Headnotes

to the Order of the Second Senate of 15 December 2015

– 2 BvL 1/12 –

1. **[…]**

2. **It follows from Art. 59(2) first sentence of the Basic Law (*Grundgesetz* – GG) that international treaties are accorded the rank of ordinary (federal) statutes, unless they fall within the scope of application of a more specific opening clause (particularly Arts. 23 to 25 GG).**

3. **Art. 59(2) first sentence GG does not limit the applicability of the *lex posterior* principle in relation to international treaties. In accordance with the will of the people as expressed through elections, subsequent legislatures must have the power to revise, within the limits set by the Basic Law, legislative acts enacted by previous legislatures.**

4. **The unwritten principle of the Constitution's openness to international law does not provide a basis for establishing the unconstitutionality of statutes that violate international law. Although this principle is of constitutional rank, it does not impose an unreserved constitutional duty to comply with all rules of international law.**

5. **It cannot be derived from the principle of the rule of law that international treaty law take (conditional) precedence over (ordinary) statutory law, nor that the applicability of the *lex posterior* principle be restricted.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvL 1/12 –

IN THE NAME OF THE PEOPLE

In the proceedings for constitutional review

of whether § 50d(8) first sentence of the 2002 Income Tax Act (*Einkommensteuergesetz*), as revised by the 2003 Tax Amendment Act (*Steueränderungsgesetz 2003*), violates Article 2(1) in conjunction with Article 20(3), Article 25, and Article 3(1) of the Basic Law (*Grundgesetz* – GG) in respect of a tax exemption for income from employment earned by a person who is subject to unlimited liability for German tax, where such an exemption is agreed under international law in a treaty for the avoidance of double taxation (here: pursuant to Article 23(1) letter a, first sentence in conjunction with Article 15(1) of the Agreement for the Avoidance of Double Taxation with respect to Taxes on Income and Capital, *Abkommen zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen*, concluded between Germany and Turkey in 1985, in conjunction with the Act of Approval [*Zustimmungsgesetz*] of 27 November 1989), yet [the law referred for review] recognises the exemption when assessing tax in Germany only – and irrespective of the terms of the treaty – if the taxpayer shows that the [foreign] state entitled to exercise the right of taxation under the treaty has waived such right, or that the taxes assessed by that state on such income have been paid

– Order of Suspension and Referral from the Federal Finance Court (*Bundesfinanzhof*) of 10 January 2012 – I R 66/09 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Landau,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on 15 December 2015:

§ 50d(8) first sentence of the Income Tax Act, as revised by the Act on the Amendment of Tax Laws of 15 December 2003 (2003 Tax Amendment Act – *Steueränderungsgesetz*, Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2645), is compatible with the Basic Law.

R e a s o n s:

The referral relates to the question of whether § 50d(8) first sentence of the Income Tax Act (*Einkommensteuergesetz* – EStG) violates the Basic Law because it allows for a person who is subject to unlimited tax liability, and who has earned income from employment, to be taxed in a manner that diverges from the terms agreed in a treaty for the avoidance of double taxation. 1

A.

I.

Pursuant to § 1(1) first sentence EStG, natural persons who are domiciled or habitually resident in Germany are subject to unlimited liability for income tax. Pursuant to § 2(1) first sentence no. 4 EStG, income tax is imposed on (all) income from employment earned by the taxpayer while being subject to unlimited income tax liability. According to these provisions, all income from employment earned by natural persons who are domiciled or habitually resident in Germany is taxed under German law, irrespective of where the income is generated (so-called principle of world income – *Welteinkommensprinzip*). 2

On 16 April 1985, the Federal Republic of Germany and the Republic of Turkey concluded the Agreement for the Avoidance of Double Taxation with respect to Taxes on Income and Capital (*Abkommen zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen*, BGBl II 1989 p. 867 – hereinafter: DTT Turkey 1985), which provides as follows: 3

> Art. 15 DTT Turkey 1985 (Dependent personal services)
>
> (1) Subject to the provisions of Articles 16, 18, 19 and 20, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
>
> (2) - (3) … .

Art. 23 DTT Turkey 1985 (Elimination of double taxation in the State of residence)

(1) Double taxation for the residents of the Federal Republic of Germany shall be eliminated as follows:

a) Subject to the provisions of subparagraph (b), there shall be excluded from the basis upon which German tax is imposed, any item of income from sources within the Republic of Turkey and any item of income capital situated within the Republic of Turkey, which according to the foregoing Articles of this Agreement may be taxed, or shall be taxable only, in the Republic of Turkey; in the determination of its rate of tax applicable to any item of income or capital not so excluded, the Federal Republic of Germany may, however, take into account the items of income and capital, which according to the foregoing Articles may be taxed in the Republic of Turkey. […]

b) - d) … .

By Act of 27 November 1989 (BGBl II p. 866), the *Bundestag* approved the treaty with Turkey. 4

According to the stipulations in Arts. 15(1) and 23(1) letter a, first sentence DTT Turkey 1985, income derived from employment in Turkey by persons who are subject to unlimited tax liability in Germany does not count into the assessment basis for German taxes, thus deviating from the world income principle set forth in § 1(1) and 2(1) EStG. Such income may not be taken into consideration when assessing income tax under German law. It may be taken into consideration only when determining the tax rate for items of income from other sources. 5

In its version applicable to the present case, § 50d EStG, as revised by the Second Act on the Amendment of Tax Laws (2003 Tax Amendment Act) of 15 December 2003 (BGBl I p. 2645), addresses – in accordance with its official title – “Special Aspects regarding Double Taxation Treaties”. Subsection 8 provides: 6

> If income from employment earned by a person subject to unlimited tax liability (§ 19) is excluded from the assessment basis for German taxes on the basis of a treaty for the avoidance of double taxation, then the exemption from taxation shall be granted, irrespective of such treaty, only to the extent that the taxpayer shows that the state entitled under the treaty to exercise the right of taxation has waived such right or that the taxes assessed by that state on the income in question have been paid. If such proof is first furnished after the relevant income has been included in the assessment of income tax, the tax assessment shall be modified. § 175(1) second sentence of the Fiscal Code (*Abgabenordnung* – AO) shall apply accordingly.

Where a double taxation treaty provides for an exemption from German tax for income from employment, § 50d(8) EStG makes such exemption contingent on proof that the contracting state entitled under the treaty to exercise the right of taxation has waived such right or that the taxes assessed by the contracting state have been paid. During the course of the legislative process, the following arguments were put forward in this regard (*Bundesrat* document, *Bundesratsdrucksache* – 630/03, p. 66): 7

> "[§ 50d(8)] first sentence makes the exemption required under a double taxation treaty (DTT) for income from employment contingent on proof that the state where the employment was exercised has waived taxation of such income or that the tax assessed by that state has been paid. This aims to prevent that income is not taxed because the taxpayer breached its duty to declare income in the state in which employment was exercised due to which the state is often no longer able to enforce its tax claim upon gaining knowledge of the relevant factual circumstances, e.g. because means of enforcement against the taxpayer are no longer available. The legislature is at liberty to make a tax exemption provided in a DTT contingent on such proof. In this regard, cf. the remarks of the Federal Finance Court in the Judgment of 20 March 2002, I R 38/00, Federal Tax Gazette (*Bundessteuerblatt* – BStBl) II p. 819. If the income was already taxed in Germany the tax assessment is to be modified according to the second sentence [of § 50d(8)] once the taxpayer provides the proof required under the first sentence [of § 50d(8)]. This ensures that the right of taxation of the state in which employment is exercised is protected, and the risk of double taxation, which would otherwise arise, is avoided. Pursuant to the third sentence [of the provision], § 175(1) second sentence AO shall apply *mutatis mutandis*. Accordingly, the period for issuing the tax assessment shall begin upon expiration of the calendar year in which the proof required under the first sentence [of § 50d(8)] was furnished. The taxpayer thus has sufficient time to fulfil the conditions necessary for benefitting from the tax treatment provided for in the treaty."

§ 50d(8) EStG was applicable for the first time to the 2004 assessment period. 8

The DTT Turkey 1985 was denounced by the Federal Republic of Germany with effect from 31 December 2010. On 1 August 2012, the Agreement of 19 September 2011 between the Federal Republic of Germany and the Republic of Turkey for the Avoidance of Double Taxation and of Tax Evasion with respect to Taxes on Income (*Abkommen zwischen der Bundesrepublik Deutschland und der Republik Türkei zur Vermeidung der Doppelbesteuerung und der Steuerverkürzung auf dem Gebiet der Steuern vom Einkommen* – DTT Turkey 2011) […], approved by the *Bundestag* by Act of 24 May 2012 […], entered into force. 9

II.

1. In the initial proceedings, the plaintiffs – a married couple whose taxes are jointly assessed – challenged their income tax assessment for the year 2004. In that year, the husband had earned income from employment exercised both in Germany and in Turkey. The plaintiffs sought to have the income earned in Turkey declared tax-free [in Germany] in accordance with the stipulations of the DTT Turkey 1985. However, since they had failed to show pursuant to § 50d(8) first sentence EStG that the income earned in Turkey had been taxed there, or that Turkey had waived its right of taxation, the tax office treated their entire gross income from employment as taxable. The plaintiffs' action before the Finance Court (*Finanzgericht*) was unsuccessful. 10

2. By order of 10 January 2012, the Federal Finance Court suspended the appeal on points of law proceedings brought by the plaintiffs in order to obtain a decision from the Federal Constitutional Court on whether § 50d(8) first sentence EStG is compatible with the Basic Law. 11

In its reasoning for the referral, the Federal Finance Court submits that the appeal on points of law would have to be rejected if § 50d(8) first sentence EStG were constitutional. However, in the opinion of the Federal Finance Court, the provision violates Art. 2(1) in conjunction with Arts. 20(3), 25, and 3(1) of the Basic Law (*Grundgesetz* – GG). It is argued that upon concluding the double taxation treaty, Germany relinquished its right of taxation with respect to income from employment earned in Turkey. According to the Federal Finance Court, § 50d(8) first sentence EStG, pursuant to which Germany retains the right of taxation, therefore violates binding international treaty law. Moreover, the Federal Finance Court asserts that the provision runs contrary to the constitutional value judgment set out in Art. 25 GG, which states that the general rules of international law take precedence; the Federal Finance Court could not ascertain a viable justification in this regard. The Federal Finance Court concluded that the plaintiffs in the initial proceedings thus suffered a violation of their fundamental right to compliance with the constitutional order (a). In addition, [the Federal Finance Courts submits that] the provision [referred for review] contravenes the requirement of equal treatment in Art. 3(1) GG […]. 12

a) […] 13

While the current case-law of the Federal Finance Court and the prevailing opinion in scholarship does not accord constitutional relevance to a unilateral "breach" from international treaty obligations – known as a "treaty override" –, the referring Senate [of the Finance Court] is poised to depart from this scholarly position as well as from its own case-law. Instead, it intends to endorse the views held by [certain] other legal scholars and reflected in the recent case-law of the Federal Constitutional Court. The Federal Finance Court makes reference to the orders in *Görgülü* (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 111, 307) and East German Expropriation Case (*Alteigentümer,* BVerfGE 112, 1), as well as to the judgment on Preventive Detention (*Sicherungsverwahrung*, 14

