The interpretation of multilingual tax treaties

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PART II

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

CHAPTER 1 - LINGUISTIC PRACTICES IN INTERNATIONAL AFFAIRS

1. In general

For a long time, diplomatic relations among Western countries (including their overseas possessions) had been carried on in an international *lingua franca*, that being originally Latin, from the Roman Republic through the Holy Roman Empire up to the XXVI – XVII century, then followed by Castilian Spanish from the XVI century and French from the XVIII century.[345]

However, as Ostrower points out,[346] the identification of diplomatic language with French and Latin is Eurocentric and omits the entire effort of political relations in the original cradles of civilization in Africa, Asia and Asia Minor.[347] In fact, languages such as Greek, Chinese, Akkadian, Aramaic, Persian, Arabic and Sumerian served as recognized diplomatic languages, for a certain period, in the areas of influence of their respective nations.[348]

Ostrower also recognizes that both European and non-European diplomatic languages have gone through similar paths, characterized by slow rise and (often) abrupt falls, as have the national civilizations that spread them out.[349] His impressive study highlights that struggle for linguistic domination has persisted uninterruptedly in international relations and that national languages are constantly maneuvering for recognition and supremacy; such a struggle is against the back-drop of the political, cultural and social agitation that result from the clash of national groups and their interests.[350]

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[345] See J. B. Scott, Le Français, Langue Diplomatique Moderne: étude critique de conciliation internationale (Paris: Pédone 1924); H. Wheaton, Elements of International Law: with a sketch of the history of the science (Oxford: Clarendon Press, 1936), p. 197; H. Bonfils, Manuel de droit international public (droit de gens) (Paris: Fauchille, 1914), p. 555; and more extensively, A. Ostrower, Language, Law, and Diplomacy – Volume One (Philadelphia: University of Pennsylvania Press, 1965), pp. 27-30.

[346] A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), p. 30.

[347] As well as in America and Oceania, in relation to which the sources at our disposal are scarcer.

[348] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 4; D. Shelton, "Reconcilable Differences? The Interpretation of Multilingual Treaties", 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at. 613; A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Phioladelphia: University of Pennsylvania Press, 1965), ch. VIII.

[349] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), pp. 58-59, referring to the theory of the languages internecine wars, which would take place at an advanced stage of the process of civilizations disintegration, developed in A. J. Toynbee, *A Study of History – Vol. V: The Disintegrations of Civilizations* (Oxford: Oxford University Press, 1939).

[350] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), pp. 59-60.

The quest for mutually intelligible languages that could enhance diplomatic relations among nations has thus led in the course of human history a few languages, among the multitude available, to succeed as common vehicles of understanding. It has been noted that their success has often depended upon highly complex social, cultural, military, economic and political factors, among which the most important are (i) the numerical superiority of the group using that language, (ii) the military conquests and political power of such a group, (iii) the flexibility and richness of that language's grammar and semantics, (iv) the limited difficulties connected to learning it and (v) the wealth and prominence in commerce of the group using that language.[351]

At the end of the XIX century, diplomatic activities and relations were widely carried out in either French or English. For instance, at the 1919 Paris Peace Conference both languages were given the status of official languages; the Treaty of Versailles, which incorporated the Covenant of the League of Nations, was concluded in the French and English authentic texts; the Permanent Court of Arbitration set up in 1899 used to employ both French and English as its working languages; and both in the League of Nations Assembly and in the PCIJ, only those two languages were given an official status.[352]

This trend of subsequent dominant, at least regionally, languages in the international relations seemed, however, to have taken a pause in the mid XX century. Present international diplomacy does not appear to be dominated by a *lingua franca*; on the contrary, multilingualism seems to take control in international organizations, multilateral conferences and also in bilateral negotiations. Such a new scenario appears to be the result of the interaction of multiple factors, such as the possibility of multiple-language simultaneous translations, modern education (which is more oriented to the learning of foreign languages) and new communication technologies. The United Nations Conference initiated the modern era in the conduct of diplomatic affairs, with French, English, Chinese, Russian and Spanish serving as its official languages.[353] From that moment on, the UN General Assembly has always used these as its official languages, to which Arabic was added at the end of 1973.[354] Similarly, in the last 60 years, many other international organizations and conferences have adopted three or more languages as their official means of communication.[355]

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[351] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Philadelphia: University of Pennsylvania Press, 1965), pp. 75-80; see also the examples (and exceptions) he reported in Chapter XXII of Volume One; J. B. Scott, *Le Français, Langue Diplomatique Moderne: étude critique de conciliation internationale* (Paris: Pédone 1924), p. 129.

