The Interpretation of Multilingual Tax Treaties

Leiden University Press

Cover design: Maedium, Utrecht
Lay-out: Paolo Arginelli

ISBN 978 90 8728 201 1
NUR 780

The Interpretation of Multilingual Tax Treaties

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 29 oktober 2013
klokke 15.00 uur

door

Paolo Arginelli

geboren te Cesena (Italië)

in 1975

Promotiecommissie:

Promotores:	prof. dr. C. van Raad
	prof. dr. F.A. Engelen
Overige leden:	prof. dr. T. Bender
	prof. dr. H. De Hoop (Raboud Universiteit Nijmegen)
	prof. dr. E. Reimer (Universität Heidelberg, Germany)
	dr. J. Avery Jones (Pump Court Tax Chambers, London, UK)

to Kathrin, Agata and Luis

to my parents

Ecce unus est populus et unum labium omnibus; et hoc est initium operationis eorum, nec eis erit deinceps difficile, quidquid cogitaverint facere. Venite igitur, descendamus et confundamus ibi linguam eorum, ut non intellegat unusquisque vocem proximi sui.

Genesis, 11

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master — that's all."

L. Carroll, *Through the Looking Glass and What Alice Found There*, 6

TABLE OF CONTENTS

INTRODUCTION

PART I
SEMANTIC AND NORMATIVE ANALYSIS

PART II

POSITIVE ANALYSIS AND ITS INTERACTION WITH NORMATIVE ANALYSIS: A NORMATIVE LEGAL THEORY ON THE INTERPRETATION OF MULTILINGUAL TAX TREATIES

INTRODUCTION

1. Purpose and methodology of the study

1.1. Purpose of the study

The purpose of the present study is:
(i) to single out and clarify the most common types of issues emerging in the interpretation of multilingual tax treaties (i.e. tax treaties authenticated in two or more languages), as well as
(ii) to suggest how the interpreter should tackle and disentangle such issues under public international law, with a particular emphasis on the kinds of arguments he should use and the kinds of elements and items of evidence he should rely upon in order to support his construction of the treaty.

The issues on the interpretation of multilingual tax treaties dealt with in this study may be broadly divided in two groups *ratione materiae*:
(i) those general in nature, which may potentially concern all multilingual treaties;
(ii) those specific to multilingual tax treaties.

1.1.2. Issues potentially concerning all multilingual treaties

Certain fundamental issues concerning the interpretation of multilingual treaties appear to arise independently from the nature and content of the treaty actually at stake. Such issues may be expressed by means of the following general questions, each followed by a brief exemplification of the core issues dealt with.

a) Must all authentic texts be given the same status for the purpose of interpreting multilingual treaties?

The issue at stake here may be aptly illustrated by means of reference to Article 41 of the ICJ Statute, which in its English and French authentic texts reads as follows (*italics* by the author):

1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council.
---
1. La Cour a le pouvoir *d'indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires

du droit de chacun *doivent être* prises à titre provisoire.
2. En attendant l'arrêt définitif, *l'indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

Assume that the question to be answered by the interpreter is whether the provisional measures indicated by the ICJ pursuant to Article 41 of its Statute must be considered (or not) as binding orders. The French expression "doivent être prises" appears imperative in character. However, the English text, in particular the use of "indicate" instead of "order", of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered", seems to suggest that the ICJ's decisions under Article 41 of its Statute lack of mandatory effect.

In this case, may the interpreter rely exclusively or predominantly on one of these two authentic texts for the purpose of construing Article 41 of the ICJ Statute and, therefore, answering the above question? If so, on which arguments might he justify his choice in that respect?

More specifically, supposing the interpreter knows that the ICJ Statute was originally drafted in French and that the English text is a subsequent translation based on the former, may or should he decide that the provisional measures indicated by ICJ under Article 41 are binding (also) on the basis of the drafting history of that article, which may support the conclusion that the French text should be given more interpretative weight?[1]

b) What is the relevance of non-authentic texts for the purpose of construing (multilingual) treaties?

Consider a bilateral treaty authenticated only in French, which uses the expression "propriété ou contrôle public", for instance in the following provision of a bilateral treaty:

L'administration aura pleins pouvoirs pour décider quant à la propriété ou contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d'utilité publique déjà établis ou à établir.[2]

In this context, the French expression "propriété ou contrôle public" is ambiguous, since it may be regarded as limited to the various methods whereby the public administration might take over (or dictate the policy of) undertakings not publicly owned, or as including also every form of supervision that the administration might exercise either on the development of the natural resources of the country or over public works, services and utilities. Assume in that respect that, in French, the latter construction appears to flow more naturally from the text.

Imagine a non-official version of the treaty exists, which has been drafted by the Ministry of Foreign Affairs of one of the contracting States as an official translation in its own official language, say English. In such a translation, the expression "public

[1] The example is derived from ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment.
[2] The example is derived (with significant deviations) from PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment.

ownership or control" is used, which appears to point towards the former of the above-mentioned possible constructions.

May or should the interpreter take into account such a translation for the purpose of determining the meaning of the treaty-authentic text and rely thereon in order to support his construction? Is in that respect relevant for him to know that the translation has been drafted by the very same negotiators of the treaty, or, on the contrary, by the translation *bureau* of the Ministry of Foreign Affairs? Should the interpreter change his perspective if the other contracting State had also translated the treaty in its own official language and that official translation points towards the same meaning of the English non-official version?

c) Is there any obligation to perform a comparison of the different authentic texts anytime a multilingual treaty is interpreted?

This issue may be briefly illustrated with reference to Article 5(1)(e) of the ECHR, which allows the lawful detention "of persons of unsound minds, alcoholics or drug addicts or vagrants".

In order to construe that article, in particular for the purpose of determining whether it allows the lawful detention of non-alcohol-addicted drunk persons, may the interpreter rely solely on the English authentic text of the ECHR, or is he obliged to compare the latter with the French authentic text thereof?[3]

d) If the previous question is answered in the negative, when does an obligation to compare the different authentic texts arise?

In the example given with reference to question c), the term "alcoholics" appears *prima facie* ambiguous since, on the one hand, in its common usage it denotes persons addicted to alcohol, but, on the other hand, such a meaning does not seems to fit well in the context of Article 5(1)(e) of the ECHR, the meaning corresponding to the expression "drunk persons" appearing to fit better.

The question thus arises whether the interpreter should be obliged to compare the English with the French authentic text from the outset, in order to solve the *prima facie* ambiguity of the former, or whether he should be entitled to rely on other available means of interpretation (elements and items of evidence) before reverting to a comparison of the authentic texts. Moreover, where the latter question is answered in the affirmative, uncertainty could exist on whether the interpreter should be also entitled to rely on supplementary means of interpretation (for instance, the treaty *travaux préparatoires* of the ECHR) in order to solve the apparent ambiguity of the English authentic text, before being required to compare the latter with the French text.

e) How should the interpreter solve the prima facie discrepancies among the various authentic texts emerging from the comparison?

[3] The example is derived from ECtHR, 4 April 2000, *Witold Litwa v. Poland (Application no. 26629/95)*.

Consider a case where the application of Article 8(1) of the ECHR is at stake. The latter, in its English and French authentic texts, reads as follows (*italics* by the author):

Everyone has the right to respect for his private and family life, his *home* and his correspondence. […]

Toute personne a droit au respect de sa vie privée et familiale, de son *domicile* et de sa correspondance. […]

The English term "home" generally denotes solely the private dwelling of an individual, while the corresponding French term "domicile" has a broader intension and may be regarded as denoting also business and professional premises.

In order to reconcile such a *prima facie* discrepancy, which elements should the interpreter take into account and which arguments should he use? Should his analysis be limited to the comparison of the texts? Should he give preference to one meaning over the other exclusively on the basis of the former appearing more in line with the treaty's object and purpose?[4]

f) What should the interpreter do where the prima facie discrepancies could not be removed by means of (ordinary) interpretation?

The possibility that the ordinary process of interpretation might fall short in removing the *prima facie* discrepancies in meaning among the various authentic treaty texts seems to be suggested by Article 33(4) VCLT, according to which, where the contracting States did not agree on a different solution and the application of Articles 31 and 32 VCLT has failed to remove the apparent discrepancy, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

Such a provision raises three issues that an interpreter has to deal with.

First, one might doubt whether and to what extent, in cases of divergences not removed by the application of Articles 31 and 32 VCLT, the presumption established by Article 33(3) VCLT (the terms of the treaty are presumed to have the same meaning in each authentic text) continues to play a role for interpretation purposes. Should one accept that the various authentic texts may have (and actually do have) different meanings? And what should follow from such a conclusion?

Second, one could wonder what the meaning of the expression "the meaning which best reconciles the texts" is. Does it mean that the interpreter has to stretch the meaning of one text towards the other texts' meaning(s)? And, in such a case, how much is the interpreter entitled to stretch the former meaning? Does it mean, instead, that the interpreter is bound to find some midpoint between the meanings of the various authentic texts? Does he have to give preference to the meaning common to the highest number of authentic texts? Or does he have to apply the most restrictive interpretation, if any?

Third, what is the relevance of the final reference to the treaty object and purpose ("having regard to the object and purpose of the treaty"), considering that such object

[4] The example is derived from ECtHR, 16 December 1992, *Niemietz v. Germany (Application no. 13710/88)*.

and purpose is to be taken into account also for the purpose of Articles 31-32 VCLT?

g) Where the treaty provides that a certain authentic text is to prevail in the case of divergences:

i. At which point of the interpretative process must there be recourse to such a prevailing text?

This issue may be illustrated by taking as case study Article 208 of the Peace Treaty of Saint German, concluded on 10 September 1919 in Saint-Germain-en-Laye.

According to the English authentic of the treaty, the States to which the territory of the former Austro-Hungarian Monarchy was transferred at the end of World War I and the States arising from the dismemberment of that Monarchy acquired all property and possessions situated within their territories belonging to the former or existing Austrian Government, including "the private property of members of the former Royal Family of Austria-Hungary". The French authentic text of the treaty, in that respect, made reference to the "biens privés de l'ancienne famille souveraine d'Autriche-Hongrie". Between the English and the French authentic texts, therefore, a *prima facie* divergence of meaning might be alleged to exist, where the former was construed as referring to all private property owned by members of the Royal Family of Austria-Hungary, while the latter was construed as limiting the scope of the provision to solely the private property directly owned by the Royal Family as such.

Under the final clause of the treaty, the French authentic text of Article 208 was to prevail over the English and Italian authentic texts in cases of divergences.

Assume that the members of the former Royal Family of Austria-Hungary held some of their property in their individual capacity and not together as Royal Family.[5]

In order to decide whether the property individually held by the members of the former Royal Family could be legitimately transferred to the States arising from the dismemberment of the Monarchy under Article 208 of the Peace Treaty of Saint German, an interpreter could follow two alternative and mutually exclusive argumentative paths, as well as any of the paths laying between such two extremes. The two outermost argumentative paths that the interpreter might follow are as such:
(i) he automatically applies the French (prevailing) text, since a *prima facie* divergence between the French and English texts was alleged to exist;
(ii) he has recourse to all available means of interpretation in order to reconcile the French and English texts, before concluding that there is an actual divergence between the provisional meanings of such texts and, therefore, before relying exclusively on the prevailing treaty text.

In this respect, the question arises of whether an obligation exists for the interpreter to follow some of the above paths, or, in any case, whether any reason exists to prefer one to the others.

[5] The example is derived from Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq*. [Case No. 235].

ii. What if the prevailing text is ambiguous or obscure?

With regard to the previous example and assuming that the French prevailing text appeared ambiguous (or obscure, or unreasonable), what relevance should the interpreter attribute to the other authentic texts for the purpose of construing Article 208 of the Peace Treaty of Saint German, in particular where he concluded that the English and Italian authentic texts pointed towards the same meaning?

iii. What about the contrast between the prevailing text and the other authentic texts if the latter are coherent among themselves?

With regard to the previous example, what should an interpreter do where he provisionally concluded that (i) the French (prevailing) text of Article 208 of the Peace Treaty of Saint German did not to allow the transfer of the property individually held by the members of the former Royal Family to the States arising from the dismemberment of the Austro-Hungarian Monarchy, while (ii) both the English and the Italian authentic texts seemed to permit such a transfer? Should he try to remove the apparent difference in meaning by having recourse to all available means of interpretation? Where he failed to remove the *prima facie* discrepancy among the French, English and Italian authentic texts, should he opt for the meaning attributable to the most numerous texts in concordance, or rely on the French prevailing text?

h) What is the impact of the fact that legal jargon terms are employed in the treaty texts on the answers to be given to the previous questions?

Consider the English and French authentic texts of Article 6 of the ECHR, according to which (*italics* by the author):

1. In the determination […] of any *criminal charge* against him, everyone is entitled to a fair […] hearing by an independent and impartial tribunal […]
[…]
3. Everyone charged *with a criminal offence* has the following minimum rights:
[…]
---
1. Toute personne a droit à ce que sa cause soit entendue équitablement […] par un tribunal indépendant et impartial, établi par la loi, qui décidera […] soit du bien-fondé de toute *accusation en matière pénale* dirigée contre elle. […]
[…]
3. Tout *accusé* a droit notamment à:
[…]

With regard to the interpretation of Article 6(3) of the ECHR, in particular for the purpose of determining whether a person has been charged with a criminal offence in a specific case, the above-mentioned questions are compounded by the fact that the relevant terms used in the two authentic texts, i.e. "*criminal charge"* and *"accusation en*

matière pénale", are (i) legal jargon terms (i.e. technical legal terms) used under the laws of States employing English and French as their official languages (e.g. legal jargon terms used under English and French domestic laws) and (ii) terms generally regarded as corresponding to legal jargon terms used under the laws of other contracting States (e.g. the German legal term "Straftat").

Suppose that certain misconduct, for instance careless driving causing a traffic accident in Germany, is considered a "criminal offence" under English law, but is not considered a "Straftat" under German law (or under French law).[6]

In order to decide the case, i.e. in order to determine whether such misconduct falls within the scope of Article 6(3) of the ECHR, an interpreter should ask himself and should answer some difficult interpretative questions, such as:

(i) did the parties intend to attribute to the terms "*criminal charge"* and *"accusation en matière pénale"* a meaning other than the meanings they have under the laws of the States using them (e.g. under English and French domestic laws) and other than the meanings of the corresponding terms used under the domestic laws of other contracting States, which are drafted in languages other than English and French (e.g. the German legal jargon term "Straftat")?

(ii) if question (i) is answered in the affirmative, how such a meaning should be determined? Should it be determined autonomously from the meanings under domestic law? Or should it reflect the minimum common denominator of the meanings that the legal jargons terms used in the authentic treaty texts have under the laws of the States using such terms (e.g. under English and French domestic laws)? Or should such a common denominator be determined taking into account also the meanings of the corresponding terms used under the domestic laws of other contracting States, which are drafted in languages other than English and French (e.g. the German legal jargon term "Straftat")?

(iii) if question (i) is answered in the negative, which domestic law meaning should be used? Should it be the meaning under, say, English or French law? Or should it be the meaning under the law of the State(s) presenting the most relevant connection(s) with the case (although such a law is written neither in English, nor in French)? Or, on the contrary, should it be the meaning under the *lex fori*?[7]

(iv) how should questions (i) through (iii) be solved where the terms and expressions employed in the authentic treaty texts seemed to diverge to a more significant extent, for instance where the English authentic text used the terms "regulatory charge" and "regulatory offence"?

1.1.3. Issues specifically concerning multilingual tax treaties

[6] The example is derived from ECtHR, 21 February 1984, *Öztürk v. Germany (Application no. 8544/79).*

[7] With regard to private law disputes, a relevant alternative would be the meaning under the law of the State to which the private international *lex fori* directs.

Some interpretative issues relate specifically to multilingual tax treaties,[8] due to the following features:

(i) most tax treaties are based on the OECD Model,[9] which is officially drafted only in the English and French languages;

(ii) the OECD Model comes with a commentary (the OECD Commentary) intended to explain, sometimes in great detail, the purpose and the application of the rules expressed by means of the model articles; the OECD Commentary is also officially drafted only in the English and French languages;

(iii) most tax treaties include a rule of interpretation according to which each undefined treaty term must be given the meaning it has under the law of the contracting State applying the treaty, unless the context otherwise requires.

Such idiosyncratic issues may be expressed by means of the following general questions, each followed by a brief exemplification of the core matters dealt with.

a) What is the relevance of the OECD Model official versions for the purpose of interpreting multilingual tax treaties (either authenticated also in English and/or French, or authenticated in neither of such languages) and monolingual tax treaties authenticated neither in English, nor in French?

For the purpose of exemplification, a parallel may be drawn with questions a) and b) of the previous section.

When the interpreter is faced with a multilingual tax treaty authenticated also in the English and/or French languages (together with other languages, e.g. Italian), may the interpreter rely exclusively or predominantly on the English and/or French authentic texts for the purpose of construing the relevant treaty article? In particular, may he support such a choice by arguing that, since the English and/or French authentic texts reproduce without significant deviations the OECD Model official versions, it is reasonable to infer that the agreement of the parties was to import into the treaty the content of the Model and, therefore, the other authentic texts should be construed in harmony with the meaning derived from the interpretation of the English and/or French texts?

On the other hand, when the interpreter is faced with a multilingual or monolingual treaty authenticated neither in English, nor in French, may or should he take into account the OECD Model English and/or French official versions for the purpose of determining the meaning of the authentic treaty text(s) and rely thereon in order to support his construction? In case such question was answered in the affirmative, should the OECD Model official versions be used only to confirm the meaning determined on the basis of the authentic treaty text(s) or to determine the meaning where the construction based on the authentic text(s) left the meaning ambiguous, obscure, or

[8] Or other types of treaties that have similar features, e.g. bilateral treaties concerning estate, inheritance and gift taxes.

[9] Or on other models (such as national models, or the United Nations Model, which in turn are based to a large extent on the OECD Model).

unreasonable, or, on the contrary, should the meaning determined on the basis of the OECD Model official versions be adopted also where conflicting with a reasonable, clear and unambiguous meaning based on the authentic treaty text(s)?

b) What is the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties?

Consider a tax treaty authenticated in English and French, Article 12 of which reproduces without significant deviations Article 12 of the OECD Model. The interpreter might be faced with an interpretative issue regarding the meaning to be attributed to the terms "copyright" and "droit d'auteur" employed in the English and French authentic texts, respectively. In particular, he could have to decide whether or not the right of an actor to authorize the reproduction of a movie in which he acted falls within the scope of the two above-mentioned terms, thus triggering the application of Article 12.

In French legal jargon, the term "droit d'auteur" does not seem to encompass such a right, which, on the contrary, appears to be denoted by the term "droit voisin" (to the "droit d'auteur"). However, in English legal jargon, the term "copyright" seems to include within its scope the right of an actor to authorize the reproduction of a movie in which he acted. Therefore, a *prima facie* discrepancy in meaning appears to exist between the English and French authentic texts of the treaty.

In this respect, paragraph 18 of the Commentary to Article 12 OECD Model seems to support a broad interpretation of the terms "copyright" and "droit d'auteur", such as to include droits voisin. According to that paragraph, where the musical performance of a musician (or orchestra director) is "recorded and the artist has stipulated that he, on the basis of his copyright [*author's note*: "droit d'auteur" in the French official version][10] in the sound recording, be paid royalties on the sale or public playing of the records, then so much of the payment received by him as consists of such royalties falls to be treated under Article 12".

The question thus arises whether and to what extent the interpreter should take into account the content of paragraph 18 of the Commentary to Article 12 OECD Model in order remove the *prima facie* discrepancy in meaning between the two authentic treaty texts.

c) The relevance of Article 3(2) of OECD Model-based multilingual tax treaties for the purpose of their interpretation

This macro-issue may be divided into the following questions:

[10] The relevant excerpt of paragraph 18 of the Commentary to Article 12 OECD Model, in its French official version, reads as follow: "Lorsqu'en vertu du même contrat ou d'un contrat distinct, la prestation musicale est enregistrée et que l'artiste a accepté, sur la base de ses droits d'auteur concernant l'enregistrement, de recevoir des redevances sur la vente ou sur l'audition publique des disques, la partie de la rémunération reçue qui consiste en de telles redevances relève de l'article 12".

i. Does Article 3(2) have an impact on the nature of the potential discrepancies in meanings among the authentic texts of a multilingual tax treaty? Where this question is answered in the affirmative, which are the various types of prima facie discrepancies that may arise? Should the interpreter put all of them on the same footing for the purpose of interpreting multilingual tax treaties?

While the various authentic texts of a multilingual treaty are generally interpreted in accordance with their own *genius*,[11] the presence of Article 3(2) in OECD Model-based tax treaties may have a bearing on such a practice.

Consider a tax treaty authenticated in two languages, for instance Italian and German. The typical discrepancy that may emerge between the two authentic texts is the one arising by comparing the meanings that they have where interpreted in accordance with their own *genius,* i.e.:

(a) the meaning that the Italian text has where construed on the basis of the meaning that the terms employed therein have in the Italian language and under Italian law, with
(b) the meaning that the German text has where construed on the basis of the meaning that the terms employed therein have in the German language and under German law.

For instance, where the treaty to be interpreted used the terms "impresa" and "Unternehmen" in the Italian and German authentic texts of Article 7, these two terms might be construed on the basis of the meaning that they have under Italian and German law, respectively. Where such meanings were not absolutely equal (as actually is the case, for example, in respect to certain forestry and agriculture activities), a *prima facie* discrepancy might be said to exist between the two texts.

However, the presence of Article 3(2) may raise the question of whether the interpreter may and should compare a different pair of meanings. Consider, in this respect, a tax treaty authenticated in the Italian and English language. Where Italy is applying the treaty, the first part of Article 3(2) requires non-defined terms to be construed in accordance with the meaning that they have under Italian law. In this case, the easiest way to comply with such a rule is probably to use the Italian authentic text in order to interpret the relevant article of the treaty, thereby finding out what meaning the terms used in the Italian text (or proxies thereof) have under Italian law. Nevertheless, nothing prohibits the interpreter from employing the English text in order to construe the relevant article of the treaty. In this case, the interpreter should find out the domestic law meaning of the Italian term that he considers to best correspond to the English term employed in the English authentic text.

It might happen, for instance, that the Italian text used the term "lavoro autonomo" in a certain article of the treaty, while the English authentic text used the term "employment". The Italian term that is generally considered to correspond to the English term "employment" is the term "lavoro subordinato" (or "lavoro dipendente"). Under Italian (tax) law, the concepts corresponding to the terms "lavoro autonomo" and

[11] See YBILC 1966-II, p. 100, para. 23, per Sir Humphrey Waldock, acting as Special Rapporteur.

"lavoro subordinato" are significantly different, the former denoting as prototypical items the activities carried on by a self-employed person. Therefore, in this case a *prima facie* discrepancy may be said to exist between the two authentic texts.

The question thus arises of whether those two types of discrepancies should be equally taken into account by the interpreter for the purpose of interpreting multilingual tax treaties, or, on the contrary, whether they should be differently weighted and reconciled by the interpreter. In order to properly answer such a question, the response to the following questions appears particularly relevant.

ii. *Is there any obligation for the interpreter to reconcile (at least to a certain extent) the prima facie divergent authentic texts of an OECD Model-based tax treaty?*

With regard to the above-described types of discrepancies, the foremost question that the interpreter should ask himself is whether any obligation exists for him to take care and reconcile them,[12] at least to a certain extent and on certain occasions, or whether he may always and exclusively rely on the meaning emerging from the interpretation of one authentic text, taken in isolation. In particular, the doubt might arise whether the interpreter is entitled to rely exclusively on the domestic law meaning of the terms employed in the authentic text drafted in the official language of the State applying the treaty (if existing), disregarding the possible existence of *prima facie* different meanings that might be determined on the basis of the other authentic texts.

With regard to the two examples given in the previous section, and supposing that Italy is applying the relevant treaty, the question would be whether the interpreter was allowed to simply construe the treaty in accordance with the meaning that the terms "impresa" and "lavoro autonomo" have under Italian law, without the need to reconcile them with the meaning that the terms "Unternehmen" and "lavoro subordinato" (which is regarded as corresponding to the English term "employment") have under German and Italian domestic law, respectively.

iii. *If the previous question is answered in the affirmative, to what extent must the differences of meaning deriving from the attribution of the domestic law meanings to the corresponding legal jargon terms used in the various authentic texts be removed (e.g. in accordance with Article 33(4) VCLT) and, instead, to what extent must such differences be preserved in accordance with Article 3(2)?*

Assume that the Italy-United Kingdom tax treaty, authenticated in the English and Italian languages, makes reference to the "board of directors" of a company in the English authentic text of Article 16, while in the Italian authentic text it employs the term "consiglio di amministrazione".[13] Although under the Italian Civil Code the

[12] A similar question may be asked in respect of the alleged divergences existing between the apparent meanings of the terms employed in one of the authentic treaty texts and those underlying the corresponding terms used in the OECD Model official versions.

[13] Actually, the Italian authentic text of the 1988 Italy-United Kingdom tax treaty employs the expression

"consiglio di amministrazione" is entrusted with pure management functions, bilingual dictionaries generally equate it to the "board of directors", which under English law is entrusted with both management and supervisory functions.
In this case, the interpreter faced with such a *prima facie* discrepancy should decide whether:

(a) that discrepancy should be removed by attributing the same meaning to both the terms "board of directors" and "consiglio di amministrazione", for instance by attaching to the latter the broader meaning of the former (or *vice versa*), or whether
(b) Article 3(2) of the treaty required those terms to be construed more narrowly where Italy applies the tax treaty and more broadly where the United Kingdom applies it.[14]

This question would be particularly relevant where the interpreter had to decide whether the income received by an English resident member of the "collegio sindacale" of an Italian resident company, which is the body entrusted with control and supervisory functions under the Italian Civil Code, is covered by Article 16 of the treaty.

iv. What is the relevance of Article 3(2) for the purpose of resolving the prima facie discrepancies in meaning among the various authentic texts, where the treaty's final clause provides that a certain authentic text is to prevail in the case of discrepancies?

Consider the previous example and assume that the Italy-United Kingdom tax treaty included a French authentic text, prevailing in the case of discrepancies in meaning among the various authentic texts, which employed the term "conseil de surveillance" in Article 16. Under French law, the "conseil de surveillance" is entrusted with both management and supervisory functions, similarly to the "board of directors" under English law.

The question thus arises whether the existence of the prevailing French text demands that the interpreter attribute to the Italian text the same (broader) meaning that the other two texts have where construed in accordance with English and French laws, respectively, or, on the contrary, whether Article 3(2) of the treaty requires him to attach to the term "consiglio di amministrazione" the narrower meaning it has under Italian law whenever Italy applies the treaty.

"consiglio di amministrazione o […] collegio sindacale"; however, for the sake of the example, it is assumed that the reference to the "collegio sindacale" is not included in that treaty (as it is the case with regard to many other Italian tax treaties).

[14] Assuming here, for the sake of simplicity, that Italy applies the treaty whenever a person resident in the United Kingdom receives income in his capacity as a member of the management or supervisory boards of companies set up under Italian law and the United Kingdom applies the treaty whenever a person resident in Italy receives income in his capacity as a member of the management and supervisory board of companies set up under the laws of the United Kingdom.

1.2. Methodology of the study

In order to suggest how the interpreter should approach the above issues and support his solution to them, the author needs a yardstick, a parameter of value against which he may measure the appropriateness of a certain solution and its underlying arguments and assess whether they should be preferred over other possible solutions and arguments.

Since the object of this study is the *interpretation*[15] of multilingual tax treaties under international law, the first and foremost reference coming to mind is the VCLT, in particular Articles 31-33 thereof, which deal with the interpretation of treaties.

However, on the one hand, those very same articles must be interpreted in order to extract from them any applicable rule or principle of law and, on the other hand, they have not rarely appeared vague and ambiguous where construed and applied in practice.[16] Although such vagueness and ambiguity appear less significant where analysed against the background of the mainstream interpretations of those articles made by international law scholars, as well as by national and international courts and tribunals (sometimes indirectly resulting from the mere application of those articles to

[15] "Interpretation" is an ambiguous term. As Linderfalk notes, "[i]n one sense, we can say that we are engaged in an act of INTERPRETATION each time we are faced with a text, to which we (consciously or unconsciously) attach a certain meaning. Regardless of how carefully the text of a treaty is drafted, no one expression contained in the treaty can be regarded as clear until it has gone through interpretation. In this sense, INTERPRETATION is the only way to an understanding of a treaty. In another sense, it is only when we have already read a text, and the text has shown to be unclear, that we can say that we then INTERPRET it" (see U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 10). While the latter sense of the term "interpretation" is the one used in the maxim "in claris non fit interpretatio", in the present work the term "interpretation" is used in the former, broader meaning. Such a choice is made for the following reasons: (i) this is the meaning generally attributed to the term "interpretation" in modern linguistics; (ii) whether a text is clear or unclear is a matter of subjective judgment (i.e. of interpretation, from an philosophical hermeneutics perspective), which makes the distinction between *prior reading* and *interpretation* too blurred to be useful; (iii) it appears that, in order to make the principles enshrined in Articles 31-33 VCLT actually binding, the clearness and acceptability of the result of the *prior reading* should be assessed against the yardstick of those very same principles of interpretation (otherwise any interpreter might simply disregard such principles, where construing a treaty, and be legally justified in doing so by arguing that he clearly understood the treaty text at its first reading and, thus, he did not need to *interpret* it), which makes the distinction between *prior reading* and *interpretation* untenable. To argue, as Linderfalk does (see U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 10) that the term "interpretation" is used in the VCLT in the latter, more limited, meaning on the basis of the text of Article 33(4) VCLT ("when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove") appears to the author to read too much in such a text, which was purported to solely stress the principle that "before simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity […] every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation" (YBILC 1966-II, p. 225, para. 7).

[16] See, among many, D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 253; U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), pp. 1-4, in particular at p. 3, where the author states that "the textual cast used for Vienna Convention articles 31-33 has rendered possible a wide variety of opinions as to their normative contents".

the case under decision), they cannot be completely eradicated. The reasons for this are manifold, the most relevant being:

(i) the intrinsic vagueness and ambiguity of language as means of communication,

(ii) the different cultural backgrounds, interests and purposes of the persons interpreting and applying those articles and

(iii) the unclearness concerning the purpose and the (ontological) nature of the interpretative process that at times seems to underlie court decisions and scholarly writings.

Therefore, in order to suggest valuable and durable solutions to the question of how the interpreter should tackle and disentangle the various issues that he might face where confronted with a multilingual tax treaty, the author chose to anchor his analysis to a deeper and hopefully more stable and clear foundation. He decided to primarily approach his task on the basis of modern linguistic and, more specifically, semantic and pragmatic theories.

This approach is not absolutely new in supranational law writings. Lindefalk, for instance, resorts to the "general theory of verbal communication"[17] in order to establish a more definite description of the rules of treaty interpretation laid down in international law. In that respect, he affirms, although with some reservations, that the "correct meaning of a treaty corresponds to the utterance meaning of that treaty",[18] "utterance meaning" being a technical term used in modern linguistics.[19] In the same vein, he maintains that "to determine the correct meaning of a treaty, the applier should proceed in the exact same way as any common reader would proceed to determine the utterance meaning of any text"; moreover, in order to explain how verbal communication between writers and readers is achieved, he resorts to what he calls the "inferential model"[20] and the "communicative assumption",[21] which have been developed in modern semantic and

[17] U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 33.

[18] *Ibidem*, at p. 30. From such premises, Linderfalk reasonably infers that "the correct meaning of a treaty should be identified with the pieces of information conveyed by the treaty, according to the intentions held by each individual party, but only insofar as they can be considered *mutually* held" (*ibidem*, at p. 32).

[19] The term "utterance meaning" will be used several times in the present work. Its underlying concept, which will be discussed in detail in Chapter 2 of Part I, constitutes a cornerstone of the normative legal theory of treaty interpretation developed by the author in this work.

[20] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 35: "In this model, the utterance is just a piece of indirect evidence. The utterance is a fact, from which the receiver-reader can only *infer* what the sender-writer wished to convey. The receiver-reader must insert the utterance into some sort of context. Only by drawing on a context is it possible for the reader to arrive at a conclusion with regard to the content of the utterance". See also *ibidem*, at pp. 37-38, 40 and 48, where he states that the "CONTEXT means the entire set of assumptions about the world in general that a reader has access to when reading a text".

[21] See *ibidem*, at p. 36: "considering that a reader has access to thousands and thousands of contextual assumptions, how can she succeed in selecting the ones that lead to understanding? According to the answer offered by linguistics, the reader resorts to a second-order assumption. The reader assumes about the utterer (the writer) that he is communicating in a rational manner. In other words, the utterer is assumed to be conforming to some certain communicative standards. It is this communicative assumption *together* with the

pragmatic theories. As he explicitly points out, the choice to rely on linguistics, in order to "construct a model that describes in general terms the contents of the rules laid down in international law for the interpretation of treaties", is based on the fact that "linguistics offers us explanations that, better than others, describe the way an applier shall proceed to determine the correct meaning of the treaty, considered from the point of view of international law".[22]

Similarly Russo, dealing with the interpretation of European Union secondary law, affirms that the theory of interpretation of such legal texts must be seen as part of the broader field of linguistic theory and, therefore, it must be dogmatically founded thereon.[23] To him, interpreting legal texts implies the pragmatic, semantic and syntactical analysis thereof; such an analysis must be carried out in accordance with modern linguistics, which therefore must be regarded as a fundamental tool of interpretation in the legal field.[24] Russo builds his methodological approach on the premise that legal discourse is, like any discourse, subject to the *natural* rules of interpretation generally applicable for the purpose of construing all forms of language expressions; such rules have been analysed and explained by linguistic studies to which one has to resort in order to properly understand them. In this respect, Russo recognizes that the legislator may, to a certain extent, modify such natural rules of interpretation in order to create parallel *legal* rules of interpretation. While this can theoretically create room for a conflict between the two sets of rules, as a matter of fact such a risk does not appear particularly significant since legal rules often represent nothing other than codifications of natural rules of interpretation.[25]

Following this approach, the author focused on the answers that modern semantics (here intended in a broad sense, as including pragmatics as well) has given to key questions such as:

(i) what is the goal pursued by persons using (written) language as means of communication?

(ii) how do persons actually create their utterances and use language in that respect?

(iii) how do other persons interpret the utterances they hear or read?

(iv) why do utterances seem inextricably affected by vagueness and ambiguity?

(v) how is it possible to reduce the impact of such vagueness and ambiguity in creating and/or interpreting utterances?

Then, on the basis of such answers, the author established the fundamental principles that should guide the interpreter whenever construing a treaty. Such principles, which together work as a yardstick, a parameter of value to be used in order to assess the

---

context that makes it possible for the reader to successfully establish the content of an utterance". See also *ibidem*, at pp. 43 *et seq*.

[22] See *ibidem*, at p. 57, note 22.

[23] See E. Russo, *L'interpretazione dei testi normativi comunitari* (Milano: Giuffrè, 2007), pp. 7, 75 *et seq*., 178-179.

[24] See *ibidem* at pp. 13 and 19.

[25] See *ibidem* at pp. 181-182 and 191-192.

appropriateness of any treaty interpretation in light of the explicit or implicit arguments supporting it, try to cope with the following essential questions:

(i) what is the purpose of treaty interpretation, i.e. what should the interpreter look for when construing a treaty?

(ii) does the interpreter follow any discernable path when attributing a meaning to a treaty provision? Is there any preferable path to be followed?

(iii) what are the elements and items of evidence that should be taken into account in order to interpret a treaty?

(iv) what weight should be attributed to those elements and items of evidence and what arguments should be used in order to support the chosen construction of the treaty?

This is obviously a normative (prescriptive) type of legal analysis, which is purported to highlight the fundamental principles of treaty interpretation solely on the basis of semantics. Like all normative legal analyses, it raises the primary questions of:

(a) whether its results also represent, at least to a certain extent, a reasonable approximation of the law as it stands; and

(b) what should be done with its results where they prove to conflict with the law as it stands.

In order to answer question (a), the author has carried out a positive (descriptive) analysis, which is aimed at revealing how national and international courts and tribunals have approached the interpretation and application of treaties, in general, and tax treaties, in particular, as well as how international scholars have construed Articles 31-33 VCLT and, with regard to tax treaties, Article 3(2) OECD Model. The positive analysis conducted by the author does not focus exclusively on the interpretative issues concerning multilingual treaties, but it embraces more broadly all primary issues concerning treaty interpretation, since its aim is to provide the author with a map of the currently accepted rules and principles of interpretation, against which he could test the fundamental principles of treaty interpretation determined on the basis of his normative, semantics-based analysis, which by its nature is very general in scope.

With regard to question (b), the author has developed a theory of the interaction between normative and positive legal analyses. Adhering to the conclusions already drawn by some constitutionalists and general theorists of law,[26] the author maintains that normative and positive legal analyses, as well as the results thereof, may be seen as interrelated and mutually affecting each other. Although "[p]ositive and normative legal theory […] often seem radically disjunct",[27] the latter obviously creates the cultural

[26] See R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), at 225 *et seq*.; G. Jellinek, *Allgemeine Staatsleere* (Berlin: Springer-Verlag, 1929), at 338; A. Vermule, "Connecting Positive and Normative Legal Theory", 10 *University of Pennsylvania Journal of Constitutional Law* (2008), 387 *et seq*., in particular at 389-395; T. W. Merrill, "Bork v. Burke", 19 *Harvard Journal of Law & Public Policy* (1996), 509 *et seq*., in particular at 511 *et seq*.; E. Young, "Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation", 72 *North Carolina Law Review* (1994), 619 *et seq*., at 697 *et seq*.; L. B. Solum, "Constitutional Possibilities", *Illinois Public Law and Legal Theory Research Papers Series*, Research Paper No. 06-15 (available at the following url address: http://papers.ssrn.com/pape.tar?abstract_id=949052).

[27] A. Vermule, "Connecting Positive and Normative Legal Theory", 10 *University of Pennsylvania Journal of*

background that influences law makers, judges and scholars when producing (drafting and interpreting) law and, therefore, significantly affects future positive legal theory; on the other hand, and more interestingly, positive legal theory may affect normative legal theory both as a source[28] and as a constraint.[29] Positive legal theory serves as a source of normative legal theory every time the latter is significantly based on the actual content of the law, either because the relevant normative theory is a prescriptive theory that needs a legal *status quo* to which being applied in order to produce legal outcomes, or because the relevant normative theory draws from legal traditions in order to minimize social costs and disruption, to protect legal expectations, or to capitalize on the intellectual efforts of generations of legal theorists.[30] Positive legal theory produces indirect constraints to normative legal theory by:[31]

(i) setting significantly high costs (in terms of legal uncertainty, infringement of legal expectations, social and cultural transition) to be met in order to substitute the state of affairs that could be proposed in the normative legal theory (first-best solution) for the *status quo*; and

(ii) limiting the feasible set of legal rules and policies that may be implemented.

It is the author's belief that the last kind of interaction between positive and normative legal theory[32] is particularly significant for the purpose of the present research. The rules and principles of treaty interpretations set forth in Articles 31-33 VCLT have been generally recognized as a codification of customary international law and, as such, applicable to all treaties.[33] In addition, for more than forty years legal scholars, courts and tribunals have expressed their qualified views on how such articles should be construed, i.e. on which legal rules and principles should be derived therefrom. Although the conclusions reached by those interpreters often vary to a considerable extent, certain mainstream constructions may be identified, as well as the outer borders beyond which any interpretation of those articles that was proposed would be rejected by the vast majority of international lawyers. Against this background, drawing a normative legal theory of treaty interpretation affirming principles that conflicted with the generally accepted constructions of Articles 31-33 VCLT, or that lie to a significant extent outside the generally accepted borders of a perceived reasonable interpretation of such articles, would be equal to sustaining a legal theory of interpretation that, in the best case, could establish itself only in the very long run and would cause a protracted period

---

Constitutional Law (2008), 387 *et seq*., at 387.

[28] G. Jellinek, *Allgemeine Staatsleere* (Berlin: Springer-Verlag, 1929), at 338.

[29] R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), at 225 *et seq*.; L. B. Solum, "Constitutional Possibilities", *Illinois Public Law and Legal Theory Research Papers Series*, Research Paper No. 06-15 (available at the following url address: http://papers.ssrn.com/pape.tar?abstract_id=949052), in particular at 18 *et seq*.

[30] See, similarly, A. Vermule, "Connecting Positive and Normative Legal Theory", 10 *University of Pennsylvania Journal of Constitutional Law* (2008), 387 *et seq*., at 390-393.

[31] See A. Vermule, "Connecting Positive and Normative Legal Theory", 10 *University of Pennsylvania Journal of Constitutional Law* (2008), 387 *et seq*., at 394-395; R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), at 225 *et seq*., where the author develops his idea of "law as integrity".

[32] I.e. that positive legal theory produces indirect constraints to normative legal theory.

[33] See section 2 of Chapter 2 of Part II.

characterized by more legal uncertainty than in the current state of affairs[34] and, in the worse case, would be generally regarded as utopian, since too detached from Articles 31-33 VCLT to be considered a reasonable interpretation thereof, thus lacking the legal status to be applied in practice as long as those articles remained in force.[35] However, since the purpose of the present research is to suggest how the interpreter should *now* tackle and disentangle the most common types of issues emerging from the interpretation of multilingual tax treaties under public international law, the author is not willing to accept the above-described drawbacks of a normative legal theory infringing the generally accepted rules and principles of treaty interpretation derived from Articles 31-33 VCLT. In the author's intention, his normative legal theory should be shaped so as to fit within the generally accepted borders of a perceived reasonable interpretation of such articles; where the inferences drawn from the semantic analysis appeared to lie outside those outer borders, such inferences should be disregarded for the purpose of setting up the author's normative (semantics-based) theory of treaty interpretation. Hence, from a theoretical perspective, the author's normative legal theory of interpretation must be regarded as a *non-ideal* normative theory, as opposed to *ideal* normative theories.[36]

As a matter of fact, the fundamental principles established by the author on the basis of the semantic analysis turned out (at least in his own eyes) not to conflict with any generally agreed construction of Articles 31-33 VCLT[37] and, therefore, they have been used for the purpose of building up the author's normative theory of treaty interpretation. That obviously does not imply that the positions upheld by the author, as part of his semantics-based normative theory, never conflict with the positions expressed by other scholars, courts or tribunals. This study has plentiful instances of this. It simply means that none of the principles drawn by the author from his semantics-based analysis conflict with any unambiguous and generally accepted interpretation of Articles 31-33 VCLT.[38]

From this point of view, the fundamental principles on treaty interpretation established by the author on the basis of his normative analysis may be regarded as a compass for the interpreter to direct himself in the stormy ocean of the overlapping and conflicting positions on treaty interpretation expressed by traditional international law

[34] In particular, there would be a strong argument against its application for the purpose of interpreting treaties concluded when conflicting rules and principles of interpretation were generally accepted, i.e. that the parties to the treaty expected the latter to be interpreted according to the rules and principles of interpretation accepted at the time of the treaty conclusion and, therefore, agreed on the meaning that the treaty provisions had as construed in accordance with the latter rules and principles.

[35] The fact that customary international law principles of interpretation, which are contrary to the generally accepted constructions of Articles 31-33 VCLT, establish themselves in the years to come, although theoretically possible, appears at the best very improbable as long as the VCLT remains in force, especially where one considers that the VCLT applies as such (i.e. as a convention and not as a text codifying customary rules and principles of international law) to a vast range of treaties, thus reducing the chance for the formation of a *diurnitas* contrary to the generally accepted construction of Articles 31-33 VCLT.

[36] On this distinction see, among many, the famous sketch of it made in J. Rawls, *A theory of justice* (Cambridge: Harvard University Press, 1971), at p. 243 *et seq*.

[37] Nor with any generally agreed construction of Article 3(2) OECD Model, with regard to tax treaties.

[38] Nor with any unambiguous and generally agreed construction of Article 3(2) OECD Model, with regard to tax treaties.

scholars, courts and tribunals.

At the same time, however, such fundamental principles of interpretation counterbalance the results of those (many) studies on the interpretation of treaties that prove to be unduly silent on the most important semantic aspects of the activity of meaning attribution to treaty texts, often losing sight of the fact that such texts are no more than an imperfect means to express the agreement (if any) reached by the treaty parties. Such fundamental principles are grounded on the awareness of the imperfections of written language as means to convey concepts (in the case of treaties, rules and principles of law), of how human beings unconsciously sidestep such imperfections and play with them, both when formulating and decrypting utterances, and of how any language is inextricably tied to the background knowledge of people employing it, the absence of which (awareness) has often led interpreters to an over-rigid and narrow approach to treaty interpretation.[39]

On such fundamental principles the author has thus built up his normative legal theory, dealing with how interpreters should tackle and disentangle the most common types of issues emerging in the interpretation of multilingual tax treaties under international law.

With regard to the methods underpinning the research conducted and the analysis carried out, the author briefly highlights the following.

The sources of information and materials have been kept as wide and unconstrained as possible, taking into account the expected addressees of the study and the cultural background of the author. This means that literature, both on law and semantics, case law and tax authorities' positions have been looked for and selected mainly in English and French, although a significant amount of the materials referred to is in German, Italian and Spanish.

Furthermore, although special attention has been paid to the case law of international courts and tribunals, since tax treaties are mainly interpreted and applied at the domestic level, domestic case law and tax authorities' positions have been considerably referred to and commented upon. Similarly, domestic case law dealing with private international law treaties has been sometimes quoted. In such cases, where the choice of the legal arguments used and of the elements and items of evidence admitted and relied upon appeared to be influenced by the idiosyncratic features of the relevant national system of law, the author singled out such influence, at the best of his knowledge, and noted its possible effects. Moreover, due to the relevance of the rules and principles of interpretation enshrined in the VCLT for the subject matter of the present study, special attention has been paid to the documents issued by the International Law Commission of the United Nations on that topic, as well as to the minutes of the relevant meetings of that Commission and of the United Nations Conference held in Vienna in 1968 and 1969, which led to the signature of the VCLT.

[39] As Linderfalk puts it, the "linguistic meaning is nothing but a piece of indirect evidence, based on which the reader can only infer what the writer is trying to convey" (see U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 42).

A special remark concerns the way in which case law and tax authorities' positions have been used throughout this study. Unlike most of the literature on tax treaties, the author did not focus on interpretation as the result of legal construction, but on interpretation as the process of arguing in favor of such result. In particular, special consideration has been devoted to the types of arguments used by courts or other bodies and to the elements and items of evidence relied upon in order to support those arguments.

Accordingly, one of the *fil rouge* of this study is that the interpretative result is, to a large extent, irrelevant for academic purposes, while the path followed to reach it is the fundamental subject of the scholarly quest. Such an interpretative path, however, is not intended by the author to mean the intimate, unfathomable mental process that leads the interpreter to solve the relevant issues in the way he does, such process being inscrutable. On the contrary, the interpretative processes analysed and referred to in this study are only those that may be made the subject of external knowledge, i.e. the *a posteriori* analytical arguments used by the interpreter (courts, tribunal, tax authorities) in his written defense of the conclusion reached. Therefore, this study takes much recourse to such arguments and assesses them for what they are: rhetorical means to support a thesis on the basis of the available premises (elements and items of evidence).

Finally, it must be clear from the outset that this study looks at the interpretation of multilingual tax treaties from the perspective of international law, disregarding the impact that the idiosyncratic features of national systems of law (mainly constitutional law and procedural law) may have on the legal arguments, elements and items of evidence that could be employed in order to support the construction of those treaties. The aim of this study, that is to reach an international audience of tax treaty scholars and practitioners, makes it, on the one hand, useless to deal only with the additional issues and the different perspectives emerging under the domestic laws of a few selected States and, on the other hand, too burdensome to widen the scope of the analysis to a sufficiently large number of States to be regarded as representative worldwide.

Consequently, this study is solely purported to sketch the (common) international law approach to the interpretation of multilingual tax treaties, which scholars and practitioners from different jurisdictions may then customize according to the specific features and requirements of their respective legal systems.

2. Structure of the study

This study includes three parts, in addition to this introduction.

Part I comprises the analysis of modern semantics works on which the author based his normative legal theory, as well as the illustration of the inferences that the author drew from them and their impact on the above-mentioned normative legal theory. It is divided into three chapters.

Chapter 1 describes the content of Part I, explains the reasons behind its structure

and illustrates how the subsequent two chapters interact with each other.

Chapter 2 deals with the use of language as a means of communication. It represents, to a large extent, a summary of the materials studied and the conclusions reached by the author in the fields of semantics and (analytical) philosophy of language. Its main purpose is to make the readers aware of (i) the imperfections of language as a means to convey ideas and meanings, (ii) how human beings unconsciously sidestep such imperfections and play with them, both when formulating and decrypting utterances, and (iii) the way any language is inextricably tied to the background knowledge of the people employing it. This awareness is the necessary prerequisite for the reader to fully understand the analysis and the arguments developed in the remainder of the study

Chapter 3 illustrates the general principles of interpretation that the author derived from the above semantic analysis, describes the formal nature of the normative legal theory developed in the following parts on the basis of those principles and gives reasons for the author's choice of such a formal approach. In particular, section 1 depicts the general principles of treaty interpretation inferred from the semantic analysis carried out in Chapter 2 and points out how they will be used for the purpose of setting up the author's normative legal theory on treaty interpretation. Section 2 illustrates the principles of interpretation specific to multilingual treaties that have been derived from the semantic analysis carried out in Chapter 2 and explains how they will be used in order to build up the author's normative legal theory. Section 3 portrays the descriptive and formal nature of that normative legal theory, which attempts to provide:

(i) a clear picture of the nature of the issues arising from the interpretation and application of multilingual (tax) treaties,

(ii) the elements and items of evidence that may be used to support the possible solutions to such issues and

(iii) the arguments that may put forward in order to justify the above solutions on the basis of the available elements and items of evidence.

Part II is purported to design a normative legal theory on the interpretation of multilingual tax treaties based on the results of the semantics-based normative analysis carried out in Part I. It is divided into six chapters, dealing with the following matters.

Chapter 1 draws a concise sketch of the linguistic practices in international affairs, starting with an historical overview of the use of languages in international relations and then presenting a synopsis of the trends concerning the conclusion of multilingual treaties, in general, and tax treaties, in particular. In this section, statistical data such as those regarding the number of language versions used in tax treaties, which languages are most commonly employed, the existence of final clauses providing that a certain text is to prevail in the case of differences of meanings among the various authentic texts are illustrated and commented upon.

Chapter 2 provides the reader with a brief introduction to the VCLT. In particular, section 1 gives a picture of the historical background of the VCLT and the International Law Commission, in order for the reader to better appreciate the relevance of the latter's contribution to the systematization of the rules and principles of interpretation applicable

to international agreements. Section 2 analyses the scope of the VCLT, in particular with regard to the articles dealing with the interpretation of treaties.

Chapter 3 carries out a positive legal analysis purported to illustrate the generally accepted constructions of Articles 31 and 32 VCLT and, at the same time, it is aimed at assessing whether the rules and principles of law resulting from such constructions conflict with the semantics-based principles of treaty interpretation established by the author in Chapter 3 of Part I, or, on the contrary, whether the latter may coexist with the former and be used in order to construe Articles 31 and 32 VCLT. Chapter 3 consists of 3 sections. After the introduction, section 2 presents a positive legal analysis intended to reveal how scholars, courts and tribunals have construed Articles 31 and 32 VCLT and, more generally, how they have addressed the subject of treaty interpretation both before and after the conclusion of the VCLT. Section 3 is devoted to a comparison between the principles of interpretation developed by the author in section 1 of Chapter 3 of Part I and the generally accepted rules and principles of treaty interpretation resulting from the positive analysis carried out in the previous section. The inferences drawn from such a comparison constitute the foundations on which the author will build the answers to the research questions on the interpretation of multilingual (tax) treaties in Chapters 4 and 5 of Part II, i.e. his normative legal theory on the interpretation of multilingual tax treaties.

Chapter 4 is purported (i) to construe, as far as possible, Article 33 VCLT in coherence with the results of the analysis carried out in the previous chapters of the study, (ii) to assess whether such construction is in line with any generally accepted interpretation of that article provided for by scholars, courts and tribunals and (iii) to compare the rules and principles of interpretation derived from Article 33 VCLT with the semantics-based principles of interpretation established by the author in section 2 of Chapter 3 of Part I, in order to highlight the existence and possibly investigate the reasons of any significant discrepancies between them. The construction of Article 33 VCLT based on the author's semantics-based normative analysis, so far as it does not encroach any generally accepted interpretation thereof, is employed as a legal basis in order to answer the seven research questions concerning the interpretation of multilingual treaties (in general), which are outlined in section 1.1.1 of this Introduction. The structure of the chapter may be summarized as follows. Section 1 serves as an introduction to the chapter, highlighting its goals and organization. Section 2 describes the historical background of and the preparatory work on Article 33 VCLT. Section 3 examines what rules of interpretation may be (and have been) construed on the basis of Article 33 VCLT and compares them with the fundamental principles of interpretation established by the author in Part I; on the basis of such an analysis, this section attempts to answers general research questions a) through g). Section 4 deals with the specific interpretative issues emerging where the multilingual treaty employs legal jargon terms and is thus purported to answer general research question h). Section 5 presents a brief excursus on the legal maxims that sometimes scholars, courts and tribunals have advocated for the purpose of construing multilingual treaties and discusses their status under current international law. Finally, section 6 draws some general conclusions.

Chapter 5 deals with the interpretative issues specifically concerning multilingual tax treaties and is accordingly aimed at answering the three research questions outlined

in section 1.1.2 of this Introduction. Section 1 sets out the goals of the chapter, settles certain preliminary issues (such as the need to distinguish between the interpretation of legal jargon terms and that of non-legal jargon terms, where construing tax treaties, as well as the choice of the author to tackle the research questions addressed in this chapter solely from the perspective of international law) and describes the structure of the following sections. Section 2 briefly examines how scholars, domestic courts and tribunals have applied to tax treaties the rules of interpretation enshrined in Articles 31 and 32 VCLT, in order to confirm that the conclusions drawn in sections 3.4 through 3.6 of Chapter 4 with regard to the solution of *prima facie* discrepancies among the authentic texts of a treaty, which are mainly based on the application of Articles 31 and 32 VCLT, remain valid also in connection with tax treaties. Section 3 analyses the significance of the OECD Model, in its English and French official versions, for the purpose of interpreting multilingual tax treaties and, in particular, its relevance for removing *prima facie* discrepancies among the tax authentic treaty texts; it thus attempts to answer tax treaty research question (a). Section 4 deals with the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties and, more specifically, in order to remove *prima facie* discrepancies among the tax authentic treaty texts; hence, it attempts to answer tax treaty research question (b). Section 5 tackles tax treaty research question (c) and its sub-questions by examining how the interpreter should approach the interpretation of the legal jargon terms used in tax treaties and, in particular, how he should solve the *prima facie* divergences of meaning among the legal jargon terms employed in the various authentic texts. In order to answer such questions, section 5 preliminary analyses how the rule of interpretation encompassed in Article 3(2) OECD Model should be construed and then discusses its specific bearing on the interpretation of multilingual tax treaties. That analysis is mainly based on the results of the study carried out in section 4 of Chapter 4. Section 6 portrays the most important decisions on the interpretation of multilingual tax treaties delivered by domestic courts and tribunals and identifies any possible relevant departure from the conclusions reached in the previous sections. Finally, section 7 draws some general conclusions.

Chapter 6 analyses the rules governing the correction of errors in multilingual treaties, as established by Article 79(3) VCLT, and investigates the interaction between these rules and those provided for in Article 33 VCLT, both concerning, to a certain extent, the lack of concordance between two or more authentic texts of a treaty.

Finally, Part III describes and systematically arranges the answers given to the research questions outlined in this Introduction, thus spelling out the author's normative legal theory on the interpretation of multilingual (tax) treaties.

PART I

SEMANTIC AND NORMATIVE ANALYSIS

CHAPTER 1 - FORWARD

This part is aimed at laying the foundations for the analysis of the issues that constitute the subject matter of the present study, i.e. the most common types of issues emerging in the interpretation of multilingual tax treaties. Those issues have been already pointed out in section 1 of the Introduction and will be thoroughly analysed in Part II.

The foundations presented in this part may be divided into two categories: substantive and methodological foundations.

With regard to the first category, it has already been noted in the Introduction that, in order to suggest valuable and durable solutions to the question of how the interpreter should tackle and disentangle the various issues that he might face when confronted with a multilingual tax treaty, the author has chosen to anchor his analysis to a deeper and hopefully more stable and clear foundation than the mere text of Articles 31-33 VCLT. He has decided to primarily approach his task on the basis of modern linguistic and, more specifically, semantic and pragmatic theories.

Accordingly, Chapter 2 of this part is dedicated to the analysis of the answers that modern semantics (here intended in a broad sense, as including pragmatics) has given to key questions such as:

(i) what is the goal pursued by persons using (written) language as a means of communication?
(ii) how do persons actually create their utterances and use language in that respect?
(iii) how do other persons interpret the utterances they hear or read?
(iv) why do utterances seem inextricably affected by vagueness and ambiguity?
(v) how is it possible to reduce the impact of such vagueness and ambiguity in creating and/or interpreting utterances?

On the basis of the results stemming from the analysis of the relevant semantic studies, the author has then established the fundamental principles that should guide the interpreter whenever construing a treaty. Such principles, which together work as a yardstick, a parameter of value to be used in order to assess the appropriateness of any treaty interpretation in light of the explicit or implicit arguments supporting it, are described in section 1 of Chapter 3. Moreover, in Chapter 3 of Part II, the results of this normative analysis are tested against the results of the positive analysis of the case law and scholarly writings concerning the application of Articles 31 and 32 VCLT, in order to assess whether the semantics-based principles established by the author represent, at least to a certain extent, a reasonable approximation of the law as it stands.

Thereafter section 2 of Chapter 3 scrutinizes whether and how those fundamental principles may impact on the interpretation of multilingual (tax) treaties and, more

specifically, endeavors to concisely answer the most crucial questions arising in the interpretation of multilingual treaties. Such questions are further analysed and the relative answers expanded in Chapters 4 and 5 of Part II, with regard to, respectively, multilingual treaties in general and multilingual tax treaties in particular. Such chapters also compare the author's approach with those taken by scholars, courts and tax administrations in the application of Article 33 VCLT and, more generally, in connection with the interpretation of multilingual (tax) treaties.

Finally, the methodological foundations of this research are set out in section 3 of Chapter 3.

Specifically, that section highlights that the present study does not attempt to put forward any solution to specific multilingual tax treaty interpretative issues, but, on the contrary, is committed to designing the formal legal and logical structure within which any interpreter of multilingual tax treaties may move in order to choose and reasonably justify his interpretation.

In that respect, it also outlines the reasons why the author has decided to choose such a methodological approach, reasons that may be ascribed to the inherent ambiguity and vagueness of treaties (and which characterize any type of linguistic expression) and to the significant influence that the socio-political values of the persons called to construe (tax) treaties have on the interpretation thereof.

CHAPTER 2 – SEMANTIC ANALYSIS

1. Language as means of communication

"Without language we cannot influence other people in such-and-such ways; cannot build roads and machines, etc. And also: without the use of speech and writing people could not communicate."[40]

Language: means of communication among human beings.[41]

This is a possible definition of language, one that highlights its purpose, the reason why it was born and is used.

Every time human beings communicate with each other, some kind of language is used.[42] Therefore, as long as it proves true that man by nature is a social (politikos) animal, as Aristotle maintained as early as in the IV century B.C.,[43] language represents the most fundamental of human inventions. One could aphoristically argue that without language there would be no human beings.

The above-mentioned use by Aristotle of the term "politikos", from which the English term "political", the Italian "politico", as well as many other terms, etymologically derive, gives the author the opportunity to highlight the obvious: language is also the means used by human beings to agree upon, set and communicate the rules that regulate the social life (i.e. to conduct politics) and to administer and verify the correct application and respect of those rules. Therefore, without language there would be no law either.

Since the present study concerns a small part of the law universe, the author thought it necessary to very briefly clarify in his mind the way language functions and whether many of the ideas he ordinarily took for granted with reference thereto continue to hold true where analysed with a more critical attitude.

Understanding how language works out and, more importantly, how and in which situations it does not work out as expected, is the best first step in the path of studying

---

[40] L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 116, para. 491.

[41] A semantically equivalent definition is "language as a system for the expression of thought", whose underlying idea is rooted in early philosophy, e.g. in Heraclitus among pre-Socratic philosophers (see, for example, fragments III and IV reported in C. H. Kahn, *The Art and Thoughts of Heraclitus: an edition of the fragments with translation and commentary* (Cambridge: Cambridge University Press, 1981), pp. 28-29).

[42] It is not relevant here to discuss what kind of signs could or should be considered to be "language". What is relevant, for the purpose of the present study, is that natural languages used in the day-to-day communication by human beings (e.g. the English language, the Italian language, the Arabic language) are considered "languages".

[43] Aristotle, *Politics*, Book I (see Aristotle (translated by B. Jowett), *Politics* (The Internet Classics Archive) – available online at http://classics.mit.edu//Aristotle/politics.html).

and researching on law.

As language is a means of communication, its primary function is to convey meanings. This function is performed by combining the meanings encapsulated in *listemes* into the complex meanings of phrases, clauses, sentences and longer texts according to agreed grammatical rules.[44] A listeme may be defined as a language expression whose meaning is not determinable from the meanings (if any) of its constituent forms (i.e. its graphic and phonological components) and which, therefore, a language user must memorize as a combination of form and meaning.[45] Such a combination of form and meaning that determines a listeme is typically that found in dictionaries and corresponding to an independent lexicon entry[46] (e.g. the lexicon entry for the listeme "red", or that for the listeme "-s" in an English dictionary).

Therefore, from a *structural perspective*, meaning is compositional:[47] any complex language expression can be analysed in terms of simpler constituent expressions down to:

(i) the semantic components of listemes and

(ii) the grammatical structures that combine them (i.e. syntactical and morphologic structures).[48] Language users combine listemes into words, phrases, clauses, sentences, constructing new meanings at each level of aggregation.[49] For example, the meaning of the word "books" is composed of:

(i) the meanings of the listemes "book" and "-s" and

(ii) the morphosyntactic relationship between the two listemes.

Similarly, the meaning of the noun phrase "old books" is composed of:

(i) the meaning of the adjective listeme "old" and the compound meaning of the word "books" and

(ii) the syntactic relationship between those two words ("old" restricts the

[44] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 254.

[45] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 6.

[46] For each lexicon entry, dictionaries usually include, in addition to the "forms" and the "semantic (meaning) specifications", the rules of syntax associated with the specific listeme, i.e. its "morphosyntactic specifications"; in particular, dictionaries include information relating to the morphosyntactic class of the listeme (e.g. its type - verb, noun, adjective, etc. -, its paradigm - conjugation, declension -, its gender, etc.) and certain irregular rules of morphosyntactic peculiar of the specific listeme (e.g. irregularities, as compared to the general rule, in conjugating a verb in German). Therefore, dictionaries generally include three types of information for each entry: (i) its formal specifications (graphic form, phonological specification); (ii) its semantic specifications (meaning); (iii) its morphosyntactic specifications.

[47] See Frege's principle of compositionality as expressed in L.T.F. Gamut, *Logic, Language, and Meaning. Vol. 1. Introduction to Logic* (Chicago: Chicago University Press. 1991), p. 15 as follows: "[E]very sentence, no matter how complicated, can be seen as the result of a systematic construction process which adds logical word one by one".

[48] H. Kamp and B. Partee, "Prototype theory and compositionality", 57 *Cognition* (1995), 129 *et seq.*, at 135-136; K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 6-7; G. Sandu and P. Salo, "Compositionality", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 117 *et seq.*

[49] On the different functions of words and phrases and on the formation thereof see L. Bauer, *English Word-Formation* (Cambridge: Cambridge University Press, 1983), p. 142.

reference of the head noun "books" to a subset of books).[50]

From a *causal perspective*, on the other hand, meaning appears to be cognitively and functionally motivated.[51] It is cognitively motivated since the categories and structure of language reflect the way human beings perceive and conceive of the world(s).[52] It is functionally motivated since the categories and structure of language are motivated by their actual uses. In fact, the social-interactive function of language has determined a heavily reliance on extra-utterance elements (i.e. elements external to the sentence written or spoken) in order to convey (for the speaker) and understand (for the hearer) the intended meaning, such as common ground, common principles on behavior when communicating (the "cooperative principle"), implicatures and inductive inferences from shared general and specific experiences. This confirms that language normally provides a set of *underspecified clauses that need to be expanded* by semantic and pragmatic inferences based on the awareness of the lexicon and grammar (morphology and syntax) and heavily reliant on common ground, in particular *encyclopedic knowledge* (i.e. information supposedly available to the specific hearers and speakers on all branches of knowledge) and relevant conventions for language use.[53]

An extreme vision (and correlated explanatory model) of the relations existing between language, its functioning and the way human beings perceive and conceive of the world(s) has been expressed in the well-known Sapir-Whorf hypothesis. According to this hypothesis, no single "real world" exists, since its representation is to a large extent unconsciously built on the language habits of the various communities of human beings. Since no two languages are ever sufficiently similar to be considered to represent the same social reality, also the worlds in which different societies live are distinct worlds, not merely the same worlds with different labels attached.[54] To put it differently, users of markedly different grammars are pointed by such grammars towards different types of observations and different evaluations of externally similar acts of observation and, therefore, are not equivalent as observers and must arrive at somewhat different views of the world.[55]

Although not endorsing the Sapir-Whorf hypothesis and not relying on it for the purpose of the present study, the author finds it interesting to recall that hypothesis as additional

[50] Compare with the example of the noun phrase "young bachelors" given in K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 6.
[51] According to Wittgenstein, the need determines the use of the language, which entails that the need determines the language, since the language is nothing other that its use ("(…) doesn't the fact that sentences have the same sense consist in their having the same use?") (see L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 8, para. 20).
[52] Not just the real present world, but also any kind of hypothetic, past, future, abstract world.
[53] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 475.
[54] E. Sapir, "The status of linguistics as a science", in E. Sapir (ed. D. G. Mandelbaum), *Culture, Language and Personality: Selected Essays* (Berkley: University of California Press, 1949), 160 *et seq.*, at 162.
[55] B. L. Whorf, "Linguistics as an exact science", in B. L. Whorf (ed. J. B. Carroll), *Language, Thought, and Reality: Selected Writings* (Cambridge: MIT Press, 1956), 220 *et seq.*, at 221, who speaks of "linguistic relativity principle".

evidence of how linguists have recognized, substantially without significant deviations, that language, its functioning and human perception and conception of the worlds are strongly interconnected and influence each other. This shows, if needed, that a study on the interpretation of specific legal texts (tax treaties), which results in a study of human perceptions and conceptions of a particular intellectual world (law of treaties) and of its impact on human relations, cannot be logically and coherently carried out without attributing an appropriate relevance to the linguistic aspects thereof.

By expanding the general considerations put forward in this section, this chapter focuses on certain aspects of semantics and pragmatics,[56] cumulatively intended as the study of meaning in human languages, i.e. the analysis and representation of the meaning of linguistic expressions, of their constituents, as well as of the meaning-relations between them.[57] The study will be limited to those aspects of semantics and pragmatics that the author considers relevant in order to better analyse and theoretically systematize the core issues of the present research (issues arising in the interpretation of tax treaties, with specific regard to multilingual tax treaties). In doing so, the author will use semantics metalanguages[58] as little as possible in order to make this part of the study more intelligible for readers lacking a background in linguistics. Where words and expressions characteristic of semantics metalanguages will be used, the author will provide the reader with definitions and examples thereof, unless such words and expressions have the very same generally recognized meaning in the day-to-day English language.

2. Learning and using language: the relation between listemes and concepts

2.1. Introduction

[56] Both semantics and pragmatics concern the meaning of linguistic expressions, but they do it from slightly different perspectives. Quoting the incipit of Jaszczolt's *Semantics and Pragmatics*, "semantics pertains to the meaning of words and sentences; pragmatics pertains to the meaning of utterances, or speaker meaning. (…) pragmatics take the interlocutors, the speaker and the hearer, as the focus of attention, whereas semantics focuses on linguistic expressions. Pragmatics is a study of how hearers add contextual information to the semantic structure and how they draw inferences from what is said. The distinction between these two sub-disciplines of linguistics has standardly been founded on the context of the discourse; pragmatics has been claimed to study the contribution of the context (that is linguistic and situational context) to the meaning. But this is not a successful foundation for differentiating between the two. (…) semantics has also to make use of contextual clues and enrich the information provided by words and grammatical constructions. Hence, both semantics and pragmatics make use of context to a smaller or grater degree: the two fields are not disjoint." (see K. M. Jaszczolt, *Semantics and Pragmatics*, *Meaning in Language and Discourse* (London: Longman, 2002), p. 1). In the present study, both semantics and pragmatics issues are dealt with. Moreover, in light of the strict relation existing between the two, the author decided to use the term "semantics" in a broad sense, i.e. as also encompassing pragmatics. This approach is consistently applied hereafter, unless otherwise stated.

[57] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 5-6.

[58] Semantics metalanguages may be defined as artificial or natural languages (including technical vocabulary) used by linguists in order to analyse and describe the subject of their semantic studies, i.e. natural languages (e.g. the French language, the German language, etc.).

"Et memini hoc, et unde loqui didiceram, post adverti. Non enim docebant me maiores homines praebentes mihi verba certo aliquo ordine doctrinae sicut paulo post litteras, sed ego ipse mente, quam dedisti mihi, Deus meus, cum gemitibus et vocibus variis et variis membrorum motibus edere vellem sensa cordis mei, ut voluntati pareretur, nec valerem quae volebam omnia nec quibus volebam omnibus. Prensabam memoria, cum ipsi appellabant rem aliquam et cum secundum eam vocem corpus ad aliquid movebant, videbam, et tenebam hoc ab eis vocari rem illam, quod sonabant, cum eam vellent ostendere. Hoc autem eos velle ex motu corporis aperiebatur tamquam verbis naturalibus omnium gentium, quae fiunt vultu et nutu oculorum ceteroque membrorum actu et sonitu vocis indicante affectionem animi in petendis, habendis, reiciendis fugiendisve rebus. Ita verba in variis sententiis locis suis posita et crebro audita quarum rerum signa essent paulatim colligebam measque iam voluntates edomito in eis signis ore per haec enuntiabam. Sic cum his, inter quos eram, voluntatum enuntiandarum signa communicavi et vitae humanae procellosam societatem altius ingressus sum pendens ex parentum auctoritate nutuque maiorum hominum."[59]

This excerpt from St. Augustine's Confessions is (almost entirely) reported at the beginning of the Philosophical Investigations of Wittgenstein, who labeled it as giving a "particular picture of the essence of human language".[60] That holds true with reference to both the way language is learned by children (i.e. by means of ostensive definitions and words teaching) and the intrinsic nature of language.

According to Wittgenstein, in the description Augustine gives every word has a meaning, which is the object for which the word stands. This is certainly true with regard to objects, such as "lamp", "moon", or "cat". But it is also true with regard to actions, such as "to go", "to eat", "to speak"; and also with regard to the properties of objects and actions, such as "red", "five", "to sit ON", "to go TO".

---

[59] Augustinus, *Confessionum Libri Tredicim*, Liber Primus, c. 8 (see Augustinus, *Confessionum Libri Tredicim* (Citta Nuova Editrice) – available on-line at http://www.augustinus.it/latino/confessioni/index.htm). The following is the English translation of the excerpt found in St. Augustine, *Confessions and Enchiridion, newly translated and edited by Albert C. Outler* (Philadelphia: Christian Classics Ethereal Library, 2007), p. 17: "I remember this, and I have since observed how I learned to speak. My elders did not teach me words by rote, as they taught me my letters afterward. But I myself, when I was unable to communicate all I wished to say to whomever I wished by means of whimperings and grunts and various gestures of my limbs (which I used to reinforce my demands), I myself repeated the sounds already stored in my memory by the mind which thou, O my God, hadst given me. When they called some thing by name and pointed it out while they spoke, I saw it and realized that the thing they wished to indicate was called by the name they then uttered. And what they meant was made plain by the gestures of their bodies, by a kind of natural language, common to all nations, which expresses itself through changes of countenance, glances of the eye, gestures and intonations which indicate a disposition and attitude--either to seek or to possess, to reject or to avoid. So it was that by frequently hearing words, in different phrases, I gradually identified the objects which the words stood for and, having formed my mouth to repeat these signs, I was thereby able to express my will. Thus I exchanged with those about me the verbal signs by which we express our wishes and advanced deeper into the stormy fellowship of human life, depending all the while upon the authority of my parents and the behest of my elders."

[60] L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 2, para. 1.

The position expressed by Wittgenstein fits in the description of language given in the previous section, where the compositional nature of language has been noted and the function played by listemes as building blocks of the utterance meaning explained. In the remainder of this chapter, the term "listeme" will be generally used instead of "word", since the meaning of certain words is the result of the combination of the meanings of two or more listemes (see the previous example on the word "books") and, therefore, "words" do not seem suitable to be presented as the building blocks of semantics.[61] It is also worth mentioning, for the sake of clarity, that a listeme is not always represented by a single word, such as "dog" or "herring"; compound terms whose meaning cannot be determined by simply taking into account the meanings of the single words composing them and the syntactic rules regulating those words' interaction are also regarded as listemes (the compound term "red herring" is a *good* example thereof).

Every time a listeme is used to indicate a specific object, action, quality, etc. the latter represents the *referent* of the listeme (i.e. what the listeme is pointing at in the intention of the uttering person). According to Wittgenstein,[62] when children are taught a language by means of ostensive listeme teaching,[63] an association is established between the listeme and the specific referent pointed at (the specific cat pointed at, the specific action of eating carried on while saying the word "eat", that specific color [red] of the sofa pointed at, etc.). Due to such association, every time a specific listeme (or its closely derived words and expressions) is uttered, a mental picture of the referent comes in the child's mind.[64] After different referents are pointed at and shown in connection with the same listeme, the mental image takes a more focused and sharp shape. At this point, the author suggests, the mental image no longer refers to a specific referent, but to a certain *concept*, i.e. a mental object having the main characteristics common to the various referents pointed at. In the process of creation of the mental object corresponding to a certain listeme, the context of the utterance is of primary importance; to give just an example, "ball" may mean "a spherical or approximately spherical body or shape"[65] in a certain context, but it may also mean "pass me the ball now" in a different context, such as that of a football match.

Modern studies on the process of language acquisition by children tend equally to

[61] On the contrary, Wittgenstein uses the term "Wort", which is generally translated in English as "word" or "term". That does not change the substance of his reasoning.
[62] L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 4, para. 6.
[63] Ostensive teaching means the act of teaching something new to somebody by means of showing that something. Ostensive listeme teaching therefore is the act of teaching someone the meaning of a listeme by means of pointing at, or showing, something that represents an exemplification of the meaning of the listeme taught.
[64] Such an idea of mental images corresponding to listemes, put forward by Wittgenstein, has been later developed by Jackendoff, with reference to the idea of "conceptual structures", according to which the meaning of a language expression is also given by means of a mental three-dimensional image associated with the word uttered (see R. Jackendoff, *Consciousness and the Computational Mind* (Cambridge: MIT Press, 1987), p. 201; R. Jackendoff, *Semantics and Cognition* (Cambridge: MIT Press, 1983), p. 139).
[65] This is the first entry for "ball" at the Dictionary.com Unabridged. Random House, Inc. (accessed 13 Oct. 2009).

stress the relevance of the context for this process, especially in its early stages.[66] Children start the process of language acquisition with no knowledge about the relation between listemes and meanings; thus, when they are presented with a listeme for the first time, the context in which the listeme is uttered is the only information they can rely on. When the experience with the listemes of the relevant language grows, the ability to associate listems to referents and concepts grows as well, up to the point that, even without reference to a specific contextual situation, children are aware of and can choose among the various concepts corresponding to a listeme.[67]

In order to explain the process of language acquisition, contemporary researchers tend to attribute a significant importance to the inputs that adults give to children, in terms of frequency and manner of uttering the various listemes. However, it is also generally recognized that other factors play a substantial role in that process. Proof thereof is given by fact that listemes such as "the" and "a", which are among the most frequent listemes used by adults, are not acquired particularly early by children; moreover, although children theoretically have an infinite set of possible meanings to choose from, when presented with a novel listeme, they usually seem to figure out quite well what is meant by that listeme.[68]

First, it has been noted that children tend to interpret novel listemes as referring to objects or object categories.[69] In this respect, some scholars have suggested that since, from a perceptual-cognitive perspective, concrete objects are easier to separate from the stream of surrounding information than activities or relations, due to their stability and/or saliency, they capture the children's attention first. As a logical consequence, children tend to perceive the listemes they hear as referred to those objects.[70]

Second, it has been suggested that children generally assume that different listemes contrast in meaning and, consequently, they tend to assign the novel listemes they hear to gaps in their lexicon (i.e. to referents and concepts for which they do not have yet any referring listeme).[71] This conclusion relies on the idea that, in the process of language acquisition by children, language follows cognition and that there is normally a

[66] For a very clear summary of recent studies on the process of language acquisition by children, see L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), pp. 87 *et seq.*

[67] See, similarly, L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), pp. 4-5.

[68] See M. Tommasello, "Learning to use prepositions. A case study", 14 *Journal of Child Language* (1987), 79 *et seq*.; L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), p. 88.

[69] See E. M. Markman and G. F. Wachtel, "Children's use of mutual exclusivity to constrain the meaning of words", 20 *Cognitive Psychology* (1988), 121 *et seq*.

[70] See, for instance, D. Gentner, "Why Nouns are Learned Before Verbs: Linguistic Relativity versus Natural Partitioning", in S. A. Kuczay (ed.), *Language development. Vol. 2. Language, thought, and culture* (Hillsdale: Erlbaum, 1982), 301 *et seq*.

[71] See the theory based on the Principle of Contrast, developed by Clark (E. V. Clark, "The principle of contrast: A constraint on language acquisition", in B. MacWhinney (ed.), *Mechanisms of language acquisition* (Hillsdale: Erlbaum, 1987), 1 *et seq*.), and the slightly different theory based on the Principle of Mutual Exclusivity, described by Markman and Wachtel (E. M. Markman and G. F. Wachtel, "Children's use of mutual exclusivity to constrain the meaning of words", 20 *Cognitive Psychology* (1988), 121 *et seq*.).

temporal gap between the emergence of a concept in a child and his ability to properly associate it with a listeme.[72] Nonetheless, it has also been put forward that the process of language acquisition cannot be reduced to the learning of listemes to be associated to predefined and pre-acquired concepts, since an important phase in the process of language acquisition is represented by the very same construction of those concepts.[73] In particular, empirical evidence seems to exist in support of the hypothesis that children, when faced with new listemes, tend to create new (corresponding) concepts, if no previoulsly-created unlabelled concept is available. Such new concepts often relate to a salient part, or property of a familiar object.[74]

Based on the above, scholars have upheld the view that the relation between language acquisition and cognition is bidirectional, in that, on the one hand, children must be able to conceptualize aspects of their perceptual experience to recognize the appropriate way of referring to those aspects and, on the other hand, linguistic forms (e.g. listemes) may focus children's attention on certain aspects of experience that they would not have focused on otherwise.[75] As Hogeweg puts it, "linguistic development is inextricably bound up with cognitive development and they influence each other. Certain cognitive abilities are prerequisite to be able to learn language but at the same time linguistic conventions may influence the categorization of concepts".[76]

The above description of the process through which children learn the meaning of listemes, words and expressions holds true more generally for the entire category of human beings. More importantly it highlights, by exemplifying a technique of learning, the general existence of a structural relation between listemes and concepts, which characterizes human language and thought.

The relation between listemes and concepts, as well as the characteristics of concepts as such, are duly analysed in the following sections.

---

[72] See, for instance, J. R. Johnston and D. I. Slobin, "The development of locative expressions in English, Italian, Serbo-Croatian and Turkish", 6 *Journal of Child Language* (1979), 529 *et seq*.

[73] See L. Steels, *The Talking Heads Experiment* (Antwerpen: Laboratorium, 1999) and A. D. M. Smith, "The Inferential Transmission of Language", 13 *Adaptive Behavior* (2005), 311 *et seq*.

[74] See E. M. Markman and G. F. Wachtel, "Children's use of mutual exclusivity to constrain the meaning of words", 20 *Cognitive Psychology* (1988), 121 *et seq*.

[75] L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), p. 98, citing M. Tommasello, *Constructing a Language. A Usage-Based Theory of Language Acquisition* (Cambridge: Harvard University Press, 2003). See, similarly, the Division of Dominance theory developed in D. Gentner and L. Boroditsky, "Individuation, relational relativityand early word learning", in M. Bowerman and S. Levinson (eds.), *Language acquisition and conceptual development* (Cambridge: Cambridge University Press, 2001), 215 *et seq*.; this theory constitutes the basis of the Relational Relativity hyphothesis, according to which there is much more cross-linguistic diversity in the naming of relations between entities and actions, than there is in the naming of objects. Such a hypothesis proves useful in order to explain the non-perfect overlapping of similar legal concepts (which mainly concern relations) employed within different legal systems, and the related absence of synonymity between the corresponding legal terms, which is discussed in section 4 of Chapter 4 of Part II of this dissertation.

[76] L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), p. 99.

2.2. The relation between listemes and concepts: basic features

In order to illustrate the basic features of the relation existing between listemes and concepts, the spotlight is moved back to the previous example of a "ball". When someone utters "ball" in the context of a football match, he exactly wants to say "ball", meaning a request to the person in possession of the ball to pass it to him as soon as possible. Thus, the meaning of the utterance "ball" is, translated into our day-to-day language, the meaning of a sentence such as "pass me the ball now". The latter is just a means to make someone (the reader, for example) understand what the speaker means by saying "ball", that is what the speaker wants to obtain by uttering "ball". The need to express "ball" in terms of "pass me the ball now" is due to the fact that the hearer does not know the language spoken in the context of the football match, but knows what the author referred to as the day-to-day language. Moreover, none of the two expressions is intrinsically superior to the other: they are simply two expressions in two different languages.

Even assuming the substantial correspondence of meanings between the expressions "ball" and "pass me the ball now" within the football match context, it must be recognized that such expressions may denote different actions depending on the type of football match that is actually played. For instance, the actions connected to the passing of the ball in a soccer match significantly diverge from those connected to the passing of the ball in an American football match, since the rules of the two games are different.

This remark may seem puzzling and can legitimately lead someone to wonder, on the one hand, whether two distinct concepts of "passing the ball" exist in connection with soccer and American football and, on the other hand, whether it is correct to say that "pass me the ball" is one and the same day-to-day language expression when used in the context of a soccer match and in the context of an American football match.

These questions are two sides of the same coin and originate from the complex relation existing between the two levels characterizing the use of language. The first one is the level of the concepts, which relies significantly upon the encyclopedic knowledge of the people communicating with each other. The second one is the level of the listemes used in order to refer to such concepts, where the very same concept may be referred to by means of different listemes and the very same listeme may be used to refer to more than one concept.

These two levels (concepts and listemes) are strictly interconnected with each other and together characterize any kind of language use: to have a useful knowledge of a certain listeme in a specific language implies having some knowledge of the concept referred to by means of that listeme in that language. Such knowledge is not limited to the definitions of the specific listeme that may be found in dictionaries (i.e. the semantic specifications of that listeme as a lexicon entry), but includes the encyclopedic knowledge of the underlying concept and of the fields where the latter is relevant.[77] That

[77] The dividing line between the knowledge that may be derived from dictionaries (i.e. the lexicon knowledge, in particular with regard to semantic specifications) and the encyclopedic knowledge is blurred. Traditionally,

is because, where the knowledge of a specific listeme does not encompass some encyclopedic knowledge of the concept referred to by means of that listeme in that specific language, that listeme cannot be suitably used for communication purposes.[78] If, for example, we assume that the listeme "ball" in the specific language of soccer refers to the concept of passing the ball (the encyclopedic knowledge of which also includes the rules on how to pass the ball in soccer), a person may be said to usefully know the listeme "ball" in the soccer language only where he actually knows the concept of passing the ball in soccer and its relevant rules, at least to a certain extent. Where this is not the case, that person cannot communicate by means of that listeme with other people, since there will be no agreement between the speaker and the hearer on the content of the message transmitted by means of such a listeme, if not by mere chance.[79]

In that respect, there are various degrees of knowledge of a concept and, theoretically, it is possible to ordinate such levels on a continuous scale[80] whose edges could be named superficial knowledge (the least knowledge necessary in order to theoretically communicate by means of the corresponding term) and in-depth knowledge (the maximum level possible). The possibility of an effective communication between two persons by means of a specific listeme does not require an in-depth knowledge of the corresponding concept. What is necessary, instead, is that the hearer does have at least the same level of knowledge implicitly required by the speaker when he chose and used a specific listeme in its specific context (including the utterance in which the

---

a lexicon is considered to contain lexicographical information about listemes (i.e. formal, morphosyntactic and semantic specification) in the language, whereas an encyclopedia is considered to contain extra-linguistic semantic information about a name-bearer, in particular information about what listemes are used to refer to (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 100 *et seq*.). Within the present study, in many occasions the concept of encyclopedic knowledge is intended as inclusive of the semantic specifications of a listeme generally included in dictionaries.

[78] Consider the following instance (discussed, in a slightly different fashion, in L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 125, paras. 554-555). Consider two groups of people that apparently use the same language and, in particular, do use the very same negation sign. For both groups, such a negation sign determines the negation of the meaning of the expression to which it is attached. For one group, however, where the expression to be negated already contains one negation, the addition of the negation sign just works as an intensifier of the first negation (e.g. the expression "non-non-good" somewhat corresponds to the expression "very bad"). On the contrary, for the other group, the two negations offset each other (e.g. the expression "non-non-good" somewhat corresponds to the expression "good"). According to Wittgenstein, the question whether the negation does have the same meaning to these two groups of people would be analogous to the question whether the figure "5" meant the same to people whose numbers ended at 5 as to us.

[79] A similar consideration is expressed by Fillmore and Atkins, who point out that a word's meaning can be understood only with reference to a structured background of experience, beliefs, or practices, constituting a conceptual prerequisite for understanding the meaning. They conclude that speakers can be said to understand the meaning of the word only by first understanding the background frames that motivate the concept that the word encodes (see C. J. Fillmore and B. T. Atkins, "*Toward a frame-based lexicon: the semantic of RISK and its neighbors"*, in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 75 *et seq.*, at 76-77). According to Allan, language is a cognitive and psychological entity that must be "known" in order to be used. In addition, he points out that meaning in natural languages is very responsive to, and often a reflex of, human perception and conception (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 3).

[80] As most of the things concerning human thought, the scale is a continuous one, the boundary between one level and the following one being blurred, or even notexisting at all.

listeme has been used) in order to transmit the message he had in mind.

The example of the ball and the distinction made between the two levels of the language structure constitute a good starting point to highlight the two main characteristics of the relation existing between concepts and listemes: conventionality and ambiguity.

2.3. The relation between listemes and concepts: conventionality

The correspondence between concepts and listemes is conventional, i.e. the meaning of listemes is conventional.[81] [82]

The conventional correspondence between a listeme and a concept presupposes a necessary agreement between the people using such a listeme.[83] Without an agreement on the correspondence between listemes and concepts, listemes cannot be used to express concepts and, therefore, they cannot be used in order to communicate: they are outside the scope of language (as previously defined). Such a necessary agreement is between the person using a specific listeme in an utterance and all the potential recipients of that utterance. The agreement generally points to the correspondence established by a specific person, or group of persons, and then accepted by others.

With reference to the content of the agreement, i.e. the conventional correspondence between a concept and a listeme, it is useful to distinguish between the way in which the correspondence is established, on the one hand, and the techniques through which it may be expressed, on the other.

In relation to the first aspect, the content of the agreement may be established (i) by means of an *ad hoc* arrangement among all the persons that are using the listeme in the specific circumstance, both as speakers and hearers, (ii) by a recognized rule[84] that

[81] The contrast between the *naturalist hypothesis*, according to which the original meaning of a word gives rise to its original form "naturally", and the *conventional hypothesis*, according to which the correspondence between meaning and form is entirely arbitrary and, at the same time, conventional because it needs to be agreed upon and learned by the language community, dates back at least to the age of classic Greek philosophers (see Plato (translated by B. Jowett), *Cratylus* (The Internet Classics Archive) – available online at http://classics.mit.edu//Plato/cratylus.html). The very same etymology of the word "etymology" seems to confirm that in ancient Greece the *naturalist hypothesis* was widespread and well-rooted: "etymology" in fact derives from the combination of the listeme "etymos", which means "true sense of words", and the listeme "logia", which means "study of".

[82] On the conventional nature of language expressions and their typical feature of quickly changing meanings, it is interesting to read the criticism of Wright's naturalistic theory made by Allen in K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 159-160.

[83] On the relation between conventional correspondence and agreement, as well as on the different types of agreement, see L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 23, paras. 53 and 54.

[84] The rule must be recognized among the people that are supposed to use that specific listeme as corresponding to that specific concept.

attributes to a person or a group of person the power to do so,[85] or, in the majority of cases, (iii) by praxis.

With regard to praxis, it is necessary to keep in mind that this is empirical and not uniform. Praxis is empirical since the correspondence between the listeme and the concept must have been previously established at least once by at least one person and because the more frequently such a correspondence has been agreed upon in the past within a certain group of people, the more probable is that it will be upheld in the future within the same group. Praxis is not uniform in the sense that it varies according to the context, i.e. across different times, geographical and cultural areas, depending on the subject matter of the utterance and the people involved (i.e. the speaker and the potential hearers).

Therefore, in the vast majority of cases the correspondence between listemes and concepts established by praxis appears to be erratic. Once the context in which the listeme is used is established, however, the variety of the correspondence is narrowed down.[86] Still, due to the empirical nature of praxis, it is possible that, in a given context, there is more than one possible correspondence between a given listeme and the underlying concept. That makes the correspondence ambiguous, as will be discussed below.

For the reasons just summarized, the questions whether an agreement exists and which correspondence constitutes its content appear to be matters of inductive inference based on the frequency of the praxis in the given context and on all other items of evidence available.

With regard to the second aspect, the established content of the agreement may be expressed by means of (i) ad hoc definitions (descriptions)[87] of the listemes and (ii) exemplifications (which include ostensive exemplifications).

Definitions have the drawback of being made up of listemes that correspond to other concepts, here referred to as sub-concepts.

---

[85] For example, in western democracies, the power attributed to the legislator of establishing a correspondence between a listeme and a concept that has to be universally accepted within the community where such a correspondence is established as part of the law.

[86] As stated by Wittgenstein, words have meaning only as part of a sentence (see L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 21, para. 49). This function performed by the context is one of the specific fields of pragmatics, on which, in general, see J. L. Mey, *Pragmatics, An Introduction* (Oxford: Blackwell, 2001); K. M. Jaszczolt, *Semantics and Pragmatics*, *Meaning in Language and Discourse* (London: Longman, 2002) and the vast bibliography cited therein.

[87] Definitions and descriptions may be distinguished by considering (i) the descriptions as assertive sentences made of listemes, through which the correspondence between the listeme described and a concept is expressed; and (ii) the definitions as particular kind of descriptions, in which the concept corresponding to the defined listeme presents several features and these features are also proper to the sub-concepts corresponding to the (sub-)listemes used in the definition itself. When a definition, in this sense, is used, the features of the sub-concepts corresponding to the listemes used in the definition, taken as a whole, *biunivocally* match the features of the concept corresponding to the defined listeme. Substantially, this is the distinction between definitions and descriptions drawn in L. Wittgenstein (translated by D. F. Pears and B. F. McGuiness), *Tractatus Logico-Philosophicus* (London: Routledge, 2001). For the purpose of the present study such a distinction is not relevant and, therefore, is not maintained; the terms "definition" and "description" here are used as synonyms having the meaning attached to the listeme "description" above.

The correspondence between the sub-concepts and the listemes used in a definition is also conventional and has to be expressed somewhat. Therefore, for a definition to work, it is necessary to agree upon the correspondence between the listemes used in the definitions itself and the related concepts (sub-concepts) and to express such a correspondence through one of the means previously discussed. Theoretically, if such (sub-)correspondences were always expressed by means of definitions, the process of expressing the initial correspondence would prove either never-ending or circular and, therefore, useless.[88] An instance of such an issue appears from the following example,[89] in which the reader should assume not knowing the meaning of the listemes written in ***bold italics***.

Listeme: ***computer***

Definition 1: an electronic ***device*** designed to accept data, perform prescribed mathematical and logical operations at high speed, and display the results of these operations.

The author then considers one listeme of definition 1: ***device***

Listeme: ***device***

Definition 2 (the first of seven alternative definitions in the dictionary): a thing made for a particular ***purpose***; an invention or contrivance, esp. a mechanical or electrical one.

The author then considers one listeme of definition 2: ***purpose***

Listeme: ***purpose***

Definition 3 (the first of eleven alternative definitions in the dictionary): the ***reason*** for which something exists or is done, made, used, etc.

The author then considers one listeme of definition 3: ***reason***

Listeme: ***reason***

Definition 4 (the first of nineteen alternative definitions in the dictionary): a basis or ***cause***, as for some belief, action, fact, event, etc.: the reason for declaring war.

The author then considers one listeme of definition 4: ***cause***

Listeme: ***cause***

[88] Similarly, L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 35, para. 87. With reference to the interpretation of treaties, see W. Hummer, ""Ordinary" versus "Special" Meaning. Comparison of the Approach of the Vienna Convention on the Law of Treaties and the Yale-School Findings", 26 *Österreichische Zeitschrift für öffentliches Recht* (1975), 87 *et seq.,* at 95.

[89] The following definitions are provided by the Dictionary.com Unabridged. Random House, Inc. (accessed 15 Jan. 2010).

Definition 5 (the first of ten alternative definitions in the dictionary): the ***reason*** or ***motive*** for some human action: The good news was a cause for rejoicing.

Would the reader continue by choosing the listeme ***reason*** or ***motive***? Where the listeme ***reason*** was chosen, the reader would be sent back to definition 4 and, thus, the definition of the listeme ***computer*** would prove to be circular. Where, on the contrary, the listeme ***motive*** was selected, the reader should have recourse to another definition, with the risk of continuing endlessly.

However, as a matter of fact, in many instances the agreed correspondence is expressed by means of exemplifications (as well illustrated in the above example by both definitions 4 and 5) and the risk of circular or never-ending streams of definitions is therefore actually removed.

The fact that definitions are means to express a potentially agreed correspondence between listemes and concepts implies that a definition is never correct or incorrect *per se*. A definition is, *per se*, simply tautological. A definition may be called incorrect only where it is presented as expressing a correspondence agreed upon within a certain group of people, but, as a matter of fact, such a correspondence proves to be non-established within that group. In the latter case, however, the issue is not in the definition *per se*, but rather in the way in which that is portrayed.

Moving to exemplifications, the latter consist in pointing to specific facts, things, actions, etc. as prototypes of (the set of features of) specific concepts. The most evident and relevant features of the specific facts, things, actions, etc. pointed at in a certain context are, by means of induction, conventionally established as the set of features of the concept corresponding to the listeme at stake.

2.4. The relation between listemes and concepts: ambiguity

The correspondence between concepts and listemes is characterized by ambiguity.

This idea may be differently expressed by saying that generally the correspondence is not biunivocal,[90] i.e. in the majority of cases a concept does not correspond to a single listeme (synonymy) and a listeme does not correspond to a single concept (polysemy).[91]

[90] As a consequance, "when a particular word is used, there is not one corresponding meaning which the hearer can automatically associate with it. Instead, the hearer chooses the best or optimal interpretation of a word in a given situation. Similarly, when a speaker wants to express something, there is not always a form available that perfectly corresponds to the intended meaning. Therefore, the speaker chooses the word that corresponds to the intended meaning the best, in other words, she chooses the *optimal* form." (L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), pp. 2 and 3).

[91] Linguists distinguish between *polysemy* and *homonymy*. The former is generally intended as referring to the plurality of meanings attributable to one and the same listeme, which is characterized by a single form and a single set of morphosyntactic specifications and corresponding to a single lexicon entry in dictionaries.

The phenomenon of ambiguity is the result of the way in which the agreed correspondence between listemes and concepts is established, in particular it is the result of the above-described process of agreement formation by means of praxis. As already mentioned, praxis is characterized by significant spatial and temporal variability, which leads to both the stratification of meanings expressed by a single listeme and the use of different listemes to express the very same concept. The magnitude of the phenomenon has been further enhanced, in many language communities, by the custom of having new correspondences between listemes and concepts unilaterally and generally established by the act of a person (or group of persons) properly empowered to do so by a recognized rule of the community.

The phenomenon of polysemous listemes is explained well by the theory of *semantic chains*.[92] According to this theory, in most cases listemes originally correspond

---

Typically, when polysemy is at stake, the various concepts corresponding to a single listeme are semantically related, either in a systematic way (i.e. each listeme of a particular semantic class potentially corresponds to the same variety of concepts; e.g. "door", "gate", "window" may be used to refer to both the aperture and the covering of such aperture) or in a non-systematic way (i.e. there is no predictable pattern of concepts corresponding to a particular semantic class; e.g. the listeme "arm" may refer both to the arm of government and to human arm) (see A. Koskela and M. L. Murphy, "Polysemy and Homonymy", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 711 *et seq.*, at 711). Homonymy, on the other hand, is generally intended as referring to the phenomenon of two listemes with coincidental identical form, i.e. having the same form but usually different morphosyntactic specifications and corresponding to two different lexicon entries in dictionaries. Homonyms arise either accidentally through lexical borrowings and changes, or through some semantic or morphological drift such that a previously polysemous form is no longer perceived as being the same listeme in all its senses. In the latter case, the passage from polysemy to homonymy is subjective and sometimes conventionally recognized within a certain community. Unlike the concepts corresponding to a single polysemous listeme, concepts corresponding to different homonymous listemes are, in most cases, not semantically related (see A. Koskela and M. L. Murphy, "Polysemy and Homonymy", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 711 *et seq.*, at 711). However, this does not always hold true and linguists recognize that a clear distinction between polysemous and homonymous listemes remains difficult to draw (see A. Koskela and M. L. Murphy, "Polysemy and Homonymy", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 711 *et seq.*, at 711). Nonetheless, while drawing such a distinction remains relevant for linguists, in particular semanticists and lexicographers, it is not so for the purpose of the present study, in relation to which what is relevant to highlight is the fact that in natural languages the phenomenon of having different concepts corresponding to a single graphic form (either a single listeme or multiple homonymous listemes) is widespread. Therefore, in the remainder of this study, each reference to "polysemy" must be read as made to "homonymy" as well, unless otherwise indicated in the text.

[92] Such a theory is also known in linguistics as the *chain of similarities* theory and the *family resemblance* theory. On semantic chains, G. Lakoff, *Woman, fire and dangerous things. What categories reveal about the mind* (Chicago: University of Chicago Press, 1987), in particular Part I.
Similarly, *semantic map* theory may also be used to explain the phenomenon of polysemous listemes. *Semantic maps* aim at representing form-meaning correspondences and, by linking up language-specific formal categories to semantic categories, are purported to show that the multiple uses of a listeme are related in a systematic and universal way (J. van der Auwera and C. Temürcü, "Semantic Maps", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 863 *et seq*., at 863). On semantic map theory see also J. van der Auwera and V. Plungian, "Modality's semantic map", 2 *Linguistic Typology* (1998), 79 *et seq*.; J. van der Auwera, N. Dobrushina and V. Goussev, "A semantic map for imperative-hortatives", in D. Willems *et al*. (eds.), *Contrastive Analysis in Language. Identifying Linguistic Units of Comparison* (Basingstoke: Palgrave Macmillian, 2004), 44 *et seq*.; M. Haspelmath, "The geometry of grammatical meaning. Semantic

to a single concept. By means of praxis, the listemes then start to be used by a part of the language community in order to refer to items that are outside the scope of the original concept, but which present some kind of similarities with the items typically encompassed within its scope. When such a new use of the specific listeme becomes widespread within a relevant part of the language community, it may be said that listeme corresponds to two concepts within that language community. The process of creation of new correspondences between the listeme and concepts continue along these lines, so that a certain point in time a semantic chain of concepts corresponding to a single listeme appears to be in place. Along the chain, the first and the last concepts are semantically quite distant.[93] Allan gives the example of the listeme "mother" in order to show the effects of the process.[94] The prototypical meaning of the listeme "mother", which is most probably the original meaning thereof, denotes the female human beings that produce the ovum, conceive, gestate, give birth and nurture the child. Starting from such a concept, praxis has then extended the use of the listeme "mother" to: (i) the concept of the nurturant mother that is not the biological mother;[95] (ii) the concept of biological mother that does not nurture the child; (iii) in turn, from the concept of biological mother are derived the distinct concepts of ovum source mother[96] and gestation-birth mother; (iv) from the concept of nurturant mother are derived the concepts of spiritual mother and of mother superior in a religious context. Other concepts corresponding to the listeme "mother" could be added to the above list.

Semantic chains prove useful in order to analyse and explain why two listemes of two natural languages share just a part of their respective corresponding concepts. Consider, for instance, the listemes "ride" in English and "reiten" in German.[97] Both

---

maps and cross-linguistic comparison", in M. Tommasello (ed.), *The new psychology of language*, Vol. 2 (Mahwah: Erlbaum, 2003), 211 *et seq*.

[93] Lakoff distinguished two types of semantic chains, which he called *family resemblance categories*. The first type is that of *generative categories*, which can be formed by taking the prototypical concept corresponding to a listeme member of a certain semantic class and applying to such a concept the class rules of generation in order to designate category membership, i.e. in order to determine the other concepts that correspond to the same listeme. The concepts pertaining to a generative category appear thus semantically related in a systematic way, in the sense described in previous note 91 (i.e. each listeme of a particular semantic class potentially corresponds to the same variety of concepts; e.g. "door", "gate", "window" may be used to refer to both the aperture and the covering of such aperture). The second type is that of *radial categories*, whose actual structure is not predictable since the category is not determined by application of any class rule of generation. The concepts pertaining to a radial category appear therefore semantically related in a non-systematic way, in the sense described in previous note 91 (i.e. there is no predictable pattern of concepts corresponding to a particular semantic class). It should be noted that the idea of family resemblance categories was originally put forward by Wittgenstein (see L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 26, paras. 66-67) and only later developed by Lakoff in G. Lakoff, *Woman, fire and dangerous things: What categories reveal about the mind* (Chicago: University of Chicago Press, 1987), Chapter 2.

[94] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 328-329. The example is a reformulation of that originally discussed in G. Lakoff, *Woman, fire and dangerous things: What categories reveal about the mind* (Chicago: University of Chicago Press, 1987), pp. 82-83.

[95] The nurturant mother may be adoptive, foster, etc.

[96] Generally called *genetic* mother.

[97] Example taken from J. Lyons, *Semantics* (Cambridge: Cambridge University Press, 1977) – Vol. 1, pp. 263-264.

listemes were originally used to refer to the action of riding on horseback.[98] However, in German the original meaning has expanded as to include actions such as sitting astride a beam;[99] in this case, the specific posture or position of sitting was determinative in directing the meaning expansion. Differently, in English the original meaning has expanded as to include both (i) the act of transportation by means of bikes or motorbikes on which the posture is similar to that on a horse, and (ii) the act of transportation by other means such as coaches, trains and cars, where the original horseback-riding posture is not required; in this case, the fact of being conveyed was decisive in directing the meaning expansion.

However, the theory of semantic chains, although useful in order to explain ex post the reasons why certain semantically distant concepts correspond to the same listeme, cannot be used to predict the future evolution of such chains, since in many instances semantic chains spread out in various directions creating a sort of non-systematic radiations.

From a different perspective, the extent of language ambiguity is directly related to and influenced by the level of (intellectual) specialization that characterizes the community where the language is used. In communities where the aggregate wealth and its distribution within the group is such as to guarantee that some part of community population may commit part or the whole of its time to intellectual speculations and scientific research, as well as in communities where human activities are specialized and accordingly performed by dedicated subgroups, the ambiguity of language is generally higher due to the birth and proliferation of *jargons*. Jargon may be defined as the language (especially the vocabulary) peculiar to a particular trade, profession or group.[100] Jargons contribute to increase the ambiguity of language since they (i) increase the polysemy of existing listemes and (ii) create new listemes to express concepts that are similar to concepts corresponding to pre-existing listemes, the difference between such concepts being sometimes blurred (or, in extreme cases, becoming non-existent). Jargons are, in fact, characterized by novel listemes and pre-existing listemes used in new ways, especially because the specialized vocabulary needs to name those concepts that are special to the domains in which the jargons are used. Although performing this proper and necessary function, jargons (and their specialized vocabulary) are in some cases vacuous and pretentious, adopting harsh neologisms to express well-known concepts just for the pleasure of making the jargon community appear to be an elite group and producing, as a consequence, the above-mentioned undesirable effect of making language more ambiguous.[101] In this sense, the members of certain groups use jargons as entrance-barriers in order preserve any possible caste or competitive

[98] They have common origin in the Proto-Germanic language(s). See Online Etymology Dictionary (Douglas Harper. Accessed 09 Oct. 2009). With reference to their common etymology, see also the reference to their diachronic relation in J. Lyons, *Semantics* (Cambridge: Cambridge University Press, 1977) – Vol. 1, p. 263.
[99] Auf einem Balken reiten in German.
[100] This is the first entry for "jargon" at the Dictionary.com Unabridged. Random House, Inc. (accessed 18 Jan. 2010).
[101] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 170-172.

advantages against outsiders. These (limited) negative features of jargons give the reasons why in current English (as well in other languages) "jargon" is still used sometimes with a negative connotation. It is enlightening, in this respect, to report other dictionary definitions of jargon: unintelligible or meaningless talk or writing; gibberish; any talk or writing that one does not understand; language that is characterized by uncommon or pretentious vocabulary and convoluted syntax and often vague in meaning.[102] The etymology of the listeme "jargon" and the meanings it used to express in the past confirm the historical and widespread negative connotation of jargons, as well as the related general aversion and prejudice towards the underlying phenomenon of class-languages.[103]

However, in modern society jargons indisputably play a fundamental role as technical or specialist languages, providing the members of the various groups with a precise, efficient and economical language tool, capable of capturing distinctions not made in the ordinary language.

Jargons are characterized (and their existence identified) by the presence of certain common features.[104] These are mainly of a lexical nature, such as the existence of specialized vocabularies for specific domains and the use of idioms, abbreviations and acronyms,[105] although some are of syntactic (e.g. the widespread use of "shall" in the third person) or presentational nature (e.g. the format in which a written text is presented). In any event, the boundaries of a jargon are difficult if not impossible to draw, which makes any particular jargon difficult to define precisely, especially because every jargon borrows from language that is common to other jargons.[106]

In light of the subject matter of the present study, it may be interesting to briefly highlight the main features of English legal jargon (some of which are common to legal jargons expressed in other natural languages). First, English legal jargon is characterized

---

[102] These are entries 2, 3 and 5 for "jargon" at the Dictionary.com Unabridged. Random House, Inc. (accessed 18 Jan. 2010).

[103] Allan reports that, in middle English, "jargon" was generally used to describe the chattering of birds, or human speech that sounded as meaningless as the chattering of birds (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 169). Etymologically, "jargon" and the corresponding Italian "gergo" seem to derive from the Indo-European root "garg", from which the Latin "gùrgula", the Italian "gargana" and the Spanish "garganta" derive, all of which denotate the "throat", or from the Indo-European root "gar", from which the greek "Geryo" and the Italian "gridare" derive, which means to speak loudly (see Vocabolario Etimologico Pianigiani della lingua italiana on-line, accessed 10 February 2010; K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 169).

[104] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 172 *et seq*.

[105] It is interesting to note that the "English international tax language" presents to a certain extent the lexical features of a jargon. This is apparent when we think about the existence of certain technical terms such as "resident" and "permanent establishment"; idiomatic expressions such as "beneficial owner" and "at arm's length"; acronyms such as "CFC", "DTC" and "LOB". It is also interesting to note that the international tax community has enhanced this process of jargon formation by creating specialized glossaries, such as the "IBFD International Tax Glossary" in the English language. Notwithstanding these features and the efforts of the international tax community, the international tax domain still heavily relies on the official national tax languages of the various States of the international community and, thus, the scope of the international tax jargon (if any) is very limited. In contrast, at the level of the various States of the international community, the official national tax languages generally constitute quite well-developed jargons.

[106] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 176.

by an *ad hoc* vocabulary, made of (i) listemes exclusively used in the legal language and (ii) listemes that are used in the legal language to convey meanings different from those corresponding to those listemes when used in the day-to-day language. Furthermore, English legal jargon vocabulary presents a significant number of listemes borrowed (or derived) from Latin and French. From the syntactical and formal perspectives, it is common practice to structure long and very complex sentences,[107] frequently difficult to comprehend, in which two or three synonyms are often strung together.[108] It is also characterized by the large numbers of passives, nominalizations, multiple embeddings, intrusive phrases, multiple negatives and other features that generally make the public feel offended by the perception that the writer of the legal text is requiring them to spend an unreasonable effort in order to understand what the document means.[109] [110]

Based on the above, the conclusion may be drawn that the adoption of a particular jargon in formulating an utterance generally implies the correspondence between the listemes used therein and the concepts that are associated with such listemes within that specific jargon (if any). This has remarkable consequences for the meaning of the utterance itself. In fact, where the hearer may reasonably establish that a particular jargon has been used in formulating the utterance, a plausible presumption exists that, among the various concepts theoretically corresponding to a certain listeme, the speaker has chosen the one(s) whose correspondence to the listeme is typical of jargon used (e.g. the concept of "pass me the ball now" in soccer jargon). Various kinds of evidence exist that may lead the hearer to conclude that a specific jargon is used by the speaker, the most relevant being: the subject matter of the utterance (e.g. a technical subject matter to which a specific jargon corresponds), the identity and capacity of the speaker (e.g. a professor in a specific subject matter that has its own jargon, giving a lecture on such a subject matter), the identity and capacity of the prototype hearers (e.g. doctors attending a conference on recent medical developments in neurology), the purpose of the utterance (e.g. an in-depth analysis of a technical subject matter), the extensive use of idiomatic expressions and listemes specific to a certain jargon. The attribution of different weights to the items of evidence available in order to conclude whether a specific jargon has been used by the speaker implies a discretionary assessment (judgment) from the hearer.

However, even when the ambiguity of certain listemes used in the utterance is reduced by the conclusion that the speaker adopted a specific jargon in formulating it, the overall ambiguity of the utterance cannot be entirely removed. This is due to various factors.

---

[107] Danat reports that the average length of a sentence in a legal document is 55 words, which is 8 times the length found in dramatic texts (see B. Danat, "Language in the legal process", 14 *Law and Society Review* (1980), 445 *et seq.*, at 479).

[108] According to Allan (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 173), this feature derives from the early practice in English legal texts of conjoining a term of Germanic origin with a synonym of Romance origin.

[109] These features, commonly emphasized in the critical observations made by legal researchers, are even more precisely perceived by non-legal researchers, in particular linguists, among whom, for extensive references, K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 174.

[110] The prototype of the lawyer abundantly mis(using) legal jargon is incomparably well sketched by Alessandro Manzoni when describing the "eloquence" of dottor Azzeccagarbugli in "I promessi sposi".

First, within a specific jargon, the correspondence between a listeme and a concept is not always biunivocal: a certain listeme may be characterized by polysemy even within a specific jargon. Second, concepts may be vague with regard to their scope, in the sense that there are often borderline items the inclusion of which in the scope of the relevant concept is uncertain. Third, many jargons are variations of day-to-day languages, from which they borrow most of their vocabulary and their morphosyntactic rules; therefore, even if the ambiguity is reduced with regard to the technical listemes of the jargon, it almost invariably remains in respect of those listemes borrowed directly from the day-to-day language. Fourth, ambiguity may derive from the combination of listemes into sentences and from the underspecification of the latter.[111]

To conclude, the potential ambiguity of the listemes used in an utterance appears notably narrower than it seemed at first glance. The relevance that the context may have for ascertaining the meaning that a specific listeme does have in a specific utterance has already been mentioned. For the time being,[112] the author assumes the context is made of all information regarding the framework where the specific listeme and the utterance in which it is encompassed have been pronounced. The context may thus be deemed to encompass: the subject matter of the utterance, the identity and capacity of the speaker and of the potential hearers, the purpose of the utterance, the use of a specific jargon, the semantic content of (the remainder of) the utterance where the listeme is used and of nearby utterances, the cooperative principle (i.e. the common rules on human behavior when communicating), as well as the background and experiences of the speaker and hearers, including their *encyclopedic knowledge*.[113] In particular, the encyclopedic knowledge plays a primary role for the purpose of narrowing down the ambiguity of the specific listeme. On the one hand, part of the contextual information derives its actual content from the encyclopedic knowledge of the speaker and the potential hearers (e.g. the subject matter of the utterance, the capacity of the speaker, etc.) and, on the other hand, the various concepts associated with the specific listeme may be comparatively assessed against the background of the utterance context only where each of them has been already analysed and understood in its own context, i.e. in the framework of the encyclopedic knowledge field to which such concept pertains. However, it must be kept in mind that the process of narrowing down the ambiguity of the specific listeme by discharging the meanings that do not respond (or correspond) to the context requirements, i.e. that are not sensible in the actual context, is not a mechanical task, but implies the hearer's discretionary assessment of the various significant factors.[114]

[111] This type of ambiguity is analysed in section 4 of this chapter.
[112] The concept of "context" will be expanded in the following sections.
[113] These elements partially overlap with those previously mentioned as relevant for the purpose of determining whether the speaker has adopted a certain jargon. Such a partial overlap emphasizes the fact that in both cases the context plays a major role.
[114] In linguistic terms, that activity represents a pragmatic assessment.

3. The characteristics of concepts

3.1. Introduction

"*Meaning in natural language is an information structure that is mentally encoded by human beings*"[115]

Human beings have knowledge of the world they live in and think about through specific mental processes, which work as lenses put between them and such worlds. From the human perspective, there is no other knowledge than that acquired by means of these mental processes.[116] Through such processes, which are generally labeled as perception and cognition, people (i) elaborate ideas and mental images that are part of abstract or metaphysical worlds, (ii) decrypt the information received from the external world through the senses and (iii) organize all these ideas, images and information in the form of data that are categorized according to mental schemes biologically and culturally driven. These mental schemes consist of concepts and the intricate net of relations existing among such concepts. Concepts and the relations among them are not *a priori* schemes for categorizing knowledge data; on the contrary, they are the product of human cognitive processes that, in turn, are influenced by the very same knowledge data that such schemes are used to categorize.

In this perspective, social and cultural differences, as well as differences in life experiences between various communities do have a significant impact on the actual shape that concepts and relations among concepts tend to assume within such communities. The interaction, however, is biunivocal. In fact, the specific pattern of concepts and relations among them that characterizes a specific community is a fundamental part of its cultural legacy and, as such, is transmitted through the generations and contributes to informing both the social life of the community and the way in which experiences, facts, things are looked at and approached.

From a linguistic standpoint, cognitive linguists have advanced the hypothesis that language (including grammatical structures and rules) is constrained and informed by the relations that human beings (i) perceive in nature, (ii) experience in the world they inhabit, and (iii) conceive of in abstract and metaphysical domains.[117] More specifically, the idea upheld by cognitive linguistics is that the way in which people perceive the worlds and conceive of them informs their linguistic categorization (by means of concepts).

The most relevant consequences of such premises are the following.

---

[115] R. Jackendoff, *Consciousness and the Computational Mind* (Cambridge: MIT Press, 1987), p. 122.
[116] On the relation between the world (things and facts), cognition and language, the best reference is L. Wittgenstein (translated by D. F. Pears and B. F. McGuiness), *Tractatus Logico-Philosophicus* (London: Routledge, 2001).
[117] J. R. Taylor, "Cognitive Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 73 *et seq.*; K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 247 and 288.

First, the meaning of language expressions reflects the speaker's perception and cognition of the denotata, his perception being heavily influenced by the cultural and social environment where he has grown up and has lived.[118] In particular, concepts and the related mental categorizations reflect human needs and purposes and are constructed on the basis of the speaker's personal point of view in the specific situation he is living in (space and time-wise), which in turn is greatly influenced by the surrounding cultural and social environment. Concepts and categorizations, on the other hand, influence the language spoken in that specific cultural and social environment, the language being the means used in order to communicate thoughts that are the result of cognitive processes based on the above concepts and categorizations. The perceptions that different people have of the same phenomenon may be different as a result of the dissimilarities between their cognitive processes and their categorizations based on concepts.[119]

The perceptions differ in terms of selective emphasis, i.e. the emphasis that each person attributes to specific similarities and differences between the various phenomena that are perceived by means of the senses. The similarities and differences pertain to the various features of the phenomena and the emphasis that a certain person may attribute to such similarities or differences depends on the relevance that those features have for each of the concepts used by that very person as basis for categorizing and developing the cognitive process. Thus, the actual emphasis on similarities or differences in concrete cases mirrors the emphasis attributed to certain features rather than others in designing mental concepts.[120] In general terms, emphasis on similarities corresponds to composite concepts in respect of specific features, while emphasis on differences corresponds to individual concepts in respect of specific features. The contraposition between

[118] This first consequence has been originally noted and developed by R. E. MacLaury under the label of "Vantage Theory" (see R. E. MacLaury, "Coextensive semantic range: Different names for distinct vantages in one category", in E. Shiller and A. Bosh (eds.), *Papers from the Twenty-Third Annual Meeting of the Chicago Linguistics Society* (Chicago: Chicago Linguistic Society, 1987), 268 *et seq.*; R. E. MacLaury, "Vantage theory", in J. R. Taylor and R. E. MacLaury (eds.), *Language and the cognitive construal of the world* (Berlin: Mouton de Gruyter, 1995), 231 *et seq.*; R. E. MacLaury, *Color and Cognition in Mesoamerica. Constructing Categories as Vantages* (Austin: University of Texas Press, 1997), p. 93). For an analysis thereof in the context of cognitive semantics, J. R. Taylor, "Cognitive Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 73 *et seq.*; K. Allan, "Categorizing Percepts: Vantage Theory", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 51 *et seq.*

[119] This is particularly evident when the approaches of different cultures to the process of cognitive construction of what is perceived are compared. Since the cognitive construction of what is perceived is strictly related to the mental categories and concepts used in such a process and these mental categories and concepts are named for communication purposes, in order for people within a speech community to understand each other, there are agreed conventional names used that correspond to agreed conventional mental categories and concepts, which in turn correspond to generally agreed approaches to the process of cognitive construction within that community. When different communities are at stake, in cases where such communities are not (or have not been for a long time) in the necessity to communicate with each other, the above described reason for a convergence of language expression and therefore of concepts and approaches to the process of cognitive construction are missing and, as a result, such approaches and the resulting categorizations and concepts appear sometimes significantly distant (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 287 *et seq*.).

[120] See the various examples on color perceptions and classification provided in the literature concerning the "Vantage Theory" quoted in footnote 118.

composite and individual concepts is, in turn, echoed at the language level by means of corresponding listemes. From a dynamic perspective, the shift in emphasis from similarity to difference, and vice-versa, does not occur for no reason. People must have a reason to perpetrate a cognitive change,[121] which is generally culturally and socially driven.

Second, since perception and conception are products of the human mind and body, the latter may be considered to constrain and inform language and linguistic categorization. Indeed, language appears to be clearly anthropocentric,[122] in that human beings are used to describe the world of their experience by reference to the human body and their everyday experiences and to adopting the human body and its parts as a basis for describing and measuring other things in the world around them, as well as pure metaphysical concepts (such as "legal person", "arm's length", "company residence", just to give some of the possible examples from the English tax law language). It is the above-mentioned human-centeredness of human cognition that leads to the human-centeredness of the language, since the latter, as already mentioned more than once, just reflects human cognition.

Third, the distinction between lexicon knowledge (i.e. semantic specifications of listemes provided by dictionaries) and encyclopedia knowledge is superseded. According to Jackendoff, for example, knowing the meaning of a word that denotes a physical object includes knowing what such an object looks like; the traditional-style lexicon entry is a partial, insufficient representation of the concepts associated with listemes, since conceptual structure must also contain a partial three-dimensional model structure based on visual (and other sense) perception.[123] All in all, there is a "single level of mental representation, *conceptual structure*, at which linguistic, sensory, and motor information are compatible"[124] and the semantic specifications (dictionary meaning) of a listeme are just one part of the conceptual structure corresponding to that listeme.[125] The additional information that characterizes the concept is encyclopedic in nature, not lexical. The same idea may be expressed in terms of *conceptual frames*, which may be described as systems identifying and encompassing the characteristic features, attributes and functions of a specific concept and its characteristic interactions with other concepts necessarily or typically associated with it. Under this perspective, a listeme meaning can be understood only with reference to its background frame, which

[121] R. E. MacLaury, Color and Cognition in Mesoamerica. Constructing Categories as Vantages (Austin: University of Texas Press, 1997), p. 93.
[122] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 289-290.
[123] R. Jackendoff, *Consciousness and the Computational Mind* (Cambridge: MIT Press, 1987), p. 201; R. Jackendoff, *Semantics and Cognition* (Cambridge: MIT Press, 1983), p. 139.
[124] R. Jackendoff, *Semantics and Cognition* (Cambridge: MIT Press, 1983), p. 17.
[125] In this context, it should be noted that the semantic specifications of most of the listemes is distilled from encyclopedic information about the salient characteristics of the concepts corresponding to such listemes and that lexical information is recognized to be just one kind of encyclopedic information (i.e. lexical knowledge is a part of the encyclopedic knowledge) (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 101).

elucidates (and is the reason for) the concept that the listeme encodes. Also in this case, most of the information encoded in the framework is of an encyclopedic nature: in particular, the interactions among concepts and the role played by one concept in relation to others are part of the encyclopedic knowledge of the language users.[126]

Against this background, the author, after having drawn some preliminary distinctions among certain terms that will be repeatedly used in the remainder of this chapter, proceeds to analyse which are the structural characteristics of concepts according to the leading linguistic theories.

3.2. Reference, denotation, intension and extension

At the outset, it is necessary to draw a basic distinction between *reference* and *denotation*. Such a distinction, although described and relied on inconsistently by scholars, may be sketched in the following terms for the purpose of the present study.[127] The *referent* of a listeme in a certain utterance is what the speaker actually wants to point at when using that listeme in that utterance (a particular entity, event, time, thing, etc.). The referent is, therefore, something intimately connected with the meaning that the speaker wants to convey.[128] *Denotation*, on the other hand, refers to the theoretical relation between listemes and concepts, to which in turn the things or events in the specific world spoken of may correspond or not.

A good example for figuring out the difference between reference and denotation is represented by the case of a speaker erroneously using a certain listeme. Consider a speaker using the listeme "dog" while pointing at a cat and assume that the meaning of the listeme "dog" agreed upon by the speaker and all the hearers of that utterance is something like "a domesticated animal of the canidae family". In such a case the referent of the listeme "dog" uttered by the speaker is a cat; the fact that it appears impossible to bring a cat within the meaning of the listeme "dog" does not change the fact that the speaker, when uttering "dog" intended to make reference to the cat. On the other hand, the denotata of the listeme "dog" are all the items that are within the scope of the concept of dog corresponding to that listeme, among which the cat actually pointed at by the speaker does not figure. Clearly, when more than one concept corresponds to a certain listeme, the related denotata may vary greatly among each other and may be theoretically grouped into clusters, each of which corresponding to a different concept.[129]

---

[126] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 252 *et seq*.

[127] A similar distinction, although by means of different terminology, is drawn by Wittgenstein in L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 18.

[128] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 46. On *reference* and its relation with linguistic expressions, see A. Sullivan, "Reference: Philosophical Theories", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 810 *et seq.*

[129] Such a subdivision of denotata into clusters, even if theoretically conceivable, presents practical difficulties due to the vagueness of concepts, their blurred borders and the consequent difficulties of fitting certain denotata within the proper clusters. In addition, since concepts may overlap, some denotata may fit in more

The above example may be also used in order to draw a second distinction: that between *intension* and *extension*.[130] In the case just described, the listeme "dog" does not have any extension in the world spoken of[131] (the world of which the speaker is uttering about at that specific time), since no denotatum of the listeme "dog" exists in the state of the affairs taken into account and described by the speaker. The listeme "dog" that has been uttered, however, does still have its own intension, i.e. the concept of dog connected thereto, which continues to exist at a metaphysical level and within whose scope are all the theoretical denotata of the listeme "dog".[132] When more than one concept corresponds to a single listeme, the intension of that listeme is made of the combination of all such concepts. In contrast, when a single concept corresponds to a specific listeme, the intension thereof results made of that concept. As far as the author could find out, Frege was the first one to clearly draw this distinction by referring to *Sinn* and *Bedeutung*,[133] which have been transposed into the listemes "intension" and "extension" by intensional logicians.[134] Frege explained the difference between *Sinn* and *Bedeutung* by means of the (now famous) example of Venus. He pointed out that the well-known "morning star" and "evening star" are, in astronomic terms, the same thing: the planet Venus that appears in the east part of the sky before sunrise and in the west part thereof after sunrise. These two expressions, although corresponding to two different concepts ("a heavenly object appearing in the east part of the sky in before sunrise" and "a heavenly object appearing in the west part of the sky after sunrise") and, therefore, having two different intensions, have the same extension represented by the planet Venus, which is also the referent thereof.

---

than one cluster independently of the vagueness of the related concepts.

[130] The terms *intension* and *extension* date back to the turning of the XX century, when a discussion arose about the meaning and nature of "reality" and two opposite schools of thought faced each other in that respect, i.e. intensionalism and extensionalism. Various philosophers took positions in the course of that debate, such as Meinong, Russell and Quine. On such a debate, see among others B. Russell, *The principles of mathematics* (Cambridge: Cambridge University Press, 1903); B. Russell, "On denoting", 14 *Mind* (1905), 479 *et seq.*; W. V. O. Quine, *From a logical point of view. Nine Logico-Philosophical Essays* (Cambridge: Harvard University Press, 1953).

[131] It is worth stressing here that the world spoken of, being the world mentioned or implied in the utterance, may be the real world where the speaker is living, as well as a pure hypothetic or metaphysical world. Therefore, the extension of a certain listeme or expression in the world spoken of may be also determined on the basis of non-physical or non-actual clues, such as, for example, the assertion or negation of a complement noun phrase or of a clause connected to the listeme or expression at stake (e.g. in the utterance "we do not have a crocodile at home", the listeme "crocodile" does not have an extension in the world spoken of, unless a different proof is given).

[132] On *extension* and *intension* (with the warnng *caveat* that the listemes "extension", "intension", "denotation" and their related expressions are sometimes used with meanings different from those adopted in the present study), N. Oldager, "Extensionality and Intensionality", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 301 *et seq.*

[133] G. Frege, "Über Sinn und Bedeutung", in 100 Zeitschrift für Philosophie und philosophische Kritik (1892), 25 *et seq.*

[134] For example, R. Carnap, *Meaning and Necessity. A Study in Semantics and Modal Logic* (Chicago: Chicago University Press, 1956).

A final distinction that may be drawn is that between *sense* and *intension*: the sense of a certain listeme is generally intended by linguists to be a description of its intension by means of language expressions. So, while intension is something outside language, sense is the linguistic correspondent thereof and is, therefore, within language. Sense is no more than a translation or paraphrase of the specific listeme, which is required by the fact that we need language in order to write about language and its meaning.[135]

3.3. Linguistic theories of concepts

That said, the problem is still to clarify what a concept is. Linguists have proposed many theories in this respect, which the author has decided to group into three main clusters: the traditional theories, the prototype semantics theory and the stereotype semantics theory.

3.3.1. Traditional theories

The traditional theories consider that a concept is nothing other that the characteristic set of necessary and sufficient properties for an item to be included within the scope of the corresponding listeme. Under this perspective, concepts appear to be some sort of checklists.[136] This explanation is quite intuitive, since in our daily experience we make often reference to certain characteristics or properties that a specific item presents or does not present, in order to argue and decide whether it may be considered to be within the scope of a certain listeme.

This approach has also been presented in terms of the *decomposition assumption*: the meaning of a listeme (or a more complex expression) can be exhaustively decomposed into a finite set of semantic or conceptual primitives that are together necessary and sufficient to determine the meaning of every instance of the listeme (or expression).[137]

However, this approach presents certain drawbacks.

A first drawback is that it clashes with the basic observation that certain items are commonly considered to be within the scope of a certain listeme even if they do not exactly fulfill all the requirements of the checklist. For instance, nobody would seriously omit from the intension of the listeme "lion" a lion cub because he was born without a leg. At the same time, however, most people would probably agree on including the

[135] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 50.
[136] Among the upholders of the theory of concepts as checklists of necessary and sufficient conditions (features that may be decomposed), see J. J. Katz, *The Philosophy of Language* (New York: Harpen and Raw, 1966) and A. Wierzbicka, "Semantic Primitives and Semantic Fields", in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 209 *et seq.*
[137] On the decomposition assumption, J. J. Katz, *The Philosophy of Language* (New York: Harpen and Raw, 1966), pp. 70 *et seq.*

property "four legs" among those that characterize the concept corresponding to the listeme "lion".

A second drawbackis that this approach does not give the appropriate relevance to the fact that certain features, recognized as pertaining to a specific concept, are nonetheless generally disregarded both when considering whether an item is within the scope of the corresponding listeme and when giving examples of that concept.

Even more interesting is the fact that certain features that do not characterize (i.e. are not necessarily included in) the concept are nonetheless generally taken into account for the purpose of determining whether an item is among the denotata of that concept.[138] Sometimes these features are taken into account for such a purpose to such a great extent that they override characteristic features of the concept in that respect.[139]

3.3.2. The prototype semantics theory

In order to remedy to these drawbacks and explain the above-mentioned human behavior when dealing with items classification and concepts exemplification, linguists have developed a different approach, the most famous example of which is represented by *prototype semantics*.[140]

In prototype semantics, prototypes are the most typical exemplars[141] among the denotata of a listeme. Since more than one concept may correspond to a single listeme, the prototypicality may be seen at two different levels: (i) there may be concepts that are more typical than others as correspondent to the listeme and (ii) there may be denotata that are more typical than others within the scope of a specific concept. These "semantic" prototypes (and their typical features) are what people generally have in mind when uttering a listeme.

The basic idea of prototype semantics has been clearly pointed out by Fillmore, according to whom it consists in the following: "Instead of the meaning of a linguistic form being represented in terms of checklist of conditions that have to be satisfied in

[138] For example, the capability of flight is not a necessary feature of the concept of bird; nonetheless, it is probably the first and most important feature to come to one's mind whenever it has to be decided whether a certain animal falls within the scope of such a concept. This is the main reason why most people are uncertain about whether penguins are denoted by listeme "bird".

[139] With reference to the instance given in the previous footnote, the relevance attributed by some people to the the capability of flight as a distinctive feature of birds frequently leads such people to bring bats within the intension of the listeme "bird", notwithstanding the fact that bats do not lay eggs, the latter being one of the essential features of the concept of bird.

[140] On prototype semantics, C. J. Fillmore, "An alternative to checklist theories of meaning", in C. Cogen et al. (eds.), *Proceeding of the First Annual Meeting of the Berkeley Linguistics Society* (1975), 123 *et seq.*; G. Lakoff, *Woman, fire and dangerous things. What categories reveal about the mind* (Chicago: University of Chicago Press, 1987); J. R. Taylor, *Linguistic categorization. Prototypes in linguistic theory* (Oxford: Oxford University Press, 1989); R. E. MacLaury, "Prototypes revisited", 20 *Annual Review of Anthropology* (1991), 55 *et seq.*

[141] "As good an example as can be found" according to the different definition provided by Allan (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 335).

order for the form to be appropriately or truthfully used, it is held that the understanding of meaning requires, at least for a great many cases, an appeal to an exemplar or prototype – this prototype being possibly something which is innately available to the human mind, possibly something which, instead of being analysed needs to be presented or demonstrated or manipulated."[142]

The interesting point of such a theory is that it does not try to modify the actual definitions provided by dictionaries or to criticize the idea that a listeme might correspond to a theoretical concept, i.e its meaning, but it turns the attention to the processes of learning the meaning of listemes and using listemes in practice. The prototype semantics theory puts under the spotlight the fact that, within the scope of a certain listeme (or one corresponding concept thereof), items that may be considered prototypical (e.g. a sparrow with reference to the listeme "bird") generally coexist with others that are peripheral (e.g. an emu with reference to the listeme "bird") and that prototypical and peripheral items are not given the same attention by people when deciding to use a certain listeme rather than another and when attributing meaning to an utterance.

A corollary of such an argument is that prototypes may vary space-wise and time-wise, depending on changes in culture and customs. Furthermore, even in an environment that is well identified from a spatial and temporal perspective, cultural differences may have an impact on the choice of prototypes, typical examples thereof being the differences in the level of education and in the profession carried on.

For the sake of fairness, on the other hand, it should also be mentioned that the idea of people reasoning in terms of prototype(s) of a certain category of items seems to lose part of its strength in relation to listemes denoting very general categories. These categories, usually named by superordinate listemes with many hyponyms (e.g. "vegetable"), do not have such clear and convincing prototypes as "basic level categories" (e.g. "carrot"). However, in these cases, a function similar to that of prototypes is played by the strong family resemblances typically existing among the category members,[143] in particularly by the limited number of features common to most of them, which therefore become essential for the purpose of identifying the intension of the listeme.[144]

3.3.2.1. **Prototype semantics and language vagueness**

[142] C. J. Fillmore, "An alternative to checklist theories of meaning", in C. Cogen et al. (eds.), *Proceeding of the First Annual Meeting of the Berkeley Linguistics Society* (Berkeley: Berkeley Linguistics Society, 1975), 123 *et seq*., at 123.
[143] L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), 66-71.
[144] Obviously family resemblances increase at lower level of categorization, where the categories are more specific.

Prototype semantics has also proved useful in analyzing *vagueness*. Vagueness may be defined as the particular kind of uncertainty about the applicability of a *predicate*[145] to a specific thing or state of affairs.[146]

The main issue raised by vagueness consists in whether a certain item falls within the scope of a certain concept, i.e. whether that item is a denoted by the listeme corresponding to that concept. Although the standard example of vague listemes and predicates is that of gradable adjectives, such as tall, fat, large, etc., members of other lexical categories may be vague as well. In general, any grammatical element whose applicability to a specific thing or state of affairs requires perception, categorization, or judgment of gradient contingent facts suffers from an incurable susceptibility to vague uncertainty.[147]

Furthermore, vagueness is often contagious, in the sense that complex language expressions built up from vague listemes are often themselves vague as result.[148]

What generally does make a certain predicate vague is that it has borderline cases and seems to lack sharp boundaries: thus, it appears not to have a well-defined extension. In this respect, vague predicates give rise to what are known as sorites[149] paradoxes, the most famous of which is that of the heap, which may be summarized as follows.[150]

Imagine you have a heap of sand before you and remove a single grain from it. You would certainly say that you still have a heap of sand before you after you removed that grain. However, if you accepted such a premise and continued to remove the grains from the heap, one by one, you would end up with a single grain, which then – absurdly – would be a heap as well.

Similar paradoxes may be constructed for any vague predicate; instead of the grains of sand, the paradoxes would be based on the more or less significant presence of one or more features that characterize the concept corresponding to the predicate at stake. Consider, for instance, the noun "man". The distinction between a boy and a man is mainly one of age. Assume we take somebody that, at a certain moment, is considered by everybody to be a boy. An hour later, he is still a boy. The same holds true if we wait for another hour and then we look at him again. Therefore, one could conclude that he will never become a man. Even less an old man. That would be pleasant, but, unfortunately, that's not (yet) the case. Consider the place of business of an entrepreneur.

---

[145] A predicate may be defined as a language expression, composed of one or more listemes, which may be true of something in the *world spoken of*.

[146] Similarly C. Barker, "Vagueness", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1037 *et seq.*, at 1037.

[147] C. Barker, "Vagueness", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1037 *et seq.*, at 1037.

[148] C. Barker, "Vagueness", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1037 *et seq.*, at 1038.

[149] The listeme "sorites" etymologically derives from the Greek word "soros", which means "heap". The original formulation of the paradox of the heap is generally attributed to the Megarian philosopher Eubulides of Miletus.

[150] R. Keefe, "Vagueness: Philosophical Aspects", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1041 *et seq.*, at 1041.

Suppose that it is theoretically movable, but as a matter of fact it has not moved for the last fifty years. One would probably say that it is fixed. Therefore, it could be a permanent establishment under Article 5 of an OECD Model-based tax treaty, provided that the other requirements thereof were satisfied. Now imagine that the entrepreneur decides to move it one centimeter every week. The author would still be inclined to say that it is fixed. Assume that, after one year, the entrepreneur decides to move it one centimeter more every week, i.e. two centimeters every week. If it was fixed before, it should be considered fixed even after such a change for the purpose of determining whether it does constitute a permanent establishment. If the entrepreneur (and his descendants) repeated such behavior endlessly, this would lead to the absurd situation in which the place of business would be considered fixed even where moving, say, a hundred kilometers every week in a straight direction.

The issue arises because there seems to be no specific borderline between cases where a certain predicate clearly applies and those where it clearly does not. Moreover, the issue cannot be solved by simply recognizing that vague predicates do have borderline cases and identifying some of them. In fact, the group of borderline cases does not have sharp borders either. One could say that the group of borderline cases almost inevitably does have its own borderline cases; the latter would be borderline-borderline cases.[151] Such analytical approach would thus prove never-ending.

Wittgenstein considered vagueness caused by the absence of a conventional regulation of listemes use: we would not know the exact boundaries of the concept corresponding to a vague listeme since none has ever been drawn.[152] He found this lack of sharp boundaries perfectly justified by the fact that, in the vast majority of cases, sharp boundaries are not necessary for the listemes to be properly and effectively used.

Moreover, the absence of clearly drawn boundaries is independent from the existence of a definition of the concept or from its detailed exemplification. Both the definition and the exemplification leave the concepts, and thus the listemes, vague: the former since generally made of listemes, some of which present the very same vagueness of the defined concept; the latter since it is generally limited to a finite number of instances, therefore leaving open the possibility that some borderline cases remain in the shadow.[153]

Even if it were possible to clearly draw the boundaries of a concept by means of a definition, the issue would remain of the existence of agreement on such a definition. According to Wittgenstein, if "someone were to draw a sharp boundary I could not acknowledge it as the one that I too always wanted to draw, or had drawn in my mind. (…) His concept may then be said to be not the same as mine, but akin to it. (…) The

[151] This phenomenon is generally known as "higher-order vagueness" (see C. Barker, "Vagueness", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1037 *et seq.*, at 1040; R. Keefe, "Vagueness: Philosophical Aspects", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1041 *et seq.*, at 1041).

[152] L. Wittgenstein (translated by G. E. M. Anscombe), Philosophical Investigations (Oxford: Blackwell, 1953), p. 28, paras. 68-69.

[153] L. Wittgenstein (translated by G. E. M. Anscombe), Philosophical Investigations (Oxford: Blackwell, 1953), p. 29, para. 71.

kinship is just as undeniable as the difference".[154] He compared such a kinship to that existing between two pictures, one of which consists of color patches with vague contours and the other with patches similarly shaped and distributed but with clear contours. For Wittgenstein no one may say that the picture with clear contours rightly corresponds to the blurred one. Many different pictures with clear contours could go along well with the blurred picture; this means that there is no right definition, but just many possible ones.[155] He based this conclusion on the perception that, although the vast majority of people forming a linguistic community generally agree upon the core, typical situations that fall within the scope of a concept, other situations are considered to be covered by that concept by certain people, but not by others.[156]

This approach to the description and actual use of concepts very closely resembles that adopted in prototype semantics. Transposing the thoughts of Wittgenstein in the field of prototype semantics, one could conclude that, whenever people have to use a concept in practice, (i) they first check whether the actual situation at stake matches the prototypical situations of that concept and, if this is not the case, (ii) they assess whether the analogies between the prototypical situations and the actual situation at stake are strong and numerous enough to justify that an exception to the prototypical situations is included within the scope of that concept. It is a matter of family resemblance, where the resemblance is discretionarily assessed by each individual and the prototypical situations are used as yardstick for the family. The family resemblance is therefore assessed on the basis of the similarities existing between the features believed to be salient in the prototypes and those perceived in the potential denotata.

This is substantially the position taken by Lakoff, according to whom the relevance of prototypical situations may be explained in large part as being due to the effects of idealized cognitive models. I.e. domains are organized with an ideal notion of the world, which may fit one's understanding of the world either perfectly, very well, pretty well, somewhat well, pretty badly, badly, or not at all. The ideal notion of the world consists of prototypes. He gives the example of the listeme "bachelor", which, although commonly defined as "unmarried adult male", has been created with a particular ideal of what a bachelor is like, i.e. the bachelor prototype: an adult, uncelibate, heterosexual, and promiscuous man. People typically agree in considering the males presenting the above prototypical qualities as denoted by the listeme bachelor. However, this is no longer the case with regard to borderline cases, such as that of sexually active seventy-year-old tycoons, who might be considered by some person as having been denoted by the listeme[157] and by some others as not denoted. Moreover, most people would tend to exclude from the concept of bachelor certain individuals that,

[154] L. Wittgenstein (translated by G. E. M. Anscombe), Philosophical Investigations (Oxford: Blackwell, 1953), p. 31, para. 76.
[155] L. Wittgenstein (translated by G. E. M. Anscombe), Philosophical Investigations (Oxford: Blackwell, 1953), p. 31, para. 77.
[156] See, by analogy, L. Wittgenstein (translated by G. E. M. Anscombe), Philosophical Investigations (Oxford: Blackwell, 1953), p. 52, para. 156 *et seq*.
[157] In this case, the sexually active seventy-year-old tycoon would be considered an exception to the prototype.

although apparently falling within the scope of the definition of "unmarried adult male", do not bear much resemblance to the prototype, such as the Pope.[158]

Setting the problem in this perspective, it clearly appears that a fundamental issue with regard to the effective use of vague listemes consists in determining which is the threshold generally accepted within a certain language community for considering a certain situation to be a prototype.

In fact, although from a dynamic perspective the sorites paradoxes would make it doubtful whether a threshold could ever been established, nonetheless from a static perspective it is the very same idea of prototypes, as well as the necessary premises of the same sorites paradoxes,[159] which lead one to conclude that a threshold usually exists. Such a threshold, which may be expressed in terms of significant presence of the characteristic features of the concepts or indirectly by means of prototypes inventory, may vary within a single language community from one subgroup to another. Moreover, it may also significantly vary within a homogeneous linguistic group in a diachronic perspective, due to changes in culture and social customs.

What is of capital relevance for the present study, however, is that the threshold is context-dependent. Even within a cultural and linguistic homogeneous group taken at a certain point in time, the threshold may vary depending on the relevant comparison class[160] and the purpose of the utterance of which the listeme is part.[161]

All in all, the actual location of the threshold, i.e. the number and nature of the prototypes, is heavily influenced by the overall context of the utterance of which the listeme is part.[162] Establishing the location of the threshold is important for determining how vague listemes are used in practice since, while the classification of a situation that is above the threshold as a situation outside the scope of the relevant concept is so infrequent that it would be commonly seen as an error of classification, the same classification of a situation that is below the threshold would be generally considered to be the result of the discretionary judgment of the person making the classification. Such a judgment could be criticized on the merit, but would not usually considered to be an error. In addition, from a mere statistical point of view, the more an actual situation is below the threshold the higher the chance is that it is classified as outside the scope of the relevant concept.

Therefore, where, *ceteris paribus*, the threshold is set at two significantly

---

[158] G. Lakoff, *Woman, fire and dangerous things: What categories reveal about the mind* (Chicago: University of Chicago Press, 1987), pp.68 *et seq.,* in particular at 70.

[159] E.g. the existence of something that is commonly considered to be a heap of sand.

[160] I.e. the class of the actual situation whose inclusion in the scope of the concept is going to be assessed.

[161] Similarly C. Barker, "Vagueness", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1037 *et seq.*, at 1038.

[162] For instance, the threshold for "ripped" is certainly different for ordinary people and for professional body-builders; the shape and dimension of the cakes actually present in a bakery is determinative in order to set the threshold for "big cake", where someone wants to order "one big chocolate cake" in that very same bakery; the way in which a certain type of business is customarily conducted (e.g. mining activity) is determinative for setting the threshold for "fixed place of business", in order to determine whether a permanent establishment exists for tax treaty purposes.

different levels in two different communities, the situations commonly denoted by the relevant listeme in these two communities differ as well. Where this is the case, one could infer that the very same listeme corresponds to two different concepts in the two different communities. Such an issue is frequent when different languages are at stake, not because of the difference between the languages used by the different communities *per se*, but for the reason that the difference of language is one of the various aspects of a more general cultural difference which may easily lead the two communities to set the thresholds of potentially similar concepts at different levels.[163]

3.3.2.2. Prototype semantics, vagueness and polysemy

The above analysis of linguistic vagueness and its connected semantic issues leads the author to consider whether the borderline between polysemy and vagueness is in fact as clear as might appear at first sight.[164]

As previously indicated, a listeme is generally regarded as polysemous where it corresponds to two or more concepts, while it is considered vague where it corresponds to a single concept whose borders are blurred. However, a vague listeme may become a polysemous one, especially where, by lowering the concept borderline threshold, new situations are perceived by the vast majority of the language community as falling within the scope of the relevant concept up to becoming prototypes thereof. As noted before, vague concepts do have prototypes around which the classes of denotata grow. Prototypes tend to attract new potential members of the class that, in turn, attract other new potential members and so on. This process may be described also in terms of the progressive lowering of the concept "borderline threshold".

Each step in the chain of attraction just described is based on similarities, common features and links that are different as compared to those relevant in previous or successive steps of the chain.

In the first phase of each step of attraction, the new potential members of the class are borderline items: they are below the threshold and, in fact, some people within the community consider them to be denoted by the relevant listeme, while others do not. However, there is a subsequent phase in which the threshold is lowered so that at least certain of these new potential members start to be considered by the vast majority of the community to be clearly denoted by the relevant listeme. The blurred border has not disappeared, it has been simply moved to a lower level.

At a certain point of this process, the differences existing among the various

[163] This determines (i) an actual difference between the two concepts and, thus, (ii) the fact that the corresponding listemes in the two languages cannot be considered to be synonyms. The translation of one listeme by means of the other listeme will determine a (partial) change in the actual denotata of the language expression.

[164] On the difficulty of clearly distinguishing between homonyms, polysemes and vague listemes, see D. Tuggy, "Ambiguity, polysemy and vagueness", 4 *Cognitive Linguistics* (1993), 273 *et seq.*

subgroups of denotata are so significant that the entire class of denotata is generally seen as composed of distinct sub-classes of denotata, sub-grouped according to their main common features and differences. These sub-classes, then, begin to be seen as corresponding to different concepts: at this point of the process, the vague listeme has become polysemous. The original vagueness of the listemes, however, has not disappeared; it has simply moved to the level of each single concept so that, in many cases, the borderline between two concepts corresponding to the same listeme appears to be blurred.

Furthermore, within such a process, the exact moment when a vague listeme becomes a polysemous cannot be determined with certainty. In general, the recognition of a former vague listeme as polysemous is conventional and established by praxis: therefore, the very same concept of polysemy is vague in nature.

Finally, also the borderlines between different concepts that are semantically related, whether or not corresponding to the very same listeme, often appear blurred in such a way that such concepts appear to merge gradually one into the other. In fact, although the prototypic denotata of each concept are clearly distinguished, borderline items may be potentially denoted by both neighboring concepts. This is the case, for instance with reference to couples of listemes such as "rug and carpet", "cup and mug", or "shrub and bush".[165]

3.3.3. The stereotype semantics theory

While, according to prototype semantics, prototypes in no way define concepts or categories but simply try to explain how such concepts are actually used, a different perspective has been taken by (the otherwise somewhat similar) *stereotype semantics*.[166]

The latter upholds the prototype semantics criticism of the traditional theories, especially with regard to the notion of concepts as being checklists of features, and its idea that within the potential scope of listemes and concepts there are a core area, where the prototypical denotata are located, and a peripheral area, where non-prototypical items are situated, some of which could be considered outside the scope of the relevant listemes (or concepts) by some members of the community.

On the other hand, stereotype semantics maintains that these observations on how people actually interact with listemes are to be taken into account in order to create a better theory of what concepts are. On this basis the idea of stereotypes, intended as mental images having the features of the typical denotata, has been developed. Stereotypes are conceived as models for attributing intension to listemes[167] and are

[165] Examples taken from K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 312.
[166] On the slightly different concept of *gestalt* see M. Wertheimer, *Productive Thinking* (New York: Harper, 1959).
[167] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 339; K. Allan, "Stereotype Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 939 *et seq.*, at 942.

presumed to include the prototypes thereof.[168]

In this perspective, each concept is generally presumed to have all the attributes common to the typical denotata of the corresponding listeme. However, this presumption is not an absolute one; it simply reflects the expectations within a community and, as such, it holds true until evidence to the contrary is given.

For instance, such evidence may result from the presence of a qualifying adjective,[169] or from elements of the context such as certain features of the potential referent which differ from those of the stereotype although reasonably within the scope of the listeme. In this perspective, the position upheld by Putnam, according to which the meaning of a language expression is a minimum set of stereotypical facts about the typical denotatum thereof,[170] seems to better match the idea that concepts have a hard core and elastic peripherals.

The issue becomes therefore to distinguish between (i) the minimum set of stereotypical facts that are necessarily to be present in order for a item to be considered within the scope of a certain concept and (ii) the other characteristics that are expected to be present in the items in order for them to be included within the scope of the concept, but which may be missing in the specific case without preventing such an inclusion (e.g. the capability to fly for a bird).[171]

Such characteristics (both compulsory or merely expected), however, correspond in turn to concepts to which the same analysis in terms of stereotypical characteristics may be applied. In addition, the above-mentioned features may be characterized by vagueness. Therefore, even with regard to the minimum set of stereotypical features of a concept, the issue may arise of whether they are in fact present in the specific item under analysis. This is typically the case with reference to the features that identify a certain range of values within a larger graduate scale (e.g. "red" within the graduate scale of color, or "big" within the graduate scale of dimensions), since the edges of the range are generally blurred and vanish into the edges of neighboring ranges (e.g. the borderline between red and orange, if it exists at all, is blurred for human perception).

Finally, it cannot be forgotten that the intension of a listeme is an abstract and theoretical

[168] Allan gives the example of the listeme "vehicle", whose stereotype includes the prototypical car, as well as the peripheral horse-drawn wagon (see K. Allan, "Stereotype Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 939 *et seq.*, at 942).

[169] Allan gives the example of the expression "blue tomato", where the stereotype of the listeme tomato is probably "red", but the specification introduced by the adjective "blue" makes clear that the concept corresponding to the expression "blue tomato" is characterized by the color blue matched with the other attributes of the items typically denoted by the listeme "tomato" (excluding the color) (see K. Allan, "Stereotype Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 939 *et seq.*, at 942).

[170] H. Putnam, "The meaning of "meaning", in K. Gunderson (ed.), *Language, mind, and knowledge* (Minneapolis: University on Minnesota Press, 1975), 131 *et seq.* A comment of Putnam's view is found in K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 333 *et seq*.

[171] These characteristics have also been called "quantity implicatures" by those linguists that rethought the traditional theories on concepts in light of the criticism made by prototype and stereotype semantics (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 321).

construction and that, in reality, the meaning attributed to a specific listeme may be different for different people: as previously mentioned, the correspondence between the theoretical intension of a listeme and the intended referent may be perfect, very good, good, pretty good, somewhat good, pretty bad, bad, non-existing and may depend upon what one knows about the referent.[172]

3.3.4. Final remarks

In light of the above analysis, one may conclude that the correspondence between referents and listemes (via concepts) is not an exact one but is generally based on approximation, in the sense that the referents should generally present features that approximate those of the concepts corresponding to the listemes (i.e. the features of the typical denotata of those listemes), in order to be included within the scope of the latter.[173]

If recognizing such an approximate correspondence is generally easy where the speaker refers to a physical item before both the speaker and the hearers,[174] the same does not hold true with regard to metaphysical or hypothetic items. The approximation may be even looser where the utterance refers to hypothetic future events, which may be anticipated only in their most common and general terms by the speaker,[175] in the sense that the person assessing whether a specific item falls within the scope of the listeme used by the speaker in his utterance should use an even looser concept of approximation in order to evaluate the correspondence between the features of the underlying concept and those of the items actually at stake.

Another interesting observation derived from the foregoing analysis is that there is sometimes a discrepancy between the intension of a listeme and its prototypes, in the sense that the latter may be characterized by features that are neither necessary nor sufficient to the former, bur just ordinarily expected. This discrepancy leads to the possibility that:

> (i) when the speaker refers to a specific item existing in the world spoken of by means of an utterance, he uses a listeme whose prototype shares its most relevant characteristics (from the speaker's perspective) with the item referred, although the item referred is outside the scope of that listeme intension (e.g. the listeme "bird" is used to refer to a bat since the bird prototypes and the bat share the most relevant feature – from the speaker's perspective – of being animals capable to fly) or that, more commonly,

[172] Paraphrasing G. Lakoff, *Woman, fire and dangerous things: What categories reveal about the mind* (Chicago: University of Chicago Press, 1987), p. 69; see also K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 336.
[173] Similarly K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 337-338.
[174] For instance, where the listeme "sofa" is used in order to refer to the specific couch before the speaker and the hearers.
[175] This is typically the case of provisions of a law. Such a case will be analysed in more detail in section 4.4 of this chapter.

(ii) when a speaker wants to refer to a hypothetical item, he uses a listeme whose prototypes present, as their most relevant characteristics (from the speaker's perspective), the same characteristics the speaker was thinking of as the most relevant in the hypothetical item he has in mind, although the intension of such a listeme is such as to potentially exclude some of the items that the speaker could have been willing to include in the abstract item he had in mind.

For instance, if the speaker wanted to refer to flying animals, he would probably use the listeme "bird" in his utterance, since flying birds are the most common flying animals – in the speaker's experience – and they are also the prototypes of the listeme "bird"; however, a bat, which is a flying animal and which the speaker may have been willing to include within the scope of the hypothetical item he thought of, is outside the intension of the listeme "bird". On the other hand, it is possible that the intension of the listeme used is such as to include items that the speaker was not thinking of and was not willing to include within the scope of the hypothetical item he had in mind. For example, the speaker, when uttering the listeme "bird", did not think of non-flying birds and had no intention of referring to such kind of birds by means of the listeme uttered.

Finally, prototype and stereotype semantics are useful in order to better define when two concepts, corresponding to two different listemes, may be considered similar. This is an issue of capital importance where multilingual texts have to be critically analysed. On the basis of the above investigation, the author maintains that two concepts may be considered similar:

(i) when they share most of their prototypes, or

(ii) in the case their prototypes are limited to a few or do not coincide, when most of the features[176] that characterize such prototypes do coincide or, at least, present strong similarities.

What does constitute the majority of the respective prototypes and their distinctive features which have to be taken into account for the purpose of assessing the similarity cannot be said *in vacuo*. The answer to that question depends upon:

(a) the nature of the concepts concerned,

(b) the context in which the listemes corresponding to such concepts are used and, in particular, the object and purpose of the utterance containing those listemes, and

(c) the reason why those listemes and not others have been used in that context.

Similarity is, in fact, a vague concept and, as such, it is also context-dependent.

3.4. The relations among listemes (as well as among their corresponding concepts)

As noted in the previous section, the position taken in this study is that the meaning of a listeme may be properly grasped only with reference to a structured background of experience, knowledge and practices, which constitute a kind of conceptual prerequisite

[176] Including the functions typically performed by the prototypes within the relevant context.

for its understanding (i.e. the relevant encyclopedic knowledge). Speakers and hearers may be said to properly understand the meaning of the listemes used only by first understanding such *background frames* that motivate the concepts that the listemes encode. These background frames may be thus defined as those parts of the encyclopedic knowledge:

> (i) in which the specific concepts corresponding to the listemes used are relevant and
> (ii) that identify the structural relations among the various concepts encompassed therein.[177]

Under this approach, listemes are not related to each other directly, but only by way of their link to common background frames: in this respect, the semantic relation between two listemes mirrors the underlying structural relation between the two areas of the common background frames identified by their corresponding concepts.[178] Since, as previously recognized, human categorization and concepts are constrained and informed by the relations that human beings perceive in nature, have experienced in the world around them, or conceive of in abstract fields (conceptual constraint), one may infer that semantic relations among listemes are also constrained and informed by the human processes of perception and conception and, therefore, by the dominant cultural and social environment. This appears in line with the conclusions reached in the previous sections on the cognitive motivation of the language structure.

From the above premises it derives that, as each concept has its own background frame that identifies the structural connections among that concept and other related concepts, so each corresponding listeme has its own *semantic field*[179] that identifies the semantic relations between that listeme and the listemes corresponding to the related concepts in the background frame (*semantic network*). As Allan puts it, a semantic field is structured in such a way as to mirror the structure of the *conceptual field*.[180]

Each listeme therefore denotes, through its corresponding concept(s), a specific part of the conceptual field encompassed in the background frames. In this perspective, the differential value of each listeme, in comparison with another listeme, is given by the

[177] For instance, with reference to the concept of passing the ball in the soccer game, one relevant frame would be the field of encyclopedic knowledge pertaining to such a game, which also identifies the structural relations among the various concepts relevant for playing soccer (e.g. the concepts of ball, passing, goal, corner, yellow card, etc.).

[178] C. J. Fillmore and B. T. Atkins, "Toward a frame-based lexicon: the semantic of RISK and its neighbors", in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 75 *et seq.*, at 76-77.

[179] On semantic fields, among many, J. Lyons, *Semantics* (Cambridge: Cambridge University Press, 1977) – Vol. 1, Chapter 8; R.E. Grandy, "Semantic fields, Prototypes, and the Lexicon" in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 103 *et seq.*; A. Wierzbicka, "Semantic Primitives and Semantic Fields", in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 209 *et seq.* On the relation between semantics and background frames, C. J. Fillmore, "Frame Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 330 *et seq.*

[180] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 258.

part of the conceptual field encompassed in the background frames that it denotes in contrast to the part thereof denoted by the other listeme.[181] In this way, cultural and social differences among communities may lead to different partitions of the conceptual field by different communities through their respective relevant concepts, the result being that certain concepts (and categorizations) used within one community do not exactly correspond to any concept (and categorizations) used within other communities. Such a lack of equivalence between concepts is mirrored, at the language level, by the absence of true synonyms between the listemes used by the various communities, due to the correspondence existing between concepts and listemes.

A famous example of this issue was given by Rosch with regard to colors naming.[182] Rosch showed that the Dani,[183] who have two basic color terms (one for cool-dark and another for warm-light) can readily distinguish and refer to the colors that have distinct names in English, but their language does not make it as easy for them as it is for English speakers. The way they do it is to compare a specific color to something in the environment (e.g. the color of a tree leaves). The presumption is that the Dani speech community, until recently, has not had any great need to make frequent reference to the same number of colors as English speech communities. This example shows that, although the sensory data in the color spectrum are the same for all human beings, the various language communities may conceptually divide the color spectrum differently from one another and, as a consequence, their respective languages may have listemes corresponding to such conceptual partitions that do not have proper synonyms in the languages of other communities. The same holds true in any field of knowledge, including tax law: for instance, different tax jurisdictions may group differently the same[184] types of income.

Based on this general setting, the author analyses below some of the most common types of relation existing between listemes.

Hyponymy relations[185] play a major role among the various kinds of listemes relations due to their widespread use in many branches of human knowledge. For the purpose of the present study, hyponymy relations may be considered to be those relations that connect a specific listeme with other listemes that denote a subcategory or a supra-category of the class denoted by the former listeme (e.g. blue is hyponym of color and azure is hyponym of blue).

---

[181] Similarly, K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 258.
[182] See E. Rosch, "On the internal structure of perceptual and semantic categories", in T. E. Moore (ed.), *Cognitive Development and the Acquisition of Language* (New York: Academic Press, 1973), 111 *et seq.* An analysis of Rosch's experiment is given by K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 259.
[183] People divided in tribes originally leaving in the Irian Jaya area, West Papua.
[184] For the purpose of the present example, two items of income may be considered to be of the same type where generated from the same source (e.g. income from playing football in a professional team, income from the sale of properties, income from teaching activity, etc.).
[185] On hyponymy relations, see M. L. Murphy, "Hyponymy and Hyperonymy", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 393 *et seq.*

Hyponymy relations may develop along different lines, according to the elements and features taken into account in order to assess differences and similarities among the underlying concepts and denotata. Chaffin,[186] for example, identifies four elements of hyponymy: (i) physical similarity, (ii) functional similarity, (iii) same location, (iv) countability, but the list is not at all exhaustive.

A relevant characteristic of hyponymy relations is that they are generally transitive, but only where they are established by taking into account the very same element or feature.

Another relevant characteristic is that co-hyponyms[187] are contraries,[188] but not always contradictories, since the negation of one does not entail the other; for instance, the fact that something is not vermillion does not entail that it is scarlet, since it could be magenta.[189] In addition, a hyponym is contrary to the co-hyponyms of its own superordinate and with their hyponyms; for example, pigment blue, which is a hyponym of blue, is incompatible with red, as well as with magenta, vermillion, and scarlet.

The study of the hyponymy relations within a semantic field is particularly relevant where a compositional (or componential) analysis[190] is performed, i.e. where the sense of a specific listeme is decomposed and expressed in terms of its *semantic components*.[191] In fact, the relations between a listeme and many of its semantic components are in the nature of hyponymy relations. For example, the "Valencia" (a type of orange fruit) does have "orange" as one of its semantic components, the latter entailing the semantic component "citrus", which in turn entails the semantic component "fruit". Thus, for the transitive property of hyponymy relations mentioned above, "fruit" is also a semantic component of "Valencia". According to componential analysts, most of the listemes are analyzable in terms of semantic components and those that share one or more semantic components are semantically related, i.e. they are part of the same semantic field. Hyponymy and semantic components are the basis of the probably most common type of

[186] R. Chaffin, "The concept of a semantic relation", in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 253 *et seq.*

[187] E.g. vermillion and scarlet are co-hyponyms of red.

[188] Two items are contraries when they cannot co-occur at the same time in respect of the same thing (contraries are therefore incompatible).

[189] On the relations contrary-contradictory and incompatible-antonym, M. L. Murphy, "Antonymy and Incompatibility", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 25 *et seq.*

[190] The first broad study on compositional analysis was carried out by Bishop John Wilkins in his An Essay Towards a Real Character and a Philosophical Language; his purpose was to construct a universal or "philosophical" language by categorizing all of human experience and labeling each category by a symbol (corresponding to a listeme) in his philosophical language; each of such categories is comparable to a semantic component (see J. Wilkins, *An Essay toward a Real Character and a Philosophical Language* (London: Thoemmes Continuum, 2002), quoted in K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 269-270).

[191] In semantics, most authors distinguish semantic components from semantic primitives, the latter being those semantic components definable only circularly and by ostensive definition such as "color of the sky" in the entry for blue. The author believes that such a distinction is not relevant for the purpose of the present study and thus it is not described and analysed here. With reference to semantic primitives, see U. Weinreich, *On Semantics* (Philadelphia: University of Pennsylvania Press, 1980), pp. 50 and 300 *et seq*.

definition in jurisprudence, i.e. the definition *per genus et differentiam*.[192]

The theory of compositional analysis, which determines the compositional (and hyponymy) relations among listemes that determine the sense of some of them, presents the same drawbacks in particular with reference to those approaches that present and explain the meaning of listemes as checklists of features.[193] The semantic components of a listeme are indeed nothing more than other listemes, which in turn have to be decomposed in their own semantic components. Apart from the risk, implied by such chain of semantic decompositions, that the process may end up as circular or never-ending,[194] the theory of compositional analysis must face the critical remarks emphasized by the prototype and stereotype semantics. In particular, the decomposition of listemes in terms of their semantic components appears over-rigid when compared with the way in which the listemes are actually used by the language community members.

The example below is enlightening in this respect.[195]

"Bull" is the result of the semantic components "bovine" AND "adult" AND "male"; "cow" is the result of the semantic components "bovine" AND "adult" AND "female"; "calf" is the result of the semantic components "bovine" AND "young". The three listemes analysed are within the same semantic field, are connected by hyponymy relations and present the common semantic component "bovine". However, in dictionaries the listeme "bull" is generally given certain definitions that appear to be non-compatible with the above semantic decomposition. For example, Dictionary.com Unabridged gives, among other ones, the following definition: "the male of certain other animals, as the elephant and moose".[196] This example shows that:

(i) the idea of a semantic decomposition of listemes as such is unsatisfactory since, as the author has already pointed out more than once, each single listeme generally corresponds to more than one concept and, therefore, the (de)compositional analysis should be carried out at the level of each single concept and not at the level of the listeme;

(ii) the compositional analysis theory cannot give account of the fact that people, when using a certain listeme, have in mind either a prototype thereof or a stereotypical image of the corresponding concept and that this fact plays a major role on how listemes are actually used and which meaning is actually attributed

[192] Examples of definitions *per genus et differentiam* are that of income tax, as a tax (genus) that is applied on the income produced in the certain period of time (differentiam); or that of permanent establishment, as place of business (genus) that is fixed for a certain period of time in a certain place (differentiam). On the definition *per genus et differentiam*, see H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961), Chapters I, section 3; G. Tarello, *L'interpretazione della legge* (Milano: Giuffrè, 1980), pp. 194-202.

[193] In fact, upon a closer look, the compositional analysis presents the same "checklist" approach under a slightly different perspective.

[194] See the conclusions reached on the similar issue with regard to definitions in previous section 2.3.

[195] Example taken from K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 271-273.

[196] This is the second entry for "bull" at the Dictionary.com Unabridged. Random House, Inc. (accessed 25 Nov. 2009).

thereto in any specific utterance.
At the same time, the example is interesting since, provided that the concept corresponding to the result of the semantic components "bovine" AND "adult" AND "male" represents the prototype of the listeme "bull", our discontent with the definition of bull as "the male of certain other animals, as the elephant and moose" clearly shows that the actual use of such meaning in an utterance would be acceptable only where the context made it crystal clear that a bovine was not being referred to.[197]

Another interesting type of semantic relation is that existing among the listemes that name the different levels of a certain feature on a *category scale*. Category scales, with respect to which actual features may be measured, have their upper and lower ends bounded by pairs of *gradable antonyms*, which are contraries, but not contradictories, since the negation of one does not entail the other, an intermediate value of the specific feature being an acceptable alternative as well.[198]

Many such scales are characterized by the presence in their semantic fields of more than two listemes that denote different values on the scale itself. Such listemes have a relative order in the comparative scale and their meaning may be expressed in terms of their relative position in respect of the other listemes of the scale, i.e. in terms of their reciprocal semantic relations. For example, on the category scale of temperature, which may be conceived of as being characterized by the ordinate listemes "cold", "cool", "temperate",[199] "warm" and "hot": "hot" means upscale of "warm"; "temperate" means non-("hot", "cold", "warm", etc.); "warm" means upscale of "temperate"; "cool" means the downscale of "temperate", "cold" means the downscale of "cool". However, and here is the interesting point, "warm" is generally intended neither as downscale of "hot", nor as non-"hot".[200] This is because the listeme "warm" and the listeme "hot" both contain the semantic component "warm" and, more specifically, the intension of the listeme "warm" encompasses the intension of the listeme "hot", i.e. what is hot is always warm as well, but not vice-versa. However, the *cooperative principle* requires that the use of the listeme "warm" implicates that the referent is not hot, unless the context makes crystal clear that a hot thing is referred to.

The above analysis of the relations existing among listemes, as well as among their concepts,[201] brings to the surface the fundamental reasons for the difficulties faced when translating from one language to another and when attributing a meaning to a multilingual text.

The author previously mentioned that the meaning of listemes and more complex

[197] For instance, this might be the case where (i) in the world spoken of there was an adult male elephant, or (ii) the speaker used the expression "bull elephant".
[198] Therefore, gradable antonyms are not true antonyms (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 262 *et seq*.).
[199] In this example, temperate is considered the mid-point in the relational scale and is therefore not gradable.
[200] The same holds true, *mutatis mutandis*, with reference to "cool".
[201] This analysis has shown that we cannot deal with semantic relations without recourse to intensions and encyclopedia knowledge, i.e. without taking into account the perception and conception processes that language users go through.

language expressions are related to one another in a way that reflects the community's perception of relations among their denotata, i.e. the categorizations and the relations among concepts generally adopted within such a community. Different language communities and subgroups within a community may divide up "the same" sensory and purely conceptual data differently, i.e. may use different concepts and achieve different categorizations. As a result, the meanings of linguistic labels given by different communities to the same specific referents and denotata often overlap without being fully identical.[202] Therefore, it is very possible that in a certain language items A and B are denoted by the listeme "X" and item C is denoted by the listeme "Y", while in a different language item A is denoted by the listeme "Z" and items B and C are denoted by the listeme "W".[203]

4. The meaning of sentences

In the previous sections the author has analysed the relations between single listemes and their corresponding concepts, as well as those existing among listemes in their semantic fields and those among concepts in their background frames. He has also (i) investigated in detail the nature of concepts, (ii) drawn the connected distinctions between reference and denotation, on the one hand, and intension and extension, on the other hand and (iii) introduced the notions of prototype and stereotype semantics in that context. The entire analysis has developed around the agreed correspondence between single listemes and concepts, i.e. the attribution of meanings to single listemes.

However, human beings generally communicate their thoughts by means of complex utterances, which take the form of coordinated systems of sentences, through which they combine the meaning encapsulated in single listemes into complex meanings. Therefore, a primary purpose of this study should also be to investigate how meaning is conveyed by means of coordinated systems of sentences. That is the aim of the present section.

4.1. The role of grammar

The combination of the meanings encapsulated in listemes into more complex meanings is made possible by grammar, i.e. the system of rules, agreed within a specific language community, regulating how and under which conditions listemes may be combined, as well as the semantic effects of such combinations. Grammar is therefore a fundamental requisite of any language, which restricts the actual freedom of the language users to

[202] Similarly K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 267.

[203] Moreover, the difficulties are not only generated by the different division of "the same" data, but also by the fact that the data may be different, since, starting from the same basic data, certain communities build up synthetically-derived additional data while others do not (or do it differently); this phenomenon is generally due to the effect on the cognitive process of social and cultural differences (including differences in the encyclopedic knowledge).

combine listemes in the way they prefer for the purpose of conveying a meaning. Linguists have in fact emphasized that, in any specific community language, the combination of listemes in complex language expressions is significantly conditioned by the rules of grammar.[204]

The speaker's actual respect of such rules is imposed by his will to convey a message that is to be understood by the hearers. If the speaker did not conform his utterance to the rules of grammar, the risk would arise that the hearers do not understand the message and, therefore, that the purpose of the utterance is not achieved. The actual respect of such rules is thus based on mutual convenience and agreement. The content of the rules, on the other hand, is conventional in nature and generally established by praxis. This makes it difficult to identify *a priori* and to categorize the existing restrictions imposed by grammar to the process of listemes combination in any specific language community.[205] Some of the basic rules of grammar associated with listemes, however, are seen in the morphosyntactic specifications of most dictionaries' lexicon entries.[206]

From what was just stated it follows that each language has its own conventional grammar,[207] with its distinguishing features and patterns, such as the rules governing the use of anaphoras, subjunctives and negations, the need to express the copula, the types, purpose and functioning of quantifiers (such as the English most, each, every, none, etc.),[208] the distinction between countable and uncountable,[209] or definite and indefinite, the existence of phrasal verbs and idioms.[210]

The central role of such specific sets of grammar rules for the purpose of

[204] E.g. K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 254.
[205] E.g. K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 257.
[206] This is the case, in particular, with regard to the category features (e.g. the categorization of the listeme as noun, verb, article, etc.) and other morphosyntactic categories strictly connected to the listeme (e.g. the presence of a noun-phrase object with reference to syntactically transitive verbs; the paradigm of a certain lexeme).
[207] This conclusion is also upheld by those linguists that, following the Chomsky's approach, maintain that, in addition to specific languages grammars, a universal grammar exists, which is common to all languages since it is innate in the human mind in the form of a mental structure. See, for instance, the discussion on the relation between universal grammar and specific languages' grammars (and the related distinction between *deep structure* and *surface structure* of linguistic expressions) in N. Chomsky, *Aspects of the Theory of Syntax* (Cambridge: MIT Press, 1965).
[208] It should be emphasized that quantifiers are often a source of ambiguity, due to the syntactic rules governing their use. Consider, with regard to English quantifiers, the paradigmatic case illustrated by Allan with the clause "everyone loves someone", which could be interpreted either as "each person loves at least some other person" or as "some people are loved by everybody" (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 461).
[209] An interesting example of the different rules concerning the use of countable nouns in the grammars of different languages is the following. In English it is possible, and not infrequent, that a verb in the plural governs a subject noun in the singular (so-called "number discord"), for example when there is a collectivizing phenomenon in which the absence of the plural inflexion in the subject is due to the fact that the referents are not perceived to be significant as individuals by the speaker. This is often the case where large groups of animals are at stake. In Italian, on the other hand, such number discord is generally not allowed.
[210] Idioms may be defined as multi-word listemes (i) that look like phrases or clauses and (ii) the meaning of which is figurative and not predictable from the literal meaning of the their constituents.

attributing meanings to utterances may be illustrated by the following example.[211] Consider the English utterance "The toves gimbled in the wabe". The words used therein are *per se* nonsense and, as a consequence, one would expect the utterance to be completely lacking of any communicative power. However, "toves" is clearly a plural noun and therefore denotes more than one entity; "gimbled" is the past tense of a verb and so denotes an act or state in the past of the toves, which are the subjects of the verb; "wabe" is a noun, given that it follows the article "the"; in addition, since it falls within the scope of the preposition "in", "wabe" identifies a place or time. If the clause were uttered in a well-defined context, such (grammatical) information could perhaps allow the hearer to guess its meaning.[212]

Interestingly, it may be noted that, while speakers start their communicative process from specific semantic specifications (meanings) and try to express them by means of combining listemes according to rules of grammar, hearers on the contrary start their understanding process from specific formal (listemes) and morphosyntactic (grammatical clues, such as those discussed in the above example) specifications and try to grasp the message that the hearer intended to convey. For the purpose of understanding the meaning of an utterance, as well as of interpreting a legal text, therefore, grammatical aspects represent a crucial starting point of the analysis.

4.1.1. The combination of listemes: morphology and syntax

In general terms, the listemes combination may assume two basic forms:

(i) the combination of two or more listemes in a single *lexeme* (e.g. the word "dogs" is obtained by combining the listemes "dog" and "-s" and both "dog" and "dogs" are two forms of the same lexeme), which is regulated by morphology;
(ii) the combination of different *lexemes* into phrases, clauses and sentences, which is regulated by syntax.[213]

In light of this, it is thus necessary to introduce the concept of *lexeme*.

Lexemes[214] are members of particular lexical classes (such as nouns, verbs, adverbs, adjectives, etc.), which derive their morphosyntactic specifications and their functions from their very same inclusion in such classes. They are independent linguistic items from both a semantic and syntactic standpoint, in the sense that their meaning unitarily derives from their whole form and that they generally prohibit the insertion

[211] The example is taken from K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 81. Scientifics writings on the relation between grammar and meaning are full of similar examples, the most famous of which is probably "colorless green ideas sleep furiously", used by Chomsky as an instance of a grammatically correct but senseless sentence (see N. Chomsky, *Syntactic Structures* (The Hague: Mouton, 1957), pp. 15 *et seq*.).
[212] On the relevance of grammar in the process of meaning attribution, R. Jackendoff, *Architecture of the Language Faculty* (Cambridge: MIT Press, 1997), in particular Chapter 4.
[213] Interestingly, the listeme *syntax* derives etymologically from the combination of the ancient Greek listemes "syn" and "taxis", which may be translated as "ordering together".
[214] On lexemes, K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 119 *et seq*.

(and extraction) of linguistic elements in (and from) their boundaries by means of syntactic processes. A lexeme may take different forms (e.g. the singular and plural forms) while still remaining the very same lexeme.[215]

Sometimes lexemes may have the appearance of phrases, from which, however, they must be distinguished since the latter are not part of any lexical class and are not semantically and syntactically independent items. For example, the expression "man in the street" may refer to both (i) the lexeme *man in the street* (occasionally written as "man-in-the-street"), which is a noun bearing the meaning of "the ordinary person" and (ii) the phrase *man in the street*, composed of the distinct lexemes "man", "in", "the" and "street" and meaning "the man who is in the street". This phenomenon contributes to increasing the ambiguity of the utterances where such expressions are used.

4.1.2. Morphology

Turning to morphology,[216] it must be initially pointed out that its basic tools are *morphs* and *morphemes*. The latter term refers to the abstract theoretical concepts representing the smallest units of morphological analysis bearing an autonomous meaning. The former term, on the contrary, indicates the forms that morphemes assume. For example, in the word cats, "-s" is the morph of the *plural morpheme*, i.e. of that morpheme that allows the switch from the singular to the plural of a word.

Morphemes may be distinguished as *free form* and *bound form* morphemes.

The former are those that can stand alone within a sentence according to the current grammatical rules, while the latter are those that cannot. An example of free form morphemes is that corresponding to the morph "cat", whereas an instance of bound form morphemes is that corresponding to the morph "-s".

Bound form morphemes,[217] which are always combined to other morphemes, may be divided into *inflexional* and *derivational* morphemes.

Inflexional morphemes generally add, to the meaning of the listeme (basic lexeme) to which their morphs are attached, the meaning of a secondary grammatical category (e.g. aspect, tense, mood, person, with regard to verb lexemes; number, gender, case, with regard to noun lexemes), so producing related forms of the same lexeme.[218] A typical case is represented by the above example of "cat" and "cats": the meaning of the

[215] See the previous example relating to the words "dog" and "dogs", which are two forms of the same lexeme.
[216] On morphology and morphosyntactic, K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 109 *et seq*.
[217] Bound form morphemes may be classified in *prefixes*, *suffixes* and *infixes*, according to the part of the basic lexeme in which their morphs are inserted (at the beginning of, at the end of and within the basic lexeme, respectively). The part of the basic lexeme that does not change when an affix (i.e. a prefix, suffix or infix) is attached thereto is generally named *stem*. For example, the stem of the listeme "make" is "mak" (which together with the suffix "-ing" creates the present participle "making" and the derived noun "making").
[218] The lexeme remains the same even though both its meaning and its form change. See K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 110.

inflected word "cats" is given by the combination of the meaning of the basic lexeme "cat" and the meaning of the bound inflexional morph "-s". The complete set of forms that a single lexeme may assume by means of inflection constitutes the linguistic paradigm of that lexeme, whose typical examples are declension for nouns and conjugation for verbs.

Derivational morphemes, on the contrary, produce new lexemes either by changing the morphosyntactic specification of the basic lexeme,[219] or by modifying the semantic and form specifications thereof (or both). An example is given by the derivation of the lexeme "happiness" (a noun) from the combination of the basic lexeme "happy" (an adjective) and the morph "-ness", corresponding to a derivational morpheme that allows the transformation of an adjective into a noun. It is interesting to note that the meaning of derived lexemes is sometimes partially independent from the meaning of their combined components, especially with regard to those derived lexemes that have been in common use for a long period of time.[220] This may also be a source of ambiguity, where the independent meaning of a derived lexeme co-exists with the meaning thereof determined by mingling the meanings of the combined listemes.

A particular type of derivational morpheme is the *zero-derivation* (*conversion*) morpheme, so called since it is not associated with any morph and, therefore, has no form.[221] When attached to an existing lexeme, the zero-derivation morpheme causes it to shift its lexical class and, therefore, to change its meaning and become a different lexeme. Consider the instance of the noun "metal", which is transformed into the verb "metal" by a zero-derivation morpheme. As a result of such a transformation, the derived lexeme adopts the syntactic function and the regular inflexional morphology of the new lexical class. The existence in a grammar of zero-derivation morphemes is an additional source of ambiguity, due to homonymy of the derived and original lexemes. It is true that, in most cases, the different syntactic functions thereof, together with the actual structure of the utterance where the lexeme appears, makes it clear which is the meaning to be attributed to the lexeme. However, there are cases where the ambiguity deriving from the correspondence of forms between two lexemes cannot be cleared by means of a mere grammatical analysis. This may be the case, for instance, with regard to the use of adjectives and verbs having the same form. Consider the following example: the word "broken" may represent the adjective "broken", as well as the past participle of the verb "to break". However, no equality of meaning corresponds to the equality of form, since the adjective "broken" does have a stative denotation (it refers to something that is and was already broken before), while the past participle "broken" does have a non-stative denotation (it refers to something that is getting broken at the time spoken of by the utterance). In order to untie the semantic knot in this case, it is necessary to rely on all

[219] See the example of zero-derivation morphemes discussed below.
[220] See the examples concerning the derived lexemes "womanize" ("woman" and "-ize") and "computerize" ("computer" and "-ize") given in K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 112.
[221] On zero-derivation morphemes, K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 113 *et seq*.

the available information, mainly of a pragmatical nature.[222]

Finally, the formation of new lexemes by means of combination may also be achieved through the different process of compounding, which consists in creating compound polyword expressions that are regarded as lexemes. An example of compounded lexeme is the above-mentioned "man in the street"; another could be "beneficial owner", as used in tax treaties.

4.1.3. Syntax

When the focus of the analysis is shifted from the creation of lexemes to the creation of phrases, clauses and sentences, the object of the study becomes syntax, i.e the agreed set of rules regulating the aggregation of lexemes into semantically sensible groups.

The basic form of semantically sensible groups of lexemes is the *phrase*, which consists in a polyword expression that is not member of any lexical class and whose meaning may be consistently determined on the basis of the meanings of its formal components.[223] An example of a phrase is the following: a black crow (noun phrase).

Phrases (or single lexemes) are combined to form *clauses*, which consist in semantically coordinated groups of words built around a predicate (mostly explicit) and its (explicit or implicit) subject. Clauses may be distinguished in *independent* and *subordinate* clauses. The former are syntactically and semantically autonomous, while the latter have to be attached to another clause in order to be syntactically and semantically acceptable.

Lastly, *sentences* are also meaningful combinations of lexemes, which may be constituted by a single independent clause, or by a coordinated group of independent and subordinate clauses. In the English language, sentences are traditionally classified on the basis on the number and type of clauses they are composed of: hence, a simple sentence consists of a single independent clause with no dependent clauses; a compound sentence consists of multiple independent clauses, joined together by conjunctions and/or punctuation, with no dependent clauses; a complex sentence consists of at least one independent clause and one dependent clause; a complex-compound sentence consists of multiple independent clauses, at least one of which has at least one dependent clause.

As for morphology, the above description of the basic components of syntax is merely indicative, since each language does have its own morphological and syntactical rules and peculiarities that are not worthanalyzing in the course of this study.[224] Even the relative weights that morphology and syntax bear on the process of meaning expression

[222] On what kind of information is needed to untie the knot and on how such information is actually used in the course of a pragmatic analysis, see the remainder of this section.
[223] These two characteristics make phrases clearly distinct from compound lexemes.
[224] The same holds true with reference to paragraph structure and punctuation, which bear semantic content in written language.

by means of utterance vary greatly from one language to another, certain languages[225] tending to convey complex meanings mainly through syntactical combinations, while others[226] do so through morphological alteration of lexemes, especially by means of inflection and derivation.

4.2. The semantic analysis of clauses and sentences (utterances)

Given the purpose of the present study, it does however appear more interesting to analyse more closely clauses and sentences from a semantic and pragmatic perspective, rather than from a grammatical one.

Sentences represent the most typical formal components of *utterances*, the latter being the language expressions used by speakers to communicate a certain message to one or more hearers at a certain time and in a certain place.[227]

Each utterance may theoretically perform various possible functions, such as stating an opinion, ordering a behavior, making a promise, etc. In most cases, however, the speaker generally wants to convey one single message to the hearers by means of it. More precisely, the speaker does not simply want to convey a message by means of the utterance; he intends to cause a specific reaction to the utterance in the hearers. In order to achieve such a result, the speaker needs the hearers to recognize the meaning of the message and, as a consequence, identify which reaction to the utterance the speaker would like the hearers to have.

To put it differently, the speaker wants to deliver a specific message to the hearers in order to stimulate a specific reaction from them and, thus, he needs to put the hearers in the best situation possible to do so. Therefore, the speaker tailors the utterance to suit the hearers, taking into account the presumed common ground, the context of the utterance and what the speaker guesses about the hearers' ability to understand the message conveyed by the utterance.[228]

4.2.1. The underspecification of utterances and the role played by the overall context

In the course of this process of utterance formation, the speaker economically underspecifies the meaning of the message he wants to convey, more or less consciously relying on the hearers' ability to correctly infer such a meaning without the need for everything to be made explicit.

In this perspective, the use of language may be certainly considered a constructive

[225] These are typically labeled "isolating" or "analytical" languages (e.g. Vietnamese) (Encyclopædia Britannica. Retrieved January 29, 2010, from Encyclopædia Britannica Online).
[226] These are typically labeled "synthetic" languages (e.g. Latin) (Encyclopædia Britannica. Retrieved 29 January 2010, from Encyclopædia Britannica Online).
[227] Similarly K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 15.
[228] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 18.

and cognitive process, both from the point of view of the speaker and from that of the hearers.[229] The effectiveness of the utterance, consisting in the fact that the hearers understand the meaning of the message conveyed and recognize the reaction expected by the speaker, very much depends on the speaker's ability:

(i) to make the most accurate assumptions about the hearers (their knowledge, background experiences, etc.) and the situation existing at the moment of the interpretation and
(ii) to properly take into account the situation of the utterance.

All in all, the effectiveness of the utterance heavily depends on how the speaker does take into account the *overall context* when constructing the utterance.

But what is exactly is such *overall context* that the speaker has to take into account and assess when formulating the utterance and the hearers will symmetrically consider when interpreting it?

This is composed by various elements, the first being the *world (and time) spoken of*. When attributing a meaning to an utterance, in fact, both the speaker and the hearers generally construct a mental model of the world (and time) the utterance is partially or totally about. Such a world does not have to be a factual one, but may be a metaphysical, imagined, desired, or supposed one. Notwithstanding this, in many cases the world (and time) spoken of is somewhat linked to the world (and time) spoken in, i.e. the world (and time) in which the utterance occurs. The relevance of the world (and time) spoken of is mainly due to the fact that, among the various meanings attributable to the utterance, the hearers tend to consider only those meanings that appear coherent and sensible, i.e. those making the world (and time) spoken of internally consistent and in accordance with common ground.

Common ground is the second element of the overall context. That is made up of:

(i) things that should be obviously perceived and taken into account by the hearers,
(ii) things that should be obviously inferred and taken into account by the hearers on the basis of their perceptions, their expected knowledge of the language used,[230] including the common principles on behavior when communicating through language (*cooperative principles*), and their expected encyclopedic knowledge.[231]

As a mere exemplification, common ground includes the identity and capacity of the speaker and of the potential hearers, the purpose of the utterance, the use of a specific jargon, the cooperative principles and the background and experiences of the speaker and hearers, including their encyclopedic knowledge. Moreover, one of the most relevant cooperative principles forming part of the common ground consists in the expectation, by the speaker, that the hearers will use their knowledge and will draw inferences in

[229] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 25.
[230] I.e. its grammar, semantics and other conventions pertaining to its functioning.
[231] Which includes the knowledge gained through direct experiences of the worlds around them.

order to attribute a meaning to the utterance in light of the world being spoken of. In other words, the speaker expects the hearers to make constructive inferences from their expected knowledge and constructs his utterance accordingly.[232] Common ground may vary from one language community to another and, within a community, from a sub-group to another, in the sense that in different communities and sub-groups people may be expected to know or believe in different things and to draw from them different conclusions.[233] It is therefore important that the speaker makes the correct assumptions on what constitutes common ground within a certain community and on whether the hearers are part of such a community, so that they may be reasonably presumed to know or believe in given things.[234] Finally, it is worth noting that common ground is generally presupposed by the speaker, who considers it superfluous to make it explicit.

The third element to be taken into account as part of the overall context is the *co-text*, i.e. the text that precedes and succeeds a given utterance. Co-text is significant for the purpose of identifying the world (and time) spoken of, or better specifying something within that world. It provides additional information relevant to the proper interpretation of ambiguous forms and expressions.[235]

These three interconnected[236] elements of the overall context, where appropriately taken into account by the speaker in formulating his utterance, will ordinarily enable the hearers to reduce the ambiguity of that utterance, since just a few of the possible interpretations thereof will make sense in the overall context.

4.2.2. The cooperative principles

The author just described what the speaker should take into account when formulating his underspecified utterance, so that the hearers can properly understand the meaning of the message conveyed.

The issue, however, remains why the speaker should underspecify the meaning of the utterance and why he should take into account the overall context in order to properly shape it.

Looked at from a different angle, this issue consists in why the speaker should expect the hearers to appropriately use the overall context to integrate the underspecified

---

[232] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 22 and 25.

[233] See K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 21 *et seq.,* who highlights that common ground is similar to a convention, i.e. a regular behavior to which, in a given situation, almost everyone within a community conforms and expects almost everyone else to conform.

[234] This implies that the relevant common ground, in particular encyclopedic knowledge, has to be shared for the most part by the speaker and the hearers.

[235] For example, the ambiguity deriving from anaphors.

[236] The interconnection is multidirectional: the content of the world (and time) spoken of is co-defined by the co-text and common ground, including encyclopedic knowledge; the world (and time) spoken of, in turn, guides the hearers in picking up from the lexicon and encyclopedia the information relevant for attributing a sensible meaning to the utterance (e.g. the world spoken of guides the hearers in choosing the right lexicon and encyclopedic entry for a certain language expression used in the utterance); the meaning of the utterance has to make sense in the so-defined world (and time) spoken of.

meaning of an utterance; which, in turn, implies the question of why the hearers should integrate an underspecified utterance using the overall context.

This behavior has been empirically verified by linguists, who explained it in terms of praxis within a community.

Grice,[237] in particular, described such behavior making recourse to underlying *cooperative principles* that operate within a specific community and are part of the culture and social customs thereof. He formulated the general cooperative principle as follows: "make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged".[238] According to Grice, this general cooperative principle, which is widespread in the vast majority of language communities, operates in two directions: speakers generally observe the cooperative principle and hearers generally assume that speakers are observing it and behave accordingly.

This allows for the possibility of *implicatures*, i.e. meanings that are not explicitly conveyed in the utterance, but that are nonetheless inferred from the overall context.

Grice distinguished within the scope of this general cooperative principle four categories of maxims that he labeled Quantity, Quality, Relation and Manner.[239] The most-relevant maxims included in the four categories may be expressed as follows:[240]

> *(i) Quantity maxim* – the speaker is expected to give (no more and) no less than the information required by the hearer in order to proper interpret the utterance, the latter, in turn, being expected to draw the strongest inference possible from the utterance on the basis of the context;
> *(ii) Quality maxim* – the speaker is expected to be sincere and truthful;
> *(iii) Relation maxim* – the speaker is expected to make an utterance that is relevant in the overall context;
> *(iv) Manner maxim* – the speaker is expected to be as clear, unambiguous, brief and coherent (systematic) as possible.[241]

The Gricean theory is today formalized in bidirectional optimality theory (within formal pragmatics),[242] according to which the hearer determines the meaning of an utterance

[237] H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*
[238] H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*, at 45.
[239] Echoing Kant, as the very same author admitted (see H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*, at 45).
[240] H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*, at 45-46.
[241] An interesting example of the relevance of such maxims is represented by the case, illustrated by Wittgenstein, of the possible strange and unpredictable reactions of the hearers to an utterance in which the composite expression "the broomstick and the brush which is fitted on to it" is used instead of the common lexeme "broom" (see L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 25, para. 60).
[242] On (bidirectional) optimality theory and its application to natuaral language interpretation, see, among

under two types of contraints, which may conflict with each other, i.e.:

(i) the *semantic* (and *grammatical*) constraints, represented by the set of semantic (and grammatical) features typically associated with the terms and expressions employed in the utterance, and

(ii) the *pragmatic* constraints, represented by the pragmatic implicatures that may be inferred from the overall context.[243]

Such constraints are ordered according to a strict priority ranking and any specific constraint may be violated where this is necessary in order to satisfy higher ranked constraints. Among the possible meanings that might be attributed to an utterance, the optimal interpretation, i.e. the interpretation to be preferred under (bidirectional) optimality theory, is the one that best satisfies the relevant ranked constraints, although not satisfying all of them. This means that an interpretation that violates some of the existing constraints may nonetheless be regarded as the optimal interpretation of the utterance, where it satisfies higher constraints.

Semantic (and *grammatical*) constraints (i), which are types of *faithfulness* constraints, require the interpretation to be sematically (and grammatically) faithful to the expressions used in the utterance; thus, they rank prototypical meanings higher than peripheral, or unusual meanings.[244]

Pragmatic constraints (ii), which are types of *markedness* constraints,[245] require the interpretation not to conflict with the overall context.[246] In bidirectional optimality

---

others, A. Prince and P. Smolensky, *Optimality Theory. Constraint interaction in generative grammar* (Malden: Blackwell Publishing, 2004); H. de Hoop and H. de Swart, "Temporal adjunct clauses in Optimality Theory", 12 *Rivista di Linguistica* (2000), 107 *et seq*.; H. de Hoop, "Optimal scrambling and interpretation", in H. Bennis M. Everaert and E. Reuland (*eds*.), *Interface Strategies* (Amsterdam, KNAW, 2000), 153 *et seq*.; R. Blutner, "Some Aspects of Optimality in Natural Language Interpretation", 17 *Journal of Semantics* (2000), 189 *et seq*.; H. de Hoop, P. Hendriks and R. Blutner, "On compositionality and bidirectional optimization", 8 *Journal of Cognitive Science* (2007), 137 *et seq*.; J. Zwarts, "Competition Between Word Meanings: The Polysemy of (A)Round", in C. Meier and M. Weisgerber (eds.), *Proceedings of the Conference "sub8 – Sinn und Bedeutung"* (Konstanz: Fachbereich Sprachwissenschaft der Universität Konstanz, 2004), 349 *et seq*.

[243] See L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), p. 4.

[244] See the use of the constraint STRENGTH in J. Zwarts, "Competition Between Word Meanings: The Polysemy of (A)Round", in C. Meier and M. Weisgerber (eds.), *Proceedings of the Conference "sub8 – Sinn und Bedeutung"* (Konstanz: Fachbereich Sprachwissenschaft der Universität Konstanz, 2004), 349 *et seq*., at 356 *et seq*., as modified in L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), pp. 83-85: "I propose to reformulate STRENGTH in such a way that it pertains *only* to the set of features that are associated with the form under consideration" (*italics* by the author).

[245] I.e. constraints that require unmarked (i.e. more natural) interpretations to be preferred to marked (i.e. more complex) interpretations, provided that the speaker, in the light of the overall context, could have not expressed the resulting meaning through a less marked (i.e. more natural) expression. As Blutner puts it, an expression is blocked with regard to a cartain interpretation, if this interpretation can be generated more economically by an alternative expression, i.e. if it can be generated by a less complex expression; however, linguistic and contextual factors can trigger deblocking in case they revese the corresponding cost values (R. Blutner, "Some Aspects of Optimality in Natural Language Interpretation", 17 *Journal of Semantics* (2000), 189 *et seq*., at 194 and 198). Similarly, under the Manner principle elaborated by Levinson, marked messages are supposed to indicate marked situations (S. Levinson, *Presumptive Meanings. The Theory of Generalized Conversational Implicature* (Cambridge: MIT Press, 2000)).

[246] See the use of the constraint FIT in J. Zwarts, "Competition Between Word Meanings: The Polysemy of (A)Round", in C. Meier and M. Weisgerber (eds.), *Proceedings of the Conference "sub8 – Sinn und*

theory, the above-mentioned Gricean maxims are typically re-expressed in terms of *pragmatic* constraints.[247]

As the *semantic* (and *grammatical*) constraints may sometime require marked interpretations of the relevant utterances, the two types of constraints are potentially conflicting.[248] However, *pragmatic* constraints rank generally[249] higher than *semantic* (and *grammatical*) constraints, which entails that interpretations that conflict with the overall context of an utterance cannot be normally regarded as optimal interpretations thereof under (bidirectional) optimality theory;[250] conversely, an interpretation based on unusual or peripheral meanings of the listemes employed in the utterance may represent the optimal interpretation, where it is the most faithful construction of the utterance not at variance with the overall context.

4.2.3. The utterance meaning

The role played and the linguistic effects produced by the *cooperative principles* and the *overall context*, of which the former may be considered to be part (as a component of the common ground), lead the author to conclude that there are three conceptually different levels of meaning of an utterance.

At a first level, an utterance may be said to have as many potentially correct meanings as the grammar and the semantic specifications of the listemes used allow it to have. This level is not relevant *per se*; it simply provides us with part of the raw material needed to construct the other two levels of meaning.

The second level is that of the *speaker's meaning*, which is the private meaning thought of by the speaker when constructing the utterance.

The third level is that of the meanings that the hearers may attribute to the utterance. Among the meanings of the third level, it appears particularly significant the meaning(s) that any reasonable hearer would assign to the utterance, given (i) the first level meanings of the utterance and (ii) the hearer's analysis of and inferences from the overall context (including the speaker's presumed purpose in using that particular

---

Bedeutung" (Konstanz: Fachbereich Sprachwissenschaft der Universität Konstanz, 2004), 349 *et seq.*, at 356 *et seq.*

[247] See R. Blutner, "Some Aspects of Optimality in Natural Language Interpretation", 17 *Journal of Semantics* (2000), 189 *et seq.*, at 198 *et seq*., whith particular reference to the decomposition of the Gricean Quantity maxim in Q-principle and I-principle, where the former works to select the most coherent interpretation of an utterance, while the latter acts as a blocking mechanism and blocks all the interpretations of that utterance that can be derived more economically from an alternative utterance.

[248] L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), p. 8.

[249] See R. Blutner, "Some Aspects of Optimality in Natural Language Interpretation", 17 *Journal of Semantics* (2000), 189 *et seq.*, at 191.

[250] See J. Zwarts, "Competition Between Word Meanings: The Polysemy of (A)Round", in C. Meier and M. Weisgerber (eds.), *Proceedings of the Conference "sub8 – Sinn und Bedeutung"* (Konstanz: Fachbereich Sprachwissenschaft der Universität Konstanz, 2004), 349 *et seq.*, at 357; L. Hogeweg, *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009), p. 82.

utterance). Linguists call the latter meaning(s) the *utterance meaning*.[251]

Interpretative processes have the *utterance meaning* as their only possible goal (and, therefore, outcome).

In fact, the first level of meaning does not take into proper account the final goal of the utterance, which is to convey a message from the speaker to the hearers.

The second level of meaning is a private one and, as such, cannot be known by anybody except the speaker.[252] What the hearers may find at the end of their interpretative inquiry is the meaning that they think the speaker had in mind when formulating the utterance and that, as such, may be agreed upon by the speaker himself[253] (which does not ontologically convert it into the meaning the speaker had in mind when formulating the utterance, the latter being and remaining a private, unknowable meaning, the proof of which cannot be given in any way).

Useless to say that it is possible, and actually common, that, on the one hand, different hearers find the same utterance to have different (utterance) meanings and, on the other hand, that the speaker asserts that the meaning he had in mind was different from those found out by the hearers. This creates disputes over the meaning of the utterance.[254] These differences in meaning may be due to various factors, among which the wrong assessment by the speaker of the common ground,[255] the fact that different hearers do not share the same common ground, the differences between the actual inference process followed by the hearers and the one anticipated by the speaker, the possible misspeaking of the speaker.

What the author has just described and analysed constitutes the background of the following analysis on how the utterance meaning is generally determined.

4.2.3.1. Determining the utterance meaning (1): propositional calculus

A first level of analysis relevant for the purpose of interpreting an utterance is that of *propositional calculus*,[256] which characterizes analytical logic and which is based on deductive inferences.

The basis for the application of propositional calculus to language[257] is the

[251] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 44.
[252] See the example of the beetle given in L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 85, para. 293.
[253] For practical purposes, the utterance meaning is generally presumed to reveal the speaker meaning, unless the speaker himself makes it apparent that this is not the case. Accordingly K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 44.
[254] These disputes are more than common where the interpretation of legal documents is at stake.
[255] In particular, his wrong assessment of the encyclopedic knowledge of the hearers.
[256] Propositional calculus is also known as *propositional logic*.
[257] On the application of analytical logic and propositional calculus to language, L. Wittgenstein (translated by D. F. Pears and B. F. McGuiness), *Tractatus Logico-Philosophicus* (London: Routledge, 2001); B. Russell, *The principles of mathematics* (Cambridge: Cambridge University Press, 1903); B. Russell, "On denoting",

acknowledgment that sentences are mostly formed of declarative clauses, whose meaning (*proposition*) may be either true or false, according to the well-known logical principles of excluded middle and of (non-)contradiction.[258]

Propositional calculus establishes the truth conditions and the truth deductive inferences between propositions that are joined by logical connectives. The typical logical connectives[259] are: AND, AND/OR, EITHER … OR,[260] IF … THEN, IF AND ONLY IF … THEN.

Substantially, where applied to natural languages, propositional calculus allows us to conclude whether the meaning of a sentence composed by two or more propositions joined by logical connectives is true or false, based on whether the underlying propositions are true or false. To put it differently, it allows us to determine under which conditions, i.e. whether the underlying propositions are to be true or false, the meaning of a sentence composed by two or more propositions joined by logical connectives is true.[261]

In this respect, meanings are deemed to be true when they correspond to the situation in the world (and time) spoken of. For instance the proposition "a black cat is on the table" is true if and only if there is a black cat on the table in the world (and time) spoken of, which could be the real world before the eyes of the speaker and hearers, as well as the world of a fairytale.

When the logical connective AND is used, all the propositions of a sentence joined by such a connective must be true, in order for the meaning of the sentence to be true. A well-known example, among international tax practitioners, is that of Article 15(2) OECD Model, where the three propositions under letters a), b) and c) must be all true, to make the meaning of the sentence encompassing them true and, thus, to satisfy the condition for the exclusive right to tax of the residence State.

When the logical connective AND/OR is used, at least one of the propositions of a sentence joined by such a connective must be true, in order for the meaning of the sentence to be true.

1905 *Mind* 14, 479 *et seq.*; H. Kamp and U. Reyle*, From Discourse to Logic. Introduction to Modeltheoretic Semantics of Natural Language, Formal Logic and Discourse Representation Theory* (Dordrecht: Kluwer, 1993); K. M. Jaszczolt, *Semantics and Pragmatics*, Meaning in Language and Discourse (London: Longman, 2002), Chapters 3-4.

[258] On the principle of (non-)contradiction, according to which in a specific world and time two propositions such as "X is Y" and "X is not Y" are mutually exclusive, see Aristotle, *Metaphysics*, book IV, part 4 (see Aristotle (translated by W. D. Ross), *Metaphysics* (The Internet Classics Archive) – available online at http://classics.mit.edu//Aristotle/metaphysics.html); on the principle of excluded middle, according to which in a specific word and time, given a certain proposition such as "X is Y", either that proposition is true or its negation is, see Aristotle, *Metaphysics*, book IV, part 7 (see Aristotle (translated by W. D. Ross), *Metaphysics* (The Internet Classics Archive) – available online at http://classics.mit.edu//Aristotle/metaphysics.html).

[259] Logical connectives are indicated in logic with well-known symbols, such as "V" or "→"; here these symbols are dropped and the corresponding English terms are used instead.

[260] Also known as ONLY ONE OF and OR(ELSE).

[261] Therefore, propositional calculus is limited to assigning a truth value (true or false) to sentences, consisting of propositions connected by logic connectives, on the basis of (i) the truth functions (truth logical meaning) of the logical connectives and (ii) the truth value of each proposition in the sentence.

When the logical connective EITHER … OR is used, one and only one of the propositions of a sentence joined by such a connective must be true, in order for the meaning of the sentence to be true.

