Moritz Scherleitner

Addressing Tax Arbitrage with Hybrid Financial Instruments

A Multidisciplinary Study and Proposal for Developed and Developing Countries

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Addressing Tax Arbitrage with Hybrid Financial Instruments

Why this book?

This book analyses legislative action against tax arbitrage with hybrid financial instruments (HFIs) from a multidisciplinary perspective. It begins by investigating the non-legal problems of the legal phenomenon of tax arbitrage with HFIs, which should display the concerns caused by (uncombated) tax arbitrage with HFIs. The author works out three concerns from an inter-taxpayer equity perspective, three from an inter-nation equity perspective and three from an efficiency perspective.

Four approaches against tax arbitrage with HFIs are then analysed. These are the OECD approach, the low-tax approach, the UN approach and the recharacterization approach. The focus is on tax arbitrage transactions with HFIs that rely on a qualification conflict and substitute transactions with financial instruments that reach the same or a similar result.

The approaches under analysis are assessed in view of their potential to overcome the predefined non-legal problems. Aside from this, additional considerations regarding inter-taxpayer equity, inter-nation equity and efficiency are provided. The study also takes into account the administrability of an approach and elaborates on legal dogmatic questions.

Having conducted an analysis of the four approaches, the author provides his own solutions. He does not propose a new approach; rather, building on the prior discussions, he aims to advise tax policymakers on what action can possibly – and sensibly – be taken. In doing so, tax policymakers in three different situations are addressed: (i) those who already decided to combat tax arbitrage with HFIs through BEPS Action 2; (ii) those who are considering combating tax arbitrage with HFIs by means of targeted (and potentially simpler) linking rules; and (iii) those who do not intend to combat tax arbitrage with HFIs through targeted rules.

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Preface

In many different circumstances, hybrid financial instruments (HFIs) can be an appealing source of finance. At the same time, however, such instruments may also be used in tax planning. Its differential treatment in the affected jurisdictions can give rise to double non-taxation of a payment. Exploiting this allows for significant reductions in corporate tax liability.

In the aftermath of the recent financial crisis, such "tax arbitrage" has increasingly been a topic of debate within the G20, OECD, European Union and United Nations. As a result, various concepts of how to address the problem were developed. Besides these, some states already rely on provisions that can be of relevance in this context.

Starting from these developments, the objective of this book is to help those in charge of solving the problem make a more educated decision. As such, it addresses tax policymakers around the world. For the sake of reaching its goals, the book applies the socio-legal method. This should acknowledge that tax policymakers design rules in a context that is broader than existing tax law. They have to consider the traditional principles of tax policy, including tax competition constraints, as well as legal dogmatic restrictions – as does this book.

In chapter 1, the reader is introduced to the topic and the design of the research. In chapter 2, HFIs are illuminated from the perspective of tax law, corporate finance and economics. The goal is to understand their role in reality. In chapter 3, the guiding principles for company taxation are reviewed. Contemporary tax research relies on the triumvirate of equity, efficiency and administrability. The literature on these issues is considered in sufficient depth, but with a strong focus on the research objectives.

Chapter 4 builds a bridge between the above preparatory part and the core research. This happens by working out the non-legal concerns attached to tax arbitrage with HFIs. They include three concerns from an inter-taxpayer equity perspective, three from an inter-nation equity perspective and three from an efficiency perspective. This defines the problem. Chapters 5-8 investigate how four approaches address these concerns. These are the OECD approach, the low-tax approach, the UN approach and the recharacterization approach. The focus is on tax arbitrage transactions with HFIs that rely on a qualification conflict and substitute transactions with financial instruments that reach the same or a similar result. The research on these approaches also takes into account their administrability and le-

gal dogmatic considerations. In doing so, the collateral damage caused by the rules is assessed as well. This also happens from a multi-disciplinary perspective. In chapter 9, the author presents his own thoughts on what developed and developing countries may want to consider when dealing with the problem of tax arbitrage with HFIs.

The author is aware of tax arbitrage with HFIs only being a part of the challenges that tax policymakers have to deal with. In an attempt to consider this, the discussion is put into a broader context. As a direct consequence thereof, the book lacks a clear solution. Rather, it aims to provide information that should improve tax policymakers' ability to address the issue. It is left up to them to trade off equity, efficiency and administrability considerations, paying attention to what is possible *de lege lata* and, notably, taking into account what best fits their countries' and tax systems' needs.

Chapter 1

Introduction

1.1. Setting the scene: Tax arbitrage with hybrid financial instruments – What is it and what is being done about it?

The world's tax law is not harmonized. Hence, states may treat transactions differently for tax purposes. Even though not necessarily, these differences can provoke inconsistent legal consequences in the affected jurisdictions – a so-called "mismatch".[1] The impact such a mismatch can have on the taxpayer may be twofold. It could yield a result worse than that achievable with consistent treatment, or it could provide for a better outcome.[2] Taxpayers can exploit these differences. This means that they seek inconsistencies in different tax systems and take advantage of them – a process referred to as "tax arbitrage".[3]

1. P. Harris, *Neutralizing effects of hybrid mismatch arrangements*, in *United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries* p. 216 (A. Trepelkov, H. Tonino & D. Halka eds., United Nations 2017). *Compare*, e.g. H.D. Rosenbloom, *International Tax Arbitrage and the "International Tax System"*, 53 Tax L. Rev., pp. 137-141 (2000); R.S. Avi-Yonah, *Commentary (Response to article by H. David Rosenbloom)*, 53 Tax L. Rev. 2, pp. 167-170 (2000); P.R. West, *Foreign Law in U.S. International Taxation: The Search for Standards*, 3 Fla. Tax Rev. 4, p. 171 (1996); D. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C.L. Rev. 1, pp. 81-89 (2002); G. Fibbe, *EC Law Aspects of Hybrid Entities* ch. 1 (IBFD 2009), Books IBFD; M. Helminen, *Classification of Cross-Border Payments of on Hybrid Instruments*, 58 Bull. Intl. Taxn. 2, sec. 1. (2004), Journal Articles & Papers IBFD; G. Kofler & H. Kofler, *Internationale Steuerarbitrage*, in *Deutsches und Internationales Steuerrecht* p. 382 (G. Brähler & C. Lösel eds., Springer 2009); G. Cooper, *Some Thoughts on the OECD's Recommendation on Hybrid Mismatches*, 69 Bull. Intl. Taxn. 6/7, sec. 1. (2015), Journal Articles & Papers IBFD; and R. Russo, *The OECD Report on Hybrid Mismatch Arrangements*, 67 Bull. Intl. Taxn. 2, sec. 1. (2013), Journal Articles & Papers IBFD.

