

# Peer-Reviewed Article

## *International Double (Non-)taxation: Comparative Guidance from European Legal Principles*

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*The principle of fairness advocates against international double taxation and international double non-taxation. Countries and international organizations (OECD, G20 and EU) have taken several initiatives against such taxation. However, these initiatives are not always effective. Also, certain legal authors question the legitimacy of the OECD and its action plan on BEPS. The essential goal of this research is to find guidelines to address international double (non-) taxation. We first argue that the principle of fairness is reflected in the legal principles of proportionality, non-discrimination and the rule of law. Subsequently, we derive guidelines from these principles. We address the research question by reference to these principles as enshrined in the European Convention on Human Rights (ECHR) and in the constitutional orders of Belgium, France, Germany and the United Kingdom. Our main conclusion is that excessive international double taxation and unintended international double non-taxation do not sit well with a comprehensive approach as advocated by the legal principles. We also argue that the rule of law requires the national states to guarantee the balancing of all relevant national interests through in-depth parliamentary debate. Finally, we submit that cross-pollination between international organizations and national parliaments would contribute to the legitimacy of those organizations.*

### 1 INTRODUCTION

1. International double taxation is considered as unfair.<sup>1</sup> It results from overlapping tax competences of different states. States have taken several measures to eliminate or reduce international double taxation. They have adopted unilateral tax exemptions or credits and have entered into bilateral tax treaties. The tax treaties, however, are not always effective. Conflicts of interpretation may lead to a different application of the treaty and leave double taxation unsolved.<sup>2</sup> International double non-taxation has received more attention since the end of last century. It results from gaps in the interaction of different tax systems and in some cases due to the application of tax treaties. As a result, income from cross-border investments or activities may go untaxed, or be subject to only unduly low taxes.<sup>3</sup> To counter international double non-taxation states have introduced several measures. Also the OECD, G20 and EU are taking several initiatives against international double non-taxation. At the request of the G20, the OECD for instance has developed an action plan against international tax planning: 'Action plan on base erosion and profit shifting.' In its 2012 recommendation on aggressive tax planning the European Commission has

also suggested several measures to avoid double non-taxation.<sup>4</sup>

While initiatives aimed at eliminating international double taxation are generally applauded, international tax literature voices deviating views on the desirability of the Organisation for Economic Co-operation and Development (OECD), G20 and EU actions against international double non-taxation.<sup>5</sup> Moreover, the response of various countries differs. While some 'high-tax' jurisdictions are rather willing to actively support the initiatives of the OECD, the 'low-tax' jurisdictions adopt a more cautious attitude.<sup>6</sup> Furthermore, Ting observes that in the real world most governments are keen to promote the competitiveness of their tax systems for multinationals.<sup>7</sup> These observations trigger the following questions: what is fairness in respect of taxes? To what extent does fairness preclude international double non-taxation? The ambiguity of the answer to these questions justifies this research. The essential goal of this research is to find guidelines to answer these questions. Legal theorists submit that ethical principles, such as fairness, find a way to the legal order through

<sup>4</sup> Commission Recommendation of 6 Dec. 2012 on aggressive tax planning, C(2012) 8806 final.

<sup>5</sup> B. Arnold, M. Lang & R. Vann, 'Special Issue. Base Erosion and Profit Shifting', 68(6/7) Bull. IBFD 273–391 (2014); Ph. Baker, 'Is There a Cure for BEPS', 5 Brit. Tax Rev. 605–606 (2013); A.D. Dourado, 'The Base Erosion and Profit Shifting (BEPS) Initiative under Analysis', 43 Intertax (2015).

<sup>6</sup> D.M. Ring, 'What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State', 49 Va. J. Intl. L. 42–43 (2008).

<sup>7</sup> A. Ting, 'iTax-Apple's International Tax Structure and the Double Non-taxation Issue', 1 Brit. Tax Rev. 70–71 (2014).

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<sup>1</sup> *Infra*, at s. 2.

<sup>2</sup> OECD Commentary on Arts 23A and 23B, § 32.1 et seq.

<sup>3</sup> OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris, OECD Publishing, 19 Jul. 2013 ('OECD Action Plan on BEPS'), 7–10.

fundamental legal principles.<sup>8</sup> This article considers how the ethical fairness principle has found its way to the legal order through legal principles. The subsequent question is what guidelines can be derived from these legal principles with respect to international double (non-) taxation.

2. We address the research questions primarily by reference to the principles of proportionality, non-discrimination and the rule of law as enshrined in the European Convention on Human Rights (ECHR) ('Convention').<sup>9</sup> We also analyse case law of the European Court of Human Rights (ECtHR). We chose this approach by virtue of the status that the Convention and the ECtHR hold. Lepard for instance observes that the Convention and the ECtHR have come to exercise significant influence in Europe.<sup>10</sup> In *Loizidou v. Turkey* the ECtHR referred to the Convention as 'a constitutional instrument of European public order'.<sup>11</sup> The European Union, moreover, recognizes the importance of the Convention. Article 6(3) of the Treaty on European Union confirms that:

*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

Furthermore, Article 52(3) of the EU Charter of Fundamental Rights requires the European Court of Justice to follow the case law of the ECtHR on the scope and meaning of Charter rights which correspond to Convention rights.<sup>12</sup> In addition, many national courts refer to the Convention as a legal source for these legal principles.<sup>13</sup> Finally, recent case law of the ECtHR indicates the increasing importance of the Convention in (international) tax matters.<sup>14</sup> Del Frederico notes that 'in the last 10 years, the ECtHR has had an unstoppable force in tax matters'.<sup>15</sup> Also Hinnekens and Hinnekens observe in

this respect that 'there are signals that a greater impact in terms of protection may be on the way'.<sup>16</sup>

3. The extent to which the Convention has been relied upon in decisions of national courts nevertheless varies and divergent practices may occur.<sup>17</sup> Whereas Bonhert reports several tax-related decisions of the French *Conseil d'Etat* based on the non-discrimination principle of the Convention,<sup>18</sup> in Germany the courts do generally not rely on the Convention.<sup>19</sup> This can also be explained by the fact that in addition to the Convention many national constitutions guarantee equivalent principles of proportionality, non-discrimination and the rule of law.<sup>20</sup> Today many countries have indeed confirmed the rule of law *in fiscalibus* in their constitution.<sup>21</sup> In Germany this principle is not codified, but the *Bundesverfassungsgericht* nevertheless gives this principle a constitutional value.<sup>22</sup> Also the non-discrimination principle is confirmed in many national constitutions.<sup>23</sup> In some countries the non-discrimination principle is completed by a constitutional ability to pay principle.<sup>24</sup> In Germany the ability to pay principle is not confirmed in the constitution, but the *Bundesverfassungsgericht* has recognized this principle as the main standard through which tax legislation is tested against the principle of non-discrimination.<sup>25</sup> The United Kingdom has a special position, since it has no written constitution.<sup>26</sup> Nevertheless, the rule of law is considered as a fundamental constitutional legal principle. It is part of the UK constitutional order through historical charters granted by kings in the past:

*Human Rights and Taxation in Europe and the World* (83) 87 (G. Kofler, M.P. Maduro & P. Pistone eds, IBFD 2011).

- <sup>8</sup> Dworkin submits this relation between moral principles and legal principles by defining the latter as 'a standard which is to be observed because it is a requirement of justice or fairness or some other dimension of morality' (R. Dworkin, *Taking Rights Seriously* 22 (Harvard U. Press 1977)).
- <sup>9</sup> European Convention on Human Rights, 4 Nov. 1950 (as amended).
- <sup>10</sup> B.D. Lepard, 'International Law and Human Rights', in *Handbook of Human Rights* (583) 587 (T. Cushman ed., Routledge 2012).
- <sup>11</sup> ECHR, *Loizidou v. Turkey*, 1995, § 75.
- <sup>12</sup> P.J. Wattel, 'Access to Effective Legal Remedy', in *Principles of Law: Function, Status and Impact in EU Tax Law* (183) 199–203 (C. Brokeland ed., IBFD 2014).
- <sup>13</sup> C. Grabenwarter, 'The Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives. General Report and Outline of Main Issues', Conference of Constitutional European Courts, XVIth Congress, 2014, 2, [www.conf.euconstco.org/en/common/home.html](http://www.conf.euconstco.org/en/common/home.html).
- <sup>14</sup> For example, ECHR, *Arnaud et al. v. France*, 2015; ECHR, *Tardieu de Maleissye et al. v. France*, 2009.
- <sup>15</sup> L. del Frederico, 'The ECHR Principles as Principles of European Law and Their Implementation through the National Legal System', in
- Human Rights and Taxation in Europe and the World* (83) 87 (G. Kofler, M.P. Maduro & P. Pistone eds, IBFD 2011).
- <sup>16</sup> L. Hinnekens & Ph. Hinnekens, 'Non-discrimination at the Crossroads of International Taxation - General Report', in *Cah.Dr.Fisc.Int.* 93a, (15) 45 (IFA ed., Kluwer L. Intl. 2008).
- <sup>17</sup> P. Baker, 'Taxation and the European Convention on Human Rights in the Domestic Law of the Council of Europe Countries', Bull. IBFD (459) 459 (2001).
- <sup>18</sup> B. Bonhert, 'Non-discrimination at the Crossroads of International Taxation – France', in *Cah.Dr.Fisc.Int.* 93a, (267) 288 (IFA ed., Kluwer L. Intl. 2008).
- <sup>19</sup> S. Bruns, 'Non-discrimination at the Crossroads of International Taxation – Germany', in *Cah.Dr.Fisc.Int.* 93a, (291) 309 (IFA ed., Kluwer L. Intl. 2008).
- <sup>20</sup> P. Baker, 'Taxation and the European Convention on Human Rights in the Domestic Law of the Council of Europe Countries', Bull. IBFD (459) 459 (2001).
- <sup>21</sup> For example, Art. 170 Belgian Constitution; Art. 34 French Constitution. See also V. Thuronyi, *Comparative Tax law* 70–72 (Kluwer L. Intl. 2003).
- <sup>22</sup> K. Tipke, *Die Steuerrechtsordnung*, Cologne, Verlag Dr Otto Schmidt, 2<sup>o</sup> Auflage, Vol.1, 125–127.
- <sup>23</sup> For example, Art. 172, 1 Belgian Constitution; Art. 1 French Constitution. See also B. Bonhert, 'Non-discrimination at the Crossroads of International Taxation – France', in *Cah.Dr.Fisc.Int.* 93a (267) 268–269 (IFA ed., Kluwer L. Intl., 2008).
- <sup>24</sup> For example, Art. 13 French Declaration of the Rights of Men and Citizen.
- <sup>25</sup> M. Bourgeois, 'Constitutional Framework of the Different Types of Income', in *The Concept of Tax*, 3 (79) 97–99 (B. Peeters ed., EATLP International Tax Series 2005).
- <sup>26</sup> A. Birla, 'Non-discrimination at the Crossroads of International Taxation – UK', in *Cah.Dr.Fisc.Int.* 93a (605) 617 (IFA ed., Kluwer L. Intl. 2008).

the Magna Charta in 1215, the Petition of Rights in 1628 and the Bill of Rights in 1689.<sup>27</sup> The non-discrimination principle as such is not enshrined in the UK constitutional order, but is also considered to be part of the rule of law. Birla refers to Lord Woolf, who observed in *A v. Secretary of State for the Home Department* 'that the right not to be discriminated against is one of the most significant requirements of the rule of law'. Birla further observes that this principle is more a matter of 'procedural fairness (i.e. laws must be enforced/applied equally) and not a requirement for substantive equality (i.e. such as the prevention of discrimination in the enactment of the law)'. But he also observes that such substantive non-discrimination principle 'has been creeping' into UK domestic law through the Human Rights Act (1998), which provides a 'human rights' catalogue implementing amongst others the European non-discrimination principle.<sup>28</sup>

