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The interpretation of multilingual tax treaties

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CHAPTER 5 – INTERPRETATION OF MULTILINGUAL TAX TREATIES

1. Prolegomenon

1.1. *Research questions addressed in this chapter*

As outlined in the introduction, some interpretative issues exist that specifically relate to multilingual tax treaties,¹³⁷¹ due to the following idiosyncratic features thereof:

- (i) most tax treaties are based on the OECD Model,¹³⁷² which is officially drafted only in the English and French languages;
- (ii) the OECD Model comes with a commentary (the OECD Commentary) intended to explain, sometimes in great detail, the purpose and the application of the rules expressed by means of the model articles; the OECD Commentary is also officially drafted only in the English and French languages;
- (iii) most tax treaties include a rule of interpretation providing that each undefined treaty term must be given the meaning it has under the law of the contracting State applying the treaty, unless the context otherwise requires.

The present chapter is primarily aimed at examining such specific issues, which may be expressed by means of the following research questions:

- a) *What is the relevance of the OECD Model official versions for the purpose of interpreting multilingual tax treaties (either authenticated also in English and/or French, or authenticated in neither of these languages) and monolingual tax treaties authenticated neither in English nor in French?*
- b) *What is the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties?*
- c) *With regard to the relevance of Article 3(2) of OECD Model-based multilingual tax treaties for the purpose of their interpretation:*
 - (i) *Does Article 3(2) have an impact on the nature of the potential discrepancies in meanings among the authentic texts of a multilingual tax treaty? Where this question is answered in the affirmative, which are the various types of prima facie discrepancies that may arise? Should the interpreter put all of them on*

¹³⁷¹ Or other types of treaties that present similar features, e.g. bilateral treaties concerning estate, inheritance and gift taxes.

¹³⁷² Or on other models (such as national models, or the United Nations Model, which in turn are based to a large extent on the OECD Model).

the same footing for the purpose of interpreting multilingual tax treaties?

- (ii) *Is there any obligation for the interpreter to reconcile (at least to a certain extent) the prima facie divergent authentic texts of an OECD Model-based tax treaty?*
- (iii) *If the previous question is answered in the affirmative, to what extent must the differences of meaning deriving from the attribution of the domestic law meanings to the corresponding legal jargon terms used in the various authentic texts be removed (e.g. in accordance with Article 33(4) VCLT) and, instead, to what extent must such differences be preserved in accordance with Article 3(2)?*
- (iv) *What is the relevance of Article 3(2) for the purpose of resolving the prima facie discrepancies in meaning among the various authentic texts, where the treaty's final clause provides that a certain authentic text is to prevail in the case of divergences?*

Other interpretative issues, generally concerning multilingual treaties, have been already analysed in section 3 of Chapter 4 of Part II and, due to the fact that they arise without any relevant distinction in connection with both multilingual tax treaties and other multilingual treaties, the author will not examine them again in this chapter.

1.2. The need to distinguish between interpretation of legal jargon terms and interpretation of other terms included in (multilingual) tax treaties

A necessary preamble when one is going to deal with tax treaty interpretation concerns the possible categorization of treaty terms for the purpose of their construction.¹³⁷³

Such a categorization has the pragmatic function of directing the interpreter towards the appropriate elements and items of evidence that should be taken into account for the purpose of attributing a meaning to the relevant treaty terms and arguing in favor of such an interpretation. The need for this direction derives from the presence, in OECD Model-based tax treaties, of the special rule of interpretation encompassed in Article 3(2).

¹³⁷³ It is outside the scope of this section to deal with the interpretative issues stemming from the construction of multilingual domestic (tax) law, in particular multilingual (tax) statutes; on such issues see, among many, G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005); V. K. Bhatia et al. (eds.), *Multilingual and Multicultural Contexts of Legislation* (Frankfurt: Peter Lang, 2003); P. Salembier, "Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule", 35 *Ottawa Law Review* (2003-2004), 75 *et seq.*; J. Vanderlinden, "Langue et Droit (Belgique et Canada)", in E. Jayme (ed.), *Langue et Droit. XV Congrès International de Droit Comparé. Bristol 1998* (Bruxelles: Bruylant, 1999), 65 *et seq.*; P. Viau, "Quelques considérations sur la langue, le droit, le bilinguisme et le bijuridisme au Canada", in E. Jayme (ed.), *Langue et Droit. XV Congrès International de Droit Comparé. Bristol 1998* (Bruxelles: Bruylant, 1999), 141 *et seq.*

In that respect, one may first distinguish between *defined* and *undefined* treaty terms.

The former must be generally attributed the meaning that their definitions are purported to enlighten.¹³⁷⁴ The latter, in contrast, are theoretically subject to the interpretative rule provided for in Article 3(2).¹³⁷⁵ It is worth noting that, ironically, the terms used in the definitions of defined terms are generally not themselves defined in the treaty, thus being possibly subject as well to the interpretative rule provided for in Article 3(2).

Undefined terms, in turn, may be divided in *legal jargon* terms and *non-legal jargon* terms. The former are those terms that are attributed a specific legal jargon meaning under the law of the State applying the tax treaty.¹³⁷⁶ The latter are the remainder.¹³⁷⁷ In order to categorize a term as an undefined non-legal jargon term, it is irrelevant whether such term is attributed a legal jargon meaning under international law or under the law of the other contracting State. For instance, the term used in the Japanese authentic text of Article 16 of the 1971 Japan-United States tax treaty and corresponding to the term “capital assets” employed in the English authentic text of the

¹³⁷⁴ As more extensively discussed *infra*, tax treaties often explicitly subordinate the attribution to defined terms of the meaning provided for by the relevant definition to the fact that the context does not require otherwise (see Article 3(1) OECD Model). Even where such an explicit condition is not spelt out in the treaty text, one might wonder whether, in extreme cases, the overall context and, in particular, good faith (honesty, fairness, reasonableness and trustworthiness) could require a different meaning to be attributed to a defined term.

¹³⁷⁵ As rightly pointed out by Gibson L.J. in the *Memec* case, the expression “any term not defined” found in Article 3(2) OECD Model should be read as “any term not *relevantly* defined” (see Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 21 per Gibson L.J.). The question at stake in the *Memec* case concerned whether the absence of a definition of the term “dividends” in Article XVIII of the 1964 Germany-United Kingdom tax treaty, as modified by the 1970 protocol, signified that the term “dividends” in that article was to be construed as having the same meaning expressed by the definition found in Article VI(4) of the treaty, or as having the meaning indicated by Article II(3) thereof, which allowed the domestic law of the United Kingdom to determine it. Gibson L.J., in that respect, accepted the submission of one party to the dispute, not challenged by the other, that the words of Article II(3), “any term not otherwise defined”, meant “any term not otherwise *relevantly* defined”. According to Gibson L.J. “[a]rticle VI(4) commences with the words ‘The term ‘dividends’ as used in this article means...’”. The fact that the definition is not included in Article II as a general definition supports the view that the draftsman did not intend the Article VI(4) definition to apply whenever “dividends” is found in the Convention. That view is strengthened by the fact that Article VI(4) was substituted by the 1970 Convention at the very same time that Article XVIII was substituted, and it would be very surprising if the draftsman had intended the Article VI(4) definition to apply to Article XVIII not merely without saying so but whilst qualifying the scope of the application of Article VI(4) in the way I have indicated. Moreover where a term defined only in a distributive article is to have the same meaning in another but not every article, the draftsman has taken care to say so (see Articles XII(2), VIII(1) (substituted by the 1970 Protocol) and XVI(1)).