2. *Compare*, inter alia, OECD, *Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues* paras. 3-11 (OECD 2012), Primary Sources IBFD.

3. *See* sec. 1.4., especially the references provided for in *supra* n. 1. Note that the term "tax arbitrage" is also used in other contexts, such as domestic tax arbitrage. The book will not deal with the latter, but will focus on international tax arbitrage. For a discussion of domestic tax arbitrage, *see*, e.g.; M.S. Scholes et al., *Taxes and Business Strategy – a Planning Approach* sec. 5.6. (Pearson Education 2016), who define it as follows: "[T]ax arbitrage is the purchase of one asset (a 'long' position) and the sale of another (a 'short' position) to create a sure profit despite a zero level of net investment." An example of a (normal) domestic tax arbitrage strategy is borrowing to invest in a tax-exempt bond. *See* D.J. Shakow, *Confronting the Problems of Tax Arbitrage*, 43 Tax

One possibility, among many others,[4] to engage in tax arbitrage is to structure a financial instrument towards triggering the desired tax consequences.[5] Thereby, its classification as debt or equity often plays a role.[6] Whilst de facto, all states make this distinction, they do so in different ways.[7] Yet, depending on its classification, the tax treatment of the remunerations paid under the instrument is frequently different.[8] Whereas payments made under a debt instrument are usually deductible for the payer, this is generally not the case for payments made under an equity instrument.[9] At the same time, a debt payment is typically fully taxed at the level of the receiver. However, this is not necessarily true for payments received from an equity investment, which might face a more favourable tax treatment.[10] An instrument that qualifies as debt in the payer state and equity in the payee state can, thus, give rise to a mismatch in tax treatment: a deduction at the level of the payer may not be matched by a corresponding inclusion at the level of the receiver. Tax arbitrage with hybrid financial instruments (HFIs)[11] can also take other forms. Taxpayers may, for instance, exploit differences

L. Rev. 1, p. 1 (1987), who states that tax arbitrage concerns "transactions that, while not necessarily profitable before tax, are profitable after tax. This is the essence of tax arbitrage: an after-tax profit is possible only because the tax law treats income and deductions asymmetrically, allowing an immediate deduction for an expenditure (such as interest costs), but allowing complete or partial deferral or exemption of the income." *See*, for more detail, the discussion in Ring, *supra* n. 1, at pp. 106-109.

4. *See* OECD, *supra* n. 2, at para. 10, referring to hybrid entities, dual resident entities and hybrid transfers. Similarly, *see* Kofler & Kofler, *supra* n. 1, at pp. 388-395. For a broader overview of possible hybrid mismatch situations, *see* Harris, *supra* n. 1, at pp. 219-237.

5. Which is to be distinguished from the bona fide use of (hybrid) financial instruments. *See*, in this regard, especially the discussion and references provided for in sec. 2.2.

6. OECD, *supra* n. 2, at para. 10; and Russo, *supra* n. 1, at sec. 2. *Compare* further, e.g. M. Helminen, *The International Tax Law Concept of Dividend* ch. 9 (Kluwer Law International 2010); M. Helminen, *The Dividend Concept in International Tax Law – Dividend Payments Between Corporate Entities* ch. 9 (Kluwer Law International 1999); Helminen, *supra* n. 1, at sec. 1; T. Fehér, *Conflicts of Qualification and Hybrid Financial Instruments*, in *Conflicts of Qualification in Tax Treaty Law* pp. 227-234 (E. Burgstaller & K. Haslinger eds., Linde 2007); and S.N. Menuchin, *The Dilemma of International Tax Arbitrage: A Comparative Analysis Using the Cases of Hybrid Financial Instruments and Cross-Border Leasing* ch. 6 (ProQuest 2005).

7. *See* the discussion and references in sec. 2.1.4.

8. *See* broadly the discussion and references in sec. 2.1. More comprehensively, *see*, e.g. P. Brown, *General Report*, in *The debt-equity conundrum*, International Fiscal Association (IFA), Cahiers de droit fiscal international vol. 97B (Sdu Fiscale & Financiële Uitgevers 2012).

9. *See* the discussion and references in sec. 2.1.5.1.

10. *See* the discussion and references in sec. 2.1.5.2.

11. *See* sec. 1.4. for the (different) meaning(s) of hybrid financial instruments (HFIs) for the purposes of this book.

in the time it takes to recognize interest in the affected states.[12] Likewise, they may make use of states' disagreements as to who is considered the owner of an asset.[13]

Without the world's tax law being harmonized, tax arbitrage opportunities will not disappear.[14] However, in the aftermath of the recent global financial crisis, such tax practices have been the subject of debate at the level of the G20,[15] OECD,[16] European Union[17] and United

12. Interest may, for instance, be deductible for the payer as accrued, whilst being taxed at the level of the payee once paid. The inconsistency in the timing of the recognition gives rise to a tax deferral that taxpayers can exploit. *See* Kofler & Kofler, *supra* n. 1, at sec. 2.2.; *See also*, on the original issue discount (OID) arbitrage transactions between the United States and Japan, Ring, *supra* n. 1, at pp. 90-91.

13. *See*, e.g. OECD, *supra* n. 2, at para. 10: "Hybrid transfers: Arrangements that are treated as transfer of ownership of an asset for one country's tax purposes but not for tax purposes of another country, which generally sees a collateralised loan." This can cause a mismatch, e.g. when a dividend-paying financial instrument is transferred and the transferer regards the dividend payments as deductible interest under the collateralized loan, whilst the transferee regards them as dividends received under the asset owned. *See*, with further references, e.g. Kofler & Kofler, *supra* n. 1, at sec. 2.4. For an example, *see* OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2015 Final Report* Example 1.31 (OECD 2015), Primary Sources IBFD [hereinafter *BEPS Action 2*].