BVerfGE 128, 326), submitting that in these decisions the Federal Constitutional Court had affirmed that all state organs have a duty, derived from the rule of law principle, to observe the European Convention on Human Rights, which by virtue of its approval in accordance with Art. 59(2) GG is accorded the rank of a federal statute; the latter also applies to double taxation treaties. The Federal Finance Court asserts that in the *Görgülü* Order, the Federal Constitutional Court held that the Constitution requires the legislature to observe international treaty law unless, as an exception, the conditions on which the Federal Constitutional Court has made the permissibility of a deviation contingent are met. On this basis, the Federal Finance Court derives from the *Alteigentümer* Order the duty that all state organs observe those rules of international law that are binding on the Federal Republic of Germany and, to the extent possible, refrain from violations. By implication, this means that the legislature is constitutionally obliged – under the principle of the rule of law set out in Art. 20(3) GG – to observe international treaty law. The Federal Finance Court states that the Constitution's openness, in principle, to international law is paramount, elaborating that – in terms of substantive law – this principle acts as a restraint on the legislature's power to dispose of the existing legal laws; the extent to which this principle acts as a restraint is determined by the international treaty at issue. With a view to the *Reichskonkordat* Decision (cf. BVerfGE 6, 309 <363>), the Federal Finance Court acknowledges that, initially, the Federal Constitutional Court may have taken a different position on this issue. However, the referring court believes it to be discernible from the *Alteigentümer* Order of the Federal Constitutional Court that special justification is necessary when diverging from international treaties, that strict requirements apply in this case, and that respect for human dignity and fundamental rights provide a basis for justification in this regard. The Federal Finance Court submits that the Federal Constitutional Court has thus established a methodological basis for reviewing the necessity of a "treaty override". In balancing the principles of democracy and the rule of law, which are in conflict in this case, the decisive factor is whether the legislature could have chosen a less severe means than a breach of treaty.

As regards the present case, the Federal Finance Court submits that a justification for the violation of international law was not discernible. […] 15

b) […] 16

3. […] 17-19

III.

[…] 20

B.

The referral is admissible. 21

I.

[…] 22-23

II.

[…] 24-31

C.

The referral is unfounded. § 50d(8) first sentence EStG, as revised by the 2003 Tax Amendment Act, is compatible with the Basic Law. Neither its (potential) conflict with international treaties (I.) nor a violation of Art. 3(1) GG (II.) render the provision unconstitutional. 32

I.

1. In the order established by the Basic Law, international treaties generally share the rank of ordinary federal statutes. Therefore, they can be superseded by subsequent federal statutes that contradict the treaty stipulations (a-c). Neither the principle of the Constitution's openness to international law (d) nor the principle of the rule of law (e) yields a different result. 33

a) Within the German legal order, the rank and classification of an international treaty are determined by the Basic Law, several provisions of which regulate the relationship between international law and national law. For instance, in Art. 1(2) GG, the Constitution acknowledges inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world. These inalienable rights antedate the Basic Law and may not even be disposed of by the constitutional legislature (*Verfassungsgeber)* (cf. BVerfGE 111, 307 <329>; 112, 1 <27>; 128, 326 <369>). Arts. 23(1), and 24(1) and (1a) GG authorise the legislature to transfer sovereign powers to the European Union and other international organisations and transfrontier institutions; the legislature may also specify that law adopted by such organisations takes precedence of application (*Anwendungsvorrang*) over domestic law (cf. BVerfGE 37, 271 <280>; 73, 339 <374 and 375>). Besides, Art. 24(2) GG empowers [the Federation] to enter into a system of mutual collective security and to consent to corresponding limitations upon its sovereign powers (cf. BVerfGE 90, 286 <345 et seq.>). Art. 25 GG provides that the general rules of international law are an integral part of federal law and that they shall take precedence over the laws (cf. BVerfGE 23, 288 <300>; 31, 145 <177>; 112, 1 <21 and 22>). Finally, pursuant to Art. 59(2) first sentence GG, international treaties that regulate the political relations of the Federation or relate to subjects of federal legislation require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. 34

It follows from the existence of such "opening clauses" (*Öffnungsklauseln*), that the Basic Law determines not only the effectiveness but also the rank of international law within the national legal order. In this regard, the Constitution specifies within its 35

scope the effectiveness and applicability of international law, as well as the resolution of conflicts between national and international law. In this respect, the Constitution may, in principle, also accord precedence to national law.

Since the effectiveness and applicability of international law within the German legal order are dependent on the stipulations of the Basic Law, they may also be limited by the Constitution. This may lead to discrepancies between law that is effective in the domestic legal order, and the state's obligations under international law. 36

b) By virtue of the direct "order of implementation" (*Vollzugsbefehl*) set out in the Constitution, the general rules of international law are effective at the domestic level and take precedence over laws (Art. 25 GG) (aa). Conversely, international treaties that regulate the political relations of the Federation or relate to subjects of federal legislation require an act of approval pursuant to Art. 59(2) first sentence GG in order to be effective at the domestic level, and as a matter of principle, they have the rank of an ordinary (federal) statute only (bb). 37

aa) Art. 25 first sentence GG gives effect to the general rules of international law at the domestic level (1). According to the status conferred upon them in Art. 25 second sentence GG, within the national legal order the general rules of international law rank higher than (ordinary) statutes but lower than the Constitution (2). International treaties, however, do not generally take precedence over (ordinary) statutes under Art. 25 second sentence GG (3). 38

(1) Art. 25 first sentence GG specifies that the general rules of international law are an integral part of federal law. This gives direct effect to such rules in the German legal order, i.e. without the need for another (ordinary) statutory instrument (cf. BVerfGE 6, 309 <363>). 39

(2) Art. 25 second sentence GG provides that the general rules of international law take precedence over the laws, thus according them precedence over statutes. A statute that conflicts with a general rule of international law therefore violates the constitutional order within the meaning of Art. 2(1) GG (cf. BVerfGE 6, 309 <363>; 23, 288 <300>; 31, 145 <177>; 112, 1 <21 and 22>). 40

Based on the wording of its second sentence, however, Art. 25 GG should be understood in the sense that, while it confers to the general rules of international law a rank superior to that of (ordinary) statutes, they nonetheless rank below the Constitution ("in-between" rank) (cf. BVerfGE 6, 309 <363>; 37, 271 <279>; 111, 307 <318>; 112, 1 <24, 26>; […]). This is consistent with Art. 100(2) GG, which tasks the Federal Constitution Court with determining whether a rule of international law is an integral part of federal law, whereas it does not call on the Court to review whether the Basic Law is compatible with (prior-ranking) provisions of international law. 41

(3) The general rules of international law include customary international law and the general principles of international law (cf. BVerfGE 15, 25 <32 and 33, 34 and 35>; 23, 288 <317>; 31, 145 <177>; 94, 315 <328>; 95, 96 <129>; 96, 68 <86>; 117, 42

141 <149>; 118, 124 <134>), i.e. those rules of international law that are binding upon all or at least most states irrespective of treaty-based consent (cf. Herdegen, in: Maunz/Dürig, GG, Art. 25 para. 1 <February 2003>; cf. also BVerfGE 15, 25 <34>; 16, 27 <33>; 118, 124 <164 et seq.>). Accordingly, provisions in international treaties do not generally enjoy the precedence Art. 25 second sentence GG affords (cf. BVerfGE 6, 309 <363>; 31, 145 <178>; 117, 141 <149>; 118, 124 <134 and 135>). In contrast to other legal systems – such as in France […] or Luxembourg […] – the Basic Law does not give general precedence to international treaties over ordinary statutory law.

bb) In accordance with Art. 59(2) first sentence GG, international treaties that regulate the political relations of the Federation or relate to subjects of federal legislation first become effective on the domestic level through the act of approval specified in the provision (1). They have the rank of ordinary federal statutes (2). Neither the principle of *pacta sunt servanda* (3), nor § 2(1) AO (even with regard to international treaties on taxation) (4), yields a different result. 43

(1) The requirement of [parliamentary] approval under Art. 59(2) first sentence GG serves a number of purposes. In addition to the distribution of decision-making powers in the area of foreign affairs (cf. BVerfGE 90, 286 <357>; 104, 151 <194>; 118, 244 <258>), it serves to enable the legislative branch to exercise timely, and thus effective, control over the executive branch prior to a treaty becoming binding under international law (cf. BVerfGE 90, 286 <357>; 118, 244 <258>; 131, 152 <195 and 196>). Furthermore, it ensures the primacy of law (*Vorrang des Gesetzes*) and the requirement of a statutory provision (*Vorbehalt des Gesetzes*), since Art. 59(2) first sentence GG provides that stipulations of an international treaty may establish, modify, or revoke rights and duties for individuals only if the treaty has been approved by the legislature […]. Moreover, in the interest of promoting viable relations between subjects of international law, the requirement of approval is designed to prevent (important) treaties from being concluded with foreign states if subsequently they cannot be fulfilled due to a lack of the required endorsement by the legislature (purpose of ensuring implementation) (cf. BVerfGE 1, 372 <389 and 390>; 118, 244 <258>). Thus, the requirement of approval also serves to protect legislative discretion since it prevents international law obligations that call for legislative action at the domestic level from predetermining parliamentary decisions [...]. 44

(2) Moreover, it follows from Art. 59(2) first sentence GG that unless an international treaty falls within the scope of other, more specific “opening clauses”, particularly Arts. 23 to 25 GG, it has the rank in domestic law of an ordinary (federal) statute; thus, it does not have a rank above statutory law, let alone constitutional rank (cf. BVerfGE 111, 307 <318>). 45

Art. 59(2) first sentence GG determines not only the methodical approach by way of which treaty provisions become effective in the national legal order but also the rank accorded to provisions of international treaty law that have been given effect within 46

the national legal system. Unless an enabling provision in the Basic Law provides a legal basis to that end, (ordinary) statutory law cannot accord a higher rank to international treaty provisions. Accordingly, the Federal Constitutional Court has consistently emphasised that an order giving effect to an international treaty at the national level (*Rechtsanwendungsbefehl*) within the meaning of Art. 59(2) first sentence GG does not accord the treaty a rank in the hierarchy of norms that is superior to that of laws (cf. BVerfGE 19, 342 <347>; 22, 254 <265>; 25, 327 <331>; 35, 311 <320>; 74, 358 <370>; 111, 307 <317>; 128, 326 <367>).