¹³⁷⁶ Such terms, or the corresponding terms in the other authentic texts of the tax treaty, may be attributed no legal jargon meaning under the law of the other contracting State, that being irrelevant for the purpose of categorizing such terms as legal jargon terms with reference to the application of the tax treaty by the former contracting State.

¹³⁷⁷ Therefore, the categorization of a tax treaty term as *undefined non-legal jargon* term cannot be made in the abstract, since that category is the complement of the sub-category *undefined legal jargon* terms in the category *undefined* terms and, thus, indirectly depends on which undefined terms are attributed a legal jargon meaning under the relevant law of the State applying the tax treaty.

same article (the capital gains article) should not be considered a legal jargon term where Japan is applying the treaty since, as maintained by Gomi and Ozawa, that term is not used under Japanese domestic law and was intended to take its meaning from the United States domestic law, in which the term “capital assets” is used as a legal jargon term.¹³⁷⁸

While Article 3(2) is directly applicable for the purpose of interpreting undefined legal jargon terms, one may wonder about its relevance in order to interpret undefined non-legal jargon terms.

The solution to such an issue may be (formally) twofold. On the one hand, one could argue that, since the term to be interpreted is not attributed any legal jargon meaning under the relevant law of the State applying the tax treaty, Article 3(2) is not applicable and that term is to be construed in accordance with the general rules of interpretation enshrined in Articles 31-33 VCLT. On the other hand, it might be maintained that, in such a case, Article 3(2) does apply and, absent the relevant legal jargon meaning, the term must be attributed a contextual meaning.

In this respect, the author believes that no difference exists between the two mentioned approaches, since, for the purpose of interpreting tax treaties, ascribing to a term a contextual meaning under Article 3(2) means nothing other than interpreting that term in accordance with Articles 31-33 VCLT.¹³⁷⁹ To put it differently, the context for the purpose of Article 3(2) OECD Model is the *overall context* that the author has referred to in section 3 of Chapter 3 of Part II. It would, in fact, seem unreasonable that the contracting States had chosen to apply different rules of interpretation (with regard to both the inferential processes involved and the elements and items of evidence to be taken into account) in order to construe (i) undefined non-legal jargon terms and (ii) undefined legal jargon terms in cases where the application of the domestic legal jargon meaning led to an unreasonable result.¹³⁸⁰

¹³⁷⁸ See Gomi and Ozawa, *Explanation Article by Article of the Japan-U.S. Tax Treaty (nichibei sozei joyaku chikujō kaisetsu)* (1979), p. 71, cited by J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 53-54.

¹³⁷⁹ See, seemingly in accordance, A. Rust, “Germany”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 231-232.

¹³⁸⁰ I.e. in cases where “the context otherwise requires”.

That the term “context” in Article 3(2) cannot be reasonably held to have the same (rather restrictive) meaning that term is given in Article 31 VCLT is submitted by the International Tax Group, according to whom such an equation “would make no sense”, since the use of the term “context” in the limited sense it is employed in Article 31 VCLT “would have the effect of overriding or ousting those additional tools of treaty interpretation which the Vienna Convention itself indicates are to be used. Context [in Article 3(2) OECD Model] therefore should mean anything that can normally be taken into account or to which one may have recourse in interpreting the treaty.” (see J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 104). Similarly, Vogel maintains that “the ‘context’ concept should nevertheless be interpreted as broadly as possible” and that the “definition of ‘context’ in Art. 31(2) of VCLT [...] has no bearing on the interpretation of [Model Convention]” (see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 214, m.no 72). See, concurring, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.06, who puts forward six reasons

This conclusion is reinforced by the following two arguments.

First, as just noted, the cases where under Article 3(2) OECD Model the context requires otherwise seem to be those where the application of the legal jargon meaning leads to unreasonable results. In this respect, it must be remarked that the canon of reasonableness in interpreting treaties is the crucial principle on which Articles 31-33 VCLT are built: the principle of interpreting treaties in good faith. Thus, it is *reasonable* to argue that, in order to assess the reasonableness of the construction of a tax treaty provision, the elements and items of evidence to be taken into account and the standards of logic and inference to be followed are the same independently from the fact that the undefined terms used in that provision¹³⁸¹ are attributed a legal jargon meaning under the relevant law of the State applying the treaty or not.

Second, it has already been mentioned¹³⁸² that, within the community of international law players (States, international organizations, international courts and tribunals and other persons affected by international law) and with specific regard to treaties, Articles 31-33 VCLT spell out a significant part of the *overall context* that the cooperative principles of that community require its members to take into account when producing and interpreting treaty utterances. Such an *overall context*, however, is not limited to the means and rules of interpretation enshrined in Articles 31-33 VCLT, the former including, for instance, also generally accepted principles of logic and good sense.¹³⁸³ In this regard, the author concluded that no meaning (as opposed to a mere guess) of a specific treaty provision may be said to exist before the interpreter has gone through the process of construing the authentic text(s) in light of the *overall context*. If this is the approach for the interpreter to follow in order to construe a (tax) treaty in accordance with Articles 31-33 VCLT, the author does not see how Article 3(2) of OECD Model-type tax treaties could fairly be said to compel the interpreter to perform a different task for the purpose of determining where the (undefined) context requires otherwise and, in such a case, what it does indeed require.

In light of the previous analysis, the following conclusions may be drawn.

Article 3(2) must be taken into account for the purpose of interpreting a significant part of the undefined tax treaty terms. In fact, as it has been correctly pointed

to reject the above-mentioned equation.

It should be noted, in this respect, that such a broad construction of the term “context”, as used in Article 3(2), appears to be supported also by the history of the latter provision. As will be mentioned in the following sections, the origin of the expression “unless the context otherwise requires” in Article 3(2) may be traced back to British law, where the term “context” was generally given a very broad intension (see J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 93, in particular footnote 16 and case law cited therein).

¹³⁸¹ Even “indirectly used”, where the terms used are defined in the tax treaty, but the terms used in those definitions are, in turn, undefined therein.

¹³⁸² See section 3 of Chapter 3 of Part II.

¹³⁸³ Such as, for instance, (i) the logical principles of inference and (ii) the principles and maxims of treaty interpretation not codified in the VCLT since considered by the ILC to be principles of logic and good sense of non-binding character (see commentary on Articles 27-28 of the 1966 Draft - YBILC 1966-II, p. 218, para. 4).

out, “[m]any of the undefined terms used in tax treaties have highly technical meanings in each State”,¹³⁸⁴ i.e. they are (also) used as legal jargon terms in the domestic law of the contracting States.

However, where undefined non-legal jargon terms are at stake, Article 3(2) as such may be disregarded, the interpreter having to go through the process of construing the text in light of the *overall context* and, in particular, of the rules and means of interpretation enshrined in Articles 31, 32 and 33 VCLT.

Moreover, the above-mentioned approach is indirectly relevant with reference to defined treaty terms as well: on the one hand, where the undefined terms used in the definition are legal jargon terms, Article 3(2) is to be applied;¹³⁸⁵ on the other hand, where the undefined terms used in the definition are non-legal jargon terms, the *overall context* is to be directly taken into account in order to construe such terms. Similarly, Article 3(2) and the *overall context* guide the interpreter in dealing with *inclusive definitions*, i.e. in construing terms that are not properly defined, but merely said to include certain items or to apply to certain situations.¹³⁸⁶ Finally, depending on the circumstances, the interpreter might conclude that the (*overall*) context requires the treaty definition of a term not to be applied: this might be the case, for instance, where the provision establishing the definition provides that the latter applies “unless the context otherwise requires”;¹³⁸⁷ however, the interpreter might also plausibly arrive at and argue for the same conclusion, in the absence of such an explicit caveat, where strong evidence exists that the application of the definition would lead, in the specific case, to an absurd or unfair result.¹³⁸⁸

¹³⁸⁴ See J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 15. On the application of the *renvoi* provided for under Article 3(2) to multilingual tax treaties, see F. Wassermeyer, in H. Debatin and F. Wassermeyer (eds.), *Doppelbesteuerung: DBA* (Munich: Beck, 1997 – loose-leaf), at m.no. 15 to Article 16.

