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## The interpretation of multilingual tax treaties

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## CHAPTER 4 – INTERPRETATION OF MULTILINGUAL TREATIES

### 1. Introduction: the relevance of Article 33 VCLT and the structure of this chapter

The idea that some rules dealing with the interpretation of multilingual treaties had to be codified dates back to the beginning of the last century.<sup>686</sup>

In 1926, Mr Rundstein, a member of the Committee of Experts for the Progressive Codification of International Law set up under the auspices of the League of Nations, expressed the view that one of the issues that the Committee should have examined and solved was that concerning the difficulties of interpretation arising in the case of treaties drawn up in more than one language.<sup>687</sup>

A few years later, the Draft Convention on the Law of Treaties with Comments, prepared by the Harvard Research in International Law and published in 1935, included an article dealing with the interpretation of multilingual treaties.<sup>688</sup>

The following step was taken by the ILC in the course of the sixties and led to the codification of some general rules concerning the interpretation of multilingual treaties in Article 33 VCLT.

For the purpose of the present study, an analysis of the purpose, content and scope of the rules enshrined in Article 33 VCLT is unavoidable for two reasons.

First, most international courts and tribunals regard Article 33 VCLT as a codification of rules of customary international law concerning the interpretation of multilingual treaties<sup>689</sup> and, therefore, consider themselves bound to apply such rules in order to construe multilingual treaties, regardless of whether these treaties were concluded before

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<sup>686</sup> For an exhaustive list of the efforts spent in codifying rules on interpretations dealing with multilingual treaties before the VCLT, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 185-186, footnote 1.

<sup>687</sup> League of Nations, Committee of Experts for the progressive codification of International Law [1925-1928], vol. 2: Documents (Dobbs Ferry: Oceana Publications, 1972), pp. 131-141.

<sup>688</sup> Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.* Art. 19b of the Draft Convention on the Law of Treaties with Comments reads as follows:

"When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve".

<sup>689</sup> See, for instance, S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 737.

the entry into force of the VCLT, or whether their parties include States that did not sign or ratify the VCLT.

Even the ICJ has recently stated that, in cases of a divergence between the equally authentic texts of a treaty and where the latter does not indicate how to proceed, it is appropriate to refer to Article 33(4) VCLT, which “in the view of the Court again reflects customary international law”.<sup>690</sup> In this respect, it is interesting to note that (i) the specific issue faced by the ICJ in that case<sup>691</sup> concerned the interpretation of Article 41 of the Court’s Statute, which predates the adoption of the VCLT and (ii) that case related to a conflict between Germany and the United States of America, the latter not being party to the VCLT at the time of the facts, nor at the time of the legal proceedings and of the judgment.

Second, since the rules of interpretation enshrined in Article 33 VCLT are generally accepted (i.e. customary) rules of international law, they must also be considered part of the *common ground*<sup>692</sup> of treaty negotiators and interpreters. As such, they are expected to be properly taken into account by such negotiators and interpreters, when drafting and construing multilingual treaties, under the cooperative principles operating within the international community of States.<sup>693</sup> This implies that, whenever an interpreter construes a multilingual treaty by means of implicatures, such implicatures must (also) reflect the rules of interpretation provided for in Article 33 VCLT.

For the reasons outlined above, the present chapter will analyse the content of Article 33 VCLT and examine the relation, in any, existing between the rules of interpretation enshrined therein and the semantics-based principles of interpretation established by the author in section 2 of Chapter 3 of Part I.

More precisely, section 2 will describe the historical background to and the preparatory work on Article 33 VCLT.

Section 3 will examine which rules of interpretation may be (and have been) construed on the basis of Article 33 VCLT and compare them with the fundamental principles of interpretation established by the author in Part I.

Section 4 will deal with the specific interpretative issues emerging where the multilingual treaty employs legal jargon terms.

Section 5 will present a brief excursus on the legal maxims that scholars, courts and tribunals have sometimes advocated for the purpose of construing multilingual treaties and will discuss their status under current international law.

Finally, section 6 will draw some general conclusions.

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<sup>690</sup> See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 101. For a previous explicit reference by the ICJ to the relevance of Article 33 VCLT, although without an express recognition thereof as customary international law, see ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 25.

<sup>691</sup> ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 92 *et seq.*, concerning Germany’s third submission.

<sup>692</sup> See section 4.2.1 of Chapter 2 of Part I.

<sup>693</sup> See section 4.2.2 of Chapter 2 of Part I.

## 2. Historical background to and preparatory work on Article 33 VCLT

### 2.1. *The Third Report on the Law of Treaties prepared by Sir Humphrey Waldock*

Although the topic of the Law of Treaties had been addressed by the ILC since 1962,<sup>694</sup> the sub-topic of treaty interpretation was considered only during the sixteenth session of the ILC in 1964. On 7 July of that year, Sir Humphrey Waldock submitted to the ILC its third addendum to his Third Report on the Law of Treaties, which included six articles on the interpretation of treaties.

Among these, Articles 74 and 75 of the draft convention on the Law of Treaties dealt with the issue of treaties drawn up in two or more languages. The text thereof is reproduced below.<sup>695</sup>

*Article 74 — Treaties drawn up in two or more languages*

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the texts of the treaty are authoritative in each language except in so far as a different rule may be laid down in the treaty.
2. A version drawn up in a language other than one in which the text of the treaty was authenticated shall also be considered an authentic text and be authoritative if —
  - (a) the treaty so provides or the parties so agree; or
  - (b) an organ of an international organization so prescribes with respect to a treaty drawn up within the organization.

*Article 75. — Interpretation of treaties having two or more texts or versions*

1. The expression of the terms of a treaty is of equal authority in each authentic text, subject to the provisions of the present article. The terms are to be presumed to be intended to have the same meaning in each text and their interpretation is governed by articles 70-73.
2. When a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity as to the meaning of the term is not removed by the application of articles 70-73, the rules contained in paragraphs 3-5 apply, unless the treaty itself provides that, in the event of divergence, a particular text or method of interpretation is to prevail.
3. If in each of two or more authentic texts a term is capable of being given more than one meaning compatible with the objects and purposes of the treaty, a meaning which is common to both or all the texts is to be adopted.
4. If in one authentic text the natural and ordinary meaning of a term is clear and compatible with the objects and purposes of the treaty, whereas in another it is uncertain owing to the obscurity of the term, the meaning of the term in the former text is to be adopted.
5. If the application of the foregoing rules leaves the meaning of a term, as expressed in the

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<sup>694</sup> See the first provisional draft articles on the Law of Treaties adopted by the ILC at its fourteenth session, dealing with the conclusion, entry into force and registration of treaties, which was based on the First Report on the Law of Treaties prepared by Sir Humphrey Waldock, acting as Special Rapporteur (YBILC 1962-II, pp. 159 *et seq.*). Previously, the topic had been addressed solely in the reports prepared by the Special Rapporteurs, but not discussed in the course of the ILC meetings.

<sup>695</sup> See YBILC 1964-II, p. 62.

authentic text or texts, ambiguous or obscure, reference may be made to a text or version which is not authentic in so far as it may throw light on the intentions of the parties with respect to the term in question.

The commentary to these two articles<sup>696</sup> pointed out that the phenomenon of treaties drawn up in two or more languages had become increasingly familiar since the end of the First World War and, with the advent of the United Nations, the practice of concluding multilateral treaties in five different languages had become common. The commentary drew a clear distinction between “authentic texts” and “official texts”, the latter being those signed by the negotiating States but not accepted as authoritative thereby. In addition, the commentary recognized the need to distinguish “official translations” from “official texts”, the former being translations of the authentic texts prepared by the parties, an individual Government, or an organ of an international organization. The commentary pointed out that, whenever two or more texts are available, issues arise regarding (i) the effect of a plurality of authentic texts on the process of treaty interpretation and (ii) what recourse may be had to official texts and translations as tools for interpreting the authentic texts of the treaty.

In this respect, the commentary made clear that the purpose of Article 74 was to clarify the rules to be used for the purpose of distinguishing “authentic texts” from other texts.

The basic principle stated by Article 74 was that the only “authenticated texts” must be considered authoritative for the purpose of treaty interpretation. The following article, Article 75, clarified that the authority of the texts was “equal” in each “authentic text”. From a combined reading of Articles 74 and 75, it appears that the terms “authentic” and “authoritative” were attributed the same meaning with reference to the relevance of a text for the purpose of treaty interpretation. The reference in Article 74(1) to “authenticated” texts was purported to achieve coordination with the provisions of Article 7 of the draft convention, according to which the “authentication of the text” consisted in an autonomous procedural step in the conclusion of a treaty.<sup>697</sup> According to the commentary to Article 7 of the draft convention,<sup>698</sup> the authentication of the text(s) of a treaty was necessary in order for negotiating States to know finally and definitely what the content of the treaty was to which they might decide to become party. Authentication

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<sup>696</sup> See YBILC 1964-II, pp. 62-65.

<sup>697</sup> The text of Article 7 of the draft convention read as follows (See YBILC 1962-II, p. 167):

*Article 7*

*Authentication of the text*

1. Unless another procedure has been prescribed in the text or otherwise agreed upon by States participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways:

- (a) Initialling of the text by the representatives of the States concerned;
- (b) Incorporation of the text in the final act of the conference in which it was adopted;
- (c) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

2. In addition, signature of the text, whether a full signature or signature ad referendum, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

<sup>698</sup> See YBILC 1962-II, p. 167.

consisted in some acts and/or procedures that certified the text(s) as the final and correct one(s). For the purpose of the present study, it must be pointed out that Article 7 of the draft convention recognized as authentic texts those initialled by the representatives of the States concerned, as well as those signed by the contracting parties (either by full signature or signature *ad referendum*).<sup>699</sup>

The general rule that equated “authenticated” texts to texts equally authoritative for the purpose of interpretation was subject to two exceptions.

On the one hand, Article 74 provided that such an equation held true “except in so far as a different rule may be laid down in the treaty”. The commentary explained that such an exception was necessary for two reasons. First, some treaties specify that only certain authenticated texts are authoritative for the purpose of interpreting and applying the treaty, i.e. only certain authenticated texts are “authentic” texts.<sup>700</sup> Second, some treaties provide that, in the event of divergence between texts, a specified text is to prevail. The commentary made explicit reference to the case of a bilateral treaty where the two contracting parties designate a text in a third language as authentic and make it authoritative in the case of divergence. This is a very common practice in the tax treaty field, indeed. The commentary also recalled the case of the Peace Treaties of St. Germain, Neuilly and Trianon, which were drawn up in French, English and Italian and which provided that in the case of divergence the French text should prevail, except with regard to Parts I and XII, containing the Covenant of the League of Nations and the articles concerning the International Labour Organisation, respectively. The case appears interesting since it represents a clear example of how States may be willing to solve apparent divergences between authentic texts in different ways depending on the subject matter concerned and the drafting procedure actually adopted.

On the other hand, Article 74 recognized that a text that had not been authenticated might nonetheless be attributed by the parties an authoritative status for the purpose of the interpretation and application of the treaty.<sup>701</sup>

Article 75, instead, dealt with the different issues arising in connection with the interpretation of treaties having two or more authentic texts.

Paragraph 1 thereof, in addition to stating the principle of equal authority of all authentic texts, made clear that a general presumption existed that the parties to a treaty intended to attribute to the treaty terms the same meanings in each authentic text.

In addition, Article 75 provided that, in principle, the general rules of

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<sup>699</sup> With reference to the authentication of the text as a step of the procedure leading to the conclusion (and entry into force) of a treaty, see Article 10 of the VCLT, as well as R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1223-1224 and the references cited therein. Although the text of Article 7 of the draft conventions was later modified and the corresponding article of the VCLT (Article 10) does appear significantly different, the purpose of the authentication step in the procedure of treaty conclusion has remained unchanged.

<sup>700</sup> The commentary also referred to a case where one text had been made authentic between some parties and a different text between others, i.e. Article 13 of the Treaty of Brest-Litovsk, executed on 3 March 1918 (see YBILC 1964-II, p. 63, para. 3, where reference is erroneously made to Article 10 of the treaty).

<sup>701</sup> See Article 74(2)(a) of the draft convention.

interpretation enshrined in Articles 70-73 of the draft convention were to be applied to solve apparent divergences between authentic texts.<sup>702</sup> According to the commentary, such an approach was the direct, inevitable consequence of the fact that, notwithstanding the plurality of authentic texts, in law there is only one treaty, i.e. one set of terms accepted by the parties and one common intention with respect to those terms.<sup>703</sup>

The commentary recognized in this respect that few multilingual treaties have no discrepancies in the texts and that this is mainly due to the different genius of the languages, the absence of a complete *consensus ad idem*, the lack of sufficient time to co-ordinate the texts or unskillful drafting. It concluded that, for those reasons, the plurality of the texts might be a serious additional source of ambiguity or obscurity in the terms of the treaty. However, the commentary also acknowledged that, in cases where the meaning of terms is ambiguous or obscure in one authentic text, but it is clear and convincing as to the intentions of the parties in another, “the plurilingual character of the treaty facilitates interpretation”.<sup>704</sup>

Finally, with reference to the application of the rules of interpretation provided for in Articles 70-73 of the draft convention, the commentary pointed out that the plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances and subsequent practice; on the contrary, the equality of the texts requires that “every effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation”.<sup>705</sup>

Article 75(2), as clarified by the commentary,<sup>706</sup> recognized that parties might decide to solve the divergences between authentic texts by providing in the treaty that a particular text or method is to prevail. In this respect, the commentary pointed out that an issue might exist as to the exact point in the interpretation process at which the prevailing text or method should be resorted to, i.e. whether such a text or method is to be applied as soon as a *prima facie* divergence appears, or only in so far as the divergence may not be removed by the application of the general rules of interpretation. The commentary noted that the jurisprudence of international tribunals was uncertain in this regard, since, in some cases, the competent tribunal had applied the prevailing text without going into the question whether there was an actual divergence,<sup>707</sup> while, in other cases, it had carried on a comparison between the divergent texts for the purpose of ascertaining the intention of the parties.<sup>708</sup> It, however, recognized that the question is essentially one of intention

<sup>702</sup> See the combined reading of paragraphs 1 and 2 of Article 75 of the draft convention.

<sup>703</sup> See YBILC 1964-II, p. 63, paras. 5 and 6.

<sup>704</sup> See YBILC 1964-II, p. 63, para. 5.

<sup>705</sup> See YBILC 1964-II, p. 64, para. 6.

<sup>706</sup> See YBILC 1964-II, p. 64, para. 7.

<sup>707</sup> The commentary made reference to the decision of the Permanent Court of International Justice in the *Treaty of Neuilly* case (PCIJ, 12 September 1924, *Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly (Bulgaria v. Greece)*, judgment, pp. 5-6).

<sup>708</sup> The Commentary made reference to the decision of the Supreme Court of Poland in the case of the

of the parties, the latter being at liberty to agree that a specific text is to prevail either as soon as a divergence appears, or only where such a divergence is not removed by the application of the general rules of interpretation. The Special Rapporteur, therefore, doubted whether it would have been appropriate for the ILC to try to resolve the issue in the context of the formulation of the general rules of interpretation.<sup>709</sup>

Moreover, where the parties did not agree on a particular text to prevail and the general rules of interpretation enshrined in Articles 70-73 could not remove the divergence between authentic texts, Article 75 provided for two cases in which a specific text was to prevail according to the nature and characteristics of the divergence. In particular, (i) where more than one meaning compatible with the objects and purposes of the treaty existed, the meaning common to all the authentic texts was to be adopted, while (ii) where one authentic text was clear and the others were uncertain and obscure, the former was to be adopted.

With reference to the first case, which was dealt with in Article 75(3), the commentary clarified that the suggested provision was not to be confused with the interpretation given by certain jurists of the decision delivered by the PCIJ in the *Mavrommatis Palestine Concessions* case,<sup>710</sup> according to which the more limited (restrictive) interpretation which can be made to harmonize both authentic texts is the one which must always be adopted.<sup>711</sup> In analytical terms, this interpretation provides that, if (i) one authentic text may be interpreted as meaning A and the other authentic text as meaning B and (ii) the denotata of B constitute a subset of the denotata of A, then meaning B is to be adopted. The commentary, on the one hand, explained that the provision of Article 75(3) gave effect to the rule of the equality of the texts in cases of ambiguity and that it was effective as long as such an ambiguity did not take the same form in each authentic text. In analytical terms, it could be said that, under Article 75(3), where one authentic text may be interpreted as meaning either A or B and the other authentic text as meaning either B or C, meaning B is to be adopted. On the other hand, the commentary pointed out that the above-mentioned interpretation of the decision given by the PCIJ in the *Mavrommatis Palestine Concessions* case was erroneous since (i) whether a restrictive interpretation is to be adopted depends upon the nature of the

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*Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury* (see Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq.* [Case No. 235]) and the decision of the Italian-Bulgarian Mixed Arbitral Tribunal, 8 January 1925, *De Paoli v. Bulgarian State*, 6 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1927), 451 *et seq.*, at 456.

<sup>709</sup> See YBILC 1964-II, p. 64, para. 7.

<sup>710</sup> See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment, p. 19, where the following was stated:

“The Court is of opinion that, where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine and because the original draft of this instrument was probably made in English”.

<sup>711</sup> See YBILC 1964-II, pp. 64-65, para. 8.

treaty and the particular context where the ambiguous term occurs and (ii) in the specific situation dealt with in that case, a restrictive interpretation was appropriate also in light of the nature of the treaty (i.e. an “instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine”) and the context and circumstances thereof (e.g. “the original draft of this instrument was probably made in English”).<sup>712</sup> According to the commentary, the only conclusion that might be drawn from the *Mavrommatis Palestine Concessions* decision was that it gave strong support to the principle of harmonizing the texts, while it did not call for a general rule laying down a presumption in favor of restrictive interpretation in the case of an ambiguity in plurilingual texts.<sup>713</sup>

With reference to the second case, which was dealt with in Article 75(4), the commentary clarified that, according to the Special Rapporteur, a presumption in favor of clear, as opposed to an obscure, text was mainly a matter of common sense and, as such, it was not an absolute rule and might also conflict with the principle of equality of the texts, especially where reference to the *travaux préparatoires* and other extrinsic means of interpretation clarified the meaning of the *prima facie* obscure text. However, it also recognized that, if after the application of the general rules of interpretation (i.e. those encompassed in Articles 70-73 of the draft convention) the meaning of one authentic text was still obscure, it was legitimate to make a presumption in favor of the clearer text.<sup>714</sup>

Finally, Article 75(5) established that, for the purpose of treaty interpretation, non-authentic texts might only be used as subsidiary evidence of the intention of the parties in the last resort, in particular only where the application of all the other rules of interpretation left the meaning of a term, as expressed in the authentic texts, ambiguous or obscure.<sup>715</sup>

The reference to the “application of the foregoing rules” in paragraph 5 seems to suggest that, in the system of the draft convention, recourse to the non-authentic texts was subject to the unfruitful application of the provisions of paragraphs 3 and 4. Such a conclusion, however, appears at odds with the logical premise of such paragraphs, which were to be applied only where the application of the general rules of interpretation enshrined in Articles 70-73 might not remove the divergence between, or the ambiguity of, the texts. In fact, those general rules encompassed the recourse to supplementary means of interpretation (“other evidence or indications of the intentions of the parties”),<sup>716</sup> which could be reasonably regarded as also including the non-authentic texts of the treaty, such as “official texts” and “official translations”. Nevertheless, the above conclusion seems confirmed by the reference to the “rules contained in paragraphs 3-5” found in Article 75(2), which made the recourse to Article 75(5) subject to the

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<sup>712</sup> See, similarly, J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80.

<sup>713</sup> See YBILC 1964-II, p. 65, para. 8.

<sup>714</sup> See YBILC 1964-II, p. 65, para. 9.

<sup>715</sup> See also YBILC 1964-II, p. 65, para. 10.

<sup>716</sup> See Article 71(2) of the draft convention (YBILC 1964-II, p. 52).

unsuccessful application of the general rules provided for in Articles 70-73, hence indirectly ruling out that non-authentic texts could be included among the “other evidence or indications of the intentions of the parties” referred to in Article 71(2) of the draft convention.

It seems to the author that the solution adopted by the Special Rapporteur was not fully coherent where it drew a line between the non-authentic texts, such as “official texts” and “official translations”, and the supplementary means of interpretation considered in Article 71(2), without giving any explanation of the reasons of the different weights attributed thereto for the purpose of treaty interpretation. The different weights to be attributed to supplementary means of interpretation should not be fixed *a priori*, but vary according to the facts and circumstances of the case. In this respect, the provision encompassed in Article 75(5) of the draft convention seems to contradict the idea of treaty interpretation as a unique process whereby all available elements and items of evidence are thrown in the crucible in order to determine a reasonable meaning (i.e. the utterance meaning) of the expressions to be interpreted.<sup>717</sup> Hence, the author applauds the fact that such paragraph was subsequently removed by the ILC.

## 2.2. *The sixteenth session of the ILC and the 1964 Draft*

The ILC analysed and discussed the draft articles on treaty interpretation, included by Sir Humphrey Waldock in his Third Report on the Law of Treaties, in the course of its sixteenth session, starting at the 765<sup>th</sup> meeting.

The first issue to be addressed was whether the draft convention should contain some articles on treaty interpretation. The great majority of the ILC explicitly endorsed the view that some rules on treaty interpretation were to be included in the draft convention.

In this respect, Mr Paredes stated that rules on interpretation were indispensable for the purpose of treaty application.<sup>718</sup>

Mr Briggs agreed and added that the task of isolating and codifying the comparatively few rules that appeared to constitute the strictly legal basis of treaty interpretation was one of the functions provided for in Article 15 of the ILC Statute.<sup>719</sup>

Both Mr de Luna and Mr Castrén said that, even if at the beginning they had been skeptical as to the possibility to draft rules for the interpretation of treaties, they were positively impressed by the work of the Special Rapporteur and, therefore, they were favorable for the ILC to submit a preliminary draft thereof to Governments for comments.<sup>720</sup>

<sup>717</sup> For instance, where strictly applied, Article 75(5) could lead to the application of the presumption in favor of the “clear” text (Article 75(4)), even where the reading of an official text might shed some light on the meaning of the “obscure” text, thus making such presumption inoperative and perhaps suggesting a different meaning to be attributed to the treaty provision.

<sup>718</sup> See YBILC 1964-I, p. 275, para. 5.

<sup>719</sup> See YBILC 1964-I, p. 275, paras. 8 and 9.

<sup>720</sup> See YBILC 1964-I, p. 276, paras. 15 and 20.

Mr Ruda expressed the view that, at the current stage of development of international law, there were not as yet any obligatory rules for States on treaty interpretation, except the rule *in claris non fit interpretatio*.<sup>721</sup> He stressed that, as a consequence, any rule on interpretation inserted in the draft convention would not constitute a codification of existing customary law, but, on the contrary, it would represent a proposal for the progressive development of international law.<sup>722</sup>

Mr Tunkin said that he favored the codification of the rules on the interpretation of treaties, particularly since there was already a substantial body of precedents and State practice on the subject.<sup>723</sup>

Mr Yassen agreed on the necessity to include in the draft convention some articles on interpretation, which made it possible to determine the exact meaning of a treaty. However, he also pointed out that excessive detail should be avoided and the ILC should confine itself to the leading principles governing interpretation.<sup>724</sup>

Mr Verdross stated that States that had concluded a treaty would not be bound by the rules in question, for they were at liberty to choose other means of interpretation.<sup>725</sup> Such conclusion was further clarified by Mr Ago (the Chairman), who affirmed that the ILC, by drafting the rules on treaty interpretation, was not creating *jus cogens*. There was nothing preventing the parties to a treaty from agreeing to interpret it in another way. However, according to Mr Ago, that would occur rarely, for the draft rules were eminently reasonable.<sup>726</sup>

At the 767<sup>th</sup> meeting the ILC specifically addressed the draft articles concerning the interpretation of treaties drawn up in two or more languages.

Sir Humphrey Waldock introduced the topic by making reference to the commentary to Articles 74 and 75. With regard to Article 74, he pointed out that the only issue that caused him some difficulty was that of the language version(s) drawn up within an international organization.<sup>727</sup> It may therefore be derived that he was satisfied with the remainder of the proposed text (more relevant for the purpose of the present study).

Mr Castrén agreed with the formulation of Article 74 and proposed adding the words “or in so far as the parties agree otherwise” at the end of paragraph 1, to coordinate this paragraph with the wording used in paragraph 2(a).<sup>728</sup>

Mr Rosenne and Mr Tunkin stated their general agreement with the provisions of Articles 74 and 75 and, at the same time, shared the concern of the Special Rapporteur

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<sup>721</sup> An excessive reliance on the maxim *in claris non fit interpretatio* was damped by Mr Ago, who recalled cases where two States found a treaty perfectly clear, but interpreted it in two different ways. See YBILC 1964-I, p. 280, para. 79.

<sup>722</sup> See YBILC 1964-I, p. 277, paras. 33 and 35.

<sup>723</sup> See YBILC 1964-I, p. 278, para. 47.

<sup>724</sup> See YBILC 1964-I, p. 279, para. 55.

<sup>725</sup> See YBILC 1964-I, p. 279, para. 61.

<sup>726</sup> See YBILC 1964-I, p. 280, para. 78.

<sup>727</sup> See YBILC 1964-I, p. 298, para. 60.

<sup>728</sup> See YBILC 1964-I, p. 298, para. 61.

with reference to the case of treaties drawn up within an international organization.<sup>729</sup>

Mr Briggs, while favoring the inclusion of draft articles dealing specifically with treaties drawn up in two or more languages, such as those proposed by the Special Rapporteur, pointed out that he did not agree with the position expressed in paragraph 5 of the commentary on Article 74, where reference was made to the fact that “in law there is only one treaty (...) even when the two authentic texts appear to diverge”. According to Mr Briggs, it would have been better to state that each treaty has only one text, although there may be different language versions of such a text.<sup>730</sup> Similarly, he proposed to reword Article 74 by replacing the reference to two or more authentic texts with that to “two or more language versions of the same treaty”.<sup>731</sup>

Finally, Mr Bartos brought to the attention of the ILC the fact that it had become common to have treaties concluded in the languages of each contracting party. In these cases, a translation in a third “authoritative” language was often annexed for the purpose of facilitating the understanding and interpretation of the treaty. According to Mr Bartos, such an innovation in the States’ practice was not considered in the draft and a reference thereto should have been made at least in the commentary.<sup>732</sup> However, both Mr Tunkin and Mr Ago (Chairman) made clear that Article 74(1) covered those cases.<sup>733</sup>

In closing the meeting, Mr Ago (Chairman) suggested to refer Articles 74 and 75 to the Drafting Committee, with the comments made during the discussion.<sup>734</sup>

The discussion was resumed at the 770<sup>th</sup> meeting, held on 20 July 1964. Mr Ago (Chairman) invited the ILC to consider the text of Article 74 as proposed by the Drafting Committee, which read:

*Article 74 — Treaties drawn up in two or more languages*

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.
2. A version drawn up in a language other than one in which the text of the treaty was authenticated shall also be authoritative, and considered as an authentic text if —
  - (a) the parties so agree; or
  - (b) the established rules of an international organization so provide.<sup>735</sup>

The text proposed by the Drafting Committee took in due consideration the observation made by Mr Castrén and, at least in part, that made by Mr Briggs during the 767<sup>th</sup> meeting. The text was amended to incorporate two minor improvements in wording proposed by Sir. Humphrey Waldock and then adopted unanimously.<sup>736</sup>

<sup>729</sup> See YBILC 1964-I, p. 298, paras. 63 *et seq.* and p. 299, para. 66.

<sup>730</sup> See YBILC 1964-I, p. 299, para. 69.

<sup>731</sup> See YBILC 1964-I, p. 299, para. 70.

<sup>732</sup> See YBILC 1964-I, p. 299, para. 71.

<sup>733</sup> See YBILC 1964-I, p. 299, paras. 73 and 74.

<sup>734</sup> See YBILC 1964-I, p. 299, para. 75.

<sup>735</sup> YBILC 1964-I, p. 318, para. 54.

<sup>736</sup> See YBILC 1964-I, p. 318, para. 55. No significant change had been made in the commentary by the Draft

Afterwards, Mr Ago (Chairman) invited the ILC to consider the text of Article 75 as proposed by the Drafting Committee, which read:

*Article 75. — Interpretation of treaties having two or more texts or versions*

1. The expression of the terms of a treaty is of equal authority in each authentic text, unless the treaty itself provides that, in the event of divergence, a particular text or method of interpretation shall prevail.
2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 70-74, a meaning which is common to both or all the texts shall be preferred.

As Sir Humphrey Waldock pointed out, the Drafting Committee had significantly shortened the text of the article. In particular, paragraph 4 of the original draft, according to which, in cases where the meaning of one text was clear and that of the other was not, the former would be adopted, had been dropped. That was decided since the solution proposed in the former paragraph 4, although a matter of common sense, might not always be the correct one and the Drafting Committee had preferred to leave the matter for interpretation to the States concerned or to the competent tribunals. Similarly, paragraph 5 of the original draft, dealing with the possible use of non-authentic texts, had been dropped on the grounds that it could have too much opened the door to the use of non-authentic versions of a treaty for the purpose of its interpretation.<sup>737</sup>

Then, replying to an issue of clarity raised by Mr Ago, Sir Humphrey Waldock proposed redrafting the incipit of paragraph 1 as “The text of the treaty is of equal authority in each language, unless etc.”<sup>738</sup> He also suggested removing the words “or versions” from the title of Article 75 and those “or method of interpretation” from paragraph 1 thereof.<sup>739</sup>

With regard to paragraph 2, Mr Paredes pointed to an issue that, even today, constitutes one of the most debated matters in the field of interpretation of multilingual treaties. According to Mr Paredes, Article 75(2) was unclear and contradictory, since, on the one hand, it dealt with cases where the comparison of two language versions discloses that the use of different terms led to some ambiguity or obscurity, while, on the other hand, it proposed that a meaning common to both or all language versions should be preferred for the purpose of solving such ambiguity or obscurity.<sup>740</sup> To reduce

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Committee. See, to this extent, the version of the commentary transmitted to the Governments for comments at the end of the ILC’s sixteenth session (YBILC 1964-II, pp. 206-207, paras. 2-4).

<sup>737</sup> See YBILC 1964-I, p. 319, para. 57. It is just the case to note that, except the above-mentioned elimination of paragraphs 4 and 5 and that of paragraph 3, which, however, was not commented on by the ILC’s members, the changes undergone by Article 75 in the version proposed by the Drafting Committee were almost exclusively of a formal nature and did not modify the substance of the rules of interpretation encompassed in the original draft prepared by Sir Humphrey Waldock.

<sup>738</sup> See YBILC 1964-I, p. 319, para. 60.

<sup>739</sup> See YBILC 1964-I, p. 319, para. 61.

<sup>740</sup> See YBILC 1964-I, p. 319, para. 63.

uncertainty in that respect, Sir Humphrey Waldock proposed replacing the words “is common to both or all the texts shall be preferred” with the words “so far as possible reconciles the different texts shall be adopted”.<sup>741</sup> Mr Bartos, however, observed that the reconciliation of the different texts raised a very special difficulty, since in some cases no meaning common to the different texts could be found. In illustrating this point, he made reference to the Agreement on Reparations from Germany,<sup>742</sup> which had been drawn up in English and French, both being authentic languages. That treaty referred to assets placed under enemy “control”, in English, and “contrôle”, in French. In that respect, Mr Bartos pointed out that France had attributed to the term “contrôle” the meaning it has in French, i.e. that of the term “surveillance”, while Great Britain had attributed to the term “control” the meaning it has in English, i.e. that of the term “management”. According to Mr Bartos, in that case it was not possible to find out a meaning common to both language versions.<sup>743</sup>

At the end of the discussion, Mr Ago (Chairman) proposed to the ILC the following text, which was approved unanimously:

*Article 75. — Interpretation of treaties having two or more texts or versions*

1. The different authentic texts of a treaty are equally authoritative in each language unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.
2. The terms of the treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 70-74, a meaning which so far as possible reconciles the different texts shall be adopted.<sup>744</sup>

The ILC, in accordance with Articles 16 and 21 of its Statute, transmitted the above two articles and the commentaries thereon<sup>745</sup> to the Governments for observations, together with the other articles constituting part III of the draft convention on the law of treaties, which concerned the effects, application, modifications and interpretation of treaties.<sup>746</sup> In the process of drafting the “Report of the International Law Commission covering the work of its sixteenth session, 11 May — 24 July 1964”,<sup>747</sup> which contained the version of part III of the ILC’s draft on the law of treaties sent to Governments, Articles 74 and 75 were renumbered as 72 and 73 and their text changed accordingly. Their respective titles were also modified. Here below is the text of Articles 72 and 73, as transmitted to

<sup>741</sup> See YBILC 1964-I, p. 319, para. 64.

<sup>742</sup> Agreement on reparation from Germany, on the establishment of an inter-allied reparation agency and on the restitution of monetary gold, concluded in Paris on 14 January 1946.

<sup>743</sup> See YBILC 1964-I, p. 319, para. 65.

<sup>744</sup> YBILC 1964-I, p. 319, para. 66.

<sup>745</sup> The part of the commentary dealing with the interpretation of multilingual treaties was modified, as compared to the previous version prepared by Sir Humphrey Waldock, for the purpose of taking into account and explaining the reason of the changes made in Article 75. No other significant changes were made. See, to this extent, the version of the commentary transmitted to the Governments for comments at the end of the ILC’s sixteenth session (YBILC 1964-II, p. 207, paras. 5-9).

<sup>746</sup> YBILC 1964-II, p. 175, para. 16.

<sup>747</sup> Document A/5809 (Official Records of the General Assembly, Nineteenth Session, Supplement No. 9).

## Governments:

*Article 72. Treaties drawn up in two or more languages*

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.
2. A version drawn up in a language other than one of those in which the text of the treaty was authenticated shall also be authoritative and be considered as an authentic text if:
  - (a) The parties so agree; or
  - (b) The established rules of an international organization so provide.

*Article 73. Interpretation of treaties having two or more texts*

1. The different authentic texts of a treaty are equally authoritative in each language, unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.
2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the different texts shall be adopted.<sup>748</sup>

**2.3. Governments' comments on the 1964 Draft**

Twenty-seven governments transmitted their comments on part III of the draft convention. However, only eleven dealt with articles on treaty interpretation.<sup>749</sup> A reading of the governments' comments clearly shows that the effort of the ILC to codify solely the main and basic principles of interpretation was approved by most of the States; the content of the articles dealing with treaty interpretation was also generally agreed upon. That notwithstanding, many governments declared that they reserved the right to express their views on the final version of the draft.<sup>750</sup>

Five governments specifically commented on Articles 72 and 73. The Finnish Government considered the draft rules concerning the interpretation of treaties useful and appropriate.<sup>751</sup>

The Israeli government suggested inserting the comparison between two or more authentic versions of the treaty in Article 69, as part of the general rule of interpretation. According to that government, in fact, such a comparison was a normal practice in the process of treaty interpretation and its importance was not limited to the case dealt with in Article 73 (i.e. the case where the comparison disclosed a difference), as it frequently assisted the interpreter in determining the meaning of the text and the intention of the

<sup>748</sup> YBILC 1964-II, p. 206.

<sup>749</sup> See YBILC 1966-II, pp. 279 *et seq.*

<sup>750</sup> That was an approach common to both the States that commented on the articles dealing with treaty interpretation and those that did not. See, for example, the statements made by Afghanistan, Cyprus, Czechoslovak and U.S.S.R. (YBILC 1966-II, pp. 279, 285, 286-287 and 343, respectively).

<sup>751</sup> See YBILC 1966-II, p. 293.

parties. The Israeli government also emphasized the need to collect more information regarding the drafting practices for multilingual instruments and proposed to make Article 73 more consistent with Article 72 by substituting the word “versions” for the word “texts” whenever they appear.<sup>752</sup>

The need to modify the use of the word “texts” in Article 73 was also pointed out by the United States government, which, upholding the position taken in that respect by Mr Briggs during the 767<sup>th</sup> ILC’s meeting, stressed that each treaty should be conceived as a unit, consisting of a single text. Therefore, according to that government, where the text is expressed in two or more languages, the several language versions are an integral part of and constitute a single text. In contrast, the use of the word “texts” in Article 73 seemed to derogate from the unity of the treaty as a single document. The United States government also suggested an alternative version of Article 73, whose wording took into account such comments.<sup>753</sup> With reference to Article 72, the United States government, on the one hand, recognized that paragraph 1 reproduced a widely accepted rule and, on the other hand, criticized the content of paragraph 2(b), emphasizing that if a non-authenticated version of a treaty was to be considered authentic for the purpose of interpretation, it should be made so only by a provision of that very same treaty or by a supplementary agreement between the parties. Therefore, it recommended that the entire paragraph 2(b), which referred to the “established rules of an international organization” as source of authenticity, be deleted.<sup>754</sup>

The Portuguese government commented on both Articles 72 and 73. With reference to the former, it stated its general agreement thereon and wondered if it would have not been appropriate to include an additional subparagraph recognizing the authentic status of a non-authentic language version also in cases where the subsequent practice of the parties showed in an unequivocal manner their will to confer authority on such a version, by analogy with the approach taken in Article 69(3) in respect of the general rule of interpretation. No particular remark was made with reference to Article 73.<sup>755</sup>

Finally, the Yugoslavian government noted that consideration “must also be given to the case where an international instrument is the work of several States having different legal systems and conceptions and where the interpretation of a solution must be in conformity with the juridical conceptions of all the contracting parties”.<sup>756</sup> This was a clear reference to the issue of multijuralism, which comes into play where the corresponding terms used in the various authentic texts of a treaty denote different legal concepts in the various legal systems where such terms are used. This issue is discussed in section 4 of this chapter.

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<sup>752</sup> See YBILC 1966-II, p. 301.

<sup>753</sup> See YBILC 1966-II, p. 359.

<sup>754</sup> See YBILC 1966-II, p. 359.

<sup>755</sup> See YBILC 1966-II, pp. 336-337.

<sup>756</sup> See YBILC 1966-II, p. 361.

#### 2.4. *The Sixth Report on the Law of Treaties prepared by Sir Humphrey Waldock*

On the basis of the comments transmitted by the governments and those provided by the Sixth Committee of the General Assembly,<sup>757</sup> Sir Humphrey Waldock prepared his Sixth Report on the Law of Treaties, where he also extensively analysed such comments.

In replying to the comments concerning Article 69, Sir Humphrey Waldock dealt with the proposal made by the Israeli government of including a reference to the comparison of the authentic texts among the principal means of interpretation.

In that respect, he observed that such a proposal was not one that the ILC should have adopted without very careful consideration of its implications. The legal relation between authentic language versions of a treaty was a question of some delicacy, as well shown by the ILC's analysis contained in the commentary to Articles 72 and 73.

According to the Special Rapporteur, while the interaction between two (or more) authentic texts, each of which interpreted in accordance with its own *genius*, was certainly useful in order to solve apparent divergences between them or to clarify the ambiguities of one text, the insertion of the "comparison of authentic versions" among the general elements of interpretation (Article 69) might have far-reaching implications by undermining the security of the individual texts. This conclusion was based on the recognition that each language has its own *genius* and it is not always possible to express the same idea in identical phraseology or syntax in different languages. In Sir Humphrey Waldock's view, attributing legal value to a comparison for the purpose of determining the ordinary meaning of the terms in the context of the treaty could have encouraged attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning of the treaty. Pending the examination by the ILC of the Israeli government's proposal, the Special Rapporteur preferred to confine himself to the above preliminary observations on the matter.<sup>758</sup>

With regard to the comments concerning Articles 72 and 73, Sir Humphrey Waldock

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<sup>757</sup> The Sixth Committee of the General Assembly considered the topic of the draft articles prepared by the ILC from its 839<sup>th</sup> through its 853<sup>rd</sup> meetings, held from 29 September to 15 October 1965. The topic had been allocated to the Sixth Committee by the General Assembly at its 1336<sup>th</sup> plenary meeting, held on 24 September 1965. The Sixth Committee issued a Report that summarized the results of its analysis (see Document A/6090, Official Records of the General Assembly, Twentieth Session, Annexes, agenda item 87, Report of the Sixth Committee of 4 November 1965, paras. 51-52), from which it appears that the great majority of the delegates regarded the draft articles as generally reflecting existing international law and practice and considered as positive the process of codifying some rules on treaty interpretation, especially for the purpose of reducing potential disputes between the contracting States regarding the application of treaties. However, no relevant comments on the specific topic of interpretation of multilingual treaties had been put forward in the Report. During the discussions held at the Sixth Committee, the only two delegations that made new comments were the Kenyan and Romanian ones, both expressing the view that paragraph 2(b) of Article 72 should have been deleted (see *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 850<sup>th</sup> meeting, para. 41 and 842<sup>nd</sup> meeting, para. 16 respectively). For a brief analysis of the content of the Report with reference to the topic of treaty interpretation, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 71.

<sup>758</sup> See YBILC 1966-II, p. 100, para. 23.

first faced the issue, raised by both the Israeli and the United States governments, of the usage of the terms “texts” and “versions” in those articles. In replying to the suggestion put forward by the former government, the Special Rapporteur explained that using “versions” instead of “texts” throughout Article 73 would have made such an article inconsistent with Article 72(2), where a reference to a(n authentic) text was also made.<sup>759</sup>

With reference to the more articulate observation submitted by the United States government, Sir Humphrey Waldock noted that its statement, conceding that the usage of the term “texts” was becoming more frequent, represented a “serious underestimate of the treaty practice in the matter”. According to the Special Rapporteur, in fact, the general practice had always been to speak of authentic “texts” and not authentic “versions” of a treaty.<sup>760</sup> He added that the doctrinal basis of the United States government’s observation appeared to be open to question. In fact, he found that the use of the term “texts” did not derogate from the concept of “treaty as a unity” more than the use of term “versions” would have. Where recourse had been to the fiction that only one text exists, which is drawn up in multiple language “versions”, the same element of multiplicity would have been introduced as in the case where the term “texts” had been used, “text” becoming just another name for “treaty” and “version” just another name for “text”. The substance of the matter would have not changed. In addition, Sir Humphrey Waldock noted that, so far as the English language was concerned, the word “versions” was more indicative of difference than the word “texts”.<sup>761</sup>

He then turned to the actual usage of the terms “text” and “version” in draft Articles 72 and 73. The Special Rapporteur explained that, on the one hand, the word “version”, not being a term of art but just a word of entirely general meaning, had been carefully chosen by the ILC to indicate those renderings of a treaty drawn up in languages different from the authentic ones, i.e. those non-authoritative for interpretation purposes,<sup>762</sup> on the other hand, the word “text” had been used only with reference to the language versions recognized as authentic and considered authoritative for the purpose of treaty interpretation. In the system of Article 72 and 73, the metamorphosis of a language “version” into an authoritative “text” took place as a consequence of the recognition of its authentic status. According to Sir Humphrey Waldock, the distinct reference to “texts” and “versions” in Article 72(2) as well as in the treaty practice helped to clarify and sharpen the fundamental distinction between “authentic texts” (authoritative for interpretation purposes) and “official versions” and “translations”

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<sup>759</sup> See YBILC 1966-II, p. 102, para. 2.

<sup>760</sup> See YBILC 1966-II, p. 102, para. 3 and references and practices there quoted. The existence of such a general practice, both before and after 1966, is also confirmed with regard to the specific field of tax treaties, as it clearly emerges from the analysis of the final clauses of the treaties included in the IBFD Tax Treaty Database ([www.ibfd.org](http://www.ibfd.org)), almost all of which use the term “texts” and not “versions” in their English authentic text (if any).

<sup>761</sup> YBILC 1966-II, p. 102, para. 4.

<sup>762</sup> In this respect, the Special Rapporteur gave the case of the European Convention of Human Rights as an example. That Convention, in fact, is drawn up in two authentic languages, English and French, but it has been translated by some contracting States in their own languages for internal purposes. According to the Special Rapporteur, such official translations could be properly indicated as Convention’s language “versions”, but not as Convention’s authentic “texts” (YBILC 1966-II, p. 102, para. 5).

(non-authoritative for interpretation purposes).<sup>763</sup>

With regard to the matter of the elimination of paragraph 2(b) from Article 72, the Special Rapporteur noted that the more general issue, concerning the applicability of the draft articles as a whole to treaties drawn up within an international organization, had already been addressed by the ILC through the insertion of Article 3(bis) among the “General Provisions”.<sup>764</sup> For that reason, there was no need to maintain a specific paragraph dealing with that same subject matter in the *corpus* of Article 72.<sup>765</sup>

Finally, in addition to some minor drafting amendments, Sir Humphrey Waldock suggested combining Articles 72 and 73 in a single article. According to the Special Rapporteur, such a solution (i) would have permitted showing more clearly the connection existing between Article 72 and the first paragraph of Article 73 and (ii) would have helped to avoid any appearance of over-emphasizing the significance of the multilingual character of a treaty as an element of interpretation. The following is the new text of Article 72, as suggested by the Special Rapporteur:<sup>766</sup>

*Article 72*

*Interpretation of treaties drawn up in two or more languages*

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, unless the treaty otherwise provides.
2. A version of the treaty drawn up in a language other than one of those in which the text was authenticated shall also be considered as an authentic text and authoritative if the treaty so provides or the parties so agree.
3. Authentic texts are equally authoritative in each language unless the treaty provides that, in the event of divergence, a particular text shall prevail.
4. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1,<sup>767</sup> when a comparison of the texts discloses a difference in the expression of the treaty and any resulting ambiguity or obscurity is not removed by the application of article 69-70, a meaning which as far as possible reconciles the texts shall be adopted.

<sup>763</sup> See YBILC 1966-II, p. 102, para. 5. However, the Special Rapporteur conceded that the term “different” in Article 73(1) was not well chosen, since the emphasis of that paragraph was on similarity and equality and not on differences (YBILC 1966-II, p. 103, para. 10).

<sup>764</sup> Article 3(bis), which was directly derived from previous Article 48, read as follow (YBILC 1965-II, p. 160):  
*Article 3 bis. Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations*

The application of the present articles to treaties which are constituent instruments of an international organization or have been drawn up within an international organization shall be subject to the rules of the organization in question.

<sup>765</sup> See YBILC 1966-II, p. 103, para. 8.

<sup>766</sup> YBILC 1966-II, p. 103, paras. 9 and 11.

<sup>767</sup> Note that, in the text of Article 72 reported as materially used for discussion by the ILC during its eighteenth session, the reference to “paragraph 1” is replaced by a reference to “paragraph 3”. See YBILC 1966-I (part II), p. 208, para. 1.

### 2.5. *The eighteenth session of the ILC and the 1966 Draft*

The ILC resumed the discussion on the interpretation of plurilingual treaties during its eighteenth session, held in 1966. For the purpose of the discussion, the ILC took into account the feedback received from the governments and the Sixth Committee of the United Nations General Assembly, as well as the input given by Sir Humphrey Waldock in his Sixth Report on the Law of Treaties.

The topic was taken up again at the ILC's 874<sup>th</sup> meeting, held on 21 June 1966. The Chairman, Mr Yasseen, invited the ILC to consider the new combined text of Articles 72 and 73 proposed by the Special Rapporteur, who, in turn, explained the main changes as compared to the previous draft and the reasons therefor.<sup>768</sup>

Mr Verdross made the first intervention and said that, although he generally agreed with the content and structure of the new article, he thought it was desirable to add a final provision to paragraph 4, according to which where it was impossible to find a meaning which reconciled the texts, the language to be considered should be that in which the treaty had been drawn up.<sup>769</sup> In the event his proposal was not accepted by the ILC, his alternative suggestion was to delete the words "as far as possible" from paragraph 4, in order to exclude the application of paragraph 4, second sentence, in cases where a meaning reconciling the texts could not be found.<sup>770</sup>

Mr Rosenne pointed out that, on the one hand, he was satisfied by the reply given by the Special Rapporteur in respect of the issue concerning the usage of the terms "texts" and "versions" in the draft article(s), but, on the other hand, he thought that the emphasis placed on the equality of authentic texts raised the question of whether comparison of authentic texts should be included among the elements of interpretation listed in the article dealing with the general rule of interpretation (at that time, Article 69).<sup>771</sup>

In this respect, Mr Rosenne's opinion differed from that of Sir Humphrey Waldock. As previously mentioned, the latter analysed the issue in his Sixth Report<sup>772</sup> and concluded that such an inclusion was not one that the ILC should adopt without very careful consideration of its implications.

In contrast, Mr Rosenne was in favor of such an inclusion. In supporting his position, he referred to doctrine,<sup>773</sup> normal practice and principle; in particular, he quoted the position taken by the American Law Institute, which included "the comparison of texts in the different languages in which the agreement was concluded" among the

<sup>768</sup> See YBILC 1966-I (part II), p. 208, paras. 1-4.

<sup>769</sup> See YBILC 1966-I (part II), p. 208, para. 5.

<sup>770</sup> See YBILC 1966-I (part II), p. 211, para. 37.

<sup>771</sup> See YBILC 1966-I (part II), pp. 208-209., paras. 7 *et seq.*

<sup>772</sup> See YBILC 1966-II, p. 100, para. 23.

<sup>773</sup> See YBILC 1966-I (part II), p. 209, para. 8, where there are quotations (among others) of the Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 971; C. E. Rousseau, *Principes généraux du droit international public. Tome I* (Paris: Pedone, 1944), p. 721; A. D. McNair, *The Law of Treaties* (Oxford: The Clarendon Press, 1961), p. 433.

factors to be considered for the purpose of treaty interpretation,<sup>774</sup> and the statement made by Kiss, according to which “(l)orsque des textes en plusieurs langues font également foi, il convient d'utiliser l'ensemble des textes pour déterminer le sens véritable du traité”.<sup>775</sup> Mr Rosenne was also of the opinion that a good practitioner would have almost automatically compared the different language versions before commencing any process of interpretation and that, in the view of such practice, it would have been misleading to place the comparison of different texts in a “secondary position” in Article 72.<sup>776</sup>

On the basis of those arguments, Mr Rosenne believed that all language versions should be analysed together for the purpose of treaty interpretation and that it was preferable not to leave that point to be decided by the interpreter and to discourage any tendency to base the interpretation of a treaty on a single language version, since such a tendency would have seriously impaired the fundamental concept of the treaty as a single unit.<sup>777</sup> A reference to the comparison of authentic texts should have therefore been included in the article dealing with the general rule of interpretation (i.e. draft Article 69).<sup>778</sup>

As a last point, Mr Rosenne noted the need to clarify the relevance of the *travaux préparatoires* for the purpose of interpreting multilingual treaties and, in that respect, he made reference by analogy to the reasons put forward by the Special Rapporteur for transferring the content of Article 71 (dealing with terms having a special meaning) into Article 69.<sup>779</sup> According to Mr Rosenne, as the transfer of the provision dealing with special meaning to Article 69 made it possible to have recourse to the *travaux préparatoires* (referred to in Article 70) for the purpose of verifying or determining the cases where a special meaning had to be attributed to a certain term, so the inclusion of a reference to the comparison of authentic texts in Article 69 would have made clearer that the recourse to the *travaux préparatoires* was allowed for the purpose of solving apparent divergences between authentic texts.<sup>780</sup>

Mr Castrén proposed adding the words “or the parties have otherwise agreed” after the words “otherwise provides” in paragraph 1 of Article 72, in order to coordinate this expression with that used in paragraph 2. He also proposed deleting the words “and authoritative” in paragraph 2, since the reference to “authentic text” was sufficient to made clear the status of the language version.<sup>781</sup>

Mr Ago pointed out that, although the proposed Article 72 was acceptable as far as substance was concerned, it could be simplified in its structure and made clearer. In particular, he suggested that paragraph 3 was redundant, since the case contemplated

<sup>774</sup> American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1965), §147, p. 451.

<sup>775</sup> A. C. Kiss, *Répertoire de la pratique française en matière de droit international public. Tome I* (Paris: Centre national de la recherche scientifique, 1962), p. 465.

<sup>776</sup> See YBILC 1966-I (part II), p. 209, para. 11.

<sup>777</sup> See YBILC 1966-I (part II), p. 209, para. 12.

<sup>778</sup> YBILC 1966-I (part II), p. 210, para. 16.

<sup>779</sup> See YBILC 1966-II, p. 100, para. 22.

<sup>780</sup> See YBILC 1966-I (part II), p. 209, para. 15.

<sup>781</sup> See YBILC 1966-I (part II), p. 210, paras. 17-18.

therein was already covered by the expression of paragraph 1 “unless the treaty otherwise provides”.<sup>782</sup> With reference to the comment made by Mr Verdross, Mr Ago said that the issue concerning the weight to be attributed to the language in which the treaty had been drawn up in cases of irreconcilable texts could have been solved by referring to the *travaux préparatoires* and the circumstances of the conclusion of the treaty, as explicitly allowed by Article 70. This would have led to the discovery that the treaty had been originally drawn up in a certain language and such an element should have been taken in due account for interpretation purposes. In addition, the solution adopted in the draft did not present the inconvenience of being too rigid, as it would have been a system attributing a “premium” to the original language version, independently of the reasons why that specific language had been chosen for such a purpose.<sup>783</sup>

Mr Briggs supported the suggestion made by Mr Ago with regard to the elimination of paragraph 3 and added, in that respect, that the word “equally” could be added between the expressions “the text is” and “authoritative in each language”.<sup>784</sup> He considered that the first part of paragraph 4 was redundant as well, since the fact that the terms of the treaty were presumed to have the same meaning in each authentic text was already implicit in the (re)formulation of paragraph 1.<sup>785</sup> With regard to paragraph 2, he doubted whether a non-authenticated version of a treaty could be put at the same level as an authenticated one.<sup>786</sup>

Ultimately, Sir Humphrey Waldock took the floor and replied to the comments put forward by the other members of the ILC. With reference to the last suggestion proposed by Mr Briggs, he said that the ILC could not adopt any provision that would disregard the express provision of the parties and, where a treaty explicitly provided for putting a non-authenticated version and the authenticated versions on the same level, such a will should prevail.<sup>787</sup>

On the contrary, he substantially agreed with Mr Ago’s proposal to delete paragraph 3, provided that paragraph 1 was accordingly modified.<sup>788</sup>

In respect of the issue raised by Mr Verdross, the Special Rapporteur recalled the ILC that the matter had already been subject of debate during its sixteenth session in 1964 and that, at that time, the ILC had reached the conclusion that it was not acceptable to go any further than was done in (then) Article 73.<sup>789</sup> It was inadvisable to go beyond

<sup>782</sup> See YBILC 1966-I (part II), p. 210, paras. 20-21.

<sup>783</sup> See YBILC 1966-I (part II), p. 210, para. 22. Also Mr Rosenne seemed to attach particular relevance to the language in which the treaty had originally been drawn up. See, in that respect, his statement that, for the purpose of treaty interpretation, it was essential to refer to the comparison of authentic texts, or at least of those texts in which the treaty had been drawn up by the parties at the negotiating stage (YBILC 1966-I (part II), p. 209, para. 8).

<sup>784</sup> See YBILC 1966-I (part II), p. 210, para. 26.

<sup>785</sup> See YBILC 1966-I (part II), p. 210, para. 28.

<sup>786</sup> See YBILC 1966-I (part II), p. 210, para. 29.

<sup>787</sup> See YBILC 1966-I (part II), p. 210, para. 30.

<sup>788</sup> See YBILC 1966-I (part II), p. 210, para. 32.

<sup>789</sup> YBILC 1966-I (part II), p. 210, para. 33.

that and, where no reconciliation of the texts was possible and the recourse to the *travaux préparatoires* and the circumstances of the conclusion of the treaty did not remove the uncertainty, the interpreter was to be left free to decide the meaning to be attributed to a certain provision in light of all the circumstances.<sup>790</sup>

Finally, with reference to the proposal made by Mr Rosenne of including a reference to the comparison of the texts among the general rules of interpretation, he observed that, although it was true that interpreters normally undertook such a comparison, the suggested inclusion would have implied that it was no longer possible to rely on a single text as an expression of the will of the parties until a difficulty arose and that it was always necessary to consult all the authentic texts for interpretation purposes. According to the Special Rapporteur, that solution had a number of drawbacks: in particular, it would have led to practical difficulties for the legal advisers of the newly independent States, who did not always have staff familiar with the many languages used in drafting international treaties.<sup>791</sup> His conclusion was further upheld by Mr El-Erian.<sup>792</sup>

Sir Humphrey Waldock then proposed to refer the article dealing with the interpretation of plurilingual treaties to the Drafting Committee for consideration in light of the discussion and the ILC so decided.