The logical connective IF … THEN appears particularly interesting for the purpose of the present study, due to its significant rate of utilization in legal texts. It may be analysed under two different, and reciprocal, perspectives. Under the *modus ponens*, if the proposition following IF (*premise*) is true, the proposition following THEN (*conclusion*) is also true.[262] Under the *modus tollens*, if the proposition following THEN (*conclusion*) is false, then the proposition following IF (*premise*) is also false. However, the contrary is not true: if the proposition following THEN (*conclusion*) is true, this does not entail that the proposition following IF (*premise*) is also true.[263]

This holds true, on the contrary, where the logical connective IF AND ONLY IF … THEN is used. When this is the case, if the proposition following IF AND ONLY IF (*premise*) is true, the proposition following THEN (*conclusion*) is also true; at the same time if the proposition following THEN (*conclusion*) is true, then the proposition following IF AND ONLY IF (*premise*) is also true.[264]

Propositional calculus applied to language is particularly useful in determining when a certain proposition entails another proposition. In terms of truth-value, a certain proposition may be said to entail another proposition when, if the meaning of the former is true, then the meaning of the latter is true in all possible worlds (and times). For example, for the purpose of the OECD Model, the proposition "X is a body corporate" entails the proposition "X is a company",[265] since whenever the former is true, the latter is also true.

Moreover, the analysis of entailment relations in terms of propositional calculus permits a simple application of the logical transitivity principle, according to which if proposition A entails proposition B and the latter entails proposition C, then proposition A entails proposition C. Expanding the above example, since the proposition "X is a body corporate" entails the proposition "X is a company" and the latter entails the proposition "X is a person", then the proposition "X is a body corporate" entails the proposition "X is a person".[266]

Also synonymy relations may be expressed in terms of propositional calculus: a proposition A may be said to be synonym of another proposition B if, and only if, the meaning of the former is semantically equivalent to the meaning of the latter in all possible worlds, so that whenever the former is true, the latter is also true and vice

[262] The modus ponens of the logical connective IF … THEN is typically used in order to construct logical syllogisms, on which, Aristotle, *Prior Analytics*, book I, part 1 (see Aristotle, (translated by A. J. Jenkinson), *Prior Analytics* (The Internet Classics Archive) – available online at http://classics.mit.edu//Aristotle/prior.html).

[263] The most effective example is that of the snoring wife: if your wife is snoring, then she is sleeping; but, luckily enough, this does not mean that every time that she falls asleep, she starts snoring too.

[264] Symmetrically, where either of the two propositions is false, the other one is false as well.

[265] Based on Article 3(1) OECD Model.

[266] Based on Article 3(1) OECD Model.

versa.[267] An example may be derived from Article 4(1) OECD Model: the proposition "X is a person who, under the laws of State Y, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature"[268] and the proposition "X is a resident of State Y for the purpose of this Convention" are synonyms. In fact, whenever the former is true, the latter is also true and vice versa.

Propositional calculus, however, is to a certain extent inadequate as a means of analysis of natural languages and must therefore be paired by semantic and pragmatic analysis.

The first reason for its inadequacy is that the use of logical connectives in natural languages is sometimes ambiguous. Take, for instance, the case where the conjunction "or" is used in a sentence. Does it correspond to the logical connective EITHER … OR, therefore requiring that only one of the joined propositions is true for the sentence meaning to be true, or does it stand for the logical connective AND/OR, in which case the sentence meaning is true even where all the joined propositions are true? When this is the case, the ambiguity is generally solved by an analysis of the overall context, i.e. by means of pragmatics. A similar problem exists with reference to the conjunction "if", which, in the praxis of many natural languages may stand for both the logical connectives "IF … THEN" and "IF AND ONLY IF … THEN".

Another cause of inadequacy consists in the need to extract a proposition from the relative clause, before the propositional calculus may be applied. In other terms, propositional calculus is a type of analysis that presupposes propositions, the latter being the meanings of clauses that must be determined by the hearers. In order to construct the meanings of such clauses, the hearers cannot rely on propositional calculus,[269] but have to carry out a semantic and pragmatic analysis on the basis of the overall context of the utterance.

Third, when the meanings of the joined clauses have been made clear by means of interpretation and the correspondence between the conjunction joining the underlying clauses and the logical connective joining the propositions is undisputed, an issue may arise as to the semantic meaning of the conjunction used. In English, for instance, the conjunction "and", which corresponds to the logical connective AND, may be attributed the meaning of "and then" in certain instances. While its function as a logical connective is undisputed (both joined propositions must be true for the meaning of the sentence to be true), its semantic meaning, relevant for determining the utterance meaning, is not. Take, for example, the following sentence: "Foreman got hit by Ali and was knocked out".[270] It does not have the same meaning as "Foreman was knocked out and got hit by Ali", although from a propositional calculus standpoint they are equivalent, since in the

[267] Synonymy is the relation that characterizes every proper definition, where the defined term and the definition itself are synonyms in every world (and time) where the definition applies.
[268] For ease of presentation, the references in Article 4(1) OECD Model to States, political subdivision and local authorities, as well as the contents of the second sentence of the very same paragraph and of paragraphs 4(2) and 4(3) are disregarded in the example.
[269] In fact, as previously illustrated, the scope of propositional calculus is limited to ascertaining the truth-value relations among propositions and does not concern the extraction of such propositions from the underlying clauses.
[270] Ali v Foreman, Kinshasa (Zaire), 20 October 1974.

first sentence "and" implies a causal/temporal relation between being hit and being knocked out, which is absent in the second sentence. This implied meaning is outside the scope of propositional calculus, since it concerns a different level of analysis, i.e. that of the semantic and pragmatic meaning of sentences.

4.2.3.2. Determining the utterance meaning (2): implicature relations

At the semantic and pragmatic level of analysis, *implicature relations* play a role that, at least for its significance, corresponds to that played by entailment relations in the propositional calculus.

An *implicature* is a meaning of a sentence that, although not entailed by the propositions composing the sentence, is implied on the basis of the cooperative principles and the overall context.

Implicatures may be more or less strong. They are considered to be strong whenever they cannot be canceled or denied without creating incoherence in the sentence meaning. In the opposite case, they are considered weak implicatures.

Strong implicatures are generally implicated by the very same conventional meaning of the lexemes composing the sentence, in particular by the meaning of certain conjunctions and adverbs within it. These are the kind of implicatures identified by Grice as *conventional implicatures*.[271]

For example, the sentence "He is Italian; he is, therefore, brave" conventionally implicates that the speaker believes that Italians are usually brave.[272] This implicature is conventional since it is determined by the conventional meaning of the adverb "therefore". It is noteworthy that the fact that the person spoken of is Italian does not entail that he is brave, since it could turn out that he is a coward although he continues to be Italian; at the same time, it cannot be said that the meaning of the sentence "He is Italian; he is, therefore, brave" entails the proposition "Italian are always (or generally)[273] brave" since, if the latter is false, the former anyway proves true whenever the person spoken of is Italian and is brave. The adverb "therefore" is not a logical connective; however, since it is used to express a relation of consequence, it creates a conventional implicature.

Take the following sentence: "Sally got pregnant, but Max was pleased".[274] From a propositional calculus perspective, the conjunction "but" is equivalent to "and", in the sense that both conjunctions correspond to the logical connective AND and, therefore,

[271] H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*, at 44-45.
[272] A similar example is found in H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*, at 44-45.
[273] Here a difficulty would arise with reference to the attribution of a truth-value to a proposition where the adverb generally is used. This issue, however, lies outside the scope of the present study.
[274] Example taken from K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 190.

bear its truth function. However, "but" conventionally implicates some sort of contrast, unexpectedness, or adversity. In the above sentence, "but" conventionally implicates that Max was expected not to be happy that Sally is pregnant.

These two examples have in common that, if the implicatures did not hold true or were denied,[275] the main sentences would somehow appear incoherent.

Weak implicatures, on the other hand, are generally the effect of the overall context of the utterance; in this perspective, they correspond to those identified by Grice as *conversational implicatures*.[276]

Consider the following sentence: "I have to work on my PhD thesis". *Per se* it does not implicate anything, apart from the fact that the person speaking is a PhD student, working on his PhD thesis. However, when we take into account its overall context and the cooperative principles, the result may be that such an utterance implicates additional information. For instance, if the co-text includes a previous question made by a different speaker, such as "Do we watch the Cavs playing tonight?", then the following "I have to work on my PhD thesis" seems conversationally to implicate that the PhD student is not going to watch the Cavs' game.

However, contrary to what observed in respect of conventional implicatures, conversational implicatures may be canceled or denied without creating incoherence. In the above example, if the PhD student completes the sentence by saying "but, you know buddy, the Cavs are the Cavs", this implicates that he is going to watch the Cavs's game; at the same time, the denial of the previous implicature does not create any incoherence, taken the dialogue as a whole. Thus, a conversational implicature is a pragmatic and inductive inference determined on the basis of the utterance meaning that appears the most probable given the overall context.[277]

Conversational implicatures are particularly relevant for interpretative purposes because they represent the principal device for the speaker to minimize the quantity of language used, i.e. to underspecify the meaning of the utterance, and for the hearers to supplement the utterance in order to understand the meaning of the message conveyed and to be aware of the reaction expected by the speaker.[278] For this reason, here the author briefly analyses the most common types of conversational implicature, which are *quantity conversational implicatures*.[279]

---

[275] For instance: Italians are generally considered not to be brave; Max is expected to be very happy of Sally being pregnant.

[276] H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*, at 45.

[277] It may therefore be concluded that, while conventional implicatures are mainly semantic-based, since determined by the conventional meaning of the lexemes (in particular conjunctions and adverbs) used in the utterance, conversational implicatures are mainly pragmatic-based, since they are determined by the overall context of the utterance (including the operation of the cooperative principles).

[278] K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 192.

[279] On quantity conversational implicatures and their subdivision into two distinct types, see H. P. Grice, "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq.*, at 45 *et seq*. See also K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), pp. 196 *et seq*.

Quantity conversational implicatures may be divided into two types.

The first one is generally known as *scalar implicature*[280] and consists in the following: given any ordinate scale in the form [E1, E2, E3, …, En], if the speaker asserts the value/item Ei in the utterance, that assertion conversationally implicates that values/items greater than Ei are not referred to by means of that utterance. For example, if Rita says "I have two cats", this conversationally implicates that she does not have three or more cats. If, as a matter of fact, she has four, although she uttered a logical truth, she could be accused of speaking "falsely" since she has failed to observe the conventions of the normal use of the language (cooperative principles) and has misled the hearers. Scalar implicatures, as any other conversational implicature, may be cancelled (denied) without creating incoherence in the utterance.

The quantity implicatures of the second type, known as *preference conditions*,[281] are direct consequences of the *quantity maxim* of the cooperative principles, according to which the speaker is supposed to give no more and no less information than is required for the hearer to properly interpret the utterance. These implicatures are therefore strongly based on common ground, i.e. on shared knowledge and expectations in a specific community. Preference conditions based on common ground are thus generally implicated by the utterance, unless an indication of the contrary is given. The following is an instance of preference conditions. The utterance "I am looking at a bird", said in an ordinary conversation between two men in the street (i.e. non-specialists, such as non-ornithologists) conversationally implicates that the speaker is looking at a bipedal animal with beak and feathers and which is capable of flying.[282] This holds true unless an indication of the contrary is given by the overall context[283] and although the listeme "bird" may also denote animals incapable to fly (e.g. penguins).

It appears, therefore, that quantity implicatures may be, and often are, influenced by the conventional prototypes, within a certain community, of the listemes used by the speaker. Similarly, the use of the verb "walk" conversationally implicates "walk forward", so that, if walking in any other direction is intended, that direction must be made explicit. Also, the use of the lexeme "transazione" in a contract concluded under Italian civil law conversationally implicates that the contracting parties intended to refer to "a legal agreement between the same parties that may be reached, by means of the reciprocal waiving of claims, in order to avoid a lawsuit" and not to a "sale" or any other "business transaction" between the parties,[284] since (i) the former is the generally agreed technical (legal) meaning of the lexeme "transazione" within the community of lawyers and (ii) a contract concluded under Italian civil law is a legal agreement, generally

[280] On scalar implicatures, L. R. Horn, *A Natural History of Negation* (Chicago: University of Chicago Press, 1989), p. 232.
[281] On preference conditions, R. Jackendoff, *Semantic Structures* (Cambridge: MIT Press, 1990), pp. 34 *et seq.*
[282] A similar example is given by Allan (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 197).
[283] For example, by the following statement by the very same speaker: "It is a penguin!".
[284] The term "transazione" is currently used in the Italian day-to-day and business language in order to refer to a business transaction, in particular the transfer of a right against consideration.

concluded through the intervention of lawyers.

Finally, conversational implicatures are relevant in order to reduce the ambiguity of utterances since, in the common case where a certain expression appears to be polysemic:

> (i) the cooperative principles, in particular the *relation* and the *manner maxims*, lead the hearers to presume that the speaker intended to convey a coherent and clear message;
> (ii) the coherence and clearness of the message are assessed and determined on the basis of the overall context;
> (iii) based on the above, the hearers substitute the few senses that appear reasonable in the overall context[285] for the ambiguous expression at stake. In many instances, these senses amount to one only.

4.2.3.3. Determining the utterance meaning (3): presuppositions

Another interesting point, in the analysis of the utterance meaning, relates to *presuppositions*.

Presuppositions may be analysed and classified both in terms of entailment (propositional calculus) and in terms of implicatures (both conventional and conversational). The actual analysis and classification depends on the intrinsic feature of the specific presupposition at stake, as well as on the purpose of the analysis conducted.

For instance, the proposition "my bike is blue" entails the proposition "I do have a bike". One could generally conclude that also the proposition "my bike is not blue" entails the proposition "I do have a bike". However, this is not always the case. The issue here is the ambiguity of the clause "my bike is not blue", which may expresses both the propositions "I do have a bike that is not blue" and "I do not have any bike, not even a blue one". If the clause "my bike is not blue" is deemed to express the former proposition, then it is true that it entails the proposition "I do have a bike"; if it is deemed to express the latter proposition, then this is not the case. The issue, therefore, may become that of determining the meaning of the relevant clauses, i.e. which propositions correspond to those clauses. This issue may be solved by means of pragmatic analysis, taking into account the cooperative principles and in light of the overall context. For example, in the above instance, one could conclude that the clause "my bike is not blue" presupposes the proposition "I have a bike" since, unless evidence to the contrary is given by the overall context, the *maxims* of *quantity*, *manner* and *relation* would require the speaker to clearly state that he does not have any bike at all, if that was the case. However, as for every conversational implicature, the speaker could cancel that implicature by stating, for example, that in fact he does not have any bike at all.

[285] I.e. the senses that make the message conveyed both coherent and clear in light of the overall context.

4.3. Final remarks: the role of grammar and semantics in the formulation and interpretation of utterances

The analysis performed in this section leads the author to devise the following two interconnected conclusions.

First, in formulating the utterance, the speaker is subject to certain potential restrictions, caused by the necessity that the hearers properly understand its meaning and, therefore, that the speaker's message is effectively conveyed.

These potential restrictions are primarily of a grammatical nature, in the sense that the lexemes, phrases, clauses and sentences that compose the utterance must fulfill the conditions of being well formed of the community language for the hearers to be able to establish the utterance meaning.

In addition, when choosing the lexemes to be used and the structure of the clauses and sentences, the speaker is potentially restricted:

(i) by the semantic specifications of the listemes and

(ii) by the inferences that he expects the hearers will draw from the overall context of the utterance on the basis of the cooperative principles.

Anomalies from a grammatical, semantic, or pragmatic perspective may block the ability of the hearers to determine the utterance meaning and, thus, could make impossible for the utterance to convey the intended message.

These restrictions, however, are just potential, in the sense that they create the risk for the speaker that the hearers cannot properly understand the message he wants to convey. The actual effect of these potential restrictions, that is to say the fact that the above-mentioned elements actually did operate as restrictions, making the speaker fail in conveying the intended message or obliging him to modify *ex post* the utterance meaning by means of an additional utterance, may, however, be assessed only synthetically and *a posteriori*, i.e. on the basis of the actual structure of the utterance and of the actual overall context thereof.[286] Consider the following instance: "Pizza a ate Paul night yesterday". In terms of orthodox English grammar, this is a very badly structured sentence. One should conclude that grammar restrictions would prevent the readers from understanding it. However, the author imagines that most readers attributed to that sentence the same meaning they would have attributed to the sentence "Paul ate a pizza yesterday night". This is because the semantic and pragmatic information provided by the overall context (i.e. world spoken of: eating; time spoken of: the past, probably yesterday night; encyclopedic knowledge: pizza is a well-known Italian kind of food and Paul is probably the name of a person, who could like to eat pizza; etc.) is, quantity and quality-wise, enough in order to attribute to the former sentence such a meaning.

[286] Allan correctly points out that the *a priori* drafting of a list of actual restrictions (of a grammatical, semantic and pragmatic nature) would entail the need to try every conceivable combination of listemes in every conceivable context, such a task being at best impracticable and at worst impossible (see K. Allan, *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001), p. 256).

Second, in determining the utterance meaning, the hearers take into account the rules of grammar, in particular those of morphology and syntax, conventionally agreed upon within the community language and make the inferences that they are expected to draw, on the basis of the cooperative principles, from the semantic specifications of the lexemes used in the utterance and its overall context. These inferences generally takes the forms of implicatures, both conventional, i.e. determined by the conventional meaning of the lexemes used in the utterance, and conversational, i.e. pragmatic inferences based on the overall context.

In contrast, propositional calculus has a more limited relevance for the purpose of determining the utterance meaning, both because its scope is limited to truth-value analysis, i.e. the assessment of whether a sentence composed by propositions joined by logical connectives is true in the specific world and time spoken of, and because it heavily relies on implicatures and pragmatic analysis in order to determine the meaning of the clauses (the propositions) to which the propositional calculus must be applied.

4.4. The special case of sentences that cover the future

When an utterance is used in order to describe or cover the future, there is a supplementary factor, in addition to those illustrated in the previous sections, which may contribute to increasing its ambiguity and vagueness. In such a case, in fact, a discrepancy usually exists between the general intention of the speaker,[287] on the one hand, and the situation described in his utterance, on the other. This discrepancy is difficult to avoid in many instances.

The key reason for such a discrepancy is that human thought generally works by means of prototypes, exactly as language does.

When a person wants to convey a certain message (for example, a rule of behavior to be applied in the future), which corresponds to his general intention, he instinctively thinks about the prototypical situation(s) to which his message is intended to refer and, consequently, he builds his utterance around that prototypical situation(s). However, this does not mean that the content of the message he wanted to convey was limited to the prototypical situation(s) he referred to in his utterance.

If a mother tells her 14-year-old daughter that she cannot go to her first high school party wearing a short skirt, this does not mean that she intended to allow her daughter to go there wearing mini-pants. The author assumes that the vast majority of parents would agree on this inference.

As discussed in section 3.3.2, prototype semantics has demonstrated the fundamental role played by prototypes in the choice of the listemes and expressions actually used by the speaker and stereotype semantics has even led to the conclusion that the intension of a specific listeme is based on the minimum set of stereotypical features that the typical

[287] I.e. his vision of the future.

denotata of that listemes present.

By analogy, it may be asserted that prototypical situations commonly constitute the models around which the speaker instinctively constructs his utterances. The scope of the prototypical situations may more or less approximate the abstract scope of the general intention of the speaker. However, it is generally difficult (sometimes impossible) and time-consuming for the speaker to determine *a priori* the gap existing between the scope of the former and that of the latter, which makes the effort of anticipating all the possible relevant situations substantially unworkable.

Therefore, although it is viable for the speaker to more analyse his general intention in greater depth in order to find better prototypical situations thereof,[288] in many instances seeking all prototypical situations whose aggregate scope matches exactly with the scope of the speaker's general intention proves to be in vain. The reason for such a difficulty lies in the fact that the very same speaker is unable to properly express his general intention and to anticipate all possible future instances, although, where put before an actual case, he would without doubt be capable of determining whether or not the specific item falls within the scope of his general intention. As St. Augustine acknowledged with reference to the concept of time, "Quid est ergo tempus? Si nemo ex me quaerat, scio; si quaerenti explicare velim, nescio".[289]

Moreover, the prototypical situations that come to mind and that are thus used by the speaker in his utterances vary greatly according to the overall context of those utterances, since they somewhat depend on the world (and time) spoken of, on the co-text of the utterances and on common ground.[290] This may contribute to making even more difficult for the hearers to determine the general intention of the speaker, especially where significant differences exist between the encyclopedic knowledge of the hearers and that of the speaker at the moment of producing the utterance.

The phenomenon just described often determines a status of uncertainty whenever the speaker's task is that of formulating generally applicable commands and rules of behavior.[291] Thus, it characterizes and contributes to determining the ambiguity and vagueness of the law.[292]

---

[288] Even a "general definition" may be seen as a prototype, with a very broad scope, of a general intention. A clear instance is the definition of resident person in art. 4(1) OECD MC, the latter being a very elaborated prototype of the general intention of the OECD in respect of the concept of "residence for treaty purposes". The existence of a discrepancy between the general intention and the prototype (Article 4(1) definition) is proved by the large amount of academic discussion and literature on what should fall within the scope of such a prototype (definition).

[289] Augustinus, *Confessionum Libri Tredicim*, Liber Undecimus, c. 14 (see Augustinus, *Confessionum Libri Tredicim* (Citta Nuova Editrice) – available on-line at http://www.augustinus.it/latino/confessioni/index.htm). The excerpt may be translated as follows: "What is then time? If nobody asks me, I know; if I have to explain to somebody asking me, I don't".

[290] In particular, they may vary depending on the encyclopedic knowledge shared by the speaker and the hearers.

[291] On the relation between "command" and "rule" and on the connected legal issues, H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961), Chapters I through III.

[292] See, with regard to the ontological vagueness of the rules of law, H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), pp. 124-135.

In fact, the persons drafting a certain law provision[293] in most cases cannot properly anticipate all the situations they would be willing to regulate by means of that provision. In such instances, where a situation occurs that is seemingly outside the scope of that provision, the choice for the interpreters,[294] from a general theory of law standpoint, is either (i) to consider that situation as non-regulated by that specific piece of law, which means that the situation at stake usually ends up being regulated by other provisions of law (including general principles of law, customs, *ex aequo et bono*) or (ii) to consider that situation as regulated by an extensive or analogical application of that provision. The latter solution may encounter the approval of the community, where it may be reasonably inferred that the situation falls within the scope of that provision as ascertainable from the analysis of the overall structure, content and purpose thereof.

Consider, in this respect, the following instance. The regulation of the new greenhouse of your city contains the following provision: "birds cannot be introduced in the greenhouse". You are one of the persons working at the greenhouse and, being allowed by the regulation to propose new plants, insects and animals to be put therein, you propose five bats. Your supervisor, however, believes that the regulation does not allow bats to be put in the greenhouse and rejects your proposal. One might reasonably wonder whether the supervisor is right in this respect. On the one hand, the intension of the listeme "bird" does not seem to include bats; therefore, it might be argued that your proposal was not in breach of the applicable regulation. On the other hand, it could be inferred from the overall context of the relevant article of the regulation that the reference to birds should be intended as a reference to "all flying animals that, due to their size and potential speed, are capable to damage the air system plants attached to the ceiling of the greenhouse". Whether it is reasonable to construe the relevant article in this manner is a matter that depends on the overall context, i.e. the whole content of the regulation, the type of air system plants actually installed, the shared encyclopedic knowledge of the drafters and the potential addressees of the regulation, etc. In any case, it does not seem *prima facie* absurd to assume that the lexeme "bird" has been employed in that provision because it denotes the prototype of the flying animals whose presence in the greenhouse the drafters intended to prohibit.

All in all, finding out the utterance meaning of any legal provision exactly consists in assessing what is its most reasonable meaning[295] on the basis of the actual text thereof, the cooperative principles and all other elements of the overall context.

The result of such an inferential process is not determinable *a priori* and, as has already been noted in the previous section, it may vary according to the person carrying it out since, where items of evidence exist in favor of more than one construction of the relevant legal provision, as is often the case, such items may be weighted differently by

[293] E.g. the legislator with reference to a statute, the contracting parties with reference to a contract, the contracting States with reference to a treaty, etc.
[294] I.e. the "hearers" of the utterance.
[295] I.e. either the one incorporating the above-proposed meaning of the lexeme "birds" (all flying animals that, due to their size and potential speed, are capable to damage the air system plants attached to the ceiling of the greenhouse) or any alternative reasonable meaning thereof.

different people for the purpose of determining the utterance meaning.

As a matter of fact, in most cases there will be a person competent to decide on this and other similar matters, who will settle the issue on the basis of "his" established meaning of the provision, as determined by discretionarily assessing the relative weights of the different items of evidence through an inductive inferential process.

CHAPTER 3 – NORMATIVE ANALYSIS AND NECESSITY OF A FORMAL APPROACH

1. A normative theory on treaty interpretation based on semantic analysis

By transposing the results of the above semantic analysis in the field of international treaties, the author attempts in this section to establish the fundamental principles of a normative legal theory on treaty interpretation. Such principles, which are described below, should operate as a compass for the interpreters whenever they are construing treaties and arguing for their chosen interpretations.

As clarified in section 1.2 of the Introduction, however, the drafting of such principles represents only the first step in the process of establishing a useful and accurate normative legal theory on treaty interpretation under international law. It is, in fact, the author's belief that positive legal theory may produce indirect constraints to normative legal theory by:

(i) setting significantly high costs (in terms of legal uncertainty, infringement of legal expectations, social and cultural transitions) to be met in order to substitute the state of affairs that could be proposed in the normative legal theory (first-best solution) for the *status quo*; and

(ii) limiting the feasible set of legal rules and policies that may be implemented.

In the following parts of this study a positive legal analysis is carried out with a view to identifying the generally accepted constructions of Articles 31-33 VCLT and Article 3(2) OECD Model, or, at least, the outer borders beyond which any proposed interpretation of those articles would be rejected by the vast majority of international lawyers. Since the purpose of the present research is to suggest how the interpreter should *now* tackle and disentangle the most common types of issues emerging from the interpretation of multilingual tax treaties under international law, the author is not willing to accept the drawbacks of a normative legal theory infringing the generally accepted rules and principles of treaty interpretation derived from Articles 31-33 VCLT and Article 3(2) OECD Model, i.e. that such a normative legal theory:

(i) could establish itself only in the very long run,

(ii) would cause a protracted period characterized by more legal uncertainty than in the current state of affairs and

(iii) in the worse case scenario, would be generally regarded as utopian, since too detached from those articles to be considered a reasonable interpretation thereof, thus lacking the legal status to be applied in practice as long as those articles remained in force.

This implies that the author's normative legal theory must be shaped so as to fit within the generally accepted borders of a perceived reasonable interpretation of Articles 31-33 VCLT and Article 3(2) OECD Model. Where the principles of interpretation inferred

from the semantic analysis appear to lie outside those outer borders, such principles will be disregarded for the purpose of setting up the author's normative (semantics-based) legal theory of treaty interpretation. On the contrary, where they appear to fit within those borders, they will be confirmed and used as cornerstones of that normative legal theory.

Listed below are the general principles of treaty interpretation drawn by the author from the semantic analysis carried out in the previous chapter.

(i) For the purpose of legal theories, interpretation should not be intended as the intimate, unfathomable mental process that leads the interpreter to establish the treaty utterance meaning, such process generally being purely intuitive and synthetic and, most importantly, inscrutable. Nor should it be intended as the result of such a process. In contrast, the term "interpretation" should be used to denote those processes that are subject to external knowledge, i.e. the *a posteriori* analytical written (or oral) arguments used by the interpreter to support the meaning he attributed to the legal text: interpretation as a rhetorical means to uphold a thesis on the basis of the available premises (elements and items of evidence).

(ii) The goal of treaty interpretation is to establish the message (meaning) that the contracting States' representatives intended to be conveyed to the potential addressees of the treaty. In different terms, the quest of the interpreter is directed towards the intention of the parties.

(iii) However, the meaning that the interpreter must look for is obviously not the private meaning thought of by the contracting States' representatives when concluding the treaty, since that meaning is a private one and, as such, cannot be known by anybody other than the representatives themselves. The only possible object of the interpretative process is the *utterance meaning* of the treaty text, i.e. the meaning(s) that any reasonable interpreter would assign to that text, as expression of the intention of the parties, given:

(a) the various meanings that the grammar and the semantic specifications of the terms used in the treaty allow it to have and
(b) the interpreter's analysis of and inferences from the overall context.

Thus treaty interpretation is purported to establish and argue for the meaning that most fairly and reasonably could be said to have been intended by the parties (the *utterance meaning*).

(iv) The overall context is made up of all those elements and items of evidence that are helpful for the purpose of determining and arguing for the utterance meaning. The overall context in particular includes:

(a) the subject matter of the treaty and its object and purpose [*world spoken of*];
(b) the international legal context of which the treaty is part, the legal systems of the States concluding the treaty, the encyclopedic (legal) knowledge of the

persons involved in its drafting, the expected encyclopedic (legal) knowledge of the addressees of the treaty, the commonly accepted principles of behavior in the international community (including any cooperative principle of communication), every reasonable inference that the drafters and the addresses might be expected to derive from the above [*common ground*];

(c) the text that precedes and succeeds the text to be interpreted [*co-text*].

(v) None of the elements that constitute the overall context is inherently superior (or inferior) to the others. The weight that any specific element of the overall context may (or should) be given for the purpose of establishing and arguing for the utterance meaning depends on the circumstances of the case.

(vi) The interpreter should construe the treaty text on the basis of all *implicatures* that may be derived from the text and the overall context, i.e. by duly taking into account those meanings which, although not entailed by the text as such, are implied by the very same text and the overall context. In order to determine such implicatures, the interpreter should take into consideration the following generally accepted cooperative principles of communication (together with any other principle accepted within the international community):

(a) the parties are expected to give (no more and) no less than the information required by the addressees in order to properly interpret the treaty;
(b) the parties are expected to be sincere and truthful;
(c) the parties are expected to include in the treaty provisions that are relevant in the overall context;
(d) the parties are expected to be as clear, unambiguous, brief and coherent (systematic) as possible.

(vii) The relevance of the treaty text must not be overestimated. In fact, like any other human-drafted texts, treaty texts are:

(a) sets of underspecified clauses that need to be expanded by semantic and pragmatic inferences, in particular *implicatures*, based on the relevant lexicon, grammar and overall context;
(b) inherently characterized by ambiguity and vagueness.

(viii) The relevance of grammatical constraints must not be overestimated. Since it is possible that the treaty text is affected by grammatical anomalies and errors, nothing precludes the interpreter from establishing and arguing for an utterance meaning that appears *prima facie* to be irreconcilable with the grammatical structure of the text to be construed.

(ix) Where the interpreter may reasonably establish that a particular jargon (e.g. legal jargon) has been used in drafting the treaty, a plausible presumption exists that, among the various concepts theoretically corresponding to the terms used, the parties have chosen the ones whose correspondence to the terms is typical of jargon used (e.g. the

legal jargon meaning of a certain term).
Various kinds of evidence exist that may lead the interpreter to conclude that a specific jargon has been used by the parties, the most relevant being: the subject matter of the treaty, the identity and capacity of the treaty drafters, the identity and capacity of the expected addressees, the object and purpose of the treaty, the extensive use of idiomatic terms and expressions specific of that jargon.

(x) In establishing the utterance meaning of a treaty provision, the interpreter should consider that the contracting States' representatives in most cases choose the terms to be employed in the treaty on the basis of the approximate overlapping between the prototypical items denoted by those terms and the items that they intended to be covered by those terms. The approximation is due to the fact that it is generally very difficult and time-consuming (if not impossible) for the contracting States' representatives to anticipate all possible cases in which they intend to apply the treaty and, therefore, the choice of the treaty terms is based on the items that the representatives had actually anticipated at the time of the treaty's conclusion.
For this reason, it is possible that the generally accepted intension of a term used in a treaty results in both:

(a) too broad a meaning as compared to the parties' intended denotata of that term, since the former includes peripheral (non-prototypical) items that the parties did not intend to be denoted by that term as they do not have the characteristics that warrant their inclusion;
(b) too narrow a meaning as compared to the parties' intended denotata of that term, since the former does not include items that parties intended to be denoted by that term as they have the characteristics that warrant their inclusion (characteristics similar to those of the prototypic denotata of the term).

Therefore, the interpreter should always carefully consider whether it seems reasonable that the parties would have intended:

(a) that certain items, which do not have the relevant characteristics of the prototypical items denoted by the relevant treaty term, were excluded from the scope of that term, although being within the generally accepted intension thereof, and
(b) that certain items, which present some relevant characteristics in common with the prototypical items denoted by the relevant treaty term, were included in the scope of that term, although not being within the generally accepted intension thereof.

An example of (a) is represented by the possible exclusion from the scope of the term "boat", as used in Article 6(2) OECD Model, of a vessel permanently anchored in one of Amsterdam canals and exclusively used as a dwelling. An example of (b) is represented by the possible inclusion in the scope of the term "alienation", as used in Article 13(1) OECD Model, of the creation by the owner (or the transfer) of a usufruct right on an immovable property in favor of (to) another person.

(xi) In addition, since cultural and social differences among national communities may lead to different partitions of the conceptual field by different national communities through their respective relevant concepts, it is possible that when the contracting States' representatives agree on a certain term to be used in a treaty, each of them actually looks at that term through the glasses of his own partition of the conceptual field, i.e. he *prima facie* attributes to that term the meaning (concept) that such a term, or a similar term in his own language, has within his own encyclopedic knowledge, which in turn is strongly influenced by his national culture. This phenomenon, which contributes to increasing the vagueness of treaty terms, is particularly acute where legal jargon terms are at stake, due to the frequent discrepancies among the meanings that the same, or similar, terms have under the laws of different States.
For instance, it is quite common that the meanings of terms used in two different languages in order to denote the same items often overlap without being fully identical. In this regard, it is possible that in language 1 items A and B are denoted by term "X" and item C is denoted by term "Y", while in language 2 item A is denoted by term "Z" and items B and C are denoted by term "W".[296] If item A is the prototype of terms "X" and "Z" in the two respective languages and the treaty employs term "X" in its authentic text, the representative of the State using language 2 will probably attribute *prima facie* to term "X" the meaning that the corresponding term "Z" (which is the term sharing its prototype with treaty term "X") has under his language. This raises the issue of what the agreement among the parties is (if an agreement exists) on whether or not item B is denoted by treaty term "X".
In these cases, the interpreter should determine the utterance meaning by:

(a) first assessing whether the parties intended the relevant term to be attributed a uniform meaning by all contracting States, or whether they intended each State to interpret that term on the basis of its own concepts;
(b) in case a uniform meaning was intended by the parties, attributing a particular relevance to the overall context and to the prototypical items common to all or most national concepts;
(c) in case a uniform meaning was not intended by the parties, determining what (type of) national concept the parties meant to be used for the purpose of construing the treaty term.

(xii) Any subsequent act of the parties that directly or indirectly may shed light on the meaning that they attribute to the treaty should be taken into account by the interpreter in his quest for the utterance meaning.

[296] Moreover, the difficulties are not only generated by the different division of "the same" data, but also by the fact that the data may be different, since starting from the same basic data certain communities build up synthetically-derived additional data while others do not (or do it differently); this phenomenon is generally due to the effect on the cognitive process of social and cultural differences (including differences in the encyclopedic knowledge).

2. The impact of the semantic analysis on the interpretation of multilingual treaties

The semantic analysis that has led the author to establish the above fundamental principles of treaty interpretation plays a significant role as well in respect of multilingual treaty interpretation. The two main reasons for its relevance in that respect may be summarized as follows.

First, the interpretation of a multilingual treaty is nothing more than the interpretation of its authentic texts. Since there does not appear to be any intrinsic difference between the sole text of a monolingual treaty and one of the authentic texts of a multilingual treaty (the only differences being extrinsic, i.e. that the latter text is part of a wider group of texts), there is no reason to consider the principles of interpretation established in the previous section inapplicable with regard to each authentic text of a multilingual treaty taken in isolation.

Second, in order to remove a *prima facie* discrepancy in meanings between two (or more) authentic texts of a multilingual treaty the interpreter needs a compass: he needs to know what he is supposed to look for and how he is supposed to do it. This compass is represented by the principles of interpretation established in the previous section, which provide for guidance on how the interpreter should determine and argue for the utterance meaning of the treaty. In fact, the purpose of the treaty interpreter remains establishing and arguing for the utterance meaning of the treaty, notwithstanding the number of texts in which the latter is authenticated. In this respect, the act of removing the *prima facie* discrepancy in meanings between two (or more) authentic texts of a multilingual treaty coincides with the act of establishing the utterance meaning of that treaty.

Starting from these two basic remarks, the author has developed the following principles.

(i) For the purpose of interpreting one authentic text of a multilingual treaty, the other authentic texts are part of the overall context and, therefore, may be used in order to construe the former.

(ii) However, since the relevance of the treaty text(s) must not be overestimated, where the parties have agreed that more than one treaty text is authentic, it is reasonable to infer that those parties intended to allow treaty interpretation to be based on any one of such authentic texts, taken in isolation, together with the elements of the overall context other than the other authentic texts. To put it differently, it is reasonable to assume that the parties to a multilingual treaty generally did not intend to oblige the interpreter to read and compare all authentic texts for the purpose of construing the treaty.

(iii) The interpretation of a multilingual treaty on the basis of just one of its authentic texts is not different from the interpretation of a monolingual treaty. In this case, the principles of interpretation established in the previous section also apply to multilingual treaties.

(iv) Any alleged discrepancy in meaning among the authentic texts of a treaty is just apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the number of its authentic texts.

(v) Where an alleged discrepancy in meaning among the authentic texts of treaty is pointed out, the interpreter must remove it by establishing the single utterance meaning of all authentic texts. In order to determine and argue for that utterance meaning, the principles established in the previous section should be applied; in particular, the relevance of the treaty texts for that purpose should not be overestimated.

(vi) Since the quest of the interpreter is directed at establishing the common intention of parties, it is reasonable for him to attribute, in the case of a *prima facie* discrepancy in meaning among the authentic treaty texts, a particular relevance to the text that has been originally drafted by the contracting States' representatives and on which the consensus among them was formed, for the purpose of removing that *prima facie* discrepancy. This holds particularly true where evidence exists that the other authentic texts are subsequent translations prepared by persons that did not participate in the treaty negotiation and conclusion.

(vii) The interpreter may take into account non-authentic language versions of a treaty, such as the official translations thereof produced by the contracting States, for the purpose of construing it. The interpretative weight that the interpreter should attribute to such language versions varies depending on the available evidence that they may contribute to ascertain the common intention of the parties (for instance, the fact that both official translations produced by the contracting States of a bilateral treaty seem to suggest the same construction of a certain treaty provision, which appears, in contrast, ambiguous on the basis of the sole authentic text).

(viii) Where the treaty provides that a specific text has to prevail in cases of discrepancy in meanings among the authentic texts (the prevailing text), it appears reasonable to assume that the parties intended the utterance meaning of that text to prevail only where an interpretation based on the *prima facie* divergent authentic texts and the overall context does not lead the interpreter to convincingly attribute a single utterance meaning to all such texts.
Considering that the various texts of the provision to be interpreted are just one of the elements that must be taken into account for the purpose of establishing the utterance meaning of that provision, together with the elements of the overall context, and that the relevance of the text for treaty interpretation purposes should not be overestimated, it seems to the author that the recourse to the prevailing text should be quite limited in practice.

(ix) Especially in the case of treaties authenticated in all the official languages of the

contracting States, the question may arise of whether the parties intended the relevant terms used in the various authentic texts to be attributed a uniform meaning by all contracting States, or whether they intended each State to interpret those terms in accordance with the meaning of the term used in the text authenticated in its own official language (i.e. in accordance with its own domestic law meaning of that term, where legal jargon terms are at stake). In fact, as previously noted, it is possible that cultural and social differences among national communities may lead to different partitions of the conceptual field by different national communities through their respective relevant concepts and, therefore, that the meanings of terms used in different national languages in order to denote the same items often overlap without being fully identical. This phenomenon, which contributes to increasing the vagueness of treaty terms, is particularly acute where legal jargon terms are at stake.

Similarly to what mentioned at point (xi) of the previous section, which deals with a somewhat analogous case, the interpreter should first answer this question on the basis of the treaty text(s) and of overall context and then determine the utterance meaning of the relevant treaty provision:

(a) in case a uniform meaning was intended by the parties, by attributing a particular relevance to the overall context and to the prototypical items denoted by all or most of the terms employed in the various authentic texts;
(b) in case a uniform meaning was not intended by the parties, by construing the treaty in accordance with the (national) meaning of the term used in the text authenticated in the official language of the State applying the treaty, provided that such term is similar to the (majority of the) terms used in the other authentic texts. Where the test of similarity fails, the reasonable suspicion may arise that the parties did not intend the relevant treaty provision to be construed in accordance with the (national) meaning of that term.

For the purpose of such a comparison, two terms, construed in accordance with their respective national meanings, may be considered similar:

(a) when they share most of their prototypes, or
(b) in the case their prototypes are limited to a few or do not coincide, when most of the features (including their function in the relevant field of knowledge) that characterize such prototypes coincide or, at least, present strong similarities.

What does constitute the majority of the respective prototypes and their distinctive features, which have to be taken into account for the purpose of assessing the similarity, cannot be said *in vacuo*. The answer to that question depends upon:

(a) the nature of and the functions performed by the concepts underlying those terms;
(b) the overall context in which those terms are used (in particular, the object and purpose of the provision containing those terms).

For the reasons already discussed in the previous section, the drafting of these principles represents only the first step in the process of establishing a useful and accurate

normative legal theory on treaty interpretation under international law. In the remainder of this study, such principles will be assessed against the background of the generally accepted interpretations of Articles 31-33 VCLT and Article 3(2) OECD Model, as resulting from the positive legal analysis carried out in the following parts. Where the principles of treaty interpretation inferred from the above semantic analysis appear to conflict with the generally accepted rules and principles of interpretation derived from Articles 31-33 VCLT and Article 3(2) OECD Model, the former principles will be disregarded for the purpose of setting up the author's normative (semantics-based) legal theory of treaty interpretation. In contrast, where they appear not to encroach the latter rules and principles, they will be confirmed and used as cornerstones of the author's normative legal theory.

3. Liberal theory of politics and international law: the necessity of a formal approach

3.1. The non-existence of a single meaning of treaty provisions: the discretion of the interpreter

This study is directed to drawing a sketch, as precisely and comprehensively as possible, of the issues that may be faced by a person called on to interpret and apply a multilingual tax treaty and, more precisely, those issues that are caused by the multilingualism of that treaty.

Although not limited to highlighting the legal issues at stake, the sketch is of a pure descriptive and formal nature. It does not provide the reader with a recipe for infallibly solving such issues, since such a magic formula does not exist. However, it attempts to provide (i) a clear picture of the nature of the issues arising from the interpretation and application of multilingual tax treaties, (ii) the elements and items of evidence that may be used to support the possible solutions to such issues and (iii) the arguments that may be put forward in order to justify the above solutions on the basis of the elements and items of evidence available.

Therefore, in the present study there is no endeavor to find out the "correct" (or best) interpretation of specific tax treaty provisions and not even to argue in favor of any specific construction thereof, since it is the author's opinion that such "correct" interpretation do not exist *per se*: there is no such thing as only one possible interpretation of a treaty provision.

First, the interpretation depends on the overall context and, in particular, on the legal and factual situations in the relation to which the interpreter is called on to apply the treaty provisions.

Second, with regard to a relatively[297] high number of specific legal and factual

[297] I.e. relatively as compared to the total number of the legal and factual situations to which the interpreter might be willing to test the applicability of the treaty provisions.

situations, there is more than one interpretation that could be plausibly argued for on the basis of sound reasoning and principles.[298] Among such various possible interpretations, the relation is not one between a correct interpretation and the other incorrect interpretations and not even one that orders them on an objectively graduated scale ranging from the worse to the best possible interpretation. The choice of the interpretation to be argued for in any specific case is a subjective one, in the sense that it entails the discretionary (not arbitrary) judgment of the interpreter. This subjectivity is caused by several interconnected factors, a significant part of which is semantic in nature and has been analysed in the previous chapter.[299]

Nonetheless, the author would like to scrutinize some of these factors here from a different (non-semantic) perspective, in order to better show the kaleidoscopic nature of (tax) treaty interpretation. The chosen foundation of this analysis consists of an international socio-political and legal theory that, as such, articulates the basic assumptions underlying both modern socio-political and legal international discourse. Such theory is that proposed by Koskenniemi in *From Apology to Utopia* and there labeled the "liberal theory of politics".[300] This theory is based on two assumptions, which probably few international lawyers would seriously challenge.

3.2. The liberal theory of politics and its bearing on treaty interpretation

3.2.1. Concreteness and normativity of international treaty law

The first assumption underlying Koskenniemi's liberal theory of politics is that international law (including treaties) emerges from the international legal subjects themselves (mainly States). It is therefore an artificial, non-natural order, which is justified only insofar as it is created by and linked to the actual wills and interests of those legal subjects.[301] In this sense, international law is characterized by "concreteness";

[298] Such reasoning and principles pertain, quite obviously, not only to the domain of law, but also to the domains of logic and semantics as well. In addition, it should be noted that whether a specific interpretation of a treaty provision is plausibly argued for is (again) a matter of subjective appreciation, which leads the interpreter into a hermeneutical circle.

[299] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), pp. 43-44: "It is a fact that the rules of interpretation laid down in international law are not always sufficient to generate a determinate interpretation result. […] We have to accept that, although a treaty may have been interpreted in full accordance with the rules of interpretation laid down in international law, there will nevertheless be situations where two conflicting interpretation results must both be regarded as legally correct. […] In the inferential model, an interpretation result is always an assumption. […] An assumption is neither true nor false; it is measured in terms of strength. […] In the situation where two conflicting interpretation results are both to be regarded as correct, considered from the point of view of international law, we can still defend our claim that they are both prima facie warranted". See also *ibidem*, at pp. 343 and 346.

[300] See M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), pp. 5-6, 21-23.

[301] I.e. of the individuals that act on their behalf. See M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), p. 21.

it is the result of voluntary political choices made by States, which are postulated as all sovereign, equal and independent.[302]

The second assumption is that, once created, international law becomes binding on the same international legal subjects that have produced or have agreed on it. They cannot invoke their subjective opinions to escape its constraining force, for otherwise the object and purpose of their original order-creating will would be frustrated.[303] In this sense, international law is characterized by "normativity", since it effectively limits the conduct of the States subject to it.[304]

There is, underlying the liberal theory of politics, a clear analogy between the position of States within the world order and that of individuals within their own States: both create the law and are subject thereto.[305] To put it differently, concreteness bases international law on States' behavior, while normativity makes the former independent of the latter.

Both concreteness and normativity are thus necessary constituents of international law: the lack of the former would reduce international law to a complex of norms based on some natural morality; the absence of the latter would equate international law to an apologetic description of States' behavior. Evidence of the necessary co-presence of both aspects in international law is given by the very same fact that modern international law scholarship focuses on the interplay between them and tries to figure out which intermediate position best portrays current international law.[306]

At the same time, however, concreteness and normativity seem to inherently conflict with each other. This clash clearly surfaces as soon as an international law dispute arises. Even where the analysis is limited to the interpretation and application of

[302] See O. Schachter, "International Law in Theory and Practice. General Course in Public International Law", 178 *RCADI* (1982), 9 *et seq.*, at 24 and 26. In this respect and with specific regard to treaties, it is worth recalling that the Preamble to the VCLT (i) notes that the principle of States' free consent is universally recognized and (ii) recalls certain principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples and those of the sovereign equality and independence of all States.

[303] See M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), pp. 21-22.

[304] See O. Schachter, "International Law in Theory and Practice. General Course in Public International Law", 178 *RCADI* (1982), 9 *et seq.*, at 25-26. With regard to treaties, it must be noted that, while the Preamble to the VCLT recognizes that the principle *pacta sunt servanda* is universally recognized, Articles 26 and 27 thereof state that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" and that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", respectively.

[305] M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), p. 22. On the analogy between liberal democracies and world order, see the original thinking of Rousseau in J. J. Rousseau (ed. M. Cranston), *The Social Contract* (Harmondsworth: Penguin Books 1986), book I, Chapter 7.

[306] See M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), pp. 20-21 (citing J. Fawcett, *Law and Power in International Relations* (London: Faber & Faber, 1982), pp. 38 *et seq*.), who depicts extreme scholars' positions, on the scale that goes from concreteness to normativity, as apologist and utopian respectively; R. A. Falk, *The Status of Law in International Society* (Princeton: Princeton University Press, 1970), pp. 41 *et seq*.

treaties, the issue obviously appears.

Take the following basic instance. A State intends to exercise certain of its sovereign powers. However, an interested person opposes the exercise of such powers by pointing to the contrary rule enshrined in a specific provision of a treaty to which that State is party. The latter, in turn, while recognizing being bound by that treaty, maintains that it has never consented to the interpretation of the relevant treaty provision put forward by the opponent.

On the one hand, it could be argued that no one knows what that State has agreed to, when signing and ratifying the treaty, better than the State itself (as expressed through one of its representatives). In this respect, it might be argued that any interpretation different from the one submitted by the contracting State itself should be disregarded, as otherwise that State would be made subject to a rule to which it has never consented. Such a result would, in fact, be contrary to the concrete nature of international law.

On the other hand, however, this argument would lead to a fully apologetic vision of international (treaty) law, for every time that international (treaty) law was potentially useful,[307] it would in fact turn out to be useless since it would never bind any State.[308] In pretty skeptical terms, international (treaty) law would apply only in so far as no conflict arose. If the maxim *pacta sunt servanda* has any meaning at all, it is common sense that international (treaty) law must be capable of being applied also against the will of the States. In other words, international (treaty) law must be truly normative.

3.2.2. The claimed (apparent) solution of the clash between concreteness and normativity: the relevance of the common intention of the parties as expressed by the treaty text

Hence, the issue arises as to how to solve the apparent conflict between the normativity and concrete characters of international law. One could start by making clear that the State's will - relevant from a concreteness perspective - is the one through which the State has originally consented to be bound by international law. Therefore, with reference to treaty law, the State's will is that to be bound by a specific treaty and expressed through one of the means listed in Article 11 VCLT. From a purely theoretical perspective, such a will may be clearly distinguished from the will subsequently expressed by a State (through its agents), which, as in the previous example, may also concern how the specific treaty is to be interpreted and applied in a specific case. If it were possible to establish with certainty that the latter will does not conform to the former, the conclusion would follow that the State is bound by the treaty against its current will as long as such a treaty remains in force.

However, drawing such a sharp distinction between original will and subsequent will is problematic.

[307] I.e. any time it had to be used in order to solve a potential conflict.

[308] Unless one took the rather formalistic view that a State is considered to be bound even where international law is interpreted in accordance with its will.

First, the original will does not simply consist, as may appear at first glance, of the will to be bound by a certain document (the treaty), but of the will to be bound by certain rules and principles expressed by means of that document. Therefore, the consent to be bound (the will) entails a (logically) previous interpretation of the treaty provisions: the consent, in fact, is one to be bound by such an interpretation, i.e. by the rules and principles expressed through the treaty.

Second, the meaning attributed by a contracting State (through its representatives) to the treaty provisions, i.e. the interpretation thereof that constitutes a logical prerequisite of that State's consent, is from the ontological perspective a *speaker's meaning*. The latter has been described above in Chapter 2 as the private meaning thought of by the speaker when constructing the utterance, which, as such, cannot be known by anybody except the speaker. Thus, no one can know what a State has actually consented to be bound to except the State itself, i.e. no one except the persons involved in the conclusion of the treaty on behalf of that State.[309] Therefore, speaking of ascertaining the original State's will is, rigorously speaking, epistemological nonsense.

Third, the fact that the content of the State's original will cannot be known by anyone except the State itself gives that State the theoretical chance to hold that its subsequently stated will is nothing other that a restatement of its original will, for nobody can seriously maintain the view that he knows better than the State itself what its original will was. This leads to the potential disappearance of the theoretical clear-cut distinction between original and subsequent State's wills.

Thus, if (i) a treaty binds a State only insofar as the latter consented to be bound and (ii) a treaty so binding continues to bind that State even against its subsequent contrary will as long as it is in force with respect thereto, but (iii) it is not possible to know what a State actually consented to be bound to, then the interpreter may be reasonably seen as locked in a *cul-de-sac*. Either he upholds the position later expressed by the State (or its agents) concerning its original will, thus making the maxim *pacta sunt servanda* substantially void, or he rejects that position as such[310] and construes the treaty in an autonomous way, thus preserving the normativity character of international law but, at the same time, opening the door to two kinds of criticism: first, that his approach may lead the State to be bound by a rule or principle that it never agreed upon and, second, that his position is utopian since his autonomous interpretation of the treaty provisions is based on a subjective understanding of what such a provision requires, under the mask of the intrinsic, ontological, natural, ordinary (and so forth) meaning thereof.

In the current state-of-art, the commonly adopted solution to this paradox, with specific

[309] It is self-evident that such persons could theoretically have different understandings among themselves as to what they exactly bound their State to. In addition, even where they subscribe to a common statement on what was their original interpretation of the treaty provisions (original will), there would be no possibility to ascertain the correspondence between the content of such a statement (which should in turn be interpreted) and the original will as such.

[310] Which does not entail that he cannot then construe that treaty provision in the same way as the State did in the specific case.

regard to treaty law, consists in asserting that the purpose of treaty interpretation is to reveal the common intention of the treaty parties as primarily expressed by the treaty text.[311]

At first sight, this appears an extremely sensible solution: on the one hand, it rejects the decisive relevance *per se* of the unilateral subsequent interpretation put forward by a treaty party and preserves the normative character of treaties[312] by making reference to the tangible result of the parties' negotiations and agreement, i.e. the treaty text; on the other hand, it links, at least from a theoretical perspective, the actual bearing of the treaty to the original intention of the parties by requiring its interpretation to be aimed at elucidating the presumed common initial will, thus attempting to preserve the concrete nature of treaty law.

However, at a closer look, the very same attempt to reconcile the conflicting characters of concreteness and normativity leaves that conflict very much alive at two interconnected levels: (i) at the level of the elements and items of evidence that should be used in order to interpret the treaty and (ii) at the level of the arguments that may be used for supporting the chosen interpretation.

At the first level, the positions expressed by modern scholars on the subject of treaty interpretation range from those of attributing paramount importance to the treaty text and suggesting as far as possible a literal interpretation thereof, in accordance with Vattel's maxim "*it is not permissible to interpret what has no need of interpretation"*,[313] to that of allowing free recourse to all available evidence and factors which could be relevant for ascertaining the meaning intended by the parties to be attached to the treaty terms.[314] Between these two extremes is a rainbow array of positions which seek to balance (all in somewhat different fashions) the relevance of the treaty text with that of

---

[311] See, among many references to such an approach, the Commentary to arts. 27-29 of the 1966 Draft (YBILC 1966-II, pp. 218-226).

[312] It is generally recognized that the normative character of international law requires it to be capable of being impartially and objectively ascertained and applied. In this respect, see O. Schachter, "International Law in Theory and Practice: General Course in Public International Law", 178 *RCADI* (1982), 9 *et seq.*, at 58; L. Ehrlich, "The Development of International Law as a Science", 105 *RCADI* (1962), 177 *et seq.*, at 177; P. Reuter, *Droit International Public* (Paris: Presse Universitaires de France, 1972), pp. 35-36. However, at a closer look, it seems that the concrete character of international law also requires it to be capable of being impartially and objectively ascertained and applied in order to prevent the national and international entities entrusted with the power of interpreting, applying and enforcing international law to use such powers so as to further their own interests in a way not warranted by the original States' will (see, by analogy, M. Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), p. 22).

[313] See E. de Vattel, *Le droit des gens. Ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (London, 1758), Book II, § 263. A somewhat similar position is taken by McNair, according to whom interpretation is just a secondary process that only comes into play where it is not possible to make sense of the "plain terms" of a treaty in their context (see A. D. McNair, *The Law of Treaties* (Oxford; The Clarendon Press,1961), p. 365, note 1).

[314] See American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1965), §146, p. 449; Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 937 (Article 19); M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967).

other evidence of the common intention of the parties.[315] It is not difficult to recognize, in the clash between such different positions, the conflict between concreteness (any evidence or element may be legitimately used in order to ascertain the common intent of the contracting States) and normativity (the treaty text is the result of the agreement of the contracting States and its plain meaning is binding on them as such), although portrayed from a different angle. The issue is particularly evident with regard to the debate concerning the possibility to use the *travaux préparatoires* for the purpose of treaty interpretation and the limits on such use.[316]

At the second level, an analysis of the case law of and the proceedings before international courts and tribunals show a regular swing from ascending arguments, i.e. arguments based on the concreteness of treaty law, to descending arguments, i.e. arguments based on the normativity thereof,[317] and vice-versa, both in the pleadings of the parties and in the decisions of the judges and arbitrators. As Koskenniemi puts it, descending arguments are premised on the assumption that a normative code overrides individual State behavior, will or interest, and works so as to produce conclusions about State obligations from such a code; on the contrary, ascending arguments are premised on the assumption that States' behavior, will and interest are determinant of the law. Under the descending arguments, the normative codes, i.e. rules and principles of law, are effectively constraining; under the ascending arguments, the justifiability of such normative codes is derived from the facts of States' behavior, will and interest. The two

[315] As mere instances of a potential never-ending list, one may recall the position of Schwarzenberger on the ambiguity of words and his consequent rejection of literal interpretations (see G. Schwarzenberger, "Myths and realities of treaty interpretation: articles 27-29 of the Vienna draft convention on the law of treaties", 9 *Virginia Journal of International Law* (1968), 1 *et seq.*), the repudiation of restrictive interpretation and the connected upholding of the principle of effectiveness by Lauterpacht (see H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law* (1949), 48 *et seq.*), the research for a balance apparent in both the 1956 resolution on treaty interpretation issued by the Institute of International Law (see Institute of International Law, 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*) and the principles of treaty interpretation elaborated by Sir Gerald Fitzmaurice (see G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq.*, at 211-212).

[316] See *infra*. As indicative references, see U. Linderfalk, "Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation", 54 *Netherlands International Law Review* (2007), 133 *et seq.*; J. Klabbers, "International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?, 50 *Netherlands International Law Review* (2003), 267 *et seq.*; S. M. Schwebel, "May Preparatory Work be Used to Correct Rather Than Confirm the "Clear" Meaning of a Treaty Provision?", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 541 *et seq.*; M. Ris, "Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention of the Law of Treaties", 14 *Boston College International and Comparative Law Review* (1991), 111 *et seq.*; M. S. McDougal, "The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*", 61 *American Journal of International Law* (1967), 992 *et seq.*

[317] The terms "descending" and "ascending" are derived from Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), in particular pp. 59-60, who in turn takes such terminology from Ullmann (see W. Ullmann, *Law and Politics in the Middle Ages; an introduction into the sources of medieval political ideas* (London: Hodder & Stoughton, 1975), pp. 30-31.

types of argument seem both exhaustive and mutually exclusive. From an ascending perspective, the descending arguments are too subjective and must be consequently rejected, since they fail to demonstrate the content of the normative codes in a reliable manner, unless they make reference to the actual behavior, will and interest of the treaty parties, therefore becoming ascending in nature. From a descending perspective, the ascending arguments are too subjective as well, for they privilege the States' behavior, will and interest over objectively binding normative codes, hence appearing nothing more that an apologia for the States' conduct. The result is a never-ending swinging of the legal arguments between such opposing positions in the quest for an impossible static equilibrium. Each interpretative argument put forward may always be theoretically challenged from both extreme positions (normativity-descending; concreteness-ascending), or at least from the position that is conceptually more distant from the argument itself. Under this perspective, treaty interpretation appears an inherently infinite dynamic process where each construction is rejected, as either not enough normative (descending argument), or not enough concrete (ascending argument), in favor of a conflicting construction, which, in turn, may be rejected on the basis of the opposite arguments.[318]

3.2.3. Articles 31 and 32 VCLT as legal codification of the general principles underlying the quest for the utterance meaning

The above analysis is obviously applicable to the two-pronged rule of interpretation provided for by Articles 31 and 32 VCLT, which represents a specific instance of the common approach of considering treaty interpretation as aimed at elucidating the common intention of the treaty parties as primarily expressed by the treaty text.[319]

It is one of the author's theses (as it will be illustrated in detail in Chapter 3 of Part II) that such articles express, in the context of treaty interpretation, the same principles established by modern linguistics for the purpose of determining the *utterance meaning*.

[318] See, in a similar vein, Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), pp. 59-60.

[319] See the following comment by Arnold: "The obvious difficulty with Art. 31(1) (even as supplemented by the rules in Art. 31(2)-(4)) [VCLT] is that it can support any type of interpretive approach. A literal approach can be justified on the basis of the reference to the text of the treaty in Art. 31(1). There is nothing in Art. 31(1) to prevent a judge or other interpreter of a treaty from arguing or concluding that, if the words of a treaty provision are reasonably clear, they must simply be applied without regard to the context and purpose. A somewhat more nuanced approach would be that the text of the treaty must be the dominant consideration even if it i s not the exclusive consideration – in other words, although the context and purpose of the treaty should be taken into account, they can never override the clear meaning of the text of the treaty. Alternatively, a judge or other interpreter of a treaty can use the reference to the context and purpose in Art. 31(1) to justify a contextual or teleological approach under which the words of the treaty can be stretched, and in some circumstances even ignored, in order to ensure that the treaty is interpreted and applied in accordance with its perceived purpose. In the end, Art. 31(1) does not dictate how much weight must be given to each of the three elements – text, context, and purpose – in any particular case." (B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 6).

However, as already pointed out in Chapter 2 of this part, the quest for the utterance meaning does not lead all interpreters to the same result: what the utterance meaning is for one person may not be the utterance meaning for a different person; even more interestingly, what constitutes the utterance meaning for one interpreter (i.e. an interpretation in good faith of a treaty provision in accordance with the interpretative rule provided for by Articles 31 and 32 VCLT) may differ from what one contracting State affirms to be its own original understanding of that treaty provision and, therefore, from the basis of its original consent to be bound by such a treaty provision.

3.2.3.1. The impact of language vagueness and ambiguity on the establishment of the utterance meaning of a treaty provision

The possibility that two or more persons give different interpretations, as utterance meanings, of a certain treaty provision in a certain overall context depends on the language vagueness and ambiguity, which have been discussed in Chapter 2 of this part. It must be emphasized, in this respect, that the language vagueness and ambiguity having a bearing on the process of construing a treaty provision do not concern solely the text of the very same treaty to be interpreted, but also terms, expressions, and provisions external to the treaty that might be taken into account for the purpose of its interpretation and application. Among the latter, a significant role is played by those terms, expressions, and provisions:

(i) included in agreements relating to the treaty and made between all the parties in connection with the conclusion of the treaty,
(ii) included in the instruments made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as instruments related to the treaty,
(iii) included in subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions,
(iv) included in any document taken as an evidence of or as expressing the subsequent practice of the parties in the application of the treaty,
(v) expressing rules and principles of international law applicable in the relations between the parties and provided for by customary law, other (more or less related) treaties, or maxims on principles of law generally recognized by civilized nations,
(vi) recorded in the courses of the *travaux préparatoires*.

Similarly relevant for treaty interpretation, although different in nature, are those terms and provisions used to express meta-rules, i.e. rules establishing how treaty provisions should be construed for the purpose of determining the rules and principles to be applied to specific legal and factual situations; Articles 31, 32 and 33 VCLT, for instance, contain sentences expressing such meta-rules.

Some terms, expressions and provisions, both internal and external to the treaty to be interpreted, are so ambiguous and vague that in the international setting in which they are used they are capable of being reasonably interpreted in many conflicting ways. This

remark is obvious where terms and expressions such as "sovereignty", "self-defense", "good faith", "law", "unless the context otherwise requires", "reasonable" are at stake. In such cases, no person could seriously counter the claim that those terms and expressions might reasonably[320] denote different things where used in respect of different legal and factual situations and where uttered or interpreted by different people, especially in case the latter have significantly different cultural backgrounds. However, a similar issue may arise where apparently more precise terms such as "dividends", "company", "paid to", "ship", "similar nature"[321] are at stake.

In addition, such terms, expressions and provisions are sometimes construed as to express rules and principles that conflict with each other and, therefore, need to be balanced, thus introducing another element of uncertainty and possible conflicting views. In fact, where principles (and rules) of law are to be balanced against each other, a subjective (political) decision must be taken in order to determine under which conditions a certain principle is to prevail over another (or over an apparently conflicting rule) and vice versa.[322]

3.2.3.2. The impact of the cultural background of the interpreter on the establishment of the utterance meaning of a treaty provision

Moreover, the multiplicity of the utterance meanings of a single treaty provision is enhanced by the impact thereon of the different cultural backgrounds of the interpreters, as more generally outlined in Chapter 2 of this part.

Law in general, and international law in particular, is nowadays viewed as a social phenomenon reflecting the underlying social reality. Different schools of legal thought, even if to different extents, recognize that law is not a pre-existing and immutable set of rules and that its actual content depends on the social environment in which it is applied.[323] Thus, most of them highlight the need for studying the relevant political and social background.

Nonetheless, social reality is not made up solely of the behavior of people (and States' acts by means of such human behavior), which can be studied in an empirical manner, but also and more importantly of people's underlying ideas about (international)

[320] And what does "reasonably" denote? In which context?

[321] Just to use terms and expressions familiar to international tax lawyers.

[322] On the possible distinctions between rules and principles and on the nature of the latter as commands to be "optimized" (i.e. balanced), see R. Dworkin, "The Model of Rules", 35 *University of Chicago Law Review* (1967), 14 *et seq.*; A. Aarnio, "Taking Rules Seriously", 42 *Archives for Philosophy of Law and Social Philosophy – Supplement* (1990), 180 *et seq.*; R. Alexy, "On the Structure of Legal Principles", 13 *Ratio Juris* (2000), 294 *et seq.*; on whether those enshrined in Articles 31 – 33 VCLT should be regarded as rules or principles, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 36-38.

[323] See, for example, the somewhat converging approaches in this respect of the policy-oriented school of McDougal (see H. D. Lasswell and M. S. McDougal, "Trends and Theories about Law: Clarity in Conceptions of Authority and Control", in M. K. Nawaz (ed.), *Essays in International Law in Honour of Krishna Rao* (Leyden: Sijthoff, 1976), 68 *et seq.*) and the neo-natural school (see L. Strauss, *Natural Right and History* (Chicago: The University of Chicago Press, 1953), pp. 120 ff; J. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), pp. 23-55).

society, which in part determine their behavior and influence how people see their own and other people's behavior.[324] The relevance of social ideas for the purpose of perceiving, conceiving and creating social behavior determines that, whenever law is construed taking into account people's social behavior, the consequence is that such a construction of the law is more or less significantly influenced by the social ideas underlying both human behavior and the representation of such behavior that social and historical studies give.

From this perspective, construing the law from a normative text appears to be a more or less conscious political exercise, in the sense that the result of the interpretation is influenced by the socio-political ideas that are widespread in the community where the law is to be applied, as well as those of the persons that have to construe the law. As Unger puts it, and Koskenniemi restates with specific reference to international law, in order for the law to work properly without the need to refer to political ideas external to its own concepts and categorizations, it is necessary that the law itself is based and designed to sustain coherent and widely-accepted ideas inherent in the society that it has to regulate.[325]

However, international law[326] is not characterized by such coherent and widely accepted ideas underlying the international community. Even the existence of an accord, among international lawyers, on the socio-political ideas underlying broadly used terms, such as State "sovereignty", "independence", "equality", appear to be only theoretical: as soon as the question arises as to what such terms (and the related concepts) in fact require in actual situations, the apparent agreement falls apart and conflicting answers are given and vigorously supported. The same holds true, in the field of treaty law, with regard to the ideas underlying terms and expressions such as "good faith" or "pacta sunt servanda". One should take into account that, although *nomina sunt consequentia rerum*,[327] the *consequentia* are potentially different for each different person.[328]

Take the well-known and long-standing debate about the interaction between abuse of law and tax treaties. Scholars fight with one another on (i) whether domestic anti-abuse (or avoidance; is there any inherent difference?) provisions should prevail over tax treaty provisions, (ii) whether tax treaty provisions can be construed in an anti-avoidance fashion, (iii) whether tax treaties contain a unwritten anti-abuse principle, (iv) and so forth. Similarly, different national courts have strongly upheld this or that position, i.e allowing or counteracting manifestly (in their view) abusive tax planning schemes relying on tax treaty provisions. Such conflicting positions have been argued with force and supported by sound arguments. If one analyses this debate seriously, one most probably will draw the conclusion that the different positions are not *per se* right or

[324] In this respect, such ideas constitute the glasses through which people perceive reality.
[325] See R. M. Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986), 5-8; M. Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), pp. 474-475.
[326] And (tax) treaty law in particular.
[327] Justinian, Institutiones, Book II, 7, 3.
[328] And they *are* normally different for culturally diverse communities.

wrong, since they are built on partially contrasting concepts of "good faith" or "pacta sunt servanda", as well as of State "sovereignty" and "equality". Such contrasting concepts are in turn based on the different socio-political ideas (values) of the scholars supporting the relevant doctrines and of the judges delivering the relevant decisions.

Where the socio-political background of a person includes the idea that the abuse of tax law is an absolutely unacceptable behavior, for instance because it encroaches on fundamental values such as taxpayer equality and constitutional obligations such as that of paying taxes in accordance with a person's own ability to pay, that person will probably tend to construe tax treaties as allowing the application of domestic anti-abuse rules or principles, or, in any case, so as to allow the tax authorities to counteract the alleged abusive practices. Such an interpretation will then be supported by "legal" rhetorical arguments based on the interpreter's idiosyncratic concepts of "good faith", "pacta sunt servanda", "State sovereignty" and "State equality". For instance, the interpreter might use the following ascending arguments: the "pacta sunt servanda" principle is based on the contracting States' equality and sovereign consent to be bound by the rules enshrined in the treaty provisions; such rules have been understood in good faith by one of the contracting States as not covering (or precluding their favorable application to) clear-cut abusive practices;[329] such an understanding is reasonable since the purpose of the treaty is to enhance sound economic trade between the contracting States and abusive practices generally entail some kind of lack of economic substance; a different interpretation of the treaty provision would have the unacceptable effect of binding the above-mentioned contracting State more than it consented to be bound, thus encroaching on its sovereignty and infringing the principle of equality between contracting States.[330] In addition, the interpreter might justify its conclusion by means of certain descending arguments. For instance, he could maintain that the principle of "good faith" is fundamental in both the interpretation and the application of tax treaties and that such a principle does not admit that the benefits of a tax treaty are extended to artificial, tax-planning driven schemes; he could recall that both the title and the preamble of the treaty make reference to the purpose of counteracting tax evasion and that the "pacta sunt servanda" principle thus precludes any interpretation leading to disregard of the clear commitment undertaken by the contracting States to neutralize abusive practices;[331] finally, he could argue that counteracting abusive practices is a

[329] Where such abusive practices are counteracted by domestic anti-abuse rules or principles, the interpreter could also support his position by stating that the tax treaty provisions have been understood and consequently agreed upon by the contracting States on the obvious premise that the facts to which such provisions are applied have to be previously selected and "labeled" on the basis of the contracting States's domestic law, of which the domestic anti-abuse rules and principles are a part, since there is no "natural" meaning of terms such as "dividends", "interest", "business profits", "employer" (and so forth) and Article 3(2) of the tax treaty clearly refers to the contracting States's domestic law for the purpose of construing undefined treaty terms. In this respect, he could also rely on paragraphs 22 and 22(1) of the OECD Commentary to Article 1 OECD Model Convention, as evidence of the understanding of the contracting States on such an issue, especially where the contracting States were members of the OECD and did not insert any observation in the OECD Commentary with regard to those paragraphs.

[330] The latter would be the case where the thesis of the non-applicability of domestic anti-abuse law was upheld by the other contracting State.

[331] He could add, ad abundantiam, that the reference to tax evasion (instead of tax avoidance) should not be

political and legal commitment adopted worldwide in all developed jurisdictions and its underlying legal principle must thus be considered to be a commonly recognized principle of law that cannot be disregarded in interpreting an international instrument.

Correspondingly, where the socio-political background of a person includes the idea that tax abuse may be tolerated in certain cases, for instance where there is no express prohibition thereof and, thus, counteracting it would conflict with the principles of legal certainty and protection of legitimate expectations or where, in certain forms, it may guarantee a net benefit to his own State's economy, that person may arrive at the conclusion that, in such cases, tax treaties are to be construed as prohibiting the application of domestic anti-abuse rules and principles, or, in any case, so as to secure the tax treaty benefits to the abusive schemes. This interpretation will be supported by legal rhetorical arguments based on the interpreter's idiosyncratic concepts of "good faith", "pacta sunt servanda", State "sovereignty" and "equality". Therefore, similarly to the previous example, ascending arguments might be used. For instance, the interpreter might put forward that the treaty text does not contain an anti-abuse provision and, therefore, reading the existence of an inherent anti-abuse provision in it would amount to superseding the contracting States's agreement and, thus, sovereignty and equality. In addition, descending arguments could be made as well. For example, the interpreter could maintain that the "pacta sunt servanda" principle requires that tax treaty provisions securing certain tax benefits prevail over the conflicting domestic anti-abuse rules, since if a State were lawfully entitled not to apply the treaty provisions merely because of the existence of a conflicting domestic law provision (even an anti-abuse provision), that State would have as a matter of fact *carte blanche* as to when to comply with the treaty obligations, thus depriving the very same principle "pacta sunt servanda" of any real content.

3.2.4. The double nature of treaty interpretation

So far, each ascending legal argument could be counteracted by a descending one and vice-versa. The point is, however, not only that conflicting positions may be sensibly supported by equally strong legal arguments, but also and foremost that, although such legal arguments are presented by scholars and judges as an elucidation of the reasoning that led them to their chosen interpretation, the unstated socio-political values of the interpreter also play a significant role in the decision-making process. One could thus distinguish, by following by analogy the division between the pairs invention-intuition and demonstration-logic drawn by Poincaré,[332] between the phase of (i) interpreting the treaty provision (i.e. choosing the interpretation) and that of (ii) justifying the interpretation (i.e. supporting it with legal arguments).

---

read literally, especially taking into account the flexible language that characterizes the preamble and the clarification recently inserted in the widely accepted OECD Commentary to the OECD Model , on which the tax treaty is based.

[332] See H. Poincaré (translated by G.B. Halstead), *The Foundations of Science: Science and Hypothesis, The Value of Science, Science and Methods* (Lancaster: The Science Press, 1946), p. 219.

In the first phase, the interpretation is intuitively arrived at through the interaction between the treaty provision and the interpreter's overall context, in which both his socio-political background and his knowledge of legal rules and principles, which are in turn somewhat influenced by his socio-political background, play a relevant role.[333]

In the second phase, socio-political considerations are generally set aside, in order to preserve legal interpretation from the criticism of being nothing more than a sociological exercise. In such a second phase, logical, semantic and legal considerations take the entire scene. At the same time, the "legal" nature of the second phase determines that an interpretation which cannot be reasonably supported by purely legal, semantic and logical arguments will never be accepted by the relevant community as a proper legal interpretation; in this sense, the conventional "legal" nature of treaty interpretation restricts the spectrum of the possible constructions that may arrived at through the first phase of the process.[334]

3.2.5. The existence of trends in the interpretation of treaties

The above analysis, however, does not conflict with the common-sense perception that certain trends exist in the interpretation of treaty provisions. These trends surface where a significant number of interpretations of a certain treaty provision (or similar treaty provisions, as in the case of different treaties concluded along the lines of a common model, such as the OECD Model) are looked at and grouped according to a geographical or temporal perspective.

They represent further evidence supporting the thesis of the significance of socio-political backgrounds in the process of construing tax treaty provisions.

---

[333] It is in this phase that legal dogmatics plays a prominent role in leading the interpreter to a certain (set of) construction(s) of the treaty. It enables the interpreter to have a prejudice on, a pre-cognition of the meaning of the treaty, thus playing a heuristic function in the interpretation process (see similarly E. Russo, *L'interpretazione dei testi normativi comunitari* (Milano: Giuffrè, 2007), pp. 23-25; on the relevance of the prejudice for hermeneutics see, above all, H.-G. Gadamer (originally translated by W. Glen-Doepel and revised by J. Weinsheimer and D. G. Marshall), *Truth and Method* (London: Continuum International Publishing Group, 2004) and, with particular reference to legal hermeneutics, *ibidem* at 320 *et seq*.).

[334] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), pp. 4 and 5, where the author assesses as inadequate both the "radical legal skepticism" theory of treaty interpretation, according to which "legal norms capable of constraining political judgment [in the interpretation of treaties] simply do no not exist", and the "one-right-answer" theory of treaty interpretation, according to which "an applier can interpret a treaty by applying a number of legal rules and be perfectly certain of always arriving at a determinate result in a completely value-free way [without] room for political judgment", none of which "can be taken as a sound description of the prevailing legal state of affairs". The author maintains that "legal rules [of interpretation] capable of constraining political judgment certainly do exist [but they] are far from the self-sufficing regime suggested by the one-right-answer thesis. The rules of interpretation provide a framework for the interpretation process; but within this framework, appliers are often left with what could be called a certain freedom of action. […] Typically, whether a certain understanding of a treaty will be perceived as correct or not is a matter partly of whether the understanding can be shown to conform to the standards laid down in international law, partly of whether it can be shown to be legitimate [*this author's note*: *i.e.* politically correct]".

A good example of what has just been said may be drawn from the reports submitted to the International Fiscal Association with regard to the topic "Tax treaties and tax avoidance: application of anti-avoidance provisions", published in the 2010 *Cahiers de droit fiscal international,*[335] which substantially discuss the same topic that has been previously analysed by the author for exemplification purposes. In the Summary and conclusion section of his General Report, van Weeghel points out the following:

(i) it seems that in many countries the application of general anti-avoidance rules can be reconciled with tax treaty obligations; in particular, it is remarked that the statements in paragraph 22(1) of the commentary on Article 1 of the OECD Model Convention, according to which the domestic substance over form, economic substance and general anti-abuse principles are part of the basic domestic law for determining which facts give rise to a tax liability, seem to be endorsed in the branch reports for countries that have relevant experience;[336] however, the General Report recognizes that significant exceptions exist in that respect, such as those put forward in the Netherlands, Luxembourg, Indian and Portuguese reports;[337]

(ii) it appears more difficult to reconcile specific domestic anti-avoidance provisions with tax treaty obligations; moreover, even in the same jurisdiction, conflicting conclusions have been reached with regard to different specific anti-avoidance provisions;[338] with specific reference to exit tax provisions, although States generally have been able to preserve the application thereof, because the taxable event (the deemed disposition of assets) takes place just prior to the transfer of residence to the other contracting State, in cases where the balanced allocation of taxing rights attained through the treaty is altered in substance after the transfer of residence, the principle of good faith does prevent the materialization of the exit charge;[339]

(iii) with regard to the issue whether abuse of tax treaties should be regarded as an abuse of domestic law or as an abuse of the tax treaty itself, the responses given by the branch reporters vary considerably; however, in practice this does not seem to lead to different outcomes as a result of the different approaches;[340]

---

[335] International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010).

[336] See S. van Weeghel, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010), 17 *et seq*., at 19.

[337] See S. van Weeghel, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010), 17 *et seq*., at 26-28.

[338] See the examples he gives concerning CFC and thin capitalization provisions. (see S. van Weeghel, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010), 17 *et seq.*, at 19).

[339] See S. van Weeghel, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010), 17 *et seq.*, at 29.

[340] See S. van Weeghel, "General Report", in International Fiscal Association, *Cahiers de droit fiscal*

(iv) finally, with reference to treaty shopping cases, the branch reports show an array of different outcomes: very comparable facts have resulted in opposite judgments in treaty shopping cases; in addition, even with appreciation for the factual elements, it is clear that the approach to treaty interpretation in different countries is very different, varying from *pacta sunt servanda* in the Netherlands and India, to a denial of treaty benefits based on the lack of economic substance and the presence of a tax avoidance motive in China, Switzerland and Israel.[341]

3.3. Conclusions

Turning back to the purpose of the present study, the author believes that the brief analysis above has uncovered what all international tax lawyers have in front of their eyes every day, but probably too close and too big to be clearly noticed.[342]

Tax treaty provisions are often so ambiguous and vague that, even taking into account their overall context, more than one interpretation thereof may reasonably be put forward.

Furthermore, the choice of the interpretation is significantly influenced by the socio-political values of the persons called upon to construe the tax treaty provisions, although such preferences and their impact on the interpretative result is usually not made overt, but veiled by the dynamic of the ascending and descending legal arguments used to justify the choice.

The preliminary conclusion that the author draws from this analysis is that linguistic aspects, although being relevant for interpretative purposes since they (i) restrict the array of interpretations that may be reasonably considered viable, (ii) provide the interpreter with certain elements to be used in order to justify its interpretative choice and (iii) are part of the overall context that influences such a choice, are not *per se* determinative of the interpretation in the vast majority of cases. Linguistic analysis, and a semantic one in particular, is just an important tool at the disposal of the interpreter.

The present study is built up on the above reflection.

On the one hand, this study does not endeavor to put forward any best solution for

---

international, Vol. 95a (The Hague: Sdu Uitgevers, 2010), 17 *et seq.*, at 35.

[341] See S. van Weeghel, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010), 17 *et seq.*, at 35-42, in particular at 38 and 39 (where there is a detailed description of the significant opposite conclusions reached, with regard to similarly patterned facts, in the Swiss case *A Holding ApS* (Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR,* 536 *et seq.*) and in the Indian case *Azadi Bachao Andolan* (Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq.*) and 41.

[342] Hence, the author would suggest to those scholars studying and writing on the subject of tax treaty interpretation: "don't think, but look!" (L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 27, para. 66).

multilingual tax treaty interpretative issues, since the choice between the various possible solutions is not directed by only semantic and legal considerations, but also by socio-political discretionary choices. The opposite approach would, therefore, lead the author outside the boundaries of his research into the realm of socio-political studies.

On the other hand, this study is committed to designing the formal legal and logical structure within which the interpreter of multilingual tax treaties may move in order to choose and reasonably justify his interpretations. That formal structure is made up of the rules and principles to be complied with by the interpreter in justifying the chosen interpretation by means of legal and logical arguments.[343] These rules and principles hence constitute (or should constitute) part of the encyclopedic knowledge of the interpreter and, as such, are also part of the elements of the overall context that direct the interpreter in choosing a certain construction of the tax treaty provisions.

This is the normative legal theory that the author is committed to establishing through the present work.

From the standpoint of the sources, the rules and principles constituting the formal structure sketched in the present study are primarily derived from:

(i) the principles of logic generally used in the linguistic field and in legal rhetoric and argumentation;

(ii) the semantics-based principles of treaty interpretation established by the author in sections 1 and 2.

Chapters 3 and 4 of Part II will endeavor to demonstrate, by means of a positive analysis of the history, case law, scholarly writings and States' practice concerning Articles 31-33 VCLT, that the principles of interpretation generally derived from such articles may be regarded as not appreciably departing from the principles of treaty interpretation established by the author in sections 1 and 2 and may, therefore, be referred to in order to give more concreteness and precision to the latter principles.

Similarly, the positive analysis carried out in Chapter 5 of Part II with regard to Article 3(2) OECD Model will attempt to show that the generally accepted interpretations of that article do not conflict with the principles of treaty interpretation established by the author in sections 1 and 2, which implies that Article 3(2) OECD Model may be construed in harmony with those principles for the purpose of designing the formal legal and logical structure within which the interpreter of multilingual tax treaties may move in order to choose and reasonably justify his interpretations.

From the standpoint of the content, those rules and principles deal with:

(i) the elements and items of evidence that may (and should) be taken into account for the purpose of tax treaty interpretation;

(ii) the interrelation between such elements and items of evidence (in particular between equally authentic treaty texts) and

[343] See the closing remark in B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 15, which reads: "In the end, however, all arguments about methods or rules of interpretation are rhetorical (in the classical sense) devices that can be used to impress and persuade others about the meaning of language."

(iii) how and to what extent such elements and items of evidence may be used in order to interpret multilingual tax treaties.

In this respect, Articles 31-33 VCLT and Article 3(2) OECD Model, when construed in light of the generally accepted principles of logic and the semantics-based principles of treaty interpretation established in sections 1 and 2, provide the author with suitable rules and principles to deal with those three matters. Yet, as the analysis performed in the following parts will show, such rules and principles are often vague enough to allow different interpretative results when applied to concrete cases.

Someone may say that the result of the present study is itself so vague that it is practically useless and the author could better have spent his time differently. To this criticism the author will reply that "[i]t is the business of philosophy, not to resolve a contradiction by means of a […] discovery, but to make it possible for us to get a clear view of the state of [affairs] that troubles us: the state of affairs before the contradiction is resolved".[344]

[344] L. Wittgenstein (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 42, para. 125.

PART II

POSITIVE ANALYSIS AND ITS INTERACTION WITH NORMATIVE ANALYSIS: A NORMATIVE LEGAL THEORY ON THE INTERPRETATION OF MULTILINGUAL TAX TREATIES

CHAPTER 1 - LINGUISTIC PRACTICES IN INTERNATIONAL AFFAIRS

1. In general

For a long time, diplomatic relations among Western countries (including their overseas possessions) had been carried on in an international *lingua franca*, that being originally Latin, from the Roman Republic through the Holy Roman Empire up to the XXVI – XVII century, then followed by Castilian Spanish from the XVI century and French from the XVIII century.[345]

However, as Ostrower points out,[346] the identification of diplomatic language with French and Latin is Eurocentric and omits the entire effort of political relations in the original cradles of civilization in Africa, Asia and Asia Minor.[347] In fact, languages such as Greek, Chinese, Akkadian, Aramaic, Persian, Arabic and Sumerian served as recognized diplomatic languages, for a certain period, in the areas of influence of their respective nations.[348]

Ostrower also recognizes that both European and non-European diplomatic languages have gone through similar paths, characterized by slow rise and (often) abrupt falls, as have the national civilizations that spread them out.[349] His impressive study highlights that struggle for linguistic domination has persisted uninterruptedly in international relations and that national languages are constantly maneuvering for recognition and supremacy; such a struggle is against the back-drop of the political, cultural and social agitation that result from the clash of national groups and their interests.[350]

---

[345] See J. B. Scott, Le Français, Langue Diplomatique Moderne: étude critique de conciliation internationale (Paris: Pédone 1924); H. Wheaton, Elements of International Law: with a sketch of the history of the science (Oxford: Clarendon Press, 1936), p. 197; H. Bonfils, Manuel de droit international public (droit de gens) (Paris: Fauchille, 1914), p. 555; and more extensively, A. Ostrower, Language, Law, and Diplomacy – Volume One (Philadelphia: University of Pennsylvania Press, 1965), pp. 27-30.

[346] A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), p. 30.

[347] As well as in America and Oceania, in relation to which the sources at our disposal are scarcer.

[348] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 4; D. Shelton, "Reconcilable Differences? The Interpretation of Multilingual Treaties", 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at. 613; A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Phioladelphia: University of Pennsylvania Press, 1965), ch. VIII.

[349] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), pp. 58-59, referring to the theory of the languages internecine wars, which would take place at an advanced stage of the process of civilizations disintegration, developed in A. J. Toynbee, *A Study of History – Vol. V: The Disintegrations of Civilizations* (Oxford: Oxford University Press, 1939).

[350] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), pp. 59-60.

The quest for mutually intelligible languages that could enhance diplomatic relations among nations has thus led in the course of human history a few languages, among the multitude available, to succeed as common vehicles of understanding. It has been noted that their success has often depended upon highly complex social, cultural, military, economic and political factors, among which the most important are (i) the numerical superiority of the group using that language, (ii) the military conquests and political power of such a group, (iii) the flexibility and richness of that language's grammar and semantics, (iv) the limited difficulties connected to learning it and (v) the wealth and prominence in commerce of the group using that language.[351]

At the end of the XIX century, diplomatic activities and relations were widely carried out in either French or English. For instance, at the 1919 Paris Peace Conference both languages were given the status of official languages; the Treaty of Versailles, which incorporated the Covenant of the League of Nations, was concluded in the French and English authentic texts; the Permanent Court of Arbitration set up in 1899 used to employ both French and English as its working languages; and both in the League of Nations Assembly and in the PCIJ, only those two languages were given an official status.[352]

This trend of subsequent dominant, at least regionally, languages in the international relations seemed, however, to have taken a pause in the mid XX century. Present international diplomacy does not appear to be dominated by a *lingua franca*; on the contrary, multilingualism seems to take control in international organizations, multilateral conferences and also in bilateral negotiations. Such a new scenario appears to be the result of the interaction of multiple factors, such as the possibility of multiple-language simultaneous translations, modern education (which is more oriented to the learning of foreign languages) and new communication technologies. The United Nations Conference initiated the modern era in the conduct of diplomatic affairs, with French, English, Chinese, Russian and Spanish serving as its official languages.[353] From that moment on, the UN General Assembly has always used these as its official languages, to which Arabic was added at the end of 1973.[354] Similarly, in the last 60 years, many other international organizations and conferences have adopted three or more languages as their official means of communication.[355]

---

[351] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), pp. 75-80; see also the examples (and exceptions) he reported in Chapter XXII of Volume One; J. B. Scott, *Le Français, Langue Diplomatique Moderne: étude critique de conciliation internationale* (Paris: Pédone 1924), p. 129.

[352] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 4-5 and notes 8-12 at pp. 48-49; D. Shelton, "Reconcilable Differences? The Interpretation of Multilingual Treaties", 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at 614 and footnotes therein.

[353] See United Nations, *Documents of the United Nations Conference on International Organization*, held from 25 April to 26 June 1945 in San Francisco, vol. 1, pp. 165-166; vol. 2, pp. 589-590; vol. 3, pp. 223 *et seq.*; vol. 5, pp. 17-19, 50-52; vol. 8, p. 191; vol. 12, pp. 65-67; vol. 13, pp. 651-653.

[354] See UN General Assembly's resolutions 3190 (XXVIII) and 3191 (XXVIII) of 18 December 1973.

[355] For a detailed analysis of the current linguistic practice in most international organizations and their organs, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 7-31; with reference to the current linguistic practice in multilateral conferences

In their extensive studies on the use of languages in international relations, both Ostrower and Tabory point out the pros and cons of such a recent trend towards multilingualism.

The use of variety of languages and the abandonment of a single dominant idiom in both organized diplomacy and bilateral relations has better fulfilled the doctrine of the equality of States;[356] in this respect, especially at the level of international organizations, multilingualism has been regarded as a major step towards the recognition of the equal status of groups of nations using a particular idiom, and thus capable of unhinging the previous linguistic practice, which was generally regarded as one of the means through which super-powers (or former powers) sought to dominate international diplomacy.[357]

In addition, it has been pointed out that it may be preferable for States' diplomatic agents to speak in a language with which they are familiar, rather than risking incorrectly expressing their arguments and ideas in a foreign official language, with the consequent hazard of causing misunderstandings.[358]

Such advantages, however, are counterbalanced by problems caused by linguistic multiplicity, in particular the heavy administrative and financial burdens associated with multilingualism, including those connected to the huge and expensive bureaucracy and translation machinery.[359]

2. Treaties

2.1. In general

As for the use of diplomatic language in general, the conclusion of treaties has witnessed the increasing use of multiple languages since the end of the Second World War. In this respect, the ILC noted that the "phenomenon of treaties drawn up in two or more

---

convened to draw up treaties, see *ibidem*, pp. 31-36.

[356] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Phioladelphia: University of Pennsylvania Press, 1965), pp. 127, 403, 414 *et seq*.; *Volume Two*, pp. 731-732.

[357] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 144.

[358] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 145, referring to C. Boothe Luce, "The Ambassadorial Issue: Professionals or Amateurs?", 36 *Foreign Affairs* (1957), 105 *et seq.*, at 109-110.

[359] According to the interview given by (then) EU Commissioner Leonard Orban to EurActiv and published on-line on 13 November 2008 (available at: http://www.euractiv.com/en/culture/orban-multilingualism-cost-democracy-eu/article-177107), the "amount of money spent by the European Union's institutions on translation and interpretation represents approximately €1.1 billion per year, which represents one percent of the EU budget". On the issue of the cost of multilingualism in diplomatic relations, see, among many others, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 146, note 195 at p. 157 and note 319 at p. 166; with specific reference to the European Union, see H. Haarman, "Language Politics and the New European Identity", in F. Coulmas (ed.), *A Language Policy for the European Community: Prospects and Quandaries* (Berlin: Mouton de Gruyter, 1991), 103 *et seq.*, in particular at 114.

languages has become extremely common and, with the advent of the United Nations, general multilateral treaties drawn up, or finally expressed, in five different languages have become quite numerous".[360]

Multilateral treaties are generally authenticated in all the official languages of the international organization under whose auspices the relevant conference is held, or, in any case, sponsoring the treaty conclusion.[361] This holds true with regard to both the United Nations[362] and regional organizations, such as the Council of Europe[363] and the Organization of American States.[364] It is also interesting that certain treaties creating international organizations have been authenticated in the official languages of all member States of the organization itself.[365]

Where international organizations are not involved in the treaty conclusion or conference organization,[366] the tendency is to authenticate treaties in all official languages of the contracting States;[367] however, where the official languages of the contracting States are numerous, it is customary that the parties agree to authenticate the treaty solely in one or a few of the internationally known languages, such as, English, French, or Spanish.[368]

The conclusion of treaties authenticated in multiple languages indubitably presents certain advantages.

For example, scholars have argued that, where multiple languages are used at the drafting stage, the process of treaty negotiation may clarify and bring to the surface

[360] See YBILC 1966- II, p. 224, para. 1.
[361] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 355; M. Tabory, Multilingualism In International Law and Institutions (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 37-38.
[362] Which does have six official languages: English, French, Arabic, Chinese, Russian and Spanish (see 2003 UN Final Clauses of Multilateral Treaties Handbook, p. 77, letter M).
[363] Which does have two official languages: English and French (see Article 12 of the Statute of the Council of Europe, done in London on 5 May 1949).
[364] The Charter of the Organization of American States has four authentic texts: English French, Spanish and Portuguese (see Article 139 of the Charter of the Organization of American States, concluded in Bogotá on 30 April 1948, as last modified by the "Protocol of Managua", adopted on 10 June 1993, at the Nineteenth Special Session of the Organization General Assembly). These are also the official languages of most of its organs (see, for instance, Article 64 of the Inter-American Juridical Committee).
[365] The clearest example is represented by the Treaty on European Union and the Treaty on the Functioning of the European Union (see Article 55 of the Consolidated Version of the Treaty on European Union (2010/C 83/01) and Article 358 of the Consolidated Version of the Treaty on the Functioning of the European Union (2010/C 83/01)).
[366] See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 37 *et seq*.; an example thereof, in the tax field, is the Nordic Tax Convention (Convention between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, concluded in Helsinki on 23 September 1996), which has been authenticated in all official languages of the six contracting States, i.e. Danish, Faroese, Finnish, Icelandic, Norwegian, and Swedish.
[367] With the possible addition of an authentic text in an internationally well-known language.
[368] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 355.

possible problems of formulation, which otherwise could later lead to interpretative issues. Rosenne, for instance, pointed out that "the process of trilingual drafting (as opposed to mere translation) frequently brought to light questions of substance, sometime quite unsuspected, requiring further elucidation."[369] This, however, does not hold true when the drafting is carried out exclusively in one language and the other authentic texts, added subsequently, are just mere translations of the negotiated one.

Another advantage derives from the possibility for the contracting States' public bodies to apply domestically the treaty without the need for ad hoc (internationally non-authoritative) translations, where the treaty has been authenticated in one of the official languages of the relevant contracting State. The advantage, in this case, is two-fold: on the one hand, it avoids the risk that different bodies use different ad hoc translations; on the other hand, it may reduce future interpretative issues and misunderstanding regarding the intension of certain treaty terms and expressions, by means of bringing forward the analysis thereof at the drafting stage.[370]

However, as already pointed out, such advantages are counterbalanced by significant disadvantages.

Apart from the general issue of the financial and administrative burdens connected to multilingualism,[371] certain drawbacks exist that are specific for multilingual treaties.

First, in the course of negotiation, the feasibility of simultaneous drafting seems to be limited to three or four languages. The use of a higher number of authentic language texts might cause substantial effort to be devoted to the concordance between the various texts, rather than to the substance thereof. Similarly, the probability of confusion, errors and *prima facie* discrepancies may be regarded as proportional to the number of authentic texts.[372]

Second, this has a significant effect on treaty interpretation. As the International Law Commission of the United Nations pointed out, "[f]ew plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete consensus ad idem, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts. In that event the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty".[373]

Finally, small or poor States generally do not have adequate staff, with regard to the number of their components and their overall linguistic capabilities, to check all the authentic texts of the treaties to which they are part, both before signing and ratifying

[369] See Rosenne, *The Law of Treaties – A Guide to the legislative history of the Vienna Convention* (New York: Oceana Publications, 1970), p. 36.
[370] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 145-146.
[371] See section 1 of this chapter.
[372] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 146.
[373] See YBILC 1966- II, p. 225, para. 6.

them and at the subsequent stage of their application and interpretation.[374] This obviously creates an unwarranted advantage for bigger and richer States.

2.2. Bilateral treaties in particular

When concluding bilateral treaties, contracting States tend to authenticate them in all their official languages and, often, in a "neutral" internationally well-known language (usually either English or French) as well.[375]

Since most States have just one official language and not many States use the same official languages, the actual situation is that the majority of bilateral treaties are authenticated in two or three languages.

A study published by Gamble and Ku in 1993,[376] based on the nearly 12,500 bilateral treaties signed between 1920 and 1970 and contained either in the League of Nations Treaty Series or in the United Nations Treaty Series, shows that (i) about 55% of the treaties concluded between 1920 and 1942 have been authenticated solely in the official languages of both contracting States, while (ii) with regard to the treaties concluded between 1945 and 1970, such a ratio has increased to about 87%.[377]

That study also provides two additional interesting features. First,[378] in cases where the treaties have been authenticated solely in the official languages of both contracting States, the majority of treaties have two authentic texts; in contrast, in cases where the treaties have not been authenticated solely in the official languages of the contracting States, the vast majority of treaties (about 95%) have just one authentic text.[379] Second, while the average number of authentic texts for the treaties concluded between 1920 and 1942 is about 1.6, the average number for the treaties concluded between 1945 and 1970 is nearly 2.0,[380] which seems to confirm the above-illustrated

[374] M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 146.
[375] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 355. With regard to tax treaties, it is interesting to note that, in recent years, a few States started to conclude their treaties in one authentic language only, generally English or French (see in that respect G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxi).
[376] J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*
[377] See J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 242.
[378] See J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 243.
[379] Such a single authentic text is in the French language in nearly 60% of the cases and in the English language in nearly 30% of the cases; however, the study shows an inversion in the tendency to choose the language for the single authentic text: in fact, while in the '20, '30 and '40 of the last century French overwhelmed English, the '50 and '60 are characterized by an inverse trend (seeJ. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 243-245).
[380] See J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State

trend toward abandoning the use of a *lingua franca* and toward restating the equal status and sovereignty of the contracting States through the use of their own official languages for treaty purposes.

It is necessary to stress, however, that the study of Gamble and Ku does not provide the author with any data on the treaties concluded in the last 40 years, a period long enough to indicate significant reversals of linguistic trends in bilateral treaty practice.

In 2005, Maisto published a study on the impact of multilingualism on the interpretation of tax treaties and (then) European Community law.[381] In that study, country reporters from Austria, Belgium, France, Germany, Italy, the Netherlands and Switzerland listed the tax treaties (in force) concluded by their respective countries, including information concerning the authentic texts thereof. The analysis of such lists sheds some light on the linguistic practice followed by (a few) OECD member States when concluding their tax treaties. Although the sample, amounting to 512 treaties, covers just about one sixth of the total tax treaties currently in force worldwide, which may be estimated as approximately 3,000 units,[382] and does not include any treaties concluded between developing countries, which might present different linguistic features due to the widespread diffusion of the French, Spanish and Portuguese languages in certain areas caused by historic political reasons, this study highlights some interesting trends.

Of the tax treaties listed, about 17% have been authenticated in one language only, 39% in two languages, 39% in three languages and 5% in four or more languages.[383] Moreover, 189 treaties provide that a specific authentic text is to prevail in the case of (apparent) conflicts; this means that, of the 424 tax treaties authenticated in two or more languages, about 45% provide for a prevailing language in cases of (apparent) divergences among the texts and 55% do not.

About 55% of the sample tax treaties have been authenticated only in the official languages of the two contracting States. Of these treaties, the overwhelming majority do not provide for any prevailing language.[384] Moreover, 14% thereof have been

---

Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 263.

[381] G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD Publications, 2005).

[382] According to Eassen, citing the *Worldwide Investment Report 1998: Trends and Determinants* (UNCTAD, 1998), at the end of the the XX century the number of tax treaties in force was approaching 2,000 (see A. Easson, "Do We Sill Need Tax Treaties?", 54 *Bulletin for international taxation* (2000), 619 *et seq.*, at 619). According to Arnold, Sasseville and Zolt, this number exceeded 2,500 at the beginning of the XXI century (see B. Arnold, J. Sasseville and E. Zolt, "Summary of the Proceedings of an Invitational Seminar on Tax Treaties in the 21st Century", 56 *Bulletin for international taxation* (2002), 233 *et seq.*, at 233; see similarly P. Egger et al., "The Impact of Endogenous Tax Treaties on Foreign Direct Investment: Theory and Evidence", 39 *Canadian Journal of Economics* (2006), 901 *et seq.*, at 902). A query made by the author on the IBFD Tax Treaty Database (accessed on 24 June 2011) shows the number of income and capital tax treaties currently in force to equal 4,419; this figure, however, significantly exceeds the actual number of tax treaties currently in force worldwide due to the fact that each authentic text and unofficial English translation of these tax treaties is included in the database as an autonomous item.

[383] Only the 1998 Belgium-Kazakhstan tax treaty has been authenticated in five languages, namely the French, Dutch, English Russian and Kazakhstan ones, English prevailing in the case of conflict.

[384] Exceptions are, for instance, the 1999 Austria-India tax treaty, where the German, English and Hindi texts

authenticated in one language only,[385] 14% in three languages and 71% in two languages; only three treaties have been authenticated in four languages.

Among the other 45% of the tax treaties listed, i.e. those authenticated (also) in a language that is not an official language of any contracting State, approximately 22% have been authenticated only in a "neutral" language, 68% in three languages and 10% in four or more languages; none has been authenticated in two languages. Those authenticated in three or more languages generally provide for the text drafted in the "neutral" language to prevail in the case of (apparent) divergences among the texts.[386]

---

are all equally authentic, but, "[i]n the case of a divergence among the texts, the English text shall be the operative one"; the 1973 Germany-South Africa tax treaty, where the English, Afrikaans and German texts are all equally authentic, "except in the case of doubt when the English text shall prevail"; the 1968 Belgium-Greece tax treaty, where the Dutch, French and Greek texts are all equally authentic, but, "[i]n the event of divergence between the texts, the French text shall be decisive" (the same holds true with regard to the 2004 Belgium-Greece tax treaty, which entered into force in 2006).

[385] The majority of these tax treaties have been authenticated in a language that is official in both contracting States, such as (i) German in the 2000 Austria-German tax treaty, the 1969 Austria-Lichtenstein tax treaty, 1962 Austria-Luxembourg tax treaty, the 1974 Austria-Switzerland tax treaty, or the 1971 Germany-Switzerland tax treaty; (ii) French in the 1964 Belgium-France tax treaty (although De Boek (see R. De Boek, "Belgium", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 172 and 196) affirms that the 1964 Belgium-France tax treaty has been authenticated in both the French and the Dutch language, from the text of the treaty as resulting from Volume 557 of the United Nations Treaty Series and the United Nations on-line registry (Url: http://treaties.un.org/pages/showDetails.aspx?objid=080000028012bf50) it appears that the treaty has been concluded in the French language only; see accordingly C. Legros, "France", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 199 *et seq.*, at 217), the 1975 Benin-France tax treaty, the 1965 Burkina Faso-France tax treaty, the 1987 Congo (Republic of)-France tax treaty, the 1966 France-Gabon tax treaty and the 1966 France-Switzerland tax treaty; (iii) Italian in the 1976 Italy-Switzerland tax treaty; (iv) Dutch in the 1975 Netherlands-Suriname tax treaty.

[386] That is the case in about the 34% of the total sample, i.e. the 85% of the relevant sub-category. This figure might be taken as evidence of the willingness of the contracting States to prevent errors occurring in the translation from the originally agreed-upon text (i.e. the one drafted in the "neutral" language by the treaty negotiators) into the texts drafted in the contracting States official languages could negatively affect the interpretation and thus the application of the tax treaty.

It is interesting to note that, according to the final clauses of a few tax treaties, the texts drafted in the official languages of the two contracting States are equally authentic and, in the case of any divergence between such texts, the "neutral" text is to prevail. For instance, the final clause of the 1970 Japan-Netherlands tax treaty states the following: "Done at The Hague, on March 3, 1970 in six originals, two each in the Netherlands, Japanese and English languages. The Netherlands and Japanese texts are equally authentic and, in case there is any divergence of interpretation between the Japanese and Netherlands texts, the English text shall prevail". Where the final clause is drafted along such an unusual pattern, the question may arise as to whether the interpreter is entitled to consult and base his construction (also) on the English text before an (apparent) divergence between the Japanese and the Dutch authentic texts is detected and noted. According to Lang, this question should be answered in the negative (see M. Lang, "The Interpretation of Tax Treaties and Authentic Languages", in G. Maisto, A. Nikolakakis and J. M. Ulmer (*eds.*), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq*, at 16; see also M. Lang, "Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen", 20 *Internationales Steuerrecht* (2011), 403 *et seq*.). The author, however, notes that Lang's conclusion, although supported by the syntax of the final clause in the English authentic text (which, ironically, according to that reading of the final clause itself cannot be relied upon before a potential divergence between the other two authentic texts has been mentioned), does appear in conflict with the reasonable object and purpose of providing for a prevailing text, the latter being to avoid that the translation of the "neutral" text, originally agreed upon by the contracting States representatives (in *primis* the treaty negotiators), into the other authentic texts, drafted in the official

The "neutral" language commonly employed is English, French being used only in 14 treaties.

One may thus conclude that contracting States are quite firm in not conceding any linguistic advantage to the respective treaty partners and to preserve State equality in this field. About 89% of the listed treaties have their authentic texts drafted in the official languages of both contracting States (at least one official language for each State), while about 10% are authenticated only in a "neutral language": this means that in only 1% of the sample treaties one party has conceded a linguistic advantage to the other contracting State, by authenticating the tax treaty only in the official language of the latter; that appears to be the case only where the former State is a developed country, while the other is (or was) a developing one.[387] Furthermore, in very few cases the listed tax treaties provide that the official language of one or both contracting States (i.e. not a "neutral language") is to prevail in the case of (apparent) conflict: over 12 cases (just 2% of the total sample), in eight the prevailing text is drafted in English, which is also the official language of the economically weaker[388] contracting State;[389] in four the prevailing text is drafted in French.[390]

Finally, the comparison between the tax treaty lists included in the study published by Maisto and the statistics reported by Gamble and Ku confirms the trend of contracting

---

languages of the two contracting States by the relevant departments of the respective Ministries of Foreign Affairs (or Ministries of Finance), could inadvertently lead to a perceived change in the meaning of the treaty provisions. If that is the object and purpose of the final clause, it would seem reasonable to conclude that the interpreter is always allowed to consult the "neutral" text and to compare it with the authentic text drafted in the language of his own State in order to construe the treaty in accordance with, as far as possible, the intended meaning agreed upon by the parties. This inference is particularly strong in cases where, such as with regard to the 1970 Japan-Netherlands tax treaty, it is reasonable to suspect that the persons called upon to apply the tax treaty (taxpayers, tax authorities, tax judges) are not familiar with the official language(s) of the other contracting State, in which the other authentic text is drafted: in these cases, in fact, allowing the recourse to the "neutral" text only after a potential divergence between the other texts is detected would substantially amount to rendering the provision of a prevailing text substantially inoperative, *contra* the maxim *ut res magis valeat quam pereat*.

[387] E.g. the 1974 Belgium-Malta tax treaty, the 1989 Belgium-Nigeria tax treaty, the1991 Netherlands-Nigeria tax treaty, the 1989 Netherlands-Philippines tax treaty and the 1989 Netherlands-Zimbabwe tax treaty, all authenticated only in the English language.

[388] At the time of the tax treaty conclusion.

[389] See the 1999 Austria-India tax treaty, authenticated in the German, Hindi and English languages; the 1993 Belgium-India tax treaty, authenticated in the Dutch, French, Hindi and English languages; the 1995 Germany-India tax treaty, authenticated in the German, Hindi and English languages; the 1973 Germany-South Africa tax treaty, authenticated in the German, Africaans and English languages; the 1993 India-Italy tax treaty, authenticated in the Italian, Hindi and English languages; the 1988 India-Netherlands tax treaty, authenticated in the Dutch, Hindi and English languages; the 1994 India-Switzerland tax treaty, authenticated in the German, Hindi and English languages; the 1998 Philippines-Switzerland tax treaty, authenticated in the German and English languages.

[390] See the 1968 Belgium-Greece tax treaty, authenticated in the Dutch, French and Greek languages; the 1982 Belgium-Hungary tax treaty, authenticated in the Dutch, French and Hungarian languages; the 1996 Belgium-Romania tax treaty, authenticated in the Dutch, French and Romanian languages; the 1975 Belgium-Tunisia tax treaty, authenticated in the Dutch, French and Arabic languages (it should be noted, however, that the French language, although not possessing an official status under Tunisian law is widely used within the country).

States concluding bilateral treaties solely in their official languages. However, with regard to treaties concluded not only in the contracting States' official languages, while the statistics provided by Gamble and Ku show that the majority thereof has (or had) only one authentic text, generally drafted in a "neutral" language, according to the lists reported in the study published by Maisto the majority of such treaties do have three or more authentic texts, one drafted in a "neutral" language and the remainder in the official languages of the two contracting States. These general trends are symptomatic of the willingness of the contracting States, on the one hand, to reaffirm their sovereignty and internationally equal status from a linguistic standpoint as well and, on the other hand, which seems distinctive of tax treaties, to guarantee that the authentic treaty texts are generally also available in their own official languages, in order to facilitate the treaties' interpretation and application by the taxpayers, the tax authorities and the competent tax courts, who might not be familiar with other languages, not even French or English, but are generally very familiar with the technical language of domestic tax law.

CHAPTER 2 – INTRODUCTION TO THE VIENNA CONVENTION ON THE LAW OF TREATIES

1. Brief historical background of the Vienna Convention on the Law of Treaties and the International Law Commission[391]

The idea of developing international law through its codification by means of both the restatement of existing rules and the formulation of new rules dates back the end of the eighteenth century. In one of his masterpieces, *Principles of International Law*[392] (on which he mainly worked between 1786 and 1789), Bentham envisaged the possibility of drafting an international law code, based on the application of his principle of utility to the relations between nations. However, in planning the structure and content of such a code, he made little reference to the existing law of nations, so that the project resembled more an integrated collection of new rules than a codification and systematization of existing customary international law.

From that moment on, the trend towards the codification of international law has been constantly growing, especially due to the initiative of private institutions such as the Institut de Droit International, the International Law Association and the Harvard Research in International Law.[393] Intergovernmental efforts to promote codification and development of international law date back to the beginning of the nineteenth century and, more specifically, to the Congress of Vienna (1814-1815), where legal provisions relating, *inter alia*, to the abolition of the slave trade and the rank of diplomatic agents were adopted by the signatory Powers of the 1814 Treaty of Paris.[394]

A major step in this intergovernmental activity is represented by the resolution taken by the Assembly of the League of Nations on 22 September 1924, which envisaged the creation of a standing organ (the Committee of Experts for the Progressive Codification of International Law) with the task of (i) preparing a list of subject matters whose regulation by means of international agreements was the most desirable and realizable;

---

[391] For complete references to the history of the International Law Commission and the Vienna Convention on the Law of Treaties see *The Work of the International Law Commission*, United Nations, Office of Legal Affairs (2004) and S. Rosenne, *The Law of Treaties – A Guide to the legislative history of the Vienna Convention* (New York: Oceana Publications, 1970), respectively. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), in particular Chapters 3 and 4.

[392] J. Bentham, P*rinciples of International Law* (Bowring edition, 1843) is available on the website of the University of Texas at Austin: http://www.laits.utexas.edu/poltheory/bentham/pil/index.html

[393] In this respect, see document A/AC.10/25, "Note on the private codification of public international law" available on the website of the United Nations: http://www.un.org/law

[394] Treaty signed on 30 May 1814 by France, on the one side, and the Allies (i.e. Austria, Great Britain, Prussia, Russia, Sweden and Portugal), on the other side.

(ii) examining and reporting on the comments made by governments on such a list and (iii) making proposals on the procedures to be followed in preparing the conferences for the regulation of these subject matters.[395] The Committee of Experts for the Progressive Codification of International Law was, therefore, an organ with both a proposing and an advisory scope and represented the major means of the first intergovernmental attempt to codify and develop entire fields of international law with a worldwide reach. However, the only tangible result of the League of Nation's initiative was the drafting of four international instruments, all concerning different issues relating to nationality, by the Codification Conference held in The Hague from 13 March through 12 April 1930; this Conference had worked on an initial proposal by the Committee of Experts for the Progressive Codification of International Law, then developed by a five persons Preparatory Committee.[396] On 25 September 1931, the League of Nations Assembly adopted a resolution on the procedure of codification, which strengthened the influence of governments at every stage of the process of codifying international instruments.[397] Such a resolution appears particularly relevant since some of its most significant features and recommendations were subsequently incorporated in the Statute of the International Law Commission of the United Nations, in particular the requirement of a greater involvement of governments in all the different stages of the codification process, the call for a close collaboration in such a process of international and national scientific institutes and the need to entrust an expert committee with the preparation of draft instruments.

After the Second World War, the role played by the League of Nations was picked up by the United Nations. As well documented by the transcripts of the United Nations Conference on International Organization,[398] the governments participating in the Conference were neither strongly oriented toward leaving any legislative power to the United Nations for issuing binding instruments of international law, nor to accepting any such instruments that could have been voted by the majority of the member States. On the contrary, widespread agreement existed on the opportunity to give the United Nations the task of studying problematic subject matters in the field of international law and recommending possible solutions to the member States.[399] This approach resulted in the inclusion of Article 13(1) in the United Nations Charter, according to which the "General Assembly shall initiate studies and make recommendations for the purpose of

[395] See the Official Journal of the League of Nations, Special Supplement, no. 21, p. 10.
[396] On 12 April 1930, the Conference adopted the following instruments: (i) Convention on certain questions relating to the conflict of nationality laws (see League of Nations, Treaty Series, vol. 179, p. 89); (ii) Protocol relating to military obligations in certain cases of double nationality (see League of Nations, Treaty Series, vol. 178, p. 227); (iii) Protocol relating to a certain case of statelessness (see League of Nations, Treaty Series, vol. 179, p. 115); (iv) Special Protocol concerning statelessness (see League of Nations, document C.27.M.16.1931.V). The first three instruments have been in force since 1937.
[397] See the Official Journal of the League of Nations, Special Supplement, no. 92, p. 9.
[398] The conference held from 25 April to 26 June 1945 in San Francisco and resulted in the creation of the United Nations Charter.
[399] See United Nations, *Documents of the United Nations Conference on International Organization*, held from 25 April to 26 June 1945 in San Francisco, vol. 3, documents 1 and 2; vol. 8, document 1151; and vol. 9, documents 203, 416, 507, 536, 571, 792, 795 and 848.

(…) encouraging the progressive development of international law and its codification". In light of this obligation, the General Assembly[400] decided to create a Committee on the Progressive Development of International Law and its Codification, which, in turn, had to study and recommend the methods by which the United Nations and, more specifically, the General Assembly should have encouraged the progressive development of international law and its codification.[401] The Committee on the Progressive Development of International Law and its Codification concluded its work by adopting a report recommending the establishment of an international law commission and proposing some provisions for drafting its statute.[402]

Following that proposal, the General Assembly, on 21 November 1947, adopted resolution 174(II) by means of which the International Law Commission (hereafter "ILC") was established. According to Article 1 of the ILC's Statute, the object of the ILC is "the promotion of the progressive development of international law[403] and its codification". In that respect, Article 15 of the same Statute defines "for convenience" (i) progressive development as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" and (ii) codification as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

As a matter of fact, the Commission's work on a certain topic generally involves aspects of both the progressive development and the codification of international law.[404] The 34 members of the ILC are chosen among persons of recognized competence in international law and serve in their individual capacity.[405] In addition, no two members of the ILC may be nationals of the same State.[406] With reference to the structure of the ILC, a figure of capital importance for the functioning thereof is that of the Special Rapporteur. This is a member of the ILC who is appointed by the latter at the early stage of the consideration of a topic and who continues to perform his specific functions until the ILC has completed its work on such a topic, provided that he remains a member of the ILC until that moment. The Special Rapporteur performs many crucial tasks, among whichs worth highlighting is (i) the preparation of reports on the topic that are submitted

[400] Hereafter, unless otherwise specified, any reference to the General Assembly is intended as made to the General Assembly of the United Nations.
[401] See the Resolution 94 (I) adopted by the General Assembly of the United Nations on 11 December 1946.
[402] See the Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1.
[403] According to the second paragraph of Article 1 of the its Statute, the ILC "shall concern itself primarily with public international law, but is not precluded from entering the field of private international law". As a matter of fact, since its institution the ILC has predominantly worked in the field of public international law and criminal international law.
[404] See, among other ones, paragraph 102 of the Report of the Working Group on review of the multilateral treaty-making process (Document A/CN.4/325), in YBILC 1979-II (part I), p. 210.
[405] See Article 2(1) of the ILC's Statute and the historical backgroung thereof in United Nations, *The Work of the International Law Commission* (UN Office of Legal Affairs, 2004), pp. 5 *et seq*. and the extracts thereof available on their website: http://www.un.org/law/ilc/. There were originally 15 members. The current number has been established by the General Assembly by its resolution no. 36/39 adopted on 18 November 1981.
[406] See Article 2(2) of the ILC's Statute.

to the plenary ILC, (ii) the participation in and contribution to the work of the ILC's Drafting Committee[407] on the topic and (iii) the elaboration of commentaries to draft articles. In substance, his main functions consist in drawing the borders of the topic discussion, developing its content for the purpose of the analysis to be performed by the ILC and making proposals for draft articles of an international instrument on the topic.[408]

The ILC, whose first election took place on 3 November 1948, opened the first of its annual sessions on 12 April 1949. During that session, the ILC drew up a provisional list of 14 topics suitable for future codification. The "Law of Treaties" was one of the topics included in the list. However, until the end of the fifties, notwithstanding the work carried on by the Special Rapporteurs[409] and the reports produced thereby, the ILC had barely discussed the topic. Things changed at the beginning of the following decade.

Between 1962 and 1966, the ILC had done significant work on the topic on the basis of the six reports submitted by Sir Humphrey Waldock, who acted as Special Rapporteur.[410] In 1966, the ILC delivered a draft convention to the General Assembly (hereafter, the "1966 Draft"), accompanied by a commentary thereon and a recommendation, according to which the General Assembly was to organized an international conference for the purpose of studying the draft and concluding a convention on the topic.[411] In 1966 and 1967, the General Assembly issued two resolutions addressed to member States by means of which it convened the United Nations Conference on the Law of Treaties (hereafter the "Conference").[412] The

[407] The Drafting Committee is a working sub-group of the ILC whose members vary from session to session and, since 1992, from topic to topic at any given session. The Drafting Committee plays an important role in harmonizing the various viewpoints and working out generally acceptable solutions. The Drafting Committee is entrusted with the task of harmonizing the different viewpoints of the ILC's members both from a purely drafting perspective and from a more substantive perspective, especially when the plenary ILC has been unable to resolve certain issues or an unduly protracted discussion is anticipated. This activity generally leads to the drafting of a specific text on the topic, or part thereof (e.g. draft articles or commentaries), which is presented as proposal to the plenary ILC. The latter may subject such text to amendments or alternative formulations and then refer it back to the Drafting Committee for further consideration. See YBILC 1958-II, p. 108, para. 65; YBILC 1979-II (part I), pp.197-198, paras. 45 *et seq*.; YBILC 1987-II (part II), p. 55, paras. 237 *et seq*.; YBILC 1992-II (part II), p. 54, para. 371; YBILC 1996-II (part II), p. 85, para. 148 (j) and pp. 93-94, paras. 212 *et seq*.

[408] See, among other documents, YBILC 1982-II (part II), pp. 123-124, para. 271; YBILC 1996-II (part II), p. 91, paras. 188 *et seq*.

[409] The Special Rapporteurs who dealt with the "Law of Treaties" in this period were Brierly, Lauterpacht and Fitzmaurice.

[410] At its thirteenth session, in 1961, the ILC elected Sir Humphrey Waldock to succeed Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties, since the latter had to retire from the ILC on his election as judge of the International Court of Justice. At the same time, the ILC took three main decisions as to its work on the law of treaties, according to which: (i) the aim of the work on that subject was to prepare draft articles on the law of treaties intended to serve as the basis for a convention; (ii) the Special Rapporteur had been requested to re-examine the work previously done in this field by the ILC and the previous Special Rapporteurs; (iii) the Special Rapporteur had to begin with the issues concerning the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the entire subject in two years. See Official Records of the General Assembly, Sixteenth Session, Supplement no. 9 (A/4843), para. 39.

[411] The procedure followed by the ILC founds its legal basis in Article 23(1-d) of the ILC's statute.

[412] General Assembly Resolution 2166(XXI) of 5 December 1966 (see Official Records of the General Assembly of the United Nations, Twenty-first Session, Supplement No. 16, UN Doc. A-6316, p.95) and

Conference was held in Vienna between 26 March and 24 May 1968 and between 9 April and 22 May 1969. The VCLT was adopted by the Conference on 22 May 1969 and opened for signature on 23 May 1969.[413] It entered into force on 27 January 1980 for the 35 States that deposited their instruments of accession or ratification with the Secretary-General of the United Nations on or before 28 December 1980.[414] As of 26 September 2011, the VCLT has entered into force for 111 States.[415]

2. Scope of the VCLT

The VCLT applies (only) to treaties concluded between States.[416] For the purpose of the application of the VCLT, the term "treaty" must be understood as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[417] It is important to note that an international agreement is to be considered a "treaty" for the purpose of the VCLT only where the parties intended to create a legal relationship from which international rights and obligations arise. This is made clear by the Commentary on Article 2 of the 1966 Draft, according to which the element of intention is implicit in the phrase "governed by international law".[418] Where such an intention is present, written agreements[419] between States[420] constitute "treaties" for the purpose of the VCLT even if informally concluded

---

General Assembly Resolution 2287(XXII) of 6 December 1967 (see Official Records of the General Assembly of the United Nations, Twenty-second Session, Supplement No. 16, UN Doc. A-6716, p.80).

[413] The VCLT was concluded in the following authentic languages: English, French, Spanish, Russian and Chinese. For the purpose of its signature, it was deposited with the Secretary-General of the United Nations. Interestingly, the VCLT was open for signature not only by States who were members of the United Nations, but also by any of the specialized agencies, the International Atomic Energy Agency and parties to the Statute of the International Court of Justice, and any other State invited by the General Assembly to become a party to the Convention.

[414] See Article 84(1) VCLT to this extent.

[415] See United Nations Treaty Collection Database, available at http://treaties.un.org.

[416] Article 1 VCLT.

[417] Article 2(1-a) VCLT. On the definition of "treaty" for the purpose of the VCLT, see R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1199-1203.

[418] See YBILC 1966- II, p. 189, para. 6.

[419] It is important to emphasize that, even if oral agreements are excluded, as such, from the definition of "treaties" relevant for the application of the VCLT, this does not mean that they have no legal status as international obligations among States, as clarified by Article 3 VCLT. In this respect, the Commentary to the 1966 Draft recognizes that oral international agreements may "possess legal force and that certain of the substantive rues set out in the draft articles may have relevance also in regard to such agreements" (YBILC, 1966- II, p. 190, para. 3). In addition, Article 3 VCLT also makes clear that the rules of the VCLT that represent customary international law apply to oral international agreements. To that extent, see also UNCLT-1st, p. 146, paras. 5-6.

[420] Treaties between one or more States and one or more international organizations are regulated by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986. However, according to Article 3(c) VCLT, the VCLT applies to the relations between States that are regulated by international agreements to which other subjects of international law are also parties. For the purpose and scope of such provision of Article 3 VCLT, see also

as "memoranda of understandings", "exchange of note", or similar instruments.[421] In that case, the rules enshrined in the VCLT, in particular the provisions on treaty interpretation, apply to the treaties notwithstanding their specific nature and object.[422]

With regard to the temporal scope of the VCLT, the general rule is established by Article 4 VCLT, according to which the convention does not have retroactive effect.[423] This rule appears coherent with that provided for in Article 28 VCLT, stating that the provisions of a treaty do not bind a party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of the treaty with respect to that party, unless a different intention appears from the treaty itself or is otherwise established.

However, such a general rule does contain a relevant exception, provided for in the very same Article 4 VCLT: the ban of retroactive effect does not apply with reference to all rules enshrined in the VCLT that would have been applicable under international law independently from the entry into force of the VCLT. In that respect, this exception makes clear that rules of customary international law that predate the (entry into force of the) VCLT continue to apply as if the latter had never come into force.[424]

In light of the above analysis and for the purpose of the present study, it is critical to ascertain whether the rules on treaty interpretation, provided for in Articles 31 through 33 VCLT, may be considered to be codification of customary law. The answer to such a question constitutes guidance in determining whether the rules on interpretation mentioned in the VCLT are applicable to treaties concluded by States not party to the VCLT, and to treaties concluded before the entry into force of the VCLT.

Throughout the debate on treaty interpretation and up to the formulation of Articles 27-29 of the 1966 Draft, the ILC was careful not to go beyond the realm of declaratory codification and not to formulate innovative rules or, in any case, provisions for which

---

UNCLT-1st, p. 147, para. 7. Finally, pursuant to Article 5, VCLT also applies to treaties between States through which international organizations are constituted and to treaties adopted within international organizations, without prejudice to any applicable rule of the organization.

[421] See YBILC 1966- II, p. 188, para. 2.

[422] To this extent, see YBILC 1966- II, p. 219, para. 6. For a specific instance, see ICJ, 12 November 1991, *Arbitral Award of 31 July 1989 (Guinea-Bassau v. Senegal)*, judgment, para. 48.

[423] On the topic of the temporal application of the VCLT see, among others, I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 7-9; S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 5-12; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 48-54. Article 4 VCLT was not included in the 1966 Draft and was added to the final version of the VCLT following a proposal submitted by five States during the second session of the Conference.

[424] See also the Preamble to the VCLT, where it is affirmed that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". The same holds true for rules of international law from sources other than custom that predate the entry into force of the VCLT.

there was no basis in existing usage.[425] The final text of the VCLT testifies to such an approach, having many instances of this kind, such as: the primary reference to the text of the treaty as expression of the intention of the parties; the absence of detailed rules of interpretation, in favor of broad and general principles; the refusal to include automatic rules of interpretation that could prove unsatisfactory in certain circumstances, leading to faulty conclusions; the relevant role played by the object and purpose of the treaty; the provision that all authentic texts have equal authority, lacking a different agreement of the parties thereon; the absence of any guidance concerning the moment when the agreed rule giving priority to one authentic text over another should be activated, due to the lack of unequivocal guidance from previous jurisprudence on such an issue.[426]

This would make a good argument in favor of the possibility that the principles enshrined in Articles 31-33 VCLT, or at least most of them, could be considered rules of customary international law.

The point is of primary relevance, since a conclusion in the affirmative would lead to the undisputed application of such rules both in respect of treaties concluded before the entry into force of the VCLT and in respect of treaties concluded by States that are not party to the VCLT.

According to Rosenne, regardless of what may have been customary international law before the VCLT, the meticulous preparation of its provision by the ILC, the careful study and reactions by governments and the proceedings of the Vienna Conference constitute a significant process of definition and consolidation of the customary international law of treaties that became crystallized through the adoption of the VCLT.[427] Since the relevant conditions were generally fulfilled,[428] that author concluded that most of the rules of the VCLT could have become customary law and, as such, binding as well for those States that did not become party to the VCLT. Rosenne also noted that the original purpose of the ILC's activity (i.e. finding out and clarifying just the general principles of law applicable to treaties) and the abandonment by the ILC of the distinction between the activity of "codification" and that of "progressive development" of international law, as provided for in the ILC's statute, pointed towards the characterization of the VCLT provisions as "rules of international law", with the meaning this expression assumes under Article 4 VCLT (i.e., mainly, customary

[425] Similarly, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 175.
[426] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 175.
[427] S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 20. Apparently against the possibility that the provisions of Articles 31 and 32 VCLT represented a codification of customary law was the representative of Sweden at the Committee of the Whole of the Vienna Conference, who, in his capacity as such, emphasized that "codification would obviously not have sufficed" and the that work of the ILC "involved the progressive development of a part of the law of treaties which was as yet obscure" (UNCLT-1st, p. 178, para. 18). Similarly, see S. E. Nahlik, "La conférence de Vienne sur le droit des traités: une vue d'ensemble", in 15 *Annuaire français de droit international* (1969), 24 *et seq.*, at 40.
[428] See the conditions discussed in S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 20 *et seq*.

international law).[429] In that respect, Rosenne concluded that such a role assumed by the provisions of the VCLT, except the provisions of Article 66 thereof, should be recognized *erga omnes,* at least with regard to all treaties concluded since 22 May 1969.[430]

Tabory elaborated on the thesis of Rosenne and affirmed that most of the principles of interpretation enshrined in the VCLT, including those relevant for the interpretation of multilingual treaties, constituted pre-existing rules of customary law.[431] Their generality, the lack of specific technical rules to be applied and of a rigid order in the rules for resolving divergences among the various authentic texts (which have been often criticized) represented a flexible and generally accepted framework, within which it was left to the interpreter to find the best solution with regard to both the specific principles and maxims to be applied in the actual case and the meaning to be attached to terms and expressions selected by the parties to convey a certain agreed message. According to Tabory, in fact, no mechanical rule was provided for in the VCLT since "(t)reaties being arrangements negotiated and drafted by human beings, expressed in words which are by nature perhaps ambiguous and in languages which are inherently different, they will necessarily be open to interpretation by a combination of human discretion, understanding, expertise and judgment, which go beyond any mechanical rules".[432] The nature of the rules of interpretation enshrined in the VCLT made easier to consider them either as codification of pre-existing customary rules, or as customary rules crystallized by means of the very same VCLT.

On the other hand, Sur pointed out that the actual impact of the VCLT provisions dealing with the interpretation of treaties depended on whether many States had become parties to the VCLT and on the subsequent practice based on the application of that convention.[433] In this respect, he noted that before the conclusion of the VCLT, the case law of international courts and tribunals dealing with treaty interpretation appeared controversial and lacking of a solid theoretical basis, while the constructions developed by scholars appeared fragile and not well-rooted. Based on this analysis, he concluded that, at least until the beginning of the seventies, the interpretation of treaties was characterized to a great extent by uncertainty.[434]

---

[429] See S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 21 *et seq.*

[430] Date of adoption of the VCLT. See S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 23-24.

[431] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 218.

[432] M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 218.

[433] S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 284 and 285.

[434] S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 266-267.

From the above, it is clear that, although the rules on treaty interpretation provided for in the VCLT are potentially of a norm-creating character[435] and, as such, they can form the basis of generally-accepted rules of international law, the actual recognition thereof as rules of customary international law depends to a large extent on the judicial practice following the conclusion of the VCLT.

According to Torres Bernárdez,[436] former *ad hoc* judge of the ICJ, until the nineties of the last century, the ICJ had never explicitly recognized the declaratory nature of Articles 31-33 VCLT. While other international courts and tribunals, only a few years after the conclusion of the VCLT, took the position that such articles merely codified principles of customary international law,[437] the ICJ waited until 1991 to do the same. In the case *Arbitral Award of 31 July 1989*, the ICJ concluded that Articles 31 and 32 VCLT might, in many respects, be considered a "codification of existing customary international law".[438] Since then, the Court has consistently upheld the conclusion reached in such a judgment[439] and, in the *Kasikili/Sedudu Island* case, it even found the rule enshrined in Article 31 VCLT applicable for the purpose of interpreting a treaty concluded in 1890.[440] As Torres Bernardez put it, according to the recent jurisprudence of the ICJ, the VCLT "rules on interpretation of treaties *as they stand*" are fully recognized as "existing customary law".[441]

With specific regard to Article 33 VCLT, Torres Bernárdez recognized, on the one hand, that until 1998 (the year of publication of his article on the subject) the ICJ had never affirmed the customary law nature thereof; on the other hand, however, he took the view that the absence of an express characterization in that sense of Article 33 VCLT was probably the mere consequence of the circumstances of the cases actually

---

[435] See S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 22.

[436] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*

[437] See the case law mentioned by in I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 19 and, with specific reference to Article 33 VCLT, Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 529, para. 16.

[438] ICJ, 21 November 1991, Arbitral Award of 31 July 1989 (Guinea-Bassau v. Senegal), judgment, para. 48.

[439] See, among other decisions, ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 380; ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 41; ICJ, 15 February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment, para. 33. For an exhaustive list of the International Court of Justice's case law dealing with this issue, see S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.,* at 735 *et seq*.; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 55-56.

[440] See ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 18.

[441] S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 737.

considered by the Court, rather than evidence of the refusal by the Court to consider the principles enshrined in that article as part of customary international law.[442] In fact, in the recent *LaGrand* case,[443] the ICJ stated that, in cases of a divergence between the equally authentic texts of a treaty and where the latter does not indicate how to proceed, it is appropriate to refer to Article 33(4) VCLT, which "in the view of the Court again reflects customary international law".[444] In this respect, it is interesting to note that (i) the specific issue faced by the ICJ[445] concerned the interpretation of Article 41 of the Court's Statute, which, being an annex and integral part of the UN Charter, predates the adoption of the VCLT and (ii) the case related to a conflict between Germany and the United States of America, the latter not being a party to the VCLT at the time of the facts, nor at the time of the legal proceedings and of the judgment.

In light of the previous analysis, it seems reasonable to infer that the ICJ considers Articles 31-33 VCLT to reflect customary international law and, thus, regards them as applicable in order to interpret both treaties concluded before the adoption of the VCLT and treaties concluded by States that are not party to that convention.[446]

[442] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 737.

[443] ICJ, 27 June 2001, LaGrand (Germany v. United States of America), judgment.

[444] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 101. For a previous explicit reference by the ICJ to the relevance of Article 33 VCLT, although without an express recognition thereof as customary international law, see ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 25.

[445] ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 92 *et seq.,* concerning Germany's third submission.

[446] According to Linderfalk, "customary law also contains a set of rules to be used for [interpretation] purpose. These rules of international custom are identical to the rules laid down in the Vienna Convention – nowadays, a fact on which not only states, but also authors, as well as international courts and tribunals, seem to be in agreement. Articles 31-33 of the Vienna Convention on the Law of Treaties should therefore be seen as evidence […] also of the rules that apply according to customary international law between states in general" (see U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 7, notes omitted).

CHAPTER 3 – POSITIVE ANALYSIS OF THE RULES ENSHRINED IN ARTICLES 31 AND 32 VCLT AND THEIR CONTRIBUTION TO THE AUTHOR'S NORMATIVE LEGAL THEORY ON TREATY INTERPRETATION

1. Introduction

This chapter is divided into two main sections.

In section 2 the author carries out a positive analysis aimed at revealing the commonly accepted practices concerning the interpretation of treaties under international law and, more specifically, in the application of Articles 31 and 32 VCLT. In that respect, the author's analysis is mainly based on (i) the case law of international courts and tribunals (and, to a lesser extent, national courts) both preceding and subsequent to the conclusion of the VCLT, (ii) scholarly writings on the interpretation of treaties and (iii) the *travaux préparatoires* of the VCLT.

Section 3 is devoted to the comparison between the principles of interpretation developed by the author in section 1 of Chapter 3 of Part I and the generally accepted rules and principles of treaty interpretation resulting from the positive analysis carried out in section 2 of this chapter.

The inferences drawn from such a comparison will constitute the foundations on which the author will build the answers to the research questions on the interpretation of multilingual (tax) treaties in Chapters 4 and 5 of this part, i.e. his normative legal theory on the interpretation of multilingual tax treaties.

2. Positive analysis of the rules of interpretation enshrined in Articles 31 and 32 VCLT

"Thus logic and intuition have each their necessary role. Each is indispensable. Logic, which alone can give certainty, is the instrument of demonstration; intuition is the instrument of invention." [447]

2.1. The ILC's approach to the codification of the rules on treaty interpretation

[447] See H. Poincaré (translated by G.B. Halstead), *The Foundations of Science: Science and Hypothesis, The Value of Science, Science and Methods* (Lancaster: The Science Press, 1946), p. 219.

From a structural perspective, the task of codifying rules on treaty interpretation required the ILC to answer three interrelated sets of questions.

First, was there any generally accepted rule on interpretation that could be inferred from the case law of international courts and arbitration tribunals and from States' practice? If the preceding question was answered in the affirmative, what was the nature and content of such rules? Were they detailed and strict, or loose enough to leave a certain discretionary power to the interpreter? Were they technical rules applicable only to specific situations, or were they principles of general application?

Second, in the event such customary rules prove to exist, should have they been codified as part of the law of treaties?

Third, where the second question had answered in the affirmative, do these rules have to be organized in any hierarchical order?

The first and second sets of questions are dealt with together in the remainder of this section. The third question is considered in the following section.

At the ILC's 726th meeting, i.e. at the beginning of the ILC's work on the law of treaties, Mr Ago submitted that the interpretation of treaties was an issue of capital importance for the Commission's work and for the law of treaties in general.[448] In this respect, he emphasized that the questions concerning the existence and the content of generally accepted rules on treaty interpretation[449] could not be left aside by the ILC, since such rules were the first and foremost means to secure certainty on the law of treaties.

This position was upheld by other members of the ILC, such as Mr Elias[450] and Mr Paredes,[451] although with diverging opinions on whether general rules on interpretation, or just some detailed rules on specific matters, were to be included in the draft codification. Mr Verdross, however, drew attention to the fact that, before answering the question of whether rules on interpretation had to be included in a report of the law of treaties, the ILC should have clarified whether it recognized the existence of such rules; he further noted that it was highly controversial whether the rules established by the case law of arbitral tribunals and international courts were general rules of international law or merely technical rules.[452]

At the end of its work on the subject matter, the ILC decided to include in the 1966 Draft only the comparatively few general principles that appeared to be largely accepted as compulsory rules for the interpretation of treaties.

The ILC was aware of the customary recourse to other principles and maxims in

[448] YBILC 1964-I, p. 23, para. 34.
[449] Mr Ago put forward the following questions as exemplifications: "what precisely was a technical rule? Was it or was it not mandatory? Was there or was there not a rule under which the terms of a treaty must be construed in the etymological sense or having regard to the context of the treaty? Was there or was there not a rule that in deciding between two possible interpretations of a treaty the preparatory work, the object of the treaty and the practice of the parties concerned must be taken into account?" (YBILC 1964-I, p. 23, para. 34).
[450] YBILC 1964-I, p. 22, para. 24.
[451] YBILC 1964-I, p. 22, para. 28.
[452] YBILC 1964-I, p. 21, para. 15.

international practice.
However, it recognized that they were, for the most part, principles of logic and good sense and that the recourse to many of them was discretionary rather than obligatory. According to the ILC, such principles and maxims were valuable as guides to assist the interpreter in appreciating the meaning that the parties might have intended to attach to the expressions employed in the treaty, but their suitability for use in any given case depended on a variety of considerations that had first to be appreciated by the interpreter himself.

Therefore, the ILC decided not to codify them as law of treaties and to leave the interpreter free to adopt them depending on the particular circumstances of each case.[453]

The draft articles on treaty interpretation submitted by the ILC to the General Assembly (1966 Draft) were then incorporated, with just one relevant change,[454] in the VCLT.

The rules on treaty interpretation included in the VCLT read as follows:

> **Article 31**
> *General rule of interpretation*
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> **Article 32**
> *Supplementary means of interpretation*
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.
>
> **Article 33**

[453] Commentary on Articles 27-28 of the 1966 Draft, para. 4 (YBILC 1966-II, p. 218).
[454] See Article 33(4) VCLT, on which see *infra*.

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

2.2. The hierarchical order of the rules of interpretation encompassed in Articles 31 and 32 VCLT and the metaphor of the "crucible"

With regard to the question whether the few general principles to be included in the draft convention on the Law of Treaties had to be organized in some hierarchical order,[455] the solution adopted by the ILC, and then implemented in the VCLT, is two-sided.

On the one hand, there is hierarchical distinction between the means of interpretation provided for in Article 31 VCLT, which "all relate to the agreement between the parties *at the time when or after it received authentic expression in the text*", and those provided for in Article 32 VCLT, which are supplementary and somewhat subordinated to the former.[456]

This solution has been welcomed by most scholars dealing with the subject matter.[457] Bernhardt, for instance, praised this solution, which he regarded as reflecting the intention of the ILC to give precedence to the text of the treaty, as expression of the intention of the parties, over the subjective intention to be derived from other, less

[455] On such an issue see Institute of International Law, "Observations des membres de la Commission Sur le rapport de M. Lauterpacht. Comments by Sir Eric Beckett", 43-I *Annuaire de L'Institut de Droit International* (1950), 435 *et seq.*, at 439-440.
[456] Commentary on Articles 27-28 of the 1966 Draft, para. 10 (YBILC 1966-II, p. 220)
[457] See, for example, among the first scholars commenting the 1966 Draft and the VCLT, R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 496; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 87 and 102 (also quoted in M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 205); M. Schröder, "Gedanken zu einer Hierarchie der Interpretationsregeln im Völkerrecht", 21 *Revue hellénique de droit international* (1968), 122 *et seq.*, at 131-132. However, others, such as McDougal, strongly criticizes the solution adopted by the ILC, mainly because it would unduly restrict the freedom of the interpreter of choosing the most adequate means of interpretation available in each specific case (see M. S. McDougal *et al*., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 992-1000).

reliable, sources.[458] Similarly, Schröder appreciated the ILC's decision to distinguish between primary (later, Article 31 VCLT) and supplementary (later, Article 32 VCLT) means of interpretation and to put the latter in a subsidiary position as compared to the former, since it removed the uncertainty existing in practice on the relevance of the *travaux préparatoires*.[459]

The above hierarchical distinction between Articles 31 and 31 VCLT, however, should not be intended to be a strict one. In this respect, the commentary to the 1966 Draft made clear that no rigid line is intended to exist between the primary means of (now) Article 31 and the supplementary means of (now) Article 32: the possibility that the latter are used to confirm the meaning resulting from the application of Article 31 constitutes a bridge (a "general link") between the two articles and maintains the unity of the process of interpretation.[460]

On the other hand, there is no hierarchy of means within Article 31 VCLT.[461] The commentary to Articles 27-28 of the 1966 Draft states that the text of Article 31 (then 27), when read as a whole, cannot be properly regarded as laying down a legal hierarchy of norms for the interpretation of treaties.[462] The very same title of Article 31 reads "General *rule* of interpretation", in the singular, and thus puts emphasis on the connection between the different paragraphs and means of interpretation, in order to show that their application involves a single operation.[463] The various means of interpretation have been ordered in Article 31 VCLT on the basis of considerations of logic, rather than of any obligatory legal hierarchy.[464]

This approach has been assessed differently by scholars: some, like Germer, have expressed a positive assessment of the "logical" structure of Article 31,[465] while others

[458] R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 496.

[459] M. Schröder, "Gedanken zu einer Hierarchie der Interpretationsregeln im Völkerrecht", 21 *Revue hellénique de droit international* (1968), 122 *et seq.*, at 131-132.

[460] See the commentary on Articles 27-28 of the 1966 Draft, para. 10 (YBILC 1966-II, p. 220). On the (uncertain) relationship existing between the means of interpretation encompassed in Article 31 and those of Article 32 see also S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 274-279; for an actual instance thereof, see ICJ, 25 July 1974, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, judgment, separate opinion of Judge de Castro.

[461] The commentary to the 1966 Draft highlights that the way in which the various means of interpretation are organized within Article 31 VCLT is just the result of logical considerations. Logic suggested that the first element to be mentioned was "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Again, logic suggested that the second elements to be mentioned (in paragraph 2 of Article 31) were those comprised in the "context", due to fact that they either form part of the text or are intimately related thereto. Other elements of primary importance for interpretation purposes were included in paragraph 3 of Article 31; their placement after those comprised in the "context" was due to the logical consideration that, since they are extrinsic to the text, they are less connected to paragraph 1 than the elements forming the "context" (see YBILC 1966-II, p. 220, para. 9).

[462] See commentary on Articles 27-28 of the 1966 Draft, para. 9 (YBILC 1966-II, p. 220).

[463] See, similarly M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 203.

[464] See commentary on Articles 27-28 of the 1966 Draft, para. 9 (YBILC 1966-II, p. 220).

[465] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on

have criticized it, saying that it misses the primary object of a rule of interpretation, i.e. establishing a clear order among the means of interpretation to be used. O'Connell, in particular, points out that the VCLT fails to clearly separate and indicate the priority between the textual and the teleological approaches to interpretation. According to that author, the VCLT seems to concede that "whenever a problem of interpretation arises the object of the treaty must be taken into account", without unambiguous "precedence is allotted to literal interpretation".[466]

The rejection, first by the ILC and then by the Vienna Conference, of the possibility of establishing a clear hierarchical order among the primary means of treaty interpretation is not, according to Schröder, due to the inability of the ILC to achieve it, but rather to the combined effect of the following reasons: the fact that international law scholars opposed for the most part to such a hierarchical arrangement; the absence of sufficient material confirming the existence of such a hierarchical order in the case law of arbitral tribunals and international courts; and the difficulty to make States converge on any possible hierarchy.[467]

The most relevant inference that may be drawn from the analysis of Articles 31 and 32 VCLT, in particular regarding their structure, is that the interpretative process consists of a single operation. The metaphor generally used in order to express the unity of the interpretative process is that of the "crucible": the interpreter has to find out all potentially relevant means to construe the specific treaty, in light of the circumstances of the case, and throw them into the crucible of interpretation: a proper construction of the treaty will come out of such a crucible.[468]

In other words, the final interpretation should be reached only after all relevant elements and means of interpretation have been taken into account and duly weighted in light of the whole analysis carried out: such relative weights may be reasonably attributed only on the basis of a careful scrutiny of all such elements and means, their cross-comparison, and their combined assessment.[469] Therefore, the analysis of the possible "vocabulary" meanings that may be attributed to a term, the study of the related context, the investigation of the object and purpose of the treaty, as well as the analysis of the subsequent agreement and the concordant subsequent practice of the parties, of the relevant rules of international law applicable in relations between them and of the supplementary means of interpretation should be carried out without any interruption in the interpretative process and without a rigid order being imposed. In this perspective,

---

the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 415.

[466] See D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 255.

[467] See M. Schröder, "Gedanken zu einer Hierarchie der Interpretationsregeln im Völkerrecht", 21 *Revue hellénique de droit international* (1968), 122 *et seq.*, at 131-132.

[468] See YBILC 1966-II, p. 95, para. 4 and pp. 219-210, para.8; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 9-10. See also International Centre for Settlement of Investment Disputes, 21 October 2005, *Aguas del Tunari v. Republic of Bolivia*, Case No. ARB/02/3, para. 91.

[469] Such a process is to be followed also for the purpose of concluding that a "special" meaning, in the sense of Article 31(4) VCLT, is to be attributed to a term, since it is only from the contemporary analysis of all elements and items of evidence available that it is possible to establish whether the parties actually intended such a "special" meaning to be attributed to that term.

treaty interpretation is regarded as an art and not an exact science,[470] since such a mandated process of interpretation may lead to different conclusions according to the different factual circumstances of each case and due to the different weights attributed by the interpreter to the various elements and evidence that must be taken into account according to the rules enshrined in Articles 31 and 32 VCLT.

In this respect, the supplementary means of interpretation referred to in Article 32 VCLT should be placed on the same footing as the means encompassed in the general rule of interpretation from a procedural standpoint. It is therefore important to distinguish between:

(i) the interpretative weight to be attributed to the elements and items of evidence resulting from the analysis of such a supplementary means of interpretation and
(ii) the chronological place that such an analysis occupies in the process of interpretation.

With reference to (ii), it appears from the recent case law of international courts and tribunals[471] that the analysis of all the potentially relevant means of interpretation, including the supplementary means, constitutes a single intellectual process. Under this approach the position is rejected whereby the process of finding out the appropriate meaning of a term should be carried out without any investigation of, for example, the *travaux préparatoires* or the circumstances of the conclusion of the treaty and that such means had to be resorted only in a second, logically distinct, moment for the purpose of confirming such a meaning, or determining the appropriate one where the first part of the process did not lead to a satisfactory result. The unity of the entire interpretative process, moreover, is certainly not a creation of the ILC; the very same Vattel pled for an "accumulation"[472] approach, where different rules and means of interpretation had to be taken into account simultaneously.[473]

With reference to (i), the supplementary means of interpretation generally have to be attributed a qualitatively lower weight, as compared to the means of interpretation encompassed in the general rule, for the purpose of attributing the appropriate meaning to treaty terms and sentences. In many cases, they are helpful in directing the interpreter in the choice of the meaning when the elements and items of evidence stemming from the application of the general rule are not in themselves conclusive, i.e. where the meaning of the terms or sentences remain ambiguous or excessively vague. They may play an important role as well in the less common cases where the meaning is obscure, or manifestly absurd or unreasonable. However, according to Article 32 VCLT, they

[470] See ILC Draft Commentary, YBILC 1966-II, p. 218, para.4.
[471] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), Chapter 1, in particular pp. 39 *et seq*.
[472] This term is taken from R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 163.
[473] See E. de Vattel, *Le droit des gens. Ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (London, 1758), Book II, § 322, where the author, at the end of the paragraphs on treaty interpretation, states that "Toutes les Règles contenuës dans ce Chapitre doivent se combiner ensemble, & l'Interprétation se faire de manière qu'elle s'accommode à toutes, selon qu'elles sont applicables au cas. Lorsque ces Règles paroissent se croiser, elles se balancent & se limitent réciproquement, suivant leur force & leur importance, & selon qu'elles appartiennent plus particulièrement au cas dont il est question".

may be only used for purposes of confirmation whenever the elements and evidence stemming from the application of the general rule lead to a clear, unambiguous and reasonable meaning; that is to say that such a meaning cannot theoretically[474] be overturned by a different meaning clearly pointed to by the supplementary means of interpretation.

With regard to multilingual treaties, some scholars[475] uphold the existence of a compulsory process of interpretation organized in well-defined, subsequent steps to be walked through under the provisions of Article 33 VCLT. The soundness of this thesis will be analysed in Chapter 4. In the remainder of this chapter, as its title suggests, only the rules of interpretation enshrined in Articles 31 and 32 VCLT will be dealt with.

2.3. The content of the rules of interpretation enshrined in Articles 31 and 32 VCLT

2.3.1. In general

A quick analysis of the rules encompassed in Articles 31 and 32 VCLT shows that such rules contain elements taken from the three main approaches habitually advocated with regard to treaty interpretation.

Traditionally, scholars used to distinguish among:[476]

> (i) the textual approach, according to which the text of the treaty is considered the authentic expression of the agreed intention of the parties;
> (ii) the subjective approach, whereby the intention of the parties is considered a subjective element, distinct from the text of the treaty, which is to be "discovered" by making recourse to other relevant means of interpretation in addition to the text (e.g. the *travaux préparatoires*);
> (iii) the teleological approach, for which the declared or apparent object and purpose of the treaty is the fundamental guideline for interpretation purposes, even where such object and purpose seem to go beyond, or even diverge from, the intentions of the parties as expressed in the treaty text.

Although the VCLT approach to treaty interpretation is an integrated one, where the above theories appear to be tightly mingled, the ILC appeared willing to attribute a prominent role the text of the treaty,[477] which was considered the starting point of the interpretative process.

---

[474] The issue of the relation between the seemingly clear, unambiguous and reasonable meanings based on the means of interpretation provided for in Article 31 VCLT and the different meanings suggested by supplementary means of interpretation is dealt with in section 2.3.5 of this chapter.
[475] The most representative of whom is M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 205.
[476] See commentary on Articles 27-28 of the 1966 Draft, para. 2 (YBILC 1966-II, p. 218).
[477] See commentary on Articles 27-28 of the 1966 Draft, para. 9 (YBILC 1966-II, p. 220).

The prominence of the text was also recognized by the studies previously carried on by the Institute of International Law and the case law of the ICJ and PCIJ. As stated by the ILC, "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation. […] Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain." [478]

The prominence of the text, however, is not an absolute one, since it is generally recognized that the treaty terms and the ordinary meaning thereof must be duly weighted against all other relevant elements and items of evidence, which together must be thrown into the crucible.[479]

In this respect, the work of the ILC and, thus, the VCLT appear to have been significantly influenced by both the 1956 Resolution of the Institute of International Law[480] and the principles on interpretation formulated by Sir Gerald Fitzmaurice,[481] which point to the text as a start, but also highlight that the treaty is to be interpreted as a whole, taking into account its object and purpose.[482]

The practical effects of the VCLT approach are thus twofold.

On the one hand, it is now "generally recognized that an interpretation that does not emerge from the text cannot be accepted, however plausible it may be in view of the circumstances, unless failure to do so would lead to an obviously unreasonable result".[483]

On the other hand, the interpretations that may be grounded in and derived from a single text are often so kaleidoscopically different from each other that the text cannot, by itself, suffice in order to solve all the interpretative issues. Moreover, an integration of the text with other elements and items of evidence is generally required also for the purpose of establishing whether an unreasonable result emerges from a "textual" interpretation, since the soundness of an interpretation may be assessed only where a yardstick exists for the purpose of this evaluation; such a yardstick, in turn, must be determined on the basis of all the elements and items of evidence available, the bare text often not sufficing in that respect.

---

[478] See commentary on Articles 27-28 of the 1966 Draft, para. 11 (YBILC 1966-II, pp. 220-221).
[479] Similarly R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 144.
[480] Institute of International Law, "Résolution of 19 avril 1956: Interprétation des traités", 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*
[481] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq.*, at 211-212.
[482] See YBILC 1964-II, pp. 55-56.
[483] R. H. Berglin, "Treaty Interpretation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: the Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal", 21 *Texas International Law Journal* (1986), 39 *et seq.*, at 44; see also R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 145.

In a nutshell, the approach implemented in the VCLT cannot be reduced to a textual interpretation approach, since an accurate reading of Articles 31 and 32 VCLT and an analysis of their application by courts and tribunals clearly show that elements typical of the different approaches coexist therein and interact strictly with one another.[484]

The following subsections analyse in some detail the various elements of interpretation to be taken into account under Articles 31 and 32 VCLT.

2.3.2. Good faith

"Tamerlane, after having engaged the city of Sebastia to capitulate, under his promise of shedding no blood, caused all the soldiers of the garrison to be buried alive"[485]

The origin of the international legal concept associated with the English term "good faith" may be traced back to the concept corresponding to the Latin term "bona fides" used in Roman law, particularly in the law of contracts.[486] Such a concept then evolved in the field of the international relations among Nations up to the point of becoming a well-established principle of international law. In its current international legal meaning the term "good faith" was mentioned as early as at the beginning of the XX century in the *North Atlantic Fisheries* arbitral award.[487]

Its general recognition and relevance as a fundamental principle in international relations is adequately shown by the following three notations:

(i) it is set forth in Article 2(2) of the Charter of the United Nations;

(ii) it is embodied in Articles 26 and 31 VCLT as the leading principle to be followed in the interpretation and application of treaties;

(iii) it has been included by the Institute of International Law, as the cornerstone of the interpretative process, in Article 1 of its resolution on treaty

[484] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 747-748; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 121.

[485] E. de Vattel, *Le droit des gens. Ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (London, 1758), Book II, § 273, quoting Paffendorf's Law of Nature.

[486] See J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), pp. 5 *et seq*.; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 122 *et seq*. See also PCIJ, 17 March 1934, *Lighthouses case between France and Greece*, judgment, separate opinion by Judge Séfériadès, p. 47.

[487] See Arbitral award of 7 September 1910, *The North Atlantic Coast Fisheries Case (Great Britain, United States),* in 11 *Reports of International Arbitral Awards*, 167 *et seq.,* at 188. For a list of international law cases where the principle of good faith is referred to, see ICJ, 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, judgment, para. 38. See also paragraph 2 of the Commentary to art. 55 of the Third Report on the Law of Treaties prepared by Sir Humphrey Waldock (YBILC 1964-II, p. 8, para. 2).

interpretation.[488]

The foremost aspect to be taken into account, when dealing with good faith in international relations, is that such a principle, just as bona fides in Roman and civil law, "has strong connotations with such moral virtues as honesty, fairness, reasonableness and trustworthiness".[489]

The second aspect to consider is that, notwithstanding its capital importance, the principle of good faith is not itself a source of legal obligations. According to the ICJ, the principle of good faith, although is "one of the basic principles governing the creation and performance of legal obligations […] it is not in itself a source of obligation where none would otherwise exist".[490] Conversely, since it represents the fundamental principle from which legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, it directs the way in which such legal rules must be interpreted and applied. In particular, it amounts to fundamental guidance for the interpretation and application of international agreements. Therefore, quoting Rosenne, it "constitutes a series of conduct-regulating rules" having normative value since their non-observance "may give rise to an instance of international responsibility", while their observance "may justify what is otherwise an international wrongful act".[491]

It should be finally noted that, since honesty, fairness, reasonableness and trustworthiness are mainly moral virtues strictly linked to human culture and customs, the shape and content of the principle of good faith change across the decades according to the development of such values as recognized by and in the international community.[492]

Although being a principle applicable to the whole spectrum of international law, the principle of good faith is particularly important with regard to treaties, which it governs "from the time of their formation to the time of their extinction",[493] since "contracting parties are always assumed to be acting honestly and in good faith".[494]

In this respect, the contextual analysis of the VCLT shows that a legal symbiosis exists between the principle of good faith mentioned in Article 31 and the *pacta sunt*

[488] Institute of International Law, "Résolution of 19 avril 1956: Interprétation des traités", 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*
[489] F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 123.
[490] ICJ, 20 decembre 1988, Border and Transborder Armed Actions (Nicaragua v. Honduras), judgment, para. 94.
[491] S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), p. 135.
[492] J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), p. 124. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 123.
[493] B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), p. 106
[494] PCIJ, 17 March 1934, *Lighthouses case between France and Greece*, judgment, separate opinion by Judge Séfériadès, p. 47.

servanda rule established by Article 26:[495] treaties must be interpreted and applied in good faith. Performing a treaty strictly according to its *prima facie* literal meaning it is not sufficient in this respect.[496] Treaty obligations must be carried out honestly and loyally according to the common and real intention of the parties, i.e. according to "the spirit of the treaty and not its mere literal meaning".[497] Performing a treaty in good faith requires that "a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects".[498] According to Rosenne, this is particularly relevant when the circumstances and situations of a concrete case could have been unforeseen by the contracting parties.[499]

For the same reasons, applications of treaties that result in abuses of rights are generally regarded as infringing the fundamental principle of good faith.[500]

As the other side of the coin, respect of a good faith treaty application, a good faith treaty interpretation has been defined as a reasonable,[501] honest and fair[502] interpretation. In this sense, good faith implies the need to elucidate the meaning of the terms used by the parties for the purpose of finding out the agreement reached by them.[503]

Therefore, the reference to good faith, especially where coupled with the mirror reference to the object and purpose of the treaty at the end of Article 31(1) VCLT, leads to an interpretative approach highly focused on finding out the intention of the parties starting from the text and rejects a mere literal approach. In this respect, the requirement to construe the treaty in good faith may lead the interpreter to face two critical questions:

---

[495] See the Commentary to Article 27 of the 1966 Draft, according to which the interpretative principle of good faith flows directly from the *pacta sunt servanda* rule (YBILC, 1966-II, p. 221, para. 12).
[496] F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 125.
[497] B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), 114. See also G. Schwarzenberger, "Myths and realities of treaty interpretation: Articles 27-29 of the Vienna draft convention on the law of treaties", 9 *Virginia Journal of International Law* (1968), 1 *et seq.*, at 9-10.
[498] Paragraph 2 of Art. 55 (Pacta sunt servanda) of the Third Report on the Law of Treaties prepared by Sir Humphrey Waldock (YBILC 1964-II, p. 7). The paragraph was then dropped since the ILC considered it implicit in the general obligation to perform treaties in good faith (YBILC 1966-II, p. 211, para. 4).
[499] S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), p. 176. As shown in section 4.4 of Chapter 2 of Part I, this is a rather common situation whenever a sentence that covers the future is at stake.
[500] G. Schwarzenberger, "Myths and realities of treaty interpretation: Articles 27-29 of the Vienna draft convention on the law of treaties", 9 *Virginia Journal of International Law* (1968), 1 *et seq.*, at 9-10; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 126-128. On the relation between interpretation in good faith, abuse of rights and need to balance the conflicting rights and obligations dealt with in the treaty, see WTO Appellate Body, 12 October 1998 *United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4 (WT/DS58/AB/R)*, paras. 158-159.
[501] See R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), p. 1272, note 7; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 151.
[502] See F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), p. 131. See also B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), pp. 105 *et seq*.
[503] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), 148.

(i) where the treaty appears silent on a certain case, whether the parties have deliberately agreed to leave some gaps in the treaty, i.e. they have forecasted certain possible future scenarios and decided not to include them in the scope of the treaty, or whether the specific case was unforeseen, but the parties would have explicitly brought it within the scope of a certain treaty rule, had they anticipated it;[504]

(ii) whether the interpretation based on the ordinary meaning of the treaty terms in their context and in light of the object and purpose of the treaty conflicts with the otherwise seeming intention of the parties.[505]

In relation to the first question, it is interesting to recall the position expressed by Sir Humphrey Waldock in the Commentary to Article 72 of his Third Report on the Law of Treaties, where he stated that it is justifiable to imply terms in a treaty for the purpose of giving efficacy to an intention of the parties "necessarily" to be inferred from the express provisions of the treaty.[506] Similarly, the possibility of implying terms not expressly included in the text, when interpreting treaties, was also upheld by the ILC in its Commentary to the 1966 Draft, provided that it did not lead to an "extensive" or "liberal" interpretation.[507]

In relation to the second question, good faith is to be seen not only as a standard of behavior that applies to the entire process of interpretation (including the examination of the text, context and subsequent practice), but also as a yardstick to be used in order to assess whether the apparent result of the interpretative process is manifestly absurd or unreasonable in light of the particular circumstances of the case and, therefore, must be rejected.[508]

---

[504] See House of Lords (United Kingdom), 9 December 2004, *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, [2004] UKHL 55, in particular para. 43, per Lord Steyn, and para. 63, per Lord Hope. See also ICJ, 18 July 1966, South West Africa (Ethiopia/Liberia v. South Africa), judgment, para. 92.

[505] A good example of the difficulties to be faced when trying to attribute a meaning to the absence of expected terms, or to an omission, is illustrated by the WTO case *Argentina – Safeguard measures on Imports of Footwear*. In that case, the Appellate Body and the Panel (of the WTO Dispute Settlement Body) reached opposite conclusions on the meaning to be attributed to the absence of an explicit reference to the criterion of "unforeseen developments" (included, on the contrary, in Article XIX of the 1947 General Agreement on Tarifs and Trade) in Article 2 of the Agreement on Safeguards (see WTO Appellate Body, 14 December 1999, *Argentina – Safeguard measures on Imports of Footwear,* AB-1999-7 (WT/DS121/AB/R), para. 88).

[506] YBILC 1964-II, p. 61, para. 29. According to the author, the use of the adverb "*necessarily*" (in *italics* in the original) by the Special Rapporteur constitutes a rhetorical expedient employed in order to make clear that the intention of the party should not be determined independently from the reasonable meaning attributable to the express treaty provision; since the inference of the intention of the parties from the treaty text is of an inductive nature, the result thereof can never necessarily descend from the available clues (in this case the express treaty provisions). Therefore, setting aside the rhetorical effect, the sentence contained in the draft commentary should read "it is justifiable to imply terms in a treaty for the purpose of giving efficacy to *the* intention *most probably* to be inferred from the express provisions of the treaty".

[507] YBILC 1966-II, p. 219, para.6.

[508] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 120. See also S. Rosenne, "The Election of Five Members of the International Court of Justice in 1981", 76 *American Journal of International Law* (1982), 364 *et seq.*, at 365-366; J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), p. 109. With regard to the relevance of supplementary means of interpretation for the purpose of avoiding absurd or unreasonable interpretative outcomes, see ICJ, 15

In addition, it may be noted that many rules and maxims of interpretation applied by international courts and tribunals are the result of the application of logic and common sense and, as such, are nothing more than particular manifestations of the principle of good faith.[509]

Probably, the most important of such rules and maxims is the one commonly referred to as the principle of effectiveness (sometimes referred to as *ut res magis valeat quam pereat*).[510] The ILC linked such principle to that of good faith and, to a certain extent, to the object and purpose of the treaty. According to the Commission, "in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in Article 27, paragraph 1,[511] which requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose".[512] Consequently, the ILC decided not to explicitly provide for such a principle in the 1966 Draft, notwithstanding the fact that it constituted the subject of a separate article in the original draft prepared by Sir Humphrey Waldock.[513]

At a closer look, the principle of effectiveness appears to encompass two strictly related, but distinguished, rules of interpretation.[514]

On the one hand, there is the principle of effectiveness *strictu senso*, identified with the maxim *ut res magis valeat quam pereat*. According to this maxim, good faith requires that all the terms and expressions included in a treaty are to be given a meaning and that an interpretation of the treaty, or a particular provision thereof, that attributes a meaning to all the terms is to be preferred, *ceteris paribus*, to an interpretation that does not attribute any meaning to certain terms or expressions, as if they were not part of the interpreted sentence.[515]

February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment, paras. 30-41 of Judge Schwebel's dissenting opinion.

[509] In this sense, J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), p. 109; H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law* (1949), 48 *et seq.*, at 56.

[510] The principle of effectiveness had first been codified by Sir Gerald Fitzmaurice in his formulation of the major principles of interpretation (G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq., at* 211), which, together with the 1956 Resolution of the Institute of International Law, was taken by the Sir Humphrey Waldock as inspiration for its work on treaty interpretation (see YBILC 1964-II, pp. 55-56, paras. 10 *et seq*.).

[511] Now Article 31(1) VCLT.

[512] See para. 6 of the Commentary to Arts. 27 and 28 of the 1966 Draft (YBILC, 1966-II, p. 219, para. 6)

[513] See Article 72 of the Special Rapporteur's Third Report on the Law of Treaty (YBILC 1964-II, p. 53).

[514] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 148. The double nature of the principle of effectiveness may be already seen in the formulation of such a principle elaborated by Sir Gerald Fitzmaurice (see G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq.*, at 211). Reference to both rules of interpretation may be found in ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, paras. 47 and 51-52.

[515] See, for instance, ICJ, 9 April 1949, Corfu Channel (United Kingdom v. Albania), judgment, p. 24; ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment, para. 47; ICJ, 22 July 1952, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, judgment, p. 105. In the specific case, however, the ICJ

On the other hand, there is the principle of effectiveness *latu senso*: an interpretation of the treaty that is more in line with the object and purpose thereof is to be preferred to an interpretation that is less in line with it.[516] In this case, the object and purpose of the treaty is not used solely, although it is used primarily, as prescribed by Article 31 VCLT, for the purpose of choosing among the various possible ordinary meanings of a certain term, but, more generally, to ensure that the interpretation of the treaty or a certain provision thereof is apt to realize the aims of the treaty itself.[517] However, as the ICJ affirmed in the *Interpretation of Peace Treaties* case, the duty of the interpreter is to construe and not to revise the relevant treaty and the principle of effectiveness cannot justify the interpreter in attributing to treaty provisions a meaning that would be contrary to their letter and spirit.[518]

A final remark concerns the relation between the application in good faith of the treaty and the protection of the legitimate expectations of the (other) treaty parties, which may take the technical forms of estoppel or acquiescence.

In particular, it is generally recognized that, where the action or inaction of a contracting State has generated the legitimate expectation in the other contracting States that a certain behavior is admissible under the treaty and accepted as such by the first-mentioned State, this State cannot claim that behavior to constitute a breach of the treaty.[519] Similarly, if the other contracting States have for a long period of time accepted, without any complaint, the action or inaction of the first-mentioned State, they may be considered to have created a legitimate expectation in the first-mentioned State of the existence of an agreement on the admissibility of its action or inaction under the treaty; under these circumstances, the other contracting States cannot subsequently claim that the behavior of the first-mentioned State constitutes a breach of the treaty.[520]

---

found that such an approach was not to be followed, since the text of the Iranian Declaration (the text at stake) was not a treaty text resulting from negotiations between two or more States, but the result of a unilateral drafting by the Government of Iran, which appeared to have shown a particular degree of caution when drafting the text of the Declaration and appeared to have inserted, *ex abundanti cautela*, words which, strictly speaking, might seem to have been superfluous. See also WTO Appellate Body, 14 December 1999, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8 (WT/DS98/AB/R), para. 80.

[516] See PCIJ, 19 August 1929, Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), order, p. 13; ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment, paras. 51-52. See also para. 6 of the Commentary to Articles 27 and 28 of the 1966 Draft (YBILC, 1966-II, p. 219, para. 6).

[517] This may be the case, for instance, where the interpretation based on the attribution of a special meaning to a treaty term is more in line with the object and purpose of the treaty than the construction based on the attribution of *an* ordinary meaning thereto.

[518] ICJ, 18 July 1950, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, advisory opinion, p. 229. See, in this sense, also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice. Volume I* (Cambridge: Grotious Publications Limited, 1986), p. 357; YBILC 1966-II, p. 219, para. 6.

[519] B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), 143-144; F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), 129 and 136-137.

[520] As instances of the application of the principles of acquiescence and estoppel see PCIJ, 28 June 1937, *Diversion of Water from the Meuse (Netherlands v Belgium)*, judgment, paras. 84-85; ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, pp. 32-35.

2.3.3. Ordinary meaning

Under the general rule of interpretation enshrined in Article 31 VCLT, the treaty text is the starting point of the interpretative process, since it is presumed to be the authentic expression of the intentions of the parties. Such a presumption implies that, in order to find out the intention of the parties, it is necessary to elucidate the meaning of the treaty text by means of interpretation.[521]

More specifically, as the ILC put it, the parties are to be presumed to have the intention that appears from the ordinary meaning of the terms used by them.[522] Therefore, the presumption is not limited to equating the treaty text to the authentic expression of the parties' intention, but extends to assuming that the parties have used all words in that text according to their "ordinary meaning", unless a proof to the contrary is given.

The adjective "ordinary" is qualified by the subsequent specifications encompassed in Article 31 VCLT: the ordinary meaning is the one, among the many that a term may be attributed in a particular language, that better fits within its context[523] in light of the object and purpose of the treaty.[524]

According to Sir Humphrey Waldock, speaking in his capacity of expert consultant to the UN Conference on the Law of Treaties,[525] "nothing could have been further from the Commission's intention than to suggest that words had a 'dictionary' or intrinsic meaning in themselves" and that the "Commission had been very insistent that the ordinary meaning of terms emerged in the context in which they were used, in the context of the treaty as a whole, and in the light of the object and purpose of the treaty".

The position articulated by Sir Humphrey Waldock is semantically supported by the use of the expression "the ordinary meaning *to be given* to the terms" in Article 31(1)

---

[521] See the commentary to Articles 27-28 of the 1966 Draft, paras. 2, 11 and 18 (YBILC 1966-II, pp. 218 *et seq*.)

[522] See the commentary to Articles 27-28 of the 1966 Draft, paras. 12 (YBILC 1966-II, p. 221)

[523] Including the means of interpretation referred to in Article 31(3) VCLT.

[524] See commentary to Articles 27-28 of the 1966 Draft, paras. 12 (YBILC 1966-II, p. 221), where it is stated that the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in light of its object and purpose. See also Sir Humphrey Waldock reply to the comments made by the Israeli and United States governments on the draft articles provisionally adopted by the ILC in 1964 (YBILC, 1966-I, para. 5 at p. 95 and para. 8 at p. 96) and the Separate Opinion of Judge Torres Bernárdez in the *Land, Island and Maritime Frontier Dispute* case, where he referred to the concept of "fully qualified" ordinary meaning (ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 190 of the Separate Opinion of Judge Torres Bernárdez). For an historical reconstruction of the ILC discussions on the term "ordinary meaning" in the context of the articles on treaty interpretation, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 142 *et seq*. According to Lindefalk, "it is not unjustified to argue that an ordinary meaning independent of the context and the object and purpose simply does not exist" (see U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 344).

[525] UNCLT-1st , p. 184, para. 70.

VCLT,[526] which indicates that the ordinary meaning is not intrinsic to the terms, but must be attributed by the interpreter by choosing among the various possible meanings according to the specific circumstances of the case.[527]

A similar conclusion has been reached by international courts and tribunals, which have held that the principle of the ordinary meaning does not entail that words and phrases are always to be interpreted in a purely literal way and that, often, the interpreter must choose among the multiple meanings of a term or expression on the basis of their context and of the object and purpose of the treaty.[528] According to the ICJ, this is particularly true where a purely literal, or grammatical, interpretation of the text leads to a somewhat surprising or absurd result.[529]

In this respect, where a term is used in a technical context (e.g. a specific legal subject matter), its ordinary meaning should be generally considered to coincide with the meaning attributed to that term in the relevant technical jargon (e.g. in the specific legal jargon). This inference is called for by the principle of good faith, since the attribution of whatever meaning different from that customarily used in a certain technical context would deprive the interpretation of any reasonableness in light of the good faith expectations of the parties involved.[530] Such ordinary jargon meaning may be usually determined on the basis of (i) dictionaries,[531] (ii) the analysis of the terms used in similar or related treaties,[532] or (iii) other technical documentary material.[533]

---

[526] See Article 27 of the 1966 Draft (YBILC 1966-II, p. 181), which is identical in this respect to Article 31 VCLT.

[527] Similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 164.

[528] See, for instance, PCIJ, 12 August 1922, *Competence of the International Labour Organization in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, advisory opinion, p. 23; ICJ, 26 May 1961, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, pp. 31-32 and case law quoted therein; International Centre for Settlement of Investment Disputes, 21 October 2005, *Aguas del Tunari v. Republic of Bolivia*, Case No. ARB/02/3, para. 91; ICJ, 12 November 1991, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, para. 29.
Among scholars, see *ex multis* G. Fitzmaurice, *The Law and Procedure of the International Court of Justice. Volume I* (Cambridge: Grotious Publications Limited, 1986), p. 52; A. D. McNair, *The Law of Treaties* (Oxford: The Clarendon Press, 1961), p. 367.

[529] ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, para. 52. See also, even if in slightly different terms, ICJ, 18 July 1966, *South West Africa (Ethiopia/Liberia v. South Africa)*, judgment, para. 48, where the Court stated that the rule of interpretation based on the natural and ordinary meaning of the words employed is not an absolute one, since, where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.

[530] See, for instance, PCIJ, 5 September 1933, *Legal Status of Eastern Greenland (Denmark v. Norway)*, judgment, pp. 49-50. With regard to the relevance of the principle of good faith for the purpose of establishing the ordinary meaning of treaty terms, see B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), p. 107.

[531] E.g. ICJ, 12 December 1996, *Oil Platforms, (Islamic Republic of Iran v. United States of America)*, judgment, para. 45. Furthermore, dictionaries are often used as well to elucidate the day-to-day meaning of treaty terms. See, for instance, WTO Appellate Body, 2 August 1999, *Canada – Measures Affecting the Export of Civilian Aircraft*, AB-1999-2 (WT/DS70/AB/R), para. 154, where the possible meanings of the term "confer" are sought.

[532] E.g. ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 380. As Gardiner points out, courts often do not explain whether this practice of referring to

Moreover, the subsequent agreements between the parties, their subsequent practice, the rules of international law applicable in the relations among them, as well as the available supplementary means of interpretation often prove helpful for the interpreter to refine the selection of the ordinary meaning that best fits in the circumstances of the case.[534]

Thus, since the ordinary meaning of any treaty term is a meaning qualified by all interpretative elements referred to in Article 31 (and, to a certain extent, Article 32) VCLT, the following sections deal with the content and usage of such elements.

2.3.3.1. Object and purpose of the treaty

With regard to the object and purpose of the treaty, two preliminary issues need to be tackled.

First, the fact that the term "object and purpose" is expressed in the singular raises the question of whether only the most important aim of a treaty should be taken into account for the purpose of Article 31 VCLT, as it is generally recognized that "most treaties have no single, undiluted object and purpose, but rather a variety of different, and possibly conflicting, objects and purposes".[535] That question should be answered in the negative, the opposite conclusion appearing too simplistic and over-rigid, especially where it is considered that Article 31 VCLT has an enormously wide scope and thus it must be flexible enough to be effectively applied in extremely different circumstances. Thus, the interpreter should always consider which of the various objects and purposes of a treaty are relevant with reference to the provision at stake and, where more of them appear relevant, he should assess how they interact with each other and how the contracting parties decided to balance them, as may appear from the context of the treaty and from the other available elements and items of evidence.[536]

---

the use of a certain term in other treaties is (i) in pursuit of its ordinary meaning, (ii) an implementation of rules of international law applicable in relation between the parties, (iii) one of the means of interpretation allowed under Article 32 VCLT, or (iv) simply a standard practice in the application of the VCLT (see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 175-176, citing F. Berman, "Treaty "Interpretation" in a Judicial Context", 29 *Yale Journal of International Law* (2004), 315 *et seq.*, at 317) .

[533] E.g. ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, paras. 20 and 30.

[534] See ECtHR, 4 April 2000, *Witold Litwa v. Poland (Application no. 26629/95)*, paras. 60-63 (and 34-39 with regard to the *travaux préparatoires*), where the Court attributed a significant relevance to (i) the context in which the relevant term was used, (ii) the apparent object and purpose of the relevant article of the treaty and (iii) the *travaux préparatoires* of the ECHR, in order to support an interpretation of the term "alcoholics", as used in Article 5 of the ECHR, which included not only persons addicted to alcohol, but also persons in a temporary state of drunkenness. For a lengthy description and discussion of the case, especially with reference to the role played by the *travaux préparatoires* in the decision, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 39-41.

[535] WTO Appellate Body, 12 October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 (WT/DS58/AB/R), para. 17.

[536] One could reasonably argue that the object and purpose of a specific section or article is not denoted by the expression "*its* object and purpose" contained in Article 31(1) VCLT, since the latter might be seen as referring exclusively to the object and purpose of the treaty as a whole. In that respect, the author is of the opinion that

Second, the object and purpose of the treaty should not be seen as "something that exist[s] *in abstracto*", but as something that "follow[s] from and are closely bound up with the intentions of the parties".[537] To put it differently, the object and purpose of a treaty does not exist independently from the parties' intentions, which represent the sole source of the object and purpose. This conclusion is rooted in the principle of good faith and entails, as one of its corollaries, that under the system of interpretation provided for by the VCLT the extreme forms of teleological approach, which deny any relevance of the intentions of the parties and affirmed the absolute independence from them of the treaty object and purpose,[538] have to be rejected.

With regard to the role played by the object and purpose in the process of treaty interpretation, its main function appears that of a qualifier of the ordinary meaning to be attributed to treaty terms under Article 31(1) VCLT. In fact, as the interpretative process in the VCLT system mainly consists of discovering the meaning that the parties attributed to the treaty text, the object and purpose is primarily used to elucidate the ordinary meaning of the terms used in the text[539] and not to find out a meaning independent from the text on the basis of a purely teleological interpretation of the treaty.[540] In this respect, the object and purpose of the treaty must not be looked at in isolation from the context of the treaty as a whole; on the contrary, it must be regarded as the most important part of such a context and taken into account together with it.[541] Moreover, from this vantage point, the object and purpose of the treaty appears strictly intertwined with the principle of effectiveness *latu senso*, according to which treaty terms should be interpreted so as to give them, as far as possible, an effect consistent with the object and purpose of the treaty.[542]

---

the expression "its object and purpose" should not be read too strictly, mainly due to the broad scope of Article 31 VCLT. However, even where that expression was construed strictly, the relevance of the object and purpose of specific sections or articles, in order to interpret provisions encompassed therein, would be preserved by the need to take into account the context of such provisions in order to construe them. In fact, since the treaty context includes the text of the treaty, which in turn includes the titles of the relevant sections and articles, where the reading of the text of such sections and articles (inclusive of their titles) highlights the object and purpose thereof, the latter must be taken into account for interpretative purposes as part of the context (see, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 178-179).

[537] ECtHR, 27 October 1975, *National Union of Belgian Police v. Belgium (Application no. 4464/70)*, para. 9 of Judge Fitzmaurice's Separate Opinion.

[538] For an analysis of such theories and their application by international Courts and Tribunals, see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 131 *et seq*.

[539] See YBILC 1964-I, pp. 281 *et seq.,* for the discussion that took place among the ILC's members at Commission's 765th meeting on this matter, and YBILC 1964-I, p. 309, para. 3 for the consequent redrafted version of Article 70.

[540] See, *inter alia*, the observations submitted by Mr Luna at the 871st session (YBILC 1966-1(part II), p. 193, paras. 7-10).

[541] See the statement of the Uruguayan representative at the Committee of the Whole of the Vienna Conference (UNCLT-1st, p. 170, para. 67).

[542] See ICJ, 12 December 1996, Oil Platforms, (Islamic Republic of Iran v. United States of America), judgment, para. 52; ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 43.

The above-mentioned function, however, is not the only one played by the object and purpose in the process of treaty interpretation. In fact, together with the principle of good faith, the object and purpose of the treaty also draws the dividing line between acceptable and non-acceptable interpretations. Such a function was explicitly attributed to the object and purpose of the treaty in the first draft of the provisions on treaty interpretation prepared by Sir Humphrey Waldock[543] and is now implicitly brought into effect by the requirement that treaties are interpreted in good faith, i.e. reasonably, honestly and fairly.

Even if it does not always appear easy to distinguish between this and the previous function, they are to be kept logically distinguished since there might be occasions where the meaning to be attributed to a specific term could appear *prima facie* unambiguous and clear, independently from any reference to the treaty object and purpose, but the interpretation based on such a meaning could prove absurd or unreasonable in light of the object and purpose and the context of the treaty as a whole. In this case, the interpretative process is not yet at its end, since all the elements and means of interpretation put in the "crucible" must be assessed together and balanced against each other for the purpose of finding out the proper interpretation of the treaty. The fact that the *prima facie* construction, obtained by attributing to the relevant terms of the treaty their seeming ordinary meaning, is unreasonable or absurd against the background of the object and purpose of the treaty compels the interpreter to again analyse all the interpretative elements and items of evidence at his disposal for the purpose of assessing whether it is possible to give the relevant treaty terms an ordinary meaning leading to an interpretation that does not contrast with the object and purpose of the treaty. Where this is not possible, the interpreter must decide whether the object and purpose requires the treaty to be given an interpretation going beyond that based on the ordinary meaning of the treaty text, for instance by attaching a special meaning to the relevant undefined treaty terms.[544]

While the principle of good faith represents the reason for the existence of a dividing line between acceptable and non-acceptable interpretations, the object and purpose of the treaty constitute, together with the context of the treaty as a whole, the major yardstick to test the acceptability of the result of the interpretative process: a

[543] See Article 70(2) of the Third Report on the Law of Treaties submitted by the Special Rapporteur to the ILC (YBILC 1964-II, p. 52). See also the explanation given by the Special Rapporteur on the meaning of "the context of the treaty as a whole" and its relation with the object and purposed of the treaty (the latter being the most important element of the former – see also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 168) at the ILC's 765th meeting, held on 14 June 1964 (YBILC 1964-I, p. 281, para. 87).

[544] This double function in the use of the objective and purpose of the treaty for interpretative purposes appears to be perceived also by Sinclair (see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 130). In this respect, Hummer points out that, if one looks at Articles 31-33 VCLT as a whole, the impression is that the principles of interpretation put forward therein are closer to the teleological method than is generally perceived (see W. Hummer, "Problemas jurídico-lingüísticos de la dicotomía entre el sentido 'ordinario' y el 'especial' de conceptos convencionales según la Convención de Viena sobre el Derecho de los Tratados de 1969", 28 *Revista Española de Derecho Internacional* (1975), 97 *et seq.*, at 119-120).

construction that leads to absurd or unreasonable results, having regard to the object and purpose of the treaty (and the context of the treaty as a whole), should generally be rejected.[545]

This prominence given to the object and purpose of the treaty for interpretative purposes, however, does not entail that teleological interpretations going beyond the text of the treaty are unconditionally allowed under the system of the VCLT.[546] Even where the object and purpose of the treaty functions as yardstick to draw the borderline between acceptable and unacceptable interpretations, it is only where the meaning attributable the treaty text appears absurd or unreasonable in light of the object and purpose and the context of the treaty as a whole that an interpretation that departs from the meaning of the text is acceptable (e.g. an interpretation that clearly results from the *travaux préparatoires*).

A third function played by the object and purpose in this context concerns the interpretation of multilingual treaties. An analysis thereof is carried out in section 3.4 and the following ones of Chapter 4.

A conceptually different issue concerns where the interpreter should be supposed to look in order to find out the object and purpose of the treaty.

The intention of the parties and, as a result thereof, the object and purpose of the treaty may be established on the basis of all elements and items of evidence at the disposal of the interpreter. However, under the system of the VCLT, the sources referred to in Article 31 VCLT[547] should be generally regarded as bearing more weight than the supplementary means of Article 32 VCLT for the purpose of determining the treaty object and purpose.[548]

---

[545] This reflects, in substance, the conclusion reached by Mr Jimenez de Aréchaga and Mr Luna at the ILC's 870th and 871st meetings (YBILC 1966-1(part II), p. 190, para. 69 and p. 193, paras. 4, 7 and, especially, 8). For a judicial application, see the decision of the ICJ in the *Territorial Dispute (Libya v Chad)* case, where the Court used the object and purpose of the treaty, largely determined on the basis of the treaty preamble, to verify the acceptability of an interpretation already reached through the other means provided for in the VCLT and not (only) to determine the ordinary meaning to be attributed to the relevant terms (see ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 52). See also the approach taken by the International Centre for Settlement of Investment Disputes in the *Plama v. Bulgaria* case, where the Tribunal, after having concluded that the language of the treaty was unambiguous, that the clear meaning of the text was confirmed by the title of the relevant article and that it would have required a gross manipulation of the language to reach a different conclusion, stated that it had, however, considered whether any such manipulation was permissible in light of the treaty object and purpose (see International Centre for Settlement of Investment Disputes, 8 February 2005, *Plama Consortium Limited v. Republic of Bulgaria*, Case No ARB/03/24, para. 147.

[546] See, among scholars, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 172 and 174 and F. G. Jacobs, "Varieties of Approach to Treaty Interpretation: With Special reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference", 18 *International and comparative law quarterly* (1969), 318 *et seq.*, at 338 (also cited by the former author).

[547] On the relevance of the whole text of a treaty, and not only of its preamble, for the purpose of finding out the object and purpose see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 196-197 and the case law cited in footnote 171 at p. 197.

[548] See the opinion expressed by Mr Verdross at the ILC's 870th meeting, held on 15 June 1966 (YBILC 1966-I

In particular, while the object and purpose of the treaty as a whole is often stated in the treaty preamble,[549] the object and purpose of the specific sections or articles must be generally determined on the basis of their text.

2.3.3.2. Context

"[W]ords are chameleons, which reflect the color of their environment"[550]

The first issue to be considered, with regard to the context, concerns the role that it plays within the VCLT system of interpretation.

Indubitably, the main interpretative function of the context is that of qualifier of the treaty terms for the purpose of attributing them their ordinary (or special) meaning.[551] In this respect, Sir Humphrey Waldock, referring to the Principle of Integration included by Sir Gerald Fitzmaurice in his Major Principles of Interpretation, affirmed that "the natural and ordinary meaning of terms is not to be determined in the abstract but by reference to the context in which they occur".[552] This constitutes a further proof of of the fact that an over-literal approach was rejected in the system of the VCLT.

In addition, as noted in the previous section, the context helps the interpreter, together with the object and purpose of the treaty, to draw the borders of what may be considered an acceptable interpretation according to the canon of good faith.

The second issue to be tackled regards the elements that should be regarded as part of the context.

In this respect, within the context referred to in Article 31(1) VCLT a distinction may be drawn between two concepts: the "narrow" context[553] and the "wide" context.[554]

(part II), p. 186, para. 14). See also ECtHR, 27 October 1975, *National Union of Belgian Police v. Belgium (Application no. 4464/70)*, para. 9 of Judge Fitzmaurice's Separate Opinion, where Judge Fitzmaurice mentioned that the intentions of the parties and, therefore, the object and purpose of the treaty are supposed to be expressed or embodied in - or derivable from - the text finally draw up and may not therefore legitimately be sought elsewhere, save in special circumstances.

[549] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 176, G. Fitzmaurice, *The Law and Procedure of the International Court of Justice. Volume I* (Cambridge: Grotious Publications Limited, 1986), p. 362. See also the reference to the ICJ's practice of looking for the object and purpose of a treaty in its preamble contained in the Commentary to Article 27 of the 1966 Draft (YBILC 1966-II, p. 221, para. 12).
With regard to judicial decisions, see ICJ, 27 August 1952, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, judgment, p. 197; ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 52.

[550] Hand J. in Court of Appeals (United States), 31 March 1948, *Commissioner of Internal Revenue v. National Carbide Corporation*, 167 F.2d 304, at 306, also quoted in R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 178.

[551] See YBILC 1966-II, p. 221, para.13.

[552] YBILC 1964-II, p. 56, para. 14.

[553] On the necessity not to limit the context to the sole text of the provision (or article) to be interpreted (i.e. the narrow context), see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester

The former is constituted by the sentence in which the term is located and the other closest sentences, the title of the article where the above sentences are located,[555] the structure or scheme of the provision at stake,[556] as well as the specific agreements reached by the parties for the purpose of clarifying the meaning to be attributed to such a term and embodied in the treaty. In the "narrow" context, the grammar of the paragraphs, sentences and phrases in which the terms are located is a relevant, although not decisive,[557] element that must be carefully analysed, although not determinative.

The "wide" context includes the other means of interpretation that are classified as context under Article 31(1) VCLT, which are discussed in the rest of this section.

Article 31(2) VCLT provides for a definition of the term "context", which should be read into Article 31(1) for the purpose of its interpretation.[558] According to that definition, the context encompasses:

(i) the text of the treaty, including its title,[559] preamble and annexes;

(ii) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and

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

These three elements present a common characteristic that constitutes their distinctive feature: they reflect the agreement of the parties *at the time of the treaty conclusion*.[560]

University Press, 1984), p. 127; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 146. The issue was discussed at the ILC's 893rd meeting, held on 18 July 1966, where Mr Yasseen (Chairman) and Sir Humphrey Waldock, both replying to an issue raised by Mr Jiménez de Aréchaga concerning the wording of (now) Article 31(1) VCLT, stated that "the terms of a treaty should be interpreted in the light of the treaty as a whole and not of a single article" and that such a conclusion was made fully clear by the definition of context provided for in (now) Article 31(2) VCLT (YBILC 1966-I (part II), p. 329, para. 32 and pp. 328-329, para. 25).

[554] A good illustration of the difference existing between the "narrow" and the "wide" context, as well as of the role played by the context in treaty interpretation is represented by ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, paras. 373 and 374.

[555] The relevance of the titles is well illustrated by the VCLT itself, for example in the use of the singular in the title of Article 31 "General rule of interpretation", purported to convey the idea of the unity of the interpretative process, where all the elements have to be thrown together in the crucible. However, in certain instances, the role of the titles of articles may be limited by the very same treaty. A clear example is that, given by Gardiner (see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p.181, footnote 124), of the 1992 United Nations Framework Convention on Climate Change, where it is expressly provided that the titles of articles "are included solely to assist the reader".

[556] See, for example, WTO Appellate Body, 2 August 1999, *Canada – Measures Affecting the Export of Civilian Aircraft*, AB-1999-2 (WT/DS70/AB/R), paras. 152-156.

[557] See, for example, ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, paras. 53-55.

[558] See YBILC 1966-II, p. 220, para.8.

[559] See, for example, ICJ, 12 December 1996, *Oil Platforms, (Islamic Republic of Iran v. United States of America)*, judgment, para. 47: "It should also be noted that, in the original English version, the actual title of the Treaty of 1955 — contrary to that of most similar treaties concluded by the United States at that time, such as the Treaty of 1956 between the United States and Nicaragua — refers, besides "Amity" and "Consular Rights", not to "Commerce" but, more broadly, to "Economic Relations"."

[560] See the French authentic text of Article 31 VCLT, where the expression "à l'occasion de la conclusion du

This usually excludes the possibility that such elements do not reflect the final agreement reached by the parties with reference to the actual content of the treaty. In this respect, that characteristic distinguishes them from the *travaux préparatoires*, whose words might refer to provisionary agreements between the parties that did no longer held at the time of the treaty conclusion.[561]

It is common practice in international affairs to consider a treaty concluded when it is authenticated, i.e. at the date generally indicated in the *testimonium* of the treaty as the date of signature.[562] However, an analysis of the various provisions of the VCLT that refer to the treaty conclusion shows that the term "conclusion" may assume different meanings according to the object and purpose of the provision where it is used, the meaning being either the process leading the contracting States to be bound by the treaty, or the point in time when the treaty text is authenticated (generally the moment when the treaty is signed).[563] In that respect, for the purpose of Article 31 VCLT, the term "conclusion" is probably to be seen as denoting the process starting from the adoption of the text[564] and ending at the moment when the contracting States become bound by the treaty (e.g. the moment of the ratification, exchange of instruments, accession), or, if subsequent, the moment when the contracting States have to take some agreed action for the purpose of bringing the treaty into force (e.g. an amendment to the original treaty necessary for this purpose).[565]

However, the requirement provided for by Article 31(2) VCLT that the agreement between the parties is to occur at the time of the conclusion of the treaty should not be read too strictly. This requirement, in fact, must be assessed in light of its own object and purpose, that is to distinguish agreements and instruments that almost certainly reflect the final intention of the contracting States as to the actual content of the treaty, on the one hand, and instruments (such as the *travaux préparatoires*) that probably do not, on the other hand. Under this perspective, where evidence exists that an agreement made between the parties during the negotiation process, i.e. before the signature of the treaty, was still valid at the time of the conclusion of the treaty, it is reasonable to conclude that such an agreement should be taken into account as a primary means of interpretation under Article 31(2) VCLT.[566]

---

traité" is used. See also YBILC 1964-I, p. 313, para. 53.

[561] It is, in fact, possible that subsequent changes in the agreement could have been not properly registered in the *travaux préparatoires*, due to the fact that they are usually incomplete.

[562] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 209.

[563] See the provisions included in Section I of Part II of the VCLT, in particular Articles 10 and 11 (read in combination with Articles 2(1)(a), 2(1)(f), 2(1)(g)). In that respect, see also YBILC 1962-II, p. 30, para.9.

[564] See Article 9 VCLT.

[565] See, similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 211 and E. W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", 59 *British Yearbook of International Law* (1988), 75 *et seq.*, at pp. 83-84.

[566] See YBILC 1966-II, p. 221, para. 14; YBILC 1964-I, p. 311, para. 18. See also the reply to the Australian representative given by the Chairman of the Drafting Committee of the Vienna Conference (UNCLT-1st, p. 442, para. 31) and the position expressed in R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 341-342.

With regard to the first of the three elements constituting the context for the purpose of Article 31 VCLT, i.e. the text of the treaty, this must be considered to include the preamble and annexes of the treaty,[567] as well as any other instrument that the parties intended to be part of the treaty.[568]

Where a separate instrument is not, because of the explicit or implied agreement between the parties, to be characterized as an integral part of the treaty, it is nonetheless treated, in most cases, as part of the treaty context under Article 31(2)(a) VCLT.[569]

With regard to the second element of the context, i.e. any agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty, the following points can be made.

First, the term "agreement" should be construed as denoting both written and unwritten (i.e. verbal and tacit) agreements.[570] This conclusion is supported by manifold arguments, the most important being that:[571]

(i) the term "agreement" is also used in Article 31(3)(a) VCLT and, in connection with the latter provision, it is widely recognized that it encompasses non-written agreements;[572]

(ii) the means of interpretation referred to in Article 31 VCLT are all of a juridical binding nature as between the parties, while the supplementary means of interpretation are not; since written and unwritten agreements are, under customary international law, of an equal status, both being binding on the parties according to the *pacta sunt servanda* rule,[573] an interpretation of the term

---

[567] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 187. With reference to preambles, not all of them seem bear the same interpretative value, especially as a consequence of the broad range of carefulness spent by the contracting parties in their negotiation. As Gardiner rightly points out, the *travaux préparatoires* may shed light on whether or not the parties have paid attention to the drafting of the treaty preamble (R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 186).

[568] See the combined reading of Article 31(2) and 2(1)(a) VCLT. See also ICJ, 1 July 1952, *Ambatielos Case (Greece v. United Kingdom)*, judgment, pp. 42-44.
Typical examples of this kind of instrument are the Protocols of Signature (see the definition of Protocol of Signature on the Treaty Reference Guide of the United Nations defines available at the following url: http://untreaty.un.org/ola-internet/assistance/guide.htm) and the Protocols to bilateral tax treaties concluded at the time of signature of the relevant treaty, which are often considered to constitute integral part of the treaty text because of their ancillary and subsidiary nature.

[569] For instance, agreements not in written form cannot constitute an integral part of the treaty, due to the specific provision of Article 2(1)(a) VCLT. That notwithstanding, they constitute part of the context whenever they relate to the treaty and are made between all the parties in connection with the conclusion thereof.

[570] See YBILC 1964-I, p. 310, para. 15; YBILC 1964-I, p. 313, para. 51.

[571] For a more extensive analysis of the possible arguments in support of the wide construction of the term "agreement", as used in Article 31(2) VCLT, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 196-199.

[572] See the position expressed by the German representative at the plenary session of the Vienna Convention (UNCLT-2nd, p. 57, para. 65), who, somewhat inconsistently, also maintained that the very same term "agreement" should be interpreted as referring solely to written agreements where used in Article (now) 31(2) VCLT (UNCLT-2nd, p. 57, para. 64).

[573] See Article 3 VCLT; among scholars see, for instance, R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), p. 1201.

"agreement" used in Article 31(2) VCLT leading to the inclusion of unwritten binding agreements among the supplementary means of interpretation for the purpose of treaty interpretations appears unsatisfactory;

(iii) a narrow interpretation of the term "agreement" would disregard the above-mentioned rule of customary international law and, therefore, might be seen as infringing Article 31(3)(c) VCLT, which prescribes customary international law to be taken into account for the purpose of treaty interpretation;

(iv) the fact the term "agreement", and not terms such as "treaty" or "instrument", is employed in Article 31(2)(b) VCLT appears relevant, since the use of the latter terms would have made it clear that the agreement had to be in written form.

In relation to the means that may be used in order to prove the existence and the content of unwritten agreements, it is admitted that both acquiescence and estoppel, on the one hand, and the subsequent practice of the contracting States, on the other hand, may be taken into account in that respect.[574]

Second, Article 31(2)(a) VCLT does not require the agreement to relate only, or mainly, to the interpretation of the treaty (or a part thereof). It is enough that the agreement is somewhat connected to the treaty, so that it may directly or indirectly shed some light on the proper meaning to be attributed to certain terms or expressions.[575] According to Sinclair (citing Yasseen), the agreements referred to by Article 31(2)(a) must be "concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application".[576] Moreover, Article 31(2)(a) VCLT is relevant only where an express reference to the agreement is missing in the text of the treaty. In contrast, where such a reference is included in the treaty, the agreement becomes part of the context because incorporated in the text by means of an express *renvoi*.[577]

Third, the expression "all the parties" should not be intended as entailing that, in cases of bilateral treaties based on a common model (like the OECD Model), all the States that participated directly or indirectly in the development of the model must have agreed on the interpretation of a specific term or clause of the model given in the commentary thereto, in order for that interpretation to be relevant for the bilateral treaty actually at stake. In fact, under Article 31(2)(a) VCLT, the expression "all the parties" denotes just the States party to the actual treaty and, therefore, once the proof is given (even by inference) that such States have agreed on the relevance of the interpretation provided for in the commentary to the model for the purpose of construing the actual treaty, that commentary must be regarded as included in the treaty context.

Finally, where the agreement between the parties provides for an interpretation

---

[574] See, for instance, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 209.

[575] See similarly F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 201.

[576] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 129.

[577] Examples of such express *renvoi* have been examined in ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment (see in particular the dissenting opinion of Judge Torres Bernárdez, paras. 195-196) and ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, in particular, para. 53. For a similar, even though not identical, conclusion, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 180.

that apparently contradicts the *prima facie* "ordinary meaning" of the treaty terms, it seems reasonable to conclude that such an interpretation must prevail and that the meaning of the treaty terms resulting from it must be seen as a "special meaning" according to Article 31(4) VCLT.

With regard to the third element of the context, i.e. any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as instruments related to the treaty, the following points can be made.

First, the term "instrument" seems to require the existence of a written document: since the other parties to the treaty have to accept it, it would appear difficult to imagine some parties accepting statements of other parties, unless such statements have been recorded in a written document.[578]

Second, although Article 31(2)(b) VCLT seems intended to cover cases where instruments such as ratifications, reservations and policy declarations are at stake,[579] where interpretative instruments come into play, the acceptance by the other parties of the instrument as related to the treaty often extends to the acceptance of the substance of the interpretation provided for in the instrument. This may lead to the creation of an agreement between the parties on the interpretation of the treaty that, as such, falls within the scope of Articles 31(2)(a) or 31(3)(a) VCLT.