14. Cooper, *supra* n. 1, at sec. 1.; *See also* Ring, *supra* n. 1, at p. 89, who, in the presence of a broad variety of factors steering the drafters of tax rules, expects a further "steady supply" of conflicting rules to be exploitable. In the same direction, *see* P.R. West, *supra* n. 1, at p. 171; Rosenbloom, *supra* n. 1, at pp. 138-139; Avi-Yonah, *supra* n. 1, at p. 170; and Menuchin, *supra* n. 6, at ch. 1.

15. *G20 Leaders Declaration* para. 48, Los Cabos (2012); *G20 Leaders' declaration* para. 50, St. Petersburg (2013); *G20 Leaders' Communiqué* para. 13, Brisbane (2014); *G20 Leaders' Communiqué* para. 15, Antalya (2015); and *G20 Leaders' Communique* para. 19, Hangzhou (2016).

16. OECD, *Addressing Base Erosion and Profit Shifting* pp. 40-41 and 52 (OECD 2013), Primary Sources IBFD [hereinafter *OECD Addressing BEPS*]; and OECD, *Action Plan on Base Erosion and Profit Shifting* p. 15 (OECD 2013), Primary Sources IBFD [hereinafter *OECD BEPS Action Plan*].

17. *See*, e.g. European Commission, Proposal for a Council Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, COM(2013) 814 final (25 Nov. 2013), Primary Sources IBFD; European Commission, Impact assessment Accompanying the document Proposal for a Council Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, SWD(2013) 474 final (25 Nov. 2013); and European Commission, Proposal for a Council Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Political agreement, Council 16435/14 (5 Dec. 2014). Regarding the Anti-Tax Avoidance Directive, *see* European Commission, Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016) 26 final (28 Jan.

Nations.[18] As a result, various concepts of how to address the issue have been (further)[19] developed.

The leading player in this regard is the OECD, which dedicated Action 2[20] of the OECD/G20 BEPS Action Plan[21] to this matter. In it, the OECD recommends participating states to amend their domestic and tax treaty law in order to fight hybrid mismatch arrangements in a coordinated way. In addition to HFIs, BEPS Action 2 targets hybrid entities[22] and branch mismatch structures as sources of hybrid mismatch arrangements.[23] In order to tackle the undesired outcomes that are provoked by such hybrid vehicles, i.e. so-called "deduction/no inclusion"[24] (D/NI), "double deduction"[25] (DD) and "indirect D/NI",[26] the OECD suggests the introduction of "linking rules".[27]

Likewise, the European Union took action and – besides contributing to the work of the OECD – has set up its own "Action Plan to strengthen the fight against tax fraud and tax evasion".[28] Similar to the OECD, the European Union also concentrates on HFIs, as well as on hybrid entities and hybrid permanent establishments,[29] in their efforts against hybrid mismatch ar-

2016); and European Commission, Proposal for a Council Directive Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries, COM(2016) 687 final (25 Oct. 2016), Primary Sources IBFD.

18. *See*, e.g. UN Committee of Experts on International Cooperation in Tax Matters, *Report on tenth session* p. 8 (United Nations 2014). This was based on the report by the UN Committee of Experts on International Cooperation in Tax Matters, *U.S. Approach to Application of Income Tax Treaties to Payments of Hybrid Entities – Note by Mr. Henry Louie (E/C.18/2013/CRP)* (United Nations 2013).

19. Significant work on the topic can alreadybe found in, e.g. OECD, *supra* n. 2.

20. *BEPS Action 2*, *supra* n. 13.

21. *OECD BEPS Action Plan*, *supra* n. 16.

22. *BEPS Action 2*, *supra* n. 13, at paras. 115-232.

23. OECD, *Action 2: Inclusive Framework on BEPS – Neutralising the Effects of Branch Mismatch Arrangements* (OECD 2017).

24. *BEPS Action 2*, *supra* n. 13, at para. 6(a) defines these as "payments that are deductible under the rules of the payer jurisdiction and are not included in the ordinary income of the payee".

25. *BEPS Action 2*, *supra* n. 13, at para. 6(b) defines these as "payments that give rise to two deductions in respect of the same payment".

26. *BEPS Action 2*, *supra* n. 13, at para. 6(c) defines these as "payments that are deductible under the rules of the payer jurisdiction and that are set-off by the payee against a deduction under a hybrid mismatch arrangement".

27. These are rules that make the tax treatment in one country dependent on the tax treatment in another country. For more details, *see* chs. 5 and 6.

28. Communication from the Commission to the European Parliament and the Council: An Action Plan to strengthen the fight against tax fraud and evasion, COM(2012)722 final (6 Dec. 2012).

29. Similar to the OECD, also the initial outcome of the respective proceedings at the EU level did not include rules on hybrid permanent establishments. The need for

rangements. To begin with, the European Union has amended[30] the Parent-Subsidiary Directive.[31] Next to a general-anti abuse rule (GAAR),[32] this legislative act now also contains a linking rule.[33] After that, in July 2016, the Anti-Tax Avoidance Directive (ATAD) came into force.[34] The hybrid mismatch rules included in the ATAD were, however, limited to combat D/NI and DD outcomes arising from differences in the characterization of financial instruments and entities within the European Union. By means of the Anti-Tax Avoidance Directive 2, or ATAD 2, the scope of these provisions was extended[35] in an effort to provide "a framework which is consistent and no less effective than"[36] the above-mentioned Action 2 of the OECD/G20 BEPS Action Plan.[37]

Furthermore, also the United Nations became active in this field. It published an UN Handbook,[38] incorporating assistance for developing countries to evaluate their current situations with respect to, among other things,

further work to be done in this regard was indicated in Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, recital 13, OJ L 193/1 (2016), Primary Sources IBFD [hereinafter ATAD]. The amendment of this directive brought such rules, as well as others, into its scope; *see* Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, art. 1, OJ L 144/1 (2017), Primary Sources IBFD [hereinafter ATAD 2].

30. This occurred for the first time with Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 219/40 (2014), Primary Sources IBFD, and for the second time with Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 21/1 (2015), Primary Sources IBFD.

31. Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345 (2011), EU Law IBFD [hereinafter Parent-Subsidiary Directive].