Mr Briggs, in his quality of Chairman of the Drafting Committee, presented to the ILC the new text of Article 72 at the 884<sup>th</sup> meeting, held on 5 July 1966. The proposed text was as follows:<sup>793</sup>

*Article 72*

*Interpretation of treaties expressed in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty expressed in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provide or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 69 and 70 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

At the outset, Mr Briggs explained that the main difference between the proposed text and that prepared by Sir Humphrey Waldock as part of his Sixth Report on the Law of Treaties was that the substance of previous paragraph 3 had been incorporated in the new text of paragraph 1.<sup>794</sup> Mr Verdross reverted to his disagreement on the current wording

<sup>790</sup> See YBILC 1966-I (part II), pp. 210-211, paras. 33-34.

<sup>791</sup> See YBILC 1966-I (part II), p. 211, para. 35.

<sup>792</sup> See YBILC 1966-I (part II), p. 211, para. 42.

<sup>793</sup> See YBILC 1966-I (part II), pp. 270-271, para. 42.

<sup>794</sup> See YBILC 1966-I (part II), p. 271, para. 43.

of (now) Article 3, as already expressed during the 874<sup>th</sup> meeting.<sup>795</sup> After some minor comments were made, Mr Briggs (Chairman) put Article 72 to vote and the ILC adopted it.

At its 892<sup>nd</sup> meeting, the ILC decided to recommend, in conformity with Article 23(1)(d) of its Statute, that the General Assembly convoke an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.<sup>796</sup> From that very same meeting the ILC started working on the final text of the articles to be submitted to the General Assembly.

The topic was again made subject to discussion at the 893<sup>rd</sup> meeting, held on 18 July 1966. The draft article, which had been renumbered as 29 and moved to Part III, Section 3 – Interpretation of Treaties, was discussed with regard to the usage of the term “expressed” in both the title and paragraph 2. In accordance with the final proposal put forward by Mr Ago and Sir Humphrey Waldock, the term “expressed” was deleted from paragraph 2 and replaced by the term “established” in the title.<sup>797</sup> The ILC adopted the amended article.

Finally, during its 894<sup>th</sup> meeting, held on 19 July 1966, the ILC made some minor amendments to the commentary on Article 29 and approved its final version.<sup>798</sup>

The following version of Article 29, dealing the interpretation of multilingual treaties, was submitted to the General Assembly:<sup>799</sup>

*Article 29.*

*Interpretation of treaties in two or more languages*<sup>800</sup>

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

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<sup>795</sup> See YBILC 1966-I (part II), p. 271, para. 44.

<sup>796</sup> See YBILC 1966-I (part II), p. 322, paras. 17-18.

<sup>797</sup> See YBILC 1966-I (part II), p. 328, paras. 42-43.

<sup>798</sup> See YBILC 1966-I (part II), pp. 341-342, paras. 87 *et seq.*

<sup>799</sup> YBILC 1966-II, p. 224.

<sup>800</sup> It is not clear why the title did not contain the word “established” before the words “in two or more languages”, as decided by the ILC at its 893<sup>rd</sup> meeting (see YBILC 1966-I (part II), p. 328, paras. 42-43). Also, the French version of the article did not contain the proposed word “établi” in the title (see *Annuaire de la Commission de Droit International*, vol. II, part II, p. 244).

## 2.6. *The United Nations conference on the Law of Treaties*

Following the recommendation of the ILC, the General Assembly, at its 1484<sup>th</sup> meeting, held on 5 December 1966, adopted the Resolution 2166 (XXI) requesting the Secretary-General to convoke an international conference of plenipotentiaries for the purpose of considering the law of treaties and embodying the result of its work in an international convention and such other instruments as it might deem appropriate. The conference was to be held in two sessions, the first in early 1968 and the second in early 1969.

According to point 9 of the Resolution, Member States, the Secretary-General and the Directors-General of those specialized agencies that acted as depositaries of treaties were invited to submit their written comments and observations on the 1966 Draft no later than 1 July 1967.

The General Assembly, at its 1564<sup>th</sup> meeting held 23 September 1967, allocated to its Sixth Committee the agenda item “Law of Treaties”. Accordingly, the Sixth Committee discussed such a topic at its meetings held from 9 to 26 October 1967, where it also analysed the comments and observation in the meantime submitted by some Member States and specialized agencies.<sup>801</sup>

At its 1621<sup>st</sup> meeting, held on 6 December 1967, the General Assembly adopted a second resolution concerning the conference on the Law of Treaties, by which it decided that the first session of such conference would have been held in Vienna on March 1968 and invited participating States to submit to the Secretary-General, no later than 15 February 1968, any additional comments and draft amendments for circulation to Governments.<sup>802</sup>

During the first session of the United Nations Conference on the Law of Treaties (hereafter the “Conference”),<sup>803</sup> the Committee of the Whole of the United Nations Conference on the Law of Treaties (hereafter “Committee of the Whole”) considered both the articles on treaty interpretation encompassed in the 1966 Draft and the amendments proposed by participating States.<sup>804</sup> At its 34<sup>th</sup> meeting, held on 23 April 1968, the Committee of the Whole specifically discussed possible amendments to Article 29.

In this respect, the United States<sup>805</sup> suggested three main changes to the draft article.

First, it proposed to substitute the words “language version” for the word “text” in the last part of paragraph 1.

<sup>801</sup> See the Report of the Sixth Committee on the Law of Treaties of 24 November 1967 (Document A/6913).

<sup>802</sup> See the Resolution of the United Nations General Assembly n. 2287 (XXII) of 6 December 1967.

<sup>803</sup> The topic of treaty interpretation was considered by the Committee of the Whole at its 31<sup>st</sup> through 34<sup>th</sup> meetings, held in Vienna on 19, 20, 22 and 23 April 1968 (UNCLT-1<sup>st</sup>, pp. 166 *et seq.*).

<sup>804</sup> The following States proposed amendments to the draft articles: Australia, Ceylon, Federal Republic of Germany, Pakistan, Philippines, Romania, Republic of Vietnam, Spain, Ukrainian Soviet Socialist Republic, United Republic of Tanzania, United States of America (see UNCLT-Doc, pp. 149-151).

<sup>805</sup> With reference to the proposals put forward by the United States, see UNCLT-Doc, p. 151.

Second, it recommended moving the second sentence of paragraph 3 to a new paragraph 4. The remainder paragraph 3 was to be reworded to read “The terms of the treaty are presumed to have the same meaning in each authentic language version”, i.e. the term “language version” was to be used instead of term “text”.

Third, new paragraph 4 (former paragraph 3, second sentence) was to be modified as follows: “Except in the case mentioned in paragraph 1, when a comparison of the several language versions discloses a difference of meaning which the application of Article 27 does not remove, a meaning shall be adopted which is most consonant with the object and purpose of the treaty”.

The third proposal was the most innovative, as well as the most substantive of the three. In fact, apart from the suggested substitution of the words “several language versions” for the word “texts”<sup>806</sup> and the elimination of the reference to Article 28 for the purpose of removing the difference, the proposal had as its main objective to introduce a new yardstick to resolve the discordances between the various language versions, i.e. the objective and purpose of the treaty. The proposed change was of tremendous impact, since in cases of persistent differences between the various language versions of a treaty, not a meaning that as far as possible reconciled the texts, but the meaning most consonant with the object and purpose of the treaty had to be adopted. Such a pragmatic solution, recognizing the eventuality that in certain cases the reconciliation of the different language versions was impossible, detached the investigation of the appropriate meaning from the ordinary sense of the contrasting language versions<sup>807</sup> and attached it exclusively to a partially non-textual element, such as the object and purpose of the treaty.

The United States representative, in introducing the above third proposal, strongly criticized the provision laid down in paragraph 3, second sentence, of Article 29, which did not give any indication of the guiding criteria to be followed for the purpose of reconciling the different language versions, i.e. for the purpose of effecting “some sort of compromise”, in the words of the United States representative.<sup>808</sup>

In addition, he stressed that reconciliation of the different language versions was sometimes impossible and this was especially true where a problem of multijuralism occurred, that is where the treaty dealt with legal issues and two or more systems of law were involved. According to the United States representative, in such cases it often happened that there was no legal concept in one system that exactly corresponded to a certain legal concept in the other system. Therefore, even if two “equivalent” terms were used, the legal concepts underlying and expressed by them could be non-reconcilable.<sup>809</sup>

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<sup>806</sup> It is interesting to note that, in all the three changes proposed by the United States, the position previously expressed by Mr Briggs during the ILC’s proceedings with regard to the need to substitute the term “language version” for the term “treaty” was upheld.

<sup>807</sup> Since they were regarded as non-reconciliable.

<sup>808</sup> See UNCLT-1<sup>st</sup>, pp. 188-189, paras. 39-40.

<sup>809</sup> See UNCLT-1<sup>st</sup>, p. 189, para. 41. See, in this respect, also the comment on Part III of the 1964 Draft submitted by the Yugoslavian government (see YBILC 1966-II, p. 361).

A similar approach was taken by the Republic of Vietnam,<sup>810</sup> which proposed dropping the reference to Article 28 in paragraph 3 and to replace the words “a meaning which as far as possible reconciles the texts” with the words “the meaning which comes closest to the object and purpose of the treaty” in the same paragraph. In this respect, the Vietnamese representative pointed out that it was the object and purpose of the treaty which could serve as a basis for a compromise, since they were “essential reference elements which could be of great help in overcoming difficulties of interpretation where a treaty itself provided no precise solution”.<sup>811</sup>

Australia suggested some amendments to the new paragraph 4 proposed by the United States.<sup>812</sup> First, it recommended reintroducing the reference to Article 28 for the purpose of removing the apparent difference of meaning.

Second, it proposed dropping the word “most” before the expression “consonant with the object and purpose of the treaty”.

Third and most important, Australia suggested adding the words “and which best reconciles the versions” at the end of that paragraph. The Australian representative explained that, although Australia shared the criticism expressed by the United States and Vietnam with regard to the current wording of Article 29(3) and also endorsed their proposal that the meaning most consonant with the object and purpose of the treaty should be adopted in the case of apparent difference of meaning, it was also of the opinion that the original idea of making every reasonable effort for the purpose of reconciling the various texts should be preserved.<sup>813</sup>

The opposite view was expressed by the representatives of the USSR, Israel and Trinidad and Tobago. The representative of the USSR found that the text proposed by the ILC was more satisfactory than the ones proposed by the United States, Australia and the Republic of Vietnam;<sup>814</sup> the representative of Israel doubted whether the object and purpose of the treaty could be of any help in cases where the various authentic texts were still non-reconcilable after the application of the general rule of interpretation enshrined in Article 27 of the draft;<sup>815</sup> similarly, the representative of Trinidad and Tobago argued that the interpretation of a treaty by recourse to its object and purpose was already covered by Article 29 by means of the reference to Articles 27 and 28 contained therein.<sup>816</sup>

From the discussion in the Committee of the Whole, however, it appears that the majority of the representatives supported the amendments suggested by Australia. On the basis of that discussion, the Drafting Committee of the Conference (hereafter “Drafting

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<sup>810</sup> With reference to the proposals put forward by the Republic of Vietnam, see UNCLT-Doc, p. 151.

<sup>811</sup> See UNCLT-1<sup>st</sup>, p. 189, para. 45.

<sup>812</sup> With reference to the proposals put forward by the Australia, see UNCLT-Doc, p. 151.

<sup>813</sup> See UNCLT-1<sup>st</sup>, p. 189, paras. 52-53.

<sup>814</sup> See UNCLT-1<sup>st</sup>, p. 190, para. 64.

<sup>815</sup> See UNCLT-1<sup>st</sup>, p. 190, para. 66.

<sup>816</sup> See UNCLT-1<sup>st</sup>, p. 190, para. 68.

Committee”) started working on an updated version of Article 29.

The Chairman of the Drafting Committee, Mr Yasseen, presented such an updated version of Article 29 to the Committee of the Whole at its 74<sup>th</sup> meeting, held on 16 May 1968. The new text was as follows:<sup>817</sup>

*Article 29.*

*Interpretation of treaties in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except in the case mentioned in paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Mr Yasseen, in his capacity of Chairman of the Drafting Committee, described to the Committee of the Whole the changes made in the text of Article 29 and the reasons therefor. He first pointed out that the proposal advanced by the United States to divide former paragraph 3 into two paragraphs had been endorsed, since the idea stated in the first sentence of that paragraph (the sole sentence of new paragraph 3) was quite different from that expressed in the second sentence (constituting the basis of new paragraph 4). Such a split determined the need to specify, in new paragraph 4, that the texts subject to comparison were “authentic” texts.<sup>818</sup> He then explained that the Drafting Committee decided to embrace the idea underlying the United States suggestion of adopting the meaning closest to the object and purpose of the treaty for the purpose of reconciling the different texts.<sup>819</sup> In this respect, the position taken by the Drafting Committee seemed to be largely influenced by the compromise proposal put forward by Australia. The new text proposed by the Drafting Committee was approved without formal vote and recommended to the Conference for adoption.<sup>820</sup>

At the 13<sup>th</sup> plenary meeting of the second session of the Conference, held on 6 May 1969, the Chairman of the Drafting Committee, Mr Yasseen, illustrated the text of Article 29 to the Conference and pointed out that, as compared to the text approved by the Committee of the Whole, two minor changes had been made. First, the word “authenticated” had been inserted in the title after the word “treaties” in order to make clear that the words “in two or more languages” related to the word “treaties” and not to

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<sup>817</sup> See UNCLT-1<sup>st</sup>, p. 442, para. 35.

<sup>818</sup> See UNCLT-1<sup>st</sup>, pp. 442-443, paras. 36-37.

<sup>819</sup> See UNCLT-1<sup>st</sup>, p. 443, para. 38.

<sup>820</sup> See UNCLT-1<sup>st</sup>, p. 443, para. 38.

the word “interpretation”.<sup>821</sup> Second, the *incipit* of paragraph 4 was amended to read “Except where a particular text prevails in accordance with paragraph 1” in order to make clear that the reference to paragraph 1 related to the second part and not to the first part.<sup>822</sup> The Conference adopted the so amended Article by 101 votes to none.<sup>823</sup> Article 29 was renumbered as Article 33 in the final arrangements of the Vienna Convention. The final text reads as follows:

*Article 33.*

*Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the<sup>824</sup> meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

### **3. The construction of multilingual treaties under the rules of interpretation enshrined in Article 33 VCLT and the fundamental principles of interpretation established by the author in Part I**

#### **3.1. Introduction**

Article 33 VCLT only provides broad guidelines for solving interpretative issues arising in the context of multilingual treaties, in particular those concerning the potential discrepancies in meaning among the various authentic texts.<sup>825</sup> The ILC considered whether to codify additional and more specific rules for the interpretation of multilingual treaties, such as the recognition of a legal presumption in favor of the authentic text with a clear(er) meaning, or in favor of the authentic text originally drafted in the course of the negotiations. The Commission, however, rejected such ideas, since it considered that

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<sup>821</sup> See UNCLT-2<sup>nd</sup>, p. 57, para. 61.

<sup>822</sup> See UNCLT-2<sup>nd</sup>, p. 57, para. 63.

<sup>823</sup> See UNCLT-2<sup>nd</sup>, p. 59, para. 76.

<sup>824</sup> Note that article “a”, present in the draft version adopted by the Drafting Committee of the Conference, is replaced by article “the” in the final version.

<sup>825</sup> In that respect, O’Connell criticized the provisions of the VCLT dealing with treaty interpretation since (i) they did not clearly indicate the priority in the application of the rules of interpretation and (ii) the rules themselves were in part so general that they made necessary a review of traditional methods of interpretation (i.e. non-codified principles and maxims) whenever a treaty is being interpreted. According to O’Connell, “[m]ore controversy is likely to be aroused by them than allayed” (see D. P. O’Connell, *International Law* (London: Stevens & Sons, 1970), p. 253).

“much might depend on the circumstances of each case and the evidence of the intention of the parties”<sup>826</sup>.

Moreover, the provisions encompassed in Article 33 VCLT are the heterogeneous in nature and are ontologically different from those included in Articles 31 and 32 VCLT. While the latter, for the most part, are limited to highlight which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrate the different weight that the interpreter should typically attribute thereto due to their different intrinsic attitudes to convey the final agreement of the parties, the provisions of Article 33 VCLT perform different tasks.

On the one hand, the provisions of the first two paragraphs of Article 33 VCLT establish the rule of legal effectiveness of the treaty language versions; therefore, they are not actually concerned with treaty interpretation, but constitute a logical prerequisite to such an activity since they provide the rule for determining which texts must be interpreted and which (language) versions are to be disregarded.

On the other hand, the last two paragraphs of Article 33 VCLT establish two proper rules of interpretation,<sup>827</sup> which can be entirely inferred neither from Articles 31 and 32 VCLT, nor from the first two paragraphs of Article 33 VCLT:

- (a) Article 33(3) VCLT establishes that all authentic texts are presumed to have the same meaning;
- (b) Article 33(4) VCLT establishes that, unless the treaty provides for a particular text to prevail in the case of divergence, the *prima facie* discrepancies among the various authentic texts must be removed by means of the ordinary interpretation process and, where that procedure does not succeed, the interpreter must adopt the meaning that best reconciles the various authentic texts, having regard to the object and purpose of the treaty.

The following sections are aimed at clarifying:

- (i) how those provisions of Article 33 VCLT have been construed by scholars, courts and tribunals (*positive analysis*);
- (ii) whether the rules enshrined in Article 33 VCLT, as resulting from the above positive analysis, significantly depart from the normative and semantics-based principles of interpretation established by the author in section 2 of Chapter 3 of Part I, or, in contrast, whether such rules and principles may be regarded as together forming a coherent system.

Such an analysis, however, is not carried out by author in the abstract, but with a view to answering the most fundamental questions of this study. Therefore, from a structural perspective, the analysis of above points (i) and (ii) is broken down into clusters, which

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<sup>826</sup> See YBILC 1966-II, p. 226, para. 9.

<sup>827</sup> I.e. rules that are not limited to highlight which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrate the different weight that the interpreter should typically attribute to them, but which prescribe, under certain conditions, the meaning that must be attributed to the authentic treaty texts.

are dealt with in relation to the single questions to which they are relevant.

As already mentioned in the Introduction, the research questions that are discussed in this chapter are the following:

- a) Must all authentic texts be given the same *status* for the purpose of interpreting multilingual treaties?
- b) What is the relevance of non-authentic texts for the purpose of construing (multilingual) treaties?
- c) Is there an obligation to perform a comparison of the different authentic texts anytime a multilingual treaty is interpreted (i.e. independently of the awareness of the existence of an error, or of a potential divergence of meanings, as well as from the perceived clarity of the authentic text analysed)?
- d) If the previous question is answered in the negative, when does an obligation to compare the different authentic texts arise?
- e) How should the interpreter solve the *prima facie* discrepancies among the various authentic texts emerging from the comparison?
- f) What should the interpreter do where the *prima facie* discrepancies could not be removed by means of (ordinary) interpretation?
- g) Where the treaty provides that a certain authentic text is to prevail in the case of divergences:
  - i. At which point in the interpretative process there must be recourse to such a prevailing text?
  - ii. What if the prevailing text is ambiguous or obscure?
  - iii. What about the contrast between the prevailing text and the other authentic texts, if the latter are coherent among themselves?<sup>828</sup>
- h) What is the impact on the answers to be given to the previous questions of the fact that legal jargon terms are employed in the treaty texts?

Questions a) and b) are mainly dealt with in subsection 3.2.<sup>829</sup>

Questions c) and d) are dealt with in subsection 3.3.

Question e) is dealt with in subsection 3.4.

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<sup>828</sup> This is an issue that arises more frequently with reference to multilateral treaties (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 219, note 7 to Chapter 4).

<sup>829</sup> To a certain extent, the relevance of some authentic texts (e.g. the text that is to prevail in cases of divergences of meaning) for the purpose of the interpretation of multilingual treaties is also analysed in other subsections.

Question f) is dealt with in subsection 3.5.

Questions g-i) through g-iii) are dealt with in subsection 3.6.

Question h) is separately dealt with in section 4 of this chapter.

### 3.2. *Status of the various authentic texts and relevance of non-authentic versions*

*“The affairs of sovereign States cannot, and should not, be influenced by the fortuitous choice of words selected by a nameless translator”<sup>830</sup>*

#### 3.2.1. *Research questions addressed in this section*

The present section is aimed at tackling the following two research questions, here briefly illustrated by means of examples.

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

Consider Article 41 of the ICJ Statute, which in its English and French authentic texts reads as follows (*italics* by the author):

1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council.

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1. La Cour a le pouvoir *d'indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun *doivent être* prises à titre provisoire.
2. En attendant l'arrêt définitif, *l'indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

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

In this case, may (or should) the interpreter rely exclusively or predominantly on one of these two authentic texts for the purpose of construing Article 41 of the ICJ Statute and, therefore, answering the above question? If so, on the basis of which

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<sup>830</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 584-585, para. 40.

arguments might he justify his choice in that respect?

More specifically, supposing the interpreter knows that the ICJ Statute was originally drafted in French and that the English text is a subsequent translation based on the former, might (or should) he decide that the provisional measures indicated by ICJ under Article 41 are binding (also) on the basis of the drafting history of that article, which may support the conclusion that the French text should be given more interpretative weight?<sup>831</sup>

Subsections 3.2.2 and 3.2.3 deal with research question a).

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

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

L'administration aura pleins pouvoirs pour décider quant à la propriété ou contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d'utilité publique déjà établis ou à établir.<sup>832</sup>

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

Imagine that a non-official version of the treaty exists, which has been drafted by the Ministry of Foreign Affairs of one of the contracting States as an official translation in its own official language, say English. In such a translation, the expression “public ownership or control” is used, which appears to point towards the former of the above-mentioned possible constructions.

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

<sup>831</sup> The example is derived from ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment.

<sup>832</sup> The example is derived (with significant deviations) from PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment.

Subsection 3.2.4. deals with research question b).

### 3.2.2. *The possible classifications of the authentic texts of a multilingual treaties*

Authentic texts may be divided and classified according to three main criteria. In particular, authentic texts may be classified according to the following dichotomies.<sup>833</sup> (i) working language v. official language texts; (ii) drafted v. translated texts; (iii) authentic texts produced at the time of signature v. authentic texts produced thereafter.

In the first dichotomy, “working language” and official language” are technical terms generally used in the charters of international organizations and in multilateral conferences.<sup>834</sup> Thus, this subdivision does not appear particularly relevant for the purpose of the present study, which concerns bilateral tax treaties.

Under the second dichotomy, the expression “drafted texts” indicates those texts discussed during the negotiations and eventually drafted as result thereof.<sup>835</sup>

In this context, “translated texts” are all the authentic texts other than the drafted one(s), i.e. those authentic texts drafted after the conclusion of the negotiating process (generally after the initialling of the drafted texts). Translated texts may be broadly divided into three main categories: (a) authentic texts translated and verified by the States’ representatives involved in the negotiating process;<sup>836</sup> (b) authentic texts translated and verified by people having both linguistic and technical-juridical skills, but not involved in the negotiating process; (c) authentic texts translated and verified by people having just linguistic skills and not involved in the negotiating process.

Due to the multilateral scope of treaties, it appears possible that the very same authentic text falls within different categories depending on which contracting State’s conduct is being analysed. Consider the following instance. State A’s and State B’s

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<sup>833</sup> These subdivisions originate from those proposed by Tabory (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) p. 193), but then significantly depart from the latter.

<sup>834</sup> With reference to the distinction between “working” and “official” languages, as well as with regard to the relevance of such a distinction for interpretative purposes, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 193. In her work, the author recalled the position expressed on such an issue by Pollux who, with reference to the authentic texts of the United Nations Charter, concluded that, although the Charter had (then) five authentic texts, “English and French being the working languages, the versions in these languages carry more weight than the remaining three” for the purpose of interpretation (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 193; Pollux, “The interpretation of the Charter”, 23 *British Yearbook of International Law* (1946), 54 *et seq.*, at 79).

<sup>835</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 193-194.

<sup>836</sup> I.e. by people aware of the intentions of the parties, as expressed in the course of the negotiations. In this respect, where all contracting States put in place such process of translation and verification, it appears difficult to distinguish translated texts from drafted texts for interpretative purposes.

representatives negotiate a bilateral treaty in language X and, at the end of the negotiation, draft and initial a text in such a language, which later will become an authentic text of the treaty. State A's representatives, who participated to the negotiations, prepare a translated text in language Y, which is then verified by a professional translator, lacking of the relevant technical-judicial knowledge in the specific field of the initialed treaty, on behalf of State B. This translated text will then become an authentic text. The translated text could be classified in subgroup (a), with regard to the process carried out on behalf of State A, and in subgroup (c), with regard to the process carried out on behalf of State B. Such an ineludible consequence of the multilateral nature of treaties partially blurs the above classification and makes an accurate application thereof all the more necessary.

Notwithstanding the above, the dichotomy between drafted and translated texts is of great importance for interpretative purposes since the drafted texts, as well as the translated texts that may be classified in subgroup (a), directly reflect the intention of the parties and thus, together with the *travaux préparatoires*, may play a decisive role in determining the utterance meaning of the treaty provisions.<sup>837</sup>

The third dichotomy concerns authentic texts that are produced after the signing of the treaty. In this respect there are two main scenarios where such an instance may occur: (a) where the treaty itself provides for this possibility; (b) where there is a new party to the treaty, whose official language(s) is given the status of authentic language for the purpose of that treaty.

According to Tabory, the authentic texts produced after the signing of the treaty are generally of a lesser interpretative value, since they could introduce and perpetuate possible "incorrect" meanings.<sup>838</sup>

In any case, this dichotomy does not appear useful for the purpose of the present study, since the authentic texts of bilateral tax treaties are generally all signed at the same time and their bilateral nature excludes the need to integrate the original authentic texts with new authoritative language versions due to the addition of a new treaty partner.<sup>839</sup>

### 3.2.3. *The status of the various authentic texts for the purpose of construing*

<sup>837</sup> See, substantially in accordance, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 194.

<sup>838</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 194-195, who gives as examples the addition of English as authentic language of the EEC Treaty and the addition of the French and Spanish authentic texts to the original English text of the Convention on International Civil Aviation Organization, concluded in Chicago on 7 December 1944.

<sup>839</sup> It may certainly be the case that, in the event of the creation of a new recognized State, the latter inherits the subjective legal positions of the State of which it was previously part, among which the quality of party to a bilateral tax treaty (see, for, instance, the cases concerning the tax treaty network of former USSR), and that it is willing to add an authentic text in its new official language to such a treaty. However, such a hypothesis appears remote enough not to call for an in-depth analysis of the third dichotomy in the course of the present study.

*multilingual treaties*

3.2.3.1. The narrow interpretation of Article 33(1) VCLT in the majority opinion delivered in the Young Loan arbitration

With regard to the second dichotomy, which appears the only relevant for the present study, a first reading of Article 33(1) VCLT would seem to exclude the possibility of attributing more importance to some authentic texts, as compared to others, in order to interpret a multilingual treaty.<sup>840</sup>

This construction of Article 33 VCLT was upheld in the majority opinion delivered by the Arbitral Tribunal for the Agreement on German External Debts in the *Young Loan* arbitration.<sup>841</sup> The case concerned the interpretation of Article 2(e) of Annex 1 of the London Agreement on German External Debts<sup>842</sup> (hereafter “LDA”), according to which:

(e) The amounts due in respect of the various issues of the 51/2 percent International Loan 1930 [ed.’s note: the Young Loan] are payable only in the currency of the country in which the issue was made. In view of the present economic and financial position in Germany, it is agreed that the basis for calculating the amount of currency so payable shall be the amount in US dollars to which the payment due in the currency of the country in which the issue was made would have been equivalent at the rates of exchange ruling when the Loan was issued. The nominal amount in US dollars so arrived at will then be reconverted into the respective currencies at the rate of exchange current on 1 August 1952.

Should the rates of exchange ruling any of the currencies of issue on 1 August 1952 alter thereafter by 5 per cent or more, the instalments due after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of the least depreciated currency (in relation to the rate of exchange current on 1 August 1952) reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.

The issue at stake mainly concerned the interpretation of the second part of Article 2(e), which in the authentic German and French texts read as follows:<sup>843</sup>

Sollte sich der am 1. August 1952 für eine der Emissionswährungen maßgebende Wechselkurs später um 5.v.H. oder mehr ändern, so sind die nach diesem Zeitpunkt fälligen Raten zwar nach wie vor in der Währung des Emissionslandes zu leisten; sie sind jedoch auf der Grundlage der Währung mit der geringsten Abwertung (im Verhältnis zu

<sup>840</sup> Unless a specific provision to this effect exists in the relevant treaty.

<sup>841</sup> Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*

<sup>842</sup> Agreement concluded in London on 27 February 1953 and entered into force on 16 September 1953.

<sup>843</sup> For a comparison of the three authentic texts, see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 514.

dem Wechselkurs vom 1. August 1952) zu berechnen und zu dem im Zeitpunkt der Fälligkeit der betreffenden Zahlung maßgebenden Wechselkurs wie der in die Emissionswährung umzurechnen.

Au cas où les taux de change en vigueur le 1er août 1952 entre deux ou plusieurs monnaies d'émission subiraient par la suite une modification égale ou supérieure à 5 %, les versements exigibles après cette date, tout en continuant à être effectués dans la monnaie du pays d'émission, seront calculés sur la base de la devise la moins dépréciée par rapport au taux de change en vigueur au 1er août 1952, puis reconvertis dans la monnaie d'émission sur la base du taux de change en vigueur lors de l'échéance du paiement.

Article 2(e) of Annex 1 provided protection against currency fluctuation for the benefit of the creditors of the German external debts regulated in the LDA. In particular, the second part thereof required the installment payments to be made in the currency of the country of issue, but for a value recomputed on the basis of the least depreciated currency in relation to the original rate of exchange (fixed on 1 August 1952).

The issue arose in the context of a system of fixed currency exchange rates (the Bretton Woods system) and in relation to the conversion bonds issued by Germany, under the provisions of section A of Annex 1 of the LDA (which included Article 2(e) of Annex 1), for the settlement of the obligations towards the holders of the Young Loan bonds. The clause enshrined in the second part of Article 2(e) of Annex 1 of the LDA was thus applicable to the new conversion bonds. In 1961 and 1969, the German mark was revaluated, but Germany refused to make installment payments on the basis of the new par value; according to Germany, no currency depreciation (but merely a revaluation) had occurred and, therefore, the provision of Article 2(e) was not applicable in the specific case.<sup>844</sup> Some of the other States party to the LDA did not agree with the interpretation of the relevant clause put forward by Germany and, considering Article 2(e) applicable also in the case of currency revaluation, tried to achieve an agreement; after negotiations had proved fruitless, they referred the matter to the Arbitral Tribunal established under the provision of the LDA.

As the Tribunal pointed out, the decision in the *Young Loan* arbitration depended on the meaning attributed to the expressions “Währung mit der geringsten Abwertung”, “devise la moins dépréciée” and “least depreciated currency” used in Article 2(e) of Annex 1 of the LDA and, in particular, on whether these expressions referred only to “devaluation” in the strict sense, i.e. to cases where the par value of the currency concerned had been reduced as a result of governmental action, or also to cases where the currency in question was “depreciated” in relation to another currency of issue owing to the revaluation of the latter.<sup>845</sup>

<sup>844</sup> See Germany’s argument in the *Young Loan* arbitration (Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 522-523).

<sup>845</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 528-529, para. 15.

The arbiters, in the majority opinion, stated that it might be directly inferred from Article 33(1) VCLT in conjunction with the final clause of the LDA, according to which the three texts of the treaty (German, French and English) were all equally authoritative, that the English authentic text carried no special interpretative weight merely because the treaty was largely and undisputedly drafted in that language and discussed in English by the relevant committees on the basis of the English text.<sup>846</sup> In this respect, the Tribunal found that the habit occasionally found in earlier international practice of referring to the drafted text as an aid to interpretation was, as a general rule, incompatible with the principle of the equal status of all authentic texts incorporated in Article 33(1) VCLT. According to the majority of the Arbitral Tribunal, attributing special importance or precedence to the drafted text would relegate the other authentic texts to the status of subordinated translations, thus conflicting with the provisions of the VCLT.<sup>847</sup>

### 3.2.3.2. The possible alternative interpretation of Article 33(1) VCLT: scholarly writings

However, it would seem illogical, unreasonable and unfair<sup>848</sup> not to attribute due weight, as part of the overall context, to the fact that the parties originally discussed and agreed upon one (or more) drafted text(s) and that the other authentic texts were translations of these texts.<sup>849</sup> In this perspective, the drafted text would be relevant (i) as a proxy of the *travaux préparatoires*, where the latter were not fully available, and (ii) in order to corroborate the evidence emerging from other means of interpretation.<sup>850</sup> Thus, the drafted text (as such) should be thrown in the crucible and used, according to Articles 31-33 VCLT, in order to resolve *prima facie* divergences of meaning among the various authentic texts and, according to Articles 31 and 32 VCLT, in order to determine the meaning to be reasonably attributed to the relevant treaty terms, as well as the object and

<sup>846</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 529, para. 17.

<sup>847</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 529, para. 17, where the Tribunal made also reference to M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 78 *et seq.*

<sup>848</sup> I.e. contrary to an interpretation in good faith of the treaty.

<sup>849</sup> According to Rosenne there is “all the difference in the world between a negotiated version and one produced mechanically by some translation service, however competent” (see S. Rosenne, “On Multilingual Interpretation”, in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 450. On the different issue of the problems arising from the use of just one or few languages in the course of the negotiations and, in particular, that undisclosed differences in the semantics of the mother-tongue languages of the negotiators may conceal misunderstandings in respect of the treaty, see R. Cohen, “Meaning, Interpretation and International Negotiation”, 14 *Global Society* (2000), 317 *et seq.*

<sup>850</sup> On the relevance of the history of multilingual treaties in order to establish the actual interrelationship among the various authentic texts and, thus, better understand the common intention of the parties, see S. Rosenne, “On Multilingual Interpretation”, in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 451-452.

purpose of the treaty or of a clause thereof.<sup>851</sup>

In this respect, it is interesting to note what Tabory, quoting Rosenne, concluded with regard to the availability of the evidence of the common intention of the parties to a multilingual treaty. According to the author, “[t]he basic reason for the absence of a reference to the intention of the parties from the formulation in the Vienna Convention, although it may be included in or implied from the object and purpose of the treaty, may be attributed at least in part to the effect of multilingualism on the process of interpretation. As pointed out earlier by Rosenne, the intention of the parties, which may *perhaps* be ascertain for bilateral, or bilingual multilateral treaties, is very difficult to find out in the case of plurilingual multilateral treaties, because in the latter instance, ‘some of the texts designated ‘authentic’ are in fact not the fruit of negotiation, but the product of a technical service supplied by an international secretariat operating virtually independently of the contracting parties.’”<sup>852</sup>

The author submits that, in many instances, also some of the authentic texts of bilateral treaties (such as tax treaties)<sup>853</sup> “are in fact not the fruit of negotiation”, but mere translations prepared (at best) without full involvement of both contracting States’ negotiators. In such cases, it is the author’s opinion that the intention of the parties, including the object and purpose of the treaty, should be derived primarily from the drafted texts and the supplementary means of interpretation, in particular the *travaux préparatoires*, where available.

Scholars have admitted this recourse to the drafted texts for interpretative purposes, also on the basis of the relevant practice of courts and tribunals.

In 1935, the Harvard Research in International Law recognized that, although generally all authentic texts are authoritative, “where a treaty has been drafted in one language and later translated into several versions of equal authority Courts have shown a tendency to resort to the ‘basic’ language when confronted with a divergence.”<sup>854</sup>

According to McNair, “tribunals dealing with a treaty written in two or more languages of equal authority will sometimes seek to ascertain the ‘basic language’, that is, the working language in which the treaty was negotiated and drafted and regard that

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<sup>851</sup> On the different issue of the weight that should be attributed to the various working language versions of a UN Resolution, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 212.

<sup>852</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 215 (*emphasis added*); the inner quotation is from S. Rosenne, “United Nations treaty practice”, 86 *RCADI* (1954), 275 *et seq.*, at 384. See also M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 191.

<sup>853</sup> See, for instance with reference to the Italian tax treaty practice, A. Parolini, “Italy”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 246, according to whom “[u]sually, the treaty text that is initialed by the treaty negotiators is drafted exclusively in the language that has been used in the course of the negotiation”, the other authentic texts being just later translation thereof.

<sup>854</sup> Research in International Law, “Draft Convention on the Law of Treaties with Comments”, 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 972.

as the more important.”<sup>855</sup>

Similarly, Hardy noted that “[if] the texts prove incompatible [...] [a] choice must then be made between incompatible texts; and it is only normal that the presumption should be in favour of the original version, because that was the basis on which the negotiators in fact first reached agreement and the authoritative value of the other texts is subordinated to their equivalence to the original. The strength of the presumption in favour of the original version depends on the circumstances in which the other versions were drawn up. It will be weak if the negotiators all participated directly in the elaboration of those texts; stronger if they only exercised partial control over it, as, for example, by entrusting the task to a small drafting committee; and decisive if they left the entire job of drawing up those texts to one of the parties or to some specified body. [...] [The judge] may concurrently resort, as did Umpire Ralston in the *Guastini* case, both to the conciliation method [ed.’s note: of the authentic texts] and to the method of referring to the original text”.<sup>856</sup>

Such recourse to the drafted texts was upheld even after the conclusion of the VCLT.

Germer, for example, although asserting that the drafted text could not play, as such and *per se*, a decisive role in solving divergences between authentic texts, since there would be a clear violation of the principle established by Article 33(1) VCLT if the interpreter considered the drafted text to be superior to the other authentic texts, recognized that an “examination of the preparatory work of a treaty and the circumstances of its conclusion<sup>857</sup> may, however, display the causes of a divergence between the different language versions and thus help to establish the meaning intended by the parties to be attached to the provision in question.”<sup>858</sup>

Likewise, according to Hilf, where only one authentic text has been negotiated while the drafting of the other authentic texts have been left to the single parties or to specific groups of translators, if the other rules of interpretation fail to remove the apparent difference of meaning, the drafted text as such might be considered and play a relevant role for interpretative purposes.<sup>859</sup>

Shelton expressed substantially the same opinion by stating that, where there is no common meaning between the various authentic texts and the treaty negotiations are conducted in only some languages, greater recourse should be had to the drafted text(s) to reconcile differences between authentic texts. To that extent, Article 33(4) VCLT does

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<sup>855</sup> See A. D. McNair, *The Law of Treaties* (Oxford: The Clarendon Press, 1961), p. 434 and the case law cited in footnote 2 therein.

<sup>856</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 105-106 and note 1 at 106. Similarly, with reference to the interpretation of uniform law conventions, see A. Malintoppi, “Mesures tendant à prévenir les divergences dans l’interprétation des règles de droit uniforme”, *L’Unification de Droit. Annuaire* (1959), 249 *et seq.*, at 266.

<sup>857</sup> As previously stated, the drafted text is to be considered, as such, part of the supplementary means of interpretation and strictly interconnected with the *travaux préparatoires*.

<sup>858</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 418.

<sup>859</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 93-94.

not exclude recourse to the history of the negotiations, as a supplementary means of interpretation, in order to find out in which languages the negotiation has been carried on and the final agreement reached. Thus, where the equality of authentic texts is proclaimed, but the result of a comparison of them reveals an absurd or irreconcilable difference, it is only normal that the drafted text is favored, as it constitutes the basis on which the negotiators in fact first reached agreement.<sup>860</sup>

Engelen affirmed that the VCLT does not altogether exclude the possibility of giving preference to the drafted text, but merely rejects it as an automatic solution for the case in which two or more authentic texts could not be reconciled.<sup>861</sup>

Sinclair recognized that some weight should be given to the drafted text where it is apparent from the *travaux préparatoires* that the other authentic texts are mere translations and warned that automatic and unthinking reliance on the principle of equal authenticity of the texts could lead to a failure to give effect to the common intentions of the parties in such a case. He concluded that the common intentions of the parties are reflected in the drafted text and, therefore, there should be a presumption in favor of such text, the strength of the presumption depending upon the circumstances in which the various authentic texts were drawn up.<sup>862</sup>

According to Aust, not every authentic text carries the same weight for treaty interpretation purposes, since if “the treaty was negotiated and drafted in only one of the authentic languages, it is natural to put more reliance on that text”.<sup>863</sup>

Finally, according to Haraszti, an authentic text that was not discussed during the debate and was subsequently produced as a translation could hardly be consulted to shed light on the true intention of the parties.<sup>864</sup>

### 3.2.3.3. The possible alternative interpretation of Article 33(1) VCLT: the *travaux préparatoires* of the VCLT

The *travaux préparatoires* of the VCLT appear to support the above use of the drafted texts for interpretative purposes.

As previously mentioned, in the course of the ILC’s 874<sup>th</sup> meeting, held on 21 June

<sup>860</sup> See D. Shelton, “Reconcilable Differences? The Interpretation of Multilingual Treaties”, 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at 634-636.

<sup>861</sup> See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 399-400. See also T. Bender and F. Engelen, “The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties”, in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 25-26.

<sup>862</sup> See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 152.

<sup>863</sup> See A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), at 254.

<sup>864</sup> See G. Haraszti, *Some fundamental problems of the law of treaties* (Budapest: Akadémiai Kiadó, 1973), pp. 182 *et seq.* (in particular p. 184), where the author discussed the relevance of the Chinese authentic text for the purpose of interpreting the Vienna Convention on Consular Relations (concluded in Vienna on 24 April 1963).

1966, Mr Verdross stated that, although he generally agreed with the content and structure of Article 72 of the Sixth Report on the Law of Treaties prepared by Sir Humphrey Waldock, which dealt with the interpretation of multilingual treaties, he thought it was desirable to add a final provision according to which, where it was impossible to find a meaning which reconciled the authentic texts, the language to be considered should be that in which the treaty had been drawn up.<sup>865</sup>

With reference to such a comment, Mr Ago affirmed that the issue concerning the weight to be attributed to the language in which the treaty had been drawn up in cases of irreconcilable texts could be solved by referring to the *travaux préparatoires* and the circumstances of the conclusion of the treaty, as explicitly allowed by Article 70. This would have led to the discovery that the treaty had been originally drawn up in a certain language and such an element should have been taken in due account for interpretation purposes. In addition, according to Mr Ago, the solution adopted in the article included in the Sixth Report on the Law of Treaties was not overly rigid, as it would have been a system attributing a “premium” to the original language version, independently from the reasons why the that specific language had been chosen for such a purpose.<sup>866</sup>

The Special Rapporteur, in turn, recalled that the matter had already been the subject of debate during the ILC’s sixteenth session in 1964 and that, at that time, the Commission had reached the conclusion that it was not acceptable to go any further. He believed that such a decision was correct. He found that it was impossible to say in advance that the text in which the treaty had been drafted should necessarily prevail in the case of divergence, for the defects of that text might be the source of the difficulty. Thus, although he appreciated the point raised by Mr Verdross, he preferred to maintain the current solution, according to which, where no reconciliation of the texts was possible and the recourse to the *travaux préparatoires* and the circumstances of the conclusion of the treaty did not remove the uncertainty, the interpreter was free to decide the meaning to be attributed to a certain provision in light of all the circumstances.<sup>867</sup>

Ultimately, Mr Verdross’s proposal of inserting a special provision giving precedence over the drafted text in the case of irreconcilable differences among the authentic texts was rejected.

It seems to the author that the part of the VCLT *travaux préparatoires* just recalled clearly shows, on the one hand, that the ILC agreed on the point that an automatic mechanism giving precedence to the drafted text in the case of irreconcilable differences

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<sup>865</sup> See YBILC 1966-I (part II), p. 208, para. 5. Also Mr Rosenne seemed to attach particular relevance to the language in which the treaty had been originally drawn up. See, in that respect, his statement that, for the purpose of treaty interpretation, it was essential to refer to the comparison of authentic texts, or at least of those texts in which the treaty had been drawn up by the parties at the negotiating stage (YBILC 1966-I (part II), p. 209, para. 8).

<sup>866</sup> See YBILC 1966-I (part II), p. 210, para. 22.

<sup>867</sup> See YBILC 1966-I (part II), pp. 210-211, paras. 33-34.

among authentic texts was undesirable and, on the other hand, that it was generally recognized within the Commission that:

- (i) the fact that the treaty negotiation had been carried on in a certain language and the final agreement had been reached on a text drafted in that language had an undeniable weight for interpretative purposes and
- (ii) such a fact should be accordingly taken into account in the interpretative process as part of the supplementary means of interpretation and balanced with the other elements and items of evidence in order to find out the utterance meaning to be attributed to the treaty provision at stake.

### 3.2.3.4. The possible alternative interpretation of Article 33(1) VCLT: case law

The case law of international courts and tribunals, as well as that of national courts dealing with the interpretation of treaties, shows many instances of the above-mentioned use of the drafted texts, even within the framework of Articles 31-33 VCLT.

In the *Mavrommatis Palestine Concessions* case,<sup>868</sup> the PCIJ was confronted with the apparent difference of meaning between the authentic English and French texts of Article 11 of the British Mandate for Palestine,<sup>869</sup> according to which the Administration of Palestine

“shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein”

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

The Court found that the French expression “propriété ou contrôle public” had a wider bearing than the correspondent English expression “public ownership or control”, since the former included every form of supervision that the Administration might exercise either on the development of the natural resources of the country or over public works, services and utilities, while in the latter the reference to “control” appeared limited to the various methods whereby the public administration might take over, or dictate the policy of, undertakings not publicly owned.<sup>870</sup>

In adopting the more limited interpretation resulting from the English text, which could harmonize both authentic texts and which resulted in accordance with the common intention of the parties, the PCIJ affirmed that such a conclusion was indicated with special force because the question concerned an instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine and “because the original

<sup>868</sup> PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions* (Greece v. Britain), judgment.

<sup>869</sup> Mandate conferred by the League of Nation on Great Britain on 24 July 1924.

<sup>870</sup> See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions* (Greece v. Britain), judgment, pp. 18-19.

draft of this instrument was probably made in English”.<sup>871</sup>

In the *Guastini* case,<sup>872</sup> the Umpire of the Italian-Venezuelan Mixed Claims Commission,<sup>873</sup> in dealing with the possible different meanings attributable to the terms “injury” and “danni”, used in the English and Italian authentic texts of the Protocol of 13 February 1903,<sup>874</sup> stated that (i) the text of the protocol was the result of long negotiations between the representatives of England, Germany, and Italy, on the one hand, and Mr Bowen, the Venezuela’s representative, on the other; (ii) such negotiations were carried on almost altogether in English and the draft texts (afterwards becoming protocols) were in English; (iii) it was therefore evident that the basic language was English and in the case of differences of translation resort should be had to it.<sup>875</sup>

The Strasburg Civil Tribunal, in interpreting Article 311 of the Treaty of Versailles,<sup>876</sup> noted that such a provision had been originally drawn up in the English language and, therefore, the English authentic text was to be given more weight than the French authentic text in order to interpret it.<sup>877</sup>

After the conclusion of the VCLT, the ICJ made explicit reference to the drafted text of the relevant treaty in the *LaGrand* case,<sup>878</sup> which concerned the interpretation of Article 41 of its Statute and, in particular, whether the provisional measures indicated by the ICJ

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<sup>871</sup> See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment, p. 19. For another advisory opinion in which the PCIJ seems to attribute a relevant weight to the drafted text, see PCIJ, 15 November 1932, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, advisory opinion, p. 379; more loosely, PCIJ, 12 August 1922, *Competence of the International Labour Organization in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, advisory opinion.

<sup>872</sup> Italian-Venezuelan Mixed Claims Commission, *Guastini Case*, 10 Reports of International Arbitral Awards (1903), 561 *et seq.*

<sup>873</sup> Mixed commission constituted under the Protocols between Italy and Venezuela of 13 February and 7 May 1903, dealing with certain differences arisen between Italy and the United States of Venezuela in connection with the Italian claims against the Venezuelan Government.

<sup>874</sup> See 10 Reports of International Arbitral Awards (1903), 561 *et seq.*, at 479-481.

<sup>875</sup> See Italian-Venezuelan Mixed Claims Commission, *Guastini Case*, 10 Reports of International Arbitral Awards (1903), 561 *et seq.*, at 579.

<sup>876</sup> Treaty concluded in Versailles on 28 June 1919 by Germany, on the one side, and the Allied Powers, on the other.

<sup>877</sup> See Tribunal Civil de Strasbourg, 21 July 1927, *Société Audiffren-Singrun v. Liquidation Morlang, Binger et Société Atlas*, 55 *Journal du Droit International* (1928), 732 *et seq.*, at 734. A similar reasoning was put forward by the Yugoslavian arbitrator in his dissenting opinion to the decision of the Hungarian-Serbian-Croatian-Slovenian Mixed Arbitral Tribunal in the case *Archduke Frederick of Habsburg-Lorraine v. Serbian-Croatian-Slovenian State*, where he stated that, for the purpose of interpreting Article 191 of the Treaty of Trianon (treaty concluded in Versailles on 4 June 1920 by Hungary, on the one side, and the Allied Powers, on the other), the English authentic text was to be given a special relevance, since the draft of the treaty had been prepared by English jurists and therefore the English text was the “original” (drafted) text (see Hungarian-Serbian-Croatian-Slovenian Mixed Arbitral Tribunal, 1 October 1929, *Archduke Frederick of Habsburg-Lorraine v. Serbian-Croatian-Slovenian State*, 9 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1930), 285 *et seq.*, separate opinion of the Yugoslavian arbitrator, at 390).

<sup>878</sup> See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment.

pursuant to that article were to be considered to be binding orders.<sup>879</sup>

Article 41 of the ICJ Statute, in its English and French authentic texts,<sup>880</sup> reads as follows (*italics* by the author):

1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council.

1. La Cour a le pouvoir *d'indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun *doivent être* prises à titre provisoire.

2. En attendant l'arrêt définitif, *l'indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

In this respect, the ICJ noted that, while the terms “indiquer” and “indication” in the French authentic text might be deemed neutral as to the mandatory character of the measure concerned, the expression “doivent être prises” had an imperative character. Then, in response to the submission made by the United States of America, according to which the use in the English authentic language of “indicate” instead of “order”, of “ought” instead of “must” or “shall”, and of “suggested” instead of “ordered” was to be understood as implying that ICJ’s decisions under Article 41 of its Statute lacked mandatory effect, the Court noted that it might be argued, “having regard to the fact that [...] the French text was the original version,<sup>881</sup> that such terms as “indicate” and “ought” [had] a meaning equivalent to “order” and “must” or “shall”.”<sup>882</sup>

Thereafter, the ICJ supported its construction of the “original” French text by referring to the object and purpose of its Statute, the context of Article 41 thereof and the relevant *travaux préparatoires*.

It first analysed the object and purpose of its Statute as a whole, as well as that of Article 41,<sup>883</sup> and concluded, on the basis of such object and purpose and of the terms of Article 41 when read in their context, that its power to indicate provisional measures entailed that such measures had to be binding, inasmuch as the power in question was based on the necessity, when the circumstances call for it, to safeguard and to avoid prejudice to the rights of the parties as determined by its final judgment.<sup>884</sup>

The Court then pointed out that the *travaux préparatoires* did not preclude such an interpretation. In particular, the ICJ noted that the *travaux préparatoires* clearly

<sup>879</sup> ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 98-99.

<sup>880</sup> The ICJ Statute has five authentic texts, namely in the English, French, Chinese, Spanish and Russian languages.

<sup>881</sup> It was, in fact, the originally drafted version of the corresponding article of the Statute of the PCIJ, which had been then transposed without substantial modifications, in the Statute of the ICJ (see, to that extent, ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 105-106).

<sup>882</sup> ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 100.

<sup>883</sup> Literally the “context in which Article 41 has to be seen within the Statute” (see ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 102).

<sup>884</sup> See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 102.

showed, on the one hand, that the text of Article 41 of its Statute derived from the proposal presented by the Brazilian jurist Raul Fernandes to the Committee in charge of the drafting of the PCIJ's Statute and that such a proposal was in the French language<sup>885</sup> and, on the other hand, that the use in the French authentic text of the term "indiquer" instead of "ordonner" was solely motivated by the consideration that the Court did not have the means to assure the execution of its decisions and was not intended to deny the binding character thereof.<sup>886</sup>

In the very same *Young Loan* arbitration, the dissenting opinion of three arbiters (against the four of the majority) affirmed that the method to be followed, in order to decide that case, consisted in ascertaining "the true object and purpose of the clause from the original language in which its *travaux préparatoires* were drafted" and that the "practice of resorting to the original language in which the negotiations were conducted has been adopted by international tribunals as an aid to the ascertainment of the true intent of the parties".<sup>887</sup>

The dissenting arbiters noted that only the English language had been employed during the negotiating process and that the draft text used for the discussion was written in English. In addition, they pointed out that the glossaries entitled "Consultations on German Debts Vocabulary English-French-German (Unofficial)" had been prepared by the secretariat for its own use and, in particular, as an aid for the translation of the English text in the German and French languages. In this respect, it had been testified that, although not being official documents, these glossaries were in constant use by the translation section for the purpose of translating technical terms between English, French and German. They noted that the German section of such a glossary made no distinction between an "Abwertung"<sup>888</sup> and an "Entwertung",<sup>889</sup> both being equated to the English term "depreciation" and to the French term "dépréciation".<sup>890</sup>

In light of the above, the dissenting arbiters stated the following: "What is significant is that the strength of the presumption in favour of the original English use of 'depreciated' is particularly great because here the negotiators did not participate in the translation process. On the contrary, the entire task of drafting the authentic non-English texts was left to the translation section, which in turn could rely on the glossaries prepared by it for use in translating. [...] But it cannot be responsibly contended that simply because one language is as authentic as another, no argument can be entertained which seeks to show that it does not correctly reflect the meaning of the other, particularly when the other was the basic language in the negotiations. The affairs of

<sup>885</sup> See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 105.

<sup>886</sup> See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 107.

<sup>887</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 580, para. 38.

<sup>888</sup> Which might be considered to be technically equivalent to the English term "devaluation".

<sup>889</sup> Which might be considered to be technically equivalent to the broader English term "depreciation".

<sup>890</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 583-584, para. 40.

sovereign States cannot, and should not, be influenced by the fortuitous choice of words selected by a nameless translator”.<sup>891</sup>

They accordingly concluded that, under the circumstances of the case, resort to the preliminary work had to be made and special weight might be given to the drafted text, so that the meaning of the term “depreciated”, as used in the drafted text (English), should be given preeminence.<sup>892</sup>

The Supreme Administrative Court of Sweden<sup>893</sup> paid particular attention to the English authentic text of Articles II(2) and XII(3) of the 1960 Sweden-United Kingdom tax treaty, as modified by the 1968 Protocol, in order to construe them. The Court, although the English and Swedish texts of the treaty were equally authentic, noted that the 1968 Protocol had been negotiated in English and thus the English text might, in certain cases, be regarded as expressing more accurately the common intention of the parties.

Finally, the relevance of the drafted text was explicitly considered by the High Court of Justice of England and Wales in the case *Federation of Tour Operators and al.*,<sup>894</sup> which concerned the interpretation of the last sentence of Article 15 of the Chicago Convention on International Civil Aviation.<sup>895</sup> In particular, the High Court had to decide whether the imposition of a certain air passenger duty by the United Kingdom fell within the scope of the prohibition to impose “fees, dues or other charges”, in respect solely of the right of transit over or entry into or exit from the territory of any contracting State, provided for by the above-mentioned Article 15.

In supporting his decision, Justice Burton affirmed that it was right to give some primacy to the English text, not because it was more authentic than the other texts,<sup>896</sup> but because the *travaux préparatoires* were in English and reference to them necessarily involved reference to the English authentic text. In this respect, he also noted that the other authentic texts were translations from the English and, therefore, they could not have been intended to change the meaning of the English text.<sup>897</sup>

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<sup>891</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 584-585, para. 40.

<sup>892</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 585, para. 41.

