpayer argued that the treaty did not require such proof and that the treaty had priority over section 50(d)(8) ITA as it was concluded after section 50(d)(8) ITA entered into force. According to the taxpayer, the treaty should prevail over the domestic tax provision due to the later in time rule (*lex posterior derogat legi generali*). The taxpayer went to court and the Finanzgericht Hamburg decided in her favour and reversed the decision of the tax administration.[16] It argued, in the main, that both treaties and domestic tax law have the same rank. The court assumed that the legislature generally wants to respect its public law obligations. While the legislature is entitled to override treaties – and here the court referred to a prior decision of the Bundesfinanzhof[17] – it will generally avoid a breach of a treaty. Therefore, leg-

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14 *Convention between the Republic of Azerbaijan and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital*, art. 15(1) (25 Aug. 2004) [hereinafter *Azerbaijan-Germany Tax Treaty*] has the following wording: "Subject to the provisions of Articles 16-19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State."
Art. 23(1)(a) first sentence Azerbaijan-Germany Tax Treaty has the following wording: "Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows: There shall be exempted from the assessment basis of the German tax any item of income arising in the Republic of Azerbaijan and any element of capital situated in the Republic of Azerbaijan which, according to this Convention, may be taxed in the Republic of Azerbaijan and which are not dealt with in subparagraph (b)."

15 In the German original version the exact wording is: "Sind Einkünfte eines unbeschränkt Steuerpflichtigen aus nichtselbständiger Arbeit (§ 19) nach einem Abkommen zur Vermeidung der Doppelbesteuerung von der Bemessungsgrundlage der deutschen Steuer auszunehmen, wird die Freistellung bei der Veranlagung ungeachtet des Abkommens nur gewährt, soweit der Steuerpflichtige nachweist, dass der Staat, dem nach dem Abkommen das Besteuerungsrecht zusteht, auf dieses Besteuerungsrecht verzichtet hat oder dass die in diesem Staat auf die Einkünfte festgesetzten Steuern entrichtet wurden."

16 DE: FG Hamburg [Finanzgericht Hamburg], 21 Aug. 2013, 1 K 87/12, EFG, 1932 (2013).

17 DE: BFH, 10 January 2012, I R 66/09, BFHE 236, 304. The Constitutional Court confirmed that the legislature is entitled to override treaties, see Part 3.

islation overriding a treaty has to be explicit. The national law must clearly state that a treaty override is desired. If such clear statement is lacking the national law should be interpreted in such a way that it avoids a treaty override. In the absence of a clear statement in the domestic law the tax treaty should prevail over the domestic law. In the case at hand the domestic law contains an explicit provision stating that it overrides treaties. The Finanzgericht Hamburg interpreted this provision such that it only overrode existing treaties and was silent with regard to future treaties. Consequently, future treaties have priority over the treaty overriding provision. The court also compared the wording of several treaties concluded after the enactment of section 50(d)(8) of the ITA. In some treaties the exact wording of section 50(d)(8) ITA was reiterated while other treaties did not make the application of the exemption method dependent on whether the taxpayer can prove that the income is not taxable in the other state or that he has already paid the taxes due. This different wording led the court to conclude that treaties that did not reiterate section 50(d)(8) of the ITA intended to grant exemption without any exception.

The tax administration appealed against the decision of the Finanzgericht Hamburg.

## 7. The Court's Decision

The Bundesfinanzhof granted the appeal and decided in favour of the tax administration.[18] It held that the treaty overriding legislation also had priority over treaties that were concluded after the treaty overriding legislation entered into force.

The court argued that the wording "irrespective of the treaty" did not distinguish between treaties concluded before the enactment of the provision and treaties concluded after the enactment of the provision. The wording should be interpreted in such a way that it covers all treaties – independent of the date of their conclusion.