Third, the instrument is to be made by one or more parties, i.e. it is not required that the instrument is made by all the parties.[580]

Fourth, it seems reasonable that the instrument must be accepted by all other parties to the treaty: an instrument accepted only by some parties may be relevant for the purpose of applying and interpreting the treaty among those parties, but cannot be considered to form part of the context.[581]

Fifth, the acceptance of the instrument by the other parties may be either explicit or tacit.[582] On the one hand, the text of Article 31(2)(b) VCLT is broad enough to allow tacit acceptance.[583] On the other hand, the VCLT generally adopts more explicit expressions whenever a written acceptance is required.[584]

Finally, VCLT requires the parties that did not make the instrument only to

[578] See, for a similar conclusion, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 205-206, where the author also briefly describes the history of the term "instrument" as used in Article 31 VCLT.
[579] See the similar statement by Sir Humphrey Waldock at the ILC 769th meeting (YBILC 1964-I, p. 311, para. 23).
[580] The latter instrument would probably fit within Article 31(2)(a) VCLT, if relating to the treaty.
[581] See the statement made in this respect by Mr Ago (Chairman) at the ILC's 766th meeting (YBILC 1964-I, p. 287, para. 63). See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 212. A fortiori a unilateral instrument not accepted by the other parties to the treaty cannot be considered to be covered by the provision at stake.
[582] This conclusion may be of particular relevance with reference to reservations (i) permitted by the treaty itself and (ii) for which an express acceptance by the other parties is not required (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 213-214).
[583] See YBILC 1966-II, p. 98, para. 16.
[584] See, for instance, the expression "formulated in writing" in Article 23 VCLT.

accept it as "related to the treaty".[585] Thus, since it is not required that the all the parties agree on the content of such an instrument, its value as evidence of the meaning to be attributed to a term of the treaty may vary substantially according to the level of agreement reached between the parties in that respect. An instrument made by some parties whose content has been explicitly agreed upon by the other parties will have a much greater interpretative value than an instrument produced by the former parties and just accepted as related to the treaty by the latter parties without any additional clarification on the agreement reached with reference to its content.[586]

2.3.3.3. Subsequent agreements and practice

Under Article 31(3) VCLT, the following must be taken into account, together with the context:

> a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

According to the commentary to the 1966 Draft, subsequent agreements and practice, as well as relevant rules of international law, are "all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which" are part of the context.[587] This statement is further supported by the following arguments:

> (i) the title of Article 31 VCLT makes reference to a single, general rule of interpretation, thus putting the various elements referred to in that article on the same footing for hermeneutical purposes;
> (ii) the phrase "There shall be taken into account, together with the context" is apt to incorporate these means of interpretation into Article 31(1) VCLT.[588]

The main difference between the elements referred to in Article 31(3)(a) and (b) VCLT, as compared to those mentioned in Article 31(2) VCLT, is represented by their temporal aspect. In particular, while the latter are always contemporary to the conclusion of the treaty, the former are subsequent thereto. This temporal aspect serves also to distinguish these means of interpretation from the *travaux préparatoires* since the former, being subsequent to the conclusion of the treaty, may be said to most probably reflect an agreement between the parties on the interpretation of the treaty that is still valid at the moment of its application (unless a different agreement is reached later on), while the latter might record provisional agreements between the parties that no longer held true at

[585] See YBILC 1966-II, p. 221, para.13.
[586] See, accordingly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 204.
[587] YBILC 1966-II, p. 220, para. 9. See, with specific reference to subsequent agreements, YBILC 1966-II, p. 221, para. 14. See also R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 206-207.
[588] See also, in this respect, YBILC 1966-II, p. 220, para.8.

the time of the conclusion of the treaty (and, a *fortiori*, at the later time of its application).[589]

In addition, the two elements mentioned in Article 31(3)(a) and (b) VCLT have in common that they both require an agreement between the contracting States on the interpretation of the treaty to exist.

Since the agreement between the parties is, in this case, subsequent to the conclusion of the treaty, two issues arise concerning (i) where the dividing line between interpretation and amendment of the treaty must be drawn and (ii) whether special rules and formalities apply where the agreement amounts to an amendment of the treaty.

With regard to the first issue, Sir Humphrey Waldock, speaking in his capacity of Expert Consultant to the Vienna Conference, clarified that the ILC, in distinguishing between subsequent practice[590] modifying a previous agreement and that merely interpreting it, focused on whether "a subsequent practice departed so far from any reasonable interpretation of the terms as to constitute a modification".[591] Similarly, according to Engelen, where a subsequent agreement or practice between the parties cannot reasonably be reconciled with the text of the treaty, it has the effect of modifying the treaty and, therefore, has no role to play in the application of the general rule of interpretation, but rather comes under the general rule regarding the amendment of treaties (Article 39 VCLT), which requires that the amendment complies with the rules laid down in Part II of the VCLT (Conclusion and Entry into Force of Treaties), unless the treaty itself otherwise provides.[592]

In that respect, however, it must be kept in mind that the rules of interpretation laid down by Articles 31 and 32 VCLT do not provide for a literal approach and establish that the ordinary meaning of a treaty term may be displaced in some occasions, recognizing that:

(i) a special meaning may be given to a term where the parties so intended and
(ii) decisive recourse to supplementary means of interpretation is allowed in order to determine the treaty meaning when the latter appears ambiguous, obscure, manifestly absurd or unreasonable.

Therefore, it seems that the range of situations where it may be reasonably concluded that the agreement between the parties is of an interpretative character (i.e. reaffirming the original intention of the parties) or, in any case, does not contradict such an intention (e.g. where the specific case had not been forecasted at the moment of the treaty conclusion) and, therefore, it is not of an amending character, is remarkably broad.

Moreover, the possibility of an evolutive interpretation is also to be taken into

[589] See the previous section in this respect.
[590] But the same holds true with reference to subsequent agreements.
[591] See UNCLT-1st, p. 214, para. 55. An illustration of the possible distinction between amendments and interpretations resulting from the subsequent practice followed by the parties (taken together with other relevant elements for interpretation), is given in ECtHR, 12 March 2003, *Öcalan v. Turkey (Application no. 46221/99)*, paras. 193-198.
[592] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 220 and 240.

account in this regard. As the HCHR expressly stated, an "evolutive interpretation allows variable and changing concepts *already contained in the Convention* to be construed in the light of modern-day conditions".[593] Evolutive interpretation is generally accepted in two cases (although the dividing line between them is sometimes indistinct):

(i) in cases of treaties that use general legal terms whose meaning might be expected by the parties to change over time according to the development of the law from which they derive;[594] and

(ii) in cases of treaties that are, by their nature, designed to allow for their progressive development and elaboration.[595]

Under this perspective, for instance, changes in the commentaries to Model Conventions might be considered, in some cases, to be evidence of the agreement of the parties to refine their interpretation of previously concluded treaties.

With regard to the second issue, under Article 39 VCLT treaty amendments must comply with the rules laid down in Part II of the VCLT (Conclusion and Entry into Force of Treaties). That, however, does not mean that amendments to treaties must be in written form. It is in fact generally recognized that amendments to treaties may be agreed upon orally, or even tacitly.[596]

This conclusion is confirmed by the commentary to the 1966 Draft, where it is stated that an "amending agreement may take whatever form the parties to the original treaty may choose. Indeed, the Commission recognized that a treaty may sometimes be modified even by an oral agreement or by a tacit agreement evidenced by the conduct of the parties in the application of the treaty. Accordingly, in stating that the rules of part II regarding the conclusion and entry into force of treaties apply to amending agreements, the Commission did not mean to imply that the modification of a treaty by an oral or tacit agreement is inadmissible."[597]

In any case, amendments may be subject to specific requirements, with regard to their form and procedure of acceptance, under the constitutional law of the contracting States.

---

[593] HCtHR, 29 May 1986, *Feldbrugge v. the Netherlands (Application no. 8562/79)*, para. 24 of the Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing, where the following case law of the ECtHR is cited: ECtHR, 25 April 1978, *Tyrer v. the United Kingdom (Application no. 5856/72)*, para. 31; ECtHR, 13 June 1979, *Marckx v. Belgium (Application no. 6833/74)*, para. 41; ECtHR, 22 October 1981, *Dudgeon v. the United Kingdom (Application no. 7525/76)*, para. 60.

[594] E.g. ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, para. 77 of the decision. See also the reference to the concept of "known legal term" in Judge Higgins' Separate Opinion in the case *Kasikili/Sedudu Island* (ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 2 of Judge Higgins' Separate Opinion).

[595] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 242-243.

[596] See for instance, before the conclusion of the VCLT, Arbitral Tribunal, 17 July 1965, *Italy-USA Air Transport Arbitration*, 45 *International Law Reports* (1972), 393 *et seq.* and, after the conclusion of the VCLT, Arbitration Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq.* See also R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1254-1255.

[597] YBILC 1966-II, pp. 232-233, para. 4.

As concern the scope of Article 31(3)(a) VCLT, the following points can be made.

First, the term "agreement", as previously noted in the context of Article 31(2) VCLT, should be construed as denoting both written and unwritten agreements.[598] However, as a matter of fact, where no written document exists, evidence of the existence and content of the agreement may be mostly given by reference to subsequent practice.[599] In such a case, the agreement appears to be substantially subsumed under the following provision of the VCLT.

Second, Article 31(3)(a) VCLT defines the subsequent agreement as "between the parties". The different wording, as compared to that used in Article 31(2)(a) VCLT, raises the question whether, in the case of a multilateral treaty, a subsequent agreement reached between solely some of the parties to the treaty would fit in the provision of Article 31(3)(a) VCLT. In this respect, both the French and English authentic texts of Article 31(3)(a) employ terms that seem to denote the parties as a whole ("les parties"; "the parties")[600] and the Commentary to the 1966 Draft, although with reference to (now) Article 31(3)(b) VCLT, states that the reference to "the parties" must be intended as being to "the parties as a whole".[601]

Third, although unilateral interpretative statements do not fall, as such, under the general rule of interpretation provided for in Article 31 VCLT, where they are coupled with concordant practice by the other parties or any evidence confirming that the other parties endorsed such unilateral statements, their content may assume the status of an agreed interpretation of the treaties and fall within the scope of Article 31(3)(a).

Finally, the agreement must be one regarding the interpretation or the application of the treaty; however, in addition, it may also concern other issues among the parties.

With regard to Article 31(3)(b) VCLT, the following observations can be made.

First, the practice referred to therein is only that establishing an agreement reached between the parties in respect of the interpretation of the treaty. Where the practice does not establish the tacit agreement of the parties on the treaty construction, such a practice is still relevant for the purpose of interpreting the treaty, but just as a supplementary means of interpretation.[602]

Second, the relevant practice must be carried out by bodies revealing the State's position and commitment with reference to the treaty.[603] In general terms, the relevant

[598] See Arbitral Tribunal, 3 August 2005, *Methanex Corporation v. the United States of America*, final award on jurisdiction and merits, para. 20 of Part II - Chapter B. The text of the award is available on the website of the United States government at the following url: http://www.state.gov/documents/organization/51052.pdf.
[599] According to Gardiner, the less formal the agreement, the greater the significance of subsequent practice confirming such less formal agreements or understandings (see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 222).
[600] See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 220-221.
[601] See YBILC, p. 222, para.15.
[602] See, although with regard to Third Report of the Law of Treaties submitted by Sir Humphrey Waldock to the ILC, YBILC 1964-II, p. 60, paras. 23-25. See also YBILC 1964-I, p. 298, paras. 56 and 59.
[603] See, accordingly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 228.

practice, at least in modern western countries, encompasses (i) that of the States' legislative power (usually the parliaments); (ii) that of the executive power (typically the government and any other public body charged with the authority of the State); and that of the jurisdictional power (usually the judiciary). In this respect, the evidence of such a practice may be obtained from a wide number of sources, e.g. policy statements from representatives of the legislative or executive power, statements from the representatives of the executive before the legislative body, domestic legislation, other treaties concluded, decisions of the judiciary, decisions by international courts and tribunals, press releases, opinions and declarations of official legal advisors, practice within international organizations, diplomatic correspondence, official manuals on legal issues, comments by governments on drafts produced by the ILC.[604] Since practice must be under the authority of the States party to the treaty, it is potentially admissible to take into account the practice of international organizations, this being indirectly a practice of its member States, and international tribunals.[605]

Third, it seems that where reputable studies have been carried out by international organizations, research institutes and others, the treaty interpretation provided for in such studies, coupled with the conduct, or even absence of conduct of the parties may amount to a practice establishing the agreements of those parties for the purpose of Article 31(3)(b) VCLT.[606]

Fourth, it does not seem that Article 31(3)(b) VCLT requires active practice by all contracting States.[607] The relevant practice may result from the active practice of some parties, coupled with the explicit (rare), or implicit acceptance of such a practice by the other parties. Implicit acceptance may be constituted by the absence of any reaction to the conduct of the other States; in this case, acquiescence and (to certain extent) estoppel may be relevant.[608] However, the tacit acceptance by the other parties cannot be lightly assumed. Parties that are not engaged in the practice might abstain from protest for reasons different from acquiescence, e.g. because the practice or issue at hand is not relevant for them: according to the majority of authors,[609] in these cases the silence of the parties is not conclusive.[610] Thus, the silence or inaction of a State may be interpreted

[604] For a quite comprehensive list of material sources of international customary law, see I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), p. 6.
[605] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 229, 235 and 246; I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), p. 6.
[606] See, accordingly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 239. For a judicial application, see Court of Appeal of England and Wales (United Kingdom), 23 July 1999, *Regina v. Secretary of State for the Home Department, ex parte Adan*, [1999] 3 WLR 1274, at 1296.
[607] See YBILC 1966-II, p. 99, para. 18.
[608] See ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, p. 32; ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 74. On the relevance of estoppel before the VCLT rules received widespread application, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 220 *et seq*.
[609] See, *ex multis*, I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), pp. 7 *et seq*.; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 234.
[610] See also the conclusion reached by the ICJ in the *Kasikili/Sedudu Island* case with reference to the fact that the conduct of one party and the absence of reaction by the other party of a bilateral treaty did not amount to a subsequent practice in the sense of Article 31(3)(b) VCLT in the particular circumstances of the case (see ICJ,

as consent only where the circumstances were such as to call for some reaction, on the part of that State, if it wished not to consent.[611]

Fifth, the practice should be sufficiently repeated and consistent.[612] In this sense, practice establishing an agreement on the interpretation of a treaty appears conceptually similar to the *diuturnitas* required for having customary law, i.e. "evidence of a general practice accepted as law",[613] although the period for which the practice must endure (repeated action) does not have to be as long as in the case of customary law.[614]

Finally, in some cases the evidence from practice required in order to establish the existence of an agreement on the interpretation of the treaty may be less than usually needed, for instance where (i) evidence exists of an informal agreement reached between the parties in connection with the conclusion of the treaty and relevant for its interpretation and (ii) the practice seems to conform to such an agreement.[615] This may also be the case where (i) a common model and a commentary thereon exist, on which the actual treaty is widely based[616] and (ii) there is a substantial number of other treaties concluded by the contracting parties following that model and, in respect of such other treaties, evidence of consistent practice is available.[617] This means that, although with due caution, practice in the application of similar or related treaties may be useful in order to attribute to the undefined terms of the relevant treaty their ordinary or special meanings, particularly where a common model convention is used as basis for their drafting.[618]

2.3.3.4. Relevant rules of international law

"A word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used"[619]

---

13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, paras. 74-75).

[611] See ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, p. 23. On the role played by acquiescence to other parties' conduct in treaty law and, in particular, with regard its relevance for the purpose of determining the legal status of the OECD Commentary, see H. Thirlway, "The Role of International Law Concepts of Acquiescence and Estoppel", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 29 *et seq.*

[612] See, for instance, WTO Appellate Body, 4 October 1996, *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, (WT/DS8-10-11/AB/R), pp. 12-13.

[613] See Article 38(1)(b) of the Statute of the International Court of Justice.

[614] See Arbitral Tribunal, 17 July 1965, *Italy-USA Air Transport Arbitration*, 45 *International Law Reports* (1972), 393 *et seq*., at 419.

[615] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 241-242 and the case-law cited therein.

[616] That holds especially true where the parties contributed to the development of the model.

[617] E.g. Court of Appeal of England and Wales (United Kingdom), 23 July 1999, *Regina v. Secretary of State for the Home Department, ex parte Adan*, [1999] 3 WLR 1274, at 1296; Arbitral Tribunal, 10 April 2001, *Pope & Talbot Inc v. Canada*, award on merit s of phase 2, paras. 110 *et seq*. and Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 62 (available on the NAFTA website).

[618] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 235, 282-284.

[619] United States Supreme Court, 7 January 1918, *Towne v. Eisner*, 245 U.S. 418 (1918), p. 425 per Justice

Treaties are agreements concluded in a given international legal environment. For the purpose of interpreting treaties it is therefore important to understand such legal environment, which constitutes the background against which the treaties must be read.

The relevance for treaty interpretation of such an international legal environment was already recognized before the conclusion of the VCLT.[620] Article 1(1) of the 1956 Resolution of the Institute of International Law read: "[…] Les termes des dispositions du traité doivent être interprétés dans le contexte entier, selon la bonne foi et *à la lumière des principes du droit international*."[621] Similarly, in the case *Right of Passage over Indian Territory (Portugal v. India)*, the ICJ stated that it "is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[622]

Such a principle has been incorporated in the VCLT as a part of the general rule of interpretation. According to Article 31(3)(c) VCLT, in fact, the interpreter must take into account "any relevant rules of international law applicable in the relations between the parties". This provision presents two fundamental issues that require discussion:[623]

(i) which are the relevant rules of international law to be taken into account under Article 31(3)(c);

(ii) whether such rules are those in force at the time of the conclusion of the treaties, or those at the time of the application thereof.

With reference to the first issue, the following should be noted.

In light of the history of the provision,[624] its wording and context, it seems that the following types of rules of international law are to be considered covered by Article 31(3)(c) VCLT:[625]

(i) general rules and principles of international law, including customary international law;[626]

Holmes.

[620] See also the position expressed by Lauterpacht on this issue in H. Lauterpacht, *The development of International law by the International Court* (London: Stevens & Sons Limited, 1958), pp. 27-29.

[621] Institute of International Law, 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*, at 364.

[622] ICJ, 26 November 1957, Right of Passage over Indian Territory (Portugal v. India), judgment, p. 142.

[623] On such issues see, in general, D. French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", 55 *International and comparative law quarterly* (2006), 281 *et seq.*

[624] See, in particular, YBILC 1964-I, p. 319, paras. 10, 11 and 13; YBILC 1966-I (part II), p. 267, para. 90.

[625] These rules substantially coincide with the sources of interpretation that the ICJ has to apply according to Article 38(1)(a), (b) and (c) of its Statute.

[626] See WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (WT/DS291-292-293/R), Chapter VII, para. 7.67. Note that customary international law may be formed according to the practice of States in concluding similar treaties or treaties based on a common model. See, for example, Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 64. With reference to the relation between tax treaties and customary international law, see R. S. Avi-Yonah, "Tax Competition, Tax Arbitrage and the International Tax Regime", 61 *Bulletin for international taxation* (2007), 130 *et seq.*

(ii) general principles of law recognized by civilized nations;[627]
(iii) regional or local rules of international law applicable in the relations between the parties (e.g. European law principles between two States member of the European Union);
(iv) other treaties in force between all the parties (both earlier and later treaties).

In general, it does not seem that treaties (a) between only some of the parties, (b) between some of the parties and third States and (c) just between third States may fit in the provision of Article 31(3)(c), since such treaties are not "applicable in the relations between the parties".[628] A contextual interpretation of the term "the parties", in fact, leads to the conclusion that its ordinary meaning is "the parties as a whole", since that is the meaning that such a term assumes in the other provisions of Article 31 VCLT.[629]

That conclusion, of course, does not hold true where such treaties express customary international law, or general rules of international law, which are in any case applicable between the parties. Moreover, that conclusion does not mean that such treaties are not at any rate available means of interpretation. On the one hand, where the compatibility of the provision of the treaty to be interpreted with another treaty is at stake, the existence of an obligation under the latter treaty may be clearly taken into

---

[627] See Article 38(1)(c) of the Statute of the ICJ. Such general principles include both general principles of law derived from municipal jurisprudence (mainly relating to jurisdiction, burden of proof, procedure, etc.) and general principles of international law (such as the rules of consensus, good faith, reciprocity, etc.). See I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), p. 18. Article 38 of the ICJ Statute was cited in relation to Article 31(3)(c) VCLT by the Arbitral Tribunal in the *Pope & Talbot* case (Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 46).

[628] On the issue of the scope of Article 31(3)(c) VCLT see the recent study of C. McLachlan, "The Principle of Systematic Integration and Art. 31(3)(c) of the Vienna Convention", 54 *International and comparative law quarterly* (2005), 279 *et seq.* See also U. Linderfalk, "Who Are 'The Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited", 55 *Netherlands International Law Review* (2008), 343 *et seq.*; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008), pp. 368 *et seq*.; D. French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", 55 *International and comparative law quarterly* (2006), 281 *et seq.*, at 307.
Contra this conclusion, see, however, the 2006 Report of the Study Group of the ILC finalized by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, available at the following URL: http://untreaty.un.org/ilc/texts/1_9.htm, in particular, para. 472 thereof.

[629] See previous sections with regard to the evidence supporting this conclusion. See, accordingly, the position expressed by the German representative at the Committee of the Whole of the Vienna Conference (UNCLT-1st, pp. 172-173, paras. 10-12). See also WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (WT/DS291-292-293/R), Chapter VII, para. 7.68 and footnote 242 thereto; GATT panel, 16 June 1994, *United States – Restrictions on Imports of Tuna* (DS29/R), para. 5.19 (available on-line at the following url: http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf). Among scholars, see, for instance, U. Linderfalk, "Who Are 'The Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited", 55 *Netherlands International Law Review* (2008), 343 *et seq.;* F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 253.
However, the recent Report of the ILC *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (para. 472) seems to also permit reference to treaties concluded among only some of the parties, "provided that the parties in dispute are also parties to that other treaty".

account as a supplementary means of interpretation, even where the latter treaty is not in force between all the parties to the former treaty.[630] On the other hand, where the issue at stake is the attribution to a treaty term of its ordinary (or special) meaning, such other treaties represent a primary means of interpretation so far as they may shed light on such an ordinary (or special) meaning, e.g. where they concern the same subject matter or deal with a related topic and are of a widespread application, as well as where they are based on a common model.[631]

A related issue concerns whether non-binding international instruments are within the rules of international law referred to in Article 31(3)(c) VCLT.[632] In that respect, the use of the term "rules" seems to suggest a negative answer.[633] However, in some of its decisions, the ECtHR has referred to instruments not binding as such, though they may appear to have become part of customary international law or otherwise relevant for interpretative purposes under other provision of the VCLT.[634]

Finally, the rules of international law must be "relevant", i.e. significant in order to interpret the treaty. This condition should be regarded as a loose one: it is not necessary that the treaty to be interpreted incorporates a term or concept that is clarified by the rule of international law to be applied, or is directly linked to such a rule; whenever a rule of international law may have a bearing on the treaty and is potentially relevant for its interpretation, its use is allowed by Article 31(3)(c).[635]

With regard to the second issue, which is generally referred to as the "inter-temporal law" issue, the following observations can be made.

The modifications (or additions) over time of the relevant rules of international law may affect the interpretation and the application of treaties: on the one hand, they may affect the meaning to be attributed to a treaty term, since the treaty to be interpreted may include a term that is a state-of-the-art term in public international law, or in a specific branch thereof; on the other hand, they may affect the scope of the treaty,

---

[630] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 253.

[631] See the Conclusions of the work of the Study Group on the *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, adopted by the ILC at its Fifty- eighth session (ILC 2006 Report, pp. 414-415, para. 21). See also R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 281 *et seq*. For a similar conclusion, see ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 380; WTO Appellate Body, 14 January 2002, *United States – Tax Treatment for "Foreign Sales Corporations"*, AB-2001-8 (WT/DS108/AB/RW), paras. 141-145 (including the footnotes to such paragraphs) and 185; Arbitral Tribunal, 10 April 2001, *Pope & Talbot Inc v. Canada*, award on merits of phase 2, paras. 110 *et seq*. and Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 62 (available on-line on the Nafta web site - www.naftaclaims.com).

[632] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 268 *et seq*.

[633] See, in the same sense, WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products, (WT/DS291-292-293/R)*, Chapter VII, para. 7.67.

[634] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 269. For some examples of the instruments referred to by the ECtHR, see House of Lords (United Kingdom), 16 December 2004, *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56, para. 29.

[635] See, accordingly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 254.

especially where later treaties or customary international law embody rules that conflict with those of the treaty.

From a historical perspective,[636] the inter-temporal law issue was comprehensively dealt with for the first time in the arbitral decision delivered in the case *Island of Palmas*, where Judge Huber (the sole arbitrator) stated that, as regards the question of which of different legal systems prevailing at successive periods is to be applied in a particular case, a distinction must be drawn between the creation of rights and the existence of rights.[637] According to Judge Huber, (i) a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled,[638] while (ii) the existence of the right, in other words its continued manifestation, has to follow the conditions required by the evolution of law.[639] Propositions (i) and (ii) are commonly referred to as the "first branch" and "second branch", respectively, of the inter-temporal law principle.

The ILC, after a long and acute debate[640] on whether subsequent developments of international law could be taken into account for the purpose of interpreting previously concluded treaties, upheld the position expressed by Sir Humphrey Waldock that, in the circumstances of the case, the only reasonable conclusion was for the ILC to abandon the idea of solving the issue of inter-temporal law in the draft convention and to confine the text thereof to a limited reference to "rules of international law".[641] ILC's Drafting Committee consequently inserted a reference to "any relevant rule of international law applicable in the relations between the parties" in the draft of (then) Article 69(3)(c),[642] which was then adopted without amendments by the ILC and included in the 1966 Draft as Article 27(3)(c). It later became Article 31(3)(c) VCLT.

According to the commentary to the 1966 Draft, the relevance of rules of international law for the interpretation of treaties in any given case is dependent on the intentions of the parties and the correct application of the temporal element is normally indicated by interpretation of the treaty terms in good faith.[643]

This position has been substantially restated in the conclusions reached by the

---

[636] For an exhaustive analysis of the history of Article 31(3)(c) VCLT, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 257-285.

[637] See Arbitral Tribunal, 4 April 1928, Island of Palmas (Netherlands v. USA), 2 Reports of International Arbitral Awards, 829 *et seq*., at 845 *et seq*.

[638] See with the similar position taken by the ICJ, with regard to the validity of a treaty concluded in accordance with the conditions and practice at that time prevailing, in ICJ, 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, judgment, p. 37.

[639] For instance, with reference to treaties, the issue arises where certain provisions of a treaty conflict with later *ius cogens*.

[640] See the Third Report on the Law of Treaties prepared by Sir Humphrey Waldock (YBILC 1964-II, pp. 8-10); the discussion that took place in the course of the 728th and 729th ILC's meetings (in particular, YBILC 1964-I, p. 33, para. 6; p. 34, para. 10-13) and the revised draft articles subsequently prepared by the Special Rapporteur (in particular, YBILC 1964-II, pp. 52-53; p. 56, para. 12; p. 61, para. 32); the debate that took place in the course of the 765th, 769th and 770th ILC's meetings and the outcome thereof (in particular, YBILC 1964-I, p. 297, para. 46; YBILC 1964-II, pp. 202-203, para. 11); the Sixth Report on the Law of Treaties prepared by Sir Humphrey Waldock (in particular, YBILC 1966-II, p. 96, para. 7; p. 97, paras. 12-13; p. 101, para. 25).

[641] See YBILC 1966-I (vol. II), p. 199, para. 10.

[642] YBILC 1966-I (vol. II), p. 267, para. 90.

[643] See YBILC 1966-II, p. 222, para. 16.

ILC in its recent work on the fragmentation of international law, which has also touched upon the issue of inter-temporal law. In that respect, the Summary included in the 2006 ILC's Report to the General Assembly states the following: "International law is a dynamic legal system. A treaty may convey whether in applying Article 31(3)(c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law."[644]

The conclusion reached by the ILC appears in line with the position taken by the ICJ in its case law, where the Court seems to attribute paramount relevance to the original intention of the parties, as emerging from the analysis of the text, nature and structure of the treaty, as well as from its object and purpose, in order to solve the issues of inter-temporal law at stake in the specific cases. In this sense, the ICJ appears to solve the question of the impact of subsequent rules of international law on the interpretation of previous treaties by applying the general principle of good faith.[645]

Moreover, the analysis of international case law has shown that other courts and tribunals also tend to follow such an approach, especially where the treaties to be interpreted deal with human rights and fundamental freedoms.[646]

The same conclusions appear to be shared as well among scholars. For instance, Article 4 of the 1975 Resolution of the Institute of International Law concerning the Intertemporal Problem in Public International Law states that, "[l]orsqu'une disposition conventionnelle se réfère à une notion juridique ou autre sans la définir, il convient de recourir aux méthodes habituelles d'interprétation pour déterminer si cette notion doit être comprise dans son acception au moment de l'établissement de la disposition ou dans son acception au moment de l'application."[647] Similarly, Higgins states that, even with regard to the inter-temporal law issue, in "the law of treaties […] the intention of the parties is really the key" and that there is a "wider principle – intention of the parties,

[644] See ILC 2006 Report, p. 415, para. 22.

[645] See ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, para. 77 (where the Court also distinguished between the case under review and that decided in Arbitral Tribunal, *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 *International Law Reports* (1951), 144 *et seq*., at 152); ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 2 of Judge Higgins' Separate Opinion; ICJ, 25 September 1997, *Gabčikovo–Nagymaros Project (Hungary v. Slovakia)*, judgment, para. 140; ICJ, 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, para. 53; ICJ, 18 July 1966, *South West Africa (Ethiopia/Liberia v. South Africa)*, judgment, para. 235 of Judge Tanaka's dissenting opinion. See also the similar reasoning followed by the ECJ, dealing with the inter-temporal law issue in relation to the temporary fishing limits under Council Regulation 170/83 EEC (see ECJ, 9 July 1991, Case C-146/89, *Commission v. United Kingdom*, paras. 21-25).

[646] See R. Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 173 *et seq.* See, for instance, ECtHR, 25 April 1978, *Tyrer v. United Kingdom (Application no. 5856/72)*, para. 31.

[647] Institute of International Law, "Résolution of 11 août 1975: Le problème intertemporel en droit international public", 55 *Annuaire de l'Institut de Droit International* (1975), 536 *et seq.*, at 538.

reflected by reference to object and purpose – that guides the law of treaties."[648] Sinclair, after having pointed out that the interpreter has to take into account the historical context in which treaty provisions have been negotiated, which necessarily embraces the status of international law at that time, admits that "there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in interpreting certain terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation. […] this must always be on condition that such an evolutionary interpretation does not conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty."[649]

Finally, tackling the issue from a broader perspective, the general question that the interpreter must answer is how later changes in circumstances (such as changes in linguistic usage, technological progress, development of new fields of law, evolution of rules of international law, changes in the domestic law of the parties, changes in policy and practice) should be assessed for the purpose of interpreting and applying previous treaties. In that respect, the following conclusions may be drawn:

(i) where the changes determine the formation of a new rule of *ius cogens* in conflict with the treaty, the latter must be considered become void or implicitly modified;[650]

(ii) where an unforeseen fundamental change of circumstances takes place, it is (also) possible to invoke it as a ground for terminating, suspending or withdrawing from the treaty;[651]

(iii) in all other cases, the impact of the changes will depend on the language used in the treaty,[652] the context in which such language is used, the object and purpose

[648] R. Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 173 *et seq.*, at 181. See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 290-291. See also the substantially similar conclusions reached by Linderfalk, although supported by (partially different) arguments based on a semantic analysis, in U. Linderfalk, "Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties", 10 *International Community Law Review* (2008), 109 *et seq.*, in particular at 134 *et seq*.
For an analysis of how the inter-temporal law issue may impact tax treaty interpretation and the reasons why certain tax treaty terms could (and should) be interpreted in light of the relevant evolutions subsequent to the treaty conclusion, especially where those terms concern areas that are themselves likely to evolve (such as entertaining, athletics, technology and finance), see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.03 and 9.06-9.09, who refers to the "evolutionary approach to the meaning of tax treaty terms".

[649] I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 140.

[650] See Article 64 VCLT and the Commentary to Article 61 of the 1966 Draft (YBILC 1966-II, p. 261, para. 3)

[651] However, according to Article 62 VCLT, this is possible only in so far as (i) the existence of the original circumstances constituted an essential basis of the consent to be bound by the treaty and (ii) the effect of the change is to radically modify the extent of the obligations still to be performed under the treaty.

[652] For instance, the fact that general legal terms apt to change their meaning over time have been used rather than specific terms not apt to evolutionary interpretation.

of the treaty and the circumstances of its conclusion: all these elements will be taken into account, reciprocally weighted and assessed in good faith.[653]

2.3.4. Special meaning

It is generally recognized that the expression "special meaning", in the context of Article 31(4) VCLT, should be construed as denoting any meaning that could not be ordinarily attributed to the relevant treaty term, but in favor of which there is strong evidence of the intention of the parties.[654] Thus, the term "special meaning" should not normally include the meaning(s) attributed to the interpreted terms in the jargon of the field of knowledge dealt with in the treaty, such technical meaning(s) being normally regarded as the ordinary meaning(s) in the treaty context.

As a matter of fact, however, the borderline between ordinary and special meanings proves to be blurred in the vast majority of cases. While this does not create problems from a substantive standpoint (the task of the interpreter remaining that of establishing the meaning agreed upon by the parties), it may lead to procedural uncertainties, since the burden of proving that some unusual or exceptional meaning is to be attributed to the interpreted term should theoretically rest with the person alleging it.[655] In this respect, the complexity of ascertaining the dividing line between ordinary and special meanings may render meaningless the proposition that the burden of proof lies on the party supporting the special meaning.[656]

The main issue that the ILC and scholars have debated, with regard to Article 31(4) VCLT, concerns the means of interpretation that the interpreter should use in order

---

[653] A classic example, in this respect, is represented by the decision of the Arbitral Tribunal in the *Iron Rhine* case, where it was stated that new scientific insights, new norms and standards with respect to the protection of the environment had to be taken into account for the purpose of interpreting and applying a 1839 Treaty between Belgium and the Netherlands (see Arbitral Tribunal, 24 May 2005, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 *Reports of International Arbitral Awards*, 35 *et seq.*, para. 140. See also WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (WT/DS291-292-293/R), Chapter VII, para. 7.68.

[654] According to Gardiner, Article 31(4) VCLT is mainly apt to cover cases of "a particular meaning given by someone using a term that differs from the more common meaning or meanings" (R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 291). Sinclair defines it as the "converse of the 'ordinary meaning'" (see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 126).

[655] See commentary to Article 27 of the 1966 Draft (YBILC 1966-II, p. 222, para. 17). See also PCIJ, 5 September 1933, Legal Status of Eastern Greenland (Denmark v. Norway), judgment, pp. 49-50.

[656] See, for example, the difficulties faced by the ICJ in determining the ordinary meaning of the expression "to determine the legal situation of the (…) maritime spaces" used in Article 2 of the 1986 Special Agreement Between El Salvador and Honduras to Submit to the Decision of the International Court of Justice the Land, Island ad Maritime Boundary Dispute Existing Between the Two States in the course of the case *Land, Island and Maritime Frontier Dispute* (see ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, paras. 377 of the decision and 193 of Judge Torres Bernárdez's separate opinion).

establish and argue for the "special meaning" that the parties intended to attach to the relevant treaty term.

For instance, even during the ILC's eighteenth session, the members of the Commission did not agree on whether recourse to supplementary means of interpretation was allowed for the purpose of determining the special meaning to be attributed to the treaty terms.[657] Similarly, in the course of the Vienna Conference, some comments put forward by the delegations focused on the relation between the parties' intention to attach a special meaning to a treaty terms and the *travaux préparatoires*.[658] In this respect, Sir Humphrey Waldock, in his capacity of Expert Consultant, replied to such comments by pointing out that he could not share the view of those representatives who considered that in most cases the special meaning could be found only by recourse to the *travaux préparatoires*, since the comparatively few cases where a "special meaning" had been pleaded did not support that view, but, on the contrary, mainly pointed to the text and context of the treaty.[659]

Similarly, certain scholars have submitted that the analysis of the *travaux préparatoires* of the VCLT seems to indicate that evidence of the parties' intention to attach a special meaning to a treaty term should be derived mainly through the means of interpretation provided for in Article 31 VCLT, reliance on supplementary means of interpretation being permissible only in the cases specifically provided for in Article 32 VCLT.[660] This conclusion does not do more than restate the subordinate relevance of the supplementary means of interpretation within the system of interpretation designed by the VCLT and implicitly affirms the procedural nature of Article 31(4) VCLT.[661] The meaning of any treaty term must always be established on the basis of all elements and items of evidence that may be reasonably regarded as reflecting the common intention of the parties, no special derogation being provided for in cases where the parties might have intended to attach a "special meaning" to the relevant treaty term. In the described process of interpretation, *travaux préparatoires* are generally regarded as supplementary means of interpretation because of their uncertain reliability. However, where evidence exists that an agreement reached during the *travaux préparatoires* was still valid at the time of the treaty conclusion, that agreement is part of the context and counts as such for the purpose of interpretation, notwithstanding whether the agreed meaning is labeled ordinary or special.[662]

---

[657] See, for instance, YBILC 1966-I (vol. II), p. 205, para. 24.

[658] See the written statement of the International Bank for Reconstruction and Development (UNdoc. A/Conf. 39.7/Add. 1, pp. 14-15); the comments from the United States delegation (UNCLT-1st, p. 168, para. 47). See also the comments from the Austrian delegation (UNCLT-1st, p. 178, para. 14); the comments from the Ghanian delegation (UNCLT-1st, p. 171, para. 70); the comments from the Vietnamese delegation (UNCLT-1st, p. 168, para. 51).

[659] See UNCLT-1st, p. 184, paras. 70-71.

[660] See, for instance, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 294.

[661] Apparently in agreement Engelen, who highlights that Article 31(4) VCLT does not provide for an alternative, more subjective, process of treaty interpretation (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 164).

[662] See R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 501 and F. G. Jacobs, "Varieties of Approach to

For instance, a case where the "special meaning" may be established on the basis of the sole textual analysis is represented by the inclusion of a term expressed in one (authentic) language within a sentence written in a different (authentic) language.[663] Such a practice is often adopted where the "foreign language" term used is a technical one, which is associated with a concept that cannot be expressed at any rate by terms of the language used in the reminder of the sentence to be interpreted, or where the "foreign language" term better expresses the meaning that the parties decided to attach to the corresponding term of the language used in the sentence to be interpreted.[664]

2.3.5. Supplementary means of interpretation

"[I]n no circumstances ought preparatory work to be excluded on the ground that the treaty is clear in itself. Nothing is absolutely clear in itself" [665]

According to Sinclair, the use of supplementary means of interpretation (such as the *travaux préparatoires*, the circumstances of the conclusion of the treaty and the like) has "often been regarded as the touchstone which serves to distinguish the adherents of the 'textual' approach from the adherents of the 'intentions' approach".[666] The distinction is not so much one of whether using or not such means of interpretation, but how to use them and what the object and purpose of treaty interpretation is.

In the VCLT, *the travaux préparatoires* and the means of interpretation other than those referred to in Article 31 VCLT have been classified as supplementary means of interpretation. As such, under Article 32 VCLT, their use is limited to (i) confirming the meaning resulting from the application of Article 31 VCLT and (ii) determining the

---

Treaty Interpretation: With Special reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference", 18 *International and comparative law quarterly* (1969), 318 *et seq.*, at 327. Contra, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 164-166.

[663] That practice consists of inserting a term expressed in the "foreign" language (i.e. the language other than that used in the remainder of the sentence to be interpreted) instead of a term expressed in the language used in the remainder of the sentence to be interpreted, or adding the term in the "foreign" language in brackets (or similar) after the corresponding term expressed in the language used in the remainder of the sentence to be interpreted.

[664] E.g. the English authentic text of Article 33 of the 1951 Geneva Convention relating to the Status of Refugees provides that "[n]o contracting state shall expel or return ("refouler") a refugee". Surprisingly, in interpreting such a provision, Lord Bingham of the United Kingdom House of Lords found that the verb "refouler" was the subject of a stipulative definition and, therefore, it had to be understood as having a meaning corresponding to that of the English verb "return" (House of Lords (United Kingdom), 9 December 2004, *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, [2004] UKHL 55, para. 15). See, however, the different opinion expressed by D. Shelton, "Reconcilable Differences? The Interpretation of Multilingual Treaties", 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at 623.

[665] H. Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 *Harvard Law Review* (1935), 549 *et seq.*, at 571.

[666] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116.

meaning of an otherwise ambiguous, obscure, manifestly absurd or unreasonable provision.

In the Commentary to the 1966 Draft, however, it was made clear that, notwithstanding that the various means of interpretation had been divided into two separate articles and could be used to a different extent and purpose, the ILC did not intend to preclude recourse to a supplementary means of interpretation, such as *travaux préparatoires*, until after the application of the other means has disclosed no clear or reasonable meaning.[667] The process of treaty interpretation, in fact, was to be seen as a single process.

As Mr Rosenne noted in the course of the ILC's debate, in fact, "[i]t was true that there existed a number of apparently consistent pronouncements by the International Court of Justice and arbitral tribunals to the effect that *travaux préparatoires* had only been used to confirm what had been found to be the clear meaning of the text of a treaty. However, that case-law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction. It was impossible to know by what processes judges reached their decisions and it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text, but which, as the pleadings in fact showed, was not so. At all events, it could be supposed that all practitioners of international law were free in their use of *travaux préparatoires*."[668]

Such a discrepancy between the principle affirmed and the approach actually followed also characterizes the case law of the World Court. On the one hand, the Court maintained "that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."[669] On the other hand, however, the Court has often referred to the *travaux*

[667] See YBILC 1966-II, p. 223, para.18.
[668] YBILC 1964-I, p. 283, para. 17.
[669] ICJ, 3 March 1950, *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion, p. 8. See, similarly among many other cases, PCIJ, 16 May 1925, *Polish Postal Service in Danzig*, advisory opinion, p. 39; PCIJ, 7 September 1927, *S.S. Lotus (France v. Turkey)*, judgment, p. 16; PCIJ, 8 December 1927, *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*, advisory opinion, p. 28; See ICJ, 28 May 1948, *Conditions of Admission of a State to Membership In the United Nations (Article 4 of the Charter)*, advisory opinion, p. 63. See also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*. *Volume I* (Cambridge: Grotious Publications Limited, 1986),

préparatoires or other extraneous means of interpretation even when the meaning of the treaty text appeared to be (in the Court's words) clear and reasonable. Both the PCIJ and the ICJ referred to such means of interpretation both as a background and in order to confirm the meaning based on the ordinary meaning of its terms.[670]

In this regard, the analysis of the case law of international courts and tribunals, as well as of scholarly writings, suggests the following observations.

First, treaty interpretation is a whole, single process. The interpreter may have recourse to the supplementary means of interpretation from the outset of the interpretative process, since there is no temporal limitation on the use of such means.[671]

Second, the difference between the means of interpretation included in Article 31 VCLT and those provided for in Article 32 VCLT is:

(i) one of evidence and reliability: the former generally give a clear and definite proof of the agreement reached by the parties, while the latter, often being incomplete and partial, may generally just shed some light on the possible agreement;

(ii) one of scope: the former are to be used in order to determine the meaning of the treaty, while the latter only to confirm such a meaning, or determine it in certain specific situations.

Third, where the result arrived at by applying Article 31 VCLT leaves the meaning ambiguous or obscure, the meaning determined by applying the supplementary means of interpretation is generally one of the possible alternative meanings under Article 31 VCLT, or, at least, one that does not conflict with (some of) such meanings.[672]

Fourth, where the result arrived at by applying Article 31 VCLT, although clear, is manifestly unreasonable or absurd, the meaning determined on the basis on the supplementary means of interpretation is generally different from all the possible alternative meanings determined by applying the general rule of interpretation.[673]

---

p. 48.

[670] See, among other cases, PCIJ, 15 November 1932, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, advisory opinion, pp. 378 *et seq*.; ICJ, 27 August 1952, *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), judgment, pp. 209 *et seq*.

[671] See ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 191 of Judge Torres Bernárdez's separate opinion.

[672] This is the case, for instance, where there are no actual alternative meanings emerging as result of the application of the interpretative rule put forward in Article 31 VCLT, i.e. whenever the meaning of the treaty provision is obscure.

[673] In fact, where (at least) a reasonable and logical interpretation of the treaty text was possible, such an interpretation would overrule any manifestly absurd or unreasonable interpretation of the very same text; any other solution would contradict the postulate that the interpretation of the treaty text must be performed in good faith and in light of the object and purpose of the treaty. If such a reasonable and logical interpretation existed, the interpreter would face a situation in which either such interpretation, if unambiguous, might just be confirmed by using supplementary means of interpretation, or such means might be used in order to choose among alternative sound interpretations. See, for a seemingly different opinion, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 330.
In this regard, it may be recalled that Sir Humphrey Waldock, in replying to the criticisms raised on such a matter by some of the ILC's members, gave as an example of a case in which the result of the interpretation

Fifth, *travaux préparatoires*, as well as subsequent practice, do not have an absolute value. Their relevance for interpretative purposes varies according to their aptitude to prove the agreement of the parties on the interpretation of the treaty. In this respect, subsequent unilateral practice and *travaux préparatoires* are considered, in most cases, to be supplementary means of interpretation. However, (i) concordant and consistent subsequent practice, (ii) consistent subsequent practice of some parties only, coupled with the tacit agreement (acquiescence) of the other parties and (iii) *travaux préparatoires* recording the final interpretative agreement of the parties must be considered authentic means of interpretation.

Sixth, a difficult issue arises where, though the meaning of a treaty provision appears to be clearly and reasonably identified as a result of the application of the means of interpretation provided for in Article 31 VCLT, the supplementary means of interpretation point towards a different meaning.[674] In such a case, good faith requires the interpreter to carefully review once again all available elements and items of evidence. Where the supplementary means of interpretation means appear (i) clear and reliable in the specific case and (ii) pointing to a meaning that seems to be one of those acceptable according to the wording of the treaty, as re-interpreted in accordance with the general rule of interpretation laid down in Article 31 VCLT, the meaning arrived at through the supplementary means of interpretation should be adopted.[675] On the contrary, where a review of the interpretation previously made in accordance with Article 31 VCLT shows that the original result of the interpretive process is the only one that may be reasonably arrived at on the basis of the text and the other primary means of interpretation and that such a meaning is not manifestly absurd or unreasonable, that meaning should prevail over the one resulting from the supplementary means of interpretation.[676] The latter type of conflict, however, hardly occurs in practice since

---

could be absurd or unreasonable that of a drafting error (YBILC 1966-I (vol. II), p. 206, para. 39).

[674] See instance, the point made by the Portuguese delegation at the Vienna Conference (UNCLT-1st, p. 183, para. 56).

[675] In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Judge Schwebel (dissenting) pointed out that the interpretation of the treaty at stake (the Doha Minutes) given by the majority of the ICJ was hard to reconcile with the interpretation of a treaty in good faith, which he considered to be the "cardinal injunction" of the VCLT rules of interpretation. In his view, the decision of the majority of the Court did not give the required weight to the clear evidence of the intention of the parties stemming from the *travaux préparatoires*, resulting, "if not in an unreasonable interpretation of the treaty itself, in an interpretation of the preparatory work" which was "manifestly … unreasonable." In addition, Judge Schwebel opined that the interpretation put forward by the Court could not be regarded as an acceptable interpretation under the rules established by the VCLT, since the meaning of the actual terms used in the Doha Minutes was not "clear" at all. In particular, the expression "al-tarafan", however translated, was "quintessentially unclear" and, as the Court itself acknowledged, was capable of being construed in different ways. The term was therefore "inherently ambiguous" and should have been interpreted through the decisive aid of the clearer *travaux préparatoires* (see ICJ, 15 February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment, paras. 30-41 of Judge Schwebel's dissenting opinion). See also, S. M. Schwebel, "May Preparatory Work be Used to Correct Rather Than Confirm the "Clear" Meaning of a Treaty Provision?", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 541 *et seq*.

[676] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998),

Article 31 VCLT is a very flexible tool, which generally allows for more than one meaning to be reasonably attributed to a certain treaty provision.

Seventh, the absurdity or unreasonableness of the interpretation arrived at by applying the rule provided for in Article 31 VCLT must be manifest. The commentary to the 1966 Draft highlights that cases where international tribunals have reached such a conclusion are comparatively rare and that, therefore, the application of this exception should be strictly limited, to not unduly weaken the authority of the ordinary meaning of the treaty terms.[677] Not every clear interpretation that might appear in contrast with the object and purpose of the treaty or that does not perfectly fit in the context of the treaty as a whole is to be regarded as "manifestly absurd or unreasonable": this would be the case only where, in the particular context, it appears obvious that the resulting meaning cannot be what the parties intended to agree upon.[678]

Last, all means of interpretation not included in Article 31 VCLT should be considered to be covered by the provision of Article 32 VCLT, as long as they (may) help to shed some light on the meaning of the treaty.[679] In this sense, also unilateral documents and positions are potentially relevant, since they may give a hint of the practice followed by a party, or of the treaty meaning according to a party; where the other parties were informed about such documents and positions and did not object thereto, they might even be considered to have been tacitly agreed upon. Such a broad definition of the supplementary means of interpretation is in line with the position taken by the ILC with regard to the *travaux préparatoires*, in relation to which the commentary to the 1966 Draft maintains that the "Commission did not think that anything would be gained by trying to define *travaux préparatoires*; indeed, to do so might only lead to the possible exclusion of relevant evidence."[680] This conclusion is also upheld by the vast majority of scholars.[681]

3. Assessment of the rules enshrined in Articles 31 and 32 VCLT in light of the author's normative theory of treaty interpretation

In section 1 of Chapter 3 of Part I the author concluded that (i) treaty provisions are inherently characterized by ambiguity and vagueness and (ii) their effectiveness largely depends on how the parties take into account the *overall context* when drafting them. In turn, point (ii) presupposes that the addressees (interpreters) of the treaty integrate its underspecified provisions, in order to reduce their vagueness and ambiguity, by using the overall context. The fact that both the parties and the interpreters heavily rely on the

721 *et seq.*, at 739.

[677] See YBILC 1966-II, p. 223, para. 19.

[678] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 331-332.

[679] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116.

[680] See YBILC 1966-II, p. 223, para. 20.

[681] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 334-339 and the references included there.

overall context constitutes a praxis of the international community (one of its underlying *cooperative principles*). This allows for the possibility of *implicatures*, i.e. meanings that are not explicitly conveyed by the treaty provisions, but that are nonetheless inferred from the overall context.

On such a basis, the author further concluded that the treaty interpretative process has as its only possible goal the *utterance meaning*, i.e. the meaning(s) that any reasonable interpreter would assign to the treaty text, as expression of the intention of the parties, given:

(a) the various meanings that the grammar and the semantic specifications of the terms used in the treaty allow it to have and
(b) the interpreter's analysis of and inferences from the overall context.

That excludes the relevance of any meaning other than the utterance meaning for interpretative purposes. Such "other" meanings, not being utterance meanings, are indeed not "meanings" of the treaty.

The author considered the overall context to include all those elements and items of evidence that are helpful for the purpose of determining and arguing for the utterance meaning of the relevant treaty provision. In particular, it incorporates:

(a) the subject matter of the treaty and its object and purpose [*world spoken of*];
(b) the international legal context of which the treaty is part, the legal systems of the States concluding the treaty, the encyclopedic (legal) knowledge of the persons involved in its drafting, the expected encyclopedic (legal) knowledge of the addressees of the treaty, the commonly accepted principles of behavior in the international community (including any cooperative principle of communication), every reasonable inference that the drafters and the addresses might be expected to derive from the above [*common ground*];
(c) the text that precedes and succeeds the provision to be interpreted [*co-text*].

Furthermore, the author elucidated a few other principles of treaty interpretation derived as corollaries from the above fundamental principles.

The positive analysis carried out in section 2 of this chapter shows that the rules and principles of treaty interpretation enshrined in Articles 31 and 32 VCLT, as generally construed by international law scholars and applied by (international) courts and tribunals, do not significantly depart from the principles of interpretation established by the author on the basis of his semantics-based normative analysis.[682] On the contrary,

[682] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), pp. 48-49, who maintains that, according to modern linguistic theories (in particular the "inferential model"), "in order to distinguish between correct and incorrect interpretation results, we would have to single out some contextual assumptions as being acceptable and some as unacceptable. If we examine Articles 31-33 of the Vienna Convention on the Law of Treaties, the idea is expressed somehow differently. The provisions of the convention do not address so much the idea of acceptable and unacceptable contextual assumption; rather, they address the idea of acceptable and unacceptable means of interpretation. However, on closer inspection, this must be seen to amount to very much the same thing. […] All things considered, it is apparent that when the Vienna Convention categorises means of interpretation as either acceptable or unacceptable, this can be seen indirectly to imply a corresponding categorization of contextual assumptions. Of all those contextual assumptions that

the latter principles may be usefully employed by the interpreter as a compass in order to choose among the various (sometimes conflicting) solutions that scholars, courts and tribunals have arrived at in the application of Articles 31 and 32 VCLT.

In particular, Articles 31 and 32 VCLT appear to spell out the most significant part of the overall context that the cooperative principle of the international community requires the community members to take into account when drafting and interpreting treaty provisions. Certainly, the overall context is not limited to the means and rules of interpretation enshrined in Articles 31 and 32 VCLT, the former including, for instance, generally accepted principles of logic and good sense.[683] However, Articles 31 and 32 VCLT specify the most relevant part of what has to be taken into account in order to make the treaty effective by means of interpretation.

This implies that no utterance meaning, i.e. no meaning of a specific treaty provision, may be said to exist before the interpreter has gone through the unitary process of construing the relevant text in light of the overall context and, in particular, of the rules and means of interpretation enshrined in Articles 31 and 32 VCLT (as illustrated by the metaphor of the crucible).[684] Any "meaning" arrived at without going through such a process is not a meaning; it is just an illusion of a meaning, a mere guess. It is, thus, the formal process of reasonably arguing and supporting the interpretation of a treaty provision on the basis of its overall context that divides (utterance) meanings from mere guesses of the speaker's meaning. Since no single "true" meaning exists, which is inherently due to the fact that the meaning we look for is the utterance meaning, what really matters is not the result of the enquiry, but the process followed to support it. That is a matter of epistemology.[685]

If the focus of the comparison between those two sets of principles (the principles stemming from the author's normative analysis and those resulting from the positive analysis carried out in section 2 of this chapter) is moved to a major level of detail, the following comments can be made.

The author's principle (i), i.e. the interpretation is an *a posteriori* analytical argument, is implicit in Articles 31 and 32 VCLT, in the sense that under those articles any interpretation put forward by the interpreter must appear fair and reasonable (in good faith) where assessed in light of all arguments that may be built up on the elements

---

can possibly be made by appliers with regard to the relationship held between an interpreted treaty provision and the world in general, the only ones that *may* be used, according to the convention, are those regarding the relationship held between the provision and the means of interpretation recognized as acceptable".

[683] Such as, for instance, (i) the logical principles of inference and (ii) the principles and maxims of treaty interpretation not codified in the VCLT, since considered by the ILC as principles of logic and good sense of non-binding character (see commentary on Articles 27-28 of the 1966 Draft - YBILC 1966-II, p. 218, para. 4).

[684] As Lauterpacht put it, "The controversial expression becomes scientifically clear only after we have caused to pass through it the "galvanic current" – to use Mr Justice Holmes' phrase – not only of the whole document but of all the evidence available" (see H. Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 *Harvard Law Review* (1935), 549 *et seq.*, at 572).

[685] The author finds relevant, in that respect, to draw a parallelism with epistemological approach (in "pure" science) professed by Popper, as mainly depicted in K. Popper, *The logic of scientific discovery* (London: Routledhe, 2002) and K. Popper, *Conjectures and refutations: the growth of scientific knowledge* (London: Routledhe, 1991).

and items of evidence provided for by the same articles.

The author's principles (ii) and (iii), i.e. the quest of the interpreter is directed at establishing the intention of the parties by determining the *utterance meaning* of the treaty text, overlap with the rule of interpretation provided for by Articles 31 and 32 VCLT, according to which the primary duty of the interpreter is to reasonably elucidate the meaning of the treaty text, which is presumed to represent the authentic expression of the parties' intention, by construing it on the basis of all elements and items of evidence provided for by those articles.

With reference to author's principle (iv), it has been already mentioned that Articles 31 and 32 VCLT appear to spell out the most significant part of the overall context.

The author's principle (v), i.e. none of the elements of the overall context is inherently superior to the others and the weight that any of such elements should be given for the purpose of establishing the utterance meaning depends on the circumstances of the case, corresponds to the principle stemming from the hierarchical structure of Articles 31 and 32 VCLT. Under the latter, the various means of interpretation encompassed in Article 31 VCLT are all of an equal status, while those referred to in Article 32 VCLT play a subsidiary role because experience shows that they are generally less reliable and more ambiguous and vague hints of the intention of the parties. Nonetheless, where the supplementary means of interpretation contribute to reasonably establish the agreement of the parties with regard to the interpretation of the treaty, such an agreement must be taken into account as a primary means of interpretation under Article 31 VCLT.

The author's principle (vi), i.e. the treaty text should be construed on the basis of all *implicatures* that may be derived from the text and the overall context, is implicit in the principle of good faith referred to in Article 31 VCLT, which rejects a mere literal approach and requires the treaty to be construed reasonably, honestly and fairly, thus allowing the interpreter to read terms into the treaty for the purpose of giving efficacy to the intention of the parties that may be inferred from the express provisions of the treaty.

The author's principle (vii), i.e. the relevance of the treaty text must not be overestimated since such text is inherently characterized by ambiguity and vagueness and is made of underspecified clauses that need to be expanded by semantic and pragmatic inferences, underlies both Articles 31 and 32 VCLT. This is evidenced by:

(a) the preeminent role played by the extra-textual and co-textual (broad context) means of interpretation, provided for in Articles 31 and 32 VCLT, for the purpose of establishing the ordinary meaning of the treaty terms;
(b) the express recognition of the possibility that the parties intended to attribute an unusual meaning to some of the treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge those meanings that appear manifestly absurd or unreasonable in light of the particular circumstances of the case.

The same holds true with regard to the author's principle (viii), i.e. the relevance of grammatical constraints must not be overestimated.

The author's principle (ix), i.e. there is a plausible presumption that the parties

intended to attribute to the treaty terms their jargon meanings whenever a particular jargon has been used in drafting the treaty, is implicit in the concept of ordinary meaning referred to in Article 31 VCLT, according to which, where a term is used in a technical context, its ordinary meaning should be generally considered to coincide with the meaning attributed to that term in the relevant technical jargon.

The author's principle (x), i.e. the interpreter should consider that the contracting States' representatives in most cases choose the terms to be employed in the treaty on the basis of the approximate overlapping between the prototypical items denoted by those terms and the items that they intended to be covered by those terms, may be seen as underlying Articles 31 and 32 VCLT, in particular as underlying:

(a) the requirement that the treaty terms must be given the ordinary meaning that best fits in their context and suits the object and purpose of the treaty;
(b) the possibility that, in certain cases, a special meaning should be attributed to treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge the meanings that appear manifestly absurd or unreasonable in light of the context and the treaty object and purpose.

The author's principle (xi), in particular the need to assess whether the parties intended treaty terms to be attributed a uniform meaning by all contracting States, or whether they intended each State to interpret those terms on the basis of its own (legal) concepts, is not explicitly dealt with in Articles 31 and 32 VCLT. It is however obvious that:

(a) both the ordinary and the special meanings to be determined under Article 31 VCLT may be either uniform (and autonomous) international meanings, or specific national meanings; and that
(b) it is for the interpreter to establish, on the basis of the means of interpretation provided for in Articles 31 and 32 VCLT, whether the parties intended a uniform international meaning or a specific national meaning to be attributed to the treaty terms.

The author's principle (xii), i.e. the interpreter should take into account any subsequent act of the parties that directly or indirectly may shed light on the meaning that they attribute to the treaty, is explicitly recognized by Article 31(3) VCLT.

Since the above principles of interpretation have proved not to conflict with the rules and principles of interpretation enshrined in Articles 31 and 32 VCLT, on the basis of the former, read in conjunction with the latter, the author will endeavor to answer the research questions concerning the interpretation of multilingual (tax) treaties in the next two chapters. To put it differently, based on the combined reading of those rules and principles, the author will set up his normative legal theory on the interpretation of multilingual tax treaties.

CHAPTER 4 – INTERPRETATION OF MULTILINGUAL TREATIES

1. Introduction: the relevance of Article 33 VCLT and the structure of this chapter

The idea that some rules dealing with the interpretation of multilingual treaties had to be codified dates back to the beginning of the last century.[686]

In 1926, Mr Rundstein, a member of the Committee of Experts for the Progressive Codification of International Law set up under the auspices of the League of Nations, expressed the view that one of the issues that the Committee should have examined and solved was that concerning the difficulties of interpretation arising in the case of treaties drawn up in more than one language.[687]

A few years later, the Draft Convention on the Law of Treaties with Comments, prepared by the Harvard Research in International Law and published in 1935, included an article dealing with the interpretation of multilingual treaties.[688]

The following step was taken by the ILC in the course of the sixties and led to the codification of some general rules concerning the interpretation of multilingual treaties in Article 33 VCLT.

For the purpose of the present study, an analysis of the purpose, content and scope of the rules enshrined in Article 33 VCLT is unavoidable for two reasons.

First, most international courts and tribunals regard Article 33 VCLT as a codification of rules of customary international law concerning the interpretation of multilingual treaties[689] and, therefore, consider themselves bound to apply such rules in order to construe multilingual treaties, regardless of whether these treaties were concluded before

[686] For an exhaustive list of the efforts spent in codifying rules on interpretations dealing with multilingual treaties before the VCLT, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 185-186, footnote 1.

[687] League of Nations, Committee of Experts for the progressive codification of International Law [1925-1928], vol. 2: Documents (Dobbs Ferry: Oceana Publications, 1972), pp. 131-141.

[688] Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.* Art. 19b of the Draft Convention on the Law of Treaties with Comments reads as follows:
"When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve".

[689] See, for instance, S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 737.

the entry into force of the VCLT, or whether their parties include States that did not sign or ratify the VCLT.

Even the ICJ has recently stated that, in cases of a divergence between the equally authentic texts of a treaty and where the latter does not indicate how to proceed, it is appropriate to refer to Article 33(4) VCLT, which "in the view of the Court again reflects customary international law".[690] In this respect, it is interesting to note that (i) the specific issue faced by the ICJ in that case[691] concerned the interpretation of Article 41 of the Court's Statute, which predates the adoption of the VCLT and (ii) that case related to a conflict between Germany and the United States of America, the latter not being party to the VCLT at the time of the facts, nor at the time of the legal proceedings and of the judgment.

Second, since the rules of interpretation enshrined in Article 33 VCLT are generally accepted (i.e. customary) rules of international law, they must also be considered part of the *common ground*[692] of treaty negotiators and interpreters. As such, they are expected to be properly taken into account by such negotiators and interpreters, when drafting and construing multilingual treaties, under the cooperative principles operating within the international community of States.[693] This implies that, whenever an interpreter construes a multilingual treaty by means of implicatures, such implicatures must (also) reflect the rules of interpretation provided for in Article 33 VCLT.

For the reasons outlined above, the present chapter will analyse the content of Article 33 VCLT and examine the relation, in any, existing between the rules of interpretation enshrined therein and the semantics-based principles of interpretation established by the author in section 2 of Chapter 3 of Part I.

More precisely, section 2 will describe the historical background to and the preparatory work on Article 33 VCLT.

Section 3 will examine which rules of interpretation may be (and have been) construed on the basis of Article 33 VCLT and compare them with the fundamental principles of interpretation established by the author in Part I.

Section 4 will deal with the specific interpretative issues emerging where the multilingual treaty employs legal jargon terms.

Section 5 will present a brief excursus on the legal maxims that scholars, courts and tribunals have sometimes advocated for the purpose of construing multilingual treaties and will discuss their status under current international law.

Finally, section 6 will draw some general conclusions.

---

[690] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 101. For a previous explicit reference by the ICJ to the relevance of Article 33 VCLT, although without an express recognition thereof as customary international law, see ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 25.

[691] ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 92 *et seq*., concerning Germany's third submission.

[692] See section 4.2.1 of Chapter 2 of Part I.

[693] See section 4.2.2 of Chapter 2 of Part I.

2. Historical background to and preparatory work on Article 33 VCLT

2.1. The Third Report on the Law of Treaties prepared by Sir Humphrey Waldock

Although the topic of the Law of Treaties had been addressed by the ILC since 1962,[694] the sub-topic of treaty interpretation was considered only during the sixteenth session of the ILC in 1964. On 7 July of that year, Sir Humphrey Waldock submitted to the ILC its third addendum to his Third Report on the Law of Treaties, which included six articles on the interpretation of treaties.

Among these, Articles 74 and 75 of the draft convention on the Law of Treaties dealt with the issue of treaties drawn up in two or more languages. The text thereof is reproduced below.[695]

> *Article 74 — Treaties drawn up in two or more languages*
> 1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the texts of the treaty are authoritative in each language except in so far as a different rule may be laid down in the treaty.
> 2. A version drawn up in a language other than one in which the text of the treaty was authenticated shall also be considered an authentic text and be authoritative if —
> *(a)* the treaty so provides or the parties so agree; or
> *(b)* an organ of an international organization so prescribes with respect to a treaty drawn up within the organization.
>
> *Article 75. — Interpretation of treaties having two or more texts or versions*
> 1. The expression of the terms of a treaty is of equal authority in each authentic text, subject to the provisions of the present article. The terms are to be presumed to be intended to have the same meaning in each text and their interpretation is governed by articles 70-73.
> 2. When a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity as to the meaning of the term is not removed by the application of articles 70-73, the rules contained in paragraphs 3-5 apply, unless the treaty itself provides that, in the event of divergence, a particular text or method of interpretation is to prevail.
> 3. If in each of two or more authentic texts a term is capable of being given more than one meaning compatible with the objects and purposes of the treaty, a meaning which is common to both or all the texts is to be adopted.
> 4. If in one authentic text the natural and ordinary meaning of a term is clear and compatible with the objects and purposes of the treaty, whereas in another it is uncertain owing to the obscurity of the term, the meaning of the term in the former text is to be adopted.
> 5. If the application of the foregoing rules leaves the meaning of a term, as expressed in the

[694] See the first provisional draft articles on the Law of Treaties adopted by the ILC at its fourteenth session, dealing with the conclusion, entry into force and registration of treaties, which was based on the First Report on the Law of Treaties prepared by Sir Humphrey Waldock, acting as Special Rapporteur (YBILC 1962-II, pp. 159 *et seq*.). Previously, the topic had been addressed solely in the reports prepared by the Special Rapporteurs, but not discussed in the course of the ILC meetings.

[695] See YBILC 1964-II, p. 62.

> authentic text or texts, ambiguous or obscure, reference may be made to a text or version which is not authentic in so far as it may throw light on the intentions of the parties with respect to the term in question.

The commentary to these two articles[696] pointed out that the phenomenon of treaties drawn up in two or more languages had become increasingly familiar since the end of the First World War and, with the advent of the United Nations, the practice of concluding multilateral treaties in five different languages had become common. The commentary drew a clear distinction between "authentic texts" and "official texts", the latter being those signed by the negotiating States but not accepted as authoritative thereby. In addition, the commentary recognized the need to distinguish "official translations" from "official texts", the former being translations of the authentic texts prepared by the parties, an individual Government, or an organ of an international organization. The commentary pointed out that, whenever two or more texts are available, issues arise regarding (i) the effect of a plurality of authentic texts on the process of treaty interpretation and (ii) what recourse may be had to official texts and translations as tools for interpreting the authentic texts of the treaty.

In this respect, the commentary made clear that the purpose of Article 74 was to clarify the rules to be used for the purpose of distinguishing "authentic texts" from other texts.

The basic principle stated by Article 74 was that the only "authenticated texts" must be considered authoritative for the purpose of treaty interpretation. The following article, Article 75, clarified that the authority of the texts was "equal" in each "authentic text". From a combined reading of Articles 74 and 75, it appears that the terms "authentic" and "authoritative" were attributed the same meaning with reference to the relevance of a text for the purpose of treaty interpretation. The reference in Article 74(1) to "authenticated" texts was purported to achieve coordination with the provisions of Article 7 of the draft convention, according to which the "authentication of the text" consisted in an autonomous procedural step in the conclusion of a treaty.[697] According to the commentary to Article 7 of the draft convention,[698] the authentication of the text(s) of a treaty was necessary in order for negotiating States to know finally and definitely what the content of the treaty was to which they might decide to become party. Authentication

---

[696] See YBILC 1964-II, pp. 62-65.

[697] The text of Article 7 of the draft convention read as follows (See YBILC 1962-II, p. 167):

> *Article 7*
> *Authentication of the text*
> 1. Unless another procedure has been prescribed in the text or otherwise agreed upon by States participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways:
> (a) Initialling of the text by the representatives of the States concerned;
> (b) Incorporation of the text in the final act of the conference in which it was adopted;
> (c) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.
> 2. In addition, signature of the text, whether a full signature or signature ad referendum, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.
> 3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

[698] See YBILC 1962-II, p. 167.

consisted in some acts and/or procedures that certified the text(s) as the final and correct one(s). For the purpose of the present study, it must be pointed out that Article 7 of the draft convention recognized as authentic texts those initialled by the representatives of the States concerned, as well as those signed by the contracting parties (either by full signature or signature *ad referendum*).[699]

The general rule that equated "authenticated" texts to texts equally authoritative for the purpose of interpretation was subject to two exceptions.

On the one hand, Article 74 provided that such an equation held true "except in so far as a different rule may be laid down in the treaty". The commentary explained that such an exception was necessary for two reasons. First, some treaties specify that only certain authenticated texts are authoritative for the purpose of interpreting and applying the treaty, i.e. only certain authenticated texts are "authentic" texts.[700] Second, some treaties provide that, in the event of divergence between texts, a specified text is to prevail. The commentary made explicit reference to the case of a bilateral treaty where the two contracting parties designate a text in a third language as authentic and make it authoritative in the case of divergence. This is a very common practice in the tax treaty field, indeed. The commentary also recalled the case of the Peace Treaties of St. Germain, Neuilly and Trianon, which were drawn up in French, English and Italian and which provided that in the case of divergence the French text should prevail, except with regard to Parts I and XII, containing the Covenant of the Legue of Nations and the articles concerning the International Labour Organisation, respectively. The case appears interesting since it represents a clear example of how States may be willing to solve apparent divergences between authentic texts in different ways depending on the subject matter concerned and the drafting procedure actually adopted.

On the other hand, Article 74 recognized that a text that had not been authenticated might nonetheless be attributed by the parties an authoritative status for the purpose of the interpretation and application of the treaty.[701]

Article 75, instead, dealt with the different issues arising in connection with the interpretation of treaties having two or more authentic texts.

Paragraph 1 thereof, in addition to stating the principle of equal authority of all authentic texts, made clear that a general presumption existed that the parties to a treaty intended to attribute to the treaty terms the same meanings in each authentic text.

In addition, Article 75 provided that, in principle, the general rules of

[699] With reference to the authentication of the text as a step of the procedure leading to the conclusion (and entry into force) of a treaty, see Article 10 of the VCLT, as well as R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1223-1224 and the references cited therein. Although the text of Article 7 of the draft conventions was later modified and the corresponding article of the VCLT (Article 10) does appear significantly different, the purpose of the authentication step in the procedure of treaty conclusion has remained unchanged.

[700] The commentary also referred to a case where one text had been made authentic between some parties and a different text between others, i.e. Article 13 of the Treaty of Brest-Litovsk, executed on 3 March 1918 (see YBILC 1964-II, p. 63, para. 3, where reference is erroneously made to Article 10 of the treaty).

[701] See Article 74(2)(a) of the draft convention.

interpretation enshrined in Articles 70-73 of the draft convention were to be applied to solve apparent divergences between authentic texts.[702] According to the commentary, such an approach was the direct, inevitable consequence of the fact that, notwithstanding the plurality of authentic texts, in law there is only one treaty, i.e. one set of terms accepted by the parties and one common intention with respect to those terms.[703]

The commentary recognized in this respect that few multilingual treaties have no discrepancies in the texts and that this is mainly due to the different genius of the languages, the absence of a complete *consensus ad idem,* the lack of sufficient time to co-ordinate the texts or unskillful drafting. It concluded that, for those reasons, the plurality of the texts might be a serious additional source of ambiguity or obscurity in the terms of the treaty. However, the commentary also acknowledged that, in cases where the meaning of terms is ambiguous or obscure in one authentic text, but it is clear and convincing as to the intentions of the parties in another, "the plurilingual character of the treaty facilitates interpretation".[704]

Finally, with reference to the application of the rules of interpretation provided for in Articles 70-73 of the draft convention, the commentary pointed out that the plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux preparatoires,* the surrounding circumstances and subsequent practice; on the contrary, the equality of the texts requires that "every effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation".[705]

Article 75(2), as clarified by the commentary,[706] recognized that parties might decide to solve the divergences between authentic texts by providing in the treaty that a particular text or method is to prevail. In this respect, the commentary pointed out that an issue might exist as to the exact point in the interpretation process at which the prevailing text or method should be resorted to, i.e. whether such a text or method is to be applied as soon as a *prima facie* divergence appears, or only in so far as the divergence may not be removed by the application of the general rules of interpretation. The commentary noted that the jurisprudence of international tribunals was uncertain in this regard, since, in some cases, the competent tribunal had applied the prevailing text without going into the question whether there was an actual divergence,[707] while, in other cases, it had carried on a comparison between the divergent texts for the purpose of ascertaining the intention of the parties.[708] It, however, recognized that the question is essentially one of intention

[702] See the combined reading of paragraphs 1 and 2 of Article 75 of the draft convention.
[703] See YBILC 1964-II, p. 63, paras. 5 and 6.
[704] See YBILC 1964-II, p. 63, para. 5.
[705] See YBILC 1964-II, p. 64, para. 6.
[706] See YBILC 1964-II, p. 64, para. 7.
[707] The commentary made reference to the decision of the Permanent Court of International Justice in the *Treaty of Neuilly* case (PCIJ, 12 September 1924, *Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly (Bulgaria v. Greece),* judgment, pp. 5-6).
[708] The Commentary made reference to the decision of the Supreme Court of Poland in the case of the

of the parties, the latter being at liberty to agree that a specific text is to prevail either as soon as a divergence appears, or only where such a divergence is not removed by the application of the general rules of interpretation. The Special Rapporteur, therefore, doubted whether it would have been appropriate for the ILC to try to resolve the issue in the context of the formulation of the general rules of interpretation.[709]

Moreover, where the parties did not agree on a particular text to prevail and the general rules of interpretation enshrined in Articles 70-73 could not remove the divergence between authentic texts, Article 75 provided for two cases in which a specific text was to prevail according to the nature and characteristics of the divergence. In particular, (i) where more than one meaning compatible with the objects and purposes of the treaty existed, the meaning common to all the authentic texts was to be adopted, while (ii) where one authentic text was clear and the others were uncertain and obscure, the former was to be adopted.

With reference to the first case, which was dealt with in Article 75(3), the commentary clarified that the suggested provision was not to be confused with the interpretation given by certain jurists of the decision delivered by the PCIJ in the *Mavrommatis Palestine Concessions* case,[710] according to which the more limited (restrictive) interpretation which can be made to harmonize both authentic texts is the one which must always be adopted.[711] In analytical terms, this interpretation provides that, if (i) one authentic text may be interpreted as meaning A and the other authentic text as meaning B and (ii) the denotata of B constitute a subset of the denotata of A, then meaning B is to be adopted. The commentary, on the one hand, explained that the provision of Article 75(3) gave effect to the rule of the equality of the texts in cases of ambiguity and that it was effective as long as such an ambiguity did not take the same form in each authentic text. In analytical terms, it could be said that, under Article 75(3), where one authentic text may be interpreted as meaning either A or B and the other authentic text as meaning either B or C, meaning B is to be adopted. On the other hand, the commentary pointed out that the above-mentioned interpretation of the decision given by the PCIJ in the *Mavrommatis Palestine Concessions* case was erroneous since (i) whether a restrictive interpretation is to be adopted depends upon the nature of the

---

Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury (see Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury,* 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq.* [Case No. 235]) and the decision of the Italian-Bulgarian Mixed Arbitral Tribunal , 8 January 1925, *De Paoli v. Bulgarian State*, 6 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1927), 451 *et seq.,* at 456.

[709] See YBILC 1964-II, p. 64, para. 7.

[710] See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment, p. 19, where the following was stated:

> "The Court is of opinion that, where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine and because the original draft of this instrument was probably made in English".

[711] See YBILC 1964-II, pp. 64-65, para. 8.

treaty and the particular context where the ambiguous term occurs and (ii) in the specific situation dealt with in that case, a restrictive interpretation was appropriate also in light of the nature of the treaty (i.e. an "instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine") and the context and circumstances thereof (e.g. "the original draft of this instrument was probably made in English").[712] According to the commentary, the only conclusion that might be drawn from the *Mavrommatis Palestine Concessions* decision was that it gave strong support to the principle of harmonizing the texts, while it did not call for a general rule laying down a presumption in favor of restrictive interpretation in the case of an ambiguity in plurilingual texts.[713]

With reference to the second case, which was dealt with in Article 75(4), the commentary clarified that, according to the Special Rapporteur, a presumption in favor of clear, as opposed to an obscure, text was mainly a matter of common sense and, as such, it was not an absolute rule and might also conflict with the principle of equality of the texts, especially where reference to the *travaux préparatoires* and other extrinsic means of interpretation clarified the meaning of the *prima facie* obscure text. However, it also recognized that, if after the application of the general rules of interpretation (i.e. those encompassed in Articles 70-73 of the draft convention) the meaning of one authentic text was still obscure, it was legitimate to make a presumption in favor of the clearer text.[714]

Finally, Article 75(5) established that, for the purpose of treaty interpretation, non-authentic texts might only be used as subsidiary evidence of the intention of the parties in the last resort, in particular only where the application of all the other rules of interpretation left the meaning of a term, as expressed in the authentic texts, ambiguous or obscure.[715]

The reference to the "application of the foregoing rules" in paragraph 5 seems to suggest that, in the system of the draft convention, recourse to the non-authentic texts was subject to the unfruitful application of the provisions of paragraphs 3 and 4. Such a conclusion, however, appears at odds with the logical premise of such paragraphs, which were to be applied only where the application of the general rules of interpretation enshrined in Articles 70-73 might not remove the divergence between, or the ambiguity of, the texts. In fact, those general rules encompassed the recourse to supplementary means of interpretation ("other evidence or indications of the intentions of the parties"),[716] which could be reasonably regarded as also including the non-authentic texts of the treaty, such as "official texts" and "official translations". Nevertheless, the above conclusion seems confirmed by the reference to the "rules contained in paragraphs 3-5" found in Article 75(2), which made the recourse to Article 75(5) subject to the

[712] See, similarly, J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80.
[713] See YBILC 1964-II, p. 65, para. 8.
[714] See YBILC 1964-II, p. 65, para. 9.
[715] See also YBILC 1964-II, p. 65, para. 10.
[716] See Article 71(2) of the draft convention (YBILC 1964-II, p. 52).

unsuccessful application of the general rules provided for in Articles 70-73, hence indirectly ruling out that non-authentic texts could be included among the "other evidence or indications of the intentions of the parties" referred to in Article 71(2) of the draft convention.

It seems to the author that the solution adopted by the Special Rapporteur was not fully coherent where it drew a line between the non-authentic texts, such as "official texts" and "official translations", and the supplementary means of interpretation considered in Article 71(2), without giving any explanation of the reasons of the different weights attributed thereto for the purpose of treaty interpretation. The different weights to be attributed to supplementary means of interpretation should not be fixed *a priori*, but vary according to the facts and circumstances of the case. In this respect, the provision encompassed in Article 75(5) of the draft convention seems to contradict the idea of treaty interpretation as a unique process whereby all available elements and items of evidence are thrown in the crucible in order to determine a reasonable meaning (i.e. the utterance meaning) of the expressions to be interpreted.[717] Hence, the author applauds the fact that such paragraph was subsequently removed by the ILC.

2.2. The sixteenth session of the ILC and the 1964 Draft

The ILC analysed and discussed the draft articles on treaty interpretation, included by Sir Humphrey Waldock in his Third Report on the Law of Treaties, in the course of its sixteenth session, starting at the 765th meeting.

The first issue to be addressed was whether the draft convention should contain some articles on treaty interpretation. The great majority of the ILC explicitly endorsed the view that some rules on treaty interpretation were to be included in the draft convention.

In this respect, Mr Paredes stated that rules on interpretation were indispensable for the purpose of treaty application.[718]

Mr Briggs agreed and added that the task of isolating and codifying the comparatively few rules that appeared to constitute the strictly legal basis of treaty interpretation was one of the functions provided for in Article 15 of the ILC Statute.[719]

Both Mr de Luna and Mr Castrén said that, even if at the beginning they had been skeptical as to the possibility to draft rules for the interpretation of treaties, they were positively impressed by the work of the Special Rapporteur and, therefore, they were favorable for the ILC to submit a preliminary draft thereof to Governments for comments.[720]

[717] For instance, where strictly applied, Article 75(5) could lead to the application of the presumption in favor of the "clear" text (Article 75(4)), even where the reading of an official text might shed some light on the meaning of the "obscure" text, thus making such presumption inoperative and perhaps suggesting a different meaning to be attributed to the treaty provision.
[718] See YBILC 1964-I, p. 275, para. 5.
[719] See YBILC 1964-I, p. 275, paras. 8 and 9.
[720] See YBILC 1964-I, p. 276, paras. 15 and 20.

Mr Ruda expressed the view that, at the current stage of development of international law, there were not as yet any obligatory rules for States on treaty interpretation, except the rule *in claris non fit interpretatio*.[721] He stressed that, as a consequence, any rule on interpretation inserted in the draft convention would not constitute a codification of existing customary law, but, on the contrary, it would represent a proposal for the progressive development of international law.[722]

Mr Tunkin said that he favored the codification of the rules on the interpretation of treaties, particularly since there was already a substantial body of precedents and State practice on the subject.[723]

Mr Yassen agreed on the necessity to include in the draft convention some articles on interpretation, which made it possible to determine the exact meaning of a treaty. However, he also pointed out that excessive detail should be avoided and the ILC should confine itself to the leading principles governing interpretation.[724]

Mr Verdross stated that States that had concluded a treaty would not be bound by the rules in question, for they were at liberty to choose other means of interpretation.[725] Such conclusion was further clarified by Mr Ago (the Chairman), who affirmed that the ILC, by drafting the rules on treaty interpretation, was not creating *jus cogens*. There was nothing preventing the parties to a treaty from agreeing to interpret it in another way. However, according to Mr Ago, that would occur rarely, for the draft rules were eminently reasonable.[726]

At the 767th meeting the ILC specifically addressed the draft articles concerning the interpretation of treaties drawn up in two or more languages.

Sir Humphrey Waldock introduced the topic by making reference to the commentary to Articles 74 and 75. With regard to Article 74, he pointed out that the only issue that caused him some difficulty was that of the language version(s) drawn up within an international organization.[727] It may therefore be derived that he was satisfied with the remainder of the proposed text (more relevant for the purpose of the present study).

Mr Castrén agreed with the formulation of Article 74 and proposed adding the words "or in so far as the parties agree otherwise" at the end of paragraph 1, to coordinate this paragraph with the wording used in paragraph 2(a).[728]

Mr Rosenne and Mr Tunkin stated their general agreement with the provisions of Articles 74 and 75 and, at the same time, shared the concern of the Special Rapporteur

[721] An excessive reliance on the maxim *in claris non fit interpretatio* was damped by Mr Ago, who recalled cases where two States found a treaty perfectly clear, but interpreted it in two different ways. See YBILC 1964-I, p. 280, para. 79.
[722] See YBILC 1964-I, p. 277, paras. 33 and 35.
[723] See YBILC 1964-I, p. 278, para. 47.
[724] See YBILC 1964-I, p. 279, para. 55.
[725] See YBILC 1964-I, p. 279, para. 61.
[726] See YBILC 1964-I, p. 280, para. 78.
[727] See YBILC 1964-I, p. 298, para. 60.
[728] See YBILC 1964-I, p. 298, para. 61.

with reference to the case of treaties drawn up within an international organization.[729]

Mr Briggs, while favoring the inclusion of draft articles dealing specifically with treaties drawn up in two or more languages, such as those proposed by the Special Rapporteur, pointed out that he did not agree with the position expressed in paragraph 5 of the commentary on Article 74, where reference was made to the fact that "in law there is only one treaty (…) even when the two authentic texts appear to diverge". According to Mr Briggs, it would have been better to state that each treaty has only one text, although there may be different language versions of such a text.[730] Similarly, he proposed to reword Article 74 by replacing the reference to two or more authentic texts with that to "two or more language versions of the same treaty".[731]

Finally, Mr Bartos brought to the attention of the ILC the fact that it had become common to have treaties concluded in the languages of each contracting party. In these cases, a translation in a third "authoritative" language was often annexed for the purpose of facilitating the understanding and interpretation of the treaty. According to Mr Bartos, such an innovation in the States' practice was not considered in the draft and a reference thereto should have been made at least in the commentary.[732] However, both Mr Tunkin and Mr Ago (Chairman) made clear that Article 74(1) covered those cases.[733]

In closing the meeting, Mr Ago (Chairman) suggested to refer Articles 74 and 75 to the Drafting Committee, with the comments made during the discussion.[734]

The discussion was resumed at the 770th meeting, held on 20 July 1964. Mr Ago (Chairman) invited the ILC to consider the text of Article 74 as proposed by the Drafting Committee, which read:

> *Article 74 — Treaties drawn up in two or more languages*
> 1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.
> 2. A version drawn up in a language other than one in which the text of the treaty was authenticated shall also be authoritative, and considered as an authentic text if —
> *(a)* the parties so agree; or
> *(b)* the established rules of an international organization so provide.[735]

The text proposed by the Drafting Committee took in due consideration the observation made by Mr Castrén and, at least in part, that made by Mr Briggs during the 767th meeting. The text was amended to incorporate two minor improvements in wording proposed by Sir. Humphrey Waldock and then adopted unanimously.[736]

---

[729] See YBILC 1964-I, p. 298, paras. 63 *et seq*. and p. 299, para. 66.
[730] See YBILC 1964-I, p. 299, para. 69.
[731] See YBILC 1964-I, p. 299, para. 70.
[732] See YBILC 1964-I, p. 299, para. 71.
[733] See YBILC 1964-I, p. 299, paras. 73 and 74.
[734] See YBILC 1964-I, p. 299, para. 75.
[735] YBILC 1964-I, p. 318, para. 54.
[736] See YBILC 1964-I, p. 318, para. 55. No significant change had been made in the commentary by the Draft

Afterwards, Mr Ago (Chairman) invited the ILC to consider the text of Article 75 as proposed by the Drafting Committee, which read:

> *Article 75. — Interpretation of treaties having two or more texts or versions*
> 1. The expression of the terms of a treaty is of equal authority in each authentic text, unless the treaty itself provides that, in the event of divergence, a particular text or method of interpretation shall prevail.
> 2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 70-74, a meaning which is common to both or all the texts shall be preferred.

As Sir Humphrey Waldock pointed out, the Drafting Committee had significantly shortened the text of the article. In particular, paragraph 4 of the original draft, according to which, in cases where the meaning of one text was clear and that of the other was not, the former would be adopted, had been dropped. That was decided since the solution proposed in the former paragraph 4, although a matter of common sense, might not always be the correct one and the Drafting Committee had preferred to leave the matter for interpretation to the States concerned or to the competent tribunals. Similarly, paragraph 5 of the original draft, dealing with the possible use of non-authentic texts, had been dropped on the grounds that it could have too much opened the door to the use of non-authentic versions of a treaty for the purpose of its interpretation.[737]

Then, replying to an issue of clarity raised by Mr Ago, Sir Humphrey Waldock proposed redrafting the incipit of paragraph 1 as "The text of the treaty is of equal authority in each language, unless etc."[738] He also suggested removing the words "or versions" from the title of Article 75 and those "or method of interpretation" from paragraph 1 thereof.[739]

With regard to paragraph 2, Mr Paredes pointed to an issue that, even today, constitutes one of the most debated matters in the field of interpretation of multilingual treaties. According to Mr Parades, Article 75(2) was unclear and contradictory, since, on the one hand, it dealt with cases where the comparison of two language versions discloses that the use of different terms led to some ambiguity or obscurity, while, on the other hand, it proposed that a meaning common to both or all language versions should be preferred for the purpose of solving such ambiguity or obscurity.[740] To reduce

---

Committee. See, to this extent, the version of the commentary transmitted to the Governments for comments at the end of the ILC's sixteenth session (YBILC 1964-II, pp. 206-207, paras. 2-4).

[737] See YBILC 1964-I, p. 319, para. 57. It is just the case to note that, except the above-mentioned elimination of paragraphs 4 and 5 and that of paragraph 3, which, however, was not commented on by the ILC's members, the changes undergone by Article 75 in the version proposed by the Drafting Committee were almost exclusively of a formal nature and did not modify the substance of the rules of interpretation encompassed in the original draft prepared by Sir Humphrey Waldock.

[738] See YBILC 1964-I, p. 319, para. 60.

[739] See YBILC 1964-I, p. 319, para. 61.

[740] See YBILC 1964-I, p. 319, para. 63.

uncertainty in that respect, Sir Humphrey Waldock proposed replacing the words "is common to both or all the texts shall be preferred" with the words "so far as possible reconciles the different texts shall be adopted".[741] Mr Bartos, however, observed that the reconciliation of the different texts raised a very special difficulty, since in some cases no meaning common to the different texts could be found. In illustrating this point, he made reference to the Agreement on Reparations from Germany,[742] which had been drawn up in English and French, both being authentic languages. That treaty referred to assets placed under enemy "control", in English, and "contrôle", in French. In that respect, Mr Bartos pointed out that France had attributed to the term "contrôle" the meaning it has in French, i.e. that of the term "surveillance", while Great Britain had attributed to the term "control" the meaning it has in English, i.e. that of the term "management". According to Mr Bartos, in that case it was not possible to find out a meaning common to both language versions.[743]

At the end of the discussion, Mr Ago (Chairman) proposed to the ILC the following text, which was approved unanimously:

> *Article 75. — Interpretation of treaties having two or more texts or versions*
> 1. The different authentic texts of a treaty are equally authoritative in each language unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.
> 2. The terms of the treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 70-74, a meaning which so far as possible reconciles the different texts shall be adopted.[744]

The ILC, in accordance with Articles 16 and 21 of its Statute, transmitted the above two articles and the commentaries thereon[745] to the Governments for observations, together with the other articles constituting part III of the draft convention on the law of treaties, which concerned the effects, application, modifications and interpretation of treaties.[746] In the process of drafting the "Report of the International Law Commission covering the work of its sixteenth session, 11 May — 24 July 1964",[747] which contained the version of part III of the ILC's draft on the law of treaties sent to Governments, Articles 74 and 75 were renumbered as 72 and 73 and their text changed accordingly. Their respective titles were also modified. Here below is the text of Articles 72 and 73, as transmitted to

[741] See YBILC 1964-I, p. 319, para. 64.
[742] Agreement on reparation from Germany, on the establishment of an inter-allied reparation agency and on the restitution of monetary gold, concluded in Paris on 14 January 1946.
[743] See YBILC 1964-I, p. 319, para. 65.
[744] YBILC 1964-I, p. 319, para. 66.
[745] The part of the commentary dealing with the interpretation of multilingual treaties was modified, as compared to the previous version prepared by Sir Humphrey Waldock, for the purpose of taking into account and explaining the reason of the changes made in Article 75. No other significant changes were made. See, to this extent, the version of the commentary transmitted to the Governments for comments at the end of the ILC's sixteenth session (YBILC 1964-II, p. 207, paras. 5-9).
[746] YBILC 1964-II, p. 175, para. 16.
[747] Document A/5809 (Official Records of the General Assembly, Nineteenth Session, Supplement No. 9).

Governments:

> *Article 72. Treaties drawn up in two or more languages*
> 1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.
> 2. A version drawn up in a language other than one of those in which the text of the treaty was authenticated shall also be authoritative and be considered as an authentic text if:
> (a) The parties so agree; or
> (b) The established rules of an international organization so provide.
>
> *Article 73. Interpretation of treaties having two or more texts*
> 1. The different authentic texts of a treaty are equally authoritative in each language, unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.
> 2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the different texts shall be adopted.[748]

2.3. Governments' comments on the 1964 Draft

Twenty-seven governments transmitted their comments on part III of the draft convention. However, only eleven dealt with articles on treaty interpretation.[749] A reading of the governments' comments clearly shows that the effort of the ILC to codify solely the main and basic principles of interpretation was approved by most of the States; the content of the articles dealing with treaty interpretation was also generally agreed upon. That notwithstanding, many governments declared that they reserved the right to express their views on the final version of the draft.[750]

Five governments specifically commented on Articles 72 and 73. The Finnish Government considered the draft rules concerning the interpretation of treaties useful and appropriate.[751]

The Israeli government suggested inserting the comparison between two or more authentic versions of the treaty in Article 69, as part of the general rule of interpretation. According to that government, in fact, such a comparison was a normal practice in the process of treaty interpretation and its importance was not limited to the case dealt with in Article 73 (i.e. the case where the comparison disclosed a difference), as it frequently assisted the interpreter in determining the meaning of the text and the intention of the

[748] YBILC 1964-II, p. 206.
[749] See YBILC 1966-II, pp. 279 *et seq.*
[750] That was an approach common to both the States that commented on the articles dealing with treaty interpretation and those that did not. See, for example, the statements made by Afghanistan, Cyprus, Czechoslovak and U.S.S.R. (YBILC 1966-II, pp. 279, 285, 286-287 and 343, respectively).
[751] See YBILC 1966-II, p. 293.

parties. The Israeli government also emphasized the need to collect more information regarding the drafting practices for multilingual instruments and proposed to make Article 73 more consistent with Article 72 by substituting the word "versions" for the word "texts" whenever they appear.[752]

The need to modify the use of the word "texts" in Article 73 was also pointed out by the United States government, which, upholding the position taken in that respect by Mr Briggs during the 767th ILC's meeting, stressed that each treaty should be conceived as a unit, consisting of a single text. Therefore, according to that government, where the text is expressed in two or more languages, the several language versions are an integral part of and constitute a single text. In contrast, the use of the word "texts" in Article 73 seemed to derogate from the unity of the treaty as a single document. The United States government also suggested an alternative version of Article 73, whose wording took into account such comments.[753] With reference to Article 72, the United States government, on the one hand, recognized that paragraph 1 reproduced a widely accepted rule and, on the other hand, criticized the content of paragraph 2(b), emphasizing that if a non-authenticated version of a treaty was to be considered authentic for the purpose of interpretation, it should be made so only by a provision of that very same treaty or by a supplementary agreement between the parties. Therefore, it recommended that the entire paragraph 2(b), which referred to the "established rules of an international organization" as source of authenticity, be deleted.[754]

The Portuguese government commented on both Articles 72 and 73. With reference to the former, it stated its general agreement thereon and wondered if it would have not been appropriate to include an additional subparagraph recognizing the authentic status of a non-authentic language version also in cases where the subsequent practice of the parties showed in an unequivocal manner their will to confer authority on such a version, by analogy with the approach taken in Article 69(3) in respect of the general rule of interpretation. No particular remark was made with reference to Article 73.[755]

Finally, the Yugoslavian government noted that consideration "must also be given to the case where an international instrument is the work of several States having different legal systems and conceptions and where the interpretation of a solution must be in conformity with the juridical conceptions of all the contracting parties".[756] This was a clear reference to the issue of multijuralism, which comes into play where the corresponding terms used in the various authentic texts of a treaty denotate different legal concepts in the various legal systems where such terms are used. This issue is discussed in section 4 of this chapter.

[752] See YBILC 1966-II, p. 301.
[753] See YBILC 1966-II, p. 359.
[754] See YBILC 1966-II, p. 359.
[755] See YBILC 1966-II, pp. 336-337.
[756] See YBILC 1966-II, p. 361.

2.4. The Sixth Report on the Law of Treaties prepared by Sir Humphrey Waldock

On the basis of the comments transmitted by the governments and those provided by the Sixth Committee of the General Assembly,[757] Sir Humphrey Waldock prepared his Sixth Report on the Law of Treaties, where he also extensively analysed such comments.

In replying to the comments concerning Article 69, Sir Humphrey Waldock dealt with the proposal made by the Israeli government of including a reference to the comparison of the authentic texts among the principal means of interpretation.

In that respect, he observed that such a proposal was not one that the ILC should have adopted without very careful consideration of its implications. The legal relation between authentic language versions of a treaty was a question of some delicacy, as well shown by the ILC's analysis contained in the commentary to Articles 72 and 73.

According to the Special Rapporteur, while the interaction between two (or more) authentic texts, each of which interpreted in accordance with its own *genius*, was certainly useful in order to solve apparent divergences between them or to clarify the ambiguities of one text, the insertion of the "comparison of authentic versions" among the general elements of interpretation (Article 69) might have far-reaching implications by undermining the security of the individual texts. This conclusion was based on the recognition that each language has its own *genius* and it is not always possible to express the same idea in identical phraseology or syntax in different languages. In Sir Humphrey Waldock's view, attributing legal value to a comparison for the purpose of determining the ordinary meaning of the terms in the context of the treaty could have encouraged attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning of the treaty. Pending the examination by the ILC of the Israeli government's proposal, the Special Rapporteur preferred to confine himself to the above preliminary observations on the matter.[758]

With regard to the comments concerning Articles 72 and 73, Sir Humphrey Waldock

[757] The Sixth Committee of the General Assembly considered the topic of the draft articles prepared by the ILC from its 839th through its 853rd meetings, held from 29 September to 15 October 1965. The topic had been allocated to the Sixth Committee by the General Assembly at its 1336th plenary meeting, held on 24 September 1965. The Sixth Committee issued a Report that summarized the results of its analysis (see Document A/6090, Official Records of the General Assembly, Twentieth Session, Annexes, agenda item 87, Report of the Sixth Committee of 4 November 1965, paras. 51-52), from which it appears that the great majority of the delegates regarded the draft articles as generally reflecting existing international law and practice and considered as positive the process of codifying some rules on treaty interpretation, especially for the purpose of reducing potential disputes between the contracting States regarding the application of treaties. However, no relevant comments on the specific topic of interpretation of multilingual treaties had been put forward in the Report. During the discussions held at the Sixth Committee, the only two delegations that made new comments were the Kenyan and Romanian ones, both expressing the view that paragraph 2(b) of Article 72 should have been deleted (see *Official Records of the General Assembly, Twentieth Session, Sixth Committee,* 850th meeting, para. 41 and 842nd meeting, para. 16 respectively). For a brief analysis of the content of the Report with reference to the topic of treaty interpretation, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 71.

[758] See YBILC 1966-II, p. 100, para. 23.

first faced the issue, raised by both the Israeli and the United States governments, of the usage of the terms "texts" and "versions" in those articles. In replying to the suggestion put forward by the former government, the Special Rapporteur explained that using "versions" instead of "texts" throughout Article 73 would have made such an article inconsistent with Article 72(2), where a reference to a(n authentic) text was also made.[759]

With reference to the more articulate observation submitted by the United States government, Sir Humphrey Waldock noted that its statement, conceding that the usage of the term "texts" was becoming more frequent, represented a "serious underestimate of the treaty practice in the matter". According to the Special Rapporteur, in fact, the general practice had always been to speak of authentic "texts" and not authentic "versions" of a treaty.[760] He added that the doctrinal basis of the United States government's observation appeared to be open to question. In fact, he found that the use of the term "texts" did not derogate from the concept of "treaty as a unity" more than the use of term "versions" would have. Where recourse had been to the fiction that only one text exists, which is drawn up in multiple language "versions", the same element of multiplicity would have been introduced as in the case where the term "texts" had been used, "text" becoming just another name for "treaty" and "version" just another name for "text". The substance of the matter would have not changed. In addition, Sir Humphrey Waldock noted that, so far as the English language was concerned, the word "versions" was more indicative of difference than the word "texts".[761]

He then turned to the actual usage of the terms "text" and "version" in draft Articles 72 and 73. The Special Rapporteur explained that, on the one hand, the word "version", not being a term of art but just a word of entirely general meaning, had been carefully chosen by the ILC to indicate those renderings of a treaty drawn up in languages different from the authentic ones, i.e. those non-authoritative for interpretation purposes;[762] on the other hand, the word "text" had been used only with reference to the language versions recognized as authentic and considered authoritative for the purpose of treaty interpretation. In the system of Article 72 and 73, the metamorphosis of a language "version" into an authoritative "text" took place as a consequence of the recognition of its authentic status. According to Sir Humphrey Waldock, the distinct reference to "texts" and "versions" in Article 72(2) as well as in the treaty practice helped to clarify and sharpen the fundamental distinction between "authentic texts" (authoritative for interpretation purposes) and "official versions" and "translations"

[759] See YBILC 1966-II, p. 102, para. 2.

[760] See YBILC 1966-II, p. 102, para. 3 and references and practices there quoted. The existence of such a general practice, both before and after 1966, is also confirmed with regard to the specific field of tax treaties, as it clearly emerges from the analysis of the final clauses of the treaties included in the IBFD Tax Treaty Database (www.ibfd.org), almost all of which use the term "texts" and not "versions" in their English authentic text (if any).

[761] YBILC 1966-II, p. 102, para. 4.

[762] In this respect, the Special Rapporteur gave the case of the European Convention of Human Rights as an example. That Convention, in fact, is drawn up in two authentic languages, English and French, but it has been translated by some contracting States in their own languages for internal purposes. According to the Special Rapporteur, such official translations could be properly indicated as Convention's language "versions", but not as Convention's authentic "texts" (YBILC 1966-II, p. 102, para. 5).

(non-authoritative for interpretation purposes).[763]

With regard to the matter of the elimination of paragraph 2(b) from Article 72, the Special Rapporteur noted that the more general issue, concerning the applicability of the draft articles as a whole to treaties drawn up within an international organization, had already been addressed by the ILC through the insertion of Article 3(bis) among the "General Provisions".[764] For that reason, there was no need to maintain a specific paragraph dealing with that same subject matter in the *corpus* of Article 72.[765]

Finally, in addition to some minor drafting amendments, Sir Humphrey Waldock suggested combining Articles 72 and 73 in a single article. According to the Special Rapporteur, such a solution (i) would have permitted showing more clearly the connection existing between Article 72 and the first paragraph of Article 73 and (ii) would have helped to avoid any appearance of over-emphasizing the significance of the multilingual character of a treaty as an element of interpretation. The following is the new text of Article 72, as suggested by the Special Rapporteur:[766]

> *Article 72*
> *Interpretation of treaties drawn up in two or more languages*
> 1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, unless the treaty otherwise provides.
> 2. A version of the treaty drawn up in a language other than one of those in which the text was authenticated shall also be considered as an authentic text and authoritative if the treaty so provides or the parties so agree.
> 3. Authentic texts are equally authoritative in each language unless the treaty provides that, in the event of divergence, a particular text shall prevail.
> 4. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1,[767] when a comparison of the texts discloses a difference in the expression of the treaty and any resulting ambiguity or obscurity is not removed by the application of article 69-70, a meaning which as far as possible reconciles the texts shall be adopted.

[763] See YBILC 1966-II, p. 102, para. 5. However, the Special Rapporteur conceded that the term "different" in Article 73(1) was not well chosen, since the emphasis of that paragraph was on similarity and equality and not on differences (YBILC 1966-II, p. 103, para. 10).

[764] Article 3(bis), which was directly derived from previous Article 48, read as follow (YBILC 1965-II, p. 160):
> *Article 3 bis. Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations*
> The application of the present articles to treaties which are constituent instruments of an international organization or have been drawn up within an international organization shall be subject to the rules of the organization in question.

[765] See YBILC 1966-II, p. 103, para. 8.

[766] YBILC 1966-II, p. 103, paras. 9 and 11.

[767] Note that, in the text of Article 72 reported as materially used for discussion by the ILC during its eighteenth session, the reference to "paragraph 1" is replaced by a reference to "paragraph 3". See YBILC 1966-I (part II), p. 208, para. 1.

2.5. The eighteenth session of the ILC and the 1966 Draft

The ILC resumed the discussion on the interpretation of plurilingual treaties during its eighteenth session, held in 1966. For the purpose of the discussion, the ILC took into account the feedback received from the governments and the Sixth Committee of the United Nations General Assembly, as well as the input given by Sir Humphrey Waldock in his Sixth Report on the Law of Treaties.

The topic was taken up again at the ILC's 874th meeting, held on 21 June 1966. The Chairman, Mr Yasseen, invited the ILC to consider the new combined text of Articles 72 and 73 proposed by the Special Rapporteur, who, in turn, explained the main changes as compared to the previous draft and the reasons therefor.[768]

Mr Verdross made the first intervention and said that, although he generally agreed with the content and structure of the new article, he thought it was desirable to add a final provision to paragraph 4, according to which where it was impossible to find a meaning which reconciled the texts, the language to be considered should be that in which the treaty had been drawn up.[769] In the event his proposal was not accepted by the ILC, his alternative suggestion was to delete the words "as far as possible" from paragraph 4, in order to exclude the application of paragraph 4, second sentence, in cases where a meaning reconciling the texts could not be found.[770]

Mr Rosenne pointed out that, on the one hand, he was satisfied by the reply given by the Special Rapporteur in respect of the issue concerning the usage of the terms "texts" and "versions" in the draft article(s), but, on the other hand, he thought that the emphasis placed on the equality of authentic texts raised the question of whether comparison of authentic texts should be included among the elements of interpretation listed in the article dealing with the general rule of interpretation (at that time, Article 69).[771]

In this respect, Mr Rosenne's opinion differed from that of Sir Humphrey Waldock. As previously mentioned, the latter analysed the issue in his Sixth Report[772] and concluded that such an inclusion was not one that the ILC should adopt without very careful consideration of its implications.

In contrast, Mr Rosenne was in favor of such an inclusion. In supporting his position, he referred to doctrine,[773] normal practice and principle; in particular, he quoted the position taken by the American Law Institute, which included "the comparison of texts in the different languages in which the agreement was concluded" among the

[768] See YBILC 1966-I (part II), p. 208, paras. 1-4.
[769] See YBILC 1966-I (part II), p. 208, para. 5.
[770] See YBILC 1966-I (part II), p. 211, para. 37.
[771] See YBILC 1966-I (part II), pp. 208-209., paras. 7 *et seq*.
[772] See YBILC 1966-II, p. 100, para. 23.
[773] See YBILC 1966-I (part II), p. 209, para. 8, where there are quotations (among others) of the Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 971; C. E. Rousseau, *Principes généraux du droit international public. Tome I* (Paris: Pedone, 1944), p. 721; A. D. McNair, *The Law of Treaties* (Oxford; The Clarendon Press,1961), p. 433.

factors to be considered for the purpose of treaty interpretation,[774] and the statement made by Kiss, according to which "(l)orsque des textes en plusieurs langues font également foi, il convient d'utiliser l'ensemble des textes pour déterminer le sens véritable du traité".[775] Mr Rosenne was also of the opinion that a good practitioner would have almost automatically compared the different language versions before commencing any process of interpretation and that, in the view of such practice, it would have been misleading to place the comparison of different texts in a "secondary position" in Article 72.[776]

On the basis of those arguments, Mr Rosenne believed that all language versions should be analysed together for the purpose of treaty interpretation and that it was preferable not to leave that point to be decided by the interpreter and to discourage any tendency to base the interpretation of a treaty on a single language version, since such a tendency would have seriously impaired the fundamental concept of the treaty as a single unit.[777] A reference to the comparison of authentic texts should have therefore been included in the article dealing with the general rule of interpretation (i.e. draft Article 69).[778]

As a last point, Mr Rosenne noted the need to clarify the relevance of the *travaux préparatoires* for the purpose of interpreting multilingual treaties and, in that respect, he made reference by analogy to the reasons put forward by the Special Rapporteur for transferring the content of Article 71 (dealing with terms having a special meaning) into Article 69.[779] According to Mr Rosenne, as the transfer of the provision dealing with special meaning to Article 69 made it possible to have recourse to the *travaux préparatoires* (referred to in Article 70) for the purpose of verifying or determining the cases where a special meaning had to be attributed to a certain term, so the inclusion of a reference to the comparison of authentic texts in Article 69 would have made clearer that the recourse to the *travaux préparatoires* was allowed for the purpose of solving apparent divergences between authentic texts.[780]

Mr Castrén proposed adding the words "or the parties have otherwise agreed" after the words "otherwise provides" in paragraph 1 of Article 72, in order to coordinate this expression with that used in paragraph 2. He also proposed deleting the words "and authoritative" in paragraph 2, since the reference to "authentic text" was sufficient to made clear the status of the language version.[781]

Mr Ago pointed out that, although the proposed Article 72 was acceptable as far as substance was concerned, it could be simplified in its structure and made clearer. In particular, he suggested that paragraph 3 was redundant, since the case contemplated

[774] American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1965), §147, p. 451.
[775] A. C. Kiss, *Répertoire de la pratique française en matière de droit international public. Tome I* (Paris: Centre national de la recherche scientifique, 1962), p. 465.
[776] See YBILC 1966-I (part II), p. 209, para. 11.
[777] See YBILC 1966-I (part II), p. 209, para. 12.
[778] YBILC 1966-I (part II), p. 210, para. 16.
[779] See YBILC 1966-II, p. 100, para. 22.
[780] See YBILC 1966-I (part II), p. 209, para. 15.
[781] See YBILC 1966-I (part II), p. 210, paras. 17-18.

therein was already covered by the expression of paragraph 1 "unless the treaty otherwise provides".[782] With reference to the comment made by Mr Verdross, Mr Ago said that the issue concerning the weight to be attributed to the language in which the treaty had been drawn up in cases of irreconcilable texts could have been solved by referring to the *travaux préparatoires* and the circumstances of the conclusion of the treaty, as explicitly allowed by Article 70. This would have led to the discoverery that the treaty had been originally drawn up in a certain language and such an element should have been taken in due account for interpretation purposes. In addition, the solution adopted in the draft did not present the inconvenience of being too rigid, as it would have been a system attributing a "premium" to the original language version, independently of the reasons why that specific language had been chosen for such a purpose.[783]

Mr Briggs supported the suggestion made by Mr Ago with regard to the elimination of paragraph 3 and added, in that respect, that the word "equally" could be added between the expressions "the text is" and "authoritative in each language".[784] He considered that the first part of paragraph 4 was redundant as well, since the fact that the terms of the treaty were presumed to have the same meaning in each authentic text was already implicit in the (re)formulation of paragraph 1.[785] With regard to paragraph 2, he doubted whether a non-authenticated version of a treaty could be put at the same level as an authenticated one.[786]

Ultimately, Sir Humphrey Waldock took the floor and replied to the comments put forward by the other members of the ILC. With reference to the last suggestion proposed by Mr Briggs, he said that the ILC could not adopt any provision that would disregard the express provision of the parties and, where a treaty explicitly provided for putting a non-authenticated version and the authenticated versions on the same level, such a will should prevail.[787]

On the contrary, he substantially agreed with Mr Ago's proposal to delete paragraph 3, provided that paragraph 1 was accordingly modified.[788]

In respect of the issue raised by Mr Verdross, the Special Rapporteur recalled the ILC that the matter had already been subject of debate during its sixteenth session in 1964 and that, at that time, the ILC had reached the conclusion that it was not acceptable to go any further than was done in (then) Article 73.[789] It was inadvisable to go beyond

[782] See YBILC 1966-I (part II), p. 210, paras. 20-21.
[783] See YBILC 1966-I (part II), p. 210, para. 22. Also Mr Rosenne seemed to attach particular relevance to the language in which the treaty had originally been drawn up. See, in that respect, his statement that, for the purpose of treaty interpretation, it was essential to refer to the comparison of authentic texts, or at least of those texts in which the treaty had been drawn up by the parties at the negotiating stage (YBILC 1966-I (part II), p. 209, para. 8).
[784] See YBILC 1966-I (part II), p. 210, para. 26.
[785] See YBILC 1966-I (part II), p. 210, para. 28.
[786] See YBILC 1966-I (part II), p. 210, para. 29.
[787] See YBILC 1966-I (part II), p. 210, para. 30.
[788] See YBILC 1966-I (part II), p. 210, para. 32.
[789] YBILC 1966-I (part II), p. 210, para. 33.

that and, where no reconciliation of the texts was possible and the recourse to the *travaux préparatoires* and the circumstances of the conclusion of the treaty did not remove the uncertainty, the interpreter was to be left free to decide the meaning to be attributed to a certain provision in light of all the circumstances.[790]

Finally, with reference to the proposal made by Mr Rosenne of including a reference to the comparison of the texts among the general rules of interpretation, he observed that, although it was true that interpreters normally undertook such a comparison, the suggested inclusion would have implied that it was no longer possible to rely on a single text as an expression of the will of the parties until a difficulty arose and that it was always necessary to consult all the authentic texts for interpretation purposes. According to the Special Rapporteur, that solution had a number of drawbacks: in particular, it would have led to practical difficulties for the legal advisers of the newly independent States, who did not always have staff familiar with the many languages used in drafting international treaties.[791] His conclusion was further upheld by Mr El-Erian.[792]

Sir Humphrey Waldock then proposed to refer the article dealing with the interpretation of plurilingual treaties to the Drafting Committee for consideration in light of the discussion and the ILC so decided.

Mr Briggs, in his quality of Chairman of the Drafting Committee, presented to the ILC the new text of Article 72 at the 884th meeting, held on 5 July 1966. The proposed text was as follows:[793]

> *Article 72*
> *Interpretation of treaties expressed in two or more languages*
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty expressed in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provide or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 69 and 70 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

At the outset, Mr Briggs explained that the main difference between the proposed text and that prepared by Sir Humphrey Waldock as part of his Sixth Report on the Law of Treaties was that the substance of previous paragraph 3 had been incorporated in the new text of paragraph 1.[794] Mr Verdross reverted to his disagreement on the current wording

[790] See YBILC 1966-I (part II), pp. 210-211, paras. 33-34.
[791] See YBILC 1966-I (part II), p. 211, para. 35.
[792] See YBILC 1966-I (part II), p. 211, para. 42.
[793] See YBILC 1966-I (part II), pp. 270-271, para. 42.
[794] See YBILC 1966-I (part II), p. 271, para. 43.

of (now) Article 3, as already expressed during the 874th meeting.[795] After some minor comments were made, Mr Briggs (Chairman) put Article 72 to vote and the ILC adopted it.

At its 892nd meeting, the ILC decided to recommend, in conformity with Article 23(1)(d) of its Statute, that the General Assembly convoke an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.[796] From that very same meeting the ILC started working on the final text of the articles to be submitted to the General Assembly.

The topic was again made subject to discussion at the 893rd meeting, held on 18 July 1966. The draft article, which had been renumbered as 29 and moved to Part III, Section 3 – Interpretation of Treaties, was discussed with regard to the usage of the term "expressed" in both the title and paragraph 2. In accordance with the final proposal put forward by Mr Ago and Sir Humphrey Waldock, the term "expressed" was deleted from paragraph 2 and replaced by the term "established" in the title.[797] The ILC adopted the amended article.

Finally, during its 894th meeting, held on 19 July 1966, the ILC made some minor amendments to the commentary on Article 29 and approved its final version.[798]

The following version of Article 29, dealing the interpretation of multilingual treaties, was submitted to the General Assembly:[799]

> *Article 29.*
> *Interpretation of treaties in two or more languages*[800]
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

[795] See YBILC 1966-I (part II), p. 271, para. 44.
[796] See YBILC 1966-I (part II), p. 322, paras. 17-18.
[797] See YBILC 1966-I (part II), p. 328, paras. 42-43.
[798] See YBILC 1966-I (part II), pp. 341-342, paras. 87 *et seq*.
[799] YBILC 1966-II, p. 224.
[800] It is not clear why the title did not contain the word "established" before the words "in two or more languages", as decided by the ILC at its 893rd meeting (see YBILC 1966-I (part II), p. 328, paras. 42-43). Also, the French version of the article did not contain the proposed word "établi" in the title (see Annuaire de la Commission de Droit International, vol. II, part II, p. 244).

2.6. The United Nations conference on the Law of Treaties

Following the recommendation of the ILC, the General Assembly, at its 1484th meeting, held on 5 December 1966, adopted the Resolution 2166 (XXI) requesting the Secretary-General to convoke an international conference of plenipotentiaries for the purpose of considering the law of treaties and embodying the result of its work in an international convention and such other instruments as it might deem appropriate. The conference was to be held in two sessions, the first in early 1968 and the second in early 1969. According to point 9 of the Resolution, Member States, the Secretary-General and the Directors-General of those specialized agencies that acted as depositaries of treaties were invited to submit their written comments and observations on the 1966 Draft no later than 1 July 1967.

The General Assembly, at its 1564th meeting held 23 September 1967, allocated to its Sixth Committee the agenda item "Law of Treaties". Accordingly, the Sixth Committee discussed such a topic at its meetings held from 9 to 26 October 1967, where it also analysed the comments and observation in the meantime submitted by some Member States and specialized agencies.[801]

At its 1621st meeting, held on 6 December 1967, the General Assembly adopted a second resolution concerning the conference on the Law of Treaties, by which it decided that the first session of such conference would have been held in Vienna on March 1968 and invited participating States to submit to the Secretary-General, no later than 15 February 1968, any additional comments and draft amendments for circulation to Governments.[802]

During the first session of the United Nations Conference on the Law of Treaties (hereafter the "Conference"),[803] the Committee of the Whole of the United Nations Conference on the Law of Treaties (hereafter "Committee of the Whole") considered both the articles on treaty interpretation encompassed in the 1966 Draft and the amendments proposed by participating States.[804] At its 34th meeting, held on 23 April 1968, the Committee of the Whole specifically discussed possible amendments to Article 29.

In this respect, the United States[805] suggested three main changes to the draft article.

First, it proposed to substitute the words "language version" for the word "text" in the last part of paragraph 1.

[801] See the Report of the Sixth Committee on the Law of Treaties of 24 November 1967 (Document A/6913).
[802] See the Resolution of the United Nations General Assembly n. 2287 (XXII) of 6 December 1967.
[803] The topic of treaty interpretation was considered by the Committee of the Whole at its 31st through 34th meetings, held in Vienna on 19, 20, 22 and 23 April 1968 (UNCLT-1st, pp. 166 *et seq*.).
[804] The following States proposed amendments to the draft articles: Australia, Ceylon, Federal Republic of Germany, Pakistan, Philippines, Romania, Republic of Vietnam, Spain, Ukrainian Soviet Socialist Republic, United Republic of Tanzania, United States of America (see UNCLT-Doc, pp. 149-151).
[805] With reference to the proposals put forward by the United States, see UNCLT-Doc, p. 151.

Second, it recommended moving the second sentence of paragraph 3 to a new paragraph 4. The remainder paragraph 3 was to be reworded to read "The terms of the treaty are presumed to have the same meaning in each authentic language version", i.e. the term "language version" was to be used instead of term "text".

Third, new paragraph 4 (former paragraph 3, second sentence) was to be modified as follows: "Except in the case mentioned in paragraph 1, when a comparison of the several language versions discloses a difference of meaning which the application of Article 27 does not remove, a meaning shall be adopted which is most consonant with the object and purpose of the treaty".

The third proposal was the most innovative, as well as the most substantive of the three. In fact, apart from the suggested substitution of the words "several language versions" for the word "texts"[806] and the elimination of the reference to Article 28 for the purpose of removing the difference, the proposal had as its main objective to introduce a new yardstick to resolve the discordances between the various language versions, i.e. the objective and purpose of the treaty. The proposed change was of tremendous impact, since in cases of persistent differences between the various language versions of a treaty, not a meaning that as far as possible reconciled the texts, but the meaning most consonant with the object and purpose of the treaty had to be adopted. Such a pragmatic solution, recognizing the eventuality that in certain cases the reconciliation of the different language versions was impossible, detached the investigation of the appropriate meaning from the ordinary sense of the contrasting language versions[807] and attached it exclusively to a partially non-textual element, such as the object and purpose of the treaty.

The United States representative, in introducing the above third proposal, strongly criticized the provision laid down in paragraph 3, second sentence, of Article 29, which did not give any indication of the guiding criteria to be followed for the purpose of reconciling the different language versions, i.e. for the purpose of effecting "some sort of compromise", in the words of the United States representative.[808]

In addition, he stressed that reconciliation of the different language versions was sometimes impossible and this was especially true where a problem of multijuralism occurred, that is where the treaty dealt with legal issues and two or more systems of law were involved. According to the United States representative, in such cases it often happened that there was no legal concept in one system that exactly corresponded to a certain legal concept in the other system. Therefore, even if two "equivalent" terms were used, the legal concepts underlying and expressed by them could be non-reconcilable.[809]

---

[806] It is interesting to note that, in all the three changes proposed by the United States, the position previously expressed by Mr Briggs during the ILC's proceedings with regard to the need to substitute the term "language version" for the term "treaty" was upheld.

[807] Since they were regarded as non-reconciliable.

[808] See UNCLT-1st, pp. 188-189, paras. 39-40.

[809] See UNCLT-1st, p. 189, para. 41. See, in this respect, also the comment on Part III of the 1964 Draft submitted by the Yugoslavian government (see YBILC 1966-II, p. 361).

A similar approach was taken by the Republic of Vietnam,[810] which proposed dropping the reference to Article 28 in paragraph 3 and to replace the words "a meaning which as far as possible reconciles the texts" with the words "the meaning which comes closest to the object and purpose of the treaty" in the same paragraph. In this respect, the Vietnamese representative pointed out that it was the object and purpose of the treaty which could serve as a basis for a compromise, since they were "essential reference elements which could be of great help in overcoming difficulties of interpretation where a treaty itself provided no precise solution".[811]

Australia suggested some amendments to the new paragraph 4 proposed by the United States.[812] First, it recommended reintroducing the reference to Article 28 for the purpose of removing the apparent difference of meaning.

Second, it proposed dropping the word "most" before the expression "consonant with the object and purpose of the treaty".

Third and most important, Australia suggested adding the words "and which best reconciles the versions" at the end of that paragraph. The Australian representative explained that, although Australia shared the criticism expressed by the United States and Vietnam with regard to the current wording of Article 29(3) and also endorsed their proposal that the meaning most consonant with the object and purpose of the treaty should be adopted in the case of apparent difference of meaning, it was also of the opinion that the original idea of making every reasonable effort for the purpose of reconciling the various texts should be preserved.[813]

The opposite view was expressed by the representatives of the USSR, Israel and Trinidad and Tobago. The representative of the USSR found that the text proposed by the ILC was more satisfactory than the ones proposed by the United States, Australia and the Republic of Vietnam;[814] the representative of Israel doubted whether the object and purpose of the treaty could be of any help in cases where the various authentic texts were still non-reconcilable after the application of the general rule of interpretation enshrined in Article 27 of the draft;[815] similarly, the representative of Trinidad and Tobago argued that the interpretation of a treaty by recourse to its object and purpose was already covered by Article 29 by means of the reference to Articles 27 and 28 contained therein.[816]

From the discussion in the Committee of the Whole, however, it appears that the majority of the representatives supported the amendments suggested by Australia. On the basis of that discussion, the Drafting Committee of the Conference (hereafter "Drafting

[810] With reference to the proposals put forward by the Republic of Vietnam, see UNCLT-Doc, p. 151.
[811] See UNCLT-1st, p. 189, para. 45.
[812] With reference to the proposals put forward by the Australia, see UNCLT-Doc, p. 151.
[813] See UNCLT-1st, p. 189, paras. 52-53.
[814] See UNCLT-1st, p. 190, para. 64.
[815] See UNCLT-1st, p. 190, para. 66.
[816] See UNCLT-1st, p. 190, para. 68.

Committee") started working on an updated version of Article 29.

The Chairman of the Drafting Committee, Mr Yasseen, presented such an updated version of Article 29 to the Committee of the Whole at its 74th meeting, held on 16 May 1968. The new text was as follows:[817]

> *Article 29.*
> *Interpretation of treaties in two or more languages*
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except in the case mentioned in paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Mr Yasseen, in his capacity of Chairman of the Drafting Committee, described to the Committee of the Whole the changes made in the text of Article 29 and the reasons therefor. He first pointed out that the proposal advanced by the United States to divide former paragraph 3 into two paragraphs had been endorsed, since the idea stated in the first sentence of that paragraph (the sole sentence of new paragraph 3) was quite different from that expressed in the second sentence (constituting the basis of new paragraph 4). Such a split determined the need to specify, in new paragraph 4, that the texts subject to comparison were "authentic" texts.[818] He then explained that the Drafting Committee decided to embrace the idea underlying the United States suggestion of adopting the meaning closest to the object and purpose of the treaty for the purpose of reconciling the different texts.[819] In this respect, the position taken by the Drafting Committee seemed to be largely influenced by the compromise proposal put forward by Australia. The new text proposed by the Drafting Committee was approved without formal vote and recommended to the Conference for adoption.[820]

At the 13th plenary meeting of the second session of the Conference, held on 6 May 1969, the Chairman of the Drafting Committee, Mr Yasseen, illustrated the text of Article 29 to the Conference and pointed out that, as compared to the text approved by the Committee of the Whole, two minor changes had been made. First, the word "authenticated" had been inserted in the title after the word "treaties" in order to make clear that the words "in two or more languages" related to the word "treaties" and not to

[817] See UNCLT-1st, p. 442. para. 35.
[818] See UNCLT-1st, pp. 442-443. paras. 36-37.
[819] See UNCLT-1st, p. 443, para. 38.
[820] See UNCLT-1st, p. 443, para. 38.

the word "interpretation".[821] Second, the *incipit* of paragraph 4 was amended to read "Except where a particular text prevails in accordance with paragraph 1" in order to make clear that the reference to paragraph 1 related to the second part and not to the first part.[822] The Conference adopted the so amended Article by 101 votes to none.[823] Article 29 was renumbered as Article 33 in the final arrangements of the Vienna Convention. The final text reads as follows:

> *Article 33.*
> *Interpretation of treaties authenticated in two or more languages*
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the[824] meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

3. The construction of multilingual treaties under the rules of interpretation enshrined in Article 33 VCLT and the fundamental principles of interpretation established by the author in Part I

3.1. Introduction

Article 33 VCLT only provides broad guidelines for solving interpretative issues arising in the context of multilingual treaties, in particular those concerning the potential discrepancies in meaning among the various authentic texts.[825] The ILC considered whether to codify additional and more specific rules for the interpretation of multilingual treaties, such as the recognition of a legal presumption in favor of the authentic text with a clear(er) meaning, or in favor of the authentic text originally drafted in the course of the negotiations. The Commission, however, rejected such ideas, since it considered that

[821] See UNCLT-2nd, p. 57, para. 61.
[822] See UNCLT-2nd, p. 57, para. 63.
[823] See UNCLT-2nd, p. 59, para. 76.
[824] Note that article "a", present in the draft version adopted by the Drafting Committee of the Conference, is replaced by article "the" in the final version.
[825] In that respect, O'Connell criticized the provisions of the VCLT dealing with treaty interpretation since (i) they did not clearly indicate the priority in the application of the rules of interpretation and (ii) the rules themselves were in part so general that they made necessary a review of traditional methods of interpretation (i.e. non-codified principles and maxims) whenever a treaty is being interpreted. According to O'Connell, "[m]ore controversy is likely to be aroused by them than allayed" (see D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 253).

"much might depend on the circumstances of each case and the evidence of the intention of the parties".[826]

Moreover, the provisions encompassed in Article 33 VCLT are the heterogeneous in nature and are ontologically different from those included in Articles 31 and 32 VCLT. While the latter, for the most part, are limited to highlight which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrate the different weight that the interpreter should typically attribute thereto due to their different intrinsic attitudes to convey the final agreement of the parties, the provisions of Article 33 VCLT perform different tasks.

On the one hand, the provisions of the first two paragraphs of Article 33 VCLT establish the rule of legal effectiveness of the treaty language versions; therefore, they are not actually concerned with treaty interpretation, but constitute a logical prerequisite to such an activity since they provide the rule for determining which texts must be interpreted and which (language) versions are to be disregarded.

On the other hand, the last two paragraphs of Article 33 VCLT establish two proper rules of interpretation,[827] which can be entirely inferred neither from Articles 31 and 32 VCLT, nor from the first two paragraphs of Article 33 VCLT:

(a) Article 33(3) VCLT establishes that all authentic texts are presumed to have the same meaning;

(b) Article 33(4) VCLT establishes that, unless the treaty provides for a particular text to prevail in the case of divergence, the *prima facie* discrepancies among the various authentic texts must be removed by means of the ordinary interpretation process and, where that procedure does not succeed, the interpreter must adopt the meaning that best reconciles the various authentic texts, having regard to the object and purpose of the treaty.

The following sections are aimed at clarifying:

(i) how those provisions of Article 33 VCLT have been construed by scholars, courts and tribunals (*positive analysis*);

(ii) whether the rules enshrined in Article 33 VCLT, as resulting from the above positive analysis, significantly depart from the normative and semantics-based principles of interpretation established by the author in section 2 of Chapter 3 of Part I, or, in contrast, whether such rules and principles may be regarded as together forming a coherent system.

Such an analysis, however, is not carried out by author in the abstract, but with a view to answering the most fundamental questions of this study. Therefore, from a structural perspective, the analysis of above points (i) and (ii) is broken down into clusters, which

[826] See YBILC 1966-II, p. 226, para. 9.

[827] I.e. rules that are not limited to highlight which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrate the different weight that the interpreter should typically attribute to them, but which prescribe, under certain conditions, the meaning that must be attributed to the authentic treaty texts.

are dealt with in relation to the single questions to which they are relevant.

As already mentioned in the Introduction, the research questions that are discussed in this chapter are the following:

a) Must all authentic texts be given the same *status* for the purpose of interpreting multilingual treaties?

b) What is the relevance of non-authentic texts for the purpose of construing (multilingual) treaties?

c) Is there an obligation to perform a comparison of the different authentic texts anytime a multilingual treaty is interpreted (i.e. independently of the awareness of the existence of an error, or of a potential divergence of meanings, as well as from the perceived clarity of the authentic text analysed)?

d) If the previous question is answered in the negative, when does an obligation to compare the different authentic texts arise?

e) How should the interpreter solve the *prima facie* discrepancies among the various authentic texts emerging from the comparison?

f) What should the interpreter do where the *prima facie* discrepancies could not be removed by means of (ordinary) interpretation?

g) Where the treaty provides that a certain authentic text is to prevail in the case of divergences:
   i. At which point in the interpretative process there must be recourse to such a prevailing text?
   ii. What if the prevailing text is ambiguous or obscure?
   iii. What about the contrast between the prevailing text and the other authentic texts, if the latter are coherent among themselves?[828]

h) What is the impact on the answers to be given to the previous questions of the fact that legal jargon terms are employed in the treaty texts?

Questions a) and b) are mainly dealt with in subsection 3.2.[829]
Questions c) and d) are dealt with in subsection 3.3.
Question e) is dealt with in subsection 3.4.

[828] This is an issue that arises more frequently with reference to multilateral treaties (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 219, note 7 to Chapter 4).
[829] To a certain extent, the relevance of some authentic texts (e.g. the text that is to prevail in cases of divergences of meaning) for the purpose of the interpretation of multilingual treaties is also analysed in other subsections.

Question f) is dealt with in subsection 3.5.
Questions g-i) through g-iii) are dealt with in subsection 3.6.

Question h) is separately dealt with in section 4 of this chapter.

3.2. Status of the various authentic texts and relevance of non-authentic versions

"*The affairs of sovereign States cannot, and should not, be influenced by the fortuitous choice of words selected by a nameless translator*"[830]

3.2.1. Research questions addressed in this section

The present section is aimed at tackling the following two research questions, here briefly illustrated by means of examples.

a) Must all authentic texts be given the same status for the purpose of interpreting multilingual treaties?

Consider Article 41 of the ICJ Statute, which in its English and French authentic texts reads as follows (*italics* by the author):

1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council.
---
1. La Cour a le pouvoir *d'indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun *doivent être* prises à titre provisoire.
2. En attendant l'arrêt définitif, *l'indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

Assume that the question to be answered by the interpreter is whether the provisional measures indicated by the ICJ pursuant to Article 41 of its Statute must be considered (or not) to be binding orders. The French expression "doivent être prises" appears imperative in character. However, the English text, in particular the use of "indicate" instead of "order", of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered", seems to suggest that the ICJ's decisions under Article 41 of its Statute lack mandatory effect.

In this case, may (or should) the interpreter rely exclusively or predominantly on one of these two authentic texts for the purpose of construing Article 41 of the ICJ Statute and, therefore, answering the above question? If so, on the basis of which

[830] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 584-585, para. 40.

arguments might he justify his choice in that respect?

More specifically, supposing the interpreter knows that the ICJ Statute was originally drafted in French and that the English text is a subsequent translation based on the former, might (or should) he decide that the provisional measures indicated by ICJ under Article 41 are binding (also) on the basis of the drafting history of that article, which may support the conclusion that the French text should be given more interpretative weight?[831]

Subsections 3.2.2 and 3.2.3 deal with research question a).

b) What is the relevance of non-authentic texts for the purpose of construing (multilingual) treaties?

Consider a bilateral treaty authenticated only in French, which uses the expression "propriété ou contrôle public", for instance in the following provision of a bilateral treaty:

L'administration aura pleins pouvoirs pour décider quant à la propriété ou contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d'utilité publique déjà établis ou à établir.[832]

In that context, the French expression "propriété ou contrôle public" is ambiguous, since it may be regarded as limited to the various methods whereby the public administration might take over (or dictate the policy of) undertakings not publicly owned, or as including also every form of supervision that the administration might exercise either on the development of the natural resources of the country or over public works, services and utilities. Assume in that respect that, in French, the latter construction appears to flow more naturally from the text.

Imagine that a non-official version of the treaty exists, which has been drafted by the Ministry of Foreign Affairs of one of the contracting States as an official translation in its own official language, say English. In such a translation, the expression "public ownership or control" is used, which appears to point towards the former of the above-mentioned possible constructions.

Might or should the interpreter take into account such a translation for the purpose of determining the meaning of the authentic treaty text and rely thereon in order to support his construction? Is it in that respect relevant for him to know that the translation has been drafted by the very same negotiators of the treaty, or, on the contrary, by the translation *bureau* of the Ministry of Foreign Affairs? Should the interpreter change his perspective if the other contracting State had also translated the treaty in its own official language and that official translation points towards the same meaning of the English non-official version?

[831] The example is derived from ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment.
[832] The example is derived (with significant deviations) from PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment.

Subsection 3.2.4. deals with research question b).

3.2.2. The possible classifications of the authentic texts of a multilingual treaties

Authentic texts may be divided and classified according to three main criteria. In particular, authentic texts may be classified according to the following dichotomies:[833] (i) working language v. official language texts; (ii) drafted v. translated texts; (iii) authentic texts produced at the time of signature v. authentic texts produced thereafter.

In the first dichotomy, "working language" and official language" are technical terms generally used in the charters of international organizations and in multilateral conferences.[834] Thus, this subdivision does not appear particularly relevant for the purpose of the present study, which concerns bilateral tax treaties.

Under the second dichotomy, the expression "drafted texts" indicates those texts discussed during the negotiations and eventually drafted as result thereof.[835]

In this context, "translated texts" are all the authentic texts other than the drafted one(s), i.e. those authentic texts drafted after the conclusion of the negotiating process (generally after the initialling of the drafted texts). Translated texts may be broadly divided into three main categories: (a) authentic texts translated and verified by the States' representatives involved in the negotiating process;[836] (b) authentic texts translated and verified by people having both linguistic and technical-juridical skills, but not involved in the negotiating process; (c) authentic texts translated and verified by people having just linguistic skills and not involved in the negotiating process.

Due to the multilateral scope of treaties, it appears possible that the very same authentic text falls within different categories depending on which contracting State's conduct is being analysed. Consider the following instance. State A's and State B's

---

[833] These subdivisions originate from those proposed by Tabory (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) p. 193), but then significantly depart from the latter.

[834] With reference to the distinction between "working" and "official" languages, as well as with regard to the relevance of such a distinction for interpretative purposes, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 193. In her work, the author recalled the position expressed on such an issue by Pollux who, with reference to the authentic texts of the United Nations Charter, concluded that, although the Charter had (then) five authentic texts, "English and French being the working languages, the versions in these languages carry more weight than the remaining three" for the purpose of interpretation (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 193; Pollux, "The interpretation of the Charter", 23 *British Yearbook of International Law* (1946), 54 *et seq.*, at 79).

[835] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 193-194.

[836] I.e. by people aware of the intentions of the parties, as expressed in the course of the negotiations. In this respect, where all contracting States put in place such process of translation and verification, it appears difficult to distinguish translated texts from drafted texts for interpretative purposes.

representatives negotiate a bilateral treaty in language X and, at the end of the negotiation, draft and initial a text in such a language, which later will become an authentic text of the treaty. State A's representatives, who participated to the negotiations, prepare a translated text in language Y, which is then verified by a professional translator, lacking of the relevant technical-juridical knowledge in the specific field of the initialed treaty, on behalf of State B. This translated text will then become an authentic text. The translated text could be classified in subgroup (a), with regard to the process carried out on behalf of State A, and in subgroup (c), with regard to the process carried out on behalf of State B. Such an ineludible consequence of the multilateral nature of treaties partially blurs the above classification and makes an accurate application thereof all the more necessary.

Notwithstanding the above, the dichotomy between drafted and translated texts is of great importance for interpretative purposes since the drafted texts, as well as the translated texts that may be classified in subgroup (a), directly reflect the intention of the parties and thus, together with the *travaux préparatoires,* may play a decisive role in determining the utterance meaning of the treaty provisions.[837]

The third dichotomy concerns authentic texts that are produced after the signing of the treaty. In this respect there are two main scenarios where such an instance may occur: (a) where the treaty itself provides for this possibility; (b) where there is a new party to the treaty, whose official language(s) is given the status of authentic language for the purpose of that treaty.

According to Tabory, the authentic texts produced after the signing of the treaty are generally of a lesser interpretative value, since they could introduce and perpetuate possible "incorrect" meanings.[838]

In any case, this dichotomy does not appear useful for the purpose of the present study, since the authentic texts of bilateral tax treaties are generally all signed at the same time and their bilateral nature excludes the need to integrate the original authentic texts with new authoritative language versions due to the addition of a new treaty partner.[839]

3.2.3. The status of the various authentic texts for the purpose of construing

[837] See, substantially in accordance, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 194.

[838] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 194-195, who gives as examples the addition of English as authentic language of the EEC Treaty and the addition of the French and Spanish authentic texts to the original English text of the Convention on International Civil Aviation Organization, concluded in Chicago on 7 December 1944.

[839] It may certainly be the case that, in the event of the creation of a new recognized State, the latter inherits the subjective legal positions of the State of which it was previously part, among which the quality of party to a bilateral tax treaty (see, for, instance, the cases concerning the tax treaty network of former USSR), and that it is willing to add an authentic text in its new official language to such a treaty. However, such a hypothesis appears remote enough not to call for an in-depth analysis of the third dichotomy in the course of the present study.

multilingual treaties

3.2.3.1. The narrow interpretation of Article 33(1) VCLT in the majority opinion delivered in the Young Loan arbitration

With regard to the second dichotomy, which appears the only relevant for the present study, a first reading of Article 33(1) VCLT would seem to exclude the possibility of attributing more importance to some authentic texts, as compared to others, in order to interpret a multilingual treaty.[840]

This construction of Article 33 VCLT was upheld in the majority opinion delivered by the Arbitral Tribunal for the Agreement on German External Debts in the *Young Loan* arbitration.[841] The case concerned the interpretation of Article 2(e) of Annex 1 of the London Agreement on German External Debts[842] (hereafter "LDA"), according to which:

> (e) The amounts due in respect of the various issues of the 51/2 percent International Loan 1930 [ed.'s note: the Young Loan] are payable only in the currency of the country in which the issue was made. In view of the present economic and financial position in Germany, it is agreed that the basis for calculating the amount of currency so payable shall be the amount in US dollars to which the payment due in the currency of the country in which the issue was made would have been equivalent at the rates of exchange ruling when the Loan was issued. The nominal amount in US dollars so arrived at will then be reconverted into the respective currencies at the rate of exchange current on 1 August 1952.
>
> Should the rates of exchange ruling any of the currencies of issue on 1 August 1952 alter thereafter by 5 *per cent* or more, the instalments due after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of the least depreciated currency (in relation to the rate of exchange current on 1 August 1952) reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.

The issue at stake mainly concerned the interpretation of the second part of Article 2(e), which in the authentic German and French texts read as follows:[843]

> Sollte sich der am 1. August 1952 für eine der Emissionswährungen maßgebende Wechselkurs später um 5.v.H. oder mehr ändern, so sind die nach diesem Zeitpunkt fälligen Raten zwar nach wie vor in der Währung des Emissionslandes zu leisten; sie sind jedoch auf der Grundlage der Währung mit der geringsten Abwertung (im Verhältnis zu

[840] Unless a specific provision to this effect exists in the relevant treaty.
[841] Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan), 59 International Law Reports (1980), 494 *et seq*.
[842] Agreement concluded in London on 27 February 1953 and entered into force on 16 September 1953.
[843] For a comparison of the three authentic texts, see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 514.

> dem Wechselkurs vom 1. August 1952) zu berechnen und zu dem im Zeitpunkt der Fälligkeit der betreffenden Zahlung maßgebenden Wechselkurs wie der in die Emissionswährung umzurechnen.
>
> Au cas où les taux de change en vigueur le 1er août 1952 entre deux ou plusieurs monnaies d'émission subiraient par la suite une modification égale ou supérieure à 5 %, les versements exigibles après cette date, tout en continuant à être effectués dans la monnaie du pays d'émission, seront calculés sur la base de la devise la moins dépréciée par rapport au taux de change en vigueur au 1er août 1952, puis reconvertis dans la monnaie d'émission sur la base du taux de change en vigueur lors de l'échéance du paiement.

Article 2(e) of Annex 1 provided protection against currency fluctuation for the benefit of the creditors of the German external debts regulated in the LDA. In particular, the second part thereof required the installment payments to be made in the currency of the country of issue, but for a value recomputed on the basis of the least depreciated currency in relation to the original rate of exchange (fixed on 1 August 1952).

The issue arose in the context of a system of fixed currency exchange rates (the Bretton Woods system) and in relation to the conversion bonds issued by Germany, under the provisions of section A of Annex 1 of the LDA (which included Article 2(e) of Annex 1), for the settlement of the obligations towards the holders of the Young Loan bonds. The clause enshrined in the second part of Article 2(e) of Annex 1 of the LDA was thus applicable to the new conversion bonds. In 1961 and 1969, the German mark was revaluated, but Germany refused to make installment payments on the basis of the new par value; according to Germany, no currency depreciation (but merely a revaluation) had occurred and, therefore, the provision of Article 2(e) was not applicable in the specific case.[844] Some of the other States party to the LDA did not agree with the interpretation of the relevant clause put forward by Germany and, considering Article 2(e) applicable also in the case of currency revaluation, tried to achieve an agreement; after negotiations had proved fruitless, they referred the matter to the Arbitral Tribunal established under the provision of the LDA.

As the Tribunal pointed out, the decision in the *Young Loan* arbitration depended on the meaning attributed to the expressions "Währung mit der geringsten Abwertung", "devise la moins dépréciée" and "least depreciated currency" used in Article 2(e) of Annex 1 of the LDA and, in particular, on whether these expressions referred only to "devaluation" in the strict sense, i.e. to cases where the par value of the currency concerned had been reduced as a result of governmental action, or also to cases where the currency in question was "depreciated" in relation to another currency of issue owing to the revaluation of the latter.[845]

---

[844] See Germany's argument in the *Young Loan* arbitration (Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 522-523).

[845] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 528-529, para. 15.

The arbiters, in the majority opinion, stated that it might be directly inferred from Article 33(1) VCLT in conjunction with the final clause of the LDA, according to which the three texts of the treaty (German, French and English) were all equally authoritative, that the English authentic text carried no special interpretative weight merely because the treaty was largely and undisputedly drafted in that language and discussed in English by the relevant committees on the basis of the English text.[846] In this respect, the Tribunal found that the habit occasionally found in earlier international practice of referring to the drafted text as an aid to interpretation was, as a general rule, incompatible with the principle of the equal status of all authentic texts incorporated in Article 33(1) VCLT. According to the majority of the Arbitral Tribunal, attributing special importance or precedence to the drafted text would relegate the other authentic texts to the status of subordinated translations, thus conflicting with the provisions of the VCLT.[847]

3.2.3.2. The possible alternative interpretation of Article 33(1) VCLT: scholarly writings

However, it would seem illogical, unreasonable and unfair[848] not to attribute due weight, as part of the overall context, to the fact that the parties originally discussed and agreed upon one (or more) drafted text(s) and that the other authentic texts were translations of these texts.[849] In this perspective, the drafted text would be relevant (i) as a proxy of the *travaux préparatoires,* where the latter were not fully available, and (ii) in order to corroborate the evidence emerging from other means of interpretation.[850] Thus, the drafted text (as such) should be thrown in the crucible and used, according to Articles 31-33 VCLT, in order to resolve *prima facie* divergences of meaning among the various authentic texts and, according to Articles 31 and 32 VCLT, in order to determine the meaning to be reasonably attributed to the relevant treaty terms, as well as the object and

[846] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq*., at 529, para. 17.

[847] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq*., at 529, para. 17, where the Tribunal made also reference to M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 78 *et seq*.

[848] I.e. contrary to an interpretation in good faith of the treaty.

[849] According to Rosenne there is "all the difference in the world between a negotiated version and one produced mechanically by some translation service, however competent" (see S. Rosenne, "On Multilingual Interpretation", in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 450. On the different issue of the problems arising from the use of just one or few languages in the course of the negotiations and, in particular, that undisclosed differences in the semantics of the mother-tongue languages of the negotiators may conceal misunderstandings in respect of the treaty, see R. Cohen, "Meaning, Interpretation and International Negotiation", 14 *Global Society* (2000), 317 *et seq.*

[850] On the relevance of the history of multilingual treaties in order to establish the actual interrelationship among the various authentic texts and, thus, better understand the common intention of the parties, see S. Rosenne, "On Multilingual Interpretation", in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 451-452.

purpose of the treaty or of a clause thereof.[851]

In this respect, it is interesting to note what Tabory, quoting Rosenne, concluded with regard to the availability of the evidence of the common intention of the parties to a multilingual treaty. According to the author, "[t]he basic reason for the absence of a reference to the intention of the parties from the formulation in the Vienna Convention, although it may be included in or implied from the object and purpose of the treaty, may be attributed at least in part to the effect of multilingualism on the process of interpretation. As pointed out earlier by Rosenne, the intention of the parties, which may *perhaps* be ascertain for bilateral, or bilingual multilateral treaties, is very difficult to find out in the case of plurilingual multilateral treaties, because in the latter instance, 'some of the texts designated 'authentic' are in fact not the fruit of negotiation, but the product of a technical service supplied by an international secretariat operating virtually independently of the contracting parties.' "[852]

The author submits that, in many instances, also some of the authentic texts of bilateral treaties (such as tax treaties)[853] "are in fact not the fruit of negotiation", but mere translations prepared (at best) without full involvement of both contracting States' negotiators. In such cases, it is the author's opinion that the intention of the parties, including the object and purpose of the treaty, should be derived primarily from the drafted texts and the supplementary means of interpretation, in particular the *travaux préparatoires*, where available.

Scholars have admitted this recourse to the drafted texts for interpretative purposes, also on the basis of the relevant practice of courts and tribunals.

In 1935, the Harvard Research in International Law recognized that, although generally all authentic texts are authoritative, "where a treaty has been drafted in one language and later translated into several versions of equal authority Courts have shown a tendency to resort to the 'basic' language when confronted with a divergence."[854]

According to McNair, "tribunals dealing with a treaty written in two or more languages of equal authority will sometimes seek to ascertain the 'basic language', that is, the working language in which the treaty was negotiated and drafted and regard that

[851] On the different issue of the weight that should be attributed to the various working language versions of a UN Resolution, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 212.

[852] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 215 (*emphasis* added); the inner quotation is from S. Rosenne, "United Nations treaty practice", 86 *RCADI* (1954), 275 *et seq.*, at 384. See also M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 191.

[853] See, for instance with reference to the Italian tax treaty practice, A. Parolini, "Italy", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 246, according to whom "[u]sually, the treaty text that is initialed by the treaty negotiators is drafted exclusively in the language that has been used in the course of the negotiation", the other authentic texts being just later translation thereof.

[854] Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 972.

as the more important."[855]

Similarly, Hardy noted that "[if] the texts prove incompatible […] [a] choice must then be made between incompatible texts; and it is only normal that the presumption should be in favour of the original version, because that was the basis on which the negotiators in fact first reached agreement and the authoritative value of the other texts is subordinated to their equivalence to the original. The strength of the presumption in favour of the original version depends on the circumstances in which the other versions were drawn up. It will be weak if the negotiators all participated directly in the elaboration of those texts; stronger if they only exercised partial control over it, as, for example, by entrusting the task to a small drafting committee; and decisive if they left the entire job of drawing up those texts to one of the parties or to some specified body. […] [The judge] may concurrently resort, as did Umpire Ralston in the *Guastini* case, both to the conciliation method [ed.'s note: of the authentic texts] and to the method of referring to the original text".[856]

Such recourse to the drafted texts was upheld even after the conclusion of the VCLT.

Germer, for example, although asserting that the drafted text could not play, as such and *per se*, a decisive role in solving divergences between authentic texts, since there would be a clear violation of the principle established by Article 33(1) VCLT if the interpreter considered the drafted text to be superior to the other authentic texts, recognized that an "examination of the preparatory work of a treaty and the circumstances of its conclusion[857] may, however, display the causes of a divergence between the different language versions and thus help to establish the meaning intended by the parties to be attached to the provision in question."[858]

Likewise, according to Hilf, where only one authentic text has been negotiated while the drafting of the other authentic texts have been left to the single parties or to specific groups of translators, if the other rules of interpretation fail to remove the apparent difference of meaning, the drafted text as such might be considered and play a relevant role for interpretative purposes.[859]

Shelton expressed substantially the same opinion by stating that, where there is no common meaning between the various authentic texts and the treaty negotiations are conducted in only some languages, greater recourse should be had to the drafted text(s) to reconcile differences between authentic texts. To that extent, Article 33(4) VCLT does

[855] See A. D. McNair, *The Law of Treaties* (Oxford; The Clarendon Press,1961), p. 434 and the case law cited in footnote 2 therein.
[856] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 105-106 and note 1 at 106. Similarly, with reference to the interpretation of uniform law conventions, see A. Malintoppi, "Mesures tendant à prévenir les divergences dans l'interprétation des règles de droit uniforme", *L'Unification de Droit. Annuaire* (1959), 249 *et seq.*, at 266.
[857] As previously stated, the drafted text is to be considered, as such, part of the supplementary means of interpretation and strictly interconnected with the *travaux préparatoires*.
[858] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 418.
[859] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 93-94.

not exclude recourse to the history of the negotiations, as a supplementary means of interpretation, in order to find out in which languages the negotiation has been carried on and the final agreement reached. Thus, where the equality of authentic texts is proclaimed, but the result of a comparison of them reveals an absurd or irreconcilable difference, it is only normal that the drafted text is favored, as it constitutes the basis on which the negotiators in fact first reached agreement.[860]

Engelen affirmed that the VCLT does not altogether exclude the possibility of giving preference to the drafted text, but merely rejects it as an automatic solution for the case in which two or more authentic texts could not be reconciled.[861]

Sinclair recognized that some weight should be given to the drafted text where it is apparent from the *travaux préparatoires* that the other authentic texts are mere translations and warned that automatic and unthinking reliance on the principle of equal authenticity of the texts could lead to a failure to give effect to the common intentions of the parties in such a case. He concluded that the common intentions of the parties are reflected in the drafted text and, therefore, there should be a presumption in favor of such text, the strength of the presumption depending upon the circumstances in which the various authentic texts were drawn up.[862]

According to Aust, not every authentic text carries the same weight for treaty interpretation purposes, since if "the treaty was negotiated and drafted in only one of the authentic languages, it is natural to put more reliance on that text".[863]

Finally, according to Haraszti, an authentic text that was not discussed during the debate and was subsequently produced as a translation could hardly be consulted to shed light on the true intention of the parties.[864]

3.2.3.3. The possible alternative interpretation of Article 33(1) VCLT: the travaux préparatoires of the VCLT

The *travaux préparatoires* of the VCLT appear to support the above use of the drafted texts for interpretative purposes.

As previously mentioned, in the course of the ILC's 874th meeting, held on 21 June

[860] See D. Shelton, "Reconcilable Differences? The Interpretation of Multilingual Treaties", 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at 634-636.
[861] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 399-400. See also T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 25-26.
[862] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 152.
[863] See A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), at 254.
[864] See G. Haraszti, *Some fundamental problems of the law of treaties* (Budapest: Akadémiai Kiadó, 1973), pp. 182 *et seq*. (in particular p. 184), where the author discussed the relevance of the Chinese authentic text for the purpose of interpreting the Vienna Convention on Consular Relations (concluded in Vienna on 24 April 1963).

1966, Mr Verdross stated that, although he generally agreed with the content and structure of Article 72 of the Sixth Report on the Law of Treaties prepared by Sir Humphrey Waldock, which dealt with the interpretation of multilingual treaties, he thought it was desirable to add a final provision according to which, where it was impossible to find a meaning which reconciled the authentic texts, the language to be considered should be that in which the treaty had been drawn up.[865]

With reference to such a comment, Mr Ago affirmed that the issue concerning the weight to be attributed to the language in which the treaty had been drawn up in cases of irreconcilable texts could be solved by referring to the *travaux préparatoires* and the circumstances of the conclusion of the treaty, as explicitly allowed by Article 70. This would have led to the discovery that the treaty had been originally drawn up in a certain language and such an element should have been taken in due account for interpretation purposes. In addition, according to Mr Ago, the solution adopted in the article included in the Sixth Report on the Law of Treaties was not overly rigid, as it would have been a system attributing a "premium" to the original language version, independently from the reasons why the that specific language had been chosen for such a purpose.[866]

The Special Rapporteur, in turn, recalled that the matter had already been the subject of debate during the ILC's sixteenth session in 1964 and that, at that time, the Commission had reached the conclusion that it was not acceptable to go any further. He believed that such a decision was correct. He found that it was impossible to say in advance that the text in which the treaty had been drafted should necessarily prevail in the case of divergence, for the defects of that text might be the source of the difficulty. Thus, although he appreciated the point raised by Mr Verdross, he preferred to maintain the current solution, according to which, where no reconciliation of the texts was possible and the recourse to the *travaux préparatoires* and the circumstances of the conclusion of the treaty did not remove the uncertainty, the interpreter was free to decide the meaning to be attributed to a certain provision in light of all the circumstances.[867]

Ultimately, Mr Verdross's proposal of inserting a special provision giving precedence over the drafted text in the case of irreconcilable differences among the authentic texts was rejected.

It seems to the author that the part of the VCLT *travaux préparatoires* just recalled clearly shows, on the one hand, that the ILC agreed on the point that an automatic mechanism giving precedence to the drafted text in the case of irreconcilable differences

[865] See YBILC 1966-I (part II), p. 208, para. 5. Also Mr Rosenne seemed to attach particular relevance to the language in which the treaty had been originally drawn up. See, in that respect, his statement that, for the purpose of treaty interpretation, it was essential to refer to the comparison of authentic texts, or at least of those texts in which the treaty had been drawn up by the parties at the negotiating stage (YBILC 1966-I (part II), p. 209, para. 8).
[866] See YBILC 1966-I (part II), p. 210, para. 22.
[867] See YBILC 1966-I (part II), pp. 210-211, paras. 33-34.

among authentic texts was undesirable and, on the other hand, that it was generally recognized within the Commission that:

> (i) the fact that the treaty negotiation had been carried on in a certain language and the final agreement had been reached on a text drafted in that language had an undeniable weight for interpretative purposes and
> (ii) such a fact should be accordingly taken into account in the interpretative process as part of the supplementary means of interpretation and balanced with the other elements and items of evidence in order to find out the utterance meaning to be attributed to the treaty provision at stake.

3.2.3.4. The possible alternative interpretation of Article 33(1) VCLT: case law

The case law of international courts and tribunals, as well as that of national courts dealing with the interpretation of treaties, shows many instances of the above-mentioned use of the drafted texts, even within the framework of Articles 31-33 VCLT.

In the *Mavrommatis Palestine Concessions* case,[868] the PCIJ was confronted with the apparent difference of meaning between the authentic English and French texts of Article 11 of the British Mandate for Palestine,[869] according to which the Administration of Palestine

> "shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein"
>
> "aura pleins pouvoirs pour décider quant à la propriété ou contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d'utilité publique déjà établis ou à établir".

The Court found that the French expression "propriété ou contrôle public" had a wider bearing than the correspondent English expression "public ownership or control", since the former included every form of supervision that the Administration might exercise either on the development of the natural resources of the country or over public works, services and utilities, while in the latter the reference to "control" appeared limited to the various methods whereby the public administration might take over, or dictate the policy of, undertakings not publicly owned.[870]

In adopting the more limited interpretation resulting from the English text, which could harmonize both authentic texts and which resulted in accordance with the common intention of the parties, the PCIJ affirmed that such a conclusion was indicated with special force because the question concerned an instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine and "because the original

[868] PCIJ, 30 August 1924, The Mavrommatis Palestine Concessions (Greece v. Britain), judgment.
[869] Mandate conferred by the League of Nation on Great Britain on 24 July 1924.
[870] See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment, pp. 18-19.

draft of this instrument was probably made in English".[871]

In the *Guastini* case,[872] the Umpire of the Italian-Venezuelan Mixed Claims Commission,[873] in dealing with the possible different meanings attributable to the terms "injury" and "danni", used in the English and Italian authentic texts of the Protocol of 13 February 1903,[874] stated that (i) the text of the protocol was the result of long negotiations between the representatives of England, Germany, and Italy, on the one hand, and Mr Bowen, the Venezuela's representative, on the other; (ii) such negotiations were carried on almost altogether in English and the draft texts (afterwards becoming protocols) were in English; (iii) it was therefore evident that the basic language was English and in the case of differences of translation resort should be had to it.[875]

The Strasburg Civil Tribunal, in interpreting Article 311 of the Treaty of Versailles,[876] noted that such a provision had been originally drawn up in the English language and, therefore, the English authentic text was to be given more weight than the French authentic text in order to interpret it.[877]

After the conclusion of the VCLT, the ICJ made explicit reference to the drafted text of the relevant treaty in the *LaGrand* case,[878] which concerned the interpretation of Article 41 of its Statute and, in particular, whether the provisional measures indicated by the ICJ

[871] See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment, p. 19. For another advisory opinion in which the PCIJ seems to attribute a relevant weight to the drafted text, see PCIJ, 15 November 1932, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, advisory opinion, p. 379; more loosely, PCIJ, 12 August 1922, *Competence of the International Labour Organization in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, advisory opinion.

[872] Italian-Venezuelan Mixed Claims Commission, *Guastini Case*, 10 *Reports of International Arbitral Awards* (1903), 561 *et seq*.

[873] Mixed commission constituted under the Protocols between Italy and Venezuela of 13 February and 7 May 1903, dealing with certain differences arisen between Italy and the United States of Venezuela in connection with the Italian claims against the Venezuelan Government.

[874] See 10 Reports of International Arbitral Awards (1903), 561 *et seq*., at 479-481.

[875] See Italian-Venezuelan Mixed Claims Commission, *Guastini Case*, 10 *Reports of International Arbitral Awards* (1903), 561 *et seq.*, at 579.

[876] Treaty concluded in Versailles on 28 June 1919 by Germany, on the one side, and the Allied Powers, on the other.

[877] See Tribunal Civil de Strasbourg, 21 July 1927, *Société Audiffren-Singrun v. Liquidation Morlang, Binger et Société Atlas*, 55 *Journal du Droit International* (1928), 732 *et seq*., at 734. A similar reasoning was put forward by the Yugoslavian arbitrator in his dissenting opinion to the decision of the Hungarian-Serbian-Croatian-Slovenian Mixed Arbitral Tribunal in the case *Archduke Frederick of Habsburg-Lorraine v. Serbian-Croatian-Slovenian State*, where he stated that, for the purpose of interpreting Article 191 of the Treaty of Trianon (treaty concluded in Versailles on 4 June 1920 by Hungary, on the one side, and the Allied Powers, on the other), the English authentic text was to be given a special relevance, since the draft of the treaty had been prepared by English jurists and therefore the English text was the "original" (drafted) text (see Hungarian-Serbian-Croatian-Slovenian Mixed Arbitral Tribunal, 1 October 1929, *Archduke Frederick of Habsburg-Lorraine v. Serbian-Croatian-Slovenian State*, 9 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1930), 285 *et seq*., separate opinion of the Yugoslavian arbitrator, at 390).

[878] See ICJ, 27 June 2001, LaGrand (Germany v. United States of America), judgment.

pursuant to that article were to be considered to be binding orders.[879]

Article 41 of the ICJ Statute, in its English and French authentic texts,[880] reads as follows (*italics* by the author):

> 1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council.
>
> 1. La Cour a le pouvoir *d'indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun *doivent être* prises à titre provisoire.
>
> 2. En attendant l'arrêt définitif, *l'indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

In this respect, the ICJ noted that, while the terms "indiquer" and "indication" in the French authentic text might be deemed neutral as to the mandatory character of the measure concerned, the expression "doivent être prises" had an imperative character. Then, in response to the submission made by the United States of America, according to which the use in the English authentic language of "indicate" instead of "order", of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered" was to be understood as implying that ICJ's decisions under Article 41 of its Statute lacked mandatory effect, the Court noted that it might be argued, "having regard to the fact that […] the French text was the original version,[881] that such terms as "indicate" and "ought" [had] a meaning equivalent to "order" and "must" or "shall"".[882]

Thereafter, the ICJ supported its construction of the "original" French text by referring to the object and purpose of its Statute, the context of Article 41 thereof and the relevant *travaux préparatoires*.

It first analysed the object and purpose of its Statute as a whole, as well as that of Article 41,[883] and concluded, on the basis of such object and purpose and of the terms of Article 41 when read in their context, that its power to indicate provisional measures entailed that such measures had to be binding, inasmuch as the power in question was based on the necessity, when the circumstances call for it, to safeguard and to avoid prejudice to the rights of the parties as determined by its final judgment.[884]

The Court then pointed out that the *travaux préparatoires* did not preclude such an interpretation. In particular, the ICJ noted that the *travaux préparatoires* clearly

---

[879] ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 98-99.

[880] The ICJ Statute has five authentic texts, namely in the English, French, Chinese, Spanish and Russian languages.

[881] It was, in fact, the originally drafted version of the corresponding article of the Statute of the PCIJ, which had been then transposed without substantial modifications, in the Statute of the ICJ (see, to that extent, ICJ, 27 June 2001, *LaGrand (Germany v. United States of America),* judgment, paras. 105-106).

[882] ICJ, 27 June 2001, LaGrand (Germany v. United States of America), judgment, para. 100.

[883] Literally the "context in which Article 41 has to be seen within the Statute" (see ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 102).

[884] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 102.

showed, on the one hand, that the text of Article 41 of its Statute derived from the proposal presented by the Brazilian jurist Raul Fernandes to the Committee in charge for the drafting of the PCIJ's Statute and that such a proposal was in the French language[885] and, on the other hand, that the use in the French authentic text of the term "indiquer" instead of "ordonner" was solely motivated by the consideration that the Court did not have the means to assure the execution of its decisions and was not intended to deny the binding character thereof.[886]

In the very same *Young Loan* arbitration, the dissenting opinion of three arbiters (against the four of the majority) affirmed that the method to be followed, in order to decide that case, consisted in ascertaining "the true object and purpose of the clause from the original language in which its *travaux préparatoires* were drafted" and that the "practice of resorting to the original language in which the negotiations were conducted has been adopted by international tribunals as an aid to the ascertainment of the true intent of the parties".[887]

The dissenting arbiters noted that only the English language had been employed during the negotiating process and that the draft text used for the discussion was written in English. In addition, they pointed out that the glossaries entitled "Consultations on German Debts Vocabulary English-French-German (Unofficial)" had been prepared by the secretariat for its own use and, in particular, as an aid for the translation of the English text in the German and French languages. In this respect, it had been testified that, although not being official documents, these glossaries were in constant use by the translation section for the purpose of translating technical terms between English, French and German. They noted that the German section of such a glossary made no distinction between an "Abwertung"[888] and an "Entwertung",[889] both being equated to the English term "depreciation" and to the French term "dépréciation".[890]

In light of the above, the dissenting arbiters stated the following: "What is significant is that the strength of the presumption in favour of the original English use of 'depreciated' is particularly great because here the negotiators did not participate in the translation process. On the contrary, the entire task of drafting the authentic non-English texts was left to the translation section, which in turn could rely on the glossaries prepared by it for use in translating. […] But it cannot be responsibly contended that simply because one language is as authentic as another, no argument can be entertained which seeks to show that it does not correctly reflect the meaning of the other, particularly when the other was the basic language in the negotiations. The affairs of

[885] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 105.
[886] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 107.
[887] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.,* dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 580, para. 38.
[888] Which might be considered to be technically equivalent to the English term "devaluation".
[889] Which might be considered to be technically equivalent to the broader English term "depreciation".
[890] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 583-584, para. 40.

sovereign States cannot, and should not, be influenced by the fortuitous choice of words selected by a nameless translator".[891]

They accordingly concluded that, under the circumstances of the case, resort to the preliminary work had to be made and special weight might be given to the drafted text, so that the meaning of the term "depreciated", as used in the drafted text (English), should be given preeminence.[892]

The Supreme Administrative Court of Sweden[893] paid particular attention to the English authentic text of Articles II(2) and XII(3) of the 1960 Sweden-United Kingdom tax treaty, as modified by the 1968 Protocol, in order to construe them. The Court, although the English and Swedish texts of the treaty were equally authentic, noted that the 1968 Protocol had been negotiated in English and thus the English text might, in certain cases, be regarded as expressing more accurately the common intention of the parties.

Finally, the relevance of the drafted text was explicitly considered by the High Court of Justice of England and Wales in the case *Federation of Tour Operators and al.*,[894] which concerned the interpretation of the last sentence of Article 15 of the Chicago Convention on International Civil Aviation.[895] In particular, the High Court had to decide whether the imposition of a certain air passenger duty by the United Kingdom fell within the scope of the prohibition to impose "fees, dues or other charges", in respect solely of the right of transit over or entry into or exit from the territory of any contracting State, provided for by the above-mentioned Article 15.

In supporting his decision, Justice Burton affirmed that it was right to give some primacy to the English text, not because it was more authentic than the other texts,[896] but because the *travaux préparatoires* were in English and reference to them necessarily involved reference to the English authentic text. In this respect, he also noted that the other authentic texts were translations from the English and, therefore, they could not have been intended to change the meaning of the English text.[897]

---

[891] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq*., dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 584-585, para. 40.

[892] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq*., dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 585, para. 41.

[893] Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162*, *Regeringsrättens årsbok* (1987) (also reported in summary in IBFD Tax Treaty Case Law Database). The decision was taken by a majority of three to two judges. See also, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), 20.04 and 20.05 and P. Sundgren, "Interpretation of Tax Treaties – A Case Study", *British Tax Review* (1990), 286 *et seq.*, at 300.

[894] High Court of Justice of England and Wales, 4 September 2007, *Federation of Tour Operators and al. v. Her Majesty's Treasury et al.*, [2007] EWHC 2062 (Admin).

[895] Concluded in Chicago on 7 December 1944.

[896] The Chicago Convention on International Civil Aviation has been authenticated in the English, French, Russian and Spanish languages.

[897] See High Court of Justice of England and Wales, 4 September 2007, *Federation of Tour Operators and al. v. Her Majesty's Treasury et al.*, [2007] EWHC 2062 (Admin), para. 80.

3.2.3.5. Conclusions on research question a)

Under Article 33(1) VCLT, all authentic texts are equally authoritative for treaty interpretation purposes, in the sense that each of them may be (autonomously) relied upon in order to construe the treaty.

However, the preceding positive analysis shows that the drafted text (i.e. the text that has been discussed upon during the negotiations and eventually drafted as result thereof) may sometimes be given more weight than the other texts for the purpose of construing the treaty, since there is a reasonable presumption that it may reflect more accurately the common intention of the parties, in particular where the treaty negotiators were not involved in the subsequent drafting and examination of the other authentic texts. In this perspective, the drafted text appears relevant (i) as a proxy of the *travaux préparatoires,* where the latter are not fully available, and (ii) in order to corroborate the evidence emerging from other means of interpretation. Thus, the interpreter should throw the drafted text (as such) in the crucible and use it, according to Articles 31-33 VCLT, in order to compose *prima facie* divergences of meaning among the various authentic texts and, according to Articles 31 and 32 VCLT, in order to determine the meaning to be reasonably attributed to the relevant treaty terms and the object and purpose of the treaty.

Nothing in the VCLT precludes the interpreter taking into account the drafted text of a treaty as previously described. On the contrary, good faith seems to impose on the interpreter the duty to attribute the appropriate weight to it for the purpose of construing multilingual treaties.

Those conclusions are substantially in line with principle (vi) established by the author in section 2 of Chapter 3 of Part I, according to which, since the quest of the interpreter is directed at establishing the common intention of parties, it is reasonable for him to attribute, in the case of a *prima facie* discrepancy in meaning among the authentic treaty texts, a particular relevance to the text that was originally drafted by the contracting States' representatives and on which the consensus among them was formed, for the purpose of removing that *prima facie* discrepancy.

3.2.4. The relevance of non-authentic language versions: conclusions on research question b)

In the system of the VCLT, no explicit relevance is attached to non-authentic language versions.

The original draft articles prepared by Sir Humphrey Waldock and included in his Third Report on the Law of Treaties overtly dealt with the relevance of such language versions for the purpose of treaty interpretation. In particular, Article 75(5) of his Third Report established that non-authentic language versions could be used as subsidiary evidence of the intention of the parties where the application of all the other rules of

interpretation left the meaning of a term, as expressed in the authentic text(s), ambiguous or obscure.[898]

Then, in the course of its sixteenth session, the ILC decided to drop that provision on the grounds that it could have opened the door too much to the use of non-authentic versions of a treaty for the purpose of its interpretation.

That said, however, nothing in the text or in the *travaux préparatoires* of the VCLT seems to prevent the interpreter from taking non-authentic language versions into account as supplementary means of interpretation,[899] attributing to them an interpretative weight that may vary depending on the available evidence that such language versions may contribute to determine the common intention of the parties. Quite the opposite, since the supplementary means of interpretation covered by Article 32 VCLT are generally regarded as including all means of interpretation (other than those referred to in Article 31 VCLT) that may shed some light on the meaning of the treaty,[900] it is reasonable to conclude that non-authentic language versions may be considered within the scope of Article 32 VCLT, and accordingly used, depending on the circumstances of the case.[901]

For instance, unilateral documents such as the treaty official translations produced by the contracting States are potentially relevant, since they may give a hint of the practice followed by a party, or of the treaty meaning according to a party;[902] where the other parties were informed about such documents and positions and did not object thereto, they might even be considered to have been tacitly agreed upon. The same holds true, *mutatis mutandis*, with regard to multilateral documents such as treaty official texts.

In a slightly different perspective, non-authentic language versions may come into play as documents on which the subsequent practice of the parties is based. In particular, where non-authentic language versions have been put into public circulation and relied upon by the parties for the purpose of applying the relevant treaty, they could give rise to issues of possible (i) estoppel and acquiescence, (ii) establishment by practice of a common interpretation of the treaty, or (iii) amendment by practice of the treaty.[903]

In this respect, it is interesting to make a reference to the *Taba Arbitration*,[904] where the Arbitral Tribunal had to decide upon the exact location of part of the border

[898] See also YBILC 1964-II, p. 65, para. 10.
[899] See YBILC 1966-II, p. 223, para. 20.
[900] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 334-339 and the references included there.
[901] See, in this respect, YBILC 1966-II, p. 226, para. 9; M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 105-108; F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), p. 398.
[902] See, however, Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).
[903] See, similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 363.
[904] Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq.*

between Egypt and Israel (also) on the basis of a treaty concluded in 1906 between the former Turkish Sultanate and the Khedivate of Egypt. This treaty had been drafted in the Turkish language only; however, the treaty was then translated into Arabic and from Arabic into English. The tribunal noted that the "English translations were printed in a number of official sources and apparently were relied on thereafter" and that "it transpired that […] no authorities since before the First World War had ever consulted the authentic Turkish text, not even the Parties to this dispute."[905] The tribunal concluded that, for interpretative purposes, it would have followed the general practice of the parties and thus referred to the English translation and not to the authentic Turkish text.[906] As fairly pointed out by Gardiner, the decision of the tribunal to rely mainly on the English translation for the purpose of construing the 1906 treaty must be seen as "coloured by the greater significance to be attached to how the treaty had been implemented in practice".[907]

Finally, the above conclusions appear coherent with principle (vii) established by the author in section 2 of Chapter 3 of Part I, according to which the interpreter may take into account the non-authentic language versions of a treaty for the purpose of construing the latter, the interpretative weight attributable to such language versions depending on the available evidence that they may contribute to ascertain the common intention of the parties.[908]

3.3. Presumption of similar meaning: the right to rely on one single text

3.3.1. Research questions addressed in this section

[905] See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq*., para. 45.
[906] See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq*., para. 45.
[907] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 362. It must be noted, however, that the above-mentioned statement of the tribunal has to be read against its proper background, i.e. taking into account that the establishment of frontiers is a field of international law where it is customarily accepted that the subsequent practice of the parties plays a major role for the purpose of interpreting the relevant treaties. In this respect, the arbitral tribunal had the chance to deal with the issue of the possible divergence between the meaning reasonably attributable to the text of the treaty and the practice followed by the parties; in paragraph 210 of its award it made reference to the ICJ decision in the *Temple of Preah Vihear* case (ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment) and stated the following: "If a boundary line is once demarcated jointly by the parties concerned, the demarcation is considered as an authentic interpretation of the boundary agreement even if deviations may have occurred or if there are some inconsistencies with maps. This has been confirmed in practice and legal doctrine, especially for the case that a long time has elapsed since demarcation. […] It is therefore to be concluded that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected."
[908] For instance, the fact that both official translations produced by the contracting States of a bilateral treaty seem to suggest the same construction of a certain treaty provision, which appears on the contrary ambiguous on the basis of the sole authentic text, may reasonably lead the interpreter to construe the treaty in accordance with such official translations.

The present section is aimed at tackling the following two research questions, here briefly illustrated by means of examples.

c) Is there any obligation to perform a comparison of the different authentic texts anytime a multilingual treaty is interpreted?

This issue may be briefly illustrated with reference to Article 5(1)(e) of the ECHR, which allows the lawful detention "of persons of unsound minds, alcoholics or drug addicts or vagrants".

In order to construe that article, in particular for the purpose of determining whether it allows the lawful detention of non-alcohol-addicted drunk persons, may the interpreter rely solely on the English authentic text of the ECHR, or is he obliged to compare the latter with its French authentic text?[909]

d) If the previous question is answered in the negative, when does an obligation to compare the different authentic texts arise?

In the example given with reference to question c), the term "alcoholics" appears *prima facie* ambiguous since, on the one hand, in its common usage it denotes persons addicted to alcohol, but, on the other hand, such meaning does not seems to fit well in the context of Article 5(1)(e) of the ECHR, the meaning corresponding to the expression "drunk persons" appearing to fit better.

The question thus arises of whether the interpreter should be obliged to compare the English with the French authentic text from the outset, in order to solve the *prima facie* ambiguity of the former, or whether he should be entitled to rely on other available means of interpretation (elements and items of evidence) before reverting to the comparison of the authentic texts. Moreover, where the latter question is answered in the affirmative, uncertainty could exist on whether the interpreter should be also entitled to rely on supplementary means of interpretation (for instance, the treaty *travaux préparatoires* of the ECHR) in order to solve the apparent ambiguity of the English authentic text, before being required to compare the latter with the French text.

3.3.2. The absence of an obligation for the interpreter to always compare the authentic treaty texts

3.3.2.1. The combined interpretation of Article 33(1) and 33(3) VCLT

Under the VCLT, there is no obligation for the interpreter to analyse from the outset all the authentic texts of a treaty in order to interpret and apply it.

Article 33(1) VCLT states that the text is equally authoritative (for interpretative

[909] The example is derived from ECtHR, 4 April 2000, *Witold Litwa v. Poland (Application no. 26629*/95).

purposes) in each authentic language, unless an agreement to the contrary exists.

Furthermore, according to Article 33(3) VCLT, the terms of a treaty are presumed to have the same meaning in each authentic text.

The combination of these two provisions, read in their context, establishes the following:

(i) a rule of law according to which every treaty provision has just a single meaning, which is equally expressed by each of its authentic texts;
(ii) a rebuttable presumption that each authentic text is accurate enough to guarantee that the interpretation of the treaty based solely on it leads to the same utterance meaning that could be derived through an interpretation based on any of the other authentic texts.

The first part of the present study has shown that the attribution of meaning to a language expression is a complex matter and that many variables are involved, so that different meanings may be attributed to the same utterance due to the different weight attached to and roles played by the various elements of its overall context. This uncertainty is compounded when the speaker conveys a single message by means of a plurality of equivalent (in the speaker's intention and representation) utterances. The above distinction between (i) and (ii) is to be seen in such a framework.

The combined reading of Articles 33(1) and 33(3) VCLT establishes the rule according to which (i) the speaker intends to convey a single message (the treaty meaning) by means of a plurality of equivalent utterances (the authentic texts).[910] This rule, as such, is not subject to any condition, nor does it need any corroboration. This means that the various authentic texts must always be attributed the same utterance meaning, since it is established by the rule of law that they have the same meaning. Thus, from a logical perspective, referring to a divergence in meaning between the various authentic texts is erroneous since such texts *cannot* have different meanings;[911] it would be more correct to speak of a divergence between the meanings provisionally attributed to the various authentic texts (construed in isolation from each other), or of a *prima facie* apparent (not real) divergence of meanings.[912]

At the same time, a combined reading of Articles 33(1) and 33(3) VCLT establishes the rebuttable presumption (ii) that the meaning provisionally attributed to any of the authentic texts, taken in isolation, is the utterance meaning of the treaty.[913]

---

[910] This rule may be departed from if the parties so agree, as explicitly admitted by Article 33(1) VCLT.

[911] See commentary to Article 29 of the 1966 Draft, in which it is stressed that "in law there is only one treaty - one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge" (YBILC 1966-II, p. 225, paras. 6); see also YBILC 1966-II, p. 225, paras. 7.

[912] It is here submitted that Engelen concluded the same, as a matter of substance, although through different linguistic expressions: "However, even then [ed.'s note: when it is "established that the terms of the treaty actually do *not* have the same meaning in each text"] it must be assumed that the different authentic texts were always *intended* to mean the same, despite the failure of the parties to accurately express their common intention in each text, and the interpreter should bear this in mind when reconciling the different texts in accordance with the principles of Article 33(4) VCLT" (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 394).

[913] The position of most scholars is confusing (and confused) on this point, a widespread conclusion being that

3.3.2.2. Evidence from the travaux préparatoires of the VCLT

The above conclusions are also supported by an analysis of the *travaux préparatoires* of the VCLT.

As previously mentioned, following the transmission by the ILC of its 1964 Draft to the governments for observations, the Israeli government suggested introducing, within the general rule of interpretation, a provision requiring the comparison between the authentic texts of the treaty. In the view of that government, such a comparison was a normal practice in the process of treaty interpretation and its importance was not limited to the case of *prima facie* divergence of meanings among the authentic texts, as it frequently assisted the interpreter in determining the meaning of the various texts and the intention of the parties to the treaty.[914]

In his Sixth Report on the Law of Treaties, Sir Humphrey Waldock replied to the Israeli government's proposal by stating that the latter was not one that the ILC should have adopted without very careful consideration of its implications. According to the Special Rapporteur, while interaction between two (or more) authentic texts was certainly useful in order to solve apparent divergences of meanings or to clarify the ambiguities of one

upon the discovery of a *prima facie* divergence between the authentic texts, the presumption of Article 33(3) VCLT that the terms of the treaty have the same meaning in each text is rebutted and ceases to hold true (to this extent, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 391-392). Tabory, for instance, affirmed that upon discovery on an unclear passage, a textual divergence or a difference of opinion, "the presumption in Article 33(3) VCLT ceases to hold" (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 198). Similarly, Germer attributed to Article 33(3) VCLT a limited function and stated that the latter was a consequence of the very nature of the presumption, which was acknowledged by Sir Humphrey Waldock (at the ILC 874th meeting); he concluded that when an international adjudicator is confronted with a divergence between the different authentic texts of a treaty, the presumption of Article 33(3) VCLT does not give him any guidance, so that he has to resort to the rules set forth in Article 33(4) VCLT (see P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414). However, the author submits that (i) the Special Rapporteur, in the course of the ILC 874th meeting, had never referred to such a limited presumption of equal meaning of the authentic texts (he had never used the word "presumption" at all, indeed), but had simply discussed of the right to rely on a single authentic text (see, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 393-394); (ii) the right to rely on a single text is a strict consequence of the presumption that each authentic text is accurate enough to guarantee that the interpretation of the treaty based solely thereon leads to the same utterance meaning that could be determined through an interpretation based on any of the other authentic texts, and not of the rule (non-rebuttable presumption) that all authentic texts have the same meaning; (iii) Article 33(4) VCLT does not set aside Article 33(3) VCLT, but, on the contrary, it is built thereon: in fact, it requires the interpreter to determine the common meaning of the various authentic texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this is not possible, to adopt the meaning that best reconciles the texts (both provisions supporting the idea of the treaty unity and of the interconnected equality of meaning of the various authentic texts).

[914] See YBILC 1966-II, p. 301.

text, the insertion of the "comparison of authentic versions" in the general rule of interpretation could have far-reaching implications by undermining the security of the individual texts and encouraging attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning of the treaty.[915]

When the ILC later discussed the issue, Mr Rosenne restated the proposal of the Israeli government and supported it by quoting prevailing opinion, normal practice and principles. He considered that all authentic texts had to be analysed together for the purpose of treaty interpretation and that it was preferable to discourage any tendency to base the construction of a treaty on a single text, since such a tendency would have seriously impaired the fundamental concept of the treaty as a single unit.[916]

Sir Humphrey Waldock, in turn, replied that the suggested provision implied that it was always necessary to consult all the authentic texts for interpretation purposes. He found that such a solution had a number of drawbacks and would have caused practical difficulties for the legal advisers of newly independent States, who did not always have staff familiar with the many languages used in drafting international treaties.[917] His position was supported by Mr El-Erian.[918]

Ultimately, the ILC opted for not including the provision suggested by the Israeli government and upheld by Mr Rosenne, thus indirectly giving support to the reasons put forward by the Special Rapporteur. The text finally adopted by the Vienna Conference does not differ, in this respect, from the one provisionally approved by the ILC.

3.3.2.3. The position(s) taken by scholars

Scholars have generally supported the above conclusions as well.[919]

According to Hilf, each authentic text is as binding as all the other texts, so that, according to the intention of the contracting parties, the content of the agreement is fully

[915] See YBILC 1966-II, p. 100, para. 23.
[916] See YBILC 1966-I (part II), p. 209, para. 12.
[917] See YBILC 1966-I (part II), p. 211, para. 35. In this respect, Kuner pointed out that "[t]here can be no doubt that comparison of language versions often requires library resources and multilingual legal personnel that are quite rare even in richest Western democracies, not to mention the Third World." (C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 962); see also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 387.
[918] See YBILC 1966-I (part II), p. 211, para. 42.
[919] In addition to the authors cited above, see also T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 19 *et seq*. and F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 384 *et seq*. and references therein.

embodied in each text. Therefore, each authentic text may serve, taken in isolation, as the basis for interpretation unless a lack of clarity or an apparent divergence in meaning is discovered.[920]

Hilf considered such a conclusion cogent also in light of pragmatic considerations on the (non-) feasibility of consulting all authentic versions during routine interpretation of treaties and maintained that it reflected the actual practice in the application of treaties, since practitioners and tribunals used not to carry on a comparison of the various authentic texts unless specific issues arose.[921]

Germer recognized that an "international adjudicator interpreting a plurilingual treaty does not always have to consult all the authentic texts of the treaty, but can rely on a single text until he is confronted with an alleged divergence between the different authentic language versions of the treaty".[922] In this respect, the author submitted that such a legitimate practice had often allowed avoidance of needless complications of the interpretation process.[923]

Kuner pointed out that, under Article 33 VCLT, it is unnecessary to compare the various authentic texts on a routine basis, i.e. when no allegation of an ambiguity in one text or a difference among texts has been made.

The author also made reference, in this respect, to the Restatement of the Law of the American Law Institute,[924] according to which "[a]n international tribunal, therefore, may consider any convenient text unless an argument is addressed to some other text".[925]

Similarly, according to Gardiner, the interpreter may legitimately use a single authentic text for "routine" interpretation. However, where there is reason to believe that there might be an issue affected by the choice of the authentic text used for interpretative purposes, or where a difference or dispute over interpretation is being presented to a court or tribunal, comparison of texts is likely to be essential.[926]

---

[920] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 54 and 72-73.

[921] See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 75. According to Tabory, Hilf, while upholding the above-mentioned conclusions for practical reasons, would have conceded that Rosenne's approach was the ideal one from a doctrinal viewpoint (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 198). It does not seem to the author that Hilf expressed such a clear "doctrinal" support for Rosenne's approach to the subject matter.

[922] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.,* at 412.

[923] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 412.

[924] See American Law Institute, *Restatement of the Law, Third: Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1987), §147, p. 451.
§ 325 reporter's note 2 (1987).

[925] See C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 954; in particular footnote 6.

[926] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 360-361.

Even Tabory, although considering that from a theoretical perspective only the reference to more than one authentic text would ensure the accuracy of interpretation, due to the lack of precision and the nuances that characterize human languages, recognized that Article 33 VCLT creates a right to rely on a single authentic text until a difference in meaning is disclosed.[927]

However, she believed that the absence of any legal obligation to compare the various authentic texts was an adjustment of the law to practical considerations, based on the inability of practitioners to master several languages and that it was an innovation introduced by the VCLT, and thus not representing pre-existing customary international law.[928]

Finally, the very same Rosenne who had strongly criticized Article 29(3) of the 1966 Draft "for failing to pose squarely as a primary element of interpretation the comparison of authentic multilingual versions" acknowledged that under such a provision no obligation to carry out a comparison of the various authentic texts existed and limited the scope of his analysis *de lege ferenda*, blaming the ILC for having confused the technical aspect of determining the authoritativeness of the different authentic texts of a treaty with the interpretative process thereof, in which the comparison of the various authentic texts should play a role.[929]

3.3.2.4. The case law of national and international courts and tribunals

The practice of courts and tribunals to consider only one, or few, of the authentic texts when interpreting a multilingual treaty is manifest. For a (long) list of case law that gives evidence of such a practice, it is enough here to refer to the surveys carried out by Hardy, before the adoption of the VCLT,[930] and to the references made by Kuner to decisions of both domestic and international courts and tribunals.[931]

The case law points to an unambiguous direction, which is probably self evident to all practitioners that, in different fields of law, had the chance to routinely deal with the interpretation and application of multilingual treaties:

---

[927] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 198-200.
[928] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199; in particular, the expression in brackets "(once the Vienna Convention entered into force)" referred to the absence of a legal obligation to compare the various authentic texts under the VCLT.
[929] See S. Rosenne, "Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison", 5 *Columbia Journal of Transnational Law* (1966), 205 *et seq.*, at 224.
[930] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 139 *et seq*.
[931] C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 956-957, in particular footnotes 20 through 30.

(i) domestic courts tend to rely exclusively on the authentic text in their official languages, as long as no issue of differences in meaning is put forward by the parties;
(ii) international courts and tribunals tend to rely exclusively on the authentic texts in their working (official) languages, or in the language of the case discussed before them, unless an issue of differences in meaning is raised before them.

Moreover, where issues of potential divergences between certain authentic texts of the treaty are raised before such courts and tribunals, it is not uncommon that the latter carry out only the comparison of the texts in relation to which the potential divergence has been alleged, notwithstanding the existence of other authentic texts of the treaty to be interpreted.[932]

A final remark concerns the fact that, in respect of any treaty to be interpreted, those courts and tribunals operate either as organs of the contracting States, or as entities empowered by such contracting States to decide on the application of the treaty. Such States, in turn, may be either (i) parties to the VCLT, or (ii) not.

In case (i), the decisions of the above-mentioned courts and tribunals constitute a subsequent practice in the application of the VCLT. As that subsequent practice is continuous and homogeneous in the use of only one, or few, of the authentic treaty texts for interpretative purposes, it constitutes a subsequent practice in the application of the VCLT that establishes the agreement of the parties regarding its interpretation,[933] which confirms the thesis that Article 33 VCLT allows the interpreters to rely solely on one authentic text, as long as a *prima facie* divergence in meaning or an interpretative issue is put forward.

With reference to case (ii), it must be noted that such a practice is so continuous and homogeneous that it appears to reach the threshold of the general practice necessary for the formation of customary international law; moreover, the nature of the organs putting in place that practice (the judiciary) and, in particular, the fact that at least some of those courts and tribunals are bound to respect and apply customary international law,[934] reasonably confirm that the right to rely on a single authentic text, unless an apparent divergence in meaning or an interpretative issue arise, is regarded by States as law. It may therefore be concluded that such a right, at the present stage, constitutes customary international law.

3.3.2.5. Conclusions on research question c)

The preceding analysis has shown that no reasonable doubt exists on the fact that, under

[932] See, for instance, ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, paras. 24-47; ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 99-109.
[933] See Article 31(3)(b) VCLT, which represents customary international law.
[934] See, for example, Article 38(1)(b) of the ICJ Statute.

the VCLT, the interpreter is under no obligation to take into account more than one authentic text whenever construing and applying a multilingual treaty. Except for the cases pinpointed in the following section, the interpreter has the right to rely on any single authentic text in order to determine the utterance meaning of the relevant treaty provision, which is to be ascertained on the basis of the rules of interpretation provided for in Articles 31 and 32 VCLT.[935]

As previously noted, the interpreter of course remains free to take into account more than one authentic text in his quest for the utterance meaning of the treaty.

These conclusions appear in line with principles (i), (ii) and (iii) established by the author in section 2 of Chapter 3 of Part I, according to which:

(i) for the purpose of interpreting one authentic text of a multilingual treaty, the other authentic texts are part of the overall context and, therefore, may be used in order to construe the former;

(ii) since the relevance of the treaty text(s) must not be overestimated, where the parties have agreed that more than one treaty text is authentic, it is reasonable to infer that those parties intended to allow treaty interpretation to be based on any of such authentic texts, taken in isolation, together with the elements of the overall context other than the other authentic texts; and

(iii) the interpretation of a multilingual treaty on the basis of just one of its authentic texts is not different from the interpretation of a monolingual treaty and therefore the principles applicable to the interpretation of the latter apply to the interpretation of the former.

3.3.3. The obligation for the interpreter to compare the authentic treaty texts whenever an alleged difference of meaning is put forward

It is generally recognized that the interpreter (in particular, any adjudicator) must take into account all the *relevant* authentic texts whenever one of the parties puts forward a *prima facie* divergence of meaning among them.[936]

It is submitted, in this respect, that a different approach would breach both the

[935] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 148-149; Commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7). On the (low) frequency of having recourse, by the ICJ, to the rules of interpretation provided for by Article 33 VCLT, as compared to those enshrined in Articles 31-32 VCLT, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 16-17 and 33 (footnote 93).

[936] To this extent, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 197-199; P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 360; T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 24. See also the further references included in section 3.3.2.3 of this chapter.

obligation to interpret the treaty in good faith, as provided for under Article 31 VCLT, and the requirement to remove any *prima facie* difference of meanings according to Article 33(4) VCLT.

3.3.4. On whether an obligation exists to compare the authentic treaty texts whenever the interpreted text appears prima facie ambiguous, obscure, or unreasonable

3.3.4.1. In general

Where the interpretation is based on an authentic text whose meaning is *prima facie* ambiguous, obscure or unreasonable, the question arises of whether the interpreter is obliged to refer to the other authentic texts as soon as the ambiguity, obscurity, or unreasonableness appears, or exclusively after the application of the interpretative rules of Articles 31 and 32 VCLT has failed to solve the issue.

According to Tabory, the VCLT did not clarify at which point of the interpretative process the comparison of the various authentic texts is to be undertaken.[937] Although Tabory believed that the comparison of the authentic texts should be theoretically carried out whenever a problem or lack of clarity arises in interpreting a treaty on the basis of a single authentic text,[938] she could not find in the VCLT system any clear indication whether the "problem" or "lack of clarity" should be regarded as existing solely at the end of the interpretative process provided for in Articles 31 and 32 VCLT, or at their first-sight appearance.

3.3.4.2. The restrictive position upheld by Hilf

Hilf noted that, where uncertainty in determining the utterance meaning of one authentic treaty text shows up, the normal practice would probably be to consult the various authentic texts; in fact, as explicitly recognized by the ILC in the Commentary to Article 29 of the 1966 Draft,[939] when the meaning of terms is ambiguous or obscure in one language but it is clear and convincing as to the intentions of the parties in another, the comparison of the authentic texts facilitates interpretation of the text the meaning of which is doubtful.[940]

In a subsequent statement, he concluded that upon discovery of an unclear provision[941] the presumption of Article 33(3) VCLT ceases to hold and the comparison

[937] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199.
[938] See her drawing of the interpretation pyramid at p. 177.
[939] See YBILC 1966-II, p. 225, para. 6.
[940] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 72 and 75.
[941] As well as in the case of a prima facie divergence in meaning among the authentic texts.

of the texts under Article 33(4) must take place.[942] However, the issue remains of *when* a provision should be considered "unclear": at the first-sight vagueness or ambiguity thereof, after the unfruitful application of the rule of interpretation provided for under Article 31 VCLT, or after the unfruitful use of the relevant supplementary means of interpretation?[943]

Hilf resolved this issue by linking it to the question of whether reliance on a single text for the purpose of routine interpretation could entail the State's international responsibility where it was afterwards established, by the competent judiciary, that the authentic text that State relied upon actually contradicted the meaning intended by the parties, which would have been discovered had the other authentic texts been consulted as well.[944]

That author found that a State might violate its treaty obligations where it relied on a single authentic text for interpretation purposes and thereafter it emerged that such a text did not properly express the treaty meaning. Therefore, he concluded that, where during the course of routine interpretation of a treaty a difficulty arose, any State continuing to rely on a single authentic text would deliberately assume the risk of an incorrect application of the treaty that could cause its international responsibility. The comparison of the authentic texts for interpretation purposes would thus be necessary as soon as any evidence of unclearness or ambiguity of the authentic text used appeared in order to avoid the risk of incurring international responsibility.

Hilf's analysis appears correct, but incomplete.

It is certainly true that a "wrong" interpretation (i.e. the interpretation regarded as such by the competent judiciary) of a treaty by a State's organs may lead these organs to behave in such a way as to violate the obligations stemming from that treaty, i.e. to commit an internationally wrongful act on behalf of their State.[945] It is also generally

[942] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), p. 77.

[943] The author, in this respect, submits that the segregation of the rule of interpretation provided for under Article 31 VCLT from the supplementary means of interpretation of Article 32 VCLT, for the purpose of determining where a provision is "unclear", should be rejected since it conflicts with the unity of the process of interpretation that characterizes the VCLT system. The point is further analysed in section 3.3.4.5 of this chapter.

[944] See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 78-83. In this respect, Tabory put forward that the VCLT did not clarify which legal consequences for the contracting States could be derived from the use of a single authentic text for interpretation purposes, where the construction so derived overlooked a different meaning expressed in the authentic texts not consulted (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199). The relevance of customary international law on State responsibility in tax matters, including tax treaty matters, is broadly analysed in H. Pijl, "State Responsibility in Taxation Matters", 60 *Bulletin for international taxation* (2006), 38 *et seq*.

[945] See Articles 2 and 4 of the ILC 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter "ILC Draft on States' Responsibility"), available in the annex to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49(Vol. I)/Corr.4.

recognized that every internationally wrongful act of a State entails the international responsibility therefor.[946]

However, the same holds true where the interpretation by the State's organs is based on more than one authentic text and on the comparison thereof. In fact, the breach of the treaty obligations consists in the conduct of the State's organs being in violation of relevant treaty provisions, as interpreted by the court, tribunal, or other organization called to assess the (in)correct application of the treaty by that State. The fact that the State's organs have based their (mis)application of the relevant treaty provisions on an interpretation of it that took into account just one or all of the authentic texts of such a treaty is immaterial with respect of the existence of a breach.

One could perhaps wonder whether an interpretation based on the comparison of all the authentic texts might more probably conform to the decision of the adjudicator. In this respect, the author does not have an answer. Not being a wizard, he merely respectfully submits that where the State's organ applying the treaty has construed the chosen authentic text in accordance with the rules of interpretation enshrined in Articles 31 and 32 VCLT and, in good faith, has arrived at a reasonable, clear and unambiguous utterance meaning, without any of the interested parties having raised any issue of potential textual divergence, the possibility that an independent adjudicator will decide differently solely (or mainly) on the basis of the comparison with the other authentic texts appears remote.

Obviously, the fact that the State's organs have based their "wrong" interpretation of the treaty on the comparison of various (or all) authentic texts, following a *prima facie* ambiguity or lack of clarity of the first text consulted, may be taken into account, together with other items of evidence, in order to assess the behaviour of that State. This assessment could even lead to the conclusion that the State, in the specific case, interpreted and applied the treaty in good faith and without any negligent action or omission, which could be relevant for the purpose of determining the reparation for the injury caused by the internationally wrongful act.[947]

Nonetheless, it is submitted that, in the absence of any potential textual divergence raised by the contracting States, their organs, or other persons entitled to the benefits of the treaty, which could have been reasonably known by the State's organs (mis)applying the treaty, the fact that such organs have interpreted the treaty fairly, in accordance with the provisions of Articles 31 and 32 VCLT, on the basis of a single authentic text as implicitly allowed by Article 33(1) and (3) VCLT and have thus arrived at a reasonable, unambiguous meaning, would likewise be probably assessed as evidence of the State's good faith in the interpretation and application of the treaty and of the absence of any negligent action or omission on its part.

Thus, all in all, it does not seem that the arguments put forward by Hilf definitely set aside the issue of whether the interpreter is obliged to refer to the other authentic texts:

[946] See Article 1 of the ILC Draft on States' Responsibility.
[947] See Article 39 and, more generally, Chapter II of the ILC Draft on States' Responsibility.

(i) as soon as the construction based on a single text appears *prima facie* ambiguous, obscure or absurd, or
(ii) exclusively after the unfruitful application of the rules of interpretation enshrined in Articles 31 and 32 VCLT.

3.3.4.3. Evidence from the travaux préparatoires of the VCLT

One could rely on the VCLT *travaux préparatoires* in order to support solution (i) above.

In replying to the Israeli government's observations on the 1964 draft, the Special Rapporteur admitted the "interaction between two versions when each has been interpreted in accordance with its own genius and a divergence has appeared between them or *an ambiguity in one of them*".[948]

Moreover, responding to the comments put forward by Mr Rosenne in the course of the ILC's 874th meeting, the Special Rapporteur affirmed that "[t]o erect comparison into one of the means of legal interpretation set out in Article 69 would imply that it was no longer possible to rely on a single text as an expression of the will of the parties *until a difficulty arose* and that it was necessary to consult all the authentic texts for that purpose".[949]

Such statements, especially the second one, could be interpreted as evidence that, according to Sir Humphrey Waldock, comparison of the authentic texts should have been carried out as soon as any difficulty or ambiguity in the interpretation of one text emerged.

However, the author believes this would be to read too much into two sentences whose main purpose was to counteract the proposal to erect the comparison of authentic texts as one of the means of interpretation set out in (now) Article 31 VCLT.[950]

In addition, this reading would run against the principles of the unity of the interpretative process which underlies Articles 31-33 VCLT, and of the right to rely on any authentic text for the purpose of construing the treaty. These two principles seem to point to the contrary conclusion that (i) ambiguity, lack of clarity, or unreasonableness of meaning may be said to exist only as final results of the unitary interpretative process encompassing the application of both Articles 31 and 32 VCLT and (ii) the interpreter has the right to carry out such a unitary interpretative process on the basis of a single authentic text, without any obligation to carry out a textual comparison due to the *prima facie* ambiguity, lack of clarity, or unreasonableness of meaning of that text.

---

[948] See YBILC 1966-I (part II), p. 100, para. 23 (*emphasis* added).
[949] See YBILC 1966-II, p. 211, para. 35 (emphasis added).
[950] See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 393-394.

3.3.4.4. The case law of national and international courts and tribunals

The most prominent evidence in favor of considering the interpreter obliged to refer to the other authentic texts exclusively after the unfruitful application of the rules of interpretation enshrined in Articles 31 and 32 VCLT is represented by the case law of national and international courts and tribunals, which generally rely just on one or two authentic texts in order to settle controversies concerning the interpretation of treaties, i.e. controversies concerning the meaning to be attributed to certain treaty provisions where *prima facie* ambiguities or lack of clarity exists.[951]

A clear instance of this is the ICJ's decision in the *Territorial Dispute* case,[952] where the Court had to construe Article 3 of the Treaty of Friendship and Good Neighbourliness between France and Libya[953] and Annex I thereto.

The ICJ pointed out that its initial task consisted in interpreting the relevant provisions of the treaty, on which the parties had taken divergent positions.[954] It then stated the following:

> "The Treaty was concluded in French and Arabic, both texts being authentic; the Parties in this case have not suggested that there is any divergence between the French and Arabic texts, save that the words in Arabic corresponding to 'sont celles qui résultent' (are those that result) might rather be rendered 'sont les frontières qui résultent' (are the frontiers that result). The Court will base its interpretation of the Treaty on the authoritative French text."[955]

Ultimately, the Court recalled that (i) in accordance with customary international law, as reflected in Article 31 VCLT, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose, (ii) interpretation must be based above all upon the text of the treaty and (iii) recourse may be had to means of interpretation such as the *travaux préparatoires* of the treaty and the circumstances of its conclusion, as supplementary means of interpretation.[956] The ICJ interpreted the ambiguous (for the parties) French authentic text of the treaty accordingly.

3.3.4.5. On whether the interpreter is entitled to use supplementary means of interpretation to solve the prima facie ambiguity, obscurity, or unreasonableness of the interpreted text before resorting to a comparison with the other authentic texts

Similarly, it would seem that the distinction between the primary means of interpretation

[951] See the references in section 3.3.2.4 of this chapter.
[952] ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment.
[953] Treaty concluded in Tripoli by the French Republic and the United Kingdom of Libya on 10 August 1955.
[954] ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment, para. 38.
[955] ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment, para. 39.
[956] ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment, para. 41.

referred to in Article 31 VCLT and the supplementary means of interpretation referred to in Article 32 is not relevant in order to differentiate between cases where the interpreter is obliged and cases where he is not obliged to carry out a comparison of the authentic treaty texts. Where the interpreter is capable of removing the *prima facie* ambiguity, obscurity, or unreasonableness of meaning by having recourse to the means of interpretation provided for in Article 32 VCLT, no obligation should exist for him to compare the various authentic texts, exactly as no obligation should exist in cases where such a result is achieved on the basis solely of the primary means of interpretation.

In this regard, the author does not agree with Engelen, who submitted that, "when the interpretation of any one authentic text in accordance with Article 31 VCLT leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the Vienna Convention system of interpretation and, in particular, the principle of good faith requires the interpreter to first have recourse to the other authentic texts in order to determine the meaning before recourse is had for this purpose to the supplementary means of interpretation mentioned in Article 32 VCLT."[957]

Engelen's conclusion appears to impair the original assumptions (and its corollaries of legal certainty and ease of administration) that the various authentic texts are equally authoritative and have the same meaning, as well as the principle of unity of the interpretative process. As mentioned earlier, Article 33(3) establishes the presumption that the meaning attributed to any of the authentic texts, construed in isolation, is the utterance meaning of the treaty; as long as this presumption holds true, that is until a potential divergence is shown, the clear, reasonable and unambiguous meaning inferred from the interpretation of a single authentic text and supported by the application of the rules provided for in Articles 31 and 32 VCLT must be seen as expressing the "true" agreement of the parties.[958]

3.3.5. The consequences of limiting the obligation to compare the authentic treaty texts to cases where an alleged difference of meaning is put forward

3.3.5.1. The criticism raised by certain scholars

The conclusion that, under the VCLT system, the interpreter is not obliged to carry out

[957] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 390. See also T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 23-24.

[958] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 412-413, who affirmed that an international adjudicator interpreting a multilingual treaty may rely on any of the authentic texts until he is confronted with an alleged divergence between them and referred to the ordinary interpretative practice of the ICJ to support that conclusion. See also J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 141

any comparison of the authentic treaty texts until an alleged difference of meanings is put forward has been criticized by more than one scholar.