(3) The principle of *pacta sunt servanda*, which for its part is a general rule of international law […], does not yield a different result. While it is true that the principle places a special duty (under international law) on the state vis-à-vis the respective contracting parties, it does not in any way govern the validity and rank of international treaties at the domestic level […]. In particular, it does not entail that all provisions of an international treaty qualify as general rules of international law within the meaning of Art. 25 GG (cf. BVerfGE 31, 145 <178>; cf. also Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the Second Senate of 22 August 1983 – 2 BvR 1193/83 –, Neue Zeitschrift für Verwaltungsrecht – NVwZ 1984, p. 165 <165>; BVerfG, Order of the Second Chamber of the First Senate of 24 October 2000 – 1 BvR 1643/95 –, Zeitschrift für Vermögens- und Immobilienrecht – VIZ 2001, p. 114 <114>). 47

(4) § 2(1) AO does not change this result, not even in terms of international treaties on taxation […]. According to that provision, treaties on taxation concluded with other countries within the meaning of Art. 59(2) first sentence GG, take precedence over tax legislation insofar as they have become part of directly applicable domestic law. But since § 2 AO is a provision of ordinary statutory law, it cannot, within its regulatory scope, confer a higher rank upon international treaties in the hierarchy of norms […]. At most, it could specify that national tax legislation is subsidiary to double taxation treaties and other international treaties concerning tax law. 48

c) Where international treaties have the rank of (ordinary) federal statutes, they may be superseded by subsequent contradicting federal statutes in accordance with the principle of *lex posterior* (aa). Art. 59(2) first sentence GG does not call this into question (bb). Similarly, recent case-law of the Federal Constitutional Court has not established any special conditions on which such superseding effect were dependent (cc). International law does not prevent legal acts that violate international law from being effective at the domestic level (dd). 49

aa) The principle of *lex posterior derogat legi priori* applies in the event of a conflict between domestic law of equal rank, unless the earlier provision is more specific than the newer one or the applicability of the principle of *lex posterior* is waived. Where provisions of an international treaty are effective within the domestic legal order, and where they share the rank of an (ordinary) federal statute, it follows that they may also be abrogated by a subsequent contradicting federal statute to the extent of that con- 50

tradiction […].

bb) Art. 59(2) first sentence GG does not limit the applicability of the principle of *lex posterior* in relation to international treaties. Since the legislature may generally only approve an international treaty in its entirety or not approve it at all (cf. BVerfGE 90, 286 <358>), it is asserted by some that the act of approval and the international treaty are inseparably linked. According to this view, the act of approval is protected by Art. 59(2) first sentence GG against substantive modifications, unless repealed in full [...], and the legislature may repudiate an international treaty only in conformity with international law [...]. 51

This view, however, must be rejected. 52

In particular, it conflicts with the principle of democracy (Art. 20(1) and (2) GG) and the principle of parliamentary discontinuity (*Grundsatz der parlamentarischen Diskontinuität* [translator's note: under the principle of parliamentary discontinuity, draft legislation and all other matters still pending in the Bundestag automatically lapse with the end of the parliamentary term, guaranteeing a "clean slate" to the new Parliament post-election]). Power in democracy is always temporary in nature (cf. Dreier, in: Dreier, GG, vol. 2, 2nd ed. 2006, Art. 20 <Demokratie> para. 79). This implies that, in accordance with the will of the people as expressed through elections, subsequent legislatures must be able to revise, within the limits set by the Basic Law, legislative acts undertaken by earlier legislatures […]. It would be incompatible with this concept if a parliament could bind subsequent legislatures during later parliamentary terms and limit their ability to rescind or correct past legislative decisions. Otherwise, political views would be set in stone […]. Moreover, the act of approval required pursuant to Art. 59(2) first sentence GG is intended to give an international treaty that is applicable at the domestic law a sufficient level of democratic legitimation [...], not lower such level. It is designed to protect the legislature's discretion […]. It would run counter to that freedom if Art. 59(2) first sentence GG were to be interpreted as "blocking any change" (*Änderungssperre*) for the future […]. 53

In addition, in contrast to the executive and judicial branches, the legislature is bound only by the constitutional order, not by ordinary law, pursuant to Art. 20(3) GG. The legislature should certainly be able to amend or revise the law, subject to the limits set by the Constitution. It is thus specifically the legislature which ought to be free of constraints imposed by ordinary statutory law [...]. If the legislature were to forfeit its power to make law to the extent that it approved international treaties by way of a federal statute, this would bind it in a manner that runs contrary to Art. 20(3) GG […]. 54

Furthermore, the legislature does not have the competence to denounce international treaties. If ratifying an international treaty indeed meant that the legislature had thereby bound itself, it would permanently forfeit its power to enact legislation (cf. BVerfGE 68, 1 <83, 85 and 86>). However, since the principle of democracy forbids the legislature from being permanently bound by legislative acts of its predecessors, and since the legislature simultaneously lacks the power to terminate international 55

treaties containing provisions that it no longer approves of, it must at least, within its area of competence, be able to enact legislation that diverges from what was agreed under international law.

Finally, just like any other domestic law, the act of approval to an international treaty does not – from the perspective of those participating in legal relationships and transactions – constitute a guarantee that no diverging statute will be enacted. [...]. 56

cc) Nor does it derive from past decisions of the Federal Constitutional Court that provisions in international treaties cannot be superseded by subsequent (federal) statutes that contradict such provisions. 57

For instance, in its decision on the stationing of chemical weapons, the Second Senate held that the Constitution could hardly be interpreted as prohibiting the Federal Republic of Germany from acting contrary to international law (cf. BVerfGE 77, 170 <233 and 234>; cf. also BVerfGE 68, 1 <107>). In its decision on the presumption of innocence it held that statutes must be interpreted and applied in conformity with Germany's obligations under international law, even if such obligations became effective at a later date than a relevant international treaty. This is because it may not be assumed that the legislature intended to diverge from the Federal Republic of Germany's obligations under international law, or to enable the violation of such obligations, unless the legislature has stated a clear intention to this end (cf. BVerfGE 74, 358 <370>). [According to the relevant decision of the Court,] it must be assumed that the legislature generally does not seek to place itself in opposition to Germany's international law obligations (cf. BVerfGE 74, 358 <370>; […]), even though it has the power of doing so (cf. BVerfGE 6, 309 <362 and 363>). 58

In addition, contrary to a position taken by some scholars [...], the Federal Constitutional Court did not state in the *Görgülü* Order (BVerfGE 111, 307) that the legislature may diverge from international treaties only to protect fundamental constitutional principles. It is true that, in this decision, the Senate held that it is not contrary to the aim of openness to international law if the legislature fails to observe international treaty law in exceptional cases, provided this is the only way to avert a violation of fundamental constitutional principles (cf. BVerfGE 111, 307 <319>). Moreover, it held that the act of approval places an obligation on the responsible authorities to take into account the European Convention on Human Rights and the decisions of the European Court of Human Rights, and further held that authorities are required to take notice of the relevant texts and case-law and take them into consideration in their internal decision-making process (cf. BVerfGE 111, 307 <324>). However, it does not follow that a statute is necessarily unconstitutional if it is incompatible with an international treaty. The *Görgülü* Order did not touch upon the consequences of a violation by the legislature of international (treaty) law. Instead, it addressed but the legal consequences that ensue when regular courts fail to sufficiently observe international law. 59

dd) As a rule, international law does not prohibit legal acts that violate international law from being effective at the domestic level (1). However, this does not imply that a 60

violation of international law is insignificant (2).

(1) International law does not preclude legal acts that violate international law from being effective at the domestic level. There are no general rules of international law concerning the fulfilment of treaty obligations at the domestic level (cf. BVerfGE 73, 339 <375>; cf. also BVerfGE 111, 307 <322>; 123, 267 <398>; 126, 286 <302>; 134, 366 <384, para. 26>; […]). Rather, international law leaves it to each state to determine how to discharge its obligation to comply with stipulations of international law (for instance, with respect to the European Convention on Human Rights, BVerfGE 111, 307 <316>, with further references; 128, 326 <370>). Although international law requires states to perform in good faith the treaties they have concluded (Art. 26 of the Vienna Convention on the Law of Treaties – VCLT), it only bars them from invoking domestic law to justify the breach of an international law obligation at the level of international law (Art. 27 first sentence VCLT). 61

In this respect, international law leaves it to each state to determine, on the basis of the relevant rules under national law governing the conflict and hierarchy of laws, the consequences in domestic law of a conflict between an international treaty and a statute, and to give precedence to national law (cf. […]). Domestic rules relate to other legal relationships than the international provisions with which they conflict. 62