[352] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 4-5 and notes 8-12 at pp. 48-49; D. Shelton, "Reconcilable Differences? The Interpretation of Multilingual Treaties", 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at 614 and footnotes therein.

[353] See United Nations, *Documents of the United Nations Conference on International Organization*, held from 25 April to 26 June 1945 in San Francisco, vol. 1, pp. 165-166; vol. 2, pp. 589-590; vol. 3, pp. 223 *et seq.*; vol. 5, pp. 17-19, 50-52; vol. 8, p. 191; vol. 12, pp. 65-67; vol. 13, pp. 651-653.

[354] See UN General Assembly's resolutions 3190 (XXVIII) and 3191 (XXVIII) of 18 December 1973.

[355] For a detailed analysis of the current linguistic practice in most international organizations and their organs, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 7-31; with reference to the current linguistic practice in multilateral conferences

In their extensive studies on the use of languages in international relations, both Ostrower and Tabory point out the pros and cons of such a recent trend towards multilingualism.

The use of variety of languages and the abandonment of a single dominant idiom in both organized diplomacy and bilateral relations has better fulfilled the doctrine of the equality of States;[356] in this respect, especially at the level of international organizations, multilingualism has been regarded as a major step towards the recognition of the equal status of groups of nations using a particular idiom, and thus capable of unhinging the previous linguistic practice, which was generally regarded as one of the means through which super-powers (or former powers) sought to dominate international diplomacy.[357]

In addition, it has been pointed out that it may be preferable for States' diplomatic agents to speak in a language with which they are familiar, rather than risking incorrectly expressing their arguments and ideas in a foreign official language, with the consequent hazard of causing misunderstandings.[358]

Such advantages, however, are counterbalanced by problems caused by linguistic multiplicity, in particular the heavy administrative and financial burdens associated with multilingualism, including those connected to the huge and expensive bureaucracy and translation machinery.[359]

2. Treaties

2.1. In general

As for the use of diplomatic language in general, the conclusion of treaties has witnessed the increasing use of multiple languages since the end of the Second World War. In this respect, the ILC noted that the "phenomenon of treaties drawn up in two or more

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convened to draw up treaties, see *ibidem*, pp. 31-36.

[356] See A. Ostrower, *Language, Law, and Diplomacy – Volume One* (Phioladelphia: University of Pennsylvania Press, 1965), pp. 127, 403, 414 *et seq*.; *Volume Two*, pp. 731-732.

[357] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 144.

[358] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 145, referring to C. Boothe Luce, "The Ambassadorial Issue: Professionals or Amateurs?", 36 *Foreign Affairs* (1957), 105 *et seq.*, at 109-110.

[359] According to the interview given by (then) EU Commissioner Leonard Orban to EurActiv and published on-line on 13 November 2008 (available at: http://www.euractiv.com/en/culture/orban-multilingualism-cost-democracy-eu/article-177107), the "amount of money spent by the European Union's institutions on translation and interpretation represents approximately €1.1 billion per year, which represents one percent of the EU budget". On the issue of the cost of multilingualism in diplomatic relations, see, among many others, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 146, note 195 at p. 157 and note 319 at p. 166; with specific reference to the European Union, see H. Haarman, "Language Politics and the New European Identity", in F. Coulmas (ed.), *A Language Policy for the European Community: Prospects and Quandaries* (Berlin: Mouton de Gruyter, 1991), 103 *et seq.*, in particular at 114.

languages has become extremely common and, with the advent of the United Nations, general multilateral treaties drawn up, or finally expressed, in five different languages have become quite numerous".[360]

Multilateral treaties are generally authenticated in all the official languages of the international organization under whose auspices the relevant conference is held, or, in any case, sponsoring the treaty conclusion.[361] This holds true with regard to both the United Nations[362] and regional organizations, such as the Council of Europe[363] and the Organization of American States.[364] It is also interesting that certain treaties creating international organizations have been authenticated in the official languages of all member States of the organization itself.[365]

Where international organizations are not involved in the treaty conclusion or conference organization,[366] the tendency is to authenticate treaties in all official languages of the contracting States;[367] however, where the official languages of the contracting States are numerous, it is customary that the parties agree to authenticate the treaty solely in one or a few of the internationally known languages, such as, English, French, or Spanish.[368]

The conclusion of treaties authenticated in multiple languages indubitably presents certain advantages.