Tabory, for instance, mentioned that nothing guarantees that the existence of a discrepancy between the various authentic texts is brought to the attention of the adjudicator. Absent a legal obligation on the interpreter to compare the various authentic texts unless a potential divergence of meanings is put forward by the interested parties, the adjudicator "may find itself interpreting a text on the faulty assumption that it reflects the meaning of the treaty as a whole, when in fact it contradicts the intended meaning".[959]

From the need to avoid such undesirable result Tabory infers the necessity to recognize the usefulness and desirability of the comparison of the different authentic texts for the purpose of interpretation, despite the absence of a firm legal obligation to do so.[960]

Similarly, Mössner affirmed that only an interpretation based on all the authentic treaty texts is capable of showing the existence of a possible difference of meanings.[961]

These statements by Tabory and Mössner highlight the obvious: no one may know that two different utterance meanings could be derived from two authentic texts before both of them have been interpreted and the respective results compared.[962]

Nonetheless, they do not seem to have any significant bearing on the existence of a legal obligation to perform a comparison of the authentic texts from the outset of the interpretative process.

Moreover, if one moves from the basic consideration that treaties are legal instruments purported to regulate potential conflicts between persons or group of persons and critically analyses the international and domestic case law concerning the interpretation of treaties, showing that parties in litigation commonly base their arguments on all elements and items of evidence available, the conclusion may be

[959] See M. Tabory, Multilingualism In International Law and Institutions (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199. See also M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 77-78.

[960] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 199-200.

[961] See J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 301.

[962] However, the second statement made by Tabory, according to which the adjudicator "may find itself interpreting a text on the faulty assumption that it reflects the meaning of the treaty as a whole, when in fact it contradicts the intended meaning" is more open to critical comments: for instance, (i) one might wonder who is to decide which is the intended meaning, if not the very same adjudicator; (ii) meaning is not something hanging in the air and capable of being objectively perceived by everybody – if anything exists that may be objectively perceived by everybody; (iii) it is as well possible that the "intended meaning" is derived by a different adjudicator on the basis of the very same authentic text; (iv) if the adjudicator found that his interpretation led to a clear, unambiguous and reasonable meaning in light of all elements and items of evidence available (except the other authentic texts), it could be argued that it is extremely difficult to imagine that he might overturn his interpretation solely on the basis of the other authentic texts.

reasonably arrived at that if a potential difference in meaning exists between the various authentic texts, one of the parties will try to use it in order to support his construction of the treaty, notwithstanding that the other party is not aware of or interested in it.

Therefore, where in the course of litigation none of the parties refers to a potential difference in meaning among the authentic treaty texts, this generally means either that no such a potential difference exists, or that no party is interested in it, and therefore there is no any need for the subject matter under litigation to be regulated by a rule of law different from that which may be reasonably derived from the authentic text used in the proceedings.

In a similar vein, Kuner affirmed that Article 33 VCLT, by providing a legal foundation for treaty constructions based solely on one authentic text, legitimates a state of affairs in which parties may reach different interpretations based on divergent texts and not be aware of the differences.[963] According to that author, since differences in meaning between the various authentic texts are not only possible, but inevitable,[964] "an obvious defect of [article 33(3) VCLT] presumption is that it works as a rule of enforced ignorance which allows such differences to go undetected".[965]

That finding would not be challenged by the fact that the right to rely exclusively on one authentic text ceases to be effective as soon as a difference in meaning is contended, since, as a matter of fact, few such contentions are ever made in reality and, in their absence, there is little chance that a court or tribunal will consult any version but the one in the language or languages in which it normally conducts business.[966]

In light of the above reasoning, Kuner concluded that, with regard to multilingual treaties, it would be better for the interpreter to rely "not solely on a single language text, but instead compare several of them", since "comparison of texts is much more compatible with the nature of multilingual treaty texts as containing inevitable divergences than is the presumption of similar meaning".[967]

The propositions put forward by Kuner may be commented from a twofold perspective.

On the one hand, if such propositions are regarded as referring to *prima facie* differences in meaning among the authentic texts, they are meaningless since the only relevant interpretation for the parties is that resulting at the end of the interpretative process based on Articles 31 and 32 VCLT.

On the other hand, if they are regarded as referring to the potential divergences remaining between the clear, unambiguous and reasonable meanings established by

[963] See C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 962.
[964] The author made reference in this respect to paragraph 6 of the Commentary to Article 29 of the 1966 Draft (see YBILC 1966-II, p. 225, para. 6).
[965] See C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958.
[966] See C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958.
[967] See C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958-959.

construing the various authentic texts, taken in isolation, in accordance with the rules of interpretation enshrined in Articles 31 and 32 VCLT, Kuner's propositions are true. However, such cases are much less frequent than Kuner seems to believe. In fact, where one single authentic text is construed in isolation by taking into account the overall context, i.e. on the basis of all the available elements and items of evidence provided for in Articles 31 and 32 VCLT, the author submits that either (i) its meaning remains ambiguous or unclear, therefore calling for the comparison with the other authentic texts, or (ii) it is so solidly built on such a plurality of elements and items of evidence that, absent any indication by the parties of a potential divergence of meanings, it is highly probable that the same meaning would be attributed by the very same interpreter to all the (other) authentic texts.[968]

3.3.5.2. An illustrative example: the decisions of the United States Supreme Court in the cases Foster v. Neilson and United States v. Percheman

The above conclusion reached by the author is well illustrated by the case law of the US Supreme Court that Kuner cited in support of his arguments.

According to Kuner, in the case *Foster v. Neilson*[969] the US Supreme Court consulted only the English authentic text of the Adams–Onís treaty[970] and concluded that it was not a self-executing treaty; four years later,[971] the same Court "was forced to reverse itself when a discrepancy in the two language versions [i.e. the English and Spanish authentic texts] was brought to its attention".[972]

However, a close analysis of these two decisions shows that the English authentic text of the Adams–Onís treaty, where taken in isolation and properly construed in its overall context, could have been reasonably interpreted in two conflicting ways;[973] therefore the US Supreme Court should also have taken into account the Spanish authentic text in order to resolve such an ambiguity. Moreover, it seems to the author that the Spanish authentic text could have been construed in accordance with the decision delivered in the *Foster v. Neilson* case, had the overall context pointed in that direction.

---

[968] Once more, this conclusion finds its main support in the very limited number of cases where the parties have raised the issue of the potential divergence in meaning among the various authentic texts, or where different texts have been actually used by the competent courts and tribunals in order to settle the dispute.
[969] Supreme Court (United States), *Foster & Elam v. Neilson*, 27 U.S. 253 (1829).
[970] Treaty of Amity, Settlement, and Limits between the United States of America and Spain, concluded at Washington on 22 February 1819.
[971] See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832).
[972] See C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958.
[973] Even more, the interpretation upheld by the US Supreme Court in the case *United States v. Percheman* appears to the author the one to be preferred in light of the overall context of the construed provision, even when only the English authentic text is considered.

In both cases, the provision of the Adams–Onís treaty that the Court had to interpret is the following:

> "All the grants of land made before the 24th of January 1818, by His Catholic Majesty […] shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty"
>
> "Todas las concesiones de terrenos hechas por su Majestad católica […] antes del 24 de enero de 1818 […] quedarán ratificadas y reconocidas á las personas que estén en posesión de ellas, del mismo modo que lo serían si su Majestad hubiera continuado en el dominio de estos territorios"

The disputes concerned whether the grants of lands made by the King of Spain before 24 January 1818, within certain territories that had been later transferred by Spain to the United States, had to be recognized by the United States even in the absence of a domestic act providing the confirmation thereof, i.e. on the basis of the sole Adams–Onís treaty.[974]

In the *Foster v. Neilson* case, the US Supreme Court found that the above treaty provision, in the authentic English text, did not say that such grants were confirmed by the treaty.

On the contrary, it considered that the language of that provision seemed to be the language of contract and, accordingly, the provision was to be intended as a promise of ratification and confirmation of those grants by means of the act of the legislature.

The Court thus concluded that, until such act was passed, it was not at liberty to disregard the existing laws on the subject and to apply the treaty directly.[975]

Four years later, in the *United States v. Percheman* case, the Court took a completely different approach.

At the outset, it depicted the framework of the provision at stake. It empahsized that, in the practice of the whole civilized world, the cession of a territory by a State was never understood to be a cession of the property belonging to its inhabitants; therefore, since neither treaty party could have considered that it was attempting to wrong individuals, the cession of the territory from Spain to the United States was to be necessarily understood as a passing over of the sovereignty only and not as interfering with private property.[976]

The Court then moved to the analysis of the provision to be interpreted and found that it had been apparently introduced on the part of Spain and it had to be intended to provide expressly for the security to private property that the laws and usage of nations

[974] It must be noted that the Adams–Onís treaty was duly in force and given direct effect in the United States under its constitution (see Supreme Court (United States), *Foster & Elam v. Neilson*, 27 U.S. 253 (1829), p. 314).
[975] See Supreme Court (United States), *Foster & Elam v. Neilson*, 27 U.S. 253 (1829), pp. 314-315.
[976] See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832), p. 87.

would, without express stipulation, have conferred. On such a basis, it concluded that no construction impairing such security further than what the positive words of the provision require would have seemed to be admissible, since without that provision the titles of individuals would have remained as valid under the new government as they were under the old.

This interpretation was confirmed by the Spanish authentic text of the provision, which conformed exactly to the above illustrated universally received doctrine of the law of nations. According to the Court, considering that (i) the English and the Spanish texts could, without violence, be made to agree, (ii) the security of private property was the purpose of the provision as intended by the parties and (iii) such security would have been complete even without that treaty provision, the United States had no motive for insisting on the interposition of government in order to give validity to titles that, according to the usage of the civilized world, were already valid.[977]

Finally, the Court noted that the words "shall be ratified and confirmed", although being properly words of contract providing for some future legislative act, were not necessarily so. They might import that the grants were "ratified and confirmed" by force of the instrument itself. The Court then observed that, since in the Spanish authentic texts the corresponding words were used in that sense, such a construction was to be regarded as a proper one, if not unavoidable. Ultimately, it made reference to *Foster v. Neilson* and stated that in that case the Spanish text had not been brought to its attention and, had it been so brought, the Court believed that it would have produced the same construction as in the current case.[978]

3.3.6. Conclusions on research question d)

On the basis of the analysis carried out in the present section, the author submits the following.

First, under Article 33 VCLT, any authentic text may be construed by the interpreter in isolation, on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT.[979] The result of such a construction is the *provisional* utterance meaning of the treaty.

This implies that no utterance meaning exists before one text has been properly construed on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT; therefore, no unclearness, ambiguity, unreasonableness may be said to exist before that interpretative process has been brought to its end.

This further implicates that, even where a *prima facie* unclearness, ambiguity or

[977] See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832), pp. 88-89.
[978] See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832), p. 89.
[979] It must be noted that the interpreter, in case he gets to know through the analysis of the *travaux préparatoires* or otherwise which is the *drafted* text and that the other authentic texts are mere translations thereof, should have recourse to the analysis of and the comparison with that *drafted* text for the reasons discussed in section 3.2 of this chapter.

unreasonableness of the construed text arises, the interpreter continues to be entitled to base its interpretation on one single text, taken in isolation. Only where the ambiguity, unclearness or unreasonableness results at the end of the interpretative process, the interpreter is compelled to compare the various texts as an aid to solving such an interpretative issue.

Second, where none of the interested parties has put forward an alleged discrepancy in meanings between some of the authentic texts and the interpretation based on a single text, taken in isolation, has led to a clear unambiguous and reasonable meaning, the *provisional* utterance meaning may be considered the *real* common utterance meaning of the treaty.

Third, where one of the interested parties puts forward an alleged discrepancy in meanings between some of the authentic texts, the interpreter is obliged to compare the apparently divergent texts and interpret them in light of that comparison, by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT,[980] in order to determine their *real* common utterance meaning.[981]

Similarly to what is mentioned in section 3.2 of this chapter, it is possible that, where interpreted in isolation, different authentic texts are attributed by the same interpreter diverging *provisional* utterance meanings; however, since the treaty is a single instrument by means of which the parties intended to convey a single message (independently from the number of its authentic texts), the discrepancy among those *provisional* utterance meanings is just apparent and must be removed by the interpreter in order to establish the *real* common utterance meaning of the various authentic texts.

From a procedural standpoint, the above conclusions imply that each interested party may legally rely on a single authentic text until the application of the treaty gives rise to a dispute based on the apparent diverging meanings of some of the authentic treaty texts.[982]

It goes without saying that an *a contrario* reading of such a conclusion does not hold true; the interpreter remains free to analyse each authentic text and to compare such texts with each other whenever he considers it helpful to do so.

The above conclusions appear supported by principles (ii), (iv) and (v) established by the author in section 2 of Chapter 3 of Part I.

In particular, according to principle (ii), where the parties have agreed that more

[980] Where one unambiguous, clear and reasonable meaning (the utterance meaning) cannot be attributed to all the texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, the utterance meaning to be adopted under Article 33(4) VCLT is the one that best reconciles the texts, having regard to the object and purpose of the treaty. This solution provided for by Article 33(4) VCLT is analysed in section 3.5 of this chapter.

[981] See the reference to the application of Articles 31 and 32 VCLT in Article 33(4), first part, VCLT.

[982] See similarly W. Rudolf, *Die Spreche in der Diplomatie und internationalen Verträgen* (Frankfurt: Athenäum Verlag, 1972), p. 61.

than one treaty text is authentic, it is reasonable to infer that those parties intended to allow treaty interpretation to be based on any of such authentic texts, taken in isolation, together with the elements of the overall context other than the other authentic texts. Thus, in order to establish the utterance meaning of a treaty text, the interpreter is allowed to use the entire overall context, any segregation of the latter in elements that can be used and elements that cannot be used for that purpose being wholly artificial. The utterance meaning is the result of a single complex interpretative process and only at the end of such a process, taken as a whole, may an utterance meaning be said to exist. This principle should direct the interpreter to reject the solution, proposed by some scholars, of considering the textual comparison compulsory whenever the meaning of a certain authentic text is still unclear, ambiguous or unreasonable where interpreted under Article 31 VCLT, but before duly taking into account the supplementary means of interpretation of Article 32 VCLT. Except for cases of alleged differences of meaning among some of the authentic texts, textual comparison becomes compulsory only where the utterance meaning, i.e. the meaning of the interpreted text as established on the basis of the entire overall context, is unclear, ambiguous or unreasonable.

According to principle (iv) any alleged discrepancy in meaning among the authentic texts of a treaty is merely apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the number of authentic texts. As a consequence, under principle (v), the interpreter must remove such alleged discrepancies by establishing the single utterance meaning of all authentic texts. These principles confirm the generally accepted conclusion that the interpreter must take into account all the *relevant* authentic texts whenever a *prima facie* divergence of meaning among them is put forward and must remove such a divergence by establishing the single utterance meaning of it.

3.4. Solution to the apparent divergences and discrepancies by means of Articles 31 and 32 VCLT

3.4.1. Research question addressed in this section

The present section is aimed at tackling the following two research questions, here briefly illustrated by means of an example.

e) How should the interpreter solve the prima facie discrepancies among the various authentic texts emerging from the comparison?

Consider a case where the application of Article 8(1) of the ECHR is at stake. The latter, in its English and French authentic texts, reads as follows (*italics* by the author):

Everyone has the right to respect for his private and family life, his *home* and his correspondence. […]

Toute personne a droit au respect de sa vie privée et familiale, de son *domicile* et de sa correspondance. […]

The English term "home" generally denotes solely the private dwelling of an individual, while the corresponding French term "domicile" has broader intension and may be regarded as denoting also business and professional premises.

In order to reconcile such a *prima facie* discrepancy, which elements should the interpreter take into account and which arguments should he use? Should his analysis be limited to a textual comparison? Should he give preference to one meaning over the other exclusively on the basis of the former appearing more in line with the treaty's object and purpose?[983]

3.4.2. Introduction

The analysis of national and international case law shows that, in the vast majority of cases, where *prima facie* divergences of meanings between the various authentic texts are put forward by one of the parties, such divergences are removed by the comparison and the interpretation of those texts in accordance with Articles 31 and 32 VCLT.

It seems that the above conclusion is not seriously disputed among scholars. Germer, for example, concluded that many of the problems faced by an interpreter of a plurilingual treaty can be solved by applying the rules of interpretation provided for in Articles 31 and 32 VCLT;[984] similar propositions have been expressed by Linderfalk,[985] Hilf,[986] Mössner[987] and Engelen.[988]

Thus, in most cases, the interpreter does not solve the apparent divergence of meanings by simply selecting the construction most consonant with the object and purpose of the treaty,[989] but determines in accordance with Articles 31 and 32 VCLT the clear, unambiguous and reasonable meaning that may be fairly attributed to all the authentic texts being compared.[990]

---

[983] The example is derived from ECtHR, 16 December 1992, *Niemietz v. Germany (Application no. 13710/88)*.
[984] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 423.
[985] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 358.
[986] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), p. 102, footnote 436.
[987] See J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 310.
[988] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 395.
[989] As he would be compelled to do, under Article 33(4) VCLT, where the application of the rules of interpretation enshrined in Articles 31 and 32 VCLT failed to remove the apparent divergence of meanings between the authentic texts.
[990] See similarly M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 200.

In this respect, according to the ILC, "[t]he unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another. […] the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation."[991]

3.4.3. Judicial instances of the application of Articles 31 and 32 VCLT in order to remove the prima facie discrepancies in meaning among the authentic texts

That said, the author considers that the best way to illustrate how an interpretation based on the overall context may lead the interpreter to remove the alleged divergences of meaning among the authentic treaty texts is to make reference to the arguments actually employed by international courts and tribunals to support their chosen construction of the relevant treaty provisions.

To this end, the author has selected the most comprehensive decisions that tackle the issue of the *prima facie* discrepancies in meaning among authentic treaty texts and has highlighted the relevant arguments employed by those courts and tribunals, in the context of the pertinent decisions, in the following subsections.[992]

---

[991] See paragraph 7 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7).

[992] Other cases, not discussed in the remainder of this section, in which the competent courts and tribunals had solved the potential divergences of meanings among the various authentic texts by applying the principles of interpretation substantially enshrined in Articles 31 and 32 VCLT (although most of them had been decided before the conclusion of the VCLT) are the following: Arbitral Tribunal, *Venezuelan Bond cases*, 4 *International arbitrations to which the United States has been a party* (1898), 3616 *et seq*., at 3623 *et seq*.; Arbitrator, 20 February 1953, *Gold Looted by Germany from Rome*, 20 International Law Reports (1953), 441 *et seq*., at 473 *et seq*.; Arbitration Tribunal, 5 August 1926, *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, 2 *Reports of International Arbitral Awards*, 777 *et seq*., at 791-795; French-Italian Conciliation Commission, 29 August 1949, *Différend Impôts extraordinaires sur le patrimoine institués en Italie - décision No. 32*, 13 *Reports of International Arbitral Awards*, 108 *et seq*., at 111 *et seq*.; Corte Suprema di Cassazione (Italy), 9 December 1974, *Ministry of Defence v. Neapolitan Tagboat Company,* 77 *International Law Reports,* 567 *et seq.*, at 569-570.

For an example of how treaty interpretation in accordance with Articles 31 and 32 VCLT might remove a *prima facie* discrepancy existing between the meanings of the various authentic texts that is caused by the different punctuation therein, see WTO Appellate Body, 7 April 2005, *United States – Measures affecting the cross-border supply of gambling and betting services*, AB-2005-1 (WT/DS285/AB/R), in particular paragraphs 242 *et seq.*

3.4.3.1. The ICJ decision in the LaGrand case

The *LaGrand* case,[993] although generally presented as a case where the ICJ looked for a meaning reconciling the text having regard to the object and purpose of the treaty, is in fact a case where the Court removed the *prima facie* divergence of meanings between the various authentic texts by applying Articles 31 and 32 VCLT.[994]

As previously submitted,[995] that case concerned the interpretation of Article 41 of the ICJ Statute and, in particular, whether the provisional measures indicated by the ICJ pursuant to that article were to be considered to be binding orders.[996] In this respect, the United States had put forward a *prima facie* divergence of meanings between the English and the French authentic texts of Article 41.

The Court, finding itself faced with two texts potentially not in total harmony, stated that in cases of divergence between the equally authentic texts of its Statute, in relation to which neither the Statute nor the UN Charter indicated how to proceed, it was appropriate to refer to the rule of customary international law reflected in Article 33(4) VCLT, according to which "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".[997]

Thus, the ICJ substantially quoted the entire text of Article 33(4) VCLT, including the reference to Articles 31 and 32 VCLT, and did not merely recall the last sentence thereof, which requires the interpreter to remove any residual difference by adopting the meaning that best reconciles the authentic texts having regard to the object and purpose of the treaty. Indeed, the Court first affirmed the need to consider the object and purpose of its Statute together with the context of Article 41 for the purpose of removing the *prima facie* divergence of meaning[998] and then actually removed it by means of an interpretation of the English and French authentic texts based on (i) the fact that the French text was the drafted text,[999] (ii) the object and purpose of its Statute taken as a whole, as well as the context and the purpose of Article 41,[1000] (iii) the relevant rules of international law applicable in the relations between the parties to its Statute[1001] and

[993] See ICJ, 27 June 2001, LaGrand (Germany v. United States of America), judgment.
[994] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 101-109.
[995] See section 3.2.3.4 of this chapter, where a more extensive analysis of the case and the reasoning of the Court is made.
[996] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 98-99.
[997] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 101.
[998] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 101.
[999] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 100.
[1000] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 102.
[1001] The Court, in particular, made reference to the "principle universally accepted by international tribunals and likewise laid down in many conventions […] to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (see ICJ, 27

(iv) the *travaux préparatoires* of its Statute.[1002]

All in all, the ICJ removed the potential divergence of meaning between the various authentic texts by construing them on the basis of the interpretative rules enshrined in Articles 31 and 32 VCLT.

3.4.3.2. The ICJ decision in the case Military and paramilitary activities in and against Nicaragua: the majority opinion

In the *Military and paramilitary activities in and against Nicaragua* case,[1003] which concerned a dispute between Nicaragua and the United States of America arising out of military and paramilitary activities in Nicaragua, the responsibility for which was attributed by the former to the latter State, the ICJ had to decide on its jurisdiction to consider and pronounce upon this dispute, as well as on the admissibility of Nicaragua's application referring it to the Court.

In order to establish the jurisdiction of the Court, Nicaragua relied, in particular, on Article 36(2) of the Statute of the ICJ, which provides that the States parties thereto may at any time declare that they recognize the jurisdiction of the ICJ as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation. While the United States made such a declaration on 14 August 1946, Nicaragua never made one. However, Nicaragua relied on the provision of Article 36(5) of the Statute of the ICJ, according to which "[d]eclarations made under Article 36 of the Statute of the Permanent Court of International Justice and *which are still in force* shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."[1004]

Under Article 36 of the Statute of the PCIJ, the "Members of the League of Nations […] may, either when signing or ratifying the Protocol [of Signature] to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court". It is relevant to note that a State member of the League of Nations became a party to the Statute of the PCIJ only where it acceded to the Protocol of Signature of the Statute of that Court. The Protocol, in this respect, provided that, in order to accede thereto, it was necessary for a State not only to sign and ratify the Protocol, but also to send the instrument of ratification to the Secretary-General of the League of Nations.

June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 103, where the Court also referred to the decision of the PCIJ in the case *Electricity Company of Sofia and Bulgaria* (see PCIJ, 5 December 1939, *Electricity Company of Sofia and Bulgaria*, order, p. 199)).

[1002] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 104-107.

[1003] ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment.

[1004] *Emphasis* added.

On 24 September 1929, as a member of the League of Nations, Nicaragua signed the Protocol of Signature of the Statute of the PCIJ and deposited with the Secretary-General of the League of Nations a declaration recognizing as unconditionally compulsory the jurisdiction of the PCIJ.

In 1935, the national authorities of Nicaragua authorized the ratification of the Protocol of Signature and the Statute of the PCIJ; on 29 November 1939, the Ministry of Foreign Affairs of Nicaragua sent a telegram to the Secretary-General of the League of Nations advising it of the dispatch of the instrument of ratification. The files of the League, however, contained no record of an instrument of ratification ever having been received and no evidence had been adduced to show that such an instrument of ratification was ever dispatched to Geneva.

After the Second World War, Nicaragua became an original Member of the United Nations, having ratified the Charter on 6 September 1945; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force (also for Nicaragua).

On the basis of the above, the United States contended that Nicaragua never became a party to the Statute of the PCIJ and, thus, its 1929 declaration was not "still in force" within the meaning of the English text of Article 36(5) of the Statute of the ICJ, since it never entered into force.

The ICJ pointed out that,[1005] in order to determine whether the provisions of Article 36(5) of its Statute could have applied to Nicaragua's declaration of 1929, it had first (i) to establish the legal characteristics of that declaration and then (ii) to compare them with the conditions laid down by the text of the above-mentioned article.[1006]

With regard to point (i), the ICJ noted that, at the time its Statute entered into force, Nicaragua's 1929 declaration was certainly *valid*, since under Article 36 of the PCIJ Statute a declaration was valid on condition that it had been made by a State either when signing or ratifying the Protocol of Signature (or at a later moment) and Nicaragua actually signed that Protocol. However, the Court also recognized that declaration, although *valid*, had not become *binding* under the Statute of the PCIJ, since Nicaragua had not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations.[1007]

From such a premise the Court inferred that Nicaragua's 1929 declaration could unquestionably have acquired binding force at least till the ICJ came into existence; in fact, since that declaration had been made "unconditionally", its potential legal effect, i.e. its validity, could be maintained indefinitely.

[1005] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 24.
[1006] I.e. the legal characteristics that a declaration must have to be relevant for the application of Article 36(5) of the ICJ Statute.
[1007] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, udgment, para. 25.

With regard to point (ii), the parties raised the issue before the Court that the English and French authentic texts of Article 36(5) of its Statute could potentially be attributed diverging meanings.[1008] The relevant French text read as follows: "[l]es déclarations *faites* en application de l'Article 36 du Statut de la Cour permanente de Justice internationale *pour une durée qui n'est pas encore expirée* seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes."[1009]

The Court was thus confronted with the task of determining the (common) meaning to be attributed to the corresponding expressions "*which are still in force"* and "*faites* […] *pour une durée qui n'est pas encore expirée*", in order to conclude whether a declaration such as that made by Nicaragua in 1929, which was valid, although not legally binding, under the PCIJ system, satisfied the conditions established by Article 36(5) of the ICJ Statute for it to be regarded as an acceptance of the compulsory jurisdiction of the ICJ.

The Court found that the above two expressions had the same meaning and they did not require a declaration made under the system of the PCIJ to be binding, in order to be regarded as an acceptance of the compulsory jurisdiction of the ICJ under Article 36(5) of its Statute, the existence of a valid declaration sufficing for that purpose. The Court reached such a conclusion by construing the two texts on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT, although without making explicit references to them. In fact, it determined the meaning of the above-mentioned expressions taking into account (i) their context, (ii) the *travaux préparatoires* and the circumstances of the conclusion of the ICJ Statute, (iii) the object and purpose of the ICJ Statute and, in particular, that of Article 36(5) thereof and (iv) the subsequent practice of the parties to that Statute.

With regard to the context of the interpreted expressions, the Court noted that Article 36(5) refrains from stipulating that declarations had to be made by States parties to the PCIJ Statute, which would have indirectly required the declaration to be binding; on the contrary, it only stipulates that the declaration had to be made "under" (in French, "en application de") Article 36 of the PCIJ Statute. In this respect, the Court considered that, since the drafters of Article 36(5) of the ICJ Statute were aware that under Article 36 of the PCIJ Statute a State could have made a declaration even without being a part of the Statute (i.e. before ratifying its Protocol of Signature), it was natural to conclude that the chosen expressions "[d]eclarations made under article 36" and "déclarations *faites* en application de l'Article 36" covered a declaration such as that made by Nicaragua.[1010]

With regard to the *travaux préparatoires* and the circumstances of the conclusion of the ICJ Statute, the Court, after highlighting that neither the English nor the French authentic texts include the term "binding", as qualifier of the term "declaration", noted

[1008] The ICJ Statute has five equally binding authentic texts, i.e. in the English, French, Spanish, Russian and Chinese languages.
[1009] *Emphasis* added.
[1010] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 28.

that pursuant to the *travaux préparatoires* the word "binding" had never been suggested and, had it been suggested for the English text, there was no doubt that the drafters would have never let the French text stand as finally worded. In fact, according to the Court, the French expression "*une durée qui n'est pas encore expirée*" did not imply a commitment of a binding character: while it might be granted that, for a period to continue or expire, it is necessary for some legal effect to have come into existence, such effect does not necessarily have to be of a binding nature. In particular, a declaration made under Article 36 of PCIJ Statute had a certain validity that could be preserved or destroyed and it was perfectly possible to read the French text as implying only this validity.[1011]

In addition, the ICJ pointed out that the French Delegation at the San Francisco Conference called for the English expression "still in force" to be translated, not by the French expression "encore en vigueur", but by the different "pour une durée qui n'est pas encore expirée". The Court concluded, in view of the excellent equivalence of the expressions "encore en vigueur" and "still in force", that the deliberate choice of the expression "pour une durée qui n'est pas encore expirée" seemed to denote the intention to widen the scope of Article 36(5) of the ICJ Statute so as to cover declarations which have not acquired binding force. Ultimately, the Court submitted that such a construction of the French text was in conformity with the English text as well, the latter requiring the declarations concerned neither to have been made by States parties to the PCIJ Statute nor (expressly) to be of a binding character.[1012]

With regard to the object and purpose of the interpreted provision, the Court affirmed that, in its interpretative process, it had to examine to what extent the general considerations governing the transfer of the powers of the PCIJ to the ICJ, and thus serving to define the object and the purpose of the provisions adopted in the latter's Statute, threw light upon the correct construction of Article 36(5) thereof. The ICJ recalled[1013] that the primary concern of those who drafted its Statute was to maintain the greatest possible continuity between the two courts and, with specific reference to Article 36(5), to preserve existing acceptances and to avoid that the creation of a new court should frustrate progress already achieved.[1014]

[1011] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 30.

[1012] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 31.

[1013] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 32.

[1014] In this respect, it is interesting to note that the conclusions reached by the Court on the object and purpose of its Statute and, in particular, Article 36(5) thereof were largely based on its *travaux préparatoires* and the circumstances of its conclusion. To this extent, see also ICJ, 26 May 1959, *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, judgment, p. 145. In addition, see the reference made by the ICJ to the report of the Chairman of the New Zealand delegation to the San Francisco Conference to his Government, where he stressed that the primary concern had been "to maintain so far as possible the progress towards compulsory jurisdiction"; the statement of the ICJ that "[i]f, for a number of circumstantial reasons, it seemed necessary to abolish the former Court and to put the new one in its place, at least the delegates to the San Francisco Conference were determined to see that this operation should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction" (see ICJ, 26 November 1984,

In this respect, the Court found it undeniable that a declaration such as the Nicaragua's 1929 declaration constituted a certain progress towards extending to the world in general the system of compulsory judicial settlement of international disputes, notwithstanding the fact that it had not taken the concrete form of a commitment having binding force under the PCIJ system. It thus concluded that there were no grounds for maintaining that the drafters of the ICJ Statute meant to go back on this progress and place it in a category in opposition to the progress achieved by declarations having binding force. In fact, although no doubt existed that their main aim was to safeguard the latter declarations, the intention to wipe out the progress evidenced by a declaration such as that of Nicaragua would have certainly not squared well with their general concern. The ICJ added that, in light of the above, it was fair to presume that, if the highly experienced drafters of the Statute had had a restrictive intention on this point, in contrast to their overall concern, they would certainly have translated it into a very different formula from the one they in fact adopted.[1015]

Therefore, according to Court, the logic of a system substituting the ICJ for the PCIJ without producing any detriment to the cause of compulsory jurisdiction implied that the ratification of the ICJ Statute must have exactly the same effects as the ratification of the Protocol of Signature of the PCIJ: in the case of Nicaragua, this had converted a potential commitment into an effective one.[1016]

Finally, with regard to the subsequent practice of the parties to ICJ Statute, the Court stated that particular weight had to be ascribed to certain official publications, namely the ICJ Yearbook, the Reports of the ICJ to the UN General Assembly and the annually published collection of Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary. The Court noted that, ever since they first appeared, all these publications had regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the ICJ by virtue of Article 36(5) of its Statute.[1017]

The Court affirmed that such publications attested to a certain interpretation of Article 36(5), whereby that provision would cover the declaration of Nicaragua, and the rejection of an opposite interpretation, which would refuse to classify Nicaragua among the States covered by that article. Moreover, the inclusion of Nicaragua in the list of States that have recognized the compulsory jurisdiction of the ICJ visibly contrasted with its exclusion from the corresponding list issued in the last Report of the PCIJ.[1018]

The Court further submitted that the importance of those publications did not lie

---

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), judgment, para. 33).

[1015] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 34.

[1016] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 35.

[1017] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 36.

[1018] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 37.

in their content as such, but in the fact that they amounted over a period of nearly 40 years to a series of identical attestations, which were entirely official, public and extremely numerous; and, even more significantly, in the corollary that the States concerned - first and foremost Nicaragua - had had every opportunity of accepting or rejecting the thus-proclaimed applicability of Article 36(5) of the ICJ Statute to the Nicaragua's 1929 Declaration.[1019]

However, as the Court actually noted, Nicaragua had at no moment either explicitly recognized, or denied that it was bound by its recognition of the ICJ's compulsory jurisdiction. According to the Court, against the background of the above-mentioned publications, the silence of the Nicaraguan Government could only be interpreted as an acceptance of the classification thus assigned to it; in the wording of the ICJ, it could not be supposed that "that Government could have believed that its silence could be tantamount to anything other than acquiescence".[1020]

The Court additionally mentioned that States other than Nicaragua had never challenged the interpretation to which the publications of the United Nations bore witness and, on the contrary, had included Nicaragua in their own lists of States bound by the compulsory jurisdiction of the ICJ. Although the Court recognized that such national publications simply reproduced those of the United Nations, it also found that it would have been difficult to interpret such reproductions as signifying an objection to the above interpretation; vice-versa they contributed to confirming the acceptance by such States of the applicability to Nicaragua of Article 36(5) of the ICJ Statute.[1021]

On the basis of the above-mentioned analysis, the Court concluded that the subsequent conduct of the parties to the ICJ Statute confirmed the interpretation whereby Article 36(5) of that Statute covered a declaration such as the one made by Nicaragua in 1929.[1022]

3.4.3.3. The ICJ decision in the Military and paramilitary activities in and against Nicaragua case: the separate opinion of Sir Robert Jennings

From the author's perspective, it is extremely interesting to note how Sir Robert Jennings,[1023] in his separate opinion in the *Military and paramilitary activities in and against Nicaragua* case, arrived at conclusion opposite to the one taken by the majority of the judges with regard to the meaning attributable to Article 36(5) of the ICJ Statute. Sir Robert Jennings argued for his interpretation of Article 36(5) of the ICJ Statute on

[1019] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 38.
[1020] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 39.
[1021] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 40.
[1022] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 42; see also para. 47 of the same judgment.
[1023] ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, pp. 533-557.

the basis of:

(a) a different allocation, as compared to the majority, of persuasive weight among the common items of evidence and

(b) a different construction, as compared to the majority, of certain available elements in order to derive the relevant evidence.

This constitutes another instance confirming that:

(i) the process of interpretation, under the VCLT system, is much less "textual" than scholars generally pretend it to be and

(ii) legal practitioners arrive at their own interpretation on the basis of an intuitive process that is influenced by their cultural and political backgrounds and then justify such an interpretation on the basis of the ascending and descending arguments that may be reasonably construed as supporting the chosen interpretation.

At first, Sir Robert Jennings noted that that the Nicaragua's 1929 Declaration could not be covered by Article 36(5) of the ICJ Statute since the latter required, according to its English text, that declarations had to be "still in force", while the Nicaragua's 1929 Declaration had never been "in force" in respect of the PCIJ.[1024] Hence, although not explicitly recalling the distinction drew by the majority between valid and compulsory declarations, he seemed to consider that for a self-binding declaration[1025] to "be in force", it is necessary that it legally binds the declaring State to the conduct provided therein, its mere validity[1026] not sufficing for that purpose.

Secondly, Sir Robert Jennings found such an interpretation to be in conformity with what the *travaux préparatoires* showed to have been the purpose of that provision. In this respect, he recalled that Article 36(5) of the ICJ Statute was the result of a British proposal made in, and accepted by, a subcommittee of the Committee of Jurists which met in Washington in 1945; he also noted that it was the subcommittee's opinion that, since many States had previously accepted compulsory jurisdiction under the PCIJ Statute, provision should have been made at the San Francisco Conference "for a special agreement for continuing these acceptances in force" for the purpose of the ICJ Statute. According to Sir Robert Jennings, thus, the proposal was to achieve the continuity of existing obligations and certainly not to create a new obligation where none existed before.[1027]

Thirdly, he mentioned that, from a linguistic standpoint the other authentic texts of Article 36(5) of the ICJ Statute (i.e. the Chinese, Russian and Spanish texts) apparently translated the formulation of the criterion of continuity expressed by the English term

[1024] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 536.
[1025] Such as the one provided for under Article 36 of the PCIJ Statute.
[1026] I.e. its capability to acquire binding force at the occurrence of a certain event.
[1027] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 536.

"which are still in force".

He also noted that the final French version of that article was proposed by the French delegation at the San Francisco Conference, who conversely did not suggest any change to the corresponding English text. The proposal, in fact, was limited to replacing the expression "pour une durée qui n'est pas encore expiree" for the former "encore en vigueur", which corresponded to the English "still in force". In this respect, Sir Robert Jennings mentioned that, according to the official report of the meeting, the "French Representative stated that the changes suggested by him […] were not substantive ones, but were intended to improve the phraseology."[1028]

He then recalled that, under the provision of Article 33(4) VCLT, where two authentic texts were capable of different meanings, the interpreter was required to adopt the meaning best reconciling the texts, having regard to the object and purpose of the treaty. In his opinion, that requirement banned any solution seeking to give a special meaning to the French text, which could not be seen in the Chinese, English, Russian and Spanish either.[1029]

Based on these premises, he went on in quest of a common meaning to be attributed to all authentic texts. He noted that, in Article 36(5) of the ICJ Statute, the word "still" seemed to convey the idea of something which was in force for the PCIJ and was therefore to be deemed "still in force" for the ICJ; in that sense, there was an important difference between being simply "in force" and being "still in force". Against this background and taking into account that the French Delegation, on the one hand, did not propose any change to the English text and, on the other hand, affirmed that the proposal to modify the French text was intended solely to improve the phraseology, Sir Robert Jennings concluded that the only reasonable explanation to such a proposed change was that the French Delegation considered the alternative French text capable of conveying more clearly the meaning and purpose of the English expression "still in force". Therefore, the final French text seized upon the notion of continuity as the essential criterion of the declarations: what did matter was not only that a declaration was "in force" in its terms, but that it had been in force for the PCIJ and had been expressed for a period that continued and was still not expired. That interpretation of the French text was confirmed by the fact that it retained the important qualifying adverb "encore".[1030]

Ultimately, Sir Robert Jennings expressed the view that (i) it was doubtful that there was any material difference between the meanings of the various authentic texts and, in any case, (ii) if such a difference existed, he was bound to adopt the meaning that best reconciled all the five language versions.

He submitted that a declaration of acceptance of compulsory jurisdiction, which had never come into operation under the PCIJ Statute, certainly could not be said to be

[1028] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 537.
[1029] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 537.
[1030] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 538.

"still in force" under the ICJ Statute, that being the requirement clearly established by four authentic texts of the very same Statute (in the English, Chinese, Spanish and Russian languages); that interpretation was consistent with the object and purpose of Article 36(5) of the ICJ Statute, i.e. the carry-over to the ICJ of obligations created in respect of the PCIJ.

Moreover, he found there was no difficulty in attributing the same meaning to the French authentic text, which, by means of the expression "pour une durée qui n'est pas encore expirée", certainly referred to a declaration by which the compulsory jurisdiction of the PCIJ was actually established; in fact, a declaration to which no date of commencement of the obligation in respect of the PCIJ could be assigned, owing to the failure to ratify the Protocol of Signature, could not be said to be "pour une durée qui n'est pas encore expirée", for what had never begun could not be said to have had a duration at all.[1031]

3.4.3.4. The ICJ decision in the Elettronica Sicula case

In the *Elettronica Sicula* case,[1032] the ICJ had to interpret the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States of America[1033] and the 1951 Supplementary agreement thereto,[1034] for the purpose of deciding on their alleged violation by Italy. Among other issues, the Court was called upon to decide whether the fact that two US corporations wholly owned the capital of an Italian corporation, which in turn owned immovable property in Italy, could be regarded as entailing that those two US corporations owned "immovable property or interests therein" in Italy, as provided for in Article VII(1) of the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States of America.

Italy relied on the Italian text of the treaty, which was one of the two authentic texts thereof together with the English text, for the purpose of denying such an entailment. The Italian text of Article VII(1) made reference to the owning "di beni immobili o di altri diritti reali". According to Italy, the provision at stake did not apply to the two US corporations since their own property rights ("diritti reali") were limited to shares in the Italian corporation, while the immovable property ("bene immobile") was exclusively owned by the latter.

The United States, however, contended that the English expression "immovable property or interests therein" was sufficiently broad to include indirect ownership of property rights held through an Italian subsidiary.

In this regard, both parties had dealt with the potential divergence in meaning between the Italian and English expressions to support their respective positions.

[1031] See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, pp. 538-539.
[1032] ICJ, 20 July 1989, Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy), judgment.
[1033] Treaty concluded in Rome on 2 February 1948.
[1034] Agreement concluded in Washington on 26 September 1951.

Ultimately, the Court found that, although no doubt having several possible meanings, the term "interest" in English usage was commonly used to denote different kinds of rights in land. Hence, it concluded that it was possible to interpret the English and Italian authentic texts of Article VII as meaning much the same thing, i.e. as converging toward the more restrictive "Italian" meaning, especially as the clause in question was in any event limited to immovable property. That said, however, the Court stated that it had some sympathy with the contention of the United States, as being more in accord with the object and purpose of the treaty.[1035]

Although the ICJ did not have to solve the above interpretative issue in order to decide the case,[1036] its reasoning shows how far a court might be led by the object and purpose of the treaty in its attempt to determine the common meaning of two or more authentic texts.

3.4.3.5. The decision of the Italian-United States Conciliation Commission in the Flegenheimer case

In the *Flegenheimer* case,[1037] the Italian-United States Conciliation Commission[1038] had to interpret Article 78(9)(a)(2) of the 1947 Peace Treaty between Italy the Allied and Associated Powers (hereafter "1947 Peace Treaty")[1039] in order to decide whether Mr Flegenheimer could be considered a "United Nations national" for the purpose of the same Article 78 and, as such, enjoy the legal protection provided for therein.

The case originated from the request made by the Government of the United States of cancellation of the sale of shares in an Italian company concluded by Mr Flegenheimer in 1941 at a price significantly lower than the market price. The United States petition was argued on the basis that Mr Flegenheimer, of the Jewish faith, fearing that the anti-Semitic legislation enacted in Italy in 1938 might be applied to him, concluded such an unfavorable sale contract under conditions of force or duress, so that the contract was void *ab initio* and Mr Flegenheimer had the right to be restored under Article 78(3) of the above-mentioned 1947 Peace Treaty,[1040] which in the English authentic text reads as

[1035] See ICJ, 20 July 1989, Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy), judgment, para. 132.
[1036] See ICJ, 20 July 1989, Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy), judgment, paras. 133-136.
[1037] Italian-United States Conciliation Commission, 20 September 1958, Flegenheimer case – decision No. 182, 14 Reports of International Arbitral Awards, 327 *et seq*.
[1038] Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace between the Allied and Associated Powers and Italy, concluded in Paris on 10 February 1947.
[1039] Treaty of Peace between the Allied and Associated Powers and Italy, concluded in Paris on 10 February 1947.
[1040] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 1.

follows:

> The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

The right to restoration, however, was subject to the condition that Mr Flegenheimer might be considered a "United Nations national". This, in turn, raised the issue of the interpretation of Article 78(9)(a)(2) of the 1947 Peace Treaty, which in the English authentic text reads as follows:

> "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

The Government of the United States contended that Article 78(9)(a)(2) had the effect of including in the expression "United Nations nationals" all individuals, who were not necessarily "treated" as enemies, but "considered" to be such under the legislation in force in Italy during the war.

It based its interpretation on the Russian authentic text[1041] of that article, where the term "rassmatrivat" was used. According to the United States Government, "rassmatrivat" was an unambiguous term and could only be given the same meaning of the English term "considered", while the term "treated" could be translated in Russian by the different terms "obchoditsia" and "podvergnut dejstwiyu", which, however, had not been adopted in the treaty text.

Since under Article 90 of the 1947 Peace Treaty the English, French and Russian texts were equally authentic, the Russian text had to be taken into account in order to interpret Article 78(9)(a)(2); in this respect, the United States Government referred to decision No. 32 of the French – Italian Conciliation Commission, according to which "[q]uelle que soit la genèse des deux textes il n'est pas licite de s'en tenir exclusivement à l'un des deux; l'interprète doit plutôt s'efforcer d'éclairer l'un en se servant de l'autre".[1042]

That Government, moreover, argued that in the specific case preference was to be given to the authentic Russian text since the term "rassmatrivat" exactly corresponded to the term "considerate", which was used in the Italian translation of the 1947 Peace Treaty. Although such a translation did not have the value of an authenticated text, the United States Government contended that it could be opposed to the Italian Government in the case at stake, since it expressed in a clear and unequivocal manner the meaning attached by Italy to Article 78(9)(a)(2). Therefore, since the contracting parties, Italy in particular, had originally attributed to the terms "treated", "traités" and "rassmatrivat"[1043]

[1041] The 1947 Peace Treaty was concluded in three authentic languages, those being English, French and Russian; in addition, a translation in the Italian language had been prepared as well in the course of the negotiations (see Article 90 of the 1947 Peace Treaty).
[1042] French-Italian Conciliation Commission, 29 August 1949, Différend Impôts extraordinaires sur le patrimoine institués en Italie - décision No. 32, 13 Reports of International Arbitral Awards, 108 *et seq*., at 112.
[1043] I.e. the corresponding terms used in the English, French and Russian authentic texts of Article 78(9)(a)(2).

the meaning corresponding to the English term "considered" and the Italian term "considerate", Italy was no longer allowed, by virtue of the doctrine of estoppel, to give such terms another meaning in order to modify the extent of its obligations.[1044]

The Italian Government, on the other hand, denied the correctness of the United States's arguments, contending that the mere possibility of being "considered" as enemy was not sufficient to entitle a person to the restitution and restoration imposed by the 1947 Peace Treaty on Italy and that, for such a purpose, it was necessary that he had been actually "treated" as enemy.[1045]

The Italian-United States Conciliation Commission rejected the arguments put forward by the United States.

It recognized, at the outset, that the interpreter should make all possible efforts in order to reconcile the three authentic texts, while he was not entitled to use the Italian translation for the purpose of corroborating the interpretation of some of them because of its unauthentic status. In this respect, it stated that "the interpretation of the text of a treaty [could] be made only by using the versions that have been declared to be authenticated originals by the Treaty itself".[1046]

With regard to the terms "treated" and "traités", used in the English and French authentic texts, respectively, the Commission found, on the basis of dictionaries analysis, that their usual and natural meaning was conveyed by the expression "to act towards a person in such and such a manner"; it also found that, since it was universally admitted in international law that the natural meaning of the terms used had to be taken as the starting point of the process of treaty interpretation, such a meaning had to be given a significant weight for the purpose of construing Article 78(9)(a)(2) of the 1947 Peace Treaty, especially where compared to other, unusual meanings that those two terms might have in the respective languages.[1047]

It then pointed out that the Russian authentic text could not be exactly reconciled with the English and French texts, as interpreted in their natural and usual manner. In such a situation, the Commission believed that, according to the teachings of international law, "that adjustment should be made on the basis of a "common denominator which answer[ed] the meaning of all the [authentic] texts".[1048] It is interesting to note, however, that the Commission, right after such a statement, went on to say that it was "universally admitted that treaties [could] confer rights and impose obligations on the contracting States only within the limits within which the intent of

[1044] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 65.
[1045] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 65.
[1046] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).
[1047] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).
[1048] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter b).

these States became manifest in a concordant manner." The Commission then concluded that it was clear that the meaning of the term "rassmatrivat" in the Russian text, where interpreted as a synonym of the English "considered", included the natural and usual meaning of the English and French terms "treated" and "traités", for a person treated as enemy by the Italian Government have had forcibly been first considered to be enemy by the very same Government, whereas the reverse proposition did not hold true. Thus, it might be reasonably argued that the plea of the Commission for a "common denominator" interpretation was in fact a defense of the interpretation imposing treaty obligations on the contracting States (in this case Italy) only in so far it was manifest that all parties agreed thereupon, i.e. that no obligation could be imposed on a contracting State that had never agreed to it, that being in accordance with the basic principles of equality and sovereignty of States. Similarly, one might have good arguments to conclude that the Commission would have not similarly upheld a "common denominator" interpretation, where it had resulted in adopting the meaning imposing the more burdensome obligations on the contracting States.[1049]

Another argument that could be used to dull the emphasis on the supposed "common denominator" nature of the interpretation endorsed by the Commission is represented by the fact that the latter justified its interpretation of Article 78(9)(a)(2) on the basis of a contextual analysis, as well as in light of the object and purpose of the treaty.

At first, the Commission explicitly stated that the "true and proper meaning of all international treaties should always be found in the purpose aimed at by the Parties".[1050] In this respect, it noted that the Russian authentic text of Article 78(9)(a)(2), as interpreted by the United States Government, did not seem to answer the intent of the contracting Parties, at the time they drew up the Part VII of the 1947 Peace Treaty, which contained Article 78. In particular, the Commission found that the US interpretation appeared in conflict with the aim of paragraphs 1 through 4 of that very same article, which were purported to assure restoration to persons injured by exceptional war measures introduced in the Italian legislation. According to the Commission, a restoration of property, rights and interests was not conceivable unless these were previously injured in such a manner as to engage the responsibility of the Italian State. This conclusion was forcefully supported by the above-quoted text of Article 78(3). However, a person could be considered an enemy without any injury resulting thereby either to himself or to his property, rights or interests; for such an injury to materialize, a concrete course of action by the State authorities was necessary, having prejudicial consequences for the person against whom such course of action was taken. The Commission found that the treaty negotiators did not aim at creating an "enemy status" for the purpose of Article 78, whereby it would have been sufficient for the relevant conditions to materialize under Italian law to make the provisions of the

[1049] This may be taken as a further instance of the facts that generally courts and tribunals, when opting for a "restrictive" or "common denominator" interpretation, do this in light of the overall context. See YBILC 1964-II, p. 65, para. 8.

[1050] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter c).

1947 Peace Treaty applicable. On the contrary, the meaning to be given to the terms under interpretation was one of concrete, effective treatment, meted out to a person by reason of his enemy status, and not one of abstract possibility of subjecting a person to a course of action capable of causing injury, on the grounds that such a person fulfilled the conditions for being considered, under a legal provision of municipal law, to be an enemy person.[1051]

Moreover, the Commission considered that the provision of Article 78(9)(a)(2), introducing a rule of an exceptional character in that it extended the diplomatic protection of the United Nations to persons who were not their nationals, had to be interpreted in a restrictive sense, since it deviated from the general rules of the Law of Nations on that point. Thus, the Commission found that, also in this respect, its interpretation of Article 78(9)(a)(2) was to be preferred to the one put forward by the United States.[1052]

Finally, the Commission touched upon the issue of whether Italy was precluded from relying on an interpretation of Article 78(9)(a)(2) different from the one that could be derived from the natural reading of the Italian translation thereof. It rejected the argument that the Italian Government was bound by the Italian translation on the grounds that the latter was an indication of the manner in which Italy had understood its obligations arising out of the 1947 Peace Treaty. In this respect, the Commission held that the principle of estoppel could be opposed to Italy only where the latter, by explicit declaration, by conclusive acts, or even by an attitude regularly taken towards the other contracting States, had appeared to attribute to Article 78(9)(a)(2) the meaning that the United States attached to the Russian text thereof. However, the existence of a translation devoid of authentic value was not sufficient to that purpose, a translation which, according to the allegations the Italian Government, was in fact the collective work of all contracting States, who purposely refused to give it any character of authenticity; such a translation lacked any international legal significance and it was not proved that Italy had ever accepted the meaning that the United States considered to result from the Russian text.[1053]

3.4.3.6. The decision of the WTO Appellate Body in the US – Softwood Lumber from Canada case

In the case *US – Softwood Lumber from Canada*,[1054] the WTO Appellate Body had to

[1051] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter c).
[1052] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter d).
[1053] See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).
[1054] WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R); see also WTO Appellate Body, 23 September 2002, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, AB-2002-2 (WT/DS207/AB/R), paras. 264-280.

interpret Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures in order to decide whether standing timbers attached to the land fell within the meaning of the term "goods", as used in that Article provision: "[f]or the purpose of this Agreement, a subsidy shall be deemed to exist if […] a government provides goods or services other than general infrastructure".

The WTO Panel had previously adopted a narrow definition of the term "goods", drawn from Black's Law Dictionary, suggesting the exclusion of immovable property (in the case at stake, the standing timbers attached to the land) from the scope of the term.[1055]

The Appellate Body, making reference to Article 31 VCLT, first stated that the meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used. It observed, in this respect, that the dictionary meaning of a term is generally ambiguous; for instance, the Shorter Oxford English Dictionary offered a more general definition of the term "goods" than the one adopted by the Panel, which included "property or possessions" especially - but not exclusively - movable property". Therefore, although recognizing that dictionary definitions offer a useful starting point for discerning the ordinary meaning of a term, the Appellate Body noted, however, that such definitions have their limitations in revealing the ordinary meaning thereof, in the sense of Article 31 VCLT. According to the Appellate Body, this was especially true where the meanings of the terms used in the different authentic texts of the treaty are susceptible to differences in scope.[1056]

With regard to the case at stake, the Appellate Body noted that the French authentic text of Article 1.1(a)(1)(iii) used the term "biens", as corresponding to the English "goods", while the Spanish authentic text used the term "bienes". According to the dictionaries consulted, the French and Spanish terms denoted a wide range of property, including immovable property; as such, they corresponded more closely to a broad definition of "goods", which included "property or possessions" in general, than to the more limited definition adopted by the Panel.[1057]

The Appellate Body, then, observed that under the customary rule of treaty interpretation reflected in Article 33(3) VCLT the terms of a treaty authenticated in more than one language are presumed to have the same meaning in each authentic text and concluded that such a rule implied that the treaty interpreter should seek the meaning giving effect, simultaneously, to all the terms of the treaty, as they are used in each authentic text. In this respect, the Appellate Body made reference both to the commentary to the 1966 Draft, according to which the presumption of equal meaning of each authentic text requires that every effort be made in order to find a common meaning for the texts before preferring one to another, and to the ICJ's decision in the *Elettronica*

[1055] See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), paras. 57-58.
[1056] See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), paras. 58-59.
[1057] See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 59.

Sicula case described above.[1058]

In light of the above, the Appellate Body concluded that the ordinary meaning of the term "goods" in the English authentic text of Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures should not be read so as to exclude tangible items of property, like trees, that are severable from land.[1059]

The interpretation put forward by the Appellate Body, however, was not based solely on a comparative linguistic analysis.

First, the Appellate Body found that a contextual analysis supported such a construction. The analysis of the terms accompanying the word "goods" in Article 1.1(a)(1)(iii), such as "general infrastructure", led to the very same conclusion that all goods that might be used by an enterprise to its benefit - including even goods that might be considered infrastructure - were to be considered "goods" within the meaning of the interpreted provision, unless they were infrastructure of a general nature.[1060] Such a conclusion was not overturned by the analysis of the meaning attributable to the term "goods", as used in other articles of the WTO Agreement on Subsidies and Countervailing Measures and in the Multilateral Agreements on Trade in Goods (Annex 1A of the WTO Agreement), since:

(a) the scope and purpose of those articles and agreement was different from that of Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures and

(b) the term "goods" was differently qualified therein by the accompanying words "imported", "exported" and "trade", which were not present in Article 1.1(a)(1)(iii).

Similarly, the interpretation put forward by the Appellate Body was not prejudiced by the (different) meaning attributable to the term "products" used in Article II of the 1994 General Agreement on Tariffs and Trade (GAAT), "goods" and "products" being different words that did not need necessarily to have the same meanings in the different contexts in which they were used.[1061]

Second, the Appellate Body submitted that a narrow interpretation of the term "goods" would have undermined the object and purpose of the WTO Agreement on Subsidies and Countervailing Measures, which was to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures. According to the Appellate Body, it was in furtherance of that object and purpose that Article 1.1(a)(1)(iii) recognized that subsidies might be conferred, not only through monetary transfers, but also by the provision of non-monetary input; therefore, a narrow

[1058] See WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R), para. 59 and, in particular footnote 50 therein.

[1059] WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 59.

[1060] See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 60.

[1061] See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), paras. 62-63.

interpretation of the term "goods" in Article 1.1(a)(1)(iii) would have permitted the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of standing timber for the sole purpose of severing it from land and processing it.[1062]

Third, the Appellate Body rejected an interpretation of the term "goods" based on the municipal law of one of the WTO Member States. In this respect, Canada had contended that standing timbers were not "goods", since they were neither "personal property" nor an "identified thing to be severed from real property". The Appellate Body, after having noted that the concepts of "personal" and "real" property, as referred to by Canada, are creatures of municipal law not reflected in Article 1.1(a)(1)(iii), submitted that the manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO agreements.[1063]

3.4.3.7. The decision of the ECtHR in the Niemietz case

In the *Niemietz* case,[1064] the ECtHR was confronted with the issue of whether the search of an office made on behalf of the public prosecutor could give rise to a breach of Article 8(1) of the ECHR, which in its English and French authentic texts reads as follows (*italics* by the author):

> Everyone has the right to respect for his private and family life, his *home* and his correspondence. […]
>
> Toute personne a droit au respect de sa vie privée et familiale, de son *domicile* et de sa correspondance. […]

The Court considered that the term "home", in the English authentic text, should not be construed narrowly; on the contrary, it should be regarded as denoting also business and professional premises. It pointed out that this conclusion was fully consonant with the French authentic text, the term "domicile" having a broader intension than the term "home", capable of being extended to a professional person's office as well.[1065]

The attribution to the term "home" of such a special meaning, however,[1066] was not based solely on the comparison with its corresponding French term; quite the contrary,

---

[1062] See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 64.
[1063] See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 65.
[1064] ECtHR, 16 December 1992, Niemietz v. Germany (Application no. 13710/88).
[1065] See ECtHR, 16 December 1992, Niemietz v. Germany (Application no. 13710/88), para. 30.
[1066] This meaning is "special" under Article 31 VCLT if one takes the view that such wide meaning is not "ordinary" for the term "home", which however is not a straightforward conclusion (see the entries for "home" at the Dictionary.com Unabridged. Random House, Inc. (accessed 7 Oct. 2010), in particular entry no. 9).

the Court found support thereto in the context of that term and in the object and purpose of Article 8 of the ECHR, as well as in the subsequent practice of certain contracting States.

In this respect, the Court noted that the term "home" had been interpreted as extending to business premises in some contracting parties, among which Germany, the latter being the State charged of breaching Article 8 of the ECHR in the case at stake.[1067]

It also submitted that it was not always possible to draw precise distinctions between private and business premises, since activities related to a profession or business could well be conducted from a person's private residence, while activities not so related could well be carried on in offices or commercial premises. Thus, a narrow interpretation of the terms "home" and "domicile" could give rise to a risk of unequal treatment of persons being in substantially comparable situations.[1068]

Furthermore, the ECtHR linked the term "home" to the previous term "private life" used in Article 8. It considered that it would have been too restrictive to limit the meaning of the latter term to the notion of an "inner circle" in which the individual might live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle; respect for private life also had to comprise, at least to a certain degree, the right to establish and develop relationships with other human beings. In this regard, there was no apparent reason to exclude, from the intension of the term "private life", activities of a professional or business nature since it was, after all, in the course of their working lives that the majority of people had a significant, if not the greatest, opportunity of developing relationships with the outside world. This view was supported by the fact that, as similarly mentioned in relation to the meaning of the term "home", it was not always possible to clearly distinguish which of an individual's activities formed part of his professional or business life and which did not. Therefore, to deny the protection of Article 8 to professional activities could lead to an inequality of treatment, in that such protection would remain available to persons whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them.[1069]

Finally, the Court found that interpreting the terms "home" and "private life" as including certain professional or business activities or premises was consonant with the essential object and purpose of Article 8, i.e. to protect the individual against arbitrary interference by the public authorities. At the same time, it emphasized that such an interpretation would not unduly hamper the contracting States, for they would in any case retain their entitlement to "interfere" with people's "private life" and search their "home" to the extent permitted by paragraph 2 of the very same Article 8 of the ECHR.[1070]

3.4.3.8. The decision of the Arbitral Tribunal for the Agreement on German External

[1067] See ECtHR, 16 December 1992, *Niemietz v. Germany (Application no. 13710/88)*, paras. 18 and 30.
[1068] See ECtHR, 16 December 1992, Niemietz v. Germany (Application no. 13710/88), para. 30.
[1069] See ECtHR, 16 December 1992, Niemietz v. Germany (Application no. 13710/88), para. 29.
[1070] See ECtHR, 16 December 1992, Niemietz v. Germany (Application no. 13710/88), para. 31.

Debts in the Young Loan arbitration

In the *Young Loan* arbitration case,[1071] the majority of the Arbitral Tribunal concluded that "[the] interpretation of the clause merely in the terms of Article 31(1) of the [VCLT] already proves the Applicants' claim to be unfounded. Any possible discrepancy between the texts, when the wordings of the three authentic versions of the disputed clause are compared, is resolved if the clause is interpreted in the context of the treaty and against the background of the 'object and purpose' of the LDA".[1072]

It further maintained that "the *travaux préparatoires* confirms the conclusion to which the interpretation of the wording of the clause in dispute in accordance with Article 31(1) of the [VCLT] has already led."[1073]

As previously noted, the main issue at stake in the case was the interpretation of the expressions "Währung mit der geringsten Abwertung", "devise la moins dépréciée" and "least depreciated currency" used in the German, French and English authentic texts of Article 2(e) of Annex 1 of the LDA. In particular, the question to be answered by the Tribunal was whether such expressions related only to devaluation in the strict sense, i.e. to cases where the par value of the currency concerned had been reduced as a result of a governmental action, or it applied as well to cases where the currency in question was "depreciated" in relation to another currency of issue of the bonds owing to the revaluation of the latter.[1074]

At the outset, the Tribunal noted that if it had proceeded on terminology alone and taken the words in their ordinary, everyday sense in the language concerned, it was at least not excluded that the German text would have provided one answer to the original query, and the French and English texts a different one.

In German, on the one hand, the term "Abwertung", where used in technical jargon, meant a reduction in the external value of a currency - in relation to a fixed yardstick, e.g. gold - by an act of government. On the contrary, in the everyday usage, the expression "formal devaluation" ("formelle Abwertung") tended to be used to describe the devaluation of a currency by governmental act, as distinguished from the far more common economic phenomenon of the depreciation of a currency.

In English and French, on the other hand, the terms "depreciation" and

[1071] Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.* For an analysis of the issue at stake in the *Young Loan* case, see section 3.2.3.1 of this chapter.

[1072] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 548, para. 38.

[1073] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 548, para. 37.

[1074] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 529, para. 15.

"dépréciation" were normally used to describe the economic phenomenon of depreciation of a currency, while formal devaluation was usually denoted by the terms "devaluation" and "dévaluation", respectively. However, although the pairs "depreciation" – "depreciation" and "devaluation" – "devaluation" were theoretically distinguishable in both English and French, the Tribunal found, mainly on the basis of the analysis of contemporary writings, that as a matter of fact they were used interchangeably to describe the same processes. Hence, the Tribunal concluded that the possibility that the German, English and French authentic texts of the disputed clause had different meanings could not be ruled out on the basis of the mere analysis of their wordings.[1075]

Thus, in order to solve the potential conflict of meanings between the three authentic texts, the Tribunal had recourse to the various means of interpretation provided for in Articles 31 and 32 VCLT, i.e. construed the above-mentioned expressions in light of the overall context.

First, the Tribunal considered that the LDA and, in particular, the provision under discussion, had to be construed in the context of the Bretton Woods system, which governed the international monetary relations at the time of the LDA's conclusion and which had continued to play such a role for approximately the following twenty years.[1076] The Bretton Woods system was based on the fixed par value agreed between the International Monetary Fund (hereafter also "IMF") and the single States for almost every currency and expressed in terms of gold or US dollars, pursuant to Article IV(1)(a) of the IMF Agreement.[1077]

According to the Tribunal, the incorporation of the LDA into the Bretton Woods system had a concrete bearing on the essential meaning of the terms "Abwertung", "depreciated" and "dépréciée", since it constituted relevant evidence against the view that the revaluation of one of the currencies of the LDA contracting States automatically meant a depreciation ("Abwertung", "depreciation") of all other currencies.

In this respect, the Tribunal noted that, although it was true that the revaluation of one currency (A) determined that a person purchasing it had to spend more of another currency (B) than he had had to spend before the revaluation, the par value of the latter currency (B) as agreed with the IMF had not changed due to such a revaluation. Therefore, it was not possible to maintain that the latter currency (B) had depreciated ("abgewertet", "dépréciée") in the sense of Article 2(e) of Annex 1 of the LDA. In fact,

[1075] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 530-532, paras. 18 and 20.

[1076] Since the Bretton Woods system, regulated by the IMF Agreement, was in force for all the LDA contracting States, except Switzerland, and regulated the relations between the values of their respective currencies, the reference to such a system by the Arbitral Tribunal might be regarded as based on Article 31(3)(c) VCLT, or, at least, on Article 32 VCLT (i.e. as a relevant element of the legal and political framework in which the LDA had been concluded).

[1077] Agreement adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, on 22 July 1944 (in its original text).

in the Bretton Woods system, the counter-value of the latter currency (B) expressed in terms of gold or US dollars had remained unchanged, as the purchasing power of that currency on its home market and the external value thereof in relation to all other currencies except the revalued one had remained unchanged.

According to the Tribunal, the position of persons owning currency (B) would have changed only if that currency had been devalued in the formal sense, since under the Bretton Woods system "revaluation and devaluation were both bilateral "deals" between the IMF and the States concerned in each case".[1078]

Second, the Tribunal fund that such a conclusion was supported by the structure and wording of Article 13 of the LDA, which, with reference to the cases under litigation, would have required computing the new amounts of the installments to be paid on the basis of the par values of the various currencies agreed with the IMF, which, however, had not changed as a result of the revaluation of the German mark.[1079]

Third, it considered the bearing of Article 8 of the LDA on the construction of the terms to be interpreted.[1080]

Article 8 of the LDA obliged the Federal Republic of Germany not to permit any discrimination or preferential treatment among the different categories of debts or as regards the currencies in which debts were to be paid or in any other respect, unless such difference was the result of settlement in accordance with the Agreement itself.

In this respect, the Tribunal recognized that, as a matter of fact, the holders of bonds expressed in German mark would have received more than the other creditors as a result of the revaluations of the German mark in 1961 and 1969. However, it found that such disparity of treatment, being the result of the application of the method of computation provided for in Article 13 of the LDA, was to be regarded as "in accordance with the Agreement itself" and thus allowed by Article 8 thereof.

Moreover, the Tribunal also noted that the prohibition of discrimination in Article 8 of the LDA had to be construed in its context, where it appeared to have no bearing beyond that of a *pari passu* clause,[1081] whose customary function in loan contracts was, in the interest of the bondholders, to simply prevent the borrower from entering into

[1078] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 535, para. 24, and at 538, para 27.

[1079] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 535-536, paras. 24 and 25.

[1080] The Tribunal also made reference to Article V(2)(b) of Annex II and Article 7(3) of Annex IV to the LDA in order to support its findings (see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 540, para. 28); such arguments, however, seem of a lesser relevance in the whole argument developed by the Tribunal.

[1081] The Tribunal stated that such a *pari passu* clause was, in fact, included in Article II of the original Agreement between the Government of the German Reich, as debtor, and the Bank for International Settlements acting as trustee for the holders of the (then) outstanding bonds (agreement concluded in Paris on 10 June 1930).

new, additional obligations which then would rank before the bonded debt itself, i.e. to guarantee an equal ranking for loans furnished with such a clause (and subsequent loans), and not to prevent any type of different treatment of the bondholders, in particular unequally high redemption payments.[1082]

The Tribunal then analysed the object and purpose of the LDA, which substantially consisted in the settlement of German external debts at the end of the Second World War.

In this respect, the LDA was purported to achieve a compromise, in the interests of all parties concerned, between the liabilities of the Federal Republic of Germany and its actual economic capacity. According to the Tribunal, a prerequisite of the fullest possible settlement of such debts was the recovery of the German economy, in the sense that the LDA's object and purpose could be achieved only if foreign creditors were prepared to waive a substantial part of their claims and to come to terms with the German debtors on conditions for payment of what remained.

Thus, when construing the individual provisions of the LDA, the interpreter had always to take into account the particular concern of the contracting parties, while formulating the LDA, with maintaining in all parts the delicate balance between, on the one hand, the justified aim for adequate satisfaction of the creditors and, on the other, a desire not to burden the debtors with an economically intolerable load, which could have jeopardized the successful implementation of the settlement.

In light of the analysis of the object and purpose of the LDA, the Tribunal concluded that the clause at stake, where interpreted as applying only in cases of formal devaluations, undoubtedly constituted an attempt by the parties to find a sensible middle way between the desirable and the possible, at least as far as they could see it in 1952 (i.e. when the LDS was concluded). On the other hand, the broader interpretation suggested by the applicants could not be regarded as justified simply because the Germany economy in the fifties and sixties of the twentieth century proved capable of recovering more rapidly and strongly than originally expected.[1083]

The majority of the arbitrators also took into account the subsequent practice of the contracting States and found that at least some of the comments made immediately after the conclusion of the LDA by spokesmen of the Applicants might be clearly interpreted as indicating that the clause in dispute should have been regarded exclusively as a protective provision against devaluation.

Similarly, the German interpretation of the disputed clause, as evidenced in public statements and documents, appeared from the start restricted to the case of devaluation.

The Tribunal, however, concluded that, all in all, the analysis of the period

[1082] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 538-539, para. 28.

[1083] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 540-541, para. 30.

between the signing of the LDA in 1952 and the first revaluation of the German mark in 1961, when the differences of opinion came out into the open, bore little fruit, since no lasting agreement was reached among the parties on the interpretation of the disputed clause, nor did the conduct of the individual parties give any decisive insight into what they understood by the terms "depreciated", "dépréciée" and "Abwertung".[1084]

The Tribunal eventually turned to the analysis of the *travaux préparatoires*.

It found that the clause in dispute was a compromise agreed, after lengthy negotiations, by the private creditors' representatives and the delegates of the creditor States participating in the Conference on German External Debts[1085] and which had become necessary due to the United States not agreeing to retain the protection clause (the gold clause) originally embodied in Article VI (a) of the General Bond of the Young Loan.

The *travaux préparatoires* showed that the creditors agreed that they had to insist on protection against a potential drop in the value of the currencies of issue. However, the question of how far such protection should be extended was open and was disputed. In this respect, the minutes submitted to the Tribunal contained no statement indicating, even by implication, that the new clause, in addition to protecting the relevant currency of issue against devaluation, also had to guarantee participation in the revaluation of any other currency of issue. Moreover, the testimony of witnesses confirmed that neither revaluation, nor appreciation had been mentioned at the Conference on German External Debts.

On the basis of such elements, the Tribunal drew the conclusion that no one at the Conference had seriously reckoned with the possibility of a revaluation of the German mark and therefore no one had mentioned this eventuality. In addition, the Tribunal noted that the possibility that another currency could have been revalued had not been expressly taken into consideration in the course of the negotiations and, from such a basis, inferred that there was no intention of contemplating the consequences of a revaluation of any currency whatever.

Finally, the Tribunal noted that its conclusion was further supported by the fact that, in the course of the Conference, the possibility to include a currency option clause with reference to the Young Loan had been never discussed, while it had been so with regard to two other loans.[1086] Since currency options generally also covered the case of revaluation, the absence of any serious discussion in that respect strengthened the conviction that all that had been ever intended was a clause protecting creditors against currency devaluations.

The Tribunal thus found that the analysis of the *travaux préparatoires* confirmed the interpretation reached through the application of Article 31 VCLT.[1087]

[1084] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 542-543, para. 31.

[1085] Conference held in London, between February and August 1952.

[1086] Namely the City of Munich and the Potash Loans.

[1087] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of*

3.4.3.9. The decisions delivered by the ECJ with regard to the interpretation of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters

The application of the rules of interpretation enshrined in Articles 31 and 32 VCLT for the purpose of reconciling *prima facie* divergent authentic texts has also been endorsed by the ECJ, when called upon to construe certain provisions of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters.[1088]

For instance, in the case *De Bloos v. Bouyer*,[1089] the ECJ had to interpret Article 5(1) of the Brussels Convention, according to which:

> A person domiciled in a Contracting State may, in another Contracting State, be sued:
> (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question.

In particular, the Court was asked whether, with reference to an action brought by the Belgian grantee of an exclusive sales concession against the French grantor thereof, in which the former claimed that the latter had infringed the exclusive concession, the term "obligation" in Article 5(1) was to be interpreted as applying without distinction to any obligation arising out of the contract granting the exclusive sales concession (or even arising out of the successive sales concluded in performance of the said contract), or as referring exclusively to the obligation forming the basis of the legal proceedings brought before the court seeking to establish its jurisdiction. The various authentic texts of Article 5(1) seemed capable of diverging constructions in that respect.

The ECJ solved the interpretative issue by stating that Article 5(1) could not be interpreted as referring to any obligation whatsoever arising under the contract in question, but, on the contrary, the term "obligation" had to be construed as referring to the specific contractual obligation forming the basis of the legal proceedings before the referring court.[1090] This solution was mainly justified on the basis of the object and purpose of the Convention, as derived from its preamble, which required the need to avoid as far as possible creating situations in which a number of courts had jurisdiction in respect of one and the same contract.[1091] In addition, the Court highlighted that such a conclusion was further supported by the Italian and German authentic texts of Article

---

Belgium et al. v. the Federal Republic of Germany (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 543-548, paras. 32-47.

[1088] Convention concluded in Brussels on 27 September 1968.

[1089] ECJ, 6 October 1976, Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer.

[1090] See ECJ, 6 October 1976, Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, paras. 10 and 11.

[1091] See ECJ, 6 October 1976, Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, paras. 8 and 9.

5(1),[1092] which appeared less ambiguous in this respect.

In the *Effer v. Kantner* case,[1093] the ECJ was again faced with the interpretation of Article 5(1) of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters. In this case, the issue at stake whether the court of the place of performance of a contractual obligation had jurisdiction even where the very existence of the contract was disputed between the parties.

The Court eventually answered in the affirmative.[1094] It first noted that the wording of the authentic texts of Article 5(1) did not resolve the issue unequivocally, since while the German text used the expression "Vertrag oder Ansprüche aus einem Vertrag" in order to denote the scope of paragraph 1, while the French and Italian authentic texts contained the expressions "en matière contractuelle" and "in materia contrattuale" respectively. The ECJ considered that, in view of the ambiguity and lack of uniformity between the different authentic texts, it was advisable to have regard both to the context of Article 5(1) and to the object and purpose of the Convention.[1095]

With regard to the latter, the Court found that it was clear from the provisions of the Convention, and in particular from the preamble thereto, that its essential aim was to strengthen in the Community the legal protection of persons established therein; for that purpose, the Convention provided a collection of rules which were designed to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more contracting States and which, in the interests of legal certainty and for the benefit of the parties, conferred jurisdiction upon the national court territorially best qualified to determine a dispute.[1096]

With regard to the former, the ECJ noted that the provisions of the Convention, in particular those included in section 7 of title II (Examination as to jurisdiction and admissibility), appeared to include among the powers of the referred national court the power to consider the existence of the contract itself, that being indispensable in order to enable that court to examine whether it had jurisdiction under Article 5(1). According to the ECJ, if this had not been the case, Article 5(1) would have been in danger of being deprived of its legal effect, since it would have been accepted that, in order to defeat the rule contained in that provision, it was sufficient for one of the parties to claim that the contract did not exist.[1097]

The Court thus concluded that respect for the aims and spirit of the convention demanded Article 5(1) to be construed as meaning that the court called upon to decide a dispute arising out of a contract might examine the essential preconditions for its jurisdiction, so establishing the existence or the inexistence of the relevant contract.[1098]

[1092] See ECJ, 6 October 1976, Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, para. 12.
[1093] ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*.
[1094] See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 8.
[1095] See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 5.
[1096] See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 6.
[1097] See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 7.
[1098] *Ibidem*. see, similarly, ECJ, 24 June 1981, Case 150/80, *Elefanten Schuh GmbH v. Pierre Jacqmain*, paras. 13-17, concerning the interpretation of Article 18, second sentence, of the very same Brussels Convention on

3.4.4. The preference for the interpretation(s) common to all the compared authentic texts

3.4.4.1. The need to distinguish between (i) the attribution to treaty terms of the meaning common to all the compared authentic texts and (ii) the restrictive interpretation of treaty terms

In his cornerstone work on the interpretation of multilingual treaties, which predates the VCLT, Hardy concluded that where one authentic text allows several interpretations, while the other authentic text allows only one of them, the interpreter is bound to choose the latter construction, that being the only one "reconciling" the various texts.[1099]

A rule based on this position had been originally included by Sir Humphrey Waldock in his Third Report on the Law of Treaties, whose Article 75(3) read as follows:[1100]

> If in each of two or more authentic texts a term is capable of being given more than one meaning compatible with the objects and purposes of the treaty, a meaning which is common to both or all the texts is to be adopted.

The ILC Drafting Committee, however, removed this provision from the text of Article 75 in the course of the ILC's sixteenth session without providing any explanation.

One can merely speculate that the reason behind this was the risk that the provision could have been (mis)construed as a rule favoring "restrictive" interpretations, i.e. the kind of interpretation that some scholars thought the PCIJ had embraced in the *Mavrommatis Palestine Concessions* case[1101] and that the ILC, on the contrary, intended to reject as a general rule.[1102]

In this respect, the commentary to Article 75(3) of Sir Humphrey Waldock's Third Report on the Law of Treaties clarified that the proposed rule of interpretation was not to be confused with the restrictive interpretation, according to which the more

---

jurisdiction and enforcement of judgments in civil and commercial matters.

[1099] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 150.

[1100] See YBILC 1964-II, p. 62.

[1101] See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment, p. 19, where it was stated the following:

> "The Court is of opinion that, where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine and because the original draft of this instrument was probably made in English".

See also the laconic conclusion (which seems to favor a "restrictive" interpretation) on the issue of the *prima facie* divergence between the French and English authentic texts of Article 302(2) of the 1919 Treaty of Versailles, in Germano-Polish Mixed Arbitral Tribunal, 1 August 1929, *Poznaski v. German State*, 5 *Annual digest of public international law cases* (1929-1930), 506 *et seq.* [Case No. 298], at 507.

[1102] See YBILC 1964-II, p. 65, para. 8; YBILC 1966-II, pp. 225-226, para. 8.

limited (restrictive) construction which can be made to harmonize with all authentic texts is the one which must be adopted.[1103]

Moreover, the commentary to the 1966 Draft provides that the PCIJ, in the *Mavrommatis Palestine Concessions* case, did "not appear necessarily to have intended […] to lay down as a general rule that the more limited interpretation which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs. The mere fact that the ambiguity arises from a difference of expression in a plurilingual treaty does not alter the principles by which the presumption should or should not be made in favour of a restrictive interpretation. Accordingly, while the *Mavrommatis* case gives strong support to the principle of conciliating — i.e. harmonizing — the texts, it is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts".[1104]

The restrictive interpretation, on the one hand, and the construction of treaty terms according to the meaning common to all the authentic texts compared, on the other hand, must be clearly distinguished both (a) with regard to the interpretative results that they tend to achieve and (b) in terms of their possible use within the system of interpretation of the VCLT.

Under the first perspective (a), the restrictive interpretation leads to the result that, if (i) one authentic text may be interpreted as meaning A and the other authentic text as meaning B and (ii) the denotata of B constitute a subset of the denotata of A, then meaning B is to be adopted.

The construction of treaty terms according to the meaning common to all the compared authentic texts, instead, implies that, where one authentic text may be interpreted as meaning either A or B and the other authentic text as meaning either B or C, meaning B is to be adopted.

Under the second perspective (b), the following comments can be made.

The former rule has been explicitly rejected as a general rule of interpretation by the ILC. The author praises this decision since, as treaty interpretation is directed at establishing the common intention of the parties, where two authentic texts appear *prima facie* to point towards two diverging, reasonable and unambiguous meanings, no mechanical rule providing for a preference for the most restrictive meaning can ensure that such a meaning represent the utterance meaning of the treaty.

On the contrary, the latter rule, whatever the reason for dropping it from the text

[1103] See YBILC 1964-II, pp. 64-65, para. 8.

[1104] YBILC 1966-II, pp. 225-226, para. 8 (footnotes omitted). See, similarly, J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80

of (now) Article 33,[1105] appears to suitably fit the purpose of establishing the common intention of the parties. In fact, where one authentic text presents an ambiguity of meanings that cannot be resolved by means of the rules of interpretation enshrined in Articles 31 and 32 VCLT, while the other authentic text may be attributed only one clear, unambiguous and reasonable meaning, and the latter meaning coincides with one of the meanings attributable to the former text, it is only reasonable (although not compulsory) to conclude that the parties intended to attach to the treaty the latter meaning.

3.4.4.2. The limited scope of the rule providing for the attribution to treaty terms of the meaning common to all the authentic texts compared

At a closer look, however, the rule providing for the attribution to treaty terms of the meaning common to all the compared authentic texts appears to be characterized by a rather limited scope in practice, since it is based on the premises that:

(i) each authentic text, or at least some authentic texts, may be construed in an array of alternative ways and

(ii) the arrays of alternative meanings corresponding to each authentic text differ from each other due exclusively to the wording used in such texts (and not to the overall context).

In that respect, it has been already shown that:

(a) the meaning of a treaty provision (like the meaning of any other utterance) is highly dependent on its overall context and that the role played by its wording is thus limited and

(b) in the VCLT system the choice of the meaning to be attributed to undefined terms is significantly influenced by elements other than the mere dictionary meanings of those terms, such as their context, the object and purpose of the treaty, the subsequent agreements and practice of the parties, the interaction with

[1105] After this provision had been removed from the ILC draft articles, Bernhardt maintained that the presumption provided for in Article 29(3) of the 1966 Draft, now Article 33(3) VCLT, led to the substantially same result. According to the author, that presumption would effectively fix the precedence of the authentic text using unequivocal expressions, so far as its meaning was included in the ambiguous (although the term actually used by Bernhardt is "unclear") provisions of the other texts; in contrast, where all texts were ambiguous, the presumption would not give further help to the interpreter (see R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 505). The conclusion reached by Bernhardt was later criticized by other scholars. In particular, Germer affirmed that, where it is argued that a possible difference in meaning exists, the presumption provided for by Article 33(3) VCLT ceases to hold and the interpreter is to apply the rules enshrined in Article 33(4) VCLT, which do not embody the principle of preference for the unambiguous (although the term actually used by Germer is "clearest") text (see P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414). Such criticism, however, seems erected on highly disputable foundations, especially in light of the analyses conducted by the author and reported in the previous sections and in the following pages.

other rules of international law, the *travaux préparatoires*, the other supplementary means of interpretation and, more generally, all elements and items of evidence included in the overall context.

In addition, it has been put forward in section 3 of Chapter 3 of Part I that the choice of the treaty meaning by the interpreter, as well his choice of the legally sound arguments that support it, is influenced by his cultural and political preferences, which commonly lead him to favor one single meaning among those potentially available.

Therefore, where a authentic treaty text, taken in isolation, is construed by the interpreter in accordance with its overall context (which includes the rules of interpretation enshrined in Article 31 and 32 VCLT), the result of the interpretative process is generally the meaning that best suits, from the interpreter's perspective, all elements and items of evidence thrown into the crucible.

Hence, in light of the nature of such an interpretative process, it is reasonable to expect that, in the vast majority of cases, the interpretative result will be the same with regard to all authentic texts, since all the elements and items of evidence thrown into the crucible, except the very same terms and expressions to be interpreted, are the same for the purpose of construing all of them.

Even in the unusual case where the interpreter arrives, with regard to each authentic texts, at an array of alternative meanings among which he struggles to choose one, it is submitted that such a difficulty will generally be partially independent from the nuances of the various authentic texts and thus it will be hardly solved by means of choosing the single meaning common to all the possibilities, since most probably the various authentic texts will present the same or similar arrays of possible meanings.

All in all, such a rule lies on a tremendously simplified representation of the process of treaty interpretation and, in practice, it will seldom be applicable due to the infrequency of cases where one authentic text may be attributed several meanings and the other only one of them.[1106]

3.4.4.3. Relevant case law: in general

The three decisions described here below aptly illustrate the difficulty to apply in practice the above-mentioned rule of interpretation.

They are the same decisions taken by Gardiner as examples of the fact that "the requirement in Article 33(4) to achieve a meaning which best reconciles the texts, having

[1106] One of the few cases in which the competent court or tribunal justified its decision solely on the basis of this approach is Arbitrator, 3 September 1924, *Affaire des réparations allemandes selon l'article 260 du Traité de Versailles (Allemagne contre Commission des Réparations)*, 1 *Reports of International Arbitral Awards*, 429 *et seq.*, in particular at. 437-439, where the arbitrator concluded that where "l'un des textes est clair et l'autre ne l'est pas, la solution qui s'impose est celle d'interpréter le texte moins clair à la lumière de l'autre texte et conformément au sens qui résulte des termes de ce dernier texte" (see *ibidem*, at 439).

regard to the object and purpose of the treaty, does not exclude the possibility of concluding that the meaning which is clear in one of the texts [*author's note*: while the others are ambiguous] is the correct one".[1107]

A close analysis of these decisions, however, shows that Gardiner's statement is misleading since in none of them was the court:

(i) dealing with the issue of reconciling authentic texts whose meanings remained irremovably different after the application of Article 31-32 VCLT and
(ii) justifying the chosen solution as resulting from the selection of the only meaning common to the various texts and the consequent rejection of the other meanings attributable to the ambiguous texts.

On the contrary, it appears that the courts:

(i) construed the various authentic texts and eliminated potential differences of meaning through the application of the principles of interpretations enshrined in Articles 31 and 32 VCLT and, as a result thereof,
(ii) removed the uncertainty concerning the meaning of the potentially ambiguous texts by affirming that such texts could be reasonably attributed only one meaning where interpreted in light of the overall context.

3.4.4.4. Relevant case law: the ECtHR decision in the Wemhoff case

Just before the VCLT was concluded, the ECtHR decided the *Wemhoff* case,[1108] in which it was confronted with, among other things, the issue of whether there had been a contravention by the German judicial authorities of the second part of Article 5(3) of the ECHR. The Court had thus to interprete the latter Article, which, in the English and French authentic texts, reads as follows:

> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c)[1109] […] *shall be entitled to trial within a reasonable time or to release pending trial*. […]

> 3. Toute personne arrêtée ou détenue, dans les conditions prévues au paragraphe 1 c) […] *a le droit d'être jugée dans un délai raisonnable, ou libérée pendant la procédure*. […]

The Court found that Article 5(3), read in its context, required the provisional detention of accused persons not to be prolonged beyond a reasonable time.[1110] The issue,

---

[1107] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 375.
[1108] ECtHR, 27 June 1968, Wemhoff v. Germany (Application no. 2122/64).
[1109] Paragraph 1(c) of Article 5 ECHR reads as follows:
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> […]
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so

[1110] See ECtHR, 27 June 1968, *Wemhoff v. Germany (Application no. 2122/64)*, para. 5 of the Court's findings.

however, arose of whether this requirement concerned just the period of detention until the beginning of the trial or whether it also covered the duration of the trial.

The German government argued that it was the opening of the trial that marked the end of the period with which Article 5(3) was concerned.[1111]

The Court, however, rejected such an interpretation.

At the outset, it recognized that the English authentic text could be theoretically construed in accordance with the interpretation put forward by the German government. That text was *prima facie* ambiguous, since the expression "entitled to trial" could also be read as meaning "entitled to be brought to trial" and the following reference to "pending trial" seemed to require release before the trial, taken as whole, i.e., before its opening.[1112]

However, the Court then noted that while the English authentic text theoretically permitted both interpretations, the French authentic text of Article 5(3) could not be construed as the German government had done. In fact, it provided that:

> (i) the obligation to release the accused person within a reasonable time continued until that person had been "jugée", i.e. until the day of the judgment closing the trial, and
>
> (ii) the accused person had to be released "pendant la procédure", a very broad expression that in the Court's view indubitably covered both the trial and the investigation.[1113]

Ultimately, the ECtHR concluded that, since it was confronted with two versions of a treaty which were equally authentic but not exactly the same, it had to follow established international law precedents and hence interpret those authentic texts so as to reconcile them as far as possible.[1114]

The Court, nonetheless, did not justify the interpretation finally endorsed as resulting from the selection of the only meaning common to both the ambiguous and the unambiguous texts, but as the only reasonable construction that each of the authentic texts allowed.

In this regard, the ECtHR noted that, due to the law-making treaty nature of the ECHR, it was necessary to seek the interpretation most appropriate to realizing the aim and achieve the object of the treaty. From this perspective, it found impossible to see why the protection against unduly long detention that Article 5 sought to ensure for persons suspected of offences should not continue up to delivery of the judgment rather than cease at the moment the trial opens.[1115]

3.4.4.5. Relevant case law: the ICJ decision in the Border and Transborder Armed

[1111] See ECtHR, 27 June 1968, *Wemhoff v. Germany (Application no. 2122/64)*, para. 6 of the Court's findings.
[1112] See ECtHR, 27 June 1968, *Wemhoff v. Germany (Application no. 2122/64)*, para. 7 of the Court's findings.
[1113] See ECtHR, 27 June 1968, *Wemhoff v. Germany (Application no. 2122/64)*, para. 7 of the Court's findings.
[1114] See ECtHR, 27 June 1968, *Wemhoff v. Germany (Application no. 2122/64)*, para. 8 of the Court's findings.
[1115] ECtHR, 27 June 1968, *Wemhoff v. Germany (Application no. 2122/64)*, para. 8 of the Court's findings.

Actions (Nicaragua v. Honduras) case

A second relevant decision is that delivered by the ICJ in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case,[1116] where the Court was confronted with the question of whether it had jurisdiction over a dispute between Nicaragua and Honduras concerning the alleged activities of armed bands said to be operating from Honduras on the border between Honduras and Nicaragua and in the Nicaraguan territory.

In order to establish the jurisdiction of the ICJ, Nicaragua relied on the provisions of Article XXXI of the Pact of Bogotá[1117] and the connected declarations made by the two parties accepting the jurisdiction of the Court. Article XXXI of the Pact of Bogotá provided as follows:

> In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature [ed.'s note: *différends d'ordre juridique* in the French text] that arise among them […]

In this respect, the Court held it had jurisdiction in the dispute submitted to it by Nicaragua on the basis of Article XXXI of the Pact of Bogotá.[1118] Honduras objected to such jurisdiction by relying on Article XXXII of the same treaty, which in its English and French authentic texts reads as follows:[1119]

> When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them *shall be entitled to have recourse* to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute.
>
> Lorsque la procédure de conciliation établie précédemment, conformément à ce traité ou par la volonté des parties, n'aboutit pas à une solution et que ces dites parties n'ont pas convenu d'une procédure arbitrale, l'une quelconque d'entre elles *aura le droit de porter la question* devant la Cour internationale de Justice de la façon établie par l'article 40 de son Statut. La compétence de la Cour restera obligatoire, conformément au paragraphe l de l'article 36 du même Statut.

[1116] ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment.
[1117] American Treaty on Pacific Settlement, concluded in Bogotá on 30 April 1948 in the English, French, Portuguese and Spanish languages.
[1118] See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, paras. 28-41.
[1119] *Emphasis* added by the author.

Honduras contended that Articles XXXI and XXXII of the Pact of Bogotá had to be read together: while the former was to define the extent of the ICJ's jurisdiction, the second was to determine the conditions under which the Court could be seized. Thus, according to Honduras, the Court could have jurisdiction under Article XXXI only if, as specified in Article XXXII, there had been a prior recourse to conciliation and lack of agreement to arbitrate, which was not the situation at stake.[1120]

To support its position, Honduras relied heavily on the French authentic text of Article XXXII, which provided that either party had *le droit de porter la question devant la Cour*. In this respect, it argued that this French expression and, in particular, the term *"question"* had been used in order to link the two articles by means of a reference to the question which might have been the subject of the dispute referred to the ICJ under Article XXXI.

The ICJ, although recognizing that the use of the term "*question*" could make the French authentic text of Article XXXII ambiguous at first sight, upheld the position taken by Nicaragua, i.e. that the two articles were autonomous.

In justifying its decision, the Court made reference to the other three authentic texts of the Pact of Bogotá, i.e. those written in the English, Portuguese and Spanish languages, noting that all of them spoke, in general terms, of an entitlement to have recourse to the Court and did not justify the conclusion that there was a link between Article XXXI and Article XXXII.[1121]

However, from the whole reasoning developed by the ICJ it seems that, even in the absence of the three other authentic texts, its conclusion would have not changed and the French text would have not remained ambiguous. To put it differently, it does not seem that, in the Court's view, the French text allowed two alternative interpretations, while the other authentic texts allowed only one construction, the ICJ thus being bound to choose the common interpretation for the purpose of applying the treaty. On the contrary, it appears that the Court used several elements and items of evidence to support the conclusion that the French text (as well as the others) could be reasonably construed only in the sense put forward by Nicaragua.

In this respect, the ICJ first noted that the interpretation put forward by Honduras ran counter to the wording of the French text of Article XXXII, which made no reference to Article XXXI and in which the parties could have used the term "*différend*", instead of the ambiguous "*question*", the former being the very same term used in Article XXXI, had they intended to make the jurisdiction of the Court under Article XXXI subject to the conditions enshrined in Article XXXII.

Second, the ICJ took into account the context of Article XXXII and mentioned the fact that the latter, unlike Article XXXI, referred expressly to the jurisdiction of the Court under Article 36(1) of its Statute. According to the ICJ, such a reference would have been difficult to understand if the sole purpose of Article XXXII had been to

[1120] See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 43.
[1121] See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 45.

specify the procedural conditions for bringing before the Court disputes for which jurisdiction had already been conferred upon it by virtue of the declaration made in Article XXXI, pursuant to Article 36(2) of its Statute.[1122]

Third, the ICJ made reference to the object and purpose of the Pact of Bogotá, as resulting from both its text and the *travaux préparatoires*, which consisted in the reinforcement of the mutual commitments of the American States with regard to judicial settlement. In particular, the Court quoted the position expressed by the Sub-Committee that had prepared the draft treaty, according to which "[l]a Subcomisión estimó que el procedimiento principal para el arreglo pacifico de los conflictos entre los Estados Americanos ha de ser el procedimiento judicial ante la Corte Internacional de Justicia […]".[1123] The Court found that Honduras' interpretation was clearly contrary to the object and the purpose of the Pact, since it implied that the commitment, at first sight firm and unconditional, set forth in Article XXXI would have in fact been emptied of all content if, for any reason, the dispute had not been subjected to prior conciliation.[1124]

3.4.4.6. Relevant case law: the decision of the Court of Appeals of Alaska in the Busby v. State of Alaska case

The third decision analysed by the author was delivered in 2002 by the Court of Appeals of Alaska in the *Busby v. State of Alaska* case[1125] and concerned the interpretation of Article 24(5) of the UN Convention on Road Traffic.[1126]

Mr Busby was a former resident of Alaska whose driver's license had been revoked while he was living there. Busby later moved to Nicaragua, where he obtained an international driving permit under the provisions of the UN Convention on Road Traffic.

In 1998, Mr Busby drove from Central America to Alaska and there was stopped by a state trooper for a traffic violation. During the stop, the trooper discovered that Mr Busby's Alaska driver's license was revoked, so Mr Busby was charged with (and subsequently convicted of) the misdemeanor of driving while his international driving license was revoked.

Mr Busby, however, argued that, although his Alaska driver's license was revoked, he was still entitled under the UN Convention on Road Traffic to drive in Alaska because he had an international driving permit.

[1122] See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 45.
[1123] See Novena Conferencia Internacional Americana, Actas y Documentos, Vol. IV, p. 156 (Registry's translation into English: "the Sub-committee took the position that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice").
[1124] See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 46.
[1125] Court of Appeals (United States), 1 February 2002, Thomas *Busby v. State of Alaska*, 40 P.3d 807.
[1126] Convention on Road Traffic, concluded in Geneva on 19 September 1949.

In this respect, the Court was called upon to interpret Article 24(5) of the UN Convention on Road Traffic in order to decide whether the State of Alaska was authorized, under that article, to withdraw Mr Busby's right to use his international driving permit within that State.

Article 24(5) of the UN Convention on Road Traffic, in the English and French authentic texts, reads as follows (*emphasis* and [interpolations] by the author):

> A Contracting State or a subdivision thereof may *withdraw* from the driver the right to use [an international driving permit] only if the driver has committed a driving offence of such a nature as would entail the forfeiture of his driving permit under the legislation and regulations of that Contracting State
> In such an event, the Contracting State or subdivision thereof *withdrawing* the use of the permit may *withdraw* and retain the permit until the period of the withdrawal of use expires or until the holder leaves the territory of that Contracting State, whichever is the earlier […].
>
> Un État contractant ou une de ses subdivisions ne peut *retirer* à un conducteur le droit de faire usage d'un [permis international de conduire] que si ce dernier a commis une infraction à la réglementation nationale en matière de circulation susceptible d'entraîner le retrait du permis de conduire en vertu de la législation dudit État
> En pareil cas, l'État contractant ou celle de ses subdivisions qui a *retiré* l'usage du permis pourra *se faire remettre* le permis et le conserver jusqu'à l'expiration du délai pendant lequel l'usage de ce permis est retiré au conducteur, ou jusqu‘au moment où ce dernier quittera le territoire de cet État contractant, si son départ est antérieur à l'expiration dudit délai. […]

The Court recognized that the double use of the term “withdraw” in the English text (i.e. with reference to both the right to use the driving permit and the driving permit itself) created some ambiguity, which in turn provided some support for Mr Busby's contention that his international driving permit remained in force until the State of Alaska took some positive action to “withdraw and retain it”.

However, it noted that the authentic French text did not contain such an ambiguity. The use of the expression “pourra *se faire remettre* le permis ”, in contrast with the previous “peut *retirer* […] le droit de faire usage d'un [permis]”, made clear that a contracting State’s act of withdrawing a driver's right to use an international driving permit on its roads was distinct from any action that State might take to secure physical custody of the permit. Under the French authentic text, it was plain that if a State had withdrawn a driver's right to use the international driving permit, it might also require the driver to surrender the permit until the driver's right to drive was restored or until the driver left its territory. The latter follow-up action (i.e. securing physical custody of the permit) was just an additional remedy available to that State under the Convention and, therefore, the legality of its initial action (i.e. withdrawing the driver's right to drive within its territory) did not depend on whether it actually forced the driver to surrender physical custody of the international driving permit.

On the basis of the above analysis, the Court concluded that no direct inconsistency existed between the English and French authentic texts. The interpretative

issue at stake stemmed from an ambiguity in the English text (i.e. the double use of "withdraw"), which might arguably make such a text inconsistent with the French text. In these circumstances, the Court found itself bound, under Article 33(3) VCLT, to assume that the two authentic texts had the same meaning and, thus, to resolve the ambiguity in the English text in favor of the clear meaning of the French text.

The reasoning of the Court, nonetheless, went on to consider (i) the relevance of the treaty's object and purpose and (ii) whether the possible alternative interpretation of the English authentic text was absurd or unreasonable. In this respect, it reasoned that the alternative construction of the English text of Article 24(5), i.e. the one proposed by Mr Busby, would have led to results that were at odds with the objectives and purpose of the Convention on Road Traffic: drivers could obtain new international driving permits and then play a game of "cat and mouse" with States that had previously suspended their licenses. The Court concluded that Mr Busby's construction was unreasonable and that the contracting parties, had they thought that the Convention led to these results, would have never signed it.[1127]

Hence, what the Court in fact achieved was to remove the alleged ambiguity of the English text through an interpretation compliant with Articles 31 and 32 VCLT, thus finding that its only reasonable construction corresponded to the above interpretation of the French text.

3.4.5. Ancillary issues concerning the reconciliation of the prima facie divergent authentic texts

In this section the author briefly tackles certain ancillary issues concerning the reconciliation of the *prima facie* divergent authentic texts.

First, the question might arise if, where a party has put forward the possibility of a divergence of meanings among certain authentic texts, the interpreter is bound to compare solely such texts or, on the contrary, all authentic texts of the treaty.

In this regard, the recent case law of the ICJ seems to constitute evidence in support of the former solution.[1128] In particular, in the *LaGrand* case,[1129] the Court limited the comparison solely to the English and French authentic texts of Article 41 of its Statute, in relation to which a *prima facie* divergence of meanings had been put

[1127] See Court of Appeals (United States), 1 February 2002, Thomas *Busby v. State of Alaska*, 40 P.3d 807, at 813-815.

[1128] Other courts and tribunal have endorsed the same solution as well. See, for instance, French-Italian Conciliation Commission, 29 August 1949, *Différend Impôts extraordinaires sur le patrimoine institués en Italie - décision No. 32*, 13 *Reports of International Arbitral Awards*, 108 *et seq.*, at 111 *et seq*., where the Commission solved a *prima facie* divergence of meanings between the English and French authentic texts of Article 78(6) of the Treaty of Peace between the Allied and Associated Powers and Italy, concluded in Paris on 10 February 1947, by comparing only those two texts, notwithstanding that the Russian text was equally authentic under Article 90 of the treaty.

[1129] ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment; for an analysis thereof, see the former part of the present section.

forward by the United States, although its Statute had also been authenticated in the Chinese, Russian and Spanish languages.[1130]

Second, where the interpreter, on the basis of a comparison of the various authentic texts and the analysis of the *travaux préparatoires*, reaches the conclusion that an editorial oversight occurred in one authentic text, it seems reasonable that such an interpreter is not bound to take into account the defective authentic text in order to construe the relevant treaty provision and may rely exclusively on the other authentic texts.[1131]

Third, in line with the position expressed in section 3.2.4., the author recognizes the possibility for the interpreter to have recourse (also) to non-authentic versions of the treaty in order to univocally construe the *prima facie* divergent authentic texts, as such versions constitute supplementary means of interpretation under Article 32 VCLT.[1132] That said, the relevance for interpretative purposes of such versions will depend on their drafting history,[1133] as well as on how the contracting States actually made use of them in order to construe and apply the treaty.[1134]

Finally, in the process of construing the various authentic texts for the purpose of removing their apparent divergences of meaning, the interpreter may also attribute a significant weight to the drafted text(s), for the same reasons already put forward in section 3.2.3 of this chapter. In this respect, Rosenne suggested that the ILC, in drafting the rules of interpretation applicable in respect of multilingual treaties, wanted to stress "the importance of determining the history of the multilingual texts concerned in order to establish their interrelationship as a matter of fact. That would be the point of departure for an operation designed to establish the intention of the parties to the treaty in question. Already in 1964, the Commission […] requested the Secretariat to furnish further information regarding the practice of the United Nations in drawing up the texts of multilingual instruments".[1135]

[1130] In this respect, it must be noted that Germany had instead analysed and compared all five authentic texts in its Memorial to the Court of 16 September 1999, paras. 4.149 and 4.150.

[1131] See, in accordance, the Report of the Human Rights Committee, 22 November 1978 (*Yearbook of the Human Rights Committee 1977-78*, vol. II, p. 300).

[1132] See, in thist respect, YBILC 1966-II, p. 226, para. 9; M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 105-108; F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), p. 398.

[1133] One thing is that the non-authentic language version had been discussed in the course of the negotiations and represents the document on which the final agreement of the parties had been actually reached (although later the contracting States had translated it into texts drafted in their respective official languages, which alone had been authenticated); another thing is that the non-authentic version is a later translation unilaterally prepared by the foreign affairs department of one of the contracting State for internal use only.

[1134] See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq*., in particular para. 45 thereof, which is discussed in section 3.2.4 of this chapter.

[1135] See S. Rosenne, "On Multilingual Interpretation", in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 450-451.

3.4.6. Conclusions on research question e)

In most of the cases where the interpreter is faced with two or more authentic texts, i.e. either where one party has raised the issue of a *prima facie* discrepancy in meanings among them, or where the interpreter has voluntarily decided to compare such texts in order to find an aid for the purpose of construing an apparently unclear or ambiguous text, he will be able to interpret them so as to find a common, clear, unambiguous and reasonable meaning and to plausibly justify his construction on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT (including the possibility of taking into account non-authentic versions of the treaty and the opportunity to ascribe a special relevance to the drafted text).

Even in cases where the construction of an authentic text, taken in isolation, according to Articles 31 and 32 VCLT leaves the meaning thereof ambiguous or obscure, the comparison with other authentic texts may prove a decisive aid for the interpreter in order to clear up his doubts and arrive at an univocal solution, which may be reasonably supported from a logical and legal standpoint.

The recourse to Articles 31 and 32 VCLT implies that no rigid *ad hoc* rule of interpretation is applied in order to remove the *prima facie* discrepancies in meaning among the authentic treaty texts, but the solution actually adopted and the arguments to support it are selected on the basis of the treaty overall context.

In particular, the rule of restrictive interpretation does not play a specific role in the solution of apparent divergences of meanings among the authentic treaty texts under the system of the VCLT and has been explicitly rejected as such by the ILC. Whether a restrictive interpretation is to be adopted in any specific case depends upon the nature and history of the treaty, its object and purpose, the particular context where the ambiguous terms occur and the situation dealt with in that case.

Though, in the infrequent cases where the comparison of the authentic texts does not prove a sufficient aid to remove all the ambiguities of such texts, where only one reasonable and clear meaning[1136] exists that is common to the various authentic texts, such a meaning will be generally selected as being the only interpretative solution logically possible. This preference for the only meaning common to the compared authentic texts does not represent, however, the application of a rigid *ad hoc* rule, but a mere instance of treaty interpretation in good faith and in light of the overall context.

[1136] I.e. one single intension common to the various authentic texts (e.g. text A may mean X or Y; text B may mean X or Z: X is the only common intension possible and, as such, it will be probably selected as the treaty meaning) and not one particular denotatum that is common to all the possible extensions of the various authentic texts (e.g. text A appears to mean just X; text B appears to mean just Y; however the denotata of X – its extension – are a subgroup of the denotata of Y; the conclusion that the meaning X must be selected since it represents the most restrictive interpretation capable of reconciling the various authentic texts cannot be upheld, since that solution consists of choosing one meaning over another simply because the former denotes a number of referents smaller that the latter).

Those conclusions appear in line with principles (iv), (v), (vi) and (vii) established by the author in section 2 of Chapter 3 of Part I, according to which:
(iv) any alleged discrepancy in meaning among the authentic texts of a treaty is just apparent, since the treaty is an instrument intended by the parties to convey a single message;
(v) the interpreter must remove the *prima facie* discrepancy in meaning among the authentic treaty texts by construing them in accordance with the general principles of treaty interpretation; in particular, the relevance of the treaty texts for the purpose of establishing the single utterance meaning should not be overestimated;
(vi) for the purpose of removing the *prima facie* discrepancy in meaning among the authentic treaty texts, it is reasonable to attribute a particular relevance to the text that has been originally drafted by the contracting States' representatives and on which was formed the consensus among them;
(vii) the interpreter may take into account non-authentic language versions of a treaty for the purpose of construing it; the interpretative weight that should be attributed thereto varies depending on the available evidence that they may contribute to ascertain the common intention of the parties.

3.5. Reconciling the residual divergences and discrepancies: following the object and purpose of the treaty?

3.5.1. Research question addressed in this section

The present section is aimed at tackling the following research question.

f) What should the interpreter do where the prima facie discrepancies could not be removed by means of (ordinary) interpretation?

The possibility that the ordinary process of interpretation might fall short in removing the *prima facie* discrepancies in meaning among the various authentic treaty texts seems to be suggested by Article 33(4) VCLT, according to which, where the contracting States did not agree on a different solution and the application of Articles 31 and 32 VCLT has failed to remove the apparent discrepancy, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

Such a provision raises three issues that the interpreter will deal with in the present section.

First, one might doubt whether and to what extent, in cases of divergences not removed by the application of Articles 31 and 32 VCLT, the presumption established by Article 33(3) VCLT (the terms of the treaty are presumed to have the same meaning in each authentic text) continues to play a role for interpretation purposes. Should one accept that the various authentic texts may have (and actually do have) different meanings? And

what should follow from such a conclusion?

Second, one could wonder what the meaning of the expression "the meaning which best reconciles the texts" is. Does it mean that the interpreter has to stretch the meaning of one text towards the other texts' meaning(s)? And, in such a case, how much is the interpreter entitled to stretch the former meaning? Does it mean, instead, that the interpreter is bound to find some midpoint between the meanings of the various authentic texts? Does he have to give preference to the meaning common to the highest number of authentic texts? Or does he have to apply the most restrictive interpretation, if any?

Third, what is the bearing of the final reference to the treaty object and purpose ("having regard to the object and purpose of the treaty"), considering that such an object and purpose is to be taken into account also for the purpose of Articles 31-32 VCLT?

3.5.2. Scholarly opinions on whether the presumption established by Article 33(3) VCLT continues to hold true where the discrepancy in meanings among the authentic treaty texts is not removed by the application of Articles 31 and 32 VCLT

As noted above, one might doubt whether and to what extent, in cases of divergences of meanings not removed by the application of Articles 31 and 32 VCLT, the presumption established by Article 33(3) VCLT continues to play a role for interpretation purposes.[1137]

In this respect, Tabory concluded that "the answer probably differs for each individual linguistic discrepancy".

She also pointed out that the use of the term "reconcile" and the reference to the object and purpose of the treaty, which is indubitably common to all authentic texts, seemed to deny giving preference to any single language version and to point to the continued regard, as far as possible, to all the authentic texts of the treaty.[1138]

At the same time, however, she also appeared to recognize that the need for "preferring one text to another" might arise.[1139]

According to Germer, "[a]s soon as it is argued that the authentic [texts] of the treaty

[1137] Before the adoption of the VCLT, Dahm argued that the existence of an irreconcilable difference between the various authentic texts (i.e. the existence of a situation similar to that considered in the last part of Article 33(4) VCLT) made the treaty null and void, due to the absence of a true agreement among and consent of the parties (see G. Dahm, *Völkerrecht. Vol. 3* (Stuttgart: Kohlhammer Verlag, 1961), p. 44).
[1138] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 202.
[1139] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 200.

present a difference of meaning, the presumption ceases to be effective. This is a simple consequence of the very nature of the presumption".[1140]

Thus, it seems that the author considered that the effectiveness of the presumption ceased as soon as a potential divergence was noted. That, however, does not imply that Germer intended to express the view that the basic idea of the treaty as a unique body with a single agreed meaning had to be abandoned, but just that, as soon as a potential difference was pointed out, the interpreter could no longer rely on a single authentic text for interpretation purposes.

Mössner, on the other hand, concluded that Article 33(4) VCLT constituted an exception to the general rule of equality of meaning among the various authentic texts and allowed the possibility for the interpreter to give priority to some of them.[1141]

The same position seems to have been taken by Hilf.[1142]

3.5.3. Scholarly opinions on the meaning of the expression "the meaning which best reconciles the texts" used in the last part of Article 33(4) VCLT

Numerous scholars have attempted to answer the question of what meaning should be attributed to the expression "the meaning which best reconciles the texts" employed in the last part of Article 33(4) VCLT.

In particular, many of them have wondered whether it should be intended as requiring the interpreter to stretch the meaning of one text towards the other texts' meaning(s); or as implying that the interpreter is bound to find some midpoint between the meanings of the various authentic texts; or as meaning that the interpreter must give preference to the meaning common to the highest number of authentic texts; or even as requiring the interpreter to apply the most restrictive interpretation, if any.

Tabory, for instance, concluded that the individual circumstances of the case, as well as the object and purpose of the treaty, must be taken into account for the purpose of choosing the best solution in each given case.[1143]

Similarly, Mössner found that the choice, adopted by the ILC, not to prescribe any technical rule of interpretation for resolving discrepancies among the various authentic texts represented a compromise solution and an accumulation of two otherwise

[1140] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414.
[1141] See J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 300-301.
[1142] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), p. 102.
[1143] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 213

alternatives sub-rules, i.e.:

(i) preferring the meaning that best reconciles the various authentic texts;

(ii) preferring the meaning that best reflects the "object and purpose" of the treaty.

As such, it might be useful simply as a general guideline.

According to Mössner, the vagueness of the interpretative rule encompassed in Article 33(4) derives from its lack of precision as to the (a) degree and (b) manner in which the two sub-rules should be applied: its absolutely abstract nature leaves the interpreter exactly in the same situation in which he would have been if Article 33(4) had not be included in the VCLT.[1144]

Sur, dealing with the entire package of interpretative principles codified by the VCLT,[1145] concluded that this principles presents uncertain and ambiguous solutions for the interpreter and that they seemed to perpetuate the ambiguities that characterized the practice before the VCLT, more than remove them.[1146]

According to the author, the solution adopted by the ILC did not simplify the interpretive process in practice: the interpreter was just given a general framework to be filled in according to the circumstances, while a number of issues were left completely or partially unresolved. [1147]

With specific reference to the principles of interpretation for multilingual treaties, Sur appeared to appreciate the solution proposed by the ILC in Article 29(3) of the Draft Convention submitted to the Vienna Conference: in particular, the use of the expression "as far as possible" allowed the interpreter to remove the possible divergences among the authentic texts even where the actual reconciliation was impossible.[1148]

Finally, Germer found that the last clause of Article 33(4) failed to clarify the method through which the meaning that best reconciles the authentic text has to be chosen.[1149]

3.5.4. An alternative approach for the solution of the first two issues

3.5.4.1. The contextual interpretation of the term "reconcile"

[1144] See J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 302.

[1145] See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 247-285.

[1146] See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), p. 269

[1147] See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 273-275.

[1148] See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), p. 274.

[1149] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 403 and 423.

In the author's opinion, the way those two issues have been dealt with by scholars is significantly impaired by the unconsciously ambiguous and unclear use, by the very same scholars, of terms such as "texts", "versions", "meaning" and "reconcile", which mirrors the probably unclear perception of the semantic issue underlying those questions.

The following analysis is directed to clarifying those issues.

Article 33(4) VCLT requires the interpreter to verify whether the authentic texts appearing *prima facie* divergent may be construed, under the rules enshrined in Articles 31 and 32 VCLT, so that a clear, unambiguous and reasonable meaning is attributed to all of them. If such a meaning exists, that is the end of the quest: that meaning is to be adopted by the interpreter.

Where this is not the case, however, the interpreter must adopt "the meaning which best reconciles the texts". Such an expression must be read in its context, which first and foremost includes the underlying idea of the unity of the treaty and the connected rule of law, reflected in Article 33(3), that all authentic texts *do have* the same meaning.[1150]

In this context, the use of the term "reconciles" simply means that the interpreter must attribute to all authentic texts one single meaning, notwithstanding the fact that such a meaning could not be provisionally attributed to all those texts on the basis of an interpretation made in accordance with the provisions of Articles 31 and 32 VCLT.[1151] In fact, if the interpreter is arrived at the conclusion that, according to his own judgment, it is apparently not possible to construe all authentic texts in the same way on the basis of the interpretative rules enshrined in Articles 31 and 32 VCLT, it is inevitable that the meanings provisionally attributed to some of those texts in application of such rules will be discharged and a different meaning will be preferred to them as the utterance meaning of the treaty.

The activity of the interpreter thus consists in choosing one of the provisional utterance meanings attributable to the various authentic texts in accordance with the provisions of Articles 31 and 32 VCLT and in attributing it to all other authentic texts.

The possibility of adopting a meaning that could not be reasonably attributed to any of the authentic texts on the basis of the principles enshrined in Articles 31 and 32 VCLT should be rejected,[1152] unless exceptional and very strong evidence exists in favor of such a solution, since it appears contrary to the whole system of interpretation provided for in the VCLT, where the texts of the treaty are the starting point of the interpretative process and the attribution of meaning must comply with the rules

[1150] See also principle (iv) established by the author in section 2 of Chapter 3 of Part I.

[1151] This is also the etymological meaning of "to reconcile", coming from the Latin verb "reconciliare" (to reestablish the agreement; to reunify), which morphologically derives from the union of "conciliare" (i.e. to unify; to establish an agreement) and "re" (once again) (see Online Etymology Dictionary (Douglas Harper. Accessed 14 July 2010); M. Cortelazzo and P. Zolli, *Il Nuovo Etimologico. Dizionario Etimologico della Lingua Italiana* (Bologna: Zanichelli Editore, 1999)).

[1152] See, similarly, U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 363.

provided for in Articles 31 and 32 VCLT. That solution appears also unreasonable, in that it implies that the contracting States failed to fairly convey their intended message through *all* the authentic texts, even where due weight is given to the overall context.

Against this background, to say, as Tabory did,[1153] that the last sentence of Article 33(4) VCLT denies "giving preference to any single language version and to point to the continued regard, as far as possible, to all the versions of the treaty" in thus nonsensical.

Strictly speaking, within the system of the VCLT, it is not possible to give any preference to a text over another, but just to a meaning over another.

However, if even, in her proposition, the reference to the meanings attributed to the various authentic texts is substituted for the reference to the language versions, the proposition still remains nonsensical since either:

(i) the interpreter has arrived at the conclusion that he cannot construe all the texts in the same way, which by itself demonstrates that some meaning has to prevail over the others, or

(ii) the interpreter has not arrived at such a conclusion, i.e. he can attribute the same meaning to all authentic texts under Articles 31 and 32 VCLT and, therefore, he does not need to apply the last sentence of Article 33(4) VCLT.

3.5.4.2. Evidence from the travaux préparatoires of the VCLT

This interpretation of the term "reconcile" finds support in the *travaux préparatoires* of the VCLT.

First, the possibility that the interpreter had to choose among the meanings provisionally attributed to the various authentic texts was clearly recognized by the members of the ILC.

For instance, before the Vienna Conference modified its text, Article 29 of the 1966 Draft (now Article 33 VCLT) provided that, "when a comparison of the texts discloses a difference of meaning which the application of Articles 27 and 28 does not remove, a meaning which *as far as possible* reconciles the texts shall be adopted".[1154] Thus, by way of the expression "as far as possible", the ILC seemed to admit the possibility that the "final" meaning was to be chosen among those provisionally attributed to the otherwise irreconcilable texts.[1155]

To the same extent, in the course of the ILC 874th meeting, the Special Rapporteur, in replying to an observation submitted by Mr Verdross, affirmed that "[i]t was inadvisable to try to lay down a general rule providing an automatic solution for the

[1153] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 202.
[1154] See YBILC 1966-II, p. 224 (emphasis added).
[1155] See, similarly, S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), p. 274.

case in which two or more authentic texts could not be reconciled. If, after resort to all the means of interpretation set out in Article 69 and the further means set out in Article 70, it was found impossible to determine the meaning of a treaty provision, then, according to paragraph 4 of the new Article 72, an attempt must be made to find a meaning which as far as possible reconciled the various authentic texts. Beyond that it was inadvisable to go, and *if no reconciliation of the texts was possible*, *the interpretation should be left to be determined in the light of all the circumstances*."[1156]

The Commentary to Article 29 of the 1966 Draft[1157] was even more explicit in this respect and stated that:

> (i) the presumption that the treaty terms are intended to have the same meaning in each authentic text "requires that every effort should be made to find a common meaning for the texts *before preferring one to another*" and
> (ii) "[t]he plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should *first* be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation".

Second, from the reading of the minutes of the Vienna Conference it may be inferred that one of the main reasons that led the contracting States to modify the text of Article 29(3) of the 1966 Draft and to adopt the current text of Article 33(4) VCLT was exactly the need to introduce a rule that might give some guidance to the interpreter in case he had to choose among the possible meanings attributable to the various authentic texts.

In the course of the first session of the Vienna Conference, the United States[1158] suggested redrafting the last paragraph of Article 29 in order to include the following clause: "a meaning shall be adopted which is most consonant with the object and purpose of the treaty".

According to the United States, under such a clause, in cases of persistent differences between the various language versions of a treaty, not a meaning that as far as possible reconciled the texts had to be adopted, but the meaning most consonant with the object and purpose of the treaty, thus explicitly recognizing the eventuality that in certain cases the reconciliation of the different language versions was impossible. The United States representative, in introducing this proposal, stressed that reconciliation of the different language versions was sometimes impossible and this was especially true where a problem of multijuralism occurred, i.e. where the treaty dealt with legal issues and two or more systems of law were involved. According to the United States representative, in such cases it often happened that there was no legal concept in one system that exactly corresponded to a certain legal concept in the other system. Therefore, even if two "equivalent" terms were used, the legal concepts underlying and

[1156] See YBILC 1966-I (part II), p. 210, para. 33 (*emphasis* added).
[1157] See YBILC 1966-II, p. 225, para. 7 (*emphasis* added).
[1158] With reference to the proposals put forward by the United States, see UNCLT-Doc, p. 151.

expressed by them could be non-reconcilable.[1159]

The Republic of Vietnam and Australia took a similar approach in this respect, although the latter suggested certain modifications to the text proposed by the United States.[1160]

The Drafting Committee of the Vienna Conference presented a redrafted text of Article 29 to the Committee of the Whole at its 74th meeting, held on 16 May 1968.[1161] Mr Yasseen, in his capacity of Chairman of the Drafting Committee, explained to the Committee of the Whole that the Drafting Committee decided to embrace the idea underlying the United States suggestion of adopting the meaning closest to the object and purpose of the treaty for the purpose of reconciling the different texts.[1162] In this respect, the position taken by the Drafting Committee seemed to be largely influenced by the compromise proposal put forward by Australia. The new text proposed by the Drafting Committee was approved without formal vote and recommended to the Conference for adoption.[1163] The Vienna Conference eventually approved it.

3.5.4.3. The concordant position of certain scholars

Other scholars have also allowed the possibility for the interpreter to give preference to (the meaning attributable to) a single authentic text over the others.

According to Hilf, for instance, where reconciliation of the texts by means of the application of the interpretative rules enshrined in Articles 31 and 32 VCLT has failed, Articles 33(4) VCLT admits the possibility of giving preference to the meaning of the text that is most in accord with the object and purpose of the treaty.[1164]

Gardiner affirmed that "[a]s article 33(4) requires that regard be had to the object and purpose of the treaty when achieving this reconciliation, the process seems more one of selecting a meaning by application of that criterion than trying to find commonality between elements of provisions whose differences have already become so apparent as to raise the need for reconciliation."[1165]

[1159] See UNCLT-1st, p. 189, para. 41. See, in this respect, also the comment on Part III of the ILC's 1964 Draft made by the Yugoslavian government (YBILC 1966-II, p. 361).
[1160] With reference to the proposals put forward by the Republic of Vietnam, see UNCLT-Doc, p. 151 and UNCLT-1st, p. 189, para. 45. With reference to the proposals put forward by the Australia, see UNCLT-Doc, p. 151 and UNCLT-1st, p. 189, paras. 52-53.
[1161] See UNCLT-1st, p. 442. para. 35.
[1162] See UNCLT-1st, p. 443, para. 38.
[1163] See UNCLT-1st, p. 443, para. 38.
[1164] See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 102. Similarly J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 301 and F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 405-406.
[1165] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 360.

Finally, Linderfalk rightly pointed out that "[o]ne cannot reasonably assume the parties to the Vienna Convention to have envisioned the meaning of the VCLT article [33(4)] in such a way that an applier – seeking to identify the meaning that best reconciles the authenticated texts – can choose not only a meaning already given, but also other possible meanings. Comparison must be limited to the meanings already given. […] the applier must choose between meaning M1 and meaning M2 [*author's note*: those being the ordinary meaning attributed to the authentic text 1 and the authentic text 2, on the basis of an interpretation conformed to the rules enshrined in Articles 31 and 32 VCLT]."[1166]

3.5.4.4. The decision of the Arbitral Tribunal for the Agreement on German External Debts in the Young Loan arbitration

International courts and tribunals have also admitted that, for the purpose of reconciling otherwise irreconcilable authentic texts, it is necessary to adopt the meaning attributable to one (or more) of them and discharge the others.

The traditional reference, in this respect, is to the *Young Loan* arbitration.

In that case, the majority of the Tribunal held that "[t]he repeated reference by Article 33 (4) of the [VCLT] to the 'object and purpose' of the treaty means in effect nothing else than that any person having to interpret a plurilingual international treaty has the opportunity of resolving any divergence in the texts which persists, after the principles of Articles 31 and 32 of the [VCLT] have been applied, by opting, for a final interpretation, for the one or the other text which in his opinion most closely approaches the 'object and purpose' of the treaty. Application of Article 33 (4) of the [VCLT] to the case under decision means that the Arbitral Tribunal has the right - and the duty - to adopt that interpretation of the clause in dispute which most closely approaches the object and purpose of the LDA."[1167]

Similarly, the three dissenting Arbiters affirmed that "[i]n cases where it is obvious that the terms used in the different authentic languages have different meanings that can be 'reconciled' only by adopting one or the other, it becomes necessary to apply rules of interpretation not specifically codified by the Convention. For this purpose the rules of customary International Law will govern. Resort to such customary rules is specifically affirmed in the last paragraph of the preamble of the [Vienna Convention on the Law of

[1166] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 363.
[1167] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 548, para. 39.

Treaties]".[1168]

The dissenting Arbiters concluded that customary rules of interpretation allowed and, in the case at stake, required giving a special weight to the drafted text in order to interpret multilingual treaties,[1169] which actually seemed to be a reasonable solution in light of the particular overall context (including the *travaux préparatoires* and the facts and circumstances of the negotiation and conclusion of the LDA).[1170]

It is interesting to note, however, that Gardiner[1171] gave an apparently different reading of the Arbitral Tribunal decision in the *Young Loan* arbitration case.

According to Gardiner, by choosing to give effect to the meaning attributed to the German authentic text of Article 2(2) of Annex 1 of the LDA, the Tribunal substantially reconciled such a text with the other authentic texts of the treaty, namely those in the French and English languages, since the meaning attributed the latter were wide enough to encompass the meaning attributed to the former.

In that case, the reconciliation consisted in choosing the "more restrictive"[1172] meaning, i.e., the meaning that was within the range of possibilities in all three languages,[1173] although the Tribunal described its solution as one of selecting the meaning attributed to one authentic text (the German authentic text), over the others, as that most in line with the object and purpose of the treaty.[1174]

The author does not share the reading of the case given by Gardiner.

It must be preliminarily noted that the Tribunal did not proceed as Gardiner described.

First, it concluded that the different texts might be construed so as to remove any

[1168] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578, para. 37.

[1169] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578-585, paras. 37-41.

[1170] See para. 4 of the commentary to Articles 27-28 (YBILC 1966-II, p. 218, para. 4) and para. 9 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 226, para. 9).

[1171] R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 382-383.

[1172] This term is not used by Gardiner; it is derived from the Commentary to Article 75 of the Sir Humphrey Waldock's Third report on the law of treaties (YBILC 1964-II, p. 65, para. 8).

[1173] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 382. In other terms, Gardiner seems to mean that the Tribunal selected the only meaning whose denotata were all denoted also by the other meanings. Since the relevant terms in the French ("dépréciée") and English ("depreciated") texts of Article 2(2) of Annex 1 of the LDA had been interpreted as denoting both formal currency devaluations and actual currency depreciations due to the revaluation of other currencies, while the term used in the German text ("Abwertung") had been interpreted as denoting only formal currency devaluations, the latter meaning was the only one whose denotata (i.e. formal currency devaluations) were all also denoted by the other meaning (the contrary, in fact, was not true, since certain denotata of the French and English terms, as interpreted by the Tribunal according to Gardiner, namely the actual currency depreciations due to the revaluation of other currencies, were not denoted by the German term, as interpreted by the Tribunal).

[1174] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 548-550, paras. 39 and 41.

prima facie divergence of meanings by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT.[1175]

Then, it stated that "even if credence were given to the view that the discrepancy between the meaning of the German text of the disputed clause, on the one hand, and that of the English and French texts, on the other, could not be resolved by interpretation in the terms of Article 31(1)" VCLT, the application of the last sentence of Article 33(4) VCLT, according to which "any discrepancy between the several authentic texts of a treaty that cannot be eliminated by applying the principles of Articles 31 and 32 should ultimately be settled by attaching that meaning to the provision in question 'which best reconciles the texts, having regard to the object and purpose of the treaty' ", would lead to the same conclusion.[1176]

That said, even limiting the present analysis to the way in which the Tribunal applied the final clause of Article 33(4) VCLT in order to support the latter statement, it does not seem that the reading of the Tribunal's arguments given by Gardiner may be shared.

First, such a reading is misleading, since it may induce the reader to believe that the Tribunal, in that part of its reasoning, found out an ordinary meaning common to all three authentic texts, while, in fact, the Tribunal:

(i) clearly stated that it was dealing with the hypothetical situation in which the apparent discrepancy between the various authentic texts could not be resolved by an interpretation made in accordance with Article 31(1) VCLT and

(ii) concluded that, in such a hypothetical situation, the only solution available consisted in "opting" for one of the conflicting meanings.

Second, that reading might be seen as supporting the idea that reconciliation of otherwise irreconcilable texts could be fairly done by means of choosing the most restrictive meaning, that being the one "within the range of possibilities in all" authentic texts. However, this author submits that such a solution should be rejected as a general rule (and, in fact, the ILC rejected it as such),[1177] since it actually leads the interpreter to

[1175] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 548, paras. 37-38.

[1176] See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 548, paras. 38-39.

[1177] See section 3.4.4 of this chapter. That solution was explicitly rejected by the ILC in the Commentary to Article 29 of the 1966 Draft, where it stated that (i) the reading given by certain scholars of the PCIJ's decision in the *Mavrommatis Palestine Concessions* case, according to which the most limited (restrictive) interpretation that can be made to harmonize with all authentic texts is the one which must always be adopted, could not be accepted and that (ii) whether a restrictive interpretation is to be adopted depends upon the nature of the treaty and the particular context in which the ambiguous term occurs (see YBILC 1966-II, pp. 225-226, para. 8). See, similarly, J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80.

[1177] It may be reasonably upheld, for instance, that the drafted text could play a relevant role in the selection of the meaning to be attributed to the otherwise irreconcilable authentic texts and for the purpose of its justification (see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578-585, paras. 37-41).

choose among the meanings provisionally attributable to equally authoritative texts on the basis of a purely accidental element, i.e. that the concept underlying the relevant term used in the "chosen" text denotes a group of items that is a subset of the group of items denoted by the corresponding terms used in the other authentic texts.[1178]

3.5.5. The relevance of the object and purpose of the treaty in order to reconcile the otherwise diverging texts

With regard to the issue of which meaning should be selected in order to reconcile the authentic treaty texts, it seems fairly obvious that such a meaning should be the one that best reflects the common intention of the parties. In order to select that meaning, the interpreter assesses and balances all the available elements and items of evidence,[1179] although he appears bound to ascribe a significant weight to the object and purpose of the treaty due to the specific reference thereto included in Article 33(4) VCLT.[1180]

The reference to the "object and purpose of the treaty" in Article 33(4) VCLT, however, raises two questions that need to be addressed.

The first question concerns "which" object and purpose of the treaty should be taken into account in order to apply the last clause of Article 33(4) VCLT, since it is possible, and indeed not infrequent, that a treaty has many objects and purposes. Gaja, in this respect, pointed out that "the reference to the object and purpose of a treaty raises difficulties because treaties generally do not define their object and purpose and, moreover, may have a plurality of objects and purposes, without establishing any clear hierarchy among those objects and purposes".[1181]

[1178] Such a solution, in fact, had been explicitly rejected by the ILC in the Commentary to Article 29 of the 1966 Draft, where it stated that (i) the reading given by certain scholars of the PCIJ's decision in the *Mavrommatis Palestine Concessions* case, according to which the most limited (restrictive) interpretation that can be made to harmonize with all authentic texts is the one which must always be adopted, could not be accepted and that (ii) whether a restrictive interpretation is to be adopted depends upon the nature of the treaty and the particular context in which the ambiguous term occurs (see YBILC 1966-II, pp. 225-226, para. 8; see, similarly, J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80).

[1179] It may be reasonably upheld, for instance, that the drafted text could play a relevant role in the selection of the meaning to be attributed to the otherwise irreconcilable authentic texts and for the purpose of its justification (see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578-585, paras. 37-41).

[1180] It goes without saying that the meaning to be adopted cannot contrast with the object and purpose of the treaty (or that of the construed provision), as otherwise:

(i) it would prove to be an unreasonable meaning and, as such, contrary to an interpretation in good faith of the treaty;

(ii) *a fortiori* - it could not be regarded as one of the reasonable meanings preliminary attributed to the various authentic texts and, thus, it could not be one of the meanings among which the interpreter could select the "final" utterance meaning.

[1181] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and*

The interpretative problem created by the plurality of the treaty's objects and purposes may be overcome where the provision to be construed appears to pursue only one of such objects and purposes. In such a case, it may be reasonably upheld that the specific object and purpose of that provision is the one that must be taken into account in order to apply Article 33(4) VCLT.

However, this is not always the case, since some objects and purposes may underlie all treaty provisions and, in turn, certain treaty provisions may be regarded as pursuing more than one object and purpose. In such cases, the interpreter must balance the relevant objects and purposes, in order to find a reasonable equilibrium among them with reference to the specific situation at stake, in the same way as he would do in respect of potentially conflicting principles of law.

The second question concerns the double reference to the object and purpose of the treaty included in Article 33(4) VCLT. In this respect, it has been correctly pointed out that the object and purpose of the treaty comes into operation twice in the process of resolving apparent divergences of meanings between the various authentic texts, i.e.:

(i) indirectly, through the reference to the general rule of interpretation encompassed in Article 31 VCLT, which includes the object and purpose of the treaty among the primary means of interpretation;

(ii) directly, in cases of residual divergences, where it is stated that in reconciling the various authentic texts the interpreter must have "regard to the object and purpose of the treaty".[1182]

The existence of such a double reference to the object and purpose of the treaty was criticized by some delegations at the Vienna Conference.[1183]

Among scholars, Mössner considered redundant the reference to Articles 31 and 32 made by Article 33(4) VCLT, since generally a divergence between the various authentic texts would be discovered during the routine interpretation process provided for in Articles 31 and 32 VCLT and, therefore, already tackled through their application for the purpose of removing it.[1184]

Similarly, Hilf doubted the usefulness of a reference to the object and purpose of the treaty in order to solve a divergence that could not have been removed by an interpretation based on the rules enshrined in Articles 31 and 32 VCLT, in which the

---

Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 94.

[1182] See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 101; P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 425.

[1183] In particular, the criticism was raised by the representatives of Israel and Trinidad Tobago (see UNCLT-1st, p. 190, paras. 66 and 68 respectively).

[1184] See J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 300 *et seq*.

object and purpose of the treaty also played a relevant role. The author, however, recognized that the double reference to the object and purpose of the treaty at least made clear that the interpreter should adopt the meaning most compatible with such object and purpose.[1185]

Germer considered such a double reference to be artificial, since the problems arising in connection with a divergence between different authentic texts would be essentially the same as those encountered in respect of a divergence between different provisions of a treaty authenticated in a single language. In both cases, the purpose of the interpreter would be to find out the meaning that the contracting States intended to attach to the terms of the treaty.[1186]

Contrary to the above scholars, Engelen maintained that the repeated reference, in Article 33(4) VCLT, to the object and purpose of the treaty is not without significance.

On the one hand, Article 31 VCLT emphasizes the primacy of the text of the treaty and does not admit of teleological interpretations going beyond what is expressed or necessarily implied in the text. In this context, the object and purpose of the treaty plays a limited role, being taken into account for the purpose of determining the ordinary meaning attributable to undefined terms.

On the other hand, Article 33(4) VCLT places the main emphasis on the object and purpose of the treaty and admits, as a last resort, of more liberal interpretations in an effort to reconcile the authentic texts, which would not be admissible in applying Article

---

[1185] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 101-102.

[1186] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq*., at 425-426.
In this respect, this author submits that Germer, although concluding in a reasonable manner by making reference to the intention of the parties, used the wrong analogy since the problems faced by the interpreter in the two cases he mentioned are not "essentially the same". Although they certainly present certain similarities, the relation between two potentially antinomic provisions (rules) differs from the relation between two authentic texts of same provision (rule). With reference to the former, the scope, the contexts and the objects and purposes of the two provisions (rules) are not the same and their comparison and the analysis of their interaction generally play a fundamental role for the purpose of removing the apparent antinomy. With regard to the latter, there is only one scope, one context and one set of objects and purposes, since only one provision (rule) is at stake. Therefore, the above-mentioned dynamic analysis (comparison and analysis of the interaction) cannot be applied to the latter and a more static type of analysis has to be performed instead. In addition, the solution of the potential antinomies is generally different: while in the case of apparently divergent authentic texts the interpreter may choose between the meaning provisionally attributed to one text and that provisionally attributed to the other text in order to determine their common meaning, in the case of apparently incompatible provisions (rules) of a treaty, the interpreter is called upon to modify the apparent scope of one (or both) of them, without the possibility of simply discharging one of the two. All in all, in one case the interpreter is faced with two distinct rules, while in the other he is faced with a single rule expressed by means of two distinct utterances. Hence, the purpose of the interpretation is different: in the former case, the interpreter is called to determine the exact scope of each rule, in order to eliminate possible antinomies (i.e. to eliminate the possibility that their contextual application to a single instance will lead to contrary results); in the latter case, the interpreter is called upon to construe two (or more) utterances in order to determine their single utterance meaning, i.e. the single rule.

31 VCLT.[1187]

In a similar vein, Tabory concluded that the purpose of the reference to the treaty object and purpose is different on the two occasions, since in the closing provision of Article 33 VCLT, the reference could be seen as a warning to the interpreter not to abandon the due regard for the "object and purpose" when reconciling the various authentic texts, even where other elements of the general rule of interpretation had been abandoned.[1188]

In broad terms, the thesis put forward by Engelen and Tabory appears the most convincing, as it makes clear that the roles played by the treaty object and purpose in Article 31 VCLT and in the last sentence of Article 33(4) VCLT are different.

As mentioned in the previous sections, the last sentence of Article 33(4) VCLT requires the interpreter who could not find a common meaning attributable to all authentic texts by applying Articles 31 and 32 VCLT[1189] to choose among the various meanings provisionally attributed to such texts in order to establish the treaty utterance meaning. In this regard, the object and purpose of the treaty works as the most important yardstick for the interpreter to choose among those meanings.

How such a yardstick is actually used by the interpreter depends on the particular circumstances of the case and on the personal background of the interpreter: the actual approach may range from the position expressed by Linderfalk, according to whom the interpreter has to choose the interpretation through which the object and purpose of the treaty is best realized,[1190] to that supported by Gaja, who submitted that the "object and purpose" constitutes the "framework" within which the texts have to be reconciled, i.e. the choice between the possible meanings has to be made.[1191]

[1187] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 403-404.

[1188] See, in this sense, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 212-213.

[1189] In the context of Articles 31 and 32 VCLT, the object and purpose of the treaty plays a double role: first, it constitutes a relevant element to be considered in order to determine the common "ordinary" meaning to be attached to the corresponding terms used in the various authentic texts: second, it functions as a external limit that draws the borderline between reasonable and unreasonable (i.e. contrary to good faith) interpretations of the treaty.

[1190] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 366.

[1191] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 94. Gaja further clarifies his position on the role theoretically played by the "object and purpose" in Article 33(4) VCLT (although recognizing that the case law analysis seems to confirm a trend towards giving decisive weight to such criterion in order to overcome divergences in multilingual texts – see *ibidem*, p. 98) by stating that "only an interpretation that is sustainable according to the object an purpose of the treaty could be viable to this effect" (see *ibidem,* p. 94). According to the author, however, the requirement that the reconciling interpretation (i.e. meaning) must be "sustainable according to the object an purpose of the treaty" seems redundant at this stage of the analysis/justification process, for any interpretation (i.e. meaning) not being sustainable according to the object an purpose of the treaties should have been already rejected as non-admissible under the rules of interpretation provided for under Articles 31 and 32 VCLT, which would exclude it from the array of possible interpretations (i.e. meanings), remaining after the application of said Articles 31 and 32, among which the reconciling interpretation (i.e. meaning) is to be chosen.

Conversely, the author does not share the idea, underlying the thesis upheld by Engelen and Tabory, that the last sentence of Article 33(4) VCLT allows the interpreter to have recourse to more liberal interpretations and to abandon the other elements of the general rules of interpretation. This aspect is further examined in the following section.

3.5.6. Article 33(4) VCLT and special meanings

As the last sentence of Article 33(4) VCLT requires the interpreter, in order to establish the final utterance meaning, to choose among the various meanings provisionally attributed to the authentic treaty texts in accordance with Articles 31 and 32 VCLT, the author submits that the final utterance meaning is always established through the application of the ordinary rules of interpretation (enshrined in Articles 31 and 32 VCLT) to one of the authentic treaty texts.

However, since in this case the final utterance meaning differs from the meanings provisionally attributed to (at least) some of the authentic treaty texts,[1192] which in turn were determined under the broadest application of the interpretative rules enshrined in Articles 31 and 32 VCLT, the question arises of whether the final utterance meaning might also be regarded as the result of the application of the general rules of interpretation (enshrined in Articles 31 and 32 VCLT) to such authentic treaty texts.

A brief example may help clarify that issue. Consider a treaty with two language authentic texts (A and B), which have been construed by the interpreter under Articles 31 and 32 VCLT as meaning "X" and "Y", respectively. Assume that the interpreter has established that the meaning that "best reconciles the texts, having regard to the object and purpose of the treaty" is "X". Obviously, meaning "X" may be regarded as the result of the application of the rules of interpretation enshrined in Articles 31 and 32 VCLT to text A. However, the legitimate question arises of whether meaning "X" might also be regarded as the result of the application of the rules of interpretation enshrined in Articles 31 and 32 VCLT to text B.

If the question is answered in the positive, this implies that the application of the last clause of Article 33(4) VCLT was not necessary and, strictly speaking, that that clause cannot be said to have been applied, since its prerequisite was not fulfilled (i.e. no difference of meaning existed that the application of Articles 31 and 32 did not remove). Hence, this answer leads to the conclusion that the final clause of Article 33(4) VCLT is never applicable.

If the question is answered in the negative, conversely, this means that treaties may be legitimately construed in a way that is contrary to that compelled by the rules of interpretation enshrined in Articles 31 and 32 VCLT, which in turn would destroy the foundations of the customary system of interpretation codified by the VCLT, since the

[1192] Otherwise the interpreter would not have had the need to apply the rule encompassed in the last sentence of Article 33(4) VCLT.

very same VCLT would allow the non-application of its rules of interpretation in order to construe a treaty text, thus reducing them to no more than a set of non-binding suggestions.

The author submits that this apparent paradox should be disentangled as follows.

First, the latter answer should be rejected in order to preserve the reliability and the internal coherence of the VCLT system of interpretation.

In fact, its acceptance would imply for the interpreter to have at his disposal two sets of interpretative rules: one set, made up exclusively of the rules enshrined in Articles 31 and 32 VCLT, to be used where monolingual treaties are at stake and another set, made up of both the rules enshrined in Articles 31 and 32 VCLT and some other (teleological?) rule, to be applied to multilingual treaties.

The existence of such a double set of rules, apart from being internally incoherent, could be relied on by the interpreter in order to argue in favor of a final utterance meaning that could not be reasonably attributed to any of the authentic texts on the basis of Articles 31 and 32 VCLT, since Article 33(4) VCLT would in this case allow the interpreter to liberally and teleologically construe all authentic treaty texts.[1193]

Second, the argument is put forward that the last sentence of Article 33(4) must be construed as a rule that indirectly allows the interpreter to take, as the "special meaning" that the parties intended to attach to a certain term used in one of the authentic treaty texts, the meaning provisionally attributed to the corresponding term used in another authentic text and eventually chosen by the interpreter as the final utterance meaning thereof, i.e. as the meaning that "best reconciles the texts, having regard to the object and purpose of the treaty".

In this respect, the author does not share the proposition, made by Engelen, that "[s]imply preferring one authentic text to another is no doubt in flagrant contradiction of the principle of equal authority of the texts (Article 33(1) VCLT)"[1194] since the choice made by the interpreter:

(i) is not between the two authentic texts, but between the meanings provisionally attributed thereto;

(ii) is aimed solely at determining the final utterance meaning common to all authentic texts;

(iii) entails the adoption of the (ordinary or special) meaning provisionally attributed to a term employed in one authentic text[1195] as the special meaning of the corresponding term employed in the other authentic text.[1196]

[1193] Engelen and Tabory apparently consider that the last sentence of Article 33(4) VCLT allows the interpreter to opt for such an interpretation (see previous section).

[1194] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 405.

[1195] On the basis of the rules of interpretation enshrined in Article 31 and 32 VCLT.

[1196] The same, *mutatis mutandis*, holds true with regard to the expressions (and not terms) used in the various authentic texts, as well as in cases where a corresponding term or expression does not compare in a certain authentic text, but nonetheless it may be implied therein.

Under this perspective:

(i) the fact that the (ordinary or special) meaning provisionally attributed to a certain term(s) in one (or more) authentic text(s) is regarded as the meaning "which best reconciles the texts, having regard to the object and purpose of the treaty", is thus taken as the decisive evidence of the common intention of the parties to attach that meaning, as a "special meaning", to the corresponding terms used in the other authentic texts;

(ii) the last sentence of Article 33(4) VCLT is regarded as a rule of a purely procedural nature, purporting to offer a way out for those interpreters that considered the attribution of a certain special meaning to the relevant treaty term as an intolerable stretch of its reasonable meaning.

3.5.7. Conclusions on research question f)

Under Article 33(4) VCLT, where a comparison of the authentic treaty texts discloses a difference of meaning that the application of Articles 31 and 32 VCLT does not remove, the interpreter must adopt "the meaning which best reconciles the texts". Such an expression must be read in its context, which first and foremost includes the underlying principle of the unity of the treaty and the connected rule of law, reflected in Article 33(3), that all authentic texts *do have* the same meaning.[1197]

In that context, the use of the term "reconcile" simply means that the interpreter must attribute to all authentic texts a single meaning, notwithstanding the fact that such a meaning could not be provisionally attributed to all those texts on the basis of an interpretation made in accordance with the provisions of Articles 31 and 32 VCLT.

The activity of the interpreter thus consists in choosing one of the provisional utterance meanings attributable to the various authentic texts in accordance with the provisions of Articles 31 and 32 VCLT and attributing it to all other authentic texts.

The possibility of adopting a meaning that could not be reasonably attributed to any of the authentic texts on the basis of the principles enshrined in Articles 31 and 32 VCLT should be rejected, unless exceptional and very strong evidence exists in favor of such a solution, since it appears contrary to the whole system of interpretation provided for in the VCLT, where the texts of the treaty are the starting point of the interpretative process and the attribution of meaning must comply with the rules provided for in Articles 31 and 32 VCLT. That solution appears unreasonable as well, in that it implies that the contracting States failed to fairly convey their intended message through *all* the authentic texts, even where due weight is given to the overall context.

The meaning to be selected by the interpreter in order to reconcile the authentic treaty texts should be the one that best reflects the common intention of the parties.

In order to select that meaning, the interpreter assesses and balances all available

[1197] See principle (iv) established by the author in section 2 of Chapter 3 of Part I.

elements and items of evidence, although he appears bound to ascribe a significant weight to the object and purpose of the treaty due to the specific reference thereto in Article 33(4) VCLT. In other terms, the object and purpose of the treaty works as the most important yardstick for the interpreter to choose, among the meanings provisionally attributed to the authentic treaty texts on the basis of the principles enshrined in Articles 31 and 32 VCLT, the final utterance meaning of the treaty.

In this respect, since treaties generally have many objects and purposes, the interpreter should use as yardstick those objects and purposes that appear relevant with respect to the provision to be interpreted and balance them in order to find a reasonable equilibrium with reference to the specific situation at stake.

Finally, the last sentence of Article 33(4) should be construed as a rule that indirectly allows the interpreter to take, as the "special meaning" that the parties intended to attach to a certain term used in one of the authentic treaty texts, the (ordinary or special) meaning provisionally attributed to the corresponding term used in another authentic text and eventually chosen by the interpreter as the final utterance meaning, i.e. as the meaning that "best reconciles the texts, having regard to the object and purpose of the treaty". Under this perspective:

(i) the fact that the (ordinary or special) meaning provisionally attributed to a certain term(s) in one (or more) authentic text(s) is regarded as the meaning "which best reconciles the texts, having regard to the object and purpose of the treaty", is thus taken as the decisive evidence of the common intention of the parties to attach that meaning, as a "special meaning", to the corresponding terms used in the other authentic texts;

(ii) the last sentence of Article 33(4) VCLT is regarded as a rule of a purely procedural nature, purporting to offer a way out for those interpreters that considered the attribution of a certain special meaning to the relevant treaty term as an intolerable stretching of its reasonable meaning.

So construed, the rule provided for in the last sentence of Article 33(4) VCLT appears an eminently reasonable solution, since:

(a) it is in line with principle (iv) established by the author in section 2 of Chapter 3 of Part I, according to which any alleged discrepancy in meaning among the authentic texts of a treaty is only apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the number of its authentic texts;

(b) it restates the content of principle (v) established by the author in section 2 of Chapter 3 of Part I, in that, on the one hand, it requires the interpreter to establish the final utterance meaning on the basis of the overall context and, in particular, of the parties' object and purpose and, on the other hand, it does not overestimate the relevance of the treaty texts for the purpose of establishing the final utterance meaning, providing the possibility for the interpreter to attach to the terms used in certain authentic texts a special meaning that might seem

prima facie difficult to attribute to it, but which nonetheless appears to best suit the parties' intention and the treaty's object and purpose.

3.6. The case of the prevailing text

3.6.1. Research questions addressed in this section

The present section is aimed at tackling the following three research (sub)question(s), here briefly illustrated by means of examples.

g) Where the treaty provides that a certain authentic text is to prevail in the case of divergences: (i) at which point of the interpretative process must there be recourse to such a prevailing text?

This issue may be illustrated by taking as case study Article 208 of the Peace Treaty of Saint German, concluded on 10 September 1919 in Saint-Germain-en-Laye.

According to the English authentic thereof, the States to which the territory of the former Austro-Hungarian Monarchy was transferred at the end of World War I and the States arising from the dismemberment of that Monarchy acquired all property and possessions situated within their territories belonging to the former or existing Austrian Government, including "the private property of members of the former Royal Family of Austria-Hungary". The French authentic text of the Treaty, in this respect, made reference to the "biens privés de l'ancienne famille souveraine d'Autriche-Hongrie". Between the English and the French authentic texts, therefore, a *prima facie* divergence in meaning might be alleged to exist, where the former was construed as referring to all private property owned by members of the Royal Family of Austria-Hungary, while the latter was construed as limiting the scope of the provision to the private property directly owned by the Royal Family as such.

Under the final clause of the treaty, the French authentic text of Article 208 was to prevail over the English and Italian authentic texts in cases of divergences.

Assume that the members of the former Royal Family of Austria-Hungary held some of their property in their individual capacity and not together as Royal Family.[1198]

In order to decide whether the property individually held by the members of the former Royal Family could be legitimately transferred to the States arising from the dismemberment of the Monarchy under Article 208 of the Peace Treaty of Saint German, the interpreter could follow two alternative and mutually exclusive argumentative paths, as well as any of the paths lieing between such two extremes. The two outermost argumentative paths that the interpreter might follow are:

(i) he automatically applies the French (prevailing) text, since a *prima facie*

[1198] The example is derived from Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq*. [Case No. 235].

divergence between the French and English texts was alleged to exist;
(ii) he has recourse to all available means of interpretation in order to reconcile the French and English texts, before concluding that there is an actual divergence between the provisional meanings of such texts and, therefore, before relying exclusively on the treaty's prevailing text.

In this respect, the question arises of whether an obligation exists for the interpreter to follow some of the above paths, or, in any case, whether any reason exists to prefer one over the others.

This question is addressed in section 3.6.2.

g) Where the treaty provides that a certain authentic text is to prevail in the case of divergences: (ii) what must the interpreter do if the prevailing text is ambiguous or obscure?

With regard to the previous example and assuming that the French prevailing text appeared ambiguous (or obscure, or unreasonable), what relevance should the interpreter attribute to the other authentic texts for the purpose of construing Article 208 of the Peace Treaty of Saint German, in particular where he concluded that the English and Italian authentic texts pointed towards the same meaning?

This question is addressed in section 3.6.3.

g) Where the treaty provides that a certain authentic text is to prevail in the case of divergences: (iii) what must the interpreter do if the prevailing text contrasts with the other coherent authentic texts?

With regard to the previous example, what should the interpreter do where he provisionally concluded that:

(i) the French (prevailing) text of Article 208 of the Peace Treaty of Saint German did not to allow the transfer of the property individually held by the members of the former Royal Family to the States arising from the dismemberment of the Austro-Hungarian Monarchy, while
(ii) both the English and the Italian authentic texts seemed to permit such a transfer?

Should he try to remove the apparent difference of meaning by having recourse to all available means of interpretation? Where he failed to remove the *prima facie* discrepancy among the French, English and Italian authentic texts, should he opt for the meaning attributable to the most numerous concordant texts, or rely on the French prevailing text?

This question is addressed in section 3.6.4.

3.6.2. When does the recourse to the prevailing text become compulsory?

3.6.2.1. The position of the ILC and the discordant case law of national and international courts and tribunals

As the ILC correctly detected,[1199] the application of treaty provisions giving priority to a particular authentic text in the case of potential divergences in meaning[1200] may raise the difficult issue of the exact point in the interpretative process at which such provision should be put into operation.

In particular, one could wonder whether the prevailing text should be automatically applied as soon as the slightest difference appears between the wordings of the various authentic texts,[1201] or recourse should instead first be had to all the relevant means of interpretation provided for under Articles 31 and 32 VCLT, in order to reconcile the texts, before concluding that there is in effect a divergence between the provisional utterance meanings of such texts.

According to the ILC,[1202] this issue should be resolved by the interpreter on a case-by-case basis, since the intention of the parties inserting such a provision in the treaty might vary greatly from one extreme to the other. In this respect, the interpreter should first and foremost determine the intention of the parties in relation to that issue.

The case law of national and international courts and tribunals mirrors such uncertainty.[1203]

As the ILC also noted, in some cases courts and tribunals simply applied the prevailing text from the outset without going into the question of whether there was an actual divergence between the authentic texts.[1204] As example of such an approach, the ILC referred to the *Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly* case,[1205] in which the PCIJ based its decision exclusively on the French

---

[1199] See paragraph 4 of the commentary to the 1966 Draft (YBILC 1966-II, p. 224, para. 4).

[1200] Infrequently, treaty's final clauses provide that, in the case of divergent or unclear texts, the interpreter has to apply not a predetermined authentic text, but the text that best satisfies certain requirements in the specific case at stake. Although such uncommon final clauses are not deal with in the present study, due to the fact that they hardly ever appear in tax treaties, it may be interesting to reproduce below the text of the declaration (in French) appended to the 1869 Extradition Agreement between Austria-Hungary and Italy, concluded in Florence on 27 February 1869:

> *"Que les deux textes de la Convention, savoir le texte allemand et le texte italien, doivent être considères comme également authentiques, et que s'il pouvait se trouver une divergence entre ces deux textes, de même que s'il surgissait un doute sur l'interprétation suivra l'interprétation la plus favorable a l'extradition du prévenu*."

[1201] Or even from the outset of the interpretative process, without any attempt to apply the other authentic texts.

[1202] See paragraph 4 of the commentary to the 1966 Draft (YBILC 1966-II, p. 224, para. 4).

[1203] For a comprehensive analysis of the case law on this matter before the conclusion of the VCLT, see J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 129-136.

[1204] See paragraph 4 of the commentary to the 1966 Draft (YBILC 1966-II, p. 224, para. 4).

[1205] PCIJ, 12 September 1924, Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly (Bulgaria v. Greece), judgment, pp. 3-10.

authentic text of paragraph 4 of the Annex to Section IV of Part IX of the Treaty of Neuilly,[1206] which was to prevail over the other authentic texts (in the English and Italian languages) in the case of divergences.[1207]

Another instance of such an approach is that of the *Aron Kahane successeur v. Francesco Parisi and the Austrian State* case,[1208] where the Austrian-Romanian Mixed Arbitral Tribunal concluded, contrary to the submission of the Austrian government, that the English authentic text should not be taken into consideration for the purpose of interpreting the Treaty of Saint-Germain.[1209]

According to the Austrian-Romanian Mixed Arbitral Tribunal, the interpretation of the debated provision of the Treaty of Saint-Germain was to be based solely on the French authentic text thereof, apparently due to the fact that, under the final clause of that treaty, in the case of divergence the French text prevailed over the English and Italian authentic texts.[1210]

In other occasions, however, the competent courts and tribunals carried out a comparison of the various authentic texts in order to ascertain the intention of the parties, notwithstanding the fact that the treaty provided for a prevailing text to be applied in cases of discrepancies in meanings.

This was the case, for instance, with reference to the decision delivered by the Supreme Court of Poland in the *Archdukes of the Habsburg-Lorraine House v. the Polish State Treasury* case,[1211] which dealt with the interpretation and application of Article 208 of the Treaty of Saint-Germain.[1212]

The case concerned the claim advanced by the Archdukes of the Habsburg-Lorraine House for the restitution of lands that the Polish State had acquired under Article 208 of the Treaty of Saint-Germain, according to which the States to which the territory of the former Austro-Hungarian Monarchy was transferred and the States arising from the dismemberment of that Monarchy acquired all property and possessions situated within their territories belonging to the former or existing Austrian Government, including "the private property of members of the former Royal Family of Austria-Hungary". The plaintiffs maintained that the acquisition of property by the Polish State was unlawful, since the members of the former Royal Family had held such property

[1206] Treaty concluded on 27 November 1919 in Neuilly-sur-Seine, France.
[1207] See Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly, PCIJ, Ser. A., No. 3, 1924, pp. 5-7.
[1208] Romanian-Austrian Mixed Arbitral Tribunal, 19 March 1929, Aron Kahane successor v. Francesco Parisi and the Austrian State, 8 Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix (1929), 943 *et seq*.
[1209] Treaty concluded on 10 September 1919 in Saint-Germain-en-Laye, France.
[1210] Except with regard to Parts I (Covenant of the League of Nations) and XIII (Labour) of the Treaty, for the purpose of which the French and English texts were considered of equal force.
[1211] See Supreme Court (Poland), 16 June 1930, Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury, 5 Annual digest of public international law cases (1929-1930), 365 *et seq*. [Case No. 235].
[1212] Treaty cocluded on 10 September 1919 in Saint-Germain-en-Laye, France.

(mainly lands) in their individual capacity. For that reason, such property could not be considered to be property of the former Royal Family, i.e. "biens privés de l'ancienne famille souveraine d'Autriche-Hongrie", as provided for by the French authentic text of Article 208 of the Treaty,[1213] which was to prevail over the other authentic texts (in the English and Italian languages) in the case of divergence.[1214]

The Polish Supreme Court, however, dismissed the appeal of the Archdukes of the Habsburg-Lorraine House. In giving grounds for its decision, the Court affirmed the following.[1215]

First, the final clause of the Treaty of Saint-Germain, according to which (i) the treaty was ratified in French, English, and Italian and, (ii) in the case of divergence, the French text of which was to prevail,[1216] had to be interpreted as meaning that all three texts were authentic and therefore relevant for interpretative purposes, the superior status of the French text coming into play only in case the existence of a material divergence was established. In fact, since the contracting parties decided to have texts in different languages, it had to be assumed that their decision was intended to produce some legal consequence, i.e. that they wanted to attribute legal authority to each text for the purpose of the interpretation and application of the treaty. This conclusion drawn by the Court appears in line with the maxim "ut res magis valeat quam pereat", since the contrary assumption that a text (e.g. the English, or Italian text) had no importance at all was tantamount to maintaining that the parties, in having drafted and authenticated it, wished to regard such a text as non-existent.

Second, it was not possible to establish the existence of a material divergence between the various authentic texts without a careful analysis thereof. Such an analysis, carried out with the aid of all available means of interpretation, was purported to determine all possible meanings attributable to the various authentic texts. No material divergence might be said to exist solely because a *prima facie* literal difference existed.

Third, the true significance of the final clause was that, where an authentic text might be interpreted in several ways, one of which reconcilable with the other authentic texts, such a common meaning was to prevail. In fact, a general rule of interpretation existed according to which, where an authentic text is unclear or ambiguous, it is necessary to take into account the meaning of the other authentic texts in order to properly interpret it. Hence, an authentic text could be disregarded only insofar as none of its possible meanings might also be attributed to the text that had to prevail in the case of divergence.

Thus, it seems that the Polish Supreme Court arrived at the conclusion that the

---

[1213] See Supreme Court (Poland), 16 June 1930, Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury, 5 Annual digest of public international law cases (1929-1930), 365 *et seq*. [Case No. 235], at 367.

[1214] See the final clause the Treaty of Saint-Germain (immediately following Article 381 thereof).

[1215] See Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury,* 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq.* [Case No. 235], at 368-371; J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 130-131.

[1216] Except in Parts I (Covenant of the League of Nations) and XIII (Labour), where the French and English texts were of equal force.

only actual difference existing between (i) a final clause providing for the prevalence of one authentic text over the others in the case of divergence and (ii) a final clause simply stating the equal authority of the various authentic texts consists in that where an otherwise irreconcilable difference is established to exist, the former (i) provides the interpreter with a quick and certain means of resolving that divergence, while the latter (ii) does not. Conversely, as long as no material divergence has been proved to exist, both final clauses require the interpreter to carefully analyse the various authentic texts, in order to find, where possible, a meaning common to all of them.[1217]

In the *Clorialdo Devoto v. Austrian State* case,[1218] the Italian-Austrian Mixed Arbitral Tribunal, in interpreting paragraph 4 of the Annex to Section IV of Part X of the Treaty of Saint-Germain,[1219] which instituted a special settlement procedure for claims presented by nationals of an Allied or Associated Power against Austria, interpreted the ambiguous (prevailing) French authentic text in light of the more precise English authentic text, which allowed only one of the meanings attributable to the former. According to the tribunal, such a meaning was also in line with the clear intention of the parties, determined on the basis of all available elements and items of evidence.

Similarly, in the *De Paoli v. Bulgarian State* case,[1220] the Italian-Bulgarian Mixed Arbitral Tribunal, in interpreting Article 179 of the Treaty of Neuilly,[1221] which allowed certain diplomatic or consular claims to be submitted to the Mixed Arbitral Tribunal established under that Treaty, interpreted the ambiguous (prevailing) French authentic text in light of the more precise English authentic text.

In light of this uncertainty the ILC, doubting whether it would have been appropriate to try to resolve such an issue by including a specific rule of interpretation in its draft articles on the Law of Treaties, limited itself to the insertion of a general reservation for cases where the treaties contain this type of provision.[1222]

3.6.2.2. The solution proposed by Hardy and the possible criticisms thereof

As previously mentioned, in facing the ambiguity of the relevant case law on the matter,

[1217] See Supreme Court (Poland), 16 June 1930, Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury, 5 Annual digest of public international law cases (1929-1930), 365 *et seq*. [Case No. 235], at 371, note III.
[1218] See Italian-Austrian Mixed Arbitral Tribunal, 23 April 1924, Clorialdo Devoto v. Austrian State, 4 Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix (1925), 500 *et seq*., at 502; on such a case, see also J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 British Yearbook of International Law (1961), 72 *et seq*., at 134-135.
[1219] Treaty comcluded on 10 September 1919 in Saint-Germain-en-Laye, France.
[1220] See Italian-Bulgarian Mixed Arbitral Tribunal , 8 January 1925, De Paoli v. Bulgarian State, 6 Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix (1927), 451 *et seq*., at 456.
[1221] Treaty concluded on 27 November 1919 in Neuilly-sur-Seine, France.
[1222] I.e. the reservation included in paragraphs 1 and 4 of Article 33 VCLT.

the ILC expressed the view that the issue concerning the exact moment at which the prevailing text should be given precedence was to be resolved by the interpreter on a case-by-case basis, since the intention of the parties might vary considerably in this respect. Therefore, the quest of the interpreter should first and foremost be directed to ascertaining the intention of the parties with regard to the meaning of the relevant final clause.

The conclusion of the ILC, although reasonable in theory, presents a significant drawback in its actual application. In fact, as Hardy correctly pointed out, "final clauses are nearly always drawn up somewhat automatically",[1223] so that it is reasonable to assume that the contracting States generally do not really discuss with each other the meaning to be attached thereto and, even worse, they probably do not have any accurate idea of when the prevailing text should be given precedence.

Hardy,[1224] in order to overcome the interpretative problem stemming from the fact that "final clauses are nearly always drawn up somewhat automatically", suggested that the intention of the parties that agreed on the adoption of a final clause providing for a prevailing text in the case of divergence seems to be, "above all, to eliminate any uncertainty that might arise from the plurality of texts and to provide the judge with a sure and rapid means of settling any dispute on the subject".

He continued by saying that "to require of a judge that he constantly keep comparing the texts and only as a last resort recognize that the authentic text [ed.'s note: the prevailing authentic text] must prevail would seem contrary to that intention".

Then, although recognizing that it would be somewhat arbitrary to set an exact limit up to which the effort at textual conciliation should be sustained by the adjudicator before the prevailing text is actually given precedence, Hardy concluded that it would appear reasonable to say that there is a divergence and, consequently, an obligation to apply the prevailing text as soon as the comparison of the texts no longer suffices to reconcile them. He supported such a conclusion by affirming that "the only type of divergence which the contracting parties would normally have in mind is a purely verbal or prima facie divergence, for the much more complex notion of a discrepancy which cannot be solved except by the most subtle process of construction can only be grasped

[1223] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132. See also A. Parolini, "Italy", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 255, where the author admits that it is "not altogether clear whether the different wordings of the "prevalence" clause [in Italian tax treaties] are meant to reach different results" (the typical wordings of such clauses, in the Italian tax treaty practice, are the following: "in case of doubt", "in case of dispute", in case of divergences in interpretation", "in case of divergences in interpretation and application of the treaty"); similarly, R. Cadosch, "Switzerland", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 303 *et seq.*, at 310-311, who notes, with regard to Swiss tax treaties, that "[t]here is no obvious reason for a different wording of the [prevalence] clause, and Switzerland's Federal Tax Administration does not assume any difference in practice".

[1224] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132.

after exhaustive study of the relevant case law" and that, in "any event, when the texts can only be reconciled by reference to the preparatory work, a refusal to apply the authentic text [ed.'s note: the prevailing authentic text] would render the relevant final clauses wholly meaningless and constitute a flagrant disregard of the will of the contracting parties".[1225]

The reasoning and conclusions upheld by Hardy may be criticized in several respects, just as Hardy found to be the case with regard to the decision delivered by the Polish Supreme Court in the *Archdukes of the Habsburg-Lorraine House v. the Polish State Treasury* case.

First, Hardy did not give any reason in support of the presumption that the intention of the contracting parties, when introducing a highly routine and automatic final clause providing for a prevailing text in the case of divergence, is (also) to "to provide the judge with a sure and rapid means of settling any dispute on the subject".

One could presume as well that the intention of the parties is to provide the interpreter with a single and clear means to construe the multilingual treaty where no (other) reconciliation appears possible, i.e. where no single reasonable meaning may be attributed to all authentic texts when they are interpreted in good faith and the light of the overall context.[1226]

Second, the assertion that "the only type of divergence which the contracting parties would normally have in mind is a purely verbal or *prima facie* divergence" clashes with the previous claim that "final clauses are nearly always drawn up somewhat automatically", since the latter seems to imply that the contracting States, when agreeing on the inclusion of the relevant final clause, probably do not have any accurate idea of when the prevailing text should be given precedence, while the former suggests that such contracting States generally have a clear idea thereof and draw the final clause accordingly: therefore the two sentences are contrary, even if not (necessarily) contradictory.

Third, that very same assertion ("the only type of divergence which the contracting parties would normally have in mind is a purely verbal or *prima facie* divergence") is not supported by any adequate evidence: why could the contracting parties not have in mind the divergence remaining between the meanings attached to two (or more) authentic

[1225] See, accordingly, T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 31, where the authors submit that "the parties precisely intended to avoid the exacting task of reconciling the different texts by applying the rather "abstract" rules of interpretation set forth in the Vienna Convention. In case of divergence, these rules at least require a careful comparison of the three texts, and because of the language barrier, this would raise serious practical difficulties. […] It is, therefore, submitted that a *prima facie* divergence of interpretation between the [two] texts should suffice to invoke the supremacy of the [prevailing] text".

[1226] I.e. in accordance with the rules of interpretations enshrined in Articles 31 and 32 VCLT.

texts after they have been interpreted in light of their overall context, i.e. by taking into account all the relevant elements and items of evidence?

Moreover, the connected reference to "the exhaustive study of the relevant case law", which would be necessary in order to grasp the "much more complex notion of a discrepancy which cannot be solved except by the most subtle process of construction", is absolutely misleading and probably the result of a conceptual confusion: the contracting States do not need to have in mind all the possible divergences and uncertainties that might arise with reference to all the provisions of a treaty in order to be aware of the possibility that such "complex discrepancies" may result from the interpretation of the different authentic texts thereof. The average experience of an international lawyer or diplomat suffices more than abundantly in this respect.

Finally, the conclusion that, "when the [authentic] texts can only be reconciled by reference to the preparatory work, a refusal to apply the [prevailing text] would render the relevant final clauses wholly meaningless" is false: where the intention of the parties is to provide the interpreter with a single and clear means to construe the multilingual treaty in case no reconciliation appears possible in light of the ordinary rules of interpretation,[1227] a reconciliation of the authentic texts (also) by reference to the *travaux préparatoires* does not render the final clause meaningless, it simply render superfluous the recourse to the prevailing text in the specific case.

3.6.2.3. The solution proposed by the author

The author submits that, unless some decisive evidence to the contrary is available,[1228] final clauses providing for a prevailing text in the case of divergences should be construed as requiring the interpreter to compare the *prima facie* divergent authentic texts in light of all the available elements and items of evidence, in order to determine whether a reconciliation is possible by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, before relying exclusively on the prevailing text.[1229]

The apparently divergent authentic texts, therefore, should be construed in light of the overall context and compared with each other in the quest for a common meaning. Only where, at the end of the interpretative process, no common meaning may be reasonably said to exist should preference be given to the meaning of the prevailing text.[1230]

[1227] I.e. the rules of interpretations enshrined in Articles 31 and 32 VCLT.

[1228] Such evidence may stem from the analysis of any of the means of interpretation provided for under Articles 31 and 32 VCLT.

[1229] See L. Ehrlich, "L'interprétation des traités", 24 *RCADI* (1928), 5 *et seq.*, at 98-99 and Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 973.

[1230] Somewhat similarly, Jennings and Watts maintained that the presumption of equal meaning enshrined in Article 33(3) VCLT "suggests that, even where the parties stipulate that one or two authentic texts shall prevail, they should normally be taken to intend that some attempt should first be made to reconcile the authentic texts so as to discover whether there really is any divergence, rather then the 'master' text should be

There are several arguments that may be relied upon in order to support this conclusion.

First, from logical and semantic perspectives, no divergence in meaning between two or more authentic texts may be said to exist before the meaning thereof have been determined. Thus, since:

(i) the only possible meaning for interpretative purposes is the utterance meaning and

(ii) the utterance meaning is the result of the process of interpretation of an authentic text in light of the overall context and, in particular, of the elements and means of interpretation enshrined in Articles 31 and 32 VCLT,

no divergence between the authentic texts may be said to exist before such texts are construed in light of the overall context and by applying the rules of interpretation provided for in Articles 31 and 32 VCLT.

Second, the conclusion put forward by the author fits better (than the conflicting solution upheld by Hardy) in the system of the VCLT. As the ILC correctly pointed out, although plurilingual in expression, any treaty remains one in law. In particular:

(i) "in law there is only one treaty - one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge";[1231]

(ii) "[p]lurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the rules set out in Articles 27 and 28 [ed.'s note: now Articles 31 and 32 VCLT]. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another";[1232]

(iii) "whether the ambiguity or obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of

---

applied automatically right at the outset" (see R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), p. 1283, note 3).

[1231] See paragraph 6 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 6).

[1232] See paragraph 7 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7).

the parties by recourse to the normal means of interpretation".[1233]

Even where the parties have agreed that, in the case of divergence, a specific authentic text is to prevail, the treaty remains one in law and the very same fact that the priority of the prevailing text is relevant only in the case of a divergence supports such a conclusion.

In this perspective, the solution put forward by the author, in the absence of strong evidence in favor of a different intention of the parties, preserves as much as possible the unity of the treaty, requiring the interpreter to compare the *prima facie* diverging texts and to construe them on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT in order to establish the treaty utterance meaning.

Third, the conclusion put forward by the author does not conflict with any of the provisions of the VCLT.

In particular, it does not clash with Article 33(1) VCLT, since the latter does not state that authentic texts other than the prevailing one are not authoritative for interpretative purposes, but simply provides (tautologically) that the parties are free to decide that in the case of divergence a text is to prevail over the other, otherwise authoritative, texts.[1234] In this respect, the combined reading of paragraphs 1 and 2 of Article 33 VCLT supports the conclusion that all authenticated texts are to be treated as authoritative for interpretative purposes, unless the parties agree that some of them are not and evidence exists of such an agreement.

The solution proposed by the author does not conflict with Article 33(4) VCLT either. The last sentence of that article establishes a rule of interpretation for cases where (i) an otherwise irreconcilable divergence exists and (ii) the parties did not agree that a specific text is to prevail in the case of divergence.[1235] However, Article 33(4) VCLT does not state anything on the interpretative process that should be followed where the parties agreed that, in the case of divergence, a specific text is to prevail. An *a contrario* reasoning, according to which the fact that Article 31(4) VCLT explicitly states that an interpretation of the *prima facie* divergent texts according to Articles 31 and 32 VCLT must be carried out where the parties did not agree on a prevailing text, while it does not state anything with reference to the case where the parties so agreed, implies that in the latter case no attempt should be made to remove the *prima facie* divergence by interpreting the authentic texts in accordance with Articles 31 and 32 VCLT and that the prevailing text should instead apply from the outset, is faulty. There is nothing in the text of Article 33 VCLT, nor in the overall context, that justifies a similar implicature.

Likewise, it cannot be reasonably upheld that, since Article 31(4) VCLT speaks of "a difference of meaning which the application of Articles 31 and 32 does not remove", thus implying that such a difference of meaning results before the authentic

[1233] See paragraph 7 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7).
[1234] See, to this extent, the distinction made by the ILC between the case where the parties decide that only certain authenticated texts are authentic (i.e. authoritative) and the case where the parties agree (implicitly or explicitly) on the authoritativeness of all the authenticated texts and on the prevalence of a certain authentic text where a divergence exists (YBILC 1966-II, p. 224, para. 3).
[1235] See sections 3.4. and 3.5 of this chapter.

texts are interpreted according to such articles, the term "divergence" in Article 33(1) VCLT must be construed as a difference of meaning resulting before the authentic texts are interpreted according to Articles 31 and 32 VCLT. Although such an interpretation could at first sight appear a sound "contextual" interpretation, three relevant pieces of evidence contradict it:

(i) the terminology used is different, "difference" v. "divergence";
(ii) in paragraph 8 of the commentary to Article 29 of the 1966 Draft, the ILC used the term "divergence" as a synonym for "difference of meaning which the application of Articles 27 and 28 does not remove", which would actually point to the opposite conclusion;[1236]
(iii) paragraph 4 of the commentary to Article 29 of the 1966 Draft is clear enough in denying the existence, under Article 33 VCLT, of any obligation for the interpreter to apply the prevailing text as soon as a prima facie difference between the various authentic texts is put forward.

Fourth, the author submits that, in order to ascertain the existence of a "verbal" divergence (as suggested by Hardy), the interpreter should preliminarily determine the "verbal" meaning of the authentic texts being compared.

However, the distinction between an interpretation intended to determine the "verbal" meaning of an utterance and that intended to determine the utterance meaning thereof appears to be a vague one: how accurate should the construction of the compared authentic texts carried out by the interpreter be in order to fairly show the existence of a "verbal" divergence and thus justify the exclusive reference to the prevailing text?

This vague minimum-interpretation requirement could detract from the most attractive feature of Hardy's proposal, i.e. that of providing the judge with a sure and rapid means of settling any dispute. In order to avoid such drawback, "verbal" meanings should be equated to dictionary meanings and any contextual interpretation should be avoided. This approach, however, would lead to the extremely recurrent appearance of "verbal" differences between the various authentic texts, for it is hard for two different lexemes in two different languages to be associated exactly (and solely) to the same concept. That, in turn, would entail the extremely recurrent exclusive recourse to the prevailing text. In such a way, as a matter of fact, any interested party could unilaterally invoke and obtain the right to rely exclusively on the prevailing text, whenever it would appear more favorable for it than the other authentic texts, by simply highlighting a *prima facie* dictionary divergence. In this respect, the final clause would be transformed into a mere procedural tool in the hands of interested parties.

However, since treaties should be interpreted and applied in good faith, it seems reasonable that the prevailing text is to be preferred to the other authentic texts only insofar the existence of an divergence between the provisional utterance meanings of those texts have been ascertained in accordance with the rules of interpretation enshrined in Articles 31 and 32 VCLT, not sufficing in that respect that an interested party merely put forward a presumed difference of meanings in order to rely on the potentially more

[1236] See YBILC 1966-II, p. 225, para. 8.

favorable prevailing text.[1237]

Fifth, the solution proposed by Hardy appears not coherent with the system of interpretation provided for by the VCLT, the former attributing relevance to pure "verbal" differences, while the latter allowing special meaning to be attributed to treaty terms and stressing that the ordinary meaning thereof is to be determined in good faith, in light of the object and purpose of the treaty and of the relevant context.

Sixth, the comparison of the allegedly divergent authentic texts, combined with an interpretation thereof based on Articles 31 and 32 VCLT, enhances the trustworthiness of the utterance meaning determined and argued for by the interpreter.

In fact, on the one hand, textual comparison may shed light on possible alternative meanings that could be not so evident where the interpreter were just engaged in construing a single authentic text, even where it was the prevailing text. On the other hand, the comparison may restrict the set of possible meanings attributable to the prevailing texts construed in isolation, since some of them could be incompatible with the meanings reasonably attributable to the other authentic texts.

While the potential lower reliability of an interpretation arrived at by construing an authentic text in isolation is acceptable where no apparent divergence has been put forward by any party, since in this case the presumption of clarity and identity of the provisional utterance meanings of the various authentic text operates, the same conclusion does not hold true where the risk of a potential discrepancy in the provisional utterance meanings has been pointed out and must accordingly be set aside by means of comparative interpretation.

It is interesting to note that Hardy recognized that issue and, with reference to the assertion made by certain authors that either the authentic texts are divergent and thus the authentic text must necessarily be applied, or they are in agreement and so the prevailing text may still be applied because equivalent to the other texts, concluded that such an assertion was false "because the interpretation most compatible with all the texts is not necessarily the one suggested by the [prevailing] text viewed separately".[1238] However, he maintained that it was highly unlikely that the contracting parties ever worried about the falsehood of such an assertion and that the method of having direct recourse to the prevailing text in the case of verbal divergences presented one practical advantage that should suffice to ensure its adoption: being simple, rapid and sure.[1239]

[1237] See, to this extent, the argument put forward by the plaintiffs in the *Archdukes of the Habsburg-Lorraine House v. the Polish State Treasury* case, according to which a divergence existed between the authentic texts and therefore exclusively the prevailing text (the French text, potentially more favorable to them) had to be used for interpretative purposes (see Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury,* 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq.* [Case No. 235], at 367).

[1238] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 126 and 133-134.

[1239] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 134.

Seventh, it is submitted that the slightly different forms that the treaty's final clauses giving preference to one authentic text in cases of divergences may take do not generally affect the conclusion drawn in this section.

A survey of the final clauses adopted in tax treaties has shown that a variety of formulas, such as "in the case of dispute in the interpretation", "in the case of doubt", "in the case of any divergence of interpretation", "in the case of divergence between the texts", is actually used by contracting States.[1240]

However, as has been already noted, final clauses are nearly always drawn up somewhat automatically and contain a number of more or less stereotypical formulas that are accepted in diplomatic parlance, but which courts and tribunals do not take into consideration because they have lost their true meaning.[1241] Such a somewhat automatic use of stereotypical and interchangeable formulas significantly lower the relevance of their texts for the purpose of their interpretation, due to the likely absence of a clear agreed intention of the contracting parties in that respect, or, at least, to the likely absence of a strong link between the intention of the parties and the formula actually adopted in the final clause of the treaty. Since the interpretation that the author put forward in this section is mostly grounded on:

(i) the only common feature of those formulas, i.e. that the prevalence of one text over the other authentic texts is made subject to the existence of an interpretative issue due to the multilingual character of the treaty,

(ii) the logical and semantic analysis of the premise of such final clauses, i.e. the existence of a divergence between the authentic texts and

(iii) the need to preserve as much as possible the principles enshrined in Articles 31-33 VCLT and to construe such final clauses in a fashion that is coherent with those principles,

it is sensible to conclude that slight changes in the wording of the final clauses do not impact on the reliability of that interpretation.

Finally, it is the author's opinion that, where the provisional utterance meaning of the prevailing text is given priority by the interpreter, the principle of the unity of the treaty causes that meaning to become the final utterance meaning (as well) of all other authentic texts. In this respect, with regard to those texts that could not be provisionally

[1240] In this respect, it is also interesting to note the statement of a former Canadian tax treaty negotiator, according to which, in cases where treaties are concluded in two or more official languages, "some countries would insist that, in cases of inconsistencies between the two versions, the language used during the negotiations would prevail over the other language" (see J-M. Déry , "The Process of Tax Treaty Negotiation", in B. Arnold and J. Sasseville (eds.), *Special Seminar on Canadian Tax Treaties: Policy and Practice* (Toronto: Canadian Tax Foundation, 2000), 2 *et seq.*). This statement reflects the common ground that the prevailing authentic text in (tax) treaties is in most cases the *drafted text*. From the perspective of the issue dealt with in the present section, such a general coincidence of prevailing text and drafted text is an argument for concluding that the prevailing text (wearing the hat of the *drafted text*) might be given by the interpreter a special weight for the purpose of determining the common meaning of apparently diverging authentic texts, even before (from a logical perspective) the apparent divergence is resolved by recourse to the prevailing text as such.

[1241] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132 and 133.

attributed the meaning of the prevailing text on the basis of an interpretation in line with Articles 31 and 32 VCLT, it is submitted that the latter meaning must be regarded as the "special meaning" that the parties intended to attach to the relevant treaty terms employed in those texts.

3.6.3. What if the meaning of the prevailing text is ambiguous, obscure or unreasonable?

Where the meaning attributable to the prevailing text, construed in isolation from the other texts and according to the rules of interpretation enshrined in Articles 31 and 32 VCLT,[1242] is ambiguous, obscure or unreasonable, there is still chance that the analysis of the other authentic texts may shed some light on the utterance meaning of the former.[1243]

That holds particularly true where a single meaning is attributable to all the other texts, which appears clear, unambiguous and reasonable.

However, even in this case, the interpreter is not bound to attribute such a common meaning to the prevailing text as well. The VCLT does not dispose over any mechanical rule in that respect, since the ILC and, arguably, the Vienna Conference considered that, although attributing to the unclear, ambiguous, or unreasonable (prevailing) text of a treaty the clear, unambiguous and reasonable meaning of the other texts appears a solution of common sense, it might not always be the correct one[1244] since much may depend on the circumstances of each case and the evidence of the intention of the parties.[1245]

That notwithstanding, it is the author's opinion that in most cases the interpreter will choose to attribute that common meaning to the prevailing text as well.

In fact, where the latter is ambiguous and one of its possible meanings coincides

---

[1242] That may well be the case where, for instance, the person applying the treaty is basing his interpretation thereof exclusively on such a text, on the basis of the right to rely on any of the authentic texts, taken in isolation, which is established by Article 33, paragraphs 1 and 3 VCLT.

[1243] See T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 32.

[1244] This is particularly true with regard to the case at stake, considering that quite often the prevailing text is also the drafted text.

[1245] See the explanation given by Sir Humphrey Waldock, during the 700th ILC's meeting, concerning the elimination by the ILC Drafting Committee of paragraph 4 (and implicitly 5) of Article 74 of his Third Report, according to which, in cases where the meaning of one text was clear and that of the other was not, the former had to be adopted (YBILC 1964-I, p. 319, para. 57); see also paragraph 9 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 226, para. 9).
See, partially in accordance, T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 32-33.

with the meaning attributed to the other authentic texts,[1246] such a meaning will be probably adopted,[1247] absent any strong evidence in favor of the other meaning(s) attributable to the prevailing text.[1248]

Where the meaning of the prevailing text appears unclear, the clear, unambiguous and reasonable meaning of the other text(s) may probably persuade the interpreter of the possibility to attribute the same meaning to the prevailing text, especially considering that a proper treaty interpretation under the VCLT system is far from being a literal interpretation.

Similarly, where the meaning provisionally attributed to the prevailing text is, although clear and unambiguous, somewhat awkward,[1249] the analysis of the other authentic texts may shed some light on the utterance meaning of the former, highlighting alternative solutions that had not emerged from the interpretation of the prevailing text taken in isolation.

In the improbable event that the interpreter was not persuaded to extend to the prevailing text the meaning common to the other texts,[1250] the prevailing text meaning should be theoretically adopted according to the final clause. In this scenario, the utterance meaning of the other authentic texts could still be somewhat relevant in directing the interpreter in his task of elucidating the meaning of the prevailing text. The issue, here, is substantially reduced to one of interpreting a single authentic text (the prevailing text) according to the rules enshrined in Articles 31 and 32 VCLT, where the other authentic texts would enter into play as part of the context (the text of the treaty).

3.6.4. What about the contrast between the prevailing text and the other (consistent) texts?

As previously noted, textual comparison may shed light on possible alternative meanings which might have been overlooked by the interpreter engaged in construing an authentic text in isolation.

Therefore, it is possible that textual comparison may direct the interpreter towards the attribution of the same meaning to all the authentic texts.[1251]

[1246] Where none of the meanings attributable to the prevailing text, interpreted in isolation, coincides with the meaning attributed to the other texts, either the comparison of the text leads the interpreter to review and modify his original interpretations, so that an acceptable common meaning is arrived at, or, where this is not the case, the ambiguous meanings of the former should prevail. The meaning attributable to the other authentic texts, however, could still play a role in directing the interpreter in choosing among the alternative meanings of the prevailing text.

[1247] See also the conclusion drawn in section 3.4.4 of this chapter.

[1248] Such strong evidence will be probably missing, since otherwise the interpreter would have reasonably solved the ambiguity in favor of the other meaning even before the comparison of the texts.

[1249] But not so unreasonable to be considered to be an unacceptable interpretation under the canon of good faith.

[1250] It is submitted that, especially in the case of unclear or unreasonable meaning of the prevailing text, it would be hard for the interpreter to convincingly justify the adoption of a meaning other than the clear and reasonable meaning attributable to the other authentic texts.

[1251] Such a common meaning could theoretically be either the meaning attributed to the prevailing text,

However, where this is not the case, the author is of the opinion that the final clause requires the interpreter to adopt the meaning of the prevailing text, provided that it is clear, unambiguous and reasonable.

3.6.5. Conclusions on research question g)

The application of a treaty provision giving priority to a particular text, in cases of divergences of meaning among the authentic treaty texts, requires the interpreter to establish at which stage of the interpretative process the prevailing text should be given such a priority.

The VCLT is silent in this respect and the case law of national and international courts and tribunals does not provide any clear guidance.

According to the ILC, this issue should be resolved by the interpreter by determining, in each single case, the intention of the parties with regard to the meaning of the relevant final clause.

This conclusion, although reasonable in theory, presents a significant drawback in its actual application, since "final clauses are nearly always drawn up somewhat automatically",[1252] so that it is reasonable to assume that the contracting States generally do not really discuss with each other the meaning to be attached thereto and, even worse, they probably do not have any accurate idea of when the prevailing text should be given precedence.

The author submits that, unless some decisive evidence to the contrary is available, final clauses providing for a prevailing text in the case of divergences should be construed as requiring the interpreter to compare the *prima facie* divergent authentic texts in light of all the available elements and items of evidence, in order to determine whether a reconciliation is possible by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, before relying exclusively on the prevailing text.

The apparently divergent authentic texts, therefore, should be construed in light of the overall context and compared with each other in the quest for a common meaning. Only where, at the end of the interpretative process, no (provisional) common meaning may be reasonably said to exist should preference be given to the meaning of the prevailing text.

This solution substantially corresponds to principle (viii) established by the author in section 2 of Chapter 3 of Part I, according to which, where the treaty provides that a specific text has to prevail in cases of discrepancy in meanings among the authentic texts, it appears reasonable to assume that the parties intended the utterance

---

interpreted in isolation, or that attributed to the other text(s), interpreted in isolation.

[1252] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132.

meaning of that text to prevail only where an interpretation based on the *prima facie* divergent authentic texts and the overall context does not lead the interpreter to convincingly attribute a single utterance meaning to all such texts.

From a different perspective, where the meaning attributable to the prevailing text, construed in isolation from the other texts and according to the rules of interpretation enshrined in Articles 31 and 32 VCLT, is ambiguous, obscure or unreasonable, there is still a chance that the analysis of the other authentic texts may shed some light on the utterance meaning of the former.

That holds particularly true where a single meaning is attributable to all other texts, which appears clear, unambiguous and reasonable. Even in this case, however, the interpreter is not bound to attribute such a common meaning to the prevailing text as well. The VCLT does not provide for any mechanical rule in that respect, since the ILC and, arguably, the Vienna Conference considered that, although attributing to the unclear, ambiguous, or unreasonable (prevailing) text of a treaty the clear, unambiguous and reasonable meaning of the other texts appears a solution of common sense, it might not always be the correct one since much may depend on the circumstances of each case and the evidence of the intention of the parties. In the improbable event that the interpreter is not persuaded to extend to the prevailing text the meaning common to the other texts, the prevailing text meaning must be theoretically adopted according to the final clause. In this scenario, the utterance meaning of the other authentic texts may still be relevant in directing the interpreter in his task of elucidating the meaning of the prevailing text.

Finally, where the clear, unambiguous and reasonable meanings attributable to the prevailing text and to the other texts appear to conflict with each other, textual comparison may shed light on possible alternative meanings which might have been overlooked by the interpreter engaged in construing the authentic texts in isolation. It is thus possible that textual comparison may direct the interpreter towards the attribution of the same meaning to all authentic texts.

However, where this is not the case, the final clause requires the interpreter to adopt the meaning of the prevailing text, provided that it is clear, unambiguous and reasonable.

4. The interpretation of legal jargon terms employed in (multilingual) treaties

4.1. Research question addressed in and structure of this section

The present section is aimed at tackling the following research question, here briefly illustrated by means of an example.

h) What is the impact on the answers to be given to the questions discussed in

section 3 of the fact that legal jargon terms are employed in the treaty texts?

Consider the English and French authentic texts of Article 6 of the ECHR, according to which (*italics* by the author):

1. In the determination […] of any *criminal charge* against him, everyone is entitled to a fair […] hearing by an independent and impartial tribunal […]
3. Everyone charged *with a criminal offence* has the following minimum rights:
[…]
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
---
1. Toute personne a droit à ce que sa cause soit entendue équitablement […] par un tribunal indépendant et impartial, établi par la loi, qui décidera […] soit du bien-fondé de toute *accusation en matière pénale* dirigée contre elle.
[…]
3. Tout *accusé* a droit notamment à:
[…]
e) se faire assister gratuitement d'un interprète, s'il ne comprend pas ou ne parle pas la langue employée à l'audience.

With regard to the interpretation of Article 6(3) of the ECHR, in particular for the purpose of determining whether a person has been charged with a criminal offence in a specific case, the questions discussed in section 3 of this chapter are compounded by the fact that the relevant terms used in the two authentic texts, i.e. "*criminal charge"* and *"accusation en matière pénale"*, are (i) legal jargon terms used under the laws of States employing English and French as their official languages (e.g. legal jargon terms used under English and French domestic law) and (ii) terms generally regarded as corresponding to legal jargon terms used under the law of other contracting States (e.g. the German law term "Straftat").

Suppose that a certain misconduct, for instance careless driving causing a traffic accident in Germany, is considered a "criminal offence" under English law, but is not considered a "Straftat" under German law (as well as under French law).[1253]

In order to decide the case, i.e. in order to determine whether such a misconduct falls within the scope of Article 6(3) of the ECHR, the interpreter should ask himself and answer some difficult interpretative questions, such as:

(i) did the parties intend to attribute to the terms "*criminal charge"* and *"accusation en matière pénale"* a meaning other than the meanings they have under the laws of the States using them (e.g. under English and French domestic law) and other than the meanings of the corresponding terms used under the domestic law of the contracting States that are drafted in languages other than English and French (e.g. the German legal jargon term "Straftat")?

(ii) if question (i) is answered in the affirmative, how such a meaning should be determined? Should it be determined autonomously from the meanings under domestic law? Or should it reflect the minimum common denominator of the meanings that the legal jargon terms used in the authentic treaty texts have

[1253] The example is derived from ECtHR, 21 February 1984, *Öztürk v. Germany (Application no. 8544/79).*

under the laws of the States using such terms (e.g. under English and French domestic law)? Or should such a common denominator be determined taking into account also the meanings of the corresponding terms used under the domestic law of other contracting States, which are drafted in languages other than English and French (e.g. the German legal jargon term "Straftat")?

(iii) if question (i) is answered in the negative, which domestic law meaning should be used by the interpreter? Should it be the meaning under, say, English or French law? Or should it be the meaning under the law of the State(s) presenting the most relevant connection(s) with the case (although such a law is written neither in English nor in French)? Or, on the contrary, should it be the meaning under the *lex fori*?[1254]

(iv) how should questions (i) through (iii) be solved where the terms and expressions employed in the authentic treaty texts seemed to diverge to a more significant extent, for instance where the English authentic text used the terms "regulatory charge" and "regulatory offence"?

With a view to answering such questions, the present section is structured as follows.

Section 4.2 describes the differences existing between legal jargon terms and day-to-day language terms that are most relevant for the purpose of the present study.

Section 4.3 elaborates on the idiosyncratic features of legal jargon terms and shows what impact they may have on the interpretation of treaties (in general). In particular, sections 4.3.2 and 4.3.3 describe the most common approaches developed in the field of uniform law conventions with regard to the construction of legal jargon terms.

Section 4.4 highlights the most relevant issues faced by the interpreter when construing treaties employing legal jargon terms.

Finally, section 4.5 examines how the presence of legal jargon terms in the texts of multilingual treaties may affect their interpretation, in light of the analysis carried out by the author in sections 3 and 4 of this chapter.

4.2. Difference between legal jargon and day-to-day language terminology

Legal jargon terminology differs from day-to-day language terminology mainly from three perspectives. Such differences are those responsible for the additional issues that the interpreter may encounter when interpreting treaties where legal jargon terms are used.

First, legal jargon terminology, as compared to day-to-day language terminology, is generally characterized by less ambiguous relations between terms and their underlying

[1254] With regard to private law disputes, a relevant alternative would be the meaning under the law of the State to which the private international *lex fori* directs.

concepts.[1255]

In fact, one of the most distinguishing features of legal jargons consists in that the social subgroups using them tend to relate each jargon term with only one concept, especially by means of legal definitions, in order to increase the precision of the language and thus enhance legal certainty and clearness of in-depth analysis on complex subject matters.[1256]

Second, concepts underlying legal jargon terms are generally less vague than concepts associated with day-to-day language terms.

The scope of the former, in fact, is more clearly agreed upon by the social subgroup using that particular legal jargon, legal concepts being characterized by a comparatively higher number of prototypical denotata (and prototypical non-denotata) than concepts associated with day-to-day language terms. The reduction of the twilight zone[1257] and, therefore, of the vagueness of most legal concepts is mainly due to the extensive use of legal definitions and, even more significantly, to the existence of settled praxis, well-established scholars' opinions and converging case law.

Third, the shape and scope of legal concepts tend to vary more significantly from one national community[1258] to another than the shape and scope of concepts underlying day-to-day language terms.

As previously mentioned, concepts and relations among them are not *a priori* schemes for categorizing knowledge data; on the contrary, they are the product of human cognitive processes that, in turn, are influenced by the very same knowledge data that

[1255] This does not mean, however, that within a national legal system each term corresponds exclusively to one underlying concept. It is, in fact, common, that in different branches of law of a single legal system a term corresponds to (more or less slightly) different concepts, so that different legal jargons may be said to exist in connection with different branches of law (see, among others, R. Guastini, *Lezioni di teoria analitica del diritto* (Torino: Giappichelli, 1986), at 6 *et seq*.). This holds particularly true for tax law, where statutes abundantly employ terms originally used in private and commercial law (see F. Gény, "Le particularisme du droit fiscal", in R. Carré de Malberg et al., *Mélanges R. Carré de Malberg* (Paris: Librairie du Recueil Sirey, 1933), 193 *et seq.*), although not infrequently either the legislator by means of ad hoc definitions, or the interpreters by means of legal construction do make them correspond, in the context of tax law, to concepts other than those underlying such terms in private and commercial law. In such cases, i.e. where the same legal terms are used in both private law and tax law statutes, one of the main issues that the tax law interpreter has to face is whether such terms are used (i) in their private law terms capacity, which would lead the interpreter to refer to the legal concepts associated with those terms under the relevant private law, or (ii) as autonomous tax law terms, thus allowing the interpreter to attach thereto different concepts (see similarly P. Locher, "The Swiss Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 79 *et seq.*, at 84 *et seq*.).

[1256] The reverse phenomenon, consisting in that each legal concept is related with one single legal jargon term, is not equally widespread, it not being uncommon that a single concept is (univocally) associated with two or more legal jargon synonyms.

[1257] I.e. the gray area of items that for a significant number of the social group members are, and for another significant part thereof are not, denoted by a certain legal jargon term.

[1258] Here, the term "national community" is intended to denote the leading community among those that form the population of a State. The author is aware that such a definition implies a significant simplification of the often problematic relations existing among national identity, State jurisdiction and social communities living within one State territory.

such schemes are used to categorize.

In this perspective, social and cultural differences, as well as differences in life experience between various communities, do have a significant impact on the actual shape that concepts and relations among concepts tend to assume within such communities. Moreover, such interaction works in both directions: the specific pattern of concepts and relations among them that characterizes a specific community is a fundamental part of its cultural legacy and, as such, is transmitted through the generations and contributes to inform both the social life of the community and the way in which experiences, facts, things are looked at and approached.

That said, concepts underlying day-to-day language terms are, for a large part, connected to everyday human experiences, which are perceived through the senses, and customs. Nowadays such everyday perceptions, experiences and customs do not vary extensively from one national community to another.

This present state of affairs is due to manifold causes, the most relevant being the common biological nature of human beings, the very limited types of environment permitting human life on the planet, the wide-ranging homologation of every-day habits and the cultural convergence that had taken place in Europe since the Roman Empire through the Middle Ages and the Renaissance and has spread out all over the world boosted by colonialism from the fifteenth and sixteenth centuries until the mid-twentieth century and that has been enhanced by the significant migrations of the last two centuries, the booming of international trade after the Second World War and the late western cultural imperialism supported by means of mass communication, such as radio, television, and internet. As a result, the concepts underlying the majority of the day-to-day terms in a certain language quite accurately match the concepts underlying the corresponding day-to-day terms in other languages. By means of simplification, it might be said that most of the concepts underlying day-to-day language terms are, broadly speaking, the same in each language and in each national community.

However, it may be noted that, with regard to some specific fields of human knowledge, there are still significant cultural diversities existing among different national communities. Law is indubitably one of these fields. National legal systems have slowly developed through decades, sometimes centuries, and, notwithstanding the recent harmonization of some of their subfields achieved via international agreements and through the action of international organizations, they remain even today among the most idiosyncratic features of national communities.[1259] This idiosyncrasy of national legal systems is reflected in the peculiarity of their underlying legal concepts, which normally do not have accurate equivalents in other legal systems, but just general correspondents (if any), i.e. concepts that fulfill similar functions within the respective

[1259] It is interesting to note, in this respect, that even in cases where certain domestic statutory provisions appear similar in two or more States, as a consequence of an international effort towards harmonization or of the fact that a specific legal discipline of one State has been transplanted in the legal order of another State, in the absence of an international organization undertaking the task of guaranteeing a uniform interpretation of such provisions, the latter are often differently interpreted and applied in the various States due to the different legal systems and cultures thereof (see, similarly, M. Barassi, "Comparazione giuridica e studio del diritto tributario straniero", in V. Uckmar (ed.), *Diritto Tributario Internazionale* (Padova: Cedam, 2005), 1499 *et seq.*, at 1528, footnote 97).

legal systems and with which they share a significant part of their prototypical denotata.[1260] Such idiosyncratic legal concepts are generally expressed by means of legal jargon terminology. Thus, the lack of an accurate correspondence between the legal concepts used in two national legal systems is mirrored by the absence of proper synonyms in the two legal jargons.[1261]

This idiosyncrasy of national legal systems is commonly referred to as *multijuralism*.[1262]

4.3. The possible approaches to the interpretation of legal jargon terms used in treaties

[1260] See, with reference to income tax law, H. J. Ault and B. J. Arnold, *Comparative Income Taxation: A Structural Analysis* (New York: Aspen Publishers, 2004), at xxii and xxiii, where the authors point out that, although some recognizable "family resemblances" and common "broad features" exist among the income tax legal systems that belong to the same legal tradition (mainly common law v. civil law traditions), each system "has evolved in its own particular set of approaches and principles", which have led each system to have its own proper set of detailed rules and concepts. In that respect, the authors conclude that "[t]here is of course always a danger in attempting to relate legal rules or concepts in one system to a seemingly similar situation in another system. The institutional and cultural backgrounds may be different and the actual operation of each individual rule depends on the overall structure of both the tax system and the legal system generally. Doing meaningful comparative analysis is especially difficult in the tax area, where political pressure, chance and historical accident have all had important influence on the development of the systems."

[1261] No significant issue arises, however, where the different jargons relate to a common international background knowledge, i.e. where the social communities using the different jargons, although multilingual (which explains why different jargons exist), might be seen as forming an homogeneous group in respect of a common field of knowledge, characterized by a single set of principles, rules and concepts, although expressed in different languages (e.g. public international law). In addition, these types of social groups generally use one or two commonly spoken languages (e.g. English and French) as means of communication and for exchanging ideas at the international level.

[1262] See A. Breton et al. (eds.)., *Multijuralism. Manifestations, Causes and Consequences* (Farnham: Ashgate Publishing, 2009), p. 1, where the editors note that "[a]t one level of generality, multijuralism is the coexistence of two or more legal systems or sub-systems within a broader normative legal order to which they adhere. […] the co-existence of common law and civil law is a macroscopic divide. At a finer level of analysis, multijuralism is a more widespread phenomenon and also a more fluid reality than the distinction suggests. As a consequence, it becomes more difficult to identify the concepts associated with, or underlying, the expression. Multijuralism itself can be defined in a broad way as the coexistence of systems of norms considered binding by a subset of actors".