¹³⁸⁵ See, similarly, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 21; C. van Raad, “Interpretatie van belastingverdragen”, 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*, at 53; J. F. Avery Jones, “Problems of Categorising Income and Gains for Tax Treaty Purposes”, *British Tax Review* (2001), 382 *et seq.*, at 395-396, where reference is made also to Hoge Raad (Netherlands), 25 May 1994, case 28959, BNB 1994/219; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.07.

See, explicitly *contra*, Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq.*, at 202, with regard to the interpretation of the undefined terms employed in the definition of “dividends”, provided for in Article 10 of an OECD Model-type tax treaty. It is interesting to note, however, that the Supreme Administrative Court, in its reasoning, made abundantly reference to Czech Republic private law, in particular to the private law (and tax law) meaning of the Czech term, corresponding to the English “corporate right”, used in the treaty definition for the purpose of construing and applying Article 10 (*ibidem*, at 203).

¹³⁸⁶ See, similarly, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 21. For an instance of recourse to the domestic legal jargon meaning in order to construe a inclusively defined treaty term, see House of Lords (United Kingdom), 16 July 1959, *Ostime v. Australian Mutual Provident Society*, 38 TC 492, opinion of Lord Denning at 525.

¹³⁸⁷ See, for instance, Article 3(1) OECD Model.

¹³⁸⁸ I.e. at an interpretation and application of the tax treaty that is contrary to good faith. In such a case, the interpreter might, for instance, decide to use the domestic legal jargon meaning of the other Contracting States

Based on such conclusions, the author has decided that:

- (i) issues concerning the interpretation of treaty undefined legal jargon terms¹³⁸⁹ will be dealt with in this chapter, since they fall within the scope of research question (c) outlined in section 1.1 of this chapter;
- (ii) issues concerning the interpretation of treaty undefined non-legal jargon terms¹³⁹⁰ will not be generally dealt with in this chapter, since they were already analysed in section 3 of Chapter 4 of Part II, except where those issues relate to how the OECD Model and its Commentary may affect the interpretation of such terms; in this case, in fact, those issues fall within the scope of research questions (a) and (b) outlined in section 1.1 of this chapter.

1.3. The international law perspective of the analysis carried out in this chapter

A second necessary preamble to any work on tax treaty interpretation concerns the field of analysis of the work itself.

In both monistic and dualistic States, tax treaties are applicable domestically, either because they are reproduced (or referred to) by a specific domestic statute, or because they directly become part of the domestic legal system under the relevant constitutional law. In both cases, tax treaties are to be interpreted and applied by the judiciary as rules governing the relation between each contracting State and its taxpayers.

As part of the domestic legal systems of the contracting States, tax treaty texts must be construed in accordance with the rules and principles of interpretation provided for in such contracting States,¹³⁹¹ which may partially differ from those expressed by means of Articles 31-33 VCLT.

At the same time, however, tax treaties maintain their original status as international written agreements between States and, as such, they are subject to the VCLT and other relevant principles and rules of international law.

Theoretically, the present study does not deal with how tax treaties should be construed as part of the domestic law of the contracting States. It only concerns the rules and principles of interpretation of such treaties under public international law.

To a large extent, however, the latter rules and principles of interpretation are considered

(the State not applying the treaty) in order to construe the relevant term, such an interpretation being the most sound one in light of the *overall context* (on the basis of the fact that the parties have agreed to refer to the domestic legal jargon meanings to a large extent by means of Article 3(2)). See, similarly, High Court of Justice of England and Wales (United Kingdom), 1 March 1982, *IRC v. Exxon Corporation*, [1982] STC 356.

¹³⁸⁹ Even those used in the definition of a defined treaty term.

¹³⁹⁰ Even those used in the definition of a defined treaty term.

¹³⁹¹ Which may vary depending on the subject matter of the statutes (e.g. private law, criminal law, administrative law, etc.), as well as the origin of the statutes (internal, international, European Union, etc.).

to be relevant and are referred to also by domestic courts, tribunals and tax authorities.¹³⁹²

In this respect, the results of the present study may be, at least in part, of importance for the day-to-day practice of taxpayers, tax authorities and judges from different States.

For a similar reason, the author will pay attention to the case law of national courts and tribunals concerning the application of tax treaties, in order to understand to which extent, notwithstanding domestic law constraints, such courts and tribunals follow the rules and principles of treaty interpretation in force under public international law and how they actually construe them.

1.4. *Structure of the chapter*

Section 2 briefly examines how scholars, domestic courts and tribunals have applied to tax treaties the rules of interpretation enshrined in Articles 31 and 32 VCLT, in order to confirm that the conclusions drawn in sections 3.4 through 3.6 of Chapter 4 of Part II with regard to the solution of *prima facie* discrepancies among the authentic texts of a treaty, which are mainly based on the application of Articles 31 and 32 VCLT, also remain valid in connection to tax treaties.

Section 3 analyses the significance of the OECD Model, in its English and French official versions, for the purpose of interpreting multilingual tax treaties and, in particular, its relevance for removing *prima facie* discrepancies among the tax authentic treaty texts. That section, thus, attempts to answer research question (a).

Section 4 deals with the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties and, more specifically, in order to remove *prima facie* discrepancies among the tax authentic treaty texts. That section, therefore, attempts to answer research question (b).

Section 5 tackles research question (c) and its sub-questions by examining how the interpreter should approach the interpretation of the legal jargon terms used in tax treaties and, in particular, how he should solve the *prima facie* divergences of meaning among the legal jargon terms employed in the various authentic texts. In order to answer such questions, section 5 preliminary analyses how the rule of interpretation encompassed in Article 3(2) OECD Model should be construed and then discusses its specific bearing on the interpretation of multilingual tax treaties. That analysis is based on the results of the study carried out in section 4 of Chapter 4 of Part II.

Section 6 portrays the most important decisions on the interpretation of multilingual tax treaties delivered by domestic courts and tribunals and identifies any significant departure from the conclusions reached in the previous sections.

Finally, section 7 draws some general conclusions.

¹³⁹² This may be the case, for instance, where the relevant constitutional law provides the obligation for domestic law to comply with the treaties (in force) concluded by the State, or it makes domestic law subject to such treaties (e.g., see Article 117 of the Italian Constitution).

2. The rules of interpretation enshrined in Articles 31-32 VCLT applied to tax treaties

2.1. *In general*

As previously mentioned, Articles 31 and 32 VCLT are generally regarded as codifications of customary international law. As such, they are applicable to tax treaties for the purpose of their construction.