For example, scholars have argued that, where multiple languages are used at the drafting stage, the process of treaty negotiation may clarify and bring to the surface

[360] See YBILC 1966- II, p. 224, para. 1.
[361] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 355; M. Tabory, Multilingualism In International Law and Institutions (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 37-38.
[362] Which does have six official languages: English, French, Arabic, Chinese, Russian and Spanish (see 2003 UN Final Clauses of Multilateral Treaties Handbook, p. 77, letter M).
[363] Which does have two official languages: English and French (see Article 12 of the Statute of the Council of Europe, done in London on 5 May 1949).
[364] The Charter of the Organization of American States has four authentic texts: English French, Spanish and Portuguese (see Article 139 of the Charter of the Organization of American States, concluded in Bogotá on 30 April 1948, as last modified by the "Protocol of Managua", adopted on 10 June 1993, at the Nineteenth Special Session of the Organization General Assembly). These are also the official languages of most of its organs (see, for instance, Article 64 of the Inter-American Juridical Committee).
[365] The clearest example is represented by the Treaty on European Union and the Treaty on the Functioning of the European Union (see Article 55 of the Consolidated Version of the Treaty on European Union (2010/C 83/01) and Article 358 of the Consolidated Version of the Treaty on the Functioning of the European Union (2010/C 83/01)).
[366] See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 37 *et seq*.; an example thereof, in the tax field, is the Nordic Tax Convention (Convention between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, concluded in Helsinki on 23 September 1996), which has been authenticated in all official languages of the six contracting States, i.e. Danish, Faroese, Finnish, Icelandic, Norwegian, and Swedish.
[367] With the possible addition of an authentic text in an internationally well-known language.
[368] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 355.

possible problems of formulation, which otherwise could later lead to interpretative issues. Rosenne, for instance, pointed out that "the process of trilingual drafting (as opposed to mere translation) frequently brought to light questions of substance, sometime quite unsuspected, requiring further elucidation."[369] This, however, does not hold true when the drafting is carried out exclusively in one language and the other authentic texts, added subsequently, are just mere translations of the negotiated one.

Another advantage derives from the possibility for the contracting States' public bodies to apply domestically the treaty without the need for ad hoc (internationally non-authoritative) translations, where the treaty has been authenticated in one of the official languages of the relevant contracting State. The advantage, in this case, is two-fold: on the one hand, it avoids the risk that different bodies use different ad hoc translations; on the other hand, it may reduce future interpretative issues and misunderstanding regarding the intension of certain treaty terms and expressions, by means of bringing forward the analysis thereof at the drafting stage.[370]

However, as already pointed out, such advantages are counterbalanced by significant disadvantages.

Apart from the general issue of the financial and administrative burdens connected to multilingualism,[371] certain drawbacks exist that are specific for multilingual treaties.

First, in the course of negotiation, the feasibility of simultaneous drafting seems to be limited to three or four languages. The use of a higher number of authentic language texts might cause substantial effort to be devoted to the concordance between the various texts, rather than to the substance thereof. Similarly, the probability of confusion, errors and *prima facie* discrepancies may be regarded as proportional to the number of authentic texts.[372]

Second, this has a significant effect on treaty interpretation. As the International Law Commission of the United Nations pointed out, "[f]ew plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete consensus ad idem, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts. In that event the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty".[373]

Finally, small or poor States generally do not have adequate staff, with regard to the number of their components and their overall linguistic capabilities, to check all the authentic texts of the treaties to which they are part, both before signing and ratifying

[369] See Rosenne, *The Law of Treaties – A Guide to the legislative history of the Vienna Convention* (New York: Oceana Publications, 1970), p. 36.
[370] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 145-146.
[371] See section 1 of this chapter.
[372] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 146.
[373] See YBILC 1966- II, p. 225, para. 6.

them and at the subsequent stage of their application and interpretation.[374] This obviously creates an unwarranted advantage for bigger and richer States.

2.2. Bilateral treaties in particular

When concluding bilateral treaties, contracting States tend to authenticate them in all their official languages and, often, in a "neutral" internationally well-known language (usually either English or French) as well.[375]

Since most States have just one official language and not many States use the same official languages, the actual situation is that the majority of bilateral treaties are authenticated in two or three languages.