32. Art. 1(2) Parent-Subsidiary Directive.

33. Art. 4(1)(a) Parent-Subsidiary Directive.

34. *See*, for background information, e.g. A. Rigaut, *Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons*, 56 Eur. Taxn. 11, secs. 1-2 (2016), Journal Articles & Papers IBFD.

35. *See*, e.g., for background information, T. Balco, *ATAD 2: Anti-Tax Avoidance Directive*, 57 Eur. Taxn. 4, sec. 2 (2017), Journal Articles & Papers IBFD.

36. Recital 7 ATAD 2.

37. Id.

38. *See* United Nations, *Handbook on Selected Issues in Protecting the Tax Base of Developing Countries* (2nd ed., United Nations 2017) [hereinafter UN Handbook], including ten contributions dealing with different BEPS issues from the perspective of developing countries. An earlier version was published in 2015; *see* United Nations, *Handbook on Selected Issues in Protecting the Tax Base of Developing Countries* (1st ed., United Nations 2015).

hybrid mismatch arrangements.[39] The approach taken by the United Nations differs from the actions taken by the OECD and the European Union. First, aside from HFIs, the United Nations focuses on a broader setting of other hybrid mismatch situations.[40] Secondly, there are considerable deviations in its recommendations. Rather than proposing linking rules, the United Nations discusses other possible solutions, such as comprehensive withholding taxes or a separation of residence and source tax bases.[41] In addition, the United Nations updated its Model Convention.[42]

Tax arbitrage with HFIs can also be combatted through other means. Some of them, such as rules denying a deduction for no/low-taxed intra-group interest payments to related parties, are similar to the OECD/EU regulations. They were also developed with a view to address earnings-stripping into favourable tax environments.[43] Others, such as mitigating the problem by using GAARs and/or transfer pricing rules, are different. These types of regulations exist widely and were not introduced for the purpose of fighting tax arbitrage with HFIs;[44] however, they appear to have some potential to do so.

1.2. Motivation and research goals

The thesis will analyse legislative action against tax arbitrage with HFIs. Having done so, it will propose relevant guidelines for developed and developing countries. The ultimate goal of the research is to provide tax policymakers with considerations that should help them approach the issue in a more educated way. As such, the conceivable impact of the rules should be discussed. For that purpose, a multidisciplinary perspective is required. Thus, this book primarily conducts socio-legal research.[45]

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39. Harris, *supra* n. 1.
40. *See* the 13 hybrid mismatch situations discussed in id., at pp. 219-237.
41. *See* the discussion and references provided for in sec. 7.1.
42. *United Nations Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2017), Treaties & Models IBFD.
43. On the rationale of such a rule, *see* sec. 6.2.
44. On the rationale in broad terms, *see* sec. 8.2.
45. On socio-legal research in general, *see*, concisely, e.g. the discussion in P. Minkkinen, *Oikeus- ja yhteiskuntatieteellinen tutkimus – suuntaus, tarkastelutapa, menetelmä?*, Lakimies 7/8, sec. 3 (2017), as well as, further going, the contributions and references provided for in D. Feenan (ed.), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013); and D. Cowan & D. Wincott (eds.), *Exploring the*

Having shed light on financial instruments from the perspective of tax law, corporate finance and economics[46] and having elaborated on the guiding principles for company taxation (namely equity, efficiency and administrability),[47] the following research path helps the book achieve its aims.

First, the non-legal problems of the legal phenomenon of tax arbitrage with HFIs will be investigated. This should display the concerns caused by (uncombatted) tax arbitrage with HFIs. Chapter 4 will work out three concerns from an inter-taxpayer equity perspective, three from an inter-nation equity perspective and three from an efficiency perspective. The nature of

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'Legal' in Socio-Legal Studies (Palgrave Macmillan 2016). *See also* B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001); and W. Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press 1997). Minkkinen, who provided for these and other references, states that the "broad notion of 'socio-legal' is not limited to empirical approaches to law, but it embraces the idea of a multidisciplinary methodological pluralism that is required if one wishes to study law in its social, political, economic and cultural contexts". The research goal of this book, i.e. assisting tax policymakers in overcoming the non-legal problems induced by tax arbitrage with HFIs in a way that is most suitable for their countries, demands a socio-legal perspective. In simple terms, this is because tax policymakers design rules in a context that is broader than existing tax law, and addressing their needs also requires this analysis to take place in that wider setting. This means that it has to consider the traditional principles of tax policy, including tax competition constraints. Legal doctrinal research, on the other hand, is not central to this book. Given that the addressees of this research are tax policymakers around the world, an analysis of the rules against tax arbitrage with HFIs from the perspective of contemporary domestic tax systems is neither possible nor required. In this context, *see* the discussion in sec. 1.5. It should, however, be noted that this book will reveal a pressing need for such research to take place (*see* especially secs. 5.4.5., 6.4.5, 7.4.5. and 8.4.5.). As such, scholars are called upon to analyse and systematize the respective domestic implementation legislation of the rules discussed in this study from the perspective of their tax systems. This does not mean that the book will be free of legal dogmatic research; in fact, its goals demand a discussion as to whether the relevant rules comply with higher-ranking law. If they do not, they cannot be implemented. In such case, they are not (practically) suitable. Especially sec. 1.5. will outline this in more detail. Hence, in secs. 5.5., 6.5. and 7.5., in connection with secs. 2.1.5.3. and 8.5., the book will, metaphorically speaking, leave the tax policymaker's office and – to the benefit of the former – move into the courtroom. In this context, legal dogmatic research methods will be employed. Thereby, all methods of interpretation (grammatical, historical, systematic and teleological), will be given room. *See*, on the methods of interpretation, F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Springer 1982). *See also*, more generally, e.g. M. Van Hoecke, *Legal Doctrine: Which Method(s) for What Kind of Discipline?*, in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (M. Van Hoecke ed., Hart Publishing 2011).

46. *See* secs. 2.1.-2.3.