National courts and tribunals charged with the task of interpreting and applying tax treaties have generally endorsed such an approach, either explicitly or implicitly.¹³⁹³

¹³⁹³ See, for an explicit reference to Articles 31-33 VCLT in order to interpret the relevant tax treaties, High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank*, 63 TC 218, at 234-236; High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports*, 338 *et seq.*, at 356; Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 90, para. 34; Federal Court (Australia), 16 May 2000, *Ngee Hin Chong v. CoT*, 2 *ITLR*, 707 *et seq.*, at 714 (with regard to Australia, see however the contrary approach taken by the majority of the judges in High Court (Australia) 15 August 2012, *Minister for Home Affairs of the Commonwealth v Zentai*, 246 *Commonwealth Law Reports*, 213 *et seq.*, at 238-239, para. 65, per Gummow, Crennan, Kiefel and Bell JJ, where it was stated that the Treaty on Extradition between Australia and the Republic of Hungary, concluded on 25 October 1995, had to be interpreted “by the application of ordinary principles of statutory interpretation”; contrary, *ibidem*, para. 19, per French CJ, where the Chief Justice made reference to articles 31 and 32 VCLT in order to construe the extradition treaty; with regard to the relevance of the High Court (Australia) majority decision in *Zentai* for the purpose of interpreting tax treaties, see Federal Court (Australia), 26 April 2013, *Resource Capital Fund III LP v Commissioner of Taxation*, 15 *ITLR*, 814 *et seq.*, at 835 *et seq.*, paras. 48-53, where the court concluded for the substantial irrelevance thereof); Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 208, para. 7.b.; Conseil d’Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, conclusions of the Commissaire du Gouvernement at 1115-1116; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 54; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 22-23; New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT*, 5 *ITLR*, 658 *et seq.*, at 670, para. 43; Hoge Raad (Netherlands), 21 February 2003, case 37024, 5 *ITLR*, 818 *et seq.*, at 876, paras. 3.5 and 3.6; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 886-887, para. 14; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*, at 229; Federal Court of Appeal (Canada), 4 February 2004, *Beame v. R*, 6 *ITLR*, 767 *et seq.*, at 770-771, para. 13; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 74-75, paras. 40-42; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*, at 811-812, paras. 37-38; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 8-9, para. 10; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 555-556, para. 3.4.1. and 3.4.2.; Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq.*, at 49, para. 80; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1074, para. 15; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 72-73; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq.*, at 544; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 749, para. 36; Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*, at 34, paras. 46 and 47; Special Commissioners (United

In certain jurisdictions, courts do not usually refer to the VCLT when construing and applying tax treaties, but this is not conclusive evidence that they disregard such rules altogether. Moreover, as the author has already mentioned, Articles 31 and 32 VCLT substantially affirm a common sense principle, i.e. that treaties must be interpreted honestly, reasonably and with fairness, by taking into account the *overall context*.¹³⁹⁴ This is, in the vast majority of cases, what courts and tribunals of most jurisdictions tend to do, even without taking a look at the specific guidance of the VCLT.

Only in very limited instances has the review of national case law shown an explicit rejection of applying the interpretative principles enshrined in Articles 31 and 32 VCLT. One example is the judgment of the Court of Appeal of Liege (Belgium) in the *Verast & Folens* case, where it was held that “[e]n raison du caractère explicite, précis et dépourvu de toute équivoque des article 11,1, et 11,2,(c) de la *Convention* belgo-française du 10 mars 1964, il est inutile de recourir aux règles d’interprétions dont l’administration se prévaut”, i.e. those encompassed in Articles 31-32 VCLT.¹³⁹⁵

Finally, the analysis of national case law has shown the tendency of judges to adopt a holistic and comprehensive approach, where all the available elements and items of

Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq.*, at 478, para. 56; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 342-344, paras. 19-24; Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 396-397, paras. 84-87; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*, at 681-683, paras. 38-41; Conseil d’Etat (France), 31 March 2010, *Société Zimmer Ltd v. Ministre de l’Economie, des Finances et de l’Industrie*, 12 *ITLR*, 739 *et seq.*, conclusions of the Rapporteur Public at 759 (where the Rapporteur Public, however, use the misleading expression “interprétation littérale” in order to describe the principle of interpretation provided for in Articles 31-33 VCLT); Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 812, para. 50; Court of Appeal of England and Wales (United Kingdom), 8 July 2010, *Smallwood and another v. Revenue and Customs Commissioners*, 12 *ITLR*, 1002 *et seq.*, at 1018, para. 27.

For an implicit reference to the principles of interpretation provided for in Articles 31-32 VCLT, see, for instance, Income Tax Appellate Tribunal of Delhi (India), 26 July 2004, *Enesco Maritime Ltd v. Deputy Commissioner of Income Tax*, 7 *ITLR*, 822 *et seq.*, at 837.

¹³⁹⁴ Similarly, Arnold notes that “[t]he basic interpretive approach set out in Art. 31(1) [VCLT] should not strike anyone as novel. The interpretation of any written material – newspapers, books, articles, memos, and legal documents – requires us to read the words, sometimes several times, very carefully. Further, [...] the meaning of words is always dependent on the context in which they are used. And finally, all language is purposive. Obviously, the parties to a treaty are attempting to accomplish certain results, and the treaty should be interpreted to promote, rather than frustrate, those intentions or purposes. The same three major elements – the ordinary meaning of words (text), context, and purpose – form the foundation for the interpretation of language generally. Tax legislation and tax treaties are no different in this regard. The general principle or approach set out in Art. 31(1) of the Vienna Convention is self-evident; as a result, it is unhelpful to judges and others trying to decipher the meaning of a provision in a tax treaty. Would anyone seriously suggest that a meaning could be attributed to a treaty provision without considering the ordinary meaning of the words or the particular context in which they appear?” (see B. Arnold, “The Interpretation of Tax Treaties: Myths and Realities”, 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 5).

¹³⁹⁵ Court of Appeal of Liege (Belgium), 14 January 1998, *Verast & Folens v. Belgium*, 1 *ITLR*, 435 *et seq.*, at 441. See also Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq.*, at 203-204.

evidence are considered together for the purpose of treaty interpretation and accordingly weighted on the basis of the specific circumstances of the case.¹³⁹⁶

2.2. *Good faith and the agreed expectation of the parties*

National courts and tribunals make often reference to “good faith” when interpreting tax treaties within the context of the VCLT.¹³⁹⁷

In certain cases, they even deal with the possible meaning of “good faith” for the purpose of construing tax treaties in accordance with the VCLT. For instance, the United Kingdom Special Commissioners of Taxation, in the *Sportsman* case,¹³⁹⁸ held that the reference to “good faith” in Article 31 VCLT is generally accepted as simply meaning that the interpretation should not lead to manifestly absurd or unreasonable results, i.e. that the treaty construction should be a sensible one.

More fundamentally, national courts and tribunals normally reject those constructions that result in unreasonable outcomes,¹³⁹⁹ even where the alternative interpretations

¹³⁹⁶ See, for instance, the explicit statements in Federal Court of Appeal (Canada), 24 February 2000, *R v. Dudney*, 2 ITLR, 627 *et seq.*, at 632, para. 10; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT*, 2 ITLR, 707 *et seq.*, at 714, quoting High Court (Australia), 24 February 1997, *Applicant A. v. Minister for Immigration and Ethnic Affairs*, 190 Commonwealth Law Reports, 225 *et seq.*, at 254-256; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 ITLR, 1 *et seq.*, at 12, para. 17; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank plc v. Deputy Director of Income Tax*, 9 ITLR, 1062 *et seq.*, at 1074, para. 15.