<sup>893</sup> Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162, Regeringsrättens årsbok* (1987) (also reported in summary in IBFD Tax Treaty Case Law Database). The decision was taken by a majority of three to two judges. See also, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), 20.04 and 20.05 and P. Sundgren, “Interpretation of Tax Treaties – A Case Study”, *British Tax Review* (1990), 286 *et seq.*, at 300.

<sup>894</sup> High Court of Justice of England and Wales, 4 September 2007, *Federation of Tour Operators and al. v. Her Majesty's Treasury et al.*, [2007] EWHC 2062 (Admin).

<sup>895</sup> Concluded in Chicago on 7 December 1944.

<sup>896</sup> The Chicago Convention on International Civil Aviation has been authenticated in the English, French, Russian and Spanish languages.

<sup>897</sup> See High Court of Justice of England and Wales, 4 September 2007, *Federation of Tour Operators and al. v. Her Majesty's Treasury et al.*, [2007] EWHC 2062 (Admin), para. 80.

## 3.2.3.5. Conclusions on research question a)

Under Article 33(1) VCLT, all authentic texts are equally authoritative for treaty interpretation purposes, in the sense that each of them may be (autonomously) relied upon in order to construe the treaty.

However, the preceding positive analysis shows that the drafted text (i.e. the text that has been discussed upon during the negotiations and eventually drafted as result thereof) may sometimes be given more weight than the other texts for the purpose of construing the treaty, since there is a reasonable presumption that it may reflect more accurately the common intention of the parties, in particular where the treaty negotiators were not involved in the subsequent drafting and examination of the other authentic texts. In this perspective, the drafted text appears relevant (i) as a proxy of the *travaux préparatoires*, where the latter are not fully available, and (ii) in order to corroborate the evidence emerging from other means of interpretation. Thus, the interpreter should throw the drafted text (as such) in the crucible and use it, according to Articles 31-33 VCLT, in order to compose *prima facie* divergences of meaning among the various authentic texts and, according to Articles 31 and 32 VCLT, in order to determine the meaning to be reasonably attributed to the relevant treaty terms and the object and purpose of the treaty.

Nothing in the VCLT precludes the interpreter taking into account the drafted text of a treaty as previously described. On the contrary, good faith seems to impose on the interpreter the duty to attribute the appropriate weight to it for the purpose of construing multilingual treaties.

Those conclusions are substantially in line with principle (vi) established by the author in section 2 of Chapter 3 of Part I, according to which, since the quest of the interpreter is directed at establishing the common intention of parties, it is reasonable for him to attribute, in the case of a *prima facie* discrepancy in meaning among the authentic treaty texts, a particular relevance to the text that was originally drafted by the contracting States' representatives and on which the consensus among them was formed, for the purpose of removing that *prima facie* discrepancy.

3.2.4. *The relevance of non-authentic language versions: conclusions on research question b)*

In the system of the VCLT, no explicit relevance is attached to non-authentic language versions.

The original draft articles prepared by Sir Humphrey Waldock and included in his Third Report on the Law of Treaties overtly dealt with the relevance of such language versions for the purpose of treaty interpretation. In particular, Article 75(5) of his Third Report established that non-authentic language versions could be used as subsidiary evidence of the intention of the parties where the application of all the other rules of

interpretation left the meaning of a term, as expressed in the authentic text(s), ambiguous or obscure.<sup>898</sup>

Then, in the course of its sixteenth session, the ILC decided to drop that provision on the grounds that it could have opened the door too much to the use of non-authentic versions of a treaty for the purpose of its interpretation.

That said, however, nothing in the text or in the *travaux préparatoires* of the VCLT seems to prevent the interpreter from taking non-authentic language versions into account as supplementary means of interpretation,<sup>899</sup> attributing to them an interpretative weight that may vary depending on the available evidence that such language versions may contribute to determine the common intention of the parties. Quite the opposite, since the supplementary means of interpretation covered by Article 32 VCLT are generally regarded as including all means of interpretation (other than those referred to in Article 31 VCLT) that may shed some light on the meaning of the treaty,<sup>900</sup> it is reasonable to conclude that non-authentic language versions may be considered within the scope of Article 32 VCLT, and accordingly used, depending on the circumstances of the case.<sup>901</sup>

For instance, unilateral documents such as the treaty official translations produced by the contracting States are potentially relevant, since they may give a hint of the practice followed by a party, or of the treaty meaning according to a party;<sup>902</sup> where the other parties were informed about such documents and positions and did not object thereto, they might even be considered to have been tacitly agreed upon. The same holds true, *mutatis mutandis*, with regard to multilateral documents such as treaty official texts.

In a slightly different perspective, non-authentic language versions may come into play as documents on which the subsequent practice of the parties is based. In particular, where non-authentic language versions have been put into public circulation and relied upon by the parties for the purpose of applying the relevant treaty, they could give rise to issues of possible (i) estoppel and acquiescence, (ii) establishment by practice of a common interpretation of the treaty, or (iii) amendment by practice of the treaty.<sup>903</sup>

In this respect, it is interesting to make a reference to the *Taba Arbitration*,<sup>904</sup> where the Arbitral Tribunal had to decide upon the exact location of part of the border

<sup>898</sup> See also YBILC 1964-II, p. 65, para. 10.

<sup>899</sup> See YBILC 1966-II, p. 223, para. 20.

<sup>900</sup> See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 334-339 and the references included there.

<sup>901</sup> See, in this respect, YBILC 1966-II, p. 226, para. 9; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 105-108; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 398.

<sup>902</sup> See, however, Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).

<sup>903</sup> See, similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 363.

<sup>904</sup> Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq.*

between Egypt and Israel (also) on the basis of a treaty concluded in 1906 between the former Turkish Sultanate and the Khedivate of Egypt. This treaty had been drafted in the Turkish language only; however, the treaty was then translated into Arabic and from Arabic into English. The tribunal noted that the “English translations were printed in a number of official sources and apparently were relied on thereafter” and that “it transpired that [...] no authorities since before the First World War had ever consulted the authentic Turkish text, not even the Parties to this dispute.”<sup>905</sup> The tribunal concluded that, for interpretative purposes, it would have followed the general practice of the parties and thus referred to the English translation and not to the authentic Turkish text.<sup>906</sup> As fairly pointed out by Gardiner, the decision of the tribunal to rely mainly on the English translation for the purpose of construing the 1906 treaty must be seen as “coloured by the greater significance to be attached to how the treaty had been implemented in practice”.<sup>907</sup>

Finally, the above conclusions appear coherent with principle (vii) established by the author in section 2 of Chapter 3 of Part I, according to which the interpreter may take into account the non-authentic language versions of a treaty for the purpose of construing the latter, the interpretative weight attributable to such language versions depending on the available evidence that they may contribute to ascertain the common intention of the parties.<sup>908</sup>

### 3.3. *Presumption of similar meaning: the right to rely on one single text*

#### 3.3.1. *Research questions addressed in this section*

<sup>905</sup> See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq.*, para. 45.

<sup>906</sup> See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq.*, para. 45.

<sup>907</sup> See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 362. It must be noted, however, that the above-mentioned statement of the tribunal has to be read against its proper background, i.e. taking into account that the establishment of frontiers is a field of international law where it is customarily accepted that the subsequent practice of the parties plays a major role for the purpose of interpreting the relevant treaties. In this respect, the arbitral tribunal had the chance to deal with the issue of the possible divergence between the meaning reasonably attributable to the text of the treaty and the practice followed by the parties; in paragraph 210 of its award it made reference to the ICJ decision in the *Temple of Preah Vihear* case (ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment) and stated the following: “If a boundary line is once demarcated jointly by the parties concerned, the demarcation is considered as an authentic interpretation of the boundary agreement even if deviations may have occurred or if there are some inconsistencies with maps. This has been confirmed in practice and legal doctrine, especially for the case that a long time has elapsed since demarcation. [...] It is therefore to be concluded that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected.”

<sup>908</sup> For instance, the fact that both official translations produced by the contracting States of a bilateral treaty seem to suggest the same construction of a certain treaty provision, which appears on the contrary ambiguous on the basis of the sole authentic text, may reasonably lead the interpreter to construe the treaty in accordance with such official translations.

The present section is aimed at tackling the following two research questions, here briefly illustrated by means of examples.

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

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

In order to construe that article, in particular for the purpose of determining whether it allows the lawful detention of non-alcohol-addicted drunk persons, may the interpreter rely solely on the English authentic text of the ECHR, or is he obliged to compare the latter with its French authentic text?<sup>909</sup>

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

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

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

### 3.3.2. *The absence of an obligation for the interpreter to always compare the authentic treaty texts*

#### 3.3.2.1. The combined interpretation of Article 33(1) and 33(3) VCLT

Under the VCLT, there is no obligation for the interpreter to analyse from the outset all the authentic texts of a treaty in order to interpret and apply it.

Article 33(1) VCLT states that the text is equally authoritative (for interpretative

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<sup>909</sup> The example is derived from ECtHR, 4 April 2000, *Witold Litwa v. Poland* (Application no. 26629/95).

purposes) in each authentic language, unless an agreement to the contrary exists.

Furthermore, according to Article 33(3) VCLT, the terms of a treaty are presumed to have the same meaning in each authentic text.

The combination of these two provisions, read in their context, establishes the following:

- (i) a rule of law according to which every treaty provision has just a single meaning, which is equally expressed by each of its authentic texts;
- (ii) a rebuttable presumption that each authentic text is accurate enough to guarantee that the interpretation of the treaty based solely on it leads to the same utterance meaning that could be derived through an interpretation based on any of the other authentic texts.

The first part of the present study has shown that the attribution of meaning to a language expression is a complex matter and that many variables are involved, so that different meanings may be attributed to the same utterance due to the different weight attached to and roles played by the various elements of its overall context. This uncertainty is compounded when the speaker conveys a single message by means of a plurality of equivalent (in the speaker's intention and representation) utterances. The above distinction between (i) and (ii) is to be seen in such a framework.

The combined reading of Articles 33(1) and 33(3) VCLT establishes the rule according to which (i) the speaker intends to convey a single message (the treaty meaning) by means of a plurality of equivalent utterances (the authentic texts).<sup>910</sup> This rule, as such, is not subject to any condition, nor does it need any corroboration. This means that the various authentic texts must always be attributed the same utterance meaning, since it is established by the rule of law that they have the same meaning. Thus, from a logical perspective, referring to a divergence in meaning between the various authentic texts is erroneous since such texts *cannot* have different meanings;<sup>911</sup> it would be more correct to speak of a divergence between the meanings provisionally attributed to the various authentic texts (construed in isolation from each other), or of a *prima facie* apparent (not real) divergence of meanings.<sup>912</sup>

At the same time, a combined reading of Articles 33(1) and 33(3) VCLT establishes the rebuttable presumption (ii) that the meaning provisionally attributed to any of the authentic texts, taken in isolation, is the utterance meaning of the treaty.<sup>913</sup>

<sup>910</sup> This rule may be departed from if the parties so agree, as explicitly admitted by Article 33(1) VCLT.

<sup>911</sup> See commentary to Article 29 of the 1966 Draft, in which it is stressed that "in law there is only one treaty - one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge" (YBILC 1966-II, p. 225, paras. 6); see also YBILC 1966-II, p. 225, paras. 7.

<sup>912</sup> It is here submitted that Engelen concluded the same, as a matter of substance, although through different linguistic expressions: "However, even then [ed.'s note: when it is "established that the terms of the treaty actually do *not* have the same meaning in each text"] it must be assumed that the different authentic texts were always *intended* to mean the same, despite the failure of the parties to accurately express their common intention in each text, and the interpreter should bear this in mind when reconciling the different texts in accordance with the principles of Article 33(4) VCLT" (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 394).

<sup>913</sup> The position of most scholars is confusing (and confused) on this point, a widespread conclusion being that

### 3.3.2.2. Evidence from the travaux préparatoires of the VCLT

The above conclusions are also supported by an analysis of the *travaux préparatoires* of the VCLT.

As previously mentioned, following the transmission by the ILC of its 1964 Draft to the governments for observations, the Israeli government suggested introducing, within the general rule of interpretation, a provision requiring the comparison between the authentic texts of the treaty. In the view of that government, such a comparison was a normal practice in the process of treaty interpretation and its importance was not limited to the case of *prima facie* divergence of meanings among the authentic texts, as it frequently assisted the interpreter in determining the meaning of the various texts and the intention of the parties to the treaty.<sup>914</sup>

In his Sixth Report on the Law of Treaties, Sir Humphrey Waldock replied to the Israeli government's proposal by stating that the latter was not one that the ILC should have adopted without very careful consideration of its implications. According to the Special Rapporteur, while interaction between two (or more) authentic texts was certainly useful in order to solve apparent divergences of meanings or to clarify the ambiguities of one

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upon the discovery of a *prima facie* divergence between the authentic texts, the presumption of Article 33(3) VCLT that the terms of the treaty have the same meaning in each text is rebutted and ceases to hold true (to this extent, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 391-392). Tabory, for instance, affirmed that upon discovery on an unclear passage, a textual divergence or a difference of opinion, "the presumption in Article 33(3) VCLT ceases to hold" (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 198). Similarly, Germer attributed to Article 33(3) VCLT a limited function and stated that the latter was a consequence of the very nature of the presumption, which was acknowledged by Sir Humphrey Waldock (at the ILC 874<sup>th</sup> meeting); he concluded that when an international adjudicator is confronted with a divergence between the different authentic texts of a treaty, the presumption of Article 33(3) VCLT does not give him any guidance, so that he has to resort to the rules set forth in Article 33(4) VCLT (see P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414). However, the author submits that (i) the Special Rapporteur, in the course of the ILC 874<sup>th</sup> meeting, had never referred to such a limited presumption of equal meaning of the authentic texts (he had never used the word "presumption" at all, indeed), but had simply discussed of the right to rely on a single authentic text (see, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 393-394); (ii) the right to rely on a single text is a strict consequence of the presumption that each authentic text is accurate enough to guarantee that the interpretation of the treaty based solely thereon leads to the same utterance meaning that could be determined through an interpretation based on any of the other authentic texts, and not of the rule (non-rebuttable presumption) that all authentic texts have the same meaning; (iii) Article 33(4) VCLT does not set aside Article 33(3) VCLT, but, on the contrary, it is built thereon: in fact, it requires the interpreter to determine the common meaning of the various authentic texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this is not possible, to adopt the meaning that best reconciles the texts (both provisions supporting the idea of the treaty unity and of the interconnected equality of meaning of the various authentic texts).

<sup>914</sup> See YBILC 1966-II, p. 301.

text, the insertion of the "comparison of authentic versions" in the general rule of interpretation could have far-reaching implications by undermining the security of the individual texts and encouraging attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning of the treaty.<sup>915</sup>

When the ILC later discussed the issue, Mr Rosenne restated the proposal of the Israeli government and supported it by quoting prevailing opinion, normal practice and principles. He considered that all authentic texts had to be analysed together for the purpose of treaty interpretation and that it was preferable to discourage any tendency to base the construction of a treaty on a single text, since such a tendency would have seriously impaired the fundamental concept of the treaty as a single unit.<sup>916</sup>

Sir Humphrey Waldock, in turn, replied that the suggested provision implied that it was always necessary to consult all the authentic texts for interpretation purposes. He found that such a solution had a number of drawbacks and would have caused practical difficulties for the legal advisers of newly independent States, who did not always have staff familiar with the many languages used in drafting international treaties.<sup>917</sup> His position was supported by Mr El-Erian.<sup>918</sup>

Ultimately, the ILC opted for not including the provision suggested by the Israeli government and upheld by Mr Rosenne, thus indirectly giving support to the reasons put forward by the Special Rapporteur. The text finally adopted by the Vienna Conference does not differ, in this respect, from the one provisionally approved by the ILC.

### 3.3.2.3. The position(s) taken by scholars

Scholars have generally supported the above conclusions as well.<sup>919</sup>

According to Hilf, each authentic text is as binding as all the other texts, so that, according to the intention of the contracting parties, the content of the agreement is fully

<sup>915</sup> See YBILC 1966-II, p. 100, para. 23.

<sup>916</sup> See YBILC 1966-I (part II), p. 209, para. 12.

<sup>917</sup> See YBILC 1966-I (part II), p. 211, para. 35. In this respect, Kuner pointed out that "[t]here can be no doubt that comparison of language versions often requires library resources and multilingual legal personnel that are quite rare even in richest Western democracies, not to mention the Third World." (C. B. Kuner, "The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning", 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 962); see also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 387.

<sup>918</sup> See YBILC 1966-I (part II), p. 211, para. 42.

<sup>919</sup> In addition to the authors cited above, see also T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 19 *et seq.* and F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 384 *et seq.* and references therein.

embodied in each text. Therefore, each authentic text may serve, taken in isolation, as the basis for interpretation unless a lack of clarity or an apparent divergence in meaning is discovered.<sup>920</sup>

Hilf considered such a conclusion cogent also in light of pragmatic considerations on the (non-) feasibility of consulting all authentic versions during routine interpretation of treaties and maintained that it reflected the actual practice in the application of treaties, since practitioners and tribunals used not to carry on a comparison of the various authentic texts unless specific issues arose.<sup>921</sup>

Germer recognized that an “international adjudicator interpreting a plurilingual treaty does not always have to consult all the authentic texts of the treaty, but can rely on a single text until he is confronted with an alleged divergence between the different authentic language versions of the treaty”.<sup>922</sup> In this respect, the author submitted that such a legitimate practice had often allowed avoidance of needless complications of the interpretation process.<sup>923</sup>

Kuner pointed out that, under Article 33 VCLT, it is unnecessary to compare the various authentic texts on a routine basis, i.e. when no allegation of an ambiguity in one text or a difference among texts has been made.

The author also made reference, in this respect, to the Restatement of the Law of the American Law Institute,<sup>924</sup> according to which “[a]n international tribunal, therefore, may consider any convenient text unless an argument is addressed to some other text”.<sup>925</sup>

Similarly, according to Gardiner, the interpreter may legitimately use a single authentic text for “routine” interpretation. However, where there is reason to believe that there might be an issue affected by the choice of the authentic text used for interpretative purposes, or where a difference or dispute over interpretation is being presented to a court or tribunal, comparison of texts is likely to be essential.<sup>926</sup>

<sup>920</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 54 and 72-73.

<sup>921</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 75. According to Tabory, Hilf, while upholding the above-mentioned conclusions for practical reasons, would have conceded that Rosenne’s approach was the ideal one from a doctrinal viewpoint (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 198). It does not seem to the author that Hilf expressed such a clear “doctrinal” support for Rosenne’s approach to the subject matter.

<sup>922</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 412.

<sup>923</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 412.

<sup>924</sup> See American Law Institute, *Restatement of the Law, Third: Foreign Relations Law of the United States* (St. Paul: American Law Institute, 1987), §147, p. 451.

§ 325 reporter’s note 2 (1987).

<sup>925</sup> See C. B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning”, 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 954; in particular footnote 6.

<sup>926</sup> See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 360-361.

Even Tabory, although considering that from a theoretical perspective only the reference to more than one authentic text would ensure the accuracy of interpretation, due to the lack of precision and the nuances that characterize human languages, recognized that Article 33 VCLT creates a right to rely on a single authentic text until a difference in meaning is disclosed.<sup>927</sup>

However, she believed that the absence of any legal obligation to compare the various authentic texts was an adjustment of the law to practical considerations, based on the inability of practitioners to master several languages and that it was an innovation introduced by the VCLT, and thus not representing pre-existing customary international law.<sup>928</sup>

Finally, the very same Rosenne who had strongly criticized Article 29(3) of the 1966 Draft “for failing to pose squarely as a primary element of interpretation the comparison of authentic multilingual versions” acknowledged that under such a provision no obligation to carry out a comparison of the various authentic texts existed and limited the scope of his analysis *de lege ferenda*, blaming the ILC for having confused the technical aspect of determining the authoritativeness of the different authentic texts of a treaty with the interpretative process thereof, in which the comparison of the various authentic texts should play a role.<sup>929</sup>

#### 3.3.2.4. The case law of national and international courts and tribunals

The practice of courts and tribunals to consider only one, or few, of the authentic texts when interpreting a multilingual treaty is manifest. For a (long) list of case law that gives evidence of such a practice, it is enough here to refer to the surveys carried out by Hardy, before the adoption of the VCLT,<sup>930</sup> and to the references made by Kuner to decisions of both domestic and international courts and tribunals.<sup>931</sup>

The case law points to an unambiguous direction, which is probably self evident to all practitioners that, in different fields of law, had the chance to routinely deal with the interpretation and application of multilingual treaties:

<sup>927</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 198-200.

<sup>928</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199; in particular, the expression in brackets “(once the Vienna Convention entered into force)” referred to the absence of a legal obligation to compare the various authentic texts under the VCLT.

<sup>929</sup> See S. Rosenne, “Interpretation of Treaties in the Restatement and the International Law Commission’s Draft Articles: A Comparison”, 5 *Columbia Journal of Transnational Law* (1966), 205 *et seq.*, at 224.

<sup>930</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 139 *et seq.*

<sup>931</sup> C. B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning”, 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 956-957, in particular footnotes 20 through 30.

- (i) domestic courts tend to rely exclusively on the authentic text in their official languages, as long as no issue of differences in meaning is put forward by the parties;
- (ii) international courts and tribunals tend to rely exclusively on the authentic texts in their working (official) languages, or in the language of the case discussed before them, unless an issue of differences in meaning is raised before them.

Moreover, where issues of potential divergences between certain authentic texts of the treaty are raised before such courts and tribunals, it is not uncommon that the latter carry out only the comparison of the texts in relation to which the potential divergence has been alleged, notwithstanding the existence of other authentic texts of the treaty to be interpreted.<sup>932</sup>

A final remark concerns the fact that, in respect of any treaty to be interpreted, those courts and tribunals operate either as organs of the contracting States, or as entities empowered by such contracting States to decide on the application of the treaty. Such States, in turn, may be either (i) parties to the VCLT, or (ii) not.

In case (i), the decisions of the above-mentioned courts and tribunals constitute a subsequent practice in the application of the VCLT. As that subsequent practice is continuous and homogeneous in the use of only one, or few, of the authentic treaty texts for interpretative purposes, it constitutes a subsequent practice in the application of the VCLT that establishes the agreement of the parties regarding its interpretation,<sup>933</sup> which confirms the thesis that Article 33 VCLT allows the interpreters to rely solely on one authentic text, as long as a *prima facie* divergence in meaning or an interpretative issue is put forward.

With reference to case (ii), it must be noted that such a practice is so continuous and homogeneous that it appears to reach the threshold of the general practice necessary for the formation of customary international law; moreover, the nature of the organs putting in place that practice (the judiciary) and, in particular, the fact that at least some of those courts and tribunals are bound to respect and apply customary international law,<sup>934</sup> reasonably confirm that the right to rely on a single authentic text, unless an apparent divergence in meaning or an interpretative issue arise, is regarded by States as law. It may therefore be concluded that such a right, at the present stage, constitutes customary international law.

### 3.3.2.5. Conclusions on research question c)

The preceding analysis has shown that no reasonable doubt exists on the fact that, under

<sup>932</sup> See, for instance, ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, paras. 24-47; ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 99-109.

<sup>933</sup> See Article 31(3)(b) VCLT, which represents customary international law.

<sup>934</sup> See, for example, Article 38(1)(b) of the ICJ Statute.

the VCLT, the interpreter is under no obligation to take into account more than one authentic text whenever construing and applying a multilingual treaty. Except for the cases pinpointed in the following section, the interpreter has the right to rely on any single authentic text in order to determine the utterance meaning of the relevant treaty provision, which is to be ascertained on the basis of the rules of interpretation provided for in Articles 31 and 32 VCLT.<sup>935</sup>

As previously noted, the interpreter of course remains free to take into account more than one authentic text in his quest for the utterance meaning of the treaty.

These conclusions appear in line with principles (i), (ii) and (iii) established by the author in section 2 of Chapter 3 of Part I, according to which:

- (i) for the purpose of interpreting one authentic text of a multilingual treaty, the other authentic texts are part of the overall context and, therefore, may be used in order to construe the former;
- (ii) since the relevance of the treaty text(s) must not be overestimated, where the parties have agreed that more than one treaty text is authentic, it is reasonable to infer that those parties intended to allow treaty interpretation to be based on any of such authentic texts, taken in isolation, together with the elements of the overall context other than the other authentic texts; and
- (iii) the interpretation of a multilingual treaty on the basis of just one of its authentic texts is not different from the interpretation of a monolingual treaty and therefore the principles applicable to the interpretation of the latter apply to the interpretation of the former.

### 3.3.3. *The obligation for the interpreter to compare the authentic treaty texts whenever an alleged difference of meaning is put forward*

It is generally recognized that the interpreter (in particular, any adjudicator) must take into account all the *relevant* authentic texts whenever one of the parties puts forward a *prima facie* divergence of meaning among them.<sup>936</sup>

It is submitted, in this respect, that a different approach would breach both the

<sup>935</sup> See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 148-149; Commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7). On the (low) frequency of having recourse, by the ICJ, to the rules of interpretation provided for by Article 33 VCLT, as compared to those enshrined in Articles 31-32 VCLT, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 16-17 and 33 (footnote 93).

<sup>936</sup> To this extent, see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 197-199; P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 360; T. Bender and F. Engelen, "The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 24. See also the further references included in section 3.3.2.3 of this chapter.

obligation to interpret the treaty in good faith, as provided for under Article 31 VCLT, and the requirement to remove any *prima facie* difference of meanings according to Article 33(4) VCLT.

### 3.3.4. *On whether an obligation exists to compare the authentic treaty texts whenever the interpreted text appears prima facie ambiguous, obscure, or unreasonable*

#### 3.3.4.1. In general

Where the interpretation is based on an authentic text whose meaning is *prima facie* ambiguous, obscure or unreasonable, the question arises of whether the interpreter is obliged to refer to the other authentic texts as soon as the ambiguity, obscurity, or unreasonableness appears, or exclusively after the application of the interpretative rules of Articles 31 and 32 VCLT has failed to solve the issue.

According to Tabory, the VCLT did not clarify at which point of the interpretative process the comparison of the various authentic texts is to be undertaken.<sup>937</sup> Although Tabory believed that the comparison of the authentic texts should be theoretically carried out whenever a problem or lack of clarity arises in interpreting a treaty on the basis of a single authentic text,<sup>938</sup> she could not find in the VCLT system any clear indication whether the “problem” or “lack of clarity” should be regarded as existing solely at the end of the interpretative process provided for in Articles 31 and 32 VCLT, or at their first-sight appearance.

#### 3.3.4.2. The restrictive position upheld by Hilf

Hilf noted that, where uncertainty in determining the utterance meaning of one authentic treaty text shows up, the normal practice would probably be to consult the various authentic texts; in fact, as explicitly recognized by the ILC in the Commentary to Article 29 of the 1966 Draft,<sup>939</sup> when the meaning of terms is ambiguous or obscure in one language but it is clear and convincing as to the intentions of the parties in another, the comparison of the authentic texts facilitates interpretation of the text the meaning of which is doubtful.<sup>940</sup>

In a subsequent statement, he concluded that upon discovery of an unclear provision<sup>941</sup> the presumption of Article 33(3) VCLT ceases to hold and the comparison

<sup>937</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199.

<sup>938</sup> See her drawing of the interpretation pyramid at p. 177.

<sup>939</sup> See YBILC 1966-II, p. 225, para. 6.

<sup>940</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 72 and 75.

<sup>941</sup> As well as in the case of a *prima facie* divergence in meaning among the authentic texts.

of the texts under Article 33(4) must take place.<sup>942</sup> However, the issue remains of *when* a provision should be considered “unclear”: at the first-sight vagueness or ambiguity thereof, after the unfruitful application of the rule of interpretation provided for under Article 31 VCLT, or after the unfruitful use of the relevant supplementary means of interpretation?<sup>943</sup>

Hilf resolved this issue by linking it to the question of whether reliance on a single text for the purpose of routine interpretation could entail the State’s international responsibility where it was afterwards established, by the competent judiciary, that the authentic text that State relied upon actually contradicted the meaning intended by the parties, which would have been discovered had the other authentic texts been consulted as well.<sup>944</sup>

That author found that a State might violate its treaty obligations where it relied on a single authentic text for interpretation purposes and thereafter it emerged that such a text did not properly express the treaty meaning. Therefore, he concluded that, where during the course of routine interpretation of a treaty a difficulty arose, any State continuing to rely on a single authentic text would deliberately assume the risk of an incorrect application of the treaty that could cause its international responsibility. The comparison of the authentic texts for interpretation purposes would thus be necessary as soon as any evidence of unclarity or ambiguity of the authentic text used appeared in order to avoid the risk of incurring international responsibility.

Hilf’s analysis appears correct, but incomplete.

It is certainly true that a “wrong” interpretation (i.e. the interpretation regarded as such by the competent judiciary) of a treaty by a State’s organs may lead these organs to behave in such a way as to violate the obligations stemming from that treaty, i.e. to commit an internationally wrongful act on behalf of their State.<sup>945</sup> It is also generally

<sup>942</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 77.

<sup>943</sup> The author, in this respect, submits that the segregation of the rule of interpretation provided for under Article 31 VCLT from the supplementary means of interpretation of Article 32 VCLT, for the purpose of determining where a provision is “unclear”, should be rejected since it conflicts with the unity of the process of interpretation that characterizes the VCLT system. The point is further analysed in section 3.3.4.5 of this chapter.

<sup>944</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 78-83. In this respect, Tabory put forward that the VCLT did not clarify which legal consequences for the contracting States could be derived from the use of a single authentic text for interpretation purposes, where the construction so derived overlooked a different meaning expressed in the authentic texts not consulted (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199). The relevance of customary international law on State responsibility in tax matters, including tax treaty matters, is broadly analysed in H. Pijl, “State Responsibility in Taxation Matters”, 60 *Bulletin for international taxation* (2006), 38 *et seq.*

<sup>945</sup> See Articles 2 and 4 of the ILC 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter “ILC Draft on States’ Responsibility”), available in the annex to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49(Vol. I)/Corr.4.

recognized that every internationally wrongful act of a State entails the international responsibility therefor.<sup>946</sup>

However, the same holds true where the interpretation by the State's organs is based on more than one authentic text and on the comparison thereof. In fact, the breach of the treaty obligations consists in the conduct of the State's organs being in violation of relevant treaty provisions, as interpreted by the court, tribunal, or other organization called to assess the (in)correct application of the treaty by that State. The fact that the State's organs have based their (mis)application of the relevant treaty provisions on an interpretation of it that took into account just one or all of the authentic texts of such a treaty is immaterial with respect of the existence of a breach.

One could perhaps wonder whether an interpretation based on the comparison of all the authentic texts might more probably conform to the decision of the adjudicator. In this respect, the author does not have an answer. Not being a wizard, he merely respectfully submits that where the State's organ applying the treaty has construed the chosen authentic text in accordance with the rules of interpretation enshrined in Articles 31 and 32 VCLT and, in good faith, has arrived at a reasonable, clear and unambiguous utterance meaning, without any of the interested parties having raised any issue of potential textual divergence, the possibility that an independent adjudicator will decide differently solely (or mainly) on the basis of the comparison with the other authentic texts appears remote.

Obviously, the fact that the State's organs have based their "wrong" interpretation of the treaty on the comparison of various (or all) authentic texts, following a *prima facie* ambiguity or lack of clarity of the first text consulted, may be taken into account, together with other items of evidence, in order to assess the behaviour of that State. This assessment could even lead to the conclusion that the State, in the specific case, interpreted and applied the treaty in good faith and without any negligent action or omission, which could be relevant for the purpose of determining the reparation for the injury caused by the internationally wrongful act.<sup>947</sup>

Nonetheless, it is submitted that, in the absence of any potential textual divergence raised by the contracting States, their organs, or other persons entitled to the benefits of the treaty, which could have been reasonably known by the State's organs (mis)applying the treaty, the fact that such organs have interpreted the treaty fairly, in accordance with the provisions of Articles 31 and 32 VCLT, on the basis of a single authentic text as implicitly allowed by Article 33(1) and (3) VCLT and have thus arrived at a reasonable, unambiguous meaning, would likewise be probably assessed as evidence of the State's good faith in the interpretation and application of the treaty and of the absence of any negligent action or omission on its part.

Thus, all in all, it does not seem that the arguments put forward by Hilf definitely set aside the issue of whether the interpreter is obliged to refer to the other authentic texts:

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<sup>946</sup> See Article 1 of the ILC Draft on States' Responsibility.

<sup>947</sup> See Article 39 and, more generally, Chapter II of the ILC Draft on States' Responsibility.

- (i) as soon as the construction based on a single text appears *prima facie* ambiguous, obscure or absurd, or
- (ii) exclusively after the unfruitful application of the rules of interpretation enshrined in Articles 31 and 32 VCLT.

### 3.3.4.3. Evidence from the travaux préparatoires of the VCLT

One could rely on the VCLT *travaux préparatoires* in order to support solution (i) above.

In replying to the Israeli government's observations on the 1964 draft, the Special Rapporteur admitted the "interaction between two versions when each has been interpreted in accordance with its own genius and a divergence has appeared between them or *an ambiguity in one of them*".<sup>948</sup>

Moreover, responding to the comments put forward by Mr Rosenne in the course of the ILC's 874<sup>th</sup> meeting, the Special Rapporteur affirmed that "[t]o erect comparison into one of the means of legal interpretation set out in Article 69 would imply that it was no longer possible to rely on a single text as an expression of the will of the parties *until a difficulty arose* and that it was necessary to consult all the authentic texts for that purpose".<sup>949</sup>

Such statements, especially the second one, could be interpreted as evidence that, according to Sir Humphrey Waldock, comparison of the authentic texts should have been carried out as soon as any difficulty or ambiguity in the interpretation of one text emerged.

However, the author believes this would be to read too much into two sentences whose main purpose was to counteract the proposal to erect the comparison of authentic texts as one of the means of interpretation set out in (now) Article 31 VCLT.<sup>950</sup>

In addition, this reading would run against the principles of the unity of the interpretative process which underlies Articles 31-33 VCLT, and of the right to rely on any authentic text for the purpose of construing the treaty. These two principles seem to point to the contrary conclusion that (i) ambiguity, lack of clarity, or unreasonableness of meaning may be said to exist only as final results of the unitary interpretative process encompassing the application of both Articles 31 and 32 VCLT and (ii) the interpreter has the right to carry out such a unitary interpretative process on the basis of a single authentic text, without any obligation to carry out a textual comparison due to the *prima facie* ambiguity, lack of clarity, or unreasonableness of meaning of that text.

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<sup>948</sup> See YBILC 1966-I (part II), p. 100, para. 23 (*emphasis added*).

<sup>949</sup> See YBILC 1966-II, p. 211, para. 35 (*emphasis added*).

<sup>950</sup> See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 393-394.

### 3.3.4.4. The case law of national and international courts and tribunals

The most prominent evidence in favor of considering the interpreter obliged to refer to the other authentic texts exclusively after the unfruitful application of the rules of interpretation enshrined in Articles 31 and 32 VCLT is represented by the case law of national and international courts and tribunals, which generally rely just on one or two authentic texts in order to settle controversies concerning the interpretation of treaties, i.e. controversies concerning the meaning to be attributed to certain treaty provisions where *prima facie* ambiguities or lack of clarity exists.<sup>951</sup>

A clear instance of this is the ICJ's decision in the *Territorial Dispute* case,<sup>952</sup> where the Court had to construe Article 3 of the Treaty of Friendship and Good Neighbourliness between France and Libya<sup>953</sup> and Annex I thereto.

The ICJ pointed out that its initial task consisted in interpreting the relevant provisions of the treaty, on which the parties had taken divergent positions.<sup>954</sup> It then stated the following:

“The Treaty was concluded in French and Arabic, both texts being authentic; the Parties in this case have not suggested that there is any divergence between the French and Arabic texts, save that the words in Arabic corresponding to ‘sont celles qui résultent’ (are those that result) might rather be rendered ‘sont les frontières qui résultent’ (are the frontiers that result). The Court will base its interpretation of the Treaty on the authoritative French text.”<sup>955</sup>

Ultimately, the Court recalled that (i) in accordance with customary international law, as reflected in Article 31 VCLT, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose, (ii) interpretation must be based above all upon the text of the treaty and (iii) recourse may be had to means of interpretation such as the *travaux préparatoires* of the treaty and the circumstances of its conclusion, as supplementary means of interpretation.<sup>956</sup> The ICJ interpreted the ambiguous (for the parties) French authentic text of the treaty accordingly.

### 3.3.4.5. On whether the interpreter is entitled to use supplementary means of interpretation to solve the *prima facie* ambiguity, obscurity, or unreasonableness of the interpreted text before resorting to a comparison with the other authentic texts

Similarly, it would seem that the distinction between the primary means of interpretation

<sup>951</sup> See the references in section 3.3.2.4 of this chapter.

<sup>952</sup> ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment.

<sup>953</sup> Treaty concluded in Tripoli by the French Republic and the United Kingdom of Libya on 10 August 1955.

<sup>954</sup> ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 38.

<sup>955</sup> ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 39.

<sup>956</sup> ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 41.

referred to in Article 31 VCLT and the supplementary means of interpretation referred to in Article 32 is not relevant in order to differentiate between cases where the interpreter is obliged and cases where he is not obliged to carry out a comparison of the authentic treaty texts. Where the interpreter is capable of removing the *prima facie* ambiguity, obscurity, or unreasonableness of meaning by having recourse to the means of interpretation provided for in Article 32 VCLT, no obligation should exist for him to compare the various authentic texts, exactly as no obligation should exist in cases where such a result is achieved on the basis solely of the primary means of interpretation.

In this regard, the author does not agree with Engelen, who submitted that, “when the interpretation of any one authentic text in accordance with Article 31 VCLT leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the Vienna Convention system of interpretation and, in particular, the principle of good faith requires the interpreter to first have recourse to the other authentic texts in order to determine the meaning before recourse is had for this purpose to the supplementary means of interpretation mentioned in Article 32 VCLT.”<sup>957</sup>

Engelen’s conclusion appears to impair the original assumptions (and its corollaries of legal certainty and ease of administration) that the various authentic texts are equally authoritative and have the same meaning, as well as the principle of unity of the interpretative process. As mentioned earlier, Article 33(3) establishes the presumption that the meaning attributed to any of the authentic texts, construed in isolation, is the utterance meaning of the treaty; as long as this presumption holds true, that is until a potential divergence is shown, the clear, reasonable and unambiguous meaning inferred from the interpretation of a single authentic text and supported by the application of the rules provided for in Articles 31 and 32 VCLT must be seen as expressing the “true” agreement of the parties.<sup>958</sup>

### 3.3.5. *The consequences of limiting the obligation to compare the authentic treaty texts to cases where an alleged difference of meaning is put forward*

#### 3.3.5.1. The criticism raised by certain scholars

The conclusion that, under the VCLT system, the interpreter is not obliged to carry out

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<sup>957</sup> See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 390. See also T. Bender and F. Engelen, “The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties”, in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 23-24.

<sup>958</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 412-413, who affirmed that an international adjudicator interpreting a multilingual treaty may rely on any of the authentic texts until he is confronted with an alleged divergence between them and referred to the ordinary interpretative practice of the ICJ to support that conclusion. See also J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 141

any comparison of the authentic treaty texts until an alleged difference of meanings is put forward has been criticized by more than one scholar.

Tabory, for instance, mentioned that nothing guarantees that the existence of a discrepancy between the various authentic texts is brought to the attention of the adjudicator. Absent a legal obligation on the interpreter to compare the various authentic texts unless a potential divergence of meanings is put forward by the interested parties, the adjudicator “may find itself interpreting a text on the faulty assumption that it reflects the meaning of the treaty as a whole, when in fact it contradicts the intended meaning”.<sup>959</sup>

From the need to avoid such undesirable result Tabory infers the necessity to recognize the usefulness and desirability of the comparison of the different authentic texts for the purpose of interpretation, despite the absence of a firm legal obligation to do so.<sup>960</sup>

Similarly, Mössner affirmed that only an interpretation based on all the authentic treaty texts is capable of showing the existence of a possible difference of meanings.<sup>961</sup>

These statements by Tabory and Mössner highlight the obvious: no one may know that two different utterance meanings could be derived from two authentic texts before both of them have been interpreted and the respective results compared.<sup>962</sup>

Nonetheless, they do not seem to have any significant bearing on the existence of a legal obligation to perform a comparison of the authentic texts from the outset of the interpretative process.

Moreover, if one moves from the basic consideration that treaties are legal instruments purported to regulate potential conflicts between persons or group of persons and critically analyses the international and domestic case law concerning the interpretation of treaties, showing that parties in litigation commonly base their arguments on all elements and items of evidence available, the conclusion may be

<sup>959</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 199. See also M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 77-78.

<sup>960</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 199-200.

<sup>961</sup> See J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 301.

<sup>962</sup> However, the second statement made by Tabory, according to which the adjudicator “may find itself interpreting a text on the faulty assumption that it reflects the meaning of the treaty as a whole, when in fact it contradicts the intended meaning” is more open to critical comments: for instance, (i) one might wonder who is to decide which is the intended meaning, if not the very same adjudicator; (ii) meaning is not something hanging in the air and capable of being objectively perceived by everybody – if anything exists that may be objectively perceived by everybody; (iii) it is as well possible that the “intended meaning” is derived by a different adjudicator on the basis of the very same authentic text; (iv) if the adjudicator found that his interpretation led to a clear, unambiguous and reasonable meaning in light of all elements and items of evidence available (except the other authentic texts), it could be argued that it is extremely difficult to imagine that he might overturn his interpretation solely on the basis of the other authentic texts.

reasonably arrived at that if a potential difference in meaning exists between the various authentic texts, one of the parties will try to use it in order to support his construction of the treaty, notwithstanding that the other party is not aware of or interested in it.

Therefore, where in the course of litigation none of the parties refers to a potential difference in meaning among the authentic treaty texts, this generally means either that no such a potential difference exists, or that no party is interested in it, and therefore there is no any need for the subject matter under litigation to be regulated by a rule of law different from that which may be reasonably derived from the authentic text used in the proceedings.

In a similar vein, Kuner affirmed that Article 33 VCLT, by providing a legal foundation for treaty constructions based solely on one authentic text, legitimates a state of affairs in which parties may reach different interpretations based on divergent texts and not be aware of the differences.<sup>963</sup> According to that author, since differences in meaning between the various authentic texts are not only possible, but inevitable,<sup>964</sup> “an obvious defect of [article 33(3) VCLT] presumption is that it works as a rule of enforced ignorance which allows such differences to go undetected”.<sup>965</sup>

That finding would not be challenged by the fact that the right to rely exclusively on one authentic text ceases to be effective as soon as a difference in meaning is contended, since, as a matter of fact, few such contentions are ever made in reality and, in their absence, there is little chance that a court or tribunal will consult any version but the one in the language or languages in which it normally conducts business.<sup>966</sup>

In light of the above reasoning, Kuner concluded that, with regard to multilingual treaties, it would be better for the interpreter to rely “not solely on a single language text, but instead compare several of them”, since “comparison of texts is much more compatible with the nature of multilingual treaty texts as containing inevitable divergences than is the presumption of similar meaning”.<sup>967</sup>

The propositions put forward by Kuner may be commented from a twofold perspective.

On the one hand, if such propositions are regarded as referring to *prima facie* differences in meaning among the authentic texts, they are meaningless since the only relevant interpretation for the parties is that resulting at the end of the interpretative process based on Articles 31 and 32 VCLT.

On the other hand, if they are regarded as referring to the potential divergences remaining between the clear, unambiguous and reasonable meanings established by

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<sup>963</sup> See C. B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning”, 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 962.

<sup>964</sup> The author made reference in this respect to paragraph 6 of the Commentary to Article 29 of the 1966 Draft (see YBILC 1966-II, p. 225, para. 6).

<sup>965</sup> See C. B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning”, 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958.

<sup>966</sup> See C. B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning”, 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958.

<sup>967</sup> See C. B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning”, 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958-959.

construing the various authentic texts, taken in isolation, in accordance with the rules of interpretation enshrined in Articles 31 and 32 VCLT, Kuner's propositions are true. However, such cases are much less frequent than Kuner seems to believe. In fact, where one single authentic text is construed in isolation by taking into account the overall context, i.e. on the basis of all the available elements and items of evidence provided for in Articles 31 and 32 VCLT, the author submits that either (i) its meaning remains ambiguous or unclear, therefore calling for the comparison with the other authentic texts, or (ii) it is so solidly built on such a plurality of elements and items of evidence that, absent any indication by the parties of a potential divergence of meanings, it is highly probable that the same meaning would be attributed by the very same interpreter to all the (other) authentic texts.<sup>968</sup>

### 3.3.5.2. An illustrative example: the decisions of the United States Supreme Court in the cases *Foster v. Neilson* and *United States v. Percheman*

The above conclusion reached by the author is well illustrated by the case law of the US Supreme Court that Kuner cited in support of his arguments.

According to Kuner, in the case *Foster v. Neilson*<sup>969</sup> the US Supreme Court consulted only the English authentic text of the Adams–Onís treaty<sup>970</sup> and concluded that it was not a self-executing treaty; four years later,<sup>971</sup> the same Court “was forced to reverse itself when a discrepancy in the two language versions [i.e. the English and Spanish authentic texts] was brought to its attention”.<sup>972</sup>

However, a close analysis of these two decisions shows that the English authentic text of the Adams–Onís treaty, where taken in isolation and properly construed in its overall context, could have been reasonably interpreted in two conflicting ways;<sup>973</sup> therefore the US Supreme Court should also have taken into account the Spanish authentic text in order to resolve such an ambiguity. Moreover, it seems to the author that the Spanish authentic text could have been construed in accordance with the decision delivered in the *Foster v. Neilson* case, had the overall context pointed in that direction.

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<sup>968</sup> Once more, this conclusion finds its main support in the very limited number of cases where the parties have raised the issue of the potential divergence in meaning among the various authentic texts, or where different texts have been actually used by the competent courts and tribunals in order to settle the dispute.

<sup>969</sup> Supreme Court (United States), *Foster & Elam v. Neilson*, 27 U.S. 253 (1829).

<sup>970</sup> Treaty of Amity, Settlement, and Limits between the United States of America and Spain, concluded at Washington on 22 February 1819.

<sup>971</sup> See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832).

<sup>972</sup> See C. B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning”, 40 *International and Comparative Law Quarterly* (1991), 953 *et seq.*, at 958.

<sup>973</sup> Even more, the interpretation upheld by the US Supreme Court in the case *United States v. Percheman* appears to the author the one to be preferred in light of the overall context of the construed provision, even when only the English authentic text is considered.

In both cases, the provision of the Adams–Onís treaty that the Court had to interpret is the following:

"All the grants of land made before the 24th of January 1818, by His Catholic Majesty [...] shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty"

“Todas las concesiones de terrenos hechas por su Majestad católica [...] antes del 24 de enero de 1818 [...] quedarán ratificadas y reconocidas á las personas que estén en posesión de ellas, del mismo modo que lo serían si su Majestad hubiera continuado en el dominio de estos territorios”

The disputes concerned whether the grants of lands made by the King of Spain before 24 January 1818, within certain territories that had been later transferred by Spain to the United States, had to be recognized by the United States even in the absence of a domestic act providing the confirmation thereof, i.e. on the basis of the sole Adams–Onís treaty.<sup>974</sup>

In the *Foster v. Neilson* case, the US Supreme Court found that the above treaty provision, in the authentic English text, did not say that such grants were confirmed by the treaty.

On the contrary, it considered that the language of that provision seemed to be the language of contract and, accordingly, the provision was to be intended as a promise of ratification and confirmation of those grants by means of the act of the legislature.

The Court thus concluded that, until such act was passed, it was not at liberty to disregard the existing laws on the subject and to apply the treaty directly.<sup>975</sup>

Four years later, in the *United States v. Percheman* case, the Court took a completely different approach.

At the outset, it depicted the framework of the provision at stake. It emphasized that, in the practice of the whole civilized world, the cession of a territory by a State was never understood to be a cession of the property belonging to its inhabitants; therefore, since neither treaty party could have considered that it was attempting to wrong individuals, the cession of the territory from Spain to the United States was to be necessarily understood as a passing over of the sovereignty only and not as interfering with private property.<sup>976</sup>

The Court then moved to the analysis of the provision to be interpreted and found that it had been apparently introduced on the part of Spain and it had to be intended to provide expressly for the security to private property that the laws and usage of nations

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<sup>974</sup> It must be noted that the Adams–Onís treaty was duly in force and given direct effect in the United States under its constitution (see Supreme Court (United States), *Foster & Elam v. Neilson*, 27 U.S. 253 (1829), p. 314).

<sup>975</sup> See Supreme Court (United States), *Foster & Elam v. Neilson*, 27 U.S. 253 (1829), pp. 314-315.

<sup>976</sup> See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832), p. 87.

would, without express stipulation, have conferred. On such a basis, it concluded that no construction impairing such security further than what the positive words of the provision require would have seemed to be admissible, since without that provision the titles of individuals would have remained as valid under the new government as they were under the old.

This interpretation was confirmed by the Spanish authentic text of the provision, which conformed exactly to the above illustrated universally received doctrine of the law of nations. According to the Court, considering that (i) the English and the Spanish texts could, without violence, be made to agree, (ii) the security of private property was the purpose of the provision as intended by the parties and (iii) such security would have been complete even without that treaty provision, the United States had no motive for insisting on the interposition of government in order to give validity to titles that, according to the usage of the civilized world, were already valid.<sup>977</sup>

Finally, the Court noted that the words “shall be ratified and confirmed”, although being properly words of contract providing for some future legislative act, were not necessarily so. They might import that the grants were “ratified and confirmed” by force of the instrument itself. The Court then observed that, since in the Spanish authentic texts the corresponding words were used in that sense, such a construction was to be regarded as a proper one, if not unavoidable. Ultimately, it made reference to *Foster v. Neilson* and stated that in that case the Spanish text had not been brought to its attention and, had it been so brought, the Court believed that it would have produced the same construction as in the current case.<sup>978</sup>

### 3.3.6. Conclusions on research question d)

On the basis of the analysis carried out in the present section, the author submits the following.

First, under Article 33 VCLT, any authentic text may be construed by the interpreter in isolation, on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT.<sup>979</sup> The result of such a construction is the *provisional* utterance meaning of the treaty.

This implies that no utterance meaning exists before one text has been properly construed on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT; therefore, no unclearness, ambiguity, unreasonableness may be said to exist before that interpretative process has been brought to its end.

This further implicates that, even where a *prima facie* unclearness, ambiguity or

<sup>977</sup> See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832), pp. 88-89.

<sup>978</sup> See Supreme Court (United States), *United States v. Percheman*, 32 U.S. 51 (1832), p. 89.

<sup>979</sup> It must be noted that the interpreter, in case he gets to know through the analysis of the *travaux préparatoires* or otherwise which is the *drafted* text and that the other authentic texts are mere translations thereof, should have recourse to the analysis of and the comparison with that *drafted* text for the reasons discussed in section 3.2 of this chapter.

unreasonableness of the construed text arises, the interpreter continues to be entitled to base its interpretation on one single text, taken in isolation. Only where the ambiguity, unclarity or unreasonableness results at the end of the interpretative process, the interpreter is compelled to compare the various texts as an aid to solving such an interpretative issue.

Second, where none of the interested parties has put forward an alleged discrepancy in meanings between some of the authentic texts and the interpretation based on a single text, taken in isolation, has led to a clear unambiguous and reasonable meaning, the *provisional* utterance meaning may be considered the *real* common utterance meaning of the treaty.

Third, where one of the interested parties puts forward an alleged discrepancy in meanings between some of the authentic texts, the interpreter is obliged to compare the apparently divergent texts and interpret them in light of that comparison, by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT,<sup>980</sup> in order to determine their *real* common utterance meaning.<sup>981</sup>

Similarly to what is mentioned in section 3.2 of this chapter, it is possible that, where interpreted in isolation, different authentic texts are attributed by the same interpreter diverging *provisional* utterance meanings; however, since the treaty is a single instrument by means of which the parties intended to convey a single message (independently from the number of its authentic texts), the discrepancy among those *provisional* utterance meanings is just apparent and must be removed by the interpreter in order to establish the *real* common utterance meaning of the various authentic texts.

From a procedural standpoint, the above conclusions imply that each interested party may legally rely on a single authentic text until the application of the treaty gives rise to a dispute based on the apparent diverging meanings of some of the authentic treaty texts.<sup>982</sup>

It goes without saying that an *a contrario* reading of such a conclusion does not hold true; the interpreter remains free to analyse each authentic text and to compare such texts with each other whenever he considers it helpful to do so.

The above conclusions appear supported by principles (ii), (iv) and (v) established by the author in section 2 of Chapter 3 of Part I.

In particular, according to principle (ii), where the parties have agreed that more

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<sup>980</sup> Where one unambiguous, clear and reasonable meaning (the utterance meaning) cannot be attributed to all the texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, the utterance meaning to be adopted under Article 33(4) VCLT is the one that best reconciles the texts, having regard to the object and purpose of the treaty. This solution provided for by Article 33(4) VCLT is analysed in section 3.5 of this chapter.

<sup>981</sup> See the reference to the application of Articles 31 and 32 VCLT in Article 33(4), first part, VCLT.

<sup>982</sup> See similarly W. Rudolf, *Die Sprechweise in der Diplomatie und internationalen Verträgen* (Frankfurt: Athenäum Verlag, 1972), p. 61.

than one treaty text is authentic, it is reasonable to infer that those parties intended to allow treaty interpretation to be based on any of such authentic texts, taken in isolation, together with the elements of the overall context other than the other authentic texts. Thus, in order to establish the utterance meaning of a treaty text, the interpreter is allowed to use the entire overall context, any segregation of the latter in elements that can be used and elements that cannot be used for that purpose being wholly artificial. The utterance meaning is the result of a single complex interpretative process and only at the end of such a process, taken as a whole, may an utterance meaning be said to exist. This principle should direct the interpreter to reject the solution, proposed by some scholars, of considering the textual comparison compulsory whenever the meaning of a certain authentic text is still unclear, ambiguous or unreasonable where interpreted under Article 31 VCLT, but before duly taking into account the supplementary means of interpretation of Article 32 VCLT. Except for cases of alleged differences of meaning among some of the authentic texts, textual comparison becomes compulsory only where the utterance meaning, i.e. the meaning of the interpreted text as established on the basis of the entire overall context, is unclear, ambiguous or unreasonable.

According to principle (iv) any alleged discrepancy in meaning among the authentic texts of a treaty is merely apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the number of authentic texts. As a consequence, under principle (v), the interpreter must remove such alleged discrepancies by establishing the single utterance meaning of all authentic texts. These principles confirm the generally accepted conclusion that the interpreter must take into account all the *relevant* authentic texts whenever a *prima facie* divergence of meaning among them is put forward and must remove such a divergence by establishing the single utterance meaning of it.

### 3.4. *Solution to the apparent divergences and discrepancies by means of Articles 31 and 32 VCLT*

#### 3.4.1. *Research question addressed in this section*

The present section is aimed at tackling the following two research questions, here briefly illustrated by means of an example.

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

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

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

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

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

In order to reconcile such a *prima facie* discrepancy, which elements should the interpreter take into account and which arguments should he use? Should his analysis be limited to a textual comparison? Should he give preference to one meaning over the other exclusively on the basis of the former appearing more in line with the treaty’s object and purpose?<sup>983</sup>

### 3.4.2. Introduction

The analysis of national and international case law shows that, in the vast majority of cases, where *prima facie* divergences of meanings between the various authentic texts are put forward by one of the parties, such divergences are removed by the comparison and the interpretation of those texts in accordance with Articles 31 and 32 VCLT.

It seems that the above conclusion is not seriously disputed among scholars. Germer, for example, concluded that many of the problems faced by an interpreter of a plurilingual treaty can be solved by applying the rules of interpretation provided for in Articles 31 and 32 VCLT;<sup>984</sup> similar propositions have been expressed by Linderfalk,<sup>985</sup> Hilf,<sup>986</sup> Mössner<sup>987</sup> and Engelen.<sup>988</sup>

Thus, in most cases, the interpreter does not solve the apparent divergence of meanings by simply selecting the construction most consonant with the object and purpose of the treaty,<sup>989</sup> but determines in accordance with Articles 31 and 32 VCLT the clear, unambiguous and reasonable meaning that may be fairly attributed to all the authentic texts being compared.<sup>990</sup>

<sup>983</sup> The example is derived from ECtHR, 16 December 1992, *Niemietz v. Germany* (Application no. 13710/88).