It must be noted that multijuralism may concern not only the legal systems of different States, when compared to each other, but also the legal systems coexisting within a single State. See, for instance with regard to Canada tax and private law, M. Cuerrier et al., "Symposium: Canadian Bijuralism and Harmonization of Federal Tax Legislation", 51 *Canadian Tax Journal* (2003), 133 *et seq.*; J. Sasseville, "The Canadian Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 35 *et seq.* The present study, however, does not analyse the effects of multijuralism on the construction of a State coherent legal system, but just focuses on the issues that multijuralism causes in respect of treaty interpretation.

In that respect, for a broad analysis of the reciprocal influence of international treaties and domestic legal systems, see J. H. Currie, "International Treaties and Conventions as Agents of Convergence and Multijuralism in Domestic Legal Systems", in A. Breton et al (eds.)., *Multijuralism. Manifestations, Causes and Consequences* (Farnham: Ashgate Publishing, 2009), 11 *et seq.*

4.3.1. In general

It must preliminarily be noted that, where a treaty term is used both in a legal jargon and in the day-to-day language, the interpreter must first establish whether such a term is to be construed, for the purpose of the treaty, according to its legal jargon or day-to-day meaning.

In this respect, various elements and items of evidence exist that may lead the interpreter to conclude that the parties intended to use the relevant term in its legal jargon capacity, such as the subject matter of the treaty and of the specific provision to be construed, the identity of the treaty negotiators and the process that led to the treaty conclusion, the identity and capacity of the treaty addresses, the object and purpose of the treaty and of the relevant provision, the extensive use therein of idiomatic expressions and terms specific (solely) of the legal jargon.

Where the interpreter concludes that the parties intended to use the relevant treaty term as a legal jargon term, the following more subtle and, at the same time, fundamental issues must be addressed.

First, the interpreter should assess whether it is reasonable to conclude that the parties intended to attribute to the relevant term the technical (legal jargon) meaning corresponding to that term under the domestic laws of the States using that specific legal jargon.[1263]

Let the author take a step back for the sake of clarity. Any interpreter, where called to construe a treaty, should start his analysis by grasping the first impression of what could be the ordinary meaning of the relevant treaty term by looking at the entries corresponding to that term in dictionaries and encyclopedias. For instance, having to construe the term "alcoholic" as used in Article 5 of the ECHR, the interpreter should presumably start his quest by looking at the entries associated with the term "alcoholic" in English dictionaries and Encyclopedias and then, on such a basis, establish in good faith the reasonable meaning to be attributed to that term in its overall context.

However, one may wonder whether it is equally sensible for the interpreter of a multilateral treaty authenticated only in English to establish the meaning of the term "criminal charge" used therein primarily on the basis of the legal definition of that term under e.g. English law[1264] and the analysis of the related national case law and scholarly writings (e.g. writings in legal dictionaries and encyclopedias). Is this reasonable, in that

[1263] A case where the parties typically do not intend to attribute to a treaty term the meaning that it has under the law of the State(s) using it (as legal jargon term) is that of treaties concluded with the purpose to standardize contracting States' domestic laws in the field of private law; see, for instance, S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 119-120, 141 and 251 *et seq*.; P. Francescakis, "Qualifications", in *Répertoire de droit international Dalloz. Tome II* (Paris: Jurisprudence Générale Dalloz, 1969), 703 *et seq*., at 705, para. 29; P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq*., at 431.

[1264] The same holds true in respect of other domestic law using the same (or a similar) English term, such as Australian law, Canadian law, Irish law, etc.

respect, to infer from the fact that the treaty is authenticated only in English that the parties intended to attribute to the term "criminal charge" the legal jargon meaning that it has under the domestic law of only one contracting State (in the above example, English law),[1265] especially where under the law of the other contracting States concepts similar to that underlying the legal jargon term "criminal charge" do exist?

That conclusion appears even more difficult to uphold where the treaty is authenticated in two languages, say English and French, and the legal jargon meanings of the terms employed in those texts, e.g. "criminal charge" and "accusation en matière pénale", under the relevant domestic law, e.g. English and French law, differ from each other to a certain extent. In this case, it would be logically impossible to attribute to the treaty terms "criminal charge" and "accusation en matière pénale" a single meaning that exactly overlaps with both those domestic law meanings.

Where the interpreter concludes that the relevant treaty term should be attributed a meaning other than its legal jargon meaning under the domestic law of the States using that specific legal jargon term in their legal systems, he has to establish the alternative meaning that must be attached to it.

For instance, the interpreter may find it reasonable that the parties intended to attribute to that term a meaning that somehow takes into account and reflects the corresponding concepts existing under the laws of the various contracting States, either in the form of a uniform meaning that, although based on such domestic legal concepts, departs therefrom in order to best suits the context, object and purpose of the relevant treaty provision,[1266] or in the form of a meaning representing the minimum common denominator of the national legal concepts.[1267]

[1265] Or even the meaning that that term has under the domestic law of a State that is not party to the treaty.

[1266] On the reasons for preferring an autonomous interpretation of treaties, in particular uniform law conventions, see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 165 *et seq*. and the scholars cited in footnote 81 therein. Bariatti also points out that involving an international organization or an international court or tribunal in the process of interpreting uniform law conventions is generally recognized as the best solution in order to guarantee the uniform application thereof in the different contracting States. However, due to the relevant interests at stake, where the treaties are not concluded within the framework of an international organization, the above solution is often disregarded and the contracting States tend to rely on peer review processes of consultation and, possibly, to periodical modifications of the original treaties by virtue of *ad hoc* protocols (*ibidem*, pp. 169-171).

[1267] Such a solution, however, subtly corresponds to giving preference to one party's intended interpretation (the most restrictive) over the other parties' intended interpretations. Moreover, although it may be considered reasonable in certain cases, as for instance where its effect is not to bind any contracting States to any reciprocal concession unless all parties have clearly agreed to be so bound, in other cases it may lead to manifestly absurd results. Consider the following example: a certain tax treaty does not include any general rule of interpretation similar to Article 3(2) OECD Model; under the tax law of one contracting State, the term "employment" is deemed to denote (also) the relationships between a law school and the external lecturers that teach at the LLM programs organized by the former and structure their lectures on the basis of the directives received from it, while under the tax law of the other contracting State these relationships are clearly outside the intension of the term "employment"; in an OECD-type tax treaty, going for the most restrictive interpretation would lead to conclude that income derived by the lecturers from such relationships could not be taxed by the source State (i.e. the State of residence of the law school and in which the LLM lectures are given), since Article 21 of the treaty would apply to income of lecturers resident in the other contracting State, even where under the tax law of the source State these relationships would be regarded as "employment"

Alternatively, he may infer from the overall context that the parties intended to attribute to that term a meaning corresponding to the legal concept existing under the domestic law of the contracting State that presents the strongest connection with the situation to which the treaty must be applied.[1268]

Moreover, he may consider it sensible that the parties intended to attribute to that term a fixed hard-core meaning,[1269] leaving the interpreter with the duty to complete it by reference to the national legal system of the State applying the treaty in the actual

---

relationships.

On the applicability of such a method for the purpose of interpreting uniform law conventions, see, among others, A. N. Makarov, "Réflexions sur l'interprétation des circonstances de rattachement dans les règles de conflit faisant partie d'une Convention internationale", in *Mélanges offerts à Jacques Maury. Tome I: Droit international privé et public* (Paris: Librairie Dalloz et Sirey, 1960), 206 *et seq.*, at 207 *et seq*.; R. David, "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, p. 101.

[1268] With reference to treaties purported to standardize the contracting States' domestic private law and private international law, it is recognized by the majority of scholars that the uniform and autonomous (from domestic law jargons and categorizations) interpretation thereof is necessary in order to guarantee that the object and purpose of such treaties, i.e. to create a single set of rules applicable to certain facts in all contracting States, is not frustrated and equality of rights and obligations is achieved in respect of all persons covered by the treaty provisions; the failure of their uniform interpretation, moreover, may increase the tendency towards *forum shopping* (see, e.g., A. Malintoppi, "The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts", in C. M. Schmitthoff (ed.), *The Sources of the Laws of International Trade. With special reference to East-West Trade* (London: Stevens & Sons, 1964), 127 *et seq*., at 128; E. Frankenstein, *Internationales Privatrecht (Grenzrecht). Volumen I* (Berlin: Rothschild, 1926), pp. 295 *et seq*.; S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 119-121, 129-130, 132-133, 141).

However, the same scholars point out (quite obviously) that in certain cases treaties allow, or even demand, the competent court to construe their provisions in accordance with domestic law (e.g. the law pointed at by the *lex fori*, or the law of a specific State) and, therefore, with national legal jargons. In such cases, it would be incorrect to seek an autonomous and uniform interpretation, since the latter would be contrary to the common intention of the parties (see, for instance, S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 133-140; R. David, "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, pp. 96 *et seq*.).

In this respect, the issue remains to determine whether the parties intended certain terms to be construed in accordance with the law and jargon of a specific State, even in the absence of an express provision to that extent in the treaty. According to Bariatti (see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 140), the question may be answered in the affirmative where the terms used in the treaty originally come from specific legal systems (e.g. the term "trust" as used in the Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980), or where a national legal jargon term is reproduced *tel quel* in the other authentic texts of the treaties (e.g. the term "mortgage", as used in the French and Spanish authentic texts of Article 1(1)(d) of the Convention on the International Recognition of Rights in Aircrafts, concluded in Geneva on 19 June 1948).

[1269] The agreement, in this respect, would be limited to (i) the inclusion within the treaty terms denotata of the items that are denoted by all the corresponding terms in the legal jargons of the various contracting States and (ii) the exclusion from the treaty term denotata of the items that are not denoted by any of the corresponding terms in the legal jargons of the various contracting States. On the difficulties faced by contracting States, in the course of the negotiations, to find a common meaning for all treaty terms and expressions, and on the related necessity to use ambiguous and vague terms and expressions in order to accommodate the possible divergent views thereof, see W. Hummer, ""Ordinary" versus "Special" Meaning. Comparison of the Approach of the Vienna Convention on the Law of Treaties and the Yale-School Findings", 26 *Österreichische Zeitschrift für öffentliches Recht* (1975), 87 *et seq.*, at 153 *et seq.*

case, especially where the treaty is aimed at interacting with domestic law. And so forth.

Finally, it is worth noting that different approaches may be contextually applied in order to construe different legal jargon terms in the very same treaty.

For instance, with regard to the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters,[1270] the ECJ affirmed:

> "10. The [Brussels] Convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought.
> 11. Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of article 220 of the [EEC] treaty. […]"[1271]

In the following sections the author briefly describes the most common approaches to the interpretation of legal jargon treaty terms that have been adopted in the field of uniform law conventions.[1272]

The decision to make reference to the solutions developed in that field of treaty law is mainly due to the following reasons.

First and foremost, the interaction between treaties and domestic legal systems (including legal jargon terminology) has been addressed more comprehensively and in depth with regard to that field of international law than in respect of other fields.[1273]

Moreover, uniform law conventions also present certain features that make them comparable to tax treaties. First, they both provide for rules of law that, on the one hand, are internationally binding on the contracting States and, on the other hand, strictly interact with and partially modify the relevant domestic law of those contracting States.

[1270] Concluded in Brussels on 27 September 1968.

[1271] See ECJ, 6 October 1976, Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, paras. 10-11.

[1272] This field is here intended to cover treaties dealing with (i) uniform substantive private law, (ii) uniform international private law (conflict of laws) and (iii) procedural international law.

[1273] See, among many others, A. Malintoppi, "The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts", in C. M. Schmitthoff (ed.), *The Sources of the Laws of International Trade. With special reference to East-West Trade* (London: Stevens & Sons, 1964), 127 *et seq.*; E. Frankenstein, *Internationales Privatrecht (Grenzrecht). Volumen I* (Berlin: Rothschild, 1926); S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986); R. David, "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5; P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*; J. W. F. Sundberg, "A Uniform Interpretation of Uniform Law" 10 *Scandinavian Studies in Law* (1966), 219 *et seq.*; A. Malintoppi, "Mesures tendant à prévenir les divergences dans l'interprétation des règles de droit uniforme", *L'Unification de Droit. Annuaire* (1959), 249 *et seq.*; P. Francescakis, "Qualifications", in *Répertoire de droit international Dalloz. Tome II* (Paris: Jurisprudence Générale Dalloz, 1969), 703 *et seq*. On the (limited) relationship between "qualification" issues under private international law and under international tax law, see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 52-53, m.nos. 90-92.

Second, the interpretation of both types of treaties is primarily left to domestic courts.[1274]

4.3.2. Uniform interpretation of treaties

As previously noted, the parties may have intended to attribute to the legal jargon terms used in the treaty a meaning that is *uniform*. In this respect, the term "uniform" is used here to indicate that the concept corresponding to a certain treaty term is always the same in all possible circumstances in which the provision containing such term is applied.

With regard to uniform law conventions, the majority of scholars have expressed a theoretical preference for the *uniform* construction of treaty terms, mainly due to the alleged autonomy of the legal systems created by the treaties from the legal systems existing under the contracting States' domestic law, as well as to the need to guarantee that equal rights are granted to and legal obligations imposed on different persons by reason of the same treaty provisions.[1275]

This uniformity of meaning may be achieved in different ways.

A first method consists in using a term that is an international legal jargon term, i.e. a term commonly used in the field of international law (or a specific subfield thereof) and having a relatively unambiguous and clear meaning when used in such a field,[1276] that meaning being different from the one it has when used in the context of the relevant national legal systems.

The intention of the parties in this respect is established by the interpreter on the

---

[1274] See, with reference to uniform law conventions, S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 119 and, with reference to tax treaties, IBFD Tax Treaties Case Law Database (accessed on 6 July 2011).

[1275] See, *inter alia*, P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.* at 432; P. Francescakis, "Qualifications", in *Répertoire de droit international Dalloz. Tome II* (Paris: Jurisprudence Générale Dalloz, 1969), 703 *et seq.*, at 705, paras. 38-39; G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99; D. Martiny, "Autonome und einheitliche Auslegung im Europäischen Internationalen Zivilprozeßrecht", 45 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1981), 427 *et seq.*, at 430 *et seq*. and references therein.
As far as case law in concerned, see the authoritative statement made by the ECJ with regard to the interpretation of Article 1 of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968: "in order to ensure, as far as possible, that the rights and obligations which derive from [the Brussels Convention] for the Contracting States and the persons to whom it applies are equal and uniform, [the terms of the Convention] should not be interpreted as a mere reference to the internal law of one or the other of the States concerned. […] The concept used […] must be regarded as independent concepts which must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems " (see ECJ, 22 February 1979, Case 12/76, *Henri Gourdain v. Franz Nadler*, para. 3).

[1276] Consider, for example, terms such as "State", "territory", "reservation", "authentic text", "ratification", "good faith", "contracting parties".

basis of all available elements and items of evidence, which might support the conclusion that the "international meaning" is to be preferred over the conflicting "national meanings".[1277] For the sake of legal certainty, however, the parties sometimes insert a specific provision in the treaty in order to appropriately direct the interpreter to that conclusion.

A second method is to provide the interpreter with a legal definition of the treaty terms.[1278] The drawback of this solution is, obviously, that whenever other legal jargon terms are used in the definition, the very same issue surfaces again.

A third method consists in inserting a specific provision calling for a uniform interpretation, as far as possible independent from the meanings that the legal jargon terms have under their respective domestic laws.

For instance, Article 18 of the 1980 Rome Convention[1279] provides that "[i]n the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their

[1277] The "international" meaning of treaty terms may also be established on the basis (i) of the analysis of the definitions of the same terms contained in other treaties, or (ii) of the interpretation of the same terms, used in other treaties, made by courts, tribunals and scholars, or emerging as result of widespread and constant praxis. The reference to other treaties and their construction as means of interpretation (i.e. as elements used in order to support a certain construction of the provision to be interpreted) is allowed within the system of interpretation provided for by Articles 31-33 VCLT, either under Article 31(3)(c) VCLT (where they are concluded between the very same parties of the treaty to be interpreted, or where their provision represent customary international law), or under Article 32 VCLT as supplementary means of interpretation. Moreover, the meaning attached to the same terms in other treaties may be regarded as evidence of the ordinary meaning of the relevant terms in the international law context. A classical instance of interconnected interpretation of treaties (and treaty terms) is that of the International Labour Organization conventions, with reference to which see J. M. Servais, *International Labour Law* (The Hague: Kluwer International Law, 2009), paras. 162-164. Another instance is provided by the interpretation made by the ECJ of Articles 5(1) and 16(4) of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968: with reference to the first article, the Court made reference to Article 6 of the Convention on the law applicable to contractual obligation, concluded in Rome on 19 June 1980, in order to interpret the expression "place of performance of the obligation" contained therein (see ECJ, 26 May 1982, Case 133/81, *Roger Ivenel v. Helmut Schwab*, paras. 13-15) ; with reference to the second article, in order to construe the expression "proceedings concerned with the registration or validity of patents", the Court made reference to the European Patent Convention, concluded in Munich on 5 October 1973, and to the Community Patent Convention, concluded in Luxembourg on 15 December 1975, both not applicable in the case at stake (see ECJ, 15 November 1983, Case 288/82, *Duijnstee v. Goderbauer*, para. 27).

[1278] See, for instance, Article 22(3) of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968; Article 5 of the OECD Model and all tax treaties based thereon; Article 1(2) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929. Moreover, in certain cases, the treaty definition refers to the definition of the same term included in another treaty; for example, Article 1 of the European Convention on the Suppression of Terrorism, concluded in Strasbourg on 27 January 1977, refers to both the Convention for the Suppression of Unlawful Seizure of Aircraft, concluded in the Hague on 16 December 1970, and to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded in Montreal on 23 September 1971, for the purpose of shaping the meanings of the expressions "political offence", "offence connected with a political offence" and "offence inspired by political motives", which are used in the former convention.

[1279] Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980.

interpretation and application".[1280]

A fourth method is to rely on the good faith and common sense of the interpreter, who will decide, in light of all available elements and items of evidence, including the fact that the treaty to be construed is a uniform law-making treaty, whether a uniform meaning is required that best suits the object and purpose of the treaty and fits in the context of the provision containing the relevant term,[1281] or, on the contrary, whether compelling reasons exist for adopting a different solution.[1282]

The above four methods are generally purported to achieve an interpretation that, in addition to being "uniform", is also "autonomous" in the sense that is independent from the national legal jargon meanings that the terms used (or their corresponding national legal jargon terms) may have under the relevant domestic laws.

Also in the case where the different national legal jargon meanings are taken into account by the interpreter, they merely represent the starting point for the purpose of arriving at uniform and autonomous meaning, which must primarily fit in the context and suit the object and purpose of the treaty to be construed.

Nonetheless, the comparative analysis of the relevant domestic legal concepts and

[1280] See also Article 7 of the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980; Article 15 of the Annex to the Convention providing a Uniform Law on the Form of an International Will, concluded in Washington on 26 October 1973; Article 6(1) of the Convention on Agency in the International Sale of Goods, concluded in Geneva on 17 February 1983.

[1281] See, in this respect, P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 429 *et seq.*; P. Guggenheim, "Landesrechtliche Begriffe im Volkerrecht, vor allem im Bereiche der internationalen Organisation", in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt: Vittorio Klostermann, 1956), 133 *et seq.*, at 133 *et seq*.

[1282] For instance, in the case *US – Softwood Lumber from Canada* the WTO Appellate Body, dealing with the interpretation of Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures, rejected an interpretation of the term "goods" based on the municipal law of one of the WTO Member States. In this respect, Canada had contended that standing timbers were not "goods", since they were neither "personal property" nor "identified thing to be severed from real property". The Appellate Body, after having noted that the concepts of "personal" and "real" property, as referred to by Canada, are creatures of municipal law not reflected in Article 1.1(a)(1)(iii), submitted that the manner in which the municipal law of a WTO Member classifies an item cannot be determinative of the interpretation of provisions of the WTO agreements (see WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R)*, para. 65).
In the *King v. Bristow Elicopters* and *Morris v. KLM* cases, Lord Steyn and Lord Hobhouse of Woodborough expressed the view that, in order to construe the term "lésion corporelle" used in Article 17 of the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, the legal jargon meaning of that term under any national legal system was irrelevant, since it followed from the convention scheme and nature that the basic concepts it employed in order to achieve its purpose were autonomous concepts, which, as such, were to be construed autonomously and independently from national laws. The opposite approach would have defeated uniformity and led to the complication of simple issues, the inadequately informed investigation of other legal systems and, most importantly, to uncertainty (see House of Lords (United Kingdom), 28 February 2002, *King v. Bristow Helicopters Ltd, In Re M (A Child By Her Litigation Friend CM)*, [2002] UKHL 7, paras. 16 and 147).

principles[1283] is generally recognized as being of great significance for the purpose of the above methods.[1284] The analysis of the (contracting and non-contracting) States' domestic laws, in this case, is mainly aimed:

> (i) at finding the common ground on which the interpreter may build up the "ordinary meaning" of the treaty terms in their context and in light of the object and purpose of the treaty; or
>
> (ii) where it proves difficult to establish such a common ground, at suggesting the interpretative solution that best suits the object and purpose of the treaty and fits in the context thereof.[1285]

In contrast, the quest of the interpreter is generally not directed at finding a "minimum common denominator" of the relevant domestic law concepts and principles in order to take it as, or immediately derive from it, the autonomous treaty meaning.[1286]

This reference to the relevant domestic legal systems, whose legitimacy may be grounded, among other things, on the need to determine the "ordinary meaning" of the treaty terms under Article 31 VCLT,[1287] on the possibility to rely on supplementary means of interpretation under Article 32 VCLT[1288] and on the explicit reference to the

---

[1283] On the different effects, on the interpretation of uniform law conventions, of the existence of common legal concepts, as compared to the mere existence of common legal principles, see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 289 *et seq*., who highlights that in the latter case the interpreter discretion is generally wider and his construction is generally regarded as "creative". In this sense, see also P. Guggenheim, "Landesrechtliche Begriffe im Volkerrecht, vor allem im Bereiche der internationalen Organisation" in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt: Vittorio Klostermann, 1956), 133 *et seq.*, at 141 and P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 431.

[1284] See R. Plaisant, *Les règles de conflit de lois dans les traités* (Alençon: Imprimerie Alençonnaise, 1946), p. 69; P. Guggenheim, "Landesrechtliche Begriffe im Volkerrecht, vor allem im Bereiche der internationalen Organisation" in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt: Vittorio Klostermann, 1956), 133 *et seq*., at 133 ff; D. Martiny, "Autonome und einheitliche Auslegung im Europäischen Internationalen Zivilprozeßrecht", 45 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1981), 427 *et seq.*, at 441 *et seq*.

[1285] See P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 431.

For an actual instance where the competent tribunal construed the uniform and autonomous meaning of the relevant treaty term (also) on the basis of the analysis of the contracting States' legal systems, see ECtHR, 21 February 1984, Öztürk v. Germany (Application no. 8544/79), in particular paras. 50-53.

[1286] See, in this sense, the analysis of the ECJ's usual reference to the contracting States' domestic law made by Advocate General Lagrange in Case 14/61, *Hoogovens v. High Authority*.

[1287] It is, in fact, just reasonable to expect that the meaning of a treaty term that has a specific legal jargon meaning under the domestic law of a certain State and whose corresponding terms in other languages have as well specific legal jargon meanings under the domestic law of other States, had been determined through a negotiation taking such meanings as starting point, especially where the main object and purpose of the treaty is that of making those States's domestic law uniform in that respect.

[1288] On the relevance of comparative law as a subsidiary means of interpretation before the conclusion of the VCLT, see H. Lauterpacht, *Private Law Sources and Analogies of International Law. With Special Reference to International Arbitration* (London: Longmans, 1927), pp. 183 *et seq*. For an instance in which the ICJ relied, *inter alia*, on the common principles of law in force in different States in order to support its interpretation of a

"general principles of law recognized by civilized nations" contained in Article 38(1)(c) of the ICJ Statute, is quite flexible with regard to the subject of the comparative analysis: in fact, depending on the characteristics of the case at stake, the analysis may be limited to contracting States, or include also non-contracting States; it may refer indifferently to the original treaty parties, as well as to parties that acceded subsequently; it may concern the legal concepts and principles in force at the moment of the treaty conclusion, or those in force at the moment of the treaty application.[1289]

Finally, a fifth method that may be adopted consists in directing the interpreter towards a specific national legal jargon meaning for the purpose of using it as uniform meaning in the context of a specific treaty provision.

This is a first type of *renvoi*[1290] (hereafter "type-I *renvoi*") to the domestic law of

---

treaty provision, see ICJ, 28 November 1958, *Case concerning the application of the convention of 1902 governing the guardianship of infants (Netherlands v. Sweden)*, judgment, p. 71.

[1289] See, for instance, D. Martiny, "Autonome und einheitliche Auslegung im Europäischen Internationalen Zivilprozeßrecht", 45 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1981), 427 *et seq.*, at 442 *et seq*.

[1290] In the present work, and particularly in this and the following chapters, ther term "renvoi" is used in a sense other than the one in which it is generally employed in the English writings on private international law.
In the latter, the term "renvoi" is commonly used in order to denote the problem emerging where the foreign law which is applicable under the choice of law rules of the *forum* is intended to include the private international law rules of the foreign State: in this case, if, under the private international law of the foreign State, the rules applicable to the case at stake are not those of that very same State, but those of a different State (which may be either the State of the *forum*, or a third State), the issue for the *forum* arises whether, and to what extent, it should accept such a *renvoi* to the rules of the latter State (see, among many others, L. Collins (gen. ed.), *Dicey, Morris and Collins on The Conflict of Laws* (London: Sweet & Maxwell, 2006), pp. 73 *et seq*.; P. North and J. J. Fawcett, *Cheshire and North's Private International Law* (Oxford: Oxford University Press, 2004), pp. 51 *et seq*.; K. Lipstein, "The General Principles of Private International Law", 135 *RCADI* (1972), 97 *et seq*., at 210 *et seq*.; E. G. Lorenzen, "The *Renvoi* Theory and the Application of Foreign Law. I. *Renvoi* in General", 10 *Columbia Law Review* (1910), 190 *et seq*.).
In contrast, the term "renvoi" is employed here to denote the case where the meaning of a legal jargon term employed in a treaty (or in the private international law of a State) is established by reference to the domestic law of a(nother) State. This construction of the term "renvoi" is rooted in the general theory of law, where it (and its Latin-derived correspondents, such as the Italian "rinvio") is employed to denote the legal technique of referring to another legal order (or to another part of the same legal order) for the purpose of establishing the meaning of a legal jargon term, or of regulating a certain case by means of a rule of law (see, for instance, H. Kelsen (translated by B. Laroche and V. Faure), *Théorie générale du droit et de l'État* (Bruxelles: Bruylant, 1997); N. Bobbio, *Teoria generale del diritto* (Torino: Giappichelli Editore, 1993); S. Romano, *L'ordinamento giuridico* (Firenze: Sansoni, 1946)). Moreover, this construction of the term "renvoi" is also sometimes adoped in legal writings in the fields of private international law and uniform law conventions (see, for instance, C. Focarelli, *Lezioni di diritto internazionale privato* (Perugia: Morlacchi Editore, 2005), pp. 49 *et seq*.; H. Kelsen, "Observations sur le rapport de George S. Maridakis: "Le renvoi en droit international privé"", in H. Kelsen (edited by C. Leben), *Ecrits français de droit international* (Paris: PUF, 2001), 309 *et seq*., in particular at 312; S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), Chapters 2 and 4; P. Picone, "Il rinvio all' "ordinamento competente" nel diritto internazionale privato", *Rivista di diritto internazionale privato e processuale* (1981), 309 *et seq*.). Finally, the term "renvoi" is not unusually employed in this sense in legal writings on tax treaty law, with particular reference to Article 3(2) OECD Model and equivalent tax treaty provisions (see, among others, S. A. Rocha, *Interpretation of Double Taxation Conventions: General Theory and Brazilian Perspective* (Alphen aan den Rijn: Kluwer Law International, 2009), pp. 122 *et seq*.; E. van der Bruggen, "Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of

a State.[1291] The issue for the parties, in this respect, consists in how to render unambiguous their intention to adopt a specific national legal jargon meaning as the meaning of the treaty term (or terms). There are various alternatives to achieve that result, the most common being the following:

(i) using a term that originally comes from a specific legal system;[1292]

(ii) employing the same national legal jargon term in all authentic texts of the treaty, either by itself or in brackets after the corresponding legal jargon term in the languages of the other authentic texts;[1293]

(iii) using a legal jargon term in a language different from the language generally employed in the sole authentic text of the treaty;

(iv) explicitly stating that the interpreter has to make reference to the meaning that a certain term has under the domestic law of a specific State;

(v) relying on the good faith of the interpreter, who will decide in light of all available elements and items of evidence[1294] whether the *renvoi* to a specific national legal jargon meaning is required, or, on the contrary, persuasive reasons exist to support a different choice.[1295]

---

the Vienna Convention on the Law of Treaties", 43 *European Taxation* (2003), 142 *et seq*.; K. Vogel, "La clause de renvoi de l'article 3, par. 2 Modèle de Convention de l'OCDE", in *Réflexions offertes a Paul Sibille. Études de fiscalité* (Bruxelles: Bruylant, 1981), 857 *et seq*.; R. Lenz, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 42 (Basel: Verlag für Recht and Gesellschaft, 1960), 281 *et seq*., in particular at 296).

In addition, with regard to the relevance of the *renvoi*, as intended in the present work, for the purpose of private international law, it is worth noting that such a *renvoi* is a technique sometimes employed by legal scholars and courts to solve the problems of characterization that often arise in the interpretation and application of the private international law of the *forum* (which may then lead to a *renvoi* in the private international law sense). See, in this respect, the comprehensive analysis carried out by the first authors to have dealt with this issue: F. Kahn, "Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts", 30 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (1891), 1 *et seq*.; E. Bartin, "De l'impossibilité d'arriver à la solution définitive des conflits de loi", *Journal du droit international privé* (1897), 225 *et seq*., 466 *et seq*. and 720 *et seq.;* E. G. Lorenzen, "The Theory of Qualifications and the Conflict of Laws", 20 *Columbia Law Review* (1920), 247 *et seq*.; E. Bartin, "La doctrine des qualifications et ses rapports avec le caractère national du conflit des lois", 31 *RCADI* (1930), 561 *et seq*.; E. Rabel, "Das Problem der Qualifikation", 5 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1931), 241 *et seq*.; J. D. Falconbridge, "Characterisation in the Conflict of Laws", 53 Law Quarterly Review (1937), 235 *et seq*. and 537 *et seq*.; A. H. Robertson, *Characterisation in the Conflict of Laws* (Cambridge: Harvard University Press, 1940); E. G. Lorenzen, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws", 50 *Yale Law Journal* (1940-1941), 743 *et seq*.

[1291] Generally, but not necessarily, a contracting State.

[1292] E.g. the term "trust" as used in the Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980.

[1293] E.g. the term "mortgage", as used in the French and Spanish authentic texts of Article 1(1)(d) of the Convention on the International Recognition of Rights in Aircrafts, concluded in Geneva on 19 June 1948; the term "force majeure" in the English authentic text of Article 3 of the Hours of Work (Industry) Convention, concluded in Washington on 28 November 1919.

[1294] Including, for instance, the nature of the drafted text, the fact that the treaty has just one authentic text and the *travaux préparatoires*.

[1295] For example, Malaurie indicates that Belgian judges often made reference to English legal concepts and principles for the purpose of interpreting the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded in Brussels on 25 August 1924 in the sole French authentic text, since they considered that the Convention provisions were based on English law (see P. Malaurie, "Le droit

It is clear from the above that such a fifth method does not lead to an autonomous interpretation, although the interpretation stemming from its application is doubtless uniform.

4.3.3. Non-uniform interpretation of treaties

The parties may have intended not to attribute a uniform meaning to some of the legal jargon terms used in the treaty, for instance in order to increase the predictability of its interpretation and thus legal certainty, to make less burdensome the application of the treaty by national courts and tribunals, to improve the interaction between the treaty provisions and the intertwined provisions of domestic law, or simply due to the impossibility of reaching an agreement on the uniform intension of a legal concept.[1296]

Despite the underlying reasons, the choice of the parties to reject the uniform construction of certain treaty terms almost invariably leads to the adoption, for the purpose of treaty interpretation, of some national legal jargon meanings.

This *renvoi* to the domestic law meaning of the treaty terms (or their correspondent legal jargon terms in the official languages of other contracting States, where such languages have not be used for drafting the authentic texts of the treaties), may, however, take different forms, which in turn often lead to significantly different interpretative results.

In a first form, the *renvoi* may be to the substantive *lex fori*, i.e. to the relevant substantive law of the legal system of the court of the *forum* (hereafter "type-II *renvoi*").

For instance, the original text of Article 25(1) of the 1929 Warsaw Convention[1297]

---

français et la diversité des langues", *Journal du droit international* (1965), 565 *et seq.*, at 573, footnote 31). Similarly, in the *Eastern Airlines v. Floyd* case, the US Supreme Court, in order to decide whether the term "lésion corporelle", used in the (sole) French authentic text of Article 17 of the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, denoted also the mental distress suffered by the passengers of a flight and caused by the risk of an imminent crash, considered the meaning that the term "lésion corporelle" had under French law in 1929, as a guidance to the shared expectations of the parties to the Convention, due to the fact that the latter was drafted in French by continental jurists (see Supreme Court (United States), 17 April 1991, *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991), p. 536).

[1296] With specific reference to the use of the *renvoi* to the contracting States' domestic law in private law treaties and tax treaties, Gaja cites, as instances of the reasons that may lead the parties to implement such a solution, (i) the fact that national authorities may not be sufficiently equipped to analyse the different texts in their possibly diverging meanings and to apply Articles 31-33 VCLT in order to determine a uniform interpretation and (ii) the fact that the use of the same rules of interpretation (namely those stemming from Articles 31-33 VCLT) by different domestic courts is no guarantee of a uniform result (see G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 98).
With regard to the adoption of the *renvoi* to the *lex fori* in the field of uniform law conventions, Bariatti points out that such a choice is generally due to the resistance of the contracting States to standardizing certain legal concepts, especially in relation with procedural law, or to the actual impossibility to reach an agreement, in the course of the negotiation, on the uniform intension of a legal concept (see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 137).

[1297] Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, in the French authentic text in force before the changes made by the 1955 Hague

provided for an explicit *renvoi* to the law of the referred court for the purpose of determining the "faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dole".[1298]

This type of *renvoi* implies that the meaning attributed to a certain treaty provision may vary due to the "nationality" of the court deciding the case and, therefore, that two identical situations may in fact be subject to two different rules of law simply because of the different "nationality" of the courts to which the cases have been referred and independent of the exercise of any discretionary judgment by those courts. This type of *renvoi*, clearly, favors attempts at *forum shopping*.

With regard to the methods that could be adopted in order to regulate the *renvoi*, the latter is generally required by an explicit provision of the treaty to be interpreted.[1299] However, it is possible that, in the silence of the parties and on the basis of all available elements and items of evidence, the interpreter arrives at and justifies the conclusion that the contracting States intended to operate a *renvoi* to the substantive *lex fori*.[1300]

In a second form, the *renvoi* may be to the private international *lex fori*, i.e. to the rules on the conflict of laws of the court of the *forum* (hereafter "type-III *renvoi*").

In this case, the court of the *forum* will determine, on the basis of its State's rules on the conflict of laws, which is the domestic substantive law applicable to the case at stake and will consequently interpret the relevant treaty terms on the basis of the legal jargon meanings that such terms (or their corresponding legal jargon terms in the official language in which the applicable domestic substantive law is expressed) have under the applicable domestic substantive law.

Although to a different extent and through a different process, type-III *renvoi* also

---

amending protocol.

[1298] Other well-know examples of renvoi type-II are: Articles 21, 22(1) and 29 of the same 1929 Warsaw Convention; Article 1(3) of the Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980; Articles 33 and 52(1) of the above-mentioned Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968.

[1299] See the examples given in the previous footnotes.

[1300] A case where it is not unfrequent to regard the *renvoi* to domestic law as intended to be to the substantive *lex fori* concerns those (treaty) terms that must be interpreted in order to characterize a legal relation (or situation) for the purpose of selecting the appropriate rule of conflict of laws. The first explicitly analyses of such an issue, although carried out with reference to the domestic rules on the conflict of laws, appeared in F. Kahn, "Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts", 30 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (1891), 1 *et seq*. and in E. Bartin, "De l'impossibilité d'arriver à la solution définitive des conflits de loi", *Journal du droit international privé* (1897), 225 *et seq*., 466 *et seq*. and 720 *et seq*., at 226 *et seq*. In the latter, the author commented the decision delivered by the Court of Appeal of Alger, on 24 December 1889, in the *Bartholo* case. In that case, the court had to decide whether the French or Maltese substantive private law was to be applied in order to establish the rights that the widow of Mr Bartholo had on the estate of her former husband (originally a Maltese citizen, married in Malta and died in Alger – at that time being part of France – as a French citizen). The question at stake before the court originated from the fact that under Maltese law such rights were regulated by succession law, while under French law they were regulated by family law. Thus, the issue obviously arose of whether the private international law rule regarding family law matters or that regarding succession law matters had to apply. The Court of Appeal decided to characterize the widow's rights in accordance with the substantive *lex fori* (i.e. as family law relation) for the purpose of deciding which private international law rule to apply.

implies that the meaning attributed to a certain treaty term may vary due to the "nationality" of the court of the *forum*. It is true that, due to the operation of their respective rules on the conflict of laws, the courts of two different jurisdictions may end up to apply the same domestic substantive law to two identical cases. However, due to the discrepancies existing between the private international law rules of different States, the coincidence of the applicable domestic substantive rules is not certain, but just the result of chance.[1301]

Furthermore, similar to what it has been noted with regard to type-II *renvoi*, type-III *renvoi* may favor attempts at *forum shopping* and is generally required by an explicit provision of the treaty to be interpreted,[1302] although it is possible that the interpreter decides to apply it, even in the absence of that explicit provision, on the basis of its appreciation of the available elements and items of evidence.[1303]

In a third form, the *renvoi* is not directed to the *lex fori*, but to the substantive domestic law of a State bearing a certain connection with the situation potentially regulated by the treaty provision to be interpreted (hereafter "type-IV *renvoi*").

For example, Article V(1)(d) of the 1958 New York Convention[1304] provides that the recognition and enforcement in one State of an arbitral award made in the territory of another State may be refused where "[t]he composition of the arbitral authority or the arbitral procedure […] was not in accordance with the law of the country where the arbitration took place". Similarly, Article 3(2) of the bilateral treaty between Italy and Switzerland on claims for damages caused by road accidents[1305] provides that "[i]l

[1301] See, similarly, F. Deby-Gérard, Le rôle de la règle de conflit dans le règlement des rapports internationaux (Paris: Dalloz, 1973), p. 267.

[1302] See, for instance, Article 53 of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968, and Article 18 of the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, concluded on 2 October 1973.

[1303] For instance, the ECJ, in a decision concerning the interpretation of Article 5(1) of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, after noting that "in the case of an action relating to contractual obligations Article 5(1) allows a plaintiff to bring the matter before the court for the place 'of performance' of the obligation in question", concluded that it was "for the court before which the matter [was] brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction" and that, for such a purpose, the referred court had to "determine in accordance with its own rules of conflict of laws what [was] the law applicable to the legal relationship in question and define in accordance with that law the place of performance of the contractual obligation in question". According to the ECJ, "in these circumstances the reference in the Convention to the place of performance of contractual obligations [could not] be understood otherwise than by reference to the substantive law applicable under the rules of conflict of laws of the court before which the matter [was] brought" (see ECJ, 6 October 1976, Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, paras. 13 and 15).
See also Court of Rotterdam, 18 June 1963, *Journal du Droit International* (1969), 990 *et seq.*, at 991; Cour de Cassation (France), 4 March 1963, *Hocke*, 53 *Revue critique de droit international privé* (1964), 264 *et seq.,* where the *renvoi* to the substantive domestic law of a State, made by the private international law of the State of the *forum*, is construed by the court of the *forum* as including the interpretation of the relevant uniform law convention terms made by the judges of the former State.

[1304] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958.

[1305] Accordo tra la Confederazione Svizzera e la Repubblica Italiana concernente il risarcimento dei danni in

concetto di veicolo a motore si determina secondo la legislazione del Paese dove avviene l'incidente".[1306]

The specific features of this type of *renvoi*, as compared to type-II and type-III *renvois*, consist in that the former (i) does not permit any forum shopping and (ii) guarantees a partially uniform interpretation.[1307] With reference to (ii), in fact, although it is true that two situations that are identical, but for the connections they have with different States, are potentially subject to different rules when those connections are relevant for the purpose of the *renvoi* to the applicable domestic substantive law, where those situations do not present any differences in respect of their geographical connections, they will be invariably subject to the same rule, independent of the court to which the case is referred.

Finally, it may be noted that type-IV *renvoi* is generally regulated by an explicit treaty provision, although, even in this case, it cannot be excluded that the interpreter decides to adopt it for the purpose of treaty interpretation and justifies such a decision on the basis of the available elements and items of evidence.[1308]

With regard to all the above types of *renvoi* the question arises of whether the reference to the domestic law of the relevant State must be considered to include treaties to which that State is party and other international legal instruments addressing that State (such as regulations and directives in the legal framework of the European Union). The issue is actually twofold.

First, the question of the theoretical admissibility of such an inclusion should be generally answered in the affirmative, as long as those treaties and other international legal instruments provide for rules and principles of law applicable in the legal order of the State concerned, independent of whether they are applied directly or are

---

caso di incidenti della circolazione stradale, concluded in Rome on 16 August 1978. Article 3(2) thereof may be translated in English as follows: "the concept of motor vehicle is determined according to the law of the State where the accident took place".

[1306] See also Article 50 of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968; Articles V(1) and VII of the Convention providing a Uniform Law on the Form of an International Will, concluded in Washington on 26 October 1973; Article 3 of the Convention on the law governing transfer of title in international sales of goods, concluded in the Hague on 15 April 1958.

[1307] It must be noted that the categorization here adopted by the author with reference to "uniform", "partially uniform" and "non-uniform" interpretation does not coincide with that followed by the majority of private international law scholars, who tend to include type-IV *renvoi* within the methods to achieve "uniform" interpretation (see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), Chapters II and IV and the references to scholars therein).

[1308] This may be the case, for instance, where the private international laws of the contracting States (or, more generally, the private international laws of a highly significant number of States worldwide) provide for the same connecting factor for the purpose of identifying the relevant private law applicable to a certain subject matter. In such a case, the comparative analysis of the (contracting) States' private international law rules may show a significant convergence in relation to a specific subject matter, which in turn may lead the interpreter to conclude (and justify) that the treaty terms included in the provisions dealing with that subject matter should be attributed the legal jargon meaning they have under the law of the State to which such international private law rules would have referred (see A. Cassese, *Il diritto interno nel processo internazionale* (Padova: Cedam, 1962), pp. 202 *et seq*.).

implemented by means of *ad hoc* domestic legislation.[1309]

Second, with regard to whether, in the specific case, the *renvoi* should be considered to include such international legal instruments, the interpreter must assess all available elements and items of evidence in order to establish the intention of the parties in that respect.[1310]

Similarly it is not possible to determine a priori whether the *renvoi* is meant to the law in force at the moment of the treaty conclusion, or to that in force at the moment of the treaty application, that depending on the intention of the parties, which is to be established by the interpreter on the basis of all available elements and items of evidence.[1311]

4.4. Problems arising in the interpretation of legal jargon terms

4.4.1. The required knowledge of foreign legal systems and concepts

The choice to attribute a uniform and autonomous meaning to undefined treaty terms, or to employ one of the aforementioned types of *renvoi*, also leads to different burdens on the interpreter in terms of knowledge of the relevant foreign legal concepts and systems of law.

On one extreme of the scale, the use of a type-II *renvoi* renders the task of the interpreter rather easy, since the latter has to refer to and apply its domestic law concepts for the purpose of construing the relevant treaty provision.

The situation generally becomes more complicated where type-III and type-IV *renvois* are at stake, since the interpreter may be often required to refer to and apply legal concepts of foreign substantive law and, therefore, he needs to acquire a sufficient understanding of the foreign legal system and of the role played therein by the foreign

[1309] See A. von Overbeck, "Le champ de l'application des règles de conflit ou de droit matériel uniforme prévues par les traits. Exposé préliminaire et rapport définitif avec projet de résolution présentés à l'Institut de Droit International", 58-I *Annuaire de l'Institut de Droit International* (1979), 97 *et seq*., at 117; W. Wengler, "Réflexions sur l'application du droit international public par les tribunaux internes", 72 *Revue Générale de Droit International Public* (1968), 921 *et seq.*, at 964, in particular note 15 and references therein. With specific regard to the relevance of EU law for the purpose of Article 3(2) of OECD Model-based tax treaties, see F. Avella, "Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention", *World Tax Journal* (2012), 95 *et seq*., at 113 *et seq*.

[1310] See, although with reference to tax treaties, F. Avella, "La qualificazione dei redditi nelle Convenzioni internazionali contro le doppie imposizioni stipulate dall'Italia", *Rivista di Diritto Tributario. Parte Quinta* (2010), 45 *et seq.*, at 54; F. Avella, "Il beneficiario effettivo nelle convenzioni contro le doppie imposizioni: prime pronunce nella giurisprudenza di merito e nuovi spunti di discussione", *Rivista di Diritto Tributario. Parte Quinta* (2011) 14 *et seq.*, at 22 *et seq*.

[1311] See P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 428; J. W. F. Sundberg, "A Uniform Interpretation of Uniform Law", 10 *Scandinavian Studies in Law* (1966), 219 *et seq.*, at 236. See, by analogy, the analysis of the inter-temporal law issue in section 2.3.3.4 of Chapter 3 of Part II.

legal concepts for the purpose of properly interpreting the relevant treaty provision.

The use of a type-I *renvoi* presents similar qualitative problems, although quantitatively more significant due to the fact that, at least with reference to multilateral treaties, interpreters from most of the contracting States have to refer to and apply foreign legal concepts.

Finally, at the other extreme of the scale, the choice to attribute a uniform and autonomous meaning to undefined treaty terms presents major interpretative issues and uncertainties, caused by the need for the interpreter to take into account a vast spectrum of contextual elements, including the relevant foreign legal concepts and systems of law, in order to construe the treaty provisions at stake.

4.4.2. The tendency to examine foreign legal systems and concepts through the looking glasses of the interpreter's domestic law

Not infrequently do interpreters lack the knowledge of the relevant foreign legal concepts and systems of law necessary to properly construe the treaty.[1312]

What interpreters tend to do in these cases[1313] is to attribute to the treaty terms the domestic legal jargon meaning of the corresponding terms employed in their national legal systems. The "correspondence" between such terms is generally established by interpreters by taking into account their past practice, multilingual dictionaries, comparative law studies and the analysis of multilingual treaties in which both languages (legal jargons)[1314] are used as authentic languages. Such correspondence is generally established on the basis of:

(i) the similarity of the functions performed by the concept underlying the treaty term in its original legal system and by the concept underlying the "corresponding" term under the interpreter's national legal system;
(ii) the correspondence of a significant part of the prototypical denotata (and non-denotata) of those two terms.[1315]

[1312] With regard to the field of private international law and private substantive law treaties, the risk of an unsatisfactory interpretation of the treaty due to the inappropriate knowledge of foreign law is pointed out in R. David, "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, p. 106 and R. Mankiewicz, "Die Anwendung des Warschauer Abkommens", 27 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1962), 456 *et seq.*, at 457.

[1313] With reference to tax law, see, by analogy, the interesting statement made by Thuronyi on the dangerous effects of "ethnocentrism" in the practice of drafting foreign States' tax law systems (see V. Thuronyi, "Studying Comparative Tax Law" in G. Lindencrona, S. Lodin and B. Wiman (eds.), *International Studies in Taxation: Law and Economics. Liber Amicorum Leif Mutén* (London: Kluwer Law International, 1999), 333 *et seq.*, at 334 and 338), according to which, in the drafting of the tax legislation of foreign States, tax specialists inevitably tend to look at tax law either exclusively or excessively from the perspective of their own States, mainly because most of them are first and foremost specialists in the law of the latter.

[1314] I.e. the language in which the treaty to be interpreted is authenticated and the language in which their own domestic laws are drafted.

[1315] For instance, where an Italian lawyer is faced with the interpretation of the term "enterprise" included in a

This phenomenon, often unperceived, causes the construction of undefined treaty terms to be heavily influenced by the domestic legal system and concepts of the treaty interpreter. This, in turn, leads interpreters from different States to construe the same treaty provision differently[1316] and, more generally, to unsatisfactory interpretative results.[1317]

4.4.3. Whether proxies of the relevant legal jargon terms should be used for the purpose of interpretation

In order to interpret a treaty term in light of its domestic law meaning, the interpreter is often required to decide whether that treaty term, although not being a term of the relevant legal jargon, may be regarded as a proxy for a term of the relevant legal jargon and, therefore, whether it may be attributed the legal jargon meaning of the latter for the purpose of the treaty[1318]

Some instances of this issue may be taken from Italian tax treaty practice. The legal jargon term used in the Italian income tax code (ITC)[1319] to denote employment

---

treaty provision, he will commonly construe that term as denoting the concept underlying the Italian legal jargon term "impresa", which is generally regarded as corresponding to the English term "enterprise". However, it is normal that some of the denotata of one term are not denoted by the other term (and vice versa), either because they are unknown in the legal system corresponding to the jargon of the latter term, or because they are denoted by a different term in such a jargon.

[1316] This tendency is also stressed in S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 154-160, where it is pointed out that the major reason for the existence of divergent interpretations of (uniform private law) treaty provisions is that treaties are highly incomplete legal systems, in which general principles of law, legal categorizations, fundamental legal concepts are absent; in addition, treaties generally regulate only a few selected features of the underlying relevant domestic legal systems (e.g. contract law, family law, income tax law, etc.). Such incompleteness necessarily leads the interpreter to rely on his encyclopedic knowledge of his own legal system(s) in order to interpret undefined terms and to complete (or extensively interpret) treaty provisions by means of analogy. As a result, when two interpreters are from two different States (where different legal systems are in force), it is just part of the normal course of events that two different interpretations are arrived at and supported (see also R. David, "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, pp. 94, 98 *et seq.*, 106, 167 *et seq*.; P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 432; J. W. F. Sundberg, "A Uniform Interpretation of Uniform Law" 10 *Scandinavian Studies in Law* (1966), 219 *et seq.*, in particular at 234; 119; A. Malintoppi, "The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts", in C. M. Schmitthoff (ed.), *The Sources of the Laws of International Trade. With special reference to East-West Trade* (London: Stevens & Sons, 1964), 127 *et seq.*, at 128 *et seq*.).

[1317] I.e. the absence of uniformity, where uniformity is sought, and the misconstruction of foreign legal jargon terms, where a *renvoi* to foreign legal concepts is at stake.

[1318] The fact that a day-to-day language term (or a term of a different legal jargon in the same natural language) may be regarded as a proxy for a legal jargon term depends on various circumstances that have to be appreciated by the interpreter, the most important of which are the following: (i) the two terms are synonyms where used in the day-to-day language; (ii) the definition of the legal jargon term makes reference to (or use of) the other term; (iii) even where they are not synonyms, their related concepts may play the same function in the context where the treaty term is used and have a significant common group of denotata (and non-denotata).

[1319] Presidential Decree no. 917 of 22 December 1986.

income[1320] is "redditi di lavoro dipendente";[1321] however, in Article 15 (or its equivalent) of many tax treaties concluded by Italy the expression "lavoro subordinato" is used instead of "lavoro dipendente". Similarly, the legal jargon term used in the ITC to denote alienation is "cessione";[1322] however, in Article 13 (or equivalent) of many tax treaties concluded by Italy the term "alienazione" is used instead of "cessione".

The issue at stake here is twofold.

On the one hand, the question may be raised of whether and on which basis the two terms might be regarded as proxies. In that respect, in footnote 1318 the author has mentioned some of the elements that could be taken into account by the interpreter in order to answer such a question.

On the other hand, provided that the interpreter concludes that the two terms are proxies in the specific context, the issue must be tackled of whether such proximity is to be seen as evidence of the intention of the parties to attach to the treaty term the meaning of the corresponding legal jargon term, or, on the contrary, whether the use of a term different from the legal jargon term constitutes evidence of the parties' intention not to rely on the legal jargon meaning. In order to solve such an issue, the interpreter may take into account other elements, such as how common the use of similar kinds of proxies in the treaty is, the reasonableness of the interpretations based on either solution, the existence of other possible reasons that could explain why a proxy, and not the legal jargon term, has been used and so forth.

4.4.4. Whether domestic law assimilations should be taken into account for the purpose of interpretation

An additional problem emerges with regard to cases of assimilation occurring in the legal jargon from which the treaty terms are derived.

By assimilation, the author intends to refer to instances where, for specific purposes, the denotata of a certain term (B) are treated as if they were (also) denoted by a different term (A).

The assimilation may take different forms. For instance, under the ITC the following assimilations take place, among other ones:

[1320] Note that the sentence that the author has just written down is a tautology, since here "employment income" is nothing other that a different sign used to denote the same denotata of "the legal jargon term used in the Italian income tax code", which in turn is used a perfect synonym of the following "redditi di lavoro dipendente". There is no attempt to know what the concept associated with the term "employment income" is where the latter is used as English legal jargon term (if any); that would be useless for the purpose of the reasoning expressed by the sentence and, furthermore, by far too complicated.
As previously noted, the same mental process usually occurs when an interpreter who has knowledge of the legal system, and related legal jargon, of a certain State (e.g. France) reads and attributes a meaning to a term of a different legal jargon (e.g. Japanese): the second terms is often treated as if it were an exact synonym of the former (just a different sign that denotes the same denotata of the former term).

[1321] SeeArticle. 49 *et seq*. ITC.

[1322] As of September 2010, the term "cessione" appears more than fifty times in the ITC; in contrast, the term "alienazione" is not used at all (its derived term "alienate" is employed just once).

(i) the tax law provisions dealing with "cessioni a titolo oneroso" (*alienations against remuneration*) of property also apply to "conferimenti in società" (*capital contributions into companies*);[1323]
(ii) the "strumenti finanziari" *(financial instruments)* whose remuneration is totally represented by participation in the profits of the issuing company are deemed to be akin to "azioni" *(shares)*;[1324]
(iii) *income derived by a company's director*, who, as such, is not an employee of that company for private law purposes, is (generally) assimilated to "redditi di lavoro dipendente" *(income from employment)*.[1325]

The existence of assimilations under the relevant domestic law may lead the interpreter to conclude that the above-mentioned treaty term (A) should be construed as if it denoted also the denotata of the legal jargon term (B), especially where the scope of the treaty significantly overlaps with the scope of the domestic provisions in relation to which the assimilation has been set up.

However, the opposite conclusion could be drawn as well. The interpreter, for instance, could argue that, since for the purpose of the domestic legal system a specific assimilation has been considered necessary in order to regard term (A) as denoting also the denotata of term (B), the absence of an equivalent assimilation, or specific definition, in the treaty would make it impossible to make a similar enlargement of the intension of term (A) in the treaty context. The interpreter could further uphold his position by drawing the distinction, which might be customary in the relevant national legal system, between cases of assimilation and cases of broad definition of terms.[1326]

4.5. Conclusions on research questions h): the relevance of multijuralism for the interpretation of multilingual treaties

The preliminary comment to be made, with regard to the impact of multijuralism on the interpretation of multilingual treaties, is that the presence of legal jargon terms in the authentic texts of a treaty does not change the goal of its interpreter, which remains establishing the utterance meaning of its provisions.

[1323] See Article 9(5) ITC; therefore, each capital contribution transaction is treated, for Italian income tax purposes, as if it were an alienation against remuneration, although it is not directly denoted by the latter expression in the Italian tax legal jargon (and not denoted at all thereby in the Italian private and commercial legal jargon).
[1324] See Article 44(2) ITC.
[1325] See Article 50(1) ITC.
[1326] It might, however, be counter-argued that (i) the latter distinction is, from a treaty perspective, of a purely formal nature, since the function performed by those two different techniques (i.e. assimilation and broad definition) is substantially the same within the specific national legal system and the choice of one, instead of the other, has not been made by the legislator having the treaty scenario in mind and (ii) it is reasonable to imagine that the parties, when concluding the treaty, had clearly in mind that term (A), in the specific legal jargon, actually also denotes the denotata of term (B) and thus its inclusion in the treaty was intended to achieve the same result.

Similarly, the outcomes of the analysis carried out by the author in section 3 of this chapter are not fundamentally affected by the fact that the treaty terms to be construed are legal jargon terms. Therefore, the interpreter continues to be entitled to rely on any single authentic text, taken in isolation, for the purpose of interpreting the treaty, and he is required to remove the *prima facie* discrepancies in meaning by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.

At a more in-depth level of analysis, however, the interaction between the multilingual nature of the treaty and the use therein of legal jargon terms may play a substantial role.

First, the multilingual character of the treaty comes into play as an element that the interpreter may assess in order to establish how the parties intended to construe the legal jargon terms employed in the treaty.

In particular, where the treaty is authenticated in all the official languages of the contracting States and, due to its nature, it interacts strictly with the contracting States' domestic laws, the interpreter could be led to conclude that the parties intended the legal jargon terms employed in the treaty to be attributed their technical meanings under the domestic law of the contracting State applying the treaty. In this case, in fact, the interpreter might regard the linguistic aspect so deeply intertwined with the legal characterization aspect, for the purpose of the treaty application, as to render such a solution almost unavoidable.[1327]

The treaty term expressed in the official language of the State applying the treaty, in this respect, would work as the key to unlock the door of the appropriate domestic law meaning, i.e. as a guide for the interpreter to select the domestic law meaning that the parties considered to best fit in the context of the relevant treaty provision.

Second, the fact that the interpretation concerns legal jargon terms significantly influences the resolution by the interpreter of the *prima facie* discrepancies in meaning among the authentic treaty texts.

In fact, based on the assumption that the concepts underlying the legal jargon terms employed in one legal system do not normally have accurate equivalents in other

[1327] Similarly, Fantozzi has pointed out, with reference to tax treaties (although his analysis applies well beyond such a narrow field), that there is an intrinsic difficulty in singling out "the "linguistic" issues relating to the interpretation of double tax conventions from the broader "classification" issues. The two concepts are deeply intertwined, and I therefore do not know if it is possible to define where the thin line that divides the two exactly lies. I find it rather easier to imagine them as two sides of the same coin. In the various hypotheses the interpreter/translator can be faced with, there is, in my view, always a part of each aspects. […] For the treaty to apply […] it is required that a treaty situation takes place. It is therefore required that the State which has to give up part of its power to tax recognizes the *material event* occurred in the other State, as represented by a *legal concept*. The definition of this legal concept involves issues of both kinds: *linguistic* and *classification* issues." (A. Fantozzi, "Conclusions", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 335 *et seq.*, at 335-336).

legal systems, but just general correspondents (if any), i.e. concepts that fulfill similar functions within the respective legal systems and with which they share a considerable part of their prototypical denotata (and non-denotata),[1328] the interpreter must not look for an exact equivalence, but just for a general correspondence among the domestic law concepts underlying the legal jargon terms used in the various authentic texts in order to establish that no discrepancy exists between such texts.

For instance, where a treaty concluded between Austria and Italy is authenticated in the German and Italian languages and employs the terms "Unternehmen" and "impresa", the interpreter, in order to conclude that there is no discrepancy in meaning between those two terms, must be satisfied in ascertaining that the legal concepts underlying these two terms under Austrian and Italian domestic laws generally correspond with each other, in the sense that they fulfill similar functions within the respective legal systems[1329] and share a substantial part of their prototypical denotata (and non-denotata).[1330] The fact these two concepts do not perfectly overlap may not be considered significant in order to establish whether a discrepancy in meaning exists between the two texts.

Once such a general correspondence has been established, any discrepancy in meaning bewteen the authentic treaty texts will no longer be considered to exist and the interpreter must proceed to determine the utterance meaning of the legal jargon treaty terms on the basis of either authentic text.

Thus, for instance, where the interpreter concludes that the parties intended to attribute a uniform and autonomous meaning to a certain legal jargon treaty term, he will construe such a term on the basis of the overall context and by taking into account the various corresponding concepts under the domestic laws of the contracting States. In the previous example, where the treaty was in force between Austria, Italy, France and Spain, the interpreter would consider, as part of the overall context, the domestic law meanings that the treaty terms "Unternehmen" and "impresa" and their corresponding terms "entreprise" and "empresa" have under Austrian, Italian, French, and Spanish domestic law, respectively.[1331] The result of his interpretation, due to the loose relation existing between the autonomous treaty meaning and the corresponding domestic law meanings under the laws of the contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

[1328] See the position expressed by the United States representative at the Vienna Conference with regard to the impossibility of reconciling the different authentic texts of a treaty where different systems of law were involved, due to the fact that often there is no legal concept in one system that exactly corresponds to a certain legal concept in the other system (UNCLT-1st, p. 189, para. 41). See also, in this respect, the comment on Part III of the 1964 Draft made by the Yugoslavian government (YBILC 1966-II, p. 361).

[1329] E.g. both are used by the respective legal system in order to distinguish certain economic activities from others, in connection with bankruptcy procedures, the requirement to keep accounts, etc.

[1330] E.g. they both denote banking activities, insurance activities, sale and production of goods activities, certain activities in the provision of services, etc.

[1331] He could take into account as well the domestic law meanings of other corresponding terms under the laws of non-member States, as long as he can reasonably argue their relevance for his current analysis.

Similarly, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,[1332] he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State of the *forum*) has under the substantive *lex fori*. In the previous example, where the treaty in force between Austria, Italy, France, and Spain was to be interpreted by a French court, the interpreter would attribute to the treaty terms "Unternehmen" and "impresa" the meaning that the term "entreprise" has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

However, where the interpreter establishes that no general correspondence may be considered *prima facie* to exist among the legal jargon terms employed in the various authentic texts, e.g. because their underlying concepts under the relevant domestic laws do not fulfill similar functions and do not share any significant part of their prototypical denotata (and non-denotata), the interpreter must remove the consequent apparent discrepancy in meanings among the authentic treaty texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.[1333] In the previous example, where the Italian authentic text of the treaty employed the term "attività economica" instead of "impresa", the former having a much wider scope than the latter under Italian law, a *prima facie* discrepancy in meaning might be considered to exist between the Italian and the German authentic texts. An interpretation of those texts based on Articles 31 and 32 VCLT could then lead the interpreter to conclude that the general meaning underlying the treaty terms "Unternehmen" and "attività economica" is that characterizing the terms "Unternehmen", "impresa" (and not "attività economica"), "entreprise" and "empresa" under Austrian, Italian French and Spanish domestic laws.

Once the *prima facie* discrepancy has been set aside and the general meaning underlying all legal jargon terms employed in the authentic treaty texts has been established, the more precise meaning that the parties intended to attach thereto (i.e. the utterance meaning) will be determined by the interpreter according to the circumstances.

For instance, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,[1334] he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State *fori*) has under the substantive

[1332] The same, however, holds true as well with regard to other types of *renvoi*.
[1333] See, although with specific regard to tax treaties, G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99-100.
[1334] The same, however, holds true as well with regard to other types of *renvoi*.

lex fori. In the previous example, where the treaty was to be interpreted by a French court, the interpreter would attribute to the treaty terms "Unternehmen" and "attività economica" the meaning that the term "entreprise" has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

Finally, whenever faced with the interpretation of a treaty term, the interpreter must assess, as illustrated in subsections 4.4.3 and 4.4.4 of this chapter, whether for the purpose of construing that term he should also take into account legal jargon proxies and assimilations under the relevant domestic law.

The above conclusions are substantially in line with principle (ix) established by the author in section 2 of Chapter 3 of Part I. That principle highlights that, especially where the relevant treaty is authenticated in all the official languages of the contracting States, the question may arise of whether the parties intended the relevant terms used in the various authentic texts to be attributed a uniform meaning, or whether they intended each State to interpret those terms in accordance with the meaning that the term employed in the text authenticated in its own official language has under its domestic law.

According to principle (ix), the interpreter should first answer such a question on the basis of the treaty text(s) and the overall context and then determine the utterance meaning of the relevant treaty provision:

(a) in case a uniform meaning was intended by the parties, by attributing a particular relevance to the overall context and to the prototypical items denoted by all, or most of, the terms employed in the various authentic texts;
(b) in case a uniform meaning was not intended by the parties, by construing the treaty in accordance with the (national) meaning of the term used in the text authenticated in the official language of the State applying the treaty, provided that such term is similar to the (majority of the) terms used in the other authentic texts. Where the test of similarity fails, the reasonable suspicion may arise that the parties did not intend the relevant treaty provision to be construed in accordance with the (national) meaning of that term.

For the purpose of such a comparison, two terms, construed in accordance with their respective national meanings, may be considered similar:

(i) when they share most of their prototypes, or
(ii) in the case their prototypes are limited to a few or do not coincide, when most of the features (including their function in the relevant field of knowledge) that characterize such prototypes coincide or, at least, present strong similarities.

What constitutes the majority of the respective prototypes and their distinctive features, which have to be taken into account for the purpose of assessing the similarity, cannot be

said *in vacuo*. The answer to that question depends upon:

(a) the nature of and the functions performed by the concepts underlying those terms;
(b) the overall context in which those terms are used (in particular the object and purpose of the provision containing those terms).

5. Significant principles and maxims of interpretation applied by international tribunals: interactions with the rules of Article 33 VCLT

The author has already mentioned that the ILC decided to codify only "the comparatively few general principles [that appeared] to constitute general rules for the interpretation of treaties",[1335] leaving the interpreter the freedom to apply the other other principles and maxims suitable for use in the particular case at stake. As the ILC pointed out, such principles and maxims "are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case."[1336]

An analysis of the case law of the ICJ (and, previously, of the PCIJ), of the decisions of national and international courts and tribunals, as well as the scrutiny of the positions expressed by scholars in the field of public international law, show the existence of a significant number of other principles and maxims occasionally referred to in connection with the interpretation of multilingual treaties. The following is deemed to be an extensive, although not complete, list of these principles and maxims:[1337]

(i) Preference for the authentic texts with a clear meaning over those with unclear meanings[1338]

[1335] See paragraph 5 of the Commentary to Articles 27 and 28 of the 1966 Draft (YBILC 1966-II, pp. 218-219, para. 5).
[1336] See paragraph 4 of the Commentary to Articles 27 and 28 of the 1966 Draft (YBILC 1966-II, p. 218, para. 4).
[1337] The author has maintened as much as possible, in such a list, the wording used by courts, tribunals and legal scholars; in particular, it may be noted that the following principles and maxims often make reference to the treaty "texts", although, for the reasons put forward in the present study, reference to the "meanings" of such texts should have been made in some cases.
[1338] Explicitly rejected by the ILC as a general principle to be codified. See paragraph 9 of the Commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 226, para. 9). See also J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961),

(ii) Preference for the drafted text(s)[1339]

(iii) Comparison (from the outset) of the various authentic texts[1340]

(iv) Subjective interpretation of the treaty (i.e. interpretation of the treaty mainly based on the intention of the parties as a subjective element distinct from the text)[1341]

(v) The maxim *ut res magis valeat quam pereat* and the principle of effectiveness. In the case of a *prima facie* divergence among the authentic treaty texts, this maxim would imply that the text(s) whose meaning makes a treaty provision have a certain effect should be preferred over those texts whose meanings make the same provision ineffective, or meaningless (the effectiveness being assessed in light of the object and purpose of the treaty)[1342]

(vi) Preference for the text that best harmonizes the treaty with the relevant rules of

---

72 *et seq.*, at 87-92; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 7-8, 11, 82, 328; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 285-286; W. Rudolf, *Die Spreche in der Diplomatie und internationalen Verträgen* (Frankfurt: Athenäum Verlag, 1972), p. 70; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 94-95.

[1339] See section 3.2.3 of this chapter; see also A. D. McNair, *The Law of Treaties* (Oxford; The Clarendon Press,1961), p. 434; J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 98-105; A. Verdross et al., *Völkerrecht* (Vienna: Springer-Verlag, 1964), p. 174; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 326-327; P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 418 *et seq.*; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 288-289; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 65-69, 88-94.

[1340] See section 3.3 of this chapter.

[1341] On the relevance of such a principle with reference to the interpretation of multilingual treaties, see the Commentary to the Draft Convention on the Law of Treaties with Comments, prepared by the Research in International Law (see Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 971); M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 82-83; H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law* (1949), 48 *et seq.*, at 76; C. Parry, "The Law of Treaties", in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), 175 *et seq.*, at 214.

[1342] See R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1280-1281. It must be noted that the ILC considered that such principle(s), insofar it reflected a true general rule of interpretation, was already embodied in the provision of (now) Article 31(1) VCLT, which requires a treaty to be interpreted in good faith and in light of its object and purpose (see YBILC 1966-II, p. 225, para. 7).

international law applicable in the relation between the parties[1343]

(vii) Preference for the narrowest authentic text[1344]

(viii) Interpretation *contra proferentem,* according to which the authentic text whose meaning is least to the advantage of the party which proposed and first prepared the provision, or for the benefit of which the provision was inserted in the treaty, should be preferred[1345]

(ix) Preference for the authentic text in the language used in the proceedings before the court or tribunal[1346]

(x) Preference for the authentic text in the official language of the party to which the disputed provision refers[1347]

(xi) Preference for the authentic text in the official language of the obligated party, or for the authentic text that the obligated party has ratified[1348]

[1343] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 408.

[1344] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 76-81; R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 505; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), p. 325 and references in footnotes 157-159; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 287-288; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 63-65. For instance, in his separate opinion in the *Western Sahara* case, Judge Ammoun stated that he could not reject the contention, put forward by Marocco, in favour of the authentic text with the narrower meaning, since it was based on settled case law (see ICJ, 16 October 1975, *Western Sahara*, advisory opinion, Judge Ammoun's separate opinion, p. 88).

[1345] See, among others, M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 99-100; D. P. O'Connell, International Law (London: Stevens & Sons, 1970), p. 257; R. Jennings and A. Watts (eds.), Oppenheim's International Law. Volume I. Peace (London: Longman, 1992), p. 1279 and footnotes therein.

[1346] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 152.

[1347] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 152.

[1348] See A. Rivier, *Principes du droit des gens. Tome II* (Paris: Arthur Rousseau, 1896), p. 122; J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 113-115; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 327-329; D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 256 and n. 69; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 284-285; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 95-99. This principle appears strictly

(xii) The maxim *in dubio mitius*, according to which the authentic texts whose meaning is less onerous to the party assuming an obligation, or imposes the fewest restrictions on the (sovereign) parties, should be preferred[1349]

(xiii) Preference for the authentic text that best balances the rights and obligations of the parties[1350]

(xiv) Recourse to non-authentic versions[1351]

(xv) Preference for the authentic texts with an unambiguous meaning, which is also one of the meanings of the other ambiguous texts[1352]

(xvi) A combination of several of the above principles.

The most interesting question, with regard to such principles and maxims, concerns their status as principles of international law (if any) and their relation to the rules expressed by Articles 31-33 VCLT.

Some of them, in particular no. (i), (v), (vi) and (xv), might qualify (in the future) as "international customs" or "general principles of law" and could be regarded as principles expressed by "judicial decisions and the teachings of the most highly qualified publicists of the various nations" under Article 38 of the ICJ Statute.[1353]

---

connected to the the other principle according to which each party is bound only by the authentic text drawn up in its own official language (see J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 76-81; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 288-289; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 55 *et seq.*; D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 258; M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 223, note 86).

[1349] See R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1278-1279 and the case law cited in the footnote therein. The *Mavrommatis Palestine Concessions* case (PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment) could also be seen as an instance of application of the maxim *in dubio mitius*, although, as clearly pointed out by Jennings and Watts, the application of such a maxim in that case could be better regarded as flowing from the general nature of the treaty rather than as a consequence of its multilingual character (see R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), p. 1284, note 5).

[1350] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 408.

[1351] On the possibility and relevance of using non-authentic version for the purpose of interpreting multilingual treaties, see section 3.2.4 of this chapter See also J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 123-138 and 153-154; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 103-115.

[1352] See section 3.4.4 of this chapter.

[1353] See, in this sense, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 207.

In any event, although scholars' positions vary greatly with regard to the actual relevance and status of such principles and maxims,[1354] it seems that their reasonable use in practice should be limited to assisting the interpreter in establishing and arguing for the utterance meaning of the treaty provisions where the overall context appears to support their relevance.[1355]

In contrast, these principles and maxims cannot be "automatically" applied by the interpreter in order to resolve *prima facie* divergences between the various authentic texts, since such a use would conflict with both (i) the principle that, as far as possible, the meaning common to all authentic texts is to be determined by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT,[1356] and (ii) the principle that, when this is not possible, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted.[1357] Some of them[1358] may provide the interpreter with a reasonable solution, in light of the overall context, for the purpose of determining the common meaning of the various authentic texts on the basis of the interpretative rules enshrined in Articles 31 and 32 VCLT and, to a lesser extent, in order to adopt the meaning which best reconciles the various authentic texts, having regard to the object and purpose of the treaty. In these cases, however, the recourse to such principles and maxims appears supported not so much by their previous, more or less recurrent, use by courts and tribunals, nor by the fact that they have been upheld by well-known scholars, but simply by the fact that their application provides a logical and fair solution of the interpretative issue at stake, within the framework of the VCLT. As put by Germer, the specific principles for the interpretation of multilingual treaties that have been proposed from time to time are nothing but an application of the standard rules of treaty interpretation enshrined in Articles 31 and 32 VCLT with a special view to the

[1354] See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 283-285; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 279; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 101; D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 253; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), p. 104; M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 207; L. Ehrlich, "L'interprétation des traités", 24 *RCADI* (1928), 5 *et seq.*, at 99-100; H. Kelsen (revised and edited by R. W. Tucker), *Principles of International Law* (New York: Holt, Rinehart and Winston, 1966), pp. 459-460.

[1355] See, in this respect, YBILC 1966-II, p. 218, para. 4, and p. 226, para. 9; see also M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 208, where the author pointed out that the VCLT avoids clearly dividing the principles and maxims that constitute customary international law, whose application (compulsory, unless a different agreement between the parties exists) is regulated by the VCLT Preamble, from those principles and maxims that just represent judicial practice, whose (non-compulsory) application is delineated in the VCLT Commentary.

[1356] Which, in turn, do not provide for any automatic rule for the solution of potential divergences of meanings.

[1357] See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 408, who mentions as support for this argument the decision of the ILC not to include among the general rules for the interpretation of multilingual treaties the rules set out in paragraphs 3 and 4 of Article 75 of Sir Humphrey Waldock's Third Report on the Law of Treaties (see sections 2.1 and 2.2 of this chapter).

[1358] In particular nos. (i), (ii), (iv), (v), (vi), (xii), (xiii), (xiv), (xv) and (xvi).

concrete problems of interpretation with which the interpreter had been confronted.[1359]

Finally, it has been maintained that most of such principles and maxims would constitute supplementary means of interpretations under Article 32 VCLT.[1360]

The author submits that this characterization should be rejected.[1361] In fact, the means of interpretation referred to by Article 32 VCLT are acts, facts and circumstances that may be appreciated as items of evidence of the common intention of the parties and, therefore, as elements from which it is possible to infer the utterance meaning of the treaty. The above-mentioned principles and maxims, in contrast, are not elements on the basis of which the possible common intention of the parties can be determined, but paths that the inferential process of interpretation could follow, in order to determine the utterance meaning of the treaty, starting from the elements available (acts, facts and circumstances, including the supplementary means of interpretation).

6. Conclusions

The main goal achieved by the VCLT, in respect of the interpretation of multilingual treaties, is the codification of the fundamental principles to be followed by the interpreter, about which some uncertainty existed before.[1362]

The analysis carried out by the author has highlighted the heterogeneous nature of the provisions encompassed in Article 33 VCLT and the ontological differences between these and the provisions of Articles 31 and 32 VCLT. While the latter, for the most part, are limited to pointing out which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrating the different weights that the interpreter should typically attribute thereto due to their different intrinsic attitudes toward conveying the final agreement of the parties, the provisions of Article 33 VCLT perform different tasks.

On the one hand, the provisions of the first two paragraphs of Article 33 VCLT establish the rules of legal effectiveness of the treaty language versions. Thus, they are not actually concerned with treaty interpretation, but constitute a logical prerequisite to

[1359] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 427.
[1360] See M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 100-101.
[1361] See, accordingly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 410-411 and P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 427.
[1362] For instance, Liang, in an article published in 1953, wondered whether, with regard to a treaty concluded under the auspices of the United Nations, whose provisions had been originally drafted in one language and then officially translated into the other United Nations official langages, all five texts should have been considered "equally authentic" in the absence of any specific provision in this respect (see Y-L. Liang, "The Question of Revision of a Multilingual Treaty Text", 47 *American Journal of International Law* (1953), 263 *et seq.*, at 264).

such an activity, since they provide the rules for determining which texts must be interpreted and which (language) versions, in contrast, may be taken into account only as additional elements to corroborate the utterance meaning of the treaty text(s).

On the other hand, the last two paragraphs of Article 33 VCLT establish two proper rules of interpretation,[1363] which cannot be entirely inferred either from Articles 31 and 32 VCLT, or from the first two paragraphs of Article 33 VCLT:

(i) Article 33(3) VCLT establishes that all authentic texts always have the same meaning and that the interpreter may, unless a *prima facie* discrepancy between different authentic texts is pointed out, rely autonomously on any of those authentic texts in order to construe the treaty;

(ii) Article 33(4) VCLT provides that *prima facie* discrepancies among the various authentic texts must be removed by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and that, where such a procedure does not succeed, the interpreter has to adopt either the meaning attributable to the prevailing text, or, in the absence of a prevailing text, the meaning that best reconciles the authentic texts, having regard to the object and purpose of the treaty.

With regard to the (proper) rules of interpretation established by Article 33 VCLT, as previously noted, some scholars have criticized the choice of the ILC and the Vienna Conference not to insert clear and firm guidelines for the solution of issues concerning the interpretation of multilingual treaties.

Germer, for instance, stated that, although the last clause of Article 33(4) VCLT directs the interpreter to adopt the meaning which best reconciles the authentic texts in light of the object and purpose of the treaty, the very same provision fails to specify the precise method by which this meaning is to be found.[1364]

After an extensive review of the literature on the interpretation of multilingual treaties, Tabory submitted that the "absence of sufficiently firm guidelines to overcome problems involved in multilingual interpretation is widely noted in the literature".[1365] Tabory also affirmed that the "elusive" solution adopted by the Vienna Conference and based on the reconciliation of the texts in light of the object and purpose of the treaty did not clarify whether the meaning to be finally adopted was to be arrived at by pushing or stretching the meaning in one text as far as possible towards the other, or by finding the midpoint between them, or by reducing the meaning in both texts to the lowest possible common denominator. However, she recognized that the individual circumstances of the

[1363] I.e. rules that are not limited to highlighting which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrating the different weights that the interpreter should typically attribute thereto, but which prescribe, under certain conditions, the meaning that must be attributed to the authentic treaty texts.

[1364] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 403; similarly, J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 302.

[1365] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 215.

case, as well as the object and purpose of the treaty, no doubt provide the interpreter with some guidance in that respect.[1366]

O'Connell, discussing the whole set of rules on treaty interpretation enshrined in Articles 31-33 VCLT, asserted that such articles "have the effect of transforming logical positions into rules of law. However, the priorities inherent in the application of these rules are not clearly indicated, and the rules themselves are in part so general that it is necessary to review traditional methods whenever interpreting a treaty. […] More controversy is likely to be aroused by them than allayed."[1367]

Such criticisms, however, fail to appreciate that the process of interpretation of multilingual treaties, as any other process of meaning attribution to signs, is a cognitive process based on the triangular interaction between the speaker (contracting States), the hearer (interpreter) and the utterance (treaty texts); and, as any other cognitive process, it cannot be imprisoned in a jail of strict, compulsory rules to be followed, since it is based on intuition and logic, both having their own necessary role in the process of interpretation and both being inherently refractory to *a priori* external restrictions. In this respect, as Poincaré put it, logic and intuition are both "indispensable. Logic, which alone can give certainty, is the instrument of demonstration; intuition is the instrument of invention."[1368]

Thus, the author agrees with Rosenne who, with regard to (multilingual) treaty interpretation, acknowledged that the most the law can do is "to indicate in *general terms* […] the nature of the rules governing the process by which this art [*ed.'s note*: of interpretation] is applied in a concrete case, the kind of intellectual discipline with which the interpreter must gird himself."[1369]

That is exactly what Article 33 VCLT does: drawing a framework of basic principles within which the interpreter may exercise his discretionary judgment in order to determine the utterance meaning of the treaty in light of the overall context.[1370]

In this respect, the comparison between the outcomes of the semantics-based normative analysis carried out in Part I and the results of the positive analysis on how scholars, courts and tribunals have construed and applied Articles 31-33 VCLT, carried out in this

[1366] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 213.
[1367] See D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 253.
[1368] See H. Poincaré (translated by G.B. Halstead), *The Foundations of Science: Science and Hypothesis, The Value of Science, Science and Methods* (Lancaster: The Science Press, 1946), p. 219.
[1369] See S. Rosenne, "On Multilingual Interpretation", in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 454.
[1370] See, in this sense, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 218; similarly, Germer, according to whom the VCLT "does not set forth a rigid formula for the interpretation of plurilingual treaties, but adheres to the idea that whether the obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties" (see P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 426).

and the previous chapter, has shown that, within the general guidelines on the interpretation of multilingual treaties set forth in the VCLT, the interpreter may often find an appropriate compass in the teachings of modern semantics, whose applications in the field of (multilingual) treaty interpretation have been inferred and arranged in the form of fundamental principles of interpretation by the author in sections 1 and 2 of Chapter 3 of Part I.

CHAPTER 5 – INTERPRETATION OF MULTILINGUAL TAX TREATIES

1. Prolegomenon

1.1. Research questions addressed in this chapter

As outlined in the introduction, some interpretative issues exist that specifically relate to multilingual tax treaties,[1371] due to the following idiosyncratic features thereof:

(i) most tax treaties are based on the OECD Model,[1372] which is officially drafted only in the English and French languages;

(ii) the OECD Model comes with a commentary (the OECD Commentary) intended to explain, sometimes in great detail, the purpose and the application of the rules expressed by means of the model articles; the OECD Commentary is also officially drafted only in the English and French languages;

(iii) most tax treaties include a rule of interpretation providing that each undefined treaty term must be given the meaning it has under the law of the contracting State applying the treaty, unless the context otherwise requires.

The present chapter is primarily aimed at examining such specific issues, which may be expressed by means of the following research questions:

a) What is the relevance of the OECD Model official versions for the purpose of interpreting multilingual tax treaties (either authenticated also in English and/or French, or authenticated in neither of these languages) and monolingual tax treaties authenticated neither in English nor in French?

b) What is the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties?

c) With regard to the relevance of Article 3(2) of OECD Model-based multilingual tax treaties for the purpose of their interpretation:

(i) Does Article 3(2) have an impact on the nature of the potential discrepancies in meanings among the authentic texts of a multilingual tax treaty? Where this question is answered in the affirmative, which are the various types of prima facie discrepancies that may arise? Should the interpreter put all of them on

[1371] Or other types of treaties that present similar features, e.g. bilateral treaties concerning estate, inheritance and gift taxes.

[1372] Or on other models (such as national models, or the United Nations Model, which in turn are based to a large extent on the OECD Model).

the same footing for the purpose of interpreting multilingual tax treaties?

(ii) Is there any obligation for the interpreter to reconcile (at least to a certain extent) the prima facie divergent authentic texts of an OECD Model-based tax treaty?

(iii) If the previous question is answered in the affirmative, to what extent must the differences of meaning deriving from the attribution of the domestic law meanings to the corresponding legal jargon terms used in the various authentic texts be removed (e.g. in accordance with Article 33(4) VCLT) and, instead, to what extent must such differences be preserved in accordance with Article 3(2)?

(iv) What is the relevance of Article 3(2) for the purpose of resolving the prima facie discrepancies in meaning among the various authentic texts, where the treaty's final clause provides that a certain authentic text is to prevail in the case of divergences?

Other interpretative issues, generally concerning multilingual treaties, have been already analysed in section 3 of Chapter 4 of Part II and, due to the fact that they arise without any relevant distinction in connection with both multilingual tax treaties and other multilingual treaties, the author will not examine them again in this chapter.

1.2. The need to distinguish between interpretation of legal jargon terms and interpretation of other terms included in (multilingual) tax treaties

A necessary preamble when one is going to deal with tax treaty interpretation concerns the possible categorization of treaty terms for the purpose of their construction.[1373]

Such a categorization has the pragmatic function of directing the interpreter towards the appropriate elements and items of evidence that should be taken into account for the purpose of attributing a meaning to the relevant treaty terms and arguing in favor of such an interpretation. The need for this direction derives from the presence, in OECD Model-based tax treaties, of the special rule of interpretation encompassed in Article 3(2).

[1373] It is outside the scope of this section to deal with the interpretative issues stemming from the construction of multilingual domestic (tax) law, in particular multilingual (tax) statutes; on such issues see, among many, G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005); V. K. Bhatia et al. (eds.), *Multilingual and Multicultural Contexts of Legislation* (Frankfurt: Peter Lang, 2003); P. Salembier, "Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule", 35 *Ottawa Law Review* (2003-2004), 75 *et seq.*; J. Vanderlinden, "Langue et Droit (Belgique et Canada)", in E. Jayme (ed.), *Langue et Droit. XV Congrès International de Droit Comparé. Bristol 1998* (Bruxelles: Bruylant, 1999), 65 *et seq.*; P. Viau, "Quelques considérations sur la langue, le droit, le bilinguisme et le bijuridisme au Canada", in E. Jayme (ed.), *Langue et Droit. XV Congrès International de Droit Comparé. Bristol 1998* (Bruxelles: Bruylant, 1999), 141 *et seq.*

In that respect, one may first distinguish between *defined* and *undefined* treaty terms.

The former must be generally attributed the meaning that their definitions are purported to enlighten.[1374] The latter, in contrast, are theoretically subject to the interpretative rule provided for in Article 3(2).[1375] It is worth noting that, ironically, the terms used in the definitions of defined terms are generally not themselves defined in the treaty, thus being possibly subject as well to the interpretative rule provided for in Article 3(2).

Undefined terms, in turn, may be divided in *legal jargon* terms and *non-legal jargon* terms. The former are those terms that are attributed a specific legal jargon meaning under the law of the State applying the tax treaty.[1376] The latter are the remainder.[1377] In order to categorize a term as an undefined non-legal jargon term, it is irrelevant whether such term is attributed a legal jargon meaning under international law or under the law of the other contracting State. For instance, the term used in the Japanese authentic text of Article 16 of the 1971 Japan-United States tax treaty and corresponding to the term "capital assets" employed in the English authentic text of the

---

[1374] As more extensively discussed *infra*, tax treaties often explicitly subordinate the attribution to defined terms of the meaning provided for by the relevant definition to the fact that the context does not require otherwise (see Article 3(1) OECD Model). Even where such an explicit condition is not spelt out in the treaty text, one might wonder whether, in extreme cases, the overall context and, in particular, good faith (honesty, fairness, reasonableness and trustworthiness) could require a different meaning to be attributed to a defined term.

[1375] As rightly pointed out by Gibson L.J. in the *Memec* case, the expression "any term not defined'" found in Article 3(2) OECD Model should be read as "any term not *relevantly* defined'' (see Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 21 per Gibson L.J.). The question at stake in the *Memec* case concerned whether the absence of a definition of the term "dividends" in Article XVIII of the 1964 Germany-United Kingdom tax treaty, as modified by the 1970 protocol, signified that the term "dividends" in that article was to be construed as having the same meaning expressed by the definition found in Article VI(4) of the treaty, or as having the meaning indicated by Article II(3) thereof, which allowed the domestic law of the United Kingdom to determine it. Gibson L.J, in that respect, accepted the submission of one party to the dispute, not challenged by the other, that the words of Article II(3), "any term not otherwise defined'', meant "any term not otherwise relevantly defined''. According to Gibson L.J. "[a]rticle VI(4) commences with the words "The term 'dividends' as used in this article means...''. The fact that the definition is not included in Article II as a general definition supports the view that the draftsman did not intend the Article VI(4) definition to apply whenever "dividends'' is found in the Convention. That view is strengthened by the fact that Article VI(4) was substituted by the 1970 Convention at the very same time that Article XVIII was substituted, and it would be very surprising if the draftsman had intended the Article VI(4) definition to apply to Article XVIII not merely without saying so but whilst qualifying the scope of the application of Article VI(4) in the way I have indicated. Moreover where a term defined only in a distributive article is to have the same meaning in another but not every article, the draftsman has taken care to say so (see Articles XII(2), VIII(1) (substituted by the 1970 Protocol) and XVI(1)".

[1376] Such terms, or the corresponding terms in the other authentic texts of the tax treaty, may be attributed no legal jargon meaning under the law of the other contracting State, that being irrelevant for the purpose of categorizing such terms as legal jargon terms with reference to the application of the tax treaty by the former contracting State.

[1377] Therefore, the categorization of a tax treaty term as *undefined non-legal jargon* term cannot be made in the abstract, since that category is the complement of the sub-category *undefined legal jargon* terms in the category *undefined* terms and, thus, indirectly depends on which undefined terms are attributed a legal jargon meaning under the relevant law of the State applying the tax treaty.

same article (the capital gains article) should not be considered a legal jargon term where Japan is applying the treaty since, as maintained by Gomi and Ozawa, that term is not used under Japanese domestic law and was intended to take its meaning from the United States domestic law, in which the term "capital assets" is used as a legal jargon term.[1378]

While Article 3(2) is directly applicable for the purpose of interpreting undefined legal jargon terms, one may wonder about its relevance in order to interpret undefined non-legal jargon terms.

The solution to such an issue may be (formally) twofold. On the one hand, one could argue that, since the term to be interpreted is not attributed any legal jargon meaning under the relevant law of the State applying the tax treaty, Article 3(2) is not applicable and that term is to be construed in accordance with the general rules of interpretation enshrined in Articles 31-33 VCLT. On the other hand, it might be maintained that, in such a case, Article 3(2) does apply and, absent the relevant legal jargon meaning, the term must be attributed a contextual meaning.

In this respect, the author believes that no difference exists between the two mentioned approaches, since, for the purpose of interpreting tax treaties, ascribing to a term a contextual meaning under Article 3(2) means nothing other than interpreting that term in accordance with Articles 31-33 VCLT.[1379] To put it differently, the context for the purpose of Article 3(2) OECD Model is the *overall context* that the author has referred to in section 3 of Chapter 3 of Part II. It would, in fact, seem unreasonable that the contracting States had chosen to apply different rules of interpretation (with regard to both the inferential processes involved and the elements and items of evidence to be taken into account) in order to construe (i) undefined non-legal jargon terms and (ii) undefined legal jargon terms in cases where the application of the domestic legal jargon meaning led to an unreasonable result.[1380]

[1378] See Gomi and Ozawa, *Explanation Article by Article of the Japan-U.S. Tax Treaty (nichibei sozei joyaku chikujo kaisetsu)* (1979), p. 71, cited by J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 53-54.

[1379] See, seemingly in accordance, A. Rust, "Germany", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 231-232.

[1380] I..e. in cases where "the context otherwise requires".
That the term "context" in Article 3(2) cannot be reasonably held to have the same (rather restrictive) meaning that term is given in Article 31 VCLT is submitted by the International Tax Group, according to whom such an equation "would make no sense", since the use of the term "context" in the limited sense it is employed in Article 31 VCLT "would have the effect of overriding or ousting those additional tools of treaty interpretation which the Vienna Convention itself indicates are to be used. Context [in Article 3(2) OECD Model] therefore should mean anything that can normally be taken into account or to which one may have recourse in interpreting the treaty." (see J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 104). Similarly, Vogel maintains that "the 'context' concept should nevertheless be interpreted as broadly as possible" and that the "definition of 'context' in Art. 31(2) of VCLT […] has no bearing on the interpretation of [Model Convention]" (see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 214, m.no 72). See, concurring, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.06, who puts forward six reasons

This conclusion is reinforced by the following two arguments.

First, as just noted, the cases where under Article 3(2) OECD Model the context requires otherwise seem to be those where the application of the legal jargon meaning leads to unreasonable results. In this respect, it must be remarked that the canon of reasonableness in interpreting treaties is the crucial principle on which Articles 31-33 VCLT are built: the principle of interpreting treaties in good faith. Thus, it is *reasonable* to argue that, in order to assess the reasonableness of the construction of a tax treaty provision, the elements and items of evidence to be taken into account and the standards of logic and inference to be followed are the same independently from the fact that the undefined terms used in that provision[1381] are attributed a legal jargon meaning under the relevant law of the State applying the treaty or not.

Second, it has already been mentioned[1382] that, within the community of international law players (States, international organizations, international courts and tribunals and other persons affected by international law) and with specific regard to treaties, Articles 31-33 VCLT spell out a significant part of the *overall context* that the cooperative principles of that community require its members to take into account when producing and interpreting treaty utterances. Such an *overall context*, however, is not limited to the means and rules of interpretation enshrined in Articles 31-33 VCLT, the former including, for instance, also generally accepted principles of logic and good sense.[1383] In this regard, the author concluded that no meaning (as opposed to a mere guess) of a specific treaty provision may be said to exist before the interpreter has gone through the process of construing the authentic text(s) in light of the *overall context*. If this is the approach for the interpreter to follow in order to construe a (tax) treaty in accordance with Articles 31-33 VCLT, the author does not see how Article 3(2) of OECD Model-type tax treaties could fairly be said to compel the interpreter to perform a different task for the purpose of determining where the (undefined) context requires otherwise and, in such a case, what it does indeed require.

In light of the previous analysis, the following conclusions may be drawn.

Article 3(2) must be taken into account for the purpose of interpreting a significant part of the undefined tax treaty terms. In fact, as it has been correctly pointed

---

to reject the above-mentioned equation.
It should be noted, in this respect, that such a broad construction of the term "context", as used in Article 3(2), appears to be supported also by the history of the latter provision. As will be mentioned in the following sections, the origin of the expression "unless the context otherwise requires" in Article 3(2) may be traced back to British law, where the term "context" was generally given a very broad intension (see J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 93, in particular footnote 16 and case law cited therein).

[1381] Even "indirectly used", where the terms used are defined in the tax treaty, but the terms used in those definitions are, in turn, undefined therein.

[1382] See section 3 of Chapter 3 of Part II.

[1383] Such as, for instance, (i) the logical principles of inference and (ii) the principles and maxims of treaty interpretation not codified in the VCLT since considered by the ILC to be principles of logic and good sense of non-binding character (see commentary on Articles 27-28 of the 1966 Draft - YBILC 1966-II, p. 218, para. 4).

out, "[m]any of the undefined terms used in tax treaties have highly technical meanings in each State",[1384] i.e. they are (also) used as legal jargon terms in the domestic law of the contracting States.

However, where undefined non-legal jargon terms are at stake, Article 3(2) as such may be disregarded, the interpreter having to go through the process of construing the text in light of the *overall context* and, in particular, of the rules and means of interpretation enshrined in Articles 31, 32 and 33 VCLT.

Moreover, the above-mentioned approach is indirectly relevant with reference to defined treaty terms as well: on the one hand, where the undefined terms used in the definition are legal jargon terms, Article 3(2) is to be applied;[1385] on the other hand, where the undefined terms used in the definition are non-legal jargon terms, the *overall context* is to be directly taken into account in order to construe such terms. Similarly, Article 3(2) and the *overall context* guide the interpreter in dealing with *inclusive definitions*, i.e. in construing terms that are not properly defined, but merely said to include certain items or to apply to certain situations.[1386] Finally, depending on the circumstances, the interpreter might conclude that the (*overall*) context requires the treaty definition of a term not to be applied: this might be the case, for instance, where the provision establishing the definition provides that the latter applies "unless the context otherwise requires";[1387] however, the interpreter might also plausibly arrive at and argue for the same conclusion, in the absence of such an explicit caveat, where strong evidence exists that the application of the definition would lead, in the specific case, to an absurd or unfair result.[1388]

[1384] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 15. On the application of the *renvoi* provided for under Article 3(2) to multilingual tax treaties, see F. Wassermeyer, in H. Debatin and F. Wassermeyer (eds.), *Doppelbesteuerung: DBA* (Munich: Beck, 1997 – loose-leaf), at m.no. 15 to Article 16.

[1385] See, similarly, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 21; C. van Raad, "Interpretatie van belastingverdragen", 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*, at 53; J. F. Avery Jones, "Problems of Categorising Income and Gains for Tax Treaty Purposes", *British Tax Review* (2001), 382 *et seq.*, at 395-396, where reference is made also to Hoge Raad (Netherlands), 25 May 1994, case *28959*, BNB 1994/219; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.07.

See, explicitly *contra*, Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq.*, at 202, with regard to the interpretation of the undefined terms employed in the definition of "dividends", provided for in Article 10 of an OECD Model-type tax treaty. It is interesting to note, however, that the Supreme Administrative Court, in its reasoning, made abundantly reference to Czech Republic private law, in particular to the private law (and tax law) meaning of the Czech term, corresponding to the English "corporate right", used in the treaty definition for the purpose of construing and applying Article 10 (*ibidem*, at 203).

[1386] See, similarly, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 21. For an instance of recourse to the domestic legal jargon meaning in order to construe a inclusively defined treaty term, see House of Lords (United Kingdom), 16 July 1959, *Ostime v. Australian Mutual Provident Society*, 38 TC 492, opinion of Lord Denning at 525.

[1387] See, for instance, Article 3(1) OECD Model.

[1388] I.e. at an interpretation and application of the tax treaty that is contrary to good faith. In such a case, the interpreter might, for instance, decide to use the domestic legal jargon meaning of the other Contracting States

Based on such conclusions, the author has decided that:

(i) issues concerning the interpretation of treaty undefined legal jargon terms[1389] will be dealt with in this chapter, since they fall within the scope of research question (c) outlined in section 1.1 of this chapter;

(ii) issues concerning the interpretation of treaty undefined non-legal jargon terms[1390] will not be generally dealt with in this chapter, since they were already analysed in section 3 of Chapter 4 of Part II, except where those issues relate to how the OECD Model and its Commentary may affect the interpretation of such terms; in this case, in fact, those issues fall within the scope of research questions (a) and (b) outlined in section 1.1 of this chapter.

1.3. The international law perspective of the analysis carried out in this chapter

A second necessary preamble to any work on tax treaty interpretation concerns the field of analysis of the work itself.

In both monistic and dualistic States, tax treaties are applicable domestically, either because they are reproduced (or referred to) by a specific domestic statute, or because they directly become part of the domestic legal system under the relevant constitutional law. In both cases, tax treaties are to be interpreted and applied by the judiciary as rules governing the relation between each contracting State and its taxpayers.

As part of the domestic legal systems of the contracting States, tax treaty texts must be construed in accordance with the rules and principles of interpretation provided for in such contracting States,[1391] which may partially differ from those expressed by means of Articles 31-33 VCLT.

At the same time, however, tax treaties maintain their original status as international written agreements between States and, as such, they are subject to the VCLT and other relevant principles and rules of international law.

Theoretically, the present study does not deal with how tax treaties should be construed as part of the domestic law of the contracting States. It only concerns the rules and principles of interpretation of such treaties under public international law.

To a large extent, however, the latter rules and principles of interpretation are considered

---

(the State not applying the treaty) in order to construe the relevant term, such an interpretation being the most sound one in light of the *overall context* (on the basis of the fact that the parties have agreed to refer to the domestic legal jargon meanings to a large extent by means of Article 3(2)). See, similarly, High Court of Justice of England and Wales (United Kingdom), 1 March 1982, *IRC v. Exxon Corporation*, [1982] STC 356.

[1389] Even those used in the definition of a defined treaty term.

[1390] Even those used in the definition of a defined treaty term.

[1391] Which may vary depending on the subject matter of the statutes (e.g. private law, criminal law, administrative law, etc.), as well as the origin of the statutes (internal, international, European Union, etc.).

to be relevant and are referred to also by domestic courts, tribunals and tax authorities.[1392]

In this respect, the results of the present study may be, at least in part, of importance for the day-to-day practice of taxpayers, tax authorities and judges from different States.

For a similar reason, the author will pay attention to the case law of national courts and tribunals concerning the application of tax treaties, in order to understand to which extent, notwithstanding domestic law constraints, such courts and tribunals follow the rules and principles of treaty interpretation in force under public international law and how they actually construe them.

1.4. Structure of the chapter

Section 2 briefly examines how scholars, domestic courts and tribunals have applied to tax treaties the rules of interpretation enshrined in Articles 31 and 32 VCLT, in order to confirm that the conclusions drawn in sections 3.4 through 3.6 of Chapter 4 of Part II with regard to the solution of *prima facie* discrepancies among the authentic texts of a treaty, which are mainly based on the application of Articles 31 and 32 VCLT, also remain valid in connection to tax treaties.

Section 3 analyses the significance of the OECD Model, in its English and French official versions, for the purpose of interpreting multilingual tax treaties and, in particular, its relevance for removing *prima facie* discrepancies among the tax authentic treaty texts. That section, thus, attempts to answer research question (a).

Section 4 deals with the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties and, more specifically, in order to remove *prima facie* discrepancies among the tax authentic treaty texts. That section, therefore, attempts to answer research question (b).

Section 5 tackles research question (c) and its sub-questions by examining how the interpreter should approach the interpretation of the legal jargon terms used in tax treaties and, in particular, how he should solve the *prima facie* divergences of meaning among the legal jargon terms employed in the various authentic texts. In order to answer such questions, section 5 preliminary analyses how the rule of interpretation encompassed in Article 3(2) OECD Model should be construed and then discusses its specific bearing on the interpretation of multilingual tax treaties. That analysis is based on the results of the study carried out in section 4 of Chapter 4 of Part II.

Section 6 portrays the most important decisions on the interpretation of multilingual tax treaties delivered by domestic courts and tribunals and identifies any significant departure from the conclusions reached in the previous sections.

Finally, section 7 draws some general conclusions.

[1392] This may be the case, for instance, where the relevant constitutional law provides the obligation for domestic law to comply with the treaties (in force) concluded by the State, or it makes domestic law subject to such treaties (e.g., see Article 117 of the Italian Constitution).

2. The rules of interpretation enshrined in Articles 31-32 VCLT applied to tax treaties

2.1. In general

As previously mentioned, Articles 31 and 32 VCLT are generally regarded as codifications of customary international law. As such, they are applicable to tax treaties for the purpose of their construction.

National courts and tribunals charged with the task of interpreting and applying tax treaties have generally endorsed such an approach, either explicitly or implicitly.[1393]

[1393] See, for an explicit reference to Articles 31-33 VCLT in order to interpret the relevant tax treaties, High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank,* 63 TC 218, at 234-236; High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports,* 338 *et seq*., at 356; Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT,* 1 *ITLR,* 75 *et seq.*, at. 90, para. 34; Federal Court (Australia), 16 May 2000, *Ngee Hin Chong v. CoT,* 2 *ITLR*, 707 *et seq.*, at 714 (with regard to Australia, see however the contrary approach taken by the majority of the judges in High Court (Australia) 15 August 2012, *Minister for Home Affairs of the Commonwealth v Zentai*, 246 *Commonwealth Law Reports,* 213 *et seq*., at 238-239, para. 65, per Gummow, Crennan, Kiefel and Bell JJ, where it was stated that the Treaty on Extradition between Australia and the Republic of Hungary, concluded on 25 October 1995, had to be interpreted "by the application of ordinary principles of statutory interpretation"; contrary, *ibidem*, para. 19, per French CJ, where the Chief Justice made reference to articles 31 and 32 VCLT in order to construe the extradition treaty; with regard to the relevance of the Hight Court (Australia) majority decision in *Zentai* for the purpose of interpreting tax treaties, see Federal Court (Australia), 26 April 2013, *Resource Capital Fund III LP v Commissioner of Taxation*, 15 *ITLR*, 814 *et seq*., at 835 *et seq*., paras. 48-53, where the court concluded for the substantial irrelevance thereof); Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 208, para. 7.b.; Conseil d'Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, conclusions of the Commissaire du Gouvernement at 1115-1116; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 54; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 22-23; New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT*, 5 *ITLR*, 658 *et seq.*, at 670, para. 43; Hoge Raad (Netherlands), 21 February 2003, case *37024*, 5 *ITLR*, 818 *et seq.*, at 876, paras. 3.5 and 3.6; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 886-887, para. 14; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*, at 229; Federal Court of Appeal (Canada), 4 February 2004, *Beame v. R*, 6 *ITLR*, 767 *et seq.*, at 770-771, para. 13; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 74-75, paras. 40-42; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*, at 811-812, paras. 37-38; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 8-9, para. 10; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 555-556, para. 3.4.1. and 3.4.2.; Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq.*, at 49, para. 80; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1074, para. 15; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 72-73; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq.*, at 544; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 749, para. 36; Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR,* 15 *et seq.*, at 34, paras. 46 and 47; Special Commissioners (United

In certain jurisdictions, courts do not usually refer to the VCLT when construing and applying tax treaties, but this is not conclusive evidence that they disregard such rules altogether. Moreover, as the author has already mentioned, Articles 31 and 32 VCLT substantially affirm a common sense principle, i.e. that treaties must be interpreted honestly, reasonably and with fairness, by taking into account the *overall context*.[1394] This is, in the vast majority of cases, what courts and tribunals of most jurisdictions tend to do, even without taking a look at the specific guidance of the VCLT.

Only in very limited instances has the review of national case law shown an explicit rejection of applying the interpretative principles enshrined in Articles 31 and 32 VCLT. One example is the judgment of the Court of Appeal of Liege (Belgium) in the *Verast & Folens* case, where it was held that "[e]n raison du caractère explicite, précis et dépourvu de toute équivoque des article 11,1, et 11,2,(c) de la *Convention* belgo-française du 10 mars 1964, il est inutile de recourir aux règles d'interprétions dont l'administration se prévaut", i.e. those encompassed in Articles 31-32 VCLT.[1395]

Finally, the analysis of national case law has shown the tendency of judges to adopt a holistic and comprehensive approach, where all the available elements and items of

---

Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq.*, at 478, para. 56; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 342-344, paras. 19-24; Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 396-397, paras. 84-87; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*, at 681-683, paras. 38-41; Conseil d'Etat (France), 31 March 2010, *Société Zimmer Ltd v. Ministre de l'Economie, des Finances et de l'Industrie*, 12 *ITLR*, 739 *et seq.*, conclusions of the Rapporteur Public at 759 (where the Rapporteur Public, however, use the misleading expression "interprétation littérale" in order to describe the principle of interpretation provided for in Articles 31-33 VCLT); Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 812, para. 50; Court of Appeal of England and Wales (United Kingdom), 8 July 2010, *Smallwood and another v. Revenue and Customs Commissioners*, 12 *ITLR*, 1002 *et seq.*, at 1018, para. 27.
For an implicit reference to the principles of interpretation provided for in Articles 31-32 VCLT, see, for instance, Income Tax Appellate Tribunal of Delhi (India), 26 July 2004, *Ensco Maritime Ltd v. Deputy Commissioner of Income Tax*, 7 *ITLR*, 822 *et seq.*, at 837.

[1394] Similarly, Arnold notes that "[t]he basic interpretive approach set out in Art. 31(1) [VCLT] should not strike anyone as novel. The interpretation of any written material – newspapers, books, articles, memos, and legal documents – requires us to read the words, sometimes several times, very carefully. Further, […] the meaning of words is always dependent on the context in which they are used. And finally, all language is purposive. Obviously, the parties to a treaty are attempting to accomplish certain results, and the treaty should be interpreted to promote, rather than frustrate, those intentions or purposes. The same three major elements – the ordinary meaning of words (text), context, and purpose – form the foundation for the interpretation of language generally. Tax legislation and tax treaties are no different in this regard. The general principle or approach set out in Art. 31(1) of the Vienna Convention is self-evident; as a result, it is unhelpful to judges and others trying to decipher the meaning of a provision in a tax treaty. Would anyone seriously suggest that a meaning could be attributed to a treaty provision without considering the ordinary meaning of the words or the particular context in which they appear?" (see B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 5).

[1395] Court of Appeal of Liege (Belgium), 14 January 1998, *Verast & Folens v. Belgium*, 1 *ITLR*, 435 *et seq.*, at 441. See also Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq.*, at 203-204.

evidence are considered together for the purpose of treaty interpretation and accordingly weighted on the basis of the specific circumstances of the case.[1396]

2.2. Good faith and the agreed expectation of the parties

National courts and tribunals make often reference to "good faith" when interpreting tax treaties within the context of the VCLT.[1397]

In certain cases, they even deal with the possible meaning of "good faith" for the purpose of construing tax treaties in accordance with the VCLT. For instance, the United Kingdom Special Commissioners of Taxation, in the *Sportsman* case,[1398] held that the reference to "good faith" in Article 31 VCLT is generally accepted as simply meaning that the interpretation should not lead to manifestly absurd or unreasonable results, i.e. that the treaty construction should be a sensible one.

More fundamentally, national courts and tribunals normally reject those constructions that result in unreasonable outcomes,[1399] even where the alternative interpretations

[1396] See, for instance, the explicit statements in Federal Court of Appeal (Canada), 24 February 2000, *R v. Dudney*, 2 *ITLR*, 627 *et seq.*, at 632, para. 10; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT, 2 ITLR*, 707 *et seq., at 714,* quoting High Court (Australia), 24 February 1997, *Applicant A. v. Minister for Immigration and Ethnic Affairs,* 190 *Commonwealth Law Reports*, 225 *et seq.*, at 254-256; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 12, para. 17; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank plc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1074, para. 15.

[1397] See, for instance, Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 213; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq*., at 1065; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 10, para. 13; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 557, para. 3.4.3., where the Court held that the principle of good faith includes the prohibition of abuses and, more specifically, the use of a rule of law against its object and purpose to realize interests which are not protected by it and, as a consequence, concluded that the prohibition for the taxpayers to abuse the rights otherwise granted by the tax treaties is recognized at the European level (the Court was dealing with the interpretation and application of the 1973 Denmark-Switzerland tax treaty) and that is not necessary for the contracting States to adopt an explicit provision to that effect in their treaties; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq*., at 544.

[1398] Special Commissioners (United Kingdom), 23 September 1998, *Sportsman v. IRC*, 1 *ITLR*, 237 *et seq.*, at 244, paras. 4.1 and 5.1.

[1399] See the contrary proposition, put forward by Mössner, that "[l]egal rules of interpretation do not guarantee that the process of understanding would lead to a reasonable result. They, rather, give guidance and allot the responsibility for a failed communication" (see J. M. Mössner, "Klaus Vogel Lecture 2009 – Comments", 64 *Bulletin for international taxation* (2010), 16 *et seq*., at 17). It must be noted that such a proposition is expressed with reference to (i) domestic tax law and (ii) tax treaties, seen as part of the contracting States' domestic law; it does not concern tax treaties under international law.
Notwithstanding this, the proposition appears misleading: no judge would seriously agree to having delivered an "unreasonable" decision; the judge would, in any case, maintain that his interpretation of the (domestic or treaty) legal provision at stake was the most reasonable construction that could be argued for on the basis of the available and *usable* elements and items of evidence. In the vast majority of cases, the elements and items of evidence that the judge may rely on and use for the purpose of interpretation are those that all the parties to the

upheld diverge from the *prima facie* readings of those provisions.[1400] In this respect, it is

disputes, i.e. the hearers of the legal utterance, could have access to. Therefore, his interpretation coincides with the *utterance meaning* of the legal provision at stake, which implies its being a reasonable interpretation.

[1400] See, for instance, Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, para. 19, where Addy J. concluded that the deemed disposition by a deceased person of his capital property immediately before his death, provided for in the Canadian Income Tax Act, should be regarded as a "sale or exchange of capital assets" under Article VIII of the 1942 Canada-United States tax treaty (which exempted from tax in one contracting State the capital gains on such sales or exchanges realized by a resident of the other contracting State), since the opposite construction would lead to an absurd and unreasonable result in light of the "general intention" of the parties; Conseil d'Etat (France), 13 October 1999, *Re SA Diebold Courtage*, 2 *ITLR*, 365 *et seq.*, at 381, and the related conclusions of the Commissaire du Gouvernement at 387, concerning the necessity of regarding the payment of royalties to a partnership treated as tax transparent under the law of the other Contracting State as paid to its partners where the latter are resident in that State for the purpose of the tax treaty (it is interesting to note that such an approach appears to contrast with the reservations expressed by France in Annex II to the OECD Partnerships Report, in particular at paragraphs 4, 12 and 13 thereof, and reiterated as observations in the 2000 update of the OECD Commentary – see paragraph 27.2 of the Commentary to Article 1 OECD Model; it should be noted, however, that in 2008 France modified the latter paragraph in order to reduce the extent of its declared disagreement with the OECD approach); Bundesfinanzhof (Germany), 21 September 1999, *Re A Foreign Silent Partnership*, 2 *ITLR*, 859 *et seq*., at 866-867 concerning the rational for considering the permanent establishment of a fiscally transparent (atypical silent) partnership as a permanent establishment of its (atypical silent) partners for tax treaty purposes; Conseil d'Etat (France), 20 October 2000, *Re SA New Building Promotion Limited*, 3 *ITLR*, 783 *et seq*., conclusions of the Commissaire du Gouvernement at 802 ; Hoge Raad (Netherlands), 7 December 2001, case *35231*, 4 *ITLR*, 558 *et seq*., at 576, Opinion of the Advocate General at 585-586, paras. 5.12-5.16, in the sense to reject an interpretation that would unlikely represent the common understanding of the parties and to prefer a substantive approach on the basis of the matter considered in its entirety; Income Tax Appellate Tribunal of Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq*., at 731-732, paras. 49 and 51; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister if National Revenue*, 5 *ITLR*, 638 *et seq*., at 649-650, paras. 29-30, where the Court, with regard to the question whether the obligation to exchange information under Article 26 of the 1975 Canada-France tax treaty was limited to information already in the possession of the requested tax authorities, considered that it would have been hard to imagine that such authorities already had, in all cases, in their possession all the information needed by the requesting State for the purpose of implementing its domestic law provisions and, thus, inferred from the article read as a whole that the requested tax authorities were under an obligation to gather the information not already in their possession; Cour de Cassation (Belgium), 28 May 2004, *Belgium v. SW and VR-M*, 7 *ITLR*, 442 *et seq*., at 452, where the Court seemed to have applied Article 15(1) of the 1970 Belgium-Luxembourg tax treaty to the income derived by an international hauler resident of Belgium and employed by a Luxembourg-based haulage company as if that article contained a rule equivalent to the one enshrined in Article 15(3) OECD Model, apparently due to the analogy between the activity of an international hauler and that of a person working aboard of a ship or aircraft operated in international traffic; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 9-10 and 14, paras. 13 and 19, where the Court also made reference to the principle *ut res magis valeat quam pereat* (quoting Harman J. in High Court of Justice of England and Wales (United Kingdom), 31 August 1988, *Union Texas Petroleum Corporation v. Critchley*, [1998] STC 691, at 707); *ibidem*, at 18, para. 29.1, where the Court stated that an "interpretation leading to such an incongruity is to be avoided even if some violence is required to be done to the words of the treaty", and at 20, para. 30; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq*., at 196, para. 14; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1074, para. 15; Special Commissioners (United Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq.*, at 477-478, paras. 54-56 and, generally, at 481-483; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq*., at 501-503, paras. 7-8, where the authority seemed to attribute decisive weight to the reasonableness of one possible interpretation of the 1994 India-Switzerland tax treaty (leading to the taxability in India, even in

the absence of a permanent establishment therein, of profits derived by a non-resident from the operation of ships in international traffic), as opposed to the unreasonableness of the contrary interpretation (leading to the non-taxability in India of such profits), in light of the treaty's overall structure (the absence of any provision dealing expressly with the taxation of profits derived from the operation of ships in international traffic, as compared to the existence – Article 8 of the tax treaty - of a provision dealing with the taxation of profits derived from the operation of aircrafts in international traffic) and its history (its later amendment by protocol in 2000, introducing a previously missing "other income" article); Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 812, para. 51, and at 813, para 57.

See, however, Conseil d'Etat (France), 9 February 2000, *Re Hubertus AG*, 2 *ITLR*, 637 *et seq*., where both the Court and the Commissaire du Gouvernement concluded that the income attributed to the partners of a fiscally transparent ("translucent") partnership does not maintain the character it had in the hands of the partnership; the author maintains that it is questionable whether this is a reasonable interpretation of OECD Model-like tax treaties, since it would lead on many occasions to an allocation of the taxing rights between the contracting States different from the one the latter agreed upon with regard to the prototypical cases of direct investment or activity carried on by the taxable person (here the partners); see the substantially similar comment by Baker in 2 *ITLR,* at 639.

See also High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank,* 63 TC 218, where Mummery J., interpreting Article XV of the 1945 United Kingdom-United States tax treaty, concluded that "[t]he words of art XV, both on their own and in the context of the convention as a whole, are clear. The natural and ordinary meaning of the words is that art XV exempts from United Kingdom tax interest which has been paid by United States corporations", although such a conclusion could have been considered to infringe (as it most probably did, in the author's view) the common intention of the parties, as ascertainable from the structure and the relevant provisions of the tax treaty, i.e. that, where profits (including interest) were attributable to a permanent establishment in the United Kingdom (which was the case in the situation at stake before the High Court of Justice), the latter State retained the right to tax them. See, in the same vein, Bundesfinanzhof (Germany), 9 October 1985, case *IR 128/80*, *Bundessteuerblatt. Teil II* (1988), 810 *et seq*., where the Court, interpreting the similarly worded provision encompassed in Article XIV of the 1954 Germany-United States tax treaty and applying it to an analogous situation, i.e. to the case of interest paid by a United States corporation and attributable to a permanent establishment that the recipient had in Germany, concluded that Germany was prevented from taxing the interest. Interestingly, the United States Court of Federal Claims, faced with the interpretation of the corresponding provision included in Article XII(1) of the 1942 Canada-United States tax treaty (as amended by a protocol of 21 November 1951), construed it in the opposite way and held that, though a *prima facie* reading of Article XII(1) led to the conclusion that interest was to be exempt in the United States since paid by a Canadian corporation and received by a Canadian corporation, Article XII(1) had to be applied in accordance with the intention of the parties, which certainly was not to exempt the interest where the recipient carried on a business in the United States through a branch and the interest was connected therewith. Kashiwa J., in that respect, noted that "the ultimate question remains what was intended when the language actually employed in Article XII was chosen, imperfect as that language may be. […] that language, when understood in light of the treaty's history and explanatory provisions, effected only a waiver of United States taxes imposed solely through the deemed sourcing provisions on those not present in the United States." (see Court of Federal Claims (United States), 5 May 1982, *Great -West Life Assurance Company*, 678 F.2d 180).

For a seemingly explicit rejection of the canon of reasonableness in interpreting tax treaties, see High Court of Justice of England and Wales (United Kingdom), 12 March 1976, *Avery Jones v. IRC*, [1976] STC 290, where Walton J. stated (*italics* added by the author): "[Mr Oliver] submitted that article XV should be given - in particular the words relating to citizenship - "as much meaning as it needs to have" and that the construction he would place upon the words used was "reasonable". These are truly remarkable submissions. On what principle is the Court to decide how much meaning a provision needs to have? And what authority is there that because a construction which a particular person seeks to place upon a provision is "reasonable" it must be the correct one? Such propositions have only to be stated to be rejected as unsound. If the present case has to be decided upon any such general propositions, the general propositions applicable are that, as far as it is humanly possible, a document must be construed so as to give effect to every word used by the Parties, and in deciding what the meaning of those words is one must look at the document as a whole to see whether those words occur elsewhere, as, if possible, the same construction should be placed on them in both contexts. Moreover, I

interesting to report the following passage from the decision delivered by the Income Tax Appellate Tribunal of Mumbai in the *Clifford Chance* case:[1401] "Law consists not in a particular instance, but in the reason. It is said *ubi eadem ratio ibi idem judicium* […] It is not within human powers to foresee the manifold sets of facts which may arise, therefore it is not possible under *lex scripta* […] to provide for them in clear and unequivocal terms. The trouble lies with our method of drafting. The principal object of the draftsman is to achieve certainty – a laudable object in itself. But in pursuit of it, he loses sight of the equally important object – clarity. Resultantly it brings obscurity and absurdity. It is therefore important to find out the intention of the law-makers. If we accept the interpretation as suggested by the assessee, it would lead to absurdity. […] Certainly this could not be the intention of the treaty-maker […]".

Closely related to the above-mentioned approach is the inclination of national courts and tribunals to make reference to the desirability of implementing the true intentions of the contracting States, their agreed expectations, or the like.[1402] The statements of Iacobucci

---

think that the Courts would always be very slow to refuse to give any meaning at all to a provision in an agreement made between two governments if any *sensible* construction at all could be placed upon it." Ironically, Walton J. ended up substituting the adjective "sensible" for the adjective "reasonable".

[1401] Income Tax Appellate Tribunal of Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq*., at 731, para. 49.

[1402] See High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank,* 63 TC 218, at 234-236; Tax Court (Canada), 30 October 1998, *Dudney v. R*, 1 *ITLR*, 371 *et seq*., at 376; Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 211 and 212; Hoge Raad (Netherlands), 6 December 2002, case *36773*, 5 *ITLR*, 680 *et seq*., at 698, where the Court found that no evidence whatsoever existed of a common intention of the contracting States (Belgium and the Netherlands) to treat dividends paid to the acquirer of shares as dividends paid to the vendor of those shares for the purpose of applying Article 10 of the 1970 Belgium-Netherlands tax treaty (not even for anti-avoidance purposes); *ibidem*, Opinion of the Advocate General at 709, para. 5.3; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq*., at 279-280 where the Court appeared to conclude that "abuse" and "treaty shopping" (*rectious*: behavior that would be usually labeled as such, since when the contracting States agree on allowing this type of use of the tax treaty by third countries resident taxpayers, that behavior cannot be seriously denoted any longer by the term "abuse", nor via the term "treaty shopping") of the India-Mauritius tax treaty might have been foreseen and even intended by the Contracting States, at the moment of concluding such a treaty, in order to boost the flow of capital and investments from third countries in India through Mauritius and that, if it were so, there would be nothing in that tax treaty to prevent a resident of a third country from benefitting from the favorable provisions of the 1982 India-Mauritius tax treaty by means of setting up a (letter-box) investment company in Mauritius; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq*., at 302; Federal Court of Appeal of Ottawa (Canada), 13 October 2003, *Edwards v. R*, 6 *ITLR*, 564 *et seq*., at 570, paras. 27-29, in particular 29, where the Court stated that "the commonly expressed intention of the parties is entitled to great weight and should not be ignored unless a contrary intent can be shown in either the words of the treaty or in some other expression by the parties"; Court of Federal Claims (United States), 4 January 2005, *Sarkisov v. United States of America*, 7 *ITLR*, 469 *et seq*., at 472, where there is also reference to further relevant United States' case law; Tax Court (Canada), 8 April 2005, *Allchin v. R*, 7 *ITLR*, 851 *et seq*., at 864, para. 33, quoting Iacobucci J. in *Crown Forest* (see Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 43); Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 10, para. 14, quoting, indirectly, Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, at 5190; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1073-1074, para. 14,

J. in the *Crown Forest* decision are a good example in that respect: "[r]eviewing the intentions of the drafters of a taxation convention is a very important element in delineating the scope of the application of that treaty" and, quoting Addy J. in *J. N. Gladden Estate v. The Queen*,[1403] "[c]ontrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties".[1404]

The other side of the coin, notably, is that national courts and tribunals appear used to regarding the *overall context* (i.e. the context for the purpose of article 3(2)) as comprising "tout ce qui pout éclairer l'intention des autours de la Convention".[1405]

---

quoting, indirectly, Federal Court, 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, at 5190; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq*., at 188, quoting Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, at 5190; Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq*., at 413-432 (citing, among other cases, Supreme Court (United States), 15 June 1982, *Sumitomo Shoji America Inc v. Avagliano,* 457 U.S. 176 (1982), at 180; Supreme Court (United States), 29 April 1963, *Maximov v. United States,* 373 U.S. 49 (1963), at 54; Court of Appeals (United States), 6 December 1994, *Xerox Corporation v. United States*, 41 F.3d 647, at 652 and 656; Supreme Court (United States), 9 November 1936, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), at 11; Court of Federal Claims (United States), 5 May 1982, *Great -West Life Assurance Company*, 678 F.2d 180, at 183), at 443 and at 445; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq*., at 749, para. 37; Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R*, 10 *ITLR*, 827 *et seq*., at 34 (quoting Supreme Court (Canada), 20 October 1994, *Thomson v. Thomson,* [1994] 3 SCR 551, at 578 and Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, at 814, para. 43); Income Tax Appellate Tribunal of Mumbai (India), 13 august 2008, *Deputy Director and Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 *ITLR*, 103 *et seq*., at 117, para. 18; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq*., at 502-503, para. 8; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq*., at 825, para. 98.

Seemingly *contra* Edwardes-Ker, who submits that Article 31(1) VCLT, "by omitting an express reference to the parties' intentions, makes clear that treaty terms must be given the meaning which they *do* have (the textual approach) – rather than a meaning which the parties may (or may not) have intended them to have. The best evidence of the treaty partner States' intentions is to be found in the ordinary meaning of the treaty text itself. […] If excessive weight is given to the parties' supposed intentions (by, for example, stressing the contractual nature of a treaty) insufficient weight may then be given to the treaty's actual text. […] some domestic courts have focused excessively on the fact that a treaty is an agreement between two States – and have then sought (often unsuccessfully) to give effect to what they supposed these intentions were." (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 6.01 and 6.02; more generally, the whole of Chapter 6).

For a strong criticism of textuality, as an improper restriction in the quest for the intention of the parties, see M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), in particular Chapters 1-3, and M. S. McDougal, "The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*", 61 *American Journal of International Law* (1967), 992 *et seq.*

[1403] Federal Court, 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, at 5190.

[1404] Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, p. 822, para. 43.

[1405] Conseil d'Etat (France), 27 July 2001, *Re SA Golay Buchel France*, 4 *ITLR*, 249 *et seq*., conclusions of the Commissaire du Gouvernement at 255. For other instances, see Federal Court of Appeal of Ottawa (Canada), 13 October 2003, *Edwards v. R*, 6 *ITLR*, 564 *et seq*., at 568-569, paras. 27-29, where the Court attributed great weight to the common intention of the parties, as expressed by an exchange of diplomatic notes subsequent to the conclusion of the relevant tax treaty, in order to support its construction of the latter; First Council of Taxpayers (Brazil), 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue*

2.3. Ordinary meaning under Article 31(1) VCLT

There are two common trends in national case law with regard to the requirement, provided for by Article 31(1) VCLT, that treaties must be interpreted in accordance with the (qualified) ordinary meaning to be given to their terms.

On the one hand, most decisions show the tendency of national courts and tribunals not to equate the "ordinary meaning" of a term, for the purpose of Article 31 VCLT, to its mere "grammatical or dictionary" meaning (even supposing that something such as a "grammatical or dictionary" meaning exists),[1406] but to choose and argue in favor of the meaning that makes the most sense[1407] in the context where the relevant term is found and, in particular, against the background of the provision of which it is a part.[1408]

Department in Brasilia, 9 *ITLR*, 627 *et seq*., at 659, where the Council stated that, for the purpose of Article 3(2) of the relevant tax treaty (corresponding to Article 3(2) OECD Model), the context was constituted by the intention of the parties at the time of the signature of the treaty and, therefore, also by the meaning that the term to be interpreted has under the law of the other contracting State (an implicit reference to the reciprocity principle).

[1406] See, in that respect, District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq*., at 543, where the Court, quoting Wittgenstein, affirmed that "… there is no such thing as a literal meaning apart from the context that makes it meaningful".

[1407] From the interpreter's perspective.

[1408] See High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank,* 63 TC 218, at 234-236; Special Commissioners (United Kingdom), 23 September 1998, *Sportsman v. IRC*, 1 *ITLR*, 237 *et seq.*, at 244-245, para. 4.1; Tax Court (Canada), 30 October 1998, *Dudney v. R*, 1 *ITLR*, 371 *et seq*., at 376; Tax Court (United States), 18 November 1999, *Compaq v. CIR (the ACT credit claim)*, 2 *ITLR*, 323 *et seq*., at 331, 333 and 336; Income Tax Appellate Tribunal on Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq*., at 730-731, paras. 48-49; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister if National Revenue*, 5 *ITLR*, 638 *et seq*., at 648, para. 25, where the Court stated that its construction of Article 26 of the 1975 Canada-France tax treaty (concerning exchange of information) conformed with the object and purpose of that article, with the general coverage of the treaty, as well as with the interpretation of the model provision upon which Article 26 of the tax treaty was based; *ibidem*, at 650-651, para. 35, where the strict and literal interpretation put forward by applicants was rejected on the ground of the international nature of the 1975 Canada-France treaty; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., minority opinion at 814, referring, for interpretative purposes, to the objective and purpose of Article 11 of the 1948 Denmark-United States tax treaty and of Article 9 of the 1955 Canada-Denmark tax treaty (both corresponding to Article 15 of the OECD Model), which consisted in ensuring that tax regulations did not obstruct the international mobility of qualified labour; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 887, para.17 where the Court pointed out that the terms used in Article XIX of the 1980 Canada-United States tax treaty were to be interpreted in light of the (primary) purpose of that article; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq*., at 285; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq*., at 197, para. 18; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq*., at 1074, para 15; Federal Court of Appeal (Canada), 21 September 2007, *Gulf Offshore NS Ltd v. Canada,* 10 *ITLR*, 172 *et seq*., at 176-177, paras. 20, 22 and 24; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq.*, at 544; Authority for Advance Rulings (India), 18 July 2008, *Dell International Service India Pvt Ltd v.*

On the other hand, however, domestic courts and tribunals often use, as a starting point for their analysis and arguments, the definitions and the synonyms of the relevant treaty terms provided for in dictionaries.[1409]

2.4. The object and purpose of the tax treaty

National courts and tribunals often refer to the object and purpose of the relevant tax treaties, in particular as resulting from the preambles thereof,[1410] in order to construe the

---

CIT (International Taxation), 11 *ITLR*, 173 *et seq*., at 189, para. 12.7; Authority for Advance Rulings (India), 26 June 2009, *Cal Dive Marine Construction (Mauritius) Ltd v. Director of Income Tax*, 12 *ITLR*, 38 *et seq*., at 47-48, para. 6.4; Income Tax Appellate Tribunal of Delhi (India), 16 October 2009, *New Skies Satellites NV v. Assistant Director of Income Tax & Shin Satellite Public Company Limited v. Deputy Director of Income Tax*, 12 *ITLR*, 409 *et seq*., at 427-428, para. 207; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq*., at 503-504, paras. 9-9.1, with regard to the meaning of the expression "[i]tems of income […] not dealt with in the foregoing Articles" employed in Article 22 (corresponding to Article 21 OECD Model) of the 1994 India-Switzerland tax treaty, as amended by the 2000 protocol, and in particular to whether profits from the operation of ships in international traffic, which are explicitly excluded from the scope of Article 7 (dealing with business profits) of the treaty, could be considered to be "dealt with" in Article 7 and, therefore, excluded from the scope of Article 22; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq*., at 812-813, paras. 51 and 54, and at 825, para. 99.

See, however, Hoge Raad (Netherlands), 28 October 1998, case *32330*, 1 *ITLR*, 551 *et seq*., at 559 and 564, where the Court distinguished between the terms "income" ("inkomsten" in the Dutch authentic text) and "items of income" ("bestanddelen van het inkomen" in the Dutch authentic text), included in Articles 27 and 22, respectively, of the 1980 UK-Netherlands tax treaty, by considering capital gains denoted by the latter term, but not by the former.

[1409] See Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, Re V SA, 4 *ITLR*, 191 *et seq*., at 209; Tax Court (Canada), 31 January 2002, *Cheek v. R*, 4 *ITLR*, 652 *et seq*., at 661, para 27; Income Tax Appellate Tribunal on Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq*., at 729-730, paras. 43-45; Tax Court (Canada), 8 April 2005, *Allchin v. R*, 7 *ITLR*, 851 *et seq*., at 872, para. 52; Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 *ITLR*, 563 *et seq*., at 590, para. 139; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq*., at 195, para. 11; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq*., at 189, paras. 35-36; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq*., at 760, paras. 72-73; Income Tax Appellate Tribunal of Chennai (India), 19 May 2008, *West Asia Maritime Ltd and another v. Income Tax Officer*, 10 *ITLR*, 965 *et seq*., at 969-970, para. 11-14; Authority for Advance Rulings (India), 18 July 2008, *Dell International Service India Pvt Ltd v. CIT (International Taxation)*, 11 *ITLR*, 173 *et seq*., at 189-190, para. 12.7; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq*., at 503-504, para. 9; Federal Court of Appeal (Canada), 10 June 2010, *Lingle v. R*, 12 *ITLR*, 996 *et seq*., at 999, para. 7.

For other references to case law where dictionaries have been used for the purpose of enlightening the ordinary meaning of undefined terms employed in the relevant tax treaties, see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.03.

[1410] The object and purpose of a tax treaty may be determined, of course, on the basis of elements other than the title or the preamble thereof, such as, for instance, the structure and goal of the relevant treaty articles. In this respect, it would be difficult to take seriously the statement that the only object and purpose of a tax treaty including OECD-type articles on exchange of information, assistance in the collection taxes and non-discrimination is the avoidance of double taxation.

On the other hand, it seems to the author that the actual inclusion of the expressions "prevention of fiscal

provisions thereof.[1411]

evasion" or "prevention of fiscal evasion and avoidance" in the title of the treaty, or even the presence of an article on exchange of information in the corpus thereof, does not have a decisive weight for the purpose of deciding whether the tax treaty articles, in particular the distributive rules, may be construed so as to allow the prevention of perceived tax abuse or avoidance by the contracting States. The issue here is one of good faith in the interpretation and application of the treaty (by the contracting States; the taxpayer's good faith being absolutely irrelevant in this respect) and of original common intention of the parties, i.e. whether it is reasonable to hold that the reciprocal surrender of taxing rights by the parties with a view to stimulating cross-border economic relations (in particular trade and investments) was originally, or has later become, subject to, in the intention of the parties, the condition that no avoidance or abuse of the relevant domestic and treaty tax law provisions was at stake. The answer to such a question then becomes the foundation for deciding whether domestic anti-avoidance (re)characterizations of facts might affect the construction of the tax treaty provisions via Article 3(2), so that undefined legal jargon terms in the treaty might be given the meaning attributed thereto under domestic law anti-avoidance provisions or anti-abuse principles and, in the case of an affirmative answer, whether the context requires a different interpretation. In this respect, more than the title of the treaty, it seems relevant to ascertain whether in the domestic law of either contracting State at the time of the conclusion of the treaty, or later in both States, such anti-avoidance provisions and/or principles were present and the relevance they (have) had in the contracting State's domestic law system (see more extensively *infra*, section 5.3 of this chapter; see also P. Arginelli et al., "The Royal Bank of Scotland case: More controversy on the interpretation of the term "beneficial owner"", in R. Russo and R. Fontana (eds.), *A Decade of Case Law. Essays in honour of the 10th anniversary of the Leiden Adv LLM in International Tax Law* (Amsterdam: IBFD Publications, 2008), 215 *et seq.*, at 235-241).

[1411] See, for instance, High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank,* 63 TC 218, at 234-236; Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT,* 1 *ITLR*, 75 *et seq.,* at 90, para. 35*;* Tax Court (Canada), 30 October 1998, *Dudney v. R*, 1 *ITLR*, 371 *et seq*., at 379; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, p. 822, para. 43, where Iacobucci J., quoting Addy J. in Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, stated that a "literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned"; Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, Re V SA, 4 *ITLR*, 191 *et seq.*, at 210, para. 7.bb. the Court stated that the search for the object and purpose of the treaty leads one to ask what the parties wished to achieve, and para. 7.aaa., where the Court pointed out that tax treaties do not have as their object and purpose permitting persons that are not resident of either Contracting State from benefitting from the advantages of the treaty by interposing a conduit company; Conseil d'Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, at 1108, where the Court stated that the (alleged) treaty objective of combatting tax avoidance and evasion might not, in the absence of express provisions to that effect, derogate from the rules stated in the treaty (see, to the same effect, the conclusions of the Commissaire du Gouvernement at 1115 and 1117); Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 9-10, paras. 11 and 13 (quoting Lord Denning in Court of Appeal of England and Wales (United Kingdom), 22 May 1974*, H.P. Bulmer Ltd et al. v. J Bollinger S.A. et al.*, [1974] Ch 401, at 425-426); Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v, Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq*., at 788, para. 62 per Arden LJ.; Federal Court of Appeal (Canada), 13 June 2007, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 1111 *et seq*., at 1113, paras. 5 and 6, where the Court, after having interpreted the treaty "purposively and contextually", noted the following: "The appellant urged us to look behind this textual compliance with the relevant provisions to find an object or purpose whose abuse would justify our departure from the plain words of the disposition. We are unable to find such an object and purpose"; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq.*, at 544, where the Court stated that the object and purpose of tax treaties did not include the improper use of their provisions and the benefits they granted (one might question, however, whether such a statement takes us a step forward at all, since the issue is now what constitutes an improper use – abuse – of the treaty provisions); Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 398, paras. 87-89; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler*

An illustration is given by Northrop J. of the Federal Court of Australia, who, when faced with the interpretation of Article 7 of the 1980 Australia-Switzerland tax treaty in the *Thiel* case, held that "[t]he policy behind the Agreement is to avoid the imposition of double taxation with respect to taxes on income. That is a stated purpose of the Agreement. If possible, the proper construction of the Agreement should be consistent with that policy or purpose."[1412]

Sometimes the object and purpose of the tax treaty even appear to be attributed a decisive weight for construing the relevant treaty provisions.

For instance, in the *Re Austria-Germany double tax convention* case,[1413] the Austrian Verwaltungsgerichtshof, in deciding whether the 1954 Austria-Germany tax treaty (in particular Articles 4(1) and 15(1) thereof, corresponding to Articles 7(1) and 23A(1) of the OECD Model) prevented Austria from taking into account the losses incurred by a resident taxpayer through its German permanent establishment[1414] for the purpose of determining its taxable profits, considered that the treaty object and purpose, explicitly defined by Article 1(1) of the treaty as to ensure that persons resident in one or both the Contracting States did not incur double taxation, required an answer to that question in the negative. The Court found that the above-mentioned object and purpose made clear that the tax treaty was directed against increased taxation by means of multiple inclusion of revenue and, therefore, although within the limits imposed by the coexistence in the two contracting States of different rules to determine the taxable base and different tax rates, the treaty application should ideally lead to a taxation of income deriving from international operations that was neither grater, nor lesser than the taxation of comparable income from pure domestic operations.[1415] Since, in purely domestic situations and in the absence of tax treaties, such a loss would have been deductible from

---

India Private Ltd v. Deputy Commissioner of Income Tax, 11 *ITLR*, 811 *et seq*., at 826-827 (citing Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq*., at 279-280); Tax Court (Canada), 10 September 2009, *Garron and others v. R*, 12 *ITLR*, 79 *et seq*., at 131-132, para. 381; Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 *ITLR*, 645 *et seq*., at 654-655, para. 5, where the Court concluded that only a "reasonable" domestic anti-tax haven rule could stand against a tax treaty, such as the 1994 Japan-Singapore tax treaty, purported to safeguard and promote bilateral economic transactions and to avoid international double taxation; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq*., at 813, para. 56 and at 824-825, para. 97.
See also the cases reported in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf) at 11.03, where courts and tribunals seem to swing, as is normally the case, between decisions more and other less teleologically oriented.

[1412] Federal Court (Australia), 20 December 1988, *Thiel v. Commissioner of Taxation*, [1988] FCA 443, at para. 24 of the dissenting opinion of Northrop J. (upheld in High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports,* 338 *et seq*.).

[1413] Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 *ITLR*, 547 *et seq*.

[1414] The losses accrued from the business carried on in Germany by a general partnership of which the Austrian resident taxpayer was a partner; however, under both Austrian domestic law and the tax treaty, that partnership ('s place of business) constituted a permanent establishment of the Austrian resident partner.

[1415] Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 *ITLR*, 547 *et seq*., at 554.

the taxpayer's taxable base, the same result should occur where the tax treaty applied.[1416]

2.5. The context under Article 31(2) VCLT

National courts and tribunals generally analyse the structure of the provision that includes the term to be interpreted, as well as the meaning of the other terms employed therein, in order to construe the former. Moreover, they commonly make reference to other provisions of the same tax treaty for the purpose of construing the provision debated between the parties, both where such other provisions are part of the very same treaty article and where they are not (including the provisions incorporated in later protocols).[1417] The same holds true with regard to the treaty preamble, which is

[1416] The Court also found such a conclusion to be in accordance with the general principle that tax treaties do no more than limit the taxing rights of the contracting States and, by no means, extend tax liability as determined under domestic law (see Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 *ITLR*, 547 *et seq*., at 555).

[1417] See Hoge Raad (Netherlands), 28 October 1998, case *32330*, 1 *ITLR*, 551 *et seq*., at 559 and 564; Tax Court (United States), 18 November 1999, *Compaq v. CIR (the ACT credit claim)*, 2 *ITLR*, 323 *et seq*., at 331 and 333, where reference was also made to the "general structure" of the treaty; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT,* in 2 *ITLR*, 707 *et seq.*, at 715 and 723-725, where the Court referred to the possibility to find indications in favor of a certain interpretation by looking at the relevant tax treaty "as a whole"; Hoge Raad (Netherlands), 1 November 2000, case *35398*, 3 *ITLR*, 466 *et seq*., at 483, para. 3.4, highlighting that, under Article 31 VCLT, the meaning to be attributed to undefined terms should be the one that best fits in the context of the treaty as a whole; Administrative Court of Appeal of Paris (France), 30 January 2001, *Re Schneider SA*, 3 *ITLR,* 529 *et seq.*, at 545, where the Court stated, with regard to the interrelation between domestic CFC rules and the 1966 France-Switzerland tax treaty, that from none of the provisions of that treaty did it appear that the objective of fighting tax avoidance and evasion permitted a derogation from the clear rule of Article 7 thereof, according to which the profits of a Swiss resident company might be taxed solely in Switzerland; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 33, paras. 70-71, where the Court pointed out that, in order to determine whether a person residing in Hong Kong (after 1997) and liable to Hong Kong taxes was to be regarded, for the purpose of Article 4 of the 1986 Canada-China tax treaty, as liable to tax in China by reason of his residence "under the laws of that Contracting State", it was necessary to construe the expression "under the laws of that Contracting State" against the background of Article 2 of the treaty (Taxes Covered); *ibidem* at 35-36, paras. 80-82, with regard to the need to construe Articles 3, 4, 23 and 24 of the 1986 Canada-China tax treaty in a harmonious fashion, in order to avoid internal inconsistencies that might jeopardize the functioning of the treaty; Hoge Raad (Netherlands), 21 February 2003, case *37024*, 5 *ITLR*, 818 *et seq.*, at 876, para. 3.6, where the Court, after having argued that the expression "is present" in Article 15(2)(a) of the Netherlands-Nigeria tax treaty, read in the context of that provision, indicated unmistakably *physical* presence, noted that there was nothing elsewhere in the treaty or the explanatory notes to indicate that the contracting States had a different meaning in mind; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*, at 816-817, paras. 56-61, where the Court analysed the treaty provision to be interpreted, i.e. Article 4(3) of the 1969 Australia-Singapore tax treaty, against the background of the whole Article 4 of that treaty, in particular Article 4(1) thereof, and concluded that Article 4(3) (i.e. the permanent establishment deeming provision) was substantially independent from Article 4(1) (i.e. the permanent establishment general provision); Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 12, para. 17, and at 16, para. 24; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 74, where the Court referred to Article 12 (Capital Gains) of the 1971 Italy-Ireland tax treaty in order to construe Article 2(2) thereof and concluded that the Irish Capital Gains Tax was to be regarded as a tax on income for the purpose of that tax treaty; Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities*

frequently referred to in order to establish the object and purpose of the relevant tax treaty.[1418]

For example, in the *Ngee Hin Chong* case,[1419] the Administrative Appeals Tribunal of Adelaide (Australia), in order to support its interpretation of the expression "shall be taxable in that State" included in Article 18(2) of the English authentic text of the 1981 Australia-Malaysia tax treaty,[1420] noted that, where the contracting States intended to deny the taxing right to one of them, they explicitly did so by using the term "only" in the English authentic text of the tax treaty, as for instance in Articles 7, 8, 14, 17 and 18(1) thereof.[1421] Similarly, the Tribunal noted that Articles 22 and 23, for the purpose of eliminating juridical double taxation by means of the credit method, made reference, *inter alia*, to Article 18 and that such a reference could be said not to be absurd only where Article 18(2) was construed as allowing concurrent taxation.[1422]

Clearance Inc v. Income Tax Officer, 11 *ITLR*, 201 *et seq*., at 222, para. 38, where the tribunal made reference to Article 26(5) of the 1989 India-United States tax treaty for the purpose of interpreting Article 26(2) thereof; Special Commissioners (United Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq*., at 478-481, where the Special Commissioners outlined (i) the way in which the distributive rules generally allocate taxing rights between the two contracting States with regard to the different categories of income (concurrent or exclusive taxation) and (ii) the circumstances under which the allocation under (i) might be modified under the 1975 United Kingdom-United States tax treaty (i.e. where the domestic CFC legislation applies, partnerships are involved, or the treaty "saving clause" operates), as a background against which to construe the interaction between Articles 1(4) and 23 of the above-mentioned treaty; *ibidem*, at 482-483, paras. 66 and 68; Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 395-396, para. 82, where the Court made extensive references to Articles 10, 11(5) and 11(6) for the purpose of construing Article 11(9)(a) of the 1982 Australia-United States tax treaty; Authority for Advance Rulings (India), 26 June 2009, *Cal Dive Marine Construction (Mauritius) Ltd v. Director of Income Tax*, 12 *ITLR*, 38 *et seq*., at 47, paras. 6.2 and 6.3, where the authority pointed out the relevance, for interpretative purposes, of the contextual setting of the provision to be construed and noted that "[p]aragraph 1 of Article 5 [of the relevant tax treaty could] not be viewed as a water-tight compartment without taking colour from or shedding light on various clauses of para 2"; Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 *ITLR*, 645 *et seq*., at 653-654, para. 4, where the Court analysed Article 7(1) of the 1994 Japan-Singapore tax treaty as a whole in order to conclude that it only prohibited juridical double taxation and, therefore, did not prevent Japan from applying its CFC rule to a resident taxpayer investing in a company resident in Singapore; Court of Appeal of England and Wales (United Kingdom), 8 July 2010, *Smallwood and another v. Revenue and Customs Commissioners*, 12 *ITLR*, 1002 *et seq.*, at 1018, para. 28, where the Patten LJ analysed the structure of the 1981 Mauritius-United Kingdom tax treaty (distinguishing, in particular, the function played by the "distributive rules" articles, on the one hand, from that of the article dealing with the elimination of double taxation, on the other hand) for the purpose of determining the goals that articles 4 and 13 of that treaty were designed to achieve, which, in turn "largely colour[ed] the interpretation of the provisions themselves"; *ibidem*, at 1022, paras. 40-41.

[1418] See section 2.3.3.1 of Chapter 3 of Part II.

[1419] Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT,* 1 *ITLR*, 75 *et seq.*

[1420] As well as the expression "may be taxed", which represented the English translation, agreed upon by the parties to the litigation, of the corresponding Malaysian expression included in the Malaysia authentic text of the treaty.

[1421] See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT,* 1 *ITLR,* 75 *et seq.*, at 91, para. 38.

[1422] See *ibidem*, at 90-91, paras. 36-37.

In addition, where an instrument made by a contracting State in connection with the conclusion (here intended as a process) of the relevant tax treaty has been publicly recognized by the other contracting State as an instrument related to that treaty and reflecting the common understanding reached in the course of the negotiations, courts and tribunals often take it into account for the purpose of interpreting the treaty as provided for in Article 31(2)(b) VCLT.

An instance thereof is represented by the Technical Explanations issued by the United States Treasury Department in connection with the conclusion of the 1980 Canada-United States tax treaty and accepted by the Canadian Minister of Finance as accurately reflecting the understanding reached by the parties in the course of the negotiations with regard to the interpretation of that treaty.[1423]

2.6. The other means of interpretation provided for by Article 31(3) VCLT

National courts and tribunals not infrequently attribute relevance to the case law of the other State party to the tax treaty to be interpreted, given that it constitutes evidence of the understanding of that State of the relevant treaty provisions. As further mentioned in section 3 of this chapter, this holds true even where the provisions interpreted by the foreign courts and tribunals are part of a tax treaty concluded by the treaty partner with another State.[1424]

Obviously, where such judicial practice is consistently followed by courts and tribunals of both contracting States, it falls within the scope of Article 31(3)(b) VCLT, which provides that the interpreter must also take into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

[1423] See Canadian Department of Finance Press Releases 81-16 of 4 February 1981 and 84-128 of 16 August 1984. With reference to case law, see, for instance, Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, at para. 64. Seemingly *contra*, Federal Court of Appeal (Canada), 26 September 1997, *Attorney General of Canada v. William F. Kubicek*, 97 DTC 5454, at para. 10, which, however, appears to focus on the weight to be given to the United States Technical Explanation, as endorsed by the Canadian Minister of Finance, for interpretative purpose at the domestic law level (tax treaty as a Canadian statute), rather than at the international level (tax treaty as an international agreement). See also B. J. Arnold et al., *Ward's Tax Law and Planning. Volume 6* (Toronto: The Carwell Co. Ltd., 1983), pp. 21 *et seq.* and M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 25.06.

[1424] See, for instance, Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, p. 822, para. 43; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 557, para 3.4.4., where reference was made to the fact that the principle of abuse of rights was recognized by the judiciary of the other Contracting State (Denmark); Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 751-753, para. 43, where reference was made to a decision of the Hoge Raad of the Netherlands, for the purpose of construing the term "beneficial owner" as used in the 1986 Canada-Netherlands tax treaty; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 *ITLR*, 811 *et seq*., at 839-840, paras. 57-59; Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq*., at 67-68, para. 15, where the Court made reference to a decision of the United States Tax Court on the meaning of the term "habitual abode" in order to construe Article IV(2) of the 1980 Canada-United States tax treaty.

Similarly, national courts and tribunals sometimes take into account the common practice of the contracting States' tax authorities and governmental organs in order to construe the relevant tax treaty provisions and argue in support of the chosen interpretation thereof.[1425] This approach is clearly in line with Article 31(3)(b) VCLT.[1426]

In particular, where the competent court or tribunal concludes that the contracting States tax authorities' common practice is sufficiently unambiguous and consistent, it is rare that it rejects the construction of the relevant tax treaty provisions resulting from

[1425] See Supreme Court (United States), *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), at 184-85; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 63; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 33-35, paras. 72, 73 and 77; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq*., at 315-317 where the Court seemed to attribute weight to the historical position of the United Kingdom regarding the proper interpretation of Article 7 of the 1975 United States-United Kingdom tax treaty, in order to construe this provision; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 557, para. 3.4.4., where the Court made reference to the subsequent practice of the other contracting State (Denmark) to enter into tax treaties containing anti-abuse provisions in order to construe in an anti-abuse fashion the 1973 Denmark-Switzerland tax treaty; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq*., at 193, para. 17, where the Court noted that there had been no public or published statements by the governments of the contracting States (Canada and Barbados), nor any agencies or subdivisions thereof, nor any exchange of diplomatic notes, nor other internal documents (to the best of the Court's knowledge) dealing with the issue at stake before the Court (i.e. the interaction between Articles XXVII(3) and XXX(2) of the 1980 Barbados-Canada tax treaty); Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq*., at 436-439, where, for the purpose of interpreting Article 7 of the 1975 United Kingdom-United States tax treaty in connection with bank inter-branch transactions (interest on internal "loans"), the Court made reference to both (i) the contracting States' conduct contemporaneous to the treaty negotiations and conclusion and (ii) their subsequent conduct (the United Kingdom government also submitted, in that respect, an *amicus curiae* brief to the court), noting that the approach followed by the US government after the introduction of Treasury Regulation § 1.882-5 was publicly registered for the first time in the 1984 OECD Report *Transfer Pricing and Multinational Enterprises* and, thus, it could not be directly used (absent any evidence to the contrary) to support the view that it reflected the understanding of the United States, and even less that of both parties (the United Kingdom dissenting in that respect), at the time of the treaty conclusion; Tax Court (Canada), 8 April 2010, TD Securities (USA) LLC v. R, 12 *ITLR*, 783 *et seq.*, at 820-822, paras. 80-87, where the Court made reference to the Canadian Revenue Authority's practice with regard to the application of tax treaties to income derived by fiscally transparent entities (other than United States limited liability companies – "LLC"), and at 822-824, paras. 90-94, where it made reference to the United States' practice on the same matter, in order to get some evidence of the possible common understanding of Canada and the Unites States with reference to the application of their 1980 tax treaty to income derived by a United States LLC.

[1426] It is worth noting that the Finnish Supreme Administrative Court, in the case *Re A Oyj Abp,* recorded the divergence of opinion of the two contracting States (Belgium and Finland) Ministries of Finance regarding the compatibility of the Finnish CFC rule with the relevant tax treaty and, thus, the impossibility of ascertaining directly the common intention or position of the parties with respect to such an issue, before arguing in favor of the compatibility on the basis (also) of the OECD Commentary (see Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq*., at 1066). See also Bundesfinanzhof (Germany), 17 October 2007, *Re a Partnership*, 10 *ITLR*, 628 *et seq*., at 653-654, where the Court seemed to be theoretically willing to take into account the subsequent consistent practice of the parties for the purpose of interpreting tax treaties, but, in the specific case, found that the German tax authorities had failed to prove that the factual application of the 1989 Germany-United States tax treaty by the two contracting States mirrored their consistent view on the construction of the relevant provisions of the treaty, thus concluding that Article 31(3)(b) VCLT was not applicable in such circumstances.

it.[1427]

According to the majority of scholars,[1428] mutual agreements reached by the competent authorities of the contracting States and purported to resolve issues concerning the interpretation of the relevant tax treaties under provisions similar to Article 25(3) OECD Model are binding on the contracting States at the international law level. In such a case, in fact, the competent authorities act as duly authorized representatives of the contracting States and, therefore, the mutual agreement reached thereby is to be regarded as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" under Article 31(3)(a) VCLT.

Similarly, paragraph 54 of the Commentary to Article 25 OECD Model states that "[m]utual agreements resolving general difficulties on interpretation or application are binding on administrations as long as the competent authorities do not agree to modify or rescind the mutual agreement" and paragraph 13.1 of the Commentary to Article 3 OECD Model explicitly maintains that mutual agreements should be taken into account for the purpose of interpreting undefined treaty terms.

The absence of national case law confirming the bindingness of mutual agreements for interpretative purposes is mainly due to the fact that, in general, their relevance at the domestic law level depends on whether certain legal requirements (in terms of form and procedure) imposed by the constitutions of the contracting States are satisfied, this often not being the case.[1429]

Finally, it has been persuasively argued that rules and principles of European Union law should be regarded as "rules of international law applicable in the relations between the parties" under Article 31(3)(c) VCLT for the purpose of construing tax treaties

[1427] *Contra,* however, Court of Appeal of Liege (Belgium), 14 January 1998, *Verast & Folens v. Belgium*, 1 *ITLR*, 435 *et seq.*, at 449, where the Court stated that the Belgian tax administration, which relied on the corresponding practice of the tax administration of the other contracting State (France), failed to establish that the latter tax administration did not misunderstand the rule enshrined in the relevant treaty provision; Bundesfinanzhof (Germany), 2 September 2009, *Re a German-Belgian Competent Authority Agreement*, 12 *ITLR*, 475 *et seq*., at 490-491, where the Court (confusingly) held that the mutual agreement reached by the competent tax authorities under Article 25 of the 1967 Belgium-Germany tax treaty, with a view to solving the issue of double non-taxation of severance payments made to Belgian resident individuals working in Germany, represented a change in the tax treaty and not an interpretation of it since it went further than the clear text of Article 15 of the treaty allowed and, therefore, on the one hand, it could not be properly viewed as a subsequent agreement between the parties regarding the interpretation of the treaty or a subsequent practice establishing the agreed interpretation thereof under Article 31(3)VCLT and, on the other hand, it could not have any effect on German courts unless incorporated into domestic law.

[1428] See, for instance, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 16.01; A. A. Skaar, "The Legal Nature of Mutual Agreements Under Tax Treaties", *Tax Notes International* (1992), 1441 *et seq.*, at 1446-1447; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 47, m.no. 82c; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 431-434.

[1429] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 16.03 and 27.03-27.06; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 433; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 47-48, m.nos. 82d and 82e and case law referred to there.

concluded between European Union Member States.[1430] This conclusion is in line with that supported by the author in section 2.3.3.4 of Chapter 3 of Part II.

2.7. Supplementary means of interpretation under Article 32 VCLT and other extrinsic materials

National courts and tribunals sometimes mention official documents prepared by the competent ministries or parliamentary committees in the course of the ratification process. Similarly, reference is at times made to the positions of the contracting States' tax authorities and the interpretations put forward in the commentaries to national tax treaty models.

These documents, being unilateral in nature, do not directly shed light on the common understanding of the parties in respect of the relevant tax treaties and, thus, cannot be categorized either as (typical) *travaux préparatoires,* or as means of interpretation referred to in Article 31(3)(a) and (b).

However, it cannot be disputed that they constitute evidence of the understanding of one of the contracting States and, as such, may be certainly be taken into account as supplementary means of interpretation.[1431] The actual weight that the content of these documents is to be attributed for the purpose of construing the relevant tax treaty provisions depends on the other items of evidence available and on the reasonableness of the interpretations provided for therein.[1432]

[1430] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 436; F. Avella, "Il beneficiario effettivo nelle convenzioni contro le doppie imposizioni: prime pronunce nella giurisprudenza di merito e nuovi spunti di discussione", *Rivista di Diritto Tributario. Parte Quinta* (2011), 14 *et seq*., pp. 25 *et seq*., in particular footnote 32; F. Avella, "Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention", *World Tax Journal* (2012), 95 *et seq*., at 97 *et seq*.

[1431] See, broadly in agreement, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), Chapter 25, in particular at 25.02; contrary, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p.34, m.no. 71.

[1432] See Court of Federal Claims (United States), 7 July 1999, *National Westminster Bank v. US*, 1 *ITLR*, 725 *et seq*., at 735, referring to the 1977 United States Treasury Department Technical Explanation concerning the 1975 United States-United Kingdom tax treaty and to the Report of the Senate Committee on Foreign Relations dated 25 April 1978 concerning its favorable recommendation of the same treaty; similarly, Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq*., at 306-307, where the Court, however, pointed out that, even where it was to read the above-mentioned documents as supporting the position of the US government in the dispute (which was not the case), the unilateral view of the United States were not controlling the proper construction of the 1975 United States-United Kingdom tax treaty, since the Court had to give meaning to the common intention of the treaty parties; Tax Court (United States), 18 November 1999, *Compaq v. CIR (the ACT credit claim)*, 2 *ITLR*, 323 *et seq*., at 332-333, where the Court made reference (i) to the United States Treasury Department Technical Explanation to the 1975 United States-United Kingdom tax treaty and (ii) to the US Rev. Proc. 80-18 and concluded that, as unilateral documents, they presented no reason to deviate from the intention of the contracting States as evidenced by the structure of the tax treaty and the plain meaning of the language of the relevant provision; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT,* 2 *ITLR*, 707 *et seq*., at 719, where reference was made to the explanatory memorandum accompanying the Bill that gave effect to the 1980 Australia-Malaysia tax treaty (which the Court found equivocal and of little assistance) and to the Second

Of course, the same holds true with regard to the case law of the treaty partner's courts and tribunals,[1433] as well as to that State's subsequently implemented domestic law provisions, which interact (or might interact) with the tax treaty articles to be

---

Reading speech introducing that Bill (which the Court also found equivocal); Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, Re V SA, 4 *ITLR*, 191 *et seq.*, at 211; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq*., at 1061- 1062, where the Court referred to Government Bill no. 155/1994 vp dealing with the compatibility of the newly introduced Finnish CFC rule with the tax treaties to which Finland was party; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 881, para. 6 where reference was made to the United States Technical Explanation to Article XIX of the 1980 Canada-United States tax treaty (see *ibidem* at 887, paras. 15 and 16), para. 7 where reference is made to the United States Technical Explanation to Article 19 of the United States Model Income Tax Convention (see *ibidem* at 888, paras. 19 and 20), and at 882, para. 9 where the Court held that, although not constituting authority on a question of law, the United States Technical Explanations are "an element to be taken into account in the interpretation process" of the tax treaty; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq*., at 184, para. 13, where the Court referred to the Canada Revenue Agency Interpretation Bulletin IT-221R3 for the purpose to construe the term "permanent home" as used in Article IV(2) of the 1980 Canada-United States tax treaty; Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq*., at 432-433, where reference was made to the United States Technical Explanation to the 1975 United Kingdom-United States tax treaty (submitted to the Senate Foreign Relations Committee), regarded by the Court as part of the "entire context" that must be taken into account for the purpose of construing that treaty; *ibidem*, at 438, where the Court held that, since a treaty must be interpreted so as to give effect to the intent of both parties, a government's position merits less deference where that government and the one of the other contracting State disagree on the meaning of the treaty; *ibidem*, at 439, where the Court concluded that its construction of Article 7 of the 1975 United Kingdom-United States tax treaty found direct support in the contemporary understanding of the United Kingdom, as evidenced by its contemporaneous and subsequent practice, as well as in the OECD Commentary to Article 7 of the 1963 OECD Draft, on which the treaty was based (moreover, the Court noted that there was very little evidence that the contemporary understanding of the United States differed in any way from that of the United Kingdom, although its subsequent practice clearly did); Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities Clearance Inc v. Income Tax Officer*, 11 *ITLR*, 201 *et seq*., at 219-220, paras. 30-32, where the Tribunal noted that the Technical Explanation to the United States Model Tax Convention, representing an authoritative statement on the treaty policy of the United States and being binding thereon, has a strong persuasive value on the ground of reciprocity as well for the purpose of construing the 1989 India-United States tax treaty, since one should suppose that India was aware of the United States Model Tax Convention and its accompanying Technical Explanation when negotiating the treaty and thus, as a corollary, it should be assumed that once an expression appearing in such a Model is being used in the tax treaty, that expression should be given the same meaning assigned to it in the Technical Explanation, unless evidence to the contrary exists (quite surprisingly, the Tribunal went on by stating that whenever a conflict exists between the OECD Commentary and the Technical Explanation to the United States Model, the former has to give way to the latter: the Tribunal did not seem to consider that the OECD Commentary is, to a very large extent, reproduced in or referred to by the Commentary to the United Nations Model, in the drafting of which India is involved); District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq*., at 857-858, where the Court referred to a letter of the Norwegian Ministry of Finance dated 4 April 2000, in which it was stated that under OECD Model-type tax treaties, the conclusion of contracts by an agent on behalf of the principal leads to a permanent establishment of the latter in the State where the former acts as if the contracts "in reality" bind the principal, even if they are not directly legally binding thereon.
With regard to older case law, see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 28.03, 28.04 and, with specific regard to the United States, 28.17 and 28.18.

[1433] References to courts and tribunals' decisions where the case law of the other contracting States' courts and tribunals are taken into account for the purpose of interpreting tax treaties are included in section 3 of this chapter.

interpreted.[1434]

It is interesting to note that, in some cases, national courts and tribunals have also referred to the circumstances of the conclusion of the relevant tax treaty in order to interpret it, such as the domestic tax laws in force in the contracting States at the time of the treaty conclusion[1435] and the international legal framework relevant to one of the contracting States, but not to the other.

For instance, in the *Re V SA* case,[1436] the Federal Commission (Switzerland) noted that the reason[1437] for the adoption of Article 10(2)(b) of the 1993 Luxembourg-Switzerland tax treaty was to extend, to the relation between the two contracting States,

---

[1434] See, for instance, Bundesfinanzhof (Germany), 5 March 1986, case *IR 201/82*, *Bundessteuerblatt. Teil II* (1986), 496 *et seq.*, where the Court attributed relevance to the fact that the other contracting State (Switzerland) had enacted, after the conclusion of the 1931 Germany-Switzerland tax treaty, a domestic law provision purported to prevent abuse of its own tax treaties (i.e. the Swiss Federal Decree of 14 December 1962), for the purpose of arguing that the German relevant domestic law anti-abuse provision (Article 6(1) of the German Steueranpassungsgesetz) could be applied to situations covered by that treaty.

[1435] See Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, para. 19, where Addy J. referred to the United States tax law on capital gains in force at the time of the conclusion of the 1942 Canada-United States tax treaty, as part of the "surrounding circumstances when the treaty was signed", in order to explain why that treaty employed the term "sale or exchange" in connection with the obligation of the source State to exempt capital gains derived by a resident of the other State; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 557, where the Court noted that Denmark, during the negotiations of the 1973 Denmark-Switzerland tax treaty, did not make any reservation on the application of the resolution of the Federal Council of Switzerland of 14 December 1962, concerning measures against the unjustified use of tax treaties, which had already an impact on the former 1957 Denmark-Switzerland tax treaty (it might also be held that such an absence of explicit reservation on behalf of Denmark, together with the previous application by Switzerland of the above-mentioned resolution to situations covered by the 1957 treaty, amounted to a tacit agreement between the parties allowing the application of anti-abusive measures by Switzerland to situations covered by the new (1973) tax treaty; in that case, the tacit agreement would be relevant as part of the context under Article 31(2) VCLT); Bundesfinanzhof (Germany), 17 October 2007, *Re a Partnership*, 10 *ITLR*, 628 *et seq*., at 650, where the Court held that the expression "business property of [such] a permanent establishment" used in the 1989 Germany-United States tax treaty was chosen instead of the OECD Model expression "effectively connected with [such] a permanent establishment" because, under the previous 1954 Germany-United States tax treaty, the latter expression was to be construed in accordance with the United States domestic law under a mutual agreement entered into by the tax authorities of the contracting States and, thus, by not including such an expression the parties wanted to prevent the impression that the interpretation agreed upon in the mutual agreement was to be applied also in respect of the 1989 treaty; Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 395, para. 81, where the Court took into account the domestic tax law policy of the United States, which triggered the inclusion of Article 11(9)(a) in the 1982 Australia-United States tax treaty, but concluded that the construction and application of the taxing right of Australia under Article 11(9)(a) could not be controlled by the United States domestic tax law policy, since the text of the article, read in its context, pointed to a different construction. See also Belgian Tax Authorities, Circular Letter No. AFZ/2004/0053 of 16 January 2004, where it is stated that the domestic law of the other contracting State (in particular the meaning that an undefined treaty term has under such law) should be taken into account as part of the context in order to construe Belgian tax treaties.

[1436] Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, Re V SA, 4 *ITLR*, 191 *et seq.*, at 211 and 212.

[1437] Such a reason apparently resulted from the Swiss domestic "travaux préparatoires" to the 1993 Luxembourg-Switzerland tax treaty.

the benefits provided for by the Parent-Subsidiary Directive[1438] and, therefore, Article 10(2)(b) was to be interpreted against the background of that directive as a whole. Since Article 1(2) of the Parent-Subsidiary Directive provided that the provisions of national law or tax treaties concerning the prevention of evasion and abuse might continue to operate, the Federal Commission concluded that the same should apply with regard to Article 10(2)(b) of the 1993 Luxembourg-Switzerland tax treaty, which was purported to do no more than to extend the scope of the directive benefits.

In the same vein, national courts and tribunals sometimes analyse the previous and subsequent tax treaties concluded between the very same contracting States (as well as protocols modifying the relevant tax treaty), in order to draw some evidence by way of inference from the changes in the wording used.[1439]

Another recurrent feature of national case law is the reference to the work of worldwide-recognized scholars in the field of international taxation, in general, and of tax treaties, in particular. Thus, it is not rare to find citations of the works of Vogel, Baker and (the members of) the International Tax Group as authorities confirming the interpretation in favor of which the relevant court or tribunal is arguing.

The frequency of such references is so high[1440] that one could get the impression

[1438] Directive 90/435/EEC of the European Economic Community.

[1439] See, for instance, Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 889, para. 22

[1440] See, among many, Authority for Advance Rulings (India), 18 March 1997, *TVM Ltd v. CIT*, 1 *ITLR*, 296 *et seq*., at 315-316; Tax Court (Canada), 30 October 1998, *Dudney v. R*, 1 *ITLR*, 371 *et seq*., at 376; Authority for Advance Rulings (India), 28 April 1999, *Y's Application*, 2 *ITLR*, 66 *et seq*., at 78 and 81; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT,* 2 *ITLR*, 707 *et seq.*, at 715-716; Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, Re V SA, 4 *ITLR*, 191 *et seq.*, at 208 and 210; Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 *ITLR*, 547 *et seq*., at 555; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 31, paras. 62-63, at 33, paras 69-70, and at 35, para. 79; New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT*, 5 *ITLR*, 658 *et seq*., at 676-678, paras. 67-70 and 76; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*, at 229; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq*., at 267-268, 270 and 275; Federal Court of Appeal of Ottawa (Canada), 13 October 2003, *Edwards v. R*, 6 *ITLR*, 564 *et seq*., at 568-569, para. 22; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 19, para. 30; High Court of Justice of England and Wales (United Kingdom), 7 October 2005, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 236 *et seq*., at 254, para. 40, and at 256-257, paras. 45 and 48; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 555, para. 3.4; Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 *ITLR*, 563 *et seq*., at 585-586, paras. 110-111; Court of Appeal of England and Wales (United Kingdom), 2 March 2006, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 653 *et seq*., at 670 and 672, paras. 34, 37 and 38; Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v, Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq*., at 794, paras. 75-76 per Arden LJ.; Supreme Court (India), 4 January 2007, *Ishikawajma-Harima Heavy Industries Ltd v. Director of Income Tax*, 9 *ITLR*, 799 *et seq*., 827-828; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1071, para. 12, at 1076, para. 19, and at 1079-1080, paras. 29-34; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 77, 80 and 81; Income Tax Appellate Tribunal of Chennai

that some of the interpretative guidance given in such works substantially amount to paradigms[1441] of tax treaty application, i.e. to shared worldwide understandings of how tax treaties (and some of their OECD-standard provisions) should be generally construed and applied.[1442]

Finally, national courts and tribunals have on certain occasions carried out a comparative analysis of the domestic law rules that could be restricted by the application of the relevant tax treaties, or a study of their historical background.

Where such rules are implemented worldwide, this kind of analysis becomes more frequent and national courts and tribunals appear to attribute more weight to them for the purpose of determining the interrelation between the domestic tax rules at stake and the relevant treaty provisions.[1443]

(India), 19 May 2008, *West Asia Maritime Ltd and another v. Income Tax Officer*, 10 *ITLR*, 965 *et seq*., at 970-971, para. 15; Authority for Advance Rulings (India), 18 July 2008, *Dell International Service India Pvt Ltd v. CIT (International Taxation)*, 11 *ITLR*, 173 *et seq*., at 188, para. 12.2, and at 193, para. 13.5; Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities Clearance Inc v. Income Tax Officer*, 11 *ITLR*, 201 *et seq*., at 220, para. 34, and at 228-229, paras. 60-62; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 *ITLR*, 811 *et seq*., at 850-851; Income Tax Appellate Tribunal of Delhi (India), 16 October 2009, *New Skies Satellites NV v. Assistant Director of Income Tax & Shin Satellite Public Company Limited v. Deputy Director of Income Tax*, 12 *ITLR*, 409 *et seq*., at 435-437, in particular paras. 221 and 223; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 *ITLR*, 915 *et seq*., at 930.

[1441] Here the term "paradigm" is employed in the sense it has been used in T. Kuhn, *The Structure of Scientific Revolutions* (Chicago: The University of Chicago Press, 1962). See also A. Bird, "Naturalizing Kuhn", 105 *Proceedings of the Aristotelian Society* (2005), 99 *et seq*., in particular at 112-114.

[1442] Baker, in his note as editor of the *ITLR* to the decision of the High Court in the *Indofood* case (High Court of Justice of England and Wales (United Kingdom), 7 October 2005, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 236 *et seq*.) stated the following: "In some respects, the editor has never been more pleased that he wrote in his book about the meaning of 'beneficial ownership' since it is somewhat uncertain what the outcome of the case would have been if a judge without a tax background had been asked simply to explain the meaning of beneficial ownership. The editor hopes that the material cited is generally accepted as a correct definition of the meaning of beneficial ownership" (*ibidem*, at 237).

One of the few significant deviations from such paradigms is represented by the way in which Indian courts and tribunals are used to construing the expression "may be taxed", commonly found in Indian tax treaties: that expression is generally interpreted by those courts and tribunals as a synonym for "shall be taxable only", which is also a commonly used expression in OECD Model-type tax treaties, including Indian ones (see, for instance, Income Tax Appellate Tribunal of Pune (India), 29 June 2007, *DCIT v. Patni Computer Systems Ltd*, 10 *ITLR,* 53 *et seq.*, at 57-60, paras. 5-8). The effect of such an interpretation is that of converting India, which generally adopts the credit method to relieve double taxation in its tax treaties, into an exemption country.

[1443] See, for instance, the worldwide historical and comparative analysis of CFC rules carried out by the Supreme Administrative Court of Finland in the *Re A Oyj Abp* case (Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq*., at 1058); see, similarly, the analysis of the international background relating to the French CFC legislation carried on by the Commissaire du Gouvernement Austry in the *Schneider* case (Conseil d'Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq*., conclusions of the Commissaire du Gouvernement at 1109-1111).

2.8. Conclusions

The analysis of national case law has shown that, notwithstanding domestic law constraints, courts and tribunals tend to follow the principles enshrined in Articles 31 and 32 VCLT when interpreting tax treaties.

From the perspective of this study, the most reasonable inference that may be drawn from this is that, where a *prima facie* discrepancy in meaning among the tax authentic treaty texts in put forward, national courts and tribunals should similarly apply those principles of interpretation in order to remove it.

Moreover, based on such an analysis, it does not seem that any of the approaches to treaty interpretation taken by national courts and tribunals includes elements that might constitute a ban on the application of the rule provided for in the last part of Article 33(4) VCLT, according to which the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, must be adopted where the discrepancy in meaning cannot be removed by the application of Articles 31 and 32 VCLT.

The author, thus, maintains that the analysis carried out and the conclusions drawn in section 3 of Chapter 4 of Part II, which concerns the rules of interpretation applicable to multilingual treaties derived from Article 33 VCLT, should be considered to be generally relevant also for the purpose of the construction of multilingual tax treaties by national courts and tribunals.

3. The significance of the OECD Model for the purpose of interpreting multilingual tax treaties

3.1. Research question addressed in this section

The present section is aimed at tackling the following research question, here briefly illustrated by means of an example.

a) *What is the relevance of the OECD Model official versions for the purpose of interpreting multilingual tax treaties (either authenticated also in English and/or French, or authenticated in neither of these languages) and monolingual tax treaties authenticated neither in English, nor in French?*

When the interpreter is faced with a multilingual tax treaty authenticated also in the English and/or French languages (together with other languages, e.g. Italian), may he rely exclusively or predominantly on the English and/or French authentic texts for the purpose of construing the relevant treaty article? In particular, may he support such a choice by arguing that, since the English and/or French authentic texts reproduce without significant deviations the official versions of the OECD Model, it is reasonable to infer

that the agreement of the parties was to import into the treaty the content of the Model and, therefore, that the other authentic texts should be construed in harmony with the meaning derived from the interpretation of the English and/or French texts?

On the other hand, when the interpreter is faced with a multilingual or monolingual treaty authenticated neither in English, nor in French, may or should he take into account the OECD Model English and/or French official versions for the purpose of determining the meaning of the authentic treaty text(s) and rely thereon in order to support his construction? In case such a question is answered in the affirmative, should the OECD Model official versions be used only to confirm the meaning determined on the basis of the authentic treaty text(s) or to determine the meaning where the construction based on the authentic text(s) left the meaning ambiguous, obscure, absurd or unreasonable, or, on the contrary, should the meaning determined on the basis of the OECD Model official versions be adopted also where conflicting with a reasonable, clear and unambiguous meaning based on the authentic treaty text(s)?

3.2. Introduction

"Frankly, […] my impression is that the words are not beacons of clarity. Maybe this is the risk of dozens of negotiators of several languages negotiating the OECD Model, and then two countries trying to adopt that model to their circumstances – we end up with a camel rather than a horse"[1444]

Tax treaties currently in force worldwide are, to a very large extent, based on the OECD Model. This triggers several consequences of interest for the purpose of the present study, which are analysed separately in the following sections.

Here it is merely noted that the fact that most of the tax treaties currently in force are based on the OECD Model constitutes the main reason for the abundant recourse to the OECD Commentary in order to construe such treaties. The relevance of the OECD Commentary for the purpose of interpreting (multilingual) tax treaties is dealt with in section 4 of this chapter.

3.3. The OECD Model as a substitute for the treaty "drafted" text

The process of negotiating tax treaties generally focuses on the desired departures from the OECD Model. This implies that, as a matter of fact, there is no real negotiation carried out between the contracting States with regard to the content of those treaty provisions reproducing the corresponding provisions of the Model.

Thus, with regard to those provisions, it does not make much sense to refer to the drafted

[1444] Miller J. in Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R*, 10 *ITLR*, 827 *et seq.*, at 855.

text as such in order to construe the treaty.[1445] The reference, in these cases, should be made to the text of the OECD Model,[1446] as supplemented by the OECD Commentary

[1445] The limited influence that the drafted text as such (either in English or French) has on the other authentic texts of the relevant tax treaty indirectly emerges from the analysis of the wording of the capital gains article of the Italian tax treaties. In many of the treaties that are authenticated in French (but not in English), the Italian authentic text refers to "beni mobili facenti parte dell'attivo di una stabile organizzazione" (for instance, the Italian tax treaties concluded with Algeria, Argentina, Bulgaria, Hungary, Mozambique and Venezuela), which appears to be a translation of the OECD Model French provision "biens mobiliers qui font partie de l'actif d'un établissement stable". Similarly, in many of the tax treaties authenticated in English (but not in French), the Italian authentic text refers to "beni mobili facenti parte della proprietà aziendale di una stabile organizzazione" or to "beni mobili appartenenti ad una stabile organizzazione" (for instance, the Italian tax treaties concluded with Bangladesh, China, India, Thailand, the United Kingdom and the United States), which appears to be a translation of the OECD Model English provision "business property of a permanent establishment". This might be taken as evidence of the fact that the drafted text significantly influences the Italian authentic text even with regard to OECD Model-type provisions (see in this sense, A. Parolini, "Italy", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 246-247). There are, however, (i) a significant number of Italian tax treaties authenticated in French (and not in English), whose Italian authentic text of the capital gains article reads "beni mobili facenti parte della proprietà aziendale di una stabile organizzazione" or "beni mobili appartenenti ad una stabile organizzazione" (for instance, the Italian tax treaties concluded with the Netherlands, Portugal, Spain, Sweden and Tunisia) and (ii) a significant number of Italian tax treaties authenticated in English (and not in French), where the Italian authentic text of that article refers to "beni mobili facenti parte dell'attivo di una stabile organizzazione" (for instance, the Italian tax treaties concluded with Estonia, Slovenia and Tanzania). The presence of such a considerable number of "exceptions" weakens the inference that the drafted text has a direct bearing on the Italian authentic text of Italian tax treaties and reinforces the conclusion that both OECD Model official versions (English and French) should be taken into account as relevant elements of the overall context for the purpose of interpreting tax treaty provisions based thereon.

[1446] In both its English and French official versions.

Interestingly, Lang highlights that the OECD Model (and its Commentary) itself was originally negotiated and drafted by the representatives of the OEEC, and then OECD, member States in French and English and that while certain working parties, especially in the fifties, when most of the drafting work for the 1963 OECD Draft was done, were working mainly in French, others were working predominantly in English. In this regard, he raises the question of whether this fact should lead the interpreter to put more emphasis on either the English or the French official versions of the OECD Model in order to construe certain of its provisions, depending upon the working language predominantly used by the working party which originally drafted the specific provision at stake. Quite convincingly, he concludes that this should not be the case, since "more weight could only be put to a specific language version if there is a clear indication that this language was the predominant working language during drafting", while "[i]f other versions were carefully drawn by the negotiators having reference to all the texts, they were not mere translations" and therefore they should be relied upon as well. According to the Lang, "[f]or the provisions of the OECD model which were drafted in the 1950s, it is often not clear whether it is justifiable to put more emphasis on a specific language version. Almost all minutes and preliminary reports were available in both languages. Thus, there is no clear indication that the discussions focused only on one specific language version of the draft." (see M. Lang, "The Interpretation of Tax Treaties and Authentic Languages", in G. Maisto, A. Nikolakakis and J. M. Ulmer (eds.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq*., at 23-24; see also M. Lang, "Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen", 20 *Internationales Steuerrecht* (2011), 403 *et seq*.).

This, however, is not the only reason why the practice of putting more emphasis on either the English or the French official versions of the OECD Model, for the purposes of interpreting tax treaties, should be generally rejected. One should never forget that the purpose of any tax treaty interpreter, at the international level, is to determine the "utterance meaning" of the tax treaty provisions, i.e. to determine which could have been the originally meaning agreed upon by the parties. In that respect, the *travaux préparatoires* of the OECD Model have not been publicly available, not even to tax treaty negotiators and State officials, for quite a long time

thereto,[1447] especially in order to remove *prima facie* divergences of meaning among the tax authentic treaty texts.

Nevertheless, the arguments favoring the attribution of a special weight, for interpretative purposes, to the text of the OECD Model coincide with those already put forward by the author with regard to the relevance of the drafted text for construing treaties, the most important being the reasonable chance that the text of the OECD Model may convey more precisely the common intention of the parties than the (other) authentic texts of the tax treaty, since the OECD Model text was most probably before the negotiators where they agreed to not substantially deviate from it.

In the same vein, Lang points out that "[i]f English and French, or at least one of

---

and, thus, they could not have been before the eyes of the contracting States' representatives when negotiating and concluding tax treaties in such a period. It is, therefore, compelling to infer from the previous proposition that, independently of the actual behavior of the OEEC and OECD working parties in the original discussion on and drafting of the OECD Model provisions, such behavior should be regarded as irrelevant for the purpose of construing tax treaties based on such a Model and, as a consequence thereof, that the English and French official versions of the Model should be equally relied upon for the purpose of interpreting those tax treaties. See also J. F. Avery Jones and D. A. Ward, "Agents as permanent establishments under the OECD Model Tax Convention", 33 *European Taxation* (1993), 154 *et seq.*, at 155 *et seq.* and 160 *et seq.,* where the authors note that Article 5(5) OECD Model appears to have been originally drafted in French and infer from this that the expression "an authority to conclude contracts in the name of the enterprise" ("des pouvoirs […] de conclure des contrats au nom de l'entreprise" in the French official version) was originally intended to have the meaning it had under the French code and, more generally, in civil law jurisdictions, i.e. as a synonym of the expression "an authority to conclude contracts legally binding the enterprise". The genesis of the above OECD Model expression and the inference derived from it by the authors has been also taken into account by the Rapporteur Public of the French Conseil d'Etat in order to support her conclusion on the meaning of the identical expression employed in the 1995 France-United Kingdom tax treaty (See Conseil d'Etat (France), 31 March 2010, *Société Zimmer Ltd v. Ministre de l'Economie, des Finances et de l'Industrie*, 12 *ITLR*, 739 *et seq.*, conclusions of the Rapporteur Public at 780).

[1447] The need for the interpreter to rely on the OECD English and French official versions is even more critical in connection with the use of the OECD Commentary. The following case is apt to illustrate this issue.
In 1996, the Austrian Supreme Administrative Court (see Verwaltungsgerichtshof (Austria), 31 July 1996, *case no. 92/13/0172*, available on the IBFD Tax Treaty Case Law Database), interpreting Article 16 of the 1974 Austria-Switzerland tax treaty, which makes reference to "Aufsichtsrats- oder Verwaltungsratsvergütungen" in its sole German authentic text, concluded that payments made to a member of a Swiss "Verwaltungsrat" (i.e. a company organ similar to an Anglo-Saxon "board of directors") were outside the scope of Article 16 of that tax treaty. In supporting its conclusion, the Court noted that the relevant part of Article 16 of the 1974 Austria-Switzerland tax treaty substantially reproduced the (French) text of Article 16 of the 1963 OECD Draft. The Court inferred from this that the OECD Commentary to that model was relevant in order to interpret Article 16 of the tax treaty. It then referred to the German translation, prepared by the German Ministry of Finance in collaboration with the Austrian and Swiss Ministries of Finance, of the Commentary to Article 16 of the 1963 OECD Draft, which mentioned solely "Aufsichtsräte" (i.e. a company organ similar to the French "conseil de surveillance") and not "Verwaltungsräte" (the following German versions of the Commentary, in contrast, mentioned both). According to the Court, the exclusive reference to "Aufsichtsräte" in the Commentary was evidence of the fact that company organs entrusted with both management and supervisory functions were outside the scope of Article 16 of the OECD Draft, which was limited to organs carrying on exclusively supervisory functions.
It is doubtful, however, whether the Court would have argued for the same interpretation, had it referred to the French official version of the Commentary to the OECD 1963 Draft, which made reference to both the "conseil d'administration" and the "conseil de surveillance" (see, with regard to the position of Austrian scholars on the subject matter, V. E. Metzler, "Austria", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 137 *et seq.*, at 141).

these languages, are among the authentic languages of a bilateral treaty, and if it is evident that a certain treaty provision is a mere translation of a provision of the OECD model, it is therefore well justified to focus more on the English or French version of the OECD model that was copied and to put less emphasis on other language versions, even if they are authentic as well."[1448]

Moreover, the relevance of the English and French official versions of the OECD Model for the purpose of interpreting (multilingual) tax treaty provisions based thereon remain unaffected by the fact that the specific tax treaty at stake is authenticated neither in the English, nor in the French language.

Nothing in the VCLT precludes the interpreter from taking into account such versions for the purpose of construing a tax treaty. It has been already mentioned[1449] that, with regard to treaties in general, the VCLT system allows the recourse to non-authentic treaty versions as supplementary means of interpretation, the interpretative weight to be attributed thereto varying in accordance with the available evidence that such language versions may contribute to establishing the common intention of the parties.[1450]

In connection with tax treaties based on the OECD Model, the English and French official versions of the Model are clearly worth being attributed a significant weight in the quest for such a common intention and for the purpose of supporting the treaty construction put forward, since it is only reasonable to assume that the agreement of the parties has been reached, most probably even without lengthy discussions, on the basis of such versions, as supplemented by the Commentary thereon.[1451] In this case, it would appear restrictive to label the OECD Model official versions as "supplementary means of interpretation" of the tax treaty to be construed since, where the tax treaty is based on and indirectly reproduces the OECD Model in its English and/or French versions, recourse to such versions as interpretative tools is the fairest and most sensible way to ascertain the common intention of the parties, i.e. to determine in good faith the ordinary contextual meaning of the terms employed in the authentic texts of the tax

---

[1448] M. Lang, "The Interpretation of Tax Treaties and Authentic Languages", in G. Maisto, A. Nikolakakis and J. M. Ulmer (*eds*.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq*, at 22-23 (see also M. Lang, "Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen", 20 *Internationales Steuerrecht* (2011), 403 *et seq*.). See, in slightly different terms, G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxv. According to Vogel, the term "context" in Article 3(2) should also cover the OECD Model and its Commentary (see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 215, m.no. 72).
See, however, apparently *contra,* Cadosch, who maintains that "[i]f there is no deviating result between the official language of each contracting State, then the English version should not question this result" (R. Cadosch, "Switzerland", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 303 *et seq.*, at 313 and 314).

[1449] See section 3.2.4 of Chapter 4.

[1450] With regard to the relevance, for the purpose of interpreting a tax treaty, of the initialled version drafted in the *lingua franca* used in the course of negotiations, notwithstanding the fact that it was not then authenticated as a treaty text, see P. Sundgren, "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: http://www.skatter.se/index.php?q=node/1079; accessed on 23 July 2011.

[1451] See also the arguments developed in the following part of this section.

treaty, or their intended special meaning.[1452]

This perspective is shared by Lang, who, on the one hand, admits that the English and the French official versions of the OECD Model could qualify as "supplementary means of interpretation" under Article 32 VCLT and, on the other hand, proves to be unsatisfied with the limited role that they would play as such, since "[m]aterial falling under article 32 of the VCLT is accorded only a secondary role in the interpretation of treaties." According to that author, "[i]f it can be established by reference to the text of the treaty that a double taxation convention is, in principle, based on the OECD model, an interpretation in good faith requires that the original language versions of the model be consulted in the interpretation process. […] If the contracting states merely translated the wording of the OECD model in drafting a certain provision, it is only reasonable to assume that they intended such a provision to have the meaning it has as expressed in the English and French versions of the OECD model. The general rule of interpretation in article 31(1) of the VCLT thus establishes the relevance of the original language versions of the OECD model in the interpretation process. […] For OECD Member countries, article 5(b) of the concention on the OECD might come into play here. In the case of doubt and in the absence of other indications to the contrary, it may be assumed that OECD member countries wanted to comply with the OECD recommendation and thus intended only to translate the OECD model into other languages. However, if they have made a reservation to a certain provision of the model, this might indicate the contrary."[1453]

Similarly, in the *Smallwood* case,[1454] the Special Commissioners made reference

---

[1452] See Vogel in K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 45, m.no. 81: "If the text of the OECD MC has been adopted unchanged, it is to be assumed that the contracting States intended to conform to the Council's recommendation. It follows that when interpreting such treaties, whether or not official versions are drafted in one or more languages, the model in both its original language versions (English and French) should be considered in addition to the individual treaty text(s), as should the MC Commentary."

[1453] See M. Lang, "The Interpretation of Tax Treaties and Authentic Languages", in G. Maisto, A. Nikolakakis and J. M. Ulmer (*eds*.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq*., at 26-29 (see also M. Lang, "Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen", 20 *Internationales Steuerrecht* (2011), 403 *et seq*.).
Lang, correctly from this author's perspective, applies the same principle in connection to tax treaty provisions that are derived from the United Nations Model: "More difficulties could arise if certain treaty provisions, or the treaty as a whole, are taken from the UN model. In such a case, similar deliberations have to be made as in the context of the OECD model. However, the interpretation of provisions taken from the UN model could require examining even more language versions. Additional difficulties might be due to the fact that the UN model is to a large extent based on the OECD model. If a bilateral treaty primarily follows the UN model and the corresponding provision of that model has itself been copied from the OECD model, more attention will be paid to the English and French versions of the OECD model. The situation is comparable to the interpretation of a treaty that was drafted in certain languages, with additional languages being authenticated over time. It is obvious that more emphasis should be placed on the languages that were the working languages when that provision of the treaty was drafted. If this was done in the OECD context, those working languages were English and French" (see M. Lang, "The Interpretation of Tax Treaties and Authentic Languages", in G. Maisto, A. Nikolakakis and J. M. Ulmer (*eds*.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq*., at 29-30).

[1454] Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 *ITLR*, 574 *et seq*.

to the French official version of Article 4(3) OECD Model in order to construe the sole English authentic text of Article 4(3) of the 1981 Mauritius-United Kingdom tax treaty, which exactly reproduced the English official version of Article 4(3) of the 1963 OECD Draft. The Special Commissioners, in particular, held that the term "effective", used in the treaty tie-breaker rule to indirectly qualify the term "place of management", should have been understood in the sense of the French "effective" (siège de direction effective), as used in Article 4(3) OECD Model, which connoted real management.[1455]

It should be finally noted that, although it is true that the OECD Model itself present some instances of *prima facie* discrepancies between its official versions, such *prima facie* discrepancies are quite limited in number and may be removed by the analogical application of the interpretative rules enshrined in Article 33 VCLT.

A straightforward (but amusing) example[1456] is represented by the use of the term "artiste" in the English official version of Article 17 OECD Model and of (seemingly) the same term in the French official version thereof. Indeed, as some scholars have pointed out,[1457] the term "artiste"[1458] in the English language is generally used to denote entertainers of a more frivolous, less serious nature than those denoted by the term "artist",[1459] such as entertainers acting in cabarets. On the contrary, the French term "artiste" is commonly used to denote both types of entertainers, i.e. both frivolous and serious ones.[1460] As the above-mentioned scholars put it, "there is some question about whether Article 17 does not apply to performers of serious art as opposed to more frivolous entertainers."[1461] However, on the one hand, it should be noted that the English term "artiste" is an ambiguous one, since it may also be used with a broad meaning in order to denote all kinds of entertainers (although it is perhaps employed less commonly as such),[1462] and, on the other hand, there is nothing in the OECD Commentary that

[1455] *Ibidem*, at 610.

[1456] A second entertaining (and fake) example is reported in J. Sasseville, "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 132, where the author notes that, while the English official version of Article 6 OECD makes reference to "livestock and equipment", the French official version thereof uses the corresponding expression "cheptel mort ou vif", which might "suggest that while a live cow is immovable property in both versions, a dead cow is immovable property only in French". As the Sasseville correctly points out, however, "[t]he mistake underlying that suggestion […] is that "*cheptel mort*" is really a translation of the word "equipment"."

A third, thornier, instance is represented by the possible *prima facie* discrepancy between the terms "corporate rights" and "parts sociales" employed in the English and French official versions of Article 10(3) OECD Model, with regard thereto see J. F. Avery Jones et al., "The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?", 1 *World Tax Journal* (2009), 5 *et seq.*, at 19 *et seq*.

[1457] See K. Vogel et al., *United States Income Tax Treaties* (The Hague: Kluwer Law and Taxation, 1989 – loose-leaf), commentary to Article 17.

[1458] The term "artiste" is used both in the English official version of Article 17 OECD Model and, several times, in the Commentary thereto.

[1459] The term "artist" is only used twice in the English official version of the Commentary to Article 17 of the 2010 OECD Model (paragraph 18 thereof).

[1460] See Le Grand Robert de la Langue Française. Tome I (Paris: Le Robert, 1990), p. 580.

[1461] See K. Vogel et al., *United States Income Tax Treaties* (The Hague: Kluwer Law and Taxation, 1989 – loose-leaf), commentary to Article 17.

[1462] See Dictionary.com Unabridged. Random House, Inc. (accessed 22 Apr. 2011).

might support the conclusion that only more frivolous entertainers fall within the scope of Article 17 OECD Model. Thus, the latter conclusion should be discharged by the interpreter in light of the overall context.

3.4. The influence of the OECD Model on the drafting of tax treaties authentic texts

The authentic texts of tax treaties drafted in the official languages of the contracting States are often influenced by either of the two OECD Model official versions,[1463] especially in the choice of the terms employed.[1464]

[1463] It is interesting to note that, according to Sasseville (Head of the Tax Treaty Unit of the OECD Centre for Tax Policy and Administration), the "practical reality is that, nowadays, the OECD work on tax treaties is primarily carried on in English and the French version is usually a translation" (see J. Sasseville, "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 130.
On the pros and cons of having the OECD Model drafted in two official languages, rather in just one language, see the analysis of Le Gall (J. P. Le Gall, "OECD MC: One or two official languages?", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 327 *et seq.*, at 328-330), who summarizes them as follows:
- Pros: (i) two official languages secure a double entry into the legal systems that, traditionally at least, divide the world, i.e. common law and civil law systems; each official version is thus supposed to take into account the principles, concepts and terms used in the relevant country; (ii) each official version is meant to express and reflect the same concept: therefore, comparing the two versions allows a better understanding of the meaning of the Model provisions and makes it possible to elicit discrepancies between two seeming different wordings that might refer, in part at least, to different situations; (iii) the two versions can be used directly in bilateral treaties where either the two contracting States are countries using one of the two languages or are countries using each of the two languages, this advantage resulting in reducing costs and lessening the risks of mistakes or misunderstandings (it must be remarked, however, that Le Gall does not seem entirely convinced that such pros really represent significant advantages, in particular pro (ii) – see *ibidem*, at 329).
- Cons: (i) having just one official version would save time, since only one text would have to be consulted; (ii) having just one official version would eliminate the difficulties stemming from the comparison of the two official versions and the possible discrepancies existing between them, thus creating greater legal security; (iii) giving up one of the two official versions would impose a greater demand for accuracy on the part of the drafters of the model, since having two versions is sometime an invitation to laziness; (iv) having only one official version of the OECD Model could lead to the elaboration of common concepts in the international tax language.
While the author generally agrees that the reduction of the official languages of the OECD Model to just one would trigger more advantages than disadvantages, both quantity and quality-wise, he is skeptical with regard to the possibility of such a choice to boost the elaboration of common concepts in the international tax language, since, as the present study hopefully demonstrates, it is the very structure of the model, as well as the background context of its application, i.e. (a) the close interaction between tax treaties and the underlying domestic tax law, (b) the fact that tax treaties are made to be applied by tax lawyers, tax authorities and national (tax) courts and tribunals and (c) the absence of a international judiciary entrusted with the task of applying, or even just interpreting, tax treaties uniformly, that makes it difficult (if not impossible) as a matter of fact to forsake the *renvoi* to domestic law concepts and legal categories.

[1464] See, accordingly, G. Toifl, "Die Besteuerung von Geschäftsführern, Vorständen und Aufsichtsräten international tätiger Unternehmen", in W. Gassner and M. Lang (eds.), *Besteuerung und Bilanzierung international tätiger Unternehmen - 30 Jahre Steuerrecht an der Wirtschaftsuniversität Wien* (Vienna: Orac, 1998), 379 *et seq.*, at 389; G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxv. According to Parolini, independently of whether the drafted text of Italian tax treaties is in English or French, the Italian authentic text thereof appears to be

In particular, the terms used in tax treaties are often those that most closely resemble, from a morphological and phonetic perspective, the terms employed in the official version of the OECD Model that is taken as a benchmark by the treaty negotiators, even where the former terms are not legal jargon terms under the domestic law of the contracting States, but just day-to-day proxy of these, or where they are not the legal jargon terms most commonly used in the statutes concerning the taxes covered by the treaties.[1465]

Sometimes it even happens that the terms employed in the treaty have a day-to-day or legal jargon meaning (under the law of the relevant contracting State) that appears to diverge from the meaning that should be reasonably attached thereto in the context of the tax treaty provision in which they are used and in light of the OECD Model.

Moreover, in a similar fashion States often develop their own translations of the OECD Model, or their own models based thereon,[1466] and then tend to reproduce the texts of such translations (or national models) as their own language authentic texts of the tax treaties concluded with other States.[1467]

---

generally influenced by the French official version of the OECD Model, probably because of the similarities existing between the languages, as well as between the legal systems of France and Italy (see A. Parolini, "Italy", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 248-251 and the examples reported there).
At the same time, however, certain terms and expressions used in the OECD Model are derived from legal jargon terms used under the law of certain OECD member States. In this respect, it has been pointed out that the current OECD Model has been developed on the basis of previous tax treaty models, in particular those drafted under the auspices of the League of Nations, which in turn had been developed taking as benchmark the tax treaties in force between continental European States at the beginning of the twentieth century and, therefore, borrowing terms from their respective domestic laws. This would explain why certain terms currently used in the English official version of the OECD Model are (or were) alien to the legal culture of common law countries, those terms having being literally "translated" into English from other languages (see J. F. Avery Jones et al., "The Origins of Concepts and Expressions used in the OECD Model and their Adoption by States", 60 *Bulletin for international taxation* (2006), 220 *et seq.*, at 220).

[1465] For instance, with regard to Italian tax treaties, the title of the article corresponding to Article 13 OECD Model in the Italian authentic text is generally "Utili di capitale", which appears to be a "literal translation" of the title of the French official version of Article 13 OECD Model "Gains en capital". As correctly pointed out by Parolini (see A. Parolini, "Italy", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 252) the term "Utili di capitale" is not a legal jargon term under Italian law (either in tax law, or in private law), the corresponding legal jargon term used for income tax law purposes being "plusvalenze".

[1466] Both (the translation and the model) being drafted in the official language(s) of the drafting State.

[1467] See, for instance, with regard to Germany and Austria, V. E. Metzler, "Austria", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 137 *et seq.*, at 137 and A. Rust, "Germany", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 221-222; with regard to Switzerland, R. Cadosch, "Switzerland", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 303 *et seq.*, at 304; with regard to Belgium, R. De Boek, "Belgium", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 168; with regard to the Netherlands, S. Douma, "Netherlands", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 267 *et seq.*, at 269 and 277.

A similar phenomenon occurs where the authentic treaty text (or texts), drafted in a contracting State's official language(s), literally reproduces the text of the English or French official version of the OECD Model, in such cases the terms employed in the treaty being different from the legal jargon terms used in the domestic law of that contracting State. This is mainly due to three reasons:

(i) the terms used in the relevant OECD Model official version are "literal" translations of terms used in the other official language version of the OECD Model, or translations of terms employed in older tax treaties used as source of inspiration by the Model drafters;[1468]

(ii) the terms used in the relevant OECD Model official version derive from the domestic law of a State other than the contracting State applying the tax treaty;[1469] or

(iii) the terms used in the relevant OECD Model official version were intended to have a scope different from that of the terms used under the domestic law of the States whose official language is the same language employed in the Model.[1470]

The following examples, taken from the Italian and Belgian tax treaty practice, are illuminating in that respect.

The legal jargon term used in the ITC[1471] to denote employment income[1472] is "redditi di lavoro dipendente";[1473] however, in Article 15 (or its equivalent) of the tax treaties concluded by Italy the expression "lavoro subordinato" is used instead of "lavoro dipendente".

Similarly, the legal jargon term used in the ITC to denote an alienation is "cessione";[1474] however, in Article 13 (or equivalent) of the tax treaties concluded by Italy the term "alienazione" is used instead of "cessione".

[1468] See footnote 1464.

[1469] This is often the case, for instance, with reference to the United Kingdom and the United States.

[1470] See, with regard to the employment of the term "alienation" in the English official version of Article 13 OECD Model, J. F. Avery Jones et al., "The Origins of Concepts and Expressions used in the OECD Model and their Adoption by States", 60 *Bulletin for international taxation* (2006), 220 *et seq.*, at 249-250 and references therein.

[1471] Presidential Decree no. 917 of 22 December 1986.

[1472] It is interesting to note that, in the sentence preceding the footnote reference, the term "employment income" is used just as a different sign to denote the same denotata of "the legal jargon term used in the Italian income tax code", which in turn is used as a perfect synonym for the following "redditi di lavoro dipendente" (as in a tautology). There is no attempt to determine what the concept associated with the term "employment income" is where the latter is used as English legal jargon term (if it is used at all); that would be useless for the purpose of the reasoning expressed by the sentence and, furthermore, by far too complicated. A similar mental process instinctively occurs where an interpreter who has knowledge of the legal system, and related legal jargon, of a certain State (e.g. France) reads and attributes a meaning to a term from a different legal jargon (e.g. Japanese); that Japanese legal jargon term is treated as if it were an exact synonym for the French legal jargon term that dictionaries or practice shows to correspond to the former term (just a different sign that denotes the same denotata of the former term).

[1473] See arts. 49 *et seq*. ITC.

[1474] As of September 2010, the term "cessione" appears more than fifty times in the ITC; in contrast, the term "alienazione" as such is not used at all (the term "alienate", which is derived from it, is employed just once).

The French official version of the OECD Model[1475] generally employed the term "activité industrielle au commerciale" as an equivalent of the term "business" used in the English official version thereof, most probably because it reflected the terminology employed in the French general tax code.[1476] Interestingly, Italian tax treaties, which are generally based on the French official version of the 1963 OECD Draft Model,[1477] use the term "attività industriale e commerciale" in their Italian authentic texts, although this term is used neither in the Italian civil code, nor in the ITC, which both employ the term "attività commerciale".[1478]

The French authentic texts of Belgian tax treaties generally employ the term "gains en capital" in Article 13 (or equivalent) while the legal jargon term under Belgian domestic law is "plus-values". Similarly, while in the French authentic text of Article 12 (or equivalent) of Belgian tax treaties the term "redevances" is commonly used, the corresponding legal jargon expressions used in the Belgian Income Tax Code are "revenus de la location, de l'affermage, de l'usage et de la concession de biens" or "revenues de biens".[1479]

The above analysis constitutes a strong argument in support of the appropriateness of a loose approach in the application of the *renvoi* provided for in Article 3(2) of OECD Model-based tax treaties.