¹³⁹⁷ See, for instance, Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 ITLR, 191 *et seq.*, at 213; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 ITLR, 1009 *et seq.*, at 1065; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 ITLR, 1 *et seq.*, at 10, para. 13; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 ITLR, 536 *et seq.*, at 557, para. 3.4.3., where the Court held that the principle of good faith includes the prohibition of abuses and, more specifically, the use of a rule of law against its object and purpose to realize interests which are not protected by it and, as a consequence, concluded that the prohibition for the taxpayers to abuse the rights otherwise granted by the tax treaties is recognized at the European level (the Court was dealing with the interpretation and application of the 1973 Denmark-Switzerland tax treaty) and that is not necessary for the contracting States to adopt an explicit provision to that effect in their treaties; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 ITLR, 524 *et seq.*, at 544.

¹³⁹⁸ Special Commissioners (United Kingdom), 23 September 1998, *Sportsman v. IRC*, 1 ITLR, 237 *et seq.*, at 244, paras. 4.1 and 5.1.

¹³⁹⁹ See the contrary proposition, put forward by Mössner, that “[l]egal rules of interpretation do not guarantee that the process of understanding would lead to a reasonable result. They, rather, give guidance and allot the responsibility for a failed communication” (see J. M. Mössner, “Klaus Vogel Lecture 2009 – Comments”, 64 *Bulletin for international taxation* (2010), 16 *et seq.*, at 17). It must be noted that such a proposition is expressed with reference to (i) domestic tax law and (ii) tax treaties, seen as part of the contracting States’ domestic law; it does not concern tax treaties under international law.

Notwithstanding this, the proposition appears misleading: no judge would seriously agree to having delivered an “unreasonable” decision; the judge would, in any case, maintain that his interpretation of the (domestic or treaty) legal provision at stake was the most reasonable construction that could be argued for on the basis of the available and *usable* elements and items of evidence. In the vast majority of cases, the elements and items of evidence that the judge may rely on and use for the purpose of interpretation are those that all the parties to the

upheld diverge from the *prima facie* readings of those provisions.¹⁴⁰⁰ In this respect, it is

disputes, i.e. the hearers of the legal utterance, could have access to. Therefore, his interpretation coincides with the *utterance meaning* of the legal provision at stake, which implies its being a reasonable interpretation.

¹⁴⁰⁰ See, for instance, Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R.*, 85 DTC 5188, para. 19, where Addy J. concluded that the deemed disposition by a deceased person of his capital property immediately before his death, provided for in the Canadian Income Tax Act, should be regarded as a “sale or exchange of capital assets” under Article VIII of the 1942 Canada-United States tax treaty (which exempted from tax in one contracting State the capital gains on such sales or exchanges realized by a resident of the other contracting State), since the opposite construction would lead to an absurd and unreasonable result in light of the “general intention” of the parties; Conseil d’Etat (France), 13 October 1999, *Re SA Diebold Courtaige*, 2 *ITLR*, 365 *et seq.*, at 381, and the related conclusions of the Commissaire du Gouvernement at 387, concerning the necessity of regarding the payment of royalties to a partnership treated as tax transparent under the law of the other Contracting State as paid to its partners where the latter are resident in that State for the purpose of the tax treaty (it is interesting to note that such an approach appears to contrast with the reservations expressed by France in Annex II to the OECD Partnerships Report, in particular at paragraphs 4, 12 and 13 thereof, and reiterated as observations in the 2000 update of the OECD Commentary – see paragraph 27.2 of the Commentary to Article 1 OECD Model; it should be noted, however, that in 2008 France modified the latter paragraph in order to reduce the extent of its declared disagreement with the OECD approach); Bundesfinanzhof (Germany), 21 September 1999, *Re A Foreign Silent Partnership*, 2 *ITLR*, 859 *et seq.*, at 866-867 concerning the rationale for considering the permanent establishment of a fiscally transparent (atypical silent) partnership as a permanent establishment of its (atypical silent) partners for tax treaty purposes; Conseil d’Etat (France), 20 October 2000, *Re SA New Building Promotion Limited*, 3 *ITLR*, 783 *et seq.*, conclusions of the Commissaire du Gouvernement at 802; Hoge Raad (Netherlands), 7 December 2001, case 35231, 4 *ITLR*, 558 *et seq.*, at 576, Opinion of the Advocate General at 585-586, paras. 5.12-5.16, in the sense to reject an interpretation that would unlikely represent the common understanding of the parties and to prefer a substantive approach on the basis of the matter considered in its entirety; Income Tax Appellate Tribunal of Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq.*, at 731-732, paras. 49 and 51; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister of National Revenue*, 5 *ITLR*, 638 *et seq.*, at 649-650, paras. 29-30, where the Court, with regard to the question whether the obligation to exchange information under Article 26 of the 1975 Canada-France tax treaty was limited to information already in the possession of the requested tax authorities, considered that it would have been hard to imagine that such authorities already had, in all cases, in their possession all the information needed by the requesting State for the purpose of implementing its domestic law provisions and, thus, inferred from the article read as a whole that the requested tax authorities were under an obligation to gather the information not already in their possession; Cour de Cassation (Belgium), 28 May 2004, *Belgium v. SW and VR-M*, 7 *ITLR*, 442 *et seq.*, at 452, where the Court seemed to have applied Article 15(1) of the 1970 Belgium-Luxembourg tax treaty to the income derived by an international hauler resident of Belgium and employed by a Luxembourg-based haulage company as if that article contained a rule equivalent to the one enshrined in Article 15(3) OECD Model, apparently due to the analogy between the activity of an international hauler and that of a person working aboard of a ship or aircraft operated in international traffic; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 9-10 and 14, paras. 13 and 19, where the Court also made reference to the principle *ut res magis valeat quam pereat* (quoting Harman J. in High Court of Justice of England and Wales (United Kingdom), 31 August 1988, *Union Texas Petroleum Corporation v. Critchley*, [1998] STC 691, at 707); *ibidem*, at 18, para. 29.1, where the Court stated that an “interpretation leading to such an incongruity is to be avoided even if some violence is required to be done to the words of the treaty”, and at 20, para. 30; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq.*, at 196, para. 14; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 *ITLR*, 1062 *et seq.*, at 1074, para. 15; Special Commissioners (United Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq.*, at 477-478, paras. 54-56 and, generally, at 481-483; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq.*, at 501-503, paras. 7-8, where the authority seemed to attribute decisive weight to the reasonableness of one possible interpretation of the 1994 India-Switzerland tax treaty (leading to the taxability in India, even in

the absence of a permanent establishment therein, of profits derived by a non-resident from the operation of ships in international traffic), as opposed to the unreasonableness of the contrary interpretation (leading to the non-taxability in India of such profits), in light of the treaty's overall structure (the absence of any provision dealing expressly with the taxation of profits derived from the operation of ships in international traffic, as compared to the existence – Article 8 of the tax treaty - of a provision dealing with the taxation of profits derived from the operation of aircrafts in international traffic) and its history (its later amendment by protocol in 2000, introducing a previously missing “other income” article); Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 812, para. 51, and at 813, para 57.

See, however, Conseil d'Etat (France), 9 February 2000, *Re Hubertus AG*, 2 *ITLR*, 637 *et seq.*, where both the Court and the Commissaire du Gouvernement concluded that the income attributed to the partners of a fiscally transparent (“translucent”) partnership does not maintain the character it had in the hands of the partnership; the author maintains that it is questionable whether this is a reasonable interpretation of OECD Model-like tax treaties, since it would lead on many occasions to an allocation of the taxing rights between the contracting States different from the one the latter agreed upon with regard to the prototypical cases of direct investment or activity carried on by the taxable person (here the partners); see the substantially similar comment by Baker in 2 *ITLR*, at 639.