Many courts have been influenced by the case law of the ECtHR when interpreting the abovementioned constitutional legal principles.<sup>29</sup> Chang and Yeh observe internationalization of constitutional law, but at the same time they also find that in practice disparity exists.<sup>30</sup> The Belgian Constitutional Court (*Grondwettelijk Hof*) for instance strictly interprets constitutional legal principles in accordance with the Convention and the case law of the ECtHR.<sup>31</sup> Although the French courts refer less to the Convention or the ECtHR,<sup>32</sup> Spielmann observes that the French case law is also influenced by the Convention and the ECtHR.<sup>33</sup> The highly influential German *Bundesverfassungsgericht* on the contrary, rarely refers to the Convention or the ECtHR.<sup>34</sup> English notes that as compared to the ECtHR the *Bundesverfassungsgericht* has been less reluctant to test substantive tax rules against constitutional principles and human rights.<sup>35</sup> In order not to be blind for this disparity, in addition to the Convention and the case law

of the ECtHR, this article also considers the Belgian, French, German and UK case law in respect of double (non-)taxation. These jurisdictions illustrate different approaches to the protection of fundamental legal principles. Taking into account the methodology of this research, the findings submitted in this article are rather general and comparative in nature.<sup>36</sup>

## 2 FAIRNESS AS POINT OF DEPARTURE

4. This contribution takes fairness as a point of departure. Many legal theorists have submitted that fairness is an important ethical principle that should be adhered to, also in the field of taxation. Already in ancient times traces of the principle of fairness with respect to taxes can be found. Aristotle puts forward the 'golden mean' as the ultimate fairness criterion. According to him the 'golden mean' is the desirable middle between two extremes, one of excess and the other of deficiency (the 'middle-way').<sup>37</sup> For example, in the Aristotelian view, courage is a virtue in the middle between recklessness and cowardice.<sup>38</sup> Aristotle also applies this theory to expenses of public interest.<sup>39</sup> According to Aristotle fairness requires a person to make a suitable contribution to expenses of public interest, not too much and not too little. The contribution should be 'in proportion to one's position and means' (ability to pay principle).<sup>40</sup> Also according to Aristotle legislators must introduce suitable legislation encouraging people to follow this middle-way.<sup>41</sup> Legal theorists derive from the theory of Aristotle that taxes also should strike the 'golden mean': not too much and not too little. Happé finds an argument in this theory for the fair share principle. According to him with respect to taxes the theory of the golden mean requires that everyone contributes his fair share.<sup>42</sup> The consequences of this argument are twofold and correspond to the motives for the actions against international double taxation as well as international double non-taxation (*supra* n. 1).

First, the theory of the 'golden mean' advocates against taxes that are 'too high'. Along with the Aristotelian ability to pay principle, Happé derives from the fair share principle an argument against international double taxation. He argues that companies cannot be

*Europe and the World* (285) 286 (G. Kofler, M.P. Maduro & P. Pistone eds, IBFD 2011).

<sup>36</sup> Regarding this research methodology cf. V.C. Jackson, 'Comparative Constitutional Law: Methodologies', in *The Oxford Handbook of Comparative Constitutional Law* (54) 60 (M. Rosenfeld & A. Sajó eds, 2012).

<sup>37</sup> Aristotle, *Ethica Nicomachea*, Groningen, Historische Uitgeverij, 1999 (translated into Dutch by C. Pannier & J. Verhaeghe) (*Ethica Nicomachea*), 65, 1107a.

<sup>38</sup> Aristotle, *Ethica Nicomachea*, 69, 1108b 25.

<sup>39</sup> Aristotle, *Ethica Nicomachea*, 120, 122b20.

<sup>40</sup> Aristotle, *Ethica Nicomachea*, 120, 1122b30.

<sup>41</sup> Aristotle, *Ethica Nicomachea*, 11.

<sup>42</sup> R.H. Happé, 'Belastingethiek: een kwestie van fair share', in *Belastingen en ethiek, Geschriften voor de Vereniging voor Belastingwetenschap*, 243 (3) 26 (Kluwer, 2011).

<sup>27</sup> M. Bourgeois, 'Constitutional Framework of the Different Types of Income', in *The Concept of Tax 3* (79) 106 (B. Peeters ed., EATLP International Tax Series 2005).

<sup>28</sup> A. Birla, 'Non-discrimination at the Crossroads of International Taxation – UK', in *Cah.Dr.Fisc.Int.* 93a (605) 617 (IFA ed., Kluwer L. Intl. 2008).

<sup>29</sup> C. Grabenwarter, 'The Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives. General Report and outline of main issues', *Conference of Constitutional European Courts*, XVIth Congres, 2014, 2.

<sup>30</sup> W.C. Chang & J.R. Yeh, 'Internationalisation of Constitutional Law', in *Comparative Constitutional Law* (1166) 1166–1167 (M. Rosenfeld & A. Sajó eds, Oxford U. Press 2012).

<sup>31</sup> For example, Belgian *Grondwettelijk Hof* 13 Oct. 1989, No. 23/99.

<sup>32</sup> For example, French *Conseil d'Etat* 15 Oct. 2014, No. 371538.

<sup>33</sup> D. Spielmann, 'Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe', in *Comparative Constitutional Law* (1231) 1238 and 1248 (M. Rosenfeld & A. Sajó eds, Oxford U. Press 2012).

<sup>34</sup> J. English, 'The Impact of Human Rights on Domestic Substantive Taxation – The German Experience', in *Human Rights and Taxation in Europe and the World* (285) 286 (G. Kofler, M.P. Maduro & P. Pistone eds, IBFD 2011).

<sup>35</sup> J. English, 'The Impact of Human Rights on Domestic Substantive Taxation – The German Experience', in *Human Rights and Taxation in*

forced to contribute twice their fair share. Disparities between tax systems cannot justify international double taxation. Fairness requires that countries enter into tax treaties in order to eliminate international double taxation.<sup>43</sup> Also Pires submits that:

*double taxation violates tax justice, because overall taxation is not applied according to taxable capacity. Although equal taxation may be applied in each state from the national point of view to taxpayers in equal situations, a second taxation will exist due to the fact that they receive income abroad. It may even be that both taxations exceed the amount of the related taxable income. There would therefore be inequity in distribution of tax burdens and penalization of those who are not guilty of tax evasion or avoidance.*<sup>44</sup>

Conversely, the theory of the 'golden mean' also advocates against taxes that are 'too low'. The Aristotelian middle-way is also to be considered as abandoned, when taxpayers make a contribution that is lower than what is required by the fair share principle. According to Happé this is the case when taxpayers reduce their effective tax burden to (nearly) nihil.<sup>45</sup> Sasseville observes that double non-taxation is undesirable and unfair.<sup>46</sup> Hinnekens submits that:

*Cette situation de double non-imposition n'est généralement pas désirable. (Nous laissons ici de côté la question de savoir si cette appréciation négative des effets s'applique à toutes ou seulement à certaines situations de double non-imposition). Elle entraîne une perte budgétaire et n'est ni équitable entre justiciables, ni neutre du point de vue économique. Elle risque, en outre, d'être utilisée par les Etats contractants, comme mesure bilatérale de concurrence fiscale dommageable avec effets néfastes pour les autres Etats.*<sup>47</sup>

Also the European Commission<sup>48</sup> and the OECD<sup>49</sup> consider international double non-taxation as unfair.<sup>50</sup>

5. In *Ethica Nicomachea* Aristotle further elaborates on the theory of the 'golden mean' and derives some (more concrete, but still general) principles from this theory. First, he submits that equality represents fairness

as the middle-way between more and less. Equal persons should receive equal things and unequal persons should receive unequal things.<sup>51</sup> Second, Aristotle notes that this maxim results in disputes, when equals do not receive equal things or when unequals receive equal things. According to him everyone agrees that distribution should occur in proportion to a certain merit, but the kind of merit that should be taken into account is subject of disagreement: 'democrats refer to freedom, oligarchs to wealth or noble origin and aristocrats to eminence'.<sup>52</sup> In order to resolve these disputes he submits that proportionality should be observed. According to Aristotle 'the just is the proportional and the unjust is what violates the proportion'.<sup>53</sup> Finally, it is important to keep in mind that Aristotle considered the *Ethica Nicomachea* as a handbook for future legislators:<sup>54</sup> to make fair legislation one needs a good theoretical insight on the conditions that bring happiness.<sup>55</sup> According to Aristotle legislators are responsible for introducing fair legislation facilitating people to pursue happiness. As such, legislation has a central role in the theory of Aristotle. His point of departure is that fairness requires legislation providing rules for mutual relations.<sup>56</sup> According to Aristotle 'law should govern'.<sup>57</sup>

It follows that the Aristotelian 'golden mean' suggests three fairness principles that are relevant for our subject: the principles of non-discrimination and proportionality and the rule of law. Legal theorists submit that ethical principles find their way to the legal order through legal principles (*supra* n. 1).<sup>58</sup> This is also true for the European Convention which bridges the Aristotelian ethical fairness principles and the legal principles relevant for our research. First, Arnardóttir indeed notes that the classical Aristotelian equality maxim is central to the non-discrimination principle of the Convention.<sup>59</sup> Second, he observes that ECtHR case law follows the Aristotelian tradition in using proportionality as a central criterion to determine the scope of the non-discrimination principle.<sup>60</sup> Finally, the proportionality principle and the rule of law in tax matters are also confirmed in Article 1 of the First Protocol to the Convention<sup>61</sup> (*infra* n. 7). This justifies our approach to address the issue from the angle of the principles of proportionality and non-discrimination and the rule of law (*supra* n. 2).

<sup>43</sup> R.H. Happé, 'Belastingethiek: een kwestie van fair share', *Belastingen en ethiek, Geschriften voor de Vereniging voor Belastingwetenschap*, 243 (3) 63 (Kluwer, 2011).

<sup>44</sup> M. Pires, *International Juridical Double Taxation of Income* 86–87 (Kluwer L. Intl. 1989).

<sup>45</sup> R. Happé, 'Multinationals, Enforcement Covenants, and Fair Share', in *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* 159–160 (J. Freedman ed., Oxford University Center for Business Taxation 2008).

<sup>46</sup> J. Sasseville, 'The Role of Tax Treaties in the 21st Century', *Bull. IBFD* 246–248 (2002).

<sup>47</sup> L. Hinnekens, 'La prévention de la double non-imposition dans les conventions bilatérales suivant le modèle de l'OCDE', in *Mélanges John Kirkpatrick*, Brussel, Bruylant, 2004, (385) 385.

<sup>48</sup> European Commission, Staff working paper. The Internal Market: Factual Examples of Double Non-taxation Cases. Consultation document, TAXUD D1 D(2012), 4.

<sup>49</sup> OECD Action Plan on BEPS, 8.

<sup>50</sup> Cf. S. Hemels, 'Fairness: A Legal Principle in EU Tax Law?', in *Principles of Law: Function, Status and Impact in EU Tax Law* (413) 413 (C. Brokeland ed., IBFD 2014).

<sup>51</sup> Aristotle, *Ethica Nicomachea*, 1131a–1131b.

<sup>52</sup> *Ibid.* at 1131b.

<sup>53</sup> *Ibid.* at 1131b (15).

<sup>54</sup> *Ibid.* at 11.

<sup>55</sup> *Ibid.* at 56.

<sup>56</sup> *Ibid.* at 1134b.

<sup>57</sup> Aristotle, *Politics*, 3.16.

<sup>58</sup> H. Gribnau, 'Not Argued from but Prayed to Who's Afraid of Legal Principles?', 12(1) eJ. Tax Res. (185) 187 (2014).

<sup>59</sup> O.M. Arnardóttir, *Equality and Non-Discrimination Under the European Convention on Human Rights* 10 (Kluwer L. Intl. 2003).

<sup>60</sup> *Ibid.* at 11.

<sup>61</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 Mar. 1952 ('First Protocol').