Hence, the terms actually used in the authentic treaty text drafted in the official language of a contracting State should be given the meaning that not only such terms, but also their legal jargon synonyms and proxies in the official language of that State have for the purpose of that State's domestic law, unless the context otherwise requires.

Similarly, where the interpreter has to select the legal jargon term that, under the law of the contracting State applying the treaty (e.g. the Netherlands), corresponds to the term employed in the authentic treaty text to be interpreted, which is a drafted in a language (e.g. English) other than the language in which the domestic law of that State is drafted (i.e. Dutch), he should take into account not only the terms that, according to bilingual dictionaries, correspond to the relevant treaty term, but also their legal jargon synonyms and proxies under the law of the State applying the treaty (i.e. Netherlands law), unless the context otherwise requires.

This point, as it is strictly connected with the analysis of the *renvoi* to domestic

[1475] Before the amendments introduced by the OECD in 2000.

[1476] See J. Sasseville, "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 130.

[1477] See G. Maisto, "La traduzione dei testi giuridici redatti in più lingue e l'interpretazione delle convenzioni per evitare le doppie imposizioni", *Rivista di Diritto Tributario. Parte Quarta* (2004), 131 *et seq.*, at 132, where the author submits that the French official version of the OECD Model seems to have been used as a model for the drafting of the Italian authentic texts of the major part of the tax treaties concluded by Italy.

[1478] The term "attività commerciale" is given different meanings for the purpose of the Italian Civil Code and the ITC, respectively; see F. Avella, "Italy", in G. Maisto (ed.), *The meaning of "enterprise", "business" and "business profits" under Tax Treaty and EU Tax Law* (Amsterdam: IBFD Publications, 2011), 341 *et seq.*, at 351 *et seq.* and 364 *et seq.*

[1479] See R. De Boek, "Belgium", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 169.

law encompassed in Article 3(2) OECD Model, will be further dealt with in section 5.3.2.4 of this chapter.

3.5. A plea for the consistent interpretation of tax treaties based on the OECD Model

On the basis of the preceding analysis, a sound argument may be put forward in favor of the consistent interpretation of corresponding provisions of different tax treaties,[1480] concluded by different contracting States on the basis of the OECD Model and drafted in different authentic languages.

Clearly, such provisions are made of different signs and are part of different documents: as such, they may theoretically be construed independently from each other and be attributed diverging meanings.

However, a relevant number of these provisions are part of the authentic texts of tax treaties that have been authenticated in the French and/or English languages as well. As previously discussed, under Article 33(3) VCLT all authentic texts of a treaty (must) have the same meaning: thus, with regard to each distinct tax treaty, all corresponding provisions in the different authentic texts, i.e. those drafted in the official languages of the contracting States and those drafted in the English and/or French languages (if different and existing), must be given the same utterance meaning by the interpreter.

Moreover, from the fact that each State generally drafts and concludes its tax treaties along the same pattern, by reproducing to a great extent:

(a) the text of the OECD Model, for the purpose of drafting the French and/or English authentic texts of those treaties, and

(b) its own standard translation of the OECD Model, for the purpose of drafting the authentic text of those treaties in its own language (if not English or French),

one may draw the inference that:

(i) all provisions of different tax treaties concluded by a certain State, which present the same wording in the authentic texts drafted in the official language of that State and/or in English and French are intended to be interpreted consistently by that very same State;

(ii) due to the rule of law established by Article 33(3) VCLT,[1481] the same holds true for the corresponding provisions encompassed in the other languages authentic texts of those tax treaties;

(iii) considering the remarkably high number of tax treaties in force and the fact that they are patterned for the most part along the lines of the English or French

[1480] Except the effects stemming from the *renvoi* to the contracting States' domestic law provided for in Article 3(2).

[1481] All authentic texts of a (tax) treaty must be attributed the same utterance meaning under Article 33(3) VCLT.

> official versions of the OECD Model, which is purported to promote the application by all countries of the same or similar tax treaty rules to comparable situations,[1482] all tax treaty provisions that directly[1483] or indirectly[1484] reproduce the provisions of the OECD Model should be interpreted consistently.[1485]

This explains the rather considerable number of references made by national courts and tribunals to decisions delivered by foreign judiciaries, including courts and tribunals of States not being party to the specific treaty to be construed, interpreting similar worded provisions of other tax treaties.[1486] As Baker put it: "Cases on the application of standardized provisions of double taxation conventions […] have immense relevance in many countries. (This is one of the reasons for this set of law reports)".[1487] They indubitably represent an item of evidence of the *ordinary meaning to be given* to OECD Model standard terms and expressions used in OECD Model-based tax treaties.

For instance, Sir Christopher Staughton, in his dissenting opinion in the *Memec* case,[1488] referred to a decision delivered by the German Bundesfinanzhof with regard to Article 28 of the 1971 Germany-Switzerland tax treaty, allegedly similar to the one Sir

---

[1482] See paragraphs 2 and 3 of the Introduction to the OECD Model.

[1483] This is the case with regard to any provision included in the French or English authentic text of a tax treaty and which exactly (or very similarly) reproduces the corresponding provision of the English or French official versions of the OECD Model.

[1484] This is the case with regard to any provision included in the authentic text of a tax treaty drafted in the official language of a contracting State, in the case either (i) such a tax treaty also includes a French or English authentic text and that provision, as worded in the French or English authentic text, exactly (or very similarly) reproduces the corresponding provision of the English or French official versions of the OECD Model, or (ii) the former provision exactly (or very similarly) reproduces a provision included in another tax treaty concluded by the same State, which in turn includes a French or English authentic text and that provision, as worded in the French or English authentic text, exactly (or very similarly) reproduces the corresponding provision of the English or French official versions of the OECD Model. The same holds true with regard to the provisions included in the authentic texts drafted in a different language (i.e. not in French, English, or the official language of that State), whenever the treaty of which it is part also includes an authentic text in French, English or the official language of that State and the corresponding provision included in that text reproduces directly or indirectly a provision of the OECD Model.

[1485] This conclusion is strengthened, with regard to OECD member States, by the Recommendation adopted by of the OECD Council on 23 October 1997 (doc C(97)195/final), which provides that (i) member States should "conform to the Model Tax Convention, as interpreted by the Commentaries thereon", when concluding new or revising existing tax treaties and (ii) their tax administrations should "follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles", thus recommending an uniform interpretation and application of tax treaty provisions substantially reproducing the OECD Model provisions.

[1486] See the statement by Kogels (H. Kogels, "Tools for interpretation issues", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 326 *et seq.*, at 326), according to whom "[i]n order to reach a common interpretation, knowledge of the interpretation by judges in the contracting States is essential". See also M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 5.04, 24.05, 24.06, 25, 28 and 29; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 39-42; D. A. Ward, "Use of foreign court decisions in interpreting tax treaties", in G. Maisto (ed.), *Courts and Tax Treaty Law* (Amsterdam: IBFD Publications, 2007), 161 *et seq.*, in particular at 175-185.

[1487] P. Baker, 1 *ITLR,* at 728-729.

[1488] Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*

Christopher Staughton had to construe.[1489] In that respect, he maintained that this decision of the Bundesfinanzhof was to be regarded as an indication of the willingness of Germany to similarly construe the provision at stake before him, i.e. Article XVIII(1)(b) of the 1964 Germany-United Kingdom tax treaty. Thus, "in the interest of uniformity", Sir Christopher Staughton found that the United Kingdom should do the same.[1490]

[1489] The reference made by Sir Christopher Staughton, however, appears puzzling, since Article 28 of the 1971 Germany-Switzerland tax treaty seems similar to the provision he had to construe, i.e. Article XVIII(1)(b) of the 1964 Germany-United Kingdom tax treaty, neither in respect of its wording, nor in respect of its object and purpose (the preservation of the right to levy withholding taxes on certain items of income by the source State).

[1490] See Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 27-28. See also Federal Court of Appeal (Canada), 24 February 2000, *R v. Dudney*, 2 *ITLR*, 627 *et seq.*, at 636, where the court made reference to a decision of the Belgian Court of Appeal (Belgium not being party to the interpreted treaty); Conseil d'Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, conclusions of the Commissaire du Gouvernement at 113, where reference was made to a decision of the Court of Appeal of London (the United Kingdom not being party to the interpreted treaty); New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT*, 5 *ITLR*, 658 *et seq*., at 670-671, para. 44, where it was stated both that "[w]hen interpreting a [tax treaty] in international tax law, it has been held in a number of jurisdictions that recourse may be had to the Official Commentary to the OECD models" and that "courts have had regard to decisions in other jurisdictions in international comity in an attempt to achieve international uniformity", and paras. 48-50; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq.*, at 268-269, where the court referred to a decision of the Federal Court of Canada, at 270-272, where there court referred to two decisions of the Federal Court of Australia, at 272-273, where the court referred to a decision of the Tax Court of Canada, and at 274, where the court made reference to a decision of the High Court of England and Wales; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 9 and 19-20, paras. 11-13 and 30, where the tribunal made reference to decisions of Canadian, German and English courts in order to interpret the 1989 India–United States tax treaty; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq*., at 199, para. 23, where the court referred to a decision of the French Conseil d'Etat and a decision of the Finnish Supreme Administrative Court; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1070, para. 10, where the tribunal referred to a decision of the Federal Court of Canada for the purpose of interpreting the 1992 India-United Arab Emirates tax treaty; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 762-765, paras. 85-93, where the court took into account a decision of the England and Wales Court of Appeals for the purpose of interpreting the 1986 Canada-Netherlands tax treaty; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 *ITLR*, 811 *et seq*., at 838-839, para. 56, where the tribunal noted that, due to the "widespread uniformity of many of the provisions of bilateral tax treaties, most of which are directly or indirectly derived from the OECD Model and Commentaries, it is not uncommon that a court in country A may find it useful in interpreting a tax treaty between country A and country B to refer to and gain guidance from a decision of a court in, say, country C interpreting a treaty between county C and B or even C and D where the treaty provision is virtually the same as the treaty provision in issue"; *ibidem*, at 838-848, where the court made reference to judgments from the German Bundesfinanzhof, the United States Court of Appeal, the French Conseil d'Etat and the United Kingdom House of Lords for the purpose of construing Article 24(4) of the 1995 Germany-India tax treaty; District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq*., at 858; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 *ITLR*, 915 *et seq*., at 930, where the tribunal referred to the decision of a Belgian court for the purpose of interpreting the 1982 India-Mauritius tax treaty; see also First-Tier Tribunal (United Kingdom), 1 April 2010, *FCE Bank plc v. Revenue and Customs Commissioners*, 12 *ITLR*, 962 *et seq*., at 983-991, where the tribunal made reference to three decisions of the Supreme Courts of the Netherlands, Finland (Administrative Court) and Sweden (Administrative Court) in order to support its interpretation of Article 24(5) of the 1975 United Kingdom-

It goes without saying that such foreign court decisions may vary to a considerable extent both in the results achieved and in the arguments used in support thereof.[1491] However, their possible inconsistency does not represent a significant drawback in the practice of national judiciaries of referring to them, since those decisions are binding neither at the public international level, nor at the domestic level on those national judiciaries. As Lord Diplock maintained in the *Fothergill* case,[1492] "[a]s respects decision of foreign courts, the persuasive value of a particular court's decision must depend on its reputation and its status, the extent to which its decisions are binding on courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system."

Similarly, it is not unusual to find in national case law mention and rely on other States' tax authorities practice (even with regard to States that are not party to the treaty to be construed).[1493]

3.6. Textual comparison: subsequent versions of the OECD Model, deviations from

---

United States tax treaty and, in addition, explicitly noted that it regarded "as important that courts give consistent interpretations of treaty provisions contained in the OECD Model that are widely used in tax treaties".
See, for older case law, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), Chapter 29.

[1491] Lord Wilberforce of the House of Lords (United Kingdom) noted, in respect of the Convention on the Contract for the International Carriage of Goods by Road (concluded in Geneva on 19 May 1956), that such Convention "has been accepted by more than 20 states some of them close to English ways of thought. I cannot credit them all, or some average of them, with recognizably superior, or even different, methods of interpretation. We should of course try to harmonise interpretation but […] courts in six member countries have produced 12 different interpretations of particular provisions – so uniformity is not to be reached by that road. To base our interpretation of this Convention on some assumed, and unproved, interpretation which other courts are to be supposed likely to adopt is speculative as well as masochistic." (House of Lords (United Kingdom), 9 November 1977, *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd*, [1978] AC 141, at 154).

[1492] House of Lords (United Kingdom), 10 July 1980, *Fothergill v. Monarch Airlines Ltd*, [1981] AC 251, at 284.

[1493] See, for instance, Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162*, *Regeringsrättens årsbok* (1987), where the Court referred to the practice followed by the tax authorities of the other contracting State (United Kingdom) for the purpose of interpreting Article XII(3) of the 1960 Sweden-United Kingdom tax treaty; Authority for Advance Rulings (India), 28 April 1999, *Y's Application*, 2 *ITLR*, 66 *et seq*., at 78; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 36, paras. 83-84; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*, at 231 where it was mentioned that periods of less than six months appear not to have been found sufficient in any practice to trigger the existence of a permanent establishment (notably, the Court seems to have taken inspiration from paragraph 6 of the Commentary to Article 5 of the OECD Model in order to establish such a practice, although no reference was made to it); Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq*., at 81, para. 61; Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*, at 35-36, para. 43, where the Court referred to governments' and tax authorities' practice form Denmark, Canada and the United Kingdom.
See also M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 28.05.

the OECD Model and differences with other tax treaties concluded by the contracting States

The existence of a Model on which most of the tax treaties currently in force are based and the consequent broad uniformity of such treaties cause national courts and tribunals to pay particular attention to the discrepancies existing:

(i) between the subsequent versions of the OECD Model,

(ii) between the OECD Model and the tax treaty to be interpreted, as well as

(iii) between the tax treaty to be interpreted and the other tax treaties concluded by the contracting States of the former.

For instance, the fact that the tax treaty to be interpreted is designed along the lines of the OECD Model sometimes triggers the analysis of the changes introduced in the Model itself and the assessment of the possible reason thereof, for the purpose of interpreting a tax treaty provision that reproduces or resembles the corresponding OECD Model provision before, or after that change.[1494]

Likewise, deviations from the OECD Model provisions existing at the date of the treaty conclusion (or negotiation) are sometimes queried by national courts and tribunals in order to determine what the reasons for these might have been and how those reasons may affect the construction of the relevant tax treaty provisions.[1495]

[1494] See, for instance, Hoge Raad (Netherlands), 9 December 1998, case *32709*, 1 *ITLR*, 839 *et seq*., at 854, dealing with the significance of the move of the PE construction provision from paragraph 2 of Article 5 of the 1963 OECD Draft Model (which substantially reproduced the corresponding provision of the 1958 Report of the Fiscal Committee of the OEEC) to new paragraph 3 of Article 5 of the 1977 OECD Model for the purpose of interpreting Article 2.2(2)(a)(gg) of the 1959 Netherlands-Germany tax treaty; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*, at 813-814, paras. 42-44, dealing with the modification of the royalty definition in Article 12(2) of the 1992 OECD Model.

[1495] See Federal Court (Australia), 20 December 1988, *Thiel v. Commissioner of Taxation*, [1988] FCA 443, in particular at para. 38 of the separate opinion of Sheppard J.; High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports,* 338 *et seq*., para. 15 of the separate opinion of McHuge J.; Federal Court of Appeal (Canada), 8 November 1993, *Crown Forest v. Canada*, 94 DTC 6107, para. 17 of the opinion of Heald J.A.; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, paras. 55 *et seq*. per Iacobucci J.; Hoge Raad (Netherlands), 1 November 2000, case *35398*, 3 *ITLR*, 466 *et seq*., at 483-484, para. 3.5, where the absence of Article 24(6) of the OECD Model in the corresponding Article of the 1986 Canada-Netherlands tax treaty was interpreted as evidence of the intention of the Contracting States to exclude the application of the treaty non-discrimination provisions to taxes other than those referred to in Article 2 of the very same treaty (*contra* the Opinion of Advocate General Wattel at 495, para. 8); Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 26, paras. 37-38, where the court noted that (i) the text of Article 2 of the 1986 Canada-China tax treaty differed significantly from the corresponding OECD Model article, due in particular to the absence of any reference to taxes imposed on behalf of the contracting States' political subdivisions or local authorities and that (ii) Canada, in that respect, had expressly reserved its position in the OECD Commentary and, as a consequence, drew the conclusion that the relevant part of the OECD Commentary on Article 2 could not apply in order to interpret the above-mentioned tax treaty provision; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 887, para. 18; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 75-76, para. 44 where the Court concluded that the extension of the scope of the "construction permanent establishment" provision in Article 5(2) of the 1978 Ivory Coast-Norway tax treaty (according to

Finally, comparison with other tax treaties concluded by the two States party to the tax treaty to be interpreted is occasionally carried out by national courts and tribunals for the purpose of determining additional elements in support of the possible alternative constructions of the tax treaty provisions before them.[1496]

In that respect, the analysis of other tax treaties concluded by the contracting States may be helpful in order to ascertain their policy in respect of certain provisions or issues in the application of the treaties to which they are party.[1497]

---

which a building site or construction or assembly project is deemed to constitute a permanent establishment independently of its duration), as compared to the corresponding provision of the OECD Model, had no relevance for the purpose of interpreting the general definition of permanent establishment provided for in Article 5(1) of that tax treaty; Tax Court (Canada), 8 April 2005, *Allchin v. R*, 7 *ITLR*, 851 *et seq*., at 871-872, paras. 50-51, where the Court concluded that the OECD Commentary on Article 4, for the part dealing with the "habitual abode" tie-breaker test (theoretically relevant for the case at stake), was not useful in interpreting the 1980 Canada-United States tax treaty since, while in the OECD Model that test was to be used (i) where a person did not have a permanent home available in either State (i.e. without passing through the "centre of vital interests" test) or (ii) where the State in which he had the centre of his vital interests could not be determined, in the 1980 Canada-United States tax treaty the "centre of vital interest" test was to be applied in case (i), leaving the "habitual abode" applicable only in case (ii) (one might question, indeed, the significance of such a difference for the purpose of assessing the relevance of the OECD Commentary paragraphs discussing the "habitual abode" test); by analogy, Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R*, 10 *ITLR*, 827 *et seq.*, at 840-843 and 855, where the Court (and one of its three expert witnesses) took note of the presence, in the 2001 United Nations Model, of a special provision dealing with the existence of permanent establishments of insurance companies (Article 5(6) of that Model), which was absent in both the OECD Model and the relevant tax treaty, as well as of the fact that both the OECD Commentary and the United Nations Commentary noted that such kind of provision was directed at obviating the possibility that insurance companies doing large-scale business in a State could not be taxed therein due to the absence of a permanent establishment, and drew the inference that the contracting States (Canada and the United States) were most probably aware of the above-mentioned possibility and of the chance to insert a specific provision as a remedy, so that the non-inclusion of such a provision could be regarded as an acceptance by those States of the possibility that insurance companies resident of the other contracting State and doing large-scale business in their territory could escape tax liability therein due to the absence of a permanent establishment, such acceptance being probably justified in light of the reciprocity of its effects on both States' tax revenues (see, similarly, Tax Court (Canada), 16 May 2008, *American Income Life Insurance Company v. Canada*, 11 *ITLR*, 52 *et seq*., at 80, paras. 85-86); Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 345, paras. 26 and 27, where the Court noted that Article 2 of the 1980 Australia-Switzerland tax treaty did not contain paragraphs 1 and 2 of Article 2 OECD Model, without drawing any strong inference from it; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*, at 708, para. 148, where the Court highlighted the main differences, relevant for the solution of the case at stake, between the 1976 Australia-Netherlands tax treaty, on the one hand, and the 1977 OECD Model, on the other hand, for the purpose of construing Articles 7 and 13 of the former.

[1496] See, in support of a very cautious employment of such practice, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 49-51, m.nos. 84-87.

[1497] See, for instance, Cour de Cassation (Belgium), 12 October 1973, *Dobbelmann Gmbh v. Belgium*, *Pasicrisie belge. Arrets de la cour de Cassation* (1974), 159 *et seq.*, where the court made reference to other two tax treaties concluded by Belgium in order to construe the expression "montant brut des dit dividendes" used in Article 10 of the 1967 Belgium-Germany tax treaty; similarly, Cour de Cassation (Belgium), 21 February 1979, *Société Anonyme de Participations et d'Études, Compagnie Saint-Gobain Pont a Mousson v. Belgium*, *Pasicrisie belge. Arrets de la cour de Cassation* (1979), 737 *et seq*.; Hoge Raad (Netherlands), 1 November 2000, case *35398*, 3 *ITLR*, 466 *et seq*., Opinion of the Advocate General Wattel at 489-490, where the wording of the non-discrimination articles of the tax treaties concluded by the Netherlands with Brazil and

Vietnam, as well as the explanatory notes to those treaties were analysed and it was concluded that, even in the absence of a provision similar to Article 26(2) of the OECD Model, the non-discrimination article might be applied to taxes other than those mentioned in Article 2; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister if National Revenue*, 5 *ITLR*, 638 *et seq*., at 648, para. 26, where the court (however) rejected the view that the different wordings of Article XXVII of the 1980 Canada-United States tax treaty and of Article 26 of the 1975 Canada-France tax treaty (both concerning exchange of information) would trigger different obligations on the tax authority requested to exchange information; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq*., at 274 where the 1982 India-Mauritius tax treaty was compared to the 1989 India-United States tax treaty, the latter including a limitation on benefits provision absent in the former; Federal Court of Appeal (Canada), 13 October 2003, *Edwards v. R*, 6 *ITLR*, 564 *et seq*., at 568-569, paras. 22-26, where the court, in order to determine whether the 1986 Canada-China tax treaty also applied to Hong Kong from 1997 onwards, made reference to both the 1984 China-United Kingdom and the 1984 China-United States tax treaties, as well as to Baker's position regarding the applicability of the 1984 China-United Kingdom tax treaty to Hong Kong and to the position expressed, with reference to the same issue, in the United States Technical Explanations to the 1984 China-United States tax treaty; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 76, para. 45 where the court referred to the special provisions concerning activities carried out on the continental shelf included in the tax treaties and amending protocols concluded by Norway in the '70s, although ultimately recognizing that such provisions were not aimed at changing, and thus had no bearing on the construction of, the general definition of permanent establishment; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*, at 814-815, paras. 46-49, where the Court referred to the 1953 Australia-United States tax treaty, which included a provision similar to the one encompassed in the 1969 Australia-Singapore tax treaty at stake before the Court; Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 *ITLR*, 563 *et seq*., at 580-581, paras. 80-81, where the Court, in order to construe Article XV(3) of 1980 Canada-United States tax treaty, reviewed other tax treaties concluded by Canada and inferred from them the policy of Canada (and its treaty partners) concerning the taxation of pilots engaged in international flights; somewhat similarly, Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq*., at 194, para. 5, and at 197, paras. 16-17, where the court allowed a senior advisor on tax treaties with the Canada Revenue Agency, who had been involved in negotiating 20 treaties over ten years, to testify to his experience with regard to the reason why Canada insisted to include a specific type of provision (i.e. the FAPI provision) in some of its tax treaties, in order to grasp the possible intention of at least one of the contracting States with regard to the provision at stake; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 74, where the Court pointed out that the researches made had not been able to uncover any other treaty, entered into by Ireland, containing the unusual wording of Article 2(2) of the 1971 Italy-Ireland tax treaty; Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R*, 10 *ITLR*, 827 *et seq*., at 842-843, with regard to the practice of Canada and the United States to include special "insurance business" permanent establishment provisions in their tax treaties, which was considered potentially relevant in order to interpret Article V of the 1980 Canada-United States tax treaty; Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities Clearance Inc v. Income Tax Officer*, 11 *ITLR*, 201 *et seq*., at 227-228, paras. 54-59, where the tribunal warned about the inference that differently-worded provisions included in different tax treaties concluded by the same State should be always attributed different meanings, tax treaties remaining the products of bilateral negotiations, whose wording largely depend on the comfort level of the treaty partners with the words so employed; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq*., at 506, para. 10, where the authority carried on a comparative analysis of how profits from the operation of ships in international traffic were dealt with in various tax treaties concluded by India, in order to determine whether they were taxable in India under the 1994 India-Switzerland tax treaty; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 816, footnote 9, where the Court, in the context of construing the 1980 Canada-United States tax treaty and applying it to income derived by a United States fiscally transparent LLC, made reference to the fact that Canada had earlier amended its tax treaty with France in order to expressly recognize partnerships and other fiscally transparent entities for the purpose of the application of the latter treaty; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 *ITLR*, 915 *et seq*., at 925-927, where the tribunal analysed the "construction

Interestingly, courts have proved willing to peruse and compare both earlier and later treaties and have alternatively used the result of such an analysis to support the view that the different wording was evidence of a different intended meaning of the provisions under scrutiny, or to argue for the thesis that the different wording of the other (later or earlier) treaty better elucidated the meaning that the contracting States intended to attach to the treaty provision to be construed.

With regard to this practice, the analysis of the various authentic texts of the different tax treaties compared and, in particular, of their drafted texts proves to be a useful tool for the interpreter, providing strong evidence of the common understanding of the parties with regard to unusual provisions. Such an analytical technique, for instance, might be conveniently employed in order to inquire the causes, if any, of the different wordings employed in the subject-to-tax provisions included in Austrian tax treaties,[1498] in which, although the German authentic texts use a variety of different terms and expressions such as "steuerpflichtig sein", "der Besteuerung unterworfen", "der Besteuerung unterliegen", "besteuert werden" and "der Steuer unterliegen", the English authentic texts all employ the uniform term "subject-to-tax".[1499]

3.7. Conclusions on research question a)

The analysis carried out in the previous sections has demonstrated that the role played by the OECD Model official versions (English and French) in respect of (multilingual) tax treaties based on such a Model is similar to that played by the drafted text for the purpose of interpreting multilingual treaties.

To put it differently, the OECD Model official versions represent significant evidence of the intention of the parties with regard to the meaning of tax treaty provisions drafted along the lines of the OECD Model. Thus, the interpreter should take them into account as primary means of interpretation in order to establish the utterance (ordinary or special) meaning of the relevant treaty terms and expressions.

---

permanent establishment" provisions included in the tax treaties concluded by India and deviating from the wording of the OECD and United Nations Models, in that they all include a reference to the aggregation of all, or connected, sites, projects and activities carried on by a non-resident enterprise in order to determine the existence of a permanent establishment thereof in India, and inferred from the absence of such a reference in the tax treaty to be interpreted (the 1982 India-Mauritius tax treaty) that such an aggregation was generally not allowed under that treaty.
See also, with regard to subsequent tax treaties concluded by the treaty parties, the case law referred to in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.01, 26.02 and 26.03.

[1498] See M. Schilcher, Die Vermeidung der doppelten Nichtbesteuerung durch subject-to-tax-Klauseln (Vienna: Linde, 2004), p. 57.

[1499] The drawback of such drafting is highlighted by Metzler, who notes that in the Austrian tax treaty practice subject-to-tax-clauses are generally interpreted very differently, mainly due to the huge variety of terms and expressions used in the German authentic texts of the relevant treaties; the author concludes that, for a more uniform interpretation of these clauses, a more conscientious use of such German terms and expressions would be preferable (see V. E. Metzler, "Austria", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 137 *et seq.*, at 149).

With specific reference to the subject of this study, the OECD Model official versions constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, i.e. by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT. This holds true also in cases where none of the authentic treaty texts is drafted in English or French.

In addition, the impact of the OECD Model official versions on the drafting of the authentic texts of tax treaties based on such a Model constitutes a strong argument in support of the following conclusions.

First, it supports the appropriateness of a loose approach in the application of the *renvoi* provided for in Article 3(2) of OECD Model-based tax treaties, in the sense that the terms actually used in the authentic treaty texts should be given the meaning that not only such terms, but also their legal jargon synonyms and proxies in the official language of the State applying the treaty, have for the purpose of that State's domestic law, unless the context otherwise requires. This point, being strictly connected with the analysis of the *renvoi* to domestic law encompassed in Article 3(2) OECD Model, will be further analysed in section 5.3.2.4 of this chapter.

Second, it supports the inclusion, among the means of interpretation to be used for removing the *prima facie* discrepancies in meaning between the authentic treaty texts in accordance with Articles 31 and 32 VCLT, of certain elements and items of evidence. In particular, it constitutes the main foundation of the argument that all tax treaty provisions that directly or indirectly reproduce the provisions of the OECD Model should be interpreted consistently, which in turn justifies the practice of having recourse to the decisions delivered by foreign judiciaries and the practices of foreign tax authorities (including those of States that are not party to the specific treaty to be construed) in order to establish the *ordinary meaning to be given* to OECD Model standard terms and expressions (used in OECD Model-based tax treaties) under Articles 31 and 32 VCLT. Moreover, it justifies the recourse by the interpreter, as supplementary means of interpretation, to the analysis of the differences existing (i) between the subsequent versions of the OECD Model, (ii) between the OECD Model and the tax treaty to be interpreted, as well as (iii) between the tax treaty to be interpreted and other tax treaties concluded by the contracting States of the former, for the purpose of establishing the intention of the parties, i.e. the utterance meaning of the relevant tax treaty provision.

4. The OECD Model Commentary as part of the overall context

4.1. Research question addressed in this section

The present section is aimed at tackling the following research question, here briefly illustrated by means of an example.

b) What is the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties?

Consider a tax treaty authenticated in English and French, Article 12 of which reproduces without significant deviations Article 12 of the OECD Model. The interpreter might be faced with an interpretative issue regarding the meaning to be attributed to the terms "copyright" and "droit d'auteur" employed in the English and French authentic texts, respectively, of that article. In particular, he might have to decide whether or not the right of an actor to authorize the reproduction of a movie in which he acted falls within the scope of the two above-mentioned terms, thus triggering the application of Article 12.

In the French legal jargon, the term "droit d'auteur" does not seem to encompass such a right, which, on the contrary, appears to be denoted by the term "droit voisin" (to the "droit d'auteur"). However, in the English legal jargon, the term "copyright" seems to include within its scope the right of an actor to authorize the reproduction of a movie in which he acted. Therefore, a *prima facie* discrepancy in meaning appears to exist between the English and French authentic texts of the treaty.

In that respect, paragraph 18 of the Commentary to Article 12 OECD Model seems to support a broad interpretation of the terms "copyright" and "droit d'auteur", such as to include droits voisin. According to that paragraph, where the musical performance of a musician (or orchestra director) is "recorded and the artist has stipulated that he, on the basis of his copyright [*author's note*: "droit d'auteur" in the French official version][1500] in the sound recording, be paid royalties on the sale or public playing of the records, then so much of the payment received by him as consists of such royalties falls to be treated under Article 12".

The question thus arises whether and to what extent the interpreter should take into account the content of paragraph 18 of the Commentary to Article 12 OECD Model in order remove the *prima facie* discrepancy in meaning between the two authentic treaty texts.

4.2. Introduction

"*The Commentaries are not binding, but they are the best evidence of the generally accepted interpretation of OECD-style conventions*".[1501]

[1500] The relevant excerpt of paragraph 18 of the Commentary to Article 12 OECD Model, in its French official version, reads as follow: "Lorsqu'en vertu du même contrat ou d'un contrat distinct, la prestation musicale est enregistrée et que l'artiste a accepté, sur la base de ses droits d'auteur concernant l'enregistrement, de recevoir des redevances sur la vente ou sur l'audition publique des disques, la partie de la rémunération reçue qui consiste en de telles redevances relève de l'article 12".

[1501] Baker, 5 *ITLR*, at 1004, in commenting on a decision of the French Conseil D'Etat (Conseil d'Etat (France), 30 June 2003, *Minister for the Economy, Finance and Industry v. Interhome AG*, 5 *ITLR*, 1001 *et seq.*), which made reference to the post-2003 OECD Commentaries in order to interpret a 1966 tax treaty in relation to tax years in the 1980s.

The relevance of the OECD Commentary for tax treaty interpretation has been the subject of a striking number of articles and books. It is not the purpose of this section to review, discuss or comment on such publications, nor to comprehensively deal with the subject matter.[1502] Its much more limited aim[1503] is to establish the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties and, more specifically, of removing *prima facie* discrepancies in meaning among tax authentic treaty texts.

From a historical perspective, each tax treaty model developed by or under the auspices of international organizations, from the League of Nations onward, has been accompanied by commentaries explaining the intended meaning of the model provisions.[1504] The practice of providing commentaries to the relevant models was probably taken from that of providing commentaries or explanatory reports to multilateral treaties.[1505]

With specific regard to the OECD Commentary, starting from 1992 the OECD practice has always been to modify it every two or three years, generally without

---

[1502] The two most recent and comprehensive studies on the matter, where a conspicuous number of further references may be found, are: S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008) and D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005).

[1503] The present section does not deal with the interpretative issues stemming from the fact that the parties to a tax treaty have entered reservations or observations to the OECD Commentary, if they are OECD member States, or expressed their positions thereon, if they are not OECD member States; likewise, for the purpose of the analysis carried out in this section (unless otherwise provided), it is assumed that no reservation, observation or position has been expressed by the contracting States.
The issues connected with the interpretation of tax treaty provisions reproducing the OECD Model provisions, in respect of which one or both the contracting States have entered observations in the OECD Commentary, have been throughly analysed in G. Maisto, "The Observations on the OECD Commentaries in the Interpretation of Tax Treaties", 59 *Bulletin for international taxation* (2005), 14 *et seq*. See also D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), pp. 64-78.

[1504] See D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), p. 3. The authors added that over the years the OECD Commentaries "have expanded, have become more detailed and *sometimes have departed in several places from what could fairly be said to be the literal or textual interpretation of the Model to a point where it is widely believed that the OECD Committee on Fiscal Affairs* […] *is sometimes attempting to change the Model by changing its interpretation*" (see *ibidem*, p. 4, *emphasis* added). According to this author, however, the idea that the Commentary often attributes to the OECD Model provisions certain meanings further than their proper (literal or textual) meanings is flawed and theoretically dangerous: it is flawed since none may be said to know the intended meaning of an utterance better than the person that actually uttered it and, in the case at stake, the Commentary is drawn up by the same organization that created the respective model; it is theoretically dangerous since it relies on and upholds the view that utterances have an intrinsic meaning, separate from their overall context (which, in this case, clearly encompasses the relevant commentaries) and independent from the relation existing (or intended to exist) between the speaker and the hearers, thus employing an utopian argument in order to justify the substitution of the meaning preferred by the authors (or other interpreters) for the meaning intended by the international organization that drew up the model (which, in turn, makes it an apologetic argument in favor of the constructions chosen by the interpreters).

[1505] See *ibidem*, p. 3.

introducing any related change in the Model Convention.[1506]

No scholar has ever seriously questioned the potential relevance of the OECD Commentary for the purpose of interpreting tax treaties. Most likely, this is due to the effect that the Commentary may have on the consistent construction of those treaties. According to Vogel, for instance, "OECD MC and its Commentary are very important for the interpretation of tax treaties in that they provide a source from which the courts of different States can seek a common interpretation."[1507]

Similarly, the review of national courts and tribunals' case law has shown that judiciaries do, in many cases, refer to the OECD Commentary in order to construe tax treaty provisions.[1508]

The relevance attributed to the OECD Commentary, however, varies significantly from country to country and, sometimes, also within a single jurisdiction. On the one hand, a considerable number of courts and tribunals have expressed the view that the OECD Commentary is one of the most important elements to be taken into account for the purpose of interpreting tax treaties patterned along the lines of the OECD Model.[1509]

[1506] Accordingly, as of 1992, the OECD started to publish the Model and its Commentary in loose-leaf form.

[1507] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 43, m.no. 79.

[1508] In addition to the case law cited here below, see the decisions of national courts and tribunals referred to in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.11 and 26.12.

[1509] See, for instance, Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 55; Tax Court (Canada), 30 October 1998, *Dudney v. R*, 1 *ITLR*, 371 *et seq.*, at 376-379; Court of Federal Claims (United States), 7 July 1999, *National Westminster Bank v. US*, 1 *ITLR*, 725 *et seq*., at 737 and 748; Hoge Raad (Netherlands), 9 December 1998, case *32709*, 1 *ITLR*, 839 *et seq*., at 853-854; Federal Court of Appeal (Canada), 24 February 2000, *R v. Dudney*, 2 *ITLR*, 627 *et seq*., at 632-634; Hoge Raad (Netherlands), 1 November 2000, case *35398*, 3 *ITLR*, 466 *et seq*., Opinion of Advocate General Wattel at 493, where it is stated that, in respect of tax treaty provisions reproducing OECD Model provisions, the OECD Commentary must prevail unless there are clear indications that both contracting States intended to deviate from that standard; Court of Appeal of The Hague (Netherlands), 27 February 2001, case *BK-98/02743*, 3 *ITLR,* 631 *et seq*., at 644, para 6.2; Conseil d'Etat (France), 27 July 2001, *Re SA Golay Buchel France*, 4 *ITLR*, 249 *et seq*., conclusions of the Commissaire du Gouvernement at 261; Corte Suprema di Cassazione (Italy), 7 March 2002, *Ministry of Finance (Tax Office) v. Philip Morris Gmbh*, 4 *ITLR*, 903 *et seq*., at 938 and 941-945, where (ironically with hindsight) the Court referred to the OECD Commentary more than ten times in order to support its decision; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq*., at 1065 and 1070-1071; Corte Suprema di Cassazione (Italy), 25 May 2002, case *7682*; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister if National Revenue*, 5 *ITLR*, 638 *et seq*., at 650-654, paras. 32, 36, 38, 40 and 44; New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT* 5 *ITLR*, 658 *et seq*., at 671, para. 46 and at 676, para. 66; Corte Suprema di Cassazione (Italy), 6 Decembre 2002, case *17373*, where the OECD Commentary is referred to fourteen times; Conseil d'Etat (France), 30 June 2003, *Minister for the Economy, Finance and Industry v. Interhome AG*, 5 *ITLR*, 1001 *et seq.*, conclusions of the Commissaire du Gouvernement at 1031, 1034, 1037-1038 and 1040; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq*., at 304; Corte Suprema di Cassazione (Italy), 23 April 2004, case *7851*; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq*., at 76, para. 46, where it was stated that the OECD Commentary is an important source of law in the interpretation of tax treaties, including those concluded between member and non-member States of the OECD; Tax Court (Canada), 8 April 2005, *Allchin v. R*, 7 *ITLR*, 851 *et seq*., at 864-872, para. 35, quoting Iacobucci J. in *Crown*

Forest (see Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 55), para. 40, para. 47 and para. 51, where the Court, however, concluded that the OECD Commentary on Article 4, for the part dealing with the "habitual abode" tie-breaker test (theoretically relevant for the case at stake) was not useful in interpreting the relevant tax treaty since, while in the OECD Model that test was to be used (i) where a person did not have a permanent home available in either State (i.e. without passing through the "centre of vital interests" test) or (ii) where the State in which he had the centre of his vital interests could not be determined, in the relevant tax treaty the "centre of vital interest" test was to be applied in case (i), leaving the "habitual abode" applicable only in case (ii) (one might question, indeed, the significance of such a difference for the purpose of assessing the relevance of the OECD Commentary paragraphs discussing the "habitual abode" test); Special Commissioners (United Kingdom), 7 June 2005, *UBS AG v. Revenue and Customs Commissioners*, 7 *ITLR*, 893 *et seq*., at 906-907, para. 10, where it was said that "the negotiators on both sides could be expected to have the Commentary in front of them and can be expected to have intended that the meaning in the Commentary should be applied in interpreting the treaty when it contains the identical wording and neither party had made an observation disagreeing with the Commentary" and, with reference to the explanation of Article 24(3) OECD Model provided for in the OECD Commentary thereto, that "[i]t seems clear that the parties to the treaty intended that such explanation should be more important than the ordinary meaning to be given to the terms of that phrase. This is either on the basis that the existence of the Model and the Commentaries demonstrate that the parties intended it as a special meaning within art 31(4) of the Vienna Convention, or that the Vienna Convention does not purport to be a comprehensive statement of the method of treaty interpretation"; *ibidem*, at 917-919, paras. 22, 24 and 25; Tax Court (Canada), 22 July 2005, *Yoon v. R*, 8 *ITLR*, 129 *et seq*., at 140-144, paras. 21, 23, 28, 33 and 38; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 558, para. 3.4.5., where the Court affirmed that OECD member States are in principle obliged to take into account the OECD Model and the Commentary thereto in order to interpret their treaties (at least with regard to those concluded with other OECD member States); Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 *ITLR*, 563 *et seq*., at 580, para. 79, at 584, para. 107, and 589, para. 136; Court of Appeal of England and Wales (United Kingdom), 2 March 2006, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 653 *et seq*., at 674-675, para. 42 per Sir Andrew Morritt, and 683-684, para. 74 per Chadwick LJ.; Income Tax Appellate Tribunal of Mumbai (India), 30 September 2005, *Metchem Canada Inc v. Deputy Commissioner of Income Tax*, 8 *ITLR,* 1043 *et seq.*, at 1049 and 1050, where the tribunal noted that the OECD Commentary had a key roe in determining the scope and connotation of Article 24(2) of the 1985 Canada-India tax treaty and that when tax treaty expressions or clauses are picked up from the OECD Model, the normal presumption is that the persons using the said clauses or expressions are aware about the meanings assigned thereto by the OECD and intend to use them in the same sense and for the same purpose, unless a contrary intention is specifically expressed in the text of the treaty or additional protocol (the tribunal, furthermore, explicitly extended such a reasoning to tax treaties involving a non-OECD country); Administrative Court (Luxembourg), 17 January 2006, *Re XXX SA*, 9 *ITLR*, 176 *et seq*., at 186, where it was stated that provisions of a tax treaty copied from the OECD Model should be applied in light of the OECD Commentary since the main purpose of that Model is to enable the problems that arise most commonly in the field of international juridical double taxation to be resolved in an uniform fashion; First Council of Taxpayers (Brazil), 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue Department in Brasilia*, 9 *ITLR*, 627 *et seq*., at 657-658; See Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v, Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq*., at 776, para. 25 per Moses LJ., at 788, para. 61 per Arden LJ.; House of Lords (United Kingdom), 23 May 2007, *NEC Semi-Conductors Ltd and Other test claimants v. Inland Revenue Commissioners*, 9 *ITLR,* 995 *et seq.*, at 1002, para. 16 per Lord Hoffmann, who extended by analogy the reasoning underlying the OECD Commentary on Article 24(1), according to which, in order to determine whether a discrimination prohibited by that article exists, it must be assessed whether two residents are being treated differently "solely by reason of having a different nationality", to Article 24(5) of the Model (corresponding to Article 24(5) of the 1975 United States-United Kingdom tax treaty and Article 25(3) of the 1969 Japan-United Kingdom tax treaty, whose interpretation was at stake before the court), in the sense that, in order to determine whether a discrimination prohibited by Article 24(5) OECD Model exists, it should be assessed whether resident companies are treated differently solely on grounds that their capital is owned by persons resident of the other contracting State; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq*., at 183-184, para. 12; Income Tax Appellate Tribunal of New Delhi (India), 26 October

On the other hand, some courts and tribunals have found that the OECD Commentary is of limited relevance for the purpose of interpreting tax treaties, or even that recourse thereto is permissible only in order to confirm an independently clear meaning or to construe otherwise ambiguous, obscure or unreasonable provisions.[1510]

2007, *Rolls-Royce plc v. Director of Income Tax*, 10 *ITLR*, 327 *et seq*., at 348, paras. 20 and 21, where the tribunal reproduced, without quoting its source, the content of paragraphs 4 and 4.1 of the 2003 Commentary to Article 5 of the OECD Model in order to support its solution of the controversy before it; Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq*., at 432, where the Court affirmed that the OECD Commentary to the 1963 OECD Draft, on which the 1975 United Kingdom-United States tax treaty was based, was part of the "entire context" to be taken into account for the purpose of interpreting that tax treaty; *ibidem,* at 435, 436, 439 and 442; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq*., at 546, where the Court stated that (i) it is sufficient that one of the two contracting States is a member of the OECD in order to create an expectation among both contracting States that the interpretation of a OECD Model-type tax treaty will be based on the Commentary thereof, as is published from time to time, and that (ii) the uniform interpretation and application by courts in the contracting States of OECD Model-type tax treaties in inherently necessary by virtue of a contractual act that becomes a part of the law in the contracting States; Corte Suprema di Cassazione (Italy), 15 February 2008, case *3889*, where the Court, at para. 2.1, in order to support the conclusion that the 2005 amendments made in the Commentary to Article 5 OECD were not decisive in the case at stake, maintained that (i) the OECD Commentary is not legally binding under international law and that (ii) it is relevant that the Italian government entered a specific observation to such amendments in the Commentary; Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 *ITLR*, 574 *et seq.*, at 605, where the Special Commissioners held that the OECD Commentary is an important means of interpretation of tax treaties following the OECD Model since, in such a case, the negotiators on both sides could be expected to have intended that the meaning in the Commentary should be applied in interpreting the tax treaty, that being true with regard to both OECD member States and non-member States; *ibidem*, where the Special Commissioners argued that, if the OECD Commentary contains a clear explanation of the meaning of the term, it seems clear that the parties to the treaty intended that such an explanation should be more important than the ordinary meaning to be given to the terms of that phrase, either on the basis that the existence of the Model and the Commentaries demonstrate that the parties intended it as a special meaning within Article 31(4) VCLT, or that the VCLT is not purported to be a comprehensive statement of the methods of treaty interpretation (see also First-Tier Tribunal (United Kingdom), 1 April 2010, *FCE Bank plc v. Revenue and Customs Commissioners*, 12 *ITLR*, 962 *et seq*., at 972); Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 765, paras. 95-96 and at 767, para. 100; Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R*, 10 *ITLR*, 827 *et seq*., at 843, para. 48, at 844, para. 49, at 845-846, paras. 54-55 and 57, at 848, para. 65; Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*, at 34, para. 47, at 35, para. 49, and at 38, para. 66; Tax Court (Canada), 16 May 2008, *American Income Life Insurance Company v. Canada*, 11 *ITLR*, 52 *et seq*., at 63-64, paras. 37-38, at 71-72, para. 59, at 75-76, para. 73 and at 80, para. 87; Corte Suprema di Cassazione (Italy), 17 October 2008, case *25374*, para. 5.3; Federal Court of Appeal (Canada), 26 February 2009, *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq*., at 767, para. 10 and at 768, para. 14; Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq*., at 65, paras. 11 and 12, and at 68, para. 17; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 819, para. 77, where the Court noted that the OECD Commentary, in the absence of any relevant reservation or observation, reflected the intentions of the OECD member States with respect to treaties based upon the OECD Model; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 *ITLR*, 915 *et seq*., at 927, para. 10, at 929, paras. 13-14, at 932, para. 16, and at 934, para. 19, referring to both the 2005 OECD Commentary and the 2001 United Nations Commentary to Article 5(3) of the respective models (and, in paragraph 16, also to the Technical Explanations to the 1996 United States Model); Corte Suprema di Cassazione (Italy), 8 April 2010, case *8488*, where the Court affirmed that, in order to interpret Article 5 of the 1976 Italy-Switzerland tax treaty, it was necessary to make reference to the Commentary to Article 5 OECD Model, since the actual treaty was based on such a Model.

[1510] See, for instance, High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171

As often happens where one is called to categorize human behavior, the dividing line between the two approaches is sometimes blurred, either because the approach followed is not overtly elucidated by the courts, or because it is pointed out in a vague or ambiguous manner.

Additionally, the case law review has revealed that national courts and tribunals sometimes make reference to other documents issued by the OECD, such as reports or discussion drafts, in order to support their interpretative solutions.[1511] The relevance of

---

Commonwealth Law Reports, 338 *et seq.*, para. 10 of the opinion of Dawson J. and para. 13 of the opinion of McHugh J.; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*, at 229-230, where the Court maintained that, with regard to tax treaties concluded by States non-member of the OECD, the OECD Commentary may be relevant as a supplementary means of interpretation, in particular where those tax treaties reproduce the wording of the OECD Model and do not contain any evidence pointing to a contrary interpretation (note, however, the more drastic approach of the Assessment Board and the District Court, which apparently denied any relevance to the OECD Commentary with regard to tax treaties concluded by Norway with OECD non-member States – *ibidem*, at 229); Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq.,* at 204, where the OECD Commentary appears to be regarded as a supplementary means of interpretation under Article 32 VCLT; implicitly, Income Tax Appellate Tribunal of Kolkata (India), 22 August 2005, *ABN Amro Bank NV v. Assistant Director of Income Tax International Taxation & Assistant Director of Income Tax International Taxation v. Bank of Tokyo Mitsubishi Ltd*, 8 *ITLR,* 502 *et seq.*, at 521-522, paras. 25-26, where the tribunal denied the deductibility of interest "paid" by permanent establishments located in India to their foreign banks head offices under Article 7 of the relevant tax treaties, read in conjunction with Indian domestic tax law, since under the latter "the payment of expenditure to self" is not deductible (such a conclusion is clearly at variance with the long standing position taken by the OECD (and international practice) and reflected in paragraph 19 of the 1994 Commentary to Article 7 of the OECD Model); High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 73-75, where the OECD Commentary was considered a supplementary means of interpretation under the VCLT; Income Tax Appellate Tribunal of Mumbai (India), 4 July 2008, *Assistant Director of Income Tax (International Taxation) v. M/S Chiron Behring Gmbh & Co*, 11 *ITLR,* 83 *et seq.*, at 89, para. 12, where the tribunal stated that "when the language of the treaty is unambiguous and does not admit of any doubt whatsoever, there is no need to make a reference to the Commentaries [and] all the authorities are bound by the [clear treaty] and cannot take the assistance of Commentaries for accepting or rejecting any claim of the person in disregard to it. These can be referred to in a situation where the scope of an article is not clearly emanating from the language used. So these have only a persuasive value and cannot override the specific provisions of the treaty"; Income Tax Appellate Tribunal of Mumbai (India), 13 August 2008, *Deputy Director and Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 *ITLR*, 103 *et seq*., at 199, where the tribunal (quoting a previous order of its) noted that "the commentary on the Model Convention can be taken assistance of only if the language of the treaty is drafted loosely or in an inclusive way or it does not unearth the intention of the Contracting States in a lucid manner"; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 344, para. 24, where the Court quoted McHugh J in High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports,* 338 *et seq*., at 357, affirming that the supplementary means of interpretation provided for in Article 32 VCLT include the OECD Model and its Commentary; Income Tax Appellate Tribunal of Mumbai (India), 29 September 2008, *Assistant Director of Income Tax v. Delta Airlines Inc*, 12 *ITLR*, 344 *et seq.*, at 353, para. 10 and at 355, para. 12 (in the latter paragraph, the tribunal held that, where the contracting States define within a tax treaty a term that is undefined in the OECD Model, the meaning attributed to that term in the OECD Commentary cannot be applied in order to expand the scope of such a term as defined in the treaty itself); Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 *ITLR*, 645 *et seq*., at 654, para. 4, describing the OECD Commentary as a supplementary means of interpretation under Article 32 VCLT.

[1511] See, for instance, Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, Re V SA, 4 *ITLR*, 191 *et seq.*, at 209 and 213, referring to the Report *Double Taxation Conventions and the Use of*

these documents varies depending on (i) whether they are final versions or drafts subject to discussion and (ii) whether their conclusions have been incorporated into the OECD Commentary.

4.3. The reason for relying on the OECD Commentary in order to interpreter OECD Model-based tax treaties

Most of the studies carried out by scholars in the last decades have concerned not so much the question of whether the OECD Commentary might be relied on for the purpose of construing tax treaties, but - essentially - to what extent the interpreter should rely on it. In particular, the major studies published recently have focused on the question of whether the OECD Commentary should be considered to be legally binding.[1512]

Conduit Companies, adopted by the OECD Council on 27 November 1986; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., at 806-808, where the Court analysed the 1985 OECD Report *Taxation Issues Relating to International Hiring-out of Labour*; High Court of Justice of England and Wales (United Kingdom), 7 October 2005, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 236 *et seq*., at 252, 254 and 255, paras. 32, 33 and 41, where the Court analysed the content of the Report *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on 27 November 1986*;* Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 558, para 3.4.5., where the Court made reference to the Report *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on 27 November 1986; Income Tax Appellate Tribunal of New Delhi (India), 26 October 2007, *Rolls-Royce plc v. Director of Income Tax*, 10 *ITLR*, 327 *et seq*., at 355, para. 24.1, where the tribunal summarized (but did not apply under the specific circumstances of the case) the new OECD approach on the attribution of profits to permanent establishments, as resulting from the report *The Attribution of Profits to Permanent Establishments – Parts I (General Considerations), II (Banks) and III (Global Trading)*, released by the OECD Committee on Fiscal Affairs in December 2006, although without quoting its source; Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 *ITLR*, 574 *et seq.*, at 615, where the Special Commissioners, for the sake of completeness, referred to the discussion draft *The impact of the Communications Revolution on the Application of "Place of Effective Management" as a Tie Breaker Rule,* released in 2001 by the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits of the OECD, noting that, although it did not present the official views of the OECD and did not have the status of evidence, it represented the view of informed commentators and thus might be taken into account as useful background information; Special Commissioners (United Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq.*, at 479-481, paras. 61-63, where the Special Commissioners made reference to the OECD Partnerships Report, although admitting not deriving much direct assistance from it; Income Tax Appellate Tribunal of Delhi (India), 16 October 2009, *New Skies Satellites NV v. Assistant Director of Income Tax & Shin Satellite Public Company Limited v. Deputy Director of Income Tax*, 12 *ITLR*, 409 *et seq*., at 438-439, referring to the 2001 Report (to Working Party 1 of the OECD Committee on Fiscal Affairs)*Tax Treaty Characterization Issues Arising From E-Commerce* issued by the Technical Advisory Group on Treaty Characterization of Electronic Commence Payments; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 816-818, where the Court made reference to the OECD Partnerships Report in order to construe the 1980 Canada-United States tax treaty in relation to income derived by a United States fiscally transparent LLC.
See also, for older case law, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.16.

[1512] See, for instance, S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries*

In this regard, the author respectfully submits that the question of whether the OECD Commentary is "legally binding" under public international law (not to mention domestic law) is misleading and the recurrent use by scholars of the term "binding", either to affirm or to negate the need for courts and tribunals to base their decisions on the Commentary, is regrettable.[1513]

It should go without saying that the OECD Commentary, taken as an OECD legal instrument, does not impose any legal obligation whatsoever binding on the contracting States party to a tax treaty,[1514] as is pointed out at paragraph 29 of the Introduction to the OECD Model.

However, that is not the issue at stake. To say that the OECD Commentary is not an instrument legally binding on the contracting States is not a relevant answer to the fundamental question that the tax treaty interpreter, at the international law level, should ask himself, since such a question is not (i) whether the OECD Commentary, taken as an OECD legal instrument, is legally binding on the contracting States and the courts called to apply that treaty, but (ii) what is the utterance meaning of the sole relevant binding instrument between the contracting States, i.e. the tax treaty.

The issue, therefore, is one of "reasonableness" of the meaning attributed to the treaty and of the arguments supporting it and not one of "bindingness" of an international legal instrument.[1515]

In this respect, there is nothing at the international law level, and surely even less at the domestic law level, that compels the interpreter to always attribute to tax treaty provisions the meaning attached by the OECD Commentary to the corresponding OECD Model provisions. In each case, an analysis of the overall context may lead the interpreter to conclude, and provide him with reasonable arguments to support such a conclusion, that the parties intended to attach to a certain treaty term or expression a meaning different from the one that could be determined on the basis of the OECD

(Amsterdam: IBFD Publications, 2008); D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), in particular Chapter 4; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), section 10.9.; D. A. Ward, "The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process", 60 *Bulletin for international taxation* (2006), 97 *et seq*., at 99-100; F. Engelen, "Some Observations on the Legal Status of the Commentaries on the OECD Model", 60 *Bulletin for international taxation* (2006), 105 *et seq*. See also K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 46-47, m.no. 82b.

[1513] See H. Thirlway, "The Role of International Law Concepts of Acquiescence and Estoppel", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 29 *et seq*., at 32.

[1514] See the first entry of the definition of the term "binding" on the Merriam-Webster's Dictionary of Law (retrieved on 30 June 2011 from Dictionary.com website: http://dictionary.reference.com/browse/binding).

[1515] In the words of Thirlway, "the problem is […] one of the correct legal inferences [*author's note*: the meaning of the tax treaty] to be drawn from the facts [*author's note*: the behavior of the parties and, more generally, the overall context]" (see H. Thirlway, "The Role of International Law Concepts of Acquiescence and Estoppel", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 29 *et seq.*, at 34).

Commentary existing at the time of the treaty's conclusion (or as later modified), leaving aside the fact that the Commentary wording itself is subject to interpretation, like any other written text.

That said, it seems to the author more than reasonable to imagine that OECD member States had in mind the OECD Model and its Commentary (at that time) when they concluded a tax treaty following to a large extent such a Model and, therefore, that they intended to attach the meaning elucidated in the Commentary to the treaty terms and expressions that reproduce, directly or indirectly, those used in the OECD Model official versions.

Disregarding the interpretation given in the OECD Commentary amounts in itself to choosing a different interpretation:

(i) in favor of which, normally, less evidence exists of the agreement between the contracting States[1516] and

(ii) whose possibility of representing the original common will of the parties is ontologically not different from that of the OECD's interpretation (i.e. the interpretation put forward in the OECD Commentary), due to the ambiguity and vagueness of the relevant terms, expressions, and provisions.

Thus, a refusal by a court or tribunal to apply the interpretation put forward in the OECD Commentary, at least in cases of treaties concluded between OECD member States, could open the door for the criticism that the court or tribunal has deliberately substituted its will for the common will of the contracting States.

Such an inference appears particularly difficult to refute when one considers the non-binding recommendations on tax treaties adopted by of the OECD Council.[1517]

The last of these recommendations, which was issued on 23 October 1997, provides that (i) member States should "conform to the Model Tax Convention, *as interpreted by the Commentaries thereon*", when concluding new or revising existing tax treaties and (ii) their tax administrations should "*follow the Commentaries* on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles".[1518]

Where an OECD Member State had followed the OECD Model in drafting one of its tax treaties, the most reasonable inferences that may be drawn are that:

(a) such a State intended to fully (and not just partially) implement the OECD recommendation and, therefore, intended to conclude a tax treaty establishing the same legal rules provided for by the OECD Model, i.e. those legal rules resulting from the combined reading of the OECD Model and its Commentary;[1519]

[1516] The interpretation included in the OECD Commentary, in fact, (i) is explicitly agreed upon by the OECD member States as the substantive content of an OECD Council recommendation, (ii) may be explicitly disagreed upon by OECD non-member States in the very same OECD Commentary, and (iii) is generally well-known and discussed upon by tax lawyers (including tax officials) dealing with tax treaty law.

[1517] See Articles 5(b) and 6 of the Convention on the Organisation for Economic Co-operation and Development (OECD), concluded in Paris on 14 December 1960, and Article 18(b) of the OECD Rules of Procedure.

[1518] See OECD doc C(97)195/final (*emphasis* added).

[1519] No one could seriously maintain that the rules provided for by the OECD Model differ from those (if any)

(b) such a State intended the terms and expressions used in the tax treaty to have the meaning provided for (even by means of examples) in the OECD Commentary, since the latter is the only official instruction manual publicly available, the only one that the persons applying the treaty certainly have the chance to consult;[1520]
(c) such a State did not intend to voluntarily cause legal uncertainty or misunderstandings with the other contracting State by attaching to the tax treaty terms and expressions meanings different from those agreed upon by its duly authorized representatives at the OECD level and with reference to which no dissenting opinion is publicly available.

Based on the above, the author believes that, in the absence of any significant departure of the tax authentic treaty texts from the OECD Model or of any extra-textual evidence of a contrary agreement between the parties,[1521] the interpreter should construe any tax treaty concluded between OECD member States in accordance with the OECD Commentary,[1522] any other construction being less reasonable.[1523]

---

resulting from the ordinary meaning of the paragraphs of the OECD Commentary, since this is the understanding of the international organization (the OECD) that has issued the Model.

[1520] This argument is less tenable with regard to those OECD member States that publish their own models and related commentaries (e.g. the United States). However, on the one hand, where the wording of the OECD Model and that of the national model do not diverge, it is uncommon that the national commentary takes a position conflicting with that of the OECD Commentary and, on the other hand, in the case of a conflict between the two commentaries, arguments (a) and, partially, (c) would still give precedence to an interpretation based on the OECD Commentary, rather than on the national commentary.

[1521] For instance, where the relevant contracting States have expressed an observation with reference to the interpretation put forward in the OECD Commentary.

[1522] See a similar conclusion, although argued on the basis of a different vantage point, may be found in: American Law Institute, *Federal Income Tax Project. International Aspects of United States Income Taxation, II. Proposals on United States Income Tax Treaties* (Philadelphia: American Law Institute, 1992), p. 54; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 23.25; H. G. Ault, "The Role of the OECD Commentaries in the Interpretation of Tax Treaties", 22 *Intertax (1994),* 144 *et seq.*, at 145 *et seq.*; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 44-45, m.nos. 80-81; J. F. Avery Jones, "The binding nature of the OECD Commentaries from the UK point of view", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD, 2008), 157-162, at 161 (cf. the narrow position of Edwardes-Ker, which the author does not share, in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 19.01);

[1523] In the Martin Ellis Lecture held on 31 August 2000 at the Institute of International and Comparative Taxation at the University of Leiden, Vogel supported the idea that the interpretations put forward in the OECD Commentary should be given different weight depending (foremost) on the amount of time elapsed between their inclusion in the Commentary and the time of the conclusion of the relevant tax treaty. He maintained the following: "If the meaning attributed to a term by the Commentaries was not the "ordinary meaning" when the treaty was concluded, in particular, if the amendment is a more recent one [*author's note*: from the analysis of the previous paragraphs of the article, it seems that Vogel would consider a period of approximately 20-25 years sufficiently long for the OECD Commentary meaning to acquire the status of "ordinary meaning" of a term in the international tax language], we must examine whether the meaning conveyed by the Commentaries can be presumed to have been agreed upon as a "special meaning" within the meaning of Art. 31(4) of the Vienna Convention. I suggest that such an assumption be considered justified only when, between the amendment to the Commentaries and the conclusion of the particular treaty, enough time has elapsed for the amendment to seep through to the common consciousness of international tax experts who

Does this mean that the contracting States are bound by the OECD Commentary? According to the author, both the question and any answer to it are irrelevant, since they involve giving a name to a meaning, not a meaning to a name.

A similar conclusion should be also drawn with regard to tax treaties concluded between OECD member and non-member States.

First, although it is obviously possible that, under international law, contracting States decide to attach different meanings to the same text included in two or more of their treaties, even where such treaties reproduce to a large extent a model developed by an international organization, this is not the most natural conclusion to draw. Thus, if one starts from the premise that OECD member States, when concluding tax treaties with each other, intend to interpret those tax treaties in accordance with the OECD Commentary,[1524] the natural inference that follows is that such States will do the same when concluding tax treaties with OECD non-member States.

Second, unless evidence of a different agreement exists, the most reasonable assumption is that the other contracting State, i.e. an OECD non-member State, also intended to interpret the relevant tax treaty in accordance with the OECD Model. This inference is based on the following arguments:

(i) a different conclusion would amount to admitting that no agreement between the contracting States has ever been reached on some of the rules of law to be incorporated into the treaty;

(ii) the representatives of the OECD non-member State could (or should) have figured out the intention of the other party's representatives on the basis of the above analysis and, where dissenting, should have better expressed their dissenting opinion and registered it, in order to avoid misunderstandings;

(iii) the OECD Commentary is also generally known and consulted by the tax administrations and the practitioners of OECD non-member States;

---

are not members of Working Party No. 1. The time necessary for this should not be estimated too short – I suggest a period of ten years, but this may be open to discussion. Moreover, that the Commentaries were adopted as a "special meaning" can be assumed, in my view, only between the OECD Member countries. […] If the amendment is too recent for such seeping through, the Commentaries may still serve as a "supplementary means of interpretation", subject to the limitations of Art. 32 of the Vienna Convention" (K. Vogel, "The Influence of the OECD Commentaries on Treaty interpretation", 54 *Bulletin for international taxation* (2000), 612 *et seq.*, at 616).

The author does not share the conclusion reached by Vogel. In light of the arguments put forward in this section, although the longstanding presence of some interpretations in the OECD Model may of course have a certain impact on the level of reasonableness of the inference that the contracting States intended to attribute to the tax treaty's undefined terms and expressions the meaning attached thereto by the OECD Commentary, such inference remains, in the author's eyes, by far more reasonable than any other in the absence of clear evidence to the contrary, either resulting from a departure of the tax treaty provisions from the corresponding OECD Model provisions, or from extra-textual elements. Moreover, as succinctly stated by Avery Jones, "[g]iven the amount of work that goes into the Commentary one doubts if states intend it to have only [the] status [of supplementary means of interpretation under the VCLT]" (see J. F. Avery Jones, "The binding nature of the OECD Commentaries from the UK point of view", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 157 *et seq.*, at 162).

[1524] Which is the conclusion just reached and argued.

(iv) since 1997 many OECD non-member States[1525] have started to participate in the annual meetings organized by the Committee on Fiscal Affairs of the OECD (in order to discuss issues related to the negotiation, application and interpretation of tax treaties), as well as to set out their positions concerning the OECD Model and Commentary within the Commentary itself;[1526]
(v) the Commentary to the United Nations Model Tax Convention,[1527] in the drafting of which non-OECD member States generally participate, largely reproduces and refers to the OECD Commentary for the purpose of interpreting those provisions of the United Nations Model Tax Convention that do not depart from those of the OECD Model (i.e. the large majority of the provisions of the United Nations Model Tax Convention).[1528]

A corollary of such inferences is that OECD non-member States should be assumed willing to interpret in accordance with the OECD Commentary also the tax treaties concluded with other OECD non-member States, absent clear evidence to the contrary.[1529]

In that respect, Edwardes-Ker, commenting on the statement of the American Law Institute, according to which it would normally be wholly unrealistic to think that treaty negotiators who adopted language derived from the OECD Model did not knowingly accept the common meaning of that language as agreed among the OECD member States (i.e. that expressed in the OECD Commentary),[1530] claimed that such a

[1525] More precisely, 31 OECD non-member States as of 2010 (see paragraph 4 of the 2010 OECD Model Introduction – Non-OECD Economies' Positions on the OECD Model Tax Convention).
[1526] See paragraphs 2-3 of the 2010 OECD Model Introduction – Non-OECD Economies' Positions on the OECD Model Tax Convention.
[1527] The first sentence of paragraph 36 of the Introduction to the 2001 United Nations Model reads as follows: "If the negotiating parties decide to use in a treaty wording suggested in the United Nations Model Convention, it is to be presumed that they would also expect to derive assistance in the interpretation of that wording from the relevant Commentary."
[1528] It is true that the United Nations Model and Commentary are updated much less frequently than the OECD ones and that, therefore, it is not infrequent that the United Nations Commentary to a certain provision of the Model reproduces the wording of the corresponding OECD Commentary as it stood before its most recent amendments. However, it is the author's opinion that, in light of the fact that the Commentary to the United Nations Model generally fully reproduces the text of the preceding OECD Commentary where the underlying Model provisions are the same and, in such cases, it commonly states that the OECD Commentary is fully relevant for or pertinent to the interpretation of the United Nations Model provisions (e.g. with regard to Article 23A of the Model, p. 278 of the United Nations Commentary), the view may be reasonably supported that, where later OECD Commentaries concern provisions common to both Models and do not conflict with previous OECD Commentaries, the text of the former will most probably be referred to, or included, in the next United Nations Commentary and, since such later OECD Commentaries do not conflict with the current United Nations Commentary, they should be taken into account in order to construe tax treaty articles reproducing both the OECD Model and the United Nations Model provisions.
[1529] With reference to tax treaties concluded by OECD non-member States, Vogel notes that when the text of the treaty coincides with that of the OECD Model and the context does not suggest a different interpretation, the parties should be presumed as well to have intended to adopt the meaning conveyed by the OECD Model and its commentary (K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 45-46, m.no. 82).
[1530] American Law Institute, *Federal Income Tax Project. International Aspects of United States Income*

statement "undoubtedly applies to tax treaties negotiated between OECD Members. It probably applies to tax treaties modeled on OECD lines between a State which is not an OECD Member and a State which is an OECD Member. It may also apply to tax treaties modeled on OECD lines between two States which are not OECD Members."[1531]

4.4. The relevance of the OECD Commentaries subsequent to the tax treaty conclusion

The question of whether and to what extent changes to the OECD Commentary made after the conclusion of a tax treaty should be taken into account for the purpose of construing it has become particularly pressing since the OECD, in 1992, adopted the concept of an ambulatory Model and started issuing new OECD Commentary releases every two or three years.[1532]

In this respect, the approaches followed by national courts and tribunals have proved significantly heterogeneous, some courts appearing willing to rely on the last available version of the OECD Commentary,[1533] while others seeming more hesitant to use a

---

Taxation, II. Proposals on United States Income Tax Treaties (Philadelphia: American Law Institute, 1992), p. 54.

[1531] M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 23.24.

[1532] The OECD's position in this respect is spelt out in the Introduction to the OECD Model, which devises the idea of the ambulatory application of the OECD Commentary (see paras. 3 and 33-36 of the Introduction to the OECD Model).

[1533] I.e. the OECD Commentary as relevantly modified after the conclusion of the tax treaty to be interpreted. See Authority for Advance Rulings (India), 28 April 1999, *Y's Application*, 2 *ITLR*, 66 *et seq*., at 77 and 81; Court of Appeal of The Hague (Netherlands), 27 February 2001, case *BK-98/02743*, 3 *ITLR,* 631 *et seq.*, at 645, para 6.5; High Court (Denmark), 6 April 2001, *Halliburton Company Germany Gmbh v. Ministry of Treasury*, 4 *ITLR*, 19 *et seq*., at 45-46, where the Court, after having pointed out that both the tax treaties to be applied (i..e. the 1948 Denmark-United States tax treaty and the 1955 Denmark-Canada tax treaty) pre-dated the OECD Model and that the facts at issue occurred in 1990 and thus pre-dated the 1992 changes to the OECD Commentary to Article 15, concerning cases of hiring-out of labor (new paragraph 8 therof), resolved the case in accordance with the solution adopted in the 1992 Commentary, with regard to which none of the interested Contracting States entered any observation (interestingly the Court emphasized that, although the concept of hiring-out of labor was not known when those tax treaties were concluded, the interpretation put forward in the Commentary did not constitute a material change to such treaties); similarly, the majority opinion in Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., at 813-814; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq*., at 1065, where the Court stated that, in the spirit of the VCLT, the amendments later made to the OECD Commentary have significance as an aid to tax treaty interpretation and that, as the Commentary describes the practices of the OECD member countries, the subsequent changes and amendments to it are relevant particularly to matters which concern new situations and phenomena (in the specific case, the Court referred to the paragraphs added in 1992 to the Commentary to Article 1 OECD Model, which concerned the interaction between domestic CFC rules and tax treaties, in order to support its construction of the 1976 Belgium-Finland tax treaty); Hoge Raad (Netherlands), 21 February 2003, case *37024*, 5 *ITLR*, 818 *et seq.*, at 876, para. 3.7; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 77, paras. 48-49, where the Court concluded that the OECD Commentary to the 2003 OECD Model is of great importance for the interpretation of tax treaties concluded before 2003, to the extent that the

provisions of the 2003 OECD Model correspond to the provisions of those earlier tax treaties; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 546, para 3.4.5., where it was stated that later OECD Commentaries are supplementary means of interpretation, since they are generally intended to clarify already existing rules (*ibidem*, at 259-269, paras. 3.6.-3.6.3.); District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq.*, at 546, where it was affirmed that the OECD Commentaries that have been changed with regard to unchanged articles are to be applied even with reference to treaties concluded prior to the changes, since the Commentaries give expression to the consensus among the States that are members of the OECD as to the correct application and proper interpretation of existing provisions in specific situations; Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 *ITLR*, 574 *et seq.*, at 606, where it was held: "The relevance of commentaries adopted later than the treaty is more problematic because the parties cannot have intended the new commentary to apply at the time of making the treaty. However, to ignore them means that one would be shutting one's eyes to advances in international tax thinking, such as how to apply the treaty to payments for software that had not been considered when the treaty was made. The safer option is to read the later commentary and then decide in light of its content what weight should be given to it" (the author acknowledges that such an excerpt could be quoted as well as an instance of courts and tribunals seeming more hesitant to use later Commentaries in order to construe previously concluded tax treaties; however, in the author's opinion, it shows the theoretical willingness of the Special Commissioners to take into account, and even significantly rely on, later Commentaries as long as they do not revert the common understanding of the parties as reasonably inferred from previous Commentaries and other items of evidence; in fact, at 615, with regard to the possibility to use the 2000-amended OECD Commentary on Article 4(3) in order to interpret Article 4(3) of the 1981 Mauritius-United Kingdom tax treaty, the Special Commissioners held: "We see no reason why this approach should not be adopted even though it is in the commentary issued after the treaty. It is not significantly different from the earlier commentary"; see also, in this respect, First-Tier Tribunal (United Kingdom), 1 April 2010, *FCE Bank plc v. Revenue and Customs Commissioners*, 12 *ITLR*, 962 *et seq*., at 972 and 994); Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq*., at 34-35, paras. 47-48, where one gets the impression that the Court, for the purpose of favoring the inter-temporal dynamic application of tax treaties, would be even willing to construe them according to well-proved and generally accepted State practice superseding the latest version of the OECD Commentary; Income Tax Appellate Tribunal of Mumbai (India), 13 august 2008, *Deputy Director and Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 *ITLR*, 103 *et seq*., at 120-124, where the tribunal, quite interestingly, after having pointed out that recourse to the OECD Commentary should be limited to cases where "the language of the treaty is drafted loosely or in an inclusive way or it does not unearth the intention of the Contracting States in a lucid manner" and having noted that this was the case with regard to the tax treaty provision at stake (*ibidem*, at 119), made abundant reference to the Commentary on Article 8 OECD Model, as modified in 2005, for the purpose of interpreting Article 9 of the 1993 India-United Kingdom tax treaty (corresponding to Article 8 OECD Model); Federal Court of Appeal (Canada), 26 February 2009, *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq*., at 766-767, paras. 9-11, where the Court maintained that later Commentaries should be considered a relevant guide to the interpretation and application of previously concluded tax treaties, where the wording of such treaties mirror the wording of the OECD Model and those commentaries (i) represent a fair interpretation of such wording, (ii) do not conflict with the Commentary existing at the time of the treaty conclusion and (iii) neither Contracting State has registered an objection (i.e. an observation) to those later commentaries (it is to be noted that, in this regard, the Court made reference to the 2003 OECD Model Introduction, where "the OECD invites its members to interpret their bilateral treaties in accordance with the Commentaries 'as modified from time to time' (para 3) and 'in the spirit of the revised commentaries' (para 33)"); Tax Court (Canada), 18 September 2009, *Antle and others v. R*, 12 *ITLR*, 359 *et seq*., at 398-399, para. 96, where the Court made reference to paragraphs 7 and 9 of the Commentary to Article 1 OECD Model, as modified in 2003, in order to construe the 1980 Barbados-Canada tax treaty; Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 *ITLR*, 645 *et seq*., at 654, para. 4, where reference is made to the Commentary to Article 7 OECD Model, as amended in 2003, for the purpose of interpreting Article 7 of the 1994 Japan-Singapore tax treaty; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 814-816, where the Court made reference to the Commentary to Article 1 of the OECD Model (as modified in 2000 in order to include the conclusions of the OECD

version of the Commentary modified[1534] after the conclusion of the tax treaty to be interpreted.[1535]

In the author's opinion, at the international law level later Commentaries should be heavily relied on for the purpose of interpreting formerly concluded tax treaties,[1536] unless evidence exists of a common intention of the parties to differently construe the tax

---

Partnerships Report) in order to interpret the 1980 Canada-United States tax treaty (before new paragraph IV(6), made by the 2007 protocol, entered into force) and noted that neither Canada nor the United States made an observation on the new relevant paragraphs of the 2000 OECD Commentary.

[1534] Obviously, the modification here is intended to concern parts of the Commentary relevant for the purpose of construing the tax treaty provisions at stake before the court or tribunal.

[1535] See Administrative Court of Appeal of Paris (France), 30 January 2001, *Re Schneider SA*, 3 *ITLR,* 529 *et seq.*, conclusions of the Commissaire du Gouvernement at 554; Conseil d'Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, conclusions of the Commissaire du Gouvernement at 1117; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., minority opinion at 816; Conseil d'Etat (France), 30 June 2003, *Minister for the Economy, Finance and Industry v. Interhome AG*, 5 *ITLR*, 1001 *et seq.*, conclusions of the Commissaire du Gouvernement at 1039, where, although concluding that the paragraphs of the OECD Commentary included (or modified) after the conclusion of the relevant tax treaty cannot clarify the meaning of its provision (*author's note*: probably in the sense that they cannot be regarded as an expression of the common intention of the parties in respect of the meaning to be attributed to these provisions), nonetheless conceded that they are an important indication of the generally accepted interpretation of provisions drafted along the lines of those included in the OECD Model; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq*., at 310-312 where, with reference to two OECD Committee on Fiscal Affairs' discussion drafts (i.e. the discussion draft *The Attribution of Profits to Permanent Establishments*, released by the OECD Committee on Fiscal Affairs in February 2001, and part II (Banks) of the Discussion draft *The Attribution of Profits to Permanent Establishments,* released by the OECD Committee on Fiscal Affairs in March 2003), the Court held that they were not relevant for the purpose of interpreting the 1975 United States-United Kingdom tax treaty, since (among other reasons) they were many years subsequent to the treaty and thus offered no insights into the genuine shared expectations of the parties; Conseil d'Etat (France), 30 December 2003, *Re Société Andritz Sprout Bauer*, 6 *ITLR*, 604 *et seq*., at 638-639; Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq.*, at 52, para. 86, where the Court concluded that "one can only consult the OECD commentary in existence at the time the treaty was negotiated without reference to subsequent revisions"; Tax Court (Canada), 10 September 2009, *Garron and others v. R*, 12 *ITLR*, 79 *et seq*., at 130-131, paras. 374-376, where the Court (strictly speaking in an *obiter dictum*) affirmed the relevance of the 1977 OECD Commentary in order to interpret the 1980 Barbados–Canada tax treaty and, in particular, to tackle the issue of the interaction between Canadian anti-avoidance provisions and that treaty, thus implicitly rejecting the relevance of the 2003 Commentary for that purpose (in this respect, however, it could be taken the view that the 2003 amendments to the Commentary to Article 1 of the OECD Model contradicted the position expressed in the OECD Commentaries preceding the conclusion of the Barbados-Canada tax treaty and only because of this specific circumstance was it appropriate not to take the 2003 Commentary into account in order to construe that treaty); Conseil d'Etat (France), 31 March 2010, *Société Zimmer Ltd v. Ministre de l'Economie, des Finances et de l'Industrie*, 12 *ITLR*, 739 *et seq.*, conclusions of the Rapporteur Public at 778 and 781. See also the similar position taken by the Danish tax authorities in the *Casino Copenhagen* case (see High Court (Denmark), 3 February 2000, *Casino Copenhagen K/S v. Ministry of Taxes*, 3 *ITLR,* 447 *et seq.*, at 451) accepting the irrelevance of the 1992 changes to the OECD Commentary to Article 15, concerning the meaning of the term "employer", with regard to a tax treaty concluded in 1961 and facts occurred in 1991.

[1536] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.04: "It is arguable that the OECD Member States have already agreed to use later OECD commentary to interpret earlier tax treaties – in line with the OECD Committee on Fiscal Affairs' conclusions to this effect".

treaty texts.[1537]

Indeed, based on the analysis carried out in the previous section, it seems reasonable to envisage that OECD member States intend(ed) to attach to the terms and expressions of their tax treaties the meanings expounded in later OECD Commentaries, since:

(i) the OECD Council Recommendation so provides;

(ii) these meanings are going to be "previous" Commentaries meanings for the tax treaties subsequently concluded by the same States;

(iii) the most sensible presumption in this respect, as previously outlined, is that, in the absence of clear evidence to the contrary, each State intends to attach the same meaning to the same (or corresponding) wording used in all its OECD Model-based tax treaties;

(iv) those States concurred in the drafting and approval of the later Commentaries through their authorized representatives at the OECD Council and Committee for Fiscal Affairs.

Foremost, it appears more reasonable that the OECD member States intend to interpret their tax treaties (in particular those concluded with each other) in accordance with the current OECD Commentary rather than to construe those treaties in a different fashion since, while elements and items of evidence exist in support of the former conclusion, generally no element other than the very same (vague and ambiguous) texts of those tax treaties may be relied on in order to support the latter conclusion. Only where the analysis of the overall context showed evidence of the possible intention of the contracting States to attribute a meaning different from that elucidated in later OECD Commentaries to the treaty terms and expressions could the interpreter fairly conclude for the irrelevance of later Commentaries on the basis of his balanced assessment of the conflicting items of evidence.

The most popular argument employed by scholars and judiciaries to support a very limited recourse to later OECD Commentaries is that the contracting States could not have intended, at the moment of concluding the tax treaty, to interpret it in accordance with the subsequent OECD Commentary. Thus, from a diachronic perspective, the later OECD Commentary could not be regarded as representing the common understanding of the parties *at the time of the treaty conclusion*.

While this argument may have some merit where tax treaties are interpreted and applied at the domestic law level, mainly due to the limits and requirements imposed by the constitutions of many States to their governments and parliaments in connection with the conclusion of treaties and their implementation in the domestic law systems, at the international law level its appeal is fairly narrow.

[1537] The interpreter should look for such evidence in the deviations of the tax treaty texts from the OECD Model, or in extra-textual elements. The different meanings theoretically attributable to the OECD Model-type provisions (as compared to those attached thereto by the OECD Commentary) should not be regarded, in this respect, as evidence of a different intention of the parties exactly because those provisions are presumed to be generally construed by the parties in accordance with later OECD Commentaries (a different approach in that respect would lead to a circular inference).

Under Articles 31-33 VCLT, indeed, the interpreter is called upon to determine the utterance meaning of the tax authentic treaty texts, which must be based on all elements that diachronically may provide a reliable evidence of the common intention of the parties in that respect, including elements subsequent to the treaty conclusion. Articles 31(3)(a) and (b) VCLT, for instance, clearly attribute significant relevance to the subsequent agreements between and the subsequent practice of the contracting States for the purpose of construing the treaty.

Moreover, it is interesting to recall that the main reason why the *travaux préparatoires* had been (de)classified among the supplementary means of interpretation in the VCLT is that they normally record only interim and partial agreements (if any) reached among the parties in the course of the negotiations, or even only the position of some of the parties, so that in most cases there is no adequate evidence that they represent the final agreement of the contracting States as regard to the interpretation of the treaty provisions.

This specific problem, however, does not concern the Commentaries to the OECD Model, since such Commentaries are published together with, or after, the relevant Model. Similarly, if one accepts the theoretical relevance of the OECD Commentary for the purpose of interpreting tax treaties, the risk does not exist that the interpretations put forward in the OECD Commentaries published after the treaty conclusion represent just an interim and not the final agreement between the contracting States as regards the interpretation of that treaty. Clearly, one could argue that the OECD Commentaries do not reflect the agreement of the parties at all, but such an argument concerns the different issue of the relevance, for interpretative purposes, of a legally non-binding international law instrument and does not impinge on the theoretical capability of a later instrument to properly record the actual and current agreement of the parties in respect of a previously concluded treaty.

The authors and judges upholding the theoretical relevance of later OECD Commentaries[1538] have generally drawn the limit to the use of such Commentaries by means of the following two conditions:

(i) they represent a fair interpretation of the wording of the relevant tax treaty and
(ii) they do not conflict with the Commentary existing at the time of the treaty conclusion.

With regard to the first condition, it is the author's view that, due to the vague and sometime ambiguous wording of the OECD Model (reproduced in the relevant tax treaty), which, on the one hand, has to deal with future facts and circumstances and, on the other hand, has to provide within few pages a standardized system of rules capable of interacting with and connecting the contracting States' heterogeneous income tax systems,[1539] the interpreter should be very cautious in concluding that later OECD

[1538] See, for instance, Federal Court of Appeal (Canada), 26 February 2009, *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq*., at 766-767, paras. 9-11; D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), pp. 110-111; D. A. Ward, commentary to *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq.*, at 763-764.

[1539] Which generally differ from each other to a significant extent and are built on thousands of pages of

Commentaries do not represent a fair interpretation of the wording of the relevant tax treaty, unless the position set out in the OECD Commentary can be said to be manifestly absurd or unreasonable, which is unlikely to be the case. In any event, this test does not appear different from that applicable in respect to earlier OECD Commentaries.

With regard to the second condition,[1540] the author submits that it should not be seen as an absolute one, since the interpreter is bound in any case to look for and establish the treaty utterance meaning: as the analysis of the inter-temporal law issue has shown,[1541] in treaty law "the intention of the parties is really the key".[1542] Hence, the subsequent evolution of legal concepts and constructions of standard treaty provisions, as in the case of later OECD Commentaries, should be taken in due regard for the purpose of interpreting treaties concluded earlier where it appears reasonable that this was (or is) the intention of the parties. The assessment and balancing of the contrary items of evidence remains in the discretion of the interpreter, in light of the treaty's overall context.

Ultimately, for the same reasons set out in the previous section, the above conclusions appear applicable by analogy in respect of tax treaties concluded by OECD non-member States as well.

4.5. Conclusions on research question b)

The analysis carried out in the previous sections has led the author to conclude that:

(i) in the absence of any significant departure in the tax authentic treaty texts from the OECD Model, or of any extra-textual evidence of a contrary agreement between the parties, the interpreter should construe OECD Model-based tax treaties in accordance with the OECD Commentary, any other construction appearing less reasonable; and

(ii) later OECD Commentaries should be heavily relied on for the purpose of

---

statutes, tax authorities positions and case law.

[1540] The additional proposition of the ITG that "there is little or no legal justification for the use of [later] commentaries where they fill gaps in the Model by purporting to fill gaps in the commentaries" appears questionable, in particular as it is far from clear what a "gap in the Model" is (see D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), pp. 110-111). For instance, the alleged existence of a "gap" in a OECD Model distributive rule article invariably leads to the application of another article (e.g. Article 21, or Article7). Is that really a gap? Wouldn't the interpreter in any case look for an interpretation of the former article allowing him to apply it, if he considered it reasonable to conclude that the contracting States could have never intended to apply the latter article in the case actually at stake? How to distinguish at all a proper gap from the case where vague terms or expressions are used? See, in this respect, L. De Broe and J. Werbrouck, "Kroniek Internationaal Belastingrecht 2001-2002", in *Tijdschrift Rechtspersonen en Vennootschappen* (2002), 604 *et seq.,* in particular at 607 *et seq*.

[1541] See section 2.3.3.4 of Chapter 3 of Part II.

[1542] See R. Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 173 *et seq.*, at 181.

interpreting formerly concluded tax treaties, unless evidence exists of a common intention of the parties to construe them differently.

This implies that the OECD Commentaries, both previous and subsequent to the conclusion of the relevant tax treaty, constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, in particular by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT.

As a final remark, it may be pointed out that the OECD Commentary, like any other written text, also requires being construed, in order to be used in the process of tax treaty interpretation.[1543]

In this respect, the author submits that the interpreter should establish the utterance meaning of the OECD Commentary in light of its overall context, i.e. through the analogical application of the rules encompassed in Articles 31 and 32 VCLT, and that, whenever a *prima facie* discrepancy in meaning arises between the English and French official versions thereof, such a discrepancy should be removed on the basis of the analogical application of the rules enshrined in Article 33(4) VCLT.

5. The interpretation of legal jargon terms employed in (multilingual) tax treaties

5.1. Research questions addressed in this section

The present section is aimed at tackling the following issue.

c) The relevance of Article 3(2) of OECD Model-based multilingual tax treaties for the purpose of their interpretation

This issue may be divided into the following questions, here briefly illustrated by means of examples.

i. Does Article 3(2) have an impact on the nature of the potential discrepancies in meanings among the authentic texts of a multilingual tax treaty? Where this question is answered in the affirmative, which are the

[1543] See B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, especially at 8-9. For judicial instances of interpretation of the OECD Commentary, see Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq.*, at 816; Income Tax Appellate Tribunal of Delhi (India), 29 August 2008, *Fugro Engineers BV v. Assistant Commissioner of Income Tax*, 11 *ITLR*, 421 *et seq.*, at 434-435, para. 4; District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq.*, at 859; Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq.*, at 71-72, para. 28. See also the interpretation of paragraph 3 of the Commentary on Article 3(1) OECD Model in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.07.

various types of prima facie discrepancies that may arise? Should the interpreter put all of them on the same footings for the purpose of interpreting multilingual tax treaties?

While the various authentic texts of a multilingual treaty are generally interpreted in accordance with their own *genius*,[1544] the presence of Article 3(2) in OECD Model-based tax treaties may have a bearing on such a practice.

Consider a tax treaty authenticated in two languages, for instance Italian and German. The typical discrepancy that may emerge between the two authentic texts is the one arising by comparing the meanings that they have where interpreted in accordance with their own *genius,* i.e.:

(a) the meaning that the Italian text has where construed on the basis of the meaning that the terms employed therein have in the Italian language and under Italian law, with
(b) the meaning that the German text has where construed on the basis of the meaning that the terms employed therein have in the German language and under German law.

For instance, where the treaty to be interpreted used the terms "impresa" and "Unternehmen" in the Italian and German authentic texts of Article 7, these two terms might be construed on the basis of the meaning that they have under Italian and German law, respectively. Where such meanings were not absolutely equal (as actually is the case, for example, with respect to certain forestry and agriculture activities), a *prima facie* discrepancy may be said to exist between the two texts.

However, the presence of Article 3(2) may raise the question of whether the interpreter may and should compare a different pair of meanings. Consider, in this respect, a tax treaty authenticated in the Italian and English language. Where Italy is applying the treaty, the first part of Article 3(2) requires non-defined terms to be construed in accordance with the meaning that they have under Italian law. In this case, the easiest way to comply with such a rule is probably to use the Italian authentic text in order to interpret the relevant article of the treaty, thereby determining what meaning the terms used in the Italian text (or proxies thereof) have under Italian law. Nevertheless, nothing prohibits the interpreter from employing the English text in order to construe the relevant article of the treaty. In this case, the interpreter should determine the domestic law meaning of the Italian term that he considers best corresponding to the English term employed in the English authentic text.

It could happen, for instance, that the Italian text used the term "lavoro autonomo" in a certain article of the treaty, while the English authentic text used the term "employment". The Italian term that is generally considered to correspond to the English term "employment" is the term "lavoro subordinato" (or "lavoro dipendente"). Under Italian (tax) law, the concepts corresponding to the terms "lavoro autonomo" and

[1544] See YBILC 1966-II, p. 100, para. 23, per Sir Humphrey Waldock, according to whom attributing legal value to a comparison for the purpose of determining the ordinary meaning of the terms in the context of the treaty could have encouraged attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning of the treaty.

"lavoro subordinato" are quite different, the former denoting as prototypical items the activities carried on by a self-employed person. Therefore, in this case a *prima facie* discrepancy may be said to exist between the two authentic texts.

The question thus arises of whether those two types of discrepancies should be equally taken into account by the interpreter for the purpose of interpreting multilingual tax treaties, or, on the contrary, whether they should be differently weighted and reconciled by the interpreter. In order to properly answer this first question, the response to the following questions appears particularly relevant.

ii. Is there any obligation for the interpreter to reconcile (at least to a certain extent) the prima facie divergent authentic texts of an OECD Model-based tax treaty?

With regard to the above-described types of discrepancies, the foremost question that the interpreter should ask himself is whether any obligation exists for him to take care and reconcile them,[1545] at least to a certain extent and in certain occasions, or whether he may always and exclusively rely on the meaning emerging from the interpretation of one authentic text, taken in isolation. In particular, doubts may arise of whether the interpreter is entitled to rely exclusively on the domestic law meaning of the terms employed in the authentic text drafted in the official language of the State applying the treaty (if existing), disregarding the possible existence of *prima facie* different meanings that might be determined on the basis of the other authentic texts.

With regard to the two examples made in the previous section, the question would be whether the interpreter was allowed to simply construe the treaty in accordance with the meaning that the terms "impresa" and "lavoro autonomo" have under Italian law, without the need to reconcile them with the meaning that the terms "Unternehmen" and "lavoro subordinato" (which is regarded as corresponding to the English term "employment") have under German and Italian domestic law, respectively.

iii. If the previous question is answered in the affirmative, to what extent must the differences of meaning deriving from the attribution of the domestic law meanings to the corresponding legal jargon terms used in the various authentic texts be removed (e.g. in accordance with Article 33(4) VCLT) and, instead, to what extent must such differences be preserved in accordance with Article 3(2)?

Assume that the Italy-United Kingdom tax treaty, authenticated in the English and Italian languages, makes reference to the "board of directors" of a company in the authentic English text of Article 16, while in the authentic Italian text thereof it employs the term "consiglio di amministrazione".[1546] Although under the Italian Civil Code the

[1545] A similar question may be asked in respect of the alleged divergences existing between the apparent meanings of the terms employed in one of the authentic treaty texts and those underlying the corresponding terms used in the OECD Model official versions.

[1546] Actually, the Italian authentic text of the 1988 Italy-United Kingdom tax treaty employs the expression

"consiglio di amministrazione" is entrusted with pure management functions, bilingual dictionaries generally equate it to the "board of directors", which under English law is entrusted with both management and supervisory functions.
In this case, the interpreter faced with such a *prima facie* discrepancy should decide whether:

(a) that discrepancy should be removed by attributing the same meaning to both the terms "board of directors" and "consiglio di amministrazione", for instance by attaching to the latter the broader meaning of the former (or *vice versa*), or whether
(b) Article 3(2) of the treaty required those terms to be construed more narrowly where Italy applies the tax treaty and more broadly where the United Kingdom applies it.[1547]

This question is particularly relevant where the interpreter has to decide whether the income received by an English resident member of the "collegio sindacale" of an Italian resident company, which is the company organ entrusted with control and supervisory functions under the Italian Civil Code, is covered by Article 16 of the treaty.

iv. What is the relevance of Article 3(2) for the purpose of resolving the prima facie discrepancies in meaning among the various authentic texts, where the treaty's final clause provides that a certain authentic text is to prevail in the case of divergences?

Consider the previous example and assume that the Italy-United Kingdom tax treaty included a French authentic text, prevailing in the case of discrepancies in meaning among the various authentic texts, which employed the term "conseil de surveillance" in Article 16. Under French law, the "conseil de surveillance" is entrusted with both management and supervisory functions, similar to the "board of directors" under English law.

The question thus arises of whether the existence of the prevailing French text demands that the interpreter attribute to the Italian text the same (broader) meaning that the other two texts have where construed in accordance with English and French laws, as the case may be,, or, on the contrary, whether Article 3(2) of the treaty requires him to attach to the term "consiglio di amministrazione" the narrower meaning it has under Italian law whenever Italy applies the treaty.

"consiglio di amministrazione o […] collegio sindacale"; however, for the sake of the example, it is assumed that the reference to the "collegio sindacale" is not included in that treaty (as is the case with regard to many other Italian tax treaties).

[1547] Assuming here, for the sake of simplicity, that Italy applies the treaty whenever a person resident in the United Kingdom receives income in his capacity as a member of the management or supervisory boards of companies set up under Italian law and the United Kingdom applies the treaty whenever a person resident in Italy receives income in his capacity as a member of the management and supervisory board of companies set up under the laws of the United Kingdom.

5.2. Introduction and structure of this section

A quick look at the authentic texts of any OECD Model-type tax treaty will show, to practitioners experienced in the domestic income tax law of the contracting States, that a large part of the terms used in those texts are the same legal jargon terms used under domestic law or may be considered synonyms and proxies thereof.

With regard to such terms, the author has already mentioned the difficulties connected to their uniform interpretation, in particular where their construction is meant to be autonomous. It is thus unsurprising that domestic courts and tribunals generally do not embark on an attempt to construe an autonomous meaning of such terms, considering the problems and uncertainties connected to that quest where the interpreter is faced with complex and diverse national systems of tax law subject to frequent changes.[1548]

In order to overcome this difficulty, contracting Stateshave relied for many years on their respective domestic law meanings in order to construe tax treaties. As Sasseville put it, "[c]learly, it would be impossible to draft a treaty and to know exactly what is the meaning of the terms used under the legal system of each State. In order to protect both contracting parties and avoid endless negotiations, the most practical approach is for each country to be reasonably certain that it will be able to apply the treaty on the basis of its own understanding of what it has agreed to, based on its own legal system."[1549]

The principal means to achieve this result is to include in tax treaties a provision similar to Article 3(2) OECD Model, which ensures many practical advantages, such as:

(i) the fact that taxpayers, tax officials and tax courts may rely on the familiar meaning of legal jargon terms under their respective domestic law in order to interpret the treaty;
(ii) the limitation of the otherwise numerous alternative meanings that might be attached to treaty undefined legal jargon terms;
(iii) the resulting smoother interaction between the relief rules provided for in the tax treaty and the charging rules established under domestic law;
(iv) legal certainty.[1550]

Similarly, other provisions of the OECD Model refer to the domestic laws of the contracting States for the purpose of their interpretation.

The impact of Article 3(2), and other treaty provisions referring to the domestic laws of

[1548] See accordingly J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 15-16.
[1549] J. Sasseville, "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 133.
[1550] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 208, m.no. 60; Belgian Tax Authoriries in the Circular Letter No. AFZ/2004/0053 of 16 January 2004.

the contracting States, on the interpretation of tax treaties by national courts and tribunals has been tremendous. Good evidence thereof is the overwhelming recourse to domestic law made by national courts and tribunals for the purpose of interpreting the undefined legal jargon terms employed in the relevant tax treaty provisions, including the undefined terms used in the definition of other terms.[1551]

[1551] See Federal Court (Canada), 23 July 1990, *Hale v. R*, 90 DTC 6481, at 6487-6488, where the Court referred to domestic law for the purpose of deciding whether the income derived by a former employee of a Canadian resident company from stock appreciation rights, granted to him by that company during the employment period, was to be regarded as "salaries, wages and other similar remuneration" under Article 15 of the 1978 Canada-United Kingdom tax treaty; Court of Appeal of Brussels (Belgium), 30 April 1998, *NV Immo Part v. Belgium*, 1 *ITLR*, 463 *et seq*., at 479-481, where the judge made reference to domestic law in order to determine whether a United States general partnership was to be treated as fiscally transparent and, therefore, to whom its income should be attributed for tax treaty purposes, and at 483, where the judge referred to domestic law for the purpose of characterizing as an advance payment (in contrast to income) a certain payment in cash; Hoge Raad (Netherlands), 28 October 1998, case *32330*, 1 *ITLR*, 551 *et seq*., at 559 and 564, where the Court referred to domestic law in order to interpret the expression "any income" used in Article 27(1) of the 1980 United Kingdom-Netherlands tax treaty; Conseil d'Etat (France), 9 February 2000, *Re Hubertus AG*, 2 *ITLR*, 637 *et seq*., conclusions of the Commissaire du Gouvernement at 653-654 and 656; Bundesfinanzhof (Germany), 21 September 1999, *Re A Foreign Silent Partnership*, 2 *ITLR*, 859 *et seq*., at 866, where the Court made reference to domestic law for the purpose of determining whether income from an atypical silent partnership ("Atypische stille Gesellschaft" in German) constitute business profits for the purpose of the relevant tax treaty; Administrative Court of Appeal of Paris (France), 30 January 2001, *Re Schneider SA*, 3 *ITLR,* 529 *et seq*., at 545, where the Court referred to domestic law for the purpose of determining the meaning of the expression "Les bénéficies d'une entreprise d'un Etat contractant" in cases where the CFC rule applies under French domestic law; High Court (Denmark), 6 April 2001, *Halliburton Company Germany Gmbh v. Ministry of Treasury*, 4 *ITLR*, 19 *et seq*., at 41-42, where the Court made reference to domestic law in order to construe the terms "employer" and "employee" (and their corresponding Danish terms), as used in the 1948 Denmark-United States tax treaty and the 1955 Denmark-Canada tax treaty, in the case of hiring out of labor; *similarly*, the majority opinion in Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., at 813; Conseil d'Etat (France), 27 July 2001, *Re SA Golay Buchel France*, 4 *ITLR*, 249 *et seq*., at 257-258 and conclusions of the Commissaire du Gouvernement at 260-261, where both the Court and the Commissaire pointed out that although the term "interest" was autonomously defined in Article 12(3) of the relevant tax treaty, thus excluding the possibility of attributing to that term the meaning it had under French domestic law, the terms ("créances de tout nature") used in the definition provided for in Article 11(3) were not in turn defined and, therefore, they were to be given the meaning they had under French domestic law, unless the context required a different construction, in accordance with Article 3(2) of the treaty (explicitly *contra*, Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq*., at 202; the court, however, in its following arguments, made abundant reference to Czech Republic private law, in particular to the private law and income tax law meaning of the Czech term corresponding to "corporate right", in order to construe Article 10 of the relevant tax treaties - *ibidem*, at 203); Hoge Raad (Netherlands), 7 December 2001, case *35231*, 4 *ITLR*, 558 *et seq*., at 576, para. 3.3, in which the Court referred to domestic law in order to determine whether the recapture of the premiums on annuity policies, previously deducted by a taxpayer for the purpose of determining its taxable income, on the occasion of the surrender of the annuity by the non-resident taxpayer was to be regarded as an *item of income* for the purpose of the relevant tax treaty (question answered in the negative since, under Netherlands domestic law, such a recapture is seen as a *negative personal allowance* – i.e. a recapture of previously deducted personal allowances – and not as an item of income); Income Tax Appellate Tribunal of Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq*., at 732, para. 53, where the tribunal made reference to domestic law in order to determine the meaning of the term "business profits"; Federal Court of Appeal of Montreal (Canada), 15 March 2002, *Wolf v. R*, 4 *ITLR*, 755 *et seq*., at 768-773 per Desjardins JA., at 781-787 per Decary JA. and at 788 per Noel JA., where reference was made to the civil code of Quebec and

domestic case law (both in common and civil law) for the purpose of determining whether the contractual relationship between a United States resident taxpayer and a Canadian resident company was to be regarded as one of "independent personal services" under Article XIV of the 1980 Canada-United States tax treaty, or as one of "dependent personal services" under Article XV of the same treaty; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq*., at 1068, where the Court referred to domestic law in order to determine whether the CFC income imputed to a parent company was part of the "business profits" of the latter company for the purpose of Article 7 of the 1976 Belgium-Finland tax treaty; Conseil d'Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, at 1107-1108, and conclusions of the Commissaire du Gouvernement at 1118-1126, where reference to domestic law was made for the purpose of determining the meaning of the expression "Les bénéficies d'une entreprise d'un Etat contractant" in cases where CFC rule applies under French domestic law; Federal Court of Appeal (Canada), 4 February 2004, *Beame v. R*, 6 *ITLR*, 767 *et seq.*, at 772-724, paras. 17-21, where the Court made reference to domestic law in order to interpret the term "income" used in Article VI(1) of the 1966 Canada-Ireland tax treaty; Tax Court (United States), 29 June 2004, *Abeid v. Commissioner of Internal Revenue*, 7 *ITLR*, 202 *et seq*., at 207, where the Court made reference to the domestic tax law meaning of the expression "adequate and full consideration", which was used in the definition of "annuities" provided for in the English authentic text of Article 20(5) of the 1975 Israel-United States tax treaty; Administrative Court (Luxembourg), 17 January 2006, *Re XXX SA*, 9 *ITLR*, 176 *et seq*., at 187-188, where reference to domestic law was made for the purpose of interpreting the term "déduction" in Article 24(1)(b) of the 1986 Luxembourg-Spain tax treaty (the court concluded that, since under Luxembourg's domestic law a credit for foreign taxes is allowed only against Luxembourg corporate tax, and not against Luxembourg municipal business tax, under the 1986 Luxembourg-Spain tax treaty Spanish taxes might be credited only against Luxembourg corporate tax, notwithstanding the fact that also Luxembourg municipal business tax was regarded as an income tax under Article 2 of the treaty); First Council of Taxpayers (Brazil), 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue Department in Brasilia*, 9 *ITLR*, 627 *et seq*., at 658, where reference was made to domestic law in order to determine whether the term "pagos" ("paid") in the Portuguese authentic text of Article 10 of the 1974 Brazil-Spain tax treaty might be construed as denoting the attribution of the profits of a subsidiary, tax resident of Spain, to its parent company, tax resident of Brazil, under the CFC rule of the latter State; Conseil d'Etat (France), 29 December 2006, *Ministre de l'Economie, des Finances et de l'Industrie v. Société Bank of Scotland*, 9 *ITLR*, 683 *et seq.*, at 703, where the Court affirmed that the re-characterization, under French anti-avoidance law, (i) of a usufruct agreement on non-voting preference shares (of a French resident subsidiary) into a loan agreement and (ii) of a dividend payment (by the French resident subsidiary) into a loan reimbursement on behalf of the non-resident parent company debtor, might be applied as well for the purpose of the relevant tax treaties (i.e. the tax treaty between France and the State of residence of the parent company and the tax treaty between France and the State of residence of the usufructuary – loan creditor); High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 79-81, where the Court referred to domestic law for the purpose of determining the meaning of the term "days" as used in Article 3(1)(e)(ii)(bb) of the 1971 Italy-Ireland tax treaty, according to which "the term 'resident of Italy' means […] any other person who is resident in Italy for the purposes of Italian tax and […] if resident in Ireland [for the purposes of Irish tax] is present therein for a period or periods not exceeding in the aggregate 91 days in the fiscal year"; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq*., at 187-194, in particular paras. 28, 37, 41, 42, 47 and 49, where the Court made reference to Canadian domestic law, as interpreted by Canadian courts (see Supreme Court (Canada), 25 January 1983, *Nowegijick v. R*, [1983] 1 SCR 29 and Tax Court (Canada), 10 November 2006, *Kuwalek v. R*, 2007 DTC 199), for the purpose of construing the term "derived" as used in Article XV(1) of the 1980 Canada-United States tax treaty and, more specifically, of determining whether the sentence "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", found in Article XV(1), prevented Canada from taxing a bonus accrued to an employee when he was tax resident of (and working in) the United States, but paid when he had already become tax resident of Canada (for treaty purposes): the Court concluded that, since under Canadian domestic law employment income (including bonuses) is taxable when received, Article XV(1) of the tax treaty did not preclude Canada from taxing the bonus; Bundesfinanzhof (Germany), 17 October 2007, *Re a Partnership*, 10 *ITLR*, 628 *et seq*., at 646, where the Court relied on domestic law for the purpose of interpreting the undefined term "debt claim" ("Forderung" in the German authentic text) used in Article 11 of the 1989 Germany-United States tax treaty; Tax Court (Canada), 22 April

Against this background, the author has decided to devote the first part of this section to the study of the functioning of the rule of interpretation provided for in Article 3(2) OECD Model. This analysis is carried out in section 5.3.

Likewise, section 5.4 examines the other provisions of the OECD Model that refer to the contracting States' domestic laws for the purpose of construing undefined legal jargon terms.

Finally, section 5.5, elaborating on the results of the analysis carried out in the previous sections, attempts to answer the research questions outlined in section 5.1.

2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 750, para. 40 and at 757, para. 62, where the Court, in connection with the interpretation of the terms "beneficial owner" and "bénéficiaire effective" in the English and French authentic texts of Article 10(2) of the 1986 Canada-Netherlands tax treaty, noted (i) that the concept of beneficial owner is not recognized in the civil law of Quebec, (ii) that the term "beneficial owner" is used in the English official version of the Canadian Income Tax Act, but its tax treaty correspondent "bénéficiaire effective" is not in the French official version thereof (other terms such as "propriété effective" and "droit de bénéficiaire" are used instead) and (iii) that such terms are not defined in the Canadian Income Tax Act; *ibidem*, at 765-769, in particular paras. 95, 98-100 and 105, where the Court concluded that (a) in both (Canadian) common law and civil law, the persons that ultimately receive the income are the owners of the income property, (b) in that respect and within the Canadian Income Tax Act system, the beneficial owner is the person who enjoys and assumes all the attributes of the ownership, i.e. the true owner of the property (income), (c) such a meaning applies as well to the terms "beneficial owner" and "bénéficiaire effective" as used in the relevant tax treaty; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 345-346, paras. 28-31, where the Court referred to domestic law for the purpose of construing the term "the Australian income tax" employed in Article 2(1)(a) of the 1980 Australia-Switzerland tax treaty; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*, at 698-699, paras. 102-106, where the Court referred to the tax imposed by the Commonwealth under the 1936 Australian Income Tax Assessment Act for the purpose of construing the expression "the Commonwealth income tax" employed in the 1967 Australia-United Kingdom tax treaty; Federal Regional Court (Brazil), 4 June 2009, *Federal Union v. Copesul – CIA/Petrochimica do Sul*, 12 *ITLR*, 150 *et seq.*, at 164 *et seq*., where the Court relied on domestic law in order to determine whether the term "lucros das empresas" ("business profits"), employed in the 1984 Brazil-Canada tax treaty and in the 1975 Brazil-Germany tax treaty, denoted also fees for technical services; Tax Court of Münster (Germany), 22 February 2008, *Re Reduction of Profits in Connection with the Sale of Shares in S*, 12 *ITLR*, 274 *et seq*., at 305-306, where the Court concluded that a hidden distribution of profits by a Netherlands resident subsidiary to a German resident parent company (substantially a transfer pricing secondary adjustment) constituted a dividend for the purpose of Articles 13 and 20 of the 1959 Germany-Netherlands tax treaty (corresponding to Articles 10 and 23 OECD Model, respectively), since the treaty did not include any definition of dividends and, under German domestic tax law (to which Article 2(2) of the tax treaty made a *renvoi*), that type of hidden distribution of profits was treated as a dividend (note that the court referred to the domestic law of Germany, as the State applying the treaty under Article 2(2) thereof, for the purpose of determining whether the Netherlands had a right to tax such hidden distribution under Article 13(4) of the tax treaty; it is however unclear if this amounted to a rejection of the OECD approach to conflicts of income qualification, since apparently the same qualification took place under Netherlands domestic law – see *ibidem*, at 306); see, implicitly, Court of Appeal of England and Wales (United Kingdom), 8 July 2010, *Smallwood and another v. Revenue and Customs Commissioners*, 12 *ITLR*, 1002 *et seq.*, at 1021, para. 36, where Patten LJ noted that Article 13(4) of the 1981 Mauritius-United Kingdom tax treaty only established the basis of taxation of gains for a residual category of property (i.e. property other than those dealt with in paragraphs 1 through 3 of the same Article 13) and, thus, was not concerned with how each of the contracting States chose to tax gains on the basis of residence: he therefore concluded that the issue of whether the taxpayer should be resident in the State at the time of disposal or at some other point in time was a matter for that very same State to decide as part of its own domestic law.

5.3. Article 3(2) OECD Model: history, structure and functioning

5.3.1. History of Article 3(2) OECD Model

No provision comparable to Article 3(2) OECD Model was included in the draft models and works drawn up under the auspices of the League of Nations and the Organization for European Economic Cooperation (hereafter "OEEC"). Despite this, the problem of allocating taxing rights among States having different categorizations of income had been already mentioned in the 1923 Report to the League of Nations prepared by Bruins, Einaudi, Selingman and Stamp, who noted that "the economic conception of income is so complex and that of the legal and statutory definitions of income by different countries are so diverse that the problem of double taxation is much more seriously complicated for this class of taxes than for any other".[1552]

Interestingly, in addition to not including any general rule similar to Article 3(2) OECD Model, the draft models up to the 1946 League of Nations London draft contained almost no definition of income types or categories. On the contrary, as Avery Jones has also noted,[1553] the common law countries, in particular the United States, had by the forties started to include more and more definitions of income types, as well as income sources.[1554] It is therefore not unexpected to find that a provision closely resembling Article 3(2) of the 1963 OECD Draft had been included, for the first time, in a tax treaty concluded between two common law countries, Article II(3) of the 1945 United States-United Kingdom tax treaty, which reads as follows:

> In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.

From then on, a provision containing a general *renvoi* to the law of the State applying the treaty was included in almost all tax treaties concluded by common law countries

[1552] See League of Nations Economic and Financial Commission, "Report on Double Taxation, submitted to the Financial Committee of the League of Nations by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp", EFS 73, F 19 (Geneva: 3 April 1923), at 45. One possible reason why, notwithstanding this warning, no specific rule dealing with the possible qualification conflicts arising from the different domestic categorizations of income was included in the League of Nations drafts is that, at that time, "many pioneer international tax practitioners were convinced that the meaning of the "international tax language" in tax treaty should, and would, be determined by international or supranational courts" (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 2.02 and 10.01).

[1553] See J. F. Avery Jones, "The interaction between tax treaty provisions and domestic law", in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 124.

[1554] See the 1942 Canada-United States and the 1945 United Kingdom-United States tax treaties.

and, after some years, in those concluded between civil law countries as well.[1555]

The origin of such a provision may be traced back to the Unites States and United Kingdom domestic laws and regulations.[1556] In particular, the United States Regulations issued in 1940 under Article XXI of the 1939 United States-Sweden tax treaty, although the latter did not include a provision resembling Article 3(2) OECD Model, provided that any term used in those regulations and not defined in the treaty was to be given the meaning expressed by the definition (if any) included in the Internal Revenue Code.[1557] Yet this provision of the United States Regulations made no reference at all to the context. It was only in Article II(3) of the 1945 United States-United Kingdom tax treaty that contracting States, for the first time, made the application of the domestic law meaning to undefined treaty terms explicitly subject to the condition that the context did not otherwise require. That addition is generally considered to have its roots in the United Kingdom domestic law, where expressions such as "unless the context otherwise requires" had been largely used in statutes since the end of the XIX century.[1558]

As far as the author is aware, Article 3(2) was suddenly included in the 1963 OECD Draft without any documented discussion, among the OECD member States' representatives, on its purpose, scope, and significance. The English official version of Article 3(2) of the 1963 OECD Draft reads as follows (*emphasis* added):

> As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State *relating to the taxes which are the subject of the Convention*.

In the 1977 OECD Model, the English official version of Article 3(2) was modified to a limited extent, most probably without any aim of changing its substance[1559] (*emphasis* added):

> As regards the application of the Convention by a Contracting State any term not defined *therein* shall, unless the context otherwise requires, have the meaning which it has under

[1555] See, in this respect, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 18-19.
[1556] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 18, footnote 14.
[1557] See United States Regulations T.D. 4975, 1940-2 C.b. 43, 52. See also the Regulations issued under the 1942 Canada-United States tax treaty §519.1(b), §519.110(a) and §519.114(b); and those issued under the 1939 France-United States tax treaty §514.1(b), which made reference to the more general "internal revenue laws" for interpretive purposes.
[1558] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 93, in particular footnote 16.
[1559] See, accordingly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 10.01 and J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 19, in particular footnote 17; *contra* C. van Raad, "Interpretatie van belastingverdragen", 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*, at 52-53, footnotes 19 and 21.

> the law of that State *concerning the taxes to which the Convention applies.*

A more extensive amendment was included in the 1995 version, primarily in order to explicitly deal with the issue of the static or ambulatory reference to the contracting States' domestic law.[1560] This amendment led the English official version of Article 3(2) OECD Model in its current shape (*emphasis* added):

> As regards the application of the Convention *at any time* by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning *that* it has *at that time* under the law of that State *for the purposes of* the taxes to which the Convention applies, *any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State*.

The current French official version of Article 3(2) OECD Model reads as follows:

> Pour l'application de la Convention à un moment donné par un État contractant, tout terme ou expression qui n'y est pas défini a, sauf si le contexte exige une interprétation différente, le sens que lui attribue, à ce moment, le droit de cet État concernant les impôts auxquels s'applique la Convention, le sens attribué à ce terme ou expression par le droit fiscal de cet État prévalant sur le sens que lui attribuent les autres branches du droit de cet État.

An analysis of the possible bearing of the above-reported amendments of the English official version of Article 3(2) OECD Model, as well as of the changes that the French official version has gone through,[1561] is made in the following sections of this chapter.

With regard to the Commentary, the 1963 OECD Draft was quite laconic. It read, at paragraph 8:

> The rule of interpretation laid down in paragraph 2 corresponds to similar provisions normally appearing in double taxation Conventions. The rule of interpretation in paragraph 2 of Article 6 on the taxation of income from immovable property, which has to be regarded as "lex specialis" is in no way affected by the present general rule of interpretation.

In the Commentary to the 1977 OECD Model, the above paragraph was replaced by the following (equally laconic) one:

> This paragraph provides a general rule of interpretation in respect of terms used in the Convention but not defined therein.

The Commentary was significantly expanded in 1992 in order to deal with certain issues

[1560] I.e. whether the reference to the domestic law of the contracting States was intended as a reference to the domestic law as existing at the time of the treaty conclusion, or at the time of its application to a specific set of facts. This issue is dealt with in section 5.3.2.3 of this chapter.

[1561] In 1977 the French official version of Article 3(2) OECD Model had been modified so that the expression "législation […] régissant" was replaced by the expression "droit […] concernant".

concerning the interpretation and application of tax treaty provisions similar to Article 3(2) OECD Model which had been pointed out by international tax scholars. In 1995, the OECD polished the wording of the existing paragraphs, without changing their substance, and added new paragraph 13.1, dealing with the amendments made in the 1995 version of Article 3(2) OECD Model. From then on, the Commentary to Article 3(2) OECD Model has remained untouched. It reads as follows:

> 11. This paragraph provides a general rule of interpretation for terms used in the Convention but not defined therein. However, the question arises which legislation must be referred to in order to determine the meaning of terms not defined in the Convention, the choice being between the legislation in force when the Convention was signed or that in force when the Convention is being applied, i.e. when the tax is imposed. The Committee on Fiscal Affairs concluded that the latter interpretation should prevail, and in 1995 amended the Model to make this point explicitly.
>
> 12. However, paragraph 2 specifies that this applies only if the context does not require an alternative interpretation. The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based). The wording of the Article therefore allows the competent authorities some leeway.
>
> 13. Consequently, the wording of paragraph 2 provides a satisfactory balance between, on the one hand, the need to ensure the permanency of commitments entered into by States when signing a convention (since a State should not be allowed to make a convention partially inoperative by amending afterwards in its domestic law the scope of terms not defined in the Convention) and, on the other hand, the need to be able to apply the Convention in a convenient and practical way over time (the need to refer to outdated concepts should be avoided).
>
> 13.1. Paragraph 2 was amended in 1995 to conform its text more closely to the general and consistent understanding of member states. For purposes of paragraph 2, the meaning of any term not defined in the Convention may be ascertained by reference to the meaning it has for the purpose of any relevant provision of the domestic law of a Contracting State, whether or not a tax law. However, where a term is defined differently for the purposes of different laws of a Contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over all others, including those given for the purposes of other tax laws. States that are able to enter into mutual agreements (under the provisions of Article 25 and, in particular, paragraph 3 thereof) that establish the meanings of terms not defined in the Convention should take those agreements into account in interpreting those terms.

5.3.2. The renvoi to domestic law provided for in Article 3(2) OECD Model

5.3.2.1. Forward

"Article 3(2) was a brilliant solution. The result is that in any case where the treaty relieves a category of income from tax, the relief corresponds exactly with the internal law taxing provision. This is far more important than that the treaty category of income has the same scope in each State" [1562]

As Arnold puts it, "[a] tax treaty is negotiated by a particular country with its domestic tax system in mind. Tax treaties limit domestic tax; they do not generally impose tax themselves. Tax treaties make sense only in the context of a domestic tax system; they are accessory to domestic tax systems and do not have any independent existence or meaning. This relationship between tax treaties and domestic law is illustrated by Art. 3(2) of the OECD Model".[1563]

Such a relationship between tax treaties and the contracting States' domestic law may, and generally does, lead the former to have different effects when applied by the two contracting States.[1564]

From a tax policy perspective, the great difficulty in achieving equality of tax treatment in both contracting States, due to the interaction between the tax treaty provisions and the (generally different) domestic tax law provisions,[1565] might have as its natural consequence that of driving contracting States to make all possible efforts in order to render such an interaction as effective and efficient as possible, so as at least to render tax treaties easy to apply and avoid instances of double non-taxation.

That is what OECD member States actually did through Article 3(2) OECD Model, the latter establishing the rule of law by means of which domestic law provisions are made capable of interacting with tax treaty provisions: via Article 3(2), tax treaty provisions are construed as the rules best fitting the underlying domestic tax law rules of the two contracting States.

The unavoidable other side of the coin is that, where each contracting State construes the relevant treaty terms in accordance with the meaning they (or synonyms and proxies thereof) have under its own domestic law, the frequent difference of meaning between the corresponding terms used under the domestic laws of the two contracting States inevitably leads to a difference between the meanings attributed to the

[1562] J. F. Avery Jones, "The interaction between tax treaty provisions and domestic law", in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 125.
[1563] B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 9-10.
[1564] See Supreme Court (United States), 29 April 1963, *Maximov v. United States,* 373 U.S. 49 (1963), at 54.
[1565] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 12.01, according to whom "tax treaties will not normally have an equal fiscal effect in each contracting State. This is because the effect of a tax treaty in each State will primarily depend upon each State's tax laws – and each State's tax laws will differ. […] Accordingly, the ordinary meaning of reciprocally-expressed tax treaty terms should not be distorted in an attempt to achieve "equality of effect". A tax treaty must simply be applied – regardless of its effect (if any) in each State". The author, in this respect, (also) refers to the following case law: District Court for Northern District of California (United States), 6 April 1956, *American Trust Company v. James G. Smyth*, 141 F. Supp. 414, and Supreme Court (United States), 29 April 1963, *Maximov v. United States,* 373 U.S. 49 (1963). See also *ibidem* at 10.02 and 10.03.

very same treaty provisions by the two contracting States,[1566] unless the context requires a uniform meaning to be attached thereto. Such differences of meaning may in turn lead the two contracting States, depending on the facts of the case, to apply two different treaty provisions (distributive rules) in comparable circumstances.

Article 3(2) is often said to encompass a renvoi to the substantive *lex fori*,[1567] i.e. a type-II *renvoi*. Tax treaties are, in the vast majority of cases, interpreted and applied in order to determine whether they limit the taxing rights that a contracting State has under its domestic tax law; therefore, they are generally construed and applied together with and in relation to domestic tax law. Differently from what happens in the field of private law, where the rules of private international law applicable in one State may lead a court of that State to make reference to and apply the substantive private law rules of a different State in order to solve a dispute, in the income tax field domestic courts and tribunals generally do not apply (and enforce) other States' domestic tax law, but only their own States' domestic tax law. This means that tax treaties are, in most cases, interpreted and applied by the courts and tribunals of the State whose domestic income tax law may be limited by the treaty provisions to be construed. For this reason, Article 3(2) OECD Model, which makes reference to the law of the contracting State applying the treaty, may appear to encompass a *renvoi* to the *lex fori*.

However, this classification appears misleading and based on an "accident" (in its philosophical sense) of the *renvoi* established by Article 3(2). The main purpose of Article 3(2) *renvoi* is to guarantee a correspondence and a strict interaction between the domestic law provisions imposing tax on certain categories of income and the tax treaty provisions relieving that taxation, which entails an ontological *renvoi* to the domestic law that encompasses the latter provisions; it is only by "accident" that the latter is also the domestic law of the State of the court or tribunal deciding the relevant case, since it is theoretically possible that this is not the case.[1568] Moreover, it leads to the wrong inference that the national court or tribunal, faced with a case (also) concerning the

[1566] Fantozzi, in this respect, affirms that "in the case of [tax treaties], there is the meeting of two legal worlds, often very different. The treaty, in its various linguistic versions, becomes the means by which these two different worlds communicate, the screen through which the two legal systems see each other. It is, then, clear that in this context, the meaning to be attributed to the words requires a deeper understanding of the juridical concept beneath the words, as it applies in the other country's legal system. […] one could say that the interpreter of a [tax treaty] deals with fluid concepts and therefore translation needs, necessarily, to be coupled with classification – since the envelop [*author's note*: i.e. the "words"] has to be hard, this time is the container [*author's note*: i.e. the "words"] that gives the shape to the content [*author's note*: i.e. the " juridical concept"]" (A. Fantozzi, "Conclusions", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), pp. 335 *et seq.*, at 338).

[1567] See, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 208, m.no. 59); S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 313, footnote 114.

[1568] E.g. where a case is submitted to an arbitral tribunal; or in the much more common case of a national court called to apply a provision similar to Article 23-A OECD Model, for the purpose of which it is compelled to check whether the other contracting State may tax the relevant item of income according to the provision of the tax treaty (where the court is willing to follow the directions encompassed in the Commentary to Article 23 OECD Model).

interpretation and application of a specific tax treaty provision, must construe all the provisions of that tax treaty by reference of its own domestic law, unless it is otherwise explicitly provided. However, as the OECD has recognized since 2000 in paragraphs 32.1-32.7 of the Commentary to Article 23 OECD Model,[1569] there are cases where the relevant national court or tribunal has to look at the other contracting State's law rather than at its own law, for the purpose of interpreting certain tax treaty provisions, namely where a court of the residence State is to decide, for the purpose of granting tax relief under Article 23 of a OECD Model-type tax treaty, whether the other contracting State may tax an item of income of the taxpayer in accordance with the provisions of that treaty.

Article 3(2) *renvoi*, therefore, should be better considered to be a type-IV *renvoi*, the relevant domestic law being that of the State whose right to tax under its own income tax law might be limited by the tax treaty provisions to be interpreted,[1570] or, where the treaty provisions may not have such effect, the law of the State bound by the application of those provisions.

Finally, the role that the overall context plays for the purpose of the *renvoi* provided for in Article 3(2) OECD Model is worth highlighting.

First, the overall context determines the *limes* of the concept, underlying each tax treaty undefined term, which cannot be crossed by means of the *renvoi* to the domestic law concepts.[1571]

Second, treaty undefined legal jargon terms are sometimes ambiguous under the domestic law of the State applying the treaty. In those cases, the underlying domestic law concept to be applied in order to construe the treaty provision employing that legal jargon term must be selected among the various possible domestic law concepts on the basis of an analysis of the overall context.

Third, where the contracting States' official languages are not used as authentic languages of the treaty, the issue arises as to what should be considered the terms that, in the legal jargon of such contracting States, correspond to the terms used in the authentic texts of the treaty. Such correspondence should be established by the interpreter on the basis of the overall context, in particular by taking into account specialized bilingual dictionaries, comparative law studies, other tax treaties concluded by the contracting States (where both languages[1572] are used as authentic treaty languages), the object and purpose of the relevant tax treaty provision, other related provisions of the treaty, the OECD Commentary.[1573]

[1569] See also paragraph 8.10 of the Commentary to Article 15 OECD Model.

[1570] I.e. where provisions similar to those covered in Chapters III to V and Article 24 of the OECD Model are at stake.

[1571] The overall context, in fact, requires the interpreter to disregard the part of the domestic law concept (i.e. the denotata) that lays outside those *limes*. The role played by the overall context in this respect is analysed in section 5.3.3.2 of this chapter.

[1572] I.e. the official language of the States party to the tax treaty to be interpreted and (at least) one authentic language of such a treaty.

[1573] Such means of interpretations establish the correspondence between two terms of two distinct legal jargons based on (i) the similarity of the functions performed by the concepts underlying those two terms in their

Fourth, the overall context generally guides the interpreter in deciding whether proxies and assimilations under domestic law are to be taken into account for the purpose of construing the undefined treaty terms.

The following subsections analyse the most relevant theoretical issues arising from the application of Article 3(2) OECD Model.

5.3.2.2. Which State is applying the tax treaty? Interaction between Article 3(2) and the tax relief rule

For a long time scholars have debated on which contracting State should be regarded as the State applying the tax treaty for purposes of applying Article 3(2).

This debate has been particularly lively in respect of the case where the residence State has to determine whether it must grant exemption or credit under a tax relief article drafted along the lines of Articles 23-A and 23-B OECD Model, which compel the residence State to grant relief whenever an item of income may be taxed by the other contracting State "in accordance with the provisions of [the tax treaty]".

In this respect, the main issue is whether the residence State, in order to determine whether the other contracting State may tax a certain item of income in accordance with the provisions of the tax treaty, may construe the latter provisions by attributing to their undefined legal jargon terms the meaning they have under its own domestic law, disregarding the meaning that the very same (or corresponding) terms have under the law of the other contracting State. This issue is commonly referred to as a matter concerning "conflicts of qualification".[1574]

Two conflicting solutions have been put forward by scholars in order to solve "conflicts of qualification", both somewhat relying (although to a different extent) on the meaning of the term "application" employed in Article 3(2) OECD Model and, more generally, on the object and purpose of that article.

According to a first solution, each contracting State always refers to its own domestic law in order to determine the intension of undefined treaty terms and expressions.[1575]

Under this approach, while the source State[1576] applies its domestic law meanings in order to interpret the distributive rules and, therefore, determine whether it is entitled

---

respective legal systems and (ii) the overlapping of the prototypical items (facts and things) denoted (and non-denoted) by those two terms.

[1574] See Commentary to Article 23 OECD Model, Section E. Conflicts of qualification.

[1575] See K. Vogel, "La clause de renvoi de l'article 3, par. 2 Modèle de Convention de l'OCDE", in *Réflexions offertes a Paul Sibille. Études de fiscalité* (Brussels: Bruylant, 1981), 857 *et seq*., at 960 ; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 212-213, m.no. 66 ; K. Vogel and R. A. Prokisch, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993)*,* 55 *et seq.*, at 78-79.

[1576] The term "source State" is used here to denote the contracting State that is not the State of residence for the purpose of the treaty.

to tax (and to what extent) certain items of income or capital, the residence State applies its domestic law meanings in order to interpret the distributive rules, as well as to determine which of them it would have applied if it had been the source State.[1577] Only where, under such a fiction (i.e. had the residence State been the source State), the source State appeared entitled to tax the relevant item of income or capital under one of the distributive rules,[1578] would the residence State be bound to relieve juridical double taxation under Article 23 of the treaty, since in such a case it would regard the source State as entitled to tax "in accordance with the provisions of [the tax treaty]".

The main drawback to this solution is that it may easily lead to instances of double taxation (and double non-taxation), thus frustrating the object and purpose of the tax treaty. The double taxation (and non-taxation) is generally caused by the fact that the two contracting States may consider that two different distributive rule articles apply to a specific set of facts, due to the different scope of these articles as determined by the two States through the attribution to their undefined legal jargon terms, via Article 3(2), of the different meanings these terms have under their respective domestic laws.

In order to counteract this undesirable result, the interpreter could take the view that the context requires a "uniform" interpretation avoiding double (non-) taxation.[1579] This heavy reliance on the context, however, drastically increases the unpredictability of the interpretation, since different interpreters (with different cultural backgrounds) are likely to apply different uniform "contextual" meanings to the same treaty term, and thus this appears detrimental to legal certainty.

According to a second solution, in contrast:

> (i) both contracting States apply the distributive rule articles, as interpreted by attributing to their undefined legal jargon terms the meanings they have under their respective domestic laws, in order to check whether those articles prevent them from taxing the relevant items of income;
>
> (ii) the residence State, in addition, applies the tax relief article in order to assess whether it is obliged to grant exemption or credit.[1580]

In case (ii), however, the residence State is simply applying the tax relief article (and no longer the distributive rule articles) and the only undefined legal jargon terms that it must interpret by means of the *renvoi* to its own domestic law are the terms employed in such an article (not the terms employed in the distributive rule articles, which are not

[1577] See Vogel in K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 211-212, m.nos. 65 and 65a, who maintains that "'application' is every decision by a tax authority or a court of law on a tax question for which the treaty is considered or should be considered".

[1578] I.e. under any of the provisions of Articles 6 through 22, as interpreted by the residence States by attributing to their undefined terms and expressions the meanings they have under its own domestic law.

[1579] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 5.04, 7.02, 8.14 and 8.20, who submits that references to unilateral domestic law should, as far as possible, be avoided in favor of an autonomous contextual meaning, the treaty language being an "international tax language".

[1580] Obviously, step (ii) is not carried out by the residence State in cases where it cannot tax the relevant item of income under the applicable (from its perspective) distributive rule; this may be the case, in certain cases, where tax treaty articles resembling Articles 8, 19 and 20 OECD Model are considered applicable by the residence State.

applied by the residence State for the purpose of granting relief). Where the tax relief article does not include any term denoting a category of income, it is irrelevant for the purpose of applying that article which term used in the distributive rule articles would denote the relevant item of income under the residence State's domestic law. The only question that the residence State must answer is whether the source State may tax the relevant items of income where it (the source State) applies the treaty distributive rules, i.e. where those rules are interpreted on the basis of the meaning that the legal jargon terms used therein have under the domestic law of the source State.[1581]

The most important advantage of this solution is to avoid that the interpretation and application of tax treaties based on the *renvoi* encompassed in Article 3(2) lead, *per se*, to double taxation or non-taxation.[1582] This is also a relevant argument favoring the interpretation of Articles 3(2) and 23 OECD Model underlying such a solution:[1583] it is indeed reasonable to consider that those articles have to interact in such a way as to

---

[1581] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 50"; J. F. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 133 and 142 *et seq*. See also, although based on a more restrictive interpretation of the term "application" used in Article 3(2), J. F. Avery Jones, "United Kingdom", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 597 *et seq.*, at 609); J. F. Avery Jones, "Qualification Conflicts: the Meaning of Application in Article 3(2) of the OECD Model", in H. Beisse et al. (eds.), *Festschrift für Karl Beusch zum 68. Geburtstag am 31. Oktober 1993* (Berlin: Walter de Gruyter, 1993), 43 *et seq.*, at 47.

This approach has been criticized for many years by other scholars, such as, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 211-213, m.nos. 65-66; P. Baker, *Double Taxation Conventions* (London: Sweet & Maxwell, 2001 – loose-leaf), m.no. E.21; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.20; G. Melis, *L'interpretazione nel diritto tributario* (Padova: Cedam, 2003), pp. 679-685. For a reply to the most severe criticism, see See J. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 133 and 142, who, however, recognized that the practice of many States pointed towards a different solution (see *ibidem*, at 135 and 143-146).

On the other hand, the American Law Institute faced the issue without taking a clear position on whether the residence State was required to follow the source State's domestic law characterization of the relevant items of income when granting tax relief under OECD Model-type tax treaties, although recommending it as a proper solution to be implemented where the mutual agreement procedure failed to solve the conflicts of qualification between the contracting States (see American Law Institute, *Federal Income Tax Project. International Aspects of United States Income Taxation, II. Proposals on United States Income Tax Treaties* (Philadelphia: American Law Institute, 1992), at 62 and 237).

[1582] Double non-taxation may, in any case, result where the residence State exempts the relevant items of income under Articles 8, 19 and 20 of a OECD Model-type tax treaty, as construed by attributing to their undefined legal jargon terms the meaning they have under the residence State's domestic law, and the other contracting State exempts as well such items of income under different provisions of the treaty, as construed by attributing to their undefined legal jargon terms the meaning they have under the other contracting State's domestic law.

[1583] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 212, m.no. 66, where Vogel highlights, as the sole argument in favor of this solution, "its reasonable result". See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 504-505, who supports this solution on the basis that it is demanded by an interpretation of tax treaties in good faith and in light of their object and purposes (in particular, by the principle of *effectiveness)*.

avoid, as much as possible, double taxation[1584] and non-taxation in the quite common situations where the two contracting States attribute different meanings under their respective domestic laws to the same (or corresponding) undefined legal jargon treaty term(s).

On the other hand, one of its main limits lies in the fact that its functioning is strictly intertwined with the wording of Article 23 OECD Model and its effectiveness in avoiding double taxation and non-taxation may depend on the absence in the tax relief article of terms denoting categories of income. Unfortunately, States do not generally follow the wording of Article 23 OECD Model in their tax treaties and, in many cases, they make treaty relief subject to their domestic law relief rules,[1585] or make explicit reference in the treaty relief article to certain items of income (e.g. dividends) by means of terms denoting them.[1586] Whenever the text of the treaty relief provision significantly departs from the text of Article 23 OECD Model, the treaty text must be analysed in order to determine whether and to what extent this solution may apply in the specific case.

Another significant limit of this solution is that it requires the residence State to assess whether the source State applied correctly the tax treaty on the basis of the latter State's domestic law. This implies knowledge by the taxpayer, the tax authorities and the courts of the residence State of the domestic law of the source State and, more specifically, of the meaning that the undefined legal jargon terms employed in the treaty distributive rule articles have under that law. This assessment often represents a significant procedural burden and may raise issues under the domestic law of the residence State with regard to (i) the person with whom the burden to prove the law of the other contracting State lies, (ii) the actual threshold of such a burden and (iii) the consequences stemming from its non-satisfaction.[1587]

[1584] Especially in light of the fact that the most important goal of double tax treaties, often expressly mentioned in their titles, as well as in the heading and corpus of the tax relief articles (where expressions such as "double taxation shall be avoided" are employed), is to avoid double taxation.

[1585] This is particularly true with regard to States using the credit method to relieve international juridical double taxation. See, accordingly, J. F. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 120, where further references are made. One of the possible reasons for the recurrent deviations from the wording of the OECD Model is that relief provisions are generally very detailed and complicated rules and States may probably find it more convenient to have recourse to already drafted and tested domestic law provisions, rather than look for new solutions to be implemented in their tax treaties.

[1586] See J. F. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 133-138. This case is different from the case where the tax treaty relief article refers to (named or unnamed) income taxable by the source State in accordance with a certain article of the tax treaty, such as where reference is made to taxation in accordance with Articles 10 and 11 (see Article 23 OECD Model or Article 23(4) of the 1986 Italy-China tax treaty); in the latter case, in fact, the issue is in all relevant respects analogous to the issue that normally arises where the tax relief article simply states that the residence State must exempt the income or give a credit for the taxes levied by the source State where the latter may tax the income in accordance with the provisions of the tax treaty.

[1587] Such issues are interconnected with the questions of (a) the applicability of the principle *iura novit curia* and (b) whether the residence State's courts, not being persuaded of the actual content of the other contracting State's domestic law, may apply the *lex fori* under the (rule of evidence) presumption that the other contracting State's domestic law corresponds to the law of the residence State with regard to the specific aspect at stake (see, with reference to a case where the court of a contracting State needed to determine the concept of tax

This conflict of views among scholars was allegedly put to an end in 2000 by the OECD, which amended the Commentary to Article 23 OECD Model to substantially embrace the second solution.[1588]

Among OECD member States, only the Netherlands[1589] and Switzerland[1590] entered observations in respect of the new paragraphs of the Commentary dealing with "conflicts of qualification" and no position was expressed by OECD non-member States opposing this.

Finally, it is the author's impression that the way in which the issue discussed in this section is resolved significantly affects the choice, made by the interpreter, to attribute to undefined legal jargon treaty terms their domestic law meaning or, in contrast, some uniform "contextual" meaning.

The interpreters who decide to follow the first solution generally tend to attribute a uniform "contextual" meaning to undefined tax treaty terms, in order to avoid possible issues of double taxation and non-taxation.[1591]

On the other hand, the interpreters opting for the second solution generally tend to attribute to undefined tax treaty terms their domestic law meanings, due to the comparatively higher ease of application and guarantee of legal certainty that characterize the attribution of the relevant domestic law meaning as compared to the attribution of a uniform "contextual" meaning, the instances of double taxation and non-taxation being in any case reduced by the operation of the OECD approach to conflicts of qualification.[1592]

---

residence under the law of the other contracting State, the application by the Tax Court of Canada in the *Yoon* case of the *lex fori* as a presumptive proxy of the law of the other contracting State - Tax Court (Canada), 22 July 2005, *Yoon v. R*, 8 *ITLR*, 129 *et seq*., at 137-139, paras. 12-17).

[1588] See paragraphs 32.2 and 32.3 of the Commentary to Article 23 OECD Model.

[1589] The Netherlands rejects the automatic application of the second solution to its tax treaties as long as they do not include any specific provision to that extent, or a mutual agreement has been reached in that respect with the competent authorities of the other contracting State (see paragraph 80 of the Commentary to Article 23 OECD Model).

[1590] Switzerland, on the contrary, reserves its right not to apply the solution adopted by the OECD only insofar the conflict of qualification results from a modification to the internal law of the source State subsequent to the conclusion of the tax treaty (see paragraph 81 of the Commentary to Article 23 OECD Model; see also the Swiss reservation at paragraph 27 of Annex II to the OECD Partnerships Report).

[1591] See, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 215-216, m.nos. 73-74; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), Chapters 8 and 10; M. Lang, "Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD Musterabkommen)", in G. Burmester and D. Endres (eds.), *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* (Munich: Beck, 1997), 283 *et seq*., at 303 *et seq*.

[1592] See, for instance, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to Article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 108; C. van Raad, "Interpretatie van belastingverdragen", 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*, at 52.

5.3.2.3. Whether the renvoi to domestic law should be intended as static or ambulatory

In 1995, Article 3(2) of the OECD Model was amended "to conform more closely to the general and consistent understanding of [OECD] Member states"[1593] that the *renvoi* to the contracting States' domestic law, for the purpose of interpreting undefined treaty terms, was to be regarded as ambulatory, i.e. referring to the domestic law in force at the time of the treaty application, and not as static, i.e. referring to the domestic law in force at the time of the treaty conclusion.

However, most of the tax treaties currently in force do not explicitly affirm the ambulatory nature of the *renvoi*, since they are based either on the 1963 OECD Draft, or on the original version of the 1977 OECD Model. It is therefore relevant to examine whether, and on the basis of which arguments, the ambulatory nature of the *renvoi* to the contracting States' domestic law may be upheld in the absence of the unambiguous wording included in the 1995 version of Article 3(2) OECD Model.

First and foremost, in 1992[1594] the OECD had already modified the Commentary to Article 3 OECD Model in order to make clear that the reference to domestic law in Article 3(2) should be regarded as reference to the law in force at the time of the treaty application, unless the context required a different interpretation.[1595]

Second, scholars have generally expressed their preference for the dynamic application of the *renvoi* encompassed in Article 3(2) on the basis of the following arguments.

First, the ambulatory application of the *renvoi* to the contracting States' domestic law leads to significant practical advantages, such as:[1596]

(i) tax treaties are easier to apply if the interpreter does not have to investigate what the law was at the time of the treaty conclusion;
(ii) static interpretation leads to a more frequent need for revision of tax treaties, in order to make them workable in the context of subsequently modified domestic tax laws and capable of fulfilling their primary purpose of avoiding double taxation (and non-taxation);
(iii) if the static approach were embraced, the interpreter would have to answer the uneasy question of what the relevant moment is that should be regarded as the

[1593] See paragraph 13.1 of the Commentary to Article 3 OECD Model.
[1594] I.e. before Article 3(2) OECD Model was amended in 1995.
[1595] See paragraphs 11 and 12 of the Commentary to Article 3 OECD Model. See also Report *Tax Treaty Override*, adopted by the OECD Council on 2 October 1989, at R(8)-4, para. 4. b). On the 1992 amendments of the Commentary to Article 3 OECD Model, see K. van Raad, "Additions to Article 3(2) (Interpretation) and 24 (Non-Discrimination) of the 1992 OECD Model and Commentary", 20 *Intertax* (1992), 671 *et seq.*, at 672-674.
[1596] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 41 and 46; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.05; G. Tixier, G. Gest and J. Kerogues, *Droit Fiscal International* (Paris: Librairies Techniques, 1979), para. 474; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 64, m.no. 124d.

time of the treaty conclusion, the possible choices being the date of initialing, of signature, of ratification, or of entry into force of the treaty;

(iv) if the static approach were embraced, in cases of later amendments to the treaty, the interpreter should decide whether the domestic law in force at the date of the amendments (or that in force at the time of the treaty original conclusion) is to be taken into account.

Furthermore, the analogical application of the doctrine of inter-temporal law developed in the field of public international law[1597] seems to support the application of the ambulatory approach, since that would appear to be the original intention of the parties, as emerging from the analysis of the nature and structure of the treaty and from its object and purpose.[1598]

A limited support for the static approach has been found in the argument that the alternative (ambulatory) approach would give the contracting States the opportunity to alter the scope of their international obligations by means of changing their domestic law after the conclusion of the relevant treaty.[1599] However, the decisive counterargument has been put forward that major domestic law amendments, subsequent to the treaty conclusion, would not in most cases be relied upon for the purpose of treaty interpretation, either because the context, part of which must be the effects of the treaty when it was originally negotiated, requires an interpretation preserving the original effects,[1600] or, in any case, because their application would unacceptably (i.e. against good faith) impair the originally balance or affect the original object and purpose of the tax treaty.[1601]

Third, national case law, except the decision delivered by the Supreme Court of Canada in the *Melford* case,[1602] points consistently in the direction of the ambulatory application

[1597] See section 2.3.3.4 of Chapter 3 of Part II.

[1598] See J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85 per Sir Ian Sinclair. See, similarly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 10.01.

[1599] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 64, m.no. 124d.

[1600] Actually, the same holds true even where the contrary perspective is taken: where a static approach to the *renvoi* is embraced, the context may nonetheless require an ambulatory *renvoi* in specific instances. In both cases, what really matters is how the interpreter counter-weights the different interests at stake (e.g. ease of treaty application; effective interaction between domestic law and treaty law; pacta sunt servanda). See, in this respect, M. Lang, "Die Interpretation des Doppelbesteuerungsabkommens zwischen Deutschland und Österreich", 38 *Recht der Internationalen Wirtschaft* (1992), 573 *et seq.*, who, with regard to the 1954 Austria-Germany tax treaty, which does not include any provision similar to Article 3(2) OECD Model, suggests a static *renvoi* in connection with certain undefined legal jargon terms, thus indirectly supporting the idea that the choice between the static and the ambulatory approaches depends on the specific characteristics of the treaty provisions to be interpreted and of the later changes in the contracting States' domestic law.

[1601] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 47-48; J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85 per Sir Ian Sinclair. See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 496-497, who makes also reference to Article 26 VCLT.

[1602] Supreme Court (Canada), 28 September 1982, *Melford Developments Inc. v. R*, [1982] 2 SCR 504, in

of the *renvoi* encompassed in Article 3(2), subject to the context not requiring otherwise.

In almost all cases cited in section 5.2 of this chapter, national courts and tribunals made reference, for the purpose of interpreting undefined legal jargon terms, to the domestic law in force in the relevant tax year. Although it is possible that the domestic law existing at that date was the same as that existing at the time of the treaty conclusion, the fact that neither the competent judiciaries, nor the parties to the dispute raised any issues in that respect constitutes relevant evidence of the (more or less conscious) praxis to regard the *renvoi* in Article 3(2) as ambulatory in nature.

Moreover, some decisions explicitly express a preference for the ambulatory approach.[1603]

Fourth, the praxis of tax authorities is generally oriented towards the ambulatory application of Article 3(2).[1604]

Finally, an analysis of other articles of the OECD Model seems to provide additional support to the conclusion that the *renvoi* to the contracting States' domestic law found in Article 3(2) OECD Model should be regarded as ambulatory.

First, where a contracting State introduces a new tax, to which the treaty applies pursuant to Article 2(4), in place of the tax existing at the time of the treaty conclusion, new definitions are accordingly introduced in its legal system. It would appear absurd that the definitions concerning the old tax should be relevant in order to interpret and apply the treaty with regard to the new tax, which would be the straightforward conclusion if a static approach were embraced.[1605] Moreover, paragraph 8 of the Commentary to Article 2 OECD Model states that "each State undertakes to notify the other of any significant changes made to its taxation laws by communicating to it, *for example*, details of new or substituted taxes. Member countries *are encouraged* to communicate other significant developments as well, such as *new regulations or judicial decisions*", which supports the conclusion that subsequent chances in the statutes, case law and practice of a contracting State may affect the interpretation and application of

---

particular at 514. Note, however, that Section 3 of the Canadian Income Tax Conventions Interpretation Act (RSC 1985, c. I-4, section 3), which was enacted in 1985 and applies retrospectively, makes it clear that, from a Canadian standpoint, Article 3(2) had always been intended to be ambulatory and not static in its application, contrary to the view expressed by the Supreme Court of Canada.

[1603] See Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., at 813 (see, however, the minority opinion in *ibidem*, at 816); High Court (Denmark), 6 April 2001, *Halliburton Company Germany Gmbh v. Ministry of Treasury*, 4 *ITLR*, 19 *et seq*., at 41-42; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq*., at 81; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq*., at 351, para. 43; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq*., at 699, para. 108; Cour de Cassation (Belgium), 21 December 1990, case *F1851N* (available on the IBFD Tax Treaty Case Law Database).

[1604] See, for instance, United States Letter Ruling 78-44-008; United States Revenue Ruling 80-243; United States Revenue Ruling 78-423.

[1605] See, similarly, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq*., at 32; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 489-490.

such treaty.[1606]

Second, with regard to Article 4 OECD Model, "[i]t would be impossible to apply the treaty to people who were or were not resident under a definition which was no longer applicable."[1607]

A somewhat connected issue is whether domestic law changes subsequent to the events that trigger the tax liability are to be taken into account for the purpose of applying Article 3(2).

It seems to the author that different circumstances may lead to different conclusions in this respect. However, as a broad generalization:

> (i) where changes in statutes and new court decisions have retroactive effect under domestic law, in the sense that they are aimed at properly construing existing law, they should be taken into account for the purpose of Article 3(2); while in contrast,
> (ii) changes in statutes having prospective effect and which, therefore, do not apply *ratione temporis* to the events triggering the tax liability[1608] should be disregarded in the application of Article 3(2).[1609]

A similar solution should apply in respect of the interpretation of statutory provisions[1610] and the construction of unwritten principles of law, in particular those developed by domestic courts.

First, interpreters (including judiciaries) are generally regarded as construing the law as it has always been.[1611]

Second, if the *renvoi* to the contracting States' domestic law were intended as a static reference to the general accepted meanings of the relevant treaty terms, according to national administrative practice, case law and scholarly writings, at the time of the treaty conclusion, the construction of treaty provisions would become an almost

---

[1606] See similarly J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 32.
This reading also supports the conclusion that the terms "law" and "droit", as used in article 3(2) OECD Model, refer to all relevant domestic rules and principles of law, independently of their origin (legislative, judicial, administrative, or by mere praxis). See section 5.3.2.7 of this chapter.

[1607] J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 34. See also the references made by the authors to the official interpretations of legislations enacted in the United States, the Netherlands and Sweden, all of which confirm that such States interpret Article 4 OECD Model (and the corresponding provisions of their tax treaties) as containing an ambulatory *renvoi* to the contracting States' domestic law, rather than a static one (*ibidem*, at 33-34).

[1608] Typically because they are aimed at modifying or replacing the rules of law previously in force.

[1609] See Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*, at 37, paras. 62-64.

[1610] Both those existing at the time of the treaty conclusion and those subsequently introduced.

[1611] See the *obiter* comment by Lord Radcliffe in House of Lords (United Kingdom), 16 July 1959, *Ostime v. Australian Mutual Provident Society*, 38 TC 492, at 519-520. See also J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 47, who maintain that "the reversal of a decision on appeal after the conclusion of a treaty would be taken into account in determining the law at the date of the treaty."

unworkable task for the interpreter, due to the difficulty of determining the settled or generally accepted domestic law meaning (if any) of the relevant treaty terms at a specific point in time in the (sometimes very distant) past. This would frustrate one of the major purposes of Article 3(2), namely that of rendering simpler and less uncertain the interpretation and application of tax treaties, by matching the meaning under domestic law and the meaning under treaty law of the same or similar terms.

Third, the static reference to the meaning that domestic law terms had at the time of the treaty conclusion would possibly jeopardize the interaction between the charging provisions under domestic tax law and the relief provisions under tax treaties in cases where the domestic law meaning has in the meantime changed. This, in turn, could create potential room for double non-taxation and lead to unexpected results in terms of allocation of taxing rights between the contracting States.[1612]

Therefore, what the interpreter should do, when interpreting a tax treaty by reference to the contracting States' domestic law, is simply to ascertain the current (broadly accepted) meaning of the relevant domestic law terms and apply that meaning for the purpose of construing the tax treaty, unless the context requires a different interpretation.

5.3.2.4. Undefined legal jargon terms in the treaty and their proxies under the contracting States' domestic law

In 1984, the International Tax Group stated that "[o]ne might expect that Article 3(2) directs one to internal law for the meaning of an identical item".[1613]

Similarly, Vogel seems to support the thesis that Article 3(2) applies only in so far as the undefined terms used in the tax treaty are exactly the same ones used under the domestic law of the relevant contracting State.[1614] However, this comment loses part of its significance in light of the fact that Vogel considers that, where Article 3(2) does not apply, "this does not unconditionally preclude an interpretation according to the domestic law of the State applying the treaty […]. The only result of not applying Art. 3(2) is that the treaty interpreting process is not tied to the narrow standard of Art. 3(2) (which only allows for an interpretation other than according to the domestic law when the context 'requires' this), so that more space remains for an independent

[1612] See the comments in J. F. Avery Jones, "The interaction between tax treaty provisions and domestic law", in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 125-126.

[1613] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 20.

[1614] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 209-210, m.no 62, where Vogel refers to the different position upheld by Wassermeyer (F. Wassermeyer, "Die Auslegung von Doppelbesteuerungsabkommen durch den Bundesfinanzhof", 67 *Steuer und Wirtschaft* (1990), 404 *et seq.*, at 410) and to the decision of the High Court (Australia) in the *Thiel* case (High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports,* 338 *et seq.*). See also, K. Vogel and R. A. Prokisch, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq.*, at 79.

interpretation".[1615]

In this respect, the author submits that the fact that the term used in the relevant tax treaty exactly matches a term used under the domestic law of the State applying the treaty does not seem to be the proper test to be carried out in order to draw a line between cases where the interpreter may apply the *renvoi* to domestic law enshrined Article 3(2) and cases where he may not.

As previously mentioned, the terms used in the authentic treaty texts drafted in the official languages of the contracting States are often influenced by the terminology of the OECD Model and, as a consequence, such terms frequently differ from those typically used in the respective income tax statutes.

It would seem unreasonable, in light of the relevant role played by Article 3(2) *renvoi* as a link between the tax treaty relief provisions and the contracting States' domestic law charging provisions, to infer from these terminological differences that the intention of the contracting States was not to apply that *renvoi* with regard to those treaty terms that are just proxies (or synonyms) of the legal jargon terms employed in the domestic tax law. On the contrary: it appears more sensible to treat such treaty terms as corresponding, for the purpose of Article 3(2), to their domestic law proxies and to assess, on the basis of the analysis of the overall context, whether it is unreasonable to apply their domestic law meaning for the purpose of interpreting the treaty.

Moreover, where the relevant tax treaty was not authenticated in any of the official languages of the contracting State applying it, or where the prevailing authentic text was to be interpreted, a narrow construction of Article 3(2) would make its application virtually impossible.[1616]

Other scholars have similarly upheld this conclusion[1617] and national courts and tribunals

---

[1615] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 210, m.no 62.

[1616] It is interesting to note that, where the tax treaty is authenticated only in one language (generally an international *lingua franca*), contracting States sometimes insert legal jargon terms of their own official languages in the sole authentic text of the treaty, in order to avoid uncertainties and inconsistencies by the interpreters in the selection of the domestic law meaning to be attributed to the foreign language terms. For instance, Article 16 of the 1996 Denmark-Netherlands tax treaty, which has been authenticated only in the English language, provides as follows:

> "Directors' fees or other remuneration derived by a resident of one of the States in his capacity as a member of the board of directors, a "bestuurder" or a "commissaris" of a company which is a resident of the other State may be taxed in that other State".

Paragraph IX of the 1996 Protocol to that treaty reads: "It is understood that "bestuurder" or "commissaris" of a Netherlands company means persons, who are nominated as such by the general meeting of shareholders or by any other competent body of such company and are charged with the general management of the company and the supervision thereof, respectively".

[1617] See B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 13; J. F. Avery Jones, "The interaction between tax treaty provisions and domestic law", in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 133-134; J. F. Avery Jones, "Problems of Categorising Income and Gains for Tax Treaty Purposes", *British Tax Review* (2001), 382 *et seq.*, at 393; H. Pijl, "Aantekeningen bij de lex-fori-bepaling in belastingverdragen", *Weekblad Fiscaal Recht* (1995), 1254 *et seq.*; F. Engelen, *Interpretation of Tax Treaties under International*

have repeatedly endorsed its underlying approach.[1618]

That said, two inferences may be drawn from the analysis of Article 3(2), read in its context, and the relevant case law.

First, from a general perspective, the quest for the domestic legal jargon meaning of undefined treaty terms is not a process autonomous from the analysis of the overall context. The search for the former influences and is influenced by the analysis of the latter, since:

(i) the domestic law meanings of undefined treaty terms and their possible domestic law proxies constitutes a relevant part of the overall context and, in turn,
(ii) the overall context influences the selection of the domestic law proxies, as well as the choice of the relevant domestic law meaning of polysemic domestic legal jargon terms.

The attempt to separate these two activities in watertight compartments is, in most cases, mainly aimed at achieving clarity of exposition and must be recognized for what essentially is: nothing more than a rhetorical device.

Second, in order to select the appropriate domestic law proxy, a semantic and functional analysis is generally necessary. On the one hand, the interpreter has to examine the functions served by the domestic law concepts underlying the various corresponding terms employed in the authentic treaty texts (and in the OECD Model official version), as well as the items prototypically denoted and non-denoted by those terms, under the domestic laws of the contracting States and of other States employing those terms. He may then select, as domestic law proxy of the relevant treaty term (if any), the term denoting the same or similar prototypical items and whose underlying domestic law concept serves the same or a similar function in the domestic law system of the contracting State applying the treaty.[1619] On the other hand, the functions that the concept underlying the relevant treaty term, whatever it may be, should serve within the treaty rule of which it is part may help the interpreter to support the choice of a specific domestic law proxy (if any), especially where the concept underlying the latter serves similar functions in the domestic law system of the contracting State applying the treaty. Obviously, the functional and semantic analysis may lead the interpreter to conclude that no adequate domestic law proxy exists and provide him with the arguments to support such inference.

5.3.2.5. Undefined legal jargon terms in the treaty and assimilations under the contracting States' domestic law

---

Law (Amsterdam: IBFD Publications, 2004), p. 488; P. J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq.*, at 71.

[1618] See, for instance, Court of Appeals (United States), 16 January 1963, *Samman*, 313 F.2d 461, paras. 5, 6 and 8; Hoge Raad (Netherlands), 4 November 1992, case *27222*, BNB 1993/38; Tax Court (United States), 11 April 1983, *Estate of Burghardt*, 80 T.C. 705.

[1619] Fortunately, such a task is rendered easier by the existence of dictionaries (legal dictionaries, bilingual dictionaries, thesaurus dictionaries), as well as of legal textbooks and encyclopedias.

Another issue in the application of the *renvoi* enshrined in Article 3(2) concerns cases where the domestic statutes of the contracting States bring certain items within the scope of the relevant legal jargon term by means of explicit assimilations (sometimes referred to as "deeming provisions"), such items being otherwise excluded from it in light of the ordinary domestic law meaning of that term, or of its statutory definition.[1620]

The task for the interpreter, in this respect, is (i) to decide whether, for the purpose of construing a tax treaty provision employing such a term, the latter should be regarded as also denoting the above-mentioned assimilated items and (ii) how to properly support its conclusion.

The analysis of the OECD materials available on the subject matter does not allow concluding univocally in either sense.[1621]

However, by reading such materials in light of paragraphs 9.2, 22 and 22.1 of the Commentary to Article 1 OECD Model, which have been added in 2003, one may reasonably infer that the OECD intends to attribute a decisive role to the overall context, in order to solve the issue on a case-by-case basis, and that no firm bar to the use of domestic law assimilations for the purpose of construing tax treaties is intended to operate. In particular, the overall context of the treaty would support the application of domestic law assimilations, for the purpose of construing undefined legal jargon terms in the treaty, whenever cases of improper use of the tax treaty were at stake and those assimilations could prevent such abuses.

Similarly, national courts and tribunals have taken different approaches on whether domestic law assimilations have a bearing on the interpretation of legal jargon treaty terms.

For instance, the Bundesfinanzhof (Germany) and the lower court (Finanzgericht) of Munich did not attribute decisive weight to the fact that, under Spanish law on inheritance, property transfers and legal documents, options to buy immovable property in Spain were treated as if they were immovable property (though they were not fully equated to, or defined as immovable property), in order to decide whether capital gains from the alienation of such options were governed by Article 13(1) of the 1966

[1620] See, for instance, the case of the assimilation of (otherwise) non-resident persons to resident persons for income tax purposes, on which J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 33-34 and Supreme Administrative Court (Portugal), 25 March 2009, *A and another v. Portuguese Treasury*, 11 *ITLR,* 1001 *et seq.*, at 1019.

[1621] See the position expressed by the OECD with regard to: the case of the assimilation of interest payments to dividends under domestic law thin capitalization provisions (dealt with in paragraph 25 of the Commentary to Article 10 OECD Model); the case of the assimilation to profits distribution of the gain stemming from the sale of shares by a shareholder to the issuing company in connection with the liquidation thereof (dealt with in paragraph 31 of the Commentary to Article 13 OECD Model); the case of the assimilation of real estate companies to immovable property for the purpose of capital gains taxation (see footnote 1 to paragraph 21 of the Commentary to Article 13 of the 1963 OECD Draft; paragraph 23 of the Commentary to Article 13 OECD Model, as existing before the amendments made in 2003; Report *Tax Treaty Override*, adopted by the OECD Council on 2 October 1989, at R(8)-12 and 13, paras. 31-32).

Germany-Spain tax treaty.[1622] Similarly, the very same Bundesfinanzhof, for the purpose of construing the term "substantial interest [in a company]" employed in Article IX(3) of the 1956 Canada-Germany tax treaty, did not attach relevance to the German domestic law provision deeming a substantial interest to exist where, in cases of holdings acquired by the vendor through a donation, the donor had at any time within the five years prior to the alienation a holding of more than 25% in the capital of the company.[1623] However, the tax court of Baden-Wurttemberg apparently reached a contrary conclusion with regard to a similar case.[1624]

On the contrary, the Supreme Court of Canada seemed to consider a Canadian domestic law provision, deeming fees paid for the guarantee of borrowings to be "interest" for withholding tax purposes, capable of affecting the meaning of the undefined term "interest" used in Article III(5) of the 1956 Canada-Germany tax treaty.[1625] Likewise, the Tax Review Board of Canada held that Article 106(2) of the *Income Tax Act* of Canada, which has the effect of (re)characterizing the proceeds from the disposition of a life interest in a Canadian trust as income, rather than as component of a capital gain, was decisive in order to characterize such proceeds as income for the purpose of the 1978 Canada-United Kingdom tax treaty.[1626]

In the same vein, the Hoge Raad (the Netherlands) appeared to admit the theoretical relevance of domestic law assimilations for the purpose of construing undefined treaty terms under Article 3(2), provided that the context does not require a different interpretation.[1627]

Similarly, the Federal Court of Australia found that that Australian limited partnerships, although not being legal entities under commercial law, should be considered legal entities for the purpose of Article 11(9)(a) of the 1982 Australia-United States tax treaty, since they are deemed as such under Australian tax law.[1628]

[1622] Bundesfinanzhof (Germany), 19 May 1982, case *IR 257/78*, *Bundessteuerblatt. Teil II* (1982), 768 *et seq.*

[1623] Bundesfinanzhof (Germany), 13 December 1989, case *IR 39/87*, *Bundessteuerblatt. Teil II* (1990), 379 *et seq*.

[1624] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.08.

[1625] Supreme Court (Canada), 28 September 1982, *Melford Developments Inc. v. R*, [1982] 2 SCR 504, with regard to which, see the similar conclusion drawn in M. Kandev, "Tax Treaty Interpretation: Determining Domestic Meaning Under Article 3(2) OECD Model", 55 *Canadian Tax Journal* (2007), 31 *et seq.*, at 54. See also Federal Court of Appeal (Canada), 12 March 1980, *Associates Corporation of North America v. R,* 80 DTC 6140.

[1626] Tax Review Board (Canada), 25 January 1983, *Doris Lillian Gadsden v. Minister of National Revenue*, 83 DTC 127, at 71. See also Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188; seemingly *contra* Tax Court (Canada), 21 November 1983, *William C. Krafve v. the Minister of National Revenue*, 84 DTC 1002.

[1627] See Hoge Raad (Netherlands), 5 September 2003, cases *37651* and *37670*, BNB 2003/379 and 2003/381. See, to a similar extent, Federal Court (Canada), 28 March 1991, *Utah Mines Ltd. v. R*, 91 DTC 5245. The author's conclusion, with regard to the approach taken by the Hoge Raad in respect of the relevance of domestic law assimilations for the purpose of treaty interpretation, seems to be shared by F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 494-495 and M. Kandev, "Tax Treaty Interpretation: Determining Domestic Meaning Under Article 3(2) OECD Model", 55 *Canadian Tax Journal* (2007), 31 *et seq.*, at 55.

[1628] Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 ITLR, 365 *et seq*., at 398-399, para. 90.

Scholars have also examined the relevance of domestic law assimilations for the purpose of applying Article 3(2). In particular, the (more limited) issue of the tax treaty characterization of fictitious income provided for under the domestic laws of the contracting States has been recently dealt with by Wattel, Marres and Lang.

The first two authors, in an article published in 2003 as an adaptation of an Opinion written by Wattel in his capacity as Advocate General of the Hoge Raad (the Netherlands), maintained the following. "In general, fictitious income does not fall under the specified income allocation provisions (Arts. 6-20) of an OECD Model-type tax treaty because it is not "paid" ("payé") or "derived" ("reçu"). Fictitious income does not, however, escape the ambit of the treaty altogether. It is covered by the "other income" provision (Art. 21 OECD Model), which does not use terms like "derived" or "paid," and results in allocation to the residence state of the taxpayer. […] However, the lex specialis of Art. 3(2) of the OECD Model (interpretation by reference to domestic law) […] with the exception of its "good faith" and "context" requirements […] may still, based on the meaning of the equivalents of "derived" or "paid" in domestic tax law, bring fictitious income within the scope of one of Arts. 6-20 of the OECD Model. But even if this is the case, "good faith" and the "context" of the allocation provisions (especially the "permanency of commitments" of the contracting states) as a rule still preclude the carry-over of domestic law fictions to treaty characterization. We see three exceptions to this rule: (i) the domestic fictitious income provision was already statutory law before the treaty was signed, and the treaty partner was therefore able to take it into account during negotiations; (ii) in the fiscal year to which the treaty must be applied, the domestic law of both contracting states included a similar fiction (reciprocity of legislation), or (iii) the contracting states published a joint document in a timely and proper fashion […] that brings the fictitious income under a specific treaty provision and which enjoys sufficient democratic legitimacy to be viewed as an executive protocol to the treaty."[1629]

Lang, however, pointed out that the distinction between real and fictitious income is often subtle and arbitrary, which makes untenable the conclusion that only Article 21 of OECD Model-type tax treaties is generally applicable to fictitious income.[1630] Moreover, the author pointed out that Article 3(2) OECD Model should apply with regard to any meaning attributed to legal jargon terms under domestic tax law (including fictions), unless the context otherwise requires and, in that respect, he maintained that he

[1629] P. J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq.*, at 66; see *ibidem,* at 74 and 79; at 78, the authors also seem to admit the relevance of subsequent domestic legal fictions in cases of *fraus tractatus*, provided that certain conditions are met.

[1630] See M. Lang, ""Fictitious Income" and tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 34 *et seq.*, at 36-37 and 44, where the author maintains that the "underlying assumption of the ideas presented by Wattel/Marres is that it is possible to draw a line between fictitious and real income. […] For a definition of "fictitious income", it is necessary to know what "real income" is. But is there such a thing as real income? […] If one goes that far, the question arises if it is possible to distinguish between real and fictitious income, or if income is everything the law declares to be income".

could not "see why the answer should depend on the time when the bilateral tax treaty was signed [and] why reciprocity should play a role".[1631] The literal meanings of treaty terms such as "derived", "received" and "paid" should not be overemphasized; such words should be intended as merely expressing that a certain tax liability is allocated to a certain taxpayer by law. Therefore, according to Lang, there should not even be the necessity to distinguish between fictitious and real income under the contracting States' domestic law: "Every single tax liability must be examined for the purpose of identifying the applicable allocation rule of the OECD Model Convention".[1632]

The above analysis proves that no clear and consistent answer has been given so far to the question of whether assimilations under the contracting States' domestic laws should be taken into account for the purpose of construing treaty undefined legal jargon terms in accordance with Article 3(2). This leaves the interpreter with a broad discretion as to whether and how to actually rely on them. From a formal standpoint, taking into account that:

(i) it is often difficult to convincingly distinguish between definitions and assimilations under domestic law,[1633]
(ii) the effect and purpose of domestic law assimilations is to render the rules of law, which are ordinarily applicable to the items denoted by a certain term, also applicable to the items denoted by the assimilated terms and
(iii) one of the main benefits achieved by means of Article 3(2) is to guarantee the correspondence between the scope of the domestic charging rules and the tax treaty relief rules,

the author believes that the most sensible solution is to always consider domestic law assimilations for the purpose of Article 3(2) *renvoi*. That said, the final decision on whether a certain domestically assimilated item should be regarded as denoted by the relevant treaty term remains subject to the overall context not requiring a different interpretation.

5.3.2.6. The classification of foreign legal concepts for the purpose of Article 3(2)

The classification of foreign legal concepts (especially private or commercial law concepts) for domestic law purposes may affect the application of the *renvoi* encompassed in Article 3(2) of OECD Model-based tax treaties. In fact, although Article 3(2) mainly makes reference to domestic tax law meanings and classifications, domestic tax law, in turn, generally refers to and relies on domestic private law concepts for purposes of its application, such domestic private law concepts often not perfectly

[1631] See *ibidem*, at 41 and 42.
[1632] See *ibidem*, at 47 and 48.
[1633] See, similarly, M. Lang, ""Fictitious Income" and tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 34 *et seq.*, at 48, where the author maintains that "[i]t is very difficult, if not impossible, to distinguish between fictitious and real income. Income is whatever the legislator declares to be income."

overlapping with their correspondent foreign legal concepts (if any).

In this respect, the problems that the interpreter faces may be grouped into two main clusters: (i) whether an assimilation of foreign private law concepts to domestic private law concepts is allowed for the purpose of domestic tax law and (ii) to which domestic private law concept the foreign private law concept may be assimilated for the purpose of applying domestic tax law, if any at all.[1634]

Maisto distinguishes among five different legislative techniques used under domestic tax law in order to establish the scope of the terms and expressions employed therein, the use of which may have different effects on the possibility to include a foreign legal concept within the scope of such domestic law terms or expressions:[1635]

First, domestic tax law may include a reference to the domestic private statutory provisions defying or covering the relevant terms or expressions. Such a technique may lead to the exclusion, from the scope of the domestic tax law provision, of situations regulated by foreign law.

Second, domestic tax law may employ, together with domestic private law terms, foreign legal jargon terms, such as "trust" in civil law States. This gives evidence of the intention to broaden the scope of the domestic tax law provision and to include situations governed by foreign private law, although in a rather ambiguous and vague manner, since (i) the foreign legal jargon terms might be (and generally are) associated with different legal concepts in different States and (ii) other States may use different terms to denote somewhat similar legal concepts.

Third, domestic tax law may include *ad hoc* definitions making reference to the legal or economic effects or characteristics of the defined legal concept. Although such effects or characteristics may, more or less partially, reproduce those typical of certain domestic private law concepts, such a formulation clearly opens the way to include foreign private law concepts in the scope of the relevant domestic tax law provisions.

Fourth, domestic tax law may provide for specific rules on the characterization of foreign legal concepts for domestic tax law purposes, such as the rules on the characterization of foreign entities for corporate tax purposes.

Fifth, domestic tax law may simply employ legal jargon terms that typically denote domestic private law concepts.[1636]

Under the last technique, the interpreter clearly bears the burden of deciding whether, to what extent and how the assimilation of foreign legal concepts to domestic legal concepts should be made.[1637] However, although less evident, such a complex task

[1634] See, by analogy, paragraphs 11-14 of the OECD Partnerships Report.

[1635] See G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxvii-xxviii.

[1636] See the issue of the domestic tax law status of foreign entities in Germany, where the relevant statutes are silent on the issue, while courts and tax law scholars have generally maintained that foreign entities have to be treated similarly to the domestic entities that are the most similar thereto from a legal structure standpoint (on the German *Typenvergleich* approach, see H. Debatin, "Subjektfähigkeit ausländischer Wirtschaftsgebilde im deutschen Steuerrecht", *Der Betriebsberater* (1988), *1155 et seq.*, at 1157, and further references therein).

[1637] See, for instance, Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.,* where the Court had to decide whether a silent partnership agreement concluded under

is to be performed as well with regard to the other four techniques, in relation to which the interpreter must in any case to establish whether, under the relevant tax law provisions, the assimilation of foreign legal concepts to domestic law concepts is excluded or not.[1638]

From a tax treaty perspective, the similarities between foreign law concepts and the domestic law concepts may be also taken into account in order to argue whether, notwithstanding the absence of a sufficient proximity for justifying an assimilation under domestic tax law, the overall context of the treaty requires an interpretation entailing the domestic and foreign law concepts to be treated alike for tax treaty purposes.[1639] This issue is further examined in section 5.3.3 of this chapter.

5.3.2.7. The domestic law of the contracting States relevant for the application of Article 3(2) OECD Model

With regard to the quest for the domestic law meaning of treaty undefined legal jargon

---

German law between a United Kingdom resident company and its German resident subsidiary, according to which the former had the right to participate in the profits of the latter in its quality of silent partner thereof, was to be considered a transparent partnership agreement for the purpose of the United Kingdom domestic tax law and, thus, of the 1964 Germany-United Kingdom tax treaty.
See also Administrative Court of Paris (France), 23 March 2005, case *92-12625 Société Publi-Union*, *Revue de Jurisprudence Fiscale* (1996), No. 1463, where the Court had to decide whether the sums paid to an American publisher for the right to use a copyright (under the relevant copyright law of the United States) were royalties for the purpose of Article 11(3) of the 1967 France-United States tax treaty, according to which "Royalties derived from copyrights [*author's note*: "droit d'autour" in the French authentic text] of literary, artistic, or scientific works […] by a resident of one Contracting State shall be taxable only in that Contracting State". The Court held that such sums did not constitute royalties for the purpose of the 1967 France-United States tax treaty, one of the arguments in support of such a conclusion being that the payment was not for the right to use a "droit d'auteur" since under French law the rights held by a publisher could not be assimilated to a "droit d'auteur", which is an inalienable right attached to the individual that created the relevant intellectual work (see, in this, respect C. Legros, "France", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD, 2005), 199 *et seq.*, at 216-217).

[1638] This is the case also where the first technique is used. See Articles 117 and 120(1) of the Italian Income Tax Code, which expressly provides that only companies listed in Article 73(a) of the same Code and, more precisely only "società per azioni, in accomandita per azioni, a responsabilità limitata", are entitled to opt for the tax consolidation regime as controlled companies; this reference, however, leaves open the question whether companies formed in accordance with foreign company law that are similar to "società per azioni, in accomandita per azioni, a responsabilità limitata" formed under Italian company law are entitled to opt for such a tax regime as well.

[1639] For instance, in the above-mentioned case Administrative Court of Paris (France), 23 March 2005, case *92-12625 Société Publi-Union*, *Revue de Jurisprudence Fiscale* (1996), No. 1463, the Court could have concluded that the overall context required the interpreter to consider the sums paid to the American publisher for the right to use the copyright under American law as paid for the right to use a "droit d'auteur", for instance by arguing that the term "copyright" was used in the English authentic text of the treaty and that its underlying concept under American law broadly corresponded to the concept underlying the term "droit d'auteur" under French law. In such a way, the Court would have attached relevance to the other contracting State's domestic law, as explicitly mentioned in paragraph 12 of the Commentary to Article 3 OECD Model and embedded in the idea of reciprocity underlying treaties.

terms, two main questions arise:

(i) whether the relevant domestic law meanings are limited to those expressed by means of statutory definitions;

(ii) which are the fields of domestic law where such a quest is to be carried out.

As far as question (i) is concerned, both the English and French official versions of the OECD Model seem to suggest that the meaning to be given to undefined legal jargon terms is the meaning attributed to such terms when the domestic law of the relevant contracting State is applied.[1640] Thus, the only relevant question to be answered by the interpreter is the following: which is the intension of this term for the purpose of the application of the contracting State's domestic law?

To say that the quest for the domestic law meaning should be limited to legal definitions in statutes[1641] is, from a semantic and logical perspective, meaningless. It is a

[1640] The International Tax Group seems to uphold the view that the *renvoi* encompassed in Article 3(2) OECD Model has always be intended as a *renvoi* to the entire system of legal concepts, rules and principles relevant for the purpose of the taxes covered by the treaty (i.e. including those concepts, rules and principles endorsed by the case law and practice) and not only to enacted statutes seems; accordingly, in Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 19, the authors maintain, with regard to the changes made in the English and French official versions of article 3(2) between the 1963 OECD Draft and the 1977 OECD Model, that "[i]n English the change from "laws … relating to" to "law … concerning" might be construed as a change from statute law to law generally but it is unlikely that any change is meaning would be applied" and that "[i[n English, laws can sometimes mean statute law but it is often used in the wider sense, as in *Halsbury's Laws of England*. […] It follows from what is said in the text that we do not accept van Raad's point that there is a change in meaning of the English text, but it is certainly true of the French" (footnote 17). See, apparently contrary, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 484, footnote 1388.
The French version of the 1963 OECD Draft employed the expression "législation […] régissant", while the 1977 version "droit […] concernant". It is worth noting, in this respect, that the 1963 French version ("le sens qui lui est attribué par la législation dudit Etat *régissant* les impôts faisant l'objet de la Convention"), which literally referred to the meaning attributed to the undefined legal jargon terms in the treaty by the statutes governing the taxes covered by the treaty, was changed in 1977 and brought in line with the English version, most probably in order to avoid speculations with regard to the possible difference of meaning between them. The author's position, in this respect, as it will be expanded in the remainder of the section, is that not much weight should be placed on the use of the terms "législation" and "laws", instead of "droit" and "law" in the treaty text, since, on the one hand, such terms are used inconsistently in the OECD Commentary (the English official version of the 2010 OECD Commentary to Article 3(2) uses the term "legislation" three times, the term "law" three times and the term "laws" three times – a marvelous example of *par condicio*; the French official version, in turn, uses the term "législation" four times, the term "droit" twice and the term "lois" three times) and, on the other hand, no meaning may be said to exist without an interpretative process and, therefore, without reliance on extra-textual, i.e. extra-statutory, means such as case law, administrative practice and scholars' writings (see G. Tarello, *L'interpretazione della legge* (Milano: Giuffrè, 1980), Chapter I, in particular pp. 24-33, and references therein).

[1641] See, for instance, the following quotations, often interpreted as supporting the above-mentioned approach. K. Vogel and R. A. Prokisch, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq.*, at 79: "This means that domestic law may only be referred to for the interpretation of words or groups of words, used in the convention. This clause does not indicate that one may generally use principles of domestic law in the interpretation of the convention or to clarify unclear parts of the convention by reference to domestic law. In the US and Canada this is understood in a different way. The clause is understood to refer to the domestic law of the applying state in a general way,

false representation of what the interpreter may do (and actually does), caused by a misunderstanding of what "meaning" is. The relation between terms and their underlying concepts, which is the foundation of the meaning to be attributed to terms, is never entirely expressed by means of definitions and, in many cases, it is not at all expressed thereby:[1642] it necessarily relies on the encyclopedic knowledge of the persons using the relevant terms. This implies that, even if the *renvoi* encompassed in Article 3(2) were construed as being limited to the domestic law meanings expressed by means of statutory definitions, the *renvoi* would lead inevitably the interpreter to attribute to the treaty terms the meaning expressed by the statutory definitions as supplemented by the underlying relevant encyclopedic knowledge, i.e. a meaning that is never entirely expressed by virtue of the sole statutory definitions.

This conclusion has the following two corollaries.

First, the actual domestic law meaning of statutorily defined terms is not established (solely) on the basis of some alleged "dictionary" meanings of the terms used in the definition, but mainly on the basis of the meaning attributed by the interpreter to the latter terms in light of his background encyclopedic knowledge, which, in the field of tax law, is principally made of up case law, administrative positions (rulings and circulars) and scholarly writings.[1643]

Second, one is naturally led to ask oneself why, then, the meanings to be attached to undefined legal jargon terms in the treaty should be limited to those meanings that are expressed by means of statutory definitions, considering that the interpreter in any case is compelled to look outside the domestic law definition in order to find the relevant meaning. One could counter-argue to the latter inference that, where a definition is at stake, the level of legal certainty is higher than in cases where the relevant terms are undefined. The author is not convinced by such an argument. Although it is true that definitions may help in identifying the prototypical denotata of the defined terms, the same result is often achieved by means of case law, administrative positions and

---

including legal principles and legal concepts similar to those used by the convention. But this interpretation does not correspond to the wording and context of Article 3(2) MC. The provision is found under the heading "General Definitions"; this implies that it is concerned only with the definition of terms and does not refer in a general way to groups of legal rules and especially not to relatively unclear legal concepts or traditions." *Ibidem*, at 80: "Hence if a term is only defined in private law or in the provisions of a tax law that is not covered by the convention, references to domestic law are excluded."
K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 209, m.no. 62: "Art. 3(2) […] governs no more than the interpretation of words ('terms') used in the treaty. It provides no justification for reliance on general legal principles or domestic law in interpreting treaty law, or for closing loopholes within the treaties by reference to domestic law".
K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 210-211, m.no. 62b: "The law of the State applying the treaty referred to by Art. 3(2) could, if only the English version of the [Model Convention] were authoritative, include case law […] The French version's use of '*droit'* excludes an interpretation of this type, however; 'law' (*Recht*) in the sense of Art. 3(2) includes, therefore, only legislative and administrative laws, and other abstract-general rules subordinate to them (decrees etc.)".

[1642] See section 2.3 of Chapter 2 of Part I.

[1643] See the concept of "open texture of law" developed in H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), pp. 124-135.

scholars' writings. Moreover, with regard to non-prototypical items, the construction by case law, administrative positions and scholar's writings is as much determinative where there are statutory definitions as in the absence thereof. This logical conclusion is reinforced by the wording of Article 3(2), which, in its current versions, makes reference to "meaning" and "sens", "law" and "droit", without employing any terms such as "definition".[1644]

To sum up, a system of law does not exist without its own case law, practice and elaboration by jurists, since the latter constitute a necessary part of the background encyclopedic knowledge necessary to attribute meanings to the terms used in the statutes that are the foundations of the former. Thus, the reference to domestic law encompassed in Article 3(2) OECD Model cannot be seriously intended as a reference to the formal legislation (statutes), segregated from its interpretation by judges, practitioners and scholars operating within (and for) that legal system. That would not be a reference to domestic law, but simply to documents without any generally accepted meaning. If, in contrast, the reference were so intended, the purpose of Article 3(2) to make easier and more certain the interpretation and application of tax treaties by means of a *renvoi* to the domestic law concepts[1645] underlying the undefined legal jargon terms in the treaty would be deprived of any effectiveness.[1646] Similarly, where the reference was so

[1644] The Commentary to Article 3 OECD Model makes reference to domestic law definitions, by stating in paragraph 13.1 that "where a term is *defined* differently for the purposes of different laws of a Contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over all others, including those given for the purposes of other tax laws" (*emphasis* added). In the context in which such statement is made, however, the verb "to define" appears used as a mere synonym of "to be attributed a meaning", no evidence existing that the OECD intended, by choosing that precise term, to convey the idea that only the meanings expressed by means of legal definitions should be taken into account.
In any event, i.e. even where the interpreter considered that a definition of the relevant treaty terms must be found in the domestic law of the State applying the treaty, it seems reasonable that such definitions include those provided for in other fields of law of that very same State to which income tax law implicitly or explicitly, statically or dynamically, refers. See, in this respect, G. Melis, *L'interpretazione nel diritto tributario* (Padova: Cedam, 2003), pp. 143-161, and the vast bibliography therein.

[1645] As previously mentioned, some authors have held that Article 3(2) is just concerned with the definition of "terms" and that it has nothing to do with "legal concepts" (see, for instance K. Vogel and R. A. Prokisch, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq.*, at 79). However, although it is true that Article 3(2) deals with the interpretation of terms, this implies that it concerns the quest for the underlying (domestic legal) concepts that must be regarded as corresponding to those terms for the purpose of applying the treaty provisions. See, in this respect, the different views expressed by Ward, van Raad and Vogel in J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85.

[1646] See R. Sacco, *Introduzione al diritto comparato* (Torino: UTET, 1992), at 43 *et seq*., who highlights the need to take into account the various substantive sources of law ("formanti" in the Italian language), such as statutes, case law and scholarly writings, in order to figure out the law actually governing in a certain jurisdiction; J. Malherbe and R. De Boeck, "The Belgian Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 3 *et seq*., at 14, where the authors note that it is sometimes remarkable to see how French and Dutch case law in Belgium "cut the Gordian knot of a complex legal (tax) problem in completely different ways, often under the influence of differing Walloon and Flemish doctrines"; M. Barassi, "Comparazione giuridica e studio del diritto tributario straniero", in V. Uckmar (ed.), *Diritto Tributario Internazionale* (Padova: Cedam, 2005), 1499 *et seq.*, at 1509.

intended, the application of Article 3(2) would fail, in a significant number of cases, to guarantee that the scope of the contracting States' domestic law charging provisions is the same of the corresponding tax treaty relief provisions.

Accordingly, Sasseville states that Article 3(2) "does not required (*sic*) a definition, as some commentators and the courts have sometimes suggested. It merely requires that the words have a certain meaning under domestic law"[1647] and that "[t]he word "law" is, of course, sufficiently broad to cover both the legislation and the jurisprudence of a Contracting State."[1648] Similarly, Arnolds points out that "[t]he meaning of a term under domestic law may include a meaning established by domestic courts interpreting the term for domestic purposes in accordance with the applicable domestic approach to statutory interpretation."[1649]

In turn, this implies that, in determining the meaning that a legal jargon term does have under the law of the contracting State applying the tax treaty and in supporting his conclusion, the interpreter is bound to use the interpretative principles and techniques applicable under the (tax) law of that State.[1650] In this respect, the International Tax Group has convincingly maintained that "[f]inding internal law is something which is done in accordance with the rules of interpretation adopted in the State concerned."[1651]

The case law of national courts and tribunals appears to confirm this construction of the *renvoi* encompassed in Article 3(2).[1652]

[1647] J. Sasseville, "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 134.

[1648] J. Sasseville, "Interpretation of Double Taxation Conventions in Canada: An Update", 48 *Bulletin for international taxation* (1994), 374 *et seq.*, at 375. See also J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 19.

[1649] B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 13.

[1650] The author believes that a brief side remark is necessary with regard to his last proposition. The author is rather skeptical with regard to the possibility that interpretative principles and techniques might substantially change from one jurisdiction to another, since any interpretative exercise consists in the common human cognitive activity of attributing meanings to words. Therefore, the difference existing among different jurisdictions in that respect (as well as the difference between interpretation under domestic law and interpretation under treaty law, or between interpretation under private law and interpretation under criminal law) does not lie *in which* principles and techniques are applied, but *in how* such principles and techniques are actually used and balanced: the different results of the interpretative process are generally due to (and supported by a reference to) the different mix of weights that the interpreters attribute to the goals they want to achieve and interests they want to enhance or preserve (such as, in the tax law field, the principles of legality, non-discrimination, equality, reasonableness, ability to pay and the need to preserve the coherence of the tax system and the State's revenue, as well as the legitimate expectation of the taxpayers). Such a possible different mix of weights, of course, may be influenced to a certain extent by the domestic law principles of "interpretation", either established under statutes, or by judicial practice.
See, in that respect, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 33-34, m.nos. 61 and 63; R. Lenz, "Tax Law Interpretation; - International Trends", *Rassegna Tributaria* (1987), 155 *et seq.*, at 155; B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 14.

[1651] J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 24.

[1652] See, for instance, District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings*

Question (ii) may appear to a large extent irrelevant in practice, since the vast majority of undefined treaty terms, or proxies thereof, are used in (and therefore have a meaning for the purpose of) the contracting States' domestic income (or capital) tax law.

However, it might be the case that a certain treaty undefined legal jargon term, or a proxy thereof, is not used in the domestic income (or capital) tax law of the contracting State applying the treaty, although it is used in other fields of domestic law, for instance in private law.[1653] A *prima facie* reading of Article 3(2), in this regard, might lead the interpreter to conclude that the *renvoi* to such fields of domestic law is not allowed under that article.[1654] However, the counter-argument might be put forward that the wording of Article 3(2), both in its French and English official versions, is broad enough to allow a construction according to which the *renvoi* can be made to any field of domestic law where the undefined treaty term is employed as a legal jargon term, as long as that term bears some relevance for the purpose of domestic income tax,[1655] for instance because,

---

(1996) Ltd v. Holon Assessing Office, 10 *ITLR*, 524 *et seq.*, at 544, substantially upholding the interpretative nature (for tax treaty purposes) of domestic anti-avoidance provisions; Federal Court of Appeal (Canada), 26 September 1997, *Attorney General of Canada v. William F. Kubicek*, 97 DTC 5454, para. 8; Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 14, with regard to the meaning to be given to the treaty term "paid to" on the basis of the domestic tax law characterization of the partnership receiving the relevant item of income.

[1653] A side question, in this respect, is whether the meaning of the same or similar terms used in European Union primary or secondary law might be referred to via Article 3(2) *renvoi*. Convincingly, Vogel (see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 211, m.no. 62b) and Avella (see F. Avella, "La qualificazione dei redditi nelle Convenzioni internazionali contro le doppie imposizioni stipulate dall'Italia", *Rivista di Diritto Tributario. Parte Quinta* (2010), 45 *et seq.*, at 54; F. Avella, "Il beneficiario effettivo nelle convenzioni contro le doppie imposizioni: prime pronunce nella giurisprudenza di merito e nuovi spunti di discussione", *Rivista di Diritto Tributario. Parte Quinta* (2011), 14 *et seq.*, at 22 *et seq*.; F. Avella, "Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention", *World Tax Journal* (2012), 95 *et seq*., at 113 *et seq*.) answer in the affirmative.

[1654] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 210, m.no. 62. At m.no. 62a, Vogel states that "[i]f a term has a meaning only in a field other than that of tax law or a meaning under tax law only with respect to taxes not covered by the treaty, Art. 3(2) will be inapplicable". It should be mentioned that a term does not have any meaning in a field of law only where it is not employed at all in that field; however, where a certain term (or a proxy thereof) is used in a certain field of law, e.g. income tax law, it must have a meaning for the purpose of such field of law, even if that meaning is not expressed by means of definition; in the latter case, where the undefined term is attributed a meaning by means of implicit *renvoi* to other fields of law, that term still has a meaning for the purpose of income tax law and, therefore, the issue here discussed is irrelevant in that respect.

[1655] Where one of the other tax treaties concluded by the contracting State applying the relevant treaty contains a specific definition of term to be interpreted, the issue arises of whether one may refer to the definition in the former treaty in order to construe the undefined term of the latter treaty. Theoretically, since the former tax treaty is part of the domestic law of the relevant contracting State, one may argue that Article 3(2) of the latter treaty allows using the definition encompassed in the former treaty for the purpose of construing an undefined legal jargon term of the latter treaty. However, the context of the latter treaty might require a different interpretation, due to the bilateral nature of tax treaties and the limited scope of such a treaty definition within the legal system of the State applying the treaty (see, accordingly, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 25; F. Avella, "La qualificazione dei redditi nelle Convenzioni internazionali contro le doppie imposizioni stipulate dall'Italia", *Rivista di Diritto Tributario. Parte Quinta* (2010), 45 *et seq.*, at 55).

where it was employed under domestic tax law in a context similar to that in which it is used in the tax treaty, it would be most probably attributed that meaning it has under the other field of law.

This appears to be a more sound solution than that to disregard from the outset a reference to other fields of domestic law on the basis of the fact that the undefined legal jargon term in the treaty, or a proxy thereof, is not currently used in the domestic income tax law of the State applying the treaty.[1656] For instance, it would appear unreasonable[1657] not to consider the meaning that terms such as "trademark", "patent" or "design or model" have under the domestic private law of the relevant contracting State simply because such terms are not used under its domestic income tax law, for example because income received as consideration for the right to use a trademark is taxed under that tax law as part of a residual category encompassing all income derived from letting other persons to exploit any of the taxpayer's exclusive rights.

The OECD Commentary on Article 3 upholds such position. Commenting on the 1995 addition to Article 3(2) OECD Model, which reads "any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State", the Commentary makes the following statement: "Paragraph 2 was amended in 1995 to conform its text more closely to the general and consistent understanding of Member States. For purposes of paragraph 2, the meaning of any term not defined in the Convention may be ascertained by reference to *the meaning it has for the purpose of any relevant provision of the domestic law of a Contracting State, whether or not a tax law*. However, where a term is defined differently for the purposes of different laws of a Contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over *all others, including those given for the purposes of other tax laws*."[1658]

In this regard, Engelen points out that, if Article 3(2) were interpreted as meaning that the *renvoi* to domestic law fields other than income (or capital) tax law is not allowed, the 1995 addition to Article 3(2) OECD Model, which according to the Commentary thereof constitutes a mere clarification, would have no purpose or effect. The author thus argues that the principle *ut res magis valeat quam pereat* leads one to assume that, pursuant to Article 3(2), the meaning of any treaty undefined term may be ascertained by reference to the meaning that it has for the purposes of any relevant

[1656] See the relevance that domestic private law concepts have played in the decision Tax Court (United States), 16 October 1984, *Pierre Boulez v. Commissioner of Internal Revenue*, 83 T.C. 584.
This case aptly illustrates the additional issue of whether, in a situation where the relevant domestic law meaning is looked for in the field of substantive private law, such a domestic law meaning should be the one that the relevant term has (i) in the domestic substantive private law of the State applying the treaty, or (ii) in the substantive private law of the State to which the relevant private international law rules of the State applying the treaty make reference. This question, however, is not one that may be answered in the abstract, but just with regard to the specific circumstances of the case.

[1657] This unreasonableness derives from the fact that such a discharge would run contrary to one of the most important objects and purposes of Article 3(2), namely that of simplifying the application of tax treaties by courts, taxpayers and tax authorities of the contracting States, for whom the respective States' domestic law systems and legal concepts constitute a fundamental part of their encyclopedic knowledge.

[1658] Paragraph 13.1 of the Commentary to Article 3 OECD Model, *emphasis* added.

provision of the domestic law of a contracting State.[1659]

Finally, a related issue that arises with regard to question (ii) is what the interpreter should do where the very same term is (or similar terms are) used in various provisions of the domestic law of the State applying the treaty and different meanings are attached to such a term for the purpose of these various provisions.

A first answer is given by the text of Article 3(2) OECD Model, which, as amended in 1995,[1660] provides that any meaning under the applicable tax laws of that State prevails over the meanings given to the term under other laws of that State. Moreover, as previously mentioned, the Commentary to Article 3 OECD Model further clarifies that the meaning given to the undefined legal jargon term in the treaty for the purpose of the laws imposing the taxes to which the Convention applies prevails even over the meanings that the term has for the purposes of other tax laws.

However, it may be that the very same term is used in different provisions of the very same domestic tax law,[1661] but with different meanings. In such a case, it would seem reasonable to apply the meaning that is attributed to that term for the purpose of the tax law provision that appears to be the most closely connected to, or relevant for, the tax treaty provision to be interpreted. In this case, the "overall context", more than requiring a meaning other than the domestic law meaning to be attributed to the undefined legal jargon term, would require the most relevant meaning to be applied of the various meanings available under the contracting State's domestic law.[1662]

That said, it must be emphasized that a construction in good faith of the tax treaty does not seem to preclude the interpreter from attributing to a treaty term the meaning that it has under a domestic field of law other than tax law, where the non-tax law meaning appears to be more appropriate than the tax law meaning on the basis of the overall context. That could be the case, for instance, where the domestic non-tax law meaning is the (general) private law meaning of terms such as employment, enterprise,

---

[1659] F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 485-486. See, in slightly different terms, J. Sasseville, "Interpretation of Double Taxation Conventions in Canada: An Update", 48 *Bulletin for international taxation* (1994), 374 *et seq.*, at 375-376.

[1660] With a clarifying intent, according to paragraph 13.1 of the Commentary to Article 3 OECD Model.

[1661] E.g. it may be used twice (with different meanings) in the statute imposing the tax to which the treaty applies, or it may be used in two related statutes (with different meanings), both concerning the tax to which the treaty applies.

[1662] See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 487-488, who makes reference to the decision delivered by the Hoge Raad (Netherlands) in the case *38461/2003* (Hoge Raad (Netherlands), 12 December 2003, case *38461*, BNB 2004/123). That case concerned a Belgian resident individual who sold shares held in a Netherlands resident company back to the company itself. The issue arose of whether the income derived by the Belgian taxpayer was to be considered a dividend or a capital gain for the purpose of the 1970 Belgium-Netherlands tax treaty. Under the Netherlands Income Tax Act, the difference between the selling price and the cost of acquisition was taxied as a capital gain, while under the Netherlands Dividend Withholding Tax Act, the difference between the selling price and the average paid-up capital was treated as dividend and thus subject to withholding tax. The Hoge Raad argued that, since under Netherlands domestic tax law the withholding tax might be fully credited against the tax on the capital gain (and refunded, where exceeded the latter), the income of the Belgian resident individual was to be treated as a capital gain for the purpose of the 1970 Belgium-Netherlands tax treaty and, therefore, exempted from tax in the Netherlands.

or copyright and the tax meaning is a very unusual meaning, expressed by a statutory definition introduced after the treaty conclusion and employed in a context far removed from the context where the term is used in the tax treaty.

5.3.3. Where the context requires otherwise

5.3.3.1. The context for the purpose of Article 3(2) OECD Model

As previously noted, it is the author's belief that the context to be taken into account for the purpose of Article 3(2) OECD model is the *overall context*.

Since what constitutes the *overall context* has already been broadly analysed in this study, the present section just deals with a few limited issues that, in the author's perspective, may puzzle the tax treaty interpreter.

The first issue arises from the reading of paragraph 12 of the Commentary to Article 1 OECD Model, which states that "[t]he context is determined in particular by *the intention of the Contracting States when signing the Convention* as well as *the meaning given to the term in question in the legislation of the other Contracting State* (an implicit reference to the principle of reciprocity on which the Convention is based)" (*emphasis* added).

This statement is misleading since it may appear to put on the same level of analysis items that pertain to logically distinct planes:

(i) *the meaning given to the term in question in the legislation of the other Contracting State* is one of the elements that should be taken into account in order to determine the meaning to be attributed to the relevant treaty term, while

(ii) *the intention of the Contracting States when signing the Convention*, if referring to such a term, is exactly the meaning to be attributed thereto.

Read from this perspective, while *the meaning given to the term in question in the legislation of the other Contracting State* is actually part of the context, intended as the set of all elements and items of evidence that might be relevant in order to determine the utterance meaning of the treaty term,[1663] *the intention of the Contracting States when signing the Convention* is that utterance meaning and, therefore, cannot be part of the context relevant to determine itself.

This leads to the conclusion that the phrase *the intention of the Contracting States when signing the Convention* refers to the object and purpose of the treaty as a whole, as well as the to the object and purpose of the specific treaty provision where the term to be interpreted is employed.

[1663] In that perspective, the author wonders why the OECD Committee for Fiscal Affairs decided in 1995 to substitute the term "determined" for the term "constituted" in the above sentence of paragraph 12 of the Commentary to Article 3 OECD Model (fortunately, the French official version of that paragraph maintained the original term "constitué"). What must be determined is the meaning to be attributed to the relevant treaty term and the context represents the tool at the disposal of the interpreter to determine such a meaning: it is not the tool that has to be determined.

The second issue concerns the narrow intension that is attributed to the term "context" by some scholars. Engelen, for instance, maintains that the context for the purpose of Article 3(2) refers "to the particular context in which a term is used in the treaty. Interpreted in this way, the term 'context' as used in Article 3(2) comprises the treaty as a whole, including the preamble and annexes, as well as its object and purpose, but not any means of interpretation extraneous to the treaty."[1664] The author then goes on to conclude that, in all events, "any common interpretation that is binding on the parties under international law must always prevail over the meaning that the term in question has under their domestic laws, regardless of whether the agreement may be regarded as 'context' for the purpose of the application of Article 3(2)" and refers, as examples, to any separate agreement related to the tax treaty concluded by the parties and to the tacit agreement to interpret and apply the provisions of a tax treaty that are identical to those of the OECD Model in accordance the Commentary thereon.[1665]

Although the conclusion reached by Engelen actually widens his first proposition about the scope of the term context as used in Article 3(2),[1666] it seems to leave outside the scope of that term some of the additional elements and items of evidence referred to in Articles 31 and 32 VCLT (and, more generally, in the "overall context"), including those elements and items of evidence on the basis of which the interpreter may infer that the parties have reached an implicit agreement to interpret the tax treaty in accordance with the OECD Commentary. One might argue that all those elements and items of evidence should be in any case taken into account for the purpose of determining the content of the agreement actually reached by the parties, as directly or indirectly required by the VCLT. This, however, is tantamount to saying that all possibly relevant elements and items of evidence are to be taken into account as part of the context for the purpose of Article 3(2).

Third, principles of law and legal doctrines that are, in their fundamental constitutive elements, so widespread as to represent "general principles of law recognized by civilized nations"[1667] are obviously part of the overall context and are, therefore, relevant in order to construe tax treaties. Moreover, their general acceptance also makes them potentially relevant in order to regulate the relations between the contracting States subsequent to the conclusion of the relevant treaty.

In this respect, Vogel notes that "[o]ne such principle is the nearly universal rule that legal acts undertaken absent good faith are to be disregarded. A more concrete version embodied in tax systems of most developed States is that artificial arrangements

[1664] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 482.
[1665] Ibidem.
[1666] The author questions how the contracting States' negotiators could have ever agreed to regard the very same treaty text as part of the context for the purpose of Article 3(2) and, at the same time, not to regard other relevant agreements between them as part of the same context, but, that notwithstanding, to consider such agreements decisive in order to determine the meaning of the undefined treaty terms.
[1667] See Article 38(1)(c) of the Statute of the International Court of Justice.

obviously motivated by tax considerations only and without any reasonable business purpose are not recognized under fiscal law: in such cases the 'substance' of the transaction is considered instead of its legal 'form' […]. Being a 'general legal principle', this rule also governs the legal relations of States with one another. Thus, if a State attempts to evade its tax treaty responsibilities, those legal consequences which would have resulted from a bona fide legislative construct are considered to have occurred instead of the legal consequences brought about by the 'artificial' legal structure."[1668]

On the other hand, the general principle mentioned by Vogel should also be taken into account by the interpreter when construing the tax treaty, since it is reasonable to assume that the contracting States had that principle of law in mind when they concluded the treaty and agreed on how the distributive rule articles were to be interpreted. It would be difficult, in this respect, to maintain that the application by a contracting State of its domestic law general "anti-avoidance" or "substance over form" rule or principle,[1669] in connection with the application of a tax treaty, would amount to not applying the treaty in good faith, or to breaching its treaty obligation, since the very same fact that such a domestic law principle or rule reflects a "general principle of law recognized by civilized nations" would make it a relevant part of the overall context. To hold the contrary would imply the premise that the parties implicitly agreed not to apply such "general principle of law recognized by civilized nations" in connection with a tax treaty that should work as a link between and interact with their respective tax systems, which in turn are or might be based on such a generally accepted principle. Since such a premise seems, at least to the author, rather unsound, the burden to convincingly prove this implicit agreement should rest fairly with the person invoking that construction.[1670]

5.3.3.2. The alternative construction required by the context

One of the main issues faced by the interpreter when applying Article 3(2) is to decide what alternative constructions of the tax treaty provision under review are suggested by the overall context and whether one or more of these constructions should be applied in the case at stake instead of the interpretation based on the contracting State's domestic

[1668] K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 66, m.no. 125b.