<sup>984</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 423.

<sup>985</sup> See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 358.

<sup>986</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 102, footnote 436.

<sup>987</sup> See J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 310.

<sup>988</sup> See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 395.

<sup>989</sup> As he would be compelled to do, under Article 33(4) VCLT, where the application of the rules of interpretation enshrined in Articles 31 and 32 VCLT failed to remove the apparent divergence of meanings between the authentic texts.

<sup>990</sup> See similarly M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 200.

In this respect, according to the ILC, “[t]he unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another. [...] the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.”<sup>991</sup>

### 3.4.3. *Judicial instances of the application of Articles 31 and 32 VCLT in order to remove the prima facie discrepancies in meaning among the authentic texts*

That said, the author considers that the best way to illustrate how an interpretation based on the overall context may lead the interpreter to remove the alleged divergences of meaning among the authentic treaty texts is to make reference to the arguments actually employed by international courts and tribunals to support their chosen construction of the relevant treaty provisions.

To this end, the author has selected the most comprehensive decisions that tackle the issue of the *prima facie* discrepancies in meaning among authentic treaty texts and has highlighted the relevant arguments employed by those courts and tribunals, in the context of the pertinent decisions, in the following subsections.<sup>992</sup>

<sup>991</sup> See paragraph 7 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7).

<sup>992</sup> Other cases, not discussed in the remainder of this section, in which the competent courts and tribunals had solved the potential divergences of meanings among the various authentic texts by applying the principles of interpretation substantially enshrined in Articles 31 and 32 VCLT (although most of them had been decided before the conclusion of the VCLT) are the following: Arbitral Tribunal, *Venezuelan Bond cases*, 4 *International arbitrations to which the United States has been a party* (1898), 3616 *et seq.*, at 3623 *et seq.*; Arbitrator, 20 February 1953, *Gold Looted by Germany from Rome*, 20 *International Law Reports* (1953), 441 *et seq.*, at 473 *et seq.*; Arbitration Tribunal, 5 August 1926, *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, 2 *Reports of International Arbitral Awards*, 777 *et seq.*, at 791-795; French-Italian Conciliation Commission, 29 August 1949, *Différend Impôts extraordinaires sur le patrimoine institués en Italie - décision No. 32*, 13 *Reports of International Arbitral Awards*, 108 *et seq.*, at 111 *et seq.*; Corte Suprema di Cassazione (Italy), 9 December 1974, *Ministry of Defence v. Neapolitan Tagboat Company*, 77 *International Law Reports*, 567 *et seq.*, at 569-570.

For an example of how treaty interpretation in accordance with Articles 31 and 32 VCLT might remove a *prima facie* discrepancy existing between the meanings of the various authentic texts that is caused by the different punctuation therein, see WTO Appellate Body, 7 April 2005, *United States – Measures affecting the cross-border supply of gambling and betting services*, AB-2005-1 (WT/DS285/AB/R), in particular paragraphs 242 *et seq.*

## 3.4.3.1. The ICJ decision in the LaGrand case

The *LaGrand* case,<sup>993</sup> although generally presented as a case where the ICJ looked for a meaning reconciling the text having regard to the object and purpose of the treaty, is in fact a case where the Court removed the *prima facie* divergence of meanings between the various authentic texts by applying Articles 31 and 32 VCLT.<sup>994</sup>

As previously submitted,<sup>995</sup> that case concerned the interpretation of Article 41 of the ICJ Statute and, in particular, whether the provisional measures indicated by the ICJ pursuant to that article were to be considered to be binding orders.<sup>996</sup> In this respect, the United States had put forward a *prima facie* divergence of meanings between the English and the French authentic texts of Article 41.

The Court, finding itself faced with two texts potentially not in total harmony, stated that in cases of divergence between the equally authentic texts of its Statute, in relation to which neither the Statute nor the UN Charter indicated how to proceed, it was appropriate to refer to the rule of customary international law reflected in Article 33(4) VCLT, according to which “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.<sup>997</sup>

Thus, the ICJ substantially quoted the entire text of Article 33(4) VCLT, including the reference to Articles 31 and 32 VCLT, and did not merely recall the last sentence thereof, which requires the interpreter to remove any residual difference by adopting the meaning that best reconciles the authentic texts having regard to the object and purpose of the treaty. Indeed, the Court first affirmed the need to consider the object and purpose of its Statute together with the context of Article 41 for the purpose of removing the *prima facie* divergence of meaning<sup>998</sup> and then actually removed it by means of an interpretation of the English and French authentic texts based on (i) the fact that the French text was the drafted text,<sup>999</sup> (ii) the object and purpose of its Statute taken as a whole, as well as the context and the purpose of Article 41,<sup>1000</sup> (iii) the relevant rules of international law applicable in the relations between the parties to its Statute<sup>1001</sup> and

<sup>993</sup> See ICJ, 27 June 2001, *LaGrand* (Germany v. United States of America), judgment.

<sup>994</sup> See ICJ, 27 June 2001, *LaGrand* (Germany v. United States of America), judgment, paras. 101-109.

<sup>995</sup> See section 3.2.3.4 of this chapter, where a more extensive analysis of the case and the reasoning of the Court is made.

<sup>996</sup> See ICJ, 27 June 2001, *LaGrand* (Germany v. United States of America), judgment, paras. 98-99.

<sup>997</sup> See ICJ, 27 June 2001, *LaGrand* (Germany v. United States of America), judgment, para. 101.

<sup>998</sup> See ICJ, 27 June 2001, *LaGrand* (Germany v. United States of America), judgment, para. 101.

<sup>999</sup> See ICJ, 27 June 2001, *LaGrand* (Germany v. United States of America), judgment, para. 100.

<sup>1000</sup> See ICJ, 27 June 2001, *LaGrand* (Germany v. United States of America), judgment, para. 102.

<sup>1001</sup> The Court, in particular, made reference to the “principle universally accepted by international tribunals and likewise laid down in many conventions [...] to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute” (see ICJ, 27

(iv) the *travaux préparatoires* of its Statute.<sup>1002</sup>

All in all, the ICJ removed the potential divergence of meaning between the various authentic texts by construing them on the basis of the interpretative rules enshrined in Articles 31 and 32 VCLT.

### 3.4.3.2. The ICJ decision in the case *Military and paramilitary activities in and against Nicaragua*: the majority opinion

In the *Military and paramilitary activities in and against Nicaragua* case,<sup>1003</sup> which concerned a dispute between Nicaragua and the United States of America arising out of military and paramilitary activities in Nicaragua, the responsibility for which was attributed by the former to the latter State, the ICJ had to decide on its jurisdiction to consider and pronounce upon this dispute, as well as on the admissibility of Nicaragua's application referring it to the Court.

In order to establish the jurisdiction of the Court, Nicaragua relied, in particular, on Article 36(2) of the Statute of the ICJ, which provides that the States parties thereto may at any time declare that they recognize the jurisdiction of the ICJ as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation. While the United States made such a declaration on 14 August 1946, Nicaragua never made one. However, Nicaragua relied on the provision of Article 36(5) of the Statute of the ICJ, according to which "[d]eclarations made under Article 36 of the Statute of the Permanent Court of International Justice and *which are still in force* shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."<sup>1004</sup>

Under Article 36 of the Statute of the PCIJ, the "Members of the League of Nations [...] may, either when signing or ratifying the Protocol [of Signature] to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court". It is relevant to note that a State member of the League of Nations became a party to the Statute of the PCIJ only where it acceded to the Protocol of Signature of the Statute of that Court. The Protocol, in this respect, provided that, in order to accede thereto, it was necessary for a State not only to sign and ratify the Protocol, but also to send the instrument of ratification to the Secretary-General of the League of Nations.

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June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 103, where the Court also referred to the decision of the PCIJ in the case *Electricity Company of Sofia and Bulgaria* (see PCIJ, 5 December 1939, *Electricity Company of Sofia and Bulgaria*, order, p. 199)).

<sup>1002</sup> See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 104-107.

<sup>1003</sup> ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment.

<sup>1004</sup> *Emphasis added.*

On 24 September 1929, as a member of the League of Nations, Nicaragua signed the Protocol of Signature of the Statute of the PCIJ and deposited with the Secretary-General of the League of Nations a declaration recognizing as unconditionally compulsory the jurisdiction of the PCIJ.

In 1935, the national authorities of Nicaragua authorized the ratification of the Protocol of Signature and the Statute of the PCIJ; on 29 November 1939, the Ministry of Foreign Affairs of Nicaragua sent a telegram to the Secretary-General of the League of Nations advising it of the dispatch of the instrument of ratification. The files of the League, however, contained no record of an instrument of ratification ever having been received and no evidence had been adduced to show that such an instrument of ratification was ever dispatched to Geneva.

After the Second World War, Nicaragua became an original Member of the United Nations, having ratified the Charter on 6 September 1945; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force (also for Nicaragua).

On the basis of the above, the United States contended that Nicaragua never became a party to the Statute of the PCIJ and, thus, its 1929 declaration was not "still in force" within the meaning of the English text of Article 36(5) of the Statute of the ICJ, since it never entered into force.

The ICJ pointed out that,<sup>1005</sup> in order to determine whether the provisions of Article 36(5) of its Statute could have applied to Nicaragua's declaration of 1929, it had first (i) to establish the legal characteristics of that declaration and then (ii) to compare them with the conditions laid down by the text of the above-mentioned article.<sup>1006</sup>

With regard to point (i), the ICJ noted that, at the time its Statute entered into force, Nicaragua's 1929 declaration was certainly *valid*, since under Article 36 of the PCIJ Statute a declaration was valid on condition that it had been made by a State either when signing or ratifying the Protocol of Signature (or at a later moment) and Nicaragua actually signed that Protocol. However, the Court also recognized that declaration, although *valid*, had not become *binding* under the Statute of the PCIJ, since Nicaragua had not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations.<sup>1007</sup>

From such a premise the Court inferred that Nicaragua's 1929 declaration could unquestionably have acquired binding force at least till the ICJ came into existence; in fact, since that declaration had been made "unconditionally", its potential legal effect, i.e. its validity, could be maintained indefinitely.

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<sup>1005</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 24.

<sup>1006</sup> I.e. the legal characteristics that a declaration must have to be relevant for the application of Article 36(5) of the ICJ Statute.

<sup>1007</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 25.

With regard to point (ii), the parties raised the issue before the Court that the English and French authentic texts of Article 36(5) of its Statute could potentially be attributed diverging meanings.<sup>1008</sup> The relevant French text read as follows: “[I]es déclarations faites en application de l'Article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes.”<sup>1009</sup>

The Court was thus confronted with the task of determining the (common) meaning to be attributed to the corresponding expressions “*which are still in force*” and “*faites [...] pour une durée qui n'est pas encore expirée*”, in order to conclude whether a declaration such as that made by Nicaragua in 1929, which was valid, although not legally binding, under the PCIJ system, satisfied the conditions established by Article 36(5) of the ICJ Statute for it to be regarded as an acceptance of the compulsory jurisdiction of the ICJ.

The Court found that the above two expressions had the same meaning and they did not require a declaration made under the system of the PCIJ to be binding, in order to be regarded as an acceptance of the compulsory jurisdiction of the ICJ under Article 36(5) of its Statute, the existence of a valid declaration sufficing for that purpose. The Court reached such a conclusion by construing the two texts on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT, although without making explicit references to them. In fact, it determined the meaning of the above-mentioned expressions taking into account (i) their context, (ii) the *travaux préparatoires* and the circumstances of the conclusion of the ICJ Statute, (iii) the object and purpose of the ICJ Statute and, in particular, that of Article 36(5) thereof and (iv) the subsequent practice of the parties to that Statute.

With regard to the context of the interpreted expressions, the Court noted that Article 36(5) refrains from stipulating that declarations had to be made by States parties to the PCIJ Statute, which would have indirectly required the declaration to be binding; on the contrary, it only stipulates that the declaration had to be made “under” (in French, “en application de”) Article 36 of the PCIJ Statute. In this respect, the Court considered that, since the drafters of Article 36(5) of the ICJ Statute were aware that under Article 36 of the PCIJ Statute a State could have made a declaration even without being a part of the Statute (i.e. before ratifying its Protocol of Signature), it was natural to conclude that the chosen expressions “[d]eclarations made under article 36” and “déclarations faites en application de l'Article 36” covered a declaration such as that made by Nicaragua.<sup>1010</sup>

With regard to the *travaux préparatoires* and the circumstances of the conclusion of the ICJ Statute, the Court, after highlighting that neither the English nor the French authentic texts include the term “binding”, as qualifier of the term “declaration”, noted

<sup>1008</sup> The ICJ Statute has five equally binding authentic texts, i.e. in the English, French, Spanish, Russian and Chinese languages.

<sup>1009</sup> *Emphasis* added.

<sup>1010</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 28.

that pursuant to the *travaux préparatoires* the word "binding" had never been suggested and, had it been suggested for the English text, there was no doubt that the drafters would have never let the French text stand as finally worded. In fact, according to the Court, the French expression "*une durée qui n'est pas encore expirée*" did not imply a commitment of a binding character: while it might be granted that, for a period to continue or expire, it is necessary for some legal effect to have come into existence, such effect does not necessarily have to be of a binding nature. In particular, a declaration made under Article 36 of PCIJ Statute had a certain validity that could be preserved or destroyed and it was perfectly possible to read the French text as implying only this validity.<sup>1011</sup>

In addition, the ICJ pointed out that the French Delegation at the San Francisco Conference called for the English expression "still in force" to be translated, not by the French expression "*encore en vigueur*", but by the different "*pour une durée qui n'est pas encore expirée*". The Court concluded, in view of the excellent equivalence of the expressions "*encore en vigueur*" and "still in force", that the deliberate choice of the expression "*pour une durée qui n'est pas encore expirée*" seemed to denote the intention to widen the scope of Article 36(5) of the ICJ Statute so as to cover declarations which have not acquired binding force. Ultimately, the Court submitted that such a construction of the French text was in conformity with the English text as well, the latter requiring the declarations concerned neither to have been made by States parties to the PCIJ Statute nor (expressly) to be of a binding character.<sup>1012</sup>

With regard to the object and purpose of the interpreted provision, the Court affirmed that, in its interpretative process, it had to examine to what extent the general considerations governing the transfer of the powers of the PCIJ to the ICJ, and thus serving to define the object and the purpose of the provisions adopted in the latter's Statute, threw light upon the correct construction of Article 36(5) thereof. The ICJ recalled<sup>1013</sup> that the primary concern of those who drafted its Statute was to maintain the greatest possible continuity between the two courts and, with specific reference to Article 36(5), to preserve existing acceptances and to avoid that the creation of a new court should frustrate progress already achieved.<sup>1014</sup>

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<sup>1011</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 30.

<sup>1012</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 31.

<sup>1013</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 32.

<sup>1014</sup> In this respect, it is interesting to note that the conclusions reached by the Court on the object and purpose of its Statute and, in particular, Article 36(5) thereof were largely based on its *travaux préparatoires* and the circumstances of its conclusion. To this extent, see also ICJ, 26 May 1959, *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, judgment, p. 145. In addition, see the reference made by the ICJ to the report of the Chairman of the New Zealand delegation to the San Francisco Conference to his Government, where he stressed that the primary concern had been "to maintain so far as possible the progress towards compulsory jurisdiction"; the statement of the ICJ that "[i]f, for a number of circumstantial reasons, it seemed necessary to abolish the former Court and to put the new one in its place, at least the delegates to the San Francisco Conference were determined to see that this operation should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction" (see ICJ, 26 November 1984,

In this respect, the Court found it undeniable that a declaration such as the Nicaragua's 1929 declaration constituted a certain progress towards extending to the world in general the system of compulsory judicial settlement of international disputes, notwithstanding the fact that it had not taken the concrete form of a commitment having binding force under the PCIJ system. It thus concluded that there were no grounds for maintaining that the drafters of the ICJ Statute meant to go back on this progress and place it in a category in opposition to the progress achieved by declarations having binding force. In fact, although no doubt existed that their main aim was to safeguard the latter declarations, the intention to wipe out the progress evidenced by a declaration such as that of Nicaragua would have certainly not squared well with their general concern. The ICJ added that, in light of the above, it was fair to presume that, if the highly experienced drafters of the Statute had had a restrictive intention on this point, in contrast to their overall concern, they would certainly have translated it into a very different formula from the one they in fact adopted.<sup>1015</sup>

Therefore, according to Court, the logic of a system substituting the ICJ for the PCIJ without producing any detriment to the cause of compulsory jurisdiction implied that the ratification of the ICJ Statute must have exactly the same effects as the ratification of the Protocol of Signature of the PCIJ: in the case of Nicaragua, this had converted a potential commitment into an effective one.<sup>1016</sup>

Finally, with regard to the subsequent practice of the parties to ICJ Statute, the Court stated that particular weight had to be ascribed to certain official publications, namely the ICJ Yearbook, the Reports of the ICJ to the UN General Assembly and the annually published collection of Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository. The Court noted that, ever since they first appeared, all these publications had regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the ICJ by virtue of Article 36(5) of its Statute.<sup>1017</sup>

The Court affirmed that such publications attested to a certain interpretation of Article 36(5), whereby that provision would cover the declaration of Nicaragua, and the rejection of an opposite interpretation, which would refuse to classify Nicaragua among the States covered by that article. Moreover, the inclusion of Nicaragua in the list of States that have recognized the compulsory jurisdiction of the ICJ visibly contrasted with its exclusion from the corresponding list issued in the last Report of the PCIJ.<sup>1018</sup>

The Court further submitted that the importance of those publications did not lie

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 33).

<sup>1015</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 34.

<sup>1016</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 35.

<sup>1017</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 36.

<sup>1018</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 37.

in their content as such, but in the fact that they amounted over a period of nearly 40 years to a series of identical attestations, which were entirely official, public and extremely numerous; and, even more significantly, in the corollary that the States concerned - first and foremost Nicaragua - had had every opportunity of accepting or rejecting the thus-proclaimed applicability of Article 36(5) of the ICJ Statute to the Nicaragua's 1929 Declaration.<sup>1019</sup>

However, as the Court actually noted, Nicaragua had at no moment either explicitly recognized, or denied that it was bound by its recognition of the ICJ's compulsory jurisdiction. According to the Court, against the background of the above-mentioned publications, the silence of the Nicaraguan Government could only be interpreted as an acceptance of the classification thus assigned to it; in the wording of the ICJ, it could not be supposed that "that Government could have believed that its silence could be tantamount to anything other than acquiescence".<sup>1020</sup>

The Court additionally mentioned that States other than Nicaragua had never challenged the interpretation to which the publications of the United Nations bore witness and, on the contrary, had included Nicaragua in their own lists of States bound by the compulsory jurisdiction of the ICJ. Although the Court recognized that such national publications simply reproduced those of the United Nations, it also found that it would have been difficult to interpret such reproductions as signifying an objection to the above interpretation; vice-versa they contributed to confirming the acceptance by such States of the applicability to Nicaragua of Article 36(5) of the ICJ Statute.<sup>1021</sup>

On the basis of the above-mentioned analysis, the Court concluded that the subsequent conduct of the parties to the ICJ Statute confirmed the interpretation whereby Article 36(5) of that Statute covered a declaration such as the one made by Nicaragua in 1929.<sup>1022</sup>

### 3.4.3.3. The ICJ decision in the Military and paramilitary activities in and against Nicaragua case: the separate opinion of Sir Robert Jennings

From the author's perspective, it is extremely interesting to note how Sir Robert Jennings,<sup>1023</sup> in his separate opinion in the *Military and paramilitary activities in and against Nicaragua* case, arrived at conclusion opposite to the one taken by the majority of the judges with regard to the meaning attributable to Article 36(5) of the ICJ Statute. Sir Robert Jennings argued for his interpretation of Article 36(5) of the ICJ Statute on

<sup>1019</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 38.

<sup>1020</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 39.

<sup>1021</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 40.

<sup>1022</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, para. 42; see also para. 47 of the same judgment.

<sup>1023</sup> ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, pp. 533-557.

the basis of:

- (a) a different allocation, as compared to the majority, of persuasive weight among the common items of evidence and
- (b) a different construction, as compared to the majority, of certain available elements in order to derive the relevant evidence.

This constitutes another instance confirming that:

- (i) the process of interpretation, under the VCLT system, is much less “textual” than scholars generally pretend it to be and
- (ii) legal practitioners arrive at their own interpretation on the basis of an intuitive process that is influenced by their cultural and political backgrounds and then justify such an interpretation on the basis of the ascending and descending arguments that may be reasonably construed as supporting the chosen interpretation.

At first, Sir Robert Jennings noted that that the Nicaragua’s 1929 Declaration could not be covered by Article 36(5) of the ICJ Statute since the latter required, according to its English text, that declarations had to be “still in force”, while the Nicaragua’s 1929 Declaration had never been “in force” in respect of the PCIJ.<sup>1024</sup> Hence, although not explicitly recalling the distinction drew by the majority between valid and compulsory declarations, he seemed to consider that for a self-binding declaration<sup>1025</sup> to “be in force”, it is necessary that it legally binds the declaring State to the conduct provided therein, its mere validity<sup>1026</sup> not sufficing for that purpose.

Secondly, Sir Robert Jennings found such an interpretation to be in conformity with what the *travaux préparatoires* showed to have been the purpose of that provision. In this respect, he recalled that Article 36(5) of the ICJ Statute was the result of a British proposal made in, and accepted by, a subcommittee of the Committee of Jurists which met in Washington in 1945; he also noted that it was the subcommittee’s opinion that, since many States had previously accepted compulsory jurisdiction under the PCIJ Statute, provision should have been made at the San Francisco Conference “for a special agreement for continuing these acceptances in force” for the purpose of the ICJ Statute. According to Sir Robert Jennings, thus, the proposal was to achieve the continuity of existing obligations and certainly not to create a new obligation where none existed before.<sup>1027</sup>

Thirdly, he mentioned that, from a linguistic standpoint the other authentic texts of Article 36(5) of the ICJ Statute (i.e. the Chinese, Russian and Spanish texts) apparently translated the formulation of the criterion of continuity expressed by the English term

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<sup>1024</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 536.

<sup>1025</sup> Such as the one provided for under Article 36 of the PCIJ Statute.

<sup>1026</sup> I.e. its capability to acquire binding force at the occurrence of a certain event.

<sup>1027</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 536.

“which are still in force”.

He also noted that the final French version of that article was proposed by the French delegation at the San Francisco Conference, who conversely did not suggest any change to the corresponding English text. The proposal, in fact, was limited to replacing the expression “pour une durée qui n'est pas encore expirée” for the former “encore en vigueur”, which corresponded to the English “still in force”. In this respect, Sir Robert Jennings mentioned that, according to the official report of the meeting, the “French Representative stated that the changes suggested by him [...] were not substantive ones, but were intended to improve the phraseology.”<sup>1028</sup>

He then recalled that, under the provision of Article 33(4) VCLT, where two authentic texts were capable of different meanings, the interpreter was required to adopt the meaning best reconciling the texts, having regard to the object and purpose of the treaty. In his opinion, that requirement banned any solution seeking to give a special meaning to the French text, which could not be seen in the Chinese, English, Russian and Spanish either.<sup>1029</sup>

Based on these premises, he went on in quest of a common meaning to be attributed to all authentic texts. He noted that, in Article 36(5) of the ICJ Statute, the word “still” seemed to convey the idea of something which was in force for the PCIJ and was therefore to be deemed “still in force” for the ICJ; in that sense, there was an important difference between being simply “in force” and being “still in force”. Against this background and taking into account that the French Delegation, on the one hand, did not propose any change to the English text and, on the other hand, affirmed that the proposal to modify the French text was intended solely to improve the phraseology, Sir Robert Jennings concluded that the only reasonable explanation to such a proposed change was that the French Delegation considered the alternative French text capable of conveying more clearly the meaning and purpose of the English expression “still in force”. Therefore, the final French text seized upon the notion of continuity as the essential criterion of the declarations: what did matter was not only that a declaration was “in force” in its terms, but that it had been in force for the PCIJ and had been expressed for a period that continued and was still not expired. That interpretation of the French text was confirmed by the fact that it retained the important qualifying adverb “encore”.<sup>1030</sup>

Ultimately, Sir Robert Jennings expressed the view that (i) it was doubtful that there was any material difference between the meanings of the various authentic texts and, in any case, (ii) if such a difference existed, he was bound to adopt the meaning that best reconciled all the five language versions.

He submitted that a declaration of acceptance of compulsory jurisdiction, which had never come into operation under the PCIJ Statute, certainly could not be said to be

<sup>1028</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 537.

<sup>1029</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 537.

<sup>1030</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, p. 538.

“still in force” under the ICJ Statute, that being the requirement clearly established by four authentic texts of the very same Statute (in the English, Chinese, Spanish and Russian languages); that interpretation was consistent with the object and purpose of Article 36(5) of the ICJ Statute, i.e. the carry-over to the ICJ of obligations created in respect of the PCIJ.

Moreover, he found there was no difficulty in attributing the same meaning to the French authentic text, which, by means of the expression “pour une durée qui n'est pas encore expirée”, certainly referred to a declaration by which the compulsory jurisdiction of the PCIJ was actually established; in fact, a declaration to which no date of commencement of the obligation in respect of the PCIJ could be assigned, owing to the failure to ratify the Protocol of Signature, could not be said to be “pour une durée qui n'est pas encore expirée”, for what had never begun could not be said to have had a duration at all.<sup>1031</sup>

#### 3.4.3.4. The ICJ decision in the *Elettronica Sicula* case

In the *Elettronica Sicula* case,<sup>1032</sup> the ICJ had to interpret the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States of America<sup>1033</sup> and the 1951 Supplementary agreement thereto,<sup>1034</sup> for the purpose of deciding on their alleged violation by Italy. Among other issues, the Court was called upon to decide whether the fact that two US corporations wholly owned the capital of an Italian corporation, which in turn owned immovable property in Italy, could be regarded as entailing that those two US corporations owned “immovable property or interests therein” in Italy, as provided for in Article VII(1) of the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States of America.

Italy relied on the Italian text of the treaty, which was one of the two authentic texts thereof together with the English text, for the purpose of denying such an entailment. The Italian text of Article VII(1) made reference to the owning “di beni immobili o di altri diritti reali”. According to Italy, the provision at stake did not apply to the two US corporations since their own property rights (“diritti reali”) were limited to shares in the Italian corporation, while the immovable property (“bene immobile”) was exclusively owned by the latter.

The United States, however, contended that the English expression “immovable property or interests therein” was sufficiently broad to include indirect ownership of property rights held through an Italian subsidiary.

In this regard, both parties had dealt with the potential divergence in meaning between the Italian and English expressions to support their respective positions.

<sup>1031</sup> See ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment, separate opinion of Judge Sir Robert Jennings, pp. 538-539.

<sup>1032</sup> ICJ, 20 July 1989, Case concerning *Elettronica Sicula S.p.A. (United States of America v. Italy)*, judgment.

<sup>1033</sup> Treaty concluded in Rome on 2 February 1948.

<sup>1034</sup> Agreement concluded in Washington on 26 September 1951.

Ultimately, the Court found that, although no doubt having several possible meanings, the term “interest” in English usage was commonly used to denote different kinds of rights in land. Hence, it concluded that it was possible to interpret the English and Italian authentic texts of Article VII as meaning much the same thing, i.e. as converging toward the more restrictive “Italian” meaning, especially as the clause in question was in any event limited to immovable property. That said, however, the Court stated that it had some sympathy with the contention of the United States, as being more in accord with the object and purpose of the treaty.<sup>1035</sup>

Although the ICJ did not have to solve the above interpretative issue in order to decide the case,<sup>1036</sup> its reasoning shows how far a court might be led by the object and purpose of the treaty in its attempt to determine the common meaning of two or more authentic texts.

### 3.4.3.5. The decision of the Italian-United States Conciliation Commission in the Flegenheimer case

In the *Flegenheimer* case,<sup>1037</sup> the Italian-United States Conciliation Commission<sup>1038</sup> had to interpret Article 78(9)(a)(2) of the 1947 Peace Treaty between Italy the Allied and Associated Powers (hereafter “1947 Peace Treaty”)<sup>1039</sup> in order to decide whether Mr Flegenheimer could be considered a “United Nations national” for the purpose of the same Article 78 and, as such, enjoy the legal protection provided for therein.

The case originated from the request made by the Government of the United States of cancellation of the sale of shares in an Italian company concluded by Mr Flegenheimer in 1941 at a price significantly lower than the market price. The United States petition was argued on the basis that Mr Flegenheimer, of the Jewish faith, fearing that the anti-Semitic legislation enacted in Italy in 1938 might be applied to him, concluded such an unfavorable sale contract under conditions of force or duress, so that the contract was void *ab initio* and Mr Flegenheimer had the right to be restored under Article 78(3) of the above-mentioned 1947 Peace Treaty,<sup>1040</sup> which in the English authentic text reads as

<sup>1035</sup> See ICJ, 20 July 1989, Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy), judgment, para. 132.

<sup>1036</sup> See ICJ, 20 July 1989, Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy), judgment, paras. 133-136.

<sup>1037</sup> Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer* case – decision No. 182, 14 Reports of International Arbitral Awards, 327 *et seq.*

<sup>1038</sup> Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace between the Allied and Associated Powers and Italy, concluded in Paris on 10 February 1947.

<sup>1039</sup> Treaty of Peace between the Allied and Associated Powers and Italy, concluded in Paris on 10 February 1947.

<sup>1040</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer* case – decision No. 182, 14 Reports of International Arbitral Awards, 327 *et seq.*, para. 1.

follows:

The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

The right to restoration, however, was subject to the condition that Mr Flegenheimer might be considered a “United Nations national”. This, in turn, raised the issue of the interpretation of Article 78(9)(a)(2) of the 1947 Peace Treaty, which in the English authentic text reads as follows:

“United Nations nationals” also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

The Government of the United States contended that Article 78(9)(a)(2) had the effect of including in the expression “United Nations nationals” all individuals, who were not necessarily “treated” as enemies, but “considered” to be such under the legislation in force in Italy during the war.

It based its interpretation on the Russian authentic text<sup>1041</sup> of that article, where the term “rassmatrivat” was used. According to the United States Government, “rassmatrivat” was an unambiguous term and could only be given the same meaning of the English term “considered”, while the term “treated” could be translated in Russian by the different terms “obchoditsia” and “podvergnut dejstviyu”, which, however, had not been adopted in the treaty text.

Since under Article 90 of the 1947 Peace Treaty the English, French and Russian texts were equally authentic, the Russian text had to be taken into account in order to interpret Article 78(9)(a)(2); in this respect, the United States Government referred to decision No. 32 of the French – Italian Conciliation Commission, according to which “[q]uelle que soit la genèse des deux textes il n'est pas licite de s'en tenir exclusivement à l'un des deux; l'interprète doit plutôt s'efforcer d'éclairer l'un en se servant de l'autre”.<sup>1042</sup>

That Government, moreover, argued that in the specific case preference was to be given to the authentic Russian text since the term “rassmatrivat” exactly corresponded to the term “considerate”, which was used in the Italian translation of the 1947 Peace Treaty. Although such a translation did not have the value of an authenticated text, the United States Government contended that it could be opposed to the Italian Government in the case at stake, since it expressed in a clear and unequivocal manner the meaning attached by Italy to Article 78(9)(a)(2). Therefore, since the contracting parties, Italy in particular, had originally attributed to the terms “treated”, “traités” and “rassmatrivat”<sup>1043</sup>

<sup>1041</sup> The 1947 Peace Treaty was concluded in three authentic languages, those being English, French and Russian; in addition, a translation in the Italian language had been prepared as well in the course of the negotiations (see Article 90 of the 1947 Peace Treaty).

<sup>1042</sup> French-Italian Conciliation Commission, 29 August 1949, *Différend Impôts extraordinaires sur le patrimoine institués en Italie* - décision No. 32, 13 Reports of International Arbitral Awards, 108 *et seq.*, at 112.

<sup>1043</sup> I.e. the corresponding terms used in the English, French and Russian authentic texts of Article 78(9)(a)(2).

the meaning corresponding to the English term “considered” and the Italian term “considerate”, Italy was no longer allowed, by virtue of the doctrine of estoppel, to give such terms another meaning in order to modify the extent of its obligations.<sup>1044</sup>

The Italian Government, on the other hand, denied the correctness of the United States’s arguments, contending that the mere possibility of being “considered” as enemy was not sufficient to entitle a person to the restitution and restoration imposed by the 1947 Peace Treaty on Italy and that, for such a purpose, it was necessary that he had been actually “treated” as enemy.<sup>1045</sup>

The Italian-United States Conciliation Commission rejected the arguments put forward by the United States.

It recognized, at the outset, that the interpreter should make all possible efforts in order to reconcile the three authentic texts, while he was not entitled to use the Italian translation for the purpose of corroborating the interpretation of some of them because of its unauthentic status. In this respect, it stated that “the interpretation of the text of a treaty [could] be made only by using the versions that have been declared to be authenticated originals by the Treaty itself”.<sup>1046</sup>

With regard to the terms “treated” and “traités”, used in the English and French authentic texts, respectively, the Commission found, on the basis of dictionaries analysis, that their usual and natural meaning was conveyed by the expression “to act towards a person in such and such a manner”; it also found that, since it was universally admitted in international law that the natural meaning of the terms used had to be taken as the starting point of the process of treaty interpretation, such a meaning had to be given a significant weight for the purpose of construing Article 78(9)(a)(2) of the 1947 Peace Treaty, especially where compared to other, unusual meanings that those two terms might have in the respective languages.<sup>1047</sup>

It then pointed out that the Russian authentic text could not be exactly reconciled with the English and French texts, as interpreted in their natural and usual manner. In such a situation, the Commission believed that, according to the teachings of international law, “that adjustment should be made on the basis of a “common denominator which answer[ed] the meaning of all the [authentic] texts”.<sup>1048</sup> It is interesting to note, however, that the Commission, right after such a statement, went on to say that it was “universally admitted that treaties [could] confer rights and impose obligations on the contracting States only within the limits within which the intent of

<sup>1044</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 65.

<sup>1045</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 65.

<sup>1046</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).

<sup>1047</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).

<sup>1048</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter b).

these States became manifest in a concordant manner.” The Commission then concluded that it was clear that the meaning of the term “rassmatrivat” in the Russian text, where interpreted as a synonym of the English “considered”, included the natural and usual meaning of the English and French terms “treated” and “traités”, for a person treated as enemy by the Italian Government have had forcibly been first considered to be enemy by the very same Government, whereas the reverse proposition did not hold true. Thus, it might be reasonably argued that the plea of the Commission for a “common denominator” interpretation was in fact a defense of the interpretation imposing treaty obligations on the contracting States (in this case Italy) only in so far it was manifest that all parties agreed thereupon, i.e. that no obligation could be imposed on a contracting State that had never agreed to it, that being in accordance with the basic principles of equality and sovereignty of States. Similarly, one might have good arguments to conclude that the Commission would have not similarly upheld a “common denominator” interpretation, where it had resulted in adopting the meaning imposing the more burdensome obligations on the contracting States.<sup>1049</sup>

Another argument that could be used to dull the emphasis on the supposed “common denominator” nature of the interpretation endorsed by the Commission is represented by the fact that the latter justified its interpretation of Article 78(9)(a)(2) on the basis of a contextual analysis, as well as in light of the object and purpose of the treaty.

At first, the Commission explicitly stated that the “true and proper meaning of all international treaties should always be found in the purpose aimed at by the Parties”.<sup>1050</sup> In this respect, it noted that the Russian authentic text of Article 78(9)(a)(2), as interpreted by the United States Government, did not seem to answer the intent of the contracting Parties, at the time they drew up the Part VII of the 1947 Peace Treaty, which contained Article 78. In particular, the Commission found that the US interpretation appeared in conflict with the aim of paragraphs 1 through 4 of that very same article, which were purported to assure restoration to persons injured by exceptional war measures introduced in the Italian legislation. According to the Commission, a restoration of property, rights and interests was not conceivable unless these were previously injured in such a manner as to engage the responsibility of the Italian State. This conclusion was forcefully supported by the above-quoted text of Article 78(3). However, a person could be considered an enemy without any injury resulting thereby either to himself or to his property, rights or interests; for such an injury to materialize, a concrete course of action by the State authorities was necessary, having prejudicial consequences for the person against whom such course of action was taken. The Commission found that the treaty negotiators did not aim at creating an “enemy status” for the purpose of Article 78, whereby it would have been sufficient for the relevant conditions to materialize under Italian law to make the provisions of the

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<sup>1049</sup> This may be taken as a further instance of the facts that generally courts and tribunals, when opting for a “restrictive” or “common denominator” interpretation, do this in light of the overall context. See YBILC 1964-II, p. 65, para. 8.

<sup>1050</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter c).

1947 Peace Treaty applicable. On the contrary, the meaning to be given to the terms under interpretation was one of concrete, effective treatment, meted out to a person by reason of his enemy status, and not one of abstract possibility of subjecting a person to a course of action capable of causing injury, on the grounds that such a person fulfilled the conditions for being considered, under a legal provision of municipal law, to be an enemy person.<sup>1051</sup>

Moreover, the Commission considered that the provision of Article 78(9)(a)(2), introducing a rule of an exceptional character in that it extended the diplomatic protection of the United Nations to persons who were not their nationals, had to be interpreted in a restrictive sense, since it deviated from the general rules of the Law of Nations on that point. Thus, the Commission found that, also in this respect, its interpretation of Article 78(9)(a)(2) was to be preferred to the one put forward by the United States.<sup>1052</sup>

Finally, the Commission touched upon the issue of whether Italy was precluded from relying on an interpretation of Article 78(9)(a)(2) different from the one that could be derived from the natural reading of the Italian translation thereof. It rejected the argument that the Italian Government was bound by the Italian translation on the grounds that the latter was an indication of the manner in which Italy had understood its obligations arising out of the 1947 Peace Treaty. In this respect, the Commission held that the principle of estoppel could be opposed to Italy only where the latter, by explicit declaration, by conclusive acts, or even by an attitude regularly taken towards the other contracting States, had appeared to attribute to Article 78(9)(a)(2) the meaning that the United States attached to the Russian text thereof. However, the existence of a translation devoid of authentic value was not sufficient to that purpose, a translation which, according to the allegations the Italian Government, was in fact the collective work of all contracting States, who purposely refused to give it any character of authenticity; such a translation lacked any international legal significance and it was not proved that Italy had ever accepted the meaning that the United States considered to result from the Russian text.<sup>1053</sup>

### 3.4.3.6. The decision of the WTO Appellate Body in the US – Softwood Lumber from Canada case

In the case *US – Softwood Lumber from Canada*,<sup>1054</sup> the WTO Appellate Body had to

<sup>1051</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter c).

<sup>1052</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter d).

<sup>1053</sup> See Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).

<sup>1054</sup> WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R); see also WTO Appellate Body, 23 September 2002, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, AB-2002-2 (WT/DS207/AB/R), paras. 264-280.

interpret Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures in order to decide whether standing timbers attached to the land fell within the meaning of the term "goods", as used in that Article provision: "[f]or the purpose of this Agreement, a subsidy shall be deemed to exist if [...] a government provides goods or services other than general infrastructure".

The WTO Panel had previously adopted a narrow definition of the term "goods", drawn from Black's Law Dictionary, suggesting the exclusion of immovable property (in the case at stake, the standing timbers attached to the land) from the scope of the term.<sup>1055</sup>

The Appellate Body, making reference to Article 31 VCLT, first stated that the meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used. It observed, in this respect, that the dictionary meaning of a term is generally ambiguous; for instance, the Shorter Oxford English Dictionary offered a more general definition of the term "goods" than the one adopted by the Panel, which included "property or possessions" especially - but not exclusively - movable property". Therefore, although recognizing that dictionary definitions offer a useful starting point for discerning the ordinary meaning of a term, the Appellate Body noted, however, that such definitions have their limitations in revealing the ordinary meaning thereof, in the sense of Article 31 VCLT. According to the Appellate Body, this was especially true where the meanings of the terms used in the different authentic texts of the treaty are susceptible to differences in scope.<sup>1056</sup>

With regard to the case at stake, the Appellate Body noted that the French authentic text of Article 1.1(a)(1)(iii) used the term "biens", as corresponding to the English "goods", while the Spanish authentic text used the term "bienes". According to the dictionaries consulted, the French and Spanish terms denoted a wide range of property, including immovable property; as such, they corresponded more closely to a broad definition of "goods", which included "property or possessions" in general, than to the more limited definition adopted by the Panel.<sup>1057</sup>

The Appellate Body, then, observed that under the customary rule of treaty interpretation reflected in Article 33(3) VCLT the terms of a treaty authenticated in more than one language are presumed to have the same meaning in each authentic text and concluded that such a rule implied that the treaty interpreter should seek the meaning giving effect, simultaneously, to all the terms of the treaty, as they are used in each authentic text. In this respect, the Appellate Body made reference both to the commentary to the 1966 Draft, according to which the presumption of equal meaning of each authentic text requires that every effort be made in order to find a common meaning for the texts before preferring one to another, and to the ICJ's decision in the *Elettronica*

<sup>1055</sup> See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), paras. 57-58.

<sup>1056</sup> See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), paras. 58-59.

<sup>1057</sup> See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 59.

*Sicula* case described above.<sup>1058</sup>

In light of the above, the Appellate Body concluded that the ordinary meaning of the term “goods” in the English authentic text of Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures should not be read so as to exclude tangible items of property, like trees, that are severable from land.<sup>1059</sup>

The interpretation put forward by the Appellate Body, however, was not based solely on a comparative linguistic analysis.

First, the Appellate Body found that a contextual analysis supported such a construction. The analysis of the terms accompanying the word “goods” in Article 1.1(a)(1)(iii), such as “general infrastructure”, led to the very same conclusion that all goods that might be used by an enterprise to its benefit - including even goods that might be considered infrastructure - were to be considered “goods” within the meaning of the interpreted provision, unless they were infrastructure of a general nature.<sup>1060</sup> Such a conclusion was not overturned by the analysis of the meaning attributable to the term “goods”, as used in other articles of the WTO Agreement on Subsidies and Countervailing Measures and in the Multilateral Agreements on Trade in Goods (Annex 1A of the WTO Agreement), since:

- (a) the scope and purpose of those articles and agreement was different from that of Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures and
- (b) the term “goods” was differently qualified therein by the accompanying words “imported”, “exported” and “trade”, which were not present in Article 1.1(a)(1)(iii).

Similarly, the interpretation put forward by the Appellate Body was not prejudiced by the (different) meaning attributable to the term “products” used in Article II of the 1994 General Agreement on Tariffs and Trade (GATT), “goods” and “products” being different words that did not need necessarily to have the same meanings in the different contexts in which they were used.<sup>1061</sup>

Second, the Appellate Body submitted that a narrow interpretation of the term “goods” would have undermined the object and purpose of the WTO Agreement on Subsidies and Countervailing Measures, which was to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures. According to the Appellate Body, it was in furtherance of that object and purpose that Article 1.1(a)(1)(iii) recognized that subsidies might be conferred, not only through monetary transfers, but also by the provision of non-monetary input; therefore, a narrow

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<sup>1058</sup> See WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R), para. 59 and, in particular footnote 50 therein.

<sup>1059</sup> WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R), para. 59.

<sup>1060</sup> See WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R), para. 60.

<sup>1061</sup> See WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R), paras. 62-63.

interpretation of the term "goods" in Article 1.1(a)(1)(iii) would have permitted the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of standing timber for the sole purpose of severing it from land and processing it.<sup>1062</sup>

Third, the Appellate Body rejected an interpretation of the term "goods" based on the municipal law of one of the WTO Member States. In this respect, Canada had contended that standing timbers were not "goods", since they were neither "personal property" nor an "identified thing to be severed from real property". The Appellate Body, after having noted that the concepts of "personal" and "real" property, as referred to by Canada, are creatures of municipal law not reflected in Article 1.1(a)(1)(iii), submitted that the manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO agreements.<sup>1063</sup>

#### 3.4.3.7. The decision of the ECtHR in the Niemietz case

In the *Niemietz* case,<sup>1064</sup> the ECtHR was confronted with the issue of whether the search of an office made on behalf of the public prosecutor could give rise to a breach of Article 8(1) of the ECHR, which in its English and French authentic texts reads as follows (*italics* by the author):

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

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

The Court considered that the term "home", in the English authentic text, should not be construed narrowly; on the contrary, it should be regarded as denoting also business and professional premises. It pointed out that this conclusion was fully consonant with the French authentic text, the term "domicile" having a broader intension than the term "home", capable of being extended to a professional person's office as well.<sup>1065</sup>

The attribution to the term "home" of such a special meaning, however,<sup>1066</sup> was not based solely on the comparison with its corresponding French term; quite the contrary,

<sup>1062</sup> See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 64.

<sup>1063</sup> See WTO Appellate Body, 19 January 2004, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, AB-2003-6 (WT/DS257/AB/R), para. 65.

<sup>1064</sup> ECtHR, 16 December 1992, *Niemietz v. Germany* (Application no. 13710/88).

<sup>1065</sup> See ECtHR, 16 December 1992, *Niemietz v. Germany* (Application no. 13710/88), para. 30.

<sup>1066</sup> This meaning is "special" under Article 31 VCLT if one takes the view that such wide meaning is not "ordinary" for the term "home", which however is not a straightforward conclusion (see the entries for "home" at the Dictionary.com Unabridged. Random House, Inc. (accessed 7 Oct. 2010), in particular entry no. 9).

the Court found support thereto in the context of that term and in the object and purpose of Article 8 of the ECHR, as well as in the subsequent practice of certain contracting States.

In this respect, the Court noted that the term “home” had been interpreted as extending to business premises in some contracting parties, among which Germany, the latter being the State charged of breaching Article 8 of the ECHR in the case at stake.<sup>1067</sup>

It also submitted that it was not always possible to draw precise distinctions between private and business premises, since activities related to a profession or business could well be conducted from a person’s private residence, while activities not so related could well be carried on in offices or commercial premises. Thus, a narrow interpretation of the terms “home” and “domicile” could give rise to a risk of unequal treatment of persons being in substantially comparable situations.<sup>1068</sup>

Furthermore, the ECtHR linked the term “home” to the previous term “private life” used in Article 8. It considered that it would have been too restrictive to limit the meaning of the latter term to the notion of an “inner circle” in which the individual might live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle; respect for private life also had to comprise, at least to a certain degree, the right to establish and develop relationships with other human beings. In this regard, there was no apparent reason to exclude, from the intension of the term “private life”, activities of a professional or business nature since it was, after all, in the course of their working lives that the majority of people had a significant, if not the greatest, opportunity of developing relationships with the outside world. This view was supported by the fact that, as similarly mentioned in relation to the meaning of the term “home”, it was not always possible to clearly distinguish which of an individual’s activities formed part of his professional or business life and which did not. Therefore, to deny the protection of Article 8 to professional activities could lead to an inequality of treatment, in that such protection would remain available to persons whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them.<sup>1069</sup>

Finally, the Court found that interpreting the terms “home” and “private life” as including certain professional or business activities or premises was consonant with the essential object and purpose of Article 8, i.e. to protect the individual against arbitrary interference by the public authorities. At the same time, it emphasized that such an interpretation would not unduly hamper the contracting States, for they would in any case retain their entitlement to “interfere” with people’s “private life” and search their “home” to the extent permitted by paragraph 2 of the very same Article 8 of the ECHR.<sup>1070</sup>

#### 3.4.3.8. The decision of the Arbitral Tribunal for the Agreement on German External

<sup>1067</sup> See ECtHR, 16 December 1992, *Niemietz v. Germany* (Application no. 13710/88), paras. 18 and 30.

<sup>1068</sup> See ECtHR, 16 December 1992, *Niemietz v. Germany* (Application no. 13710/88), para. 30.

<sup>1069</sup> See ECtHR, 16 December 1992, *Niemietz v. Germany* (Application no. 13710/88), para. 29.

<sup>1070</sup> See ECtHR, 16 December 1992, *Niemietz v. Germany* (Application no. 13710/88), para. 31.

## Debts in the Young Loan arbitration

In the *Young Loan* arbitration case,<sup>1071</sup> the majority of the Arbitral Tribunal concluded that “[the] interpretation of the clause merely in the terms of Article 31(1) of the [VCLT] already proves the Applicants' claim to be unfounded. Any possible discrepancy between the texts, when the wordings of the three authentic versions of the disputed clause are compared, is resolved if the clause is interpreted in the context of the treaty and against the background of the ‘object and purpose’ of the LDA”.<sup>1072</sup>

It further maintained that “the *travaux préparatoires* confirms the conclusion to which the interpretation of the wording of the clause in dispute in accordance with Article 31(1) of the [VCLT] has already led.”<sup>1073</sup>

As previously noted, the main issue at stake in the case was the interpretation of the expressions “Währung mit der geringsten Abwertung“, “*deviser la moins dépréciée*” and “least depreciated currency” used in the German, French and English authentic texts of Article 2(e) of Annex 1 of the LDA. In particular, the question to be answered by the Tribunal was whether such expressions related only to devaluation in the strict sense, i.e. to cases where the par value of the currency concerned had been reduced as a result of a governmental action, or it applied as well to cases where the currency in question was “depreciated” in relation to another currency of issue of the bonds owing to the revaluation of the latter.<sup>1074</sup>

At the outset, the Tribunal noted that if it had proceeded on terminology alone and taken the words in their ordinary, everyday sense in the language concerned, it was at least not excluded that the German text would have provided one answer to the original query, and the French and English texts a different one.

In German, on the one hand, the term “Abwertung”, where used in technical jargon, meant a reduction in the external value of a currency - in relation to a fixed yardstick, e.g. gold - by an act of government. On the contrary, in the everyday usage, the expression “formal devaluation” (“*formelle Abwertung*”) tended to be used to describe the devaluation of a currency by governmental act, as distinguished from the far more common economic phenomenon of the depreciation of a currency.

In English and French, on the other hand, the terms “depreciation” and

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<sup>1071</sup> Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.* For an analysis of the issue at stake in the *Young Loan* case, see section 3.2.3.1 of this chapter.

<sup>1072</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 548, para. 38.

<sup>1073</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 548, para. 37.

<sup>1074</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 529, para. 15.

“dépréciation” were normally used to describe the economic phenomenon of depreciation of a currency, while formal devaluation was usually denoted by the terms “devaluation” and “dévaluation”, respectively. However, although the pairs “depreciation” – “dépreciation” and “devaluation” – “dévaluation” were theoretically distinguishable in both English and French, the Tribunal found, mainly on the basis of the analysis of contemporary writings, that as a matter of fact they were used interchangeably to describe the same processes. Hence, the Tribunal concluded that the possibility that the German, English and French authentic texts of the disputed clause had different meanings could not be ruled out on the basis of the mere analysis of their wordings.<sup>1075</sup>

Thus, in order to solve the potential conflict of meanings between the three authentic texts, the Tribunal had recourse to the various means of interpretation provided for in Articles 31 and 32 VCLT, i.e. construed the above-mentioned expressions in light of the overall context.

First, the Tribunal considered that the LDA and, in particular, the provision under discussion, had to be construed in the context of the Bretton Woods system, which governed the international monetary relations at the time of the LDA’s conclusion and which had continued to play such a role for approximately the following twenty years.<sup>1076</sup> The Bretton Woods system was based on the fixed par value agreed between the International Monetary Fund (hereafter also “IMF”) and the single States for almost every currency and expressed in terms of gold or US dollars, pursuant to Article IV(1)(a) of the IMF Agreement.<sup>1077</sup>

According to the Tribunal, the incorporation of the LDA into the Bretton Woods system had a concrete bearing on the essential meaning of the terms “Abwertung”, “depreciated” and “dépréciée”, since it constituted relevant evidence against the view that the revaluation of one of the currencies of the LDA contracting States automatically meant a depreciation (“Abwertung”, “depreciation”) of all other currencies.

In this respect, the Tribunal noted that, although it was true that the revaluation of one currency (A) determined that a person purchasing it had to spend more of another currency (B) than he had had to spend before the revaluation, the par value of the latter currency (B) as agreed with the IMF had not changed due to such a revaluation. Therefore, it was not possible to maintain that the latter currency (B) had depreciated (“abgewertet“, “dépréciée”) in the sense of Article 2(e) of Annex 1 of the LDA. In fact,

<sup>1075</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 530-532, paras. 18 and 20.

<sup>1076</sup> Since the Bretton Woods system, regulated by the IMF Agreement, was in force for all the LDA contracting States, except Switzerland, and regulated the relations between the values of their respective currencies, the reference to such a system by the Arbitral Tribunal might be regarded as based on Article 31(3)(c) VCLT, or, at least, on Article 32 VCLT (i.e. as a relevant element of the legal and political framework in which the LDA had been concluded).

<sup>1077</sup> Agreement adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, on 22 July 1944 (in its original text).

in the Bretton Woods system, the counter-value of the latter currency (B) expressed in terms of gold or US dollars had remained unchanged, as the purchasing power of that currency on its home market and the external value thereof in relation to all other currencies except the revalued one had remained unchanged.

According to the Tribunal, the position of persons owning currency (B) would have changed only if that currency had been devalued in the formal sense, since under the Bretton Woods system “revaluation and devaluation were both bilateral “deals” between the IMF and the States concerned in each case”.<sup>1078</sup>

Second, the Tribunal found that such a conclusion was supported by the structure and wording of Article 13 of the LDA, which, with reference to the cases under litigation, would have required computing the new amounts of the installments to be paid on the basis of the par values of the various currencies agreed with the IMF, which, however, had not changed as a result of the revaluation of the German mark.<sup>1079</sup>

Third, it considered the bearing of Article 8 of the LDA on the construction of the terms to be interpreted.<sup>1080</sup>

Article 8 of the LDA obliged the Federal Republic of Germany not to permit any discrimination or preferential treatment among the different categories of debts or as regards the currencies in which debts were to be paid or in any other respect, unless such difference was the result of settlement in accordance with the Agreement itself.

In this respect, the Tribunal recognized that, as a matter of fact, the holders of bonds expressed in German mark would have received more than the other creditors as a result of the revaluations of the German mark in 1961 and 1969. However, it found that such disparity of treatment, being the result of the application of the method of computation provided for in Article 13 of the LDA, was to be regarded as “in accordance with the Agreement itself” and thus allowed by Article 8 thereof.

Moreover, the Tribunal also noted that the prohibition of discrimination in Article 8 of the LDA had to be construed in its context, where it appeared to have no bearing beyond that of a *pari passu* clause,<sup>1081</sup> whose customary function in loan contracts was, in the interest of the bondholders, to simply prevent the borrower from entering into

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<sup>1078</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 535, para. 24, and at 538, para 27.

<sup>1079</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 535-536, paras. 24 and 25.

<sup>1080</sup> The Tribunal also made reference to Article V(2)(b) of Annex II and Article 7(3) of Annex IV to the LDA in order to support its findings (see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 540, para. 28); such arguments, however, seem of a lesser relevance in the whole argument developed by the Tribunal.

<sup>1081</sup> The Tribunal stated that such a *pari passu* clause was, in fact, included in Article II of the original Agreement between the Government of the German Reich, as debtor, and the Bank for International Settlements acting as trustee for the holders of the (then) outstanding bonds (agreement concluded in Paris on 10 June 1930).

new, additional obligations which then would rank before the bonded debt itself, i.e. to guarantee an equal ranking for loans furnished with such a clause (and subsequent loans), and not to prevent any type of different treatment of the bondholders, in particular unequally high redemption payments.<sup>1082</sup>

The Tribunal then analysed the object and purpose of the LDA, which substantially consisted in the settlement of German external debts at the end of the Second World War.

In this respect, the LDA was purported to achieve a compromise, in the interests of all parties concerned, between the liabilities of the Federal Republic of Germany and its actual economic capacity. According to the Tribunal, a prerequisite of the fullest possible settlement of such debts was the recovery of the German economy, in the sense that the LDA's object and purpose could be achieved only if foreign creditors were prepared to waive a substantial part of their claims and to come to terms with the German debtors on conditions for payment of what remained.

Thus, when construing the individual provisions of the LDA, the interpreter had always to take into account the particular concern of the contracting parties, while formulating the LDA, with maintaining in all parts the delicate balance between, on the one hand, the justified aim for adequate satisfaction of the creditors and, on the other, a desire not to burden the debtors with an economically intolerable load, which could have jeopardized the successful implementation of the settlement.

