Tax treaties: how to read them

by David W Marks, QC, CTA, Barrister, Inns of Court, Brisbane

Abstract: The OECD commentaries are pivotal to understanding the web of double tax agreements. In particular, the *Vienna Convention on the Law of Treaties*, to which Australia is a party, is critical to understanding how treaties are interpreted. The place to start is Australian domestic law. For example, evidence of a later agreement about a treaty's meaning may work in some countries without a written constitution, but runs up against Australia's strict separation of government powers. The purpose of this article is to unpack the following questions: whether there is a particular approach to the language; whether there is an "international fiscal language"; whether it is legitimate to drive towards common approaches in the application of the DTA, at least between contracting states; whether in doing so, it is legitimate to look at practices and case law of other states; and whether this flows from the primary objective, of a DTA, to protect against double taxation.

Introduction

We start with the domestic law, *not* the treaty (as such).[1]

We must find out, "with precision", how far the treaty has been adopted, qualified or modified, by domestic law.[1] This is because a treaty does not become part of Australian law by executive act. It becomes part of domestic law when, and to the extent, adopted by parliament.[2]

Having ascertained the domestic law *with precision*, we construe "so much only of the [treaty] and any qualifications or modifications of it, as Australian law requires".[1]

This is where technique begins. The objective of this article is to arm you with both sides of arguments about fundamental questions, dispel myths and apply what we have learnt in a contemporary context.

A good place to start is Professor Rohatgi's introductory text. He says:[3]

> "Tax treaties tend to be less precise and require a broad purposive 'substance over form' interpretation … [A] neutral interpretation and common understanding requires the use of an *international fiscal language*, which may not be found in the domestic laws and may provide a definition quite independent from domestic laws …
>
> The primary purpose of double tax treaties is to avoid and relieve double taxation … Tax treaties require a *common approach by both Contracting States* to achieve this goal. Common interpretation also leads to an *international tax language and terminology* and to *reliance on similar legal decisions and practices in other countries*, where appropriate." (emphasis added)

Let us unpack that. We can test these propositions:

- whether there is a particular approach to the language. Professor Rohatgi actually speaks of a more liberal approach to interpretation;[4]
- whether there is a need for — and we can thus assume the existence of — an "international fiscal language";
- whether it is legitimate to drive toward common approaches in application of the double tax agreement (DTA), at least between contracting states;
- whether, in doing so, it is legitimate to look at practices and case law of other states; and
- whether this flows from the primary objective, of a DTA, to protect against double taxation.

These propositions represent very respectable positions. But this is a field where there is a contest of ideas. It is exciting and challenging.

VCLT

An essential tool in the armoury is the *Vienna Convention on the Law of Treaties* (VCLT).[5]

Australia is party to the treaty. The primary interpretative provisions are arts 31 and 32, as set out below. The substance of those two rules is applied by Australian courts, even where the other contracting state is not party to the VCLT. Those articles represent "the customary rules for the interpretation of treaties".[6]

However, some care must be taken where you are dealing with a treaty concluded prior to the entry into force of the VCLT with respect to a state.[7] As a matter of substance, given that arts 31 and 32 reflect customary international law, there is no substantive effect on the analysis apart from having to ensure it is clear that you are referring to the correct body of law. The relevant date for entry into force of the VCLT was 27 January 1980.[8]

This point actually does crop up occasionally, as in *Bywater Investments Ltd v FCT*, in relation to the Australia–Switzerland treaty, a relatively recent treaty which, however, was concluded prior to entry into force of the VCLT for Switzerland.[9]

Articles 31 and 32

Turning then to arts 31 and 32:

> "**SECTION 3: INTERPRETATION OF TREATIES**
>
> Article 31 **General rule of interpretation**
>
> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 **Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

Illustrating the difference between arts 31 and 32

A critical question with treaties based on the OECD Model Tax Convention on Income and on Capital (OECD Model Convention) is the extent to which the OECD commentaries may be considered.

It is important to note how those commentaries are received. This is because "supplementary means of interpretation" received under art 32 can only go to three purposes, and then only once the meaning according to art 31 has otherwise been ascertained:

- "To confirm the meaning resulting from the application of article 31"; and
- to determine the meaning when the art 31 interpretation either:
  - leaves the meaning ambiguous or obscure; or
  - leads to a result which is manifestly absurd or unreasonable.

On the other hand, if such commentaries are received under art 31, they are either "context for the purpose of the interpretation of a treaty", or other mandatory material that must be taken into account "together with the context".

Too little has been made of these differences in the past. This may be a fertile area for drawing distinctions. It may suit one or other side to keep the court away from the commentaries, or restrict the use to which the commentaries can be put.

Trial courts can be left in a difficult position. For example, in *Russell v FCT*, Logan J simply says that it is "settled that, in construing such an agreement, a court may have regard to, inter alia, the OECD commentary on its model agreement".[10]

Logan J does not then distinguish how that material is received in terms of the VCLT or customary international law, as applicable. It is possible to see why. The passages to which Logan J refers in *Thiel v FCT* are in fact the contradictory analyses of Dawson J and McHugh J (with whom the other members of the High Court of Australia agreed).