See also High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank*, 63 TC 218, where Mummery J., interpreting Article XV of the 1945 United Kingdom-United States tax treaty, concluded that “[t]he words of art XV, both on their own and in the context of the convention as a whole, are clear. The natural and ordinary meaning of the words is that art XV exempts from United Kingdom tax interest which has been paid by United States corporations”, although such a conclusion could have been considered to infringe (as it most probably did, in the author's view) the common intention of the parties, as ascertainable from the structure and the relevant provisions of the tax treaty, i.e. that, where profits (including interest) were attributable to a permanent establishment in the United Kingdom (which was the case in the situation at stake before the High Court of Justice), the latter State retained the right to tax them. See, in the same vein, Bundesfinanzhof (Germany), 9 October 1985, case *IR 128/80*, *Bundessteuerblatt. Teil II* (1988), 810 *et seq.*, where the Court, interpreting the similarly worded provision encompassed in Article XIV of the 1954 Germany-United States tax treaty and applying it to an analogous situation, i.e. to the case of interest paid by a United States corporation and attributable to a permanent establishment that the recipient had in Germany, concluded that Germany was prevented from taxing the interest. Interestingly, the United States Court of Federal Claims, faced with the interpretation of the corresponding provision included in Article XII(1) of the 1942 Canada-United States tax treaty (as amended by a protocol of 21 November 1951), construed it in the opposite way and held that, though a *prima facie* reading of Article XII(1) led to the conclusion that interest was to be exempt in the United States since paid by a Canadian corporation and received by a Canadian corporation, Article XII(1) had to be applied in accordance with the intention of the parties, which certainly was not to exempt the interest where the recipient carried on a business in the United States through a branch and the interest was connected therewith. Kashiwa J., in that respect, noted that “the ultimate question remains what was intended when the language actually employed in Article XII was chosen, imperfect as that language may be. [...] that language, when understood in light of the treaty's history and explanatory provisions, effected only a waiver of United States taxes imposed solely through the deemed sourcing provisions on those not present in the United States.” (see Court of Federal Claims (United States), 5 May 1982, *Great-West Life Assurance Company*, 678 F.2d 180).

For a seemingly explicit rejection of the canon of reasonableness in interpreting tax treaties, see High Court of Justice of England and Wales (United Kingdom), 12 March 1976, *Avery Jones v. IRC*, [1976] STC 290, where Walton J. stated (*italics added by the author*): “[Mr Oliver] submitted that article XV should be given - in particular the words relating to citizenship - “as much meaning as it needs to have” and that the construction he would place upon the words used was “reasonable”. These are truly remarkable submissions. On what principle is the Court to decide how much meaning a provision needs to have? And what authority is there that because a construction which a particular person seeks to place upon a provision is “reasonable” it must be the correct one? Such propositions have only to be stated to be rejected as unsound. If the present case has to be decided upon any such general propositions, the general propositions applicable are that, as far as it is humanly possible, a document must be construed so as to give effect to every word used by the Parties, and in deciding what the meaning of those words is one must look at the document as a whole to see whether those words occur elsewhere, as, if possible, the same construction should be placed on them in both contexts. Moreover, I

interesting to report the following passage from the decision delivered by the Income Tax Appellate Tribunal of Mumbai in the *Clifford Chance* case:¹⁴⁰¹ “Law consists not in a particular instance, but in the reason. It is said *ubi eadem ratio ibi idem iudicium* [...] It is not within human powers to foresee the manifold sets of facts which may arise, therefore it is not possible under *lex scripta* [...] to provide for them in clear and unequivocal terms. The trouble lies with our method of drafting. The principal object of the draftsman is to achieve certainty – a laudable object in itself. But in pursuit of it, he loses sight of the equally important object – clarity. Resultantly it brings obscurity and absurdity. It is therefore important to find out the intention of the law-makers. If we accept the interpretation as suggested by the assessee, it would lead to absurdity. [...] Certainly this could not be the intention of the treaty-maker [...]”.

Closely related to the above-mentioned approach is the inclination of national courts and tribunals to make reference to the desirability of implementing the true intentions of the contracting States, their agreed expectations, or the like.¹⁴⁰² The statements of Iacobucci

think that the Courts would always be very slow to refuse to give any meaning at all to a provision in an agreement made between two governments if any *sensible* construction at all could be placed upon it.” Ironically, Walton J. ended up substituting the adjective “sensible” for the adjective “reasonable”.

¹⁴⁰¹ Income Tax Appellate Tribunal of Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 ITLR, 711 *et seq.*, at 731, para. 49.

¹⁴⁰² See High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank*, 63 TC 218, at 234-236; Tax Court (Canada), 30 October 1998, *Dudney v. R.*, 1 ITLR, 371 *et seq.*, at 376; Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 ITLR, 191 *et seq.*, at 211 and 212; Hoge Raad (Netherlands), 6 December 2002, case 36773, 5 ITLR, 680 *et seq.*, at 698, where the Court found that no evidence whatsoever existed of a common intention of the contracting States (Belgium and the Netherlands) to treat dividends paid to the acquirer of shares as dividends paid to the vendor of those shares for the purpose of applying Article 10 of the 1970 Belgium-Netherlands tax treaty (not even for anti-avoidance purposes); *ibidem*, Opinion of the Advocate General at 709, para. 5.3; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 ITLR, 233 *et seq.*, at 279-280 where the Court appeared to conclude that “abuse” and “treaty shopping” (*reicious*: behavior that would be usually labeled as such, since when the contracting States agree on allowing this type of use of the tax treaty by third countries resident taxpayers, that behavior cannot be seriously denoted any longer by the term “abuse”, nor via the term “treaty shopping”) of the India-Mauritius tax treaty might have been foreseen and even intended by the Contracting States, at the moment of concluding such a treaty, in order to boost the flow of capital and investments from third countries in India through Mauritius and that, if it were so, there would be nothing in that tax treaty to prevent a resident of a third country from benefitting from the favorable provisions of the 1982 India-Mauritius tax treaty by means of setting up a (letter-box) investment company in Mauritius; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 ITLR, 292 *et seq.*, at 302; Federal Court of Appeal of Ottawa (Canada), 13 October 2003, *Edwards v. R.*, 6 ITLR, 564 *et seq.*, at 570, paras. 27-29, in particular 29, where the Court stated that “the commonly expressed intention of the parties is entitled to great weight and should not be ignored unless a contrary intent can be shown in either the words of the treaty or in some other expression by the parties”; Court of Federal Claims (United States), 4 January 2005, *Sarkisov v. United States of America*, 7 ITLR, 469 *et seq.*, at 472, where there is also reference to further relevant United States’ case law; Tax Court (Canada), 8 April 2005, *Allchin v. R.*, 7 ITLR, 851 *et seq.*, at 864, para. 33, quoting Iacobucci J. in *Crown Forest* (see Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 43); Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 ITLR, 1 *et seq.*, at 10, para. 14, quoting, indirectly, Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R.*, 85 DTC 5188, at 5190; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 ITLR, 1062 *et seq.*, at 1073-1074, para. 14,

J. in the *Crown Forest* decision are a good example in that respect: “[r]eviewing the intentions of the drafters of a taxation convention is a very important element in delineating the scope of the application of that treaty” and, quoting Addy J. in *J. N. Gladden Estate v. The Queen*,¹⁴⁰³ “[c]ontrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties”.¹⁴⁰⁴