In light of the analysis of the object and purpose of the LDA, the Tribunal concluded that the clause at stake, where interpreted as applying only in cases of formal devaluations, undoubtedly constituted an attempt by the parties to find a sensible middle way between the desirable and the possible, at least as far as they could see it in 1952 (i.e. when the LDS was concluded). On the other hand, the broader interpretation suggested by the applicants could not be regarded as justified simply because the Germany economy in the fifties and sixties of the twentieth century proved capable of recovering more rapidly and strongly than originally expected.<sup>1083</sup>

The majority of the arbitrators also took into account the subsequent practice of the contracting States and found that at least some of the comments made immediately after the conclusion of the LDA by spokesmen of the Applicants might be clearly interpreted as indicating that the clause in dispute should have been regarded exclusively as a protective provision against devaluation.

Similarly, the German interpretation of the disputed clause, as evidenced in public statements and documents, appeared from the start restricted to the case of devaluation.

The Tribunal, however, concluded that, all in all, the analysis of the period

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<sup>1082</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 538-539, para. 28.

<sup>1083</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 540-541, para. 30.

between the signing of the LDA in 1952 and the first revaluation of the German mark in 1961, when the differences of opinion came out into the open, bore little fruit, since no lasting agreement was reached among the parties on the interpretation of the disputed clause, nor did the conduct of the individual parties give any decisive insight into what they understood by the terms "depreciated", "dépréciée" and "Abwertung".<sup>1084</sup>

The Tribunal eventually turned to the analysis of the *travaux préparatoires*.

It found that the clause in dispute was a compromise agreed, after lengthy negotiations, by the private creditors' representatives and the delegates of the creditor States participating in the Conference on German External Debts<sup>1085</sup> and which had become necessary due to the United States not agreeing to retain the protection clause (the gold clause) originally embodied in Article VI (a) of the General Bond of the Young Loan.

The *travaux préparatoires* showed that the creditors agreed that they had to insist on protection against a potential drop in the value of the currencies of issue. However, the question of how far such protection should be extended was open and was disputed. In this respect, the minutes submitted to the Tribunal contained no statement indicating, even by implication, that the new clause, in addition to protecting the relevant currency of issue against devaluation, also had to guarantee participation in the revaluation of any other currency of issue. Moreover, the testimony of witnesses confirmed that neither revaluation, nor appreciation had been mentioned at the Conference on German External Debts.

On the basis of such elements, the Tribunal drew the conclusion that no one at the Conference had seriously reckoned with the possibility of a revaluation of the German mark and therefore no one had mentioned this eventuality. In addition, the Tribunal noted that the possibility that another currency could have been revalued had not been expressly taken into consideration in the course of the negotiations and, from such a basis, inferred that there was no intention of contemplating the consequences of a revaluation of any currency whatever.

Finally, the Tribunal noted that its conclusion was further supported by the fact that, in the course of the Conference, the possibility to include a currency option clause with reference to the Young Loan had been never discussed, while it had been so with regard to two other loans.<sup>1086</sup> Since currency options generally also covered the case of revaluation, the absence of any serious discussion in that respect strengthened the conviction that all that had been ever intended was a clause protecting creditors against currency devaluations.

The Tribunal thus found that the analysis of the *travaux préparatoires* confirmed the interpretation reached through the application of Article 31 VCLT.<sup>1087</sup>

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<sup>1084</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 542-543, para. 31.

<sup>1085</sup> Conference held in London, between February and August 1952.

<sup>1086</sup> Namely the City of Munich and the Potash Loans.

<sup>1087</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of*

3.4.3.9. The decisions delivered by the ECJ with regard to the interpretation of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters

The application of the rules of interpretation enshrined in Articles 31 and 32 VCLT for the purpose of reconciling *prima facie* divergent authentic texts has also been endorsed by the ECJ, when called upon to construe certain provisions of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters.<sup>1088</sup>

For instance, in the case *De Bloos v. Bouyer*,<sup>1089</sup> the ECJ had to interpret Article 5(1) of the Brussels Convention, according to which:

A person domiciled in a Contracting State may, in another Contracting State, be sued:  
(1) in matters relating to a contract, in the courts for the place of performance of the obligation in question.

In particular, the Court was asked whether, with reference to an action brought by the Belgian grantee of an exclusive sales concession against the French grantor thereof, in which the former claimed that the latter had infringed the exclusive concession, the term “obligation” in Article 5(1) was to be interpreted as applying without distinction to any obligation arising out of the contract granting the exclusive sales concession (or even arising out of the successive sales concluded in performance of the said contract), or as referring exclusively to the obligation forming the basis of the legal proceedings brought before the court seeking to establish its jurisdiction. The various authentic texts of Article 5(1) seemed capable of diverging constructions in that respect.

The ECJ solved the interpretative issue by stating that Article 5(1) could not be interpreted as referring to any obligation whatsoever arising under the contract in question, but, on the contrary, the term “obligation” had to be construed as referring to the specific contractual obligation forming the basis of the legal proceedings before the referring court.<sup>1090</sup> This solution was mainly justified on the basis of the object and purpose of the Convention, as derived from its preamble, which required the need to avoid as far as possible creating situations in which a number of courts had jurisdiction in respect of one and the same contract.<sup>1091</sup> In addition, the Court highlighted that such a conclusion was further supported by the Italian and German authentic texts of Article

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*Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 543-548, paras. 32-47.

<sup>1088</sup> Convention concluded in Brussels on 27 September 1968.

<sup>1089</sup> ECJ, 6 October 1976, Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer.

<sup>1090</sup> See ECJ, 6 October 1976, Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, paras. 10 and 11.

<sup>1091</sup> See ECJ, 6 October 1976, Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, paras. 8 and 9.

5(1),<sup>1092</sup> which appeared less ambiguous in this respect.

In the *Effer v. Kantner* case,<sup>1093</sup> the ECJ was again faced with the interpretation of Article 5(1) of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters. In this case, the issue at stake whether the court of the place of performance of a contractual obligation had jurisdiction even where the very existence of the contract was disputed between the parties.

The Court eventually answered in the affirmative.<sup>1094</sup> It first noted that the wording of the authentic texts of Article 5(1) did not resolve the issue unequivocally, since while the German text used the expression “Vertrag oder Ansprüche aus einem Vertrag” in order to denote the scope of paragraph 1, while the French and Italian authentic texts contained the expressions “en matière contractuelle” and “in materia contrattuale” respectively. The ECJ considered that, in view of the ambiguity and lack of uniformity between the different authentic texts, it was advisable to have regard both to the context of Article 5(1) and to the object and purpose of the Convention.<sup>1095</sup>

With regard to the latter, the Court found that it was clear from the provisions of the Convention, and in particular from the preamble thereto, that its essential aim was to strengthen in the Community the legal protection of persons established therein; for that purpose, the Convention provided a collection of rules which were designed to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more contracting States and which, in the interests of legal certainty and for the benefit of the parties, conferred jurisdiction upon the national court territorially best qualified to determine a dispute.<sup>1096</sup>

With regard to the former, the ECJ noted that the provisions of the Convention, in particular those included in section 7 of title II (Examination as to jurisdiction and admissibility), appeared to include among the powers of the referred national court the power to consider the existence of the contract itself, that being indispensable in order to enable that court to examine whether it had jurisdiction under Article 5(1). According to the ECJ, if this had not been the case, Article 5(1) would have been in danger of being deprived of its legal effect, since it would have been accepted that, in order to defeat the rule contained in that provision, it was sufficient for one of the parties to claim that the contract did not exist.<sup>1097</sup>

The Court thus concluded that respect for the aims and spirit of the convention demanded Article 5(1) to be construed as meaning that the court called upon to decide a dispute arising out of a contract might examine the essential preconditions for its jurisdiction, so establishing the existence or the inexistence of the relevant contract.<sup>1098</sup>

<sup>1092</sup> See ECJ, 6 October 1976, Case 14/76, *A. De Bloos, SPRL v. Société en commandite par actions Bouyer*, para. 12.

<sup>1093</sup> ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*.

<sup>1094</sup> See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 8.

<sup>1095</sup> See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 5.

<sup>1096</sup> See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 6.

<sup>1097</sup> See ECJ, 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*, para. 7.

<sup>1098</sup> *Ibidem.* see, similarly, ECJ, 24 June 1981, Case 150/80, *Elefanten Schuh GmbH v. Pierre Jacqmain*, paras. 13-17, concerning the interpretation of Article 18, second sentence, of the very same Brussels Convention on

3.4.4. *The preference for the interpretation(s) common to all the compared authentic texts*

- 3.4.4.1. The need to distinguish between (i) the attribution to treaty terms of the meaning common to all the compared authentic texts and (ii) the restrictive interpretation of treaty terms

In his cornerstone work on the interpretation of multilingual treaties, which predates the VCLT, Hardy concluded that where one authentic text allows several interpretations, while the other authentic text allows only one of them, the interpreter is bound to choose the latter construction, that being the only one “reconciling” the various texts.<sup>1099</sup>

A rule based on this position had been originally included by Sir Humphrey Waldock in his Third Report on the Law of Treaties, whose Article 75(3) read as follows:<sup>1100</sup>

If in each of two or more authentic texts a term is capable of being given more than one meaning compatible with the objects and purposes of the treaty, a meaning which is common to both or all the texts is to be adopted.

The ILC Drafting Committee, however, removed this provision from the text of Article 75 in the course of the ILC’s sixteenth session without providing any explanation.

One can merely speculate that the reason behind this was the risk that the provision could have been (mis)construed as a rule favoring “restrictive” interpretations, i.e. the kind of interpretation that some scholars thought the PCIJ had embraced in the *Mavrommatis Palestine Concessions* case<sup>1101</sup> and that the ILC, on the contrary, intended to reject as a general rule.<sup>1102</sup>

In this respect, the commentary to Article 75(3) of Sir Humphrey Waldock’s Third Report on the Law of Treaties clarified that the proposed rule of interpretation was not to be confused with the restrictive interpretation, according to which the more

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jurisdiction and enforcement of judgments in civil and commercial matters.

<sup>1099</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 150.

<sup>1100</sup> See YBILC 1964-II, p. 62.

<sup>1101</sup> See PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment, p. 19, where it was stated the following:

“The Court is of opinion that, where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity of Mandatory for Palestine and because the original draft of this instrument was probably made in English”.

See also the laconic conclusion (which seems to favor a “restrictive” interpretation) on the issue of the *prima facie* divergence between the French and English authentic texts of Article 302(2) of the 1919 Treaty of Versailles, in Germano-Polish Mixed Arbitral Tribunal, 1 August 1929, *Poznanski v. German State*, 5 *Annual digest of public international law cases* (1929-1930), 506 *et seq.* [Case No. 298], at 507.

<sup>1102</sup> See YBILC 1964-II, p. 65, para. 8; YBILC 1966-II, pp. 225-226, para. 8.

limited (restrictive) construction which can be made to harmonize with all authentic texts is the one which must be adopted.<sup>1103</sup>

Moreover, the commentary to the 1966 Draft provides that the PCIJ, in the *Mavrommatis Palestine Concessions* case, did “not appear necessarily to have intended [...] to lay down as a general rule that the more limited interpretation which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs. The mere fact that the ambiguity arises from a difference of expression in a plurilingual treaty does not alter the principles by which the presumption should or should not be made in favour of a restrictive interpretation. Accordingly, while the *Mavrommatis* case gives strong support to the principle of conciliating — i.e. harmonizing — the texts, it is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts”.<sup>1104</sup>

The restrictive interpretation, on the one hand, and the construction of treaty terms according to the meaning common to all the authentic texts compared, on the other hand, must be clearly distinguished both (a) with regard to the interpretative results that they tend to achieve and (b) in terms of their possible use within the system of interpretation of the VCLT.

Under the first perspective (a), the restrictive interpretation leads to the result that, if (i) one authentic text may be interpreted as meaning A and the other authentic text as meaning B and (ii) the denotata of B constitute a subset of the denotata of A, then meaning B is to be adopted.

The construction of treaty terms according to the meaning common to all the compared authentic texts, instead, implies that, where one authentic text may be interpreted as meaning either A or B and the other authentic text as meaning either B or C, meaning B is to be adopted.

Under the second perspective (b), the following comments can be made.

The former rule has been explicitly rejected as a general rule of interpretation by the ILC. The author praises this decision since, as treaty interpretation is directed at establishing the common intention of the parties, where two authentic texts appear *prima facie* to point towards two diverging, reasonable and unambiguous meanings, no mechanical rule providing for a preference for the most restrictive meaning can ensure that such a meaning represent the utterance meaning of the treaty.

On the contrary, the latter rule, whatever the reason for dropping it from the text

<sup>1103</sup> See YBILC 1964-II, pp. 64-65, para. 8.

<sup>1104</sup> YBILC 1966-II, pp. 225-226, para. 8 (footnotes omitted). See, similarly, J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80

of (now) Article 33,<sup>1105</sup> appears to suitably fit the purpose of establishing the common intention of the parties. In fact, where one authentic text presents an ambiguity of meanings that cannot be resolved by means of the rules of interpretation enshrined in Articles 31 and 32 VCLT, while the other authentic text may be attributed only one clear, unambiguous and reasonable meaning, and the latter meaning coincides with one of the meanings attributable to the former text, it is only reasonable (although not compulsory) to conclude that the parties intended to attach to the treaty the latter meaning.

3.4.4.2. The limited scope of the rule providing for the attribution to treaty terms of the meaning common to all the authentic texts compared

At a closer look, however, the rule providing for the attribution to treaty terms of the meaning common to all the compared authentic texts appears to be characterized by a rather limited scope in practice, since it is based on the premises that:

- (i) each authentic text, or at least some authentic texts, may be construed in an array of alternative ways and
- (ii) the arrays of alternative meanings corresponding to each authentic text differ from each other due exclusively to the wording used in such texts (and not to the overall context).

In that respect, it has been already shown that:

- (a) the meaning of a treaty provision (like the meaning of any other utterance) is highly dependent on its overall context and that the role played by its wording is thus limited and
- (b) in the VCLT system the choice of the meaning to be attributed to undefined terms is significantly influenced by elements other than the mere dictionary meanings of those terms, such as their context, the object and purpose of the treaty, the subsequent agreements and practice of the parties, the interaction with

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<sup>1105</sup> After this provision had been removed from the ILC draft articles, Bernhardt maintained that the presumption provided for in Article 29(3) of the 1966 Draft, now Article 33(3) VCLT, led to the substantially same result. According to the author, that presumption would effectively fix the precedence of the authentic text using unequivocal expressions, so far as its meaning was included in the ambiguous (although the term actually used by Bernhardt is “unclear”) provisions of the other texts; in contrast, where all texts were ambiguous, the presumption would not give further help to the interpreter (see R. Bernhardt, “Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC’s 1966 Draft Articles on the Law of Treaties”, 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 505). The conclusion reached by Bernhardt was later criticized by other scholars. In particular, Germer affirmed that, where it is argued that a possible difference in meaning exists, the presumption provided for by Article 33(3) VCLT ceases to hold and the interpreter is to apply the rules enshrined in Article 33(4) VCLT, which do not embody the principle of preference for the unambiguous (although the term actually used by Germer is “clearest”) text (see P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414). Such criticism, however, seems erected on highly disputable foundations, especially in light of the analyses conducted by the author and reported in the previous sections and in the following pages.

other rules of international law, the *travaux préparatoires*, the other supplementary means of interpretation and, more generally, all elements and items of evidence included in the overall context.

In addition, it has been put forward in section 3 of Chapter 3 of Part I that the choice of the treaty meaning by the interpreter, as well his choice of the legally sound arguments that support it, is influenced by his cultural and political preferences, which commonly lead him to favor one single meaning among those potentially available.

Therefore, where a authentic treaty text, taken in isolation, is construed by the interpreter in accordance with its overall context (which includes the rules of interpretation enshrined in Article 31 and 32 VCLT), the result of the interpretative process is generally the meaning that best suits, from the interpreter's perspective, all elements and items of evidence thrown into the crucible.

Hence, in light of the nature of such an interpretative process, it is reasonable to expect that, in the vast majority of cases, the interpretative result will be the same with regard to all authentic texts, since all the elements and items of evidence thrown into the crucible, except the very same terms and expressions to be interpreted, are the same for the purpose of construing all of them.

Even in the unusual case where the interpreter arrives, with regard to each authentic texts, at an array of alternative meanings among which he struggles to choose one, it is submitted that such a difficulty will generally be partially independent from the nuances of the various authentic texts and thus it will be hardly solved by means of choosing the single meaning common to all the possibilities, since most probably the various authentic texts will present the same or similar arrays of possible meanings.

All in all, such a rule lies on a tremendously simplified representation of the process of treaty interpretation and, in practice, it will seldom be applicable due to the infrequency of cases where one authentic text may be attributed several meanings and the other only one of them.<sup>1106</sup>

#### 3.4.4.3. Relevant case law: in general

The three decisions described here below aptly illustrate the difficulty to apply in practice the above-mentioned rule of interpretation.

They are the same decisions taken by Gardiner as examples of the fact that “the requirement in Article 33(4) to achieve a meaning which best reconciles the texts, having

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<sup>1106</sup> One of the few cases in which the competent court or tribunal justified its decision solely on the basis of this approach is Arbitrator, 3 September 1924, *Affaire des réparations allemandes selon l'article 260 du Traité de Versailles (Allemagne contre Commission des Réparations)*, 1 *Reports of International Arbitral Awards*, 429 *et seq.*, in particular at. 437-439, where the arbitrator concluded that where “l'un des textes est clair et l'autre ne l'est pas, la solution qui s'impose est celle d'interpréter le texte moins clair à la lumière de l'autre texte et conformément au sens qui résulte des termes de ce dernier texte” (see *ibidem*, at 439).

regard to the object and purpose of the treaty, does not exclude the possibility of concluding that the meaning which is clear in one of the texts [*author's note*: while the others are ambiguous] is the correct one".<sup>1107</sup>

A close analysis of these decisions, however, shows that Gardiner's statement is misleading since in none of them was the court:

- (i) dealing with the issue of reconciling authentic texts whose meanings remained irremovably different after the application of Article 31-32 VCLT and
- (ii) justifying the chosen solution as resulting from the selection of the only meaning common to the various texts and the consequent rejection of the other meanings attributable to the ambiguous texts.

On the contrary, it appears that the courts:

- (i) construed the various authentic texts and eliminated potential differences of meaning through the application of the principles of interpretations enshrined in Articles 31 and 32 VCLT and, as a result thereof,
- (ii) removed the uncertainty concerning the meaning of the potentially ambiguous texts by affirming that such texts could be reasonably attributed only one meaning where interpreted in light of the overall context.

#### 3.4.4.4. Relevant case law: the ECtHR decision in the *Wemhoff* case

Just before the VCLT was concluded, the ECtHR decided the *Wemhoff* case,<sup>1108</sup> in which it was confronted with, among other things, the issue of whether there had been a contravention by the German judicial authorities of the second part of Article 5(3) of the ECHR. The Court had thus to interpret the latter Article, which, in the English and French authentic texts, reads as follows:

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c)<sup>1109</sup> [...] shall be entitled to trial within a reasonable time or to release pending trial. [...]

3. Toute personne arrêtée ou détenue, dans les conditions prévues au paragraphe 1 c) [...] a le droit d'être jugée dans un délai raisonnable, ou libérée pendant la procédure. [...]

The Court found that Article 5(3), read in its context, required the provisional detention of accused persons not to be prolonged beyond a reasonable time.<sup>1110</sup> The issue,

<sup>1107</sup> See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 375.

<sup>1108</sup> ECtHR, 27 June 1968, *Wemhoff v. Germany* (Application no. 2122/64).

<sup>1109</sup> Paragraph 1(c) of Article 5 ECHR reads as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so

<sup>1110</sup> See ECtHR, 27 June 1968, *Wemhoff v. Germany* (Application no. 2122/64), para. 5 of the Court's findings.

however, arose of whether this requirement concerned just the period of detention until the beginning of the trial or whether it also covered the duration of the trial.

The German government argued that it was the opening of the trial that marked the end of the period with which Article 5(3) was concerned.<sup>1111</sup>

The Court, however, rejected such an interpretation.

At the outset, it recognized that the English authentic text could be theoretically construed in accordance with the interpretation put forward by the German government. That text was *prima facie* ambiguous, since the expression “entitled to trial” could also be read as meaning “entitled to be brought to trial” and the following reference to “pending trial” seemed to require release before the trial, taken as whole, i.e., before its opening.<sup>1112</sup>

However, the Court then noted that while the English authentic text theoretically permitted both interpretations, the French authentic text of Article 5(3) could not be construed as the German government had done. In fact, it provided that:

- (i) the obligation to release the accused person within a reasonable time continued until that person had been “jugée”, i.e. until the day of the judgment closing the trial, and
- (ii) the accused person had to be released “pendant la procédure”, a very broad expression that in the Court’s view indubitably covered both the trial and the investigation.<sup>1113</sup>

Ultimately, the ECtHR concluded that, since it was confronted with two versions of a treaty which were equally authentic but not exactly the same, it had to follow established international law precedents and hence interpret those authentic texts so as to reconcile them as far as possible.<sup>1114</sup>

The Court, nonetheless, did not justify the interpretation finally endorsed as resulting from the selection of the only meaning common to both the ambiguous and the unambiguous texts, but as the only reasonable construction that each of the authentic texts allowed.

In this regard, the ECtHR noted that, due to the law-making treaty nature of the ECHR, it was necessary to seek the interpretation most appropriate to realizing the aim and achieve the object of the treaty. From this perspective, it found impossible to see why the protection against unduly long detention that Article 5 sought to ensure for persons suspected of offences should not continue up to delivery of the judgment rather than cease at the moment the trial opens.<sup>1115</sup>

#### 3.4.4.5. Relevant case law: the ICJ decision in the Border and Transborder Armed

<sup>1111</sup> See ECtHR, 27 June 1968, *Wemhoff v. Germany* (Application no. 2122/64), para. 6 of the Court’s findings.

<sup>1112</sup> See ECtHR, 27 June 1968, *Wemhoff v. Germany* (Application no. 2122/64), para. 7 of the Court’s findings.

<sup>1113</sup> See ECtHR, 27 June 1968, *Wemhoff v. Germany* (Application no. 2122/64), para. 7 of the Court’s findings.

<sup>1114</sup> See ECtHR, 27 June 1968, *Wemhoff v. Germany* (Application no. 2122/64), para. 8 of the Court’s findings.

<sup>1115</sup> ECtHR, 27 June 1968, *Wemhoff v. Germany* (Application no. 2122/64), para. 8 of the Court’s findings.

Actions (Nicaragua v. Honduras) case

A second relevant decision is that delivered by the ICJ in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case,<sup>1116</sup> where the Court was confronted with the question of whether it had jurisdiction over a dispute between Nicaragua and Honduras concerning the alleged activities of armed bands said to be operating from Honduras on the border between Honduras and Nicaragua and in the Nicaraguan territory.

In order to establish the jurisdiction of the ICJ, Nicaragua relied on the provisions of Article XXXI of the Pact of Bogotá<sup>1117</sup> and the connected declarations made by the two parties accepting the jurisdiction of the Court. Article XXXI of the Pact of Bogotá provided as follows:

In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature [ed.'s note: *différends d'ordre juridique* in the French text] that arise among them [...]

In this respect, the Court held it had jurisdiction in the dispute submitted to it by Nicaragua on the basis of Article XXXI of the Pact of Bogotá.<sup>1118</sup> Honduras objected to such jurisdiction by relying on Article XXXII of the same treaty, which in its English and French authentic texts reads as follows:<sup>1119</sup>

When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them *shall be entitled to have recourse* to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute.

Lorsque la procédure de conciliation établie précédemment, conformément à ce traité ou par la volonté des parties, n'aboutit pas à une solution et que ces dites parties n'ont pas convenu d'une procédure arbitrale, l'une quelconque d'entre elles *aura le droit de porter la question* devant la Cour internationale de Justice de la façon établie par l'article 40 de son Statut. La compétence de la Cour restera obligatoire, conformément au paragraphe 1 de l'article 36 du même Statut.

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<sup>1116</sup> ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment.

<sup>1117</sup> American Treaty on Pacific Settlement, concluded in Bogotá on 30 April 1948 in the English, French, Portuguese and Spanish languages.

<sup>1118</sup> See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, paras. 28-41.

<sup>1119</sup> *Emphasis* added by the author.

Honduras contended that Articles XXXI and XXXII of the Pact of Bogotá had to be read together: while the former was to define the extent of the ICJ's jurisdiction, the second was to determine the conditions under which the Court could be seized. Thus, according to Honduras, the Court could have jurisdiction under Article XXXI only if, as specified in Article XXXII, there had been a prior recourse to conciliation and lack of agreement to arbitrate, which was not the situation at stake.<sup>1120</sup>

To support its position, Honduras relied heavily on the French authentic text of Article XXXII, which provided that either party had *le droit de porter la question devant la Cour*. In this respect, it argued that this French expression and, in particular, the term "*question*" had been used in order to link the two articles by means of a reference to the question which might have been the subject of the dispute referred to the ICJ under Article XXXI.

The ICJ, although recognizing that the use of the term "*question*" could make the French authentic text of Article XXXII ambiguous at first sight, upheld the position taken by Nicaragua, i.e. that the two articles were autonomous.

In justifying its decision, the Court made reference to the other three authentic texts of the Pact of Bogotá, i.e. those written in the English, Portuguese and Spanish languages, noting that all of them spoke, in general terms, of an entitlement to have recourse to the Court and did not justify the conclusion that there was a link between Article XXXI and Article XXXII.<sup>1121</sup>

However, from the whole reasoning developed by the ICJ it seems that, even in the absence of the three other authentic texts, its conclusion would have not changed and the French text would have not remained ambiguous. To put it differently, it does not seem that, in the Court's view, the French text allowed two alternative interpretations, while the other authentic texts allowed only one construction, the ICJ thus being bound to choose the common interpretation for the purpose of applying the treaty. On the contrary, it appears that the Court used several elements and items of evidence to support the conclusion that the French text (as well as the others) could be reasonably construed only in the sense put forward by Nicaragua.

In this respect, the ICJ first noted that the interpretation put forward by Honduras ran counter to the wording of the French text of Article XXXII, which made no reference to Article XXXI and in which the parties could have used the term "*différend*", instead of the ambiguous "*question*", the former being the very same term used in Article XXXI, had they intended to make the jurisdiction of the Court under Article XXXI subject to the conditions enshrined in Article XXXII.

Second, the ICJ took into account the context of Article XXXII and mentioned the fact that the latter, unlike Article XXXI, referred expressly to the jurisdiction of the Court under Article 36(1) of its Statute. According to the ICJ, such a reference would have been difficult to understand if the sole purpose of Article XXXII had been to

<sup>1120</sup> See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 43.

<sup>1121</sup> See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 45.

specify the procedural conditions for bringing before the Court disputes for which jurisdiction had already been conferred upon it by virtue of the declaration made in Article XXXI, pursuant to Article 36(2) of its Statute.<sup>1122</sup>

Third, the ICJ made reference to the object and purpose of the Pact of Bogotá, as resulting from both its text and the *travaux préparatoires*, which consisted in the reinforcement of the mutual commitments of the American States with regard to judicial settlement. In particular, the Court quoted the position expressed by the Sub-Committee that had prepared the draft treaty, according to which “[I]a Subcomisión estimó que el procedimiento principal para el arreglo pacífico de los conflictos entre los Estados Americanos ha de ser el procedimiento judicial ante la Corte Internacional de Justicia [...]”.<sup>1123</sup> The Court found that Honduras’ interpretation was clearly contrary to the object and the purpose of the Pact, since it implied that the commitment, at first sight firm and unconditional, set forth in Article XXXI would have in fact been emptied of all content if, for any reason, the dispute had not been subjected to prior conciliation.<sup>1124</sup>

#### 3.4.4.6. Relevant case law: the decision of the Court of Appeals of Alaska in the *Busby v. State of Alaska* case

The third decision analysed by the author was delivered in 2002 by the Court of Appeals of Alaska in the *Busby v. State of Alaska* case<sup>1125</sup> and concerned the interpretation of Article 24(5) of the UN Convention on Road Traffic.<sup>1126</sup>

Mr Busby was a former resident of Alaska whose driver's license had been revoked while he was living there. Busby later moved to Nicaragua, where he obtained an international driving permit under the provisions of the UN Convention on Road Traffic.

In 1998, Mr Busby drove from Central America to Alaska and there was stopped by a state trooper for a traffic violation. During the stop, the trooper discovered that Mr Busby's Alaska driver's license was revoked, so Mr Busby was charged with (and subsequently convicted of) the misdemeanor of driving while his international driving license was revoked.

Mr Busby, however, argued that, although his Alaska driver's license was revoked, he was still entitled under the UN Convention on Road Traffic to drive in Alaska because he had an international driving permit.

<sup>1122</sup> See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 45.

<sup>1123</sup> See Novena Conferencia Internacional Americana, Actas y Documentos, Vol. IV, p. 156 (Registry’s translation into English: “the Sub-committee took the position that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice”).

<sup>1124</sup> See ICJ, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, judgment, para. 46.

<sup>1125</sup> Court of Appeals (United States), 1 February 2002, *Thomas Busby v. State of Alaska*, 40 P.3d 807.

<sup>1126</sup> Convention on Road Traffic, concluded in Geneva on 19 September 1949.

In this respect, the Court was called upon to interpret Article 24(5) of the UN Convention on Road Traffic in order to decide whether the State of Alaska was authorized, under that article, to withdraw Mr Busby's right to use his international driving permit within that State.

Article 24(5) of the UN Convention on Road Traffic, in the English and French authentic texts, reads as follows (*emphasis* and [interpolations] by the author):

A Contracting State or a subdivision thereof may *withdraw* from the driver the right to use [an international driving permit] only if the driver has committed a driving offence of such a nature as would entail the forfeiture of his driving permit under the legislation and regulations of that Contracting State□

In such an event, the Contracting State or subdivision thereof *withdrawing* the use of the permit may *withdraw* and retain the permit until the period of the withdrawal of use expires or until the holder leaves the territory of that Contracting State, whichever is the earlier [...].

Un État contractant ou une de ses subdivisions ne peut *retirer* à un conducteur le droit de faire usage d'un [permis international de conduire] que si ce dernier a commis une infraction à la réglementation nationale en matière de circulation susceptible d'entraîner le retrait du permis de conduire en vertu de la législation dudit État□

En pareil cas, l'État contractant ou celle de ses subdivisions qui a *retiré* l'usage du permis pourra *se faire remettre* le permis et le conserver jusqu'à l'expiration du délai pendant lequel l'usage de ce permis est retiré au conducteur, ou jusqu'au moment où ce dernier quittera le territoire de cet État contractant, si son départ est antérieur à l'expiration dudit délai. [...]

The Court recognized that the double use of the term “withdraw” in the English text (i.e. with reference to both the right to use the driving permit and the driving permit itself) created some ambiguity, which in turn provided some support for Mr Busby's contention that his international driving permit remained in force until the State of Alaska took some positive action to “withdraw and retain it”.

However, it noted that the authentic French text did not contain such an ambiguity. The use of the expression “pourra *se faire remettre* le permis”, in contrast with the previous “peut *retirer* [...] le droit de faire usage d'un [permis]”, made clear that a contracting State's act of withdrawing a driver's right to use an international driving permit on its roads was distinct from any action that State might take to secure physical custody of the permit. Under the French authentic text, it was plain that if a State had withdrawn a driver's right to use the international driving permit, it might also require the driver to surrender the permit until the driver's right to drive was restored or until the driver left its territory. The latter follow-up action (i.e. securing physical custody of the permit) was just an additional remedy available to that State under the Convention and, therefore, the legality of its initial action (i.e. withdrawing the driver's right to drive within its territory) did not depend on whether it actually forced the driver to surrender physical custody of the international driving permit.

On the basis of the above analysis, the Court concluded that no direct inconsistency existed between the English and French authentic texts. The interpretative

issue at stake stemmed from an ambiguity in the English text (i.e. the double use of “withdraw”), which might arguably make such a text inconsistent with the French text. In these circumstances, the Court found itself bound, under Article 33(3) VCLT, to assume that the two authentic texts had the same meaning and, thus, to resolve the ambiguity in the English text in favor of the clear meaning of the French text.

The reasoning of the Court, nonetheless, went on to consider (i) the relevance of the treaty’s object and purpose and (ii) whether the possible alternative interpretation of the English authentic text was absurd or unreasonable. In this respect, it reasoned that the alternative construction of the English text of Article 24(5), i.e. the one proposed by Mr Busby, would have led to results that were at odds with the objectives and purpose of the Convention on Road Traffic: drivers could obtain new international driving permits and then play a game of “cat and mouse” with States that had previously suspended their licenses. The Court concluded that Mr Busby’s construction was unreasonable and that the contracting parties, had they thought that the Convention led to these results, would have never signed it.<sup>1127</sup>

Hence, what the Court in fact achieved was to remove the alleged ambiguity of the English text through an interpretation compliant with Articles 31 and 32 VCLT, thus finding that its only reasonable construction corresponded to the above interpretation of the French text.

#### 3.4.5. *Ancillary issues concerning the reconciliation of the prima facie divergent authentic texts*

In this section the author briefly tackles certain ancillary issues concerning the reconciliation of the *prima facie* divergent authentic texts.

First, the question might arise if, where a party has put forward the possibility of a divergence of meanings among certain authentic texts, the interpreter is bound to compare solely such texts or, on the contrary, all authentic texts of the treaty.

In this regard, the recent case law of the ICJ seems to constitute evidence in support of the former solution.<sup>1128</sup> In particular, in the *LaGrand* case,<sup>1129</sup> the Court limited the comparison solely to the English and French authentic texts of Article 41 of its Statute, in relation to which a *prima facie* divergence of meanings had been put

<sup>1127</sup> See Court of Appeals (United States), 1 February 2002, *Thomas Busby v. State of Alaska*, 40 P.3d 807, at 813-815.

<sup>1128</sup> Other courts and tribunal have endorsed the same solution as well. See, for instance, French-Italian Conciliation Commission, 29 August 1949, *Différend Impôts extraordinaires sur le patrimoine institués en Italie - décision No. 32*, 13 *Reports of International Arbitral Awards*, 108 *et seq.*, at 111 *et seq.*, where the Commission solved a *prima facie* divergence of meanings between the English and French authentic texts of Article 78(6) of the Treaty of Peace between the Allied and Associated Powers and Italy, concluded in Paris on 10 February 1947, by comparing only those two texts, notwithstanding that the Russian text was equally authentic under Article 90 of the treaty.

<sup>1129</sup> ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment; for an analysis thereof, see the former part of the present section.

forward by the United States, although its Statute had also been authenticated in the Chinese, Russian and Spanish languages.<sup>1130</sup>

Second, where the interpreter, on the basis of a comparison of the various authentic texts and the analysis of the *travaux préparatoires*, reaches the conclusion that an editorial oversight occurred in one authentic text, it seems reasonable that such an interpreter is not bound to take into account the defective authentic text in order to construe the relevant treaty provision and may rely exclusively on the other authentic texts.<sup>1131</sup>

Third, in line with the position expressed in section 3.2.4., the author recognizes the possibility for the interpreter to have recourse (also) to non-authentic versions of the treaty in order to univocally construe the *prima facie* divergent authentic texts, as such versions constitute supplementary means of interpretation under Article 32 VCLT.<sup>1132</sup> That said, the relevance for interpretative purposes of such versions will depend on their drafting history,<sup>1133</sup> as well as on how the contracting States actually made use of them in order to construe and apply the treaty.<sup>1134</sup>

Finally, in the process of construing the various authentic texts for the purpose of removing their apparent divergences of meaning, the interpreter may also attribute a significant weight to the drafted text(s), for the same reasons already put forward in section 3.2.3 of this chapter. In this respect, Rosenne suggested that the ILC, in drafting the rules of interpretation applicable in respect of multilingual treaties, wanted to stress “the importance of determining the history of the multilingual texts concerned in order to establish their interrelationship as a matter of fact. That would be the point of departure for an operation designed to establish the intention of the parties to the treaty in question. Already in 1964, the Commission [...] requested the Secretariat to furnish further information regarding the practice of the United Nations in drawing up the texts of multilingual instruments”.<sup>1135</sup>

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<sup>1130</sup> In this respect, it must be noted that Germany had instead analysed and compared all five authentic texts in its Memorial to the Court of 16 September 1999, paras. 4.149 and 4.150.

<sup>1131</sup> See, in accordance, the Report of the Human Rights Committee, 22 November 1978 (*Yearbook of the Human Rights Committee 1977-78*, vol. II, p. 300).

<sup>1132</sup> See, in this respect, YBILC 1966-II, p. 226, para. 9; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 105-108; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 398.

<sup>1133</sup> One thing is that the non-authentic language version had been discussed in the course of the negotiations and represents the document on which the final agreement of the parties had been actually reached (although later the contracting States had translated it into texts drafted in their respective official languages, which alone had been authenticated); another thing is that the non-authentic version is a later translation unilaterally prepared by the foreign affairs department of one of the contracting State for internal use only.

<sup>1134</sup> See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Tabá between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq.*, in particular para. 45 thereof, which is discussed in section 3.2.4 of this chapter.

<sup>1135</sup> See S. Rosenne, “On Multilingual Interpretation”, in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 450-451.

### 3.4.6. *Conclusions on research question e)*

In most of the cases where the interpreter is faced with two or more authentic texts, i.e. either where one party has raised the issue of a *prima facie* discrepancy in meanings among them, or where the interpreter has voluntarily decided to compare such texts in order to find an aid for the purpose of construing an apparently unclear or ambiguous text, he will be able to interpret them so as to find a common, clear, unambiguous and reasonable meaning and to plausibly justify his construction on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT (including the possibility of taking into account non-authentic versions of the treaty and the opportunity to ascribe a special relevance to the drafted text).

Even in cases where the construction of an authentic text, taken in isolation, according to Articles 31 and 32 VCLT leaves the meaning thereof ambiguous or obscure, the comparison with other authentic texts may prove a decisive aid for the interpreter in order to clear up his doubts and arrive at an univocal solution, which may be reasonably supported from a logical and legal standpoint.

The recourse to Articles 31 and 32 VCLT implies that no rigid *ad hoc* rule of interpretation is applied in order to remove the *prima facie* discrepancies in meaning among the authentic treaty texts, but the solution actually adopted and the arguments to support it are selected on the basis of the treaty overall context.

In particular, the rule of restrictive interpretation does not play a specific role in the solution of apparent divergences of meanings among the authentic treaty texts under the system of the VCLT and has been explicitly rejected as such by the ILC. Whether a restrictive interpretation is to be adopted in any specific case depends upon the nature and history of the treaty, its object and purpose, the particular context where the ambiguous terms occur and the situation dealt with in that case.

Though, in the infrequent cases where the comparison of the authentic texts does not prove a sufficient aid to remove all the ambiguities of such texts, where only one reasonable and clear meaning<sup>1136</sup> exists that is common to the various authentic texts, such a meaning will be generally selected as being the only interpretative solution logically possible. This preference for the only meaning common to the compared authentic texts does not represent, however, the application of a rigid *ad hoc* rule, but a mere instance of treaty interpretation in good faith and in light of the overall context.

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<sup>1136</sup> I.e. one single intension common to the various authentic texts (e.g. text A may mean X or Y; text B may mean X or Z: X is the only common intension possible and, as such, it will be probably selected as the treaty meaning) and not one particular denotatum that is common to all the possible extensions of the various authentic texts (e.g. text A appears to mean just X; text B appears to mean just Y; however the denotata of X – its extension – are a subgroup of the denotata of Y; the conclusion that the meaning X must be selected since it represents the most restrictive interpretation capable of reconciling the various authentic texts cannot be upheld, since that solution consists of choosing one meaning over another simply because the former denotes a number of referents smaller than the latter).

Those conclusions appear in line with principles (iv), (v), (vi) and (vii) established by the author in section 2 of Chapter 3 of Part I, according to which:

(iv) any alleged discrepancy in meaning among the authentic texts of a treaty is just apparent, since the treaty is an instrument intended by the parties to convey a single message;

(v) the interpreter must remove the *prima facie* discrepancy in meaning among the authentic treaty texts by construing them in accordance with the general principles of treaty interpretation; in particular, the relevance of the treaty texts for the purpose of establishing the single utterance meaning should not be overestimated;

(vi) for the purpose of removing the *prima facie* discrepancy in meaning among the authentic treaty texts, it is reasonable to attribute a particular relevance to the text that has been originally drafted by the contracting States' representatives and on which was formed the consensus among them;

(vii) the interpreter may take into account non-authentic language versions of a treaty for the purpose of construing it; the interpretative weight that should be attributed thereto varies depending on the available evidence that they may contribute to ascertain the common intention of the parties.

### **3.5. *Reconciling the residual divergences and discrepancies: following the object and purpose of the treaty?***

#### *3.5.1. Research question addressed in this section*

The present section is aimed at tackling the following research question.

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

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

Such a provision raises three issues that the interpreter will deal with in the present section.

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

what should follow from such a conclusion?

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

Third, what is the bearing of the final reference to the treaty object and purpose (“having regard to the object and purpose of the treaty”), considering that such an object and purpose is to be taken into account also for the purpose of Articles 31-32 VCLT?

3.5.2. *Scholarly opinions on whether the presumption established by Article 33(3) VCLT continues to hold true where the discrepancy in meanings among the authentic treaty texts is not removed by the application of Articles 31 and 32 VCLT*

As noted above, one might doubt whether and to what extent, in cases of divergences of meanings not removed by the application of Articles 31 and 32 VCLT, the presumption established by Article 33(3) VCLT continues to play a role for interpretation purposes.<sup>1137</sup>

In this respect, Tabory concluded that “the answer probably differs for each individual linguistic discrepancy”.

She also pointed out that the use of the term “reconcile” and the reference to the object and purpose of the treaty, which is indubitably common to all authentic texts, seemed to deny giving preference to any single language version and to point to the continued regard, as far as possible, to all the authentic texts of the treaty.<sup>1138</sup>

At the same time, however, she also appeared to recognize that the need for “preferring one text to another” might arise.<sup>1139</sup>

According to Germer, “[a]s soon as it is argued that the authentic [texts] of the treaty

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<sup>1137</sup> Before the adoption of the VCLT, Dahm argued that the existence of an irreconcilable difference between the various authentic texts (i.e. the existence of a situation similar to that considered in the last part of Article 33(4) VCLT) made the treaty null and void, due to the absence of a true agreement among and consent of the parties (see G. Dahm, *Völkerrecht. Vol. 3* (Stuttgart: Kohlhammer Verlag, 1961), p. 44).

<sup>1138</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 202.

<sup>1139</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 200.

present a difference of meaning, the presumption ceases to be effective. This is a simple consequence of the very nature of the presumption”.<sup>1140</sup>

Thus, it seems that the author considered that the effectiveness of the presumption ceased as soon as a potential divergence was noted. That, however, does not imply that Germer intended to express the view that the basic idea of the treaty as a unique body with a single agreed meaning had to be abandoned, but just that, as soon as a potential difference was pointed out, the interpreter could no longer rely on a single authentic text for interpretation purposes.

Mössner, on the other hand, concluded that Article 33(4) VCLT constituted an exception to the general rule of equality of meaning among the various authentic texts and allowed the possibility for the interpreter to give priority to some of them.<sup>1141</sup>

The same position seems to have been taken by Hilf.<sup>1142</sup>

### 3.5.3. *Scholarly opinions on the meaning of the expression “the meaning which best reconciles the texts” used in the last part of Article 33(4) VCLT*

Numerous scholars have attempted to answer the question of what meaning should be attributed to the expression “the meaning which best reconciles the texts” employed in the last part of Article 33(4) VCLT.

In particular, many of them have wondered whether it should be intended as requiring the interpreter to stretch the meaning of one text towards the other texts’ meaning(s); or as implying that the interpreter is bound to find some midpoint between the meanings of the various authentic texts; or as meaning that the interpreter must give preference to the meaning common to the highest number of authentic texts; or even as requiring the interpreter to apply the most restrictive interpretation, if any.

Tabory, for instance, concluded that the individual circumstances of the case, as well as the object and purpose of the treaty, must be taken into account for the purpose of choosing the best solution in each given case.<sup>1143</sup>

Similarly, Mössner found that the choice, adopted by the ILC, not to prescribe any technical rule of interpretation for resolving discrepancies among the various authentic texts represented a compromise solution and an accumulation of two otherwise

<sup>1140</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414.

<sup>1141</sup> See J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 300-301.

<sup>1142</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 102.

<sup>1143</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 213

alternatives sub-rules, i.e.:

- (i) preferring the meaning that best reconciles the various authentic texts;
- (ii) preferring the meaning that best reflects the “object and purpose” of the treaty.

As such, it might be useful simply as a general guideline.

According to Mössner, the vagueness of the interpretative rule encompassed in Article 33(4) derives from its lack of precision as to the (a) degree and (b) manner in which the two sub-rules should be applied: its absolutely abstract nature leaves the interpreter exactly in the same situation in which he would have been if Article 33(4) had not been included in the VCLT.<sup>1144</sup>

Sur, dealing with the entire package of interpretative principles codified by the VCLT,<sup>1145</sup> concluded that this principles presents uncertain and ambiguous solutions for the interpreter and that they seemed to perpetuate the ambiguities that characterized the practice before the VCLT, more than remove them.<sup>1146</sup>

According to the author, the solution adopted by the ILC did not simplify the interpretive process in practice: the interpreter was just given a general framework to be filled in according to the circumstances, while a number of issues were left completely or partially unresolved.<sup>1147</sup>

With specific reference to the principles of interpretation for multilingual treaties, Sur appeared to appreciate the solution proposed by the ILC in Article 29(3) of the Draft Convention submitted to the Vienna Conference: in particular, the use of the expression “as far as possible” allowed the interpreter to remove the possible divergences among the authentic texts even where the actual reconciliation was impossible.<sup>1148</sup>

Finally, Germer found that the last clause of Article 33(4) failed to clarify the method through which the meaning that best reconciles the authentic text has to be chosen.<sup>1149</sup>

### 3.5.4. *An alternative approach for the solution of the first two issues*

#### 3.5.4.1. The contextual interpretation of the term “reconcile”

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<sup>1144</sup> See J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 302.

<sup>1145</sup> See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 247-285.

<sup>1146</sup> See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), p. 269

<sup>1147</sup> See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 273-275.

<sup>1148</sup> See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), p. 274.

<sup>1149</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 403 and 423.

In the author's opinion, the way those two issues have been dealt with by scholars is significantly impaired by the unconsciously ambiguous and unclear use, by the very same scholars, of terms such as "texts", "versions", "meaning" and "reconcile", which mirrors the probably unclear perception of the semantic issue underlying those questions.

The following analysis is directed to clarifying those issues.

Article 33(4) VCLT requires the interpreter to verify whether the authentic texts appearing *prima facie* divergent may be construed, under the rules enshrined in Articles 31 and 32 VCLT, so that a clear, unambiguous and reasonable meaning is attributed to all of them. If such a meaning exists, that is the end of the quest: that meaning is to be adopted by the interpreter.

Where this is not the case, however, the interpreter must adopt "the meaning which best reconciles the texts". Such an expression must be read in its context, which first and foremost includes the underlying idea of the unity of the treaty and the connected rule of law, reflected in Article 33(3), that all authentic texts *do have* the same meaning.<sup>1150</sup>

In this context, the use of the term "reconciles" simply means that the interpreter must attribute to all authentic texts one single meaning, notwithstanding the fact that such a meaning could not be provisionally attributed to all those texts on the basis of an interpretation made in accordance with the provisions of Articles 31 and 32 VCLT.<sup>1151</sup> In fact, if the interpreter is arrived at the conclusion that, according to his own judgment, it is apparently not possible to construe all authentic texts in the same way on the basis of the interpretative rules enshrined in Articles 31 and 32 VCLT, it is inevitable that the meanings provisionally attributed to some of those texts in application of such rules will be discharged and a different meaning will be preferred to them as the utterance meaning of the treaty.

The activity of the interpreter thus consists in choosing one of the provisional utterance meanings attributable to the various authentic texts in accordance with the provisions of Articles 31 and 32 VCLT and in attributing it to all other authentic texts.

The possibility of adopting a meaning that could not be reasonably attributed to any of the authentic texts on the basis of the principles enshrined in Articles 31 and 32 VCLT should be rejected,<sup>1152</sup> unless exceptional and very strong evidence exists in favor of such a solution, since it appears contrary to the whole system of interpretation provided for in the VCLT, where the texts of the treaty are the starting point of the interpretative process and the attribution of meaning must comply with the rules

<sup>1150</sup> See also principle (iv) established by the author in section 2 of Chapter 3 of Part I.

<sup>1151</sup> This is also the etymological meaning of "to reconcile", coming from the Latin verb "reconciliare" (to reestablish the agreement; to reunify), which morphologically derives from the union of "conciliare" (i.e. to unify; to establish an agreement) and "re" (once again) (see Online Etymology Dictionary (Douglas Harper. Accessed 14 July 2010); M. Cortelazzo and P. Zolli, *Il Nuovo Etimologico. Dizionario Etimologico della Lingua Italiana* (Bologna: Zanichelli Editore, 1999)).

<sup>1152</sup> See, similarly, U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 363.

provided for in Articles 31 and 32 VCLT. That solution appears also unreasonable, in that it implies that the contracting States failed to fairly convey their intended message through *all* the authentic texts, even where due weight is given to the overall context.

Against this background, to say, as Tabory did,<sup>1153</sup> that the last sentence of Article 33(4) VCLT denies “giving preference to any single language version and to point to the continued regard, as far as possible, to all the versions of the treaty” is thus nonsensical.

Strictly speaking, within the system of the VCLT, it is not possible to give any preference to a text over another, but just to a meaning over another.

However, if even, in her proposition, the reference to the meanings attributed to the various authentic texts is substituted for the reference to the language versions, the proposition still remains nonsensical since either:

- (i) the interpreter has arrived at the conclusion that he cannot construe all the texts in the same way, which by itself demonstrates that some meaning has to prevail over the others, or
- (ii) the interpreter has not arrived at such a conclusion, i.e. he can attribute the same meaning to all authentic texts under Articles 31 and 32 VCLT and, therefore, he does not need to apply the last sentence of Article 33(4) VCLT.

### 3.5.4.2. Evidence from the travaux préparatoires of the VCLT

This interpretation of the term “reconcile” finds support in the *travaux préparatoires* of the VCLT.

First, the possibility that the interpreter had to choose among the meanings provisionally attributed to the various authentic texts was clearly recognized by the members of the ILC.

For instance, before the Vienna Conference modified its text, Article 29 of the 1966 Draft (now Article 33 VCLT) provided that, “when a comparison of the texts discloses a difference of meaning which the application of Articles 27 and 28 does not remove, a meaning which *as far as possible* reconciles the texts shall be adopted”.<sup>1154</sup> Thus, by way of the expression “as far as possible”, the ILC seemed to admit the possibility that the “final” meaning was to be chosen among those provisionally attributed to the otherwise irreconcilable texts.<sup>1155</sup>

To the same extent, in the course of the ILC 874<sup>th</sup> meeting, the Special Rapporteur, in replying to an observation submitted by Mr Verdross, affirmed that “[i]t was inadvisable to try to lay down a general rule providing an automatic solution for the

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<sup>1153</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 202.

<sup>1154</sup> See YBILC 1966-II, p. 224 (emphasis added).

<sup>1155</sup> See, similarly, S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), p. 274.

*case in which two or more authentic texts could not be reconciled.* If, after resort to all the means of interpretation set out in Article 69 and the further means set out in Article 70, it was found impossible to determine the meaning of a treaty provision, then, according to paragraph 4 of the new Article 72, an attempt must be made to find a meaning which as far as possible reconciled the various authentic texts. Beyond that it was inadvisable to go, and *if no reconciliation of the texts was possible, the interpretation should be left to be determined in the light of all the circumstances.*<sup>1156</sup>

The Commentary to Article 29 of the 1966 Draft<sup>1157</sup> was even more explicit in this respect and stated that:

- (i) the presumption that the treaty terms are intended to have the same meaning in each authentic text “requires that every effort should be made to find a common meaning for the texts *before preferring one to another*” and
- (ii) “[t]he plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should *first* be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation”.

Second, from the reading of the minutes of the Vienna Conference it may be inferred that one of the main reasons that led the contracting States to modify the text of Article 29(3) of the 1966 Draft and to adopt the current text of Article 33(4) VCLT was exactly the need to introduce a rule that might give some guidance to the interpreter in case he had to choose among the possible meanings attributable to the various authentic texts.

In the course of the first session of the Vienna Conference, the United States<sup>1158</sup> suggested redrafting the last paragraph of Article 29 in order to include the following clause: “a meaning shall be adopted which is most consonant with the object and purpose of the treaty”.

According to the United States, under such a clause, in cases of persistent differences between the various language versions of a treaty, not a meaning that as far as possible reconciled the texts had to be adopted, but the meaning most consonant with the object and purpose of the treaty, thus explicitly recognizing the eventuality that in certain cases the reconciliation of the different language versions was impossible. The United States representative, in introducing this proposal, stressed that reconciliation of the different language versions was sometimes impossible and this was especially true where a problem of multijuralism occurred, i.e. where the treaty dealt with legal issues and two or more systems of law were involved. According to the United States representative, in such cases it often happened that there was no legal concept in one system that exactly corresponded to a certain legal concept in the other system. Therefore, even if two “equivalent” terms were used, the legal concepts underlying and

<sup>1156</sup> See YBILC 1966-I (part II), p. 210, para. 33 (*emphasis added*).

<sup>1157</sup> See YBILC 1966-II, p. 225, para. 7 (*emphasis added*).

<sup>1158</sup> With reference to the proposals put forward by the United States, see UNCLT-Doc, p. 151.

expressed by them could be non-reconcilable.<sup>1159</sup>

The Republic of Vietnam and Australia took a similar approach in this respect, although the latter suggested certain modifications to the text proposed by the United States.<sup>1160</sup>

The Drafting Committee of the Vienna Conference presented a redrafted text of Article 29 to the Committee of the Whole at its 74<sup>th</sup> meeting, held on 16 May 1968.<sup>1161</sup> Mr Yasseen, in his capacity of Chairman of the Drafting Committee, explained to the Committee of the Whole that the Drafting Committee decided to embrace the idea underlying the United States suggestion of adopting the meaning closest to the object and purpose of the treaty for the purpose of reconciling the different texts.<sup>1162</sup> In this respect, the position taken by the Drafting Committee seemed to be largely influenced by the compromise proposal put forward by Australia. The new text proposed by the Drafting Committee was approved without formal vote and recommended to the Conference for adoption.<sup>1163</sup> The Vienna Conference eventually approved it.

### 3.5.4.3. The concordant position of certain scholars

Other scholars have also allowed the possibility for the interpreter to give preference to (the meaning attributable to) a single authentic text over the others.

According to Hilf, for instance, where reconciliation of the texts by means of the application of the interpretative rules enshrined in Articles 31 and 32 VCLT has failed, Article 33(4) VCLT admits the possibility of giving preference to the meaning of the text that is most in accord with the object and purpose of the treaty.<sup>1164</sup>

Gardiner affirmed that “[a]s article 33(4) requires that regard be had to the object and purpose of the treaty when achieving this reconciliation, the process seems more one of selecting a meaning by application of that criterion than trying to find commonality between elements of provisions whose differences have already become so apparent as to raise the need for reconciliation.”<sup>1165</sup>

<sup>1159</sup> See UNCLT-1<sup>st</sup>, p. 189, para. 41. See, in this respect, also the comment on Part III of the ILC’s 1964 Draft made by the Yugoslavian government (YBILC 1966-II, p. 361).

<sup>1160</sup> With reference to the proposals put forward by the Republic of Vietnam, see UNCLT-Doc, p. 151 and UNCLT-1<sup>st</sup>, p. 189, para. 45. With reference to the proposals put forward by the Australia, see UNCLT-Doc, p. 151 and UNCLT-1<sup>st</sup>, p. 189, paras. 52-53.

<sup>1161</sup> See UNCLT-1<sup>st</sup>, p. 442, para. 35.

<sup>1162</sup> See UNCLT-1<sup>st</sup>, p. 443, para. 38.

<sup>1163</sup> See UNCLT-1<sup>st</sup>, p. 443, para. 38.