6. Once one accepts that fairness principles are reflected in the principles of proportionality, non-discrimination and the rule of law, the next question concerns the function of legal principles. How do legal principles work? The essential goal of this contribution is to find guidelines to address international double (non-) taxation (*supra* n. 1). Do legal principles provide guidelines? According to Dworkin the functions of legal principles are twofold and correspond to two principles of political integrity: 'a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible'.<sup>62</sup> Consequently, legal principles provide directional guidelines for the legislator and the judge, improving coherency of the legal order. Dworkin further argues that this requirement of coherency not only exists within each sovereign state, but also concerns the system itself.<sup>63</sup> The general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system.<sup>64</sup> In this respect he refers to the lack of international legislative body with sufficient jurisdiction to solve the grave coordination problems that every nation now confronts.<sup>65</sup> Governments fail their citizens' legitimate expectations when they accept an international system that makes impossible or discourages the international cooperation that is often essential to prevent economic, commercial, medical or environmental disaster.<sup>66</sup> Dworkin's theory is also applicable in the field of international tax law. Legal principles provide directional guidelines for lawmakers and judges. As such, legal principles not only guarantee coherence of the national legal tax order, but also improve political legitimacy of sovereign states as well as the overall international tax system.

In the next sections of this article directional guidelines are derived from the principles of proportionality, non-discrimination and the rule of law. First, we discuss the principle in general. Second, we consider the traditional views in international tax literature on the relation between the principle and international double (non-) taxation. Finally, we derive guidelines from the legal principles based on an analysis of the legal principle and respective case law. We argue that whereas for international double taxation guidelines can be derived from the proportionality principle, the non-discrimination principle is the main foundation for guidelines with respect to international double non-taxation. The rule of law provides guidelines for the implementation of measures against international double

(non-) taxation. We conclude the analysis of each principle with concrete examples illustrating how the guidelines work in practice.

### 3 PRINCIPLES OF LAW

#### 3.1 The Proportionality Principle

##### 3.1.1 The Proportionality Principle in General

7. In tax matters a proportionality principle is derived from Article 1 of the First Protocol to the Convention, which provides that:

*every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

The relation between the peaceful enjoyment of possessions and taxes has two sides. Taxes are an infringement of this peaceful enjoyment, while at the same time taxes can ethically be justified, since the state makes these possessions possible and needs financing to fulfil its functions.<sup>67</sup> This relation is reflected in the First Protocol, that also provides that the right to peaceful enjoyment of possessions 'shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.<sup>68</sup> According to established case law of the ECtHR this second rule should not be considered in an isolated way, but should be interpreted in conjunction with the first rule, confirming the right to the peaceful enjoyment of possessions.<sup>69</sup>

The ECtHR gives a broad interpretation to the term 'possessions'. It includes every item that has or can have a patrimonial value.<sup>70</sup> According to Article 1 of the First Protocol taxes must comply with the principle of legality. This principle also requires that the law is sufficiently accessible, precise and foreseeable.<sup>71</sup> In addition, the principle of proportionality must be satisfied. A measure or action must truly contribute to achieving the end.<sup>72</sup> Taxes must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the taxpayer's

<sup>67</sup> L. Murphy & T. Nagel, *The Myth of Ownership, Taxes and Justice* 175 (Oxford U. Press 2002).

<sup>68</sup> Cf. B. Peeters, 'The Protection of the Right to Property in Article 1 of the First Protocol to the European Human Rights Convention Limiting the Fiscal Power of States', in *A Vision of Taxes within and Outside European Borders* 679–701 (L. Hinnekens & Ph. Hinnekens eds, Kluwer L. Intl. 2008).

<sup>69</sup> For example, ECHR, *Gasus Dosier- und Fördertechnik GmbH v. Netherlands*, 1995, § 55.

<sup>70</sup> *Ibid.* at § 53.

<sup>71</sup> For example, ECHR, *AO Neftyanaya Kompaniya Yukos v. Russia*, 2011, § 559.

<sup>72</sup> B. Schlink, 'Proportionality (1)', in *Comparative Constitutional Law* (718) 723 (M. Rosenfeld & A. Sajó eds, Oxford U. Press 2012).

<sup>62</sup> R. Dworkin, *Law's Empire* 176 (Harvard U. Press 1986).

<sup>63</sup> R. Dworkin, 'A New Philosophy for International Law', 41(1) *Phil. & Pub. Affairs* 16 (2013).

<sup>64</sup> *Ibid.* at 17.

<sup>65</sup> *Ibid.* at 27.

<sup>66</sup> *Ibid.* at 18.

fundamental rights.<sup>73</sup> Taxes adversely affect the peaceful enjoyment, if they place an excessive burden on the person concerned or fundamentally interfere with his financial position.<sup>74</sup> In *Gáll v. Hungary* for instance the ECtHR ruled that a Hungarian tax on severance payments to civil servants was excessive and disproportionate based on three elements. First, the overall tax burden amounted to 60%. This rate exceeded about three times the general personal income tax rate of 16%. Second, the legislator had justified this special tax based on the argument that senior civil servants were in a position to influence their own employment benefits. The ECtHR observed, however, that nothing in the case suggested such an abuse. Finally, the ECtHR also took into consideration that the unexpected change in the tax regime did not sit well with Article 34 of the Charter of Fundamental Rights of the EU, which provides protection in the case of loss of employment.<sup>75</sup> Renucci observes that the ECtHR has gradually come to adopt a more substantial threshold when applying the proportionality requirement.<sup>76</sup> The next paragraphs of this article analyse the relation between the principle of proportionality and international double taxation.

### 3.1.2 Proportionality and International Double Taxation

8. The European Court of Justice has ruled at several occasions that, while international double taxation may hinder the fundamental freedoms guaranteed by EU law,<sup>77</sup> such as the freedom of establishment, it can nevertheless be justified to the extent that tax law is not harmonized since it follows from the overlapping tax competences of the EU Member States.<sup>78</sup> This case law connects with the traditional view that international double taxation results from the overlapping national tax sovereignty of states and is not prohibited by international law.<sup>79</sup>

More recently, some authors have put forward that international double taxation and the proportionality principle enshrined in Article 1 of the First Protocol do not sit well together. These authors have a nuanced and prudent point of view.<sup>80</sup> According to Gutmann it ‘could be argued that juridical double taxation ceases to be

legitimate insofar as it constitutes a disproportionate interference of states in private property’. He further acknowledges, however, that this position:

*relies on the idea that a global approach to the situation of the taxpayer should be preferred to the traditional approach which focuses on the relationship between one taxpayer and one state, thereby avoiding considering the potential overlap of taxing powers of states as a problem for human rights.*<sup>81</sup>

Helminen submits that ‘double taxation may sometimes lead to confiscatory taxation and in these cases the taxation may be in conflict with the right to property’. She nuances this statement observing that ‘the threshold for confiscatory taxation (...) is high so that in most cases of double taxation a conflict with Article 1 seems unlikely’.<sup>82</sup>

### 3.1.3 International Double Taxation: Guidelines

9. We argue that the right to peaceful enjoyment of possessions as enshrined in Article 1 of the First Protocol, advocates against excessive international double taxation. The right of peaceful enjoyment of possessions requires taxes to strike a fair balance. To determine that fair balance the ECtHR takes a comprehensive approach. The principle of comprehensiveness requires that all relevant elements are taken into account. This principle requires that also other tax rules are taken into consideration and that tax rules are mutually coherent.<sup>83</sup> In *Jokela v. Finland* the ECtHR observed for example that, although two tax rules taken isolated did not infringe the proportionality principle, ‘it must also satisfy itself that their combined effect was not such as to violate the applicants’ general right to the peaceful enjoyment of their possessions’.<sup>84</sup> From this decision it can be derived that authorities should also take into account the combined effect of concurring taxes. This point of view finds support in the case law of the ECtHR. In *Bulves AD v. Bulgaria* the ECtHR ruled that in the given circumstances (domestic) double taxation was contrary to the Convention.<sup>85</sup> In *The National & Provincial building society et al. v. United Kingdom* the ECtHR used a negative formulation, observing that ‘the applicant societies (...) had not been

<sup>73</sup> For example, ECHR, *James and others v. The United Kingdom*, 1986; ECHR, *Gasus Dosier- und Födertechnik GmbH v. The Netherlands*, 1995; ECHR, *Bulves A.D. v. Bulgaria*, 2009, § 62.

<sup>74</sup> ECHR, *Dukmedjian v. France*, 2006, § 52–54; ECHR, *Buffalo SRL v. Italy*, 2003, § 32.

<sup>75</sup> ECHR, *Gáll v. Hungary*, 2013, § 65–71.

<sup>76</sup> J.F. Renucci, *Droit Européen des droits de l’homme* 638 (Lextenso Editions 2012).

<sup>77</sup> ECJ C-67/08, *Margarete Block v. Finanzamt Kaufbeuren*, 2009, § 28.

<sup>78</sup> ECJ C-67/08, *Margarete Block v. Finanzamt Kaufbeuren*, 2009; ECJ C-128/08, *Jacques Damseaux v. Belgische Staat*, 2009; ECJ C-540/11, *Daniel Levy en Carine Sebbag v. Belgische Staat*, 2012.

<sup>79</sup> K. Vogel, *Klaus Vogel on Double Taxation Conventions* § 7–10 (3d ed., Kluwer L. Intl. 1996).

<sup>80</sup> G. Kofler & P. Pistone, ‘General Issues on Taxation and Human Rights’, in *Human Rights and Taxation in Europe and the World* (1) 10 (G. Kofler, M.P. Maduro & P. Pistone eds, IBFD, 2011).

<sup>81</sup> D. Gutmann, ‘Taking Human Rights Seriously: Some Introductory Words on Human Rights, Taxation and the EU’, in *Human Rights and Taxation in Europe and the World* (105) 109 (G. Kofler, M.P. Maduro & P. Pistone eds, IBFD 2011).

<sup>82</sup> M. Helminen, ‘The Principle of Elimination of Double Taxation under EU Law – Does it Exist?’, in *Principles of Law: Function, Status and Impact in EU Tax Law* (391) 407 (C. Brokelind ed., IBFD 2014).

<sup>83</sup> For example, ECHR, *Jokela v. Finland*, 2002 (concurrency of taxes); ECHR, *Ismatyilov v. Russia*, § 38 (concurrency of expropriation and penalty); ECHR, *Moon v. France*, 2009, § 51 (concurrency of expropriation and penalty). See also B. Peeters, ‘The Protection of the Right to Property in Article 1 of the First Protocol to the European Human Rights Convention Limiting the Fiscal Power of States’, in *A Vision of Taxes within and Outside European Borders* (679) 694–695 (L. Hinnekens & Ph. Hinnekens eds, Kluwer L. Intl. 2008).

<sup>84</sup> ECHR, *Jokela v. Finland*, 2002, § 61–62.

<sup>85</sup> ECHR, *Bulves AD v. Bulgaria*, 2009, § 68.

subjected to a double imposition and were not therefore wrongfully expropriated'.<sup>86</sup> The French *Conseil Constitutionnel* and the German *Bundesverfassungsgericht* both derived a similar prohibition of (domestic) double taxation from the right to peaceful enjoyment of possessions.<sup>87</sup>

The abovementioned case law concerns domestic double taxation. The ECtHR has until now not found international double taxation infringing the right to peaceful enjoyment of possessions. Nonetheless, in assessing whether taxation meets a fair balance in *Tardieu de Maleissye et al. v. France* the ECtHR did take into consideration the non-taxation in another country.<sup>88</sup> This suggests that foreign taxes need at least to be taken into account. The German *Bundesfinanzhof* even went a step further, observing that international double taxation resulting in an excessive tax burden may be contrary to the peaceful enjoyment of possessions. The case concerned a German testator holding real estate in France. Upon his death the real estate became subject to German as well as French inheritance taxes. The *Bundesfinanzhof* observed that, although the Convention did not impose a prohibition of international double taxation, such concurrence of taxes may be contrary to Article 1 of the First Protocol if it leads to a confiscatory tax burden: '*Eine übermäßige, konfiskatorische Steuerbelastung kann allerdings eine Verletzung des durch Art. 1 des 1. ZP-EMRK gewährleisteten Rechts auf Eigentum begründen (...)*'.<sup>89</sup> The next question was how the peaceful enjoyment of possessions should be restored. Which taxation should prevail over the other and to what extent? According to the *Bundesfinanzhof* in the case at hand it could not be concluded that Germany was liable to eliminate the international double taxation. The court referred to the OECD model convention that would in that situation give the exclusive right to Germany to impose inheritance taxes. The court found the OECD model convention relevant, especially since France was also a member of the OECD. The court concluded that in such situations the Convention may indeed require countries to eliminate international double taxation.