[1669] Or even the application of its domestic law specific "anti-avoidance" provisions, as far as they do not go beyond the limits of the above-mentioned "general principle" (which is a matter of interpretation to establish).

[1670] See, however, Hoge Raad (Netherlands), 6 December 2002, case *36773*, 5 *ITLR*, 680 *et seq*., where the Court found that no evidence whatsoever existed of a common intention of the contracting States (Belgium and the Netherlands) to treat dividends paid to the acquirer of shares as dividends paid to the vendor of those shares (by the company whose shares had been sold) for the purpose of applying Article 10 of the 1970 Belgium-Netherlands tax treaty and, therefore, did not take into account such deemed attribution of dividends, based on the Netherlands case law doctrine of just taxation (*richtige heffing*), for the purpose of interpreting and applying Article 10 of the 1970 Belgium-Netherlands tax treaty. For a brief analysis of this decision, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 497-500.

law meaning.

Scholars appear to favor significantly different approaches in this respect.

Some have maintained that domestic law meanings should be used only as last resort and that contextual meanings should generally be given precedence.[1671] Somewhat similarly, the American Law Institute has taken the position that "reference to domestic law ordinarily should be made only when other interpretative techniques do not support a treaty interpretation", based on the thesis that such an approach would promote the development of uniform interpretations of tax treaty provisions.[1672]

Notably, this position has been upheld notwithstanding the general contrary practice of national tax authorities and courts.[1673] As Edwardes-Ker noted, although courts and tax authorities should search for "contextual meanings", they rarely do so.[1674]

Moreover, this view has been promoted even though the quest for a uniform contextual meaning often leads different interpreters to different "uniform" meanings: the hope remains that, although "[t]heir findings may differ […] such differences should decrease as contextual meanings are thoroughly researched. The existence of such (hopefully decreasing) differences is preferable to forcing a residence State to accept a source State's (possibly incorrect) definitions."[1675]

The arguments most commonly put forward in order to support this position may be summarized as follows:[1676]

(i) the reference to the domestic law of one contracting State is a reference to the unilateral view of one of the parties on the meaning of a treaty term, while treaties should be interpreted according to the common understanding of the parties;

[1671] See, for instance, J. B. J. Peeters, *Internationaal Belastingrecht in Nederland* (Amsterdam: L.J. Veen's Uitgeversmaatschappij, 1954), at 138; H. Debatin and O. L. Walter, *Handbook on the United States-Germany Tax Convention* (Amsterdam: IBFD PUblications, 1966 – loose-leaf), at A 5.1.2; G. Tixier, G. Gest and J. Kerogues, *Droit Fiscal International* (Paris: Libraires Techniques, 1979), paras. 414 and 417; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.10, 8.10 and 8.14; M. Lang, "Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD Musterabkommen)", in G. Burmester and D. Endres (eds.), *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* (Munich: Beck, 1997), 283 *et seq*., at 302 *et seq*.

[1672] American Law Institute, Federal Income Tax Project. International Aspects of United States Income Taxation, II. Proposals on United States Income Tax Treaties (Philadelphia: American Law Institute, 1992), at 61.

[1673] See, however, the contrary decision in Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162*, *Regeringsrättens årsbok* (1987) (also reported in summary in IBFD Tax Treaty Case Law Database); the decision was taken by a majority of 3 to 2 judges. See also Hoge Raad (Netherlands), 6 December 2002, case *36773*, 5 *ITLR*, 680 *et seq*., Opinion of the Advocate General at 701-702, point 3.3; *ibidem*, at 709-719, points 5.5 and 5.6.

[1674] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.20.

[1675] See *ibidem*, at 8.20.

[1676] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.14 and reference therein.

(ii) the reference to the domestic law of the contracting States is likely to lead to different meanings to be attributed to the same (or corresponding) terms by the two contracting States, thus creating instances of double taxation and non-taxation;
(iii) domestic law may change, either by means of statutory amendments, or by means of the evolution of case law and practice, which may lead the tax treaties to be applied in a way unanticipated by and contrasting with the original common understanding of the parties;
(iv) an undefined legal jargon term employed in a tax treaty may correspond, under the domestic law of either contracting State, to more than one concept, which contributes to increase uncertainty in the application of the treaty;
(v) the undefined legal jargon term used in the tax treaty might be employed in the domestic law of either contracting State in a context and against a background, which includes the object and purpose of the provision of which it is a part, wholly unrelated, or not sufficiently related to the context and background of the tax treaty, thus leading to unsatisfactory results.

Those arguments, however, can be rejected one by one for the following reasons:
(i) since the parties explicitly agreed that tax treaty terms should be construed on the basis of their (unilateral) domestic law meaning, unless the context otherwise provides, such (unilateral) domestic law constructions are in accordance with the common understanding of the parties;
(ii) the approach to conflicts of qualification endorsed by the OECD, in the Commentary to Article 23 OECD Model, removes the risk of double taxation and non-taxation in most cases;
(iii) the ambulatory construction of treaty terms in accordance with the evolution of the domestic law meaning of those terms favors the correspondence between domestic charging provisions and treaty relief provisions, as well as the ease of application of the treaty; the interpreter remains free to adopt an interpretation different from that based on the subsequently modified domestic law meaning of the relevant treaty terms, where the former appears unreasonable on the basis of the context;
(iv) the ambiguity of undefined treaty terms under the domestic laws of the contracting States is generally matched by their ambiguity where a contextual approach is taken, in both cases the analysis of the overall context being capable of reducing it; on the contrary, the possible contextual meanings that might be arrived at by the interpreter often present a more significant vagueness than the corresponding domestic law meanings, since, unless the OECD Commentary has taken a position thereon, the former are developed by courts, tax authorities and scholars of different States with different legal backgrounds and encyclopedic knowledge;
(v) where the undefined treaty terms are employed, under domestic law, in a context and against a legal background wholly unrelated, or not sufficiently related, to the context and background of the tax treaty, the interpreter may

adopt an interpretation different from that based on domestic law, arguing that the context requires it.

From this vantage point, the proposition that contextual uniform meanings should be applied, as far as possible, in order to construe tax treaties boils down to the proposition that, in some cases, it is preferable to apply an interpretation other than that based on the domestic law meaning of the undefined treaty terms.

Accordingly, some scholars have taken the view that "the context must […] be reasonably strong to the internal law meaning to be ousted",[1677] while others have maintained that "it is impossible to infer from Art. 3(2) a systematic preference for interpretation from the context over interpretation by reference to national law" and that "both interpretation procedures must be viewed in mutual reciprocity".[1678]

This brief overview of the contrasting positions taken by international tax scholars on the matter constitutes enough evidence to support the proposition that, in respect of the question whether the context requires an interpretation other than that based on the *renvoi* to the domestic law of the State applying the treaty, the interpreter enjoys a significant discretion.

Nonetheless, the author considers that, in order to be reasonably grounded, the interpreter's arguments in support of his conclusion should take into account the following aspects.

First, one should never lose sight of the fact that tax treaties are made to be interpreted and applied by local operators, such as tax practitioners, national courts and tax authorities, and not by international lawyers. Currently, the only three systems actually employed at the supranational level in order to deal with (and possibly solve) issues concerning the interpretation and application of tax treaties are the mutual agreement procedure provided for in Article 25 of OECD Model-type tax treaties and, to a much lesser extent, the arbitration procedures provided for under some tax treaties[1679] and the

[1677] J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 108. See similarly C. van Raad, "Interpretatie van belastingverdragen", 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*, at 52.

[1678] K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 214, m.no. 70. See also *ibidem*, m.no. 71; J. M. Mössner, "Zur Auslegung von Doppelbesteuerungsabkommen" in K.-H. Böckstiegel et al. (eds.), *Volkerrecht, Recht der Internationalen Organisationen, Weltwirtschaftsrecht: Festschrift Für Ignaz Seidl-Hohenveldern* (Köln: Heymann, 1988), 403 *et seq.*, at 426; B. J. Arnold and M. J. McIntyre, *International Tax Primer. Second Edition* (The Hague: Kluwer Law International, 2002), at 115-116.
The position taken by Arnold and McIntyre, although also relying on the idea of the mutual reciprocity of the two interpretation procedures, appears more neutral than that endorsed by Vogel and the International Tax Group. According to the authors, "the words of Article 3(2) do not establish any clear preference for domestic law meanings or treaty meanings for undefined terms. In addition, we see no strong policy reason for establishing any residual presumption in favour of a domestic or treaty meaning. The meaning of undefined terms in a tax treaty should be determined by reference to all of the relevant information and all of the relevant context" (see *ibidem*).

[1679] See, for instance, Article XXVI(6) and (7) of the 1980 Canada-United States tax treaty; Article 29(5) of the 1992 Netherlands-United States tax treaty; Article 25(5) and (6) of the 1989 Germany-United States tax treaty. See also Article 25(5) OECD Model.

Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.[1680]

As more than once noted in the present study, the construction by local operators of the undefined legal jargon terms in the treaty on the basis of the meaning they (or proxies thereof) have under the domestic law of the State applying the treaty significantly enhances the ease of application and the predictability of the interpretation of the relevant treaty provisions.[1681]

Second, the *renvoi* to domestic law meanings finds an outer limit in the need to prevent the interpretation of the relevant treaty provision being absurd or unreasonable[1682] in light of the overall context.[1683] Thus, the effects stemming from the construction of the relevant treaty provision cannot contrast with the effects that, on the basis of the overall context, the interpreter may reasonably envisage the parties intend those provisions to have in the specific case at stake.

Therefore, the issue of which should prevail - the domestic law meaning or a conflicting contextual meaning - is not the correct question to be asked. The accurate question is, on the contrary, how strong is the indication that may be drawn from the overall context that the parties, in the specific case, would agree to attribute a meaning other than the domestic law meaning to the relevant undefined treaty term. If such an indication is strong enough, i.e. if the interpreter is more persuaded that the parties would so agree, rather than not, such other meaning, being the utterance meaning of the term, must obviously prevail over the domestic law meaning. The matter, therefore, is one of persuasion of the interpreter and capacity thereof to reasonably argue in favor of the selected meaning.

Third, the task for the interpreter is rendered more burdensome by the fact that the overall context comprises many heterogeneous elements and items of evidence,[1684]

[1680] Done in Brussels on 23 July 1990 (90/436/EEC).

[1681] See S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), at pp. 170-171, who highlights that the general application of international treaties by national courts and tribunals is a factor detrimental to their uniform interpretation.

[1682] I.e. not in good faith. According to Avery Jones, "[c]ontext, in the expression unless the context otherwise requires therefore has a wider meaning than in the Vienna Convention, and is important in avoiding the inappropriate use of internal law definitions. In *Padmore* v. IRC ([1989] STC 493) it was argued that a body of persons does not include a partnership because there was an internal tax law definition which did not include a partnership, but the court held on the basis of the wording of the treaty, which differed from the Model, that the context otherwise required, so that the internal law definition should not be used" (J. F. Avery Jones, "United Kingdom", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 597 *et seq.*, at 610).

[1683] See, for instance, Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 18, para. 29.1 and at 20, para. 30.

[1684] Such as, for instance, the domestic tax laws of the contracting States in force at the time of the treaty conclusion; the current domestic tax law of the other contracting State; the domestic private law of the contracting States (both current and in force at the time of the treaty conclusion); the domestic tax law of other States member of the OECD; the generally accepted principles of law; the Commentary to the OECD Model (both in its current version and in the version existing at the time of the treaty conclusion); other applicable rules principle of international law between the contracting States; the object and purpose of the treaty, the

generally pointing not at a single meaning, but at a group of meanings that overlap only to a limited extent and that are perceived by the interpreter as characterized by different levels of relevance. In addition, as mentioned in the first part of the present study, these various "contextual" meanings are never clearly shaped, but are always characterized by vagueness: they are not purely black and white pictures, but are made up of (i) black and white areas, representing the prototypical denotata and non-denotata, and (ii) more or less large gray areas, representing items that might be considered by a significant group of people as denoted and by another significant group as not denoted by the relevant term. These gray areas, in turn, may be darker or lighter, according to whether it is more or less generally accepted that the corresponding items are denoted, rather than not denoted by the term.

Therefore, with regard the specific item at stake in the case faced by the interpreter, it is possible that under all possible contextual meanings the item is clearly denoted (or not denoted) by the relevant treaty term, but it is equally likely that the item is clearly denoted under some and clearly not denoted under the other meanings, or that, while being clearly denoted (or not denoted) under some meanings, under the others it is doubtful whether it is denoted by the relevant treaty term.

The interpreter should thus confront, in the course of his argumentation, the result stemming from the solution of this puzzle with that deriving from the attribution of the (selected) domestic law meaning to the relevant treaty term and, in the case of conflict, supporting the chosen solution on the basis of the relative strength of the opposite items of evidence. Obviously, the existence of a clear convergence, under the various contextual meanings, on the specific item being denoted (not denoted) by the relevant treaty term, which contrasted with the fact that such an item is not denoted (denoted) by the same term under the domestic law meaning of the latter, would constitute a strong argument for the interpreter to support the conclusion that "the context otherwise requires".[1685]

Fourth, the interpreter should also assess whether the relevant undefined legal jargon term is used in significantly different contexts (i) under the contracting State's domestic law and (ii) under the treaty. In the affirmative case, one might reasonably question whether the contracting States intended that domestic law meaning to be applied for the purpose of interpreting the treaty and the arguments in favor of the meanings based on

---

context of the provision to be interpreted (including its object and purpose itself and the rules that may expressed by other provisions of the treaty); the interpretation of similarly worded tax treaty provisions by the courts of other States; etc.

[1685] According to some authors, the burden of proving that the context requires an interpretation different from that based on the domestic law meaning should rest with the party invoking the contextual meaning (see J. Sasseville, "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 134; implicitly, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", in *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 108).
For a court decision where the "choice" between the domestic law meaning and the contextual meanings is explicitly dealt with in terms of onus of proof, see Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 14, para. 18.

the overall context would gain relative weight.

The Hoge Raad (the Netherlands), for example, has endorsed the view that domestic law meanings should not be used in order to construe undefined legal jargon terms in a treaty where those terms are used in a different context under domestic law. In particular, in the case 37024/2003[1686] the Court maintained that, since the expression "[being] present", as used in Article 15 of the 1991 Netherlands-Nigeria tax treaty, was neither defined in that treaty, nor used in any similar context under Netherlands domestic tax law, such an expression was to be construed in accordance with the rules of interpretation provided for in Articles 31 and 32 VCLT.

Similarly, according to Engelen, it is reasonable to assume that the contracting States intended the *renvoi* to their domestic law provisions to apply only in so far as those provisions are relevant for the purpose of the interpretation of the treaty provisions concerned, which in turn implies that the undefined treaty terms are to be used under the contracting States' domestic law in a context similar to the one in which they are employed in the tax treaty.[1687]

The array of instances where the interpreter must evaluate whether the context requires an interpretation different from the one based on the domestic law meaning of the relevant undefined treaty terms is almost endless.[1688]

Some cases, however, require a brief analysis due to their frequency and relevance for the subject of the present study.

A first instance concerns the case where the legal jargon terms used in the authentic text drafted in the official language of the State applying the treaty are followed (generally within parenthesis) by the corresponding legal jargon terms used (alone) in another authentic text.[1689] In this case, it might be reasonably argued that the context requires an

[1686] Hoge Raad (Netherlands), 21 February 2003, case *37024*, 5 *ITLR*, 818 *et seq.*, at 876, para. 3.5. See, similarly, Hoge Raad (Netherlands), 21 February 2003, case *37011*, BNB 2003/177.

[1687] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 487.

[1688] See, for instance, High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 79-81; High Court (Ireland), 24 June 1994, *Travers v. O'Siochain*, *The Irish Reports* (1994), 199 *et seq.*; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., at 813; See Federal Court of Appeal (Canada), 4 February 2004, *Beame v. R*, 6 *ITLR*, 767 *et seq.*, at 775, para. 25; Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v, Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq*., paras. 71 and 74. See also The relevance attributed by Hemmelrath to the type and intensity of the economic ties typically existing between the business activity of an enterprise and the State where it has a permanent establishment in order to support the conclusion that the terms "business profits" and "enterprise" (as well as the corresponding terms employed in the authentic texts drafted in languages other than English) should be interpreted autonomously and not by reference to the domestic law of the contracting State applying the treaty, since the application of the domestic law meaning "would bring about inappropriate results" (see A. Hemmelrath in K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 406-407, m.nos. 23-26; *contra* F. Wassermeyer, in H. Debatin and F. Wassermeyer (eds.), *Doppelbesteuerung: DBA* (Munich: Beck, 1997 – loose-leaf), at m.n. 16a to Article 7).

[1689] See Article 3(1)(a) of the 1999 Italy-United States tax treaty, where the term "associazione commerciale" is followed by the term "(trust)" in the Italian authentic text.

interpretation different from that based on the domestic law meaning of the terms used in the authentic text drafted in the language of the contracting State applying the treaty, e.g. an interpretation based on the meaning that the terms in parenthesis have under the domestic law of the States using them, which might or might not be the other contracting State.[1690]

Similarly, the use in one authentic text of a term different from the corresponding legal jargon term commonly employed under the domestic law of the State in whose official language that authentic text is drafted may sometimes be regarded, if matched by other contextual elements, as evidence of the parties' intention to attribute to the former term a wider, or narrower, intension than the one the latter term has under that contracting State's domestic law.[1691]

Another case concerns situations where, under the relevant domestic tax law, a fine distinction exists between two (or more) terms (assume terms "A" and "B") with similar functions and a similar or neighboring scope, one of which ("A") is actually employed in the tax treaty to be construed. In such a case, the interpreter might argue that the analysis of the overall context leads to the conclusion that treaty term "A" should be given a meaning wider than the meaning that it has under the domestic law of the State applying the treaty, so as to include the meaning that term "B" has under that law.[1692]

[1690] A fortiori the "contextual meaning" may be suggested by the meaning of the corresponding legal jargon terms under the law of the other contracting State where the term used in the authentic treaty text drafted in the official language of the State applying the treaty is not a legal jargon term (see Gomi and Ozawa, *Explanation Article by Article of the Japan-U.S. Tax Treaty (nichibei sozei joyaku chikujo kaisetsu)* (1979), p. 71, cited in J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to Article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 53-54).

[1691] See, with regard to the use of the term "alienation" in Article 13 OECD Model, Federal Court (Australia), 20 August 1997, *Commissioner of Taxation* v. *Lamesa Holdings BV,* [1997] FCA 785; J. F. Avery Jones et al., "The Origins of Concepts and Expressions used in the OECD Model and their Adoption by States", 60 *Bulletin for international taxation* (2006), 220 *et seq.*, at 249-250. See also the use, in the Italian authentic text of the Italian OECD Model-based tax treaties, of the terms "Redditi immobiliari" in the title and "beni immobili" in the corpus of Article 6, while the legal jargon term used under Italian income tax law, i.e. "redditi fondiari", is never used in the treaty text; one sensible explanation of this terminological choice is that the contracting State intended Article 6 of the treaty to have a wider scope than that of "redditi fondiari" under Italian law.

[1692] See, similarly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.16, criticizing the exaggerated attention paid by Franklyn J. of the Western Australia Supreme Court and Sheppard L.J. and Lee L.J of the Australia Full Federal Court in the *Thiel* case to the distinction existing under Australian income tax law between the terms "carry on" and "carry out" for the purpose of interpreting the expressions "an enterprise carried on by a resident" and "the enterprise carries on business", as used in Articles 3(1)(f) and 7(1) of the 1980 Australia-Switzerland tax treaty. Edwardes-Ker notes that this very same approach was taken by the Australia High Court, who reversed the decision of the above-mentioned lower courts (see High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports,* 338 *et seq.*). See also Hoge Raad (Netherlands), 18 September 1985, case *22926*, BNB 1985/333, with regard to the need to apply Article 16 of the 1970 Belgium-Netherlands tax treaty also to payments made to a Belgian resident company in its capacity as director of a Netherlands resident "besloten vennootschap met beperkte aansprakelijkheid" ("BV"), notwithstanding the fact that the Dutch authentic text of that article made exclusive reference to directors of resident "naamloze vennootschappen" ("NV"). See, similarly, R. C. Palma, "Income Taxation of Intellectual and Industrial Property and Know-How: Conundrums in the Interpretation of Domestic and Treaty Law", 44 *European Taxation* (2004), 480 *et seq.*, with regard to whether the term "droit d'auteur" employed in Article

Finally, it is generally agreed that the context may require not attributing the current domestic law meaning to the relevant undefined treaty terms in situations where the domestic law meaning has changed after the treaty conclusion.[1693]

According to paragraph 12 of the Commentary to Article 3 OECD Model,[1694] the ambulatory *renvoi* to the contracting States' domestic law "applies only if the context does not require an alternative interpretation. The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State". Paragraph 13 then continues: "Consequently, the wording of paragraph 2 provides a satisfactory balance between, on the one hand, the need to ensure permanency of commitments entered into by States when signing a convention (since a State should not be allowed to make a convention partially inoperative by amending afterwards in its domestic law the scope of terms not defined in the Convention) and, on the other hand, the need to be able to apply the Convention in a convenient and practical way over time (the need to refer to outdated concepts should be avoided)."[1695]

Scholars have pointed out in this respect that the qualifying expression "unless the context otherwise requires" might constitute "an important limitation on the power of one of the contracting States to alter radically the application of its treaties by amending the definitions in its internal law, even if Article 3(2) is to have ambulatory effect."[1696]

---

12 of OECD-type tax treaties (or the corresponding terms used under the laws of other civil law countries and in their tax treaties) should be construed as also denoting those rights that under French private law are not, strictly speaking, denoted by such a legal jargon term, but by the term "droit voisin", for the example the right of actors to authorize the reproduction of the movies in which they acted (see, in this respect, their explicit inclusion under Article 12(3) of the 1994 France-United States tax treaty and their implicit inclusion in the scope of Article 12 OECD Model, as resulting from paragraph 18 of the Commentary to Article 12 OECD Model; see, apparently in accordance, Risoluzione n. 12/E of 9 February 2004 issued by the Italian Agenzia delle Entrate, although with regard to the 1992 Italy-Germany tax treaty, which extends the treatment provided for royalties to "similar payments").

[1693] These cases also offer the chance to illustrate that the meaning required by the overall context is not always a uniform meaning, but may be different for the two contracting States. In fact, where the interpreter finds that the application of the domestic law meaning, as amended after the treaty conclusion, for the purpose of construing the relevant treaty provision, would lead to a substantial alteration of the original allocation of taxing rights between the contracting States, he then often concludes that the domestic law meaning in force at the time of the treaty conclusion should apply instead of the current one. Such a meaning, however, although being a "contextual" meaning in the sense of Article 3(2) OECD Model, may be different with regard to the two contracting States, since it consists of the meaning that the relevant treaty term had under the law of each contracting State at the time of the treaty conclusion.

[1694] As amended in 1995.

[1695] See also paragraph 52 of the Commentary to Article 25 OECD Model, which seems to suppor the view that where subsequent domestic law changes shift the originally agreed allocation of taxing rights between the parties, the context requires such domestic law changes to be disregarded for the purpose of construing undefined legal jargon terms in the treaty.

[1696] D. A. Ward, "The Income Tax Conventions Interpretation Act," in *Report of Proceedings of the Thirty-Fifth Tax Conference, 1983 Conference Report* (Toronto: Canadian Tax Foundation, 1984), 602 *et seq*., at 609. See, similarly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.05. At 9.11; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 490; P. J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq.*, at 66, 74 and 79

National courts and tribunals have also generally upheld this position.[1697]

There are, however, cases where, although the attribution to the relevant treaty term of a domestic law meaning modified after the treaty conclusion leads to a change of the original allocation of taxing rights, the interpreter might reasonably argue that the context does not require a different meaning to be applied.

For instance, the fact that both contracting States, after the conclusion of the treaty, have modified their domestic laws by introducing substantially equivalent legal rules or principles, might be referred to in order to support the conclusion that the attribution of the current domestic law meaning (reflecting such a newly introduced rule or principle) to a treaty term, although significantly modifying the original allocation of taxing rights, does not run counter to a good faith construction of the treaty, since the change in the allocation of taxing rights is in this case reciprocal and, may be, almost symmetrical. On the one hand, although it is true that the parties could have not (and probably did not) forecast the introduction of such a rule or principle at the time of the treaty's conclusion, nonetheless they anticipated the possibility that changes in their domestic law could affect the treaty when they included Article 3(2) therein. On the other hand, the reciprocity of the changes in the application of the treaty provisions[1698] allows the sensible inference that such changes are agreed upon by both parties.[1699] Moreover, the interpretation and application of the relevant treaty provision in light of the new domestic law rule or principle, for a certain period of time, by both contracting States might be seen as evidence of the subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation under Article 31(3)(b) VCLT.

An analogous argument might be put forward where the rule or principle subsequently introduced by a contracting State conforms to a rule or principle already in

---

(although in respect of the more limited subject of the fictitious income provisions made in the contracting States' domestic law after the conclusion of the treaty); J. F. Avery Jones, "The interaction between tax treaty provisions and domestic law", in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 133; J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 47-48; J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85 per Sir Ian Sinclair.

[1697] See, for instance, Hoge Raad (Netherlands), 5 September 2003, cases 37651 and 37670, in BNB 2003/379 and 2003/381; Hoge Raad (Netherlands), 5 September 2003, case *37657*, BNB 2003/380. For a comment of the relevant aspects of these decisions, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 491-497 and 501-502).

[1698] Such changes should not be regarded as changes to the treaty, since the treaty provided from the outset for the possibility of prospective changes in the effects of its application, due to changes in the underlying domestic laws.

[1699] See the somewhat similar reasoning in K. van Raad, "Additions to Article 3(2) (Interpretation) and 24 (Non-Discrimination) of the 1992 OECD Model and Commentary", 20 *Intertax* (1992), 671 *et seq.*, at 674; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 494-495; . P. J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq.*, at 66, 74 and 79. See, however, *contra* M. Lang, ""Fictitious Income" and tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 34 *et seq.*, at 41-42.

force in the other contracting State at the time of the treaty conclusion.

Similarly, the fact that, after the conclusion of the treaty, a certain rule or principle of law has become widespread in the domestic tax law systems of developed States (other than the contracting States),[1700] could be relied upon by the interpreter in order to argue that the context does not require attributing to the relevant treaty term a meaning different from the one it has under the contracting State's domestic law, as modified after the treaty conclusion in order to incorporate the above-mentioned rule or principle.

Lastly, one might even argue that, where only one contracting State has subsequently introduced in its domestic law a legal rule or principle that, if referred to for the purpose of interpreting the tax treaty, would lead to a substantial change in the original allocation of taxing rights between the parties, such a rule or principle might nevertheless be referred to for the purpose of construing undefined legal jargon terms on the basis of Article 3(2) where the above-mentioned contracting State has actually construed the treaty in such a way for a sufficiently long period of time and the other contracting State has never protested, therefore silently acquiescing, or has explicitly endorsed that interpretation.[1701]

5.4. Specific tax treaty definitions that refer to domestic law

Apart from Article 3(2), other provisions of OECD Model-based tax treaties refer, explicitly or implicitly, to the domestic law of the contracting States in order to interpret legal jargon terms. This section briefly analyses such further references and, where relevant, assesses the analogies and differences with the *renvoi* encompassed in Article 3(2).

Under Article 3(1)(b), the term "company" is defined as denoting also "any entity that is treated as a body corporate for tax purposes", i.e. by means of an implicit reference to domestic tax law.

Interestingly, paragraph 3 of the Commentary to Article 3 OECD Model provides that the term company "covers any taxable unit which is treated as a body corporate according to the tax laws of the Contracting State in which it is organised". One may argue that such a clarification by the Commentary falls short in that the term "company", bearing a special relevance for the purpose of applying Articles 5(7), 10 and 16 OECD Model, where it is further qualified by the term "resident", should include any entity treated as body corporate for tax purposes under the law of the contracting State of which it is a treaty resident, regardless of the private or company laws under which it is organized.

This *renvoi* appears to be ambulatory, due to the strict link between "company"

[1700] This argument would also hold true, *a priori*, where such a rule or principle was already widespread in the domestic tax law systems of developed States at the time of the treaty conclusion.

[1701] See, similarly, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 67, m.no. 126.

and "resident" under Articles 5(7), 10 and 16 the OECD Model and the fact that the term "resident", under Article 4 OECD Model, is defined by means of an ambulatory reference to the contracting States' domestic law (see below).

Article 3(1)(g)(ii) OECD Model defines "national", in relation to a contracting State, as any legal person, partnership or association deriving its status as such from the "laws" in force in that contracting State.

The overall context suggests that the reference is intended to be to the private or company law of the relevant contracting State, i.e. the law that confer to such bodies of person their existence and status.

Moreover, it seems reasonable to conclude that the reference to such a law should be ambulatory, since it would not make sense to denote as nationals, for the purpose of the treaty, bodies of person that no longer derive their status as such from the domestic law of the relevant contracting State. This conclusion is further supported by the fact that, until 1992, the definition of "national" was included in Article 24 OECD Model, which requires an ambulatory approach in order to tackle discrimination caused by later changes occurred in the domestic laws of the contracting States.

The above comments apply, by analogy, to the implicit reference to the contracting States' laws on the acquisition or loss on nationality or citizenship encompassed in Article 3(1)(g)(i) OECD Model.[1702]

Article 4(1) OECD Model provides that, for the purposes of the relevant treaty, "the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof".[1703]

The explicit reference to the contracting State's domestic laws in the first sentence appears intended to refer to the domestic tax laws to which the treaty applies, on the basis of (i) the reference to the person's liability to tax in that State, (ii) the overall structure of the OECD Model and (iii) the role played by the term "resident" within the various distributive rule articles. On the other hand, the reference to the State and its political subdivisions and local authorities encompassed in the second sentence implies a *renvoi* to the constitutional and administrative laws of that State.

In both cases, the reference to the contracting State's domestic law should be regarded as ambulatory, since "[i]t would be impossible to apply the treaty to people who were or were not resident under a definition which was no longer applicable",[1704] as

[1702] See also paragraph 8 of the Commentary to Article 3 OECD Model.

[1703] For a case where the court decided that the term "resident" was to be interpreted in accordance with domestic tax law, although the treaty contained a definition thereof departing from such law, see High Court of Justice of England and Wales (United Kingdom), 1 March 1982, *IRC v. Exxon Corporation*, [1982] STC 356. This case is commented on, and strongly criticized, with reference to the application by Goulding J. of the principle of effectiveness in order to give effect to the intended purpose of the relevant treaty provision, in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 6.04.

[1704] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the

well as to political subdivisions and local authorities no longer existing under the relevant contracting State's domestic law.

Under Article 6 OECD Model, the term "immovable property" has, in the first place, "the meaning which it has under the law of the Contracting State in which the property in question is situated."[1705]

In this respect, the International Tax Group seems to uphold the view that the *renvoi* is intended to the general law of the contracting State in which the property is situated.[1706] However, one may argue that evidence exists to support the view that the reference should be intended primarily to be to the domestic tax law of that State. First, a contextual analysis shows that, in the very same Article 6(2), a reference is specifically made to "general law"[1707] in order to include in the intension of "immovable property" the rights to which the provisions of private law concerning landed property apply. Moreover, the tax treaty practice of certain States seems to point to the same conclusion. Under certain Canadian tax treaties, for example, the immovable property article makes reference to "real property" in the English authentic text and to "biens immeubles" in the French authentic text.[1708] Since "real property" and "biens immeubles" do have the same meaning under Canadian tax law, but they have different meanings under Canadian general law,[1709] the only construction removing the potential divergence of meaning would appear to be that based on a *renvoi* to Canadian domestic tax law.

No clear evidence, other than that referred to with regard to Article 3(2) OECD Model, seems to exist in favor of the static or ambulatory nature of the *renvoi* encompassed in Article 6.

Article 10(3) OECD Model provides that the term "dividends", for the purpose of Article 10, includes income from "other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident".

The strict context, in this case, clearly suggests that the *renvoi* is intended to the

---

OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 34.

[1705] See Article 6(2) OECD Model.

[1706] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 35.

[1707] "Droit privé" in French.

[1708] E.g. Article VI of the 1980 Canada-United States tax treaty, where however the term "real property" is explicitly given the meaning it does have under the "taxation" laws of the State where it is situated; Article 6 of the 1980 Australia-Canada tax treaty, as amended by the 2002 protocol (before the amendment there was no reference to domestic law in Article 6, so that Article 3(2) applied directly and the tax law meaning was adopted for interpretation purposes; it is doubtful whether the contracting States wanted to change such a *renvoi* to the domestic tax law by means of the insertion of the reference to the domestic law directly in Article 6, since the overall changes made by the protocol seem more oriented to bring into operation the "standard" Canadian treaty definition of "immovable/real" property); Article 6 of the 1980 Canada-New Zeeland tax treaty; Article 6 of the 1987 Canada-Papua New Guinea tax treaty, where however the "real property" is explicitly given the meaning it does have under the "taxation" laws of the State where it is situated.

[1709] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 35.

domestic tax law of the State of residence of the distributing company (i.e. the laws concerning the taxes to which the treaty applies).

In contrast, no clear evidence, other than those referred to with regard to Article 3(2) OECD Model, seems to exist in favor of the static or ambulatory nature of this *renvoi*.

Under Article 11(6) OECD Model, where the amount of the interest payments between related parties is not at arm's length, the excess part of the payments "shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of [the treaty]".

Also in this case, the strict context of the provision supports the view that the reference should be regarded as made to the relevant "tax laws" of the contracting States (i.e. the laws concerning the taxes to which the treaty applies).

For the same reason, it seems reasonable to conclude that the *renvoi* has an ambulatory nature, since the excess part of the payments may "remain taxable" only "according to the laws of each contracting State" in force in the relevant tax year.

With regard to Article 11 OECD Model, it is also interesting to note that paragraph 21 of the Commentary thereto states that "[i]t has seemed preferable not to include a subsidiary reference to domestic laws in the text; this is justified by the following considerations: […] b) the formula employed offers greater security from the legal point of view and ensures that conventions would be unaffected by future changes in any country's domestic laws". This statement seems to imply that a reference to domestic law, where included, would have been regarded as ambulatory in nature.[1710]

Article 12(4) OECD Model provides for a rule similar, in all relevant respects, to that encompassed in Article 11(6) OECD Model. Thus, the comments made in relation to the latter apply, by analogy, to the former.

In Article 23 OECD Model, no reference is made to the contracting States' domestic law. However, as paragraph 60 of the Commentary to Article 23 OECD Model points out with regard to the credit method provision, "[a] number of conventions […] contain a reference to the domestic laws of the Contracting States and further provide that such domestic rules shall not affect the principle laid down in Article 23 B".

This statement has been interpreted, correctly according to the author, as implying that the reference to the domestic credit method rules should be regarded as ambulatory and that, in any case, subsequent domestic law changes should not be taken into account where affecting the principle laid down in the treaty article.[1711]

[1710] See, accordingly, See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 36.

[1711] See J.F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 37. See also the decision of the Supreme Court (Canada) in the *Interprovincial Pipe Line Company* case, where the Court, with specific reference to the interpretation of article XV of the 1942 Canada-United States tax treaty, according to which, "[a]s far as [might] be in accordance with the provisions of the Income Tax Act", Canada agreed to allow a

Finally, the various references to the domestic (tax and other) laws of the contracting States in the treaty articles dealing with mutual agreement procedures, exchange of information and assistance in the collection of taxes should be regarded as made to the rules and principles of law in force at the time of their application, due to the essentially procedural and administrative nature of such articles.[1712]

With regard to the above implicit and explicit references to the contracting States' domestic law, Edwardes-Ker[1713] expresses the view that they are justified, from a policy perspective, by the fact that the use of the domestic law meaning in such cases is axiomatic,[1714] necessary,[1715] or helpful.[1716] As a consequence, in these cases the context does not generally require a different meaning to apply.

He also adds that, "if a tax treaty is to remain effective, these meanings must normally be those current at the time a dispute arises – and not those originally applicable when this tax treaty was first concluded. It must be presumed that this was the original intention of the parties."[1717]

To conclude, it is worth noting that while the rules of interpretation provided for in Article 3(1) and 3(2) OECD Model explicitly establish that the domestic law meanings must be applied unless the context otherwise requires, other rules, in particular those encompassed in Articles 4(1), 6(2) and 10(3) OECD Model, do not.

One might infer, from the presence in the former and the absence in the latter provisions of a reference to the context requiring a different interpretation, that with regard to the latter the drafters intended to apply the domestic law meaning without exception. With regard to Article 6(2) and 10(3), this construction may find further support in the narrow scope of such a *renvoi*, which might be considered to be limited to Articles 6 and 10,[1718] as well as to the few other articles that explicitly refer thereto.[1719]

---

credit for the income tax levied by the United States at source, stated that the effect of that article "was to establish mutual covenant to apply as between each country whatever foreign tax credit provision the respective domestic laws of each country might *from time to time* adopt" (see Supreme Court (Canada), 1 April 1968, *Interprovincial Pipe Line Company v. R.*, [1968] SCR 498 - *emphasis* added).

[1712] See, the similar conclusion reached, in respect of Article 26 OECD Model, by J.F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 38.

[1713] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.01-8.06 and 9.07.

[1714] For instance, with regard to terms "nationality" and "citizenship" employed in Article 3(1)(g)(i) OECD Model and the terms "political subdivision" and "local authority" used in Article 4 OECD Model.

[1715] For instance, with regard to the terms "domicile", "residence" and "place of management" used in Article 4 OECD Model.

As a matter of fact, Edwardes-Ker does not refer to these terms employed in Article 4 OECD Model, but simply to "residence", which however is the term defined therein; the reference therefore seems intended to the terms used to define "residence" by means of a *renvoi* to the domestic law of the relevant contracting State.

[1716] For instance with regard to the term "immovable property" employed in Article 6 OECD Model.

[1717] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.07.

[1718] See the wording of Article 10(3): "the term "dividends" as used in this article means".

Edwardes-Ker, in this respect, maintains that the definitions employed in the OECD Model that make explicit reference to the domestic laws of the contracting State "do not provide that these domestic definitions are not to apply "where the context otherwise requires" – precisely because this tax treaty context does not require them to apply."[1720]

However, an approach that rejects in advance the possibility that the overall context might require an interpretation different from the one stemming from the application of the contracting States' domestic law meaning appears to be over-rigid, since it eliminates from the outset an interpretative tool that might be helpful in order to construe the tax treaty provisions in a reasonable manner,[1721] especially in cases where the domestic law of the relevant State had gone through drastic changes that the parties could not have plausibly anticipated.[1722] In this respect, it would seem adequate to just require a severe burden of proof to be satisfied in order for a meaning other than the domestic law meaning to apply. Moreover, as the treaty definitions referring to the domestic law of the contracting States are also often made up of other undefined terms, which in turn must be construed either in accordance with Article 3(2), if legal jargon terms, or solely in accordance with the rules encompassed in Articles 31-33 VCLT, if non-legal jargon terms, the influence of the overall context on the construction of defined treaty terms in any case will remain great.[1723]

5.5. The role of the renvoi to domestic law in the interpretation of multilingual tax treaties

5.5.1. The right to rely on a single text: the relevance of the authentic text drafted in

[1719] E.g. Articles 13(1) and 21(2) OECD Model, which both refer to the definition of "immovable property" provided for in Article 6(2) OECD Model.

[1720] M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.01.

[1721] See, for instance, House of Lords (United Kingdom), 5 February 1975, *Oppenheimer v. Cattermole*, 50 TC 159.

[1722] See the example given by Edwardes-Ker (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.02) with regard to the term "national". In this respect, the author seems to support the view that the movement of the definition of "national" from Article 24 to Article 3 OECD Model could have an impact on whether the context might (now) require the domestic law meaning of the term "national" not to be applied (while it might not, when the definition was encompassed in Article 24) in cases of a substantial change in the domestic law meaning. This different outcome would be supported by the fact that Article 3(1) OECD Model (as amended in 1992) explicitly provides that the domestic law meaning is to be applied "unless the context otherwise requires", while a similar provision was missing in the definition provided for in Article 24(2) of the 1977 OECD Model. In light of the history of the definition of the term "national" in of the OECD Model, the author doubts that the movement of such a definition from Article 24 to Article 3 implies a change in the drafters' intention to make it subject (or not) to the context requiring otherwise.

[1723] This is true, for instance, with reference to the expression "any other criterion of a similar nature" employed in Article 4 OECD Model, which qualifies the reference to the domestic law of the could-be-residence State, as well as with reference to the term "corporate rights" used in Article 10(3) OECD Model, which qualifies the income that is to be subjected to the same taxation treatment as income from shares in order to be characterized as "dividends" for the purpose of Article 10.

the official language of the State applying the treaty

As previously mentioned, the *renvoi* to domestic law encompassed in Article 3(2) applies only in so far as undefined legal jargon terms in the tax treaty are at stake.

Where this is the case and no *prima facie* divergence of meanings is alleged to exist among the various authentic texts, the combined reading of Article 33 VCLT and Article 3(2) entitles the interpreter to exclusively employ the authentic text drafted in the official language of the State applying the treaty (if existing) and to construe the relevant treaty provision on the basis of the domestic law meaning that the legal jargon terms used in that text (or their proxies) have under the domestic law of that State.

The interpreter remains, however, under the duty to determine whether the context requires a different interpretation. In this respect, the analysis carried out in previous section 5.3.3 is applicable. For the purpose of the present section, it is nonetheless worth noting that, in order to assess whether the context requires a different interpretation:

(i) Article 33 VCLT allows the interpreter to disregard the other authentic texts; and

(ii) the interpreter should take into account the OECD Model (official versions) and its Commentary, where the treaty is based on that Model.

Similarly, where the tax treaty is authenticated only in one language,[1724] other than the official languages of the contracting States, Article 3(2) directs the interpreter to construe undefined legal jargon terms in accordance with the meaning that the corresponding terms, expressed in the official language of the contracting State applying the treaty, have under the domestic law of that State.

In order to choose the relevant "corresponding terms" under the law of the State applying the treaty, the interpreter should use all available elements and items of evidence, such as bilingual (legal) dictionaries, thesaurus dictionaries, (comparative) law textbooks and encyclopedias, the authentic texts of other tax treaties concluded by that State and drafted in its own official language, as well as the tax treaty model of that State, if publicly available.

For instance, where Article 7 of an Italian tax treaty authenticated only in English[1725] employs the term "enterprise", Article 3(2) would direct the interpreter to construe that term in accordance with the meaning that the corresponding terms "impresa" has under Italian income tax law. The term "impresa" should be chosen as domestic law term corresponding to the treaty term "enterprise", since, among other things:

[1724] In the very remote case that the tax treaty is authenticated in two or more languages, but not in the official language of the State applying the treaty, Article 33 VCLT enables the interpreter to rely exclusively on one authentic text and Article 3(2) directs the interpreter to construe the undefined legal jargon terms employed in that text in accordance with the meaning that the corresponding terms, expressed in the official language of the contracting State applying the treaty, do have under the domestic law of that State. In this regard, the conclusions drawn in respect of monolingual tax treaties and multilingual tax treaties authenticated also in the official language of the State applying the treaty are relevant *mutatis mutandis*.

[1725] This is a purely hypothetic case, since all Italian tax treaties are authenticated (also) in the Italian language.

(i) the former is the term generally used in the Italian authentic texts of Italian tax treaties; and

(ii) a bilingual (legal) dictionary normally indicates those two terms as synonyms.

Obviously, in this case as well the interpreter may conclude that the context requires an interpretation different from the one based on the domestic law meaning.

5.5.2. The solution of prima facie divergences between the authentic treaty texts

5.5.2.1. The nature and significance of the prima facie divergences: conclusions on research questions c-i)

This subsection deals with the following research questions:

i. Does Article 3(2) have an impact on the nature of the potential discrepancies in meanings among the authentic texts of a multilingual tax treaty? Where this question is answered in the affirmative, which are the various types of prima facie discrepancies that may arise? Should the interpreter put all of them on the same footing for the purpose of interpreting multilingual tax treaties?

In order to accurately tackle them, it is appropriate to start the analysis from the classification of the different types of divergences of meaning that may emerge from the interpretation of legal jargon terms in accordance with Article 3(2).

A first type of *prima facie* divergence may be said to exist between two accurately (although not perfectly) corresponding legal concepts existing under the laws of the two contracting States ("type-A divergence").

Often, such concepts are pointed to by the corresponding terms employed in the two authentic texts drafted in the official languages of the contracting States. For instance, the terms "impresa" and "Unternehmen" used in the Italian and German authentic texts of the 1989 Germany-Italy tax treaty point to the respective underlying legal concepts existing under Italian and German tax laws. Where these two concepts were found to be not absolutely equal (as actually is the case, for example in respect to certain forestry and agriculture activities), a (limited) divergence may be said to exist between them.

However, this type of difference may also emerge where the tax treaty is authenticated only in one (neutral) language. In the latter case, the interpreter also has to face the additional burden of determining which is the legal jargon term in the official language of the State applying the treaty best corresponding to the legal jargon term employed in the authentic treaty text (drafted in a different language).

For instance, if the Germany-Italy tax treaty had been authenticated only in the English language, the treaty term "enterprise" would point to the domestic legal concept underlying the legal jargon term "impresa" where Italy applied the treaty and, in contrast, to the domestic legal concept underlying the term "Unternehmen" where

Germany applied the treaty.

A second type of divergence[1726] may be seen to exist between two legal concepts both existing under the law of the State applying the treaty ("type-B divergence"). Generally, those legal concepts are:

> (i) the one underlying the legal jargon term used in the authentic text drafted in the official language of that State; and
> (ii) the one underlying the legal jargon term (expressed in the official language of the State applying the treaty) that is considered by the interpreter to best correspond to the legal jargon term employed in another authentic text.[1727]

For instance, the Italian text of an Italian tax treaty may use the term "lavoro autonomo" in a certain article, while the English authentic text uses the term "employment". The Italian legal jargon term that is generally considered to best correspond to the English term "employment" is the term "lavoro subordinato" (or "lavoro dipendente"); the latter is, in fact, the term that is generally used in Article 15 of Italian OECD Model-based tax treaties and one of the terms that is generally indicated as a synonym of the term "employment" in bilingual (legal) dictionaries. Under Italian (tax) law, the concepts corresponding to the terms "lavoro autonomo" and "lavoro subordinato" are significantly different, the former denoting as prototypical items the activities carried on by a self-employed person. In this case a divergence may be said to exist between the two Italian legal concepts.

In the majority of cases, however, the type-B divergence is less obvious. For instance, the English authentic text of Article 16 of the 1988 Italy-United Kingdom tax treaty, similar to Article 16 of the OECD Model, makes exclusive reference to the "board of directors" of a company, while the Italian authentic text thereof employs the expression "consiglio di amministrazione o […] collegio sindacale". Although the Italian Civil Code entrusts the "consiglio di amministrazione" with pure management functions and the "collegio sindacale" with control and supervisory functions, bilingual dictionaries generally equate the "consiglio di amministrazione" to the "board of directors" and the "collegio sindacale" with the "board of statutory auditors". On this basis, one might reach the conclusion that the Italian legal jargon term best corresponding to the English term "board of directors" is "consiglio di amministrazione", whose underlying legal concept is narrower than the one corresponding to the compound expression "consiglio di amministrazione o […] collegio sindacale". In such a case, the conclusion would be drawn that the two legal concepts are different.

From a quantitative perspective, on the other hand, the significance of the divergences

[1726] This second type of divergence may theoretically emerge as well with regard to the two (or more) authentic texts drafted in the official languages of a single contracting State. The issues connected to this case, however, are not different from those characterizing the instance of two (or more) authentic texts drafted in the official language of one contracting State and in another language.

[1727] I.e. the authentic text drafted in the official language of the other contracting State, or an authentic text drafted in a different language.

existing among the relevant legal concepts may vary within a spectrum where the extremes are:

(i) the case of legal concepts sharing all their prototypical items and presenting only limited differences with regard to the peripheral items that are within their respective scope; and

(ii) the case of legal concepts not sharing any of their respective prototypical items.

The first case is, for instance, that previously illustrated with reference to the comparison of the domestic law concepts underlying the terms "impresa" and "Unternehmen".

The second case is, for instance, that previously illustrated with reference to the comparison between (i) the Italian law concept underlying the term "lavoro autonomo" and (ii) the Italian law concept underlying the term "lavoro subordinato".

In light of the above analysis, the *prima facie* discrepancy in meaning resulting from the comparison of two authentic treaty texts, drafted in the respective official languages of the contracting States, may be examined and described in terms of type-A and type-B divergences.[1728]

In particular, a first case of *prima facie* discrepancy may emerge as a pure type-A divergence. This is the case where the relevant legal jargon terms employed in the two authentic texts appear to be very accurate correspondents, under the respective domestic laws, in light of all elements and items of evidence available (e.g. bilingual legal dictionaries, comparative law textbooks, comparative legal studies, etc.). From a quantitative perspective, pure type-A divergences generally concern only peripheral items. Even in cases where the discrepancy concerns prototypical items as well, it is usually not so significant and pervasive to make the interpreter doubt, in the absence of other decisive elements and items of evidence, that the parties intended to interpret the relevant treaty provision in accordance with the meaning that the term employed in the text drafted in the official language of the State applying the treaty (or a proxy thereof) has under the domestic law of that State. The *prima facie* discrepancy between the terms "impresa" and "Unternehmen" employed in the Italian and German authentic texts of the 1989 Germany-Italy tax treaty represents a good instance of this type of discrepancy.

A second case of *prima facie* discrepancy emerges as a combination of type-A and type-B divergences, in the sense that the discrepancy is caused:

(i) not only by the fact that the two best corresponding terms, under the respective domestic laws of the two contracting States, have two (more or less) divergent meanings (type-A divergence),

(ii) but also and predominantly by the fact that the two terms employed in the authentic treaty texts do not appear to be accurate correspondents, under the respective domestic laws, more similar terms (and thus concepts) existing under such laws (type-B divergence).

From a quantitative perspective, this second kind of discrepancy in concerns both

[1728] The same holds true, by analogy, where one (or even both) of the compared authentic texts is drafted in a language other than the official languages of the contracting States.

prototypical and peripheral items and, in extreme cases, makes the interpreter seriously doubt whether the parties intended to interpret the relevant treaty provision in accordance with the meaning that the term employed in the text drafted in the official language of the State applying the treaty (or a proxy thereof) has under the domestic law of that State. For example, where the Italian authentic text of the 1989 Germany-Italy tax treaty employed the term "attività economica" instead of "impresa", the former having a much wider scope than the latter under Italian law, the *prima facie* discrepancy in meaning between the Italian and the German authentic texts could be viewed not only as caused by the ontological discrepancies existing between the two best correspondent terms under the Italian and German domestic laws (i.e. the terms "impresa" and "Unternehmen"), but also by the fact that the term "attività economica" is used in the Italian authentic text instead of the more closely corresponding term "impresa".

At a first level of analysis, thus, the author may conclude that pure type-A divergences are inherently caused by the use of legal jargon terminology in a tax treaty and, therefore, they should be generally accepted as such and dealt with through the application of the *renvoi* encompassed in Article 3(2): the relevant domestic law meaning should be selected by the interpreter on the basis on which contracting State is applying the treaty.[1729]

In contrast, *prima facie* discrepancies caused by the interaction between type-A and type-B divergences should be examined more carefully and, where the effect of the type-B divergence was significant, the interpreter should critically assess whether the context requires the attribution of a meaning other than the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty (e.g. the meaning that the legal jargon term, which best corresponds to the term used in the other authentic text(s) of the treaty, has under the domestic law of the State applying the treaty).[1730]

5.5.2.2. The need to reconcile of the prima facie divergences: conclusions on research question c-ii)

In the last part of the previous section, the author preliminarily concluded that it would seem reasonable for the interpreter to closely look at the *prima facie* discrepancies caused by the interaction between type-A and type-B divergences and, where the effect of the type-B divergence was significant, to critically assess whether the context requires the attribution of a meaning other than the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty. This preliminary conclusion implies that the interpreter should try to reconcile the *prima facie* discrepancy.

[1729] The actual application of such domestic law meaning would obviously remain subject to the context not requiring otherwise

[1730] I.e., in the previous example, the meaning of the term "impresa" (and not of the term "attività economica") under Italian law.

From a systematic perspective, however, such a preliminary conclusion calls for a prior fundamental question to be answered:

ii. Is there any obligation for the interpreter to reconcile (at least to a certain extent) the prima facie divergent authentic texts of an OECD Model-based tax treaty? [1731]

In fact, from the outset the possibility cannot be excluded that, under the system of *renvoi* provided for in Article 3(2) OECD Model, the interpreter is entitled to always and exclusively rely on the legal concepts underlying the legal jargon terms employed in the authentic text drafted in the official language of the State applying the treaty (if existing), disregarding the possible existence of different legal concepts underlying the terms employed in the other authentic treaty texts.

This raises the question whether the interpreter is under an obligation to reconcile (at least to a certain extent) the *prima facie* divergent authentic texts of an OECD Model-based tax treaty, or, in contrast, he may always and exclusively rely on the legal concepts underlying the legal jargon terms employed in the authentic text drafted in the official language of the State applying the treaty.

The answer to such a question should be looked for in the intention of the parties.

In this respect, several items of evidence exist supporting the view that the parties probably intended the interpreter to carry out a (limited) reconciliation of the relevant authentic texts of OECD Model-based tax treaties.

First, tax treaties generally do not contain any explicit derogation to the customary international law principle that the interpreter may rely on any of the authentic treaty texts in order to construe its provisions.

To read in the *renvoi* to the law of the contracting State applying the treaty, encompassed in Article 3(2), an unconditional and compulsory obligation for the interpreter to rely exclusively on the authentic text drafted in the official language of that State, for the purpose of construing the treaty, may be regarded as reading too much in the language of Article 3(2), such a significant departure from customary international law reasonably requiring a more precise and explicit wording to be considered to have been intended by the parties.[1732]

[1731] A similar question (and a similar answer) holds true with regard to the alleged divergences existing between the legal concepts underlying the terms employed in one of the authentic treaty texts and those underlying the corresponding terms used in the OECD Model official versions.

[1732] The alternative view of the absence of an obligation for the interpreter to reconcile the authentic treaty texts (al least in certain cases and to a certain extent), which appears even less sensible than the one just described, would be to consider that the parties intended:

(i) the treaty to have multiple meanings, not depending (solely) on the domestic laws of the contracting States, but from the very same wording of its authentic texts and

(ii) to entitle the interpreter to choose the meaning that best suits his purpose by selecting the authentic text that supports it.

Second, since the tax treaty is based on the OECD Model, the argument may be put forward that the general meaning determined on the basis of the OECD Model (official versions) and the OECD Commentary constitutes a limit to the meaning attributable to the legal jargon terms used in the authentic texts drafted in the official language of the State applying the treaty.[1733]

This also implies that, where one of the authentic treaty texts, other than the one drafted in the official language of the State applying the treaty, reproduces the English or French official version of the OECD Model, the interpreter should take care of and reconcile the alleged difference between those two authentic texts. For instance, where a specific tax treaty appears to be based on the OECD Model and Article 15 thereof, in its English authentic text, reproduces Article 15 of the OECD Model, it would be difficult to reasonably argue that the interpreter may exclusively rely on the Italian authentic text of such an article, which employs the term "lavoro autonomo",[1734] and attribute to the latter term the meaning it has under Italian law, completely disregarding the English authentic text and the corresponding provision of the OECD Model.

Third, the fact that certain tax treaties are authenticated only in one neutral language,[1735] or provide for a prevailing text (generally drafted in a neutral language) in the case of divergences may be seen as supporting the argument that, with respect to tax treaties in general, the corresponding legal concepts under the law of the two contracting States should not be too different from each other.[1736]

For instance, where an OECD Model-based tax treaty is authenticated only in English and uses the term "employment" in Article 15, the interpreter must construe the latter term by attributing to it the meaning that the best corresponding Italian legal jargon term has under Italian law. The corresponding term, in this case, is probably "lavoro subordinato"[1737] and not "lavoro autonomo". It appears difficult to support the conclusion that provisions of two Italian treaties similarly structured and that present the same (or a similar) wording in their respective English authentic texts ("employment") could be interpreted in a significantly different way (with regard to prototypical items, i.e. typical employment income and typical independent activity income) only because one of the two treaties was also authenticated in the Italian language (and employed in the Italian authentic text the term "lavoro autonomo") and the other was not.

Fourth, although extremely remote in practice, it may happen that a tax treaty is authenticated in two languages that are not the official languages of either of the contracting States. In this case, where a significant *prima facie* divergence of meaning existed between the corresponding legal jargon terms used in such authentic texts, the interpreter should at least partially reconcile the two authentic texts in order to select the

[1733] See sections 3 and 4 of this chapter.
[1734] See the example in section 5.5.2.1.
[1735] I.e. they are authenticated in the official languages of neither of the contracting States.
[1736] Otherwise, similarly worded (in the neutral authentic language) tax treaties concluded by the same State could end up being construed in significantly divergent ways.
[1737] See the example in section 5.5.2.1.

domestic legal jargon term, and thus the domestic law meaning, corresponding to the terms actually used in the treaty.

For instance, where an Italian tax treaty based on the OECD Model was authenticated solely in English and French and a provision thereof employed the terms "employment" and "activités de caractère indépendant" in the English and French authentic texts, respectively, the interpreter should at least partially reconcile those two terms in order to decide which Italian domestic law term corresponds thereto and, therefore, which domestic law meaning should be used pursuant to Article 3(2).

Finally, although theoretically possible, it does not seem reasonable to lightly assume that the contracting States intended to have two completely different (sets of) rules in force where they each apply the treaty.

Gaja, in this respect, maintains that the *renvoi* to the domestic law of the contracting State applying the treaty "involves reconciling the texts in order to define a general meaning, while the more precise meaning is established according to the law of the relevant contracting State".[1738] He adds that, in any case, under Article 3(2) OECD Model, the domestic law meaning of any undefined treaty term "would have to be consistent with the general meaning that the term has under the treaty".[1739]

In order to decide whether, in any actual instance, this outer limit would be crossed by attributing to the relevant undefined treaty term the meaning it has under the domestic law of the contracting State applying the treaty, the interpreter relies on the context. Such a context, more than being the intent of the parties,[1740] or embodying the parties' common intention,[1741] is made of all the elements and items of evidence that may help the interpreter in establishing and arguing for the common intention of the

[1738] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99.
[1739] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 100, where the author notes that, "[s]hould there be any divergence among the authentic texts of a tax treay that follows the OECD Model, these would have to be first reconciled in order to define the general meaning of the provision, including the *general meaning* of the relevant term. The reference to the law of one of the contracting States for the determination of the meaning of a term would only come into play once the framework has been defined".
[1740] See S. I. Katz, "United States", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 615 *et seq*., at 650, who affirms: "The intent of the contracting parties is the context. There is no question of whether contextual interpretation is preferred to domestic. The very concept of the context implies that it must be."
Obviously, if one equates the intent of the parties to the context, no other solution may be accepted other than that of a contextual interpretation (i.e. the interpretation that reflects the intention of the parties). This, however, is a circular argument. The real issue, which is hidden by (and in) Katz's proposition, is "which is the meaning intended by the parties?" There is no ready answer to be found to that question anywhere (otherwise, one would seriously have to question the sanity of those hundreds of tax scholars that have painstakingly dealt with such issue). So, Katz ends up changing the form, but not the substance of the problem: the interpreter is still left with a handful of items of evidence and elements on the basis of which he must decide (and argue for) whether the parties (would) intend, in the specific situation, the domestic law meaning, or some other meaning, to apply.
[1741] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.10.

parties: it is the overall context that must be used in order to determine the treaty utterance meaning.

5.5.2.3. The partial reconciliation of the prima facie divergences: the fundamental role of Article 3(2) OECD Model and its interaction with Article 33(4) VCLT. Conclusions on research question c-iii)

In the previous section, the author has concluded that the interpreter should carry out a limited reconciliation of the various authentic texts, at least in certain cases, where the tax treaty is based on the OECD Model. The following question thus arises:

iii. To what extent must the differences of meaning deriving from the attribution of the domestic law meanings to the corresponding legal jargon terms used in the various authentic texts be removed (e.g. in accordance with Article 33(4) VCLT) and, instead, to what extent must such differences be preserved in accordance with Article 3(2)?

In this respect, the author has already pointed out the position upheld by Gaja, to which he substantially adheres, providing that Article 3(2) OECD Model "involves reconciling the texts in order to define a general meaning, while the more precise meaning is established according to the law of the relevant contracting State".[1742]

In other words, the interpreter may rely exclusively on the domestic law meaning of the legal jargon terms employed in the treaty as long as it significantly overlaps with the "general meaning" established on the basis of the overall context and, in particular, of the reconciliation of the relevant authentic texts.[1743] Thus, as long as the domestic law meaning and the "general meaning" significantly overlap and considering that, where it exists, the authentic treaty text drafted in the official language of the State applying the treaty provides the interpreter with the most direct and immediate access to the domestic law (concepts) of that State, it is reasonable to conclude that the selection of the appropriate domestic law meaning under Article 3(2) should be made by the interpreter on the basis of that authentic text. This solution limits the discretion of the interpreter in selecting the appropriate domestic law meaning, since it attributes significant weight to the evidence of the intention of the parties represented by their choice of a specific legal jargon term in the official language of the State applying the treaty and, thus, of its underlying legal concept over the others which are theoretically available.

[1742] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99.
[1743] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 100, where the author notes that, "[s]hould there be any divergence among the authentic texts of a tax treay that follows the OECD Model, these would have to be first reconciled in order to define the general meaning of the provision, including the *general meaning* of the relevant term. The reference to the law of one of the contracting States for the determination of the meaning of a term would only come into play once the framework has been defined".

Consider, for example, Article 16 of the 1988 Italy-United Kingdom tax treaty, whose English authentic text makes exclusive reference to the "board of directors" of a company, while the Italian authentic text thereof employs the expression "consiglio di amministrazione o […] collegio sindacale".[1744] It may be plausibly argued that the legal concepts underlying the expressions "board of directors" and "consiglio di amministrazione o […] collegio sindacale" under English and Italian law, respectively, overlap substantially. They both point to a common "general meaning", i.e. the company organs that, under the relevant company law, carry out the management, control and supervisory functions. Since the legal concept underlying the legal jargon term used in the Italian authentic text substantially overlaps with the above "general meaning", it is reasonable to use the more precise meaning of the former in order to construe the treaty where Italy is the State applying it.

Hence, the analysis to be performed by the interpreter is one that fits perfectly in the dynamics of Article 3(2): the interpreter is to construe the treaty on the basis of the domestic law meaning of the relevant legal jargon term employed in the authentic text drafted in the official language of the contracting State applying the treaty (for instance "consiglio di amministrazione o […] collegio sindacale"),[1745] unless the context requires a different interpretation. In this respect, the author submits that the context requires a different interpretation whenever the domestic law meaning does not sufficiently overlap with the "general meaning".

For this purpose, as already pointed out in section 5.5.2.2 of this chapter, the context coincides with the overall context and, therefore, it is made up of all the elements and items of evidence that may help the interpreter to determine and argue for the (common) utterance meaning of the parties. In the case of multilingual treaties, the overall context obviously includes the corresponding terms used in the various authentic texts (in the previous example "board of directors" and "consiglio di amministrazione o […] collegio sindacale") and their underlying legal concepts. It also encompasses the corresponding terms employed in the English and French versions of the OECD Model (in the previous example "board of directors" and "conseil d'administration ou de surveillance"), as well as in the OECD Commentary, if the treaty is based on the OECD Model.

In order to determine the "general meaning", where a *prima facie* divergence of meaning is put forward, the interpreter is required to partially reconcile the allegedly divergent authentic texts. The reconciliation, in this case, is characterized as "partial" in the sense that it is sufficient for the interpreter to find out the prototypical items that the corresponding terms employed in the various authentic texts are intended (by the parties) to denote (not to denote) and the functions played by their intended (by the parties) underlying concepts within the respective legal systems. In fact, the "general meaning" is determined (also) on the basis of:

[1744] See section 5.5.2.1 above.

[1745] Or the domestic law meaning of that State's legal jargon term corresponding to the term used in the treaty, in the case none of the authentic treaty texts has been drafted in that State's official language.

(i) the common prototypical items that the interpreter considers the parties intended to denote (not to denote) by means of the relevant treaty terms and/or (ii) the common functions played by the legal concepts, which the interpreter considers the parties meant to correspond to the relevant treaty terms, within the respective legal systems.

In the previous example, for instance, the "general meaning" is determined by taking into account that (a) both the English and the Italian expressions denotes statutory company organs provided for under the applicable corporate governance systems and (b) the functions carried out by such bodies, in their respective corporate governance systems, are similar, i.e. management and/or control and/or supervisory functions.

It seems reasonable to conclude that such a reconciliation must be carried out, unless evidence of a different agreement of the parties exists, on the basis of the rules encompassed in Article 33(4) VCLT, i.e. by interpreting the various authentic texts in accordance with Articles 31 and 32 VCLT and, where a divergence persists, by favoring the meaning that best reconciles the texts having regard to the object and purpose of the treaty.

The significance of Article 33 VCLT in this process, however, is not limited to the direct comparison of the legal jargon terms employed in the various authentic texts. Since (i) the overall context includes the various authentic texts of the provision to be interpreted and those of its related provisions and (ii) such provisions are also made of non-legal jargon terms, it is possible that the construction of these provisions, as expressed in the various authentic texts, may show some possible differences of meaning not due to the legal jargon terms employed therein. Such potential differences should be removed in accordance with Article 33(4) VCLT. The resulting interpretations, which may shed light on the object and purpose of the relevant treaty provision and its interaction with other related provisions, must be then taken into account by the interpreter in order to determine whether the context otherwise requires and, more specifically, to establish the "general meaning" of the relevant legal jargon terms.

Where the interpreter concludes that the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty does not sufficiently overlap with the "general meaning" of the relevant (corresponding) treaty terms, he should consequently not apply the former meaning in order to construe the treaty. In its place, the interpreter should apply the domestic law meaning that best fits the overall context and that best matches with the "general meaning", unless the context otherwise requires. For the purpose of establishing such a domestic law meaning, and thus the relevant domestic legal jargon term, the interpreter should use all the available elements and items of evidence of the parties' intention, among which bilingual (legal) dictionaries, thesaurus dictionaries, (comparative) law textbooks and encyclopedias, the authentic texts of other tax treaties concluded by the State applying the treaty (drafted in its own official language), the tax treaty model of the latter State, if publicly available, the OECD Model official versions of the relevant treaty article and the OECD Commentary.

For instance, where the Italian text of an Italian tax treaty uses the term "lavoro autonomo" in a certain article, while the English authentic text uses the term

"employment", a *prima facie* discrepancy between those authentic texts arises, since the former term, under Italian law, typically denotes the activities carried on by self-employed persons. Where, on the basis of the overall context, the interpreter concludes that the "general meaning" corresponding to the terms "lavoro autonomo" and "employment" is akin to the meanings of "employment" under English law and "emploi salarié" under French law,[1746] the interpreter should attribute to the treaty terms "lavoro autonomo" and "employment" the meaning that the term "lavoro subordinato"[1747] has under Italian tax law whenever Italy applies the treaty, unless the context otherwise requires, since the term "lavoro subordinato" is the one generally used in Article 15 of Italian OECD Model-based tax treaties and one of the terms that is generally indicated as a synonym of the terms "employment" and "emploi (salarié)" in bilingual (legal) dictionaries.

To sum up, if a *prima facie* divergence is alleged to exist among the domestic law meanings of the legal jargon terms used in the various authentic texts, the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the contracting State applying the treaty[1748] should be used in order to construe the meaning of the relevant treaty provision, unless the overall context requires a different interpretation, for instance where the comparison of the relevant authentic texts[1749] shows that such a domestic law meaning does not sufficiently overlap with the "general meaning".

However, where such domestic law meaning does substantially overlap with the "general meaning" and, more generally, the overall context does not require a different interpretation, any *prima facie* divergence of meanings is resolved by means of the *renvoi* of Article 3(2), which provides the interpreter with a clear rule for choosing which, among the *prima facie* divergent meanings, must be attributed to the relevant treaty term(s) in each specific case. To put it differently, where legal jargon terms are at stake, Article 3(2) actually operates as if it were a rule establishing the prevailing authentic text in accordance with Article 33(1) VCLT,[1750] provided that the context does not require a different interpretation.

Obviously, the activity of establishing the "general meaning" and assessing whether the domestic law meaning and the "general meaning" sufficiently overlap entails a significant dose of discretion by the interpreter, which is limited only by the (good faith) requirement to support the chosen conclusions with reasonable arguments.

If the issue is looked at from the perspective of the distinction between type-A and type-B divergences, the following conclusions may be drawn.

[1746] "Emploi salarié" is the term used in the French official version of Article 15 OECD Model.
[1747] Or "lavoro dipendente".
[1748] Or the domestic law meaning of that State's legal jargon term corresponding to the term used in the treaty, in case none of the authentic treaty texts has been drafted in that State's official language.
[1749] Or the comparison between the authentic text(s) and the OECD Model official versions.
[1750] In this case, however, there is evidence of the agreement of the parties to make the "prevailing" text applicable from the outset, subject to the overall context not requiring otherwise.

Where the p*rima facie* discrepancies among the authentic treaty texts are caused exclusively by type-A divergences, the domestic law meaning of the terms employed in the various authentic texts commonly overlaps with their "general meaning". In these cases, therefore, Article 3(2) does not require, on the basis solely of such a *prima facie* discrepancy, the interpreter to attribute to the relevant terms employed in the authentic text drafted in the official language of the State applying the treaty a meaning other than the one they have under the domestic law of that State.[1751]

Where the *prima facie* discrepancies are caused by the interaction between type-A and type-B divergences, however, it is more probable that some of the domestic law meanings of the terms employed in the various authentic texts do not sufficiently overlap with their "general meaning". This risk appears somewhat related to the impact that the type-B divergence has on the *prima facie* discrepancy. In these cases, the interpreter must carefully assess whether the meaning that the terms employed in the authentic text drafted in the official language of the State applying the treaty have under the domestic law of that State sufficiently overlaps with the "general meaning" thereof and, where this is not the case, he has to establish what is the different meaning required by the context. Such an alternative meaning might be the meaning that, under the domestic law of the State applying the treaty, best corresponds to the "general meaning" of the relevant treaty terms, or, where the context so requires, a uniform and autonomous meaning.

Scholars have sometimes taken a different position on this issue.

Sundgren,[1752] for instance, in commenting on the decision of the Supreme Administrative Court of Sweden in the case *RÅ 2004 not 59*,[1753] which concerned the interpretation of the 1966 Peru-Sweden tax treaty, held the following: "The initial statement by the [Court] that both the Swedish and the Spanish texts are authoritative for interpretation purposes is of course correct. The following conclusion, however, that, by reference to article II § 2 of the treaty[1754] – the so called *lex fori* rule – the Swedish text shall have precedence when the treaty is applied in Sweden but that in cases of uncertainty the Spanish text, too, shall be considered is not. The reason herefor is that the *lex fori* rule is an instrument for determining the meaning of terms that have not been defined in the treaty which may lead to the adoption of the internal law meaning of the term of the country applying the treaty and this has nothing to do with the interpretation problems stemming from divergent language versions. This is a different problem that shall be resolved by application of the above cited rules in article 33 of the Vienna Convention. And, in contrast to the conclusion of the [Court], the fundamental principle of article 33 and the starting point for its application is the equality of the texts, not that

[1751] It obviously remains possible that some other element of the overall context requires the interpreter to attribute to the relevant treaty term a meaning other than the current domestic law meaning. See, in this respect, section 5.3.3.2 of this chapter.

[1752] See P. Sundgren, "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: http://www.skatter.se/index.php?q=node/1079; accessed on 23 July 2011).

[1753] Supreme Administrative Court (Sweden), 25 March 2004, case *RÅ 2004 ref. 59*, *Regeringsrättens årsbok* (2004) (a summary in English is available at the IBFD Tax Treaty Case Law Database).

[1754] Similar, in all relevant respects, to Article 3(2) of the 1963 OECD Draft.

any of them shall take precedence. Nor, of course, does article 33 of the Vienna Convention refer to any internal law meaning of the term being interpreted."

In light of the previous analysis, the author disagrees with the position expressed by Sundgren. The *renvoi* encompassed in Article II(2) of the 1966 Peru-Sweden tax treaty removes the *prima facie* discrepancies emerging from the comparison of the authentic treaty texts, in so far as the latter employ undefined legal jargon terms whose meaning must be looked for, in the first place and unless the context otherwise requires,[1755] under the domestic law of the contracting State applying the treaty. In these cases, in fact, under the rule of law provided for in Article II(2), the existence of a difference in meaning between the Spanish and Swedish authentic texts, as construed in accordance with the meanings that the relevant undefined treaty terms have under the domestic laws of Peru and Sweden, respectively, does not constitute a problem at all: where it is Peru applying the treaty, the meaning resulting from the Spanish authentic text applies; conversely, where it is Sweden to apply the treaty, the meaning resulting from the Swedish authentic text applies. This holds true provided that the domestic law meaning so determined sufficiently overlaps with the "general meaning" determined on the basis of the contextual analysis (including textual comparison).

In this respect, it is interesting to highlight that the very same Sundgren notes that, "[h]owever, one must also keep in mind that the problem facing the interpreter in this case is indeed also to determine the meaning of an undefined term in the treaty, namely the term "income from a source". The interpretation task of the case is thus twofold; a) to solve, according to Article 33 of the Vienna Convention, the problem of the diverging language meanings and b) to determine, according to Article II § 2 of the treaty the meaning of an undefined term. It is, however, a difficult task to separate these two sets of rules because it is likely even if not intentional that the different languages of the contracting state will tend to reflect also these states' domestic law meanings. But the fact that the [Court] has based its interpretation approach only on the *lex fori* rule of the treaty nourishes the suspicion that the Court has not contemplated Article 33 of the Vienna Convention at all."[1756]

5.5.2.4. The solution of the prima facie divergences where a prevailing text exists: conclusions on research question c-iv)

One could wonder whether the above conclusions remain valid even where the tax

[1755] In that respect, Sundgren carries out a very well-structured and in depth analysis of the overall context in order to establish whether capital gains from the sale of shares must be considered to be income ("*rédito"* and *"inkomst"* in the Spanish and Swedish authentic treaty texts, respectively*)* for the purpose of Article XVII(2) of the 1966 Peru-Sweden tax treaty (see P. Sundgren, "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: http://www.skatter.se/index.php?q=node/1079; accessed on 23 July 2011).

[1756] See P. Sundgren, "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: http://www.skatter.se/index.php?q=node/1079; accessed on 23 July 2011.

treaty's final clause provides that, in the case of any divergence of interpretation between the authentic texts drafted in the official languages of the contracting States, the text authenticated in the *lingua franca* (generally English or French) will prevail.

In this respect, the following research question should be properly answered:

iv. What is the relevance of Article 3(2) for the purpose of resolving the prima facie discrepancies in meaning among the various authentic texts, where the treaty's final clause provides that a certain authentic text is to prevail in the case of divergences?

It is the author's opinion that such a final clause has only a limited bearing on the conclusions reached in the previous sections.

In particular, this type of final clause may be relevant in order to assess whether the overall context requires an interpretation different from that determined by attributing to the legal jargon term employed in the authentic text drafted in the language of the State applying the treaty the meaning it has under the domestic law of the latter.

As previously mentioned, since (i) the overall context includes the various authentic texts of the provision to be interpreted and those of its related provisions and (ii) such provisions are also made of non-legal jargon terms, it is possible that the constructions of these provisions, as expressed in the various authentic texts, may show some possible differences of meaning not due to the legal jargon terms employed therein. Such *prima facie* differences, where persisting after an interpretation of the relevant authentic texts based on Articles 31 and 32 VCLT, should be resolved, where the final clause so provides, by giving preference to the interpretation stemming from the prevailing text (the one drafted in the *lingua franca*). The resulting interpretation, which may shed light on the object and purpose of the relevant treaty provision and its interaction with other related provisions, must be then taken into account by the interpreter in order to determine whether the context otherwise requires and, more specifically, to establish the "general meaning" of the relevant legal jargon terms.

Moreover, the meanings that relevant legal jargon term[1757] employed in the prevailing treaty text has under the domestic laws of the States using it[1758] are part of the overall context and, as such, may play a direct role in establishing the "general meaning" of the corresponding terms used in the various authentic texts. In this case, where the interpreter cannot establish such a "general meaning" by reconciling the various authentic texts through an interpretation thereof based on Article 31 and 32 VCLT, the "general meaning" should be determined on the basis of the prevailing text, i.e. it should

[1757] Or proxies thereof.

[1758] I.e., generally, the meaning that the relevant term has under the domestic laws of the States having, as their official language, the language in which the prevailing treaty text is drafted. By recourse to bilingual dictionaries, legal dictionaries and legal textbooks and encyclopedia, the interpreter may also establish which are the terms, in the official languages of the contracting State applying the treaty (and their underlying concepts in the respective legal system), which are commonly regarded as corresponding to the terms (and underlying concepts) used in the prevailing treaty text, and determine their domestic law meanings accordingly.

be derived from the legal jargon term employed in that text.

Take for instance, the 1925 Germany-Italy tax treaty, which has been authenticated only in the German and Italian languages. According to Articles 5(3) and 11(2) of that treaty, the provisions concerning dividends paid to shareholders apply as well to income (profits distribution) from other *rights*[1759] that are similar in nature to shares, but not to income derived from other forms of participation in companies, to which other provisions of the tax treaty apply. A *prima facie* discrepancy exists between the German and the Italian authentic texts of the above-mentioned article, since the former uses the term "Wertpapieren", while the latter employs the term "valori mobiliari" for the English term *rights*. In fact, while in the German language the legal jargon term "Wertpapieren" substantially correspond to the English term "securities", thus requiring the incorporation of the relevant rights into certificates for circulation purposes,[1760] the Italian legal jargon term "valori mobiliari" has a wider bearing and might be used to denote corporate rights not represented by securities, i.e. not incorporated in any certificate.[1761] Therefore, a construction of the German text in accordance with German domestic law would lead to the conclusion that the treaty provisions concerning the taxation of income from shares do not apply to profits distributed by companies whose capital is not represented by securities, while an interpretation of the Italian authentic text made in accordance with Italian domestic law would lead to the opposite conclusion. If, by assumption, the 1925 Germany-Italy tax treaty had provided for an English authentic text to prevail in the case of divergences and the English text of Articles 5(3) and 11(2) had employed the term "securities", the interpreter would have had a good argument to conclude that the "general meaning" of the relevant treaty terms in the three authentic languages excluded rights in the capital of the distributing company not incorporated in certificates. As a consequence, where Italy was applying the treaty, the interpreter should have concluded that the context required an interpretation other than the one based on the domestic law meaning of the term "valori mobiliari". The opposite conclusion would have been reached where the hypothetical prevailing text had used the term "rights", instead of "securities".

On the other hand, it is clearly possible (and generally probable) that a single interpreter may attribute different meanings to the same treaty provision depending on which contracting State applies it. In this case, however, as long as the domestic law meanings of the terms employed in the various authentic texts substantially overlap with each other and with their "general meaning", it is not the multilingual character of the tax treaty that causes a single treaty provision[1762] to have two different meanings when applied by the two contracting States. It is the reference to those States' domestic law encompassed in

[1759] The author chose the term "rights" for the present English translation as a *neutral* term, that being a term used more than once in the current English official version of Article 10(3) OECD Model.
[1760] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a.
[1761] See G. Melis, *L'Interpretazione nel Diritto Tributario* (Padova: Cedam, 2003), p. 622.
[1762] According to Article 33 VCLT, a treaty provision remains a single treaty provision regardless of the number of authentic texts by means of which it is expressed.

Article 3(2) of the tax treaty (and, therefore, the treaty intrinsic multijuarlism) that entails it: *two texts, one treaty; one treaty, two rules*. This multiplicity of meanings, therefore, is outside the scope and purpose of the treaty's final clause; it is not an issue that clause deals with.[1763]

Take, for instance, Article 15 of the 1978 Brazil-Italy tax treaty. It employs the term "emprego" in the Portuguese authentic text and the term "attività dipendente" in the Italian authentic text as corresponding to the term "employment" used in the English authentic text, which prevails in the case of doubt. Assuming that the "general meaning" of such terms substantially corresponds to the meaning of the term "employment" under English law, the domestic law meaning of the term "attività dipendente" under Italian law (the same, *mutatis mutandis*, holds true for the Portuguese term "emprego") substantially overlaps with that "general meaning" (in the sense that the prototypical employment relations are covered by both). It is therefore reasonable for the interpreter to use the Italian law meaning of the term "attività dipendente" to construe Article 15 where Italy is the contracting State applying the treaty. The fact that the English text prevails in the case of divergences does not compel the interpreter to set aside the Italian domestic law meaning of the term "attività dipendente" only because the item of income at stake (for instance, the income paid for an activity carried out by a person under the coordination, but not under the full control and direction, of a third party), which is denoted by the latter term under Italian law, it is not denoted by the term "employment" under, say, English law.

Accordingly, the author rejects the position taken by Edwardes-Ker that "there may be no alternative to an autonomous interpretation of terms in a tax treaty where the sole text […], or the text which is to prevail in the case of a divergence of interpretation […], is expressed in a language different to that in which each signatory State's tax laws are expressed."[1764]

5.5.3. The relevance of non-authentic versions

It has already been pointed out that, in the system of the VCLT, no explicit relevance is attached to non-authentic language versions, such as the official translations produced by

[1763] This conclusion is further supported by the following analysis. If the interpreter decided to rely solely on the prevailing text, in order to interpret the legal jargon terms employed therein he should, pursuant to Article 3(2), refer to the meanings that those terms have under the law of the contracting State applying the treaty. Unfortunately, however, such terms most probably do not have any meaning under that domestic law since they are not used in it, the domestic law of that contracting State being drafted solely in the official language of that State. The interpreter, therefore, should decide which terms, expressed in the latter language, best correspond to the terms used in the prevailing treaty text: in order to do so, the best guidance available would certainly be the authentic treaty text drafted in the official language of the contracting State applying the treaty. Which would bring the interpreter back to the starting point, provided that the domestic law meaning of the relevant term employed in that text substantially overlaps with the "general meaning" common to the corresponding terms used in the various authentic texts.

[1764] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.02.

the contracting States. However, it has also been submitted that nothing seems to prevent the interpreter from taking them into account as supplementary means of interpretation, attributing an interpretative weight to them that varies depending on the available evidence that such language versions may contribute to determining the common intention of the parties.[1765]

Consider a tax treaty authenticated only in a neutral language, a non-authentic version of which exists drafted in the official language of a contracting State. If such a non-authentic version had been issued by the government of the latter State and the treaty negotiators had been closely involved in its drafting, the interpreter would have a reasonable argument to support the view that the meaning that the above contracting State intended to attribute to the terms employed in the authentic treaty text is the meaning that the corresponding legal jargon terms used in the non-authentic version (official translation) have under that State's domestic law. This conclusion is strengthened where the latter terms reproduce those generally used by that contracting State in the authentic texts of other tax treaties drafted in its own official language,[1766] since in this case it reasonable to assume that the other contracting State was aware of the former State's treaty practice when concluding the treaty.[1767]

Notably, the official translation may play a role in this process of meaning refinement only insofar the domestic law meaning determined on the basis thereof substantially overlaps with the "general meaning" established by construing the sole authentic treaty text in accordance with Articles 31 and 32 VCLT. In order to establish such a "general meaning", the interpreter may still use the official translation as a supplementary means of interpretation, but, as such, its weight in the interpretative and argumentative process will be limited.

The evidential value of the official translations clearly increases where both official translations issued by the contracting States point to the same "general meaning". In this case, the interpreter might even have an argument to challenge the "general meaning" *prima facie* resulting from the authentic treaty text and to construe the latter more liberally in light of such enlightening supplementary means of interpretation, as well as to critically review its initial assessment of the other available interpretative elements and items of evidence.

Whether the interpreter will ultimately attribute to the terms employed in the sole authentic treaty text the *prima facie* "general meaning" established on the basis of that text, or the apparently conflicting "general meaning" determined on the basis of the

[1765] See, in particular, section 3.2.4 of Chapter 4 of Part II.

[1766] The same reasoning applies with regard to the official tax treaty model (containing a provision similar to the one included in the tax treaty to be interpreted) of that State, provided that it is publicly available for consultation.

[1767] Obviously, this conclusion would hold true unless the context required a different interpretation, for instance where the domestic law meaning so determined appeared outside the scope of the "general meaning" established on the basis of the sole authentic treaty text.

contracting States' official translations is a matter of discretionary judgment. The choice for the latter alternative, nonetheless, should be supported by strong arguments relying on the actual facts and circumstances, in the absence of which preference should be given to the "general meaning" established on the basis of the authentic treaty text.

In the previous sections, it has also been submitted that non-authentic language versions may come into play as documents on which the subsequent practice of the parties is based, particularly where they have been put into public circulation and relied upon by *all* the parties for the purpose of applying the relevant treaty. This, however, does not seem to be a realistic scenario with regard to tax treaties.

5.5.4. Two special instances of interaction between Article 3(2) OECD Model and Article 33 VCLT

To conclude, two special instances of the interaction between Article 3(2) of OECD Model-type tax treaties and Article 33 VCLT are practically illustrated by the following examples.

The first instance concerns the 1967 France-United States tax treaty, which was authenticated solely in the French and English languages. Article 11(6) of that treaty provides that:

> Royalties paid for the use of […] property […] *in a State* shall be treated as income from sources within that State
>
> Les redevances payées *dans un Etat* pour l'usage […] des biens […] sont considérées comme des revenues ayant leur source dans cet Etat

While the English authentic text seems to suggest that the source of the royalties is the State where the property is used, the French authentic text seems to point to the State where the payment is made, which in turn raises the issue of which is to be regarded as the State of payment where the payor, the payee and the bank accounts credited and debited are situated in different States.

In this respect, the suggestion has been made that the application of Article 33(4) VCLT would favor the meaning ordinarily attributable to the English authentic text since the place of payment is of less significance than the place of use in determining the source of royalties.[1768]

This a typical example of how the encyclopedic knowledge and personal background of the interpreter may play a decisive role in choosing the interpretation to be given to a treaty provision, where no clearly conclusive elements and items of evidence appear to exist in favor of one of the possible alternative constructions. The

[1768] See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to Article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 103.

solution proposed, in fact, is argued for solely on the basis of an alleged major "significance" of one criterion over another, without any analysis of the solutions adopted by the same States in other treaties and in the OECD Model, of the economic studies available (if any) concerning the primacy of the place of use as criterion of economic allegiance, of the relevant provisions of the domestic tax laws of the contracting States, of the administrative issues connected with establishing the States where the intangible property is used and with apportioning for tax purposes the royalty payment among such States. In a nutshell, the solution proposed is not argued for on the basis of any in-depth analysis committed to determine the possible common intention of the parties and, as such, it might be criticized as one substituting the preference of the interpreter for the agreement of the parties.

From a procedural standpoint, however, the major flaw of such a solution is that of not attempting to apply Article 2(2) of the tax treaty, which corresponds to Article 3(2) of the OECD Model. This could have perhaps shown that the English and French texts reflected the criteria used under the domestic law of the United States and France, respectively, for the purpose of determining the source of royalty payments. If that was the case, the apparent divergence of meanings would have proved to be an actual divergence of meanings demanded by the operation of the general rule of interpretation provided for under Article 2(2) of the treaty. Each contracting State would have been entitled to tax the royalties sourced within its territory according to its domestic law and the other State (the residence State) would have been then obliged to relieve juridical double taxation in accordance with Article 23 of the tax treaty.[1769] From this standpoint, the "general meaning" of the corresponding expressions used in the English and French authentic texts of the treaty seems to coincide with the concept of "royalty source" under the respective domestic laws, since the concepts underlying such expressions appear to have a similar function within the respective tax systems.

France and the United States later modified the wording of Article 11(6) of the treaty by means of Article VI of the 1988 Protocol, which seems to support the above construction of the original texts (and, thus, of the original intention of the parties). According to the new English texts (*emphasis* added):

> (a) Royalties shall be deemed to arise in a Contracting State when the *payer is* that State itself, a local authority, a statutory body or a *resident of that State*
> (b) Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such *royalties are borne by such permanent establishment or fixed base*, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.
> (c) Notwithstanding subparagraphs (a) and (b), *royalties paid for the use of or the right to*

[1769] The only authentic drawback of this approach is that both contracting States could claim the royalties as sourced in their respective territories, thus determining a possible instance of double taxation due to a conflict of qualification (one State considerying Article 11 applicable, while the other considering Articles 6 or 22 applicable). That, however, is a problem common to other cases of conflicts of qualification and should be solved accordingly.

use property in the United States shall be deemed to arise therein

The second instance illustrates how Article 33 VCLT may be relied upon in order interpret the very same Article 3(2) of the relevant tax treaty.

Article 3(2) of the 1970 Belgium-Unites States tax treaty presents a curious potential difference of meanings among its three authentic texts. On the one hand, the English and Dutch texts provide that each undefined term has the meaning it has under the domestic law of the State whose tax is being determined, "unless the context otherwise requires" ("tenzij het zinsverband anders vereist").[1770] On the other hand, the French authentic text does not contain any reference to the fact that the context might require a different interpretation.

In this case, the interpreter could argue that the reference to the context should be regarded as implicit in the French authentic text of Article 3(2), since (i) it seems more plausible that the parties unknowingly omitted the reference in one of three authentic texts, rather than erroneously inserted it in two of them; (ii) the reference to the context otherwise requiring may be considered an explicit expression of the principle that tax treaties are to be interpreted in good faith;[1771] (iii) both the English and French official versions of the OECD Model, as well as the United States Model and the vast majority of the tax treaties concluded by the two contracting States, include a reference to the context in Article 3(2) and one may presume that, if such States actually intended to depart from that customary standard, they would have made it clear.

6. The practice of national courts and tribunals in interpreting multilingual tax treaties

In the vast majority of cases domestic courts and tribunals refer to a single authentic text for the purpose of construing tax treaty provisions, that text generally being the one drafted in the official language of the State of the court or tribunal.

A proof of this statement is given by the fact that in the first 12 annual volumes of the International Tax Law Reports, there are fewer than ten decisions in which the

[1770] The Dutch term "zinsverband" has sometimes been considered to have a narrower meaning than the English term "context": according to De Broe, the former would ordinarily denote solely the text of the treaty to be interpreter and not external (extra-textual) materials, thus being narrower even of the context as defined by Article 31(2) VCLT (see L. De Broe, *International Tax Planning and Prevention of Abuse. A Study under Domestic Tax Law, Tax Treaties and EC Law in relation to Conduit and Base Companies* (Amsterdam: IBFD Publications, 2008), pp. 276-277). According to that author, however, Article 33(4) VCLT should lead the interpreter to attribute to such a term the wider meaning that the terms "context" and "contexte" seem to have in the English and French authentic texts of Belgian tax treaties (where used). See, similarly, Hoge Raad, 5 September 2003, case *37651*, BNB 2003/379. See, *contra*, with reference to Netherlands tax treaties, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p.490.

[1771] See Article 31(1) VCLT. See also, although concerning the requirement of an implicit limitation to the ambulatory nature of Article 3(2) *renvoi*, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 48.

competent court or tribunal has taken into account more than one authentic text in order to interpret the relevant tax treaty.[1772]

As previously discussed, such a practice is in line with customary international law, as reflected in Article 33 VCLT.[1773] That notwithstanding, this approach presents the inconvenience that possible alternative interpretations, which could be suggested by the analysis of the other authentic texts of the tax treaty, are not taken into account by the interpreter, especially where the latter tend to attribute an overwhelming relevance to the *letter* of the treaty over the other elements of the overall context.

The unattractive effects of this approach may be amplified by the time factor. Where the tax treaty was concluded many years before its application, it probably employs legal jargon terms that were chosen by the contracting States on the basis of the domestic legal systems in force at the time of the treaty conclusion, which could have gone through major changes since then. As a result, the legal concepts underlying the legal jargon terms used in the treaty could no longer have the same function in the current domestic legal environment as they had in the domestic legal system in force at the time of the treaty conclusion and, therefore, the reference thereto for the purpose of construing the corresponding terms employed in the treaty could lead to unsatisfactory results. To put it differently, a plain "literal" interpretation of such terms, without a full understanding of the reasons why they had been selected and employed in the treaty at the time of its conclusion, as well as of the object and purpose of the treaty provisions employing them, might lead to constructions that are unreasonable or lacking in the appropriate argumentative support. In that respect, the comparison of different authentic texts may be sometimes useful to highlight *prima facie* discrepancies that, in turn, could be regarded as requiring a review of the initial "too literal" construction of the tax treaty

[1772] See also the statement of De Boek according to which "Belgian courts and tribunals seem reluctant to consult and compare on their own initiative the different authentic versions of a treaty, or to give precedence to a text in a language different from that of the court over the text in the lingua fori. One result of this approach […] is that Belgian case law on divergent formulations in different treaty languages is virtually non-existent" (R. De Boek, "Belgium", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 166; *ibidem*, at 179); see, similarly, the statement of Rust that even in German case law "it is very rare to find a decision in which the court refers to the other language version" (A. Rust, "Germany", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 226) and that of Waldburger, according to whom it is extremely seldom that issues of tax treaty linguistic discrepancies are raised and discussed before Swiss courts (see R. Waldburger, "Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Schweizerischen Bundesgerichts", in M. Lang, J. M. Mössner, R. Waldburger (eds.), *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und der Österreichs* (Vienna: Linde, 1998), 51 *et seq*., at 56.

[1773] *Contra*, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 38, m.no. 72.

On the other hand, the judicial practice of using a language version (typically a translation in the official language of the court or tribunal) other than the authentic texts of the relevant tax treaty in order to construe its provisions (this is often the case where the tax treaty to be interpreted has only one authentic text, drafted in a language different from the official language of the contracting State applying the treaty) appears not be in conformity with Article 33 VCLT, unless such language version is used as an aid to the construction of the authentic text of the tax treaty.

provisions at stake in light of the overall context of the treaty.[1774]

The few cases found by the author in which courts and tribunals have dealt with the multilingual character of the relevant tax treaty are reported below. These cases do not add much to the analysis carried out in the previous sections of this chapter and in Chapter 4.

In a decision delivered on 14 April 1965, the District Court of Tokyo (Japan), made reference to the English authentic text of the 1954 Japan-United States tax treaty in order to clarify the meaning of the Japanese authentic text thereof.[1775]

In the *Furness Withy* case, Thurlow J. of the Exchequer Court (Canada) had recourse to and relied on a French translation of the 1946 Canada-United Kingdom tax treaty, which had been authenticated only in English, in order to interpret Article V of that treaty.[1776] However, Abbott J. of the Supreme Court, while upholding the decision of the lower court, explicitly stated that he did "not rely upon the translation of the Convention",[1777] most probably since the French translation was not an authoritative text for interpretative purposes.[1778]

In case *16305* of 4 February 1970,[1779] the Hoge Raad (the Netherlands), made reference

[1774] Consider, for example, Articles 5(3) and 11(2) of the 1925 Germany-Italy tax treaty, which provide that the provisions of the tax treaty concerning dividends paid to shareholders apply as well to income (profits distribution) from other *rights* that are similar in nature to shares, but not to income derived from other forms of participation in companies. A prima facie discrepancy exists between the German and the Italian authentic texts of those articles, since the former use the term "Wertpapieren", while the latter employ the term "valori mobiliari" for the English term *rights*: while the German legal jargon term "Wertpapieren" substantially corresponds to the English term "securities", thus requiring the incorporation of the relevant rights into certificates for circulation purposes, the Italian legal jargon term "valori mobiliari" has a wider bearing and might be used to denote corporate rights not represented by securities, i.e. not incorporated in any certificate. In that respect, it is interesting to note that, while German scholars and courts have generally resolved such a discrepancy in favor of the meaning *prima facie* attributable to the German authentic text (see, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a; A. Rust, "Germany", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 230-231; Tax Court of Rheinland-Pfalz (Germany), 2 April 1980, case *V 351/79*, *Entscheidungen der Finanzgerichte* (1980), 357 *et seq.*; Bundesfinanzhof (Germany), 9 December 1981, case *IR 78/80*, *Bundessteuerblatt. Teil II* (1982), 243 *et seq.*; Tax Court of Munich (Germany), 22 July 1998, case *9 K 2830/97*, *Haufe-Index* 952357), Italian tax authorities have construed the treaty in accordance with the *prima facie* meaning of the Italian authentic text (see G. B. Galli and A. Miraulo, "Italy", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 385 *et seq*., at 395; G. Melis, *L'Interpretazione nel Diritto Tributario* (Padova: Cedam, 2003), p. 622).

[1775] District Court of Tokyo (Japan), 14 April 1965, 11 *Shomu Geppo*, 817 *et seq*., cited in M. Nakazato, "Japan", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 407 *et seq.*, at 414.

[1776] Exchequer Court (Canada), 24 August 1966, *Furness, Withy and Co. v. R*., 66 DTC 5358, para. 22.

[1777] Supreme Court (Canada), 29 January 1968, *Furness, Withy and Co. v. R*., in 68 DTC 5033, at 5035.

[1778] See similarly M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 20.04.

[1779] Hoge Raad (Netherlands), 4 February 1970, case *16305*, BNB 1970/71.

to both the Dutch and German authentic texts of Article 2 of the 1959 Germany-Netherlands tax treaty and construed them as both requiring a single construction project to last more than twelve months before a permanent establishment came to existence.

In the *Vauban* case,[1780] Addy J. of the Federal Court (Canada), compared the French and English authentic texts of Article 13(III) of the 1951 Canada-France tax treaty and noted that, while the former read "Les produits *ou* redevances (royalties) provenant de la vente […]", the latter read "The proceeds *of* royalties (redevances) derived from the sale […]".[1781] On the basis of such a comparison, he concluded: "It seems clear that there is a typographical error in the English version and that the word "of" between the words "proceeds" and "royalties" should read "or," the correct text therefore being: "The proceeds or royalties (redevances) derived from ..." ".[1782]

In case *18010* of 26 January 1977,[1783] the Hoge Raad (the Netherlands) had to decide whether the relief limitation provided for under Article 6 of the 1967 Netherlands-United Kingdom tax treaty in relation to income not remitted to the United Kingdom applied also to pension payments from the Netherlands to United Kingdom resident persons, the latter being otherwise exempt in the Netherlands under Article 20 of the treaty. The English authentic text of Article 6 provided that "[w]here under any provision of [the treaty] income is *relieved* from Netherlands tax and, under the law in force in the United Kingdom, an individual, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in the United Kingdom and not by reference to the full amount thereof, then the *relief* to be allowed under the [treaty] in the Netherlands shall apply only to so much of the income as is remitted to or received in the United Kingdom".[1784] The Dutch authentic text of Article 6, however, used the term "vermindering" as corresponding to the English term "relief", the former being a legal jargon term generally used for denoting a reduction or decrease in taxation, as opposed to the term "vrijstelling", which denotes an exemption from tax. The Hoge Raad compared the two authentic texts and concluded that Article 6 applied only where there was a reduction of tax under the relevant treaty provision, such as for instance under the dividends article, while it did not apply where the treaty provided for an exemption, as was the case with regard to pension payments under Article 20 of the treaty, due to the clear wording of the Dutch authentic text.[1785]

[1780] Federal Court (Canada), 5 September 1975, *Vauban Productions v. R*, 75 DTC 5371.
[1781] *Emphasis* added.
[1782] Federal Court (Canada), 5 September 1975, *Vauban Productions v. R*, 75 DTC 5371, paras. 9-10.
[1783] Hoge Raad (Netherlands), 26 January 1977, case *18010*, BNB 1977/111. See also O. C. R. Marres and S. van Weeghel, *Jurisprudentiebundel IBR* (Deventer: Kluwer, 2008), pp. 1458 *et seq*.
[1784] *Emphasis* added.
[1785] The reference to the clear wording of the Dutch authentic text should probably be read in light of Article 3(2) of the treaty, which, for the purpose of interpretation, made a *renvoi* to the domestic law meaning of the contracting State applying the treaty, subject to the context not requiring a different interpretation: the term "vermindering" being a legal jargon term under Netherlands domestic tax law, the Court possibly found that its domestic law meaning was unambiguous and applied it.
The Court, however, could have convincingly held differently on the basis of the context requiring the

In the *IR 63/80* case,[1786] the Bundesfinanzhof (Germany) had to decide whether the income received by a German resident taxpayer, formally employed by a German resident company, for a short-term (147 days) activity carried on in Spain for the benefit and under the direction of a Spanish resident company, was taxable in Spain and, therefore, to be exempted in Germany under the 1966 Germany-Spain tax treaty. As a matter of fact, although the salary relating to such an activity had been formally paid to the employee by the German employer, it was then charged, together with other auxiliary costs, by the latter to the Spanish resident company.

The Court concluded that the Spanish resident company was to be regarded as the employer ("Arbeitgeber" in the German authentic text) for the purpose of Article 15 of the treaty and, as a consequence, the income was taxable in Spain and had to be exempted from tax in Germany under Article 23(1) of the treaty.

In supporting its decision, the Bundesfinanzhof made reference to the two sole authentic texts of Article 15(2)(b), in the German and Spanish languages, and compared the different wording used therein. It noted that, while the German authentic text referred to an employer ("die Vergütungen von einem *Arbeitgeber* oder für einen Arbeitgeber gezahlt werden, der nicht in dem anderen Staat ansässig ist"),[1787] the Spanish authentic text employed the more general term *person* ("Las remuneraciones se pagan por o en nombre de una *persona* que no es residente del otro Estado").[1788] According to the German tax authorities, this different wording was to be ascribed to the fact that the only text drafted and agreed upon by the negotiators was in English[1789] and that the Spanish and German authentic texts were later translations. The Court, however, referred to Article 33 VCLT and stated that, on the one hand, both authentic texts were equally authoritative for interpretative purposes and, on the one hand, they were presumed to have the same meaning. It considered that, under Article 3(2) of the treaty (similar to Article 3(2) of the 1963 OECD Draft), it was possible to disregard the meaning attributed to a treaty undefined term by the domestic laws of the contracting States where the context plainly pointed to the (different) meaning agreed upon by the parties: in the case at stake, the context[1790] required the salary to be regarded as paid by or on behalf of the Spanish resident company, since it was deductible from the latter's profits taxable in

---

interpreter to disregard the domestic law meaning. It could have argued, for instance, that the object and purpose of Article 6 was to avoid there being little or no taxation in the Netherlands on items of income not taxed in the United Kingdom due to the absence of remittance. In this respect, a construction of Article 6 purported to make it applicable also in the case of potential exemptions in the Netherlands, due to the operation of the given treaty provisions, would have appeared more consonant with the object and purpose of the provision itself. Moreover, the Court could have held that an exemption from tax might be denoted as being an extreme case of "reduction" of the tax normally applied under Netherlands domestic law due to the tax treaty (see, substantially in accordance, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 103).

[1786] Bundesfinanzhof (Germany), 21 August 1985, case *IR 63/80*, in *Bundessteuerblatt. Teil II* (1986), 4 *et seq*.

[1787] *Emphasis* added.

[1788] *Emphasis* added. In Article 15(2)(c), however, the term "persona" was qualified by the expression "para quien se trabaje".

[1789] Interestingly, that draft did not become an authentic text of the treaty.

[1790] Which included the overall structure of Article 15, in particular Article 15(2)(b) and (c).

Spain.

In case *1169-1987*,[1791] the Supreme Administrative Court (Sweden) had to interpret Articles II(2) and XII(3) of the 1960 Sweden-United Kingdom tax treaty, as modified by the 1968 Protocol. For the purpose of construing such articles, the Court majority paid particular attention to the English authentic text thereof since, although both the English and Swedish texts of the treaty were authentic, the 1968 Protocol had been negotiated in English and thus the English text might, in the specific case, be regarded as expressing more accurately the common intention of the parties.

Under Article XII(3) of the treaty, gains from the alienation of properties, other than immovable property and movable property forming part of the business property of a permanent establishment, were taxable only in the State of residence. However, Article II(2) of the English authentic text provided as follows:

> "Where under this Convention income from a source [author's note: "inkomst från inkomstkälla" in the Swedish authentic text] in one of the territories is relieved from tax in that territory and, under the law in force in the other territory, an individual, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in that other territory and not by reference to the full amount thereof, then the relief to be allowed under this convention in the first-mentioned territory shall apply only to so much of the income as is remitted to or received in the other territory."

The issue before the Court concerned whether the gain realized by a Swedish citizen, emigrated in the United Kingdom with his family and considered resident but not domiciled therein for tax purposes, from the alienation of shares in a Swedish resident company was taxable in Sweden under the 1960 Sweden-United Kingdom tax treaty. The taxpayer, being resident but not domiciled in the United Kingdom, would have been subject to tax therein on such a gain only insofar as the proceeds from the alienation of the shares had been remitted to the United Kingdom, which was not the case. The main interpretative issue before the Court, thus, was whether the gain had to be considered "income from a source" in Sweden for the purpose of Article II(2).

The Court first noted that, under Swedish income tax law, gains from the alienation of shares in Swedish companies realized by non-resident taxpayers were taxable in Sweden if the taxpayer had been resident of Sweden at any time during the ten years proceeding the year of alienation. However, Article XII(3) of the treaty theoretically precluded Sweden from taxing such a gain. That conclusion could be reversed only by means of the application of Article II(2), which implied the need for the Court to interpret it.

In this respect, the Court pointed out that, in construing a tax treaty, the fundamental task for the interpreter is to determine the original (common) intention of

[1791] Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162*, *Regeringsrättens årsbok* (1987) (also reported in summary in IBFD Tax Treaty Case Law Database). The decision was taken by a majority of three to two judges. See also P. Sundgren, "Interpretation of Tax Treaties – A Case Study", *British Tax Review* (1990), 286 *et seq.*; and M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 20.05.

the parties and that, in order to do so in the specific case, the starting point was represented by the Swedish authentic text of the treaty, although the interpreter could rely as well on the other authentic texts in order to elucidate the intended meaning of the terms employed. Since the treaty negotiations seemed, in the Court's eyes, to have been conducted in the English language, the Court concluded that, in the specific case, the English text was to be attributed a particular weight for the purpose of determining the original intention of the parties.[1792]

A careful analysis of the English authentic text led the court to investigate the meaning the term "income", being a legal jargon term, had under the domestic law of the United Kingdom. The answer found by the Court was that United Kingdom tax law draws a clear line between the concepts underlying the terms "income" and "capital gains". Moreover, while the expressions "inkomst från inkomstkälla" was not used under Swedish tax law, the corresponding English "income from a source" was recognized as a well-known legal jargon term under United Kingdom tax law. In particular, the Court emphasized that gains derived from the alienation of shares in a Swedish resident company would clearly not be denoted by the term "income from source" under United

[1792] The decision was harshly criticized by Sundgren (see P. Sundgren, "Interpretation of Tax Treaties – A Case Study", *British Tax Review* (1990), 286 *et seq.*, at 299-301), who submitted that the Court majority, in attributing more weight to the drafted text over the other authentic text, committed a clear violation of the principle of equality of texts (quoting P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 400 and 418; see, accordingly, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a). He then added that it is quite normal that the process of negotiating bilateral tax treaties is conducted in English by Swedish representatives and that the text initialed at the end of such a process is drafted in the English language only. However, according to Sundgren, after the negotiations are concluded, a lot of efforts goes into the Swedish translation and subsequently all future authentic texts are meticulously scrutinized by both contracting States before signing them. He concluded by stating that "[t]he fact that the text was originally drawn up in English and initialled by civil servants representing the treaty partners must not be regarded as a concession by Sweden for interpretative purposes. This is the whole point of equally authoritative texts" (*ibidem*, at 300). The author, however, agrees with Edwardes-Ker (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 20.05) holding: "The equality of treaty texts cannot change the reality that all treaty texts may not be equally clear […] It does not alter the fact that a treaty text in one language (such as that in which it was originally negotiated, drafted and initialed) may well be a truer reflection of both States' understanding than an equally authoritative, albeit less helpful, text which only came into existence as a translation of this initialed text."
Noticeably, the very same Sundgren, with regard to a subsequent case (Supreme Administrative Court (Sweden), 25 March 2004, case *RÅ 2004 ref. 59*, *Regeringsrättens årsbok* (2004), stated the following: "The preparatory works of tax treaties are very few. However, the negotiations of these treaties made by Sweden are always conducted in English and will thus always result in an initialled draft in that language. The Swedish Government Bill (prop. 1967:26) of the Sweden-Peru treaty explicitly mentions the existence of this initialled English version. This draft of the treaty is clearly a part of the preparatory work thereof and one would imagine that every responsible interpreter, facing a plurilingual treaty with a divergence in its authentic texts, would jump at the opportunity to examine such a third English text." He then continued noting that the English initialled text of the 1966 Sweden-Peru tax treaty (i.e. its drafted text) contained "interesting information not only regarding the divergence between the two [authentic texts of the tax treaty], but it also cast[ed] light […] on the negotiation process which is of interest in general to the understanding of the final text(s)" (see P. Sundgren, "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: http://www.skatter.se/index.php?q=node/1079; accessed on 23 July 2011).

Kingdom law since capital gains were outside the intension of that term and, at the same time, such gains would not be denoted by the expression "inkomst från inkomstkälla" under Swedish tax law either since, on the basis of Swedish case law, such capital gains, although being considered to form part of the income of the taxpayer, were generally considered not to have any source. It ultimately concluded, with a majority of three to two judges, that the term "income from a source" was to be construed as not including capital gains arising from the sale of Swedish companies' shares.[1793]

In order to support its conclusion, the Court also made reference to the Swedish government bill bringing the 1968 Protocol into force, which stated that the amendments made by the Protocol, among which the provision of Article II(2), were of a formal nature and that capital gains from the alienation of properties, other than immovable property and movable property forming part of the business property of a permanent establishment, were to be taxed only in the residence State. From such notations, the Court drew the inference that the intention of the parties, when they agreed upon the text of the 1968 Protocol, was not to extend the right to tax of Sweden over such capital gains realized by a United Kingdom resident. In addition, the Court observed that the United Kingdom tax authorities had repeatedly taken the position that Article II(2) did not apply to capital gains, that being a relevant subsequent practice by a contracting State giving evidence of its interpretation of the treaty provisions.

In the *IR 369/83* case,[1794] the Bundesfinanzhof (Germany) had to decide whether a German resident individual who carried out some engineering activities in Italy was to be exempt in Germany under Article 7(1)(1) of the 1925 Italy-Germany tax treaty. In that respect, the Bundesfinanzhof analysed both the German and the Italian authentic texts of Article 7(1)(1) and concluded that both attributed an exclusive taxing right to the source State only under the condition that the taxpayer had the power of dispose over the premises where he performed his activity.[1795] Since, as a matter of fact, the taxpayer did

[1793] In the separate opinion of the two dissenting judges, holding in favor of the application of Article II(2) to capital gains, heavy emphasis was put on the object and purpose of Article II(2), namely the avoidance of the double non-taxation otherwise caused by the United Kingdom domestic law providing for taxation on a remittance basis of resident but not domiciled individuals.
The argument developed by the dissenting judges was broadly built upon the following points: (i) the term "inkomst", as used under Swedish domestic tax law, denoted both ordinary income and capital gains; (ii) the previous point constituted strong evidence of the fact that the Swedish negotiators, when agreeing upon the text of the 1968 Protocol, intended the terms "inkomst" and "income", as employed in new Article II(2) of the treaty, to denote capital gains as well; (iii) in the text of the 1960 Sweden-United Kingdom tax treaty, the terms "inkomst" and "income" had been generally used to denote both ordinary income and capital gains; (iv) the expression "inkomst från inkomstkälla" was to be construed, in its context, as simply requiring that a certain item of income had a sufficiently strong connection with the territory of a contracting State; (v) the object and purpose of Article II(2), i.e. to avoid double non-taxation where no remittance to the United Kingdom had occurred, would have been frustrated by an interpretation excluding capital gains from the scope of that article; (vi) capital gains realized by Swedish non-resident individuals from the alienation of shares in Swedish resident companies became taxable in Sweden only in 1983 and, therefore, they could not be the subject of any intended exclusion by the parties at the time of the conclusion of the 1968 Protocol.

[1794] Bundesfinanzhof (Germany), 3 February 1988, case *IR 369/83*, *Bundessteuerblatt. Teil II* (1988), 486 *et seq*.

[1795] According to the Court, such a condition was implicitly required by the use of the terms "fester

not have any control over the premises where he performed his activities, the Court concluded that Germany could tax the relevant income.

In a decision delivered on 10 May 1989,[1796] the Tax Recourse Commission of Zurich (Switzerland) held that the term "vorübergehend" employed in the German authentic text of Article X of the 1951 Switzerland-United States tax treaty, dealing with income from labor and personal services, was to be given the same meaning as the corresponding term "temporarily present" used in the English authentic text thereof. The relevant part of Article X of the English authentic text reads as follows:

> "An individual resident of [the United States] shall be exempt from [Switzerland] tax upon compensation for labor or personal services performed in [Switzerland] if he is temporarily present in [Switzerland] for a period or periods not exceeding a total of 183 days during the taxable year […]"[1797]

According to the commission, since the terms "vorübergehend" and "temporarily present" were not defined within the treaty, they had to be construed autonomously and in accordance with the common intention of the contracting States. In that respect, the commission found that the English term "temporarily present" expressed more clearly the intention of the parties to distinguish, for the purpose of applying Article X, between (i) those individuals that intended to remain in the source State temporarily, who were to be exempt from tax in that State, and (ii) those intending to remain there indefinitely, who might be taxed by the source State even where present therein for less than 184 days during the relevant taxable year.[1798]

In the cases 25373 and 25419 of 1989,[1799] the Hoge Raad (the Netherlands) had to decide whether the income to be taken into account in the denominator of the fraction used to determine the tax exemption (with progression) under Article XVIII(2) of the 1957 Canada-Netherlands tax treaty was the overall taxable income,[1800] i.e. the overall income reduced by the personal and family deductions to which the taxpayer was entitled under Netherlands domestic tax law, or the overall income before the application of such deductions.[1801]

The Court found that the income to be taken into account in the denominator of the fraction was the overall taxable income. In supporting such a conclusion, the Court

---

Mittelpunkt" and "sede fissa" in the German and Italian authentic texts of Article 7(1)(1), respectively.

[1796] Tax Recourse Commission (Switzerland), 10 May 1989, *Steuerentscheid* (1989), A 31.1, No. 4.

[1797] Article X(1) and (2) of the 1951 Switzerland-United States tax treaty, interpolations by the author.

[1798] For an analysis of the interaction between the requirement of the "temporarily presence" and that of the "183-days presence", see, with regard to similarly worded provisions included in other tax treaties, Hoge Raad (Netherlands), 29 September 1999, cases *33267* and *34482*, BNB 2000/16 and BNB 2000/17 and Tax Court of Köln (Germany), 28 November 1983, case *169/80 E*, *Entscheidungen der Finanzgerichte* (1984), 460 *et seq*. (all briefly dealt with in this section).

[1799] Hoge Raad (Netherlands), 13 September 1989, case *25419*, BNB 1990/60, and 6 December 1989, case *25373*, BNB 1990/44.

[1800] "Belastbaar inkomen" under Netherlands domestic law.

[1801] "Onzuiver inkomen" under Netherlands domestic law.

noted that, while the Dutch authentic text of the treaty could be seen as ambiguous in that respect, the English authentic text was clearer in referring to the taxable income as determined under Netherlands domestic law.[1802] Moreover, the Court found its conclusion to be further supported by the contextual analysis of the treaty provisions, in particular Article II(2) (corresponding to Article 3(2) OECD Model), and of the interrelation between the distributive rule Articles and Article XVIII (1) and (2).

In the *Thiel* case,[1803] the High Court of Australia was faced with the interpretation of Article 7 of the 1980 Australia-Switzerland tax treaty. In carrying on that task, three judges of the Court mentioned that, as the English and German authentic texts of the tax treaty were agreed to be equally authoritative, the meaning of the term "enterprise", used in the English authentic text of Article 7, might have been illuminated by evidence of the meaning of the corresponding German term.[1804] Unfortunately, the judges did not push the analysis further since no such evidence had been provided and the parties before the Court proved unable to agree upon a translation of the German text into English.[1805]

In the case IR 106/87,[1806] the Bundesfinanzhof (Germany) compared the German and English authentic texts of Article VI(2) of the 1964 Germany-United Kingdom tax treaty and concluded that they had the same meaning, i.e. that the reduction to 20% of the maximum withholding tax on inter-company dividends applied even in cases where the recipient of the dividends was exempt from tax in its State of residence. In fact, although a subject-to-tax condition was provided for under paragraph 1 of Article VI, which set out the general rule applicable to dividends paid by companies resident of one State to residents of the other State, the Court found that both the English and German authentic texts of paragraph 2 made clear that its provision applied notwithstanding the provision of paragraph 1.

In the *Gu* case,[1807] Bonner T.C.J. of the Federal Court (Canada) compared the French and English authentic texts of Article 19 of the 1986 Canada-China tax treaty (but not the equally authoritative Chinese text). He found that comparison, in particular with regard to the words "receives for the purpose of his maintenance, education or training" in the English text and the words "reçoit pour couvrir ses frais d'entretien, d'études ou de

[1802] See, in particular, the decision delivered by the Court in case 25373 and the Opinion of Advocate General Van Soest to case 25419.
[1803] High Court (Australia), 22 August 1990, Thiel v. Commissioner of Taxation, 171 Commonwealth Law Reports, 338 *et seq*.
[1804] *Ibidem*, at para. 9 of the judgment delivered by Mason C.J., Brennan J. and Gaudron J. See, similarly, Federal Court (Australia), 4 March 1997, *Lamesa Holdings BV v. Commissioner of Taxation,* [1997] FCA 134, where the Court, for the purpose of interpreting Article 13 of the 1976 Australia-Netherlands tax treaty, admitted the evidence provided for by a Netherlands tax treaty expert suggesting that there was no divergence in the meaning between the Dutch and English authentic text thereof.
[1805] Ibidem.
[1806] See Bundesfinanzhof (Germany), 7 February 1990, case *IR 106/87*, 159 *Sammlung der Entscheidungen des Bundesfinanzhofs*, 518 *et seq*. For a similar straightforward comparison see Tax Court of Baden-Württemberg (Germany), 16 August 1996, case *K 42/92*, *Entscheidungen der Finanzgerichte* (1997), 82 *et seq*.
[1807] Federal Court (Canada), 26 April 1991, *Chun Gu v. R*, 91 DTC 821.

formation" in the French text, useful. He concluded: "That language is quite unsuited to describe a payment of ordinary salary no matter how the recipient ultimately spends it. The language suggests that the payments must in some way be related to the recipient's maintenance costs, education costs or training costs. Payments are not received to cover costs of a specified class simply because the recipient ultimately spends the money to meet costs of the type named."[1808]

In the *Crown Forest* case,[1809] Muldoon J. of the Federal Court (Canada) compared the French and English authentic texts of the 1980 Canada-United States tax treaty in order to interpret Article IV(1) thereof, without finding any discrepancy.

In case *28217* of 1992,[1810] the Hoge Raad (the Netherlands) had to deal with an issue similar to the one tackled in the previously-mentioned cases *25373* and *25419* of 1989. In particular, the question to be answered was whether the income to be taken into account in the denominator of the fraction used to determine the tax exemption (with progression) under Article 20(3) of the 1959 Germany-Netherlands tax treaty was the overall taxable income,[1811] i.e. the overall income reduced by the personal and family deductions to which the taxpayer was entitled under Netherlands domestic tax law, or the overall income before the application of such deductions.[1812]

Under Article 20(3) of the treaty, the Netherlands had to allow as deduction, from the tax payable according to its domestic law, the amount of such tax computed on the basis of the ratio between (i) the income taxable in Germany according to the tax treaty and (ii) the *total income*. The terms used to indicate the *total income* in the two authentic texts of Article 20(3)[1813] of the treaty were "alle inkomensbestanddelen" in Dutch and "Gesamteinkommen" in German. In addition, Article 20(2) of the treaty, with reference to the exemption that Germany had to grant to its residents for income taxable in the Netherlands according to the treaty distributive rules, preserved the possibility for the former State to apply to the remaining income the tax rate that it would have applied to the taxpayer's *total income* in the absence of the tax treaty. In this case, while the German authentic text of Article 20(2) employed the very same term "Gesamteinkommen" to refer to such total income, the Dutch authentic text used the different expression "het gehele inkomen".

The Hoge Raad, unlike what it had done in respect of the differently worded Article XVIII(2) of the 1957 Canada-Netherlands tax treaty, held that the income to be taken into account in the denominator of the treaty tax exemption ratio was the overall income before the application of the personal and family deductions.[1814] In arguing in

[1808] *Ibidem*, para. 12.
[1809] Federal Court (Canada), 2 April 1992, *Crown Forest v. Canada*, 92 DTC 6305, at 6309-63011, in particular para. 23.
[1810] Hoge Raad (Netherlands), 15 April 1992, case *28217*, BNB 1992/223.
[1811] "Belastbaar inkomen" under Netherlands domestic law.
[1812] "Onzuiver inkomen" under Netherlands domestic law.
[1813] The 1959 Germany-Netherlands tax treaty had been authenticated only in the Dutch and German languages.
[1814] I.e. the "onzuiver inkomen" under Netherlands domestic law.

favor of this conclusion the Court mentioned the discrepancy, in the Dutch authentic text, between the terminology used in Article 20(2) and that employed in Article 20(3) of the tax treaty and compared it with the consistent terminology adopted in the German authentic text thereof. Arguably,[1815] since it was aware that the German Bundesfinanzhof had interpreted the term "Gesamteinkommen" in Article 20(2) of that tax treaty as denoting the taxpayer's net taxable income,[1816] the Hoge Raad found that the German term "Gesamteinkommen" might be attributed two different meanings for the purpose of Article 20(2) and Article 20(3) , as the use of two different terms in the corresponding articles of the Dutch authentic text indicated.

In case 27222 of 1992,[1817] the Hoge Raad (the Netherlands) upheld a decision of the lower court of Hertogenbosch, according to which the terms "maatschappelijk" and "capital social", usedy in the Dutch and French authentic texts, respectively, of Article 9 of the 1951 Netherlands-Switzerland[1818] tax treaty, bore the same meaning and denoted the capital issued by the company paying out the dividends and not the properly authorized, but not yet issued, capital thereof.

In the *Li* case,[1819] Isaac C.J. of the Federal Court of Appeal (Canada) compared the French and English authentic texts of Article 19 of the 1986 Canada-China tax treaty. The English authentic text referred to "a student, apprentice or business trainee […] who *is present* in the first-mentioned Contracting State solely for the purpose of his education or training", while the French authentic text referred to "un étudiant, un stagiaire ou un apprenti […] qui *séjourne* dans le premier État contractant à seule fin d'y poursuivre ses études ou sa formation".[1820] Isaac C.J. found that "[a]lthough the English version of Article 19 is arguably ambiguous, the use of the phrase *qui séjourne* in the French version, which is equally authoritative, puts it beyond doubt that the presence in Canada of which the Article speaks […] is a temporary one."[1821]

In the case *Ngee Hin Chong*,[1822] the parties referred to both the English and the Malaysian authentic texts of Article 18(2) of the 1981 Australia-Malaysia tax treaty. Under the former, pensions paid by a contracting State in respect of services rendered thereto "shall be taxable in that State"; under the latter, in the English translation agreed upon by the parties to the litigation, such pensions "may be taxed" in that State.[1823]

[1815] That was not expressly mentioned, indeed.
[1816] Bundesfinanzhof (Germany), 11 October 1967, case *IR 86/67*, 90 *Sammlung der Entscheidungen des Bundesfinanzhofs*, 74 *et seq*.
[1817] Hoge Raad (Netherlands), 4 November 1992, case *27222*, BNB 1993/38.
[1818] As amended through 1966.
[1819] Federal Court of Appeal (Canada), 5 November 1993, *Qing Gang K. Li v. R*, 94 DTC 6059.
[1820] *Emphasis* added.
[1821] Federal Court of Appeal (Canada), 5 November 1993, *Qing Gang K. Li v. R*, 94 DTC 6059, at 6062.
[1822] Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*
[1823] See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq*, at 81.

The Court concluded that the two authentic texts were to be construed as meaning that both the contracting State paying the pension and the contracting State of residence of the recipient were entitled to tax such payments, contrary to the argument of the taxpayer, according to whom they were taxable only in the State paying them. In supporting that conclusion, the Court made reference to Article 31 VCLT and, in accordance therewith, analysed the object and purpose of the tax treaty and the context of Article 18(2) thereof, including its object and purpose and other articles of the very same tax treaty.[1824] In particular, the Court noted that, where the contracting States intended to deny the taxing right of one of them, they explicitly did so by using the term "only" in the English authentic text of the tax treaty, such as in Articles 7, 8, 14, 17 and 18(1). Moreover, it noted that Articles 22 and 23, for the purpose of eliminating juridical double taxation by means of the credit method, made reference, *inter alia*, to Article 18 and that reference could be said not to be absurd only where Article 18(2) was construed as allowing concurrent taxation. Finding the meaning of the provision at stake plain, where interpreted in accordance with Article 31 VCLT, the Court did not find necessary to have recourse to the supplementary means of interpretation provided for under Article 32 VCLT.[1825] This conclusion and the underlying reasoning were upheld by the Federal Court of Australia.[1826]

In the *Memec* case,[1827] one of the issues that the Court of Appeal of England and Wales had to decide was whether, for the purpose of the application of Article XVIII(1)(b) of the 1964 Germany-United Kingdom tax treaty,[1828] the term "dividend" used therein was to be attributed the same meaning it had for the purpose of Article VI of the treaty, where a definition of "dividends" was provided, or the meaning it had under the domestic law of the United Kingdom.

In that respect, Gibson L.J. of the Court of Appeal first noted[1829] that Article II(3) of the tax treaty (corresponding to Article 3(2) OECD Model) directed the interpreter towards the domestic law meaning with respect to terms "not otherwise defined in the […] Convention" and that such an expression should be construed as meaning "not otherwise *relevantly* defined". Moreover, in light of the fact that the definition of "dividends" in Article VI started with the expression "[t]he term "dividends" as used this article means […]" and that such a definition had not been included in Article II, together with the other general definitions, he concluded that it was not the intention of the contracting States to extend the relevance of that definition outside the scope of

[1824] See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 90-92.
[1825] See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 92
[1826] See Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT,* 2 *ITLR*, 707 *et seq.*, in particular at 726.
[1827] Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*
[1828] As amended by the 1970 protocol.
[1829] Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 21.

Article VI, i.e. that the context did not require the interpreter to use the definition included in Article VI in order to construe the term "dividend" found in Article XVIII, which thus had to be attributed the legal jargon meaning it had under the domestic law of the United Kingdom according to Article II(3) of the treaty. Such a conclusion was also supported by the fact that, on the one hand, the Protocol to the treaty concluded on 23 March 1970 modified both the definition of the term "dividends" in Article VI and the text of Article XVIII, but without including in the latter any reference to the former, and, on the other hand, where a definition encompassed in a specific article of the tax treaty was to be used for the purpose of construing other articles thereof the contracting States expressly stated it.[1830]

The taxpayer, conversely, put forward the argument that the French official version of Article 10(3) of the 1963 OECD Draft, on which Article VI(4) of the 1964 Germany-United Kingdom tax treaty was based, could be construed differently since it started with the more neutral clause "Le terme «dividendes» employé dans le présent article". The Gibson L.J., however, was not very impressed with such an over-subtle point of potential linguistic discrepancy and aptly noted that, although he was theoretically open to take into account a text other than an authentic text of the treaty such as the French official version of the 1963 OECD Draft concerning the same provision, he considered that treaty interpretation was far from being a mere "literal" interpretation of texts in which such linguistic nuances could play a relevant role.[1831]

In cases *33267* and *34482* of 1999,[1832] the Hoge Raad (the Netherlands) was faced with the interpretation of Article 10(2)(a) of the 1959 Germany-Netherlands tax treaty, according to which income derived from employment was taxable solely in the contracting State of residence if the employee was present in the other State "temporarily" for a total of no more than 183 days in one calendar year and other conditions were met.

The two sole authentic texts of the treaty, in the Dutch and German languages, read as follows (excerpt):

> "indien deze werknemer […] tijdelijk in totaal niet meer dan 183 dagen gedurende een kalenderjaar, in de andere Staat verblijft"
>
> "wenn dieser Arbeitnehmer […] sich vorübergehend, zusammen nicht mehr als 183 Tage im Lauf eines Kalenderjahres, in dem anderen Staat aufhält"

The Court had to decide whether the term "temporarily" ("tijdelijk" in the Dutch

[1830] E.g. in Articles VIII(1) and XVI(1) of the tax treaty.
[1831] See Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 21. See also *ibidem*, at p. 20, where Gibson L.J. summarized the principles of interpretation to be applied in order to construe tax treaties, by making reference to the VCLT and rejecting any "literal interpretation" (quoting Mummery J in High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank,* 63 TC 218, at 234-236).
[1832] See Hoge Raad (Netherlands), 29 September 1999, cases 33267 and 34482, BNB 2000/16 and BNB 2000/17.

authentic text and "vorübergehend" in the German authentic text) had a meaning autonomous from the following reference to a stay of no more that 183 days in one calendar year. If that had been the case, it would have been possible for an employee to be present in the source State for less than 184 days in a calendar year, but still not be there "temporarily", for example where he had been present in such a State continuously in the preceding or subsequent calendar year.

In this respect, one of the arguments put before the Court was that a seeming discrepancy existed between the Dutch and the German authentic texts, a comma being present in the latter after the term "vorübergehend", but missing in the former after the corresponding term "tijdelijk". According to the tax authorities and the Court of Appeal, the presence of the comma in the German authentic text could have been seen as evidence of the intention of the parties to treat the text after the comma as an apposition, i.e. a mere elucidation of the meaning to be attached to the term "vorübergehend", which would not have had thus any autonomous meaning.[1833]

The Court, however, was not very impressed by such an argument. It ruled, instead, that the term "tijdelijk" was to be interpreted in its context and in light of the object and purpose of the entire provision of which it was part. It first observed that Article 10 of the 1959 Germany-Netherlands tax treaty was obviously derived from Article 9 of the 1954 Austria-Germany tax treaty, which in turn was based on Article VI of the 1946 League of Nations London Draft.[1834] By analyzing the two tax treaties and the London Draft from which they were derived, the Court found that there was no clear indication that the term "temporarily" (or its equivalents) had been intended by the drafters as superfluous synonym for the 183-day rule.[1835] On the contrary, the intended meaning of that term was to be determined in light of its ordinary meaning and of the object and purpose of Article 10(2) of the treaty, i.e. to facilitate the international movement of employees by means of a rule that prevented the shifting of taxing rights from the residence to the source State where the employees were present in the latter State only for a brief period of time (i.e. temporarily).[1836] According to the Court, the different punctuation in the German authentic text did not change the result of its analysis. It therefore concluded that, while in the case of a stay of more than 183 days per calendar year in the source State the income received was always taxable exclusively by the latter State, a stay of less than 184 days per calendar year led to the same result

[1833] See, in this sense, also H. Pijl, "Mutual agreement tussen Duitsland en Nederland: Inkomsten uit niet-zelfstandige arbeid", 64 *Maandblad Belasting Beschouwingen* (1995), 286 *et seq*., at 287.

[1834] The relevant paragraph of Article VI of the 1946 League of Nations London Draft, which substantially reproduced Article VII(2) of the 1943 League of Nations Mexico Draft, reads as follows in its English official version: "2. A person having its fiscal domicile in one Contracting State shall, however, be exempt from taxation in the other Contracting State in respect of such remuneration if he is temporarily present within the latter State for a period or periods not exceeding a total of one hundred and eighty-three days during the taxable year, and shall remain taxable in the first State".

[1835] In this respect, the Court seemed to have applied the principle of interpretation expressed by the maxim "*ut res magis valeat quam pereat*".

[1836] The same result would be substantially achieved under the current text of the OECD Model. See, in the same sense, K. Vogel, "Tax Treaty Monitor", 54 *Bulletin for international taxation* (2000), 254 *et seq*., at 254-255.

where that stay was not considered to be of a temporary nature.[1837]

Finally, the *Hoge Raad* rejected the idea to be bound by a decree[1838] reflecting the outcome of a mutual agreement reached by the Netherlands and Germany competent authorities under the provision of the tax treaty, according to which the terms "tijdelijk" and "vorübergehend" had no separate meaning from the 183-days rule. According to the Court, that decree did not remove the judges' obligation under Netherlands law to interpret the treaty where a case was referred thereto by the tax authorities or a taxpayer.

Interestingly, the Tax Court of Köln (Germany)[1839] reached a diametrically opposite conclusion in interpreting the identically written provision encompassed in the German authentic text of Article 13(4) of the 1959 France-Germany tax treaty. The Court maintained that the term "vorübergehend" was not to be construe autonomously, but in connection with the 183-days rule, in the sense that, whenever the stay in the source State did not exceed 183 days in the calendar year, the employee presence therein was to be regarded as temporary.[1840] It must be emphasized that the Court, in order to support its conclusion, relied on the equally French authentic text of the provision, which read: "les revenus provenant d'un travail dépendant ne peuvent être imposés que dans l'Etat Contractant dont le salarié est le résident […] si le séjour temporaire de celui-ci dans l'autre Etat n'excède pas une durée totale de 183 jours au cours d'une année civil". According to the Court, the French authentic text was perfectly clear, not leaving rooms for alternative interpretations.

In the case *Re X BV*,[1841] the Hoge Raad (the Netherlands) referred to all three authentic texts[1842] of the 1986 Canada-Netherlands tax treaty concluding that there was no apparent difference among the relevant terms used therein[1843] and that they should be attributed the meaning that appeared to best fit the context of the treaty as a whole.

In the case *Wolf*,[1844] Decary J.A. of the Federal Court of Appeal of Montreal (Canada) analysed the possible differences in meaning existing between the term "personal services" used in the English authentic text of the 1980 Canada-United States tax treaty and the term "professions" used in the French authentic text thereof. He promptly concluded that, although at first blush and in common parlance the latter term might appear to have a more restrictive and somewhat more elitist meaning, the context where

[1837] In the decision concerning case 34482, the Court also maintained that such interpretation was supported by a letter of the Netherlands Ministry of Finance dated 23 January 1967, in which the Ministry upheld the view that the term "tijdelijk" in Article 10(2)(a) of the 1959 Germany-Netherlands tax treaty had an autonomous meaning, additional to the requirement of the 183-days rule.
[1838] Decree of 13 July 1995.
[1839] Tax Court of Köln, 28 November 1983, case *169/80 E*, *Entscheidungen der Finanzgerichte* (1984), 460 *et seq*.
[1840] See, arriving at the same conclusion, Bundesfinanzhof (Germany), 10 July 1996, case *IR 4/96*, *Bundessteuerblatt. Teil II* (1997), 15 *et seq*.
[1841] See Hoge Raad (Netherlands), 1 November 2000, case *35398*, 3 *ITLR*, 466 *et seq*., at 483, para 3.4.
[1842] I.e. the English, French and Dutch authentic texts.
[1843] I.e. "any taxation", "aucune imposition" and "onderscheidenlijk",used in the English, French and Dutch authentic texts, respectively, of Article 24(3) of the treaty.
[1844] Federal Court of Appeal of Montreal (Canada), 15 March 2002, *Wolf v. R*, 4 *ITLR*, 755 *et seq*.

such terms were used (i.e. Articles XIV and XV of the above-mentioned tax treaty) made clear that the apparently wider meaning of "personal services" was intended by the contracting States to apply to both terms.[1845]

In the *PGS Geophysical* case,[1846] the Borgarting Appeals Court (Norway) compared the French (sole) authentic text of Article 5 of the 1978 Ivory Cost-Norway tax treaty with the English official version of the corresponding article of the OECD Model and concluded that the terms "stable" and "fixe", in the former, and "permanent" and "fixed", in the latter, all seem to require permanent establishments to be connected to a specific place and to last for a minimum amount of time.[1847]

In the case *RÅ 2004 ref. 59,*[1848] the Supreme Administrative Court (Sweden) had to decide whether the capital gains derived by two Swedish companies from the sale of the shares of two Peruvian companies were taxable in Sweden under the 1966 Peru-Sweden tax treaty. According to the Court, such capital gains were, under Article X of that treaty, taxable exclusively in Peru. However, the issue arose of whether Sweden, notwithstanding Article X, was entitled to tax these capital gains under Article XVII(2) of the treaty, according to which income from sources in Peru which under the laws of Peru and in accordance with the tax treaty was subject to tax in Peru was to be exempt from Swedish tax. The Spanish and Swedish sole authentic texts of that article read as follows:[1849]

> Con sujeción a las disposiciones del Artículo VIII, el *rédito* de fuente en el Perú que de acuerdo con las leyes del Perú y de conformidad con este Convenio está sujeto a impuesto en el Perú, ya sea directamente o por deducción, estará eximido del impuesto Sueco
>
> Där icke bestämmelserna i artikel VIII annat föranleda skall *inkomst* från inkomstkällor i Peru, vilken inkomst enligt peruansk lag och i överensstämmelse med detta avtal är underkastad beskattning i Peru vare sig direkt eller genom skatteavdrag, vara undantagen från svensk skatt

The Court found that Article XVII(2) was a subject-to tax clause, whose main purpose was to avoid double non-taxation of income taxable exclusively in Peru under the treaty distributive rules, but not subject to tax therein under its domestic law.[1850] Nonetheless,

---

[1845] See Federal Court of Appeal of Montreal (Canada), 15 March 2002, *Wolf v. R*, 4 *ITLR*, 755 *et seq*., at 781, para. 101.
[1846] Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*
[1847] See *ibidem* at 230.
[1848] Supreme Administrative Court (Sweden), 25 March 2004, case *RÅ 2004 ref. 59*, *Regeringsrättens årsbok* (2004) (a summary in English is available at the IBFD Tax Treaty Case Law Database).
[1849] *Emphasis* added.
[1850] In the same vein, Sundgren maintains that Article XVII(2) of the 1966 Peru-Sweden tax treaty "is not an article to prevent double taxation, it is an article to impose taxation once in order to prevent double non-taxation" (see P. Sundgren, "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL:

overturning the decision of the Advance Rulings Board,[1851] it considered that capital gains were not to be considered to be income ("rédito" and "inkomst" in the Spanish and Swedish authentic texts) for the purpose of Article XVII(2) and, therefore, concluded that Sweden was not entitled to tax the capital gains realized by the two Swedish companies, notwithstanding the fact that they were not subject to tax under Peruvian domestic law.

In supporting its interpretation, the Court recalled that the tax treaty had been drawn up in the Swedish and Spanish languages and that both texts were to be considered equally authentic. It noted that, when Sweden is to apply the treaty, the Swedish authentic text should primarily be used, due to Article II(2) of the treaty;[1852] however, in cases of uncertainty, the Spanish text is to be considered as well. In the instance at stake, the comparison of the two authentic texts showed a *prima facie* discrepancy, since, while on the basis of the Swedish text it was uncertain whether Article XVII(2) applied to capital gains, such a possibility appeared improbable on the basis of the use of the term "rédito" in the Spanish authentic text. The Court then found that such a conclusion was also supported by the analysis of Article 1, which listed the taxes covered by the treaty, since, with reference to Peru, it separately mentioned the taxes on income ("impuestos sobre la renta") and the tax on capital gains from the alienation of immovable property ("el impuesto a las ganancias de capital provenientes de la transferencia de inmuebles").

According to the Court, since the structure of the Spanish text practically excluded capital gains from the scope of Article XVII(2), the tax treaty could not be interpreted other than as precluding Sweden from taxing capital gains under its Article X.

In the *Mil Investments* case,[1853] the Tax Court of Canada noted a possible discrepancy between the English and the French authentic texts of the preamble of the 1989 Canada-Luxembourg tax treaty, the former employing the term "fiscal evasion", while the latter using the term "évasion fiscale", which could be regarded as the French synonym for the English term "tax avoidance". The Court then emphasized that, in the following 1999 Canada-Luxembourg tax treaty, the potential issue was set aside by using the term "fraude fiscale" in the French authentic text of the preamble, which fairly corresponded

---

http://www.skatter.se/index.php?q=node/1079; accessed on 23 July 2011).
Westberg, however, submits that Article XVII(2) "is a provision on the method for elimination of double taxation and not a subject-to-tax clause. It simply says that exemption must be provided by Sweden in respect of income from Peruvian sources subject to tax in Peru" and continues by noting that such interpretation "is based on the wording of the text, which in the author's opinion is supported by the commentaries in the Swedish Government Bill (proposition 1967:26, pages 25 and 26), which state that the treaty was modelled in accordance with the previous treaty between Sweden and Argentina (from 1962). It explicitly adds that taxation must take place in the state of source, if not otherwise provided, and that such income is exempt from taxation in the state of residence" (see B. Westberg, "Summary of *Case RÅ 2004 not 59.* Editor's notes", in *IBFD Tax Treaty Case Law Database*).

[1851] Which based its decision on the sole Swedish authentic text.

[1852] Which resembled Article 3(2) of the 1963 OECD Draft.

[1853] Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq*.

to the term "fiscal evasion" employed in the English authentic text thereof.[1854] From the overall review of the arguments put forward by the Court, it does not seem that the latter placed any significance on such possible discrepancy in the preamble to the treaty in order to interpret it.

In the *UBS* case,[1855] the Court of Appeal of England and Wales made reference to the French authentic text of Article 23(2) of the 1977 United Kingdom-Switzerland tax treaty, according to which "*L'imposition* d'un établissement stable qu'une entreprise d'un Etat contractant a dans l'autre Etat contractant *n'est pas établie* dans cet autre Etat *d'une façon moins favorable* que l'imposition des entreprises de cet autre Etat qui exercent la même activité", for the purpose of interpreting the English authentic text thereof, in particular the expression "The taxation […] shall not be less favourably levied", and concluded that both conveyed the same idea of a reference to the whole system whereby the liability to tax is imposed.[1856]

In the *Prévost* case,[1857] the Tax Court of Canada quoted both the English and French authentic texts of Article 10(1) and (2) of the 1986 Canada-Netherlands tax treaty[1858] and then compared the terms "beneficial owner", "bénéficiaire effectif" and "uiteindelijk gerechtigde" used in the English, French and Dutch authentic texts of Article 10(2) of that treaty, respectively.[1859] The textual comparison does not seem to have played a decisive role in the arguments developed by the court.

The Supreme Court of Norway, in the *Sølvik* case,[1860] compared the Norwegian and English authentic texts of Article 3(2) of the 1971 Norway-United States tax treaty (corresponding to Article 4(2) OECD Model) in order to properly construe and apply it.[1861] However, from the analysis of the decision, it does not seem that the Court drew any significant inferences from such a comparison.

In the *Lingle* case,[1862] Campbell J of the Tax Court of Canada stated that, where a treaty is concluded in two authentic texts, Article 33(4) VCLT "allows a comparison of the texts in order to adopt '… the meaning which best reconciles the texts having regard to the object and purpose of the treaty …' (*sic*)".[1863]

However, notwithstanding the reference to the last part of Article 33(4)

[1854] See Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq*., at 50, footnote 14.
[1855] Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v, Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq*.
[1856] See Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v, Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq*., at 775, para. 23 per Moses LJ.
[1857] Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*
[1858] *Ibidem*, at 745-746, paras. 27-28.
[1859] *Ibidem*, at 747, para. 30.
[1860] Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR,* 15 *et seq*.
[1861] See *ibidem*, at 33, paras. 42-44, at 35, para. 51, and at 38, para. 66.
[1862] Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq*.
[1863] *Ibidem*, at 71, para. 25.

VCLT,[1864] the analysis of the arguments employed by Campbell J. shows that what he actually did was to remove the potential divergence of meanings between the French and English authentic texts of Article 4(2) of the 1980 Canada-United States tax treaty by applying the principles of interpretation provided for in Articles 31 and 32 VCLT. In fact, the judge:

> (i) found that, while the English expression "in which he has an habitual abode" was, *per se*, ambiguous, the corresponding French expression "où elle séjourne de façon habituelle" was not, the latter thus removing the potential ambiguity of the former,[1865]
> (ii) made abundant references to the Commentary to Article 4(2) OECD Model in order to construe the above expressions,[1866]
> (iii) discussed the possible dictionary meanings of the term "habitual",[1867]
> (iv) construed such expressions against the background of the whole of Article 4(2)[1868] and
> (v) made reference to Article 31 VCLT and the need to look for and implement the common intention of the parties.[1869]

Finally, in the *Dell Products* case,[1870] the District Court of Oslo (Norway) was faced with the apparent discrepancy between the English and Norwegian authentic texts of Article 5(5) of the 2000 Ireland-Norway tax treaty, the former employing the expression "authority to conclude contracts in the name of the enterprise" and the latter using the expression "fullmakt til å slutte kontrakter på vegne av foretaket", which may be translated as "authority to conclude contracts *on behalf* of the enterprise".[1871]

The disagreement between the parties and, thus, the issue to be decided was of a purely legal nature and consisted of whether such expressions required the contract entered into by the agent on behalf of the principle to be "legally binding" on the latter, or just "binding in reality" thereon. The parties supported their positions on the basis of

---

[1864] Actually, the last part of Article 33(4) VCLT does not simply allow a comparison of the various authentic texts, a procedure that is generally permitted under Article 33 (as evidenced by (i) the absence of any preclusion of textual comparison in the whole Article 33 VCLT and (ii) the explicit reference to text comparison in the first part of Article 33(4) VCLT and in the commentary to Article 29 of the 1966 Draft); it demands that, except where a particular text prevails or the *prima facie* difference in meaning is removed by the application of Articles 31 and 32 VCLT, the meaning which best reconciles the texts having regard to the object and purpose of the treaty is adopted (note the form "shall be adopted" at the end of Article 33(4) VCLT).

[1865] See Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq*., at 71, para. 26 (see also Federal Court of Appeal (Canada), 10 June 2010, *Lingle v. R*, 12 *ITLR*, 996 *et seq*., at 999, para. 6).

[1866] *Ibidem*, at 68-72, paras. 20-24 and 28 (see also Federal Court of Appeal (Canada), 10 June 2010, *Lingle v. R*, 12 *ITLR*, 996 *et seq*., at 999, para. 8).

[1867] *Ibidem*, at 71, para. 27.

[1868] *Ibidem*, at 72, para. 28, where he referred to paragraph 10 of the Commentary to Article 4(2) OECD Model, according to which the tie-breaker rule should reflect "such an attachment that it is felt to be natural that the right to tax devolves upon that particular State", as well as to the objects and purposes of the treaty.

[1869] *Ibidem*, at 72, para. 29.

[1870] District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq*..

[1871] *Ibidem*, at 841 and 857.

the English (legal bindingness) and Norwegian (bindingness in reality) authentic texts of Article 5(5).[1872]

Interestingly, the Court noted that the wording of both the English and Norwegian authentic texts of Article 5(5) was reasonably open to support both interpretations and thus decided the matter on the basis of the evidence provided for in the OECD Commentary and in light of the object and purpose of Article 5(5).[1873]

In case 1550 of 3 February 2012,[1874] the Corte Suprema di Cassazione (Italy) made reference to the French authentic text of Article 18(2) of the 1981 Italy-Luxembourg tax treaty in order to establish the domestic law meaning of the term "previdenza sociale" employed in the Italian authentic text thereof.

According to the Court, the term used in the French authentic text, i.e. "sécurité sociale", could have been seen as more correctly expressing the intention of the parties in respect of the scope of Article 18(2) of the treaty.[1875] Thus, pursuant to Article 3(2) of the treaty, it construed the term "previdenza sociale" employed in the Italian authentic text in accordance with the meaning that the term "sicurezza sociale", which it found to better correspond to the French term "sécurité sociale", has under Italian law.

7. Conclusions

The rules of interpretation enshrined in Articles 31-33 VCLT also apply to tax treaties. This is confirmed by the case law of national judiciaries, as well as by the generally concordant positions expressed by scholars on that subject matter. This entails that the conclusions drawn by the author, with regard to the interpretation of multilingual treaties, in Chapter 4 of this Part remains generally valid also in respect of tax treaties.

In this respect, it is nonetheless worth highlighting the following, which idiosyncratically relate to tax treaties based on the OECD Model.

First, the overall context must be seen as comprising the OECD Commentary, which often plays a decisive role in removing the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Articles 31 and 32 VCLT.

Similarly, the overall context should be regarded as comprising the decisions delivered by foreign judiciaries and the practices of foreign tax authorities (including those of States that are not party to the specific treaty to be construed), which are helpful for the purpose of establishing the *ordinary meaning to be given* to OECD Model standard terms and expressions (used in OECD Model-based tax treaties) under Articles

[1872] *Ibidem*, at 857; see also *ibidem* at 848, for the claimant, and 853, for the defendant, who also asserted that the English authentic text was open enough to allow such an interpretation.
[1873] *Ibidem*, at 858-860.
[1874] Corte Suprema di Cassazione, 3 February 2012, case *1550* (available on-line on the website: www.ipsoa.it).
[1875] Article 18(2) of the 1981 Italy-Luxembourg tax treaty reads as follows (*emphasis* added):
"Nonobstant les dispositions du paragraphe 1er, les pensions et autres sommes payées en application de la législation sur la *sécurité sociale* d'un Etat contractant sont imposables dans cet Etat".

31 and 32 VCLT and, thus, in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts.

Third, the interpreter should be allowed to have recourse, as supplementary means of interpretation, to the analysis of the differences existing (i) between the subsequent versions of the OECD Model, (ii) between the OECD Model and the tax treaty to be interpreted, as well as (iii) between the tax treaty to be interpreted and other tax treaties concluded by the contracting States of the former, for the purpose of establishing the intention of the parties and removing the *prima facie* discrepancies in meaning among the tax authentic treaty texts.

Finally, the role played by the OECD Model official versions (English and French) in respect of multilingual tax treaties must be regarded as similar to that played by the drafted text for the purpose of interpreting other multilingual treaties. Thus, the OECD Model official versions constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, i.e. by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT. This holds true also in cases where none of the authentic treaty texts is drafted in English or French.

Where the tax authentic treaty texts employ legal jargon terms, however, the application of the rules established in Article 33 VCLT, in order to remove the *prima facie* discrepancies in meaning among the authentic treaty texts, must be reconciled with the *renvoi* to domestic law provided for in Article 3(2) of OECD Model-based tax treaties, for the purpose of interpreting such terms.

It is the author's opinion that the interpreter, where faced with *prima facie* discrepancies in meaning among the tax authentic treaty texts caused by the construction of legal jargon terms, should partially reconcile those texts in order to establish the "general meaning" underlying the corresponding legal jargon terms employed therein in light of the overall context. However, as long as the domestic law meaning of the legal jargon terms employed in the treaty significantly overlaps with their "general meaning", the interpreter is allowed to rely exclusively on the former, unless the context requires an interpretation different from that based on the current domestic law meaning under the law of the State applying the treaty. Since the authentic treaty text drafted in the official language of the State applying the treaty provides the interpreter with the most direct and immediate access to the domestic law (concepts) of that State, it is reasonable to conclude that the selection of the appropriate domestic law meaning under Article 3(2) should be made by the interpreter on the basis of that authentic text. This solution limits the discretion of the interpreter in selecting the appropriate domestic law meaning, since it attributes a significant weight to the evidence of the intention of the parties represented by their choice of a specific legal jargon term in the official language of the State applying the treaty and, thus, of its underlying legal concept over the others theoretically available.

In cases where the treaty's final clause provides that a certain authentic text is to prevail in the case of divergences, the prevailing text may play a preeminent role in establishing the "general meaning" of the corresponding terms used in the various

authentic texts. In particular, if the interpreter cannot establish such a "general meaning" by reconciling the various authentic texts through an interpretation thereof based on Articles 31 and 32 VCLT, the "general meaning" must be determined on the basis of the prevailing text. On the other hand, as long as the domestic law meanings of the terms employed in the various authentic texts substantially overlap with each other and with their "general meaning", it is not the multilingual character of the tax treaty to cause a single treaty provision to have two different meanings when applied by the two contracting States; it is the reference to those States' domestic law encompassed in Article 3(2) of the tax treaty that entails it. This multiplicity of meanings, therefore, is outside the scope and purpose of the treaty's final clause.

CHAPTER 6 – THE CORRECTION OF ERRORS: ARTICLE 79 VCLT

1. Introduction

Both Articles 33 and 79(3) VCLT deal with the (apparent) lack of concordance between two or more authentic texts of a treaty. However, while the former concerns *prima facie* differences between authentic texts that must be removed by means of interpretation, the latter deals with apparent discrepancies in meaning among the authentic treaty texts[1876] caused by an error in one of such texts, which must be corrected in accordance with one of the procedures specified in Article 79(1) and (2) VCLT.

Errors affecting treaties may be classified as (i) factual errors and (ii) technical errors in the treaty text(s).[1877]

Factual errors consist of misunderstandings of facts and circumstances relevant for the treaty's existence and application, as well as disagreements between the contracting States on the meaning (of certain parts) of the treaty. Factual errors may be broadly divided into (a) non-fundamental errors, which may be overcome by means of interpretation;[1878] and (b) fundamental errors related to matters constituting the conditions to the parties' agreement to be bound by the treaty. The latter errors may invalidate the contracting States' consent to treaties.[1879]

Technical errors are mere inaccuracies in the text(s) of a treaty that are recognized as such by the parties and must consequently be rectified by mutual consent.

Article 79 VCLT deals with technical errors. According to paragraph 1, where the parties find and agree upon the existence of an error in the authenticated text(s) of the

[1876] Under the VCLT system, the authentic treaty texts, in the parties' intention, always have the same meaning.
[1877] On the distinction between different kinds of errors affecting treaties, see the commentary on Article 14 (Absence of error) of the First Report on Law of Treaty submitted to the ILC by Lauterpacht, acting as Special Rapporteur (YBILC 1953-II, pp. 153-154); see also M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 178-179.
[1878] Such errors may also consist of discrepancies between the various authentic texts of a treaty. In such a case, however, the error must be distinguished from a technical error since (i) the discrepancy is not recognized as a mere error in the wording of the treaty by all the parties and therefore (ii) the apparent difference of meaning between the authentic texts must be removed by means of interpretation (i.e. by applying Articles 31, 32 and 33 VCLT).
[1879] On the possibility that a treaty is found to not bind a contracting State, where its consent to be bound was based on an error, see Article 48 VCLT, which specifies that the error must relate to a fact or situation that was assumed by a contracting State to exist at the time when the treaty was concluded and formed an essential basis of that State's consent to be bound by the treaty. See also, among others, R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1288-1289; A. MacNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 211. Lauterpacht described these kinds of errors as mistakes that "go to the root of the matter and affect the essential aspect of the treaty" (see YBILC 1953-II, p. 154).

treaty, such an error must be corrected. Paragraph 1 also put forward three possible techniques of correction,[1880] which may in any case be derogated from by the parties. The correction has effect *ex tunc*, unless the parties decide otherwise.[1881]

Paragraph 3 makes clear that the above rules on the correction of errors also apply where two or more authentic texts exist and there is a lack of concordance among such texts that the parties agree should be corrected.

2. Historical background and preparatory work

In the First Report on the Law of Treaties submitted to the ILC by Sir Humphrey Waldock, Articles 24 and 25 dealt specifically with the correction of errors in the treaty text(s).[1882] In the commentary thereto, the Special Rapporteur pointed out that the formulation of those provisions was primarily based on the precedents cited in the Hackwort's *Digest of International Law*,[1883] due to the absence of any tentative article dealing with the correction of errors both in the Reports on the Law of Treaties prepared by the previous Special Rapporteurs and in the Draft Convention on the Law of Treaties with Comments prepared by the Harvard Research in International Law.[1884]

The relevant text of draft Article 24 read as follows:[1885]

> *Article 24.*
> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Where a typographical error or omission is discovered in the text of a treaty for which there is no depositary after the text has been signed, the signatory States shall by mutual agreement correct the error […]
> 2. The provisions of paragraph 1 shall also apply *mutatis mutandis* to any case where there are two or more authentic texts of such a treaty which are discovered not to be concordant and the parties are agreed in considering that the wording of one of the texts is inexact and

[1880] They are: (i) initialed corrections made in the original text of the treaty; (ii) corrections set out in a specific instrument (to be executed or exchanged); (iii) corrections in a new treaty text, which is executed by the same procedure as in the case of the original text.
[1881] See Art. 79(4) VCLT.
[1882] YBILC 1962- II, pp. 80-81. The relevant difference between Articles 24 and 25 consisted in that the former dealt with treaties without depositaries and the latter with treaties with depositaries. For an exhaustive review of the legislative history of Article 79 VCLT, see S. Rosenne, *The Law of Treaties – A Guide to the legislative history of the Vienna Convention* (New York: Oceana Publications, 1970), pp. 398-401.
[1883] G. H. Hackworth, *Digest of International Law*. *Volume V* (Washington: United States Government Printing Office, 1943), pp. 93-101. In addition to this source, the Special Rapporteur referred to the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* with regard to treaties with a depositary. See YBILC 1962-II, pp. 80-81 and YBILC 1962-I, p. 182, para. 60 and p. 185, para. 87.
[1884] Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*
[1885] With reference to the specific issue of multilingual treaties, Article 25 is not different, as a matter of substance, from Article 24. The only significant departures relate to the procedure to be followed for modifying the text(s) of the treaty, due to the existence of a depositary.

requires to be amended in order to bring it into harmony with the other text or texts.

According to the commentary to Article 24, the need to introduce articles dealing with the correction of errors was due to the frequency with which errors and inconsistencies were found in the treaties' texts. More importantly, the commentary noted that the correction of such errors and inconsistencies essentially appeared to be a matter for agreement between the parties.[1886]

The ILC discussed the topic for the first time at its 657th meeting, held on 5 June 1962. The discussion was centered mainly on defining the types of errors that could be corrected by means of the procedures listed in the draft articles.

At the outset, Mr Lachs pointed out the need for a modification of the scope of Articles 24 and 25, due to the possible existence of errors other than typographical errors or omission. In that respect, according to Mr Lachs, the issue at stake was strictly connected to that concerning the distinction between changes in the text of a treaty that have to be treated as corrections as opposed to those that have to be considered amendments and reservations. As example, he referred to the case of the 1929 Warsaw Convention,[1887] where the term "transporteur" was used (confused) for the term "expéditeur" and the parties to the treaty agreed on the correctness of the latter. Mr Lachs recalled that when that convention entered into force all the contracting parties were obliged to ratify the correction. The Senate of the United States, however, charcaterized the change as a reservation and the United States ratified it as such.[1888]

Mr Bartos agreed with Mr Lachs's the statement that not only typographical errors and omissions may occur in treaties. He labeled errors other than those of a typographical kind "substantive" errors. To illustrate the issue, he made reference to two cases. The second case related to the Agreement concerning minor frontier traffic between Italy and Yugoslavia of 3 February 1949.[1889] In an annex of that agreement, a list of towns excluded from the frontier traffic had been erroneously substituted for a list of the towns between which the traffic was allowed. Interestingly, Mr Bartos affirmed that, "although that error had been purely technical, the results had exceeded the scope of typographical errors or omissions", thus meaning that (i) technical errors include typographical errors and omissions, but should not be limited thereto and (ii) substantive errors may be of a technical nature. However, he did not put forward a detailed or comprehensive definition of "technical errors".[1890]

Mr Gros also agreed that the procedures to be used in the case of correction of errors should not be limited to typographical errors or omissions. In that respect, he gave the example of frontier treaties in which the wrong elevations had been referred to in the

[1886] See YBILC 1962-II, p. 80.
[1887] Convention for the Unification of Certain Rules regarding International Air Transport, concluded in Warsaw on 12 October 1929.
[1888] See YBILC 1962-I, p. 183, para. 64.
[1889] United Nations *Treaty Series,* Vol. 33, p. 142.
[1890] See YBILC 1962-I, p. 183, para. 65.

text through errors in map reading.[1891]

Mr Jiménez de Aréchaga warned the ILC about the possible risks connected to the inclusion of substantive errors in the scope of Articles 24 and 25. He stated that the ILC should have been careful not to include the kind of errors vitiating the consent to be bound and, therefore, capable of invalidating the treaties. In that respect, where the scope of Article 24 had been broadened to include substantive errors, the structure of the article could have proved unsatisfactory. In particular, the phrase "States shall by mutual agreement correct the error", in the context of Article 24(1) as a whole, could have been read as meaning that any contracting party claiming the existence of an error in a treaty provision (e.g. the incorrect description of a river) could have considered itself not bound by such a provision. Therefore, according to Mr Jiménez de Aréchaga, before broadening the scope of Article 24, the ILC should have made clear in the text thereof that the agreement of the parties on the existence of the error was a prerequisite to its correction.[1892]

Sir Humphrey Waldock, in replying to the above comments, stated that it was of primary importance to distinguish between the case of correction of errors, on the one hand, and that of amendments to the treaty, on the other. According to the Special Rapporteur, when dealing with substantive errors, it was difficult to draw a line between these two cases and much depended on whether or not the parties agreed that an error had in fact occurred. In this context, difficulties mainly arose where the consensus of the parties upon the existence of an error was lacking and, especially in cases of misuse of words in different authentic texts, the issue verged on the subject of amendments. Therefore, according to Sir Humphrey Waldock, the ILC should have proceeded very cautiously in extending the scope of Article 24(1).[1893]

Mr Paredes found that the text of Article 24 could be amplified to deal also with substantive errors altering the relationship between the parties and jeopardizing the very existence of the treaty. However, he made clear that whenever the parties did not agree upon the existence of a substantive error in the text, the issue should be decided by the International Court of Justice.[1894] It should be noted that in the first part of his comment Mr Paredes, as well as Mr Gros and Mr Tunkin in their subsequent interventions,[1895] seemed to use the term "purely technical errors" as a synonym for "typographical errors".

Ultimately, Mr Lachs and Mr Tunkin pointed out that the prerequisite for the agreement of the parties upon the existence of an error seemed already present in the text of Article 24(1) and, therefore, they agreed on the possibility to extend the scope thereof to include the correction of any kind of error.[1896]

When the discussion turned to the content of Article 25, the focus moved to the possible

[1891] See YBILC 1962-I, p. 183, para. 67.
[1892] See YBILC 1962-I, pp. 183-184, para. 70.
[1893] See YBILC 1962-I, p.184, para. 75.
[1894] See YBILC 1962-I, p.184, paras. 76-77.
[1895] See YBILC 1962-I, p.184, paras. 78 and 81.
[1896] See YBILC 1962-I, p.184, paras. 80 and 81.

lack of concordance between the various texts of multilingual treaties.

Sir Humphrey Waldock, in replying to a comment of Mr de Luna, said that errors arising from the lack of concordance were particularly frequent and could involve points of substance. In those cases, where the parties agreed on the existence of such errors, the procedure for correction should be the same laid down for "technical errors".[1897]

Mr Rosanne suggested the possible need to distinguish between the faulty concordance of the language versions (i.e. texts) actually negotiated and the lack of concordance of the translated versions, which was more likely to be due to inadvertence.[1898] In that respect, however, Mr Bartos pointed out that the authentic texts in other languages were not regarded as translations, which seemed to suggest the artificiality of the distinction drawn by Mr Rosenne.[1899]

Finally, Mr Verdross said that the problem of technical errors, on the existence of which the parties could presumably easily reach an agreement, was quite different from that created by the lack of concordance between the various language versions (i.e. texts) of a treaty. According to Mr Verdross, such lack of concordance could have been to some extent deliberate and might give rise to difficulties of interpretation. He concluded that the issue of the interpretation of the text of a treaty drawn up in several languages was an entirely different one from that of the correction of errors in the text.[1900] The Special Rapporteur agreed on that the lack of concordance between authentic texts drawn up in several languages constituted a serious problem, which often also involved questions of interpretation.[1901]

At the end of the discussion, Mr Pal (Chairman) proposed to refer Articles 24 and 25 to the Drafting Committee for redrafting them in light of the comments made during the debate. The ILC so agreed.

The redrafted version of Article 24 was re-introduced for discussion at the ILC's 661st meeting, held on 13 June 1962.[1902] The relevant parts thereof read as follows:

> *Article 24.*
> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interest states shall by mutual agreement correct the error […]
> 2. The provisions of paragraph 1 shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to consider the wording

[1897] See YBILC 1962-I, p.185, para. 90. Note that the term "technical errors" seems here to be used by Sir Humphrey Waldock as a synonym for "typographical errors".
[1898] See YBILC 1962-I, p.185, para. 92.
[1899] See YBILC 1962-I, p.185, para. 93.
[1900] See YBILC 1962-I, p.185, para. 94.
[1901] See YBILC 1962-I, p.185, para. 95.
[1902] The redrafted text of Article 25 (dealing with the correction of errors in the texts of treaties for which there is a depositary) was re-introduced for discussion at the ILC's 662nd meeting, held on 14 June 1962 (see YBILC 1962-I, pp. 217 *et seq*., paras. 1-12). No issue relevant for the present study was raised during those discussions.

of one of the text inexact and requiring to be corrected.[1903]

From a comparative analysis of the original and the redrafted articles, it can be seen that the scope had been broadened to encompass not only the correction of typographical errors and omission, but also errors of substance that are "discovered" in the treaty texts and the correction of which is agreed upon by the parties. With specific reference to multilingual treaties, it was clarified that the same procedure provided for the correction of errors discovered in a single text was also applicable in the case of discordance between two or more authentic texts. Furthermore, the text of paragraph 2 was simplified. Apart from that, as the same Special Rapporteur pointed out, the redrafted article did not fundamentally differ from the original.[1904]

During the following discussion, Mr Bartos pointed out that Mr Rosenne and he understood that the new text of Article 24(2) also covered discrepancies between the different versions of a treaty drawn up in several languages. He therefore asked the Special Rapporteur if he agreed to insert an explanation to that effect in the commentary, which would eliminate the need to lay down the rule in the article itself.[1905]

Mr Liang, however, stated that the wording of paragraph 2 was still unsatisfactory. In particular, he said that he was not quite clear as to the force of the expression "it is proposed". In that respect, he suggested modifying the second part of that paragraph to read "and where it is considered that the wording of one of the texts is inexact and requires to be corrected".[1906] In replying to such a point, Sir Humphrey Waldock noted that, in his original draft, he had stressed the need for the parties to agree that an error had occurred, to avoid the danger of a party unilaterally declaring the text inexact and using that as an excuse for not accepting the treaty. He concluded that, in the Drafting Committee's view, the reference to the mutual agreement of the parties expressly provided for in paragraph 1 extended to paragraph 2 and the proposal referred to in the second part of the paragraph had to be a "formal" one. Accordingly, he suggested replacing the second part of paragraph 2 with the expression "and where it is proposed to correct the wording of one of the texts".[1907]

At the end of the discussion, Mr Pal (Chairman) proposed to refer once again Article 24 to the Drafting Committee for redrafting it in light of the comments made during the debate. The ILC so agreed.

The redrafted version of Article 24 was presented at the ILC and adopted thereby without any discussion at its 668th meeting, held on 26 June 1962.

The relevant parts of Article 24, as adopted by the Commission, read as follows:[1908]

[1903] See YBILC 1962-I, pp. 212-213, para. 11.
[1904] See YBILC 1962-I, p. 213, para. 12.
[1905] See YBILC 1962-I, p. 213, para. 16.
[1906] See YBILC 1962-I, p. 213, para. 19.
[1907] See YBILC 1962-I, p. 213, paras. 20 and 22.
[1908] See YBILC 1962-I, pp. 259-260, para. 48.

> *Article 24.*
> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested states shall by mutual agreement correct the error […]
> 2. The provisions of paragraph 1 shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

In the process of drafting the Report of the Commission to the General Assembly, covering the work of the ILC during its fourteenth session, the Commission made a few minor changes, leaving the substance of the article untouched, and renumbered it as Article 26.[1909]

The commentary included in the Report of the Commission to the General Assembly made clear that paragraph 1 dealt with the corrections of "errors in the text" and that such errors might be due either to typographical mistakes, or to a misdescription or mis-statement due to a misunderstanding. As a result, the correction could also affect the substantive meaning of the texts authenticated. In this respect, the commentary clarified that where the contracting States were not agreed as to the text being erroneous, a dispute arose and the "mistake" was of a kind that belonged to another branch of the law of treaties.[1910] Only where the contracting States were agreed as to the existence of an error was the matter simply one of correction of error, therefore falling under Article 26.[1911]

The commentary went on to affirm the applicability of the same article (and techniques of correction) in cases of rectifications of discordant authentic texts drawn up in two or more languages.[1912] In addition, it pointed out that the ILC noted that the issue may also arise of correcting not the authentic text itself but (non-authentic) versions of the treaty prepared in other languages. According to the ILC, however, this was not a matter of altering an authentic text of the treaty and, therefore, it was unnecessary for the article to cover the point. In these cases, the contracting States could modify the translation(s) by mutual agreement without any special formality.[1913]

In response to the comments put forward by the Japanese, Swedish and United States governments, Sir Humphrey Waldock proposed a new draft of Article 26 in his Fourth Report on the Law of Treaties.[1914] The relevant part thereof read as follows:

> *Article 26.*

[1909] See YBILC 1962-II, p. 183.
[1910] I.e. that of interpretation and, under a different perspective, invalidation of treaties.
[1911] See YBILC 1962-II, p. 183, para. 2 of the commentary.
[1912] See YBILC 1962-II, pp. 183-184, para. 3 and para. 5, first sentence, of the commentary.
[1913] See YBILC 1962-II, p. 184, para. 5 of the commentary.
[1914] With regard to both the governments' comments and the Special Rapporteur's observations and proposals, see YBILC 1965-II, pp. 60-61.

> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Unless otherwise agreed between the interested States, where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the error shall be corrected […]
> 2. Paragraph 1 applies also where there are two or more authentic texts of a treaty which are not concordant and where it is agreed to correct the wording of one of the texts.

For the purpose of the present analysis, it is noteworthy that the reference to the agreement of the parties on the correction of the wording of two or more discordant authentic texts was made explicit in paragraph 2. In contrast, the reference to the agreement of the parties as to the existence of an error and its correction was not unambiguous in the text of new paragraph 1. Finally, the Special Rapporteur reduced the paragraphs of the article from 4 to 2, thus partially satisfying the instances of curtailment of the provisions of Articles 26 and 27 put forward by the Japanese government (which, additionally, had proposed to consolidate Articles 26 and 27 in a single article).

The new text was discussed by the ILC at its 802nd meeting, held on 15 June 1965.

Mr Castrén suggested, as a matter of form, following the Japanese proposal of consolidating the content of the original Articles 26 and 27 in a single article, while retaining the substance of the new articles drafted by the Special Rapporteur.[1915] Mr Ruda and Mr Tunkin also supported the proposal for an amalgamation of Articles 26 and 27.[1916]

Similarly, Mr Elias called for more simplification in the text of Articles 26 and 27,[1917] while Mr Rosanne warned the ILC of the physiological danger deriving from having many provisions dealing with the various manifestations of error.[1918] Mr Ago agreed on such points.[1919]

The discussion then turned once again on the scope of Articles 26 and 27, i.e. to which kind of errors those articles should apply. The issue was raised by Mr Reuter, according to whom Article 26 was not comprehensible to anyone unfamiliar with the ILC's previous proceedings and the meaning of the term "error", as used in that article, was also not very clear. He recalled that the only definition of such a term was given in Article 34(4),[1920] which referred to an "error in the wording" as opposed to an error of substance, but concluded that also such a reference was unclear. According to Mr Reuter, the current text of Article 26 could be interpreted as also covering much more serious errors than typographical errors. Since different categories of error raised widely different problems, some of which could prove very serious (such as in the case of errors

[1915] See YBILC 1965-I, p. 186, para. 8.
[1916] See YBILC 1965-I, p. 187, paras. 18, 20 and 33.
[1917] See YBILC 1965-I, p. 187, para. 12.
[1918] In the Special Rapporteur's Fourth Report on the Law of Treaties, the articles dealing with errors were four: Articles 26, 27, 27(bis) and 34. For Mr Rosanne's comment, see YBILC 1965-I, p. 187, paras. 13-14.
[1919] See YBILC 1965-I, p. 187, para. 23.
[1920] With regard to the text of Article 34, dealing with errors invalidating the contracting States' consent to be bound by the treaty, see YBILC 1963-II, p. 195. Article 34(4) read as follows:

> 4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply.

of translation), Mr Reuter suggested that the ILC defer consideration of Articles 26 and 27 and make a careful study of each category of error. He concluded that, in any event, Articles 26 and 27 as they stood did not make it clear that they referred to all kinds of error, so long as the contracting States agreed to correct them. On the contrary, such a scope of Articles 26 and 27 should have been made clear right at the beginning of the articles.[1921]

The other members of the ILC, however, did not share Mr Reuter's position. The Special Rapporteur, in summarizing the discussion that took place on the matter, made clear that Articles 26 and 27 dealt with errors "in expression" (i.e. errors "in the wording", using the expression adopted in Article 34(4)), while Article 34 dealt with errors "in substance". The foremost difference between these two kinds of error was that, with reference to the former, the parties recognized their existence and agreed on their correction, while the same did not hold true with reference to the latter.[1922] The origin or type of the errors (e.g. clerical errors, typographic errors, translation errors, etc.) was not relevant for the purpose of applying Articles 26 and 27, the only decisive criterion being the agreement of the parties as to its existence and correction. Second, as pointed out by Mr Tunkin, Mr Yasseen and Mr Ago, in the case of errors "in expression", the content of the treaty provision was agreed upon by the parties and its unique meaning was not correctly and univocally expressed by the wording of the provision, which therefore needed to be corrected, while, in the case of errors "in substance" affecting the text of a treaty, different parties were attributing different meanings to the same treaty provision, e.g. due to the diverse terms used in two authentic texts of a treaty. As a consequence, the latter kind of error could, in contrast to the former, also vitiate the parties' consent to be bound by the treaty. In such a case, Article 34 was applicable.[1923] Some ILC members, however, agreed that these concepts could be expressed more clearly in the text of the relevant articles than they currently were.[1924]

At the end of the discussion, the Special Rapporteur referred to the distinction between cases involving the correction of errors and those involving the amendment of a treaty: "Even where the parties agreed that the text of the treaty contained some infelicitous expression, which might perhaps be unfortunate because of some political nuance, the case would still be one of error in expression. If, however, the parties admitted that the text was completely correct but merely wished to change it by agreement, the case was really one of amendment and should be governed by the separate provisions on the amendment of treaties".[1925]

Finally, in replying to a comment of Mr Tsuruoka,[1926] Mr Rosenne and Sir Humphrey Waldock clarified that the issue of the correction of an error could arise even after the ratification of a treaty and the provisions of Articles 26 and 27 would apply also

[1921] See YBILC 1965-I, p. 188, paras. 26, 29 and 31.
[1922] See YBILC 1965-I, p. 189, paras. 51-52. See also the concurrent position expressed by Mr Pal (YBILC 1965-I, p. 189, para. 47).
[1923] See YBILC 1965-I, pp. 188-189, paras. 32, 37 and 39.
[1924] See YBILC 1965-I, pp. 188-189, paras. 37, 39 and 51.
[1925] See YBILC 1965-I, p. 190, para. 53.
[1926] See YBILC 1965-I, p. 190, paras. 58 and 60.

in that event.[1927]

The articles under analysis were ultimately referred to the Drafting Committee with a view of shortening them in light of the discussion held.

The discussion was resumed at the ILC's 815th meeting, held on 1 July 1965.

Mr Bartos (Chairman) invited the ILC to consider the new text of Article 26 proposed by the Drafting Committee, which also incorporated the substance of previous Article 27. The relevant parts of new Article 26 read as follows:[1928]

> *Article 26.*
> *Correction of errors in texts or in certified copies of treaties*
> 1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected […]
> 3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which it is agreed should be corrected.

With specific reference to paragraph 3, Sir Humphrey Waldock explained that it dealt with the case, unlike that considered by paragraph 1, in which there was no error in the text, but a lack of concordance between two or more language versions.

Such a clarification, however, seems a bit puzzling to the author. If the parties agree on the existence of a lack of concordance, which they decide to eliminate by modifying one (or more) of the authentic texts, it follows that they also at least implicitly agreed that the modified authentic text(s) was/were unsatisfactory in expressing the concept they agreed upon and that was correctly expressed by the other authentic text(s). The author cannot see any difference between the logical process that leads to the correction in cases dealt with in paragraph 3 and that foreseen in paragraph 1. In both cases, the activity is directed to (i) discovering the presence of a written expression that does not properly convey the concept agreed upon by the parties (the error) and (ii) correcting such a written expression, whether in the single authentic text, solely in some of the various authentic texts, or in all the various authentic texts (the correction of the error).

The text of new Article 26 was adopted by the ILC and Sir Humphrey Waldock and Mr Reuter (acting Chairman of the Drafting Committee) were entrusted with the settlement of few minor drafting issues.

The above text, with some slight modifications, was finally incorporated in Article 79 VCLT, whose relevant parts read as follows:

> *Article 79*
> *Correction of errors in texts or in certified copies of treaties*
> 1. Where, after the authentication of the text of a treaty, the signatory States and the

[1927] See YBILC 1965-I, p. 190, paras. 59 and 62.
[1928] See YBILC 1965-I, p. 276, para. 6.

> contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected […]
> 3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

3. Analysis of Article 79 VCLT

The purpose of Article 79 VCLT is to establish methods to rectify errors and inconsistencies found in the authentic texts of the treaty.[1929] The article, however, leaves the contracting States free to decide both whether to proceed to a formal correction of the text and the method of correction to be adopted.[1930]

In order for Article 79 VCLT to be applicable, it is necessary that a two-pronged condition is satisfied: there must be:

(i) a technical error in some of the authentic texts of the treaty that
(ii) all contracting States recognize as such.

The first prong highlights that the focus of the analysis carried out by the parties is on the language expressions encompassed in the text of the treaty and not on some extra-textual element; moreover, it specifies that there must be a technical error, i.e that the treaty text is different from how it should be in order to properly express the meaning attached thereto by the contracting States.

The second prong makes clear that the above-mentioned error is to be recognized as such by all contracting States, i.e. that, according to all of them, some authentic texts do not properly convey the agreed meaning they attached thereto from the outset. Therefore, in order for Article 79 VCLT to apply in relation to a specific error, there must be full agreement among the parties on the concept underlying the language expression containing the error and, hence, on the meaning it conveys.

Where the existence of the above-mentioned error is not agreed upon by all contracting States, the error falls outside the scope of Article 79 VCLT.[1931] In that case, the following scenarios may be hypothesized.

First, all contracting States agree on the meaning that the specific language expression should convey, but, although some of them maintain that language expression does not properly convey such a meaning, others consider that it does and are thus not willing to replace it with a new language expression. Generally, where this scenario occurs, while there is no apparent disagreement among the contracting States on the meaning of the currently used language expression when the prototypical denotata thereof are taken into account, disagreement may arise when non-prototypical cases are assessed as falling within or outside the scope of such an expression. In the latter case,

[1929] See paragraph 1 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272).
[1930] See paragraph 3 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272).
[1931] See paragraph 1 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272).

the disagreement may be removed by means of interpretation under articles 31-33 VCLT.

Second, the contracting States do not agree on the meaning that the language expression should convey and, for that reason, some of them maintain that the language expression does not accurately convey its proper meaning, while others maintain that it does so. In this scenario, there is an issue of interpretation of the language expression currently used in the treaty, which has to be solved in accordance with Articles 31-33 VCLT.

Third, the disagreement on the meaning to be conveyed by the language expression is so relevant that an error invalidating the contracting States' consent to be bound by the treaty might be deemed to exist. Article 48 VCLT will apply to this case.

In light of the above, the statement made by the ILC in paragraph 1 of the commentary to Article 74 of the 1966 Draft (corresponding to Article 79 VCLT), according to which "the correction may affect the substantive meaning of the text as authenticated", appears awkward. The author submits that it should be read in its context as pointing out that the correction might, in extreme cases, alter the *utterance meaning* of the language expression; however, it can never modify the meaning originally attached thereto by the contracting States, since the general effect *ex tunc*[1932] of the correction implies that the contracting States have not intended such meaning to be modified at all by the correction. Moreover, if that were not the case, corrections would mingle with amendments.[1933]

With regard to the type of errors that may be corrected by means of Article 79 VCLT, paragraph 1 of the commentary to Article 74 of the 1966 Draft refers to typographical mistakes, misdescriptions or mis-statements due to misunderstandings.[1934]

With reference to the type of errors specifically governed by Article 79(3), Tabory included among them the lack of concordance due to differences in punctuation, spelling errors, typographical errors, omissions, numeric differences and inaccurate translations.[1935]

These lists, however, are by no means intended to be comprehensive, since, as the analysis of the relevant preparatory works clearly shows, Article 79 VCLT is meant to apply to all technical errors in the text of a treaty recognized as such by the contracting States, no regard being paid to their origin and typology.

Technical errors in the texts of the treaty comprise the lack of concordance between authentic texts drawn up in different languages. Therefore, where the contracting States agree that some authentic texts do not properly convey the agreed meaning of a certain treaty provision, while the others do, the former are corrected in order to better convey such a meaning. As previously stated, there is no substantial

[1932] See Article 79(4) VCLT and paragraph 6 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 273).
[1933] Amendments are separately dealt with in Part IV of the VCLT (Articles 39 through 41 thereof).
[1934] See YBILC 1966-II, p. 272.
[1935] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 183-184 and, in particular, footnotes 73, 74 and 75 therein.

difference between the logical process that leads to the correction in cases dealt with in paragraph 3 of Article 79 VCLT and that foreseen in paragraph 1 thereof. In both cases, the activity is directed to (i) discovering the presence of a language expression that does not properly convey the concept agreed upon by the contracting States (the error) and (ii) correcting such a language expression, whether in the single authentic text, solely in some of the various authentic texts, or in all the various authentic texts (the correction of the error).

Finally, it is worth reflecting on the statement by Tabory that "the borderline between the correction of technical errors and the interpretation of discordant meanings in multilingual documents in certain instances, is doubtful and unclear".[1936] The author, in order to substantiate her statement, referred to the case of the correction of the Chinese authentic text of the Convention on the Prevention and Punishment of the Crime of Genocide[1937] and, in particular, to the controversy within the Sixth Committee of the UN General Assembly on whether the amendment of the Chinese authentic text of the Convention constituted a revision or a rectification thereof.[1938]

Tabory's statement may be agreed upon if it is considered to refer solely to the decision-making process by means of which the contracting States assess whether the proposed new text of the treaty conveys the agreed meaning better than the corresponding current authentic text. Undoubtedly, in the course of this process, various interpretative issues come out, such as:

(i) whether the current authentic texts all convey the same meaning;
(ii) whether there is a meaning clearly agreed upon by all contracting States;
(iii) whether the proposed new text of the treaty properly conveys the meaning expressed by the other authentic texts; or
(iv) whether the proposed new text may cause more interpretative difficulties than the current authentic text does.

In particular, a key issue that might emerge in this phase concerns the actual shape of the supposedly agreed meaning of the treaty provision at stake, if such a meaning exists at all.

However, once all contracting States have gone through such a decision-making process, have agreed upon the existence of an error and have corrected it according to the provisions of Article 79 VCLT, the borderline between the correction of technical errors and the interpretation of *prima facie* discordant authentic texts become absolutely sharp, due to the agreed rejection of the old text by the contracting States and their decision to rely solely on the new authentic text[1939] for interpretative purposes. The

[1936] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 184 and p. 216, point 6.
[1937] See "Resolutions of the General Assembly Concerning the Law of Treaties: Memorandum prepared by the Secretariat", 14 February 1963, in YBILC 1963-II, pp. 32-35, paras. 144-154.
[1938] With regard to the debate within the Sixth Committee, see "Resolutions of the General Assembly Concerning the Law of Treaties: Memorandum prepared by the Secretariat", 14 February 1963, in YBILC 1963-II, pp. 33-35, para. 153.
[1939] Together with the other languages authentic texts still in force.

borderline is thus drawn by the declared agreement among all contracting States. No longer does an interpretative issue concern the relation between the rejected text and the new text, nor the relation between the former and the other languages authentic texts. The only interpretative issues remaining concern the meaning to be attributed to the various (current) authentic texts and the possible existence of a discordance among the apparent meanings thereof. The existence of such issues, however, logically has nothing to do with any previous or subsequent correction of errors.

Conversely, until the contracting States agree on the existence of an error and correct it under the provisions of Article 79 VCLT any alleged inconsistency existing among the meanings attributable to the various authentic texts is to be resolved by means of interpretation, according to the provisions of Articles 31-33 VCLT. In this respect, the very same fact that the existence of an error is not clear-cut and is still debated among the contracting States makes absolutely clear-cut and uncontroversial the fact that Article 79 VCLT cannot apply, while Article 33 VCLT must.[1940]

[1940] See the issue rose by Tabory in distinguishing the cases where Articles 79 or 33 VCLT would apply (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 184-185). In this regard, it is interesting to recall that, according to paragraph 1 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272), "[i]f there is a dispute as to whether or not the alleged error or inconsistency is in fact such, the question is not one simply of correction of the text but becomes a problem of mistake which falls under article 45. The present article only concerns cases where there is no dispute as to the existence of the error or inconsistency".

PART III

CONCLUSIONS

CONCLUSIONS

1. Forward

In section 1 of Chapter 3 of Part I the author, by transposing in the field of international treaties the results of the semantic analysis carried out in Chapter 2 of Part I, established the fundamental principles of a normative theory on treaty interpretation, which should operate as a compass for the interpreters whenever construing treaties and arguing for their chosen interpretations.

In that respect, the author concluded that (i) treaty provisions are inherently characterized by ambiguity and vagueness and (ii) their effectiveness heavily depends on how the parties take into account the *overall context* when drafting them. In turn, point (ii) presupposes that the addressees (interpreters) of the treaty integrate its underspecified provisions, in order to reduce their vagueness and ambiguity, by using the overall context. The fact that both the parties and the interpreters heavily rely on the overall context constitutes a praxis of the international community (as such, it constitutes part of its underlying *cooperative principle*). This allows for the possibility of *implicatures*, i.e. meanings that are not explicitly conveyed by the treaty provisions, but that are nonetheless inferred from the overall context.

On such a basis, the author further concluded that the treaty interpretative process has as its only possible goal the *utterance meaning*, i.e. the meaning(s) that any reasonable interpreter would assign to the treaty text, as expression of the intention of the parties, given:

(a) the various meanings that the grammar and the semantic specifications of the terms used in the treaty allow it to have and
(b) the interpreter's analysis of and inferences from the overall context.

That excludes the relevance of any meaning, other than the utterance meaning, for interpretative purposes.

The author considered the overall context to include all those elements and items of evidence that may be helpful for the purpose of determining and arguing for the utterance meaning of the relevant treaty provision. In particular, the overall context incorporates:

(a) the subject matter of the treaty and its object and purpose [world spoken of];
(b) the international legal context of which the treaty is part, the legal systems of the States concluding the treaty, the encyclopedic (legal) knowledge of the persons involved in its drafting, the expected encyclopedic (legal) knowledge of the addressees of the treaty, the commonly accepted principles of behavior in the international community (including any cooperative principle of communication), every reasonable inference that the drafters and the addresses might be expected to derive from the above [common ground];
(c) the text that precedes and succeeds the provision to be interpreted [co-text].

Furthermore, the author elucidated a few other principles of treaty interpretation derived as corollaries from the above fundamental principles.

The positive analysis carried out by the author in section 2 of Chapter 3 of Part II showed that the rules and principles of treaty interpretation enshrined in Articles 31 and 32 VCLT, as construed by international law scholars and applied by (international) courts and tribunals, do not significantly depart from the principles of interpretation established by the author on the basis of his normative analysis. Rather, the latter principles may be usefully employed by the interpreter as a compass in order to choose among the various (sometimes conflicting) solutions that scholars, courts and tribunals have upheld in the application of Articles 31 and 32 VCLT.

In particular, Articles 31 and 32 VCLT appear to spell out the most significant part of the overall context that the cooperative principle of the international community requires the community members to take into account when drafting and interpreting treaty provisions. Certainly the overall context is not limited to the means and rules of interpretation enshrined in Articles 31 and 32 VCLT, the former including, for instance, also generally accepted principles of logic and good sense.[1941] However, Articles 31 and 32 VCLT specify the most relevant part of what has to be taken into account in order to make the treaty effective by means of interpretation.

This implies that no utterance meaning, i.e. no meaning of a specific treaty provision, may be said to exist before the interpreter has gone through the unitary process of construing the relevant text in light of the overall context and, in particular, of the rules and means of interpretation enshrined in Articles 31 and 32 VCLT (as illustrated by the metaphor of the crucible).[1942] Any "meaning" arrived at without going through such a process is not a meaning; it is just an illusion of a meaning, a mere guess. It is, thus, the formal process of reasonably arguing and supporting the interpretation of a treaty provision on the basis of its overall context that divides (utterance) meanings from mere guesses about the speaker's meaning. Since no single "true" meaning exists, which is inherently due to the fact that the meaning we look for is the utterance meaning, what really does matter is not the result of the enquiry, but the process followed to support it.

More specifically, the comparison between the principles of interpretation stemming from the author's normative analysis and those resulting from the positive analysis carried out in section 2 of Chapter 3 of Part II led to the following remarks.

The author's principle (i), according to which treaty interpretation must be seen as *a posteriori* analytical argument, is implicit in Articles 31 and 32 VCLT, in the sense that under those articles any interpretation put forward by the interpreter must appear fair

[1941] Such as, for instance, (i) the logical principles of inference and (ii) the principles and maxims of treaty interpretation not codified in the VCLT, since considered by the ILC as principles of logic and good sense of non-binding character (see commentary on Articles 27-28 of the 1966 Draft - YBILC 1966-II, p. 218, para. 4).
[1942] As Lauterpacht put it, "The controversial expression becomes scientifically clear only after we have caused to pass through it the "galvanic current" – to use Mr Justice Holmes' phrase – not only of the whole document but of all the evidence available" (see H. Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 *Harvard Law Review* (1935), 549 *et seq.*, at 572).

and reasonable (in good faith) where assessed in light of all arguments that may be built up on the elements and items of evidence provided for by those very same articles.

The author's principles (ii) and (iii), i.e. the quest of the interpreter is directed at establishing the intention of the parties by determining the *utterance meaning* of the treaty text, overlap with the rule of interpretation provided for by Articles 31 and 32 VCLT, according to which the primary duty of the interpreter is to reasonably elucidate the meaning of the treaty text, which is presumed to represent the authentic expression of the parties' intention, by construing it on the basis of all elements and items of evidence provided for by those articles.

With reference to the author's principle (iv), which deals with what constitutes the overall context, its has been already noted that Articles 31 and 32 VCLT appear to spell out the most significant part of such context.

The author's principle (v), i.e. none of the elements of the overall context is inherently superior to the others and the weight that any of such elements should be given for the purpose of establishing the utterance meaning depends on the circumstances of the case, corresponds to the principle stemming from the hierarchical structure of Articles 31 and 32 VCLT. In the VCLT system, the various means of interpretation encompassed in Article 31 VCLT are all of an equal status, while those referred to in Article 32 VCLT play a subsidiary role because experience shows that they are generally less reliable and more ambiguous and provide vague hints of the intention of the parties. Nonetheless, where the supplementary means of interpretation contribute to reasonably establishing the agreement of the parties with regard to the interpretation of the treaty, such an agreement must be taken into account as a primary means of interpretation under Article 31 VCLT.

The author's principle (vi), i.e. the treaty text should be construed on the basis of all *implicatures* that may be derived from the text and the overall context, is implicit in the principle of good faith referred to in Article 31 VCLT, which rejects a mere literal approach and requires the treaty to be construed reasonably, honestly and fairly, thus allowing the interpreter to imply terms in the treaty (in addition to, or as replacement of the treaty terms) for the purpose of giving efficacy to the intention of the parties that may be inferred from the express provisions of the treaty.

The author's principle (vii), i.e. the relevance of the treaty text must not be overestimated since such text is inherently characterized by ambiguity and vagueness and is made of underspecified clauses that need to be expanded by semantic and pragmatic inferences, underlies both Articles 31 and 32 VCLT. This is evidenced by:

(a) the preeminent role played by the extra-textual and co-textual (broad context) means of interpretation, provided for in Articles 31 and 32 VCLT, for the purpose of establishing the ordinary meaning of the treaty terms;
(b) the express recognition of the possibility that the parties intended to attribute an unusual meaning (special meaning) to some of the treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge those meanings that appear manifestly absurd or unreasonable in light of the particular circumstances of the case.

The same holds true with regard to the author's principle (viii), i.e. the relevance of

grammatical constraints must not be overestimated.

The author's principle (ix), i.e. there is a plausible presumption that the parties intended to attribute to the treaty terms their jargon meanings whenever a particular jargon has been used in drafting the treaty, is implicit in the concept of ordinary meaning referred to in Article 31 VCLT, according to which, where a term is used in a technical context, its ordinary meaning should be generally considered to coincide with the meaning attributed to that term in the relevant technical jargon.

The author's principle (x), i.e. the interpreter should consider that the contracting States' representatives in most cases choose the terms to be employed in the treaty on the basis of the approximate overlapping between the prototypical items denoted by those terms and the items that they intended to be covered by those terms, may be seen as underlying Articles 31 and 32 VCLT, in particular as underlying:

(a) the requirement that the treaty terms must be given the ordinary meaning that best fits in their context and suits the object and purpose of the treaty;
(b) the possibility that, in certain cases, a special meaning must be attributed to treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge the meanings that appear manifestly absurd or unreasonable in light of the context and the treaty object and purpose.

The author's principle (xi), in particular the need to assess whether the parties intended treaty terms to be attributed a uniform meaning by all contracting States, or whether they intended each State to interpret those terms on the basis of its own (legal) concepts, is not explicitly dealt with in Articles 31 and 32 VCLT. It is, however, obvious that:

(a) both the ordinary and the special meanings to be determined under Article 31 VCLT may be either uniform (and autonomous) international meanings, or specific national meanings; and
(b) it is for the interpreter to establish, on the basis of the means of interpretation provided for in Articles 31 and 32 VCLT, whether the parties intended a uniform international meaning or a specific national meaning to be attributed to the treaty terms.

The author's principle (xii), i.e. the interpreter should take into account any subsequent act of the parties that directly or indirectly may shed light on the meaning that they attribute to the treaty, is explicitly recognized by Article 31(3) VCLT.

Since the interpretative principles stemming from the author's semantics-based normative analysis proved not to conflict with the generally accepted rules of interpretation enshrined in Articles 31 and 32 VCLT, the author employed such principles, as well as a construction of Articles 31-33 VCLT based thereon, as the cornerstones of his normative legal theory on the interpretation of multilingual (tax) treaty, i.e. for the purpose of answering the research questions addressed in this study.

2. Conclusions drawn by the author with regard to the research questions

2.1. Questions concerning all multilingual treaties

a) Must all authentic texts be given the same status for the purpose of interpreting multilingual treaties?

Under Article 33(1) VCLT, all authentic texts are equally authoritative for treaty interpretation purposes, in the sense that each of them may be (autonomously) relied upon in order to construe the treaty.

However, the positive analysis carried out by the author has shown that the drafted text (i.e. the text that has been discussed during the negotiations and eventually drafted as result thereof) may sometimes be given more weight than the other texts for the purpose of construing the treaty, since there is a reasonable presumption that it may more accurately reflect the common intention of the parties, in particular where the treaty negotiators were not involved in the subsequent drafting and examination of the other authentic texts. In this perspective, the drafted text appears relevant (i) as a proxy of the *travaux préparatoires,* where the latter are not fully available, and (ii) in order to corroborate the evidence emerging from other means of interpretation. Thus, the interpreter should throw the drafted text (as such) in the crucible and use it, according to Articles 31-33 VCLT, in order to solve *prima facie* divergences of meaning among the various authentic texts and, according to Articles 31 and 32 VCLT, in order to determine the meaning to be reasonably attributed to the relevant treaty terms and the object and purpose of the treaty.

Nothing in the VCLT precludes the interpreter from taking into account the drafted text of a treaty as previously described. Rather, good faith seems to impose on the interpreter the duty to attribute the appropriate weight thereto for the purpose of construing multilingual treaties.

Those conclusions are substantially in line with principle (vi) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which, since the quest of the interpreter is directed at establishing the common intention of parties, it is reasonable for him to attribute, in the case of a *prima facie* discrepancy in meaning among the authentic treaty texts, a particular relevance to the text that was originally drafted by the contracting States' representatives and on which was formed the consensus among them, for the purpose of removing that *prima facie* discrepancy.

b) What is the relevance of non-authentic texts for the purpose of construing (multilingual) treaties?

In the system of the VCLT no explicit relevance is attached to non-authentic language

versions.

The original draft articles prepared by Sir Humphrey Waldock and included in his Third Report on the Law of Treaties overtly dealt with the relevance of such language versions for the purpose of treaty interpretation. In particular, Article 75(5) of his Third Report established that non-authentic language versions could be used as subsidiary evidence of the intention of the parties where the application of all other rules of interpretation left the meaning of a term, as expressed in the authentic text(s), ambiguous or obscure.[1943]

Then, in the course of its sixteenth session, the ILC decided to drop that provision on the grounds that it could have opened the door too much to the use of non-authentic versions of a treaty for the purpose of its interpretation.

That said, nothing in the text or in the *travaux préparatoires* of the VCLT seems to prevent the interpreter from taking non-authentic language versions into account as supplementary means of interpretation,[1944] attributing thereto an interpretative weight that may vary depending on the available evidence that such language versions may contribute to determine the common intention of the parties. Quite the opposite, since the supplementary means of interpretation covered by Article 32 VCLT are generally regarded as including all means of interpretation (other than those referred to in Article 31 VCLT) that may shed some light on the meaning of the treaty,[1945] it is reasonable to conclude that non-authentic language versions may be considered within the scope of Article 32 VCLT and accordingly used, depending on the circumstances of the case.[1946]

For instance, unilateral documents such as the official treaty translations produced by the contracting States are potentially relevant, since they may give a hint of the practice followed by a party, or of the treaty meaning according to a party;[1947] where the other parties were informed about such documents and positions and did not object to them, they might even be considered (although not lightly) to have been tacitly agreed upon. The same holds true, *mutatis mutandis*, with regard to multilateral documents such as treaty official versions.

In a slightly different perspective, non-authentic language versions may come into play as documents on which the subsequent practice of the parties is based. In particular, where non-authentic language versions have been put into public circulation and relied upon by the parties for the purpose of applying the relevant treaty, they could give rise to

[1943] See also YBILC 1964-II, p. 65, para. 10.
[1944] See YBILC 1966-II, p. 223, para. 20.
[1945] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 334-339 and the references included therein.
[1946] See, in this respect, YBILC 1966-II, p. 226, para. 9; M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 105-108; F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), p. 398.
[1947] See, however, Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).

issues of possible (i) estoppel and acquiescence, (ii) establishment by practice of a common interpretation of the treaty, or (iii) amendment by practice of the treaty.[1948]

In this respect, it is interesting to make a reference to the *Taba Arbitration*,[1949] where the Arbitral Tribunal had to decide upon the exact location of part of the border between Egypt and Israel (also) on the basis of a treaty concluded in 1906 between the former Turkish Sultanate and the Khedivate of Egypt. This treaty had been drafted in the Turkish language only; however, the treaty was then translated into Arabic and from Arabic into English. The tribunal noted that the "English translations were printed in a number of official sources and apparently were relied on thereafter" and that "it transpired that […] no authorities since before the First World War had ever consulted the authentic Turkish text, not even the Parties to this dispute."[1950] The tribunal concluded that, for interpretative purposes, it would have followed the general practice of the parties and thus referred to the English translation and not to the authentic Turkish text.[1951] As fairly pointed out by Gardiner, the decision of the tribunal to rely mainly on the English translation for the purpose of construing the 1906 treaty must be seen as "coloured by the greater significance to be attached to how the treaty had been implemented in practice".[1952]

Finally, the above conclusions appear coherent with principle (vii) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which the interpreter may take into account the non-authentic language versions of a treaty for the purpose of construing the latter, the interpretative weight attributable to such language versions depending on the available evidence that they may contribute to ascertain the common intention of the parties.[1953]

[1948] See, similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 363.

[1949] Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq.*

[1950] See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq*., para. 45.

[1951] See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq*., para. 45.

[1952] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 362. It must be noted, however, that the above-mentioned statement of the tribunal has to be read against its proper background, i.e. taking into account that the establishment of frontiers is a field of international law where it is customarily accepted that the subsequent practice of the parties plays a major role for the purpose of interpreting the relevant treaties. In this respect, the arbitral tribunal had the chance to deal with the issue of the possible divergence between the meaning reasonably attributable to the text of the treaty and the practice followed by the parties; in paragraph 210 of its award it made reference to the ICJ decision in the *Temple of Preah Vihear* case (ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment) and stated the following: "If a boundary line is once demarcated jointly by the parties concerned, the demarcation is considered to be an authentic interpretation of the boundary agreement even if deviations may have occurred or if there are some inconsistencies with maps. This has been confirmed in practice and legal doctrine, especially for the case that a long time has elapsed since demarcation. […] It is therefore to be concluded that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected."

[1953] For instance, the fact that both official translations produced by the contracting States of a bilateral treaty seem to suggest the same construction of a certain treaty provision, which in contrast appears ambiguous on the basis of the sole authentic text, may reasonably lead the interpreter to construe the treaty in accordance with such official translations.

c) Is there any obligation to perform a comparison of the different authentic texts anytime a multilingual treaty is interpreted?

Under the VCLT, the interpreter is under no obligation to take into account more than one authentic text whenever construing and applying a multilingual treaty. Except where a *prima facie* divergence among the authentic treaty texts is put forward, the interpreter has the right to rely on any single authentic text in order to determine the utterance meaning of the relevant treaty provision, which is to be ascertained on the basis of the rules of interpretation provided for in Articles 31 and 32 VCLT.[1954]

Article 33(1) VCLT states that the text is equally authoritative (for interpretative purposes) in each authentic language, unless an agreement to the contrary exists. Furthermore, according to Article 33(3) VCLT, the terms of a treaty are presumed to have the same meaning in each authentic text. The combination of these two provisions, read in their context, establishes the following:

> (i) a rule of law according to which every treaty provision has just a single meaning, which is equally expressed by each of its authentic texts;
> (ii) a rebuttable presumption that each authentic text is accurate enough to guarantee that the interpretation of the treaty based solely on it leads to the same utterance meaning that could be derived through an interpretation based on any of the other authentic texts.

This means that the various authentic texts must always be attributed the same utterance meaning, since it is established by the rule of law that they have the same meaning. Thus, from a logical perspective, referring to a divergence in meaning between the various authentic texts is erroneous since such texts *cannot* have different meanings;[1955] it would be more correct to speak of a divergence between the meanings provisionally attributed to the various authentic texts (construed in isolation from each other), or of a *prima facie* apparent (not real) divergence of meanings.[1956]

At the same time, a combined reading of Articles 33(1) and 33(3) VCLT

[1954] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 148-149; Commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7). On the (low) frequency of having recourse, by the ICJ, to the rules of interpretation provided for by Article 33 VCLT, as compared to those enshrined in Articles 31-32 VCLT, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 16-17 and 33 (footnote 93).