(2) Even though international law does not preclude domestic effectiveness of legal acts that violate international law, this does not mean that the resulting violation is insignificant. If a state violates its obligations under an international treaty, the other contracting state or states can respond to the breach of treaty in a number of ways. Less serious breaches of a treaty generally entitle the other contracting state or states only to exercise a regular right of denunciation (Art. 56 VCLT), to demand compliance with treaty obligations as a form of restitution, or – as a subsidiary measure – to demand reparation (cf. Arts. 34 et seq. of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001) of 26 July 2001 – ILC Draft Articles <UN Doc. A/CN. 4/L. 602/Rev. 1>; […]). Material breaches may entitle the other contracting state or states to invoke the breach as a ground for terminating the treaty or suspending its operation, irrespective of whether a right of termination was agreed upon (Art. 60(1) VCLT; […]). Pursuant to Art. 60(3) VCLT, a material breach consists in the violation of a provision essential to the accomplishment of the object or purpose of the treaty (cf. Art. 2b in conjunction with Art. 12 of the ILC Draft Articles). 63

d) Nor does it follow from the unwritten principle of the Constitution's openness to international law that statutes in violation of international law are unconstitutional (*contra* […]). Although the principle has constitutional rank (aa), it does not entail an unreserved constitutional duty to comply with all rules of international law. Rather, this principle primarily serves as a guideline for interpretation (bb). In particular, the principle of openness to international law does not supersede the varied provisions of the Basic Law governing the rank of the various sources of international law, nor may it be used to undermine their systematic concept (cc). 64

aa) The principle of openness to international law has constitutional rank. It emerges from an overall assessment of the constitutional provisions that address the relationship between Germany and the international community […]. The Basic Law commits German public authority to international cooperation (Art. 24 GG) and European integration (Art. 23 GG). It gives special emphasis to international law, at least with respect to its general rules (Art. 25 GG), and by way of Art. 59(2) GG integrates international treaty law into the system of separation of powers. Moreover, it permits Germany to enter systems of mutual collective security (Art. 24(2) GG), mandates the use of arbitration for the peaceful settlement of disputes between states (Art. 24(3) GG), and declares wars of aggression to be unconstitutional (Art. 26 GG) (cf. BVerfGE 111, 307 <318>). As stated in the Preamble, the aim of these provisions is to integrate Germany as a peaceful and equal partner within the system of international law established by the international community (cf. BVerfGE 63, 343 <370>; 111, 307 <318>). These provisions embody the constitutional decision in favour of international cooperation on the basis of respect for and promotion of international law (cf. BVerfGE 111, 307 <317 and 318>; 112, 1 <25>; […]). As a result, they oblige all public authority to work towards averting discrepancies between the international and domestic legal order, and to ensure that Germany does not become liable to other subjects of international law for violating international law (cf. BVerfGE 58, 1 <34>; 59, 63 <89>; 109, 13 <23 and 24>; 109, 38 <49 and 50>; 111, 307 <316, 318, 328>; 112, 1 <25>; 128, 326 <368 and 369>). 65

The derived principle of the Basic Law's openness to international law has been emphasised in the Federal Constitutional Court's recent case-law, primarily with respect to human rights covenants in general and to the European Convention on Human Rights in particular (cf. BVerfGE 92, 26 <48>; 111, 307 <317 et seq.>; 112, 1 <26>; 113, 273 <296>; 123, 267 <344, 347>; 128, 326 <365, 366, 369>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 9, 174 <186, 190, 191, 192>; 17, 390 <397 and 398>), but it has also been addressed in the Court's older case-law already (cf. BVerfGE 6, 309 <362>; 18, 112 <121>; 31, 58 <75>; 41, 88 <120 and 121>). Whereas the Court initially focused on the limits of openness to international law (cf. BVerfGE 6, 309 <362 and 363>; 18, 112 <121>; 31, 58 <75 and 76>; 41, 88 <120 and 121>), its present case-law stresses that the principle commits state organs to work towards enforcing international law so as to reduce the risk of non-compliance (cf. BVerfGE 109, 38 <50>; 111, 307 <328>; 112, 1 <25>). 66

bb) However, the principle of the Constitution's openness to international law does not entail an unreserved constitutional duty to comply with all international treaties (1-2). It primarily serves as a guideline for the interpretation of fundamental rights, the constitutional principles under the rule of law, and ordinary law (3). 67

(1) Although the Basic Law seeks to integrate Germany into the legal community of peaceful and democratic states, it does not relinquish sovereignty in relation to the final authority that ultimately belongs to the Constitution. 68

(2) It does not follow from the principle of the Constitution's openness to international law that there is an unreserved constitutional duty to comply with all rules of international law. As the Second Senate held in the *Alteigentümer* Order, this would conflict with the Basic Law's structural approach laid down in Arts. 23 to 26, 1(2), 16(2) second sentence, and 59(2) GG and thus would also conflict with the varied provisions on the rank of rules of international law at the domestic level (cf. BVerfGE 112, 1 <25>). Since these provisions are the source of the principle of openness to international law, they also inform the determination of its specific meaning and content. The Basic Law does not provide that the German legal order is subordinate in every case to international law or that international law takes absolute precedence even over constitutional law. Rather, it seeks to open the domestic legal system up to international law and international cooperation (only) in the form of a regulated binding effect (cf. BVerfGE 112, 1 <25>), i.e. in the manner provided for in the varied provisions of the Basic Law on the relationship between the two legal systems. However, by no means do the relevant constitutional provisions establish an absolute duty to comply with provisions of international treaties. 69

(3) On the contrary, there are three dimensions to the duty to respect international law that follows from the Constitution's openness to international law: First, German state authorities are obliged to comply with the provisions of international law that are binding on the Federal Republic of Germany and to refrain from violations where possible. Second, the legislature must ensure that with respect the domestic legal order, violations of international law committed by German state organs can be remedied. Third, German state organs may also be under a duty (the relevant conditions need not be specified further in the present case) to enforce international law within their respective area of responsibility if violations are committed by foreign states (cf. BVerfGE 112, 1 <26>). 70

(4) According to the case-law of the Federal Constitutional Court, the principle of openness to international law also serves as a guideline for the interpretation of fundamental rights, the constitutional principles of the rule of law, and ordinary law (on the European Convention on Human Rights and on the case-law of the European Court of Human Rights as guidelines for interpretation, cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <315 and 316, 317, 324, 325, 329>; 120, 180 <200 and 201>; 128, 326 <365, 367 and 368>; BVerfGK 3, 4 <8>; 9, 174 <190>; 10, 66 <77>; 10, 234 <239>; 11, 153 <159 et seq.>; 20, 234 <247>). It requires interpreting, where possible, national statutes in such a way as to avoid a conflict with the Federal Republic of Germany's international law obligations (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <317 and 318>; 120, 180 <200 and 201>; 128, 326 <367 and 368>; BVerfGK 9, 174 <190>). In the case-law of the Chambers of the Federal Constitutional Court, this has been specified to require that if the relevant methodological principles of interpretation allow for a statute to be interpreted in several possible ways, then the interpretation that is open to international law is generally to be preferred (cf. BVerfGK 10, 116 <123>; BVerfG, Order of the Second Chamber of the 71

Second Senate of 8 December 2014 – 2 BvR 450/11 –, NVwZ 2015, p. 361 <364>; similarly Proelß, in: Linien der Rechtsprechung des Bundesverfassungsgerichts – erörtert von den wissenschaftlichen Mitarbeitern, vol. 1, 2009, p. 553 <556 et seq.>).

72 However, the requirement derived from the Basic Law to interpret a statute in a manner that is open to international law is not absolute, nor does it apply without regard to the methodological limits of statutory interpretation. It does not require that the domestic legal order be schematically aligned in parallel to international law. Rather, the substantive values of international law must be received [in domestic law] as comprehensively as possible, provided that this is both methodologically tenable and compatible with the requirements of the Basic Law (cf. BVerfGE 111, 307 <323, 329>; 128, 326 <366, 371 and 372>; BVerfGK 20, 234 <247>; with respect to the European Convention on Human Rights, cf. […]). The principle of openness to international law takes effect only subject to the order established by the Basic Law on the basis of democracy and the rule of law (cf. BVerfGE 111, 307 <318, 323, 329>; 128, 326 <366, 371 and 372>). For instance, it has no bearing on the principle of democratic self-determination (cf. BVerfGE 123, 267 <344>). It is true that, in general, it may not be assumed that the legislature intends to diverge from the obligations of the Federal Republic of Germany under international law, or that it intends to enable the breach of such obligations, unless the legislature has stated a clear intention to this end (cf. BVerfGE 74, 358 <370>; BVerfGK 10, 116 <123>). An interpretation that it is clearly contrary to statutory or constitutional law, however, is not tenable from a methodological perspective (cf. BVerfGE 111, 307 <329>; […]).

73 cc) Therefore, Art. 59(2) first sentence GG may not be construed, in terms of an interpretation that is open to international law, to imply that the legislature were not allowed to disregard binding obligations of international treaties only in exceptional cases in which this is the only way to prevent a violation of fundamental constitutional principles. An interpretation of Art. 59(2) first sentence GG that would, at least as a general rule, accord international treaties a rank above that of (ordinary) statutes, is untenable from a methodological perspective. The principle of openness to international law may not supersede the provisions of the Basic Law concerning the rank of the various sources of international law (1), nor can it be used to undermine the relevant systematic concept (2).

74 (1) In Art. 59(2) GG the Basic Law determined that domestically, international treaties enjoy (only) the rank of an (ordinary) federal statute (cf. BVerfGE 19, 342 <347>; 22, 254 <265>; 25, 327 <331>; 35, 311 <320>; 74, 358 <370>; 111, 307 <317 and 318>; 128, 326 <367>; BVerfGK 10, 116 <124>). The principle of openness to international law – which for its part is not a general rule of international law within the meaning of Art. 25 GG (cf. BVerfG, Order of the Second Chamber of the First Senate of 24 October 2000 - 1 BvR 1643/95 -, juris, para. 11) and which is derived, inter alia, from Art. 59(2) GG – changes neither this classification [in terms of rank] nor the resulting applicability of the principle of *lex posterior*. In this regard, the Senate held in its *Reichskonkordat* Decision that the Basic Law's openness to international law does

not go so far as to ensure compliance with international treaties by binding the legislature to the corresponding law (cf. BVerfGE 6, 309 <362 and 363>). The unwritten constitutional principle of openness to international law that derives from the Basic Law may specify or supplement it. It cannot, however, amend or repeal written constitutional law in a manner that is contrary to the competence and methodology set forth in Art. 79(1) and (2) GG […].