<sup>1164</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 102. Similarly J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 301 and F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 405-406.

<sup>1165</sup> See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 360.

Finally, Linderfalk rightly pointed out that “[o]ne cannot reasonably assume the parties to the Vienna Convention to have envisioned the meaning of the VCLT article [33(4)] in such a way that an applier – seeking to identify the meaning that best reconciles the authenticated texts – can choose not only a meaning already given, but also other possible meanings. Comparison must be limited to the meanings already given. [...] the applier must choose between meaning M1 and meaning M2 [*author’s note*: those being the ordinary meaning attributed to the authentic text 1 and the authentic text 2, on the basis of an interpretation conformed to the rules enshrined in Articles 31 and 32 VCLT].”<sup>1166</sup>

#### 3.5.4.4. The decision of the Arbitral Tribunal for the Agreement on German External Debts in the Young Loan arbitration

International courts and tribunals have also admitted that, for the purpose of reconciling otherwise irreconcilable authentic texts, it is necessary to adopt the meaning attributable to one (or more) of them and discharge the others.

The traditional reference, in this respect, is to the *Young Loan* arbitration.

In that case, the majority of the Tribunal held that “[t]he repeated reference by Article 33 (4) of the [VCLT] to the ‘object and purpose’ of the treaty means in effect nothing else than that any person having to interpret a plurilingual international treaty has the opportunity of resolving any divergence in the texts which persists, after the principles of Articles 31 and 32 of the [VCLT] have been applied, by opting, for a final interpretation, for the one or the other text which in his opinion most closely approaches the ‘object and purpose’ of the treaty. Application of Article 33 (4) of the [VCLT] to the case under decision means that the Arbitral Tribunal has the right - and the duty - to adopt that interpretation of the clause in dispute which most closely approaches the object and purpose of the LDA.”<sup>1167</sup>

Similarly, the three dissenting Arbiters affirmed that “[i]n cases where it is obvious that the terms used in the different authentic languages have different meanings that can be ‘reconciled’ only by adopting one or the other, it becomes necessary to apply rules of interpretation not specifically codified by the Convention. For this purpose the rules of customary International Law will govern. Resort to such customary rules is specifically affirmed in the last paragraph of the preamble of the [Vienna Convention on the Law of

<sup>1166</sup> See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 363.

<sup>1167</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 548, para. 39.

Treaties]”<sup>1168</sup>.

The dissenting Arbiters concluded that customary rules of interpretation allowed and, in the case at stake, required giving a special weight to the drafted text in order to interpret multilingual treaties,<sup>1169</sup> which actually seemed to be a reasonable solution in light of the particular overall context (including the *travaux préparatoires* and the facts and circumstances of the negotiation and conclusion of the LDA).<sup>1170</sup>

It is interesting to note, however, that Gardiner<sup>1171</sup> gave an apparently different reading of the Arbitral Tribunal decision in the *Young Loan* arbitration case.

According to Gardiner, by choosing to give effect to the meaning attributed to the German authentic text of Article 2(2) of Annex 1 of the LDA, the Tribunal substantially reconciled such a text with the other authentic texts of the treaty, namely those in the French and English languages, since the meaning attributed the latter were wide enough to encompass the meaning attributed to the former.

In that case, the reconciliation consisted in choosing the “more restrictive”<sup>1172</sup> meaning, i.e., the meaning that was within the range of possibilities in all three languages,<sup>1173</sup> although the Tribunal described its solution as one of selecting the meaning attributed to one authentic text (the German authentic text), over the others, as that most in line with the object and purpose of the treaty.<sup>1174</sup>

The author does not share the reading of the case given by Gardiner.

It must be preliminarily noted that the Tribunal did not proceed as Gardiner described.

First, it concluded that the different texts might be construed so as to remove any

<sup>1168</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578, para. 37.

<sup>1169</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578-585, paras. 37-41.

<sup>1170</sup> See para. 4 of the commentary to Articles 27-28 (YBILC 1966-II, p. 218, para. 4) and para. 9 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 226, para. 9).

<sup>1171</sup> R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 382-383.

<sup>1172</sup> This term is not used by Gardiner; it is derived from the Commentary to Article 75 of the Sir Humphrey Waldock’s Third report on the law of treaties (YBILC 1964-II, p. 65, para. 8).

<sup>1173</sup> See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 382. In other terms, Gardiner seems to mean that the Tribunal selected the only meaning whose denotata were all denoted also by the other meanings. Since the relevant terms in the French (“dépréciée”) and English (“depreciated”) texts of Article 2(2) of Annex 1 of the LDA had been interpreted as denoting both formal currency devaluations and actual currency depreciations due to the revaluation of other currencies, while the term used in the German text (“Abwertung”) had been interpreted as denoting only formal currency devaluations, the latter meaning was the only one whose denotata (i.e. formal currency devaluations) were all also denoted by the other meaning (the contrary, in fact, was not true, since certain denotata of the French and English terms, as interpreted by the Tribunal according to Gardiner, namely the actual currency depreciations due to the revaluation of other currencies, were not denoted by the German term, as interpreted by the Tribunal).

<sup>1174</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 548-550, paras. 39 and 41.

*prima facie* divergence of meanings by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT.<sup>1175</sup>

Then, it stated that “even if credence were given to the view that the discrepancy between the meaning of the German text of the disputed clause, on the one hand, and that of the English and French texts, on the other, could not be resolved by interpretation in the terms of Article 31(1)” VCLT, the application of the last sentence of Article 33(4) VCLT, according to which “any discrepancy between the several authentic texts of a treaty that cannot be eliminated by applying the principles of Articles 31 and 32 should ultimately be settled by attaching that meaning to the provision in question ‘which best reconciles the texts, having regard to the object and purpose of the treaty’ ”, would lead to the same conclusion.<sup>1176</sup>

That said, even limiting the present analysis to the way in which the Tribunal applied the final clause of Article 33(4) VCLT in order to support the latter statement, it does not seem that the reading of the Tribunal’s arguments given by Gardiner may be shared.

First, such a reading is misleading, since it may induce the reader to believe that the Tribunal, in that part of its reasoning, found out an ordinary meaning common to all three authentic texts, while, in fact, the Tribunal:

- (i) clearly stated that it was dealing with the hypothetical situation in which the apparent discrepancy between the various authentic texts could not be resolved by an interpretation made in accordance with Article 31(1) VCLT and
- (ii) concluded that, in such a hypothetical situation, the only solution available consisted in “opting” for one of the conflicting meanings.

Second, that reading might be seen as supporting the idea that reconciliation of otherwise irreconcilable texts could be fairly done by means of choosing the most restrictive meaning, that being the one “within the range of possibilities in all” authentic texts. However, this author submits that such a solution should be rejected as a general rule (and, in fact, the ILC rejected it as such),<sup>1177</sup> since it actually leads the interpreter to

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<sup>1175</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 548, paras. 37-38.

<sup>1176</sup> See Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, at 548, paras. 38-39.

<sup>1177</sup> See section 3.4.4 of this chapter. That solution was explicitly rejected by the ILC in the Commentary to Article 29 of the 1966 Draft, where it stated that (i) the reading given by certain scholars of the PCIJ’s decision in the *Mavrommatis Palestine Concessions* case, according to which the most limited (restrictive) interpretation that can be made to harmonize with all authentic texts is the one which must always be adopted, could not be accepted and that (ii) whether a restrictive interpretation is to be adopted depends upon the nature of the treaty and the particular context in which the ambiguous term occurs (see YBILC 1966-II, pp. 225-226, para. 8). See, similarly, J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80.

<sup>1177</sup> It may be reasonably upheld, for instance, that the drafted text could play a relevant role in the selection of the meaning to be attributed to the otherwise irreconcilable authentic texts and for the purpose of its justification (see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578-585, paras. 37-41).

choose among the meanings provisionally attributable to equally authoritative texts on the basis of a purely accidental element, i.e. that the concept underlying the relevant term used in the “chosen” text denotes a group of items that is a subset of the group of items denoted by the corresponding terms used in the other authentic texts.<sup>1178</sup>

### 3.5.5. *The relevance of the object and purpose of the treaty in order to reconcile the otherwise diverging texts*

With regard to the issue of which meaning should be selected in order to reconcile the authentic treaty texts, it seems fairly obvious that such a meaning should be the one that best reflects the common intention of the parties. In order to select that meaning, the interpreter assesses and balances all the available elements and items of evidence,<sup>1179</sup> although he appears bound to ascribe a significant weight to the object and purpose of the treaty due to the specific reference thereto included in Article 33(4) VCLT.<sup>1180</sup>

The reference to the “object and purpose of the treaty” in Article 33(4) VCLT, however, raises two questions that need to be addressed.

The first question concerns “which” object and purpose of the treaty should be taken into account in order to apply the last clause of Article 33(4) VCLT, since it is possible, and indeed not infrequent, that a treaty has many objects and purposes. Gaja, in this respect, pointed out that “the reference to the object and purpose of a treaty raises difficulties because treaties generally do not define their object and purpose and, moreover, may have a plurality of objects and purposes, without establishing any clear hierarchy among those objects and purposes”.<sup>1181</sup>

<sup>1178</sup> Such a solution, in fact, had been explicitly rejected by the ILC in the Commentary to Article 29 of the 1966 Draft, where it stated that (i) the reading given by certain scholars of the PCIJ’s decision in the *Mavrommatis Palestine Concessions* case, according to which the most limited (restrictive) interpretation that can be made to harmonize with all authentic texts is the one which must always be adopted, could not be accepted and that (ii) whether a restrictive interpretation is to be adopted depends upon the nature of the treaty and the particular context in which the ambiguous term occurs (see YBILC 1966-II, pp. 225-226, para. 8; see, similarly, J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 80).

<sup>1179</sup> It may be reasonably upheld, for instance, that the drafted text could play a relevant role in the selection of the meaning to be attributed to the otherwise irreconcilable authentic texts and for the purpose of its justification (see Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany (Young Loan)*, 59 *International Law Reports* (1980), 494 *et seq.*, dissenting opinion of Messrs. Robinson, Bathurst and Monguilan, at 578-585, paras. 37-41).

<sup>1180</sup> It goes without saying that the meaning to be adopted cannot contrast with the object and purpose of the treaty (or that of the construed provision), as otherwise:

- (i) it would prove to be an unreasonable meaning and, as such, contrary to an interpretation in good faith of the treaty;
- (ii) *a fortiori* - it could not be regarded as one of the reasonable meanings preliminary attributed to the various authentic texts and, thus, it could not be one of the meanings among which the interpreter could select the “final” utterance meaning.

<sup>1181</sup> See G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and*

The interpretative problem created by the plurality of the treaty's objects and purposes may be overcome where the provision to be construed appears to pursue only one of such objects and purposes. In such a case, it may be reasonably upheld that the specific object and purpose of that provision is the one that must be taken into account in order to apply Article 33(4) VCLT.

However, this is not always the case, since some objects and purposes may underlie all treaty provisions and, in turn, certain treaty provisions may be regarded as pursuing more than one object and purpose. In such cases, the interpreter must balance the relevant objects and purposes, in order to find a reasonable equilibrium among them with reference to the specific situation at stake, in the same way as he would do in respect of potentially conflicting principles of law.

The second question concerns the double reference to the object and purpose of the treaty included in Article 33(4) VCLT. In this respect, it has been correctly pointed out that the object and purpose of the treaty comes into operation twice in the process of resolving apparent divergences of meanings between the various authentic texts, i.e.:

- (i) indirectly, through the reference to the general rule of interpretation encompassed in Article 31 VCLT, which includes the object and purpose of the treaty among the primary means of interpretation;
- (ii) directly, in cases of residual divergences, where it is stated that in reconciling the various authentic texts the interpreter must have "regard to the object and purpose of the treaty".<sup>1182</sup>

The existence of such a double reference to the object and purpose of the treaty was criticized by some delegations at the Vienna Conference.<sup>1183</sup>

Among scholars, Mössner considered redundant the reference to Articles 31 and 32 made by Article 33(4) VCLT, since generally a divergence between the various authentic texts would be discovered during the routine interpretation process provided for in Articles 31 and 32 VCLT and, therefore, already tackled through their application for the purpose of removing it.<sup>1184</sup>

Similarly, Hilf doubted the usefulness of a reference to the object and purpose of the treaty in order to solve a divergence that could not have been removed by an interpretation based on the rules enshrined in Articles 31 and 32 VCLT, in which the

*Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 94.

<sup>1182</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 101; P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 425.

<sup>1183</sup> In particular, the criticism was raised by the representatives of Israel and Trinidad Tobago (see UNCLT-1<sup>st</sup>, p. 190, paras. 66 and 68 respectively).

<sup>1184</sup> See J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 300 *et seq.*

object and purpose of the treaty also played a relevant role. The author, however, recognized that the double reference to the object and purpose of the treaty at least made clear that the interpreter should adopt the meaning most compatible with such object and purpose.<sup>1185</sup>

Germer considered such a double reference to be artificial, since the problems arising in connection with a divergence between different authentic texts would be essentially the same as those encountered in respect of a divergence between different provisions of a treaty authenticated in a single language. In both cases, the purpose of the interpreter would be to find out the meaning that the contracting States intended to attach to the terms of the treaty.<sup>1186</sup>

Contrary to the above scholars, Engelen maintained that the repeated reference, in Article 33(4) VCLT, to the object and purpose of the treaty is not without significance.

On the one hand, Article 31 VCLT emphasizes the primacy of the text of the treaty and does not admit of teleological interpretations going beyond what is expressed or necessarily implied in the text. In this context, the object and purpose of the treaty plays a limited role, being taken into account for the purpose of determining the ordinary meaning attributable to undefined terms.

On the other hand, Article 33(4) VCLT places the main emphasis on the object and purpose of the treaty and admits, as a last resort, of more liberal interpretations in an effort to reconcile the authentic texts, which would not be admissible in applying Article

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<sup>1185</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 101-102.

<sup>1186</sup> See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 425-426. In this respect, this author submits that Germer, although concluding in a reasonable manner by making reference to the intention of the parties, used the wrong analogy since the problems faced by the interpreter in the two cases he mentioned are not "essentially the same". Although they certainly present certain similarities, the relation between two potentially antinomic provisions (rules) differs from the relation between two authentic texts of same provision (rule). With reference to the former, the scope, the contexts and the objects and purposes of the two provisions (rules) are not the same and their comparison and the analysis of their interaction generally play a fundamental role for the purpose of removing the apparent antinomy. With regard to the latter, there is only one scope, one context and one set of objects and purposes, since only one provision (rule) is at stake. Therefore, the above-mentioned dynamic analysis (comparison and analysis of the interaction) cannot be applied to the latter and a more static type of analysis has to be performed instead. In addition, the solution of the potential antinomies is generally different: while in the case of apparently divergent authentic texts the interpreter may choose between the meaning provisionally attributed to one text and that provisionally attributed to the other text in order to determine their common meaning, in the case of apparently incompatible provisions (rules) of a treaty, the interpreter is called upon to modify the apparent scope of one (or both) of them, without the possibility of simply discharging one of the two. All in all, in one case the interpreter is faced with two distinct rules, while in the other he is faced with a single rule expressed by means of two distinct utterances. Hence, the purpose of the interpretation is different: in the former case, the interpreter is called to determine the exact scope of each rule, in order to eliminate possible antinomies (i.e. to eliminate the possibility that their contextual application to a single instance will lead to contrary results); in the latter case, the interpreter is called upon to construe two (or more) utterances in order to determine their single utterance meaning, i.e. the single rule.

31 VCLT.<sup>1187</sup>

In a similar vein, Tabory concluded that the purpose of the reference to the treaty object and purpose is different on the two occasions, since in the closing provision of Article 33 VCLT, the reference could be seen as a warning to the interpreter not to abandon the due regard for the “object and purpose” when reconciling the various authentic texts, even where other elements of the general rule of interpretation had been abandoned.<sup>1188</sup>

In broad terms, the thesis put forward by Engelen and Tabory appears the most convincing, as it makes clear that the roles played by the treaty object and purpose in Article 31 VCLT and in the last sentence of Article 33(4) VCLT are different.

As mentioned in the previous sections, the last sentence of Article 33(4) VCLT requires the interpreter who could not find a common meaning attributable to all authentic texts by applying Articles 31 and 32 VCLT<sup>1189</sup> to choose among the various meanings provisionally attributed to such texts in order to establish the treaty utterance meaning. In this regard, the object and purpose of the treaty works as the most important yardstick for the interpreter to choose among those meanings.

How such a yardstick is actually used by the interpreter depends on the particular circumstances of the case and on the personal background of the interpreter: the actual approach may range from the position expressed by Linderfalk, according to whom the interpreter has to choose the interpretation through which the object and purpose of the treaty is best realized,<sup>1190</sup> to that supported by Gaja, who submitted that the “object and purpose” constitutes the “framework” within which the texts have to be reconciled, i.e. the choice between the possible meanings has to be made.<sup>1191</sup>

<sup>1187</sup> See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 403-404.

<sup>1188</sup> See, in this sense, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 212-213.

<sup>1189</sup> In the context of Articles 31 and 32 VCLT, the object and purpose of the treaty plays a double role: first, it constitutes a relevant element to be considered in order to determine the common “ordinary” meaning to be attached to the corresponding terms used in the various authentic texts: second, it functions as a external limit that draws the borderline between reasonable and unreasonable (i.e. contrary to good faith) interpretations of the treaty.

<sup>1190</sup> See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 366.

<sup>1191</sup> See G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 94. Gaja further clarifies his position on the role theoretically played by the “object and purpose” in Article 33(4) VCLT (although recognizing that the case law analysis seems to confirm a trend towards giving decisive weight to such criterion in order to overcome divergences in multilingual texts – see *ibidem*, p. 98) by stating that “only an interpretation that is sustainable according to the object an purpose of the treaty could be viable to this effect” (see *ibidem*, p. 94). According to the author, however, the requirement that the reconciling interpretation (i.e. meaning) must be “sustainable according to the object an purpose of the treaty” seems redundant at this stage of the analysis/justification process, for any interpretation (i.e. meaning) not being sustainable according to the object an purpose of the treaties should have been already rejected as non-admissible under the rules of interpretation provided for under Articles 31 and 32 VCLT, which would exclude it from the array of possible interpretations (i.e. meanings), remaining after the application of said Articles 31 and 32, among which the reconciling interpretation (i.e. meaning) is to be chosen.

Conversely, the author does not share the idea, underlying the thesis upheld by Engelen and Tabory, that the last sentence of Article 33(4) VCLT allows the interpreter to have recourse to more liberal interpretations and to abandon the other elements of the general rules of interpretation. This aspect is further examined in the following section.

### 3.5.6. *Article 33(4) VCLT and special meanings*

As the last sentence of Article 33(4) VCLT requires the interpreter, in order to establish the final utterance meaning, to choose among the various meanings provisionally attributed to the authentic treaty texts in accordance with Articles 31 and 32 VCLT, the author submits that the final utterance meaning is always established through the application of the ordinary rules of interpretation (enshrined in Articles 31 and 32 VCLT) to one of the authentic treaty texts.

However, since in this case the final utterance meaning differs from the meanings provisionally attributed to (at least) some of the authentic treaty texts,<sup>1192</sup> which in turn were determined under the broadest application of the interpretative rules enshrined in Articles 31 and 32 VCLT, the question arises of whether the final utterance meaning might also be regarded as the result of the application of the general rules of interpretation (enshrined in Articles 31 and 32 VCLT) to such authentic treaty texts.

A brief example may help clarify that issue. Consider a treaty with two language authentic texts (A and B), which have been construed by the interpreter under Articles 31 and 32 VCLT as meaning “X” and “Y”, respectively. Assume that the interpreter has established that the meaning that “best reconciles the texts, having regard to the object and purpose of the treaty” is “X”. Obviously, meaning “X” may be regarded as the result of the application of the rules of interpretation enshrined in Articles 31 and 32 VCLT to text A. However, the legitimate question arises of whether meaning “X” might also be regarded as the result of the application of the rules of interpretation enshrined in Articles 31 and 32 VCLT to text B.

If the question is answered in the positive, this implies that the application of the last clause of Article 33(4) VCLT was not necessary and, strictly speaking, that that clause cannot be said to have been applied, since its prerequisite was not fulfilled (i.e. no difference of meaning existed that the application of Articles 31 and 32 did not remove). Hence, this answer leads to the conclusion that the final clause of Article 33(4) VCLT is never applicable.

If the question is answered in the negative, conversely, this means that treaties may be legitimately construed in a way that is contrary to that compelled by the rules of interpretation enshrined in Articles 31 and 32 VCLT, which in turn would destroy the foundations of the customary system of interpretation codified by the VCLT, since the

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<sup>1192</sup> Otherwise the interpreter would not have had the need to apply the rule encompassed in the last sentence of Article 33(4) VCLT.

very same VCLT would allow the non-application of its rules of interpretation in order to construe a treaty text, thus reducing them to no more than a set of non-binding suggestions.

The author submits that this apparent paradox should be disentangled as follows.

First, the latter answer should be rejected in order to preserve the reliability and the internal coherence of the VCLT system of interpretation.

In fact, its acceptance would imply for the interpreter to have at his disposal two sets of interpretative rules: one set, made up exclusively of the rules enshrined in Articles 31 and 32 VCLT, to be used where monolingual treaties are at stake and another set, made up of both the rules enshrined in Articles 31 and 32 VCLT and some other (teleological?) rule, to be applied to multilingual treaties.

The existence of such a double set of rules, apart from being internally incoherent, could be relied on by the interpreter in order to argue in favor of a final utterance meaning that could not be reasonably attributed to any of the authentic texts on the basis of Articles 31 and 32 VCLT, since Article 33(4) VCLT would in this case allow the interpreter to liberally and teleologically construe all authentic treaty texts.<sup>1193</sup>

Second, the argument is put forward that the last sentence of Article 33(4) must be construed as a rule that indirectly allows the interpreter to take, as the “special meaning” that the parties intended to attach to a certain term used in one of the authentic treaty texts, the meaning provisionally attributed to the corresponding term used in another authentic text and eventually chosen by the interpreter as the final utterance meaning thereof, i.e. as the meaning that “best reconciles the texts, having regard to the object and purpose of the treaty”.

In this respect, the author does not share the proposition, made by Engelen, that “[s]imply preferring one authentic text to another is no doubt in flagrant contradiction of the principle of equal authority of the texts (Article 33(1) VCLT)”<sup>1194</sup> since the choice made by the interpreter:

- (i) is not between the two authentic texts, but between the meanings provisionally attributed thereto;
- (ii) is aimed solely at determining the final utterance meaning common to all authentic texts;
- (iii) entails the adoption of the (ordinary or special) meaning provisionally attributed to a term employed in one authentic text<sup>1195</sup> as the special meaning of the corresponding term employed in the other authentic text.<sup>1196</sup>

<sup>1193</sup> Engelen and Tabory apparently consider that the last sentence of Article 33(4) VCLT allows the interpreter to opt for such an interpretation (see previous section).

<sup>1194</sup> See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 405.

<sup>1195</sup> On the basis of the rules of interpretation enshrined in Article 31 and 32 VCLT.

<sup>1196</sup> The same, *mutatis mutandis*, holds true with regard to the expressions (and not terms) used in the various authentic texts, as well as in cases where a corresponding term or expression does not compare in a certain authentic text, but nonetheless it may be implied therein.

Under this perspective:

- (i) the fact that the (ordinary or special) meaning provisionally attributed to a certain term(s) in one (or more) authentic text(s) is regarded as the meaning “which best reconciles the texts, having regard to the object and purpose of the treaty”, is thus taken as the decisive evidence of the common intention of the parties to attach that meaning, as a “special meaning”, to the corresponding terms used in the other authentic texts;
- (ii) the last sentence of Article 33(4) VCLT is regarded as a rule of a purely procedural nature, purporting to offer a way out for those interpreters that considered the attribution of a certain special meaning to the relevant treaty term as an intolerable stretch of its reasonable meaning.

### 3.5.7. *Conclusions on research question f)*

Under Article 33(4) VCLT, where a comparison of the authentic treaty texts discloses a difference of meaning that the application of Articles 31 and 32 VCLT does not remove, the interpreter must adopt “the meaning which best reconciles the texts”. Such an expression must be read in its context, which first and foremost includes the underlying principle of the unity of the treaty and the connected rule of law, reflected in Article 33(3), that all authentic texts *do have* the same meaning.<sup>1197</sup>

In that context, the use of the term “reconcile” simply means that the interpreter must attribute to all authentic texts a single meaning, notwithstanding the fact that such a meaning could not be provisionally attributed to all those texts on the basis of an interpretation made in accordance with the provisions of Articles 31 and 32 VCLT.

The activity of the interpreter thus consists in choosing one of the provisional utterance meanings attributable to the various authentic texts in accordance with the provisions of Articles 31 and 32 VCLT and attributing it to all other authentic texts.

The possibility of adopting a meaning that could not be reasonably attributed to any of the authentic texts on the basis of the principles enshrined in Articles 31 and 32 VCLT should be rejected, unless exceptional and very strong evidence exists in favor of such a solution, since it appears contrary to the whole system of interpretation provided for in the VCLT, where the texts of the treaty are the starting point of the interpretative process and the attribution of meaning must comply with the rules provided for in Articles 31 and 32 VCLT. That solution appears unreasonable as well, in that it implies that the contracting States failed to fairly convey their intended message through *all* the authentic texts, even where due weight is given to the overall context.

The meaning to be selected by the interpreter in order to reconcile the authentic treaty texts should be the one that best reflects the common intention of the parties.

In order to select that meaning, the interpreter assesses and balances all available

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<sup>1197</sup> See principle (iv) established by the author in section 2 of Chapter 3 of Part I.

elements and items of evidence, although he appears bound to ascribe a significant weight to the object and purpose of the treaty due to the specific reference thereto in Article 33(4) VCLT. In other terms, the object and purpose of the treaty works as the most important yardstick for the interpreter to choose, among the meanings provisionally attributed to the authentic treaty texts on the basis of the principles enshrined in Articles 31 and 32 VCLT, the final utterance meaning of the treaty.

In this respect, since treaties generally have many objects and purposes, the interpreter should use as yardstick those objects and purposes that appear relevant with respect to the provision to be interpreted and balance them in order to find a reasonable equilibrium with reference to the specific situation at stake.

Finally, the last sentence of Article 33(4) should be construed as a rule that indirectly allows the interpreter to take, as the “special meaning” that the parties intended to attach to a certain term used in one of the authentic treaty texts, the (ordinary or special) meaning provisionally attributed to the corresponding term used in another authentic text and eventually chosen by the interpreter as the final utterance meaning, i.e. as the meaning that “best reconciles the texts, having regard to the object and purpose of the treaty”. Under this perspective:

- (i) the fact that the (ordinary or special) meaning provisionally attributed to a certain term(s) in one (or more) authentic text(s) is regarded as the meaning “which best reconciles the texts, having regard to the object and purpose of the treaty”, is thus taken as the decisive evidence of the common intention of the parties to attach that meaning, as a “special meaning”, to the corresponding terms used in the other authentic texts;
- (ii) the last sentence of Article 33(4) VCLT is regarded as a rule of a purely procedural nature, purporting to offer a way out for those interpreters that considered the attribution of a certain special meaning to the relevant treaty term as an intolerable stretching of its reasonable meaning.

So construed, the rule provided for in the last sentence of Article 33(4) VCLT appears an eminently reasonable solution, since:

- (a) it is in line with principle (iv) established by the author in section 2 of Chapter 3 of Part I, according to which any alleged discrepancy in meaning among the authentic texts of a treaty is only apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the number of its authentic texts;
- (b) it restates the content of principle (v) established by the author in section 2 of Chapter 3 of Part I, in that, on the one hand, it requires the interpreter to establish the final utterance meaning on the basis of the overall context and, in particular, of the parties’ object and purpose and, on the other hand, it does not overestimate the relevance of the treaty texts for the purpose of establishing the final utterance meaning, providing the possibility for the interpreter to attach to the terms used in certain authentic texts a special meaning that might seem

*prima facie* difficult to attribute to it, but which nonetheless appears to best suit the parties' intention and the treaty's object and purpose.

### 3.6. The case of the prevailing text

#### 3.6.1. Research questions addressed in this section

The present section is aimed at tackling the following three research (sub)question(s), here briefly illustrated by means of examples.

- g) *Where the treaty provides that a certain authentic text is to prevail in the case of divergences: (i) at which point of the interpretative process must there be recourse to such a prevailing text?*

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

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

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

Assume that the members of the former Royal Family of Austria-Hungary held some of their property in their individual capacity and not together as Royal Family.<sup>1198</sup>

In order to decide whether the property individually held by the members of the former Royal Family could be legitimately transferred to the States arising from the dismemberment of the Monarchy under Article 208 of the Peace Treaty of Saint Germain, the interpreter could follow two alternative and mutually exclusive argumentative paths, as well as any of the paths lying between such two extremes. The two outermost argumentative paths that the interpreter might follow are:

- (i) he automatically applies the French (prevailing) text, since a *prima facie*

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<sup>1198</sup> The example is derived from Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq.* [Case No. 235].

divergence between the French and English texts was alleged to exist;  
 (ii) he has recourse to all available means of interpretation in order to reconcile the French and English texts, before concluding that there is an actual divergence between the provisional meanings of such texts and, therefore, before relying exclusively on the treaty's prevailing text.

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

This question is addressed in section 3.6.2.

- g) *Where the treaty provides that a certain authentic text is to prevail in the case of divergences: (ii) what must the interpreter do if the prevailing text is ambiguous or obscure?*

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

This question is addressed in section 3.6.3.

- g) *Where the treaty provides that a certain authentic text is to prevail in the case of divergences: (iii) what must the interpreter do if the prevailing text contrasts with the other coherent authentic texts?*

With regard to the previous example, what should the interpreter do where he provisionally concluded that:

- (i) the French (prevailing) text of Article 208 of the Peace Treaty of Saint German did not to allow the transfer of the property individually held by the members of the former Royal Family to the States arising from the dismemberment of the Austro-Hungarian Monarchy, while  
 (ii) both the English and the Italian authentic texts seemed to permit such a transfer?

Should he try to remove the apparent difference of meaning by having recourse to all available means of interpretation? Where he failed to remove the *prima facie* discrepancy among the French, English and Italian authentic texts, should he opt for the meaning attributable to the most numerous concordant texts, or rely on the French prevailing text?

This question is addressed in section 3.6.4.

### 3.6.2. *When does the recourse to the prevailing text become compulsory?*

### 3.6.2.1. The position of the ILC and the discordant case law of national and international courts and tribunals

As the ILC correctly detected,<sup>1199</sup> the application of treaty provisions giving priority to a particular authentic text in the case of potential divergences in meaning<sup>1200</sup> may raise the difficult issue of the exact point in the interpretative process at which such provision should be put into operation.

In particular, one could wonder whether the prevailing text should be automatically applied as soon as the slightest difference appears between the wordings of the various authentic texts,<sup>1201</sup> or recourse should instead first be had to all the relevant means of interpretation provided for under Articles 31 and 32 VCLT, in order to reconcile the texts, before concluding that there is in effect a divergence between the provisional utterance meanings of such texts.

According to the ILC,<sup>1202</sup> this issue should be resolved by the interpreter on a case-by-case basis, since the intention of the parties inserting such a provision in the treaty might vary greatly from one extreme to the other. In this respect, the interpreter should first and foremost determine the intention of the parties in relation to that issue.

The case law of national and international courts and tribunals mirrors such uncertainty.<sup>1203</sup>

As the ILC also noted, in some cases courts and tribunals simply applied the prevailing text from the outset without going into the question of whether there was an actual divergence between the authentic texts.<sup>1204</sup> As example of such an approach, the ILC referred to the *Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly* case,<sup>1205</sup> in which the PCIJ based its decision exclusively on the French

<sup>1199</sup> See paragraph 4 of the commentary to the 1966 Draft (YBILC 1966-II, p. 224, para. 4).

<sup>1200</sup> Infrequently, treaty's final clauses provide that, in the case of divergent or unclear texts, the interpreter has to apply not a predetermined authentic text, but the text that best satisfies certain requirements in the specific case at stake. Although such uncommon final clauses are not dealt with in the present study, due to the fact that they hardly ever appear in tax treaties, it may be interesting to reproduce below the text of the declaration (in French) appended to the 1869 Extradition Agreement between Austria-Hungary and Italy, concluded in Florence on 27 February 1869:

*“Que les deux textes de la Convention, savoir le texte allemand et le texte italien, doivent être considérés comme également authentiques, et que s’il pouvait se trouver une divergence entre ces deux textes, de même que s’il surgissait un doute sur l’interprétation suivra l’interprétation la plus favorable à l’extradition du prévenu.”*

<sup>1201</sup> Or even from the outset of the interpretative process, without any attempt to apply the other authentic texts.

<sup>1202</sup> See paragraph 4 of the commentary to the 1966 Draft (YBILC 1966-II, p. 224, para. 4).

<sup>1203</sup> For a comprehensive analysis of the case law on this matter before the conclusion of the VCLT, see J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 129-136.

<sup>1204</sup> See paragraph 4 of the commentary to the 1966 Draft (YBILC 1966-II, p. 224, para. 4).

<sup>1205</sup> PCIJ, 12 September 1924, *Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly* (Bulgaria v. Greece), judgment, pp. 3-10.

authentic text of paragraph 4 of the Annex to Section IV of Part IX of the Treaty of Neuilly,<sup>1206</sup> which was to prevail over the other authentic texts (in the English and Italian languages) in the case of divergences.<sup>1207</sup>

Another instance of such an approach is that of the *Aron Kahane successeur v. Francesco Parisi and the Austrian State* case,<sup>1208</sup> where the Austrian-Romanian Mixed Arbitral Tribunal concluded, contrary to the submission of the Austrian government, that the English authentic text should not be taken into consideration for the purpose of interpreting the Treaty of Saint-Germain.<sup>1209</sup>

According to the Austrian-Romanian Mixed Arbitral Tribunal, the interpretation of the debated provision of the Treaty of Saint-Germain was to be based solely on the French authentic text thereof, apparently due to the fact that, under the final clause of that treaty, in the case of divergence the French text prevailed over the English and Italian authentic texts.<sup>1210</sup>

In other occasions, however, the competent courts and tribunals carried out a comparison of the various authentic texts in order to ascertain the intention of the parties, notwithstanding the fact that the treaty provided for a prevailing text to be applied in cases of discrepancies in meanings.

This was the case, for instance, with reference to the decision delivered by the Supreme Court of Poland in the *Archdukes of the Habsburg-Lorraine House v. the Polish State Treasury* case,<sup>1211</sup> which dealt with the interpretation and application of Article 208 of the Treaty of Saint-Germain.<sup>1212</sup>

The case concerned the claim advanced by the Archdukes of the Habsburg-Lorraine House for the restitution of lands that the Polish State had acquired under Article 208 of the Treaty of Saint-Germain, according to which the States to which the territory of the former Austro-Hungarian Monarchy was transferred and the States arising from the dismemberment of that Monarchy acquired all property and possessions situated within their territories belonging to the former or existing Austrian Government, including “the private property of members of the former Royal Family of Austria-Hungary”. The plaintiffs maintained that the acquisition of property by the Polish State was unlawful, since the members of the former Royal Family had held such property

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<sup>1206</sup> Treaty concluded on 27 November 1919 in Neuilly-sur-Seine, France.

<sup>1207</sup> See Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly, PCIJ, Ser. A., No. 3, 1924, pp. 5-7.

<sup>1208</sup> Romanian-Austrian Mixed Arbitral Tribunal, 19 March 1929, *Aron Kahane successor v. Francesco Parisi and the Austrian State*, 8 Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix (1929), 943 *et seq.*

<sup>1209</sup> Treaty concluded on 10 September 1919 in Saint-Germain-en-Laye, France.

<sup>1210</sup> Except with regard to Parts I (Covenant of the League of Nations) and XIII (Labour) of the Treaty, for the purpose of which the French and English texts were considered of equal force.

<sup>1211</sup> See Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 Annual digest of public international law cases (1929-1930), 365 *et seq.* [Case No. 235].

<sup>1212</sup> Treaty concluded on 10 September 1919 in Saint-Germain-en-Laye, France.

(mainly lands) in their individual capacity. For that reason, such property could not be considered to be property of the former Royal Family, i.e. “biens privés de l’ancienne famille souveraine d’Autriche-Hongrie”, as provided for by the French authentic text of Article 208 of the Treaty,<sup>1213</sup> which was to prevail over the other authentic texts (in the English and Italian languages) in the case of divergence.<sup>1214</sup>

The Polish Supreme Court, however, dismissed the appeal of the Archdukes of the Habsburg-Lorraine House. In giving grounds for its decision, the Court affirmed the following.<sup>1215</sup>

First, the final clause of the Treaty of Saint-Germain, according to which (i) the treaty was ratified in French, English, and Italian and, (ii) in the case of divergence, the French text of which was to prevail,<sup>1216</sup> had to be interpreted as meaning that all three texts were authentic and therefore relevant for interpretative purposes, the superior status of the French text coming into play only in case the existence of a material divergence was established. In fact, since the contracting parties decided to have texts in different languages, it had to be assumed that their decision was intended to produce some legal consequence, i.e. that they wanted to attribute legal authority to each text for the purpose of the interpretation and application of the treaty. This conclusion drawn by the Court appears in line with the maxim “ut res magis valeat quam pereat”, since the contrary assumption that a text (e.g. the English, or Italian text) had no importance at all was tantamount to maintaining that the parties, in having drafted and authenticated it, wished to regard such a text as non-existent.

Second, it was not possible to establish the existence of a material divergence between the various authentic texts without a careful analysis thereof. Such an analysis, carried out with the aid of all available means of interpretation, was purported to determine all possible meanings attributable to the various authentic texts. No material divergence might be said to exist solely because a *prima facie* literal difference existed.

Third, the true significance of the final clause was that, where an authentic text might be interpreted in several ways, one of which reconcilable with the other authentic texts, such a common meaning was to prevail. In fact, a general rule of interpretation existed according to which, where an authentic text is unclear or ambiguous, it is necessary to take into account the meaning of the other authentic texts in order to properly interpret it. Hence, an authentic text could be disregarded only insofar as none of its possible meanings might also be attributed to the text that had to prevail in the case of divergence.

Thus, it seems that the Polish Supreme Court arrived at the conclusion that the

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<sup>1213</sup> See Supreme Court (Poland), 16 June 1930, Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury, 5 Annual digest of public international law cases (1929-1930), 365 *et seq.* [Case No. 235], at 367.

<sup>1214</sup> See the final clause the Treaty of Saint-Germain (immediately following Article 381 thereof).

<sup>1215</sup> See Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 Annual digest of public international law cases (1929-1930), 365 *et seq.* [Case No. 235], at 368-371; J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 130-131.

<sup>1216</sup> Except in Parts I (Covenant of the League of Nations) and XIII (Labour), where the French and English texts were of equal force.

only actual difference existing between (i) a final clause providing for the prevalence of one authentic text over the others in the case of divergence and (ii) a final clause simply stating the equal authority of the various authentic texts consists in that where an otherwise irreconcilable difference is established to exist, the former (i) provides the interpreter with a quick and certain means of resolving that divergence, while the latter (ii) does not. Conversely, as long as no material divergence has been proved to exist, both final clauses require the interpreter to carefully analyse the various authentic texts, in order to find, where possible, a meaning common to all of them.<sup>1217</sup>

In the *Clorinaldo Devoto v. Austrian State* case,<sup>1218</sup> the Italian-Austrian Mixed Arbitral Tribunal, in interpreting paragraph 4 of the Annex to Section IV of Part X of the Treaty of Saint-Germain,<sup>1219</sup> which instituted a special settlement procedure for claims presented by nationals of an Allied or Associated Power against Austria, interpreted the ambiguous (prevailing) French authentic text in light of the more precise English authentic text, which allowed only one of the meanings attributable to the former. According to the tribunal, such a meaning was also in line with the clear intention of the parties, determined on the basis of all available elements and items of evidence.

Similarly, in the *De Paoli v. Bulgarian State* case,<sup>1220</sup> the Italian-Bulgarian Mixed Arbitral Tribunal, in interpreting Article 179 of the Treaty of Neuilly,<sup>1221</sup> which allowed certain diplomatic or consular claims to be submitted to the Mixed Arbitral Tribunal established under that Treaty, interpreted the ambiguous (prevailing) French authentic text in light of the more precise English authentic text.

In light of this uncertainty the ILC, doubting whether it would have been appropriate to try to resolve such an issue by including a specific rule of interpretation in its draft articles on the Law of Treaties, limited itself to the insertion of a general reservation for cases where the treaties contain this type of provision.<sup>1222</sup>

### 3.6.2.2. The solution proposed by Hardy and the possible criticisms thereof

As previously mentioned, in facing the ambiguity of the relevant case law on the matter,

<sup>1217</sup> See Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 Annual digest of public international law cases (1929-1930), 365 *et seq.* [Case No. 235], at 371, note III.

<sup>1218</sup> See Italian-Austrian Mixed Arbitral Tribunal, 23 April 1924, *Clorinaldo Devoto v. Austrian State*, 4 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1925), 500 *et seq.*, at 502; on such a case, see also J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 134-135.

<sup>1219</sup> Treaty concluded on 10 September 1919 in Saint-Germain-en-Laye, France.

<sup>1220</sup> See Italian-Bulgarian Mixed Arbitral Tribunal, 8 January 1925, *De Paoli v. Bulgarian State*, 6 *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (1927), 451 *et seq.*, at 456.

<sup>1221</sup> Treaty concluded on 27 November 1919 in Neuilly-sur-Seine, France.

<sup>1222</sup> I.e. the reservation included in paragraphs 1 and 4 of Article 33 VCLT.

the ILC expressed the view that the issue concerning the exact moment at which the prevailing text should be given precedence was to be resolved by the interpreter on a case-by-case basis, since the intention of the parties might vary considerably in this respect. Therefore, the quest of the interpreter should first and foremost be directed to ascertaining the intention of the parties with regard to the meaning of the relevant final clause.

The conclusion of the ILC, although reasonable in theory, presents a significant drawback in its actual application. In fact, as Hardy correctly pointed out, “final clauses are nearly always drawn up somewhat automatically”,<sup>1223</sup> so that it is reasonable to assume that the contracting States generally do not really discuss with each other the meaning to be attached thereto and, even worse, they probably do not have any accurate idea of when the prevailing text should be given precedence.

Hardy,<sup>1224</sup> in order to overcome the interpretative problem stemming from the fact that “final clauses are nearly always drawn up somewhat automatically”, suggested that the intention of the parties that agreed on the adoption of a final clause providing for a prevailing text in the case of divergence seems to be, “above all, to eliminate any uncertainty that might arise from the plurality of texts and to provide the judge with a sure and rapid means of settling any dispute on the subject”.

He continued by saying that “to require of a judge that he constantly keep comparing the texts and only as a last resort recognize that the authentic text [ed.’s note: the prevailing authentic text] must prevail would seem contrary to that intention”.

Then, although recognizing that it would be somewhat arbitrary to set an exact limit up to which the effort at textual conciliation should be sustained by the adjudicator before the prevailing text is actually given precedence, Hardy concluded that it would appear reasonable to say that there is a divergence and, consequently, an obligation to apply the prevailing text as soon as the comparison of the texts no longer suffices to reconcile them. He supported such a conclusion by affirming that “the only type of divergence which the contracting parties would normally have in mind is a purely verbal or prima facie divergence, for the much more complex notion of a discrepancy which cannot be solved except by the most subtle process of construction can only be grasped

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<sup>1223</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132. See also A. Parolini, “Italy”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 255, where the author admits that it is “not altogether clear whether the different wordings of the “prevalence” clause [in Italian tax treaties] are meant to reach different results” (the typical wordings of such clauses, in the Italian tax treaty practice, are the following: “in case of doubt”, “in case of dispute”, in case of divergences in interpretation”, “in case of divergences in interpretation and application of the treaty”); similarly, R. Cadosch, “Switzerland”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 303 *et seq.*, at 310-311, who notes, with regard to Swiss tax treaties, that “[t]here is no obvious reason for a different wording of the [prevalence] clause, and Switzerland’s Federal Tax Administration does not assume any difference in practice”.

<sup>1224</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132.

after exhaustive study of the relevant case law” and that, in “any event, when the texts can only be reconciled by reference to the preparatory work, a refusal to apply the authentic text [ed.’s note: the prevailing authentic text] would render the relevant final clauses wholly meaningless and constitute a flagrant disregard of the will of the contracting parties”.<sup>1225</sup>

The reasoning and conclusions upheld by Hardy may be criticized in several respects, just as Hardy found to be the case with regard to the decision delivered by the Polish Supreme Court in the *Archdukes of the Habsburg-Lorraine House v. the Polish State Treasury* case.

First, Hardy did not give any reason in support of the presumption that the intention of the contracting parties, when introducing a highly routine and automatic final clause providing for a prevailing text in the case of divergence, is (also) to “to provide the judge with a sure and rapid means of settling any dispute on the subject”.

One could presume as well that the intention of the parties is to provide the interpreter with a single and clear means to construe the multilingual treaty where no (other) reconciliation appears possible, i.e. where no single reasonable meaning may be attributed to all authentic texts when they are interpreted in good faith and the light of the overall context.<sup>1226</sup>

Second, the assertion that “the only type of divergence which the contracting parties would normally have in mind is a purely verbal or *prima facie* divergence” clashes with the previous claim that “final clauses are nearly always drawn up somewhat automatically”, since the latter seems to imply that the contracting States, when agreeing on the inclusion of the relevant final clause, probably do not have any accurate idea of when the prevailing text should be given precedence, while the former suggests that such contracting States generally have a clear idea thereof and draw the final clause accordingly: therefore the two sentences are contrary, even if not (necessarily) contradictory.

Third, that very same assertion (“the only type of divergence which the contracting parties would normally have in mind is a purely verbal or *prima facie* divergence”) is not supported by any adequate evidence: why could the contracting parties not have in mind the divergence remaining between the meanings attached to two (or more) authentic

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<sup>1225</sup> See, accordingly, T. Bender and F. Engelen, “The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties”, in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 31, where the authors submit that “the parties precisely intended to avoid the exacting task of reconciling the different texts by applying the rather “abstract” rules of interpretation set forth in the Vienna Convention. In case of divergence, these rules at least require a careful comparison of the three texts, and because of the language barrier, this would raise serious practical difficulties. [...] It is, therefore, submitted that a *prima facie* divergence of interpretation between the [two] texts should suffice to invoke the supremacy of the [prevailing] text”.

<sup>1226</sup> I.e. in accordance with the rules of interpretations enshrined in Articles 31 and 32 VCLT.

texts after they have been interpreted in light of their overall context, i.e. by taking into account all the relevant elements and items of evidence?

Moreover, the connected reference to “the exhaustive study of the relevant case law”, which would be necessary in order to grasp the “much more complex notion of a discrepancy which cannot be solved except by the most subtle process of construction”, is absolutely misleading and probably the result of a conceptual confusion: the contracting States do not need to have in mind all the possible divergences and uncertainties that might arise with reference to all the provisions of a treaty in order to be aware of the possibility that such “complex discrepancies” may result from the interpretation of the different authentic texts thereof. The average experience of an international lawyer or diplomat suffices more than abundantly in this respect.

Finally, the conclusion that, “when the [authentic] texts can only be reconciled by reference to the preparatory work, a refusal to apply the [prevailing text] would render the relevant final clauses wholly meaningless” is false: where the intention of the parties is to provide the interpreter with a single and clear means to construe the multilingual treaty in case no reconciliation appears possible in light of the ordinary rules of interpretation,<sup>1227</sup> a reconciliation of the authentic texts (also) by reference to the *travaux préparatoires* does not render the final clause meaningless, it simply render superfluous the recourse to the prevailing text in the specific case.

### 3.6.2.3. The solution proposed by the author

The author submits that, unless some decisive evidence to the contrary is available,<sup>1228</sup> final clauses providing for a prevailing text in the case of divergences should be construed as requiring the interpreter to compare the *prima facie* divergent authentic texts in light of all the available elements and items of evidence, in order to determine whether a reconciliation is possible by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, before relying exclusively on the prevailing text.<sup>1229</sup>

The apparently divergent authentic texts, therefore, should be construed in light of the overall context and compared with each other in the quest for a common meaning. Only where, at the end of the interpretative process, no common meaning may be reasonably said to exist should preference be given to the meaning of the prevailing text.<sup>1230</sup>

<sup>1227</sup> I.e. the rules of interpretations enshrined in Articles 31 and 32 VCLT.

<sup>1228</sup> Such evidence may stem from the analysis of any of the means of interpretation provided for under Articles 31 and 32 VCLT.

<sup>1229</sup> See L. Ehrlich, “L’interprétation des traités”, 24 *RCADI* (1928), 5 *et seq.*, at 98-99 and Research in International Law, “Draft Convention on the Law of Treaties with Comments”, 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 973.

<sup>1230</sup> Somewhat similarly, Jennings and Watts maintained that the presumption of equal meaning enshrined in Article 33(3) VCLT “suggests that, even where the parties stipulate that one or two authentic texts shall prevail, they should normally be taken to intend that some attempt should first be made to reconcile the authentic texts so as to discover whether there really is any divergence, rather than the ‘master’ text should be

There are several arguments that may be relied upon in order to support this conclusion.

First, from logical and semantic perspectives, no divergence in meaning between two or more authentic texts may be said to exist before the meaning thereof have been determined. Thus, since:

- (i) the only possible meaning for interpretative purposes is the utterance meaning and
- (ii) the utterance meaning is the result of the process of interpretation of an authentic text in light of the overall context and, in particular, of the elements and means of interpretation enshrined in Articles 31 and 32 VCLT,

no divergence between the authentic texts may be said to exist before such texts are construed in light of the overall context and by applying the rules of interpretation provided for in Articles 31 and 32 VCLT.

Second, the conclusion put forward by the author fits better (than the conflicting solution upheld by Hardy) in the system of the VCLT. As the ILC correctly pointed out, although plurilingual in expression, any treaty remains one in law. In particular:

- (i) “in law there is only one treaty - one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge”,<sup>1231</sup>
- (ii) “[p]lurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the rules set out in Articles 27 and 28 [ed.’s note: now Articles 31 and 32 VCLT]. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another”,<sup>1232</sup>
- (iii) “whether the ambiguity or obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of

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applied automatically right at the outset” (see R. Jennings and A. Watts (eds.), *Oppenheim’s International Law. Volume I. Peace* (London: Longman, 1992), p. 1283, note 3).

<sup>1231</sup> See paragraph 6 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 6).

<sup>1232</sup> See paragraph 7 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7).

the parties by recourse to the normal means of interpretation”.<sup>1233</sup>

Even where the parties have agreed that, in the case of divergence, a specific authentic text is to prevail, the treaty remains one in law and the very same fact that the priority of the prevailing text is relevant only in the case of a divergence supports such a conclusion.

In this perspective, the solution put forward by the author, in the absence of strong evidence in favor of a different intention of the parties, preserves as much as possible the unity of the treaty, requiring the interpreter to compare the *prima facie* diverging texts and to construe them on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT in order to establish the treaty utterance meaning.

Third, the conclusion put forward by the author does not conflict with any of the provisions of the VCLT.

In particular, it does not clash with Article 33(1) VCLT, since the latter does not state that authentic texts other than the prevailing one are not authoritative for interpretative purposes, but simply provides (tautologically) that the parties are free to decide that in the case of divergence a text is to prevail over the other, otherwise authoritative, texts.<sup>1234</sup> In this respect, the combined reading of paragraphs 1 and 2 of Article 33 VCLT supports the conclusion that all authenticated texts are to be treated as authoritative for interpretative purposes, unless the parties agree that some of them are not and evidence exists of such an agreement.

The solution proposed by the author does not conflict with Article 33(4) VCLT either. The last sentence of that article establishes a rule of interpretation for cases where (i) an otherwise irreconcilable divergence exists and (ii) the parties did not agree that a specific text is to prevail in the case of divergence.<sup>1235</sup> However, Article 33(4) VCLT does not state anything on the interpretative process that should be followed where the parties agreed that, in the case of divergence, a specific text is to prevail. An *a contrario* reasoning, according to which the fact that Article 31(4) VCLT explicitly states that an interpretation of the *prima facie* divergent texts according to Articles 31 and 32 VCLT must be carried out where the parties did not agree on a prevailing text, while it does not state anything with reference to the case where the parties so agreed, implies that in the latter case no attempt should be made to remove the *prima facie* divergence by interpreting the authentic texts in accordance with Articles 31 and 32 VCLT and that the prevailing text should instead apply from the outset, is faulty. There is nothing in the text of Article 33 VCLT, nor in the overall context, that justifies a similar implicature.

Likewise, it cannot be reasonably upheld that, since Article 31(4) VCLT speaks of “a difference of meaning which the application of Articles 31 and 32 does not remove”, thus implying that such a difference of meaning results before the authentic

<sup>1233</sup> See paragraph 7 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7).

<sup>1234</sup> See, to this extent, the distinction made by the ILC between the case where the parties decide that only certain authenticated texts are authentic (i.e. authoritative) and the case where the parties agree (implicitly or explicitly) on the authoritativeness of all the authenticated texts and on the prevalence of a certain authentic text where a divergence exists (YBILC 1966-II, p. 224, para. 3).

<sup>1235</sup> See sections 3.4. and 3.5 of this chapter.

texts are interpreted according to such articles, the term “divergence” in Article 33(1) VCLT must be construed as a difference of meaning resulting before the authentic texts are interpreted according to Articles 31 and 32 VCLT. Although such an interpretation could at first sight appear a sound “contextual” interpretation, three relevant pieces of evidence contradict it:

- (i) the terminology used is different, “difference” v. “divergence”;
- (ii) in paragraph 8 of the commentary to Article 29 of the 1966 Draft, the ILC used the term “divergence” as a synonym for “difference of meaning which the application of Articles 27 and 28 does not remove”, which would actually point to the opposite conclusion;<sup>1236</sup>
- (iii) paragraph 4 of the commentary to Article 29 of the 1966 Draft is clear enough in denying the existence, under Article 33 VCLT, of any obligation for the interpreter to apply the prevailing text as soon as a *prima facie* difference between the various authentic texts is put forward.

Fourth, the author submits that, in order to ascertain the existence of a “verbal” divergence (as suggested by Hardy), the interpreter should preliminarily determine the “verbal” meaning of the authentic texts being compared.

However, the distinction between an interpretation intended to determine the “verbal” meaning of an utterance and that intended to determine the utterance meaning thereof appears to be a vague one: how accurate should the construction of the compared authentic texts carried out by the interpreter be in order to fairly show the existence of a “verbal” divergence and thus justify the exclusive reference to the prevailing text?

This vague minimum-interpretation requirement could detract from the most attractive feature of Hardy’s proposal, i.e. that of providing the judge with a sure and rapid means of settling any dispute. In order to avoid such drawback, “verbal” meanings should be equated to dictionary meanings and any contextual interpretation should be avoided. This approach, however, would lead to the extremely recurrent appearance of “verbal” differences between the various authentic texts, for it is hard for two different lexemes in two different languages to be associated exactly (and solely) to the same concept. That, in turn, would entail the extremely recurrent exclusive recourse to the prevailing text. In such a way, as a matter of fact, any interested party could unilaterally invoke and obtain the right to rely exclusively on the prevailing text, whenever it would appear more favorable for it than the other authentic texts, by simply highlighting a *prima facie* dictionary divergence. In this respect, the final clause would be transformed into a mere procedural tool in the hands of interested parties.

However, since treaties should be interpreted and applied in good faith, it seems reasonable that the prevailing text is to be preferred to the other authentic texts only insofar the existence of an divergence between the provisional utterance meanings of those texts have been ascertained in accordance with the rules of interpretation enshrined in Articles 31 and 32 VCLT, not sufficing in that respect that an interested party merely put forward a presumed difference of meanings in order to rely on the potentially more

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<sup>1236</sup> See YBILC 1966-II, p. 225, para. 8.

favorable prevailing text.<sup>1237</sup>

Fifth, the solution proposed by Hardy appears not coherent with the system of interpretation provided for by the VCLT, the former attributing relevance to pure “verbal” differences, while the latter allowing special meaning to be attributed to treaty terms and stressing that the ordinary meaning thereof is to be determined in good faith, in light of the object and purpose of the treaty and of the relevant context.