McHugh J considered that the commentaries were supplementary means of interpretation in terms of art 32.[11] Dawson J considered that the commentaries fell within art 31 — as "context" — being an instrument "which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". However, Dawson J noted doubts in the literature as to the applicability of art 31 to the commentaries, and then explained why they would nevertheless fall within art 32 as supplementary means of interpretation.[12]

The position in England seems certainly that the OECD commentaries are taken into account (subject to what is mentioned below about later commentaries than the commentary applicable at the date of making the treaty). But the New Zealand Court of Appeal in *Commissioner of Inland Revenue v Lin* has recently found that the commentaries amount to "subsequent agreement about the treaty's interpretation". This would place the commentaries within art 31(3)(a), rather than art 32, and represents a deviation from Australia.[13]

Unfortunately, this view appears to have arisen from the New Zealand Court of Appeal's reading of the following paragraph in a decision of the United Kingdom Supreme Court, *HMRC v Anson*:[14]

> "The contemporary background of a treaty, including the legal position preceding its conclusion, can legitimately be taken into account as part of the context relevant to the interpretation of its terms …"

With respect, that paragraph does not support giving the OECD commentaries the additional weight accorded by art 31.

The most recent view from the High Court of Australia is the judgment of Gordon J in *Bywater Investments Ltd v FCT*, where her Honour favours art 32.[15] This accords with the England and Wales Court of Appeal in *Smallwood*.[16]

What else falls into art 31 or 32?

Foreign case law

The author cannot see how case law would fit within art 31 or 32. But since cases from foreign jurisdictions are often cited, the topic is dealt with here.

There are decisions in Australia and New Zealand which are more welcoming of foreign case law. Gzell J in *Unisys Corporation Inc v FCT* said:[17]

> "In addition, courts have had regard to decisions in other jurisdictions in international comity in an attempt to achieve international uniformity."

In New Zealand, Ellis J in *Chatfield & Co Ltd v Commissioner of Inland Revenue*[18] quotes at length from Singaporean authority dealing with a similar issue. The perils of ready acceptance of foreign cases are illustrated by this case. Ellis J does not address an institutional difference between Singapore and New Zealand, which was fully argued later in the Singapore courts after institutional roles changed there.[19] This is a danger with using foreign cases as nuances of the foreign state's governmental processes may have been important.

The English put this best. The Court of Appeal has said that "decisions of foreign courts on the interpretation of a convention or treaty text depend for their authority on the reputation and status of the court in question".[16] Thus, although not within art 31, and probably not within art 32, foreign cases may be looked at depending on their inherent persuasiveness.

It is difficult to lay down a hard and fast rule about this.

Sometimes sensitivity to the foreign legal system is required. In the complicated commercial case of *Indofood International Finance Ltd v JP Morgan Chase Bank*, the English courts were incidentally required to consider the application of DTAs between

Indonesia and each of Mauritius and the Netherlands.

The terms of a loan enabled redemption of the loan notes by the issuer in the event of a change in the law of Indonesia impacting the withholding tax burden, but only where the obligation could not be avoided by the issuer taking reasonable measures. Thus, the English court heard evidence of the effect of the two DTAs with Indonesia, including expert evidence about the Indonesian system of law.

What emerged was that Indonesian law was based on the civil law, that there was no doctrine of precedent, and there was no decision of an Indonesian court concerning one of the relevant treaties.[20]

So the important facts for the English court were that there was no Indonesian case law, and even if there had been, it would not have bound a subsequent Indonesian court. Again, this emphasises the need to understand the standing of a foreign court's decision.

The point came up more directly in *Lamesa Holdings BV v FCT* in an Australian court. Einfeld J found:[21]

> "I do not think recourse can be had to decisions of the Dutch court in the interpretation of tax agreements between the Netherlands and countries other than Australia, but I think that an interpretation of the Netherlands–Australia DTA by the Hoge Raad [the Netherlands' highest court in relation to tax matters] would be both admissible and persuasive given that uniformity in the application of the Agreement in both countries is desired."

That is likely to be useful guidance in future. There will always be cases where, for example, an ultimate appellate court, dealing with an identical DTA article, under a materially similar DTA, will be considered sufficiently persuasive for an Australian court to pay attention. The only hesitation I have about Einfeld J's decision in 1997 (shortly after the commencement of the Commonwealth *Evidence Act 1995*) is that his Honour deals with the matter, at least in part, as a matter of evidence rather than as a matter of submission alone.

On appeal, the Full Federal Court made this observation about the reception of evidence about foreign law:[22]

> "We would, however, express our agreement with the distinction drawn … between the content of foreign law which is receivable in evidence and the application of that law to facts once its content has been ascertained which is not. However, where the construction of an international treaty arises, evidence as to the interpretation of that or subsequent treaties in one of the participating countries forms part of a matrix of material to which reference could properly be made in an appropriate case. As presently advised we would not wish it to be thought that a limited view of the material to which reference could be made in interpreting a double tax treaty should be taken. Had there been some decision of an appropriate Dutch court interpreting a treaty with identical or similar language, then, in our view, evidence of such a decision might well have been admissible."