(2) The interpretation of Art. 59(2) GG that is at issue in the present case and that invokes the principle of openness to international law would ultimately eliminate the differences between the various sources of international law in terms of their binding effect, as determined by the specific rank accorded to the respective source under the Basic Law. As a result, the Basic Law's systematic concept would be undermined […]. This becomes quite apparent with respect to double taxation treaties: Since double taxation treaties do not normally violate the fundamental principles of the Constitution […] they would generally enjoy a rank that *de facto* would be superior to that of statutes – just like the general rules of international law. However, such an equation [of treaty law and the general rules of international law] would be inconsistent with the distinction made in Arts. 25 and 59(2) GG. The interpretation of Art. 59(2) GG may not disregard [this distinction]. 75

Moreover, the assertion that Art. 59(2) GG be interpreted in conformity with international law fails to take into account that the Basic Law distinguishes not only between international treaty law and the general rules of international law, but also between imperative provisions that may not be modified even by the constitutional legislature (*Verfassungsgeber)* – particularly inviolable and inalienable human rights (Art. 1(2) GG) – and other international law (cf. BVerfGE 111, 307 <329>; 112, 1 <27 and 28>; 128, 326 <369>). Therefore, although the Federal Finance Court and a number of legal scholars have relied on decisions of the Federal Constitutional Court, all of which concerned issues pertaining to fundamental rights and human rights (cf. BVerfGE 111, 307 <308 et seq.>; 112, 1 <13 et seq.>; 128, 326 <359 et seq.>), in order to establish that the legislature is generally bound by international treaty law, the decisions in question are not immediately applicable to the facts in the present case (on the lack of transferability of decisions due to the distinct nature of the overall normative structure, cf. [...]). 76

e) Contrary to the view set that is forth particularly in tax literature and that is now adopted by the Federal Finance Court [...], a unilateral treaty override is not unconstitutional on the grounds that it violates the principle of the rule of law. The principle of the rule of law embodied in the Basic Law must be interpreted in a manner that satisfies the requirements of a systematic interpretation of the Constitution. In any event, an interpretation (purportedly) based on the rule of law is limited by express provisions in the Basic Law and by the principle of democracy (aa). Therefore, the principle of the rule of law cannot serve as a basis for asserting that international treaty law take (conditional) precedence over (ordinary) statutory law, particularly where this conflicts with Arts. 25 second sentence and 59(2) GG, or for asserting that the princi- 77

ple of *lex posterior* has limited applicability (bb).

aa) Constitutional law does not merely comprise the individual provisions in the written Constitution. Apart from that, it also comprises certain general principles and guiding concepts that provide for inner cohesiveness and that connect the provisions of the Constitution. The constitutional legislature *(Verfassungsgeber)* did not specify these principles and concepts in any one particular legal provision because they already permeated the pre-constitutional landscape on which the drafting of the Constitution was based […]. The relevant principles include the principle of the rule of law, which derives from an integrated assessment of the stipulations in Art. 20(3) GG, specifying the binding effect on the three branches of government, and those in Arts. 1(3), 19(4), and 28(1) first sentence GG, as well as from the Basic Law's overall concept (cf. BVerfGE 2, 380 <403>). Certainly, the principle of the rule of law is primarily based on Art. 20(3) GG and its provisions specifying binding effects on the state authority (cf. BVerfGE 35, 41 <47>; 39, 128 <143>; 48, 210 <221>; 51, 356 <362>; 56, 110 <128>; 58, 81 <97>; 101, 397 <404>; 108, 186 <234>; 133, 143 <157 and 158, para. 40>; 134, 33 <89, para. 129>; established case-law). 78

The principle of the rule of law does not establish any requirements or prohibitions that are determined in an unequivocal manner or specified in every detail. Rather, its specific meaning depends on the relevant factual circumstances (cf. BVerfGE 7, 89 <92 and 93>; 65, 283 <290>; 111, 54 <82>). Because the principle of the rule of law is so broad and undefined in nature, caution is warranted when deducing that it holds specific binding effects in a given case (cf. BVerfGE 90, 60 <86>; cf. also BVerfGE 57, 250 <276>; 65, 283 <290>; 111, 54 <82>). In any event, an interpretation of the Basic Law that is (purportedly) based on the rule of law is limited by other provisions in the Basic Law. It must not conflict with the written Constitution […]. Therefore, the principle of the rule of law does not constitute a gateway for a schematic "enforcement" of international law that is inconsistent with the varied provisions of the Basic Law governing the binding effect of rules of international law (with respect to the implementation of decisions of the European Court of Human Rights, cf. BVerfGE 111, 307 <Headnote 1; 323 and 324>). 79

bb) If a treaty override is said to be unconstitutional by virtue of a violation of the principle of the rule of law, this would mean that international treaty law is conceded at least conditional precedence over (ordinary) statutory law in a manner that is contrary to the concept of the Basic Law as derived from Arts. 25 second sentence and 59(2) GG in particular. A constitutional prohibition of treaty overrides would result in depriving the legislature of the ability to make corrective changes not only to the agreement itself – which may be denounced only after a period of several years (cf. Art. 30(2) first sentence DTT Turkey 1985) and which, in any event, may not be denounced by the legislature pursuant to the Basic Law's distribution of competences as set out in Art. 59(1) GG (cf. para. 55, above); rather, the legislature would also be barred from correcting any interpretation thereof as performed by regular courts in their case-law (cf. BVerfGE 135, 1 <15, para. 45>; […]). This would conflict not only 80

with the decision set out in Arts. 25 and 59(2) GG against subordinating the Constitution to international law and in favour of according international treaty law the rank of an ordinary statute instead, but also with the principle of democracy.

The *Packaging Tax* Judgment of the Second Senate does not yield a different result. That case concerned a conflict arising between provisions of the legislature deciding on tax law (*Land*) and those of the legislature deciding on substantive law [for the relevant subject matter] (Federation), i.e. the priority of federal law under Art. 31 GG (although this was not expressly mentioned by the Senate) and coherence of the (unified) national legal order. To resolve this conflict, the Senate developed the principle that the legal order must be free of inner contradictions (*Widerspruchsfreiheit der Rechtsordnung*) (cf. BVerfGE 98, 106 <118 and 119>). It is intended to prevent persons from being subjected to contradictory legal stipulations imposed by different legislatures. By contrast, a treaty override involves a conflict between two legal provisions with equal rank that were enacted by the same legislature. As held by the Senate in the *Packaging Tax* Judgment, such conflicts are generally to be resolved "according to the rank, temporal sequence, and specificity of the provisions" (BVerfGE 98, 106 <119>). 81

2. In light of the foregoing, there is no need to determine whether § 50d(8) first sentence EStG constitutes a treaty override. As a rule, the Basic Law does not prohibit divergent national provisions from overriding the type of international treaties referenced in this provision (a). This approach does not violate the principle of the Basic Law's openness to international law (b) nor the principle of the rule of law (c); nor do other considerations oppose such an approach (d). 82

a) The DTT Turkey 1985 is an international treaty. Neither does the treaty restate general rules of international law in a clarifying manner, nor does the general rule of international law of *pacta sunt servanda* convert the individual provisions of a double taxation treaty into general rules of international law. Thus, Art. 25 GG is already inapplicable given its constituent elements, and cannot serve as the relevant standard for the constitutional review of the treaty override at issue here. 83

The only standard relevant for the constitutional review of an override of the DTT Turkey 1985 is Art. 59(2) first sentence GG. In accordance with that provision, the effectiveness within the domestic legal order of double taxation agreements, as well as of other international treaties that relate to subjects of federal legislation, is dependent on an order giving effect to them at the domestic level by way of a federal statute. As a result, the relevant treaties acquire, at the domestic level, the rank of an (ordinary) federal statute. 84

Pursuant to Art. 20(3) first half-sentence GG, and in conformity with the principle of democracy set out in Art. 20(1) and (2) GG, the legislature is bound only by the constitutional order and not by ordinary laws. For that reason, it may repeal or amend the Act of Approval to the DTT Turkey 1985 by enacting statutes that contradict the terms of the double taxation treaty at the substantive level, regardless of the fact that the 85

treaty continues to be binding under international law.

b) As set out above, the constitutional principle of openness to international law does not yield a different result. Although it is a guiding principle of constitutional and statutory interpretation, it neither confers upon double taxation treaties such as the DTT Turkey 1985 a higher rank than ordinary statutory law, nor a binding effect that would limit the legislature's powers. 86

c) Similarly, the purported unconstitutionality of a treaty override resulting from § 50d(8) first sentence EStG cannot be derived from the principle of the rule of law and, specifically, not from the principle of unity of the legal order. 87

A treaty override does not result in any legal uncertainty greater than the one generally associated with the principles of *lex posterior* and *lex specialis*. In the present case, it should be added that in § 50d(8) first sentence EStG, the legislature unambiguously expressed its intention to override the treaty ("irrespective of the treaty"), meaning that with respect to its rank, temporal sequence, and specificity, there is no doubt that § 50d(8) first sentence EStG takes precedence over diverging international law obligations contained in double taxation treaties. Rather, with § 50d(8) first sentence EStG, as revised by the 2003 Tax Amendment Act, the (federal) legislature clearly intended to enact a provision that took precedence over acts of approval on double taxation treaties. 88

d) Even assuming that the permissibility of a treaty override were dependent on whether international law allows for the possibility that the legislature repudiates a treaty of which it no longer approves (in part), this still would not render the override impermissible. According to the provisions of the Basic Law, the legislature is in any case not empowered to denounce an international treaty, irrespective of whether denunciation is permissible under international law (Art. 59(1) GG) (cf. BVerfGE 68, 1 <82>). Consequently, and contrary to the Federal Finance Court's view, when comparing a treaty override with the denunciation of a double taxation treaty for the purpose of renegotiating it and giving effect to the legislature's intentions, the latter does not constitute a less severe, albeit equally suitable means for satisfying the principle of democracy; therefore, it does not constitute a preferable option either […]. 89

Besides, neither does it appear from the perspective of the other contracting party that denunciating an international treaty necessarily constitutes a less severe means for repudiating the terms of an international treaty since denunciation will frequently put an end to the treaty as a whole (cf. Art. 44 VCLT). As a result, the other contracting party would be deprived of the possibility provided by international law to amend the treaty's substantive terms or at least its interpretation in very specific points through the [subsequent] practice in the application of the treaty based on an (implied) agreement with the other contracting party (cf. Arts. 31(3) letter b and 39 VCLT). 90

Finally, denunciation of a double taxation treaty cannot be considered a less severe 91

method from the perspective of taxpayers either […] since without double taxation treaties they are exposed to the risk of double taxation, with the exception of the set-off provided for in § 34c EStG.

II.

