



Universiteit  
Leiden  
The Netherlands

## The interpretation of multilingual tax treaties

Arginelli, P.

### Citation

Arginelli, P. (2013, October 29). *The interpretation of multilingual tax treaties*. LUP Dissertations. Leiden University Press, Leiden. Retrieved from <https://hdl.handle.net/1887/22074>

Version: Corrected Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/22074>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/22074> holds various files of this Leiden University dissertation.

**Author:** Arginelli, Paolo

**Title:** The interpretation of multilingual tax treaties

**Issue Date:** 2013-10-29

## 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?<sup>1</sup>

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.<sup>2</sup>

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

<sup>1</sup> The example is derived from ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment.

<sup>2</sup> 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?<sup>3</sup>

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 seem 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?*

---

<sup>3</sup> 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?<sup>4</sup>

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

---

<sup>4</sup> 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.<sup>5</sup>

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.

---

<sup>5</sup> 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).<sup>6</sup>

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*?<sup>7</sup>
- (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

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

<sup>7</sup> 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,<sup>8</sup> due to the following features:

- (i) most tax treaties are based on the OECD Model,<sup>9</sup> 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

<sup>8</sup> Or other types of treaties that have similar features, e.g. bilateral treaties concerning estate, inheritance and gift taxes.

<sup>9</sup> 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 voisins. 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]<sup>10</sup> 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 to 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:

---

<sup>10</sup> The relevant excerpt of paragraph 18 of the Commentary to Article 12 OECD Model, in its French official version, reads as follows: “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*,<sup>11</sup> 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

---

<sup>11</sup> 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,<sup>12</sup> 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”.<sup>13</sup> Although under the Italian Civil Code the

<sup>12</sup> 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.

<sup>13</sup> 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.<sup>14</sup>

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).

<sup>14</sup> 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*<sup>15</sup> 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.<sup>16</sup> 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

---

<sup>15</sup> “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).

<sup>16</sup> 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. Lindelfalk, for instance, resorts to the “general theory of verbal communication”<sup>17</sup> 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”,<sup>18</sup> “utterance meaning” being a technical term used in modern linguistics.<sup>19</sup> 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”<sup>20</sup> and the “communicative assumption”,<sup>21</sup> which have been developed in modern semantic and

<sup>17</sup> U. Lindelfalk, *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.

<sup>18</sup> *Ibidem*, at p. 30. From such premises, Lindelfalk 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).

<sup>19</sup> 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.

<sup>20</sup> See U. Lindelfalk, *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”.

<sup>21</sup> 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”.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.*

<sup>22</sup> See *ibidem*, at p. 57, note 22.

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

<sup>24</sup> See *ibidem* at pp. 13 and 19.

<sup>25</sup> 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,<sup>26</sup> 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”,<sup>27</sup> the latter obviously creates the cultural

<sup>26</sup> 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](http://papers.ssrn.com/pape.tar?abstract_id=949052)).

<sup>27</sup> 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<sup>28</sup> and as a constraint.<sup>29</sup> 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.<sup>30</sup> Positive legal theory produces indirect constraints to normative legal theory by:<sup>31</sup>

(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<sup>32</sup> 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.<sup>33</sup> 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.

<sup>28</sup> G. Jellinek, *Allgemeine Staatsleere* (Berlin: Springer-Verlag, 1929), at 338.

<sup>29</sup> 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](http://papers.ssrn.com/pape.tar?abstract_id=949052)), in particular at 18 *et seq.*

<sup>30</sup> 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.

<sup>31</sup> 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".

<sup>32</sup> I.e. that positive legal theory produces indirect constraints to normative legal theory.

<sup>33</sup> See section 2 of Chapter 2 of Part II.

characterized by more legal uncertainty than in the current state of affairs<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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<sup>37</sup> 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.<sup>38</sup>

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

---

<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> 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.*

<sup>37</sup> Nor with any generally agreed construction of Article 3(2) OECD Model, with regard to tax treaties.

<sup>38</sup> 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.<sup>39</sup>

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.

---

<sup>39</sup> 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 answer 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.