This decision should be nuanced and held against the interpretation of the constitutional proportionality principle in Germany. Schlink indeed observes that the German *Bundesverfassungsgericht* views proportionality as a protection against the state, not only when the state extends its reach too far but also not far enough, i.e., when the state has done too little to protect a right or

interest.<sup>90</sup> However, also according to Article 1 of the Convention '*the contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention*'. The ECtHR has repeatedly confirmed that this entails a positive duty for the contracting parties to organize the legislative framework in such a manner that citizens' fundamental rights are sufficiently guaranteed,<sup>91</sup> including the right to the peaceful enjoyment of possessions.<sup>92</sup> This opens the door for the suggestion that countries have a positive duty to eliminate excessive international double taxation. This calls for action especially in areas where international double taxation has largely remained unsolved, for instance in the field of inheritance taxes.

10. We further argue that the right to peaceful enjoyment of possessions has a directional interpretation function. It advocates a purposive interpretation, whereby measures to eliminate or reduce international double taxation are interpreted in such a manner that excessive international double taxation is effectively eliminated or reduced. Such interpretation better serves the right to peaceful enjoyment of possessions, that requires that also other tax rules are taken into account.

Furthermore, we argue that the traditional interpretation principles enshrined in the Vienna Convention on the Law of Treaties<sup>93</sup> leave sufficient room for such purposive interpretation. First, the Vienna Convention provides that a treaty is an international agreement concluded between states.<sup>94</sup> Such agreement is based on the common intention that represents a balance between the contracting states' interests. This balance is reflected in the common meaning of the treaty.<sup>95</sup> To find this common meaning the Vienna Convention provides that 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*' (Article 31, § 1).<sup>96</sup> The point of departure is good faith. Good faith requires that while the ordinary meaning of the treaty terms should be considered, the context and the object and purpose of the treaty should also be taken into account. A literal interpretation conflicting with the object and purpose of the treaty, is not in accordance with good faith.<sup>97</sup> Also the Vienna Convention, consequently, requires that the purpose of tax treaties to eliminate or reduce

<sup>86</sup> ECHR, *The National & provincial building society et al. v. United Kingdom*, 1997, § 61.

<sup>87</sup> *Conseil Constitutionnel* 29 Dec. 2012, No. 2012-662; *Conseil Constitutionnel* 26 Nov. 2010, No. 1010-70; *Bundesverfassungsgericht* 6 Mar. 2002, 2 BvL 17/99.

<sup>88</sup> ECHR, *Tardieu de Maleissye et al. v. France*, 2009.

<sup>89</sup> *Bundesfinanzhof* 19 Jun. 2013.

<sup>90</sup> B. Schlink, '*Proportionality (1)*', in *Comparative Constitutional Law* (718) 727 (M. Rosenfeld & A. Sajó eds, Oxford U. Press 2012).

<sup>91</sup> For example, ECHR, *United Communist Party of Turkey et al. v. Turkey*, 1998, § 29; ECHR, *Aziz v. Cyprus*, 2004, § 29.

<sup>92</sup> For example, ECHR, *Oneryildiz v. Turkey*, 2004, § 71 and 134.

<sup>93</sup> Vienna Convention on the Law of Treaties, 23 May 1969 ('Vienna Convention').

<sup>94</sup> Article 2 Vienna Convention.

<sup>95</sup> M. Edwardes-Ker, *Tax Treaty Interpretation* 56 and 57, § 5.02 (Doctoral Thesis, Queen Mary and Westfield College, University of London 1994).

<sup>96</sup> Article 31(1) Vienna Convention.

<sup>97</sup> O. Corten & P. Klein, *The Vienna Conventions on the Law of Treaties* 818 and 831–832 (Oxford U. Press, 2011).

international double taxation is taken into account when interpreting the treaties. Second, Article 31, § 3, a) of the Vienna Convention provides that the interpretation of a treaty should take into account, together with the context, ‘any relevant rules of international law applicable in the relations between the parties’. Since the Convention qualifies as ‘international law’, it should be taken into account when interpreting tax treaties between states that are party to the Convention. This reference to international law thus strengthens the importance of the right to peaceful enjoyment of possessions and the principle of comprehensiveness derived therefrom, when interpreting tax treaties.

Our argument finds support in the interpretation method used by UK courts when interpreting treaties. In *Bayfine v. HMRC*, for instance, the Court of Appeal observed that:

*the fact that the treaty is an international instrument made by the two contracting states must be borne in mind interpreting the provisions of the treaty. In particular a treaty must be given a purposive interpretation. (. . .) It is necessary to look first for a clear meaning of the words used in the relevant Article of the convention, bearing in mind that consideration of the purpose of an enactment is always a legitimate part of the process of interpretation. (. . .) A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty.<sup>98</sup>*

11. The purposive interpretation method is helpful in cases where international double taxation would otherwise remain unsolved due to conflicts of interpretation of facts or treaty provisions between the two contracting states (*supra* n. 1). First, a different interpretation of facts may for instance occur in the application of Article 7 of the OECD model convention that provides as follows:

*Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.*

In an overview of practical issues to eliminate double taxation of business income Geens and Schnitger both outline the problem that exists when the residence state of a company allocates profits to the head office of that company, whereas the source state considers that the company has a permanent establishment in the source state to which the profits can be allocated. In that case both states will apply the treaty differently and consider that it can tax the (same) profit.<sup>99</sup> The purposive

interpretation method advocates a common allocation of profits by the contracting states in order to effectively eliminate international double taxation. Geens notes that in this case the mutual agreement procedure (Article 25 OECD model convention) can possibly offer a solution for the unsolved double taxation.<sup>100</sup> The mutual agreement procedure is a *pactum de negotiando*. The contracting states have the duty to enter into negotiations. It is, however, not a *pactum de contrahenda*. While states have to make reasonable efforts to find a common understanding, there is in principle no binding obligation to reach an agreement.<sup>101</sup> We argue that the right to peaceful enjoyment of possessions increases the threshold for these efforts.

Second, a conflict of interpretation of treaty provisions may for instance result from an interpretation based on deviating domestic law of the contracting states. Article 3(2) of the OECD model convention indeed refers to domestic law to interpret treaty terms that are not defined in the treaty, except if the context requires otherwise. In case the domestic laws of both states result in a different interpretation leaving international double taxation unsolved, it is submitted that the right to peaceful enjoyment of possessions (Article 1 First Protocol) does advocate a purposive interpretation, whereby in addition to the domestic law also other interpretation means are used to find the common interpretation of the contracting states, so that international double taxation is effectively eliminated or reduced. Such purposive interpretation is not blind for the text of the treaty, but also takes into account other interpretation means, such as the domestic law of the other state, mutual agreements, ruling practice of the other state, primary and secondary EU law, foreign court decisions, documents regarding the treaty negotiations, the OECD commentary, the historical context of the treaty or other parallel treaties.

In *Resolute and Mrs. Haderlein v. HMRC* the court for instance applied a comprehensive approach to interpret the terms ‘salaries, wages and other similar remuneration’ of Article 15 of the tax treaty between the United Kingdom and the United States (2001). The court first observed that under UK domestic law an *ex gratia* payment for voluntary resignation qualified as taxable employment income (termination payment within section 401 ITEPA). Based on this qualification the *ex gratia* payment would be taxable in the United Kingdom. Subsequently, however, the court decided that taking into account the context of the treaty the *ex gratia* payment did not qualify as ‘salaries, wages and other

ed., Kluwer L. Intl. 2011); A. Schnitger, ‘Key Practical Issues to Eliminate Double Taxation of Business Income - Germany’, in *Cah.Dr.Fisc.Int.* 96b, (351) 358 (IFA ed., Kluwer L. Intl., 2011).

<sup>100</sup> A. Geens, ‘Key Practical Issues to Eliminate Double Taxation of Business Income - Belgium’, in *Cah.Dr.Fisc.Int.* 96b, (143) 146 (IFA ed., Kluwer L. Intl. 2011).

<sup>101</sup> Z.D. Altman, *Dispute Resolution under Tax Treaties* 11 (Doctoral Series, IBFD 2005).

<sup>98</sup> *Bayfine UK Products v. HMRC*, 2011, No. ECCA Civ. 3040, § 17. See also *Weiser v. CMRC*, 2012, KFTT 501 (TC), § 34.

<sup>99</sup> A. Geens, ‘Key Practical Issues to Eliminate Double Taxation of Business Income - Belgium’, in *Cah.Dr.Fisc.Int.* 96b, (143) 146 (IFA

similar remuneration'. The court took into consideration not only the exchange notes between the United Kingdom and the United States when the treaty was signed, but also the OECD commentary and the historical context of the treaty. Accordingly, the court considered the *ex gratia* payment as taxable in the United States under Article 22 of the treaty (other income).<sup>102</sup>

## 3.2 The Non-discrimination Principle

### 3.2.1 The Non-discrimination Principle in General

12. The non-discrimination principle is a second legal principle that can be derived from the ethical principle of fairness (*supra* n. 5). This principle is confirmed in Article 14 of the Convention that provides that:

*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other statu.*

This article provides an accessory right, in this sense that it confirms the equal enjoyment of other rights set forth in the Convention. The new Protocol No. 12 to the Convention<sup>103</sup> in addition provides a more general non-discrimination principle.<sup>104</sup> The ECtHR finds a difference in treatment discriminatory, if such difference has no objective and reasonable justification. Such justification exists if the different treatment pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>105</sup>

The ECtHR confirmed at several occasions that Article 14 in conjunction with Article 1 of the First Protocol also protects taxpayers that are not eligible for discriminatory tax concessions (e.g., deductions, exemptions or credits), although the tax concession as such did (obviously) not infringe the right to peaceful enjoyment. In *Burden and Burden v. the United Kingdom* the ECtHR analysed whether the fact that two permanently cohabiting siblings would be required to pay inheritance taxes when the first of them died, whereas married or registered homosexual couples were exempt from paying inheritance taxes in the same circumstances, was contrary to the principles guaranteed by the Convention.<sup>106</sup> In *The Church of Jesus Christ of*

*Latter-Day Saints v. the United Kingdom* the ECtHR analysed whether the tax exemption granted to the Church of England could be justified against other churches not eligible for this tax exemption.<sup>107</sup> From this case law it can be derived that not only taxes but also tax concessions (e.g., deductions, exemptions or credits) should have an objective and reasonable justification. This means that tax concessions should pursue a legitimate aim and take into consideration a reasonable relationship between the means employed and the aim sought to be realized.

Also constitutional principles of non-discrimination advocate against discriminatory tax concessions. The French *Conseil Constitutionnel*, for instance, ruled that a deduction from social contributions in favour of low-income taxpayers was contrary to the non-discrimination principle, since the legislator did not take into account all contributory capabilities of the relevant taxpayers:

*que la disposition contestée ne tient compte ni des revenus du contribuable autres que ceux tirés d'une activité, ni des revenus des autres membres du foyer, ni des personnes à charge au sein de celui-ci; que le choix ainsi effectué par le législateur de ne pas prendre en considération l'ensemble des facultés contributives crée, entre les contribuables concernés, une disparité manifeste contraire à l'article 13 de la Déclaration de 1789.*<sup>108</sup>

At several occasions various deductions or tax benefits were also reviewed by the court to safeguard that the mentioned tax concessions did not infringe the principle of fair and equal taxation.<sup>109</sup>

### 3.2.2 Non-discrimination and International Double Non-taxation

13. This aspect of the non-discrimination principle leads to the question whether or to what extent international double non-taxation resulting from tax concessions can be justified against taxpayers that are subject to ordinary taxation. With respect to the initiatives against international double non-taxation until now research has focused on the question whether the proposed anti-abuse measures are in accordance with legal principles and fundamental freedoms.<sup>110</sup> The question that is considered in this article looks at a different angle. The point of departure is that the initiatives against international double non-taxation find

<sup>102</sup> *Resolute and Mrs. Haderlein v. HMRC*, 2008, SPC 710.