The other side of the coin, notably, is that national courts and tribunals appear used to regarding the *overall context* (i.e. the context for the purpose of article 3(2)) as comprising “tout ce qui pout éclairer l’intention des autours de la Convention”.¹⁴⁰⁵

quoting, indirectly, Federal Court, 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, at 5190; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 ITLR, 179 *et seq.*, at 188, quoting Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, at 5190; Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 ITLR, 423 *et seq.*, at 413-432 (citing, among other cases, Supreme Court (United States), 15 June 1982, *Sumitomo Shoji America Inc v. Avagliano*, 457 U.S. 176 (1982), at 180; Supreme Court (United States), 29 April 1963, *Maximov v. United States*, 373 U.S. 49 (1963), at 54; Court of Appeals (United States), 6 December 1994, *Xerox Corporation v. United States*, 41 F.3d 647, at 652 and 656; Supreme Court (United States), 9 November 1936, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), at 11; Court of Federal Claims (United States), 5 May 1982, *Great-West Life Assurance Company*, 678 F.2d 180, at 183), at 443 and at 445; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 ITLR, 736 *et seq.*, at 749, para. 37; Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R*, 10 ITLR, 827 *et seq.*, at 34 (quoting Supreme Court (Canada), 20 October 1994, *Thomson v. Thomson*, [1994] 3 SCR 551, at 578 and Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, at 814, para. 43); Income Tax Appellate Tribunal of Mumbai (India), 13 August 2008, *Deputy Director and Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 ITLR, 103 *et seq.*, at 117, para. 18; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 ITLR, 495 *et seq.*, at 502-503, para. 8; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 ITLR, 783 *et seq.*, at 825, para. 98.

Seemingly *contra* Edwardes-Ker, who submits that Article 31(1) VCLT, “by omitting an express reference to the parties’ intentions, makes clear that treaty terms must be given the meaning which they *do* have (the textual approach) – rather than a meaning which the parties may (or may not) have intended them to have. The best evidence of the treaty partner States’ intentions is to be found in the ordinary meaning of the treaty text itself. [...] If excessive weight is given to the parties’ supposed intentions (by, for example, stressing the contractual nature of a treaty) insufficient weight may then be given to the treaty’s actual text. [...] some domestic courts have focused excessively on the fact that a treaty is an agreement between two States – and have then sought (often unsuccessfully) to give effect to what they supposed these intentions were.” (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 6.01 and 6.02; more generally, the whole of Chapter 6).

For a strong criticism of textuality, as an improper restriction in the quest for the intention of the parties, see M. S. McDougal et al., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), in particular Chapters 1-3, and M. S. McDougal, “The International Law Commission’s Draft Articles upon Interpretation: Textuality *Redivivus*”, 61 *American Journal of International Law* (1967), 992 *et seq.*

¹⁴⁰³ Federal Court, 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, at 5190.

¹⁴⁰⁴ Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, p. 822, para. 43.

¹⁴⁰⁵ Conseil d’Etat (France), 27 July 2001, *Re SA Golay Buchel France*, 4 ITLR, 249 *et seq.*, conclusions of the Commissaire du Gouvernement at 255. For other instances, see Federal Court of Appeal of Ottawa (Canada), 13 October 2003, *Edwards v. R*, 6 ITLR, 564 *et seq.*, at 568-569, paras. 27-29, where the Court attributed great weight to the common intention of the parties, as expressed by an exchange of diplomatic notes subsequent to the conclusion of the relevant tax treaty, in order to support its construction of the latter; First Council of Taxpayers (Brazil), 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue*

2.3. Ordinary meaning under Article 31(1) VCLT

There are two common trends in national case law with regard to the requirement, provided for by Article 31(1) VCLT, that treaties must be interpreted in accordance with the (qualified) ordinary meaning to be given to their terms.

On the one hand, most decisions show the tendency of national courts and tribunals not to equate the “ordinary meaning” of a term, for the purpose of Article 31 VCLT, to its mere “grammatical or dictionary” meaning (even supposing that something such as a “grammatical or dictionary” meaning exists),¹⁴⁰⁶ but to choose and argue in favor of the meaning that makes the most sense¹⁴⁰⁷ in the context where the relevant term is found and, in particular, against the background of the provision of which it is a part.¹⁴⁰⁸

Department in Brasilia, 9 ITLR, 627 *et seq.*, at 659, where the Council stated that, for the purpose of Article 3(2) of the relevant tax treaty (corresponding to Article 3(2) OECD Model), the context was constituted by the intention of the parties at the time of the signature of the treaty and, therefore, also by the meaning that the term to be interpreted has under the law of the other contracting State (an implicit reference to the reciprocity principle).

¹⁴⁰⁶ See, in that respect, District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 ITLR, 524 *et seq.*, at 543, where the Court, quoting Wittgenstein, affirmed that “... there is no such thing as a literal meaning apart from the context that makes it meaningful”.

¹⁴⁰⁷ From the interpreter’s perspective.

¹⁴⁰⁸ See High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank*, 63 TC 218, at 234-236; Special Commissioners (United Kingdom), 23 September 1998, *Sportsman v. IRC*, 1 ITLR, 237 *et seq.*, at 244-245, para. 4.1; Tax Court (Canada), 30 October 1998, *Dudney v. R*, 1 ITLR, 371 *et seq.*, at 376; Tax Court (United States), 18 November 1999, *Compaq v. CIR (the ACT credit claim)*, 2 ITLR, 323 *et seq.*, at 331, 333 and 336; Income Tax Appellate Tribunal of Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 ITLR, 711 *et seq.*, at 730-731, paras. 48-49; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister of National Revenue*, 5 ITLR, 638 *et seq.*, at 648, para. 25, where the Court stated that its construction of Article 26 of the 1975 Canada-France tax treaty (concerning exchange of information) conformed with the object and purpose of that article, with the general coverage of the treaty, as well as with the interpretation of the model provision upon which Article 26 of the tax treaty was based; *ibidem*, at 650-651, para. 35, where the strict and literal interpretation put forward by applicants was rejected on the ground of the international nature of the 1975 Canada-France treaty; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 ITLR, 784 *et seq.*, minority opinion at 814, referring, for interpretative purposes, to the objective and purpose of Article 11 of the 1948 Denmark-United States tax treaty and of Article 9 of the 1955 Canada-Denmark tax treaty (both corresponding to Article 15 of the OECD Model), which consisted in ensuring that tax regulations did not obstruct the international mobility of qualified labour; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 ITLR, 878 *et seq.*, at 887, para. 17 where the Court pointed out that the terms used in Article XIX of the 1980 Canada-United States tax treaty were to be interpreted in light of the (primary) purpose of that article; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 ITLR, 233 *et seq.*, at 285; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 ITLR, 189 *et seq.*, at 197, para. 18; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 ITLR, 1062 *et seq.*, at 1074, para 15; Federal Court of Appeal (Canada), 21 September 2007, *Gulf Offshore NS Ltd v. Canada*, 10 ITLR, 172 *et seq.*, at 176-177, paras. 20, 22 and 24; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 ITLR, 524 *et seq.*, at 544; Authority for Advance Rulings (India), 18 July 2008, *Dell International Service India Pvt Ltd v.*

On the other hand, however, domestic courts and tribunals often use, as a starting point for their analysis and arguments, the definitions and the synonyms of the relevant treaty terms provided for in dictionaries.¹⁴⁰⁹

2.4. *The object and purpose of the tax treaty*

National courts and tribunals often refer to the object and purpose of the relevant tax treaties, in particular as resulting from the preambles thereof,¹⁴¹⁰ in order to construe the

CIT (International Taxation), 11 *ITLR*, 173 *et seq.*, at 189, para. 12.7; Authority for Advance Rulings (India), 26 June 2009, *Cal Dive Marine Construction (Mauritius) Ltd v. Director of Income Tax*, 12 *ITLR*, 38 *et seq.*, at 47-48, para. 6.4; Income Tax Appellate Tribunal of Delhi (India), 16 October 2009, *New Skies Satellites NV v. Assistant Director of Income Tax & Shin Satellite Public Company Limited v. Deputy Director of Income Tax*, 12 *ITLR*, 409 *et seq.*, at 427-428, para. 207; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq.*, at 503-504, paras. 9-9.1, with regard to the meaning of the expression “[i]tems of income [...] not dealt with in the foregoing Articles” employed in Article 22 (corresponding to Article 21 OECD Model) of the 1994 India-Switzerland tax treaty, as amended by the 2000 protocol, and in particular to whether profits from the operation of ships in international traffic, which are explicitly excluded from the scope of Article 7 (dealing with business profits) of the treaty, could be considered to be “dealt with” in Article 7 and, therefore, excluded from the scope of Article 22; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 812-813, paras. 51 and 54, and at 825, para. 99.

