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The interpretation of multilingual tax treaties

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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 addressees 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 relatively²⁹⁷ 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 than 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 such³¹⁰ 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 treaties³¹² 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 than 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, Koskeniemi, *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 is 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 reasonably³²⁰ 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 law³²⁶ 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’ 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’ 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 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.