§ 50d(8) first sentence EStG is also compatible with Art. 3(1) GG. 92

1. a) The general guarantee of the right to equality (*Allgemeiner Gleichheitssatz)* compels the legislature to treat equally what is essentially alike and to treat unequally what is essentially different (cf. BVerfGE 98, 365 <385>; 116, 164 <180>; 122, 210 <230>; 130, 240 <252>). It prohibits both unequal burdens as well as unequal favourable treatment (cf. BVerfGE 79, 1 <17>; 121, 108 <119>; 121, 317 <370>; 122, 210 <230>; 126, 400 <416>; 130, 240 <252 and 253>; 135, 126 <143, para. 51>; BVerfG, Judgment of the First Senate of 17 December 2014 - 1 BvL 21/12 -, Neue Juristische Wochenschrift – NJW 2015, p. 303 <306>; established case-law). Therefore, where favourable treatment is afforded to one group of persons but denied to another, this is prohibited as being an exclusion from favourable treatment in violation of the equality guarantee (cf. BVerfGE 116, 164 <180>; 121, 108 <119>; 121, 317 <370>; 126, 400 <416>; BVerfG, Judgment of the First Senate of 17 December 2014 - 1 BvL 21/12 -, NJW 2015, p. 303 <306>). Although this does not rule out differentiations, they always require a justification based on factual reasons that are appropriate to the objective pursued with the differentiation and to the gravity of unequal treatment (cf. BVerfGE 124, 199 <220>; 129, 49 <68>; 130, 240 <253>; 132, 179 <188, para. 30>; 133, 59 <86, para. 72>; 135, 126 <143, para. 52>; BVerfG, Judgment of the First Senate of 17 December 2014 - 1 BvL 21/12 -, NJW 2015, p. 303 <306>). While the legislature is at liberty to choose the relevant factual situations to which it attaches the same legal consequences and that it thus deems equal in terms of the law, it must make such choice in an objective manner (cf. BVerfGE 75, 108 <157>; 107, 218 <244>; 115, 381 <389>). The standard of constitutional review applicable here is a fluid one that is based on the principle of proportionality, and whose limits cannot be determined in the abstract but instead are defined by the particular subject matters and regulatory areas affected (cf. BVerfGE 75, 108 <157>; 93, 319 <348 and 349>; 107, 27 <46>; 126, 400 <416>; 129, 49 <69>; 132, 179 <188, para. 30>; Judgment of the First Senate of 17 December 2014 - 1 BvL 21/12 -, NJW 2015, p. 303 <306>). Depending on the matter regulated and the ground of differentiation, the general guarantee of the right to equality results in different requirements relating to the factual reasons justifying the unequal treatment; this may range from a standard limited to the mere prohibition of arbitrariness to strict requirements of proportionality (cf. BVerfGE 88, 5 <12>; 88, 87 <96>; 105, 73 <110>; 110, 274 <291>; 112, 164 <174>; 116, 164 <180>; 117, 1 <30>; 120, 1 <29>; 122, 1 <23>; 122, 210 <230>; 123, 111 <119>; 126, 400 <416>; 127, 224 <244>; 129, 49 <68>; 130, 52 <66>; 130, 240 <254>; 131, 239 <255 and 256>; 135, 126 <143 and 144, para. 52>; established case-law). 93

The prohibition of arbitrariness is violated if the (un)equal treatment of two factual situations is no longer compatible with the rationales inherent in the very nature of the matter and with an assessment that gives due regard to equity considerations, i.e. if there are no reasonable and understandable reasons for the statutory provision with respect to the situation in question and its particular nature (cf. BVerfGE 76, 256 <329>; 84, 239 <268>; 85, 176 <187>; 90, 145 <196>; 101, 275 <291>; 115, 381 <389>). The legislature may be subject to stricter requirements where freedoms are affected in addition to Art. 3 GG (cf. BVerfGE 88, 87 <96>; 111, 176 <184>; 122, 210 <230>; 129, 49 <69>; BVerfG, Judgment of the First Senate of 17 December 2014 – 1 BvL 21/12 –, NJW 2015, p. 303 <306>) and where the unequal treatment concerns groups of persons (cf. BVerfGE 101, 54 <101>; 103, 310 <319>; 110, 274 <291>; 131, 239 <256>; 133, 377 <407 and 408, para. 75>). Moreover, the requirements of Art. 3(1) GG become more stringent where the statutory differentiation is based on grounds that are less under the control of the individual (cf. BVerfGE 88, 87 <96>; 129, 49 <69>; BVerfG, Judgment of the First Senate of 17 December 2014 - 1 BvL 21/12 -, NJW 2015, p. 303 <306>); the same applies the closer these grounds resemble the grounds listed in Art. 3(3) GG (cf. BVerfGE 88, 87 <96>; 124, 199 <220>; 129, 49 <69>; 130, 240 <254>; 132, 179 <188 and 189, para. 31>). 94

b) The principle of equal burdening (*Lastengleichheit*) constitutes the basis for equality considerations in the field of tax law (cf. BVerfGE 84, 239 <268 et seq.>; 122, 210 <231>; cf. also BVerfGE 117, 1 <30>; 121, 108 <119 and 120>; 127, 1 <28>; 132, 179 <189, para. 32>). According to this principle, taxpayers must, de facto and de jure, be equally burdened by a tax law (cf. BVerfGE 117, 1 <30>; 121, 108 <120>; 126, 400 <417>). In principle, the legislature is free to define the constituent elements of those factual situations to which it attaches the same legal consequences and that it thus deems equal in terms of the law (cf. BVerfGE 75, 108 <157>; 105, 73 <125 and 126>; cf. also BVerfGE 117, 1 <30>; 121, 108 <119 and 120>; 127, 1 <28>; 132, 179 <189, para. 32>); this legislative freedom is nevertheless limited, primarily by two closely related principles that apply particularly in the area of income tax law (cf. BVerfGE 82, 60 <86>; 105, 73 <125 and 126>; cf. also BVerfGE 117, 1 <30>; 121, 108 <119 and 120>; 127, 1 <28>; 132, 179 <189, para. 32>), namely by the requirement to tax according to financial capacity (*finanzielle Leistungsfähigkeit*), and the requirement of logical consistency (cf. BVerfGE 105, 73 <125>; 107, 27 <46 and 47>; 116, 164 <180>; 117, 1 <30>; 122, 210 <231>). 95

Accordingly, the constitutionally required equality of tax burdens provides that taxpayers with equal capacity be taxed at the same rate (horizontal tax fairness – *horizontale Steuergerechtigkeit*), while (vertically) taxation of higher incomes in comparison to the tax burden on lower incomes must satisfy the requirement of equity in tax law (cf. BVerfGE 82, 60 <89>; 99, 246 <260>; 107, 27 <46 and 47>; 116, 164 <180>; 122, 210 <231>; cf. also BVerfGE 117, 1 <30>; 121, 108 <119 and 120>; 127, 1 <28>; 132, 179 <189, para. 32>). Moreover, in defining the constituent elements of the taxable event, the resulting decision on burdening must be implemented in a con- 96

sistent manner, in keeping with the required equality of burdens (cf. BVerfGE 84, 239 <271>; 93, 121 <136>; 99, 88 <95>; 99, 280 <290>; 101, 132 <138>; 101, 151 <155>; 105, 73 <125 and 126>; 122, 210 <231>; cf. also BVerfGE 117, 1 <30>; 121, 108 <119 and 120>; 127, 1 <28>; 132, 179 <189, para. 32>). Thus, any deviation from the decision on burdening, which results from the choice of taxable object, must in turn be measured against the guarantee of the right to equality (requirement of consistency in defining the constituent elements of the taxable event; cf. BVerfGE 117, 1 <30 and 31>; 120, 1 <29>; 121, 108 <120>; 126, 400 <417>; 137, 350 <366, para. 41>); accordingly, deviations require a specific factual reason that is capable of justifying the unequal treatment (cf. BVerfGE 99, 88 <95>; 99, 280 <290>; 105, 73 <125 and 126>; 107, 27 <47>; 116, 164 <180 and 181>; 117, 1 <31>; 120, 1 <29>; 121, 108 <119 and 120>; 122, 210 <231>; 126, 400 <417>; 127, 1 <28>; 132, 179 <189, para. 32>; 137, 350 <366, para. 41>; BVerfG, Judgment of the First Senate of 17 December 2014 – 1 BvL 21/12 –, NJW 2015, p. 303 <306>). In accordance with the case-law of the Federal Constitutional Court, the purely fiscal purpose of increasing state revenues cannot be considered a specific factual reason for exceptions to the consistent implementation and specification of decisions concerning tax burdens (cf. BVerfGE 116, 164 <182>; 105, 17 <45>; 122, 210 <233>).

2. Although § 50d(8) EStG results in unequal treatment (a), it does not constitute a significant interference (b), and it is justified by reasonable and understandable reasons (c). 97

a) In examining the question of whether § 50d(8) first sentence EStG entails an unequal treatment, it is to be assumed that the distinction made by the legislature between limited tax liability (§§ 1(4) and 49 EStG) and unlimited tax liability (§§ 1(1) to (3) and 2 EStG) was objective and that with respect to Art. 3(1) GG, the resulting different treatment of the relevant groups of persons is generally justified (cf. BVerfGE 43, 1 <10>; BVerfG, Order of the First Chamber of the Second Senate of 9 February 2010 – 2 BvR 1178/07 –, NJW 2010, p. 2419 <2420>). Therefore, the group of taxpayers subject to unlimited tax liability and the group of taxpayers subject to limited tax liability each form the relevant main group within which justification is required for any unequal treatment. Within the group of taxpayers subject to unlimited tax liability, the legislature created a separate sub-group by taking into account the double taxation of foreign income, which may be accomplished in various ways (set-off, exemption, deduction) (cf. § 34c EStG). Differentiations within this sub-group must in turn satisfy the general guarantee of the right to equality in Art. 3(1) GG, in accordance with the requirement of horizontal and vertical equity in tax law. 98