The Bundesfinanzhof also dealt with the different wording contained in the treaties concluded after the enactment of section 50(d)(8) of the ITA. The court stated that it does not matter whether some treaties reiterate the wording of the domestic anti-abuse provision while other treaties do not contain a similar anti-abuse provision. The fact that some treaties include an anti-avoidance provision similar to section 50(d)(8) of the ITA does not mean that *e contrario* the Azerbaijan-Germany tax treaty would exclude the application of the domestic treaty overriding provision. Such *argumentum e contrario* would lead to the result that the domestic anti-avoidance rule only applies if explicitly confirmed in the treaty.

18 DE: BFH, 25 May 2016, I R 64/13, IStR, 770 (2016).

Moreover, the court also referred to the judgment of the Constitutional Court. The Constitutional Court had held in its decision on whether a treaty override is in line with the constitution, that the legislature clearly intended to give priority to section 50(d)(8) of the ITA over tax treaties irrespective of the chronology.[19]

## 8. Comments on the Court's Reasoning

While the judgment of the Finanzgericht Hamburg relied on some good arguments, at the end of the day the reasoning of the Bundesfinanzhof seems to be more convincing.[20] It would seem arbitrary to apply the anti-abuse provision of section 50d(8) of the ITA only where the tax treaty was concluded before the enactment of that provision. The timing of the conclusion of the treaty should not be the decisive factor for the application of section 50(d)(8).

If the legislature believed it necessary to close a loophole and to avoid double non-taxation arising from the application of the exemption method in tax treaties, it cannot be assumed that it wanted to fight abusive behaviour only in relation to countries with which Germany had concluded a treaty before the enactment of section 50(d)(8) of the ITA while tolerating double non-taxation in all situations where the tax treaty was concluded after the enactment of that section.

Tax provisions have to be interpreted in light of the constitution. The principle of equality enshrined in article 3 of the German Constitution requires that similar situations are treated similarly unless there is a valid reason for different treatment. The timing of the conclusion of the tax treaty does not seem to be a valid reason for different treatment.[21]

## 9. Conclusion

Both the judgment of the Constitutional Court and the judgment of the Bundesfinanzhof dealt with questions of treaty override. The leading judgment of the Constitutional Court clarified that the legislature has the power to override treaties. Domestic tax provisions which override treaties are valid and do not violate the constitution. However, it should not be lightly assumed that the legislative intention was to override treaties. Instead a clear derogation from the tax treaty is required in the national law.

19 See DE: BVerfG, 15 Dec. 2015, 2 BvL 1/12, IStR, 217 (2016) (see already part 3) para. 88: „Im vorliegenden Fall kommt hinzu, dass der Gesetzgeber in § 50d(8) EStG seinen Willen zur Abkommensüberschreibung (Treaty Override) eindeutig zum Ausdruck gebracht hat („ungeachtet des Abkommens"), so dass weder mit Blick auf den Rang noch auf die Zeit noch auf die Spezialität der Regelung Zweifel am Vorrang des § 50d(8) S. 1 EStG vor inhaltlich abweichenden völkerrechtlichen Vereinbarungen in Doppelbesteuerungsabkommen bestehen."

20 See also W. Mitschke, *Anmerkung*, IStR, 773 (2016); G. Frotscher, *Treaty Override – causa finita?* IStR, 561 (2016).

21 G. Frotscher, *Treaty Override – causa finita?* IStR, 566 (2016).

The Bundesfinanzhof has now decided that treaty overriding provisions not only have effect for tax treaties concluded before the enactment of the treaty overriding provision but will also prevail over future tax treaties.

It is to be hoped that the German legislature makes use of its treaty overriding power only on rare occasions. It would be preferable if Germany avoids such breaches of its public international law obligations and tries to renegotiate its treaties or – if this is not possible – to terminate treaties in accordance with article 31 of the OECD Model Tax Convention.

# Australia: Puppet Boards – Where is Central Management and Control Exercised and Where is the Place of Effective Management?[1]

*Michael Dirkis*

**1. Introduction**
**2. Facts of the Case**
**3. The Court‘s Decision**
**4. Comments on the Court‘s Reasoning**
**5. Conclusion**

1 AU: High Court of Australia (HCA), 16 Nov. 2016, *Bywater Investments Limited v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation*, [2016] HCA 45.