The important qualification there is "identical or similar language". As we have seen, it is also material that the foreign court be "appropriate". As to the former, the following observations are made.

In truth, DTAs (as opposed to simpler treaties for the exchange of tax information) have each been the subject of hard negotiation, with particular known and unknown agendas on each side, resulting in a bespoke product.

The web of bilateral treaties covers many people in many countries. Too much can be made of the existence of the OECD Model Convention, when the truth is that the Model Convention is simply a point of departure (even then subject to known, and unknown, reservations by states) for lengthy bilateral negotiations.

The New Zealand Court of Appeal recently said in *Commissioner of Inland Revenue v Lin*:[23]

> "It is perhaps trite to observe that each treaty is the result of a discrete round of bilateral negotiations. The final instrument reflects the parties' agreement on what terms and conditions are appropriate to their particular relationship … Each treaty must be construed discretely, in accordance with its own particular terms."

Pre-existing state of the law: context

History of treaties and legislation

It seems that the English courts will readily look at the history of the bilateral relationship in question. In *HMRC v Anson*, above, it was material to trace through the 1945 UK–US DTA, its 1966 protocol, changes to the taxation of dividends domestically in the UK, to the 1975 treaty.

This was not done idly. For example, one of the parties was arguing that a provision of the 1975 DTA had no work to do. Working through the sequence of the treaties, in the context of changes in domestic law, gave context (presumably admissible in terms of art 31) for the construction of the disputed provision.

The author can see similar analysis being accepted in Australia, if there is a point to it.

Explanatory memorandum

The Federal Court of Australia has also found it useful to look at the explanatory memorandum (EM) when the Canadian DTA was updated by a protocol. The OECD commentary on the 2002 Model Convention noted Canada's reservation concerning the definition of "royalty". The EM explicitly noted how the protocol was to deal with royalties, in light of that reservation.[24]

Unilateral statement of a state

Each state may have its own explanation of a DTA. For example, ATO issues various interpretative products including public rulings. In the international field, one product which has proved particularly valuable to advisers is the United States Treasury's technical explanations, which are prepared for US domestic purposes.

Neither an Australian tax ruling, nor a US Treasury technical explanation could easily fit within art 31, at least absent cogent evidence that such an explanation is accepted by another party to the treaty.

Klaus Vogel[25] is closest the mark in only admitting such a document, if proved to reproduce contents of letters or notes exchanged between the initialling, and the final signature, of a convention. Otherwise, *Klaus Vogel* considers that such unilateral statements fall within neither of art 31 nor 32.

There has been a contrary view in the region. The New Zealand Court of Appeal's decision in *Commissioner of Inland Revenue v JFP Energy Inc* considered that the US Treasury's technical explanation of the US–NZ DTA was useful. This was so, on the basis of the desirability of a uniform approach to the DTA by the contracting states.[26] This decision is an outlier.

For Australian purposes – later agreements and agreed practices

Whatever the position elsewhere, the High Court of Australia appears against accepting items that might otherwise fall within art 31(3)(a) and (b), being a subsequent agreement or subsequent practice in the application of the treaty, regarding or establishing the agreement of

the parties regarding interpretation of the treaty or its application.

Though not in the tax context, the decision of *Minister for Home Affairs v Zentai*[27] has subsequently been cited in a tax context.[28] In *Zentai*, the High Court rejected the executive's contention that the court should take into account a subsequent understanding between two contracting states about what a limitation contained in an extradition treaty meant. The High Court of Australia said:

> "The meaning of the limitation … is to be ascertained by the application of ordinary principles of statutory interpretation. The limitation is not susceptible of altered meaning reflecting some understanding reached by the Ministry of Justice of Hungary and the Executive branch of the Australian government."

Other basic elements

Domestic law giving the DTA force

Section 5 of the *International Tax Agreements Act 1953* (Cth) gives force of law to the larger part of Australia's current stock of DTAs. Some DTAs have different, specific provisions, usually to do with commencement.[29]

This Act formerly reproduced the text of the DTAs and any protocols. For the most part, the drafter now refers the reader to the *Australian Treaties Series* for the texts.[30]

The Act does a number of things, beyond giving the DTAs force of law in Australia:

- it clarifies the meaning of "profits" of an activity or business.[31] This potentially solves a dilemma under art 3(2) of the current OECD Model Convention;
- likewise, it clarifies the meaning of "immovable property", for the same reason;[32]
- it attempts to clear up some puzzles about trusts, in relation to interest and royalties;[33]
- it unilaterally modifies some treaties (where the DTA in question has not been revised since the *Lamesa* decision) by applying a look-through approach, down a chain of entities, to determine whether the value of the assets is wholly or principally attributable to land;[34]
- Pt IVA of the *Income Tax Assessment Act 1936* (Cth) retains primacy over the text of a treaty; and[35]
- some administrative provisions, such as debt collecting and information gathering, are facilitated.[36]

Should I get a translator?