A study published by Gamble and Ku in 1993,[376] based on the nearly 12,500 bilateral treaties signed between 1920 and 1970 and contained either in the League of Nations Treaty Series or in the United Nations Treaty Series, shows that (i) about 55% of the treaties concluded between 1920 and 1942 have been authenticated solely in the official languages of both contracting States, while (ii) with regard to the treaties concluded between 1945 and 1970, such a ratio has increased to about 87%.[377]

That study also provides two additional interesting features. First,[378] in cases where the treaties have been authenticated solely in the official languages of both contracting States, the majority of treaties have two authentic texts; in contrast, in cases where the treaties have not been authenticated solely in the official languages of the contracting States, the vast majority of treaties (about 95%) have just one authentic text.[379] Second, while the average number of authentic texts for the treaties concluded between 1920 and 1942 is about 1.6, the average number for the treaties concluded between 1945 and 1970 is nearly 2.0,[380] which seems to confirm the above-illustrated

[374] M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 146.
[375] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 355. With regard to tax treaties, it is interesting to note that, in recent years, a few States started to conclude their treaties in one authentic language only, generally English or French (see in that respect G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxi).
[376] J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*
[377] See J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 242.
[378] See J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 243.
[379] Such a single authentic text is in the French language in nearly 60% of the cases and in the English language in nearly 30% of the cases; however, the study shows an inversion in the tendency to choose the language for the single authentic text: in fact, while in the '20, '30 and '40 of the last century French overwhelmed English, the '50 and '60 are characterized by an inverse trend (seeJ. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 243-245).
[380] See J. K. Gamble and C. Ku, "Choice of Language in Bilateral Treaties: Fifty Years of Changing State

trend toward abandoning the use of a *lingua franca* and toward restating the equal status and sovereignty of the contracting States through the use of their own official languages for treaty purposes.

It is necessary to stress, however, that the study of Gamble and Ku does not provide the author with any data on the treaties concluded in the last 40 years, a period long enough to indicate significant reversals of linguistic trends in bilateral treaty practice.

In 2005, Maisto published a study on the impact of multilingualism on the interpretation of tax treaties and (then) European Community law.[381] In that study, country reporters from Austria, Belgium, France, Germany, Italy, the Netherlands and Switzerland listed the tax treaties (in force) concluded by their respective countries, including information concerning the authentic texts thereof. The analysis of such lists sheds some light on the linguistic practice followed by (a few) OECD member States when concluding their tax treaties. Although the sample, amounting to 512 treaties, covers just about one sixth of the total tax treaties currently in force worldwide, which may be estimated as approximately 3,000 units,[382] and does not include any treaties concluded between developing countries, which might present different linguistic features due to the widespread diffusion of the French, Spanish and Portuguese languages in certain areas caused by historic political reasons, this study highlights some interesting trends.

Of the tax treaties listed, about 17% have been authenticated in one language only, 39% in two languages, 39% in three languages and 5% in four or more languages.[383] Moreover, 189 treaties provide that a specific authentic text is to prevail in the case of (apparent) conflicts; this means that, of the 424 tax treaties authenticated in two or more languages, about 45% provide for a prevailing language in cases of (apparent) divergences among the texts and 55% do not.

About 55% of the sample tax treaties have been authenticated only in the official languages of the two contracting States. Of these treaties, the overwhelming majority do not provide for any prevailing language.[384] Moreover, 14% thereof have been

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Practice", 3 *Indiana International and Comparative Law Review* (1993), 223 *et seq.*, at 263.

[381] G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD Publications, 2005).

[382] According to Eassen, citing the *Worldwide Investment Report 1998: Trends and Determinants* (UNCTAD, 1998), at the end of the the XX century the number of tax treaties in force was approaching 2,000 (see A. Easson, "Do We Sill Need Tax Treaties?", 54 *Bulletin for international taxation* (2000), 619 *et seq.*, at 619). According to Arnold, Sasseville and Zolt, this number exceeded 2,500 at the beginning of the XXI century (see B. Arnold, J. Sasseville and E. Zolt, "Summary of the Proceedings of an Invitational Seminar on Tax Treaties in the 21st Century", 56 *Bulletin for international taxation* (2002), 233 *et seq.*, at 233; see similarly P. Egger et al., "The Impact of Endogenous Tax Treaties on Foreign Direct Investment: Theory and Evidence", 39 *Canadian Journal of Economics* (2006), 901 *et seq.*, at 902). A query made by the author on the IBFD Tax Treaty Database (accessed on 24 June 2011) shows the number of income and capital tax treaties currently in force to equal 4,419; this figure, however, significantly exceeds the actual number of tax treaties currently in force worldwide due to the fact that each authentic text and unofficial English translation of these tax treaties is included in the database as an autonomous item.