47. *See* secs. 3.2.1.-3.2.3.

the problems is different: some are triggered by tax arbitrage with HFIs,[48] while others emerge in the course of taking legislative action against it.[49]

Four approaches against tax arbitrage with HFIs will be analysed. They are chosen with a view to reach as many countries as possible that are interested in legislative action against tax arbitrage with HFIs.[50] These are the OECD approach,[51] the low-tax approach,[52] the UN approach[53] and the recharacterization approach.[54] The focus will be on tax arbitrage transactions with HFIs that rely on a qualification conflict and substitute transactions with financial instruments that reach the same or a similar result.[55]

The approaches under analysis will be assessed in view of their potential to overcome the non-legal problems worked out in chapter 4. Aside from this, additional considerations regarding inter-taxpayer equity, inter-nation equity and efficiency will be provided.

The analysis will take into account the administrability of an approach.[56] This happens for two reasons. First, if an approach turns out not to be administrable, it cannot be implemented – regardless of how well it solves the concerns attached to tax arbitrage with HFIs. Secondly, if an approach is principally administrable, its implementation becomes less attractive in the presence of high administrative and compliance costs.

Legal dogmatic questions will also be elaborated on.[57] Thereby, it should be inquired as to whether higher-ranking law could potentially be an obstacle to the implementation of an approach.[58]

48. Such as the increased perception of the tax system being unfair (which is the first inter-taxpayer equity concern) or the possible horizontally inequitable taxation of a local subsidiary of a multinational entity and a domestic standalone entity (which is the second inter-taxpayer equity concern), both discussed in sec. 4.2.1.
49. Such as the different interests of jurisdictions to legislate against tax arbitrage with HFIs, which makes doing so more difficult in general (which is the first inter-nation equity concern), or the potential for retaliation against legislative action against tax arbitrage with HFIs, which may lead to double taxation (which is the third inter-nation equity concern), both discussed in sec. 4.2.2.
50. In more detail, *see* sec. 1.3.
51. *See* ch. 5.
52. *See* ch. 6.
53. *See* ch. 7.
54. *See* ch. 8.
55. As for the justification, *see* sec. 1.3.; as to the terminology, *see* sec. 1.4; as to the limitations going hand in hand with taking such a perspective, *see* sec. 1.5.
56. *See* sec. 4.4.
57. *See* sec. 4.5.
58. *See* sec. 1.3. As to the relevant limitations, *see* sec. 1.5.

Having conducted the analysis of the four approaches, the author provides for his own solutions. Thereby, he will not propose a new approach; rather, building on the prior discussions, he aims to advise tax policymakers on what action can possibly – and sensibly – be taken. In doing so, tax policymakers in three different situations are addressed: (i) those who already decided to combat tax arbitrage with HFIs through BEPS Action 2; (ii) those who are considering combatting tax arbitrage with HFIs by means of targeted (and potentially simpler) linking rules; and (iii) those who do not intend to combat tax arbitrage with HFIs through targeted rules.

This can be translated into three research questions. First, what are the non-legal concerns caused by tax arbitrage with HFIs? Second, what are the effects of applying each of the four approaches against tax arbitrage with HFIs that are under analysis,[59] and what concerns are raised by the (main)[60] rules themselves?[61] Third, what guidelines can be proposed for tax policymakers that want to combat tax arbitrage with HFIs, taking into account the limitations of reality?[62]

1.3. Scope and research approach

The scope and limitations of this research will be dictated by what is found in chapter 4.[63] The concerns worked out there result from tax arbitrage transactions with HFIs that rely on a qualification conflict.[64] However, it is often not limited to that. When this is the case, tax arbitrage with HFIs exploiting a qualification conflict is only one way to reach an outcome that causes the respective concern to arise. Every other transaction that provides for the same or a similar result does so as well. Thus, denying tax arbitrage with HFIs that relies on a qualification conflict is of little value if the taxpayer can simply replicate the effects.[65] Therefore, where a broader

59. Especially referring to their ability to overcome the concerns raised by tax arbitrage with HFIs, as addressed in secs. 4.2.-4.3.
60. *See* sec. 1.3.
61. Especially referring to what is discussed under the headings “additional considerations on”, as well as to the discussions held with respect to the administrability of an approach and legal dogmatic considerations.
62. As to the relevant assumptions, *see* sec. 1.5.
63. As to the limitations, *see* sec. 1.5.
64. *See* sec. 1.4. on the understanding of this notion for the purposes of this book.
65. Which, interestingly, was a reason for some literature to doubt whether addressing tax arbitrage makes sense at all. *See* Rosenbloom, *supra* n. 1, at p. 154.

perspective is required, the research has to consider substitute transactions as well.[66]

Accurately doing so would require the study to look at any payment that (i) gives rise to a deduction at the level of the payer; and (ii) is subject to no/low taxation at the level of the receiver. This is an impossible task.[67] To keep the scope controllable, the only kind of substitute transactions focused on in this book are those that can be put into effect with financial instruments. A simplification is also made here: only deductible interest payments that are, for a reason other than the tax treatment of the transaction, no/low-taxed at the recipient level[68] are understood as substitute transactions for tax arbitrage with HFIs relying on a qualification conflict.[69] Derivatives are, for the sake of simplicity, not looked at in this context.[70] This roughly corresponds to the "interest channel"[71] referred to by the European Commission in its work on aggressive tax planning.[72] The other two main channels, i.e. royalty payments and strategic transfer pricing, are not dealt with in this book.[73]