Often, a DTA done in two languages specifies that both languages are equally authoritative.[37] It is legitimate to call evidence of the meaning of the foreign language text.[38]

This topic requires reference to art 33 of the VCLT:

> "Article 33 **Interpretation of treaties authenticated in two or more languages**
>
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

Usually, arts 33(1) and (2) will not be an issue on the OECD model used. Article 33(3) drives toward an interpretation that has both authentic texts read the same way. However, this may not always be possible, and doubtless may yet have to be resolved under art 33(4).

Thus, most of the work under DTAs done with Australia is potentially around the last two subarticles. *Klaus Vogel* considers:

> "If the two (or more) versions are irreconcilable - which can result, eg, from a drafting error — the interpretation is to be guided by Articles 31 and 32 VCLT (ie, by considering the object and purpose of the treaty, its context and any supplementary means of interpretation). If this approach is not possible, the treaty is defective due to the contradiction and the case is not governed by the treaty provision in question."

The practice adopted under art 33(4) is intended to avoid the treaty being inapplicable, as much as possible. Dörr and Schmalenbach[8] consider that art 33(4) "aims at an interpretative solution which respects the different languages, but extracts from the treaty the best reconciliation of the differences". Once art 33(4) is engaged, "the interpreter enjoys *much greater freedom* in finding a reasonable meaning of the treaty clause in question, simply by adopting a teleological[39] approach. The interpretative effort is released from the strings of the general rules of interpretation, and the purpose of the treaty is singled out as the essential guarding element of interpretation".[40]

The author cannot point to a recent example of the application of art 33(4) in the context of a DTA.[41] But *Klaus Vogel* does give a couple of examples, both foreign, of conflicts between the authentic languages of a couple of DTAs, which *Klaus Vogel* says either led, or would potentially lead, to invalidity of the article in the DTA. One example, apparently judicially ruled on in Germany last century, involved the German version of a DTA excluding from benefit dividends on shares of a German limited liability company, whereas the Italian version of the same article would have included shares of a German limited liability company.[42]

Australian approach to interpretation

The Full Federal Court said in *Tech Mahindra Ltd v FCT*:[43]

> "The principles to apply in the interpretation of the Article were not in dispute and are well settled. A holistic approach is to be taken to the interpretation of the Indian Treaty, in line with the rule of interpretation in Art 31 of the *Vienna convention on the law of treaties* … The written text has primacy but the Court must also have regard to the context, object and purpose of the treaty provisions …"

The word "liberal" is occasionally used. It is easy to find language of courts which tends either to expand or contract the degree of liberality with which the court may operate. It is hard to pin down the notion.

In *Commonwealth v Tasmania*,[44] Murphy J drew attention to the difference between a treaty, on the one hand, and contractual obligations in terms of municipal law. He spoke of "the imprecise standards of obligation under international law" in finding that a particular article of the treaty there in question imposed a real obligation.

The Full Federal Court in *FCT v Lamesa*[45] discusses the interpretation of treaties, including DTAs at length. Their Honours place the sometimes made statement that treaties should be interpreted liberally in this context:[46]

> "Third, the mandatory requirement that courts look to the context, object and purpose of treaty provisions as well as the text is consistent with the general principle that international instruments

> should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation."

The ATO view on the requirement to interpret treaties liberally is given in paras 93-94 of TR 2001/13. What is said is that the requirement for a "liberal" interpretation "is directed to the rules of construction to be adopted, rather than being directed at the width and ambit of the content" of an article. With respect, this is conventional, if perhaps difficult to apply.

On the other hand, the New Zealand Court of Appeal decision, *Commissioner of Inland Revenue v Lin*[47] appears to be charting a different course, in saying that the DTA there under consideration, "… like all double tax treaties, is to be interpreted according to the same principles applying to private contractual instruments".[48] The Court of Appeal cites a decision of the UK Supreme Court, but the passage cited does not stand for the principle.

Version of treaty commentary to use

Whether OECD, UN or other model?

The first point to note is that you may not be dealing with a treaty modelled on the OECD Model Convention. (In many cases you will.) Thus, the Full Federal Court had regard to the commentary accompanying the United Nations *Model Double Taxation Convention between Developed and Developing Countries, 1980* when construing the equivalent royalties article under the Australia–India DTA.[49]

Version before or after DTA?

The OECD Model Conventions have gradually gained ascendancy, and for the purposes of this discussion, we will focus on those products.

Which version of the OECD commentary should we use?

Sometimes the wording of a provision of a treaty has remained the same, but the OECD commentary has been updated. This could occur, for example, because a new model treaty has been adopted.

It would seem logical that the version of the commentary extant at the time of the treaty ought to be used. That is what older Australian authorities demand. But this logical reaction has recently been challenged in New Zealand.

In *Chatfield & Co Ltd v Commissioner of Inland Revenue*,[50] the question concerned art 25 of the New Zealand–Korea DTA. Chatfield, a tax agent firm, challenged decisions of the New Zealand Commissioner of Inland Revenue to issue notices for production of documents.

New Zealand was acting at the instance of Korea, under a request made under a DTA.

To make good its court challenge, Chatfield sought copies of documents exchanged between Korea and New Zealand. This included Korea's original request under the DTA that the New Zealand Commissioner obtain and provide information relating to some of Chatfield's clients.[51]

Ellis J considered that this DTA was "generally based" on the OECD *Model Tax Convention on Income and on Capital*, and that art 25 "generally follows" the terms of art 26 of the 1977 Model Convention.