<sup>103</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 2000.

<sup>104</sup> O.M. Arnardóttir, *Equality and Non-discrimination under the European Convention on Human Rights* 1 and 37 (Kluwer L. Intl. 2003).

<sup>105</sup> For example, ECHR, *X v. UK*, 1972; ECHR, *Van Raalte v. The Netherlands*, 1997.

<sup>106</sup> For example, ECHR, *Burden and Burden v. The United Kingdom*, 2008.

<sup>107</sup> E.g., ECHR, *The Church of Jesus Christ of Latter-Day Saints v. The United Kingdom*, 2014, §§ 31–33.

<sup>108</sup> French *Conseil Constitutionnel* 19 Dec. 2000, No. 00-437 DC, § 9.

<sup>109</sup> French *Conseil Constitutionnel* 29 Dec. 2009, No. 2009-599 DC, § 80 et seq. See also French *Constitutional Court* 21 Jun. 1993, No. 93-320 DC, § 30 et seq.; French *Constitutional Court* 20 Mar. 1997, No. 97-388, §§ 12 and 24 et seq.; B. Bonhert, 'Non-discrimination at the Crossroads of International Taxation – France', in *Cah.Dr.Fisc.Int.* 93a, (267) 270 (IFA ed., Kluwer L. Intl. 2008).

<sup>110</sup> For example, E.C.C.M. Kemmeren, 'Where is EU Law in the OECD BEPS Discussion?' 4 *EC Tax Rev.* 190–193 (2014).

to a certain extent a foundation in the principles of non-discrimination and proportionality. This angle of the research touches the second aspect of the Aristotelian 'golden mean': taxes should not be 'too low' (*supra* n. 4). International tax literature that looks at international double non-taxation from this angle is limited. The *Bundesfinanzhof* referred in a decision of 10 January 2012 to Frotscher, who considers the non-application of treaty exemptions (treaty override) justified in the light of the non-discrimination principle, when the treaty exemption would otherwise result in international double non-taxation. According to him the non-application of the treaty restores the equality of the taxpayers that are subject to taxation on their domestically sourced income:

*Das Treaty override bewirkt, dass dem Steuerpflichtigen dieser Vorteil wieder genommen wird. Zugleich wird er damit im Ergebnis mit anderen Steuerpflichtigen gleichbehandelt, welche entsprechende Arbeitseinkünfte im Inland beziehen, mit diesen Einkünften im Rahmen ihres sog. Welteinkommens aber besteuert werden. § 50d Abs. 8 EStG 2002 n.F. orientiert sich so gesehen an dem in Art. 3 Abs. 1 GG wurzelnden Leistungsfähigkeitsprinzip, verhindert eine sog. Keimmalbesteuerung und stellt eine gleichheitsgerechte Besteuerung (wieder) her.<sup>111</sup>*

A similar reasoning was already confirmed by the *Bundesverfassungsgericht* in the context of tax evasion. The *Bundesverfassungsgericht* observed that the German tax regime for interest income was in violation with the constitutional non-discrimination principle, because there was too much tax evasion by way of non-declaration of interest income that those taxpayers who did declare their income were taxed unfairly.<sup>112</sup> In this section the impact of the non-discrimination principle on international double non-taxation is analysed in lawful situations, i.e., not resulting from tax fraud, evasion or abuse of rights, and also making abstraction from the intention of the taxpayer, for instance making use of aggressive tax planning structures. The issue of tax planning, avoidance and abuse has been dealt with in other research.<sup>113</sup>

### 3.2.3 International Double Non-taxation: Guidelines

14. We argue that the non-discrimination principle in conjunction with the right to peaceful enjoyment of possessions advocates against unintended double non-taxation. First, these principles require that states are

clear about the aim pursued by tax concessions. Are these tax concessions introduced merely to eliminate or reduce international double taxation or (also) to achieve capital import neutrality to benefit the competitiveness of residents abroad. Second, the legal consequences of tax concessions should remain limited to the legitimate aim pursued. To substantiate these statements we first consider the comparability of domestic and cross-border situations in the next paragraphs. We then discuss the legitimate aims of tax concessions to eliminate or reduce international double taxation. Finally, we introduce the necessity principle and analyse the implications of this principle for international double non-taxation.

15. The application of the non-discrimination principle first requires a comparability analysis to determine equals or unequals in the meaning of the Aristotelian equality maxim (*supra* n. 5). According to established case law of the ECtHR the non-discrimination principle looks at 'relevantly similar situations'.<sup>114</sup> Can cross-border situations be relevantly similar to domestic situations? The ECtHR already answered this question positively in several cases. In the case *Darby v. Sweden*, for instance, the ECtHR observed that in respect of the Swedish church tax the refusal to grant a tax exemption to Darby on the grounds merely that he was not registered in Sweden amounted to a discrimination in comparison with other taxpayers who were so registered. The ECtHR's decision was based on the fact that the Swedish government admitted that this different treatment lacked any specific purpose.<sup>115</sup> In the same line the Belgian Constitutional Court (*Grondwettelijk Hof*) found that in respect of a special income tax on interest the taxation of domestic sourced interest compared to the non-taxation of foreign sourced interest was contrary to the constitutional non-discrimination principle. The court observed that during the parliamentary proceedings the legislator did not provide a justification for this different treatment. According to the court it was difficult to imagine that the legislator really intended to benefit foreign sourced interest without any justification.<sup>116</sup>

The Belgian Constitutional Court (*Grondwettelijk Hof*) also found that in respect of the income tax applicable to Belgian residents, a domestic situation (i.e., resident receiving Belgian sourced income) was comparable to a cross-border situation (i.e., resident receiving foreign sourced income), even though the second situation was governed by a bilateral tax treaty.<sup>117</sup> In Germany the *Bundesfinanzhof* has referred two constitutional questions including a similar comparability issue to the

<sup>111</sup> *Bundesfinanzhof* 10 Jan. 2012, I R 66/09, § 25.

<sup>112</sup> *Bundesverfassungsgericht* 27 Jun. 1991, No. 239, discussed in V. Thuronyi, *Comparative Tax Law* 83 (Kluwer L. Intl. 2003).

<sup>113</sup> B.J. Arnold, 'Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model Convention', Bull. IBFD 244–260 (2004); L. De Broe, *International Tax Planning and Prevention of Abuse* 1112 (IBFD 2008); D. Weber, *Tax Avoidance and the EC Treaty Freedoms: A Study of the Limitations under European Law to the Prevention of Tax Avoidance* 290 (Kluwer L. Intl. 2005).

<sup>114</sup> ECHR, *Fredin v. Sweden*, 1991, § 60; ECHR, *The National & provincial building society et al. v. United Kingdom*, 1997, § 90.

<sup>115</sup> ECHR, *Darby v. Sweden*, 1990, § 33.

<sup>116</sup> Belgian *Grondwettelijk Hof* 9 Nov. 1995, no 74/1995, § A.5.3.

<sup>117</sup> Belgian *Grondwettelijk Hof* 4 Feb. 2004, No. 20/2004 (internal and foreign sourced pensions, the latter benefiting from a treaty exemption).

*Bundesverfassungsgericht*.<sup>118</sup> These questions relate to the German income tax rules that preclude the application of treaty exemptions resulting in unintended double non-taxation (treaty override). According to tax literature these provisions are contrary to the treaty obligations and the principle *pacta sunt servanda*.<sup>119</sup> The question is whether this treaty override can be justified by the non-discrimination principle. In its constitutional questions the *Bundesfinanzhof* suggests that a situation governed by domestic law is not comparable to a situation governed by treaty law, since the legal framework differs.<sup>120</sup> This suggestion may, however, be questioned based on two arguments. First, this different legal framework should be nuanced to the extent that according to the rule of law also treaty concessions must receive the consent of the national legislator (*infra* n. 21). Second, the Vienna Convention explicitly provides that the interpretation of a treaty should take into account, together with the context, 'any relevant rules of international law applicable in the relations between the parties' (Article 31, § 3, a) Vienna Convention). This provision supports the view that in respect of access to fundamental rights enshrined in international law, domestic situations are not necessarily incomparable with treaty governed situations.

16. Subsequently, according to the ECtHR a different treatment should pursue a legitimate aim. Arnardóttir observes that a legitimate aim can almost always be found and argued for in a case under Article 14 of the Convention.<sup>121</sup> In some exceptional cases, the ECtHR concluded that there was a discrimination, because the state had been found not to pursue a legitimate aim (*supra* n. 15 regarding the case *Darby v. Sweden*).

Also for bilateral tax treaties the existence of a legitimate aim can generally be found. The OECD commentary observes that tax treaties are concluded to remove the obstacles that 'international juridical double taxation' presents to the development of economic relations between countries. This term is defined as 'the imposition of comparable taxes in two (or more) states on the same taxpayer in respect of the same subject matter and for identical periods'. As a general rule Article 23 OECD model convention provides two methods for eliminating double taxation in the residence state: the exemption method (Article 23A OECD model convention) or the credit method (Article 23B OECD model convention). According to the credit method foreign taxes are credited against domestic taxes, whereas according to

the exemption method foreign income is exempted. The OECD commentary further clarifies that according to the exemption method the residence state must exempt income which may be taxed by the source state in accordance with the treaty, whether or not the right to tax is effectively exercised by the source state. This method is regarded as the most practical one, since it relieves the residence state from undertaking investigations of the actual taxation position in the source state.<sup>122</sup>

In practice contracting states, however, not only use the exemption method to eliminate 'double imposition', but also to achieve capital import neutrality (CIN) to benefit the competitiveness of residents abroad. Capital import neutrality requires that in the source state domestic and foreign suppliers of capital or activities obtain the same after-tax rate of return on similar investments or activities in that market. From the angle of the residence state this implies that residents deriving income from abroad are taxed in such a way as to establish equality with competing taxpayers abroad.<sup>123</sup> This is achieved by limiting the overall taxation to the taxation in the source state. For active income the Dutch Minister of Finance, for instance, clearly stated in his 'Memorandum on tax treaty policy' (2011) that the Netherlands aims at achieving capital import neutrality in bilateral tax treaties.<sup>124</sup> Capital import neutrality implies that the tax exemption applies, also if the source state does not tax the income or if the taxation level is very low. In this case capital import neutrality stretches further than the mere elimination of international 'double imposition' and may result in (intended) double non-taxation.

The initiatives against international double non-taxation trigger the question to what extent or under what conditions capital import neutrality can be considered as a legitimate aim. According to Helminen on the one hand inter-individual equity is considered to require that two residents of the same state be subject to the same tax burden, regardless of the fact that one resident may have domestic and the other one foreign-source income. She observes that this requirement is best met in a system based on capital export neutrality (CEN) and the credit method. Pires observes that the credit method is also an instrument for preventing tax avoidance, because it does not encourage transfer of assets or income to countries with a lower level of taxation.<sup>125</sup> On the other hand, capital import neutrality, in addition to safeguarding the competitive position of

<sup>118</sup> *Bundesfinanzhof* 10 Jan. 2012, No. I R 66/09; *Bundesfinanzhof* 11 Dec. 2013, No. I R 4/13. See also A. Perdelwitz, 'Treaty Override – Revival of the Debate over the Constitutionality of Domestic Treaty Override Provisions in Germany', Eur. Taxn. 445–450 (2013).

<sup>119</sup> S.E. Bärsch & Ch. Spengel, 'Hybrid Mismatch Arrangements: OECD Recommendations and German Practice,' Bull. IBFD 525 (2013).

<sup>120</sup> *Bundesfinanzhof* 10 Jan. 2012, No. I R 66/09.

<sup>121</sup> O.M. Arnardóttir, *Equality and Non-discrimination under the European Convention on Human Rights* 42–43 (Kluwer L. Intl. 2003).