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66. *See*, in more detail, sec. 4.6.
67. As to the reasons that give rise to this perception, *see* the discussion in sec. 1.5.
68. I.e. the payment is not, e.g. tax-exempt because it is regarded as a dividend under the tax law of the receiver state, but rather because the recipient is, for instance, resident in a no/low-tax jurisdiction.
69. *See*, more precisely, the working definitions in sec. 1.4.
70. On the issue of derivatives in tax law, *see*, e.g. A. Laukkanen, *Taxation of Investment Derivatives* (IBFD 2007), Books IBFD; and O. Weidmann, *Taxation of Derivatives* (Kluwer Law 2015).
71. "Hybrid entity" loans and interest-free loans are not covered under the "broad perspective". Note that they were also not considered separately in Centre for European Economic Research, *The Impact of Tax Planning on Forward-Looking Effective Tax Rates*, European Commission Taxation Paper No. 64., sec. 3.2. (2016). *See also* European Commission, *Aggressive Tax Planning Indicators*, Working Paper No. 71-2017, sec. 2.2. (2017) [hereinafter European Commission ATP].
72. European Commission ATP, id., at sec. 2.2., based on Centre for European Economic Research, id., at ch. 3; and European Commission, *Recommendation on Aggressive Tax Planning* (2012-772-EU), Primary Sources IBFD [hereinafter EC Recommendation on ATP].
73. European Commission ATP, *supra* n. 71, at sec. 2.2. *See*, for an overview of empirical literature on profit shifting, R. Collier & N. Riedel, *The OECD/G20 Base Erosion and Profit Shifting Initiative and Developing Countries*, 72 Bull. Intl. Taxn. 4/5, sec. 2.3. (2018), Journal Articles & Papers IBFD, referring to D. Dharmapala, *What Do We Know about Base Erosion and Profit Shifting? A Review of the Empirical Literature*, 35 Fiscal Stud. 4 (2014); J. Heckemeyer & M. Overesch, *Multinationals. Profit Response to Tax Differentials: Effect Size and Shifting Channels*, 50 Can. J. Econ. 4 (2017); R. Davies et al., *Knocking on Tax Haven's Door: Multinational Firms and Transfer Pricing*, Review of Economics and Statistics 100 (2018); T. Karkinsky & N. Riedel, *Corporate Taxation and the Location of Patents within Multinational Firms*, 88 J. Intl. Econ. 1 (2012); and T. Tørsløv, L. Wier & G. Zucman, *The Missing Profits*

Against this background, it seems sensible to work out so-called "approaches against tax arbitrage with HFIs" in the research part of the book.[74] They will be defined in a way that covers (i) tax arbitrage with HFIs relying on a qualification conflict; and (ii) other rules explicitly proposed or implicitly relied on in combatting substitute transactions with financial instruments (excluding derivatives).[75]

Within each approach, the rules addressing tax arbitrage with HFIs are referred to as "main rules". Whenever a narrow perspective is needed, (only) these provisions will be paid attention to.[76] Furthermore, only these rules will (primarily) be analysed separately from an equity, efficiency and administrability point of view.[77] The provisions supporting the main rules are referred to as "backup rules". Depending on the approach under analysis, their role is different. Sometimes, they are required to cover substitute transactions with financial instruments.[78] Sometimes, they need to ensure

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of Nations, NBER Working Paper 24701 (2018). *See also* the references provided for in sec. 2.2.3. *See further* S. Beer, R. de Mooij & L. Liu, *International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots*, IMF Working Paper 18/68/168 (2018), who refer to seven channels of international tax avoidance: "(i) transfer mispricing (stretching, violating or exploiting weaknesses in the arm's length principle); (ii) strategic location of management of intellectual property (IP) to low-tax countries to reduce taxes on associated income; (iii) debt shifting through intracompany loans (excessive borrowing in high-tax countries and lending to low-tax countries); (iv) treaty shopping (exploiting treaty networks to route income so as to avoid tax); (v) risk transfer (conducting operations in high tax jurisdictions on a contractual basis to limit profits attributable there); (vi) avoiding PE status; and (vii) locating asset sales in low-tax jurisdictions (to avoid taxes on the capital gains)." In this cited work, at pp. 7-10, relevant empirical evidence is discussed.

74. *See* sec. 1.2.

75. With respect to substitute transactions for tax arbitrage with HFIs that are effected with financial instruments (excluding derivatives), *see* just above in this section, as well as, more precisely, sec. 1.4.

76. A "narrow" perspective is required when a concern caused by tax arbitrage with HFIs is explicitly connected to tax arbitrage with HFIs and cannot be caused by a substitute transaction. *See* secs. 4.2.1.-4.2.2. and 4.6 for more detail.

77. *See* secs. 5.4.2.2., 5.4.3.2. and 5.4.4.2. and the corresponding sections in chs. 6-8. Occasionally, backup rules will also be taken into consideration in these elaborations.

78. To give a short forecast, the main rule(s) of the OECD approach against tax arbitrage with HFIs will consist of the rules contained in BEPS Action 2 that are relevant for tax arbitrage with HFIs. They are backed up by BEPS Actions 3 and 4, as well as by relevant domestic law rules applicable to interest payments that are no/low-taxed at the recipient level. Furthermore, these rules are supported by BEPS Actions 5, 6, 8-10, 12 and 13. *See* sec. 5.1. for the relevant references. When a broader view is required, these rules – sometimes differently – have to be taken into consideration. In ch. 6, dealing with the low-tax approach against tax arbitrage with HFIs, the main rule is broader. It will be a case study of the Austrian Corporate Income Tax Act (AT: *Körperschaft-*

the integrity of the main rule.[79] On another occasion, they are not required at all.[80] Contrary to the main rules, the backup rules will not be subject to analysis themselves. They should only be mentioned in order to reflect that, in reality, legislative action against tax arbitrage with HFIs is embedded into a broader setting of legislative action against BEPS. It would be odd to ignore that, especially as the different pieces contained in the relevant legislative efforts are usually meant to interact.[81]

The four approaches chosen for analysis are, as mentioned,[82] (i) the OECD approach; (ii) the low-tax approach; (iii) the UN approach; and (iv) the recharacterization approach.

By investigating (i) and (iii), all of the coordinated actions against tax arbitrage with HFIs mentioned in section 1.1. are covered. For obvious reasons, studying them is mandatory for this research. Tax policymakers interested in combatting tax arbitrage with HFIs will have to consider this unprecedented work. Depending on their development stage, they will start by considering either the OECD approach or the UN approach. EU Member States have already decided to follow the former.[83] For that reason, a sepa-

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steuergesetz (1988), sec. 12(1)(10), Primary Sources IBFD, which, generally speaking, denies the deduction of interest payments if they are taxed below 10% at the level of the related-party recipient. Among the backup rules are those that apply to interest payments made to recipients that are taxed above 10% on the income.