At date of the case, art 26 had last been revised in 2012. The New Zealand Revenue tendered in evidence the "latest OECD commentary" on that article.[52]

In particular, the NZ competent authority deposed that, under art 25 of the New Zealand–Korea DTA, "information exchanged by the respective competent authorities is treated as secret". He further deposed that the 2012 update to the OECD Model Convention "clarifies that the confidentiality rules in Article 26 [the equivalent of the actual Article 25] cover competent authority letters, including the letter requesting the information, and that in the case of a breach of confidentiality, the other State, may suspend assistance until proper assurances are provided".[53]

Ellis J said:[54]

> "There is, however, apparently some debate about whether changes made over time to the OECD Commentaries should be used as an aid to interpretation of DTAs entered into prior to those changes. For example Dawson J in *Thiel* and Einfeld J in *Lamesa Holdings BV* … have expressed the view that amendments to the Model Convention and Commentaries are only relevant to those DTAs concluded *after* the changes are effected."

The view indicated on the basis of Australian authority is still the law in Australia.[55]

However, Ellis J puts forward a new reason to look beyond the OECD commentaries current at the date of the making of the treaty:

> "[61] On the other hand, in the time since those decisions were issued, the Introduction to the OECD Commentaries has itself been amended to indicate more clearly that the later Commentaries are intended by Member States to be used in interpreting and applying DTAs concluded before their adoption, except where the Commentaries relate to areas in which substantive changes have been made to the Model Convention itself … [Her Honour then quotes paragraphs 35 and 36 from the then most recent update to the Commentaries, as at 15 July 2014, set out below].
>
> [62] On that approach, any changes to the Commentaries (where there has been no relevant substantive change to the Model Convention) are to be viewed not as recording an agreement about a *new* meaning but as reflecting a common view as to what the meaning is and always has been."

Since that decision, a condensed version of the *Model Tax Convention on Income and on Capital* was published by the OECD as at 21 November 2017. The critical paragraphs quoted by Ellis J read as follows, together with a further para 36.1:

> "[35] Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles (see, for instance, paragraph 4 of the Commentary on Article 5. *However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations.*
>
> [36] Whilst the Committee considers that changes to the Commentaries should be relevant in interpreting and applying conventions concluded before the adoption of these changes, it disagrees with any form of a *contrario* interpretation that would necessarily infer from a change to an Article of the Model Convention or to the Commentaries that the previous wording resulted in consequences different from those of the modified wording. Many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries, and such a *contrario* interpretations would clearly be wrong in those cases.
>
> [36.1] *Tax authorities in member countries follow the general principles enunciated in the preceding four paragraphs. Accordingly, the Committee on Fiscal Affairs considers that taxpayers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties.*" (emphasis added)

Is it possible for the OECD to lift itself up by its bootstraps, like this?

First, there is the significant hurdle, in Australia, that the Full Federal Court has gently cautioned against looking beyond the version of the commentary extant when the treaty was made:[56]

> "Certainly the commentary has been used to assist in the interpretation of double tax agreements based upon it, although there may be a theoretical difficulty in using commentary published after the adoption of a double taxation agreement as relevant to the construction of that agreement. Hence, the High Court of Australia in *Thiel* had regard to the commentary to the 1977 OECD Model Convention in construing the business profits Article in the Swiss-Australian double taxation agreement."

That has been heeded.[57] It accords with what the author takes to be the conventional understanding expressed by Professor Rohatgi in *Basic international taxation*. He says that "context" in terms of art 31(2) extends to "additional materials included in any related agreement or instrument, such as protocols, notes, letters, explanations or memoranda of understanding, which were mutually agreed on by all treaty partners at the time the treaty was concluded".[58]

What this leaves out of account is art 31(3), which particularly mentions:

- a subsequent agreement between the parties "regarding the interpretation of the treaty or the application of its provisions"; and
- "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

Likewise, the current edition of *Klaus Vogel on double taxation conventions* says:

> "105 When interpreting treaties concluded by OECD member countries, only that edition of the MC Commentary which was applicable *at the time of the treaty's completion* can be binding … This conclusion is particularly compelling if, as previously discussed, the MC Comm. conveys the 'ordinary meaning' of the treaty under Article 31(1) VCLT and thus is binding, or in the sense of Article 31(4) conveys a 'special meaning' which the contracting parties attributed to a particular term …, for only the Comm. that was available at the time of the treaty's conclusion was able to determine the wording, and hence the 'ordinary meaning' of the parties. If one does not subscribe to that view, it is unclear from the outset how the obligation to consider the MC Comm. in interpreting treaties could ever be derived from the VCLT. It is hardly convincing to consider ensuing changes to the Comm. as a subsequent agreement *of the treaty parties* in the sense of Article 31(3)(a) VCLT."