<sup>122</sup> OECD commentary on Art. 23A, § 34.

<sup>123</sup> M. Helminen, 'The Principle of Elimination of Double Taxation under EU Law – Does It Exist?', in *Principles of Law: function, Status and Impact in EU Tax Law* (391) 399 (C. Brokelind ed., IBFD 2014).

<sup>124</sup> Notitie Fiscaal Verdragsbeleid 2011, 16, [www.rijksoverheid.nl/onderwerpen/belastingen-internationaal/documenten-en-publicaties/notas/2011/02/11/notitie-fiscaal-verdragsbeleid-2011.html](http://www.rijksoverheid.nl/onderwerpen/belastingen-internationaal/documenten-en-publicaties/notas/2011/02/11/notitie-fiscaal-verdragsbeleid-2011.html).

<sup>125</sup> M. Pires, *International Juridical Double Taxation of income* 190 (Kluwer L. Intl. 1989).

residents abroad, better serves the sovereignty principle.<sup>126</sup> It recognizes tax benefits granted in the state of source.<sup>127</sup> There is no consensus on the priority of capital export neutrality over capital import neutrality, or vice versa.<sup>128</sup> The non-discrimination principle at least requires the legitimate aim of the contracting states and the choice between capital import neutrality and capital export neutrality to be clear (see also *infra* n. 18). This choice may vary in function of the item of income or capital. Therefore, states should at least have a clear and elaborated tax treaty policy in this respect.

17. Finally, the non-discrimination principle requires a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The proportionality must be tested against the legitimate aim of the measure or action under review. Arnardóttir observes that the proportionality under Article 14 of the Convention is closely connected to the principle of proportionality as present throughout the Convention, also in Article 1 of the First Protocol. As mentioned above the proportionality test requires that the means adopted by the law must be capable of advancing the realization of its proper purpose. The ECtHR takes a comprehensive approach to analyse whether this condition is met (*supra* n. 9).<sup>129</sup> The necessity principle provides an additional building block to assess the proportionality of a measure or action. According to the ECtHR the intrusion upon the citizens' rights should indeed be necessary for the aim pursued.<sup>130</sup> The necessity principle also implies that if other means exist that intrude less upon the citizens' rights, the state has no reason to use the more rather than the less intrusive means.<sup>131</sup> It follows that tax concessions (e.g., deductions, exemptions or credits) must be necessary and that their consequences do not reach further than what is necessary to achieve their legitimate aim.

The German *Bundesverfassungsgericht* has applied the necessity principle in relation to the elimination of domestic double taxation of private pensions (employees) and the discriminatory treatment of state pensions (state officials). The legislator had justified an exemption for private pensions on the basis of the

elimination of double taxation. Employee contributions to private pensions were not tax deductible. Consequently, taxation of the corresponding pension payments would result in double taxation. State pensions on the contrary were fully financed by government contributions. Consequently, double taxation was not an issue. The *Bundesverfassungsgericht*, however, observed that also part of the private pensions was formed by government contributions. Hence, the elimination of double taxation could not justify the full amount of the exemption. The *Bundesverfassungsgericht* ruled that elimination of double taxation was justified, but only inasmuch as the pension payment originated from the non-deductible employee contributions, the remaining part of the exemption not being necessary to achieve the legitimate aim pursued: 'Alle wesentlichen steuerpflichtigen Einnahmen sind eigentumsrechtlich geschützt. Nicht der grundrechtliche Eigentumsschutz begründet bei den Sozialversicherungsrentnern eine mögliche Sperre für eine Steuerpflicht von Einnahmen, sondern ausschließlich das Verbot, solche Einnahmen einkommensteuerlich doppelt zu belasten'.<sup>132</sup>

The reasoning of the German *Bundesverfassungsgericht* can be transposed to international double taxation. To the extent that a bilateral tax treaty aims at eliminating double taxation, the necessity principle entails that the legal consequences of tax exemptions or credits are accordingly limited to achieving that aim. It may be questioned whether the current wording of Article 23A Model Tax Convention is still feasible. Article 23A provides that the residence state must exempt income which may be taxed by the source state in accordance with the treaty, whether or not the right to tax is effectively exercised by the source state. The purpose of the treaty, however, refers to double 'imposition' (*supra*). Schwimann observes that already in 1959 when the methods to eliminate double taxation were discussed by the Fiscal Committee of the OECD, the Working Party pointed to the implicit problem of double non-taxation in the term 'may be taxed' and that this term should be replaced by the term 'is subject to tax'. Nevertheless, the Fiscal Committee decided to uphold a renunciation of taxation, even if the state that has the right to tax does not make use of this right.<sup>133</sup> Since 1959 the proportionality threshold has increased (*supra* n. 7). The suggestion to replace the term 'may be taxed' by 'is subject to tax' better contributes to the principle of necessity.

<sup>126</sup> M. Helminen, 'The Principle of Elimination of Double Taxation under EU Law – Does It Exist?', in *Principles of Law: Function, Status and Impact in EU Tax Law* (391) 405 (C. Brokelind ed., IBFD 2014).

<sup>127</sup> M. Pires, *International Juridical Double Taxation of Income* 176 (Kluwer L. Intl. 1989).

<sup>128</sup> M. Helminen, 'The Principle of Elimination of Double Taxation under EU Law – Does It Exist?', in *Principles of Law: Function, Status and Impact in EU Tax Law* (391) 402 (C. Brokelind ed., IBFD 2014).

<sup>129</sup> A. Barak, 'Proportionality (2)', in *Comparative Constitutional Law* (738) 743 (M. Rosenfeld & A. Sajó eds, Oxford U. Press 2012).

<sup>130</sup> ECHR, *Hentrich v. France*, 1994, § 47. See also J.F. Renucci, *Droit Européen des droits de l'homme* 630 (Lextenso Editions 2012); B. Schlink, 'Proportionality (1)', in *Comparative Constitutional Law* (718) 724 (M. Rosenfeld & A. Sajó eds, Oxford U. Press 2012). The European Court, however, not always follows this theory and leaves the countries a wide margin of appreciation in this respect (e.g., ECHR, *Mellacher et al. v. Austria*, 1989, § 53).

<sup>131</sup> ECHR, *Hentrich v. France*, 1994, § 47.

<sup>132</sup> German *Bundesverfassungsgericht* 6 Mar. 2002, 2 BvL 17/99; German *Bundesverfassungsgericht* 9 Dec. 2008, 2 BvL 1/07. See also J. English, 'The Impact of Human Rights on Domestic Substantive Taxation – The German Experience', in *Human Rights and Taxation in Europe and the World* (285) 293 (G. Kofler, M.P. Maduro & P. Pistone eds, IBFD 2011).

<sup>133</sup> M. Schwimann, 'Article 23: Methods to Avoid Double Taxation', in *History of Double Tax Treaties. The relevance of the OECD Documents for the Interpretation of Tax Treaties*, (643) 652–653 (M. Lang ed., Verlag Wien 2011).

18. The non-discrimination principle not only offers guidelines to the legislator, but has also a directional interpretation function. We argue that the non-discrimination principle in conjunction with the right to peaceful enjoyment of possessions advocates a purposive interpretation, whereby measures to eliminate or reduce international double taxation are interpreted in such a manner that they do not result in unintended double non-taxation. As mentioned above the Vienna Convention leaves room for such purposive interpretation. Also the UK courts apply such purposive interpretation method (*supra* n. 10). In *Bayfine UK Products v. HMRC*, for instance, the court interpreted the treaty between the United Kingdom and the United States in such a manner that it did not result in international double non-taxation. The court observed more specifically that:

*these words, however, make it clear that the primary purposes of the Treaty are, on the one hand, to eliminate double taxation and, on the other hand, to prevent the avoidance of taxation. In seeking a purposive interpretation, both these principles have to be borne in mind. Moreover, the latter principle, in my judgment, means that the Treaty should be interpreted to avoid the grant of double relief as well as to confer relief of double taxation.*<sup>134</sup>

Also the German *Bundesfinanzhof* interpreted the treaty between Austria and Germany in such a way that it did not result into double non-taxation.<sup>135</sup> The court observed that the treaty's object and purpose was (limited to) the avoidance of double taxation. Certain legal authors criticize the aforementioned decision of the *Bundesfinanzhof*. According to Lang, Herdin and Schilcher the intention of the states when concluding the tax treaty was not clear. The case submitted to the *Bundesfinanzhof* concerned a sportsman who benefited from double non-taxation. There had been a legal practice in Austria to benefit sportsmen. Consequently, according to these authors neither the result that the states did not want double non-taxation to arise when they concluded the treaty nor the interpretation that they accepted this situation because of another reason, could be assumed without further examination.<sup>136</sup> This ambiguity shows how important it is that the legitimate aim of tax treaty exemptions or credits are sufficiently (more) clear and transparent (*supra* n. 14).

<sup>134</sup> *Bayfine UK Products v. HMRC*, 2011, No. ECCA Civ. 3040, § 17.

<sup>135</sup> *Bundesfinanzhof* 11 Oct. 2000, I-R 44-51/99, *IStr* 2001, 182.

<sup>136</sup> J. Herdin & M. Schilcher, 'Avoidance of Double Non-taxation in Austria', in *Avoidance of Double Non-taxation* (13) 15 (M. Lang ed., Verlag Wien, 2003); M. Lang, 'Die Vermeidung der doppelbesteuerung und der doppelten nichtbesteuerung als DBA-Auslegungsmaxime?', *IStr* 2002, 609–613.

The necessity principle also provides guidelines for the interpretation of so-called 'subject to tax clauses'. In some treaties such a clause is introduced as a condition for the application of a tax exemption or credit. In Belgium, Germany and the United Kingdom the interpretation of the term 'subject to tax' has been subject of debate. It is unclear whether this term requires effective taxation in the other state.<sup>137</sup> In Belgium, according to the traditional view, 'subject to tax' requires that the income is in principle qualified as taxable income. A subsequent explicit exemption provided by domestic tax law of the other state, however, does not derogate from the application of the exemption or credit. The maxim 'exemption counts as taxation' is generally applied for the interpretation of domestic as well as treaty exemptions.<sup>138</sup> This maxim may lead to double non-taxation. Some recent decisions of Belgian courts, conversely, suggest that the term 'subject to tax' should be interpreted as 'effectively taxed' for treaty purposes.<sup>139</sup> In the United Kingdom in *Weiser v. CMRC* the court interpreted the term 'subject to tax' as requiring 'income actually to be within the charge to tax in the sense that a contracting state must include the income in question in the computation of the individual's taxable income with the result that tax will ordinarily be payable subject to deductions for allowances or reliefs'.<sup>140</sup> This case concerned UK sourced pensions earned by an Israeli resident. In Israel the pension was exempt from tax. The treaty between the United Kingdom and Israel provided that the United Kingdom must exempt the pension, if it was subject to tax in Israel. The court observed:

*The starting point is to look for a clear meaning of the words in Art. XI(2) that is consistent with the purpose of the treaty. That purpose I discern to be the allocation of taxing rights between the UK and Israel to obviate double taxation, and to prevent the evasion of tax. Its purpose is not to enable double non-taxation of the relevant income.*<sup>141</sup>

It is submitted that the principles enshrined in the Convention, and especially the principle of necessity, support the abovementioned interpretation of the UK court.

<sup>137</sup> L. De Broe & N. Bammens, 'Interpretation of Subject to Tax Clauses in Belgium's Tax Treaties – A Critical Analysis of the 'Exemption Vaut Impôt' Doctrine', *Bull. IBFD* 68–73 (2009); F. Jacob & A. Hagna, 'The Germany-Luxembourg Income and Capital Tax Treaty (2012)', *Bull. IBFD* (530) 538 (2012).

<sup>138</sup> For example, Court of Appeal of Antwerpen 15 Jan. 1996, *EJF* 1996, No. 96/84; Court of Appeal of Luik 4 Oct. 2000, *JDF* 2001, 52; Court of Appeal of Brussels 7 Dec. 2011 and 14 Mar. 2012 reported in L. De Broe, D. Van Bortel & D. Murre, 'Kroniek Internationaal Belastingrecht 2012', *TRV* 250 (2013); Administrative commentary on tax treaties, no. 23/112.