79. As it will be seen in ch. 7, the UN approach against tax arbitrage with HFIs will be formed by comprehensive withholding tax on all outgoing payments. Such a rule does not differ between tax arbitrage with HFIs relying on a qualification conflict and substitute transactions with financial instruments. The backup rule will be the so-called "principal purpose test (PPT). The rationale for taking this rule into account is the need to mitigate treaty-shopping practices. The easier it is to engange in such a tax planning strategy, the harder it is to uphold comprehensive withholding tax. To be clear, any rules targeting tax treaty abuse back up the UN approach. The choice of the PPT as the only rule to be analysed, however, has a reason. *See*, in more detail, the discussion and references provided for in sec. 7.1.

80. Which will be the case in ch. 8. In simple terms, this is so because the tax arbitrage element will not be attached a special meaning for determining whether a recharacterization from debt into equity can take place. The approach thus applies to tax arbitrage transactions with HFIs and substitute transactions with financial instruments in the same way. *See*, in more detail, the discussion and references provided for in secs. 8.4.1.2. and 8.4.1.3.

81. *Compare* especially the discussion in sec. 5.1. Yet, this does not seem to be the case with respect to the UN approach, which does not appear to be directly coordinated with other contributions in the UN Handbook, *supra* n. 38. *See*, in this regard, the relevant discussion and references provided for in sec. 7.1.

82. *See* sec. 1.2.

83. In more detail, *see* the discussion and references provided for in sec. 5.1.

rate discussion of the relevant parts of the OECD/G20 BEPS Project and the relevant parts of EU law seems redundant.[84]

Elaborating on (ii) and (iv) is important due to them being a potentially interesting alternative to (i) and (iii). The low-tax approach will be analysed with a case study of section 12(1)(10) of the Austrian Corporate Income Tax Act (*Körperschaftsteuergesetz*, or KStG) and its backup rules. Being a linking rule, it is likely unfeasible for less developed countries. However, it could be an option for those that are willing to implement a targeted rule, but are unable (or unwilling) to rely on the highly complex linking rules contained in BEPS Action 2.[85] This may, for instance, be the case for middle-income countries.[86]

The recharacterization approach, on the contrary, is not a means against tax arbitrage with HFIs that countries actively implement for this purpose. Rather, it is a proxy for the protection that countries may extract from transfer pricing provisions and/or GAARs, which are rules that exist across countries. It is clear from the outset that the recharacterization approach does not provide for strong defence, even though changes to the OECD Transfer Pricing Guidelines resulting from the OECD/G20 BEPS Project may lead to easier recharacterizations from debt into equity.[87] After all, neither GAARs nor transfer pricing provisions explicitly target tax arbitrage with HFIs. Still, they could be an attractive solution for a certain set of countries, which is why they are included in the analysis conducted in this book.[88]

1.4. Terminology

In this book, tax arbitrage with HFIs will be understood as a transaction with an HFI that exploits inconsistencies in the tax treatment of this transaction under two states' tax law.[89] This results in an overall tax outcome

84. Relevant deviations will be highlighted separately. *See* especially the discussion and references provided for in sec. 5.4.5.
85. *See* especially the discussion and references provided for in sec. 5.4.5.
86. Also, less developed countries with sufficient resources dedicated to their tax authorities could consider the implementation of such a rule.
87. *See* the discussion and references provided for in secs. 8.3.2. and 8.4.1.3.
88. As revealed along the lines of ch. 8, this may especially be the case for countries that tolerate tax arbitrage with HFIs but do not want to do so indefinitely.
89. This understanding is, notably, similar to what is included in BEPS Action 2. *See*, in this regard, the discussion and references provided for in sec. 5.3.1.1. A difference between the OECD's understanding and the understanding presented in this

that is more favourable than what could be achieved if the same transaction were effected in a purely domestic setting.[90]

On the contrary, transactions with financial instruments that exploit the non/low taxation of the receiver itself[91] are not seen as tax arbitrage with HFIs in this book.[92] This is similarly true for transactions with financial instruments that exploit the circumstances in which the instrument is held.[93] For instance, interest payments made to a non/low-taxed permanent

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book concerns tax arbitrage with HFIs occurring in a domestic setting: the OECD covers them (*see BEPS Action 2*, *supra* n. 13, at Example 1.21), whilst this thesis does not. In the author's view, it is up to tax policymakers to screen their domestic law for inconsistencies. If they exist, they will find a suitable way to deal with it. That could mean, for instance, applying rules targeting (international) tax arbitrage with HFIs (as done by the OECD). Note, for clarity, that Example 1.21 is not targeted at domestic tax arbitrage as discussed in *supra* n. 3, but covers an (international) tax arbitrage outcome that is achievable in a domestic setting. To be clear, not every country's tax law shows such inconsistencies.

90. As an incomplete overview of what has been brought forward in literature to define cross-border tax arbitrage as such (and not tax arbitrage with HFIs in specific) *see* Ring, *supra* n. 1, at pp. 85-86, who states: "Various definitions of cross-border tax arbitrage have been offered by government officials, tax scholars, and practitioners. Generally, these definitions encompass situations in which countries' tax rules governing a particular transaction or structure differ sufficiently that the conflict results in tax benefits that would not exist had the transaction or entity occurred entirely domestically in either country. In cases of cross-border tax arbitrage, taxpayers avail themselves of conflicting rules and gaps between national tax systems to reduce their tax burden"; West, *supra* n. 1, at p. 171, who states: "Jurisdictions often differ in their tax treatments of particular transactions or items. The tax treatments are sometimes so different as to be inconsistent. Where this inconsistent treatment produces tax benefits that would not be available if the transaction or item were treated consistently, it may be referred to as cross-border tax arbitrage"; A.H. Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 Virginia Tax Review, p. 560 (2007), who states: "[I]nternational tax arbitrage arises when taxpayers who are subject to tax in multiple jurisdictions exploit differences in the rules of the tax regimes (whether it be different international tax regimes, different tax bases, different timing rules, different definitional elements, or otherwise) to technically comply with the law of both jurisdictions but incur a lower total net tax liability than if the transaction had been subject solely to the laws of either jurisdiction"; and Rosenbloom, *supra* n. 1, at p. 142: "'[I]nternational tax arbitrage' [is] a lofty term that refers to taking advantage of differences among country tax systems, usually differences in addressing a common tax question." *See also*, broadly, M.A. Kane, *Strategy and Cooperation in National Responses to International Tax Arbitrage*, 53 Emory L. J. 89, pp. 102-112 (2005). As for domestic tax arbitrage, which is not addressed in this book, *see* the discussion and references provided for in *supra* n. 3.