Sixth, the comparison of the allegedly divergent authentic texts, combined with an interpretation thereof based on Articles 31 and 32 VCLT, enhances the trustworthiness of the utterance meaning determined and argued for by the interpreter.

In fact, on the one hand, textual comparison may shed light on possible alternative meanings that could be not so evident where the interpreter were just engaged in construing a single authentic text, even where it was the prevailing text. On the other hand, the comparison may restrict the set of possible meanings attributable to the prevailing texts construed in isolation, since some of them could be incompatible with the meanings reasonably attributable to the other authentic texts.

While the potential lower reliability of an interpretation arrived at by construing an authentic text in isolation is acceptable where no apparent divergence has been put forward by any party, since in this case the presumption of clarity and identity of the provisional utterance meanings of the various authentic text operates, the same conclusion does not hold true where the risk of a potential discrepancy in the provisional utterance meanings has been pointed out and must accordingly be set aside by means of comparative interpretation.

It is interesting to note that Hardy recognized that issue and, with reference to the assertion made by certain authors that either the authentic texts are divergent and thus the authentic text must necessarily be applied, or they are in agreement and so the prevailing text may still be applied because equivalent to the other texts, concluded that such an assertion was false “because the interpretation most compatible with all the texts is not necessarily the one suggested by the [prevailing] text viewed separately”.<sup>1238</sup> However, he maintained that it was highly unlikely that the contracting parties ever worried about the falsehood of such an assertion and that the method of having direct recourse to the prevailing text in the case of verbal divergences presented one practical advantage that should suffice to ensure its adoption: being simple, rapid and sure.<sup>1239</sup>

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<sup>1237</sup> See, to this extent, the argument put forward by the plaintiffs in the *Archdukes of the Habsburg-Lorraine House v. the Polish State Treasury* case, according to which a divergence existed between the authentic texts and therefore exclusively the prevailing text (the French text, potentially more favorable to them) had to be used for interpretative purposes (see Supreme Court (Poland), 16 June 1930, *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, 5 *Annual digest of public international law cases* (1929-1930), 365 *et seq.* [Case No. 235], at 367).

<sup>1238</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 126 and 133-134.

<sup>1239</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 134.

Seventh, it is submitted that the slightly different forms that the treaty's final clauses giving preference to one authentic text in cases of divergences may take do not generally affect the conclusion drawn in this section.

A survey of the final clauses adopted in tax treaties has shown that a variety of formulas, such as "in the case of dispute in the interpretation", "in the case of doubt", "in the case of any divergence of interpretation", "in the case of divergence between the texts", is actually used by contracting States.<sup>1240</sup>

However, as has been already noted, final clauses are nearly always drawn up somewhat automatically and contain a number of more or less stereotypical formulas that are accepted in diplomatic parlance, but which courts and tribunals do not take into consideration because they have lost their true meaning.<sup>1241</sup> Such a somewhat automatic use of stereotypical and interchangeable formulas significantly lower the relevance of their texts for the purpose of their interpretation, due to the likely absence of a clear agreed intention of the contracting parties in that respect, or, at least, to the likely absence of a strong link between the intention of the parties and the formula actually adopted in the final clause of the treaty. Since the interpretation that the author put forward in this section is mostly grounded on:

- (i) the only common feature of those formulas, i.e. that the prevalence of one text over the other authentic texts is made subject to the existence of an interpretative issue due to the multilingual character of the treaty,
- (ii) the logical and semantic analysis of the premise of such final clauses, i.e. the existence of a divergence between the authentic texts and
- (iii) the need to preserve as much as possible the principles enshrined in Articles 31-33 VCLT and to construe such final clauses in a fashion that is coherent with those principles,

it is sensible to conclude that slight changes in the wording of the final clauses do not impact on the reliability of that interpretation.

Finally, it is the author's opinion that, where the provisional utterance meaning of the prevailing text is given priority by the interpreter, the principle of the unity of the treaty causes that meaning to become the final utterance meaning (as well) of all other authentic texts. In this respect, with regard to those texts that could not be provisionally

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<sup>1240</sup> In this respect, it is also interesting to note the statement of a former Canadian tax treaty negotiator, according to which, in cases where treaties are concluded in two or more official languages, "some countries would insist that, in cases of inconsistencies between the two versions, the language used during the negotiations would prevail over the other language" (see J-M. Déry, "The Process of Tax Treaty Negotiation", in B. Arnold and J. Sasseville (eds.), *Special Seminar on Canadian Tax Treaties: Policy and Practice* (Toronto: Canadian Tax Foundation, 2000), 2 *et seq.*). This statement reflects the common ground that the prevailing authentic text in (tax) treaties is in most cases the *drafted text*. From the perspective of the issue dealt with in the present section, such a general coincidence of prevailing text and drafted text is an argument for concluding that the prevailing text (wearing the hat of the *drafted text*) might be given by the interpreter a special weight for the purpose of determining the common meaning of apparently diverging authentic texts, even before (from a logical perspective) the apparent divergence is resolved by recourse to the prevailing text as such.

<sup>1241</sup> See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132 and 133.

attributed the meaning of the prevailing text on the basis of an interpretation in line with Articles 31 and 32 VCLT, it is submitted that the latter meaning must be regarded as the “special meaning” that the parties intended to attach to the relevant treaty terms employed in those texts.

### 3.6.3. *What if the meaning of the prevailing text is ambiguous, obscure or unreasonable?*

Where the meaning attributable to the prevailing text, construed in isolation from the other texts and according to the rules of interpretation enshrined in Articles 31 and 32 VCLT,<sup>1242</sup> is ambiguous, obscure or unreasonable, there is still chance that the analysis of the other authentic texts may shed some light on the utterance meaning of the former.<sup>1243</sup>

That holds particularly true where a single meaning is attributable to all the other texts, which appears clear, unambiguous and reasonable.

However, even in this case, the interpreter is not bound to attribute such a common meaning to the prevailing text as well. The VCLT does not dispose over any mechanical rule in that respect, since the ILC and, arguably, the Vienna Conference considered that, although attributing to the unclear, ambiguous, or unreasonable (prevailing) text of a treaty the clear, unambiguous and reasonable meaning of the other texts appears a solution of common sense, it might not always be the correct one<sup>1244</sup> since much may depend on the circumstances of each case and the evidence of the intention of the parties.<sup>1245</sup>

That notwithstanding, it is the author’s opinion that in most cases the interpreter will choose to attribute that common meaning to the prevailing text as well.

In fact, where the latter is ambiguous and one of its possible meanings coincides

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<sup>1242</sup> That may well be the case where, for instance, the person applying the treaty is basing his interpretation thereof exclusively on such a text, on the basis of the right to rely on any of the authentic texts, taken in isolation, which is established by Article 33, paragraphs 1 and 3 VCLT.

<sup>1243</sup> See T. Bender and F. Engelen, “The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties”, in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 32.

<sup>1244</sup> This is particularly true with regard to the case at stake, considering that quite often the prevailing text is also the drafted text.

<sup>1245</sup> See the explanation given by Sir Humphrey Waldock, during the 700<sup>th</sup> ILC’s meeting, concerning the elimination by the ILC Drafting Committee of paragraph 4 (and implicitly 5) of Article 74 of his Third Report, according to which, in cases where the meaning of one text was clear and that of the other was not, the former had to be adopted (YBILC 1964-I, p. 319, para. 57); see also paragraph 9 of the commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 226, para. 9).

See, partially in accordance, T. Bender and F. Engelen, “The final clause of the 1987 Netherlands Model Tax Convention and the interpretation of plurilingual tax treaties”, in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 12 *et seq.*, at 32-33.

with the meaning attributed to the other authentic texts,<sup>1246</sup> such a meaning will be probably adopted,<sup>1247</sup> absent any strong evidence in favor of the other meaning(s) attributable to the prevailing text.<sup>1248</sup>

Where the meaning of the prevailing text appears unclear, the clear, unambiguous and reasonable meaning of the other text(s) may probably persuade the interpreter of the possibility to attribute the same meaning to the prevailing text, especially considering that a proper treaty interpretation under the VCLT system is far from being a literal interpretation.

Similarly, where the meaning provisionally attributed to the prevailing text is, although clear and unambiguous, somewhat awkward,<sup>1249</sup> the analysis of the other authentic texts may shed some light on the utterance meaning of the former, highlighting alternative solutions that had not emerged from the interpretation of the prevailing text taken in isolation.

In the improbable event that the interpreter was not persuaded to extend to the prevailing text the meaning common to the other texts,<sup>1250</sup> the prevailing text meaning should be theoretically adopted according to the final clause. In this scenario, the utterance meaning of the other authentic texts could still be somewhat relevant in directing the interpreter in his task of elucidating the meaning of the prevailing text. The issue, here, is substantially reduced to one of interpreting a single authentic text (the prevailing text) according to the rules enshrined in Articles 31 and 32 VCLT, where the other authentic texts would enter into play as part of the context (the text of the treaty).

#### 3.6.4. *What about the contrast between the prevailing text and the other (consistent) texts?*

As previously noted, textual comparison may shed light on possible alternative meanings which might have been overlooked by the interpreter engaged in construing an authentic text in isolation.

Therefore, it is possible that textual comparison may direct the interpreter towards the attribution of the same meaning to all the authentic texts.<sup>1251</sup>

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<sup>1246</sup> Where none of the meanings attributable to the prevailing text, interpreted in isolation, coincides with the meaning attributed to the other texts, either the comparison of the text leads the interpreter to review and modify his original interpretations, so that an acceptable common meaning is arrived at, or, where this is not the case, the ambiguous meanings of the former should prevail. The meaning attributable to the other authentic texts, however, could still play a role in directing the interpreter in choosing among the alternative meanings of the prevailing text.

<sup>1247</sup> See also the conclusion drawn in section 3.4.4 of this chapter.

<sup>1248</sup> Such strong evidence will be probably missing, since otherwise the interpreter would have reasonably solved the ambiguity in favor of the other meaning even before the comparison of the texts.

<sup>1249</sup> But not so unreasonable to be considered to be an unacceptable interpretation under the canon of good faith.

<sup>1250</sup> It is submitted that, especially in the case of unclear or unreasonable meaning of the prevailing text, it would be hard for the interpreter to convincingly justify the adoption of a meaning other than the clear and reasonable meaning attributable to the other authentic texts.

<sup>1251</sup> Such a common meaning could theoretically be either the meaning attributed to the prevailing text,

However, where this is not the case, the author is of the opinion that the final clause requires the interpreter to adopt the meaning of the prevailing text, provided that it is clear, unambiguous and reasonable.

### 3.6.5. *Conclusions on research question g)*

The application of a treaty provision giving priority to a particular text, in cases of divergences of meaning among the authentic treaty texts, requires the interpreter to establish at which stage of the interpretative process the prevailing text should be given such a priority.

The VCLT is silent in this respect and the case law of national and international courts and tribunals does not provide any clear guidance.

According to the ILC, this issue should be resolved by the interpreter by determining, in each single case, the intention of the parties with regard to the meaning of the relevant final clause.

This conclusion, although reasonable in theory, presents a significant drawback in its actual application, since “final clauses are nearly always drawn up somewhat automatically”,<sup>1252</sup> so that it is reasonable to assume that the contracting States generally do not really discuss with each other the meaning to be attached thereto and, even worse, they probably do not have any accurate idea of when the prevailing text should be given precedence.

The author submits that, unless some decisive evidence to the contrary is available, final clauses providing for a prevailing text in the case of divergences should be construed as requiring the interpreter to compare the *prima facie* divergent authentic texts in light of all the available elements and items of evidence, in order to determine whether a reconciliation is possible by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, before relying exclusively on the prevailing text.

The apparently divergent authentic texts, therefore, should be construed in light of the overall context and compared with each other in the quest for a common meaning. Only where, at the end of the interpretative process, no (provisional) common meaning may be reasonably said to exist should preference be given to the meaning of the prevailing text.

This solution substantially corresponds to principle (viii) established by the author in section 2 of Chapter 3 of Part I, according to which, where the treaty provides that a specific text has to prevail in cases of discrepancy in meanings among the authentic texts, it appears reasonable to assume that the parties intended the utterance

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interpreted in isolation, or that attributed to the other text(s), interpreted in isolation.

<sup>1252</sup> See J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132.

meaning of that text to prevail only where an interpretation based on the *prima facie* divergent authentic texts and the overall context does not lead the interpreter to convincingly attribute a single utterance meaning to all such texts.

From a different perspective, where the meaning attributable to the prevailing text, construed in isolation from the other texts and according to the rules of interpretation enshrined in Articles 31 and 32 VCLT, is ambiguous, obscure or unreasonable, there is still a chance that the analysis of the other authentic texts may shed some light on the utterance meaning of the former.

That holds particularly true where a single meaning is attributable to all other texts, which appears clear, unambiguous and reasonable. Even in this case, however, the interpreter is not bound to attribute such a common meaning to the prevailing text as well. The VCLT does not provide for any mechanical rule in that respect, since the ILC and, arguably, the Vienna Conference considered that, although attributing to the unclear, ambiguous, or unreasonable (prevailing) text of a treaty the clear, unambiguous and reasonable meaning of the other texts appears a solution of common sense, it might not always be the correct one since much may depend on the circumstances of each case and the evidence of the intention of the parties. In the improbable event that the interpreter is not persuaded to extend to the prevailing text the meaning common to the other texts, the prevailing text meaning must be theoretically adopted according to the final clause. In this scenario, the utterance meaning of the other authentic texts may still be relevant in directing the interpreter in his task of elucidating the meaning of the prevailing text.

Finally, where the clear, unambiguous and reasonable meanings attributable to the prevailing text and to the other texts appear to conflict with each other, textual comparison may shed light on possible alternative meanings which might have been overlooked by the interpreter engaged in construing the authentic texts in isolation. It is thus possible that textual comparison may direct the interpreter towards the attribution of the same meaning to all authentic texts.

However, where this is not the case, the final clause requires the interpreter to adopt the meaning of the prevailing text, provided that it is clear, unambiguous and reasonable.

#### **4. The interpretation of legal jargon terms employed in (multilingual) treaties**

##### **4.1. Research question addressed in and structure of this section**

The present section is aimed at tackling the following research question, here briefly illustrated by means of an example.

*h) What is the impact on the answers to be given to the questions discussed in*

*section 3 of the fact that legal jargon terms are employed in the treaty texts?*

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

1. In the determination [...] of any *criminal charge* against him, everyone is entitled to a fair [...] hearing by an independent and impartial tribunal [...]

3. Everyone charged *with a criminal offence* has the following minimum rights:

[...]

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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1. Toute personne a droit à ce que sa cause soit entendue équitablement [...] par un tribunal indépendant et impartial, établi par la loi, qui décidera [...] soit du bien-fondé de toute *accusation en matière pénale* dirigée contre elle.

[...]

3. Tout *accusé* a droit notamment à:

[...]

e) se faire assister gratuitement d'un interprète, s'il ne comprend pas ou ne parle pas la langue employée à l'audience.

With regard to the interpretation of Article 6(3) of the ECHR, in particular for the purpose of determining whether a person has been charged with a criminal offence in a specific case, the questions discussed in section 3 of this chapter are compounded by the fact that the relevant terms used in the two authentic texts, i.e. “*criminal charge*” and “*accusation en matière pénale*”, are (i) legal jargon terms used under the laws of States employing English and French as their official languages (e.g. legal jargon terms used under English and French domestic law) and (ii) terms generally regarded as corresponding to legal jargon terms used under the law of other contracting States (e.g. the German law term “Straftat”).

Suppose that a certain misconduct, for instance careless driving causing a traffic accident in Germany, is considered a “criminal offence” under English law, but is not considered a “Straftat” under German law (as well as under French law).<sup>1253</sup>

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

- (i) did the parties intend to attribute to the terms “*criminal charge*” and “*accusation en matière pénale*” a meaning other than the meanings they have under the laws of the States using them (e.g. under English and French domestic law) and other than the meanings of the corresponding terms used under the domestic law of the contracting States that are drafted in languages other than English and French (e.g. the German legal jargon term “Straftat”)?
- (ii) if question (i) is answered in the affirmative, how such a meaning should be determined? Should it be determined autonomously from the meanings under domestic law? Or should it reflect the minimum common denominator of the meanings that the legal jargon terms used in the authentic treaty texts have

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<sup>1253</sup> The example is derived from ECtHR, 21 February 1984, *Öztürk v. Germany* (Application no. 8544/79).

- under the laws of the States using such terms (e.g. under English and French domestic law)? Or should such a common denominator be determined taking into account also the meanings of the corresponding terms used under the domestic law of other contracting States, which are drafted in languages other than English and French (e.g. the German legal jargon term “Straftat”)?
- (iii) if question (i) is answered in the negative, which domestic law meaning should be used by the interpreter? Should it be the meaning under, say, English or French law? Or should it be the meaning under the law of the State(s) presenting the most relevant connection(s) with the case (although such a law is written neither in English nor in French)? Or, on the contrary, should it be the meaning under the *lex fori*?<sup>1254</sup>
- (iv) how should questions (i) through (iii) be solved where the terms and expressions employed in the authentic treaty texts seemed to diverge to a more significant extent, for instance where the English authentic text used the terms “regulatory charge” and “regulatory offence”?

With a view to answering such questions, the present section is structured as follows.

Section 4.2 describes the differences existing between legal jargon terms and day-to-day language terms that are most relevant for the purpose of the present study.

Section 4.3 elaborates on the idiosyncratic features of legal jargon terms and shows what impact they may have on the interpretation of treaties (in general). In particular, sections 4.3.2 and 4.3.3 describe the most common approaches developed in the field of uniform law conventions with regard to the construction of legal jargon terms.

Section 4.4 highlights the most relevant issues faced by the interpreter when construing treaties employing legal jargon terms.

Finally, section 4.5 examines how the presence of legal jargon terms in the texts of multilingual treaties may affect their interpretation, in light of the analysis carried out by the author in sections 3 and 4 of this chapter.

## **4.2. *Difference between legal jargon and day-to-day language terminology***

Legal jargon terminology differs from day-to-day language terminology mainly from three perspectives. Such differences are those responsible for the additional issues that the interpreter may encounter when interpreting treaties where legal jargon terms are used.

First, legal jargon terminology, as compared to day-to-day language terminology, is generally characterized by less ambiguous relations between terms and their underlying

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<sup>1254</sup> With regard to private law disputes, a relevant alternative would be the meaning under the law of the State to which the private international *lex fori* directs.

concepts.<sup>1255</sup>

In fact, one of the most distinguishing features of legal jargons consists in that the social subgroups using them tend to relate each jargon term with only one concept, especially by means of legal definitions, in order to increase the precision of the language and thus enhance legal certainty and clearness of in-depth analysis on complex subject matters.<sup>1256</sup>

Second, concepts underlying legal jargon terms are generally less vague than concepts associated with day-to-day language terms.

The scope of the former, in fact, is more clearly agreed upon by the social subgroup using that particular legal jargon, legal concepts being characterized by a comparatively higher number of prototypical denotata (and prototypical non-denotata) than concepts associated with day-to-day language terms. The reduction of the twilight zone<sup>1257</sup> and, therefore, of the vagueness of most legal concepts is mainly due to the extensive use of legal definitions and, even more significantly, to the existence of settled praxis, well-established scholars' opinions and converging case law.

Third, the shape and scope of legal concepts tend to vary more significantly from one national community<sup>1258</sup> to another than the shape and scope of concepts underlying day-to-day language terms.

As previously mentioned, concepts and relations among them are not *a priori* schemes for categorizing knowledge data; on the contrary, they are the product of human cognitive processes that, in turn, are influenced by the very same knowledge data that

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<sup>1255</sup> This does not mean, however, that within a national legal system each term corresponds exclusively to one underlying concept. It is, in fact, common, that in different branches of law of a single legal system a term corresponds to (more or less slightly) different concepts, so that different legal jargons may be said to exist in connection with different branches of law (see, among others, R. Guastini, *Lezioni di teoria analitica del diritto* (Torino: Giappichelli, 1986), at 6 *et seq.*). This holds particularly true for tax law, where statutes abundantly employ terms originally used in private and commercial law (see F. Gény, "Le particularisme du droit fiscal", in R. Carré de Malberg et al., *Mélanges R. Carré de Malberg* (Paris: Librairie du Recueil Sirey, 1933), 193 *et seq.*), although not infrequently either the legislator by means of ad hoc definitions, or the interpreters by means of legal construction do make them correspond, in the context of tax law, to concepts other than those underlying such terms in private and commercial law. In such cases, i.e. where the same legal terms are used in both private law and tax law statutes, one of the main issues that the tax law interpreter has to face is whether such terms are used (i) in their private law terms capacity, which would lead the interpreter to refer to the legal concepts associated with those terms under the relevant private law, or (ii) as autonomous tax law terms, thus allowing the interpreter to attach thereto different concepts (see similarly P. Locher, "The Swiss Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 79 *et seq.*, at 84 *et seq.*).

<sup>1256</sup> The reverse phenomenon, consisting in that each legal concept is related with one single legal jargon term, is not equally widespread, it not being uncommon that a single concept is (univocally) associated with two or more legal jargon synonyms.

<sup>1257</sup> I.e. the gray area of items that for a significant number of the social group members are, and for another significant part thereof are not, denoted by a certain legal jargon term.

<sup>1258</sup> Here, the term "national community" is intended to denote the leading community among those that form the population of a State. The author is aware that such a definition implies a significant simplification of the often problematic relations existing among national identity, State jurisdiction and social communities living within one State territory.

such schemes are used to categorize.

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

That said, concepts underlying day-to-day language terms are, for a large part, connected to everyday human experiences, which are perceived through the senses, and customs. Nowadays such everyday perceptions, experiences and customs do not vary extensively from one national community to another.

This present state of affairs is due to manifold causes, the most relevant being the common biological nature of human beings, the very limited types of environment permitting human life on the planet, the wide-ranging homologation of every-day habits and the cultural convergence that had taken place in Europe since the Roman Empire through the Middle Ages and the Renaissance and has spread out all over the world boosted by colonialism from the fifteenth and sixteenth centuries until the mid-twentieth century and that has been enhanced by the significant migrations of the last two centuries, the booming of international trade after the Second World War and the late western cultural imperialism supported by means of mass communication, such as radio, television, and internet. As a result, the concepts underlying the majority of the day-to-day terms in a certain language quite accurately match the concepts underlying the corresponding day-to-day terms in other languages. By means of simplification, it might be said that most of the concepts underlying day-to-day language terms are, broadly speaking, the same in each language and in each national community.

However, it may be noted that, with regard to some specific fields of human knowledge, there are still significant cultural diversities existing among different national communities. Law is indubitably one of these fields. National legal systems have slowly developed through decades, sometimes centuries, and, notwithstanding the recent harmonization of some of their subfields achieved via international agreements and through the action of international organizations, they remain even today among the most idiosyncratic features of national communities.<sup>1259</sup> This idiosyncrasy of national legal systems is reflected in the peculiarity of their underlying legal concepts, which normally do not have accurate equivalents in other legal systems, but just general correspondents (if any), i.e. concepts that fulfill similar functions within the respective

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<sup>1259</sup> It is interesting to note, in this respect, that even in cases where certain domestic statutory provisions appear similar in two or more States, as a consequence of an international effort towards harmonization or of the fact that a specific legal discipline of one State has been transplanted in the legal order of another State, in the absence of an international organization undertaking the task of guaranteeing a uniform interpretation of such provisions, the latter are often differently interpreted and applied in the various States due to the different legal systems and cultures thereof (see, similarly, M. Barassi, “Comparazione giuridica e studio del diritto tributario straniero”, in V. Uckmar (ed.), *Diritto Tributario Internazionale* (Padova: Cedam, 2005), 1499 *et seq.*, at 1528, footnote 97).

legal systems and with which they share a significant part of their prototypical denotata.<sup>1260</sup> Such idiosyncratic legal concepts are generally expressed by means of legal jargon terminology. Thus, the lack of an accurate correspondence between the legal concepts used in two national legal systems is mirrored by the absence of proper synonyms in the two legal jargons.<sup>1261</sup>

This idiosyncrasy of national legal systems is commonly referred to as *multijuralism*.<sup>1262</sup>

#### 4.3. *The possible approaches to the interpretation of legal jargon terms used in treaties*

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<sup>1260</sup> See, with reference to income tax law, H. J. Ault and B. J. Arnold, *Comparative Income Taxation: A Structural Analysis* (New York: Aspen Publishers, 2004), at xxii and xxiii, where the authors point out that, although some recognizable “family resemblances” and common “broad features” exist among the income tax legal systems that belong to the same legal tradition (mainly common law v. civil law traditions), each system “has evolved in its own particular set of approaches and principles”, which have led each system to have its own proper set of detailed rules and concepts. In that respect, the authors conclude that “[t]here is of course always a danger in attempting to relate legal rules or concepts in one system to a seemingly similar situation in another system. The institutional and cultural backgrounds may be different and the actual operation of each individual rule depends on the overall structure of both the tax system and the legal system generally. Doing meaningful comparative analysis is especially difficult in the tax area, where political pressure, chance and historical accident have all had important influence on the development of the systems.”

<sup>1261</sup> No significant issue arises, however, where the different jargons relate to a common international background knowledge, i.e. where the social communities using the different jargons, although multilingual (which explains why different jargons exist), might be seen as forming an homogeneous group in respect of a common field of knowledge, characterized by a single set of principles, rules and concepts, although expressed in different languages (e.g. public international law). In addition, these types of social groups generally use one or two commonly spoken languages (e.g. English and French) as means of communication and for exchanging ideas at the international level.

<sup>1262</sup> See A. Breton et al. (eds.), *Multijuralism. Manifestations, Causes and Consequences* (Farnham: Ashgate Publishing, 2009), p. 1, where the editors note that “[a]t one level of generality, multijuralism is the coexistence of two or more legal systems or sub-systems within a broader normative legal order to which they adhere. [...] the co-existence of common law and civil law is a macroscopic divide. At a finer level of analysis, multijuralism is a more widespread phenomenon and also a more fluid reality than the distinction suggests. As a consequence, it becomes more difficult to identify the concepts associated with, or underlying, the expression. Multijuralism itself can be defined in a broad way as the coexistence of systems of norms considered binding by a subset of actors”.

It must be noted that multijuralism may concern not only the legal systems of different States, when compared to each other, but also the legal systems coexisting within a single State. See, for instance with regard to Canada tax and private law, M. Cuerrier et al., “Symposium: Canadian Bijuralism and Harmonization of Federal Tax Legislation”, 51 *Canadian Tax Journal* (2003), 133 *et seq.*; J. Sasseville, “The Canadian Experience”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 35 *et seq.* The present study, however, does not analyse the effects of multijuralism on the construction of a State coherent legal system, but just focuses on the issues that multijuralism causes in respect of treaty interpretation.

In that respect, for a broad analysis of the reciprocal influence of international treaties and domestic legal systems, see J. H. Currie, “International Treaties and Conventions as Agents of Convergence and Multijuralism in Domestic Legal Systems”, in A. Breton et al. (eds.), *Multijuralism. Manifestations, Causes and Consequences* (Farnham: Ashgate Publishing, 2009), 11 *et seq.*

### 4.3.1. *In general*

It must preliminarily be noted that, where a treaty term is used both in a legal jargon and in the day-to-day language, the interpreter must first establish whether such a term is to be construed, for the purpose of the treaty, according to its legal jargon or day-to-day meaning.

In this respect, various elements and items of evidence exist that may lead the interpreter to conclude that the parties intended to use the relevant term in its legal jargon capacity, such as the subject matter of the treaty and of the specific provision to be construed, the identity of the treaty negotiators and the process that led to the treaty conclusion, the identity and capacity of the treaty addresses, the object and purpose of the treaty and of the relevant provision, the extensive use therein of idiomatic expressions and terms specific (solely) of the legal jargon.

Where the interpreter concludes that the parties intended to use the relevant treaty term as a legal jargon term, the following more subtle and, at the same time, fundamental issues must be addressed.

First, the interpreter should assess whether it is reasonable to conclude that the parties intended to attribute to the relevant term the technical (legal jargon) meaning corresponding to that term under the domestic laws of the States using that specific legal jargon.<sup>1263</sup>

Let the author take a step back for the sake of clarity. Any interpreter, where called to construe a treaty, should start his analysis by grasping the first impression of what could be the ordinary meaning of the relevant treaty term by looking at the entries corresponding to that term in dictionaries and encyclopedias. For instance, having to construe the term “alcoholic” as used in Article 5 of the ECHR, the interpreter should presumably start his quest by looking at the entries associated with the term “alcoholic” in English dictionaries and Encyclopedias and then, on such a basis, establish in good faith the reasonable meaning to be attributed to that term in its overall context.

However, one may wonder whether it is equally sensible for the interpreter of a multilateral treaty authenticated only in English to establish the meaning of the term “criminal charge” used therein primarily on the basis of the legal definition of that term under e.g. English law<sup>1264</sup> and the analysis of the related national case law and scholarly writings (e.g. writings in legal dictionaries and encyclopedias). Is this reasonable, in that

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<sup>1263</sup> A case where the parties typically do not intend to attribute to a treaty term the meaning that it has under the law of the State(s) using it (as legal jargon term) is that of treaties concluded with the purpose to standardize contracting States’ domestic laws in the field of private law; see, for instance, S. Bariatti, *L’interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 119-120, 141 and 251 *et seq.*; P. Francescakis, “Qualifications”, in *Répertoire de droit international Dalloz. Tome II* (Paris: Jurisprudence Générale Dalloz, 1969), 703 *et seq.*, at 705, para. 29; P. Reuter, “Quelque réflexion sur le vocabulaire de droit international”, in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 431.

<sup>1264</sup> The same holds true in respect of other domestic law using the same (or a similar) English term, such as Australian law, Canadian law, Irish law, etc.

respect, to infer from the fact that the treaty is authenticated only in English that the parties intended to attribute to the term “criminal charge” the legal jargon meaning that it has under the domestic law of only one contracting State (in the above example, English law),<sup>1265</sup> especially where under the law of the other contracting States concepts similar to that underlying the legal jargon term “criminal charge” do exist?

That conclusion appears even more difficult to uphold where the treaty is authenticated in two languages, say English and French, and the legal jargon meanings of the terms employed in those texts, e.g. “criminal charge” and “accusation en matière pénale”, under the relevant domestic law, e.g. English and French law, differ from each other to a certain extent. In this case, it would be logically impossible to attribute to the treaty terms “criminal charge” and “accusation en matière pénale” a single meaning that exactly overlaps with both those domestic law meanings.

Where the interpreter concludes that the relevant treaty term should be attributed a meaning other than its legal jargon meaning under the domestic law of the States using that specific legal jargon term in their legal systems, he has to establish the alternative meaning that must be attached to it.

For instance, the interpreter may find it reasonable that the parties intended to attribute to that term a meaning that somehow takes into account and reflects the corresponding concepts existing under the laws of the various contracting States, either in the form of a uniform meaning that, although based on such domestic legal concepts, departs therefrom in order to best suits the context, object and purpose of the relevant treaty provision,<sup>1266</sup> or in the form of a meaning representing the minimum common denominator of the national legal concepts.<sup>1267</sup>

<sup>1265</sup> Or even the meaning that that term has under the domestic law of a State that is not party to the treaty.

<sup>1266</sup> On the reasons for preferring an autonomous interpretation of treaties, in particular uniform law conventions, see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 165 *et seq.* and the scholars cited in footnote 81 therein. Bariatti also points out that involving an international organization or an international court or tribunal in the process of interpreting uniform law conventions is generally recognized as the best solution in order to guarantee the uniform application thereof in the different contracting States. However, due to the relevant interests at stake, where the treaties are not concluded within the framework of an international organization, the above solution is often disregarded and the contracting States tend to rely on peer review processes of consultation and, possibly, to periodical modifications of the original treaties by virtue of *ad hoc* protocols (*ibidem*, pp. 169-171).

<sup>1267</sup> Such a solution, however, subtly corresponds to giving preference to one party's intended interpretation (the most restrictive) over the other parties' intended interpretations. Moreover, although it may be considered reasonable in certain cases, as for instance where its effect is not to bind any contracting States to any reciprocal concession unless all parties have clearly agreed to be so bound, in other cases it may lead to manifestly absurd results. Consider the following example: a certain tax treaty does not include any general rule of interpretation similar to Article 3(2) OECD Model; under the tax law of one contracting State, the term “employment” is deemed to denote (also) the relationships between a law school and the external lecturers that teach at the LLM programs organized by the former and structure their lectures on the basis of the directives received from it, while under the tax law of the other contracting State these relationships are clearly outside the intension of the term “employment”; in an OECD-type tax treaty, going for the most restrictive interpretation would lead to conclude that income derived by the lecturers from such relationships could not be taxed by the source State (i.e. the State of residence of the law school and in which the LLM lectures are given), since Article 21 of the treaty would apply to income of lecturers resident in the other contracting State, even where under the tax law of the source State these relationships would be regarded as “employment”

Alternatively, he may infer from the overall context that the parties intended to attribute to that term a meaning corresponding to the legal concept existing under the domestic law of the contracting State that presents the strongest connection with the situation to which the treaty must be applied.<sup>1268</sup>

Moreover, he may consider it sensible that the parties intended to attribute to that term a fixed hard-core meaning,<sup>1269</sup> leaving the interpreter with the duty to complete it by reference to the national legal system of the State applying the treaty in the actual

relationships.

On the applicability of such a method for the purpose of interpreting uniform law conventions, see, among others, A. N. Makarov, "Réflexions sur l'interprétation des circonstances de rattachement dans les règles de conflit faisant partie d'une Convention internationale", in *Mélanges offerts à Jacques Maury. Tome I: Droit international privé et public* (Paris: Librairie Dalloz et Sirey, 1960), 206 *et seq.*, at 207 *et seq.*; R. David, "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, p. 101.

<sup>1268</sup> With reference to treaties purported to standardize the contracting States' domestic private law and private international law, it is recognized by the majority of scholars that the uniform and autonomous (from domestic law jargons and categorizations) interpretation thereof is necessary in order to guarantee that the object and purpose of such treaties, i.e. to create a single set of rules applicable to certain facts in all contracting States, is not frustrated and equality of rights and obligations is achieved in respect of all persons covered by the treaty provisions; the failure of their uniform interpretation, moreover, may increase the tendency towards *forum shopping* (see, e.g., A. Malintoppi, "The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts", in C. M. Schmitthoff (ed.), *The Sources of the Laws of International Trade. With special reference to East-West Trade* (London: Stevens & Sons, 1964), 127 *et seq.*, at 128; E. Frankenstein, *Internationales Privatrecht (Grenzrecht). Volumen I* (Berlin: Rothschild, 1926), pp. 295 *et seq.*; S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 119-121, 129-130, 132-133, 141).

However, the same scholars point out (quite obviously) that in certain cases treaties allow, or even demand, the competent court to construe their provisions in accordance with domestic law (e.g. the law pointed at by the *lex fori*, or the law of a specific State) and, therefore, with national legal jargons. In such cases, it would be incorrect to seek an autonomous and uniform interpretation, since the latter would be contrary to the common intention of the parties (see, for instance, S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 133-140; R. David, "The International Unification of Private Law", in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, pp. 96 *et seq.*).

In this respect, the issue remains to determine whether the parties intended certain terms to be construed in accordance with the law and jargon of a specific State, even in the absence of an express provision to that extent in the treaty. According to Bariatti (see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 140), the question may be answered in the affirmative where the terms used in the treaty originally come from specific legal systems (e.g. the term "trust" as used in the Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980), or where a national legal jargon term is reproduced *tel quel* in the other authentic texts of the treaties (e.g. the term "mortgage", as used in the French and Spanish authentic texts of Article 1(1)(d) of the Convention on the International Recognition of Rights in Aircrafts, concluded in Geneva on 19 June 1948).

<sup>1269</sup> The agreement, in this respect, would be limited to (i) the inclusion within the treaty terms denotata of the items that are denoted by all the corresponding terms in the legal jargons of the various contracting States and (ii) the exclusion from the treaty term denotata of the items that are not denoted by any of the corresponding terms in the legal jargons of the various contracting States. On the difficulties faced by contracting States, in the course of the negotiations, to find a common meaning for all treaty terms and expressions, and on the related necessity to use ambiguous and vague terms and expressions in order to accommodate the possible divergent views thereof, see W. Hummer, "“Ordinary” versus “Special” Meaning. Comparison of the Approach of the Vienna Convention on the Law of Treaties and the Yale-School Findings", 26 *Österreichische Zeitschrift für öffentliches Recht* (1975), 87 *et seq.*, at 153 *et seq.*

case, especially where the treaty is aimed at interacting with domestic law. And so forth.

Finally, it is worth noting that different approaches may be contextually applied in order to construe different legal jargon terms in the very same treaty.

For instance, with regard to the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters,<sup>1270</sup> the ECJ affirmed: “10. The [Brussels] Convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought. 11. Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of article 220 of the [EEC] treaty. [...]”<sup>1271</sup>

In the following sections the author briefly describes the most common approaches to the interpretation of legal jargon treaty terms that have been adopted in the field of uniform law conventions.<sup>1272</sup>

The decision to make reference to the solutions developed in that field of treaty law is mainly due to the following reasons.

First and foremost, the interaction between treaties and domestic legal systems (including legal jargon terminology) has been addressed more comprehensively and in depth with regard to that field of international law than in respect of other fields.<sup>1273</sup>

Moreover, uniform law conventions also present certain features that make them comparable to tax treaties. First, they both provide for rules of law that, on the one hand, are internationally binding on the contracting States and, on the other hand, strictly interact with and partially modify the relevant domestic law of those contracting States.

<sup>1270</sup> Concluded in Brussels on 27 September 1968.

<sup>1271</sup> See ECJ, 6 October 1976, Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, paras. 10-11.

<sup>1272</sup> This field is here intended to cover treaties dealing with (i) uniform substantive private law, (ii) uniform international private law (conflict of laws) and (iii) procedural international law.

<sup>1273</sup> See, among many others, A. Malintoppi, “The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts”, in C. M. Schmitthoff (ed.), *The Sources of the Laws of International Trade. With special reference to East-West Trade* (London: Stevens & Sons, 1964), 127 *et seq.*; E. Frankenstein, *Internationale Privatrecht (Grenzrecht). Volumen I* (Berlin: Rothschild, 1926); S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986); R. David, “The International Unification of Private Law”, in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5; P. Reuter, “Quelque réflexion sur le vocabulaire de droit international”, in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*; J. W. F. Sundberg, “A Uniform Interpretation of Uniform Law” 10 *Scandinavian Studies in Law* (1966), 219 *et seq.*; A. Malintoppi, “Mesures tendant à prévenir les divergences dans l'interprétation des règles de droit uniforme”, *L'Unification de Droit. Annuaire* (1959), 249 *et seq.*; P. Francescakis, “Qualifications”, in *Répertoire de droit international Dalloz. Tome II* (Paris: Jurisprudence Générale Dalloz, 1969), 703 *et seq.* On the (limited) relationship between “qualification” issues under private international law and under international tax law, see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 52-53, m.nos. 90-92.

Second, the interpretation of both types of treaties is primarily left to domestic courts.<sup>1274</sup>

#### 4.3.2. *Uniform interpretation of treaties*

As previously noted, the parties may have intended to attribute to the legal jargon terms used in the treaty a meaning that is *uniform*. In this respect, the term “uniform” is used here to indicate that the concept corresponding to a certain treaty term is always the same in all possible circumstances in which the provision containing such term is applied.

With regard to uniform law conventions, the majority of scholars have expressed a theoretical preference for the *uniform* construction of treaty terms, mainly due to the alleged autonomy of the legal systems created by the treaties from the legal systems existing under the contracting States’ domestic law, as well as to the need to guarantee that equal rights are granted to and legal obligations imposed on different persons by reason of the same treaty provisions.<sup>1275</sup>

This uniformity of meaning may be achieved in different ways.

A first method consists in using a term that is an international legal jargon term, i.e. a term commonly used in the field of international law (or a specific subfield thereof) and having a relatively unambiguous and clear meaning when used in such a field,<sup>1276</sup> that meaning being different from the one it has when used in the context of the relevant national legal systems.

The intention of the parties in this respect is established by the interpreter on the

<sup>1274</sup> See, with reference to uniform law conventions, S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 119 and, with reference to tax treaties, IBFD Tax Treaties Case Law Database (accessed on 6 July 2011).

<sup>1275</sup> See, *inter alia*, P. Reuter, “Quelque réflexion sur le vocabulaire de droit international”, in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.* at 432; P. Francescakis, “Qualifications”, in *Répertoire de droit international Dalloz. Tome II* (Paris: Jurisprudence Générale Dalloz, 1969), 703 *et seq.*, at 705, paras. 38-39; G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99; D. Martiny, “Autonome und einheitliche Auslegung im Europäischen Internationalen Zivilprozeßrecht”, 45 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* (1981), 427 *et seq.*, at 430 *et seq.* and references therein.

As far as case law is concerned, see the authoritative statement made by the ECJ with regard to the interpretation of Article 1 of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968: “in order to ensure, as far as possible, that the rights and obligations which derive from [the Brussels Convention] for the Contracting States and the persons to whom it applies are equal and uniform, [the terms of the Convention] should not be interpreted as a mere reference to the internal law of one or the other of the States concerned. [...] The concept used [...] must be regarded as independent concepts which must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems” (see ECJ, 22 February 1979, Case 12/76, *Henri Gourdain v. Franz Nadler*, para. 3).

<sup>1276</sup> Consider, for example, terms such as “State”, “territory”, “reservation”, “authentic text”, “ratification”, “good faith”, “contracting parties”.

basis of all available elements and items of evidence, which might support the conclusion that the “international meaning” is to be preferred over the conflicting “national meanings”.<sup>1277</sup> For the sake of legal certainty, however, the parties sometimes insert a specific provision in the treaty in order to appropriately direct the interpreter to that conclusion.

A second method is to provide the interpreter with a legal definition of the treaty terms.<sup>1278</sup> The drawback of this solution is, obviously, that whenever other legal jargon terms are used in the definition, the very same issue surfaces again.

A third method consists in inserting a specific provision calling for a uniform interpretation, as far as possible independent from the meanings that the legal jargon terms have under their respective domestic laws.

For instance, Article 18 of the 1980 Rome Convention<sup>1279</sup> provides that “[i]n the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their

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<sup>1277</sup> The “international” meaning of treaty terms may also be established on the basis (i) of the analysis of the definitions of the same terms contained in other treaties, or (ii) of the interpretation of the same terms, used in other treaties, made by courts, tribunals and scholars, or emerging as result of widespread and constant praxis. The reference to other treaties and their construction as means of interpretation (i.e. as elements used in order to support a certain construction of the provision to be interpreted) is allowed within the system of interpretation provided for by Articles 31-33 VCLT, either under Article 31(3)(c) VCLT (where they are concluded between the very same parties of the treaty to be interpreted, or where their provision represent customary international law), or under Article 32 VCLT as supplementary means of interpretation. Moreover, the meaning attached to the same terms in other treaties may be regarded as evidence of the ordinary meaning of the relevant terms in the international law context. A classical instance of interconnected interpretation of treaties (and treaty terms) is that of the International Labour Organization conventions, with reference to which see J. M. Servais, *International Labour Law* (The Hague: Kluwer International Law, 2009), paras. 162-164. Another instance is provided by the interpretation made by the ECJ of Articles 5(1) and 16(4) of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968: with reference to the first article, the Court made reference to Article 6 of the Convention on the law applicable to contractual obligation, concluded in Rome on 19 June 1980, in order to interpret the expression “place of performance of the obligation” contained therein (see ECJ, 26 May 1982, Case 133/81, *Roger Ivenel v. Helmut Schwab*, paras. 13-15); with reference to the second article, in order to construe the expression “proceedings concerned with the registration or validity of patents”, the Court made reference to the European Patent Convention, concluded in Munich on 5 October 1973, and to the Community Patent Convention, concluded in Luxembourg on 15 December 1975, both not applicable in the case at stake (see ECJ, 15 November 1983, Case 288/82, *Duijnstee v. Goderbauer*, para. 27).

<sup>1278</sup> See, for instance, Article 22(3) of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968; Article 5 of the OECD Model and all tax treaties based thereon; Article 1(2) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929. Moreover, in certain cases, the treaty definition refers to the definition of the same term included in another treaty; for example, Article 1 of the European Convention on the Suppression of Terrorism, concluded in Strasbourg on 27 January 1977, refers to both the Convention for the Suppression of Unlawful Seizure of Aircraft, concluded in the Hague on 16 December 1970, and to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded in Montreal on 23 September 1971, for the purpose of shaping the meanings of the expressions “political offence”, “offence connected with a political offence” and “offence inspired by political motives”, which are used in the former convention.

<sup>1279</sup> Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980.

interpretation and application”.<sup>1280</sup>

A fourth method is to rely on the good faith and common sense of the interpreter, who will decide, in light of all available elements and items of evidence, including the fact that the treaty to be construed is a uniform law-making treaty, whether a uniform meaning is required that best suits the object and purpose of the treaty and fits in the context of the provision containing the relevant term,<sup>1281</sup> or, on the contrary, whether compelling reasons exist for adopting a different solution.<sup>1282</sup>

The above four methods are generally purported to achieve an interpretation that, in addition to being “uniform”, is also “autonomous” in the sense that is independent from the national legal jargon meanings that the terms used (or their corresponding national legal jargon terms) may have under the relevant domestic laws.

Also in the case where the different national legal jargon meanings are taken into account by the interpreter, they merely represent the starting point for the purpose of arriving at uniform and autonomous meaning, which must primarily fit in the context and suit the object and purpose of the treaty to be construed.

Nonetheless, the comparative analysis of the relevant domestic legal concepts and

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<sup>1280</sup> See also Article 7 of the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980; Article 15 of the Annex to the Convention providing a Uniform Law on the Form of an International Will, concluded in Washington on 26 October 1973; Article 6(1) of the Convention on Agency in the International Sale of Goods, concluded in Geneva on 17 February 1983.

<sup>1281</sup> See, in this respect, P. Reuter, “Quelque réflexion sur le vocabulaire de droit international”, in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 429 *et seq.*; P. Guggenheim, “Landesrechtliche Begriffe im Völkerrecht, vor allem im Bereiche der internationalen Organisation”, in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt: Vittorio Klostermann, 1956), 133 *et seq.*, at 133 *et seq.*

<sup>1282</sup> For instance, in the case *US – Softwood Lumber from Canada* the WTO Appellate Body, dealing with the interpretation of Article 1.1(a)(1)(iii) of the WTO Agreement on Subsidies and Countervailing Measures, rejected an interpretation of the term “goods” based on the municipal law of one of the WTO Member States. In this respect, Canada had contended that standing timbers were not “goods”, since they were neither “personal property” nor “identified thing to be severed from real property”. The Appellate Body, after having noted that the concepts of “personal” and “real” property, as referred to by Canada, are creatures of municipal law not reflected in Article 1.1(a)(1)(iii), submitted that the manner in which the municipal law of a WTO Member classifies an item cannot be determinative of the interpretation of provisions of the WTO agreements (see WTO Appellate Body, 19 January 2004, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6 (WT/DS257/AB/R), para. 65). In the *King v. Bristow Helicopters* and *Morris v. KLM* cases, Lord Steyn and Lord Hobhouse of Woodborough expressed the view that, in order to construe the term “lésion corporelle” used in Article 17 of the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, the legal jargon meaning of that term under any national legal system was irrelevant, since it followed from the convention scheme and nature that the basic concepts it employed in order to achieve its purpose were autonomous concepts, which, as such, were to be construed autonomously and independently from national laws. The opposite approach would have defeated uniformity and led to the complication of simple issues, the inadequately informed investigation of other legal systems and, most importantly, to uncertainty (see House of Lords (United Kingdom), 28 February 2002, *King v. Bristow Helicopters Ltd, In Re M (A Child By Her Litigation Friend CM)*, [2002] UKHL 7, paras. 16 and 147).

principles<sup>1283</sup> is generally recognized as being of great significance for the purpose of the above methods.<sup>1284</sup> The analysis of the (contracting and non-contracting) States' domestic laws, in this case, is mainly aimed:

- (i) at finding the common ground on which the interpreter may build up the "ordinary meaning" of the treaty terms in their context and in light of the object and purpose of the treaty; or
- (ii) where it proves difficult to establish such a common ground, at suggesting the interpretative solution that best suits the object and purpose of the treaty and fits in the context thereof.<sup>1285</sup>

In contrast, the quest of the interpreter is generally not directed at finding a "minimum common denominator" of the relevant domestic law concepts and principles in order to take it as, or immediately derive from it, the autonomous treaty meaning.<sup>1286</sup>

This reference to the relevant domestic legal systems, whose legitimacy may be grounded, among other things, on the need to determine the "ordinary meaning" of the treaty terms under Article 31 VCLT,<sup>1287</sup> on the possibility to rely on supplementary means of interpretation under Article 32 VCLT<sup>1288</sup> and on the explicit reference to the

<sup>1283</sup> On the different effects, on the interpretation of uniform law conventions, of the existence of common legal concepts, as compared to the mere existence of common legal principles, see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 289 *et seq.*, who highlights that in the latter case the interpreter discretion is generally wider and his construction is generally regarded as "creative". In this sense, see also P. Guggenheim, "Landesrechtliche Begriffe im Völkerrecht, vor allem im Bereiche der internationalen Organisation" in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt: Vittorio Klostermann, 1956), 133 *et seq.*, at 141 and P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 431.

<sup>1284</sup> See R. Plaisant, *Les règles de conflit de lois dans les traités* (Alençon: Imprimerie Alençonnaise, 1946), p. 69; P. Guggenheim, "Landesrechtliche Begriffe im Völkerrecht, vor allem im Bereiche der internationalen Organisation" in W. Schätzel and H. J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt: Vittorio Klostermann, 1956), 133 *et seq.*, at 133 ff; D. Martiny, "Autonome und einheitliche Auslegung im Europäischen Internationalen Zivilprozeßrecht", 45 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1981), 427 *et seq.*, at 441 *et seq.*

<sup>1285</sup> See P. Reuter, "Quelque réflexion sur le vocabulaire de droit international", in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 431.

For an actual instance where the competent tribunal construed the uniform and autonomous meaning of the relevant treaty term (also on the basis of the analysis of the contracting States' legal systems, see ECtHR, 21 February 1984, *Öztürk v. Germany* (Application no. 8544/79), in particular paras. 50-53.

<sup>1286</sup> See, in this sense, the analysis of the ECJ's usual reference to the contracting States' domestic law made by Advocate General Lagrange in Case 14/61, *Hoogovens v. High Authority*.

<sup>1287</sup> It is, in fact, just reasonable to expect that the meaning of a treaty term that has a specific legal jargon meaning under the domestic law of a certain State and whose corresponding terms in other languages have as well specific legal jargon meanings under the domestic law of other States, had been determined through a negotiation taking such meanings as starting point, especially where the main object and purpose of the treaty is that of making those States' domestic law uniform in that respect.

<sup>1288</sup> On the relevance of comparative law as a subsidiary means of interpretation before the conclusion of the VCLT, see H. Lauterpacht, *Private Law Sources and Analogies of International Law. With Special Reference to International Arbitration* (London: Longmans, 1927), pp. 183 *et seq.* For an instance in which the ICJ relied, *inter alia*, on the common principles of law in force in different States in order to support its interpretation of a

“general principles of law recognized by civilized nations” contained in Article 38(1)(c) of the ICJ Statute, is quite flexible with regard to the subject of the comparative analysis: in fact, depending on the characteristics of the case at stake, the analysis may be limited to contracting States, or include also non-contracting States; it may refer indifferently to the original treaty parties, as well as to parties that acceded subsequently; it may concern the legal concepts and principles in force at the moment of the treaty conclusion, or those in force at the moment of the treaty application.<sup>1289</sup>

Finally, a fifth method that may be adopted consists in directing the interpreter towards a specific national legal jargon meaning for the purpose of using it as uniform meaning in the context of a specific treaty provision.

This is a first type of *renvoi*<sup>1290</sup> (hereafter “type-I *renvoi*”) to the domestic law of

treaty provision, see ICJ, 28 November 1958, *Case concerning the application of the convention of 1902 governing the guardianship of infants (Netherlands v. Sweden)*, judgment, p. 71.

<sup>1289</sup> See, for instance, D. Martiny, “Autonome und einheitliche Auslegung im Europäischen Internationalen Zivilprozeßrecht”, 45 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* (1981), 427 *et seq.*, at 442 *et seq.*

<sup>1290</sup> In the present work, and particularly in this and the following chapters, the term “*renvoi*” is used in a sense other than the one in which it is generally employed in the English writings on private international law.

In the latter, the term “*renvoi*” is commonly used in order to denote the problem emerging where the foreign law which is applicable under the choice of law rules of the *forum* is intended to include the private international law rules of the foreign State: in this case, if, under the private international law of the foreign State, the rules applicable to the case at stake are not those of that very same State, but those of a different State (which may be either the State of the *forum*, or a third State), the issue for the *forum* arises whether, and to what extent, it should accept such a *renvoi* to the rules of the latter State (see, among many others, L. Collins (gen. ed.), *Dacey, Morris and Collins on The Conflict of Laws* (London: Sweet & Maxwell, 2006), pp. 73 *et seq.*; P. North and J. J. Fawcett, *Cheshire and North’s Private International Law* (Oxford: Oxford University Press, 2004), pp. 51 *et seq.*; K. Lipstein, “The General Principles of Private International Law”, 135 *RCADI* (1972), 97 *et seq.*, at 210 *et seq.*; E. G. Lorenzen, “The *Renvoi* Theory and the Application of Foreign Law. I. *Renvoi* in General”, 10 *Columbia Law Review* (1910), 190 *et seq.*).

In contrast, the term “*renvoi*” is employed here to denote the case where the meaning of a legal jargon term employed in a treaty (or in the private international law of a State) is established by reference to the domestic law of a(nother) State. This construction of the term “*renvoi*” is rooted in the general theory of law, where it (and its Latin-derived correspondents, such as the Italian “*rinvio*”) is employed to denote the legal technique of referring to another legal order (or to another part of the same legal order) for the purpose of establishing the meaning of a legal jargon term, or of regulating a certain case by means of a rule of law (see, for instance, H. Kelsen (translated by B. Laroche and V. Faure), *Théorie générale du droit et de l’État* (Bruxelles: Bruylant, 1997); N. Bobbio, *Teoria generale del diritto* (Torino: Giappichelli Editore, 1993); S. Romano, *L’ordinamento giuridico* (Firenze: Sansoni, 1946)). Moreover, this construction of the term “*renvoi*” is also sometimes adopted in legal writings in the fields of private international law and uniform law conventions (see, for instance, C. Focarelli, *Lezioni di diritto internazionale privato* (Perugia: Morlacchi Editore, 2005), pp. 49 *et seq.*; H. Kelsen, “Observations sur le rapport de George S. Maridakis: “Le *renvoi* en droit international privé””, in H. Kelsen (edited by C. Leben), *Ecrits français de droit international* (Paris: PUF, 2001), 309 *et seq.*, in particular at 312; S. Bariatti, *L’interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), Chapters 2 and 4; P. Picone, “Il rinvio all’ “ordinamento competente” nel diritto internazionale privato”, *Rivista di diritto internazionale privato e processuale* (1981), 309 *et seq.*). Finally, the term “*renvoi*” is not unusually employed in this sense in legal writings on tax treaty law, with particular reference to Article 3(2) OECD Model and equivalent tax treaty provisions (see, among others, S. A. Rocha, *Interpretation of Double Taxation Conventions: General Theory and Brazilian Perspective* (Alphen aan den Rijn: Kluwer Law International, 2009), pp. 122 *et seq.*; E. van der Bruggen, “Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of

a State.<sup>1291</sup> The issue for the parties, in this respect, consists in how to render unambiguous their intention to adopt a specific national legal jargon meaning as the meaning of the treaty term (or terms). There are various alternatives to achieve that result, the most common being the following:

- (i) using a term that originally comes from a specific legal system,<sup>1292</sup>
- (ii) employing the same national legal jargon term in all authentic texts of the treaty, either by itself or in brackets after the corresponding legal jargon term in the languages of the other authentic texts;<sup>1293</sup>
- (iii) using a legal jargon term in a language different from the language generally employed in the sole authentic text of the treaty;
- (iv) explicitly stating that the interpreter has to make reference to the meaning that a certain term has under the domestic law of a specific State;
- (v) relying on the good faith of the interpreter, who will decide in light of all available elements and items of evidence<sup>1294</sup> whether the *renvoi* to a specific national legal jargon meaning is required, or, on the contrary, persuasive reasons exist to support a different choice.<sup>1295</sup>

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the Vienna Convention on the Law of Treaties”, 43 *European Taxation* (2003), 142 *et seq.*; K. Vogel, “La clause de renvoi de l’article 3, par. 2 Modèle de Convention de l’OCDE”, in *Réflexions offertes à Paul Sibille. Études de fiscalité* (Bruxelles: Bruylant, 1981), 857 *et seq.*; R. Lenz, “General Report”, in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 42 (Basel: Verlag für Recht and Gesellschaft, 1960), 281 *et seq.*, in particular at 296).