<sup>139</sup> Court of Appeal of Brussels 17 Jan. 2008 reported in M. van Keirsbilck, 'Komt exemption vaut impôt' op de helling te staan?', *Fiscoloog Internationaal*, No. 294, 3; Court of First Instance of Bergen 11 Sep. 2013, No. 11/1078/A.

<sup>140</sup> *Weiser v. CMRC*, 2012, *KFTT* 501 (TC), § 34.

<sup>141</sup> *Weiser v. CMRC*, 2012, *KFTT* 501 (TC), § 33.

### 3.3 The Principle of the Rule of Law

#### 3.3.1 The Principle of the Rule of Law in General

19. The previous sections of this article elaborate on the guidelines that can be derived from the requirements of fairness that have found to a certain extent their way to the legal order through the principles of non-discrimination and proportionality. Now the question remains who should determine what fairness is. To whom are the guidelines primarily addressed? As mentioned above Aristotle wrote his *Ethica Nicomachea* as a handbook for the legislator. According to him 'law should govern' (*supra* n. 5). Also the ECtHR, when testing national tax legislation against the Convention, leaves a wide margin of appreciation to the national states to determine what fairness means with respect to taxation.<sup>142</sup> In *Svenska Managementgruppen AB v. Sweden* the EComHR observed that:

*it is in the first place for the national authorities to decide what kind of taxes or contributions are to be collected. Furthermore the decisions in this area will commonly involve the appreciation of political, economic and social questions which the Convention leaves within the competence of the contracting States. The power of appreciation of the Contracting States is therefore a wide one. (. . .). It may be true that the aim of these transactions includes the creation of a different policy in the economic field. However, although opinions evidently differ as to the fairness of such policy the Commission considers that it was one of which the Government were entitled to pursue.*<sup>143</sup>

Also according to established case law of the ECtHR the latter only intervenes when the interference of the authorities is devoid of reasonable foundation.<sup>144</sup> Although some constitutional courts have a more active approach than others (*supra* n. 3),<sup>145</sup> in general this is also the reason why national judges are rather reluctant to invalidate tax legislation.<sup>146</sup> For instance, in Belgium the Constitutional Court (*Grondwettelijk Hof*) only exceptionally invalidates legislation, i.e. only when the legislation is 'manifestly' contrary to constitutional principles.<sup>147</sup>

20. This observation pairs with the weight of the rule of law in tax matters. The rule of law requires that law governs a nation, as opposed to arbitrary decisions by individual government officials. The rule of law implies that every citizen is subject to the law, including the law makers themselves. This principle also applies to

taxation.<sup>148</sup> The principle of lawfulness of taxes is enshrined in Article 1 of the First Protocol. As mentioned above, taxes must comply with the principle of legality (*supra* n. 7). In *Silver et al. v. United Kingdom* the ECtHR observed that in the first place this principle requires a *domestic law*.<sup>149</sup> Second, this principle also entails that the law is of sufficient quality to enable an applicant to foresee the consequences of his or her conduct. This means that the law should be sufficiently accessible, precise and foreseeable.<sup>150</sup>

From the rule of law also follows the requirement that citizens are involved in the legislation they are subjected to. According to Dworkin 'democracy does not mean just majority rule, but it does suppose a political community almost all of whose population participates as equals directly or indirectly in the broad range of political decisions affecting their lives'.<sup>151</sup> Also Dourado and Vanistendael submit that the *ratio legis* of this principle entails democratic procedures, public discussion, argumentation, disagreement and compromise in parliament, in a context of political plurality.<sup>152</sup> Gordon and Thuronyi argue that, consequently, the executive should consult the parliament, 'since the latter is unlikely to respond well if its views are not adequately taken into consideration during the preparation of the bill'.<sup>153</sup> According to Popelier 'procedural rationality submits parliament to at least one basic requirement: the obligation to balance rights and interests in the course of a parliamentary debate'.<sup>154</sup>

Popelier explains that this procedural requirement also supports the comprehensive approach advocated by the court (*supra* n. 9). It provides an indication to the ECtHR whether the national authorities have taken into account all relevant interests. The ECtHR also explicitly refers to parliamentary debate in its decisions. In *Hirst v. the United Kingdom* the ECtHR established this procedural requirement in the context of the principle of legality in criminal law:

<sup>148</sup> A.P. Dourado, 'No Taxation without Representation in the European Union: Democracy, Patriotism and Taxes', in *Principles of Law: Function, Status and Impact in EU Tax Law* 205–234 (C. Brokeland ed., IBFD 2014).

<sup>149</sup> For example, ECHR, *Silver et al. v. United Kingdom*, 1983; ECHR, *Colas EST et al. v. France*, 2002, § 43.

<sup>150</sup> For example, ECHR, *OA O Neftyanaya Kompaniya Yukos v. Russia*, 2011, § 559; ECHR, *Serkov v. Ukraine*, 2011, § 34.

<sup>151</sup> R. Dworkin, 'A New Philosophy for International Law', 41 *Phil. & Pub. Affairs* (2) 28–29 (2013).

<sup>152</sup> A.P. Dourado, 'No Taxation without Representation in the European Union: Democracy, Patriotism and Taxes', in *Principles of Law: Function, Status and Impact in EU Tax Law* (2015) 206 (C. Brokeland ed., IBFD 2014); F. Vanistendael, 'The Role of (Legal) Principles in EU Tax Law', in *Principles of Law: Function, Status and Impact in EU Tax Law* (29) 32 (C. Brokeland ed., IBFD 2014).

<sup>153</sup> K. Gordon & V. Thuronyi, 'Tax Legislative Process', in *Tax Law Design and Drafting* 8 (V. Thuronyi ed., International Monetary Fund 1996).

<sup>154</sup> P. Popelier, 'The Court as Regulatory watchdog. The Procedural Approach in the Case Law of the European Court of Human Rights', in *The Role of Constitutional Courts in Multilevel Governance* (249) 255 (P. Popelier, A. Mazmanyan & W. Vandenbruwaene eds, Intersentia, 2013).

<sup>142</sup> O.M. Arnadóttir, *Equality and Non-discrimination under the European Convention on Human Rights* 41 (Kluwer L. Intl. 2003).

<sup>143</sup> EComHR, *Svenska Managementgruppen AB v. Sweden*, 1985.

<sup>144</sup> For example, ECHR, *James and others v. The United Kingdom*, 1986, § 46; ECHR, *Bulves A.D. v. Bulgaria*, 2009, § 62.

<sup>145</sup> V. Thuronyi, *Comparative Tax Law* 67–70 and 82–100 (Kluwer L. Intl. 2003).

<sup>146</sup> *Ibid.* at 89 and 91.

<sup>147</sup> For example, Belgian *Grondwettelijk Hof* 21 Feb. 2013, No. 13/2013, B3.3. Belgian *Grondwettelijk Hof* 13 Oct. 2011, No. 157/2011, B.5.

As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. (...) Nonetheless, it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.<sup>155</sup>

Also in tax matters the ECtHR takes into consideration the legislative process leading to the enactment of the tax rules.<sup>156</sup>

21. The way the principle of legality relates to tax treaties is subject of debate. In many countries treaties are negotiated and signed by the executive, whereas the principle of legality requires a democratically elected body to debate and decide on tax concessions (*supra* n. 20). In many countries a (tax) treaty only requires consent of parliament after signing.<sup>157</sup> In France, for example, the *Conseil Constitutionnel* observed that the parliament can only approve or disapprove a treaty. It cannot make its approval dependent upon certain conditions, reservations or interpretative declarations.<sup>158</sup> Also in Belgium the principle of legality with respect to tax concessions is confirmed in the Constitution (*supra* n. 19). However, under Article 167 of the Belgian Constitution treaties are negotiated and concluded by the executive; parliament must only give its consent after the signing of the treaty. The Belgian Court of Audit has observed that the Belgian parliament tends to give its consent without actual parliamentary debate in order to comply (politically) with the negotiated treaty.<sup>159</sup>

According to De Broe there is no need to reconcile the (Belgian) treaty procedure with the constitutional principle of legality, since tax treaties only distribute taxation powers between the contracting states and do not provide tax concessions in the meaning of the (Belgian) Constitution.<sup>160</sup> We argue, however, that a distinction should be made between the consequences of a treaty at the international level and at the national level. At the international level the treaty is an agreement between states. At this level it concerns the distribution of taxation powers. At the national level, however, the

treaty results in tax concessions for the taxpayers.<sup>161</sup> Accordingly, at the national level the principle of legality also applies. The viewpoint that tax rules embedded in treaties are also subject to the principle of legality is supported by ECtHR case law. In *Arnaud and others v. France* the court was requested to test the tax treaty between France and Monaco against the Convention. This treaty provides an anti-abuse measure according to which French nationals that have transferred their residence to Monaco, remain subject to the French *impôt sur la fortune*. According to the court the guarantees provided by Article 1 of the First Protocol were applicable, including the principle of legality.<sup>162</sup>

Masquelin and Sepulchre submit that parliamentary consent with the treaty sufficiently complies with the requirements of the principle of legality (as confirmed in the Belgian Constitution).<sup>163</sup> Also in the case *Arnaud and others v. France* the ECtHR observed that the requirement of domestic law was met, since the treaty was approved by the French parliament. The ECtHR did not further elaborate on whether the parliamentary procedure had allowed to determine a fair balance between all interests at stake. To the extent that parliamentary involvement is very limited and merely formal and that political pressure to consent with the treaty, without taking into account all relevant national interests, is very high, it may be questioned whether the rule of law is still sufficiently complied with.

### 3.3.2 Rule of Law and Measures against International Double (Non-)taxation

22. How does the requirement that citizens should be sufficiently involved in the legislation they are subjected to, relate to the international and supranational initiatives against international double (non-) taxation? This observation is relevant keeping in mind for instance the fast progress of the OECD action plan against BEPS. In addition, some proposals have far-reaching consequences. In order to swiftly implement the action plan, the OECD, for example, proposes to conclude a multilateral tax treaty that would modify most bilateral tax treaties at once.<sup>164</sup> From the methodology of the OECD action plan one can derive that also the OECD acknowledges that citizens should be involved in the law making process. The action plan indeed also elaborates on its 'participative' methodology:

<sup>155</sup> ECHR, *Hirst v. the United Kingdom* (No. 2), 6 Oct. 2005, § 79. See also ECHR, *Hatton v. United Kingdom* (No. 36022/97), 2001 and *Hatton v. United Kingdom*, 2003; ECHR, *Dickson v. United Kingdom*, 2007.

<sup>156</sup> ECHR, *Gáll v. Hungary*, 2013, § 52.

<sup>157</sup> For example, Art. 167 Belgian Constitution; Arts 52 and 53 French Constitution.

<sup>158</sup> *Conseil Constitutionnel* 9 Apr. 2003, No. 2003-470 DC, § 18.

<sup>159</sup> Court of Audit, Report of the Court of Audit to the Chamber of Representatives 'International Cooperation of the Belgian Tax Authorities', Brussels, 11 Feb. 2011, 15.

<sup>160</sup> L. De Broe, *International Tax Planning and Prevention of Abuse* 261–262 (IBFD 2008).

<sup>161</sup> M. Edwardess-Kerr, *Tax Treaty Interpretation* 13–14 (Doctoral Thesis, Queen Mary and Westfield College, University of London 1994).

<sup>162</sup> ECHR, *Arnaud and others v. France*, 2015, § 26.

<sup>163</sup> J. Masquelin, *Le droit des traités dans l'ordre juridique et dans la pratique diplomatique belges* § 152 (Bruylant 1980); V. Sepulchre, *Droits de l'homme et libertés fondamentales en droit fiscal* 40 (De Boeck & Larcier 2005).

<sup>164</sup> OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, OECD/G20 Base Erosion and Profit Shifting Project, Paris, OECD Publishing, 16 Sep. 2014, 10 and 14.