§ 50d(8) first sentence EStG states that income from employment that is exempt from taxation in Germany according to the provisions of double taxation treaties is (nevertheless) taxable in Germany in the event that the required proof is not provided. This treats taxpayers subject to unlimited tax liability unequally with respect to the exemption of income from German tax that is provided for in double taxation treaties. As regards income from employment earned by taxpayers subject to unlimited tax liabili- 99

ty who – according to the provisions of a double taxation treaty – are exempt from German tax: in the event of failure to provide the proof required by § 50d(8) first sentence EStG such income is consequently treated exactly like income earned by taxpayers subject to unlimited tax liability who are not exempt from German tax on the basis of double taxation treaties. This means that these taxpayers [i.e. the ones failing to provide proof] forfeit the favourable treatment resulting from the exemption from German tax, whereas those who furnish proof continue to benefit from it. Moreover, the requirement in § 50d(8) first sentence EStG – that proof be provided either to the fact that the contracting state waived the right of taxation, or to the fact that the taxes assessed abroad have been paid – constitutes an additional requirement that is applicable only to income earned form employment. By contrast, other types of income such as business profits (Art. 7(1) DTT Turkey 1985) and income from independent personal services (Art. 14(1) DTT Turkey 1985) may be exempt from German tax in accordance with the provisions of double taxation treaties in the same way as income from employment, yet no similar requirement to provide proof is imposed in relation to these other types of income

b) In order for the unequal treatment resulting from § 50d(8) first sentence EStG to be compatible with Art. 3(1) GG, there must be a sufficiently well-founded reason for differentiation. In that respect it is sufficient if there is a reasonable and understandable reason in line with the prohibition of arbitrariness. Circumstances indicating that a stricter standard of constitutional review should be applied are not discernible in the present case. In particular, the interference with other fundamental rights resulting from the duty to provide proof is so insignificant that it bears no resemblance to the type of cases for which the Federal Constitutional Court has recognised the need for a stricter standard for constitutional review in the event that unequal treatment occurs in the context of interferences with freedoms (cf. BVerfGE 37, 342 <353 and 354>; 62, 256 <274 and 275>; 79, 212 <218 and 219>; 88, 87 <96 et seq.>; 98, 365 <385>; 99, 341 <355 and 356>; 111, 160 <169 et seq.>; 112, 50 <67 et seq.>; 116, 243 <259 et seq.>). 100

c) The unequal treatment of taxpayers subject to unlimited tax liability, which results from § 50d(8) first sentence EStG in connection with the exemption provided for in double taxation agreements, is justified by factual reasons. 101

As is the case with the requirement incumbent upon the taxpayer to furnish proof, there is a sufficient factual reason for § 50d(8) first sentence EStG to make such requirement applicable only to the exemption of income from employment, but not to the exemption of other types of income, in the event that provisions of double taxation treaties provide for an exemption from German tax. As is evident from the statement submitted by the Federal Government in the present proceedings, and as can be gathered from the explanatory memorandum to the draft law (*Gesetzesbegründung*), the legislature sought to counteract the risk of tax abuse associated with the exemption of income from employment from German tax that is provided for in a double taxation treaty, since this risk is higher in relation to income from employment than is the 102

case with other types of income.

It seems reasonable to assume that abuse of exemption provisions in double taxation treaties is particularly easy in the case of income from employment because, compared with entrepreneurial activities, it is more difficult to detect. Therefore, there is a particular need for counter measures. This is underscored by the fact that § 50d(8) EStG was enacted in response to professional activity of pilots, sailors, and professional haulers, because in most cases it is unclear in which country their income is earned. Since their work often has them *en route* between several countries, it is very difficult for the authorities to enforce tax liability. 103

Voßkuhle Landau Huber

Hermanns Müller Kessal-Wulf

König Maidowski

Separate Opinion of Justice König

to the Order of the Second Senate of 15 December 2015

– 2 BvL 1/12 –

Neither can I agree with the decision of the Senate majority nor do I endorse its reasoning. This is because, from a constitutional perspective, it gives the legislature a *carte blanche* to use the principle of *lex posterior* in order to intentionally and deliberately override provisions in international treaties (other than human rights treaties) by way of a subsequent statute. 1

I.

1. The Senate majority primarily bases its views on the principles of democracy and discontinuity. It is argued that, since power in democracy is always temporary in nature, subsequent legislatures must be able to revise, within the limits set by the Basic Law, legislative acts enacted by previous legislatures. According to the Senate majority, the act of approval pursuant to Art. 59(2) first sentence GG is designed to protect the legislature's discretion in decision-making, and it is submitted that it would run counter to this discretion if the relevant provision were to be interpreted as "blocking any change" (*Änderungssperre*) for the future. In the opinion of the Senate majority, reliance on the unwritten principle of openness to international law or on the principle of the rule of law does not yield a different result. […] Thus, the Senate majority essentially upholds a legal view presented by the Second Senate in its 1957 judgment on the *Reichskonkordat* (BVerfGE 6, 309 <362 and 363>). 2

2. a) In today's globalised world, in which the states are linked by a multitude of international treaties that govern a large variety of issues, I hold this legal view (now) to be outdated. In order to keep in step with the developments of this extensive international cooperation on the basis of bilateral and multilateral treaties, and to give due consideration to the "rule of law" as recognised under international law […], it is necessary to strike an appropriate balance between the principle of democracy, on the one hand, and the [constitutional] principle of a state under the rule of law (*Rechtsstaatsprinzip*) in conjunction with the principle of openness to international law, on the other. 3

Drawing on the terminology applied by Robert Alexy (Alexy, Theorie der Grundrechte, 1986, pp. 75 et seq.), a so-called treaty override only at first sight appears to involve a conflict between two [legal] rules that share the rank of an ordinary statute. The Senate majority resolves this conflict, on the basis of the *lex posterior* rule, in favour of the later statute that violates international law. At the level of constitutional law, however, the conflict between a *lex prior* determined by international law, and a *lex posterior* overriding an international treaty, is not resolved by any definitive rule. It is not convincing to merely refer to the rank accorded to acts of approval under Art. 59(2) first sentence GG and, based thereon, assume without further consideration that the *lex posterior* rule applies without limitation (for a critical view of the application 4

of the *lex posterior* rule, [...]). This approach does not take into account the conflict between the principle of democracy and the rule of law principle, which is the real underlying issue with regard to the determination of rank (on recourse to the distinction between rules and principles, including with respect to objective legal interests, cf. […]).

b) As regards the conflicting statutory provisions, the real issue behind them concerns the aforementioned constitutional principles, which are in conflict with each other. The principle of the rule of law, as well as the principle of democracy, is a fundamental structural principle and as such forms part of the constitutional order, which binds also the legislature pursuant to Art. 20(3) GG. As poignantly put by Ernst-Wolfgang Böckenförde, the term “rule of law” belongs to “those terms that serve as gateway concepts, formulated in a manner that is vague and that does not fully lend itself to interpretation based on wording, and incapable of being conclusively defined in ‘objective’ and intrinsic terms; instead, such terms are open to the influx of evolving notions of constitutional theory and theory of state, and thus allow for a variety of specific meanings attributed to them …” (Böckenförde, in: Festschrift für Adolf Arndt, 1969, p. 53 <53>). The substantive meaning of the rule of law principle thus needs to be specified with respect to the facts and circumstances of each respective case […]; in this regard, the principle is receptive to new developments. Accordingly, within a constitutional review of a treaty override within the framework of a state open to international cooperation as established by the Basic Law […], the principle of the rule of law can, and indeed must, be specified in accordance with the principle of openness to international law [...]. In the 2004 *Alteigentümer* Decision, the Second Senate derived from the latter principle the duty to respect international law. It was held that this duty has three elements: First, German state organs are obliged to comply with the rules of international law that are binding on the Federal Republic of Germany and to refrain from violations where possible. Second, the legislature must ensure that with respect to the domestic legal order, violations of international law committed by German state organs can be remedied. Third, German state organs may be under a duty to enforce international law within their respective area of responsibility if violations are committed by foreign states (cf. BVerfGE 112, 1 <26>). 5

c) When construed in light of these considerations, the rule of law principle – the core element of which includes abiding by the law, respectively compliance with legal obligations (regarding the binding effect of the Constitution on all state authority, cf.: […]) – also imposes on the legislature the obligation to generally respect the binding effect of international treaties to which the legislature itself lent legitimacy by way of the act of approval, and to refrain from intentionally – and thus contrary to good faith –, abrogating such treaties unilaterally. In his 1996 farewell lecture in Munich, Klaus Vogel also vividly spoke of how the legislature has no authority to “break a promise” (cf. Vogel, JuristenZeitung – JZ 1997, p. 161 <167>; similarly, Rust/Reimer, Internationales Steuerrecht – IStR 2005, p. 843 <847>, stating: “Breaking a promise is not a viable course of action for the constitutionalised state; …”). The rule of law principle, 6

interpreted in a manner that is open to international law, thus argues in favour of subsequent legislatures being completely bound by an international treaty by virtue of the act of approval; nevertheless, it must be taken into consideration that this would completely limit the discretion in decision-making guaranteed under the principle of democracy. In other words, reliance on the principle of the rule of law would mean that the act of approval would *de facto* have the effect of "blocking any change" in relation to subsequent legislatures. The principle of the rule of law, advocating that the legislature be bound completely, and the principle of democracy, advocating that the legislature have absolute discretion in terms of adopting a decision, become competing principles, each of which entails stipulations that ought to be adhered to (*Sollensgebote*) [translator's note: in German legal texts, "sollen" generally implies that a provision is directive albeit not entirely imperative in nature]. This conflict must be resolved in a way that reconciles the two principles by striking a careful balance, with the aim to achieve "both the one and the other" instead of "all or nothing" (cf. Alexy, Theorie der Grundrechte, 1986, pp. 75 et seq.).

3. The decision by the Senate majority gives absolute preference to the principle of democracy and neglects the rule of law principle as interpreted in accordance with the principle of openness to international law. As a result, subsequent legislatures are at liberty to intentionally deviate from the provisions of an international treaty, irrespective of the resulting breach of international law. Doing so does not need to satisfy any particular conditions or require a justification. By contrast, the approach advocated here requires that the conflict between the principles of democracy and the rule of law be resolved in a manner that allows both principles to take effect to the broadest possible extent. 7

a) In striking this balance, the following criteria, in particular, should be considered: the aim pursued by the later statute, as well as its importance to the common good; the effects on the legal position of individuals who benefit from the international provision; the divergent provision's urgency; the possibility of using reasonable means of ending the international obligation in accordance with international law, e.g. by issuing an interpretative statement or denouncing or modifying the treaty; as well as the legal consequences of a breach of international law. 8

b) Where the criteria in favour of a unilateral repudiation of the international treaty in question fail to outweigh the factors arguing against a treaty override, the rule of law principle as interpreted in accordance with the openness to international law must then take precedence over the principle of democracy. In any event, such conflicts must be resolved on a case-by-case basis in order to strike an appropriate balance between the principles of democracy and the rule of law […]. 9

c) Contrary to the opinion of the Senate majority, this solution does not entail an unreserved constitutional duty to observe all rules of international law (aa); it neither supersedes the differentiated provisions of the Basic Law concerning the rank of the various sources of international law, nor does it undermine their systematic concept 10

(bb).