In addition, with regard to the relevance of the *renvoi*, as intended in the present work, for the purpose of private international law, it is worth noting that such a *renvoi* is a technique sometimes employed by legal scholars and courts to solve the problems of characterization that often arise in the interpretation and application of the private international law of the *forum* (which may then lead to a *renvoi* in the private international law sense). See, in this respect, the comprehensive analysis carried out by the first authors to have dealt with this issue: F. Kahn, “Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts”, 30 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (1891), 1 *et seq.*; E. Bartin, “De l’impossibilité d’arriver à la solution définitive des conflits de loi”, *Journal du droit international privé* (1897), 225 *et seq.*, 466 *et seq.* and 720 *et seq.*; E. G. Lorenzen, “The Theory of Qualifications and the Conflict of Laws”, 20 *Columbia Law Review* (1920), 247 *et seq.*; E. Bartin, “La doctrine des qualifications et ses rapports avec le caractère national du conflit des lois”, 31 *RCADI* (1930), 561 *et seq.*; E. Rabel, “Das Problem der Qualifikation”, 5 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* (1931), 241 *et seq.*; J. D. Falconbridge, “Characterisation in the Conflict of Laws”, 53 *Law Quarterly Review* (1937), 235 *et seq.* and 537 *et seq.*; A. H. Robertson, *Characterisation in the Conflict of Laws* (Cambridge: Harvard University Press, 1940); E. G. Lorenzen, “The Qualification, Classification, or Characterization Problem in the Conflict of Laws”, 50 *Yale Law Journal* (1940-1941), 743 *et seq.*

<sup>1291</sup> Generally, but not necessarily, a contracting State.

<sup>1292</sup> E.g. the term “trust” as used in the Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980.

<sup>1293</sup> E.g. the term “mortgage”, as used in the French and Spanish authentic texts of Article 1(1)(d) of the Convention on the International Recognition of Rights in Aircrafts, concluded in Geneva on 19 June 1948; the term “force majeure” in the English authentic text of Article 3 of the Hours of Work (Industry) Convention, concluded in Washington on 28 November 1919.

<sup>1294</sup> Including, for instance, the nature of the drafted text, the fact that the treaty has just one authentic text and the *travaux préparatoires*.

<sup>1295</sup> For example, Malaurie indicates that Belgian judges often made reference to English legal concepts and principles for the purpose of interpreting the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded in Brussels on 25 August 1924 in the sole French authentic text, since they considered that the Convention provisions were based on English law (see P. Malaurie, “Le droit

It is clear from the above that such a fifth method does not lead to an autonomous interpretation, although the interpretation stemming from its application is doubtless uniform.

#### 4.3.3. *Non-uniform interpretation of treaties*

The parties may have intended not to attribute a uniform meaning to some of the legal jargon terms used in the treaty, for instance in order to increase the predictability of its interpretation and thus legal certainty, to make less burdensome the application of the treaty by national courts and tribunals, to improve the interaction between the treaty provisions and the intertwined provisions of domestic law, or simply due to the impossibility of reaching an agreement on the uniform intension of a legal concept.<sup>1296</sup>

Despite the underlying reasons, the choice of the parties to reject the uniform construction of certain treaty terms almost invariably leads to the adoption, for the purpose of treaty interpretation, of some national legal jargon meanings.

This *renvoi* to the domestic law meaning of the treaty terms (or their correspondent legal jargon terms in the official languages of other contracting States, where such languages have not be used for drafting the authentic texts of the treaties), may, however, take different forms, which in turn often lead to significantly different interpretative results.

In a first form, the *renvoi* may be to the substantive *lex fori*, i.e. to the relevant substantive law of the legal system of the court of the *forum* (hereafter “type-II *renvoi*”).

For instance, the original text of Article 25(1) of the 1929 Warsaw Convention<sup>1297</sup>

français et la diversité des langues”, *Journal du droit international* (1965), 565 *et seq.*, at 573, footnote 31). Similarly, in the *Eastern Airlines v. Floyd* case, the US Supreme Court, in order to decide whether the term “lésion corporelle”, used in the (sole) French authentic text of Article 17 of the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, denoted also the mental distress suffered by the passengers of a flight and caused by the risk of an imminent crash, considered the meaning that the term “lésion corporelle” had under French law in 1929, as a guidance to the shared expectations of the parties to the Convention, due to the fact that the latter was drafted in French by continental jurists (see Supreme Court (United States), 17 April 1991, *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991), p. 536).

<sup>1296</sup> With specific reference to the use of the *renvoi* to the contracting States’ domestic law in private law treaties and tax treaties, Gaja cites, as instances of the reasons that may lead the parties to implement such a solution, (i) the fact that national authorities may not be sufficiently equipped to analyse the different texts in their possibly diverging meanings and to apply Articles 31-33 VCLT in order to determine a uniform interpretation and (ii) the fact that the use of the same rules of interpretation (namely those stemming from Articles 31-33 VCLT) by different domestic courts is no guarantee of a uniform result (see G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 98).

With regard to the adoption of the *renvoi* to the *lex fori* in the field of uniform law conventions, Bariatti points out that such a choice is generally due to the resistance of the contracting States to standardizing certain legal concepts, especially in relation with procedural law, or to the actual impossibility to reach an agreement, in the course of the negotiation, on the uniform intension of a legal concept (see S. Bariatti, *L’interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 137).

<sup>1297</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, in the French authentic text in force before the changes made by the 1955 Hague

provided for an explicit *renvoi* to the law of the referred court for the purpose of determining the “faute qui, d’après la loi du tribunal saisi, est considérée comme équivalente au dole”.<sup>1298</sup>

This type of *renvoi* implies that the meaning attributed to a certain treaty provision may vary due to the “nationality” of the court deciding the case and, therefore, that two identical situations may in fact be subject to two different rules of law simply because of the different “nationality” of the courts to which the cases have been referred and independent of the exercise of any discretionary judgment by those courts. This type of *renvoi*, clearly, favors attempts at *forum shopping*.

With regard to the methods that could be adopted in order to regulate the *renvoi*, the latter is generally required by an explicit provision of the treaty to be interpreted.<sup>1299</sup> However, it is possible that, in the silence of the parties and on the basis of all available elements and items of evidence, the interpreter arrives at and justifies the conclusion that the contracting States intended to operate a *renvoi* to the substantive *lex fori*.<sup>1300</sup>

In a second form, the *renvoi* may be to the private international *lex fori*, i.e. to the rules on the conflict of laws of the court of the *forum* (hereafter “type-III *renvoi*”).

In this case, the court of the *forum* will determine, on the basis of its State’s rules on the conflict of laws, which is the domestic substantive law applicable to the case at stake and will consequently interpret the relevant treaty terms on the basis of the legal jargon meanings that such terms (or their corresponding legal jargon terms in the official language in which the applicable domestic substantive law is expressed) have under the applicable domestic substantive law.

Although to a different extent and through a different process, type-III *renvoi* also

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amending protocol.

<sup>1298</sup> Other well-know examples of *renvoi* type-II are: Articles 21, 22(1) and 29 of the same 1929 Warsaw Convention; Article 1(3) of the Convention on the law applicable to contractual obligations, concluded in Rome on 19 June 1980; Articles 33 and 52(1) of the above-mentioned Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968.

<sup>1299</sup> See the examples given in the previous footnotes.

<sup>1300</sup> A case where it is not unfrequent to regard the *renvoi* to domestic law as intended to be to the substantive *lex fori* concerns those (treaty) terms that must be interpreted in order to characterize a legal relation (or situation) for the purpose of selecting the appropriate rule of conflict of laws. The first explicitly analyses of such an issue, although carried out with reference to the domestic rules on the conflict of laws, appeared in F. Kahn, “Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts”, 30 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (1891), 1 *et seq.* and in E. Bartin, “De l’impossibilité d’arriver à la solution définitive des conflits de loi”, *Journal du droit international privé* (1897), 225 *et seq.*, 466 *et seq.* and 720 *et seq.*, at 226 *et seq.* In the latter, the author commented the decision delivered by the Court of Appeal of Alger, on 24 December 1889, in the *Bartholo* case. In that case, the court had to decide whether the French or Maltese substantive private law was to be applied in order to establish the rights that the widow of Mr Bartholo had on the estate of her former husband (originally a Maltese citizen, married in Malta and died in Alger – at that time being part of France – as a French citizen). The question at stake before the court originated from the fact that under Maltese law such rights were regulated by succession law, while under French law they were regulated by family law. Thus, the issue obviously arose of whether the private international law rule regarding family law matters or that regarding succession law matters had to apply. The Court of Appeal decided to characterize the widow’s rights in accordance with the substantive *lex fori* (i.e. as family law relation) for the purpose of deciding which private international law rule to apply.

implies that the meaning attributed to a certain treaty term may vary due to the “nationality” of the court of the *forum*. It is true that, due to the operation of their respective rules on the conflict of laws, the courts of two different jurisdictions may end up to apply the same domestic substantive law to two identical cases. However, due to the discrepancies existing between the private international law rules of different States, the coincidence of the applicable domestic substantive rules is not certain, but just the result of chance.<sup>1301</sup>

Furthermore, similar to what it has been noted with regard to type-II *renvoi*, type-III *renvoi* may favor attempts at *forum shopping* and is generally required by an explicit provision of the treaty to be interpreted,<sup>1302</sup> although it is possible that the interpreter decides to apply it, even in the absence of that explicit provision, on the basis of its appreciation of the available elements and items of evidence.<sup>1303</sup>

In a third form, the *renvoi* is not directed to the *lex fori*, but to the substantive domestic law of a State bearing a certain connection with the situation potentially regulated by the treaty provision to be interpreted (hereafter “type-IV *renvoi*”).

For example, Article V(1)(d) of the 1958 New York Convention<sup>1304</sup> provides that the recognition and enforcement in one State of an arbitral award made in the territory of another State may be refused where “[t]he composition of the arbitral authority or the arbitral procedure [...] was not in accordance with the law of the country where the arbitration took place”. Similarly, Article 3(2) of the bilateral treaty between Italy and Switzerland on claims for damages caused by road accidents<sup>1305</sup> provides that “[i]

<sup>1301</sup> See, similarly, F. Deby-Gérard, *Le rôle de la règle de conflit dans le règlement des rapports internationaux* (Paris: Dalloz, 1973), p. 267.

<sup>1302</sup> See, for instance, Article 53 of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968, and Article 18 of the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, concluded on 2 October 1973.

<sup>1303</sup> For instance, the ECJ, in a decision concerning the interpretation of Article 5(1) of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, after noting that “in the case of an action relating to contractual obligations Article 5(1) allows a plaintiff to bring the matter before the court for the place ‘of performance’ of the obligation in question”, concluded that it was “for the court before which the matter [was] brought to establish under the Convention whether the place of performance is situated within its territorial jurisdiction” and that, for such a purpose, the referred court had to “determine in accordance with its own rules of conflict of laws what [was] the law applicable to the legal relationship in question and define in accordance with that law the place of performance of the contractual obligation in question”. According to the ECJ, “in these circumstances the reference in the Convention to the place of performance of contractual obligations [could not] be understood otherwise than by reference to the substantive law applicable under the rules of conflict of laws of the court before which the matter [was] brought” (see ECJ, 6 October 1976, Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, paras. 13 and 15).

See also Court of Rotterdam, 18 June 1963, *Journal du Droit International* (1969), 990 *et seq.*, at 991; Cour de Cassation (France), 4 March 1963, *Hocke*, 53 *Revue critique de droit international privé* (1964), 264 *et seq.*, where the *renvoi* to the substantive domestic law of a State, made by the private international law of the State of the *forum*, is construed by the court of the *forum* as including the interpretation of the relevant uniform law convention terms made by the judges of the former State.

<sup>1304</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958.

<sup>1305</sup> Accordo tra la Confederazione Svizzera e la Repubblica Italiana concernente il risarcimento dei danni in

concetto di veicolo a motore si determina secondo la legislazione del Paese dove avviene l'incidente".<sup>1306</sup>

The specific features of this type of *renvoi*, as compared to type-II and type-III *renvois*, consist in that the former (i) does not permit any forum shopping and (ii) guarantees a partially uniform interpretation.<sup>1307</sup> With reference to (ii), in fact, although it is true that two situations that are identical, but for the connections they have with different States, are potentially subject to different rules when those connections are relevant for the purpose of the *renvoi* to the applicable domestic substantive law, where those situations do not present any differences in respect of their geographical connections, they will be invariably subject to the same rule, independent of the court to which the case is referred.

Finally, it may be noted that type-IV *renvoi* is generally regulated by an explicit treaty provision, although, even in this case, it cannot be excluded that the interpreter decides to adopt it for the purpose of treaty interpretation and justifies such a decision on the basis of the available elements and items of evidence.<sup>1308</sup>

With regard to all the above types of *renvoi* the question arises of whether the reference to the domestic law of the relevant State must be considered to include treaties to which that State is party and other international legal instruments addressing that State (such as regulations and directives in the legal framework of the European Union). The issue is actually twofold.

First, the question of the theoretical admissibility of such an inclusion should be generally answered in the affirmative, as long as those treaties and other international legal instruments provide for rules and principles of law applicable in the legal order of the State concerned, independent of whether they are applied directly or are

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caso di incidenti della circolazione stradale, concluded in Rome on 16 August 1978. Article 3(2) thereof may be translated in English as follows: "the concept of motor vehicle is determined according to the law of the State where the accident took place".

<sup>1306</sup> See also Article 50 of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968; Articles V(1) and VII of the Convention providing a Uniform Law on the Form of an International Will, concluded in Washington on 26 October 1973; Article 3 of the Convention on the law governing transfer of title in international sales of goods, concluded in the Hague on 15 April 1958.

<sup>1307</sup> It must be noted that the categorization here adopted by the author with reference to "uniform", "partially uniform" and "non-uniform" interpretation does not coincide with that followed by the majority of private international law scholars, who tend to include type-IV *renvoi* within the methods to achieve "uniform" interpretation (see S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), Chapters II and IV and the references to scholars therein).

<sup>1308</sup> This may be the case, for instance, where the private international laws of the contracting States (or, more generally, the private international laws of a highly significant number of States worldwide) provide for the same connecting factor for the purpose of identifying the relevant private law applicable to a certain subject matter. In such a case, the comparative analysis of the (contracting) States' private international law rules may show a significant convergence in relation to a specific subject matter, which in turn may lead the interpreter to conclude (and justify) that the treaty terms included in the provisions dealing with that subject matter should be attributed the legal jargon meaning they have under the law of the State to which such international private law rules would have referred (see A. Cassese, *Il diritto interno nel processo internazionale* (Padova: Cedam, 1962), pp. 202 *et seq.*).

implemented by means of *ad hoc* domestic legislation.<sup>1309</sup>

Second, with regard to whether, in the specific case, the *renvoi* should be considered to include such international legal instruments, the interpreter must assess all available elements and items of evidence in order to establish the intention of the parties in that respect.<sup>1310</sup>

Similarly it is not possible to determine a priori whether the *renvoi* is meant to the law in force at the moment of the treaty conclusion, or to that in force at the moment of the treaty application, that depending on the intention of the parties, which is to be established by the interpreter on the basis of all available elements and items of evidence.<sup>1311</sup>

#### 4.4. Problems arising in the interpretation of legal jargon terms

##### 4.4.1. The required knowledge of foreign legal systems and concepts

The choice to attribute a uniform and autonomous meaning to undefined treaty terms, or to employ one of the aforementioned types of *renvoi*, also leads to different burdens on the interpreter in terms of knowledge of the relevant foreign legal concepts and systems of law.

On one extreme of the scale, the use of a type-II *renvoi* renders the task of the interpreter rather easy, since the latter has to refer to and apply its domestic law concepts for the purpose of construing the relevant treaty provision.

The situation generally becomes more complicated where type-III and type-IV *renvois* are at stake, since the interpreter may be often required to refer to and apply legal concepts of foreign substantive law and, therefore, he needs to acquire a sufficient understanding of the foreign legal system and of the role played therein by the foreign

<sup>1309</sup> See A. von Overbeck, “Le champ de l’application des règles de conflit ou de droit matériel uniforme prévues par les traits. Exposé préliminaire et rapport définitif avec projet de résolution présentés à l’Institut de Droit International”, 58-I *Annuaire de l’Institut de Droit International* (1979), 97 *et seq.*, at 117; W. Wengler, “Réflexions sur l’application du droit international public par les tribunaux internes”, 72 *Revue Générale de Droit International Public* (1968), 921 *et seq.*, at 964, in particular note 15 and references therein. With specific regard to the relevance of EU law for the purpose of Article 3(2) of OECD Model-based tax treaties, see F. Avella, “Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention”, *World Tax Journal* (2012), 95 *et seq.*, at 113 *et seq.*

<sup>1310</sup> See, although with reference to tax treaties, F. Avella, “La qualificazione dei redditi nelle Convenzioni internazionali contro le doppie imposizioni stipulate dall’Italia”, *Rivista di Diritto Tributario. Parte Quinta* (2010), 45 *et seq.*, at 54; F. Avella, “Il beneficiario effettivo nelle convenzioni contro le doppie imposizioni: prime pronunce nella giurisprudenza di merito e nuovi spunti di discussione”, *Rivista di Diritto Tributario. Parte Quinta* (2011) 14 *et seq.*, at 22 *et seq.*

<sup>1311</sup> See P. Reuter, “Quelque réflexion sur le vocabulaire de droit international”, in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 428; J. W. F. Sundberg, “A Uniform Interpretation of Uniform Law”, 10 *Scandinavian Studies in Law* (1966), 219 *et seq.*, at 236. See, by analogy, the analysis of the inter-temporal law issue in section 2.3.3.4 of Chapter 3 of Part II.

legal concepts for the purpose of properly interpreting the relevant treaty provision.

The use of a type-I *renvoi* presents similar qualitative problems, although quantitatively more significant due to the fact that, at least with reference to multilateral treaties, interpreters from most of the contracting States have to refer to and apply foreign legal concepts.

Finally, at the other extreme of the scale, the choice to attribute a uniform and autonomous meaning to undefined treaty terms presents major interpretative issues and uncertainties, caused by the need for the interpreter to take into account a vast spectrum of contextual elements, including the relevant foreign legal concepts and systems of law, in order to construe the treaty provisions at stake.

#### 4.4.2. *The tendency to examine foreign legal systems and concepts through the looking glasses of the interpreter's domestic law*

Not infrequently do interpreters lack the knowledge of the relevant foreign legal concepts and systems of law necessary to properly construe the treaty.<sup>1312</sup>

What interpreters tend to do in these cases<sup>1313</sup> is to attribute to the treaty terms the domestic legal jargon meaning of the corresponding terms employed in their national legal systems. The “correspondence” between such terms is generally established by interpreters by taking into account their past practice, multilingual dictionaries, comparative law studies and the analysis of multilingual treaties in which both languages (legal jargons)<sup>1314</sup> are used as authentic languages. Such correspondence is generally established on the basis of:

- (i) the similarity of the functions performed by the concept underlying the treaty term in its original legal system and by the concept underlying the “corresponding” term under the interpreter’s national legal system;
- (ii) the correspondence of a significant part of the prototypical denotata (and non-denotata) of those two terms.<sup>1315</sup>

<sup>1312</sup> With regard to the field of private international law and private substantive law treaties, the risk of an unsatisfactory interpretation of the treaty due to the inappropriate knowledge of foreign law is pointed out in R. David, “The International Unification of Private Law”, in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, p. 106 and R. Mankiewicz, “Die Anwendung des Warschauer Abkommens”, *27 Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1962), 456 *et seq.*, at 457.

<sup>1313</sup> With reference to tax law, see, by analogy, the interesting statement made by Thuronyi on the dangerous effects of “ethnocentrism” in the practice of drafting foreign States’ tax law systems (see V. Thuronyi, “Studying Comparative Tax Law” in G. Lindencrona, S. Lodin and B. Wiman (eds.), *International Studies in Taxation: Law and Economics. Liber Amicorum Leif Mutén* (London: Kluwer Law International, 1999), 333 *et seq.*, at 334 and 338), according to which, in the drafting of the tax legislation of foreign States, tax specialists inevitably tend to look at tax law either exclusively or excessively from the perspective of their own States, mainly because most of them are first and foremost specialists in the law of the latter.

<sup>1314</sup> I.e. the language in which the treaty to be interpreted is authenticated and the language in which their own domestic laws are drafted.

<sup>1315</sup> For instance, where an Italian lawyer is faced with the interpretation of the term “enterprise” included in a

This phenomenon, often unperceived, causes the construction of undefined treaty terms to be heavily influenced by the domestic legal system and concepts of the treaty interpreter. This, in turn, leads interpreters from different States to construe the same treaty provision differently<sup>1316</sup> and, more generally, to unsatisfactory interpretative results.<sup>1317</sup>

#### 4.4.3. *Whether proxies of the relevant legal jargon terms should be used for the purpose of interpretation*

In order to interpret a treaty term in light of its domestic law meaning, the interpreter is often required to decide whether that treaty term, although not being a term of the relevant legal jargon, may be regarded as a proxy for a term of the relevant legal jargon and, therefore, whether it may be attributed the legal jargon meaning of the latter for the purpose of the treaty<sup>1318</sup>

Some instances of this issue may be taken from Italian tax treaty practice. The legal jargon term used in the Italian income tax code (ITC)<sup>1319</sup> to denote employment

treaty provision, he will commonly construe that term as denoting the concept underlying the Italian legal jargon term “impresa”, which is generally regarded as corresponding to the English term “enterprise”. However, it is normal that some of the denotata of one term are not denoted by the other term (and vice versa), either because they are unknown in the legal system corresponding to the jargon of the latter term, or because they are denoted by a different term in such a jargon.

<sup>1316</sup> This tendency is also stressed in S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), pp. 154-160, where it is pointed out that the major reason for the existence of divergent interpretations of (uniform private law) treaty provisions is that treaties are highly incomplete legal systems, in which general principles of law, legal categorizations, fundamental legal concepts are absent; in addition, treaties generally regulate only a few selected features of the underlying relevant domestic legal systems (e.g. contract law, family law, income tax law, etc.). Such incompleteness necessarily leads the interpreter to rely on his encyclopedic knowledge of his own legal system(s) in order to interpret undefined terms and to complete (or extensively interpret) treaty provisions by means of analogy. As a result, when two interpreters are from two different States (where different legal systems are in force), it is just part of the normal course of events that two different interpretations are arrived at and supported (see also R. David, “The International Unification of Private Law”, in *International Encyclopedia of Comparative Law. Volume 2* (The Hague: Nijhoff, 1971), Chapter 5, pp. 94, 98 *et seq.*, 106, 167 *et seq.*; P. Reuter, “Quelque réflexion sur le vocabulaire de droit international”, in J. Boulouis et al., *Mélanges offerts à Monsieur le Doyen Louis Trotabas* (Paris: Librairie générale de droit et de jurisprudence, 1970), 423 *et seq.*, at 432; J. W. F. Sundberg, “A Uniform Interpretation of Uniform Law” 10 *Scandinavian Studies in Law* (1966), 219 *et seq.*, in particular at 234; 119; A. Malintoppi, “The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts”, in C. M. Schmitthoff (ed.), *The Sources of the Laws of International Trade. With special reference to East-West Trade* (London: Stevens & Sons, 1964), 127 *et seq.*, at 128 *et seq.*).

<sup>1317</sup> I.e. the absence of uniformity, where uniformity is sought, and the misconstruction of foreign legal jargon terms, where a *renvoi* to foreign legal concepts is at stake.

<sup>1318</sup> The fact that a day-to-day language term (or a term of a different legal jargon in the same natural language) may be regarded as a proxy for a legal jargon term depends on various circumstances that have to be appreciated by the interpreter, the most important of which are the following: (i) the two terms are synonyms where used in the day-to-day language; (ii) the definition of the legal jargon term makes reference to (or use of) the other term; (iii) even where they are not synonyms, their related concepts may play the same function in the context where the treaty term is used and have a significant common group of denotata (and non-denotata).

<sup>1319</sup> Presidential Decree no. 917 of 22 December 1986.

income<sup>1320</sup> is “redditi di lavoro dipendente”;<sup>1321</sup> however, in Article 15 (or its equivalent) of many tax treaties concluded by Italy the expression “lavoro subordinato” is used instead of “lavoro dipendente”. Similarly, the legal jargon term used in the ITC to denote alienation is “cessione”;<sup>1322</sup> however, in Article 13 (or equivalent) of many tax treaties concluded by Italy the term “alienazione” is used instead of “cessione”.

The issue at stake here is twofold.

On the one hand, the question may be raised of whether and on which basis the two terms might be regarded as proxies. In that respect, in footnote 1318 the author has mentioned some of the elements that could be taken into account by the interpreter in order to answer such a question.

On the other hand, provided that the interpreter concludes that the two terms are proxies in the specific context, the issue must be tackled of whether such proximity is to be seen as evidence of the intention of the parties to attach to the treaty term the meaning of the corresponding legal jargon term, or, on the contrary, whether the use of a term different from the legal jargon term constitutes evidence of the parties’ intention not to rely on the legal jargon meaning. In order to solve such an issue, the interpreter may take into account other elements, such as how common the use of similar kinds of proxies in the treaty is, the reasonableness of the interpretations based on either solution, the existence of other possible reasons that could explain why a proxy, and not the legal jargon term, has been used and so forth.

#### 4.4.4. *Whether domestic law assimilations should be taken into account for the purpose of interpretation*

An additional problem emerges with regard to cases of assimilation occurring in the legal jargon from which the treaty terms are derived.

By assimilation, the author intends to refer to instances where, for specific purposes, the denotata of a certain term (B) are treated as if they were (also) denoted by a different term (A).

The assimilation may take different forms. For instance, under the ITC the following assimilations take place, among other ones:

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<sup>1320</sup> Note that the sentence that the author has just written down is a tautology, since here “employment income” is nothing other than a different sign used to denote the same denotata of “the legal jargon term used in the Italian income tax code”, which in turn is used as a perfect synonym of the following “redditi di lavoro dipendente”. There is no attempt to know what the concept associated with the term “employment income” is where the latter is used as English legal jargon term (if any); that would be useless for the purpose of the reasoning expressed by the sentence and, furthermore, by far too complicated.

As previously noted, the same mental process usually occurs when an interpreter who has knowledge of the legal system, and related legal jargon, of a certain State (e.g. France) reads and attributes a meaning to a term of a different legal jargon (e.g. Japanese): the second term is often treated as if it were an exact synonym of the former (just a different sign that denotes the same denotata of the former term).

<sup>1321</sup> See Article. 49 *et seq.* ITC.

<sup>1322</sup> As of September 2010, the term “cessione” appears more than fifty times in the ITC; in contrast, the term “alienazione” is not used at all (its derived term “alienate” is employed just once).

- (i) the tax law provisions dealing with “cessioni a titolo oneroso” (*alienations against remuneration*) of property also apply to “conferimenti in società” (*capital contributions into companies*);<sup>1323</sup>
- (ii) the “strumenti finanziari” (*financial instruments*) whose remuneration is totally represented by participation in the profits of the issuing company are deemed to be akin to “azioni” (*shares*);<sup>1324</sup>
- (iii) *income derived by a company’s director*, who, as such, is not an employee of that company for private law purposes, is (generally) assimilated to “redditi di lavoro dipendente” (*income from employment*).<sup>1325</sup>

The existence of assimilations under the relevant domestic law may lead the interpreter to conclude that the above-mentioned treaty term (A) should be construed as if it denoted also the denotata of the legal jargon term (B), especially where the scope of the treaty significantly overlaps with the scope of the domestic provisions in relation to which the assimilation has been set up.

However, the opposite conclusion could be drawn as well. The interpreter, for instance, could argue that, since for the purpose of the domestic legal system a specific assimilation has been considered necessary in order to regard term (A) as denoting also the denotata of term (B), the absence of an equivalent assimilation, or specific definition, in the treaty would make it impossible to make a similar enlargement of the intension of term (A) in the treaty context. The interpreter could further uphold his position by drawing the distinction, which might be customary in the relevant national legal system, between cases of assimilation and cases of broad definition of terms.<sup>1326</sup>

#### 4.5. *Conclusions on research questions h): the relevance of multijuralism for the interpretation of multilingual treaties*

The preliminary comment to be made, with regard to the impact of multijuralism on the interpretation of multilingual treaties, is that the presence of legal jargon terms in the authentic texts of a treaty does not change the goal of its interpreter, which remains establishing the utterance meaning of its provisions.

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<sup>1323</sup> See Article 9(5) ITC; therefore, each capital contribution transaction is treated, for Italian income tax purposes, as if it were an alienation against remuneration, although it is not directly denoted by the latter expression in the Italian tax legal jargon (and not denoted at all thereby in the Italian private and commercial legal jargon).

<sup>1324</sup> See Article 44(2) ITC.

<sup>1325</sup> See Article 50(1) ITC.

<sup>1326</sup> It might, however, be counter-argued that (i) the latter distinction is, from a treaty perspective, of a purely formal nature, since the function performed by those two different techniques (i.e. assimilation and broad definition) is substantially the same within the specific national legal system and the choice of one, instead of the other, has not been made by the legislator having the treaty scenario in mind and (ii) it is reasonable to imagine that the parties, when concluding the treaty, had clearly in mind that term (A), in the specific legal jargon, actually also denotes the denotata of term (B) and thus its inclusion in the treaty was intended to achieve the same result.

Similarly, the outcomes of the analysis carried out by the author in section 3 of this chapter are not fundamentally affected by the fact that the treaty terms to be construed are legal jargon terms. Therefore, the interpreter continues to be entitled to rely on any single authentic text, taken in isolation, for the purpose of interpreting the treaty, and he is required to remove the *prima facie* discrepancies in meaning by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.

At a more in-depth level of analysis, however, the interaction between the multilingual nature of the treaty and the use therein of legal jargon terms may play a substantial role.

First, the multilingual character of the treaty comes into play as an element that the interpreter may assess in order to establish how the parties intended to construe the legal jargon terms employed in the treaty.

In particular, where the treaty is authenticated in all the official languages of the contracting States and, due to its nature, it interacts strictly with the contracting States' domestic laws, the interpreter could be led to conclude that the parties intended the legal jargon terms employed in the treaty to be attributed their technical meanings under the domestic law of the contracting State applying the treaty. In this case, in fact, the interpreter might regard the linguistic aspect so deeply intertwined with the legal characterization aspect, for the purpose of the treaty application, as to render such a solution almost unavoidable.<sup>1327</sup>

The treaty term expressed in the official language of the State applying the treaty, in this respect, would work as the key to unlock the door of the appropriate domestic law meaning, i.e. as a guide for the interpreter to select the domestic law meaning that the parties considered to best fit in the context of the relevant treaty provision.

Second, the fact that the interpretation concerns legal jargon terms significantly influences the resolution by the interpreter of the *prima facie* discrepancies in meaning among the authentic treaty texts.

In fact, based on the assumption that the concepts underlying the legal jargon terms employed in one legal system do not normally have accurate equivalents in other

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<sup>1327</sup> Similarly, Fantozzi has pointed out, with reference to tax treaties (although his analysis applies well beyond such a narrow field), that there is an intrinsic difficulty in singling out “the “linguistic” issues relating to the interpretation of double tax conventions from the broader “classification” issues. The two concepts are deeply intertwined, and I therefore do not know if it is possible to define where the thin line that divides the two exactly lies. I find it rather easier to imagine them as two sides of the same coin. In the various hypotheses the interpreter/translator can be faced with, there is, in my view, always a part of each aspects. [...] For the treaty to apply [...] it is required that a treaty situation takes place. It is therefore required that the State which has to give up part of its power to tax recognizes the *material event* occurred in the other State, as represented by a *legal concept*. The definition of this legal concept involves issues of both kinds: *linguistic* and *classification* issues.” (A. Fantozzi, “Conclusions”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 335 *et seq.*, at 335-336).

legal systems, but just general correspondents (if any), i.e. concepts that fulfill similar functions within the respective legal systems and with which they share a considerable part of their prototypical denotata (and non-denotata),<sup>1328</sup> the interpreter must not look for an exact equivalence, but just for a general correspondence among the domestic law concepts underlying the legal jargon terms used in the various authentic texts in order to establish that no discrepancy exists between such texts.

For instance, where a treaty concluded between Austria and Italy is authenticated in the German and Italian languages and employs the terms “Unternehmen” and “impresa”, the interpreter, in order to conclude that there is no discrepancy in meaning between those two terms, must be satisfied in ascertaining that the legal concepts underlying these two terms under Austrian and Italian domestic laws generally correspond with each other, in the sense that they fulfill similar functions within the respective legal systems<sup>1329</sup> and share a substantial part of their prototypical denotata (and non-denotata).<sup>1330</sup> The fact these two concepts do not perfectly overlap may not be considered significant in order to establish whether a discrepancy in meaning exists between the two texts.

Once such a general correspondence has been established, any discrepancy in meaning between the authentic treaty texts will no longer be considered to exist and the interpreter must proceed to determine the utterance meaning of the legal jargon treaty terms on the basis of either authentic text.

Thus, for instance, where the interpreter concludes that the parties intended to attribute a uniform and autonomous meaning to a certain legal jargon treaty term, he will construe such a term on the basis of the overall context and by taking into account the various corresponding concepts under the domestic laws of the contracting States. In the previous example, where the treaty was in force between Austria, Italy, France and Spain, the interpreter would consider, as part of the overall context, the domestic law meanings that the treaty terms “Unternehmen” and “impresa” and their corresponding terms “entreprise” and “empresa” have under Austrian, Italian, French, and Spanish domestic law, respectively.<sup>1331</sup> The result of his interpretation, due to the loose relation existing between the autonomous treaty meaning and the corresponding domestic law meanings under the laws of the contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

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<sup>1328</sup> See the position expressed by the United States representative at the Vienna Conference with regard to the impossibility of reconciling the different authentic texts of a treaty where different systems of law were involved, due to the fact that often there is no legal concept in one system that exactly corresponds to a certain legal concept in the other system (UNCLT-I<sup>st</sup>, p. 189, para. 41). See also, in this respect, the comment on Part III of the 1964 Draft made by the Yugoslavian government (YBILC 1966-II, p. 361).

<sup>1329</sup> E.g. both are used by the respective legal system in order to distinguish certain economic activities from others, in connection with bankruptcy procedures, the requirement to keep accounts, etc.

<sup>1330</sup> E.g. they both denote banking activities, insurance activities, sale and production of goods activities, certain activities in the provision of services, etc.

<sup>1331</sup> He could take into account as well the domestic law meanings of other corresponding terms under the laws of non-member States, as long as he can reasonably argue their relevance for his current analysis.

Similarly, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,<sup>1332</sup> he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State of the *forum*) has under the substantive *lex fori*. In the previous example, where the treaty in force between Austria, Italy, France, and Spain was to be interpreted by a French court, the interpreter would attribute to the treaty terms “Unternehmen” and “impresa” the meaning that the term “entreprise” has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

However, where the interpreter establishes that no general correspondence may be considered *prima facie* to exist among the legal jargon terms employed in the various authentic texts, e.g. because their underlying concepts under the relevant domestic laws do not fulfill similar functions and do not share any significant part of their prototypical denotata (and non-denotata), the interpreter must remove the consequent apparent discrepancy in meanings among the authentic treaty texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.<sup>1333</sup> In the previous example, where the Italian authentic text of the treaty employed the term “attività economica” instead of “impresa”, the former having a much wider scope than the latter under Italian law, a *prima facie* discrepancy in meaning might be considered to exist between the Italian and the German authentic texts. An interpretation of those texts based on Articles 31 and 32 VCLT could then lead the interpreter to conclude that the general meaning underlying the treaty terms “Unternehmen” and “attività economica” is that characterizing the terms “Unternehmen”, “impresa” (and not “attività economica”), “entreprise” and “empresa” under Austrian, Italian French and Spanish domestic laws.

Once the *prima facie* discrepancy has been set aside and the general meaning underlying all legal jargon terms employed in the authentic treaty texts has been established, the more precise meaning that the parties intended to attach thereto (i.e. the utterance meaning) will be determined by the interpreter according to the circumstances.

For instance, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,<sup>1334</sup> he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State *fori*) has under the substantive

<sup>1332</sup> The same, however, holds true as well with regard to other types of *renvoi*.

<sup>1333</sup> See, although with specific regard to tax treaties, G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99-100.

<sup>1334</sup> The same, however, holds true as well with regard to other types of *renvoi*.

*lex fori*. In the previous example, where the treaty was to be interpreted by a French court, the interpreter would attribute to the treaty terms “Unternehmen” and “attività economica” the meaning that the term “entreprise” has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

Finally, whenever faced with the interpretation of a treaty term, the interpreter must assess, as illustrated in subsections 4.4.3 and 4.4.4 of this chapter, whether for the purpose of construing that term he should also take into account legal jargon proxies and assimilations under the relevant domestic law.

The above conclusions are substantially in line with principle (ix) established by the author in section 2 of Chapter 3 of Part I. That principle highlights that, especially where the relevant treaty is authenticated in all the official languages of the contracting States, the question may arise of whether the parties intended the relevant terms used in the various authentic texts to be attributed a uniform meaning, or whether they intended each State to interpret those terms in accordance with the meaning that the term employed in the text authenticated in its own official language has under its domestic law.

According to principle (ix), the interpreter should first answer such a question on the basis of the treaty text(s) and the overall context and then determine the utterance meaning of the relevant treaty provision:

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

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

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

What constitutes the majority of the respective prototypes and their distinctive features, which have to be taken into account for the purpose of assessing the similarity, cannot be

said *in vacuo*. The answer to that question depends upon:

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

## 5. Significant principles and maxims of interpretation applied by international tribunals: interactions with the rules of Article 33 VCLT

The author has already mentioned that the ILC decided to codify only “the comparatively few general principles [that appeared] to constitute general rules for the interpretation of treaties”,<sup>1335</sup> leaving the interpreter the freedom to apply the other other principles and maxims suitable for use in the particular case at stake. As the ILC pointed out, such principles and maxims “are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case.”<sup>1336</sup>

An analysis of the case law of the ICJ (and, previously, of the PCIJ), of the decisions of national and international courts and tribunals, as well as the scrutiny of the positions expressed by scholars in the field of public international law, show the existence of a significant number of other principles and maxims occasionally referred to in connection with the interpretation of multilingual treaties. The following is deemed to be an extensive, although not complete, list of these principles and maxims:<sup>1337</sup>

- (i) Preference for the authentic texts with a clear meaning over those with unclear meanings<sup>1338</sup>

<sup>1335</sup> See paragraph 5 of the Commentary to Articles 27 and 28 of the 1966 Draft (YBILC 1966-II, pp. 218-219, para. 5).

<sup>1336</sup> See paragraph 4 of the Commentary to Articles 27 and 28 of the 1966 Draft (YBILC 1966-II, p. 218, para. 4).

<sup>1337</sup> The author has maintained as much as possible, in such a list, the wording used by courts, tribunals and legal scholars; in particular, it may be noted that the following principles and maxims often make reference to the treaty “texts”, although, for the reasons put forward in the present study, reference to the “meanings” of such texts should have been made in some cases.

<sup>1338</sup> Explicitly rejected by the ILC as a general principle to be codified. See paragraph 9 of the Commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 226, para. 9). See also J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961),

(ii) Preference for the drafted text(s)<sup>1339</sup>

(iii) Comparison (from the outset) of the various authentic texts<sup>1340</sup>

(iv) Subjective interpretation of the treaty (i.e. interpretation of the treaty mainly based on the intention of the parties as a subjective element distinct from the text)<sup>1341</sup>

(v) The maxim *ut res magis valeat quam pereat* and the principle of effectiveness. In the case of a *prima facie* divergence among the authentic treaty texts, this maxim would imply that the text(s) whose meaning makes a treaty provision have a certain effect should be preferred over those texts whose meanings make the same provision ineffective, or meaningless (the effectiveness being assessed in light of the object and purpose of the treaty)<sup>1342</sup>

(vi) Preference for the text that best harmonizes the treaty with the relevant rules of

72 *et seq.*, at 87-92; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 7-8, 11, 82, 328; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 285-286; W. Rudolf, *Die Sprache in der Diplomatie und internationalen Verträgen* (Frankfurt: Athenäum Verlag, 1972), p. 70; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 94-95.

<sup>1339</sup> See section 3.2.3 of this chapter; see also A. D. McNair, *The Law of Treaties* (Oxford: The Clarendon Press, 1961), p. 434; J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 98-105; A. Verdross et al., *Völkerrecht* (Vienna: Springer-Verlag, 1964), p. 174; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 326-327; P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 418 *et seq.*; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 288-289; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 65-69, 88-94.

<sup>1340</sup> See section 3.3 of this chapter.

<sup>1341</sup> On the relevance of such a principle with reference to the interpretation of multilingual treaties, see the Commentary to the Draft Convention on the Law of Treaties with Comments, prepared by the Research in International Law (see Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*, at 971); M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 82-83; H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law* (1949), 48 *et seq.*, at 76; C. Parry, "The Law of Treaties", in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), 175 *et seq.*, at 214.

<sup>1342</sup> See R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1280-1281. It must be noted that the ILC considered that such principle(s), insofar it reflected a true general rule of interpretation, was already embodied in the provision of (now) Article 31(1) VCLT, which requires a treaty to be interpreted in good faith and in light of its object and purpose (see YBILC 1966-II, p. 225, para. 7).

international law applicable in the relation between the parties<sup>1343</sup>

(vii) Preference for the narrowest authentic text<sup>1344</sup>

(viii) Interpretation *contra proferentem*, according to which the authentic text whose meaning is least to the advantage of the party which proposed and first prepared the provision, or for the benefit of which the provision was inserted in the treaty, should be preferred<sup>1345</sup>

(ix) Preference for the authentic text in the language used in the proceedings before the court or tribunal<sup>1346</sup>

(x) Preference for the authentic text in the official language of the party to which the disputed provision refers<sup>1347</sup>

(xi) Preference for the authentic text in the official language of the obligated party, or for the authentic text that the obligated party has ratified<sup>1348</sup>

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<sup>1343</sup> See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 408.

<sup>1344</sup> See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 76-81; R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 505; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), p. 325 and references in footnotes 157-159; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 287-288; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 63-65. For instance, in his separate opinion in the *Western Sahara* case, Judge Ammoun stated that he could not reject the contention, put forward by Morocco, in favour of the authentic text with the narrower meaning, since it was based on settled case law (see ICJ, 16 October 1975, *Western Sahara*, advisory opinion, Judge Ammoun's separate opinion, p. 88).

<sup>1345</sup> See, among others, M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 99-100; D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 257; R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), p. 1279 and footnotes therein.

<sup>1346</sup> See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 152.

<sup>1347</sup> See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 152.

<sup>1348</sup> See A. Rivier, *Principes du droit des gens. Tome II* (Paris: Arthur Rousseau, 1896), p. 122; J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 113-115; M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 327-329; D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 256 and n. 69; J. M. Mössner, "Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969", 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 284-285; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 95-99. This principle appears strictly

(xii) The maxim *in dubio mitius*, according to which the authentic texts whose meaning is less onerous to the party assuming an obligation, or imposes the fewest restrictions on the (sovereign) parties, should be preferred<sup>1349</sup>

(xiii) Preference for the authentic text that best balances the rights and obligations of the parties<sup>1350</sup>

(xiv) Recourse to non-authentic versions<sup>1351</sup>

(xv) Preference for the authentic texts with an unambiguous meaning, which is also one of the meanings of the other ambiguous texts<sup>1352</sup>

(xvi) A combination of several of the above principles.

The most interesting question, with regard to such principles and maxims, concerns their status as principles of international law (if any) and their relation to the rules expressed by Articles 31-33 VCLT.

Some of them, in particular no. (i), (v), (vi) and (xv), might qualify (in the future) as “international customs” or “general principles of law” and could be regarded as principles expressed by “judicial decisions and the teachings of the most highly qualified publicists of the various nations” under Article 38 of the ICJ Statute.<sup>1353</sup>

connected to the the other principle according to which each party is bound only by the authentic text drawn up in its own official language (see J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 76-81; J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 288-289; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 55 *et seq.*; D. P. O’Connell, *International Law* (London: Stevens & Sons, 1970), p. 258; M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 223, note 86).

<sup>1349</sup> See R. Jennings and A. Watts (eds.), *Oppenheim’s International Law. Volume I. Peace* (London: Longman, 1992), pp. 1278-1279 and the case law cited in the footnote therein. The *Mavrommatis Palestine Concessions* case (PCIJ, 30 August 1924, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, judgment) could also be seen as an instance of application of the maxim *in dubio mitius*, although, as clearly pointed out by Jennings and Watts, the application of such a maxim in that case could be better regarded as flowing from the general nature of the treaty rather than as a consequence of its multilingual character (see R. Jennings and A. Watts (eds.), *Oppenheim’s International Law. Volume I. Peace* (London: Longman, 1992), p. 1284, note 5).

<sup>1350</sup> See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 408.

<sup>1351</sup> On the possibility and relevance of using non-authentic version for the purpose of interpreting multilingual treaties, see section 3.2.4 of this chapter. See also J. Hardy, “The Interpretation of Plurilingual Treaties by International Courts and Tribunals”, 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 123-138 and 153-154; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 103-115.

<sup>1352</sup> See section 3.4.4 of this chapter.

<sup>1353</sup> See, in this sense, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 207.

In any event, although scholars' positions vary greatly with regard to the actual relevance and status of such principles and maxims,<sup>1354</sup> it seems that their reasonable use in practice should be limited to assisting the interpreter in establishing and arguing for the utterance meaning of the treaty provisions where the overall context appears to support their relevance.<sup>1355</sup>

In contrast, these principles and maxims cannot be “automatically” applied by the interpreter in order to resolve *prima facie* divergences between the various authentic texts, since such a use would conflict with both (i) the principle that, as far as possible, the meaning common to all authentic texts is to be determined by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT,<sup>1356</sup> and (ii) the principle that, when this is not possible, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted.<sup>1357</sup> Some of them<sup>1358</sup> may provide the interpreter with a reasonable solution, in light of the overall context, for the purpose of determining the common meaning of the various authentic texts on the basis of the interpretative rules enshrined in Articles 31 and 32 VCLT and, to a lesser extent, in order to adopt the meaning which best reconciles the various authentic texts, having regard to the object and purpose of the treaty. In these cases, however, the recourse to such principles and maxims appears supported not so much by their previous, more or less recurrent, use by courts and tribunals, nor by the fact that they have been upheld by well-known scholars, but simply by the fact that their application provides a logical and fair solution of the interpretative issue at stake, within the framework of the VCLT. As put by Germer, the specific principles for the interpretation of multilingual treaties that have been proposed from time to time are nothing but an application of the standard rules of treaty interpretation enshrined in Articles 31 and 32 VCLT with a special view to the

<sup>1354</sup> See S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 283-285; J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 279; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), p. 101; D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 253; M. S. McDougal *et al.*, *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), p. 104; M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 207; L. Ehrlich, “L'interprétation des traités”, 24 *RCADI* (1928), 5 *et seq.*, at 99-100; H. Kelsen (revised and edited by R. W. Tucker), *Principles of International Law* (New York: Holt, Rinehart and Winston, 1966), pp. 459-460.

<sup>1355</sup> See, in this respect, YBILC 1966-II, p. 218, para. 4, and p. 226, para. 9; see also M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 208, where the author pointed out that the VCLT avoids clearly dividing the principles and maxims that constitute customary international law, whose application (compulsory, unless a different agreement between the parties exists) is regulated by the VCLT Preamble, from those principles and maxims that just represent judicial practice, whose (non-compulsory) application is delineated in the VCLT Commentary.

<sup>1356</sup> Which, in turn, do not provide for any automatic rule for the solution of potential divergences of meanings.

<sup>1357</sup> See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 408, who mentions as support for this argument the decision of the ILC not to include among the general rules for the interpretation of multilingual treaties the rules set out in paragraphs 3 and 4 of Article 75 of Sir Humphrey Waldock's Third Report on the Law of Treaties (see sections 2.1 and 2.2 of this chapter).

<sup>1358</sup> In particular nos. (i), (ii), (iv), (v), (vi), (xii), (xiii), (xiv), (xv) and (xvi).

concrete problems of interpretation with which the interpreter had been confronted.<sup>1359</sup>

Finally, it has been maintained that most of such principles and maxims would constitute supplementary means of interpretations under Article 32 VCLT.<sup>1360</sup>

The author submits that this characterization should be rejected.<sup>1361</sup> In fact, the means of interpretation referred to by Article 32 VCLT are acts, facts and circumstances that may be appreciated as items of evidence of the common intention of the parties and, therefore, as elements from which it is possible to infer the utterance meaning of the treaty. The above-mentioned principles and maxims, in contrast, are not elements on the basis of which the possible common intention of the parties can be determined, but paths that the inferential process of interpretation could follow, in order to determine the utterance meaning of the treaty, starting from the elements available (acts, facts and circumstances, including the supplementary means of interpretation).

## 6. Conclusions

The main goal achieved by the VCLT, in respect of the interpretation of multilingual treaties, is the codification of the fundamental principles to be followed by the interpreter, about which some uncertainty existed before.<sup>1362</sup>

The analysis carried out by the author has highlighted the heterogeneous nature of the provisions encompassed in Article 33 VCLT and the ontological differences between these and the provisions of Articles 31 and 32 VCLT. While the latter, for the most part, are limited to pointing out which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrating the different weights that the interpreter should typically attribute thereto due to their different intrinsic attitudes toward conveying the final agreement of the parties, the provisions of Article 33 VCLT perform different tasks.

On the one hand, the provisions of the first two paragraphs of Article 33 VCLT establish the rules of legal effectiveness of the treaty language versions. Thus, they are not actually concerned with treaty interpretation, but constitute a logical prerequisite to

<sup>1359</sup> See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 427.

<sup>1360</sup> See M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 100-101.

<sup>1361</sup> See, accordingly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 410-411 and P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 427.

<sup>1362</sup> For instance, Liang, in an article published in 1953, wondered whether, with regard to a treaty concluded under the auspices of the United Nations, whose provisions had been originally drafted in one language and then officially translated into the other United Nations official languages, all five texts should have been considered "equally authentic" in the absence of any specific provision in this respect (see Y-L. Liang, "The Question of Revision of a Multilingual Treaty Text", 47 *American Journal of International Law* (1953), 263 *et seq.*, at 264).

such an activity, since they provide the rules for determining which texts must be interpreted and which (language) versions, in contrast, may be taken into account only as additional elements to corroborate the utterance meaning of the treaty text(s).

On the other hand, the last two paragraphs of Article 33 VCLT establish two proper rules of interpretation,<sup>1363</sup> which cannot be entirely inferred either from Articles 31 and 32 VCLT, or from the first two paragraphs of Article 33 VCLT:

- (i) Article 33(3) VCLT establishes that all authentic texts always have the same meaning and that the interpreter may, unless a *prima facie* discrepancy between different authentic texts is pointed out, rely autonomously on any of those authentic texts in order to construe the treaty;
- (ii) Article 33(4) VCLT provides that *prima facie* discrepancies among the various authentic texts must be removed by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and that, where such a procedure does not succeed, the interpreter has to adopt either the meaning attributable to the prevailing text, or, in the absence of a prevailing text, the meaning that best reconciles the authentic texts, having regard to the object and purpose of the treaty.

With regard to the (proper) rules of interpretation established by Article 33 VCLT, as previously noted, some scholars have criticized the choice of the ILC and the Vienna Conference not to insert clear and firm guidelines for the solution of issues concerning the interpretation of multilingual treaties.

Germer, for instance, stated that, although the last clause of Article 33(4) VCLT directs the interpreter to adopt the meaning which best reconciles the authentic texts in light of the object and purpose of the treaty, the very same provision fails to specify the precise method by which this meaning is to be found.<sup>1364</sup>

After an extensive review of the literature on the interpretation of multilingual treaties, Tabory submitted that the “absence of sufficiently firm guidelines to overcome problems involved in multilingual interpretation is widely noted in the literature”.<sup>1365</sup> Tabory also affirmed that the “elusive” solution adopted by the Vienna Conference and based on the reconciliation of the texts in light of the object and purpose of the treaty did not clarify whether the meaning to be finally adopted was to be arrived at by pushing or stretching the meaning in one text as far as possible towards the other, or by finding the midpoint between them, or by reducing the meaning in both texts to the lowest possible common denominator. However, she recognized that the individual circumstances of the

<sup>1363</sup> I.e. rules that are not limited to highlighting which elements and items of evidence are to be taken into account for the purpose of treaty interpretation and to illustrating the different weights that the interpreter should typically attribute thereto, but which prescribe, under certain conditions, the meaning that must be attributed to the authentic treaty texts.

<sup>1364</sup> See P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 403; similarly, J. M. Mössner, “Die Auslegung mehrsprachiger Staatsverträge, Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. Mai 1969”, 15 *Archiv des Völkerrechts* (1972), 273 *et seq.*, at 302.

<sup>1365</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 215.

case, as well as the object and purpose of the treaty, no doubt provide the interpreter with some guidance in that respect.<sup>1366</sup>

O’Connell, discussing the whole set of rules on treaty interpretation enshrined in Articles 31-33 VCLT, asserted that such articles “have the effect of transforming logical positions into rules of law. However, the priorities inherent in the application of these rules are not clearly indicated, and the rules themselves are in part so general that it is necessary to review traditional methods whenever interpreting a treaty. [...] More controversy is likely to be aroused by them than allayed.”<sup>1367</sup>

Such criticisms, however, fail to appreciate that the process of interpretation of multilingual treaties, as any other process of meaning attribution to signs, is a cognitive process based on the triangular interaction between the speaker (contracting States), the hearer (interpreter) and the utterance (treaty texts); and, as any other cognitive process, it cannot be imprisoned in a jail of strict, compulsory rules to be followed, since it is based on intuition and logic, both having their own necessary role in the process of interpretation and both being inherently refractory to *a priori* external restrictions. In this respect, as Poincaré put it, logic and intuition are both “indispensable. Logic, which alone can give certainty, is the instrument of demonstration; intuition is the instrument of invention.”<sup>1368</sup>

Thus, the author agrees with Rosenne who, with regard to (multilingual) treaty interpretation, acknowledged that the most the law can do is “to indicate in *general terms* [...] the nature of the rules governing the process by which this art [*ed.’s note*: of interpretation] is applied in a concrete case, the kind of intellectual discipline with which the interpreter must gird himself.”<sup>1369</sup>

That is exactly what Article 33 VCLT does: drawing a framework of basic principles within which the interpreter may exercise his discretionary judgment in order to determine the utterance meaning of the treaty in light of the overall context.<sup>1370</sup>

In this respect, the comparison between the outcomes of the semantics-based normative analysis carried out in Part I and the results of the positive analysis on how scholars, courts and tribunals have construed and applied Articles 31-33 VCLT, carried out in this

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<sup>1366</sup> See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 213.

<sup>1367</sup> See D. P. O’Connell, *International Law* (London: Stevens & Sons, 1970), p. 253.

<sup>1368</sup> 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.

<sup>1369</sup> See S. Rosenne, “On Multilingual Interpretation”, in S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff Publisher, 2007), 449 *et seq.*, at 454.

<sup>1370</sup> See, in this sense, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 218; similarly, Germer, according to whom the VCLT “does not set forth a rigid formula for the interpretation of plurilingual treaties, but adheres to the idea that whether the obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties” (see P. Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties”, 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 426).

and the previous chapter, has shown that, within the general guidelines on the interpretation of multilingual treaties set forth in the VCLT, the interpreter may often find an appropriate compass in the teachings of modern semantics, whose applications in the field of (multilingual) treaty interpretation have been inferred and arranged in the form of fundamental principles of interpretation by the author in sections 1 and 2 of Chapter 3 of Part I.