*As the current consensus-based framework is at risk, it is critical that a proper methodology be adopted to make sure that the work is inclusive and effective, takes into account the perspective of developing countries and benefits from the input of business and the civil society at large.*<sup>165</sup>

In its explanatory statement to the reports that have been published on 16 September 2014, the OECD reports on its methodology.<sup>166</sup> The OECD relies on the expertise of the OECD Committee on Fiscal Affairs. This committee represents 44 countries and is composed of representatives of the national tax administration of the OECD Member States.<sup>167</sup> Furthermore, countries that are not a member of the OECD and developing countries have been consulted. The OECD has also asked the advice of representatives of the business community, trade unions, non-governmental organization, think tanks and academia. The OECD notes that this exercise has resulted in 3,500 pages of comments and has triggered 10,000 viewers for the webcasts on the action plan against BEPS.<sup>168</sup>

The tendency that international institutions are more and more called to resolve problems with international aspects, is not only true in the tax field but is a general observation. Ring notes that '*globalisation decreases a state's ability to implement and pursue the policies of its people*'.<sup>169</sup> Along the same line Plattner submits that:

*The rise of multinational institutions is a natural response to a shrinking world. As cross-border contacts multiply, both in the economy and in other spheres, there is an inevitable need for institutions that can address problems that lie beyond the competence of a single state.*<sup>170</sup>

According to Ring, however, this tendency also triggers certain problems. First, international organizations are often seen as lacking democratic accountability. At a global level there is no firm concept of 'citizenship' or 'people' and elections are not possible.<sup>171</sup> Sakamoto observes in respect of the United Nations that it suffers from democratic accountability problems because its agenda setting '*has been far from democratic, give the low level of citizens' representation and participation*'.<sup>172</sup> Ring brings this observation in relation

to the efficiency of the tax system.<sup>173</sup> Research has shown that tax compliance is higher in constitutional structures that are more representative.<sup>174</sup> Also with respect to the initiatives against double non-taxation Essers submits that the OECD does not have sufficient democratic accountability or legitimacy.<sup>175</sup> According to Peters a trade-off should be made between the legitimacy and the effectiveness of international tax law in the short run. In order to restore the efficiency of international tax law the role of international institutions may prevail at the expense of democratic legitimation of the tax system. In the long run Peters advocates a model of 'deliberative international tax law', whereby the interconnectedness of the tax systems justifies the replacement of the current 'state consent' model.<sup>176</sup>

### 3.3.3 Measures against International Double (Non-) taxation: Guidelines

23. In order to align the globalization of society with the rule of law in tax matters, we argue that international or supranational levels and national levels should cross-pollinate, in order to better achieve the tax policy goals of the national states and to serve the rule of law. This argument also finds support in Dworkin's theory. As mentioned above, according to Dworkin the general obligation of each state to improve its legitimacy, includes an obligation to try to improve the overall international system (*supra* n. 6). On the one hand, the OECD is acknowledged to be a feasible forum for multilateral deliberation on effective international tax rules. The methodology of the OECD certainly has its merits. Also the ECtHR appreciates the use of consultation procedures, allowing the public and interested parties to give input.<sup>177</sup> On the other hand, the OECD methodology cannot replace the involvement of the citizens in the legislative procedure through parliamentary debate.<sup>178</sup> The representation at the OECD of the national states by their national tax officials and the consultation of representatives of the business, labour union, non-governmental organizations, *think tanks* and academia cannot replace parliamentary debate.

*United Nations, the State and Civil Society* (274) 284 (A.J. Paolini et al. eds, 1998).

<sup>165</sup> OECD Action Plan on BEPS, 25.

<sup>166</sup> OECD Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, 16 Sep. 2014.

<sup>167</sup> For the composition of the committee cf. <http://webnet.oecd.org/OECDGROUPS/Bodies/ListByNameView.aspx>.

<sup>168</sup> OECD Action Plan on BEPS, 26. OECD Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, 16 Sep. 2014, 4.

<sup>169</sup> D.M. Ring, 'What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State', 49 Va. J. Intl. L. 12 (2008).

<sup>170</sup> M. Plattner, *Democracy without Borders? Global Challenges to Liberal Democracy* 81–82 (Maryland, Rowman & Littlefield Publishers 2008).

<sup>171</sup> D.M. Ring, 'What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State', 49 Va. J. Intl. L. 13 (2008).

<sup>172</sup> Y. Sakamoto, 'The United Nations and World Order in Democratic Transition', in *Between Sovereignty and Global Governance – The*

<sup>173</sup> D.M. Ring, 'What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State', 49 Va. J. Intl. L. 14 (2008).

<sup>174</sup> B.S. Frey, 'A Constitution for Knaves Crowds Out Civic Nature', 107 Econ. J. (1043) 1050 (1997).

<sup>175</sup> P. Essers, 'International Tax Justice between Machiavelli and Habermas', Bull. Intl. Taxn. (54) 57 (2014).

<sup>176</sup> C. Peters, *On the Legitimacy of International Tax Law* s. 8.3.2.4. (Doctoral Series, IBFD 2014).

<sup>177</sup> For example, ECHR, *Evans v. United Kingdom*, 2007; ECHR, *A, B and C v. Ireland*, 16 Dec. 2010. See also P. Popelier, 'The Court as Regulatory Watchdog. The Procedural Approach in the Case Law of the European Court of Human Rights', in *The Role of Constitutional Courts in Multilevel Governance* (249) 25–259 (P. Popelier, A. Mazmanyan & W. Vandenbruwaene eds, Intersentia 2013).

<sup>178</sup> P. Essers, 'International Tax Justice between Machiavelli and Habermas', Bull. IBFD (54) 57 (2014).

Parallel to the initiatives at the OECD, G20 and EU level, it is also the responsibility of the states to provide procedures guaranteeing compliance with the rule of law and the principle of legality at the national level. This point of view is supported by ECtHR case law. The ECtHR accepts that certain elements of the legislative procedure are delegated or transferred to organizations. Nevertheless, in that case the states remain responsible for safeguarding the reasonable balance of interests. In *Evaldsson et al. v. Sweden*, for instance, the ECtHR found that private organizations were empowered to regulate collective labour agreements. According to the ECtHR, however, the state remained responsible to ensure that the interests of employees who were not member of the labour union had been taken into account.<sup>179</sup> Moreover, when certain powers are transferred to international or supranational organizations the national states remain responsible to comply with the duties resulting from the Convention. In *Matthews v. United Kingdom* the ECtHR observed:

*that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer.*<sup>180</sup>

It follows from this case law that the OECD may indeed be a feasible platform to discuss international tax rules on a multilateral basis and that as a result the preparation of domestic legislation or treaties takes to a certain extent place at the level of this international organization. However, this state of affairs does not remove the responsibility of the national states to guarantee the (real and not merely formal *post factum*) participation of its citizens in the law making process to safeguard a reasonable balance of national interests through parliamentary debate.

24. Several instruments may facilitate the involvement of national parliaments. First, national states should organize in-depth parliamentary debates on this issue. To this end Essers rightly maintains that independent experts should do their best to inform parliamentarians properly about international tax law: *'It is not enough to send opinions and expert analysis to parliament. Parliamentarians also need personal explanations and clarifications by independent tax experts.'*<sup>181</sup> Second, parliament could provide an authorization to the tax officials representing the national states with the OECD. In such authorization

boundaries and guidelines, both based on democratic deliberation, could be provided. Third, national states could also introduce an obligation to inform parliament, whereby the executive must provide regular information on tax treaty negotiations. In the Netherlands, for instance, the Dutch Minister of Finance regularly informs parliament. Still the *Algemene Rekenkamer* advised to increase the amount of information given to parliament, especially about initiatives against unintended use of treaties and the financial impact of the tax climate.<sup>182</sup> This advice is also useful for other countries. Finally, the results of national parliamentary debate should find their way up to the multilateral deliberation level at the OECD, G20 or EU, for instance through the consultation of representatives of national parliaments. This would enable the OECD to (primarily) take into account national parliamentary observations, in addition to the viewpoints of tax officials, representatives of business, labour unions, non-governmental organizations, *think tanks* and academia. Such procedure would not only improve the legitimacy of the OECD actions. Such cross-pollination would also help national states to better implement their (tax) policy in a globalized context. As a consequence, the activities at the supranational and international level would also contribute to the rule of law.

#### 4 CONCLUSION

25. Double taxation and double non-taxation are both at least in certain circumstances considered as unfair. The ethical principle of fairness has found its way to the legal order through the principles of proportionality and non-discrimination. From these principles guidelines can be derived. First, excessive international double taxation and unintended international double non-taxation both conflict with the principle of comprehensiveness that follows from the right to peaceful enjoyment of possessions. This principle requires taxes to be proportional, taking into account all relevant elements including foreign tax rules or concessions. Second, the non-discrimination principle requires that tax concessions (e.g., deductions, exemption or credits) to avoid international double taxation are necessary to achieve their legitimate aim (necessity principle). This guideline does not sit well with tax concessions resulting in unintended double non-taxation. Third, both principles also advocate a purposive interpretation, whereby measures against international double taxation are interpreted in such a way that international double taxation is effectively achieved, without resulting in unintended international double non-taxation, however.

<sup>179</sup> ECHR, *Evaldsson et al. v. Sweden*, 2007, § 63.

<sup>180</sup> ECHR, *Matthews v. United Kingdom*, 18 Feb. 1999, §§29 and 32. See also ECHR, *Prince Hans-Adam II of Liechtenstein v. Germany*, 12 Jul. 2001, § 47; ECHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005, §§ 14, 40 and 43.

<sup>181</sup> P. Essers, 'International Tax Justice between Machiavelli and Habermas', Bull. IBFD (54) 62 (2014).

<sup>182</sup> See [www.tweedekamer.nl/kamerstukken/detail?id=2014D40207&did=2014D40207](http://www.tweedekamer.nl/kamerstukken/detail?id=2014D40207&did=2014D40207), 9.

The OECD has a long tradition in initiatives against international double taxation. The right to peaceful enjoyment of possessions calls for additional action in areas where international double taxation has remained largely unresolved, for instance inheritance taxes. Moreover, the OECD and EU initiatives against international tax planning and double non-taxation follow to a certain extent the guidelines derived from principles of law. First, the OECD action plan contributes to the principle of comprehensiveness. One of the pillars of the OECD action plan is to 'ensure the coherence of the corporate income taxation at international level'.<sup>183</sup> To this end the OECD proposes for instance several 'linking rules' in order to align tax systems of different states with each other.<sup>184</sup> In the same line, the modification of the EU parent-subsidiary directive contributes to the principle of comprehensiveness. The amendment by Council Directive 2014/86/EU Article 4(1)(a) of the EU parent-subsidiary directive indeed provides that the Member State of the parent company should tax received profits distributions to the extent that such profits are deductible by the subsidiary.<sup>185</sup> Second, the principle of necessity is also served. In its

action plan the OECD indeed proposes to clarify that treaties are aimed at avoiding international double non-taxation. The European Commission also recommended to make domestic and treaty exemptions dependent upon an effective taxation abroad.<sup>186</sup>

As regards the implementation of the measures against international double (non-) taxation, however, the rule of law requires cross-pollination between the OECD, the EU and national parliaments. Parallel to the multilateral deliberations at international or supranational level, the national states are responsible to guarantee the balancing of all relevant interests at the national level through in-depth parliamentary debate. Cross-pollination between the international or supranational deliberations and the national parliamentary debates, would not only improve the legitimacy of the international or supranational actions, but also help national states to better implement their tax policy in a globalized world.

<sup>183</sup> OECD Action Plan on BEPS, 13.

<sup>184</sup> OECD, *Neutralizing the Effects of Hybrid Mismatch Arrangements*, OECD/G20 Base Erosion and Profit Shifting Project, Paris, OECD Publishing, 16 Sep. 2014, 36.

<sup>185</sup> Council directive 2011/96/EU of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and

subsidiaries of different Member States (EU parent-subsidiary directive).

<sup>186</sup> Commission Recommendation of 6 Dec. 2012 on aggressive tax planning, C(2012) 8806 final.