aa) The proposed solution neither leads to an unconditional submission of the German legal order to international law, nor to absolute precedence of international law even over constitutional law. Rather, it establishes a regulated binding effect, and the solution leaves room to ensure that “the final responsibility for respect for human dignity and for the observance of fundamental rights by German state authority [is not given up]” (BVerfGE 112, 1 <25 and 26>, referring to BVerfGE 111, 307 <328 and 329>). Before deliberately deviating from an international treaty, however, the (later) legislature is obliged to diligently weigh the various aspects mentioned above and, in particular, to examine whether it is possible under international law to abrogate the international obligation within a reasonable period of time. If this is the case, then an attempt must first be made to choose a course of action that is in conformity with international law. While it is correct that Parliament cannot itself denounce or suspend an international treaty, it nevertheless has the ability to make known its political intentions and to call upon the executive branch to take the corresponding steps externally. The legislature may unilaterally diverge from the treaty’s content only if the executive branch refuses to comply with the request or fails to take such steps, or if, in the particular case, it is not possible under international law to abrogate the treaty within a reasonable period of time. The Federal Constitutional Court reviews the balancing process and outcome; in line with the general rule, the legislature is granted a margin of appreciation (*Einschätzungsspielraum*) in this respect (cf. BVerfGE 7, 377 <403>; 50, 290 <332 et seq.>; 77, 170 <171>; 102, 197 <218>; 110, 177 <194>; 129, 124 <182 and 183>; established case-law). 11

bb) As the proposed solution does not have a general “blocking effect” (*Sperrwirkung*), it does not undermine the systematic concept expressed in Arts. 25 and 59(2) GG. The legislature retains the power to override international treaties, which flows from the principle of democracy; however, the rule of law, as interpreted in light of the principle of openness to international law, gives rise to limitations concerning the exercise of this power. These limitations ensure that, as stated by the Second Senate in the *Alteigentümer* Decision, German state organs – and this includes the legislature – will comply with the rules of international law that are binding on the Federal Republic of Germany and refrain from violations where possible (cf. BVerfGE 112, 1 <26>). This is the only way to ensure that sufficient regard is paid to the principle of openness to international law in relation to the principle of democracy – taking into account that the principle of openness to international law first and foremost serves to establish or maintain, where possible, congruency between the international law obligations of the Federal Republic of Germany and its domestic legal order and as a consequence avoid conflict (cf., on the principle of openness to international law functioning as a conflict-avoidance rule, [...]). 12

II.

Measured against these standards, § 50d(8) first sentence EStG, in the version […] 13

of 15 December 2003 (2003 Tax Amendment Act […]), would not be compatible with the Basic Law.

1. The referring court explained in detail how the provision in § 50d(8) first sentence EStG diverges from the provisions of the Agreement between the Federal Republic of Germany and the Republic of Turkey of 16 April 1985 for the Avoidance of Double Taxation with respect to Taxes on Income and Property Capital (BGBl II 1989 p. 867 [hereinafter: DTT Turkey 1985]). In particular, it violates the treaty by making the exemption of foreign income from employment contingent on proof that the other contracting state waived its right of taxation or that the taxes assessed by that state have been paid; this is contrary to the exemption model agreed upon [… in] the treaty, which is based on so-called "virtual double taxation" (*virtuelle Doppelbesteuerung*) abroad (here, in Turkey). This legal view was carefully substantiated and is well justifiable, therefore it should be taken as the basis for constitutional review. 14

Moreover, the provision diverging from the content of the DTT Turkey 1985 is not covered by an unwritten reservation concerning tax abuse (*Missbrauchsvorbehalt*). The recognition of such reservations is quite controversial […]. What argues against such a reservation in the present case is that – in contrast to the Protocol to the DTT Turkey 1985 – the Protocol to the DTT Turkey 2011 expressly provides for the applicability of domestic legal provisions on the prevention of tax abuse (cf. Clause 10 of the Protocol to the DTT Turkey 2011, […]). If a general, unwritten reservation were recognised, the inclusion of this clause would have been unnecessary. 15

Therefore, the case at hand must be regarded as constituting a treaty override in violation of international law. 16

2. With respect to the incompatibility of the statutory provision with the DTT Turkey 1985, the balancing of arguments for and against [upholding] that provision should be based on the criteria mentioned above (see I.3.a). 17

a) According to the explanatory memorandum to the draft law, the aim pursued by the legislature with the provision in § 50d(8) first sentence EStG was to prevent "income from escaping taxation because the taxpayer wrongfully failed to declare income in the state where the employment occurred, for which reason such state is in many cases no longer able to enforce its tax claim once it learns of the facts and circumstances …" […]. Accordingly, the legislature was primarily interested in ensuring taxpayer compliance (*Steuerehrlichkeit*) by establishing the duty to provide proof. Moreover, it sought to prevent complete avoidance of tax (*Keinmalbesteuerung*), at least in those cases in which the other contracting state has not fully waived its right of taxation. These are legitimate objectives of substantial importance for the common good, since the intent is to prevent taxpayers who fail to declare income in the state where the employment occurred from benefiting from their wrongful conduct in comparison to taxpayers who are in compliance. This assessment does not change even if one were to assume – as did the referring court – that the legislature may have been guided primarily by fiscal considerations when it created § 50d(8) EStG […]. 18

b) Depending on the circumstances of the individual case, the impact on the legal position of persons benefiting from the relevant rule of international law may vary significantly. However, it should be borne in mind that the exemption method based on virtual double taxation, which was agreed upon in the DTT Turkey 1985 without a subject-to-tax clause (*Rückfallklausel*) primarily served the interests of both contracting states, because neither wanted to be dependent on or have to be familiar with the other's laws, regulations, and taxation practice […]. By contrast, it was not the intention of the contracting states to create a legal position for taxpayers covered by the exemption that would enable them to avoid paying taxes in either state, even if the international agreement may have that very effect. As a result, the favourable financial treatment afforded to taxpayers that is associated with complete avoidance of tax on income earned in the other contracting state turns out to be more of a favourable side-effect of the law, which has little bearing in the process of balancing. 19

c) Under the DTT Turkey 1985, there were measures available for abrogating the treaty in accordance with international law. Pursuant to Art. 30(2) first sentence DTT Turkey 1985, either contracting state may denounce the treaty during the first six months of a calendar year, starting on 1 January of the third year following the year in which the treaty was ratified. In other words, approximately three years after the treaty had entered into force a right of denunciation became available, which was required to be exercised during the first six months of the year in which denunciation was intended. The right of denunciation is not dependent on any specific reason. Accordingly, the Federal Republic of Germany could have denounced the DTT Turkey 1985 as early as in 2003, when the 2003 Tax Amendment Act was being deliberated, or during the first six months of 2004; then, it could have negotiated a new and better agreement. The fact that the treaty was terminated by Germany on 27 July 2009, with effect from 31 December 2010, shows that this option was in principle available; this was also emphasised by the referring court. The resulting renegotiated double taxation treaty of 19 September 2011, which superseded the DTT Turkey 1985, effective 1 January 2011, continues to provide for an exemption model […], but it contains in particular […] a so-called switch-over clause (*Umschwenkklausel*) or subject-to-tax clause, which enables the Federal Republic of Germany to switch from the exemption method to the set-off method. The purpose of this clause is to ensure that Germany does not waive its right of taxation if income is not taxed in either of the contracting states [...]. Moreover, as mentioned above, a clause was expressly agreed upon in the Protocol to the DTT Turkey 2011 that provides for the applicability of domestic legal provisions on the prevention of tax abuse. 20

d) It is not ascertainable that there was any special urgency for adopting the provision in § 50d(8) EStG, e.g. in order to prevent the German treasury from suffering significant detriments. Any delay associated with taking steps to abrogate the international law obligations arising under the DTT Turkey 1985 is therefore of little relevance. 21

e) Finally, the balancing must consider the potential legal consequences of a breach of international law. In the case of a material breach of treaty, the aggrieved state party has options other than merely denouncing or suspending the treaty (cf. Arts. 60 and 65 et seq. VCLT). Irrespective of the severity of the breach, [the aggrieved party] may also demand cessation of the breach and compliance with the relevant treaty obligations as a form of restitution (cf. Arts. 30, 34, and 35 ILC Draft Articles). This means that, first and foremost, Germany is obliged to bring its domestic legal order (back) into line with the content of the treaty in question. If this is in fact impossible, the aggrieved state may – as a subsidiary measure – demand financial compensation (cf. Art. 36(1) ILC Draft Articles). 22

Even if, as in the case at hand, the aggrieved state takes no specific steps to enforce its claim to reparation, any intentional breach of treaty puts at risk Germany's reputation as a reliable partner in international legal relationships. Since Germany expects its European and international treaty partners to abide by treaties and the law, it must likewise be prepared to comply with its treaty duties and to refrain from "breaking away" from a treaty obligation unilaterally through a subsequent contradictory law. 23

f) In seeking to bring the aforementioned criteria into balance, the factors arguing against the treaty override outweigh those in favour of it. It is true that in enacting the provision in § 50d(8) first sentence EStG, the legislature pursued a legitimate purpose – which was also significant for the common good – by seeking to increase taxpayer compliance through the duty to provide proof. Moreover, the impact on the legal position of taxpayers who benefit from the application of the treaty is not particularly significant. However, the issue of the new provision was not so urgent as to have required enacting the divergent law without first calling upon the Federal Government to use means that are consistent with international law. The DTT Turkey 1985 provided the ability to denounce the treaty in a timely manner without requiring any further justification. If the aim was to avoid termination on account of the far-reaching consequences, the Federal Government should at least have attempted – either in response to a request by the *Bundestag* or of its own accord – to reach an agreement with Turkey on a retrospective interpretation of the relevant treaty provisions that would have permitted making application of the exemption method contingent on a duty to provide proof. Finally, with the treaty override, the legislature expressed its intention to unilaterally abrogate the DTT Turkey 1985, despite the availability of means that would have been consistent with international law, and thus to intentionally and unnecessarily ignore an international constraint. This sends a detrimental signal which has a negative impact on the balancing process. 24

III.

Consequently, § 50d(8) first sentence EStG, as revised by the […] 2003 Tax Amendment Act […], would be unconstitutional and void (§ 82(1) in conjunction with § 78 of the Federal Constitutional Court Act). 25

IV.

In my opinion, when reviewing subsequent statutes that contravene international law, the time has come for the Federal Constitutional Court to give effect to the “change of mindset (*Mentalitätenwandel)*” that Klaus Vogel found to have occurred with the Basic Law in comparison to earlier German constitutions with respect to the openness of the German state to international cooperation and to the integration of Germany into the international community (cf. Vogel, JZ 1997, p. 161 <163>). I regret that the Senate majority did not resolve to do so. 26

König

Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 15. Dezember 2015 - 2 BvL 1/12

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