[383] Only the 1998 Belgium-Kazakhstan tax treaty has been authenticated in five languages, namely the French, Dutch, English Russian and Kazakhstan ones, English prevailing in the case of conflict.

[384] Exceptions are, for instance, the 1999 Austria-India tax treaty, where the German, English and Hindi texts

authenticated in one language only,[385] 14% in three languages and 71% in two languages; only three treaties have been authenticated in four languages.

Among the other 45% of the tax treaties listed, i.e. those authenticated (also) in a language that is not an official language of any contracting State, approximately 22% have been authenticated only in a "neutral" language, 68% in three languages and 10% in four or more languages; none has been authenticated in two languages. Those authenticated in three or more languages generally provide for the text drafted in the "neutral" language to prevail in the case of (apparent) divergences among the texts.[386]

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are all equally authentic, but, "[i]n the case of a divergence among the texts, the English text shall be the operative one"; the 1973 Germany-South Africa tax treaty, where the English, Afrikaans and German texts are all equally authentic, "except in the case of doubt when the English text shall prevail"; the 1968 Belgium-Greece tax treaty, where the Dutch, French and Greek texts are all equally authentic, but, "[i]n the event of divergence between the texts, the French text shall be decisive" (the same holds true with regard to the 2004 Belgium-Greece tax treaty, which entered into force in 2006).

[385] The majority of these tax treaties have been authenticated in a language that is official in both contracting States, such as (i) German in the 2000 Austria-German tax treaty, the 1969 Austria-Lichtenstein tax treaty, 1962 Austria-Luxembourg tax treaty, the 1974 Austria-Switzerland tax treaty, or the 1971 Germany-Switzerland tax treaty; (ii) French in the 1964 Belgium-France tax treaty (although De Boek (see R. De Boek, "Belgium", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 172 and 196) affirms that the 1964 Belgium-France tax treaty has been authenticated in both the French and the Dutch language, from the text of the treaty as resulting from Volume 557 of the United Nations Treaty Series and the United Nations on-line registry (Url: http://treaties.un.org/pages/showDetails.aspx?objid=080000028012bf50) it appears that the treaty has been concluded in the French language only; see accordingly C. Legros, "France", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 199 *et seq.*, at 217), the 1975 Benin-France tax treaty, the 1965 Burkina Faso-France tax treaty, the 1987 Congo (Republic of)-France tax treaty, the 1966 France-Gabon tax treaty and the 1966 France-Switzerland tax treaty; (iii) Italian in the 1976 Italy-Switzerland tax treaty; (iv) Dutch in the 1975 Netherlands-Suriname tax treaty.

[386] That is the case in about the 34% of the total sample, i.e. the 85% of the relevant sub-category. This figure might be taken as evidence of the willingness of the contracting States to prevent errors occurring in the translation from the originally agreed-upon text (i.e. the one drafted in the "neutral" language by the treaty negotiators) into the texts drafted in the contracting States official languages could negatively affect the interpretation and thus the application of the tax treaty.

It is interesting to note that, according to the final clauses of a few tax treaties, the texts drafted in the official languages of the two contracting States are equally authentic and, in the case of any divergence between such texts, the "neutral" text is to prevail. For instance, the final clause of the 1970 Japan-Netherlands tax treaty states the following: "Done at The Hague, on March 3, 1970 in six originals, two each in the Netherlands, Japanese and English languages. The Netherlands and Japanese texts are equally authentic and, in case there is any divergence of interpretation between the Japanese and Netherlands texts, the English text shall prevail". Where the final clause is drafted along such an unusual pattern, the question may arise as to whether the interpreter is entitled to consult and base his construction (also) on the English text before an (apparent) divergence between the Japanese and the Dutch authentic texts is detected and noted. According to Lang, this question should be answered in the negative (see M. Lang, "The Interpretation of Tax Treaties and Authentic Languages", in G. Maisto, A. Nikolakakis and J. M. Ulmer (*eds.*), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq*, at 16; see also M. Lang, "Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen", 20 *Internationales Steuerrecht* (2011), 403 *et seq*.). The author, however, notes that Lang's conclusion, although supported by the syntax of the final clause in the English authentic text (which, ironically, according to that reading of the final clause itself cannot be relied upon before a potential divergence between the other two authentic texts has been mentioned), does appear in conflict with the reasonable object and purpose of providing for a prevailing text, the latter being to avoid that the translation of the "neutral" text, originally agreed upon by the contracting States representatives (in *primis* the treaty negotiators), into the other authentic texts, drafted in the official

The "neutral" language commonly employed is English, French being used only in 14 treaties.