The author's only doubt about that passage is the authority cited for the very first proposition. *Klaus Vogel* cites *Sun Life Assurance Co of Canada v Pearson*,[59] a decision of the High Court of England and Wales. But Vinelott J's real quibble with looking at the commentary on the 1980 Model Convention was that the 1967 treaty had "a different origin". His Honour actually says:[60]

> "The commentary is not, of course, a commentary on the 1967 treaty which has a different origin, but the views of the experts who sat on the fiscal committee on the regulation of double taxation are clearly entitled to very great weight."

In the Court of Appeal, it was agreed by the litigants that the court was "entitled to consider" the commentary on the later Model Convention.[61] (Thus, the England and Wales Court of Appeal made no decision on that issue.)

This appears to have been qualified by the later decision of the England and Wales Court of Appeal, *HMRC v Smallwood*: "Subsequent commentaries … have persuasive value only depending on the cogency of the reasoning".[16]

Practically, Australian trial and intermediate appellate courts may find it difficult to accept the OECD's position that later commentaries can be relevant to the interpretation of an earlier treaty, simply because of the considered comment of Dawson J in *Thiel v FCT*:[62]

> "For my part, I do not see why the OECD Model Convention and Commentaries should not be regarded as having been made in connection with and accepted by the parties to a bilateral treaty *subsequently concluded* in accordance with the framework of the Model." (emphasis added)

That "caveat" is noted by Einfeld J in *Lamesa Holdings BV v FCT*.[63] And, as we have seen, it is noted by then as orthodox by Logan J in *Russell v FCT*,[64] and as a "cautionary note" (to use Logan J's terminology) in *McDermott*.[65]

The change in 2000 to the OECD commentary, effectively bootstrapping later additions and changes to the commentary into consideration of pre-existing DTAs, is noted as an area of debate in paras 106-108 of TR 2001/13. However, it is apparent that the Commissioner of Taxation is endeavouring to give effect to para 36.1 of the present OECD commentary, which says that tax authorities "follow the general principles enunciated" and that "tax payers may also find it useful to consult later versions of the commentaries in interpreting earlier treaties" by this passage in that ruling.

Conclusions – version of OECD commentary

There is a debate to be had on two fronts here:

- if a later commentary is said to fall within art 31(3)(a) as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", there will be questions of proof; and
- moreover, in an Australian Chapter III court, the idea that the executive might agree on the meaning of words given force of law by a statute of the legislature will not sit well.

As to the former point, if it is said to be a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", proof of practice in tax matters has proved messy in the past.

The High Court of Australia, for example, could find no uniform practice in *Macoun v FCT*, in relation to an exempting provision in the *Convention on the Privileges and Immunities of the Specialized Agencies*.[66] And again, but in a more profound way, it will not go well for the executive to say that the meaning of words, given force by the legislature, has now been determined by action or inaction of the executive, rather than by decision of the judicial branch.

The author sees this as a developing field. Not only is it challenging intellectually, but there will also be profound challenges of proof if one or other side chooses to take the point.

When one looks at the decisions of *Sun Alliance* and *Chatfield*, we have to be conscious that neither the UK nor NZ, at the times in question, would have had quite the straightjacket of the Australian Constitution which mandates a strict separation of powers in relation to interpretation of the laws. In this region, this leaves Ellis J's decision in *Chatfield* as an outlier for the time being.

"International fiscal language"?

Occasional claims are made that a common interpretation across tax treaties, and (for the one tax treaty) between the contracting states, leads "to an international tax language and

terminology". Further, this leads to "reliance on similar legal decisions and practices in other countries".[67]

By now, it should be apparent that there are significant hurdles to the achievement of this goal. While it is possible to argue with other aspects of the New Zealand Court of Appeal's decision in *Commissioner of Inland Revenue v Lin*, there is much wisdom in the following passage:[68]

> "It is perhaps trite to observe that each treaty is the result of a discrete round of bilateral negotiations. The final instrument reflects the parties' agreement on what terms and conditions are appropriate to their particular relationship … He sought to pre-empt an interpretation difficulty for Ms Lin arising from the plain meaning of art 23 of the China DTA by referring to comparable provisions in double tax agreements negotiated by New Zealand with two other countries shortly after the China DTA. In [the appellant's] submission we should construe art 23 in the same way as differently worded companion provisions in the other treaties. We do not accept that submission. Each treaty must be construed discretely, in accordance with its own particular terms."

That said, there are passages in judgments of well-regarded courts which speak of an international tax language or an international fiscal language. For example, the England and Wales Court of Appeal in *Indofood International Finance Ltd v JP Morgan Chase Bank* does credit passages from the OECD commentary and from a learned text writer to show, in the context of the DTA interest article, that the term "beneficial owner":[69]

> "… is to be given an international fiscal meaning not derived from the domestic laws of contracting states. As shown by those commentaries and observations, the concept of beneficial ownership is incompatible with that of the formal owner who does not have 'the full privilege to directly benefit from the income'."

Dawson J in *Thiel v FCT* considered that "… an expression such as the word 'enterprise' may have no exact counterpart in domestic tax laws, being part of an 'international tax language'".[70]

Klaus Vogel[71] solves the problem by contending that the "ordinary meaning" of terms used in DTAs "is not necessarily that of everyday usage". To the extent that "an internationally uniform legal usage or a legal usage consistent between the contracting states has developed, or to the extent that a specific technical language has developed in certain specialised areas, such as tax law", the learned authors argue that this is the "ordinary" usage within the meaning of art 31(1). The learned authors distinguish this from the possibility that contracting states may have ascribed a meaning to a term "that deviates from the ordinary meaning". The latter is a matter for art 31(4).