[1955] See commentary to Article 29 of the 1966 Draft, in which it is stressed that "in law there is only one treaty - one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge" (YBILC 1966-II, p. 225, paras. 6); see also YBILC 1966-II, p. 225, paras. 7.

[1956] It is submitted here that Engelen concluded the same, as a matter of substance, although through different linguistic expressions: "However, even then [ed.'s note: when it is "established that the terms of the treaty actually do *not* have the same meaning in each text"] it must be assumed that the different authentic texts were always *intended* to mean the same, despite the failure of the parties to accurately express their common intention in each text, and the interpreter should bear this in mind when reconciling the different texts in accordance with the principles of Article 33(4) VCLT" (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 394).

establishes the rebuttable presumption (ii) that the meaning provisionally attributed to any of the authentic texts, taken in isolation, is the utterance meaning of the treaty.[1957]

The interpreter of course remains free to take into account more than one authentic text in his quest for the utterance meaning of the treaty.

These conclusions appear in line with principles (i), (ii) and (iii) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which:

> (i) for the purpose of interpreting one authentic text of a multilingual treaty, the other authentic texts are part of the overall context and, therefore, may be used in order to construe the former;
> (ii) since the relevance of the treaty text(s) must not be overestimated, where the parties have agreed that more than one treaty text is authentic, it is reasonable to infer that those parties intended to allow treaty interpretation to be based on any of such authentic texts, taken in isolation, together with the elements of the overall context other than the other authentic texts; and
> (iii) the interpretation of a multilingual treaty on the basis of just one of its authentic texts is not different from the interpretation of a monolingual treaty and therefore the principles applicable to the interpretation of the latter apply to the interpretation of the former.

[1957] The position of most scholars is confusing (and confused) on this point, a widespread conclusion being that upon the discovery of a *prima facie* divergence between the authentic texts, the presumption of Article 33(3) VCLT that the terms of the treaty have the same meaning in each text is rebutted and ceases to hold true (to this extent, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 391-392). Tabory, for instance, affirmed that upon discovery on an unclear passage, a textual divergence or a difference of opinion, "the presumption in Article 33(3) VCLT ceases to hold" (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 198). Similarly, Germer attributed to Article 33(3) VCLT a limited function and stated that the latter was a consequence of the very nature of the presumption, which was acknowledged by Sir Humphrey Waldock (at the ILC 874th meeting); he concluded that when an international adjudicator is confronted with a divergence between the different authentic texts of a treaty, the presumption of Article 33(3) VCLT does not give him any guidance, so that he has to resort to the rules set forth in Article 33(4) VCLT (see P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414). However, the author submits that (i) the Special Rapporteur, in the course of the ILC 874th meeting, never referred to such a limited presumption of equal meaning of the authentic texts (he never used the word "presumption" at all, indeed), but simply discussed the right to rely on a single authentic text (see, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 393-394); (ii) the right to rely on one single text is a strict consequence of the presumption that each authentic text is accurate enough to guarantee that the interpretation of the treaty based solely thereon leads to the same utterance meaning that could be determined through an interpretation based on any of the other authentic texts, and not of the rule (non-rebuttable presumption) that all authentic texts have the same meaning; (iii) Article 33(4) VCLT does not set aside Article 33(3) VCLT, but, on the contrary, it is built thereon: in fact, it requires the interpreter to determine the common meaning of the various authentic texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this is not possible, to adopt the meaning that best reconciles the texts (both provisions supporting the idea of the treaty unity and of the interconnected equality of meaning of the various authentic texts).

d) If the previous question is answered in the negative, when does an obligation to compare the different authentic texts arise?

Under Article 33 VCLT, any authentic text may be construed by the interpreter in isolation, on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT.[1958] The result of such a construction is the *provisional* utterance meaning of the treaty.

That implies that no utterance meaning exists before one text has been properly construed on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT; therefore, no unclearness, ambiguity, unreasonableness may be said to exist before that interpretative process has been brought to its end.

This further implicates that, even where a *prima facie* unclearness, ambiguity or unreasonableness of the construed text arises, the interpreter continues to be entitled to base its interpretation on one single text, taken in isolation. Only where the ambiguity, unclearness or unreasonableness results at the end of the interpretative process, i.e. after all available elements and items of evidence (other than the other authentic texts) have been referred to and employed in legal arguments is the interpreter compelled to compare the various texts as an aid to solve such an interpretative issue.

Thus, where none of the interested parties has put forward an alleged discrepancy in meanings between some of the authentic texts and the interpretation based on a single text, taken in isolation, has led to a clear, unambiguous and reasonable meaning, the *provisional* utterance meaning may be considered the *real* common utterance meaning of the treaty.

In contrast, where any of the interested parties has put forward an alleged discrepancy in meanings among the authentic treaty texts, the interpreter is obliged to compare the apparently divergent texts and to interpret them in light of that comparison, by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT,[1959] in order to determine their *real* common utterance meaning.[1960]

From a procedural standpoint, the above conclusions imply that each interested party may legally rely on a single authentic text until the application of the treaty gives rise to

[1958] It must be noted that the interpreter, in the event he, through the analysis of the *travaux préparatoires* or otherwise, discovers which is the *drafted* text and that the other authentic texts are mere translations thereof, should have recourse to the analysis of and the comparison with that *drafted* text for the reasons noted in section 3.2 of Chapter 4 of Part II.

[1959] Where one unambiguous, clear and reasonable meaning (the utterance meaning) cannot be attributed to all the texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, the utterance meaning to be adopted under Article 33(4) VCLT is the one that best reconciles the texts, having regard to the object and purpose of the treaty. This solution provided for by Article 33(4) VCLT is analysed in section 3.5 of Chapter 4 of Part II.

[1960] See the reference to the application of Articles 31 and 32 VCLT in Article 33(4), first part, VCLT.

a dispute based on the apparent diverging meanings of some of the authentic treaty texts.[1961]

It goes without saying that an *a contrario* reading of such a conclusion does not hold true; the interpreter remains free to analyse each authentic text and to compare such texts with each other whenever he considers it helpful to do so.

The above conclusions appear to be supported by principles (ii), (iv) and (v) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis.

In particular, according to principle (ii), where the parties have agreed that more than one treaty text is authentic, it is reasonable to infer that those parties intended to allow treaty interpretation to be based on any of the authentic texts, taken in isolation, together with the elements of the overall context other than the other authentic texts. Thus, in order to establish the utterance meaning of a treaty text, the interpreter is allowed to use the entire overall context, any segregation of the latter in elements that can be used and elements that cannot be used for that purpose being wholly artificial. The utterance meaning is the result of a single complex interpretative process and only at the end of such a process, taken as a whole, may an utterance meaning be said to exist. This principle should direct the interpreter to reject the solution, proposed by some scholars, of considering the texts' comparison compulsory whenever the meaning of a certain authentic text is still unclear, ambiguous or unreasonable where interpreted under Article 31 VCLT, but before duly taking into account the supplementary means of interpretation of Article 32 VCLT. Except for cases of alleged differences of meaning among some of the authentic texts, text comparison becomes compulsory only where the utterance meaning, i.e. the meaning of the interpreted text as established on the basis of the entire overall context, is unclear, ambiguous or unreasonable.

According to principle (iv), any alleged discrepancy in meaning among the authentic texts of a treaty is just apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the numbers of its authentic texts. As a consequence, under principle (v), the interpreter must remove such alleged discrepancies by establishing the single utterance meaning of all authentic texts. These principles confirm the generally accepted conclusion that the interpreter must take into account all the *relevant* authentic texts whenever a *prima facie* divergence of meaning among them is put forward and must remove such a divergence by establishing the single utterance meaning thereof.

e) How should the interpreter solve the prima facie discrepancies among the various authentic texts emerging from the comparison?

In most of the cases where the interpreter is faced with two or more authentic texts, he

[1961] See similarly W. Rudolf, *Die Spreche in der Diplomatie und internationalen Verträgen* (Frankfurt: Athenäum Verlag, 1972), p. 61.

will be able to interpret them so as to find a common, clear, unambiguous and reasonable meaning and to plausibly justify his construction on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT (including the possibility of taking into account non-authentic versions of the treaty and the opportunity to ascribe a special relevance to the drafted text).

Even in cases where the construction of an authentic text, taken in isolation, according to Articles 31 and 32 VCLT leaves the meaning thereof ambiguous or obscure, the comparison with other authentic texts may prove a decisive aid for the interpreter in order to clear up his doubts and arrive at an univocal solution, which may be reasonably supported from a logical and legal standpoint.

The recourse to Articles 31 and 32 VCLT implies that no rigid *ad hoc* rule of interpretation is applied in order to remove the *prima facie* discrepancies in meaning among the authentic treaty texts, but the solution actually adopted and the arguments to support it are selected on the basis of the treaty's overall context.

In particular, the rule of restrictive interpretation does not play a specific role for the solution of apparent divergences of meanings among the authentic treaty texts under the system of the VCLT and has been explicitly rejected as such by the ILC. Whether a restrictive interpretation is to be adopted in any specific case depends upon the nature and history of the treaty, its object and purpose, the particular context in which the ambiguous terms occur and the situation dealt with in that case.

Though, in the infrequent cases where the comparison of the authentic texts does not prove a sufficient aid to remove all the ambiguities of such texts, where only one reasonable and clear meaning[1962] exists that is common to the various authentic texts, such a meaning will be generally selected as being the only interpretative solution logically possible. This preference for the only meaning common to the authentic texts being compared does not represent, however, the application of a rigid *ad hoc* rule, but a mere instance of treaty interpretation in good faith and in light of the overall context.

These conclusions appear in line with principles (iv), (v), (vi) and (vii) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which:
(iv) any alleged discrepancy in meaning among the authentic texts of a treaty is merely apparent, since the treaty is an instrument intended by the parties to convey a single message;
(v) the interpreter must remove the *prima facie* discrepancy in meaning among the authentic treaty texts by construing them in accordance with the general principles of

[1962] I.e. one single intension common to the various authentic texts (e.g. text A may mean X or Y; text B may mean X or Z: X is the only common intension possible and, as such, it will be probably selected as the treaty meaning) and not one particular denotatum that is common to all the possible extensions of the various authentic texts (e.g. text A appears to mean just X; text B appears to mean just Y; however the denotata of X – its extension – are a subgroup of the denotata of Y; the conclusion that the meaning X must be selected since it represents the most restrictive interpretation capable of reconciling the various authentic texts cannot be upheld, since that solution consists of choosing one meaning over another simply because the former denotes a number of referents smaller that the latter).

treaty interpretation; in particular, the relevance of the treaty texts for the purpose of establishing the single utterance meaning should not be overestimated;
(vi) for the purpose of removing the *prima facie* discrepancy in meaning among the authentic treaty texts, it is reasonable to attribute a particular relevance to the text that has been originally drafted by the contracting States' representatives and on which the consensus among them was formed;
(vii) the interpreter may take into account non-authentic language versions of a treaty for the purpose of construing it; the interpretative weight that should be attributed thereto varies depending on the available evidence that they may contribute to ascertain the common intention of the parties.

f) What should the interpreter do where the prima facie discrepancies could not be removed by means of (ordinary) interpretation?

Under Article 33(4) VCLT, where a comparison of the authentic treaty texts discloses a difference in meaning that the application of Articles 31 and 32 VCLT does not remove, the interpreter must adopt "the meaning which best reconciles the texts". Such an expression must be read in its context, which first and foremost includes the underlying principle of the unity of the treaty and the connected rule of law, reflected in Article 33(3) VCLT, that all authentic texts *do have* the same meaning.[1963]

In that context, the use of the term "reconcile" simply means that the interpreter must attribute to all authentic texts a single meaning, notwithstanding the fact that such a meaning could not be provisionally attributed to all those texts on the basis of an interpretation made in accordance with the provisions of Articles 31 and 32 VCLT.

The activity of the interpreter thus consists in choosing one of the provisional utterance meanings attributable to the various authentic texts in accordance with the provisions of Articles 31 and 32 VCLT and attributing it to all other authentic texts.

The possibility of adopting a meaning that could not be reasonably attributed to any of the authentic texts on the basis of the principles enshrined in Articles 31 and 32 VCLT should be rejected, unless exceptional and very strong evidence exists in favor of such a solution, since it appears contrary to the whole system of interpretation provided for in the VCLT, where the texts of the treaty are the starting point of the interpretative process and the attribution of meaning must comply with the rules provided for in Articles 31 and 32 VCLT. That solution also appears unreasonable, in that it implies that the contracting States failed to fairly convey their intended message through *all* the authentic texts, even where due weight is given to the overall context.

The meaning to be selected by the interpreter in order to reconcile the authentic treaty texts should be the one that best reflects the common intention of the parties.

In order to select that meaning, the interpreter assesses and balances all available

[1963] See principle (iv) established by the author in section 2 of Chapter 3 of Part I.

elements and items of evidence, although he appears bound to ascribe a significant weight to the object and purpose of the treaty due to the specific reference thereto in Article 33(4) VCLT. In other terms, the object and purpose of the treaty works as the most important yardstick for the interpreter to choose, among the meanings provisionally attributed to the authentic treaty texts on the basis of the principles enshrined in Articles 31 and 32 VCLT, the real utterance meaning of the treaty.

In that respect, since treaties generally have many objects and purposes, the interpreter should use as yardstick those objects and purposes that appear relevant with respect to the provision to be interpreted and should balance them in order to find a reasonable equilibrium with reference to the specific situation at stake.

Finally, the last sentence of Article 33(4) VCLT should be construed as a rule that indirectly allows the interpreter to take, as the "special meaning" that the parties intended to attach to a certain term used in one of the authentic treaty texts, the (ordinary or special) meaning provisionally attributed to the corresponding term used in another authentic text and ultimately chosen by the interpreter as the real utterance meaning, i.e. as the meaning that "best reconciles the texts, having regard to the object and purpose of the treaty". Under this perspective:

(i) the fact that the (ordinary or special) meaning provisionally attributed to a certain term(s) in one (or more) authentic text(s) is regarded as the meaning "which best reconciles the texts, having regard to the object and purpose of the treaty", is thus taken as the decisive evidence of the common intention of the parties to attach that meaning, as a "special meaning", to the corresponding terms used in the other authentic texts;

(ii) the last sentence of Article 33(4) VCLT is regarded as a rule of a purely procedural nature, purported to offer a way out to those interpreters that considered the attribution of a certain special meaning to the relevant treaty term to be an intolerable stretching of its reasonable meaning.

So construed, the rule provided for in the last sentence of Article 33(4) VCLT appears an eminently reasonable solution, since:

(a) it is in line with principle (iv) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which any alleged discrepancy in meaning among the authentic texts of a treaty is merely apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the number of its authentic texts;

(b) it restates the content of principle (v) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, in that, on the one hand, it requires the interpreter to establish the final utterance meaning on the basis of the overall context and, in particular, of the parties' object and purpose and, on the other hand, it does not overestimate the relevance of the treaty texts for the purpose of establishing the final utterance meaning, providing the possibility for the interpreter to attach to the terms used

in certain authentic texts a special meaning that might seem *prima facie* difficult to attribute thereto, but which nonetheless appears to best suit the parties' intention and the treaty object and purpose.

g) *Where the treaty provides that a certain authentic text is to prevail in the case of divergences:*
   i. *At which point of the interpretative process must there be recourse to such a prevailing text?*
   ii. *What if the prevailing text is ambiguous or obscure?*
   iii. *What about the contrast between the prevailing text and the other authentic texts, if the latter are coherent among themselves?*

The application of a treaty provision giving priority to a particular text, in cases of divergences in meaning among the authentic treaty texts, requires the interpreter to establish at which stage of the interpretative process the prevailing text should be given such a priority.

The VCLT is silent in this respect and the case law of national and international courts and tribunals does not provide any clear guidance.

According to the ILC, that issue should be resolved by determining, in each case, the intention of the parties with regard to the meaning of the relevant final clause.

This conclusion, although reasonable in theory, presents a significant drawback in its actual application, since "final clauses are nearly always drawn up somewhat automatically",[1964] so that it is reasonable to assume that the contracting States generally do not really discuss with each other the meaning to be attached thereto and, even worse, they probably do not have any accurate idea of when the prevailing text should be given precedence.

The author submits that, unless some decisive evidence to the contrary is available, final clauses providing for a prevailing text in the case of divergences should be construed as requiring the interpreter to compare the *prima facie* divergent authentic texts in light of all available elements and items of evidence, in order to determine whether a reconciliation is possible by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, before relying exclusively on the prevailing text.

The apparently divergent authentic texts, therefore, should be construed in light of the overall context and compared with each other in the quest for a common meaning. Only where, at the end of the interpretative process, no (provisional) common meaning may be reasonably said to exist should preference be given to the meaning of the prevailing text.

This solution substantially corresponds to principle (viii) established by the

[1964] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132.

author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which, where the treaty provides that a specific text has to prevail in cases of discrepancy in meanings among the authentic texts, it appears reasonable to assume that the parties intended the utterance meaning of that text to prevail only where an interpretation based on the *prima facie* divergent authentic texts and the overall context does not lead the interpreter to convincingly attribute a single utterance meaning to all such texts.

From a different perspective, where the meaning attributable to the prevailing text, construed in isolation from the other texts and according to the rules of interpretation enshrined in Articles 31 and 32 VCLT, is ambiguous, obscure or unreasonable, there is still a chance that the analysis of the other authentic texts may shed some light on the utterance meaning of the former.

That holds particularly true where a single meaning is attributable to all other texts and it appears clear, unambiguous and reasonable. Even in this case, however, the interpreter is not bound to attribute such a common meaning to the prevailing text as well. The VCLT does not dispose over any mechanical rule in that respect, since the ILC and, arguably, the Vienna Conference considered that, although attributing to the unclear, ambiguous, or unreasonable (prevailing) text of a treaty the clear, unambiguous and reasonable meaning of the other texts appears to be a common sense solution, that might not always be the correct one since much might depend on the circumstances of each case and the evidence of the intention of the parties. In the improbable event that the interpreter is not persuaded to extend to the prevailing text the meaning common to the other texts, the prevailing text meaning must be theoretically adopted according to the final clause. In this scenario, the utterance meaning of the other authentic texts may still be relevant in directing the interpreter in his task of elucidating the meaning of the prevailing text.

Finally, where the clear, unambiguous and reasonable meanings attributable to the prevailing text and to the other texts appear to conflict with each other, textual comparison may shed light on possible alternative meanings, or alternative arguments to support those meanings, which might have been overlooked by the interpreter engaged in construing the authentic texts in isolation. It is thus possible that textual comparison may direct the interpreter towards the attribution of the same meaning to all authentic texts.

However, where this is not the case, the final clause requires the interpreter to adopt the meaning of the prevailing text, provided that it is clear, unambiguous and reasonable.

h) What is the impact on the answers to be given to the previous questions of the fact that legal jargon terms are employed in the treaty texts?

The presence of legal jargon terms in the authentic texts of a treaty does not change the

goal of its interpreter, which remains establishing the utterance meaning of its provisions.

Similarly, the interpreter continues to be entitled to rely on any single authentic text, taken in isolation, for the purpose of interpreting the treaty and he is still required to remove the *prima facie* discrepancies in meaning by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.

At a more in-depth level of analysis, however, the interaction between the multilingual nature of the treaty and the use therein of legal jargon terms may play a substantial role.

Under a first perspective, the multilingual character of the treaty comes into play as an element that the interpreter may assess in order to establish how the parties intended to construe the legal jargon terms employed in the treaty.

In particular, where the treaty is authenticated in all the official languages of the contracting States and, due to its nature, it strictly interacts with the contracting States' domestic laws, the interpreter could be led to conclude that the parties intended the legal jargon terms employed in the treaty to be attributed their technical meanings under the domestic law of the contracting State applying the treaty. In this case, in fact, the interpreter might regard the linguistic aspect so deeply intertwined with the legal characterization aspect, for the purpose of the treaty application, as to render such solution almost unavoidable.[1965]

The treaty term expressed in the official language of the State applying the treaty, in that respect, would work as the key to unlock the door of the appropriate domestic law meaning, i.e. as a guide for the interpreter to select the domestic law meaning that the parties considered to best fit in the context of the relevant treaty provision.

Under a second perspective, the fact that the interpretation concerns legal jargon terms significantly influences the detection and resolution of the *prima facie* discrepancies in meaning among the authentic treaty texts.

In fact, based on the assumption that the concepts underlying the legal jargon terms employed in one legal system do not normally have perfect correspondents in other legal systems, but just general correspondents (if any), i.e. concepts that fulfill

[1965] Similarly Fantozzi pointed out, with reference to tax treaties (although his analysis applies well beyond such a narrow field), that there is an intrinsic difficulty in trying "to single out the "linguistic" issues relating to the interpretation of double tax conventions from the broader "classification" issues. The two concepts are deeply intertwined, and I therefore do not know if it is possible to define where the thin line that divides the two exactly lies. I find it rather easier to imagine them as two sides of the same coin. In the various hypotheses the interpreter/translator can be faced with, there is, in my view, always a part of each aspects. […] For the treaty to apply […] it is required that a treaty situation takes place. It is therefore required that the State which has to give up part of its power to tax recognizes the *material event* occurred in the other State, as represented by a *legal concept*. The definition of this legal concept involves issues of both kinds: *linguistic* and *classification* issues." (A. Fantozzi, "Conclusions", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 335 *et seq.*, at 335-336).

similar functions within the respective legal systems and with which they share a considerable part of their prototypical denotata (and non-denotata),[1966] the interpreter shall not look for an exact correspondence, but just for a general correspondence among the domestic law concepts underlying the legal jargon terms used in the various authentic texts in order to establish that no (even *prima facie*) discrepancy exists among such texts.

For instance, where a treaty concluded between Austria and Italy is authenticated in the German and Italian languages and employs the terms "Unternehmen" and "impresa", the interpreter, in order to conclude that there is no discrepancy in meaning between those two terms, shall be satisfied in ascertaining that the legal concepts underlying these two terms under Austrian and Italian domestic laws general correspond with each other, in the sense that they fulfill similar functions within the respective legal systems[1967] and share a substantial part of their prototypical denotata (and non-denotata).[1968] The fact these two concepts do not perfectly overlap shall not be considered significant in order to establish whether a discrepancy in meaning exists between the two texts.

Once such a general correspondence has been established, any discrepancy in meaning among the authentic treaty texts may no longer be considered to exist and the interpreter has to proceed to determine the utterance meaning of the legal jargon treaty terms on the basis of whichever authentic text.

Thus, for instance, where the interpreter concludes that the parties intended to attribute a uniform and autonomous meaning to a certain legal jargon treaty term, he will construe such a term on the basis of the overall context and by taking into account the various corresponding concepts under the domestic laws of the contracting States. In the previous example, where the treaty was in force between Austria, Italy, France and Spain, the interpreter would consider, as part of the overall context, the domestic law meanings that the treaty terms "Unternehmen" and "impresa" and their corresponding terms "entreprise" and "empresa" have under the respective Austrian, Italian French and Spanish domestic laws.[1969] The result of his interpretation, due to the loose relation existing between the autonomous treaty meaning and the corresponding domestic law meanings under the laws of the contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

[1966] See the position expressed by the United States representative at the Vienna Conference with regard to the impossibility of reconciling the different authentic texts of a treaty where different systems of law were involved, due to the fact that often there is no legal concept in one system that exactly corresponds to a certain legal concept in the other system (UNCLT-1st, p. 189, para. 41). See also, in this respect, the comment on Part III of the 1964 Draft made by the Yugoslavian government (YBILC 1966-II, p. 361).

[1967] E.g. both are used by the respective legal system in order to distinguish certain economic activities from others, in connection with bankruptcy procedures, the requirement to keep accounts, etc.

[1968] E.g. they both denote banking activities, insurance activities, sale and production of goods activities, certain activities in the provision of services, etc.

[1969] He could take into account as well the domestic law meanings of other corresponding terms under the laws of non-member States, as long as he may reasonably argue for their relevance for his current analysis.

Similarly, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,[1970] he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State of the referred court) has under the substantive *lex fori*. In the previous example, where the treaty in force between Austria, Italy, France and Spain was to be interpreted by a French court, the interpreter would attribute to the treaty terms "Unternehmen" and "impresa" the meaning that the term "entreprise" has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

However, where the interpreter establishes that no general correspondence may be considered *prima facie* to exist among the legal jargon terms employed in the various authentic texts, e.g. because their underlying concepts under the relevant domestic laws do not fulfill similar functions and do not share any significant part of their prototypical denotata (and non-denotata), the interpreter must remove the consequent apparent discrepancy in meanings among the authentic treaty texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.[1971] In the previous example, where the Italian authentic text of the treaty employed the term "attività economica" instead of "impresa", the former having a much wider scope than the latter under Italian law, a *prima facie* discrepancy in meaning might be considered to exist between the Italian and the German authentic texts. An interpretation of those texts based on Articles 31 and 32 VCLT could then lead the interpreter to conclude that the general meaning underlying the treaty terms "Unternehmen" and "attività economica" is that characterizing the terms "Unternehmen", "impresa" (and not "attività economica"), "entreprise" and "empresa" under Austrian, Italian French and Spanish domestic laws.

Once the *prima facie* discrepancy has been set aside and the general meaning underlying all legal jargon terms employed in the authentic treaty texts has been established, the more precise meaning that the parties intended to attach thereto (i.e. the utterance meaning) will be determined by the interpreter according to the circumstances.

For instance, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,[1972] he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State *fori*) has under the substantive

[1970] The same, however, holds true as well with regard to other types of *renvoi*.
[1971] See, although with specific regard to tax treaties, G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99-100.
[1972] The same, however, holds true as well with regard to other types of *renvoi*.

lex fori. In the previous example, where the treaty was to be interpreted by a French court, the interpreter would attribute to the treaty terms "Unternehmen" and "attività economica" the meaning that the term "entreprise" has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

Finally, whenever faced with the interpretation of a legal jargon treaty term, the interpreter has to assess whether, for the purpose of construing that term, he should also take into account legal jargon proxies and assimilations under the relevant domestic law.

The above conclusions are substantially in line with principle (ix) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis. That principle highlights that, especially where the relevant treaty is authenticated in all the official languages of the contracting States, the question may arise whether the parties intended the relevant terms used in the various authentic texts to be attributed a uniform meaning, or whether they intended each State to interpret those terms in accordance with the meaning that the term employed in the text authenticated in its own official language has under its domestic law.

According to principle (ix), the interpreter should first answer such a question on the basis of the treaty text(s) and the overall context and then determine the utterance meaning of the relevant treaty provision:

(a) in the case a uniform meaning was intended by the parties, by attributing a particular relevance to the overall context and to the prototypical items denoted by all, or most of the terms employed in the various authentic texts;
(b) in the case a uniform meaning was not intended by the parties, by construing the treaty in accordance with the (national) meaning of the term used in the text authenticated in the official language of the State applying the treaty, provided that such term is similar to the (majority of the) terms used in the other authentic texts. Where the test of similarity fails, the reasonable suspicion may arise that the parties did not intend the relevant treaty provision to be construed in accordance with the (national) meaning of that term.

For the purpose of such a comparison, two terms, construed in accordance with their respective national meanings, may be considered similar:

(a) when they share most of their prototypes, or
(b) in case their prototypes are limited to a few or do not coincide, when most of the features (including their function in the relevant field of knowledge) that characterize such prototypes coincide or, at least, present strong similarities.

What does constitute the greatest part of the respective prototypes and their distinctive features, which have to be taken into account for the purpose of assessing the similarity, cannot be said *in vacuo*. The answer to that question depends upon:

(a) the nature of and the functions performed by the concepts underlying those terms;
(b) the overall context in which those terms are used (in particular the object and purpose of the provision containing those terms).

2.2. Questions specifically concerning multilingual tax treaties

a) What is the relevance of the OECD Model official versions for the purpose of interpreting multilingual tax treaties (either authenticated also in English and/or French, or authenticated in neither of such languages) and monolingual tax treaties authenticated neither in English nor in French?

The role played by the OECD Model official versions (English and French) in respect of (multilingual) tax treaties based on such a Model is similar to that played by the drafted text for the purpose of interpreting multilingual treaties.

To put it differently, the OECD Model official versions represent significant items of evidence of the intention of the parties with regard to the meaning of tax treaty provisions drafted along the lines of the OECD Model. Thus, the interpreter should take them into account as primary means of interpretation in order to establish the utterance (ordinary or special) meaning of the relevant treaty terms and expressions.

With specific reference to the subject of this study, the OECD Model official versions constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, i.e. by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT. This also holds true in cases where none of the authentic treaty texts is drafted in English or French.

In addition, the impact of the OECD Model official versions on the drafting of the authentic texts of tax treaties based on such a Model constitutes a strong argument in support of the following conclusions.

First, it supports the appropriateness of a loose approach in the application of the *renvoi* provided for in Article 3(2) of OECD Model-based tax treaties, in the sense that the terms actually used in the authentic treaty texts should be given the meaning that not only such terms, but also their legal jargon synonyms and proxies in the official language of the State applying the treaty have for the purpose of that State's domestic law, unless the context otherwise requires.

Second, it supports the inclusion, among the means of interpretation to be used for removing the *prima facie* discrepancies in meaning between the authentic treaty texts in accordance with Articles 31 and 32 VCLT, of certain elements and items of evidence. In particular, it constitutes the main foundation of the argument that all tax treaty provisions that directly or indirectly reproduce the provisions of the OECD Model should be interpreted consistently, which in turn justifies the practice of having recourse

to the decisions delivered by foreign judiciaries and the practices of foreign tax authorities (including those of States that are not party to the specific treaty to be construed) in order to establish the *ordinary meaning to be given* to OECD Model standard terms and expressions (used in OECD Model-based tax treaties) under Articles 31 and 32 VCLT. Moreover, it justifies the recourse by the interpreter, as supplementary means of interpretation, to the analysis of the differences existing (i) between subsequent versions of the OECD Model, (ii) between the OECD Model and the tax treaty to be interpreted, as well as (iii) between the tax treaty to be interpreted and other tax treaties concluded by the contracting States of the former, for the purpose of establishing the utterance meaning of the relevant tax treaty provision.

b) What is the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties?

It is the author's opinion that:

(i) in the absence of any significant departure by the tax authentic treaty texts from the OECD Model, or of any extra-textual evidence of a contrary agreement between the parties, the interpreter should construe OECD Model-based tax treaties in accordance with the OECD Commentary, any other construction appearing less reasonable; and

(ii) later OECD Commentaries should be heavily relied on for the purpose of interpreting formerly concluded tax treaties, unless evidence exists of a common intention of the parties to construe them differently.

This implies that the OECD Commentaries, both previous and subsequent to the conclusion of the relevant tax treaty, constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, in particular by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT.

From a different perspective, the OECD Commentary, like any other written text, must be construed in order to be used in the process of tax treaty interpretation.[1973]

In that respect, the author submits that the interpreter should establish the utterance meaning of the OECD Commentary in light of its overall context, i.e. through the analogical application of the rules encompassed in Articles 31 and 32 VCLT, and

[1973] See B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq*., especially at 8-9. For judicial instances of interpretation of the OECD Commentary, see Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq*., at 816; Income Tax Appellate Tribunal of Delhi (India), 29 August 2008, *Fugro Engineers BV v. Assistant Commissioner of Income Tax*, 11 *ITLR*, 421 *et seq*., at 434-435, para. 4; District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq*., at 859; Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq*., at 71-72, para. 28. See also the interpretation of paragraph 3 of the Commentary on Article 3(1) OECD Model in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.07.

that, whenever a *prima facie* discrepancy in meaning arose between the English and French official versions thereof, such a discrepancy should be removed on the basis of the analogical application of the rules enshrined in Article 33(4) VCLT.

c) With regard to the relevance of Article 3(2) of OECD Model-based multilingual tax treaties for the purpose of their interpretation:

(i) Does Article 3(2) have an impact on the nature of the potential discrepancies in meanings among the authentic texts of a multilingual tax treaty? Where this question is answered in the affirmative, which are the various types of prima facie discrepancies that may arise? Should the interpreter put all of them on the same footing for the purpose of interpreting multilingual tax treaties?

Where tax legal jargon treaty terms are interpreted in accordance with Article 3(2), a first type of divergence that may emerge is that between two accurately (although not perfectly) corresponding legal concepts existing under the laws of the two contracting States ("type-A divergence").

Often such concepts are pointed at by the corresponding terms employed in the two authentic texts drafted in the official languages of the contracting States. For instance, the terms "impresa" and "Unternehmen" used in the Italian and German authentic texts of the 1989 Germany-Italy tax treaty point to the respective underlying legal concepts existing under Italian and German tax laws. Where these two concepts were found to be not absolutely equal (as actually is the case, for example in respect to certain forestry and agriculture activities), a (limited) divergence might be said to exist between them.

However, this type of divergence may also emerge where the tax treaty is authenticated only in one (neutral) language. In the latter case, the interpreter has to face the additional burden of determining which is the legal jargon term in the official language of the State applying the treaty that best corresponds to the legal jargon term employed in the authentic treaty text (drafted in a different language).

For instance, where the Germany-Italy tax treaty had been authenticated only in the English language, the treaty term "enterprise" would point to the domestic legal concept underlying the legal jargon term "impresa" where Italy applied the treaty and, in contrast, to the domestic legal concept underlying the term "Unternehmen" where Germany applied the treaty.

A second type of divergence[1974] may be seen to exist between two legal concepts both existing under the law of the State applying the treaty ("type-B divergence"). Generally, those legal concepts are:

[1974] This second type of divergence may theoretically emerge also with regard to the two (or more) authentic texts drafted in the official languages of a single contracting State. The issues connected to this case, however, are not different from those characterizing the instance of two (or more) authentic texts drafted in the official language of one contracting State and in another language.

(i) the one underlying the legal jargon term used in the authentic text drafted in the official language of that State; and
(ii) the one underlying the legal jargon term (expressed in the official language of the State applying the treaty) that is considered by the interpreter to best correspond to the legal jargon term employed in another authentic text.[1975]

For instance, it may happen that the Italian text of an Italian tax treaty uses the term "lavoro autonomo" in a certain article, while the English authentic text uses the term "employment". The Italian legal jargon term that is generally considered to best correspond to the English term "employment" is the term "lavoro subordinato" (or "lavoro dipendente"); the latter is, in fact, the term that is generally used in Article 15 of Italian OECD Model-based tax treaties and one of the terms that is usually indicated as a synonym for the term "employment" in bilingual (legal) dictionaries. Under Italian (tax) law, the concepts corresponding to the terms "lavoro autonomo" and "lavoro subordinato" are significantly different, the former denoting as prototypical items the activities carried on by a self-employed person. In this case a divergence may be said to exist between the two Italian legal concepts.

In the majority of cases, however, type-B divergence is less obvious. For instance, the English authentic text of Article 16 of the 1988 Italy-United Kingdom tax treaty, similar to Article 16 of the OECD Model, makes exclusively reference to the "board of directors" of a company, while the Italian authentic text thereof employs the expression "consiglio di amministrazione o […] collegio sindacale". Although the Italian Civil Code entrusts the "consiglio di amministrazione" with pure management functions and the "collegio sindacale" with control and supervisory functions, bilingual dictionaries generally equate the "consiglio di amministrazione" with the "board of directors" and the "collegio sindacale" with the "board of statutory auditors". On this basis, one might reach the conclusion that the Italian legal jargon term best corresponding to the English term "board of directors" is "consiglio di amministrazione", whose underlying legal concept is narrower than the one corresponding to the compound expression "consiglio di amministrazione o […] collegio sindacale". In such a case, the conclusion would be drawn that the two legal concepts are different.

From a quantitative perspective, the significance of the divergences existing among the relevant legal concepts may vary within a spectrum, having as extremes:

(i) the case of legal concepts sharing all their prototypical items and presenting only limited differences with regard to the peripheral items that are within their respective scope; and
(ii) the case of legal concepts not sharing any of their respective prototypical items.

The first case is, for instance, that previously illustrated with reference to the comparison of the domestic law concepts underlying the terms "impresa" and "Unternehmen".

[1975] I.e. the authentic text drafted in the official language of the other contracting State, or an authentic text drafted in a different language.

The second case is, for instance, that previously illustrated with reference to the comparison between (i) the Italian law concept underlying the term "lavoro autonomo" and (ii) the Italian law concept underlying the term "lavoro subordinato".

The *prima facie* discrepancy in meaning resulting from the comparison of two authentic treaty texts, drafted in the respective official languages of the contracting States, may be examined and described in terms of type-A and type-B divergences.[1976]

In particular, a first case of *prima facie* discrepancy may emerge as a pure type-A divergence. This is the case where the relevant legal jargon terms employed in the two authentic texts appear to be very accurate correspondents under the respective domestic laws, in light of all elements and items of evidence available (e.g. bilingual legal dictionaries, comparative law textbooks, comparative legal studies, etc.). From a quantitative perspective, pure type-A divergences generally concern only peripheral items. Even in cases where the discrepancy concerns also prototypical items, it is usually not so significant and pervasive as to make the interpreter doubt, in the absence of other decisive elements and items of evidence, that the parties intended to interpret the relevant treaty provision in accordance with the meaning that the term employed in the text drafted in the official language of the State applying the treaty (or a proxy thereof) has under the domestic law of that State. The *prima facie* discrepancy between the terms "impresa" and "Unternehmen" employed in the Italian and German authentic texts of the 1989 Germany-Italy tax treaty represents a good instance of this type of discrepancy.

A second case of *prima facie* discrepancy emerges as a combination of type-A and type-B divergences, in the sense that the discrepancy is caused:

(i) not only by the fact that the two best corresponding terms, under the respective domestic laws of the two contracting States, have two (more or less) divergent meanings (type-A divergence),

(ii) but also and predominantly by the fact that the two terms employed in the authentic treaty texts do not appear to be accurate correspondents, under the respective domestic laws, more similar terms (and thus concepts) existing under such laws (type-B divergence).

From a quantitative perspective, this second kind of discrepancy often concerns both prototypical and peripheral items and, in extreme cases, makes the interpreter seriously doubt whether the parties intended to interpret the relevant treaty provision in accordance with the meaning that the term employed in the text drafted in the official language of the State applying the treaty (or a proxy thereof) has under the domestic law of that State. For example, if the Italian authentic text of the 1989 Germany-Italy tax treaty had employed the term "attività economica" instead of "impresa", the former having a much wider scope than the latter under Italian law, the *prima facie* discrepancy in meaning between the Italian and the German authentic texts could have been viewed not only as caused by the ontological discrepancies existing between the two best corresponding terms under the Italian and German domestic laws (i.e. the terms

[1976] The same holds true, by analogy, where one (or even both) of the authentic texts being compared is drafted in a language other than the official languages of the contracting States.

"impresa" and "Unternehmen"), but also by the fact that the term "attività economica" is used in the Italian authentic text instead of the more closely corresponding term "impresa".

At a first level of analysis, thus, the author may conclude that pure type-A divergences are inherently caused by the use of legal jargon terminology in the tax treaty and, therefore, they should be generally accepted as such and dealt with through the application of the *renvoi* encompassed in Article 3(2): the relevant domestic law meaning should be selected by the interpreter on the basis of which contracting State applies the treaty.[1977]

In contrast, *prima facie* discrepancies caused by the interaction between type-A and type-B divergences should be examined more carefully and, where the effect of the type-B divergence was significant, the interpreter should critically assess whether the context requires the attribution of a meaning other than the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty (e.g. the meaning that the legal jargon term which best corresponds to the term used in the other authentic text(s) of the treaty has under the domestic law of the State applying the treaty).[1978]

(ii) Is there any obligation for the interpreter to reconcile (at least to a certain extent) the prima facie divergent authentic texts of an OECD Model-based tax treaty?[1979]

The possibility cannot be dismissed from the outset that, under the system of *renvoi* provided for in Article 3(2) OECD Model, the interpreter is entitled to always and exclusively rely on the legal concepts underlying the legal jargon terms employed in the authentic text drafted in the official language of the State applying the treaty (if existing), disregarding the possible existence of different legal concepts underlying the terms employed in the other authentic treaty texts.

This raises the question whether the interpreter is under an obligation to reconcile (at least to a certain extent) the *prima facie* divergent authentic texts of an OECD Model-based tax treaty, or, on the contrary, he may always and exclusively rely on the legal concepts underlying the legal jargon terms employed in the authentic text drafted in the official language of the State applying the treaty.

The answer to such a question should be looked for in the intention of the parties.

In that respect, several items of evidence exist supporting the view that the parties

[1977] The actual application of such a domestic law meaning would obviously remain subject to the context not requiring otherwise

[1978] I.e., in the previous example, the meaning of the term "impresa" (and not of the term "attività economica") under Italian law.

[1979] A similar question (and a similar answer) holds true with regard to the alleged divergences existing between the legal concepts underlying the terms employed in one of the authentic treaty texts and those underlying the corresponding terms used in the OECD Model official versions.

probably intended the interpreter to carry out a (limited) reconciliation of the relevant authentic texts of OECD Model-based tax treaties whenever a *prima facie* discrepancy in meanings is put forward.

First, tax treaties generally do not contain any explicit derogation to the customary international law principle that the interpreter may rely on any of the authentic treaty texts in order to construe its provisions.

To read in the *renvoi* to the law of the contracting State applying the treaty, encompassed in Article 3(2), an unconditional and compulsory obligation for the interpreter to rely exclusively on the authentic text drafted in the official language of that State, for the purpose of construing the treaty, may be regarded as to read too much into the language of Article 3(2), such a significant departure from customary international law reasonably requiring a more precise and explicit wording to be considered as intended by the parties.[1980]

The right for the interpreter to rely on any authentic text in order to interpret the treaty, together with the possibility that a *prima facie* discrepancy in meanings exists among such texts, makes it necessary for the interpreter to reconcile such texts at least where a type-B divergence is at stake.

Second, since the tax treaty is based on the OECD Model, the argument may be put forward that the general meaning determined on the basis of the OECD Model (official versions) and the OECD Commentary constitutes a limit to the meaning attributable to the legal jargon terms used in the authentic texts drafted in the official language of the State applying the treaty.

This also implies that where one of the authentic treaty texts, other than the one drafted in the official language of the State applying the treaty, reproduces the English or French official version of the OECD Model, the interpreter should take care to reconcile the alleged difference between those two authentic texts. For instance, where a specific tax treaty appears to be based on the OECD Model and Article 15 thereof, in its English authentic text, reproduces Article 15 of the OECD Model, it would be difficult to reasonably argue that the interpreter may exclusively rely on the Italian authentic text of such an article, which employs the term "lavoro autonomo",[1981] and attribute to the latter term the meaning it has under Italian law, completely disregarding the English authentic text and the corresponding provision of the OECD Model.

Third, the fact that certain tax treaties are authenticated only in one neutral language,[1982]

[1980] The alternative view of the absence of an obligation for the interpreter to reconcile the authentic treaty texts (al least in certain cases and to a certain extent), which appears even less sensible than the one just described, would be to consider that the parties intended:

(i) the treaty to have multiple meanings, not depending (solely) on the domestic laws of the contracting States, but from the very same wordings of its authentic texts and

(ii) to entitle the interpreter to choose the meaning that best suits his purpose by selecting the authentic text that supports it.

[1981] See above example.

[1982] I.e. they are authenticated in the official languages of neither contracting State.

or that they provide for a prevailing text (generally drafted in a neutral language) in the case of discrepancies, may be seen as supporting the argument that, with regard to tax treaties in general, the corresponding legal concepts under the law of the two contracting States should not be too different from one another.[1983]

For instance, where an OECD Model-based tax treaty is authenticated only in English and uses the term "employment" in Article 15, the interpreter must construe the latter term by attributing to it the meaning that the best corresponding Italian legal jargon term has under Italian law. The best corresponding term, in this case, is probably "lavoro subordinato" and not "lavoro autonomo". In that respect, it would appear difficult to support the conclusion that the provisions of two Italian treaties similarly structured and which present the same (or a similar) wording in their respective English authentic texts ("employment") could be interpreted in a significantly different way (with regard to prototypical items, i.e. typical employment income and typical independent activity income) only because one of the two treaties was also authenticated in the Italian language (and employed the term "lavoro autonomo" in the Italian authentic text) and the other was not.

Fourth, although extremely remote in practice, it may happen that a tax treaty is authenticated in two languages that are not the official languages of either contracting State. In this case, where a significant *prima facie* divergence of meaning existed between the corresponding legal jargon terms used in such authentic texts, the interpreter should at least partially reconcile the two authentic texts in order to select the domestic legal jargon term, and thus the domestic law meaning, corresponding to the terms actually used in the treaty.

For instance, where an Italian tax treaty based on the OECD Model was authenticated solely in English and French and a provision thereof employed the terms "employment" and "activités de caractère indépendant" in the English and French authentic texts, respectively, the interpreter should at least partially reconcile those two terms in order to decide which Italian domestic law term corresponds thereto and, therefore, which domestic law meaning should be used pursuant to Article 3(2).

Finally, although theoretically possible, it does not seem reasonable to lightly assume that the contracting States intended to have two completely different (sets of) rules in force where they apply the treaty.

Gaja, in that respect, maintains that the *renvoi* to the domestic law of the contracting State applying the treaty "involves reconciling the texts in order to define a general meaning, while the more precise meaning is established according to the law of the relevant contracting State".[1984] He adds that, in any case, under Article 3(2) OECD Model, the domestic law meaning of any undefined treaty term "would have to be

[1983] Otherwise, similarly worded (in the neutral authentic language) tax treaties concluded by the same State could end up being construed in significantly divergent manners.
[1984] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99.

consistent with the general meaning that the term has under the treaty".[1985]

In order to decide whether, in any actual instance, the outer limit of the general meaning would be crossed by attributing to the relevant undefined treaty term the meaning it has under the domestic law of the contracting State applying the treaty, the interpreter relies on the context. Such context, more than being the intent of the parties,[1986] or embodying the parties' common intention,[1987] is made up of all the elements and items of evidence that may help the interpreter in establishing and arguing for the common intention of the parties: it is the overall context that must be used in order to determine the treaty utterance meaning.

(iii) If the previous question is answered in the affirmative, to what extent must the differences of meaning deriving from the attribution of the domestic law meanings to the corresponding legal jargon terms used in the various authentic texts be removed (e.g. in accordance with Article 33(4) VCLT) and, instead, to what extent must such differences be preserved in accordance with Article 3(2)?

The interpreter may rely exclusively on the domestic law meaning of the legal jargon terms employed in the treaty as long as it significantly overlaps with the "general meaning" established on the basis of the overall context and, in particular, of the reconciliation of the relevant authentic texts.[1988] Thus, as long as the domestic law

---

[1985] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 100, where the author notes that, "[s]hould there be any divergence among the authentic texts of a tax treay that follows the OECD Model, these would have to be first reconciled in order to define the general meaning of the provision, including the *general meaning* of the relevant term. The reference to the law of one of the contracting States for the determination of the meaning of a term would only come into play once the framework has been defined".

[1986] See S. I. Katz, "United States", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 615 *et seq*., at 650, who affirms: "The intent of the contracting parties is the context. There is no question of whether contextual interpretation is preferred to domestic. The very concept of the context implies that it must be."
Obviously, if one equates the intent of the parties to the context, no other solution may be accepted other than the contextual interpretation (i.e. the interpretation that reflects the intention of the parties). This, however, is a circular argument. The real issue, which is hidden by (and in) Katz's proposition, is "which is the meaning intended by the parties?" There is no ready answer given anywhere to that question (otherwise, one would have to seriously question the sanity of those hundreds of tax scholars that painstakingly have dealt with such issues). So, Katz ends up changing the form, but not the substance of the problem: the interpreter is still left with a handful of items of evidence and elements on the basis of which he must decide (and argue for) whether the parties (would) intend, in the specific situation, the domestic law meaning, or some other meaning, to apply.

[1987] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.10.

[1988] See G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 100, where the author notes that, "[s]hould there be any divergence among the authentic texts of a tax treay that follows the OECD Model, these would have to be first reconciled in order to define the general meaning of the provision, including the *general meaning* of the relevant term. The reference to the law of one of the

meaning and the "general meaning" significantly overlap and considering that, where existing, the authentic treaty text drafted in the official language of the State applying the treaty provides the interpreter with the most direct and immediate access to the domestic law (concepts) of that State, it is reasonable to conclude that the selection of the appropriate domestic law meaning under Article 3(2) should be made by the interpreter on the basis of that authentic text. This solution limits the discretion of the interpreter in selecting the appropriate domestic law meaning, since it attributes a significant weight to the evidence of the intention of the parties represented by their choice of a specific legal jargon term in the official language of the State applying the treaty and, thus, of its underlying legal concept over the others theoretically available.

Consider, for example, Article 16 of the 1988 Italy-United Kingdom tax treaty, whose English authentic text makes exclusive reference to the "board of directors" of a company, while the Italian authentic text thereof employs the expression "consiglio di amministrazione o […] collegio sindacale". It may be plausibly argued that the legal concepts underlying the expressions "board of directors" and "consiglio di amministrazione o […] collegio sindacale" under English and Italian law substantially overlap. They both point to a common "general meaning", i.e. the company organs that, under the relevant company law, carry out the management, control and supervisory functions. Since the legal concept underlying the legal jargon term used in the Italian authentic text substantially overlaps with the above "general meaning", it is reasonable to use the more precise meaning of the former in order to construe the treaty where Italy is the State applying it.

Hence, the analysis to be performed by the interpreter is one that fits perfectly in the dynamics of Article 3(2): the interpreter is to construe the treaty on the basis of the domestic law meaning of the relevant legal jargon term employed in the authentic text drafted in the official language of the contracting State applying the treaty (for instance "consiglio di amministrazione o […] collegio sindacale"),[1989] unless the context requires a different interpretation. In that respect, the author submits that the context requires a different interpretation whenever the domestic law meaning does not sufficiently overlap with the "general meaning".

For this purpose, the context coincides with the overall context and, therefore, is made up of all elements and items of evidence that may help the interpreter to determine and argue for the (common) utterance meaning of the parties. In the case of multilingual treaties, the overall context obviously includes the corresponding terms used in the various authentic texts (in the previous example "board of directors" and "consiglio di amministrazione o […] collegio sindacale") and their underlying legal concepts. It also encompasses the corresponding terms employed in the English and French versions of the OECD Model (in the previous example "board of directors" and "conseil d'administration ou de surveillance"), as well as the OECD Commentary, if the treaty is

contracting States for the determination of the meaning of a term would only come into play once the framework has been defined".

[1989] Or the domestic law meaning of that State's legal jargon term corresponding to the term used in the treaty, in the case none of the authentic treaty texts has been drafted in that State's official language.

based on the OECD Model.

In order to determine the "general meaning", where a *prima facie* discrepancy in meaning is put forward, the interpreter is required to partially reconcile the allegedly divergent authentic texts. The reconciliation, in this case, is characterized as "partial" in the sense that it is sufficient for the interpreter to find out the prototypical items that the corresponding terms employed in the various authentic texts are intended (by the parties) to denote (or not to denote) and the functions played by their intended (by the parties) underlying concepts within the respective legal systems. In fact, the "general meaning" is determined (also) on the basis of:

> (i) the common prototypical items that the interpreter considers the parties intended to denote (or not to denote) by means of the relevant treaty terms and/or (ii) the common functions played by the legal concepts, which the interpreter considers the parties meant to correspond to the relevant treaty terms, within the respective legal systems.

In the previous example, for instance, the "general meaning" is determined by taking into account that (a) both the English and the Italian expressions denote statutory company organs provided for under the applicable corporate governance systems and (b) the functions carried out by such bodies, in their respective corporate governance systems, are similar, i.e. management and/or control and/or supervisory functions.

It seems reasonable to conclude that such a reconciliation must be carried out, unless evidence of a different agreement of the parties exists, on the basis of the rules encompassed in Article 33(4) VCLT, i.e. by interpreting the various authentic texts in accordance with Articles 31 and 32 VCLT and, where a divergence persists, by favoring the meaning that best reconciles the texts having regard to the object and purpose of the treaty.

The significance of Article 33 VCLT in this process, however, is not limited to the direct comparison of the legal jargon terms employed in the various authentic texts. Since (i) the overall context includes the various authentic texts of the provision to be interpreted and those of its related provisions and (ii) such provisions are also made of non-legal jargon terms, it is possible that the construction of these provisions, as expressed in the various authentic texts, may show some possible differences of meaning not due to the legal jargon terms employed therein. Such potential differences should be removed in accordance with Article 33(4) VCLT. The resulting interpretations, which may shed light on the object and purpose of the relevant treaty provision and its interaction with other related provisions, must be then taken into account by the interpreter in order to determine whether the context otherwise requires and, more specifically, to establish the "general meaning" of the relevant legal jargon terms.

Where the interpreter concludes that the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty does not sufficiently overlap with the "general meaning" of the relevant (corresponding) treaty terms, he should consequently not apply the former meaning in order to construe the treaty. In its place, the interpreter should apply the domestic law meaning that best fits in the overall context and that best matches with the "general meaning", unless the context otherwise requires. For the purpose of establishing such a

domestic law meaning, and thus the relevant domestic legal jargon term, the interpreter should use all available elements and items of evidence of the parties' intention, among which bilingual (legal) dictionaries, thesaurus dictionaries, (comparative) law textbooks and encyclopedias, the authentic texts of other tax treaties concluded by the State applying the treaty (drafted in its own official language), the tax treaty model of the latter State, if publicly available, the OECD Model official versions of the relevant treaty article and the OECD Commentary.

For instance, where the Italian text of an Italian tax treaty uses the term "lavoro autonomo" in a certain article, while the English authentic text uses the term "employment", a *prima facie* discrepancy between those authentic texts arises, since the former term, under Italian law, typically denotes the activities carried on by self-employed persons. Where, on the basis of the overall context, the interpreter concludes that the "general meaning" corresponding to the terms "lavoro autonomo" and "employment" is akin to the meanings of "employment" under English law and "emploi salarié" under French law,[1990] the interpreter should attribute to the treaty terms "lavoro autonomo" and "employment" the meaning that the term "lavoro subordinato"[1991] has under Italian tax law whenever Italy applies the treaty, unless the context otherwise requires, since the term "lavoro subordinato" is the one generally used in Article 15 of Italian OECD Model-based tax treaties and one of the terms that is generally indicated as a synonym of the terms "employment" and "emploi (salarié)" in bilingual (legal) dictionaries.

To sum up, if a divergence is alleged to exist among the domestic law meanings of the legal jargon terms used in the various authentic texts, the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the contracting State applying the treaty[1992] should be used in order to construe the meaning of the relevant treaty provision, unless the overall context requires a different interpretation, for instance where the comparison of the relevant authentic texts[1993] shows that such a domestic law meaning does not sufficiently overlap with the "general meaning".

However, where such domestic law meaning does substantially overlap with the "general meaning" and, more generally, the overall context does not require a different interpretation, any *prima facie* divergence of meanings is resolved by means of the *renvoi* of Article 3(2), which provides the interpreter with a clear rule for choosing which among the *prima facie* divergent meanings must be attributed to the relevant treaty term(s) in each specific case. To put it differently, where legal jargon terms are at stake, Article 3(2) actually operates as if it were a rule establishing the prevailing authentic text in accordance with Article 33(1) VCLT,[1994] provided that the context does

[1990] "Emploi salarié" is the term used in the French official version of Article 15 OECD Model.
[1991] Or "lavoro dipendente".
[1992] Or the domestic law meaning of that State's legal jargon term corresponding to the term used in the treaty, in the case none of the authentic treaty texts has been drafted in that State's official language.
[1993] Or the comparison between the authentic text(s) and the OECD Model official versions.
[1994] In this case, however, there is evidence of the agreement of the parties to make the "prevailing" text

not require a different interpretation.

Obviously, the activity of establishing the "general meaning" and assessing whether the domestic law meaning and the "general meaning" sufficiently overlap entails a significant dose of discretion by the interpreter, which is limited only by the (good faith) requirement to support the chosen conclusions with reasonable arguments.

If the issue is looked at from the perspective of the distinction between type-A and type-B divergences, the following conclusions may be drawn.

Where the p*rima facie* discrepancies among the authentic treaty texts are caused exclusively by type-A divergences, the domestic law meanings of the terms employed in the various authentic texts commonly overlap with their "general meaning". In these cases, therefore, Article 3(2) does not require, on the basis solely of such a *prima facie* discrepancy, the interpreter to attribute to the relevant terms employed in the authentic text drafted in the official language of the State applying the treaty a meaning other than the one they have under the domestic law of that State.[1995]

Where the *prima facie* discrepancies are caused by the interaction between type-A and type-B divergences, however, it is more probable that some of the domestic law meanings of the terms employed in the various authentic texts do not sufficiently overlap with their "general meaning". This risk appears somewhat related to the impact that the type-B divergence has on the *prima facie* discrepancy. In these cases, the interpreter must carefully assess whether the meaning that the terms employed in the authentic text drafted in the official language of the State applying the treaty have under the domestic law of that State sufficiently overlaps with the "general meaning" thereof and, where this is not the case, he has to establish what the different meaning required by the context is. Such an alternative meaning might be the meaning that, under the domestic law of the State applying the treaty, best corresponds to the "general meaning" of the relevant treaty terms, or, where the context so requires, a uniform (and autonomous) meaning.

(iv) What is the relevance of Article 3(2) for the purpose of resolving the prima facie discrepancies in meaning among the various authentic texts, where the treaty's final clause provides that a certain authentic text is to prevail in the case of discrepancies?

Final clauses providing for a prevailing text in the case of discrepancies generally have only a limited bearing on the above conclusions.

In particular, such final clauses may be relevant in order to assess whether the overall context requires an interpretation different from that determined by attributing to the legal jargon term employed in the authentic text drafted in the language of the State applying the treaty the meaning it has under the domestic law of the latter.

---

applicable from the outset, subject to the overall context not requiring otherwise.

[1995] It obviously remains possible that some other element of the overall context requires the interpreter to attribute to the relevant treaty term a meaning other than the current domestic law meaning.

As previously mentioned, since (i) the overall context includes the various authentic texts of the provision to be interpreted and those of its related provisions and (ii) such provisions are also made up of non-legal jargon terms, it is possible that the constructions of these provisions, as expressed in the various authentic texts, may show some possible differences of meaning not due to the legal jargon terms employed therein. Such potential differences, where persisting after an interpretation of the relevant authentic texts based on Articles 31 and 32 VCLT, should be resolved under the treaty's final clause by giving preference to the interpretation stemming from the prevailing text. The resulting interpretation, which may shed light on the object and purpose of the relevant treaty provision and its interaction with other related provisions, must then be taken into account by the interpreter in order to determine whether the context otherwise requires and, more specifically, to establish the "general meaning" of the relevant legal jargon terms.

Moreover, the meanings that the relevant legal jargon term[1996] employed in the prevailing treaty text has under the domestic laws of the States using it[1997] are part of the overall context and, as such, may play a direct role in establishing the "general meaning" of the corresponding terms used in the various authentic texts. In this case, where the interpreter cannot establish such a "general meaning" by reconciling the various authentic texts through an interpretation thereof based on Articles 31 and 32 VCLT, the "general meaning" should be determined on the basis of the prevailing text, i.e. it should be derived from the legal jargon term employed in that text.

Take for instance, the 1925 Germany-Italy tax treaty, which has been authenticated only in the German and Italian languages. According to articles 5(3) and 11(2) of that treaty, the provisions concerning dividends paid to shareholders apply as well to income (profits distribution) from other *rights*[1998] that are similar in nature to shares, but not to income derived from other forms of participation in companies, to which other provisions of the tax treaty apply. A *prima facie* discrepancy exists between the German and the Italian authentic texts of the above-mentioned article, since the former uses the term "Wertpapieren", while the latter employs the term "valori mobiliari" for the English term *rights*. In fact, while in the German language the legal jargon term "Wertpapieren" substantially correspond to the English term "securities", thus requiring the incorporation of the relevant rights into certificates for circulation purposes,[1999] the Italian legal jargon term "valori mobiliari" has a wider bearing and

[1996] Or proxies thereof.

[1997] I.e., generally, the meaning that the relevant term has under the domestic laws of the States having, as their official language, the language in which the prevailing treaty text is drafted. By recourse to bilingual dictionaries, legal dictionaries and legal textbooks and encyclopedias, the interpreter may also establish what the terms are, in the official languages of the contracting State applying the treaty (and their underlying concepts in the respective legal system), which are commonly regarded as corresponding to the terms (and underlying concepts) used in the prevailing treaty text, and determine their domestic law meanings accordingly.

[1998] The author chose the term "rights" for the present English translation as a *neutral* term, that being a term used more than once in the current English official version of Article 10(3) OECD Model.

[1999] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a.

might be used to denote corporate rights not represented by securities, i.e. not incorporated in any certificate.[2000] Therefore, a construction of the German text in accordance with German domestic law would lead to the conclusion that the treaty provisions concerning the taxation of income from shares do not apply to profits distributed by companies whose capital is not represented by securities, while an interpretation of the Italian authentic text made in accordance with Italian domestic law would lead to the opposite conclusion. If, by assumption, the 1925 Germany-Italy tax treaty had provided for an English authentic text to prevail in the case of divergences and the English text of Articles 5(3) and 11(2) had employed the term "securities", the interpreter would have had a good argument for concluding that the "general meaning" of the relevant treaty terms in the three authentic languages excluded rights in the capital of the distributing company non-incorporated in certificates. As a consequence, where Italy was applying the treaty, the interpreter should have concluded that the context required an interpretation other than the one based on the domestic law meaning of the term "valori mobiliari". The opposite conclusion would have been reached where the hypothetical prevailing text had used the term "rights", instead of "securities".

On the other hand, it is clearly possible (and generally probable) that a single interpreter may attribute different meanings to the same treaty provision depending on which contracting State applies it. In this case, however, as long as the domestic law meanings of the terms employed in the various authentic texts substantially overlap with each other and with their "general meaning", it is not the multilingual character of the tax treaty that causes a single treaty provision[2001] to have two different meanings when applied by the two contracting States. It is the reference to those States' domestic law encompassed in Article 3(2) of the tax treaty (and, therefore, the treaty-intrinsic multijuarlism) that entails it: *two texts, one treaty; one treaty, two rules*. This multiplicity of meanings, therefore, is outside the scope and purpose of the treaty's final clause; it is not an issue that clause deals with.[2002]

Take, for instance, Article 15 of the 1978 Brazil-Italy tax treaty. It employs the term "emprego" in the Portuguese authentic text and the term "attività dipendente" in the Italian authentic text as corresponding to the term "employment" used in the English authentic text, which prevails in the case of doubt. Assuming that the "general meaning"

[2000] See G. Melis, *L'Interpretazione nel Diritto Tributario* (Padova: Cedam, 2003), p. 622.

[2001] According to Article 33 VCLT, a treaty provision remains a single treaty provision regardless of the number of authentic texts by means of which it is expressed.

[2002] This conclusion is further supported by the following analysis. If the interpreter decided to rely solely on the prevailing text, in order to interpret the legal jargon terms employed therein he should, pursuant to Article 3(2), refer to the meanings that those terms have under the law of the contracting State applying the treaty. Unfortunately, however, such terms most probably do not have any meaning under that domestic law since they are not use therein, the domestic law of that contracting State being drafted solely in the official language thereof. The interpreter, therefore, should decide which terms, expressed in the latter language, best correspond to the terms used in the prevailing treaty text: in order to do so, the best guidance available would certainly be the authentic treaty text drafted in the official language of the contracting State applying the treaty. Which would bring the interpreter back to the starting point, provided that the domestic law meaning of the relevant term employed in that text substantially overlaps with the "general meaning" common to the corresponding terms used in the various authentic texts.

of such terms substantially corresponds to the meaning of the term "employment" under English law, the domestic law meaning of the term "attività dipendente" under Italian law (the same, *mutatis mutandis*, holds true for the Portuguese term "emprego") substantially overlaps with that "general meaning" (in the sense that the prototypical employment relations are covered by both). It is, therefore, reasonable for the interpreter to use the Italian law meaning of the term "attività dipendente" to construe Article 15 where Italy is the contracting State applying the treaty. The fact that the English text prevails in the case of discrepancies does not compel the interpreter to set aside the Italian domestic law meaning of the term "attività dipendente" only because the item of income at stake (for instance, the income paid for an activity carried out by a person under the coordination, but not under the full control and direction, of a third party), which is denoted by the latter term under Italian law, it is not denoted by the term "employment" under, say, English law.

LIST OF ABBREVIATIONS

- ***1964 Draft***: International Law Commission's 1964 Draft articles on the law of treaties
- ***1966 Draft***: International Law Commission's 1966 Draft articles on the law of treaties
- ***AC***: Tax Law Reports – Appeal Cases (United Kingdom)
- ***BNB***: Beslissingen in belastingzaken. Nederlandse belastingrechtspraak (the Netherlands)
- ***Ch***: Tax Law Reports – Chancery Division (United Kingdom)
- ***CTC***: Canada Tax Cases
- ***DTC***: Dominion Tax Cases (Canada)
- ***ECHR***: European Convention on Human Rights, concluded in Rome on 4 November 1950
- ***ECJ*** : European Court of Justice
- ***ECtHR***: European Court of Human Rights
- ***EWHC***: High Court of Justice of England and Wales (United Kingdom)
- ***F. Supp.***: Federal Supplement (United States)
- ***F.***: Federal Reporter (United States)
- ***F.2d***: Federal Reporter, Second Series (United States)
- ***F.3d***: Federal Reporter, Third Series (United States)
- ***FCA***: Federal Court of Australia
- ***GAAT***: General Agreement on Tariffs and Trade (1994)
- ***ICJ***: International Court of Justice
- ***ICSID***: International Centre for Settlement of Investment Disputes
- ***ILC 2006 Report***: Report of the International Law Commission. Fifty-eight session (1 May-9 June and 3 July-11 August 2006). Document A/61/10
- ***ILC***: International Law Commission (United Nations)
- ***ITLR***: International Tax Law Reports
- ***NAFTA***: North American Free Trade Agreement

- ***OECD Commentary***: Commentary to the OECD Model Tax Convention on Income and on Capital (where no reference is made to any specific year of publication, the reference is intended to the 2010 version of the OECD Commentary)
- ***OECD Draft***: OECD Draft Double Taxation Convention on Income and on Capital (1963)
- ***OECD Model***: OECD Model Tax Convention on Income and on Capital (where no reference is made to any specific year of publication, the reference is intended to the 2010 version of the Model)
- ***OECD Partnerships Report***: Report *The Application of the OECD Model Tax Convention to Partnerships Partnership*, adopted by the OECD Committee on Fiscal Affairs on 20 January 1999
- ***OECD***: Organisation for Economic Co-operation and Development
- ***OEEC***: Organisation for European Economic Co-operation
- ***P.***: Pacific Reporter (United States)
- ***P.2d***: Pacific Reporter, Second Series (United States)
- ***P.3d***: Pacific Reporter, Third Series (United States)
- ***PCIJ***: Permanent Court of International Justice
- ***RCADI***: Recueil des cours de l'Académie de droit international de La Haye
- ***SCR***: Supreme Court Reports (Canada)
- ***STC***: Simon's Tax Cases (United Kingdom)
- ***T.C.***: United States Tax Court Reports
- ***Tax treaty***: bilateral tax convention on income and/or on capital
- ***TC***: Tax Cases – Official Tax Case Reports (United Kingdom)
- ***U.S.***: United States Supreme Court Reports
- ***UKHL***: United Kingdom House of Lord
- ***UN***: United Nations
- ***UNCLT-1st***: United Nations Conference on the Law of Treaties. First session, Vienna, 26 March – 24 May 1968. Summary records of the plenary meetings and of the meetings of the Committee of the Whole
- ***UNCLT-2st***: United Nations Conference on the Law of Treaties. Second session, Vienna, 9 April – 22 May 1969. Summary records of the plenary meetings and of the meetings of the Committee of the Whole

- ***UNCLT-Doc***: United Nations Conference on the Law of Treaties. First and second session, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969. Documents of the Conference
- ***UNCTAD***: United Nations Conference on Trade and Development
- ***UNICITRAL***: United Nations Commission on International Trade Law
- ***United Nations Commentary***: Commentary to the United Nations Model Double Taxation Convention between Developed and Developing Countries (where no reference is made to any specific year of publication, the reference is intended to the 2001 version of the Commentary)
- ***United Nations Model***: United Nations Model Double Taxation Convention between Developed and Developing Countries (where no reference is made to any specific year of publication, the reference is intended to the 2001 version of the Model)
- ***VCLT***: Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969
- ***WLR***: Weekly Law Reports (United Kingdom)
- ***WTO***: World Trade Organization
- ***YBILC***: Yearbook of the International Law Commission
- ***YBILC 1953-II***: Yearbook of the International Law Commission, 1953, Volume II, Documents of the fifth session including the report of the Commission to the General Assembly
- ***YBILC 1958-II***: Yearbook of the International Law Commission, 1958, Volume II, Documents of the tenth session including the report of the Commission to the General Assembly
- ***YBILC 1962-I***: Yearbook of the International Law Commission, 1962, Volume I, Summary records of the fourteenth session, 24 April – 29 June 1962
- ***YBILC 1962-II***: Yearbook of the International Law Commission, 1962, Volume II, Documents of the fourteenth session including the report of the Commission to the General Assembly
- ***YBILC 1963-I***: Yearbook of the International Law Commission, 1963, Volume I, Summary records of the fifteenth session, 6 May – 12 July 1963
- ***YBILC 1963-II***: Yearbook of the International Law Commission, 1963, Volume II, Documents of the fifteenth session including the report of the Commission to the General Assembly
- ***YBILC 1964-I***: Yearbook of the International Law Commission, 1964, Volume I, Summary records of the sixteenth session, 11 May – 24 July 1964

- ***YBILC 1964-II***: Yearbook of the International Law Commission, 1964, Volume II, Documents of the sixteenth session including the report of the Commission to the General Assembly
- ***YBILC 1965-I***: Yearbook of the International Law Commission, 1965, Volume I, Summary records of the first part of the seventeenth session, 3 May – 9 July 1965
- ***YBILC 1965-II***: Yearbook of the International Law Commission, 1965, Volume II, Documents of the first part of the seventeenth session including the report of the Commission to the General Assembly
- ***YBILC 1966-I (part I)***: Yearbook of the International Law Commission, 1966, Volume I, Part I, Summary records of the second part of the seventeenth session, 3 – 28 January 1966
- ***YBILC 1966-I (part II)***: Yearbook of the International Law Commission, 1966, Volume I, Part II, Summary records of the eighteenth session, 4 May – 19 July 1966
- ***YBILC 1966-II***: Yearbook of the International Law Commission, 1966, Volume II, Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly
- ***YBILC 1979-II (part I)***: Yearbook of the International Law Commission, 1979, Volume II, Part I, Documents of the thirty-first session (excluding the report of the Commission to the General Assembly)
- ***YBILC 1982-II (part II)***: Yearbook of the International Law Commission, 1982, Volume II, Part II, Report of the Commission to the General Assembly on the work of its thirty-fourth session
- ***YBILC 1987-II (part II)***: Yearbook of the International Law Commission, 1987, Volume II, Part II, Report of the Commission to the General Assembly on the work of its thirty-ninth session
- ***YBILC 1992-II (part II)***: Yearbook of the International Law Commission, 1992, Volume II, Part II, Report of the Commission to the General Assembly on the work of its forty-fourth session
- ***YBILC 1996-II (part II)***: Yearbook of the International Law Commission, 1996, Volume II, Part II, Report of the Commission to the General Assembly on the work of its forty-eighth session
- ***YBILC 2006-II (part II)***: Yearbook of the International Law Commission, 2006, Volume II, Part II, Documents of the second part of the fifty-eighth session including the reports of the Commission to the General Assembly

REFERENCE MATERIALS

BOOKS

- Alexy, R. (translated by R. Adler and N. MacCormick), *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (Oxford: Oxford University Press, 1989)
- Allan, K. (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009)
- Allan, K., *Natural Language Semantics* (Oxford: Blackwell Publishers, 2001)
- Arendonk, H. van, Engelen, F., and Jansen, S. (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005)
- Aristotle (translated by A. J. Jenkinson), *Prior Analytics* (The Internet Classics Archive) – available online at http://classics.mit.edu//Aristotle/prior.html
- Aristotle (translated by B. Jowett), *Politics* (The Internet Classics Archive) – available online at http://classics.mit.edu//Aristotle/politics.html
- Aristotle (translated by W. D. Ross), *Metaphysics* (The Internet Classics Archive) – available online at http://classics.mit.edu//Aristotle/metaphysics.html
- Arnold, B. J., and McIntyre, M. J., *International Tax Primer. Second Edition* (The Hague: Kluwer Law International, 2002)
- Arnold, B. J., et al., *Ward's Tax Law and Planning. Volume 6* (Toronto: The Carwell Co. Ltd., 1983)
- Augustinus, *Confessions and Enchiridion, newly translated and edited by Albert C. Outler* (Philadelphia: Christian Classics Ethereal Library, 2007)
- Augustinus, *Confessionum Libri Tredicim* (Citta Nuova Editrice) – available on-line at http://www.augustinus.it/latino/confessioni/index.htm
- Ault, H. J., and Arnold, B. J., *Comparative Income Taxation: A Structural Analysis* (New York: Aspen Publishers, 2004)
- Aust, A., *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007)
- Baker, P., *Double Taxation Conventions* (London: Sweet & Maxwell, 2001 – loose-leaf)
- Bariatti, S., *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986)
- Bauer, L., *English Word-Formation* (Cambridge: Cambridge University Press, 1983)

- Bentham, J., P*rinciples of International Law* (Bowring edition, 1843) – available on-line at http://www.laits.utexas.edu/poltheory/bentham/pil/index.html
- Bhatia, V. K., et al. (eds.), *Multilingual and Multicultural Contexts of Legislation* (Frankfurt: Peter Lang, 2003)
- Bobbio, N., *Teoria generale del diritto* (Torino: Giappichelli Editore, 1993)
- Bonfils, H., *Manuel de droit international public (droit de gens)* (Paris: Fauchille, 1914)
- Breton, A., et al. (eds.)., *Multijuralism. Manifestations, Causes and Consequences* (Farnham: Ashgate Publishing, 2009)
- Brownlie, I., *Principles of public international law* (Oxford: Oxford University Press, 2003)
- Cao, D., *Translating Law* (Clevedon: Multilingual Matters Ltd, 2007)
- Carnap, R., *Meaning and Necessity. A Study in Semantics and Modal Logic* (Chicago: Chicago University Press, 1956)
- Cassese, A., *Il diritto interno nel processo internazionale* (Padova: Cedam, 1962)
- Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953)
- Chomsky, N., *Aspects of the Theory of Syntax* (Cambridge: MIT Press, 1965)
- Chomsky, N., *Syntactic Structures* (The Hague: Mouton, 1957)
- Collins, L. (gen. ed.), *Dicey, Morris and Collins on The Conflict of Laws* (London: Sweet & Maxwell, 2006)
- Cortelazzo, M., and Zolli, P., *Il Nuovo Etimologico. Dizionario Etimologico della Lingua Italiana* (Bologna: Zanichelli Editore, 1999)
- Coulmas, F. (ed.), *A Language Policy for the European Community: Prospects and Quandaries* (Berlin: Mouton de Gruyter, 1991)
- Creech, R. L., *Law and Language in the European Union. The Paradox of a Babel "United in Diversity*" (Groningen: Europa Law Publishing, 2005)
- Dahm, G., *Völkerrecht. Vol. 3* (Stuttgart: Kohlhammer Verlag, 1961)
- De Broe, L., *International Tax Planning and Prevention of Abuse. A Study under Domestic Tax Law, Tax Treaties and EC Law in relation to Conduit and Base Companies* (Amsterdam: IBFD Publications, 2008)
- Debatin, H., and Walter, O. L., *Handbook on the United States-Germany Tax Convention* (Amsterdam: IBFD PUblications, 1966 – loose-leaf)

- Debatin, H., and Wassermeyer, F. (eds.), *Doppelbesteuerung: DBA* (Munich: Beck, 1997 – loose-leaf)
- Deby-Gérard, F., *Le rôle de la règle de conflit dans le règlement des rapports internationaux* (Paris: Dalloz, 1973)
- Douma, S., and Engelen, F. (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008)
- Dworkin, R., *Law's Empire* (Cambridge: Harvard University Press, 1986)
- Edwardes-Ker, M., *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf)
- Engelen, F., *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004)
- Falk, R. A., *The Status of Law in International Society* (Princeton: Princeton University Press, 1970)
- Fawcett, J., *Law and Power in International Relations* (London: Faber & Faber, 1982)
- Fernández de Casadevante Romani, C., *Sovereignty and Interpretation of International Norms* (Berlin: Springer-Verlag, 2007)
- Finnis, J., *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980)
- Fitzmaurice, G., *The Law and Procedure of the International Court of Justice. Volume I* (Cambridge: Grotious Publications Limited, 1986)
- Focarelli, C., *Lezioni di diritto internazionale privato* (Perugia: Morlacchi Editore, 2005)
- Frankenstein, E., *Internationales Privatrecht (Grenzrecht). Volumen I* (Berlin: Rothschild, 1926)
- Gadamer, H.-G. (originally translated by W. Glen-Doepel and revised by J. Weinsheimer and D. G. Marshall), *Truth and Method* (London: Continuum International Publishing Group, 2004)
- Gamut, L. T. F., *Logic, Language, and Meaning. Vol. 1. Introduction to Logic* (Chicago: Chicago University Press. 1991)
- Gardiner, R., *Treaty Interpretation* (Oxford: Oxford University Press, 2008)
- Guastini, R., *Lezioni di teoria analitica del diritto* (Torino: Giappichelli, 1986)
- Hackworth, G. H., *Digest of International Law. Volume V* (Washington: United States Government Printing Office, 1943)
- Haraszti, G., *Some fundamental problems of the law of treaties* (Budapest: Akadémiai Kiadó, 1973)

- Hart, H. L. A., *The Concept of Law* (London: Oxford University Press, 1961)
- Hilf, M., *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973)
- Hilf, M., *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973)
- Hogeweg, L., *Word in process. On the interpretation, acquisition, and production of words* (Utrecht: LOT, 2009)
- Horn, L. R., *A Natural History of Negation* (Chicago: University of Chicago Press, 1989)
- International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993)
- International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010)
- International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95b (The Hague: Sdu Uitgevers, 2010)
- Jackendoff, R., *Architecture of the Language Faculty* (Cambridge: MIT Press, 1997)
- Jackendoff, R., *Consciousness and the Computational Mind* (Cambridge: MIT Press, 1987)
- Jackendoff, R., *Semantic Structures* (Cambridge: MIT Press, 1990)
- Jackendoff, R., *Semantics and Cognition* (Cambridge: MIT Press, 1983), p. 139
- Jaszczolt, K. M., *Semantics and Pragmatics. Meaning in Language and Discourse* (London: Longman, 2002)
- Jayme, E. (ed.), *Langue et Droit. XV Congrès International de Droit Comparé. Bristol 1998* (Bruxelles: Bruylant, 1999)
- Jellinek, G., *Allgemeine Staatsleere* (Berlin: Springer-Verlag, 1929)
- Jennings, R., and Watts, A. (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992)
- Kahn, C. H., *The Art and Thoughts of Heraclitus. An edition of the fragments with translation and commentary* (Cambridge: Cambridge University Press, 1981)
- Kamp, H., and Reyle, U*., From Discourse to Logic. Introduction to Modeltheoretic Semantics of Natural Language, Formal Logic and Discourse Representation Theory* (Dordrecht: Kluwer, 1993)
- Katz, J. J., *The Philosophy of Language* (New York: Harpen and Raw, 1966)

- Kelsen, H. (revised and edited by R. W. Tucker), *Principles of International Law* (New York: Holt, Rinehart and Winston, 1966)
- Kelsen, H. (translated by B. Laroche and V. Faure), *Théorie générale du droit et de l'État* (Bruxelles: Bruylant, 1997)
- Kiss, A. C., *Répertoire de la pratique française en matière de droit international public*. *Tome I* (Paris: Centre national de la recherche scientifique, 1962)
- Kolb, R., *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruxelles: Bruylant, 2006)
- Koskenniemi, M., *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005)
- Kuhn, T., *The Structure of Scientific Revolutions* (Chicago: The University of Chicago Press, 1962)
- Lakoff, G., *Woman, fire and dangerous things. What categories reveal about the mind* (Chicago: University of Chicago Press, 1987)
- Lauterpacht, H., *Private Law Sources and Analogies of International Law. With Special Reference to International Arbitration* (London: Longmans, 1927)
- Lauterpacht, H., *The development of International law by the International Court* (London: Stevens & Sons Limited, 1958)
- *Le Grand Robert de la Langue Française. Tome I* (Paris: Le Robert, 1990)
- Leo, M., *Le imposte sui redditi nel testo unico. Tomo II* (Milano: Giuffré, 2007)
- Levinson, S., *Presumptive Meanings. The Theory of Generalized Conversational Implicature* (Cambridge: MIT Press, 2000)
- Linderfalk, U., *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007)
- Lyons, J., *Semantics* (Cambridge: Cambridge University Press, 1977)
- MacLaury, R. E., *Color and Cognition in Mesoamerica. Constructing Categories as Vantages* (Austin: University of Texas Press, 1997)
- Maisto, G. (ed.), *Courts and Tax Treaty Law* (Amsterdam: IBFD Publications, 2007)
- Maisto, G. (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005)
- Maisto, G. (ed.), *Residence of Companies under Tax Treaties and EC Law* (Amsterdam: IBFD Publications, 2009)

- Maisto, G. (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006)
- Maisto, G. (ed.), *The meaning of "enterprise", "business" and "business profits" under Tax Treaty and EU Tax Law* (Amsterdam: IBFD Publications, 2011)
- Maisto, G., Nikolakakis, A., and Ulmer, J. M., (*eds*.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013)
- Makarczyk, J. (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996)
- Marres, O. C. R., and Weeghel, S. van, *Jurisprudentiebundel IBR* (Deventer: Kluwer, 2008)
- Mattila, H. E. S., *Comparative Legal Linguistics* (Aldershot: Ashgate Publishing LImited, 2006)
- McDougal, M. S., *et al*., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967)
- McNair, A. D., *The Law of Treaties* (Oxford; The Clarendon Press,1961)
- Melis, G., *L'Interpretazione nel Diritto Tributario* (Padova: Cedam, 2003)
- Mey, J. L., *Pragmatics: An Introduction* (Oxford: Blackwell, 2001)
- North, P., and Fawcett, J. J., *Cheshire and North's Private International Law* (Oxford: Oxford University Press, 2004)
- O'Connell, D. P., *International Law* (London: Stevens & Sons, 1970)
- O'Connor, J. F., *Good Faith in International Law* (Aldershot: Dartmouth, 1991)
- Orakhelashvili, A., *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008)
- Ostrower, A., *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965)
- Ostrower, A., *Language, Law, and Diplomacy* (Philadelphia: University of Pennsylvania Press, 1965)
- Peeters, J. B. J., *Internationaal Belastingrecht in Nederland* (Amsterdam: L.J. Veen's Uitgeversmaatschappij, 1954)
- Plaisant, R., *Les règles de conflit de lois dans les traités* (Alençon: Imprimerie Alençonnaise, 1946)
- Plato (translated by B. Jowett), *Cratylus* (The Internet Classics Archive) – available online at http://classics.mit.edu//Plato/cratylus.html

- Poincaré, H. (translated by G.B. Halstead), *The Foundations of Science: Science and Hypothesis, The Value of Science, Science and Methods* (Lancaster: The Science Press, 1946)
- Popper, K., *Conjectures and refutations: the growth of scientific knowledge* (London: Routledhe, 1991)
- Popper, K., *The logic of scientific discovery* (London: Routledhe, 2002)
- Prince, A., and Smolensky, P., *Optimality Theory. Constraint interaction in generative grammar* (Malden: Blackwell Publishing, 2004)
- Quine, W. V. O., *From a logical point of view. Nine Logico-Philosophical Essays* (Cambridge: Harvard University Press, 1953)
- Rawls, J., *A theory of justice* (Cambridge: Harvard University Press, 1971)
- Reuter, P., *Droit International Public* (Paris: Presse Universitaires de France, 1972)
- Rivier, A., *Principes du droit des gens. Tome II* (Paris: Arthur Rousseau, 1896)
- Robertson, A. H., *Characterisation in the Conflict of Laws* (Cambridge: Harvard University Press, 1940)
- Rocha, S. A., *Interpretation of Double Taxation Conventions: General Theory and Brazilian Perspective* (Alphen aan den Rijn: Kluwer Law International, 2009)
- Romano, S., *L'ordinamento giuridico* (Firenze: Sansoni, 1946)
- Rosenne, S., *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989)
- Rosenne, S., *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007)
- Rosenne, S., *The Law of Treaties – A Guide to the legislative history of the Vienna Convention* (New York: Oceana Publications, 1970)
- Rousseau, C. E., *Principes généraux du droit international public* (Paris: Pedone, 1944)
- Rousseau, J. J. (ed. M. Cranston), *The Social Contract* (Harmondsworth: Penguin Books 1986)
- Rudolf, W., *Die Spreche in der Diplomatie und internationalen Verträgen* (Frankfurt: Athenäum Verlag, 1972)
- Russell, B., *The principles of mathematics* (Cambridge: Cambridge University Press, 1903)
- Russell, B., *The Problems of Philosophy* (New York: Barnes and Noble, 2004)
- Russo, E., *L'interpretazione dei testi normativi comunitari* (Milano: Giuffrè, 2007)

- Sacco, R. (ed.), *L'interprétation des textes juridiques rédigés sans plus d'une langue* (Torino: L'Harmattan Italia, 2002)
- Sacco, R., *Introduzione al diritto comparato* (Torino: UTET, 1992)
- Sapir, E. (ed. David G. Mandelbaum), *Culture, Language and Personality. Selected Essays* (Berkley: University of California Press, 1949)
- Schilcher, M., *Die Vermeidung der doppelten Nichtbesteuerung durch subject-to-tax-Klauseln* (Vienna: Linde, 2004)
- Scott, J. B., *Le Français, Langue Diplomatique Moderne: étude critique de conciliation internationale* (Paris: Pédone 1924)
- Servais, J. M., *International Labour Law* (The Hague: Kluwer International Law, 2009)
- Sinclair, I., *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984)
- Sørensen, M. (ed.), *Manual of Public International Law* (London: Macmillan, 1968), 175 *et seq*.
- Steels, L., *The Talking Heads Experiment* (Antwerpen: Laboratorium, 1999)
- Strauss, L., *Natural Right and History* (Chicago: The University of Chicago Press, 1953)
- Sur, S., *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974)
- Tabory, M., *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980)
- Tarello, G., *L'interpretazione della legge* (Milano: Giuffrè, 1980)
- Taylor, J. R., *Linguistic categorization. Prototypes in linguistic theory* (Oxford: Oxford University Press, 1989)
- Tiley, J., and Collison, D., *UK Tax Guide* (London: Butterworths, 1999)
- Tixier, G., Gest, G., and Kerogues, J., *Droit Fiscal International* (Paris: Librairies Techniques, 1979)
- Tommasello, M., *Constructing a Language. A Usage-Based Theory of Language Acquisition* (Cambridge: Harvard University Press, 2003).
- Toynbee, A. J., *A Study of History – Vol. V: The Disintegrations of Civilizations* (Oxford: Oxford University Press, 1939)
- Ullmann, W., *Law and Politics in the Middle Ages; an introduction into the sources of medieval political ideas* (London: Hodder & Stoughton, 1975)

- Unger, R. M., *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986)
- Van Damme, I., *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009)
- Vattel, E. de, *Le droit des gens. Ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (London, 1758) – available on-line at http://oll.libertyfund.org/title/1052
- Verdross, A., et al., *Völkerrecht* (Vienna: Springer-Verlag, 1964)
- Vogel, K., et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997)
- Vogel, K., et al., *United States Income Tax Treaties* (The Hague: Kluwer Law and Taxation, 1989 – loose-leaf)
- Wagner, A. and Cacciaguidi-Fahy, S., *Obscurity and Clarity in the Law. Prospects and Challenges* (Aldershot: Ashgate Publishing LImited, 2008)
- Ward, D. A., et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005)
- Weinreich, U., *On Semantics* (Philadelphia: University of Pennsylvania Press, 1980)
- Wertheimer, M., *Productive Thinking* (New York: Harper, 1959)
- Wheaton, H., *Elements of International Law: with a sketch of the history of the science* (Oxford: Clarendon Press, 1936)
- Whorf, B. L. (ed. John B. Carroll), *Language, Thought, and Reality. Selected Writings* (Cambridge: MIT Press, 1956)
- Wilkins, J., *An Essay toward a Real Character and a Philosophical Language* (London: Thoemmes Continuum, 2002)
- Wittgenstein, L. (translated by D. F. Pears and B. F. McGuiness), *Tractatus Logico-Philosophicus* (London: Routledge, 2001)
- Wittgenstein, L. (translated by G. E. M. Anscombe), *Philosophical Investigations* (Oxford: Blackwell, 1953)

ARTICLES

- Aarnio, A., "Taking Rules Seriously", 42 *Archives for Philosophy of Law and Social Philosophy – Supplement* (1990), 180 *et seq.*
- Alexy, R., "On the Structure of Legal Principles", 13 *Ratio Juris* (2000), 294 *et seq.*
- Allan, K., "Categorizing Percepts: Vantage Theory", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 51 *et seq*.
- Allan, K., "Stereotype Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 939-942, at 942
- Arginelli, P., "Riflessioni su linguaggio, diritto dell'Unione europea e diritto tributario", 7 *Diritto e Pratica Tributaria Internazionale* (2010), 1425 *et seq*.
- Arginelli, P., et al., "The Royal Bank of Scotland case: More controversy on the interpretation of the term "beneficial owner"", in R. Russo and R. Fontana (eds.), *A Decade of Case Law. Essays in honour of the 10th anniversary of the Leiden Adv LLM in International Tax Law* (Amsterdam: IBFD Publications, 2008), 215 *et seq.*
- Arnold, B., "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*
- Arnold, B., Sasseville, J., and Zolt, E., "Summary of the Proceedings of an Invitational Seminar on Tax Treaties in the 21st Century", 56 *Bulletin for international taxation* (2002), 233 *et seq.*
- Aste, L. J., "Reforming French Corporate Governance: A Return to the Two-Tier Board?", 32 *George Washington Journal of International Law & Economics* (1999-2000), 1 *et seq.*
- Ault, H. G., "The Role of the OECD Commentaries in the Interpretation of Tax Treaties", 22 *Intertax* (1994*),* 144 *et seq.*
- Auwera, J. van der, and Plungian, V., "Modality's semantic map", 2 *Linguistic Typology* (1998), 79 *et seq*.
- Auwera, J. van der, and Temürcü, C., "Semantic Maps", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 863 *et seq*.
- Auwera, J. van der, Dobrushina, N., and Goussev, V., "A semantic map for imperative-hortatives", in D. Willems *et al*. (eds.), *Contrastive Analysis in Language. Identifying Linguistic Units of Comparison* (Basingstoke: Palgrave Macmillian, 2004), 44 *et seq*.
- Avella, F., "Il beneficiario effettivo nelle convenzioni contro le doppie imposizioni: prime pronunce nella giurisprudenza di merito e nuovi spunti di discussione", *Rivista di Diritto Tributario. Parte Quinta* (2011), 14 *et seq.*

- Avella, F., "Italy", in G. Maisto (ed.), *The meaning of "enterprise", "business" and "business profits" under Tax Treaty and EU Tax Law* (Amsterdam: IBFD Publications, 2011), 341 *et seq.*
- Avella, F., "La qualificazione dei redditi nelle Convenzioni internazionali contro le doppie imposizioni stipulate dall'Italia", *Rivista di Diritto Tributario. Parte Quinta* (2010), 45 *et seq.*
- Avella, F., "Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention", *World Tax Journal* (2012), 95 *et seq*.
- Avery Jones, J. F., "Problems of Categorising Income and Gains for Tax Treaty Purposes", *British Tax Review* (2001), 382 *et seq.*
- Avery Jones, J. F., "Qualification Conflicts: the Meaning of Application in Article 3(2) of the OECD Model", in H. Beisse et al. (eds.), *Festschrift für Karl Beusch zum 68. Geburtstag am 31. Oktober 1993* (Berlin: Walter de Gruyter, 1993), 43 *et seq*.
- Avery Jones, J. F., "The binding nature of the OECD Commentaries from the UK point of view", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 157 *et seq.*
- Avery Jones, J. F., "The interaction between tax treaty provisions and domestic law", in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq*.
- Avery Jones, J. F., "United Kingdom", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 597 *et seq.*
- Avery Jones, J. F., and Ward, D. A., "Agents as permanent establishments under the OECD Model Tax Convention", 33 *European Taxation* (1993), 154 *et seq*.
- Avery Jones, J. F., et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*
- Avery Jones, J. F., et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*
- Avery Jones, J. F., et al., "The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?", 1 *World Tax Journal* (2009), 5 *et seq.*
- Avery Jones, J. F., et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq*.
- Avery Jones, J. F., et al., "The Origins of Concepts and Expressions used in the OECD Model and their Adoption by States", 60 *Bulletin for international taxation* (2006), 220 *et seq.*
- Avi-Yonah, R. S., "Tax Competition, Tax Arbitrage and the International Tax

Regime", 61 *Bulletin for international taxation* (2007), 130 *et seq.*

- Barassi, M., "Comparazione giuridica e studio del diritto tributario straniero", in V. Uckmar (ed.), *Diritto Tributario Internazionale* (Padova: Cedam, 2005), 1499 *et seq.*
- Barker, C., "Vagueness", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1037 *et seq*.
- Bartin, E., "De l'impossibilité d'arriver à la solution définitive des conflits de loi", *Journal du droit international privé* (1897), 225 *et seq*., 466 *et seq*. and 720 *et seq*.
- Bartin, E., "La doctrine des qualifications et ses rapports avec le caractère national du conflit des lois", 31 *RCADI* (1930), 561 *et seq*.
- Bender, T., and Engelen, F., "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*
- Berglin, R. H., "Treaty Interpretation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: the Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal", 21 *Texas International Law Journal* (1986), 39 *et seq.*
- Berman, F., "Treaty "Interpretation" in a Judicial Context", 29 *Yale Journal of International Law* (2004), 315 *et seq.*
- Bernhardt, R., "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*
- Bird, A., "Naturalizing Kuhn", 105 *Proceedings of the Aristotelian Society* (2005), 99 *et seq*.
- Blutner, R., "Some Aspects of Optimality in Natural Language Interpretation", 17 *Journal of Semantics* (2000), 189 *et seq*.
- Boothe Luce, C., "The Ambassadorial Issue: Professionals or Amateurs?", 36 *Foreign Affairs* (1957), 105 *et seq.*
- Boyens, N. de, "France", in G. Maisto (ed.), *Residence of Companies under Tax Treaties and EC Law* (Amsterdam: IBFD Publications, 2009), 441 *et seq.*
- Bruggen, E. van der, "Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties", 43 *European Taxation* (2003), 142 *et seq*.
- Buffard, I., and Zemanek, K., "The "Object and Purpose" of a Treaty: An Enigma?", 3 *Austrian Review of International and European Law* (1998), 311 *et seq.*

- Cadosch, R., "Switzerland", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 303 *et seq.*
- Chaffin, R., "The concept of a semantic relation", in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 253 *et seq*.
- Clark, E. V., "The principle of contrast: A constraint on language acquisition", in B. MacWhinney (ed.), *Mechanisms of language acquisition* (Hillsdale: Erlbaum, 1987), 1 *et seq.*
- Cohen, R., "Meaning, Interpretation and International Negotiation", 14 *Global Society* (2000), 317 *et seq.*
- Cuerrier, M., et al., "Symposium: Canadian Bijuralism and Harmonization of Federal Tax Legislation", 51 *Canadian Tax Journal* (2003), 133 *et seq.*
- Currie, J. H., "International Treaties and Conventions as Agents of Convergence and Multijuralism in Domestic Legal Systems", in A. Breton et al (eds.)., *Multijuralism. Manifestations, Causes and Consequences* (Farnham: Ashgate Publishing, 2009), 11 *et seq*.
- Danat, B., "Language in the legal process", 14 *Law and Society Review* (1980), 445 *et seq*.
- David, R., "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5
- De Boek, R., "Belgium", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*
- De Broe, L., and Werbrouck, J., "Kroniek Internationaal Belastingrecht 2001-2002", in *Tijdschrift Rechtspersonen en Vennootschappen* (2002), 604 *et seq.*
- Debatin, H., "Subjektfähigkeit ausländischer Wirtschaftsgebilde im deutschen Steuerrecht", *Der Betriebsberater* (1988), *1155 et seq.*
- Déry , J.-M., "The Process of Tax Treaty Negotiation", in B. Arnold and J. Sasseville (eds.), *Special Seminar on Canadian Tax Treaties: Policy and Practice* (Toronto: Canadian Tax Foundation, 2000), 2 *et seq.*
- Déry, J.-M., and Ward, D. A., "Canada", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993)*,* 259 *et seq.*
- Douma, S., "Netherlands", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 267 *et seq.*
- Dworkin, R., "The Model of Rules", 35 *University of Chicago Law Review* (1967), 14 *et seq.*
- Easson, A., "Do We Sill Need Tax Treaties?", 54 *Bulletin for international taxation*

(2000), 619 *et seq.*

- Egger, P., et al., "The Impact of Endogenous Tax Treaties on Foreign Direct Investment: Theory and Evidence", 39 *Canadian Journal of Economics* (2006), 901 *et seq.*
- Ehrlich, L., "L'interprétation des traités", 24 *RCADI* (1928), 5 *et seq.*
- Ehrlich, L., "The Development of International Law as a Science", 105 *RCADI* (1962), 177 *et seq.*
- Ellis, M., "Intervention by Prof. Maarten Ellis", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 100 *et seq.*
- Engelen, F., "Some Observations on the Legal Status of the Commentaries on the OECD Model", 60 *Bulletin for international taxation* (2006), 105 *et seq*.
- Englisch, J., "Germany", in G. Maisto (ed.), *Residence of Companies under Tax Treaties and EC Law* (Amsterdam: IBFD Publications, 2009), 461 *et seq.*
- Falconbridge, J. D., "Characterisation in the Conflict of Laws", 53 Law Quarterly Review (1937), 235 *et seq*. and 537 *et seq*.;
- Fantozzi, A., "Conclusions", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 335 *et seq.*
- Fillmore, C. J., "An alternative to checklist theories of meaning", in C. Cogen et al. (eds.), *Proceeding of the First Annual Meeting of the Berkeley Linguistics Society* (1975), 123 *et seq*.
- Fillmore, C. J., "Frame Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 330 *et seq*.
- Fillmore, C. J., and Atkins, Beryl T., "*Toward a frame-based lexicon: the semantic of RISK and its neighbors"*, in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 75 *et seq*.
- Fitzmaurice, G., "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq.*
- Francescakis, P., "Qualifications", in *Répertoire de droit international Dalloz. Tome II* (Paris: Jurisprudence Générale Dalloz, 1969), 703 *et seq.*
- Frege, G., "Über Sinn und Bedeutung", in 100 *Zeitschrift für Philosophie und philosophische Kritik* (1892), 25 *et seq*.
- French, D., "Treaty Interpretation and the Incorporation of Extraneous Legal Rules",

55 *International and comparative law quarterly* (2006), 281 *et seq.*

- Gaja, G., "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*
- Galli, G. B., and Miraulo, A., "Italy", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 385 *et seq*.
- Gamble, J. K., and Ku, C., "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*
- Gentner, D., "Why Nouns are Learned Before Verbs: Linguistic Relativity versus Natural Partitioning", in S. A. Kuczay (ed.), *Language development. Vol. 2. Language, thought, and culture* (Hillsdale: Erlbaum, 1982), 301 *et seq.*
- Gentner, D., and Boroditsky, L., "Individuation, relational relativityand early word learning", in M. Bowerman and S. Levinson (eds.), *Language acquisition and conceptual development* (Cambridge: Cambridge University Press, 2001), 215 *et seq.*
- Gény, F., "Le particularisme du droit fiscal", in R. Carré de Malberg et al., *Mélanges R. Carré de Malberg* (Paris: Librairie du Recueil Sirey, 1933), 193 *et seq.*
- Germer, P., "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*
- Grandy, R. E., "Semantic fields, Prototypes, and the Lexicon" in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 103 *et seq*.
- Grice, H. P., "Logic and conversation", in P. Cole and J. Morgan (eds.), *Syntax and Semantics, vol. 3. Speech Acts* (New York: Academic Press, 1975), 41 *et seq*.
- Guggenheim, P., "Landesrechtliche Begriffe im Volkerrecht, vor allem im Bereiche der internationalen Organisation", in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt: Vittorio Klostermann, 1956), 133 *et seq.*
- Haarman, H., "Language Politics and the New European Identity", in F. Coulmas (ed.), *A Language Policy for the European Community: Prospects and Quandaries* (Berlin: Mouton de Gruyter, 1991), 103 *et seq*.
- Hardy, J., "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*
- Haspelmath, M., "The geometry of grammatical meaning. Semantic maps and cross-linguistic comparison", in M. Tommasello (ed.), *The new psychology of language*, Vol. 2 (Mahwah: Erlbaum, 2003), 211 *et seq*.

- Higgins, R., "Some Observations on the Inter-Temporal Rule in International Law", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 173 *et seq.*
- Hoop, H. de, "Optimal scrambling and interpretation", in H. Bennis M. Everaert and E. Reuland (*eds*.), *Interface Strategies* (Amsterdam, KNAW, 2000), 153 *et seq*.
- Hoop, H. de, and Swart, H. de, "Temporal adjunct clauses in Optimality Theory", 12 *Rivista di Linguistica* (2000), 107 *et seq*.
- Hoop, H. de, Hendriks, P., and Blutner, R., "On compositionality and bidirectional optimization", 8 *Journal of Cognitive Science* (2007), 137 *et seq*.
- Hopt, K. J., and Leyens, P. C., "Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy", 1 *European Company and Financial Law Review* (2004), 135 *et seq.*
- Hummer, W., ""Ordinary" versus "Special" Meaning. Comparison of the Approach of the Vienna Convention on the Law of Treaties and the Yale-School Findings", 26 *Österreichische Zeitschrift für öffentliches Recht* (1975), 87 *et seq*.
- Hummer, W., "Problemas jurídico-lingüísticos de la dicotomía entre el sentido 'ordinario' y el 'especial' de conceptos convencionales según la Convención de Viena sobre el Derecho de los Tratados de 1969", 28 *Revista Española de Derecho Internacional* (1975), 97 *et seq.*
- Jacobs, F. G., "Varieties of Approach to Treaty Interpretation: With Special reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference", 18 *International and comparative law quarterly* (1969), 318 *et seq.*
- Johnston, J. R., and Slobin, D. I., "The development of locative expressions in English, Italian, Serbo-Croatian and Turkish", 6 *Journal of Child Language* (1979), 529 *et seq.*
- Kahn, F., "Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts", 30 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (1891), 1 *et seq*.
- Kamp, H., and Partee, B., "Prototype theory and compositionality", 57 *Cognition* (1995), 129 *et seq.*
- Kandev, M., "Tax Treaty Interpretation: Determining Domestic Meaning Under Article 3(2) OECD Model", 55 *Canadian Tax Journal* (2007), 31 *et seq.*
- Keefe, R., "Vagueness: Philosophical Aspects", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 1041 *et seq.*
- Kelsen, H., "Observations sur le rapport de George S. Maridakis: "Le renvoi en droit international privé"", in H. Kelsen (edited by C. Leben), *Ecrits français de droit*

international (Paris: PUF, 2001), 309 *et seq*.

- Klabbers, J., "International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?", 50 *Netherlands International Law Review* (2003), 267 *et seq*.
- Kogels, H., "Tools for interpretation issues", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 326 *et seq*.
- Kolm, E., "The Emerging system of Double Taxation Agreements in the late 19th and 20th Centuries, Development and Finance", *Quarterly Hungarian Economic Review* (2005), 66 *et seq*.
- Koskela, A., and Murphy, M. L., "Polysemy and Homonymy", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 711 *et seq*.
- Kuner, C. B., "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq*.
- Kunesch, M., "Interpretation problems concerning the multilingualism of tax treaties under special consideration of director's fees", in M. Schilcher and P. Weninger (eds.), *Fundamental Issues and Practical Problems in Tax Treaty Interpretation* (Vienna: Linde, 2008), 287 *et seq*.
- Lang, M., ""Fictitious Income" and tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 34 *et seq*.
- Lang, M., "Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen", 20 *Internationales Steuerrecht* (2011), 403 *et seq*.
- Lang, M., "Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD Musterabkommen)", in G. Burmester and D. Endres (eds.), *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* (Munich: Beck, 1997), 283 *et seq*.
- Lang, M., "Die Interpretation des Doppelbesteuerungsabkommens zwischen Deutschland und Österreich", 38 *Recht der Internationalen Wirtschaft* (1992), 573 *et seq*.
- Lang, M., "The Interpretation of Tax Treaties and Authentic Languages", in G. Maisto, A. Nikolakakis and J. M. Ulmer (*eds*.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq*.
- Lasswell, H. D., and McDougal, M. S., "Trends and Theories about Law: Clarity in Conceptions of Authority and Control", in M. K. Nawaz (ed.), *Essays in International Law in Honour of Krishna Rao* (Leyden: Sijthoff, 1976), 68 *et seq*.

- Lauterpacht, H., "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law* (1949), 48 *et seq*.
- Lauterpacht, H., "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 *Harvard Law Review* (1935), 549 *et seq.*
- Le Gall, J. P., "OECD MC: One or two official languages?", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 327 *et seq.*
- Legros, C., "France", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 199 *et seq.*
- Lenz, R., "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 42 (Basel: Verlag für Recht and Gesellschaft, 1960), 281 *et seq*.
- Lenz, R., "Tax Law Interpretation; - International Trends", *Rassegna Tributaria* (1987), 155 *et seq.*
- Liang, Y-L., "The Question of Revision of a Multilingual Treaty Text", 47 *American Journal of International Law* (1953), 263 *et seq.*
- Linderfalk, U., "Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties", 10 *International Community Law Review* (2008), 109 *et seq.*
- Linderfalk, U., "Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation", 54 *Netherlands International Law Review* (2007), 133 *et seq.*
- Linderfalk, U., "Who Are 'The Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited", 55 *Netherlands International Law Review* (2008), 343 *et seq.*
- Lipstein, K., "The General Principles of Private International Law", 135 *RCADI* (1972), 97 *et seq*.
- Locher, P., "The Swiss Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 79 *et seq.*
- Lorenzen, E. G., "The Qualification, Classification, or Characterization Problem in the Conflict of Laws", 50 *Yale Law Journal* (1940-1941), 743 *et seq.*
- Lorenzen, E. G., "The *Renvoi* Theory and the Application of Foreign Law. I. *Renvoi* in General", 10 *Columbia Law Review* (1910), 190 *et seq.*
- Lorenzen, E. G., "The Theory of Qualifications and the Conflict of Laws, 20 *Columbia Law Review* (1920), 247 *et seq*.

- MacLaury, R. E., "Coextensive semantic range: Different names for distinct vantages in one category", in E. Shiller and A. Bosh (eds.), *Papers from the Twenty-Third Annual Meeting of the Chicago Linguistics Society* (Chicago: Chicago Linguistic Society, 1987), 268 *et seq*.
- MacLaury, R. E., "Prototypes revisited", 20 *Annual Review of Anthropology* (1991), 55 *et seq.*
- MacLaury, R. E., "Vantage theory", in J. R. Taylor and R. E. MacLaury (eds.), *Language and the cognitive construal of the world* (Berlin: Mouton de Gruyter, 1995), 231 *et seq*.
- Maisto, G., "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95b (The Hague: Sdu Uitgevers, 2010), 17 *et seq*.
- Maisto, G., "La traduzione dei testi giuridici redatti in più lingue e l'interpretazione delle convenzioni per evitare le doppie imposizioni", *Rivista di Diritto Tributario. Parte Quarta* (2004), 131 *et seq.*
- Maisto, G., "The Observations on the OECD Commentaries in the Interpretation of Tax Treaties", 59 *Bulletin for international taxation* (2005), 14 *et seq.*
- Makarov, A. N., "Réflexions sur l'interprétation des circonstances de rattachement dans les règles de conflit faisant partie d'une Convention internationale", in *Mélanges offerts à Jacques Maury. Tome I: Droit international privé et public* (Paris: Librairie Dalloz et Sirey, 1960), 206 *et seq.*
- Malaurie, P., "Le droit français et la diversité des langues", *Journal du droit international* (1965), 565 *et seq.*
- Malherbe, J., and De Boeck, R., "The Belgian Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 3 *et seq.*
- Malintoppi, A., "Mesures tendant à prévenir les divergences dans l'interprétation des règles de droit uniforme", *L'Unification de Droit. Annuaire* (1959), 249 *et seq.*
- Malintoppi, A., "The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts", in C. M. Schmitthoff (ed.), *The Sources of the Laws of International Trade. With special reference to East-West Trade* (London: Stevens & Sons, 1964), 127 *et seq.*
- Mankiewicz, R., "Die Anwendung des Warschauer Abkommens", 27 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1962), 456 *et seq.*
- Markman, E. M., and Wachtel, G. F., "Children's use of mutual exclusivity to constrain the meaning of words", 20 *Cognitive Psychology* (1988), 121 *et seq*
- Martiny, D., "Autonome und einheitliche Auslegung im Europäischen Internationalen Zivilprozeßrecht", 45 *Rabels Zeitschrift für ausländisches und*

internationales Privatrecht (1981), 427 *et seq.*

- McDougal, M. S., "The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*", 61 *American Journal of International Law* (1967), 992 *et seq.*
- McLachlan, C., "The Principle of Systematic Integration and Art. 31(3)(c) of the Vienna Convention", 54 *International and comparative law quarterly* (2005), 279 *et seq*.
- Merrill, T. W., "Bork v. Burke", 19 *Harvard Journal of Law & Public Policy* (1996), 509 *et seq*.
- Metzler, V. E., "Austria", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 137 *et seq.*
- Mössner, J. M., "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*
- Mössner, J. M., "Klaus Vogel Lecture 2009 – Comments", 64 *Bulletin for international taxation* (2010), 16 *et seq.*
- Mössner, J. M., "Zur Auslegung von Doppelbesteuerungsabkommen", in K.-H. Böckstiegel et al. (eds.), *Volkerrecht, Recht der Internationalen Organisationen, Weltwirtschaftsrecht: Festschrift Für Ignaz Seidl-Hohenveldern* (Köln: Heymann, 1988), 403 *et seq*.
- Murphy, M. L., "Antonymy and Incompatibility", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 25 *et seq.*
- Murphy, M. L., "Hyponymy and Hyperonymy", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 393 *et seq.*
- Nahlik, S. E., "La conférence de Vienne sur le droit des traités: une vue d'ensemble", in 15 *Annuaire français de droit international* (1969), 24 *et seq*.
- Nakazato, M., "Japan", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 407 *et seq.*
- Oldager, N., "Extensionality and Intensionality", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 301 *et seq.*
- Palma, R. C., "Income Taxation of Intellectual and Industrial Property and Know-How: Conundrums in the Interpretation of Domestic and Treaty Law", 44 *European Taxation* (2004), 480 *et seq.*
- Panayi, C. HJI, "United Kingdom", in G. Maisto (ed.), *Residence of Companies under Tax Treaties and EC Law* (Amsterdam: IBFD Publications, 2009), 817 *et seq.*
- Parolini, A., "Italy", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax*

Treaties and EC Tax Law (Amsterdam: IBFD Publications, 2005), 245 *et seq.*

- Parry, C., "The Law of Treaties", in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), 175 *et seq.*
- Picone, P., "Il rinvio all' "ordinamento competente" nel diritto internazionale privato", *Rivista di diritto internazionale privato e processuale* (1981), 309 *et seq*.
- Pijl, H., "Aantekeningen bij de lex-fori-bepaling in belastingverdragen", *Weekblad Fiscaal Recht* (1995), 1254 *et seq.*
- Pijl, H., "Mutual agreement tussen Duitsland en Nederland: Inkomsten uit niet-zelfstandige arbeid", 64 *Maandblad Belasting Beschouwingen* (1995), 286 *et seq*.
- Pijl, H., "State Responsibility in Taxation Matters", 60 *Bulletin for international taxation* (2006), 38 *et seq.*
- Pollux, "The interpretation of the Charter", 23 *British Yearbook of International Law* (1946), 54 *et seq.*
- Putnam, H., "The meaning of "meaning"", in K. Gunderson (ed.), *Language, mind, and knowledge* (Minneapolis: University on Minnesota Press, 1975), 131 *et seq.*
- Raad, C. van, "Interpretatie van belastingverdragen", 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*
- Raad, K. van, "Additions to Article 3(2) (Interpretation) and 24 (Non-Discrimination) of the 1992 OECD Model and Commentary", 20 *Intertax* (1992), 671 *et seq.*
- Rabel, E., "Das Problem der Qualifikation", 5 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1931), 241 *et seq*.
- Reuter, P., "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*
- Ris, M., "Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention of the Law of Treaties", 14 *Boston College International and Comparative Law Review* (1991), 111 *et seq.*
- Rosch, E., "On the internal structure of perceptual and semantic categories", in T. E. Moore (ed.), *Cognitive Development and the Acquisition of Language* (New York: Academic Press, 1973), 111 *et seq.*
- Rosenne, S., "Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison", 5 *Columbia Journal of Transnational Law* (1966), 205 *et seq.*
- Rosenne, S., "On Multilingual Interpretation", in S. Rosenne, *Essays on*

International Law and Practice (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq*.

- Rosenne, S., "The Election of Five Members of the International Court of Justice in 1981", 76 *American Journal of International Law* (1982), 364 *et seq.*
- Rosenne, S., "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*
- Rosenne, S., "United Nations treaty practice", 86 *RCADI* (1954), 275 *et seq*.
- Russell, B., "On denoting", 14 *Mind* (1905), 479 *et seq.*
- Rust, A., "Germany", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*
- S. I. Katz, "United States", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 615 *et seq*.
- Salembier, P., "Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule", 35 *Ottawa Law Review* 1 (2003-2004), 75 *et seq.*
- Sandu, G., and Salo, P., "Compositionality", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 117 *et seq.*
- Sasseville, J., "Interpretation of Double Taxation Conventions in Canada: An Update", 48 *Bulletin for international taxation* (1994), 374 *et seq.*
- Sasseville, J., "The Canadian Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 35 *et seq.*
- Sasseville, J., "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*
- Schachter, O., "International Law in Theory and Practice. General Course in Public International Law", 178 *RCADI* (1982), 9 *et seq.*
- Schröder, M., "Gedanken zu einer Hierarchie der Interpretationsregeln im Völkerrecht", 21 *Revue hellénique de droit international* (1968), 122 *et seq*.
- Schwarzenberger, G., "Myths and realities of treaty interpretation: articles 27-29 of the Vienna draft convention on the law of treaties", 9 *Virginia Journal of International Law* (1968), 1 *et seq.*
- Schwebel, S. M., "May Preparatory Work be Used to Correct Rather Than Confirm the "Clear" Meaning of a Treaty Provision?", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 541 *et seq.*
- Shelton, D., "Reconcilable Differences? The Interpretation of Multilingual Treaties",

20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*

- Skaar, A. A., "The Legal Nature of Mutual Agreements Under Tax Treaties", *Tax Notes International* (1992), 1441 *et seq.*
- Smith, A. D. M., "The Inferential Transmission of Language", 13 *Adaptive Behavior* (2005), 311 *et seq.*
- Solum, L. B., "Constitutional Possibilities", *Illinois Public Law and Legal Theory Research Papers Series*, Research Paper No. 06-15 (available at the following url address: http://papers.ssrn.com/pape.tar?abstract_id=949052)
- Sullivan, A., "Reference: Philosophical Theories", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 810 *et seq.*
- Sundberg, J. W. F., "A Uniform Interpretation of Uniform Law" 10 *Scandinavian Studies in Law* (1966), 219 *et seq.*
- Sundgren, P., "Interpretation of Tax Treaties – A Case Study", *British Tax Review* (1990), 286 *et seq.*
- Sundgren, P., "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*
- Taylor, J. R., "Cognitive Semantics", in K. Allan (ed.), *Concise Encyclopedia of Semantics* (Oxford: Elsevier, 2009), 73 *et seq.*
- Thirlway, H., "The Role of International Law Concepts of Acquiescence and Estoppel", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 29 *et seq.*
- Thuronyi, V., "Studying Comparative Tax Law" in G. Lindencrona, S. Lodin and B. Wiman (eds.), *International Studies in Taxation: Law and Economics. Liber Amicorum Leif Mutén* (London: Kluwer Law International, 1999), 333 *et seq.*
- Toifl, G., "Die Besteuerung von Geschäftsführern, Vorständen und Aufsichtsräten international tätiger Unternehmen", in W. Gassner and M. Lang (eds.), *Besteuerung und Bilanzierung international tätiger Unternehmen - 30 Jahre Steuerrecht an der Wirtschaftsuniversität Wien* (Vienna: Orac, 1998), 379 *et seq.*
- Tommasello, M., "Learning to use prepositions. A case study", 14 *Journal of Child Language* (1987), 79 *et seq.*
- Torres Bernárdez, S., "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*
- Tuggy, D., "Ambiguity, polysemy and vagueness", 4 *Cognitive Linguistics* (1993), 273 *et seq.*

- Vanderlinden, J., "Langue et Droit (Belgique et Canada)", in E. Jayme (ed.), *Langue et Droit. XV Congrès International de Droit Comparé. Bristol 1998* (Bruxelles: Bruylant, 1999), 65 *et seq*.
- Vermule, A., "Connecting Positive and Normative Legal Theory", 10 *University of Pennsylvania Journal of Constitutional Law* (2008), 387 *et seq*.
- Viau, P., "Quelques considérations sur la langue, le droit, le bilinguisme et le bijuridisme au Canada", in E. Jayme (ed.), *Langue et Droit. XV Congrès International de Droit Comparé. Bristol 1998* (Bruxelles: Bruylant, 1999), 141 *et seq*.
- Vierdag, E. W., "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", 59 *British Yearbook of International Law* (1988), 75 *et seq*.
- Vogel, K., "Double Tax Treaties and Their Interpretation", 4 *International Tax and Business Lawyer* (1986), 1 *et seq*.
- Vogel, K., "La clause de renvoi de l'article 3, par. 2 Modèle de Convention de l'OCDE", in *Réflexions offertes a Paul Sibille. Études de fiscalité* (Bruxelles: Bruylant, 1981), 857 *et seq*.
- Vogel, K., "Tax Treaty Monitor", 54 *Bulletin for international taxation* (2000), 254 *et seq*.
- Vogel, K., "The Influence of the OECD Commentaries on Treaty interpretation", 54 *Bulletin for international taxation* (2000), 612 *et seq*.
- Vogel, K., and Prokisch, R. A., "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq*.
- Waldburger, R., "Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Schweizerischen Bundesgerichts", in M. Lang, J. M. Mössner, R. Waldburger (eds.), *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und der Österreichs* (Vienna: Linde, 1998), 51 *et seq*.
- Ward, D. A., "The Income Tax Conventions Interpretation Act," in *Report of Proceedings of the Thirty-Fifth Tax Conference, 1983 Conference Report* (Toronto: Canadian Tax Foundation, 1984), 602 *et seq*.
- Ward, D. A., "The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process", 60 *Bulletin for international taxation* (2006), 97 *et seq*.
- Ward, D. A., "Use of foreign court decisions in interpreting tax treaties", in G. Maisto (ed.), *Courts and Tax Treaty Law* (Amsterdam: IBFD Publications, 2007), 161 *et seq*.
- Wassermeyer, F., "Die Auslegung von Doppelbesteuerungsabkommen durch den

Bundesfinanzhof", 67 *Steuer und Wirtschaft* (1990), 404 *et seq*.

- Wattel, P. J., and Marres, O., "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq*.
- Weeghel, S. van, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international,* Vol. 95a (The Hague: Sdu Uitgevers, 2010), 17 *et seq*.
- Wengler, W., "Réflexions sur l'application du droit international public par les tribunaux internes", 72 *Revue Générale de Droit International Public* (1968), 921 *et seq*.
- Westberg, B., "Summary of *Case RÅ 2004 not 59*. Editor's notes", in *IBFD Tax Treaty Case Law Database*
- Wierzbicka, A., "Semantic Primitives and Semantic Fields", in A. Lehrer and E. F. Kittay (eds.), *Frames, Fields, and Contrasts. New Essays in Semantic and Lexical Organization* (Hillsdale: Lawrence Erlbaum, 1992), 209 *et seq*.
- Young, E., "Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation", 72 *North Carolina Law Review* (1994), 619 *et seq*.
- Zwarts, J., "Competition Between Word Meanings: The Polysemy of (A)Round", in C. Meier and M. Weisgerber (eds.), *Proceedings of the Conference "sub8 – Sinn und Bedeutung"* (Konstanz: Fachbereich Sprachwissenschaft der Universität Konstanz, 2004), 349 *et seq*.

INTERNATIONAL AND NATIONAL ORGANIZATIONS' DOCUMENTS

League of Nations

- 1943 League of Nations Mexico Draft: Model Bilateral Convention for the Prevention of the Double Taxation of Income (Doc. C.88.M.88. 1946.II.A)
- 1946 League of Nations London Draft: Model Bilateral Convention for the Prevention Of the Double Taxation of Income and Property (Doc. C.88.M.88. 1946.II.A)
- Committee of Experts for the progressive codification of International Law [1925-1928], vol. 2: Documents (Dobbs Ferry: Oceana Publications, 1972)
- League of Nations Economic and Financial Commission, 3 April 1923, *Report on Double Taxation, submitted to the Financial Committee of the League of Nations by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp* (Doc. EFS 73, F 19)
- Resolution adopted by the League of Nations Assembly on 22 September 1924 (Official Journal of the League of Nations, Special Supplement, no. 21, p. 10)
- Resolution adopted by the League of Nations Assembly on 25 September 1931 (Official Journal of the League of Nations, Special Supplement, no. 92, p. 9)
- Statute of the Permanent Court of International Justice

United Nations

- 2006 Report of the Study Group of the ILC finalized by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*
- Conclusions of the work of the Study Group on the Fragmentation of International Law: *Difficulties arising from the Diversification and Expansion of International Law*, adopted by the ILC at its Fifty- eighth session (ILC 2006 Report, 407 *et seq*.)
- Documents of the United Nations Conference on International Organization, held from 25 April to 26 June 1945 in San Francisco: vol. 1; vol. 2; vol. 3; vol. 5; vol. 8; vol. 9; vol. 12; vol. 13
- ILC 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (available in the annex to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49(Vol. I)/Corr.4)
- ILC's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (annex to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49(Vol. I)/Corr.4)

- International Law Commission's 1964 Draft articles on the law of treaties, in YBILC 1964-II, 176 *et seq*.
- International Law Commission's 1966 Draft articles on the law of treaties, in YBILC 1966-II, 177 *et seq*.
- Note on the private codification of public international law. Document A/AC.10/25
- Official Records of the General Assembly. Second Session. Sixth Committee, Annex 1
- Official Records of the General Assembly. Sixteenth Session. Supplement no. 9
- Official Records of the General Assembly. Twentieth Session. Sixth Committee
- Report of the International Law Commission. Sixteenth session (11 May - 24 July 1964). Document A/5809
- Report of the International Law Commission. Fifty-eight session (1 May-9 June and 3 July-11 August 2006). Document A/61/10
- Report of the Sixth Committee of 4 November 1965. Document A/6090
- Report of the Sixth Committee on the Law of Treaties of 24 November 1967. Document A/6913
- Resolution no. 2166(XXI) adopted by the General Assembly of the United Nations on 5 December 1966
- Resolution no. 2287(XXII) adopted by the General Assembly of the United Nations on 6 December 1967
- Resolution no. 36/39 adopted by the General Assembly of the United Nations on 18 November 1981
- Resolution no. 94 (I) adopted by the General Assembly of the United Nations on 11 December 1946
- Resolutions of the General Assembly Concerning the Law of Treaties: Memorandum prepared by the Secretariat of 14 February 1963
- Statute of the International Court of Justice
- Statute of the International Law Commission
- Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements. Document St/LEG/7/Rev.1
- The Work of the International Law Commission (UN Office of Legal Affairs, 2004)
- Treaty Reference Guide of the United Nations (available on line at the following url: http://untreaty.un.org/ola-internet/assistance/guide.htm)

- United Nations Conference on the Law of Treaties. First and second session, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969. Documents of the Conference
- United Nations Conference on the Law of Treaties. First session, Vienna, 26 March – 24 May 1968. Summary records of the plenary meetings and of the meetings of the Committee of the Whole
- United Nations Conference on the Law of Treaties. Second session, Vienna, 9 April – 22 May 1969. Summary records of the plenary meetings and of the meetings of the Committee of the Whole
- United Nations Model Double Taxation Convention between Developed and Developing Countries (2001)
- Worldwide Investment Report 1998: Trends and Determinants (UNCTAD, 1998)
- Yearbook of the International Law Commission, 1953, Volume II, Documents of the fifth session including the report of the Commission to the General Assembly
- Yearbook of the International Law Commission, 1958, Volume II, Documents of the tenth session including the report of the Commission to the General Assembly
- Yearbook of the International Law Commission, 1962, Volume I, Summary records of the fourteenth session, 24 April – 29 June 1962
- Yearbook of the International Law Commission, 1962, Volume II, Documents of the fourteenth session including the report of the Commission to the General Assembly
- Yearbook of the International Law Commission, 1963, Volume I, Summary records of the fifteenth session, 6 May – 12 July 1963
- Yearbook of the International Law Commission, 1963, Volume II, Documents of the fifteenth session including the report of the Commission to the General Assembly
- Yearbook of the International Law Commission, 1964, Volume I, Summary records of the sixteenth session, 11 May – 24 July 1964
- Yearbook of the International Law Commission, 1964, Volume II, Documents of the sixteenth session including the report of the Commission to the General Assembly
- Yearbook of the International Law Commission, 1965, Volume I, Summary records of the first part of the seventeenth session, 3 May – 9 July 1965
- Yearbook of the International Law Commission, 1965, Volume II, Documents of the first part of the seventeenth session including the report of the Commission to the General Assembly
- Yearbook of the International Law Commission, 1966, Volume I, Part I, Summary records of the second part of the seventeenth session, 3 – 28 January 1966
- Yearbook of the International Law Commission, 1966, Volume I, Part II, Summary records of the eighteenth session, 4 May – 19 July 1966

- Yearbook of the International Law Commission, 1966, Volume II, Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly
- Yearbook of the International Law Commission, 1979, Volume II, Part I, Documents of the thirty-first session (excluding the report of the Commission to the General Assembly)
- Yearbook of the International Law Commission, 1982, Volume II, Part II, Report of the Commission to the General Assembly on the work of its thirty-fourth session
- Yearbook of the International Law Commission, 1987, Volume II, Part II, Report of the Commission to the General Assembly on the work of its thirty-ninth session
- Yearbook of the International Law Commission, 1992, Volume II, Part II, Report of the Commission to the General Assembly on the work of its forty-fourth session
- Yearbook of the International Law Commission, 1996, Volume II, Part II, Report of the Commission to the General Assembly on the work of its forty-eighth session
- Yearbook of the International Law Commission, 2006, Volume II, Part II, Documents of the second part of the fifty-eighth session including the reports of the Commission to the General Assembly

Organisation for Economic Co-operation and Development

- Report of the Fiscal Committee on the Draft Convention for the avoidance of double taxation with respect to taxes on income and capital among the member countries of the OECD (document C(63)87)
- Recommendation of the Council concerning the avoidance of double taxation, adopted by the OECD Council at its 49th meeting on 30 July 1963 (document C(63)113)
- Recommendation of the OECD Council concerning the Model Tax Convention on Income and Capital, adopted by the Council on 23 October 1997 (doc C(97)195/final)
- Report *Tax Treaty Override*, adopted by the OECD Council on 2 October 1989
- Report *The Application of the OECD Model Tax Convention to Partnerships Partnership*, adopted by the OECD Committee on Fiscal Affairs on 20 January 1999
- Report *Thin Capitalisation*, adopted by the OECD Council on 26 November 1986
- OECD Thin Capitalization Report (OECD, *Issues in International Taxation*, No. 2, "Thin Capitalisation" (Paris: OECD, 1987))

- Report *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on 27 November 1986
- Discussion draft *The impact of the Communications Revolution on the Application of "Place of Effective Management" as a Tie Breaker Rule,* released in 2001 by the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits of the OECD
- Discussion draft *The Attribution of Profits to Permanent Establishments*, released by the OECD Committee on Fiscal Affairs in February 2001
- Discussion draft *The Attribution of Profits to Permanent Establishments,* released by the OECD Committee on Fiscal Affairs in March 2003
- Report *The Attribution of Profits to Permanent Establishments. Parts I (General Considerations), II (Banks) and III (Global Trading)*, released by the OECD Committee on Fiscal Affairs in December 2006

Other organizations' documents

- A. von Overbeck, "Le champ de l'application des règles de conflit ou de droit matériel uniforme prévues par les traits. Exposé préliminaire et rapport définitif avec projet de résolution présentés à l'Institut de Droit International", 58-I *Annuaire de l'Institut de Droit International* (1979), 97 *et seq.*
- American Law Institute, *Federal Income Tax Project. International Aspects of United States Income Taxation, II. Proposals on United States Income Tax Treaties* (Philadelphia: American Law Institute, 1992)
- American Law Institute, *Restatement of the Law, Second. Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1965)
- American Law Institute, *Restatement of the Law, Third. Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1987)
- Institute of International Law, "Observations des membres de la Commission Sur le rapport de M. Lauterpacht. Comments by Sir Eric Beckett", 43-I *Annuaire de L'Institute de Droit International* (1950), 435 *et seq.*
- Institute of International Law, "Résolution de 11 août 1975: Le problème intertemporel en droit international public", 55 *Annuaire de l'Institut de Droit International* (1975), 536 *et seq*.
- Institute of International Law, "Résolution de 19 avril 1956: Interprétation des traités", 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*
- OEEC Fiscal Committee (Working Party 10): document TFD/FC/35

- OEEC Fiscal Committee: document 1958□FC(58)7
- OEEC Fiscal Committee: document C(59)147
- OEEC Fiscal Committee: document FC/M(57)2
- OEEC Fiscal Committee: document FC/M(58)4
- OEEC Fiscal Committee: document FC/WP10(57)1
- OEEC Fiscal Committee: document FC/WP10(58)1
- Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq*.

URL RESOURCES

- Dictionary.com Unabridged. Random House, Inc.
- Encyclopædia Britannica Online
- History of Tax Treaty
- Le Trésor de la Langue Français Informatisé
- Merriam-Webster's Dictionary of Law (on Dictionary.com Unabridged. Random House, Inc.)
- Online Etymology Dictionary (Douglas Harper)
- Oxford English Dictionary Online
- United Nations Treaty Collection Database
- Vocabolario Etimologico Pianigiani della lingua italiana on-line

TREATIES[2003]

- Accordo tra la Confederazione Svizzera e la Repubblica Italiana concernente il risarcimento dei danni in caso di incidenti della circolazione stradale, concluded in Rome on 16 August 1978
- Agreement between the Government of the German Reich and the Bank for International Settlements, acting as trustee for the holders of the outstanding bonds, concluded in Paris on 10 June 1930
- Agreement concerning minor frontier traffic between Italy and Yugoslavia of 3 February 1949
- Agreement establishing the World Trade Organization, done at Marrakesh on 15 April 1994
- Agreement on reparation from Germany, on the establishment of an inter-allied reparation agency and on the restitution of monetary gold, concluded in Paris on 14 January 1946
- Algeria-Italy tax treaty (1991)
- American Treaty on Pacific Settlement, concluded in Bogotá on 30 April 1948
- Argentina-Italy tax treaty (1979)
- Argentina-Sweden tax treaty (1962)
- Australia-Canada tax treaty (1980)
- Australia-Malaysia tax treaty (1981)
- Australia-Netherlands tax treaty (1976)
- Australia-Singapore tax treaty (1969)
- Australia-Switzerland tax treaty (1980)
- Australia-United Kingdom tax treaty (1967)
- Australia-United States tax treaty (1953)
- Australia-United States tax treaty (1982)
- Austria-German tax treaty (2000)
- Austria-Germany tax treaty (1954)
- Austria-India tax treaty (1999)

[2003] Unless otherwise stated, the term "tax treaty" denotes bilateral tax conventions on income (and capital).

- Austria-Lichtenstein tax treaty (1969)
- Austria-Luxembourg tax treaty (1962)
- Austria-Switzerland tax treaty (1974)
- Bangladesh-Italy tax treaty (1990)
- Barbados-Canada tax treaty (1980)
- Belgium-Finland tax treaty (1976)
- Belgium-French tax treaty (1964)
- Belgium-Germany tax treaty (1967)
- Belgium-Greece tax treaty (1968)
- Belgium-Greece tax treaty (2004)
- Belgium-Hungary tax treaty (1982)
- Belgium-India tax treaty (1993)
- Belgium-Kazakhstan tax treaty (1998)
- Belgium-Malta tax treaty (1974)
- Belgium-Netherlands tax treaty (1970)
- Belgium-Nigeria tax treaty (1989)
- Belgium-Romania tax treaty (1996)
- Belgium-Tunisia tax treaty (1975)
- Belgium-Unites States tax treaty (1970)
- Benin-France tax treaty (1975)
- Brazil-Canada tax treaty (1984)
- Brazil-Germany tax treaty (1975)
- British Mandate for Palestine, conferred by the League of Nation on Great Britain on 24 July 1924
- Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968.
- Bulgaria-Italy tax treaty (1988)
- Burkina Faso-France tax treaty (1965)
- Canada-China tax treaty (1986)
- Canada-Denmark tax treaty (1955)

- Canada-France tax treaty (1951)
- Canada-France tax treaty (1975)
- Canada-Germany tax treaty (1956)
- Canada-India tax treaty (1985)
- Canada-Ireland tax treaty (1966)
- Canada-Luxembourg tax treaty (1989)
- Canada-Luxembourg tax treaty (1999)
- Canada-Netherlands tax treaty (1957)
- Canada-Netherlands tax treaty (1986)
- Canada-New Zeeland tax treaty (1980)
- Canada-Papua New Guinea tax treaty (1987)
- Canada-United Kingdom tax treaty (1946)
- Canada-United Kingdom tax treaty (1966)
- Canada-United Kingdom tax treaty (1978)
- Canada-United States tax treaty (1942)
- Canada-United States tax treaty (1980)
- Charter of the United Nations, signed in San Francisco on 26 June 1945
- Chicago Convention on International Civil Aviation, concluded in Chicago on 7 December 1944
- China-Italy tax treaty (1986)
- China-United Kingdom tax treaty (1984)
- China-United States tax treaty (1984)
- Community Patent Convention, concluded in Luxembourg on 15 December 1975
- Congo (Republic of)-France tax treaty (1987)
- Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded in Rome on 26 October 1961
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded in Montreal on 23 September 1971
- Convention for the Suppression of Unlawful Seizure of Aircraft, concluded in the Hague on 16 December 1970

- Convention for the Unification of Certain Rules Relating to International Carriage by Air, concluded at Warsaw on 12 October 1929
- Convention on Agency in the International Sale of Goods, concluded in Geneva on 17 February 1983
- Convention on certain questions relating to the conflict of nationality laws, concluded in the Hague on 12 April 1930
- Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980
- Convention on International Civil Aviation Organization, concluded in Chicago on 7 December 1944
- Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968
- Convention on Road Traffic, concluded in Geneva on 19 September 1949
- Convention on the Contract for the International Carriage of Goods by Road, concluded in Geneva on 19 May 1956
- Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, done in Brussels on 23 July 1990 (90/436/EEC)
- Convention on the International Recognition of Rights in Aircrafts, concluded in Geneva on 19 June 1948
- Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980
- Convention on the law governing transfer of title in international sales of goods, concluded in the Hague on 15 April 1958
- Convention on the Organisation for Economic Co-operation and Development (OECD), concluded in Paris on 14 December 1960
- Convention on the Prevention and Punishment of the Crime of Genocide, concluded in Paris on 9 December 1948
- Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, concluded in the Hague on 2 October 1973
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958
- Convention providing a Uniform Law on the Form of an International Will, concluded in Washington on 26 October 1973
- Convention Relating to the Status of Refugees, done in Geneva on 28 July 1951
- Covenant of the League of Nations, signed in Paris on 28 June 1919

- Denmark-Canada tax treaty (1955)
- Denmark-Netherlands tax treaty (1996)
- Denmark-Switzerland tax treaty (1957)
- Denmark-Switzerland tax treaty (1973)
- Denmark-United States tax treaty (1948)
- Doha Minutes, signed at Doha on 25 December 1990
- Estonia-Italy tax treaty (1997)
- European Convention on Human Rights, concluded in Rome on 4 November 1950
- European Convention on the Suppression of Terrorism, concluded in Strasbourg on 27 January 1977
- European Patent Convention, concluded in Munich on 5 October 1973
- Extradition Agreement between Austria-Hungary and Italy, concluded in Florence on 27 February 1869
- Framework Convention on Climate Change, done in New York on 9 May 1992
- France-Gabon tax treaty (1966)
- France-Germany tax treaty (1959)
- France-Switzerland tax treaty (1966)
- France-United States tax treaties (1967)
- France-United States tax treaty (1939)
- France-United States tax treaty (1967)
- France-United States tax treaty (1994)
- General Act for the Pacific Settlement of International Disputes, done in Geneva on 26 September 1928
- General Agreement on Tariffs and Trade (1947)
- General Agreement on Tariffs and Trade (1994)
- Germany-India tax treaty (1995)
- Germany-Italy tax treaty (1925)
- Germany-Netherlands tax treaty (1959)
- Germany-Portugal tax treaty (1980)
- Germany-South Africa tax treaty (1973)

- Germany-Spain tax treaty (1966)
- Germany-Switzerland tax treaty (1931)
- Germany-Switzerland tax treaty (1971)
- Germany-United Kingdom tax treaty (1964)
- Germany-United States tax treaty (1954)
- Germany-United States tax treaty (1989)
- Hours of Work (Industry) Convention, concluded in Washington on 28 November 1919
- Hungary-Italy tax treaty (1977)
- ICJ Statute
- India-Italy tax treaty (1993)
- India-Mauritius tax treaty (1982)
- India-Netherlands tax treaty (1988)
- India-Switzerland tax treaty (1994)
- India-United Arab Emirates tax treaty (1992)
- India-United Kingdom tax treaty (1993)
- India–United States tax treaty (1989)
- International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded in Brussels on 25 August 1924
- International Monetary Fund Agreement, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, on 22 July 1944
- Ireland-Norway tax treaty (2000)
- Israel-United States tax treaty (1975)
- Italy-China tax treaty (1986)
- Italy-Germany tax treaty (1992)
- Italy-Ireland tax treaty (1971)
- Italy-Mozambique tax treaty (1998)
- Italy-Netherlands tax treaty (1990)
- Italy-Portugal tax treaty (1980)
- Italy-Slovenia tax treaty (2001)
- Italy-Spain tax treaty (1977)

- Italy-Sweden tax treaty (1980)
- Italy-Switzerland tax treaty (1976)
- Italy-Tanzania tax treaty (1973)
- Italy-Thailand tax treaty (1977)
- Italy-Tunisia tax treaty (1979)
- Italy-United Kingdom tax treaty (1988)
- Italy-United States estate tax treaty (1955)
- Italy-United States tax treaty (1984)
- Italy-United States tax treaty (1999)
- Italy-Venezuela tax treaty (1990)
- Ivory Cost-Norway tax treaty (1978)
- Japan-Netherlands tax treaty (1970)
- Japan-Singapore tax treaty (1994)
- Japan-United Kingdom tax treaty (1969)
- Japan-United States tax treaty (1954)
- Japan-United States tax treaty (1971)
- London Agreement on German External Debts, concluded in London on 27 February 1953
- Luxembourg-Spain tax treaty (1986)
- Luxembourg-Switzerland tax treaty (1993)
- Mauritius-United Kingdom tax treaty (1981)
- Mexico-Portugal tax treaty (1999)
- Netherlands-Germany tax treaty (1959)
- Netherlands-Nigeria tax treaty (1991)
- Netherlands-Norway tax treaty (1950)
- Netherlands-Philippines tax treaty (1989)
- Netherlands-Singapore tax treaty (1971)
- Netherlands-Suriname tax treaty (1975)
- Netherlands-Switzerland tax treaty (1951)
- Netherlands-United Kingdom tax treaty (1967)

- Netherlands-United States tax treaty (1992)
- Netherlands-Zimbabwe tax treaty (1989)
- Norway-United States tax treaty (1971)
- PCIJ Statute
- Peace Treaty between the Allied and Associated Powers and Italy, concluded in Paris on 10 February 1947
- Peace Treaty of Brest-Litovsk, concluded in Brest-Litovsk on 3 March 1918
- Peace Treaty of Neuilly, concluded on 27 November 1919 in Neuilly-sur-Seine
- Peace Treaty of St. German, concluded on 10 September 1919 in Saint-Germain-en-Laye
- Peace Treaty of Trianon, concluded on 4 June 1920 in Versailles
- Peru-Sweden tax treaty (1966)
- Philippines-Switzerland tax treaty (1998)
- Protocol relating to a certain case of statelessness, concluded in the Hague on 12 April 1930
- Protocol relating to military obligations in certain cases of double nationality, concluded in the Hague on 12 April 1930
- Protocols between Italy and Venezuela of 13 February and 7 May 1903, dealing with certain differences arisen between Italy and the United States of Venezuela in connection with the Italian claims against the Venezuelan Government
- Special Agreement Between El Salvador and Honduras to Submit to the Decision of the International Court of Justice the Land, Island and Maritime Boundary Dispute Existing Between the Two States (1986)
- Special Protocol concerning statelessness, concluded in the Hague on 12 April 1930
- Sweden-United Kingdom tax treaty (1960)
- Sweden-United States tax treaty (1939)
- Switzerland-Austria tax treaty (1953)
- Switzerland-France tax treaty (1953)
- Switzerland-United Kingdom tax treaty (1977)
- Switzerland-United States tax treaty (1951)
- Treaty concluded in 1906 between the former Turkish Sultanate and the Khedivate of Egypt

- Treaty establishing the European Economic Community, concluded in Rome on the 25 March 1957
- Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, signed at Tehran on 15 August 1955
- Treaty of Amity, Settlement, and Limits between the United States of America and Spain, concluded at Washington on 22 February 1819
- Treaty of Friendship and Good Neighbourliness between France and Libya, concluded in Tripoli on 10 August 1955
- Treaty of Friendship, Commerce and Navigation between Italy and the United States of America, concluded in Rome on 2 February 1948
- Treaty of Paris, signed in Paris on 30 May 1814 by France, on the one side, and the Allies on the other side
- United Kingdom-Netherlands tax treaty (1980)
- United Kingdom-Switzerland tax treaty (1977)
- United Kingdom-United States tax treaty (1945)
- United Kingdom-United States tax treaty (1975)
- United States-Union of the Soviet Socialist Republics tax treaty (1973)
- Vienna Convention on Consular Relations, concluded in Vienna on 24 April 1963
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, done in Vienna on 21 March 1986
- Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969
- WTO Agreement on Safeguards
- WTO Agreement on Subsidies and Countervailing Measures

OTHER INTERNATIONAL INSTRUMENTS AND DOCUMENTS

- Council Directive 90/435/EEC of 23 July 1990
- Council Directive 92/100/EEC of 19 November 1992
- Novena Conferencia Internacional Americana, Actas y Documentos, Vol. IV
- Report of the Human Rights Committee, 22 November 1978 (*Yearbook of the Human Rights Committee 1977-78*, vol. II)

CASE LAW

Permanent Court of International Justice

- PCIJ, 12 August 1922, *Competence of the International Labour Organization in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, advisory opinion
- PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment
- PCIJ, 12 September 1924, *Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly (Bulgaria v. Greece),* judgment
- PCIJ, 16 May 1925, *Polish Postal Service in Danzig*, advisory opinion
- PCIJ, 7 September 1927, *S.S. Lotus (France v. Turkey)*, judgment
- PCIJ, 8 December 1927, *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*, advisory opinion
- PCIJ, 19 August 1929, *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, order
- PCIJ, 15 November 1932, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, advisory opinion
- PCIJ, 5 September 1933, *Legal Status of Eastern Greenland (Denmark v. Norway)*, judgment
- PCIJ, 17 March 1934, *Lighthouses case between France and Greece*, judgment
- PCIJ, 28 June 1937, *Diversion of Water from the Meuse (Netherlands v Belgium)*, judgment
- PCIJ, 5 December 1939, *Electricity Company of Sofia and Bulgaria*, order

International Court of Justice

- ICJ, 28 May 1948, *Conditions of Admission af a State to Membership In the United Nations (article 4 of the Charter)*, advisory opinion
- ICJ, 9 April 1949, *Corfu Channel (United Kingdom v. Albania)*, judgment
- ICJ, 3 March 1950, *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion

- ICJ, 18 July 1950, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, advisory opinion
- ICJ, 1 July 1952, *Ambatielos Case (Greece v. United Kingdom)*, judgment
- ICJ, 22 July 1952, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, judgment
- ICJ, 27 August 1952, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, judgment
- ICJ, 26 November 1957, *Right of Passage over Indian Territory (Portugal v. India)*, judgment
- ICJ, 28 November 1958, *Case concerning the application of the convention of 1902 governing the guardianship of infants (Netherlands v. Sweden)*, judgment
- ICJ, 26 May 1959, *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, judgment
- ICJ, 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, judgment
- ICJ, 26 May 1961, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment
- ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment
- ICJ, 18 July 1966, *South West Africa (Ethiopia/Liberia v. South Africa)*, judgment
- ICJ, 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion
- ICJ, 25 July 1974, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, judgment
- ICJ, 20 December 1974, *Nuclear Tests (Australia v. France)*, judgment
- ICJ, 16 October 1975, *Western Sahara*, advisory opinion
- ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment
- ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment
- ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment
- ICJ, 20 July 1989, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, judgment
- ICJ, 12 November 1991, *Arbitral Award of 31 July 1989 (Guinea-Bassau v. Senegal)*, judgment
- ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment

- ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment
- ICJ, 15 February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment
- ICJ, 12 December 1996, *Oil Platforms, (Islamic Republic of Iran v. United States of America)*, judgment, para.45
- ICJ, 25 September 1997, *Gabčikovo–Nagymaros Project (Hungary v. Slovakia)*, judgment
- ICJ, 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, judgment
- ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment
- ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment

European Court of Justice

- Advocate General Lagrange, 4 June 1962, Case 14/61, *Hoogovens v. High Authority*
- ECJ, 6 October 1976, Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*
- ECJ, 6 October 1976, Case 14/76, *A. De Bloos, SPRL v. Société en commandite par actions Bouyer*
- ECJ, 22 February 1979, Case 12/76, *Henri Gourdain v. Franz Nadler*
- ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*
- ECJ, 26 May 1982, Case 133/81, *Roger Ivenel v. Helmut Schwab*
- ECJ, 15 November 1983, Case 288/82, *Duijnstee v. Goderbauer*
- ECJ, 24 June 1981, Case 150/80, *Elefanten Schuh GmbH v. Pierre Jacqmain*
- ECJ, 9 July 1991, Case C-146/89, *Commission v. United Kingdom*

European Court of Human Rights

- ECtHR, 27 June 1968, *Wemhoff v. Germany (Application no. 2122/64)*
- ECtHR, 27 October 1975, *National Union of Belgian Police v. Belgium (Application no. 4464/70)*
- ECtHR, 8 June 1976, *Engel et al. v. the Netherlands (Applications no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72)*
- ECtHR, 25 April 1978, *Tyrer v. the United Kingdom (Application no. 5856/72)*

- ECtHR, 13 June 1979, *Marckx v. Belgium (Application no. 6833/74)*
- ECtHR, 22 October 1981, *Dudgeon v. the United Kingdom (Application no. 7525/76)*
- ECtHR, 21 February 1984, *Öztürk v. Germany (Application no. 8544/79)*
- HCtHR, 29 May 1986, *Feldbrugge v. the Netherlands (Application no. 8562/79)*
- ECtHR, 16 December 1992, *Niemietz v. Germany (Application no. 13710/88)*
- ECtHR, 4 April 2000, *Witold Litwa v. Poland (Application no. 26629/95)*
- ECtHR, 12 March 2003, *Öcalan v. Turkey (Application no. 46221/99)*

World Trade Organization

- WTO Appellate Body, 4 October 1996, *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, (WT/DS8-10-11/AB/R)
- WTO Appellate Body, 12 October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 (WT/DS58/AB/R)
- WTO Appellate Body, 2 August 1999, *Canada – Measures Affecting the Export of Civilian Aircraft*, AB-1999-2 (WT/DS70/AB/R)
- WTO Appellate Body, 14 December 1999, *Argentina – Safeguard measures on Imports of Footwear,* AB-1999-7 (WT/DS121/AB/R)
- WTO Appellate Body, 14 December 1999, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8 (WT/DS98/AB/R)
- WTO Appellate Body, 14 January 2002, *United States – Tax Treatment for "Foreign Sales Corporations"*, AB-2001-8 (WT/DS108/AB/RW)
- WTO Appellate Body, 23 September 2002, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, AB-2002-2 (WT/DS207/AB/R)
- WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R)
- WTO Appellate Body, 7 April 2005, *United States – Measures affecting the cross-border supply of gambling and betting services*, AB-2005-1 (WT/DS285/AB/R)
- WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (WT/DS291-292-293/R)

Other international courts and tribunals

- Arbitral Tribunal, *Venezuelan Bond cases*, 4 *International arbitrations to which the United States has been a party* (1898), 3616 *et seq*.
- Italian-Venezuelan Mixed Claims Commission, *Guastini Case*, 10 *Reports of International Arbitral Awards*, 561 *et seq*.
- Arbitral award of 7 September 1910, *The North Atlantic Coast Fisheries Case (Great Britain, United States),* 11 *Reports of International Arbitral Awards*, 167 *et seq.*
- Italian-Austrian Mixed Arbitral Tribunal, 23 April 1924, *Clorialdo Devoto v. Austrian State,* 4 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1925), 500 *et seq*.
- Arbitrator, 3 September 1924, *Affaire des réparations allemandes selon l'article 260 du Traité de Versailles (Allemagne contre Commission des Réparations)*, 1 *Reports of International Arbitral Awards*, 429 *et seq*.
- Italian-Bulgarian Mixed Arbitral Tribunal, 8 January 1925, *De Paoli v. Bulgarian State*, 6 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1927), 451 *et seq*.
- Arbitration Tribunal, 5 August 1926, *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, 2 *Reports of International Arbitral Awards*, 777 *et seq.*
- Arbitral Tribunal, 4 April 1928, *Island of Palmas (Netherlands v. USA)*, 2 *Reports of International Arbitral Awards,* 829 *et seq*.
- Romanian-Austrian Mixed Arbitral Tribunal, 19 March 1929, *Aron Kahane successor v. Francesco Parisi and the Austrian State*, 8 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1929), 943 *et seq*.
- Germano-Polish Mixed Arbitral Tribunal, 1 August 1929, *Poznaski v. German State*, 5 *Annual digest of public international law cases* (1929-1930), 506 *et seq*.
- Hungarian-Serbian-Croatian-Slovenian Mixed Arbitral Tribunal, 1 October 1929, *Archduke Frederick of Habsburg-Lorraine v. Serbian-Croatian-Slovenian State*, 9 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1930), 285 *et seq*.
- French-Italian Conciliation Commission, 29 August 1949, *Différend Impôts extraordinaires sur le patrimoine institués en Italie - décision No. 32*, 13 *Reports of International Arbitral Awards*, 108 *et seq.*
- Arbitrator, 20 February 1953, *Gold Looted by Germany from Rome*, 20 *International Law Reports* (1953), 441 *et seq*.
- Arbitral Tribunal, *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 *International Law Reports* (1951), 144 *et seq.*
- Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*

- Arbitral Tribunal, 17 July 1965, *Italy-USA Air Transport Arbitration*, 45 *International Law Reports* (1972), 393 *et seq.*
- Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*
- Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq*.
- GATT panel, 16 June 1994, *United States – Restrictions on Imports of Tuna* (DS29/R) (available on-line at the following url: http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf)
- Arbitral Tribunal, 10 April 2001, *Pope & Talbot Inc v. Canada*, award on merit s of phase 2 (available on-line at the following url: http://www.naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf)
- Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages (available on-line at the following url: http://www.naftaclaims.com/Disputes/Canada/Pope/PopeAwardOnDamages.pdf)
- International Centre for Settlement of Investment Disputes, 8 February 2005, *Plama Consortium Limited v. Republic of Bulgaria*, Case No ARB/03/24 (available on-line at the following url. http://icsid.worldbank.org/ICSID/FrontServlet)
- Arbitral Tribunal, 24 May 2005, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 *Reports of International Arbitral Awards*, 35 *et seq.*
- Arbitral Tribunal, 3 August 2005, *Methanex Corporation v. the United States of America*, final award on jurisdiction and merits (available on line at the following url: http://www.state.gov/documents/organization/51052.pdf)
- International Centre for Settlement of Investment Disputes, 21 October 2005, *Aguas del Tunari v. Republic of Bolivia*, Case No. ARB/02/3 (available on-line at the following url. http://icsid.worldbank.org/ICSID/FrontServlet)

Australia

- Federal Court, 20 December 1988, *Thiel v. Commissioner of Taxation*, [1988] FCA 443
- High Court, 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports,* 338 *et seq.*
- High Court, 24 February 1997, *Applicant A. v. Minister for Immigration and Ethnic Affairs,* 190 *Commonwealth Law Reports*, 225 *et seq.*

- Federal Court, 4 March 1997, *Lamesa Holdings BV v. Commissioner of Taxation,* [1997] FCA 134
- Federal Court, 20 August 1997, *Commissioner of Taxation* v. *Lamesa Holdings BV,* [1997] FCA 785
- Administrative Appeals Tribunal of Adelaide, 3 April 1998, *Ngee Hin Chong v. CoT,* 1 *ITLR,* 75 *et seq.*
- Federal Court, 16 May 2000, *Ngee Hin Chong v. CoT,* 2 *ITLR*, 707 *et seq.*
- New South Wales Supreme Court, 4 December 2002, *Unisys Corp v. FCT*, 5 *ITLR*, 658 *et seq*.
- Federal Court, 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*
- Federal Court, 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq*.
- Federal Court, 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq*.
- Federal Court, 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*
- High Court (Australia) 15 August 2012, *Minister for Home Affairs of the Commonwealth v Zentai*, 246 *Commonwealth Law Reports,* 213 *et seq*.
- Federal Court (Australia), 26 April 2013, *Resource Capital Fund III LP v Commissioner of Taxation*, 15 *ITLR,* 814 *et seq*.

Austria

- Verwaltungsgerichtshof, 31 July 1996, *case no. 92/13/0172* (available on the IBFD Tax Treaty Case Law Database)
- Verwaltungsgerichtshof, 25 September 2001, *Re Austria-Germany double tax convention*, 4 *ITLR*, 547 *et seq*.

Belgium

- Cour de Cassation, 12 October 1973, *Dobbelmann Gmbh v. Belgium*, *Pasicrisie belge. Arrêts de la cour de cassation* (1974), 159 *et seq.*
- Cour de Cassation, 21 February 1979, *Société Anonyme de Participations et d'Études, Compagnie Saint-Gobain Pont a Mousson v. Belgium*, *Pasicrisie belge. Arrets de la cour de cassation* (1979), 737 *et seq*.

- Cour de Cassation, 21 December 1990, case *F1851N* (available on the IBFD Tax Treaty Case Law Database)
- Court of Appeal of Liege, 14 January 1998, *Verast & Folens v. Belgium*, 1 *ITLR*, 435 *et seq*.
- Court of Appeal of Brussels, 30 April 1998, *NV Immo Part v. Belgium*, 1 *ITLR*, 463 *et seq*
- Cour de Cassation , 28 May 2004, *Belgium v. SW and VR-M*, 7 *ITLR*, 442 *et seq*.

Brazil

- First Council of Taxpayers, 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue Department in Brasilia*, 9 *ITLR*, 627 *et seq.*
- Federal Regional Court, 4 June 2009, *Federal Union v. Copesul – CIA/Petrochimica do Sul*, 12 *ITLR*, 150 *et seq.*

Canada

- Exchequer Court, 24 August 1966, *Furness, Withy and Co. v. R.*, 66 DTC 5358
- Supreme Court, 1 April 1968, *Interprovincial Pipe Line Company v. R.*, [1968] SCR 498
- Federal Court, 5 September 1975, *Vauban Productions v. R*, 75 DTC 5371
- Federal Court of Appeal, 12 March 1980, *Associates Corporations of North America v. the Queen*, 80 DTC 6140
- Supreme Court, 28 September 1982, *Melford Developments Inc. v. R*, [1982] 2 SCR 504
- Supreme Court, 25 January 1983, *Nowegijick v. R*, [1983] 1 SCR 29
- Tax Review Board, 25 January 1983, *Doris Lillian Gadsden v. Minister of National Revenue*, 83 DTC 127
- Tax Court, 21 November 1983, *William C. Krafve v. the Minister of National Revenue*, 84 DTC 1002
- Federal Court, 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188
- Federal Court, 23 July 1990, *Hale v. R*, 90 DTC 6481
- Federal Court, 28 March 1991, *Utah Mines Ltd. v. R*, 91 DTC 5245
- Federal Court, 26 April 1991, *Chun Gu v. R*, 91 DTC 821

- Federal Court, 2 April 1992, *Crown Forest v. Canada*, 92 DTC 6305
- Federal Court of Appeal, 5 November 1993, *Qing Gang K. Li v. R*, 94 DTC 6059
- Federal Court of Appeal, 8 November 1993, *Crown Forest v. Canada*, 94 DTC 6107
- Supreme Court, 20 October 1994, *Thomson v. Thomson,* [1994] 3 SCR 551
- Tax Court, 29 May 1995, *Cudd Pressure Control* v. R, [1995] 2 CTC 2382
- Supreme Court, 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802
- Federal Court of Appeal, 26 September 1997, *Attorney General of Canada v. William F. Kubicek*, 97 DTC 5454
- Tax Court, 30 October 1998, *Dudney v. R*, 1 *ITLR*, 371 *et seq*.
- Federal Court of Appeal, 24 February 2000, *R v. Dudney*, 2 *ITLR*, 627 *et seq*.
- Tax Court, 31 January 2002, *Cheek v. R*, 4 *ITLR*, 652 *et seq*
- Federal Court of Appeal, 15 March 2002, *Wolf v. R*, 4 *ITLR*, 755 *et seq.*
- Tax Court, 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq*.
- Federal Court, 8 November 2002, *Pacific Network Services Ltd and another v. Minister if National Revenue*, 5 *ITLR*, 638 *et seq*.
- Tax Court, 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq*.
- Federal Court of Appeal, 13 October 2003, *Edwards v. R*, 6 *ITLR*, 564 *et seq.*
- Federal Court of Appeal, 4 February 2004, *Beame v. R*, 6 *ITLR*, 767 *et seq*.
- Tax Court, 8 April 2005, *Allchin v. R*, 7 *ITLR*, 851 *et seq.*
- Tax Court, 22 July 2005, *Yoon v. R*, 8 *ITLR*, 129 *et seq*.
- Tax Court, 22 December 2005, *Sutcliffe v. Canada*, 8 *ITLR*, 563 *et seq*.
- Tax Court, 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq*.
- Tax Court, 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq*.
- Tax Court, 10 November 2006, *Kuwalek v. R*, 2007 DTC 199
- Federal Court of Appeal, 13 June 2007, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 1111 *et seq.*
- Federal Court of Appeal, 21 September 2007, *Gulf Offshore NS Ltd v. Canada,* 10 *ITLR*, 172 *et seq.*
- Tax Court, 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq*.
- Tax Court, 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq*.

- Tax Court, 16 May 2008, *Knights of Columbus v. R*, 10 *ITLR*, 827 *et seq*.
- Tax Court, 16 May 2008, *American Income Life Insurance Company v. Canada*, 11 *ITLR*, 52 *et seq*.
- Federal Court of Appeal, 26 February 2009, *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq*.
- Tax Court, 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq.*
- Tax Court, 10 September 2009, *Garron and others v. R*, 12 *ITLR*, 79 *et seq*.
- Tax Court, 18 September 2009, *Antle and others v. R*, 12 *ITLR*, 359 *et seq*.
- Tax Court, 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq*.
- Federal Court of Appeal, 10 June 2010, *Lingle v. R*, 12 *ITLR*, 996 *et seq*.

Czech Republic

- Supreme Administrative Court, 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq.*

Denmark

- High Court, 3 February 2000, *Casino Copenhagen K/S v. Ministry of Taxes*, 3 *ITLR,* 447 *et seq.*
- High Court, 6 April 2001, *Halliburton Company Germany Gmbh v. Ministry of Treasury*, 4 *ITLR*, 19 *et seq*.
- Supreme Court, 4 February 2003, *Halliburton Company Germany Gmbh v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq.*

Finland

- Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq.*

France

- Tribunal Civil de Strasbourg, 21 July 1927, *Société Audiffren-Singrun v. Liquidation Morlang, Binger et Société Atlas*, 55 *Journal du Droit International* (1928), 732 *et seq*.
- Cour de Cassation, 4 March 1963, *Hocke,* 53 *Revue critique de droit international privé* (1964), 264 *et seq.*

- Conseil d'Etat, 3 July 1985, case *56091*, *Droit Fiscal* (1985), commentaire 1967
- Conseil d'Etat, 13 October 1999, *Re SA Diebold Courtage*, 2 *ITLR*, 365 *et seq*.
- Conseil d'Etat, 9 February 2000, *Re Hubertus AG*, 2 *ITLR*, 637 *et seq*.
- Conseil d'Etat, 20 October 2000, *Re SA New Building Promotion Limited*, 3 *ITLR*, 783 *et seq*.
- Administrative Court of Appeal of Paris, 30 January 2001, *Re Schneider SA*, 3 *ITLR,* 529 *et seq*.
- Conseil d'Etat, 27 July 2001, *Re SA Golay Buchel France*, 4 *ITLR*, 249 *et seq*.
- Conseil d'Etat, 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq*.
- Conseil d'Etat, 30 December 2003, *Re Société Andritz Sprout Bauer*, 6 *ITLR*, 604 *et seq*.
- Administrative Court of Paris, 23 March 2005, case *92-12625 Société Publi-Union*, *Revue de Jurisprudence Fiscale* (1996), No. 1463
- Conseil d'Etat, 29 December 2006, *Ministre de l'Economie, des Finances et de l'Industrie v. Société Bank of Scotland*, 9 *ITLR*, 683 *et seq*.
- Conseil d'Etat , 31 March 2010, *Société Zimmer Ltd v. Ministre de l'Economie, des Finances et de l'Industrie*, 12 *ITLR*, 739 *et seq*.

Germany

- Bundesfinanzhof, 11 October 1967, case *IR 86/67*, 90 *Sammlung der Entscheidungen des Bundesfinanzhofs*, 74 *et seq*
- Tax Court of Rheinland-Pfalz, 2 April 1980, case *V 351/79*, *Entscheidungen der Finanzgerichte* (1980), 357 *et seq*.
- Bundesfinanzhof, 9 December 1981, case *IR 78/80*, *Bundessteuerblatt. Teil II* (1982), 243 *et seq*.
- Bundesfinanzhof, 19 May 1982, case *IR 257/78*, *Bundessteuerblatt. Teil II* (1982), 768 *et seq*.
- Tax Court of Köln, 28 November 1983, case *169/80 E*, *Entscheidungen der Finanzgerichte* (1984), 460 *et seq*.
- Bundesfinanzhof , 21 August 1985, case *IR 63/80*, in *Bundessteuerblatt. Teil II* (1986), 4 *et seq*.
- Bundesfinanzhof, 9 October 1985, case *IR 128/80*, *Bundessteuerblatt. Teil II* (1988), 810 *et seq*.

- Bundesfinanzhof, 5 March 1986, case *IR 201/82*, *Bundessteuerblatt. Teil II* (1986), 496 *et seq*.
- Bundesfinanzhof, 3 February 1988, case *IR 369/83*, *Bundessteuerblatt. Teil II* (1988), 486 *et seq*.
- Bundesfinanzhof, 13 December 1989, case *IR 39/87*, *Bundessteuerblatt. Teil II* (1990), 379 *et seq*.
- Bundesfinanzhof, 7 February 1990, case *IR 106/87*, 159 *Sammlung der Entscheidungen des Bundesfinanzhofs*, 518 *et seq*.
- Bundesfinanzhof, 10 July 1996, case *IR 4/96*, *Bundessteuerblatt. Teil II* (1997), 15 *et seq*.
- Tax Court of Baden-Württemberg, 16 August 1996, case *K 42/92*, *Entscheidungen der Finanzgerichte* (1997), 82 *et seq*.
- Tax Court of Munich, 22 July 1998, case *9 K 2830/97*, *Haufe-Index* 952357
- Bundesfinanzhof, 21 September 1999, *Re A Foreign Silent Partnership*, 2 *ITLR*, 859 *et seq*.
- Bundesfinanzhof, 17 October 2007, *Re a Partnership*, 10 *ITLR*, 628 *et seq*.
- Tax Court of Münster, 22 February 2008, *Re Reduction of Profits in Connection with the Sale of Shares in S*, 12 *ITLR*, 274 *et seq*.
- Bundesfinanzhof, 2 September 2009, *Re a German-Belgian Competent Authority Agreement*, 12 *ITLR*, 475 *et seq*.

India

- Authority for Advance Rulings, 18 March 1997, *TVM Ltd v. CIT*, 1 *ITLR*, 296 *et seq*.
- Authority for Advance Rulings, 28 April 1999, *Y's Application*, 2 *ITLR*, 66 *et seq*.
- Income Tax Appellate Tribunal of Mumbai, 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq*.
- Supreme Court, 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 *ITLR*, 233 *et seq*.
- Income Tax Appellate Tribunal of Delhi, 26 July 2004, *Ensco Maritime Ltd v. Deputy Commissioner of Income Tax*, 7 *ITLR*, 822 *et seq*.
- Income Tax Appellate Tribunal of Mumbai, 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq*.
- Income Tax Appellate Tribunal of Kolkata, 22 August 2005, *ABN Amro Bank NV v. Assistant Director of Income Tax International Taxation & Assistant Director of*

Income Tax International Taxation v. Bank of Tokyo Mitsubishi Ltd, 8 *ITLR,* 502 *et seq*.

- Income Tax Appellate Tribunal of Mumbai, 30 September 2005, *Metchem Canada Inc v. Deputy Commissioner of Income Tax*, 8 *ITLR,* 1043 *et seq*.
- Supreme Court, 4 January 2007, *Ishikawajma-Harima Heavy Industries Ltd v. Director of Income Tax*, 9 *ITLR*, 799 *et seq*.
- Income Tax Appellate Tribunal of Mumbai, 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq*.
- Income Tax Appellate Tribunal of Pune, 29 June 2007, *DCIT v. Patni Computer Systems Ltd*, 10 *ITLR,* 53 *et seq*.
- Income Tax Appellate Tribunal of New Delhi, 26 October 2007, *Rolls-Royce plc v. Director of Income Tax*, 10 *ITLR*, 327 *et seq*.
- Income Tax Appellate Tribunal of Chennai, 19 May 2008, *West Asia Maritime Ltd and another v. Income Tax Officer*, 10 *ITLR*, 965 *et seq*.
- Income Tax Appellate Tribunal of Mumbai, 4 July 2008, *Assistant Director of Income Tax (International Taxation) v. M/S Chiron Behring Gmbh & Co*, 11 *ITLR,* 83 *et seq*.
- Authority for Advance Rulings , 18 July 2008, *Dell International Service India Pvt Ltd v. CIT (International Taxation)*, 11 *ITLR*, 173 *et seq*.
- Income Tax Appellate Tribunal of Mumbai, 13 august 2008, *Deputy Director and Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 *ITLR*, 103 *et seq*.
- Income Tax Appellate Tribunal of Delhi, 29 August 2008, *Fugro Engineers BV v. Assistant Commissioner of Income Tax*, 11 *ITLR*, 421 *et seq*.
- Income Tax Appellate Tribunal of Pune, 10 September 2008, *Automated Securities Clearance Inc v. Income Tax Officer*, 11 *ITLR*, 201 *et seq*.
- Income Tax Appellate Tribunal of Mumbai, 29 September 2008, *Assistant Director of Income Tax v. Delta Airlines Inc*, 12 *ITLR*, 344 *et seq*.
- Income Tax Appellate Tribunal of Pune, 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 *ITLR*, 811 *et seq*.
- Authority for Advance Rulings, 26 June 2009, *Cal Dive Marine Construction (Mauritius) Ltd v. Director of Income Tax*, 12 *ITLR*, 38 *et seq*
- Authority for Advance Rulings, 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq*.

- Income Tax Appellate Tribunal of Delhi, 16 October 2009, *New Skies Satellites NV v. Assistant Director of Income Tax & Shin Satellite Public Company Limited v. Deputy Director of Income Tax*, 12 *ITLR*, 409 *et seq*.
- Income Tax Appellate Tribunal of Mumbai, 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 *ITLR*, 915 *et seq*.

Ireland

- High Court, 24 June 1994, *Travers v. O'Siochain*, *The Irish Reports* (1994), 199 *et seq*.
- High Court, 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq*.

Israel

- District Court of Tel Aviv-Yafo, 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq*.

Italy

- Corte Suprema di Cassazione, 9 December 1974, *Ministry of Defence v. Neapolitan Tagboat Company,* 77 *International Law Reports,* 567 *et seq.*
- Corte Suprema di Cassazione, 7 March 2002, *Ministry of Finance (Tax Office) v. Philip Morris Gmbh*, 4 *ITLR*, 903 *et seq*.
- Corte Suprema di Cassazione, 25 May 2002, case *7682* (available on-line on the website: www.ipsoa.it)
- Corte Suprema di Cassazione, 6 Decembre 2002, case *17373* (available on-line on the website: www.ipsoa.it)
- Corte Suprema di Cassazione, 23 April 2004, case *7851* (available on-line on the website: www.ipsoa.it)
- Corte Suprema di Cassazione, 15 February 2008, case *3889* (available on-line on the website: www.ipsoa.it)
- Corte Suprema di Cassazione, 8 April 2010, case *8488* (available on-line on the website: www.ipsoa.it)
- Corte Suprema di Cassazione, 3 February 2012, case *1550* (available on-line on the website: www.ipsoa.it)

Japan

- District Court of Tokyo, 14 April 1965, 11 *Shomu Geppo*, 817 *et seq*.,
- Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 *ITLR*, 645 *et seq.*

Luxembourg

- Administrative Court, 17 January 2006, *Re XXX SA*, 9 *ITLR*, 176 *et seq*.

Netherlands

- Court of Rotterdam, 18 June 1963, *Journal du Droit International* (1969), 990 *et seq.*
- Hoge Raad, 4 February 1970, case *16305*, BNB 1970/71
- Hoge Raad, 26 January 1977, case *18010*, BNB 1977/111
- Hoge Raad, 18 September 1985, case *22926*, BNB 1985/333
- Hoge Raad, 13 September 1989, case *25419*, BNB 1990/60
- Hoge Raad, 6 December 1989, case *25373*, BNB 1990/44
- Hoge Raad, 15 April 1992, case *28217*, BNB 1992/223
- Hoge Raad, 4 November 1992, case *27222*, BNB 1993/38
- Hoge Raad, 25 May 1994, case *28959*, BNB 1994/219
- Hoge Raad, 28 October 1998, case *32330*, 1 *ITLR*, 551 *et seq.*
- Hoge Raad, 9 December 1998, case *32709*, 1 *ITLR*, 839 *et seq*.
- Hoge Raad, 29 September 1999, case *33267*, BNB 2000/16
- Hoge Raad, 29 September 1999, case *34482,* BNB 2000/17
- Hoge Raad, 1 November 2000, case *35398*, 3 *ITLR*, 466 *et seq*.
- Court of Appeal of The Hague, 27 February 2001, case *BK-98/02743*, 3 *ITLR,* 631 *et seq.*
- Hoge Raad, 7 December 2001, case *35231*, 4 *ITLR*, 558 *et seq*.
- Hoge Raad, 6 December 2002, case *36773*, 5 *ITLR*, 680 *et seq*.
- Hoge Raad, 21 February 2003, case *37011*, BNB 2003/177
- Hoge Raad, 21 February 2003, case *37024*, 5 *ITLR*, 818 *et seq.*
- Hoge Raad, 5 September 2003, case *37651*, BNB 2003/379
- Hoge Raad, 5 September 2003, case *37657*, BNB 2003/380

- Hoge Raad, 5 September 2003, case *37670*, BNB 2003/381
- Hoge Raad, 12 December 2003, case *38461*, BNB 2004/123

Norway

- Borgarting Appeals Court, 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq*.
- Supreme Court, 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq*.
- Supreme Court, 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR,* 15 *et seq*.
- District Court of Oslo, 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq*.

Poland

- Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury,* 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq.*

Portugal

- Supreme Administrative Court (Portugal), 25 March 2009, *A and another v. Portuguese Treasury*, 11 *ITLR,* 1001 *et seq.*

Sweden

- Supreme Administrative Court, 23 December 1987, case *RÅ 1987 ref. 162*, *Regeringsrättens årsbok* (1987)
- Supreme Administrative Court, 25 March 2004, case *RÅ 2004 ref. 59*, *Regeringsrättens årsbok* (2004)

Switzerland

- Tax Recourse Commission, 10 May 1989, *Steuerentscheid* (1989), A 31.1, No. 4
- Federal Commission of Appeal in Tax Matters, 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*
- Federal Court, 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*

United Kingdom

- House of Lords, 16 July 1959, *Ostime v. Australian Mutual Provident Society*, 38 TC 492
- Court of Appeal of England and Wales (United Kingdom), 22 May 1974*, H.P. Bulmer Ltd et al. v. J Bollinger S.A. et al.*, [1974] Ch 401
- House of Lords, 5 February 1975, *Oppenheimer v. Cattermole*, 50 TC 159
- High Court of Justice of England and Wales, 12 March 1976, *Avery Jones v. IRC*, [1976] STC 290
- House of Lords, 9 November 1977, *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd*, [1978] AC 141
- House of Lords, 10 July 1980, *Fothergill v. Monarch Airlines Ltd*, [1981] AC 251
- High Court of Justice of England and Wales, 1 March 1982, *IRC v. Exxon Corporation*, [1982] STC 356
- High Court of Justice of England and Wales, 31 August 1988, *Union Texas Petroleum Corporation v. Critchley*, [1998] STC 691
- Court of Appeal of England and Wales, 19 May 1989, *Padmore v. IRC* (1989), 62 TC 352
- High Court of Justice of England and Wales, 9 February 1990, *IRC v. Commerzbank,* 63 TC 218
- Special Commissioners, 23 September 1998, *Sportsman v. IRC*, 1 *ITLR*, 237 *et seq.*
- Court of Appeal of England and Wales, 23 July 1999, *Regina v. Secretary of State for the Home Department, ex parte Adan*, [1999] 3 WLR 1274
- House of Lords, 28 February 2002, *King v. Bristow Helicopters Ltd, In Re M (A Child By Her Litigation Friend CM)*, [2002] UKHL 7
- House of Lords, 9 December 2004, *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, [2004] UKHL 55
- House of Lords, 16 December 2004, *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56
- Special Commissioners, 7 June 2005, *UBS AG v. Revenue and Customs Commissioners*, 7 *ITLR*, 893 *et seq.*
- High Court of Justice of England and Wales, 7 October 2005, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 236 *et seq.*

- Court of Appeal of England and Wales, 2 March 2006, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 653 *et seq*.
- Court of Appeal of England and Wales, 21 February 2007, *UBS AG v, Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq*.
- House of Lords, 23 May 2007, *NEC Semi-Conductors Ltd and Other test claimants v. Inland Revenue Commissioners*, 9 *ITLR,* 995 *et seq.*
- High Court of Justice of England and Wales, 4 September 2007, *Federation of Tour Operators and al. v. Her Majesty's Treasury et al.*, [2007] EWHC 2062 (Admin)
- Special Commissioners, 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 *ITLR*, 574 *et seq*.
- Special Commissioners, 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq*.
- First-Tier Tribunal, 1 April 2010, *FCE Bank plc v. Revenue and Customs Commissioners*, 12 *ITLR*, 962 *et seq*.
- Court of Appeal of England and Wales, 8 July 2010, *Smallwood and another v. Revenue and Customs Commissioners*, 12 *ITLR*, 1002 *et seq*.

United States of America

- Supreme Court, *Foster & Elam v. Neilson*, 27 U.S. 253 (1829)
- Supreme Court, *United States v. Percheman*, 32 U.S. 51 (1832)
- Supreme Court, 7 January 1918, *Towne v. Eisner*, 245 U.S. 418 (1918)
- Supreme Court, 9 November 1936, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936)
- Court of Appeals, 31 March 1948, *Commissioner of Internal Revenue v. National Carbide Corporation*, 167 F.2d 304
- District Court, 6 April 1956, *American Trust Company v. James G. Smyth*, 141 F. Supp. 414
- Court of Appeals, 16 January 1963, *Samman*, 313 F.2d 461
- Supreme Court, 29 April 1963, *Maximov v. United States,* 373 U.S. 49 (1963)
- Court of Federal Claims, 5 May 1982, *Great-West Life Assurance Company*, 678 F.2d 180
- Supreme Court, 15 June 1982, *Sumitomo Shoji America Inc v. Avagliano,* 457 U.S. 176 (1982)
- Tax Court, 11 April 1983, *Estate of Burghardt*, 80 T.C. 705

- Tax Court, 16 October 1984, *Pierre Boulez v. Commissioner of Internal Revenue*, 83 T.C. 584
- Supreme Court, 17 April 1991, *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991)
- Court of Appeals, 6 December 1994, *Xerox Corporation v. United States*, 41 F.3d 647
- Supreme Court, 12 January 1999, *El Al Israel Airlines Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999)
- Court of Federal Claims, 7 July 1999, *National Westminster Bank v. US*, 1 *ITLR*, 725 *et seq*.
- Tax Court, 18 November 1999, *Compaq v. CIR (the ACT credit claim)*, 2 *ITLR*, 323 *et seq*.
- Court of Appeals, 1 February 2002, Thomas *Busby v. State of Alaska*, 40 P.3d 807
- Court of Federal Claims, 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq.*
- Court of Appeals, 8 March 2004, *Gary and Maryanne Ehrlich v. American Airlines Inc*. *et al.,* 360 F.3d 366 (2004)
- Tax Court, 29 June 2004, *Abeid v. Commissioner of Internal Revenue*, 7 *ITLR*, 202 *et seq*.
- Court of Federal Claims, 4 January 2005, *Sarkisov v. United States of America*, 7 *ITLR*, 469 *et seq*.
- Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq*.

DOCUMENTS ISSUED BY NATIONAL PARLIAMENTS, GOVERNMENTS AND TAX AUTHORITIES

Belgium

- Tax authorities: circular letter no. AFZ/2004/0053 of 16 January 2004

Canada

- Department of Finance: Press Release 81-16 of 4 February 1981
- Department of Finance: Press Release 84-128 of 16 August 1984
- Revenue Agency: Interpretation Bulletin IT-221R3

Finland

- Government: Bill 155/1994 vp

Italy

- Ministero delle Finanze: Circolare n. 32 of 22 September 1980
- Agenzia delle Entrate: Risoluzione n. 12/E of 9 February 2004
- Agenzia delle Entrate: Risoluzione n. 18/E of 15 February 2005

Norway

- Ministry of Finance: letter dated 4 April 2000

Switzerland

- Federal Council: resolution of 14 December 1962, concerning measures against the unjustified usage of tax treaties

United States

- Internal Revenue Service: United States Revenue Ruling 56-446 (1956-2 C.B. 1065)
- Internal Revenue Service: Revenue Ruling 58-247 (1958-1 C.B. 623)

- Internal Revenue Service: Revenue Ruling 78-423
- Internal Revenue Service: Rev. Proc. 80-18
- Internal Revenue Service: Revenue Ruling 80-243
- Senate Committee on Foreign Relations: Report of 25 April 1978 concerning the 1975 United States-United Kingdom tax treaty
- Treasury Department: Treasury Regulations issued under the 1939 United States-Sweden tax treaty
- Treasury Department: Treasury Regulations issued under the 1939 France-United States tax treaty
- Treasury Department: Treasury Regulations issued under the 1942 Canada-United States tax treaty
- Treasury Department: Treasury Regulations issued under the 1951 Switzerland-United States tax treaty
- Treasury Department: Treasury Regulations § 1.882-5
- Treasury Department: Technical Explanation to the 1973 United States-Union of the Soviet Socialist Republics tax treaty
- Treasury Department: Technical Explanation to the 1975 United States-United Kingdom tax treaty
- Treasury Department: Technical Explanation to the 1980 Canada-United States tax treaty
- United States Model Income Tax Convention (1996)
- United States Model Income Tax Convention (2006)

SUMMARY

The purpose of the present study is to:

- single out and clarify the most common types of issues emerging in the interpretation of multilingual tax treaties (i.e. tax treaties authenticated in two or more languages), and
- suggest how the interpreter should tackle and disentangle such issues under public international law, with a particular emphasis on the kinds of arguments he should use and the kinds of elements and items of evidence he should rely upon in order to support his construction of the treaty.

The issues on the interpretation of multilingual tax treaties dealt with in this study may be broadly divided in two groups *ratione materiae*:

(i) those general in nature, which may potentially concern all multilingual treaties;
(ii) those specific to multilingual tax treaties.

Issues in group (i) appear to arise independently from the nature and content of the treaty actually at stake. Such issues may be formulated by means of the following research questions:

a) Must all authentic texts be given the same status for the purpose of interpreting multilingual treaties?
b) What is the relevance of non-authentic texts for the purpose of construing (multilingual) treaties?
c) Is there any obligation to perform a comparison of the different authentic texts anytime a multilingual treaty is interpreted?
d) If the previous question is answered in the negative, when does an obligation to compare the different authentic texts arise?
e) How should the interpreter solve the *prima facie* discrepancies among the various authentic texts emerging from the comparison?
f) What should the interpreter do where the *prima facie* discrepancies could not be removed by means of (ordinary) interpretation?
g) Where the treaty provides that a certain authentic text is to prevail in the case of divergences:
    - At which point of the interpretative process must there be recourse to such a prevailing text?
    - What if the prevailing text is ambiguous or obscure?
    - What about the contrast between the prevailing text and the other authentic texts if the latter are coherent among themselves?
h) What is the impact of the fact that legal jargon terms are employed in the treaty texts on the answers to be given to the previous questions?

Issues in group (ii) relate specifically to multilingual tax treaties. They may be expressed by means of the following research questions:

a) What is the relevance of the official versions of the OECD Model for the purpose of interpreting multilingual tax treaties (either authenticated also in English and/or French, or authenticated in neither of such languages)?
b) What is the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties?
c) What is the relevance of Article 3(2) of OECD Model-based multilingual tax treaties for the purpose of their interpretation?

In order to suggest valuable and durable solutions to the problem of how the interpreter should tackle and disentangle the various issues that he might face where confronted with a multilingual tax treaty, the author chose to anchor his analysis in an in-depth, stable and clear foundation. He decided to primarily approach his task on the basis of modern linguistic and, more specifically, semantic (here intended as including pragmatic) theories.

Following this approach, the author focuses on the answers that modern semantics has given to key questions such as:

(i) What is the goal pursued by persons using (written) language as means of communication?
(ii) How do persons actually create their utterances and use language in that respect?
(iii) How do other persons interpret the utterances they hear or read?
(iv) Why do utterances seem inextricably affected by vagueness and ambiguity?
(v) How is it possible to reduce the impact of such vagueness and ambiguity in creating and/or interpreting utterances?

On the basis of these answers, the author establishes the fundamental principles that should guide the interpreter whenever construing a treaty. Such principles work together as a yardstick, a parameter of value to be used in order to assess the appropriateness of any treaty interpretation in light of the explicit or implicit arguments supporting it.

This is obviously a normative (prescriptive) type of legal analysis, which is purported to highlight the fundamental principles of treaty interpretation solely on the basis of semantics. Like all normative legal analyses, it raises the primary questions of:

a) Whether its results also represent, at least to a certain extent, a reasonable approximation of the law as it stands; and
b) What should be done with its results where they prove to conflict with the law as it stands.

In order to answer question (a), the author has carried out a positive (descriptive) analysis, which is aimed at revealing how national and international courts and tribunals have approached the interpretation and application of treaties, in general, and tax treaties, in particular, as well as how international scholars have construed Articles 31-33 VCLT and, with regard to tax treaties, Article 3(2) OECD Model. This positive analysis was aimed at providing the author with a map of the currently accepted rules and principles of interpretation, against which he could test the fundamental principles of treaty interpretation determined on the basis of his normative, semantics-based analysis.

With regard to question (b), the author has developed a theory of the interaction between normative and positive legal analyses. Adhering to the conclusions already drawn by some constitutionalists and general theorists of law, the author maintains that normative and positive legal analyses, as well as the results thereof, may be seen as interrelated and mutually affecting each other. In particular, it is the author's belief that positive legal theory produces indirect constraints to normative legal theory by (i) setting significantly high costs (in terms of legal uncertainty, infringement of legal expectations, social and cultural transition) to be met in order to substitute the state of affairs that is proposed in the normative legal theory (*first-best solution*) for the status quo; and (ii) limiting the feasible set of legal rules and policies that may be implemented.

In this respect, the rules and principles of treaty interpretation set forth in Articles 31-33 VCLT have been generally recognized as a codification of customary international law and, as such, applicable to all treaties. In addition, for more than forty years legal scholars, courts and tribunals have expressed their views on how such articles should be construed, i.e. on which legal rules and principles should be derived therefrom. Although the conclusions reached by those interpreters often vary to a considerable extent, certain mainstream constructions may be identified, as well as the outer borders beyond which any interpretation of those articles that was proposed would be rejected by the vast majority of international lawyers. Against this background, drawing a normative legal theory of treaty interpretation affirming principles that conflict with the generally accepted constructions of Articles 31-33 VCLT, or that lie to a significant extent outside the generally accepted borders of a perceived reasonable interpretation of such articles, would be equal to sustaining a legal theory of interpretation that, in the best case, could establish itself only in the very long run and would cause a protracted period characterized by more legal uncertainty than in the current state of affairs. However, since the purpose of the present research is to suggest how the interpreter should *now* tackle and disentangle the most common types of issues emerging from the interpretation of multilingual tax treaties under public international law, the author was not willing to accept the above-described drawbacks of a normative legal theory infringing the generally accepted rules and principles of treaty interpretation derived from Articles 31-33 VCLT. In the author's intention, his normative legal theory should be shaped so as to fit within the generally accepted borders of a perceived reasonable interpretation of such articles; where the inferences drawn from the semantic analysis appear to lie outside those outer borders, such inferences should be disregarded for the purpose of setting up the author's normative (semantics-based) theory of treaty interpretation. Hence, from a theoretical perspective, the author's normative legal theory of interpretation must be regarded as a *non-ideal* normative theory (*second-best solution*).

The dissertation includes three parts, in addition to the introduction.

Part I comprises the analysis of relevant modern semantics works, as well as the illustration of the semantics-based principles of treaty interpretation inferred from such analysis.

Part II is purported to design the author's normative legal theory on the interpretation of multilingual tax treaties based on the results of the semantics-based normative analysis carried out in Part I. Part II is divided into six chapters. Chapter 1 draws a concise sketch of the linguistic practices in international affairs. Chapter 2 provides the reader with a brief introduction to the VCLT. Chapter 3 carries out a positive legal analysis purported to illustrate the generally accepted constructions of Articles 31 and 32 VCLT and, at the same time, it is aimed at assessing whether the rules and principles of law resulting from such constructions conflict with the semantics-based principles of treaty interpretation established by the author in Part I, or, on the contrary, whether the latter may coexist with the former and be used in order to construe Articles 31 and 32 VCLT. Chapter 4 is purported (i) to construe, as far as possible, Article 33 VCLT in coherence with the results of the analysis carried out in the previous chapters, (ii) to assess whether such a construction is in line with any generally accepted interpretation of that article provided for by scholars, courts and tribunals and (iii) to compare the rules and principles of interpretation derived from Article 33 VCLT with the semantics-based principles of interpretation established in Part I, in order to highlight the existence and possibly investigate the reasons of any significant discrepancies between them. The construction of Article 33 VCLT based on the author's semantics-based normative analysis, so far as it does not encroach any generally accepted interpretation thereof, is employed as a legal basis in order to answer the seven research questions concerning the interpretation of multilingual treaties (in general) mentioned above. Chapter 5 deals with the research questions specifically concerning multilingual tax treaties. Chapter 6 analyses the rules governing the correction of errors in multilingual treaties, as established by Article 79(3) VCLT, and investigates the interaction between these rules and those provided for in Article 33 VCLT, both concerning, to a certain extent, the lack of concordance between two or more authentic texts of a treaty.

Finally, Part III describes and systematically arranges the answers given to the research questions, thus spelling out the author's normative legal theory on the interpretation of multilingual (tax) treaties.

SAMENVATTING

INTERPRETATIE VAN MEERTALIGE BELASTINGVERDRAGEN

Het doel van de huidige studie is om:
- de meest voorkomende vraagstukken die opdoemen bij de interpretatie van meertalige belastingverdragen (d.w.z. belastingverdragen die in twee of meer talen zijn gewaarmerkt) vast te stellen en te verduidelijken; en
- aanbevelingen te doen hoe de verdragsuitlegger deze vraagstukken onder international publiekrecht moet aanpakken en ontwaren, met bijzondere nadruk op de argumenten die hij moet gebruiken en het soort elementen en bewijsmiddelen waarop hij moet vertrouwen om zijn verdragsopbouw te ondersteunen.

De vraagstukken betreffende de interpretatie van meertalige verdragen die in deze studie worden behandeld, kunnen in grote lijnen *ratione materiae* in twee groepen worden verdeeld:
(i) die van algemene aard, die potentieel alle meertalige verdragen kunnen betreffen;
(ii) deze die specifiek zijn voor meertalige belastingverdragen.

Onder de eerste groep rijzen vraagstukken onafhankelijk van de aard en inhoud van het in het geding zijnde verdrag. Deze vraagstukken mogen worden geformuleerd met behulp van de navolgende onderzoeksvragen:

a) Moeten alle authentieke teksten dezelfde status krijgen voor het interpreteren van meertalige belastingverdragen?
b) Welke relevantie hebben niet-authentieke teksten voor het analyseren van (meertalige) verdragen?
c) Bestaat er een verplichting om telkens wanneer een meertalig verdrag wordt geïnterpreteerd de verschillende authentieke teksten met elkaar te vergelijken?
d) Indien de vorige vraag ontkennend wordt beantwoord, wanneer ontstaat dan de verplichting om de verschillende authentieke teksten te vergelijken?
e) Hoe moet degene die een verdrag interpreteert prima facie afwijkingen tussen de verschillende authentieke teksten oplossen die resulteren van de vergelijking?
f) Wat moet degene die een verdrag interpreteert doen als de prima facie afwijkingen door (normale) interpretatie niet konden worden weggewerkt?
g) Indien het verdrag bepaalt dat een bepaalde authentieke tekst voorrang heeft in het geval van afwijkingen:
   - Op welk moment van het interpretatieproces moet de tekst die voorrang heeft worden gebruikt?

   - Wat moet gebeuren als de tekst die voorrang heeft dubbelzinnig of onduidelijk is?

- Wat moet worden gedaan met het verschil tussen de tekst die voorrang heeft en andere authentieke teksten, als laatstgenoemde zelf coherent zijn?

h) Wat is het gevolg voor de antwoorden op de eerdere vragen van het feit dat in verdragen juridische termen worden gebruikt?

De vraagstukken onder de tweede groep houden specifiek verband met meertalige verdragen. Zij kunnen tot uitdrukking worden gebracht met behulp van de navolgende onderzoeksvragen:

a) Wat is de relevantie van de officiële versies van het OESO Modelverdrag voor de interpretatie van meertalige belastingverdragen (die ook zijn gewaarmerkt in het Engels en/of het Frans of in geen van die talen)?
b) Wat is de relevantie van het OESO Commentaar voor de interpretatie van meertalige belastingverdragen?
c) Wat is de relevantie van artikel 3(2) van het OESO Modelverdrag voor de interpretatie van meertalige verdragen die daarop zijn gebaseerd?

Om waardevolle en duurzame oplossingen te kunnen aandragen voor het probleem hoe de uitlegger de verschillende vraagstukken, die hij onder ogen moet zien wanneer hij met een meertalig belastingverdrag wordt geconfronteerd, kan aanpakken of ontwaren, heeft de auteur ervoor gekozen om zijn analyse te verankeren in een diepgaand, stabiel en duidelijk
fundament. Hij besloot om zijn taak allereerst te benaderen op basis van moderne taalkundige en, meer specifiek. semantische (hier bedoeld als omvattend pragmatische) theorieën.

Deze benadering volgend, concentreert de auteur zich op de antwoorden die de moderne semantiek heeft gegeven op voorname vragen als:

(i) Welke doel streven personen na die (geschreven) taal als communicatiemiddel gebruiken?
(ii) Hoe creëren personen eigenlijk hun uitingen en hoe gebruiken ze taal in dat verband?
(iii) Hoe interpreteren andere personen de uitingen die ze horen of lezen?
(iv) Waarom lijken uitingen onvermijdelijk te zijn gekenmerkt door vaagheid en dubbelzinnigheid?
(v) Hoe kan de invloed van deze onduidelijkheid en dubbelzinnigheid bij het creëren en/of interpreteren van uitingen worden verminderd?

Op basis van deze antwoorden vestigt de auteur de basisprincipes die uitlegger als leidraad moet nemen voor het opstellen van een verdrag. Zulke beginselen vormen samen een maatstaf, een parameter van waarde die moet worden gebruikt om de geschiktheid van enige verdragsinterpretatie vast te stellen in het licht van de expliciete en impliciete argumenten die haar ondersteunen.

Dit is duidelijk een normatief (prescriptief) type van juridische analyse, die beoogd om de fundamentele principes van verdragsinterpretatie louter te benaderen op basis van semantiek.
Zoals alle normatieve wettelijke analyses, doet dit allereerst de vraag rijzen of:

a) Haar resultaten ook, tenminste tot op zekere hoogte, een redelijke benadering van het geldende recht vormen; en
b) Wat met de resultaten worden moet gedaan als ze in strijd te zijn met het geldende recht blijken te zijn?

Om vraag a te kunnen beantwoorden heeft de auteur een positieve (beschrijvende) analyse doorgevoerd, die zowel beoogt om te openbaren hoe nationale en internationale hoven en tribunalen de interpretatie en toepassing van verdragen, in het algemeen, en in het bijzonder belastingverdragen, hebben benaderd als ook hoe internationale wetenschappers de Artikelen 31-33 van het Verdrag van Wenen inzake het Verdragenrecht (VWiV) hebben geïnterpreteerd en met betrekking tot belastingverdragen, artikel 3(2) van het OESO Model. Deze positieve analyse beoogde om de auteur een overzicht te verschaffen van de momenteel aanvaarde regels en interpretatiebeginselen, waarmee hij de fundamentele beginselen van verdragsinterpretatie kon testen die hij heeft bepaald met behulp van zijn normatieve, op semantiek gebaseerde analyse.

Met betrekking tot vraag (b) heeft de auteur een theorie van interactie tussen een normatieve en positieve wettelijke analyse ontwikkeld. Zich aansluitend bij de conclusies die reeds zijn getrokken door verschillende aanhangers van het constitutionalisme en algemene wetstheoretici, betoogt de auteur zowel dat normatieve en positieve wettelijke analyses, als de resultaten daarvan, als met elkaar verband houdend en elkaar beïnvloedend moeten worden beschouwd. In het bijzonder is de auteur van mening dat de positieve wetstheorie tot indirecte beperkingen voor de normatieve wetstheorie leidt, doordat (i) een zeer hoge prijs (in termen van wettelijke onzekerheid, inbreuken op wettelijke verwachtingen, sociale en culturele overgang) moet worden betaald om over te stappen naar de situatie die is voorgesteld in de normatieve wetstheorie (eerste en beste oplossing) en (ii) de geschikte wettelijke regels en beleidsvormen, die zouden kunnen worden ingevoerd worden beperkt.

In dit verband, zijn de regels en principes van verdragsinterpretatie , die zijn uiteengezet in artikel 31-33 van het VWiV, algemeen erkend als een codificatie van het gebruikelijke internationale recht en, als zodanig, toepasbaar op alle verdragen. Daarnaast, hebben wetenschappers, gerechtshoven en tribunalen gedurende meer dan veertig jaar hun zienswijze tot uitdrukking gebracht hoe zulke artikelen moeten worden opgesteld, d.w.z. welke rechtsregels en principes daaruit moeten worden afgeleid. Hoewel de conclusies die door deze verdragsuitleggers zijn getrokken vaak sterk van elkaar verschillen, kunnen zowel enkele hoofdlijnen worden afgeleid, als de grenzen waarbuiten iedere voorgestelde interpretatie van deze verdragen door de grote meerderheid van internationale juristen zou worden verworpen. Het tegen deze achtegrond opstellen van een normatieve wetstheorie voor het interpreteren van verdragen die principes bevestigd die in strijd zijn met de algemeen aanvaarde interpretatie van de artikelen 31-33 VWiV, of die voor een groot deel buiten de algemeen aanvaarde grenzen van een als redelijk aanvaarde interpretatie van zodanige artikelen ligt, zou gelijk zijn aan het opstellen van een wettelijke interpretatietheorie die, in het beste geval, zichzelf slechts op zeer lange termijn zou kunnen doorzetten en het zou leiden tot een langdurige periode, die wordt gekenmerkt door meer

rechtsonzekerheid dan onder de huidige stand van zaken. Echter, omdat het doel van het huidige onderzoek is om aan te bevelen hoe de verdragsuitlegger *nu* de meest voorkomende types van vraagstukken die resulteren uit de interpretatie van meertalige verdragen onder internationaal publiekrecht moet aanpakken en ontwaren, wenste de auteur de bovenbeschreven nadelen van een normatieve wetstheorie die een inbreuk vormen op de algemene aanvaarde regels en principes van verdragsinterpretatie welke worden afgeleid van de artikelen 31-33 VWiV niet te aanvaarden. Het was de bedoeling van de auteur dat zijn normatieve wetstheorie zo moet worden ontworpen dat ze past binnen de algemeen aanvaarde grenzen van een als redelijk beschouwde interpretatie van zulke artikelen; waar de invloeden resulterend van de semantische analyse buiten deze grenzen blijken te liggen, moeten deze buiten beschouwing worden gelaten voor het opstellen van de normatieve op semantiek gebaseerde theorie van verdragsinterpretatie die de auteur heeft opgesteld. Uit theoretisch oogpunt, moet de normatieve wettelijke interpretatietheorie van de auteur daarom worden beschouwd als een niet-optimale normatieve theorie (tweede-beste oplossing).

Naast de introductie omvat het proefschrift drie delen.

Deel 1 bevat zowel de analyse van relevante moderne semantische werken, als de illustratie van de op semantiek gebaseerde principes van verdragsinterpretatie die uit zulke analyse kunnen worden afgeleid.

Deel 2 heeft tot doel om de normatieve wetstheorie van de auteur betreffende de interpretatie van meertalige verdragen te ontwikkelen op basis van de resultaten van de op semantiek gebaseerde normatieve analyse die in deel 1 is uitgevoerd. Deel 2 is verdeeld in zes hoofdstukken. Hoofdstuk 1 bevat een bondige samenvatting van de taalkundige praktijken in internationale zaken. Het tweede hoofdstuk verschaft de lezer een korte introductie van het VWiV. In hoofdstuk drie is een positieve wettelijke analyse uitgevoerd om de algemeen aanvaarde uitleg van de artikelen 31 en 32 van het VWiV te illustreren en, tegelijkertijd, beoogt het om vast te stellen of de regels en wettelijke principes die voortvloeien uit die uitleg conflicteren met de op semantiek gebaseerde principes van verdragsinterpretatie die de auteur in deel 1 heeft ontwikkeld of dat de laatstgenoemden kunnen samen gaan met de eerstgenoemde en mogen worden gebruikt voor de uitleg van de artikelen 31 en 32 VWiV. Hoofdstuk 4 beoogd, voor zover mogelijk, om (i) Artikel 33 VwiV uit te leggen in lijn met de analyse die is uitgevoerd in de voorafgaande hoofdstukken (ii) om na te gaan of zulke uitleg in lijn is met de algemeen aanvaarde uitleg van dat artikel die door wetenschappers, hoven en tribunalen is gegeven en (iii) om de regels en interpretatiebeginselen die zijn afgeleid van artikel 33 VWiV te vergelijken met de op semantiek gebaseerde interpretatiebeginselen die in het eerste deel zijn opgesteld om het bestaan te benadrukken van en mogelijk de oorzaken te onderzoeken van belangrijke afwijkingen daartussen. De uitleg van artikel 33 VwiV, die berust op de op de op semantiek gebaseerde normatieve theorie van de auteur, voor zover ze geen inbreuk maakt op enige algemeen aanvaarde interpretatie daarvan, is gebruikt als een wettelijke basis om de zeven bovengenoemde onderzoeksvragen betreffende de interpretatie van meertalige verdragen (in het algemeen) te beantwoorden. Het vijfde hoofdstuk behandelt de onderzoeksvragen welke specifiek meertalige

belastingverdragen betreffen. Hoofdstuk 6 analyseert de regels betreffende het corrigeren van fouten in meertalige verdragen, zoals opgesteld door artikel 79(3) VWiV, en onderzoekt de interactie tussen deze regels en die opgenomen in artikel 33 VWiV, die, tot op zekere hoogte, het gebrek aan overeenstemming tussen 2 of meer authentieke verdragsteksten betreft.

Het derde deel tenslotte beschrijft en rangschikt de antwoorden op de onderzoeksvragen op systematische wijze, en legt op deze wijze de normatieve wettelijke theorie van de auteur inzake de interpretatie van meertalige (belasting)verdragen uit.

CURRICULUM VITAE

Paolo Arginelli was born on 2 March 1975 in Cesena (Italy). In 1999 he graduated from the University of Bologna with a thesis on the effects of international double taxation on foreign direct investments. From November 1999 through August 2005, he had been working with Ernst & Young, dealing mainly with corporate taxation, mergers and acquisitions, and group reorganizations. In 2003 he completed a Master in domestic and international tax planning organized by University Federico II of Naples (in association with Ernst & Young). In the academic year 2005-2006 he attended the Advanced LL M in International Taxation organized by the International Tax Center (Leiden University), where he graduated with a thesis on the impact of the EU freedom of establishment on member States' legislations dealing with the offset of profits and losses between head offices and permanent establishments. From August through December 2006, he had acted as teaching assistant at the Advanced LL M in International Taxation organized by the International Tax Center. In 2007 and 2008 he had been working as Senior Research Associate at the International Bureau of Fiscal Documentation of Amsterdam, teaching and organizing courses for the International Tax Academy. At the same time, he had started teaching at the Advanced LL M in International Taxation organized by the International Tax Center, both in the tax treaty course and in the EU law course. Since 2008 he has been teaching and researching at the Università Cattolica del Sacro Cuore in Italy, where he has been appointed Adjunct Professor, teaching Corporate tax law and International law and business ethics, since 2011. In 2012 he has been appointed as alternate member of the VAT Expert Group set up by the European Commission. He has published extensively in Italian, Swiss and international tax journals (such as European Taxation, Intertax, Rivista di Diritto Tributario, Diritto e Pratica Tributaria Internazionale, Novità Fiscali, etc.) and books. He has been appointed as National Reporter for Italy in respect of the 2008 IFA Congress topic "New tendencies in tax treatment of cross-border interest of corporations" and he has been a panellist at Seminar C of the 2009 IFA Congress, held in Vancouver. He habitually teaches at masters and participates as speaker to seminars and conferences.