One may thus conclude that contracting States are quite firm in not conceding any linguistic advantage to the respective treaty partners and to preserve State equality in this field. About 89% of the listed treaties have their authentic texts drafted in the official languages of both contracting States (at least one official language for each State), while about 10% are authenticated only in a "neutral language": this means that in only 1% of the sample treaties one party has conceded a linguistic advantage to the other contracting State, by authenticating the tax treaty only in the official language of the latter; that appears to be the case only where the former State is a developed country, while the other is (or was) a developing one.[387] Furthermore, in very few cases the listed tax treaties provide that the official language of one or both contracting States (i.e. not a "neutral language") is to prevail in the case of (apparent) conflict: over 12 cases (just 2% of the total sample), in eight the prevailing text is drafted in English, which is also the official language of the economically weaker[388] contracting State;[389] in four the prevailing text is drafted in French.[390]

Finally, the comparison between the tax treaty lists included in the study published by Maisto and the statistics reported by Gamble and Ku confirms the trend of contracting

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languages of the two contracting States by the relevant departments of the respective Ministries of Foreign Affairs (or Ministries of Finance), could inadvertently lead to a perceived change in the meaning of the treaty provisions. If that is the object and purpose of the final clause, it would seem reasonable to conclude that the interpreter is always allowed to consult the "neutral" text and to compare it with the authentic text drafted in the language of his own State in order to construe the treaty in accordance with, as far as possible, the intended meaning agreed upon by the parties. This inference is particularly strong in cases where, such as with regard to the 1970 Japan-Netherlands tax treaty, it is reasonable to suspect that the persons called upon to apply the tax treaty (taxpayers, tax authorities, tax judges) are not familiar with the official language(s) of the other contracting State, in which the other authentic text is drafted: in these cases, in fact, allowing the recourse to the "neutral" text only after a potential divergence between the other texts is detected would substantially amount to rendering the provision of a prevailing text substantially inoperative, *contra* the maxim *ut res magis valeat quam pereat*.

[387] E.g. the 1974 Belgium-Malta tax treaty, the 1989 Belgium-Nigeria tax treaty, the1991 Netherlands-Nigeria tax treaty, the 1989 Netherlands-Philippines tax treaty and the 1989 Netherlands-Zimbabwe tax treaty, all authenticated only in the English language.

[388] At the time of the tax treaty conclusion.

[389] See the 1999 Austria-India tax treaty, authenticated in the German, Hindi and English languages; the 1993 Belgium-India tax treaty, authenticated in the Dutch, French, Hindi and English languages; the 1995 Germany-India tax treaty, authenticated in the German, Hindi and English languages; the 1973 Germany-South Africa tax treaty, authenticated in the German, Africaans and English languages; the 1993 India-Italy tax treaty, authenticated in the Italian, Hindi and English languages; the 1988 India-Netherlands tax treaty, authenticated in the Dutch, Hindi and English languages; the 1994 India-Switzerland tax treaty, authenticated in the German, Hindi and English languages; the 1998 Philippines-Switzerland tax treaty, authenticated in the German and English languages.

[390] See the 1968 Belgium-Greece tax treaty, authenticated in the Dutch, French and Greek languages; the 1982 Belgium-Hungary tax treaty, authenticated in the Dutch, French and Hungarian languages; the 1996 Belgium-Romania tax treaty, authenticated in the Dutch, French and Romanian languages; the 1975 Belgium-Tunisia tax treaty, authenticated in the Dutch, French and Arabic languages (it should be noted, however, that the French language, although not possessing an official status under Tunisian law is widely used within the country).

States concluding bilateral treaties solely in their official languages. However, with regard to treaties concluded not only in the contracting States' official languages, while the statistics provided by Gamble and Ku show that the majority thereof has (or had) only one authentic text, generally drafted in a "neutral" language, according to the lists reported in the study published by Maisto the majority of such treaties do have three or more authentic texts, one drafted in a "neutral" language and the remainder in the official languages of the two contracting States. These general trends are symptomatic of the willingness of the contracting States, on the one hand, to reaffirm their sovereignty and internationally equal status from a linguistic standpoint as well and, on the other hand, which seems distinctive of tax treaties, to guarantee that the authentic treaty texts are generally also available in their own official languages, in order to facilitate the treaties' interpretation and application by the taxpayers, the tax authorities and the competent tax courts, who might not be familiar with other languages, not even French or English, but are generally very familiar with the technical language of domestic tax law.