At this stage, the author considers that the advocate must pitch such arguments with care in Australia, and certainly be wary in New Zealand (in light of *Commissioner of Inland Revenue v Lin*, above).

> *"… 'beneficial owner' is to be given 'an international fiscal meaning not derived from the domestic laws …'"*

Contemporary issues

The author has discussed some simple, contemporary issues that can be applied easily, and which offer some promise. You are now equipped to argue those points with an opponent, and you also have some views on the merits.

Thus, it overstates matters to say that there is a "particular approach to the language" of tax treaties. Certainly, part of the context of an international agreement may require what some people call a "liberal approach to interpretation", but the limits of that must be understood.

Occasionally, there is reference to an "international fiscal language". Too much can be made of this. It is really an aspect of context. Similar words are used in given articles of numbers of DTAs. That is no excuse to ignore the particular words of the whole of a particular DTA.

The courts are conscious of the need to drive toward a common approach in application of a DTA, at least between contracting states. They can look more widely, but there are constraints.

First, there are proper concerns about relying too heavily on foreign practices and foreign court decisions. It is a matter of appreciating how persuasive this material is. Then, it is a matter of fitting that material into a submission, perhaps by reference to the VCLT.

Second, each treaty is negotiated between parties whose agendas are only partially known publicly. Each treaty is the result of many compromises. Small differences between treaties may lead to appreciable differences as to the persuasiveness of a later foreign decision about a third party treaty.

It is wrong to place too much emphasis on only one of the primary objectives of DTAs, which is to protect against double taxation. There has been a good deal of litigation in recent times in this region concerning the other objective, the prevention of fiscal evasion.[72]

Enquire as to the meaning of any other authentic language version of a DTA. If necessary, get skilled translators on board. This evidence is plainly admissible. The courts have noted occasionally that parties have failed to tender the evidence. It must be frustrating, if one objective is attempting to get uniform application of a DTA in two countries, for the Australian court to be denied the translation.

Do not go straight to the OECD commentary. Work out whether it is appropriate, which version to use, and what you can permissibly do with what you find. Use such tools with care. Call out incorrect use by an opponent.

Likewise, unilateral statements by Australia and other countries have to be used with great caution. And Australia's constitutional arrangements separating judicial from other branches of government mean that some things usually admitted under the VCLT under other systems of law will not be persuasive in Australia.

Work out when, and how far, you must use the VCLT. It is a powerful tool once you have worked out dates of application to each state, or whether you revert to customary international law.

David W Marks, QC, CTA
Barrister
Inns of Court, Brisbane

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References

1 *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54 at [61].

2 *Minister for Foreign Affairs and Trade v Magno* [1992] FCA 566 (parliament may equip the executive to give effect to a treaty).

3 Professor R Rohatgi, *Basic international taxation*, vol 1, 2nd ed, 2007, p 39. This is a good, basic text. The author also refers to *Klaus Vogel on double taxation conventions*, 4th ed, 2015, also a two-volume text. On the Vienna Convention, the author refers to O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: a commentary*, 2nd ed, 2018. All are readily available, and the expense will save much time.

4 Professor R Rohatgi, *Basic international taxation*, vol 1, 2nd ed, 2007. He references the Australian understanding of "liberal" in TR 2001/13. See below.

5 *Vienna Convention on the Law of Treaties* [1974] ATS 2 (VCLT). The author has referred to a standard text, O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: a commentary*, 2nd ed, 2018.

6 *Thiel v FCT* (1990) 171 CLR 338 at 356.5 per McHugh J, approved by Mason CJ, Brennan and Gaudron JJ at 344.6. Dawson J says that "the relevant rules which it lays down are applicable, being no more than an endorsement or confirmation of existing practice": p 349.3. This approach was also followed by the UK Supreme Court, in a case involving the DTA between the UK and USA, the latter not being party to the VCLT: *HMRC v Anson* [2015] UKSC 44 at [54].

7 Art 4 VCLT.

8 O Dörr and K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: a commentary*, 2nd ed, 2018, p 95, para 14.

9 Refer to the analysis in the judgment of Gordon J: [2016] HCA 45 at [149] and [181].

10 [2009] FCA 1224 at [118].

11 *Thiel v FCT* (1990) 171 CLR 338 at 356-357.

12 Ibid at 349-350.

13 *Commissioner of Inland Revenue v Lin* [2018] NZCA 38 at [19].

14 [2015] 4 All ER 288 at [58].

15 [2016] HCA 45 at [167].

16 *HMRC v Smallwood* [2010] EWCA Civ 778 at [26].

17 [2002] NSWSC 1115 at [44].

18 [2016] NZHC 1234 at [15].

19 Between *ABU v Comptroller of Income Tax* [2015] SGCA 4 and *AXY v Comptroller of Income Tax* [2018] SGCA 23, the role of the Singapore courts had changed. Instead of being part of the process of approving foreign access, it reverted to a more traditional role of judicially reviewing administrative actions by others in allowing foreign access. See [2018] SGCA 23 at [46].