91. E.g. resulting from it being resident in a no/low(er)-tax jurisdiction, it being a tax-exempt entity or it being subject to any other special tax treatment.

92. For authors that seem to regard such transactions as tax arbitrage, *see* the sources cited in *infra* n. 103.

93. *See also BEPS Action 2*, *supra* n. 13, at paras. 51 and 97. Given that this book starts from an understanding of tax arbitrage with HFIs similar to what is included in

establishment that is tax-exempt in the receiver's residence state are not considered tax arbitrage with HFIs in this study.[94] Rather – unless effected with derivatives – they will be regarded as "substitute transactions" for tax arbitrage with HFIs in the remainder of this book. By taking in this view, the essence of a tax arbitrage transaction with an HFI should be isolated, i.e. reaching the same tax outcome that is achievable via an interest payment to a tax haven without actually being required to make a payment to a tax haven.[95]

The term "hybrid" as used in this context consequently aims to signal a difference in the way in which a jurisdiction taxes the transaction. It notably does not refer to a difference in the classification of the instrument. To be clear, different classification of an instrument (most importantly, as either debt or equity) often leads to a difference in the way in which a transaction is taxed. Yet, an agreement on the classification (e.g. as debt) may also correspond to inconsistent tax consequences.[96] This is important to stress, because in chapter 2, the adjective "hybrid" has, for methodical reasons, a different task.[97] Due to that chapter primarily focusing on bona fide financing arrangements, the term HFI as used there describes an instrument that is not pure debt or pure equity, but something in between.[98]

The term "qualification conflict" refers to inconsistencies resulting from how jurisdictions qualify a transaction for the purposes of their whole tax system.[99] In other words, a qualification conflict occurs when differences

BEPS Action 2, the delimitations are, unsurprisingly, similar as well.

94. Inspired by id., where, in para. 97, also other possible fact patterns are discussed.

95. In the words of Harris, *supra* n. 1, at sec. 5: "At a fundamental and cynical level, hybrid mismatch arrangements are just a means by which tax planners use two countries with normal (and decent) tax systems to produce mismatches comparable to those achieved by routing investment through a tax haven." On secondary sheltering, *see*, e.g. L. De Broe, *International Tax Planning and Prevention of Abuse* pp. 56-57 (IBFD 2007), Books IBFD.

96. *See* the relevant discussion and references provided for in sec. 1.1. As mentioned, such outcomes may sometimes even occur in the same jurisdiction; *see BEPS Action 2*, *supra* n. 13, at Example 1.21.

97. *See* sec. 1.5.

98. The Oxford dictionary defines the term "hybrid" as follows: "Of mixed character; composed of different elements.". Depending on the context used, the word "hybrid" describes different things. In ch. 2, when speaking about different forms of financing, "hybrid" refers to instruments that lie in between the two ends of the spectrum of possible financing forms. In ch. 4, when speaking about two possible consistent tax treatments, "hybrid" refers to tax treatments that lie in between them, i.e. inconsistent tax treatments.

99. As opposed to conflicts in the qualification as debt or equity.

in the tax treatment of the same circumstances are present.[100] Naturally, the qualification conflicts primarily relevant for this book are those that lead to some sort of better treatment.[101] For clarity, it should be noted that, with the above discussion in mind, it would be superfluous to separately refer to tax arbitrage with HFIs that relies on a qualification conflict; it would suffice to speak about tax arbitrage transactions with HFIs alone. Yet, sometimes, for the sake of explicitly contrasting it with substitute transactions,[102] it appears worthwhile to emphasize its reliance on a qualification conflict. After all, tax arbitrage has also been understood by some commentators as encompassing the exploitation of differences in the tax rate.[103] As mentioned above, such transactions, if effected with financial instruments, belong to the group of substitute transactions in this book.

When speaking about developed and developing countries, the author does not have specific countries in mind. Rather, the research will be based on some stylized characteristics that can be considered typical for developing countries.[104] Already at this stage, it seems noteworthy that the most relevant attributes will be a developing country's inability and unwillingness to take targeted action against tax arbitrage with HFIs. Importantly, these characteristics will not be shown by every developing country. The BRICS countries (Brazil, Russia, India, China and South Africa), for instance, may well have better – and probably sufficient – resources and skills to implement more sophisticated rules.[105] Less developed countries, on the other hand, may not. As such, the relevant assumptions made in this book

100. *See* C. Kahlenberg & A. Kopec, *Hybrid Mismatch Arrangements – A Myth or a Problem That Still Exists?*, 8 World Tax J. 1, at footnote 3 (2016), Journal Articles & Papers IBFD: "Qualification conflicts occur generally where two or more jurisdictions apply a different treatment to the same situation (e.g. financial instrument)."
101. As mentioned in sec. 1.1., qualification conflicts can also yield worse treatment.
102. On the understanding of substitute transactions for the purposes of this book, *see* just above in this section.
103. *See* T.D. Greenaway, *International Tax Arbitrage: A Frozen Debate Thaws*, 82 Tax Notes Intl., p. 63 (2010): "The term 'international tax arbitrage' refers to arrangements that exploit meaningful differences between the tax consequences of the same item in two or more jurisdictions. For instance, one of the most basic tax law differences is the effective income tax rate." *See also* R.S. Avi-Yonah, *Tax Competition, Tax Arbitrage and the International Tax Regime*, 61 Bull. Intl. Taxn. 4, sec. 5.3. (2007), Journal Articles & Papers IBFD, who could be understood towards this end, due to the statement that "[t]ax arbitrage can be defined as transactions that are designed to take advantage of differences between national tax systems to achieve double non-taxation."
104. These are covered by the literature review conducted in secs. 3.2.1.3.2.3. and 3.2.3.2., and a summary is provided in section 7.1. *See further* M. Keen, *Taxation and Development – Again*, International Monetary Fund Working Paper No. 12/220, pp. 4-9 (2012). *See also* Collier & Riedel, *supra* n. 73, at sec. 1.
105. These countries may especially consider the discussion held in ch. 6.

Notes

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