20 *Indofood International Finance v JPMorgan* [2006] EWCA Civ 158 at [24].

21 (1997) 35 ATR 239 at 248.6.

22 (1997) 77 FCR 597 at 603.

23 [2018] NZCA 38 at [20].

24 *Task Technology Pty Ltd v FCT* [2014] FCA 38 from [12]; and also referred to on appeal, [2014] FCAFC 113 at [13]. The relevant explanatory memorandum was also referred to by the Full Court in *Tech Mahindra Ltd v FCT* [2016] FCAFC 130 from [32].

25 K Vogel, *Klaus Vogel on double taxation conventions*, 4th ed, 2015, p 40, para 86.

26 [1990] 3 NZLR 536 at 542.

27 [2012] HCA 28 at [65].

28 *Tech Mahindra Ltd v FCT* [2015] FCA 1082 at [60].

29 See, for example, s 11R of the *International Tax Agreements Act 1953* (Cth), for the Austrian agreement.

30 This is a database available through Austlii.

31 S 3(2) of the *International Tax Agreements Act 1953*.

32 S 3(5) of the *International Tax Agreements Act 1953*.

33 S 3(3) and (4) of the *International Tax Agreements Act 1953*.

34 S 3A of the *International Tax Agreements Act 1953*.

35 S 4(2) of the *International Tax Agreements Act 1953*.

36 The US agreement's terms for assistance in debt collecting are dealt with by s 20 of the *International Tax Agreements Act 1953*. Information gathering at the instance of a counterparty is facilitated by s 23 of the *International Tax Agreements Act 1953*. These matters will increasingly be dealt with via a multilateral instrument, instead of the bilateral instruments.

37 The new Australia–Germany DTA, for example, concludes: "Done at Berlin … in duplicate in the English and German languages, both texts being equally authentic".

38 *Thiel v FCT* [1990] HCA 37 at [9].

39 A tremendous word. According to the *Macquarie dictionary,* "'teleological argument' – an argument for the existence of God based on the assumption that order in the universe implies an orderer and cannot be a natural feature of the universe".

40 O Dörr and K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: a commentary*, 2nd ed, 2018, p 649, paras 36-38.

41 The process is best illustrated by the non-tax decision of the International Court of Justice, *LaGrand* [2001] ICJ Rep 466 at [101]-[102].

42 K Vogel, *Klaus Vogel on double taxation conventions*, 4th ed, 2015, p 41, para 88.

43 [2016] FCAFC 130 at [22].

44 *Commonwealth v Tasmania* (Franklin Dam case) (1983) 158 CLR 1 at 178.

45 (1997) 77 FCR 597 from 603.

46 (1997) 77 FCR 597 at 605. Here the court is quoting from a judgment of the High Court of Australia in a non-tax context, but the passage has the force of a decision of the Full Federal Court at the least.

47 [2018] NZCA 38.

48 Ibid at [19].

49 *Tech Mahindra Ltd v FCT* [2016] FCAFC 130 at [36].

50 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2015] NZHC 2099 (*Chatfield*) per Ellis J.

51 *Chatfield* at [2]-[3].

52 *Chatfield* at [7], [8] and [13].

53 *Chatfield* at [12].

54 *Chatfield* at [60].

55 For example, Logan J in *Russell v FCT* [2009] FCA 1224 at [118].

56 *McDermott Industries (Aust) Pty Ltd v FCT* [2005] FCAFC 67 at [42].

57 See *Russell v FCT* [2009] FCA 1224.

58 Professor R Rohatgi, *Basic international taxation*, 2nd ed, 2007, vol 1, p 41.

59 [1984] STC 461 at 513 (EWHC, Vinelott J).

60 Ibid at 513j.

61 [1986] STC 335 at 347 (EWCA).

62 (1990) 171 CLR 338 at 349. This is because of the unknown outer edges of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134], referring to "seriously considered dicta of a majority of this Court" as effectively binding intermediate appellate courts.

63 (1997) 35 ATR 239 at 247, ll.37-39.

64 [2009] FCA 1224 at [118].

65 *McDermott Industries (Aust) Pty Ltd v FCT* [2005] FCAFC 67 at [42].

66 [2015] HCA 44 at [82].

67 Professor R Rohatgi, *Basic international taxation*, 2nd ed, 2007, vol 1, p 39.

68 [2018] NZCA 38 at [20].

69 [2006] EWCA Civ 158 at [42].

70 (1990) 171 CLR 338 at 349.

71 K Vogel, *Klaus Vogel on double taxation conventions*, 4th ed, 2015, p 39, para 84.

72 Refer to the author's notes tracing the *Chatfield* litigation in New Zealand, in 2017 *Weekly Tax Bulletin* 10 at [299] and 2018 *Weekly Tax Bulletin* 3 at [68]. A fuller discussion of this specialised topic appears in the paper, on which this article is based, given at the Victorian 6th Annual Tax Forum on 11 to 12 October 2018, "Tax treaties – how to read them".