See, however, Hoge Raad (Netherlands), 28 October 1998, case 32330, 1 *ITLR*, 551 *et seq.*, at 559 and 564, where the Court distinguished between the terms “income” (“inkomsten” in the Dutch authentic text) and “items of income” (“bestanddelen van het inkomen” in the Dutch authentic text), included in Articles 27 and 22, respectively, of the 1980 UK-Netherlands tax treaty, by considering capital gains denoted by the latter term, but not by the former.

¹⁴⁰⁹ See Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 209; Tax Court (Canada), 31 January 2002, *Cheek v. R*, 4 *ITLR*, 652 *et seq.*, at 661, para 27; Income Tax Appellate Tribunal on Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 *ITLR*, 711 *et seq.*, at 729-730, paras. 43-45; Tax Court (Canada), 8 April 2005, *Allchin v. R*, 7 *ITLR*, 851 *et seq.*, at 872, para. 52; Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 *ITLR*, 563 *et seq.*, at 590, para. 139; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq.*, at 195, para. 11; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq.*, at 189, paras. 35-36; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 760, paras. 72-73; Income Tax Appellate Tribunal of Chennai (India), 19 May 2008, *West Asia Maritime Ltd and another v. Income Tax Officer*, 10 *ITLR*, 965 *et seq.*, at 969-970, para. 11-14; Authority for Advance Rulings (India), 18 July 2008, *Dell International Service India Pvt Ltd v. CIT (International Taxation)*, 11 *ITLR*, 173 *et seq.*, at 189-190, para. 12.7; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 *ITLR*, 495 *et seq.*, at 503-504, para. 9; Federal Court of Appeal (Canada), 10 June 2010, *Lingle v. R*, 12 *ITLR*, 996 *et seq.*, at 999, para. 7.

For other references to case law where dictionaries have been used for the purpose of enlightening the ordinary meaning of undefined terms employed in the relevant tax treaties, see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.03.

¹⁴¹⁰ The object and purpose of a tax treaty may be determined, of course, on the basis of elements other than the title or the preamble thereof, such as, for instance, the structure and goal of the relevant treaty articles. In this respect, it would be difficult to take seriously the statement that the only object and purpose of a tax treaty including OECD-type articles on exchange of information, assistance in the collection taxes and non-discrimination is the avoidance of double taxation.

On the other hand, it seems to the author that the actual inclusion of the expressions “prevention of fiscal

provisions thereof.¹⁴¹¹

evasion” or “prevention of fiscal evasion and avoidance” in the title of the treaty, or even the presence of an article on exchange of information in the corpus thereof, does not have a decisive weight for the purpose of deciding whether the tax treaty articles, in particular the distributive rules, may be construed so as to allow the prevention of perceived tax abuse or avoidance by the contracting States. The issue here is one of good faith in the interpretation and application of the treaty (by the contracting States; the taxpayer’s good faith being absolutely irrelevant in this respect) and of original common intention of the parties, i.e. whether it is reasonable to hold that the reciprocal surrender of taxing rights by the parties with a view to stimulating cross-border economic relations (in particular trade and investments) was originally, or has later become, subject to, in the intention of the parties, the condition that no avoidance or abuse of the relevant domestic and treaty tax law provisions was at stake. The answer to such a question then becomes the foundation for deciding whether domestic anti-avoidance (re)characterizations of facts might affect the construction of the tax treaty provisions under Article 3(2), so that undefined legal jargon terms in the treaty might be given the meaning attributed thereto under domestic law anti-avoidance provisions or anti-abuse principles and, in the case of an affirmative answer, whether the context requires a different interpretation. In this respect, more than the title of the treaty, it seems relevant to ascertain whether in the domestic law of either contracting State at the time of the conclusion of the treaty, or later in both States, such anti-avoidance provisions and/or principles were present and the relevance they (have) had in the contracting State’s domestic law system (see more extensively *infra*, section 5.3 of this chapter; see also P. Arginelli et al., “The Royal Bank of Scotland case: More controversy on the interpretation of the term “beneficial owner””, in R. Russo and R. Fontana (eds.), *A Decade of Case Law. Essays in honour of the 10th anniversary of the Leiden Adv LLM in International Tax Law* (Amsterdam: IBFD Publications, 2008), 215 *et seq.*, at 235-241).

¹⁴¹¹ See, for instance, High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank*, 63 TC 218, at 234-236; Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 90, para. 35; Tax Court (Canada), 30 October 1998, *Dudney v. R.*, 1 *ITLR*, 371 *et seq.*, at 379; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, p. 822, para. 43, where Iacobucci J., quoting Addy J. in Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R.*, 85 DTC 5188, stated that a “literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned”; Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 210, para. 7.bb. the Court stated that the search for the object and purpose of the treaty leads one to ask what the parties wished to achieve, and para. 7.aaa., where the Court pointed out that tax treaties do not have as their object and purpose permitting persons that are not resident of either Contracting State from benefiting from the advantages of the treaty by interposing a conduit company; Conseil d’Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, at 1108, where the Court stated that the (alleged) treaty objective of combatting tax avoidance and evasion might not, in the absence of express provisions to that effect, derogate from the rules stated in the treaty (see, to the same effect, the conclusions of the Commissaire du Gouvernement at 1115 and 1117); Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 9-10, paras. 11 and 13 (quoting Lord Denning in Court of Appeal of England and Wales (United Kingdom), 22 May 1974, *H.P. Bulmer Ltd et al. v. J Bollinger S.A. et al.*, [1974] Ch 401, at 425-426); Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v. Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq.*, at 788, para. 62 per Arden LJ.; Federal Court of Appeal (Canada), 13 June 2007, *ML (Investments) SA v. Canada*, 9 *ITLR*, 1111 *et seq.*, at 1113, paras. 5 and 6, where the Court, after having interpreted the treaty “purposively and contextually”, noted the following: “The appellant urged us to look behind this textual compliance with the relevant provisions to find an object or purpose whose abuse would justify our departure from the plain words of the disposition. We are unable to find such an object and purpose”; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq.*, at 544, where the Court stated that the object and purpose of tax treaties did not include the improper use of their provisions and the benefits they granted (one might question, however, whether such a statement takes us a step forward at all, since the issue is now what constitutes an improper use – abuse – of the treaty provisions); Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 398, paras. 87-89; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler*

An illustration is given by Northrop J. of the Federal Court of Australia, who, when faced with the interpretation of Article 7 of the 1980 Australia-Switzerland tax treaty in the *Thiel* case, held that “[t]he policy behind the Agreement is to avoid the imposition of double taxation with respect to taxes on income. That is a stated purpose of the Agreement. If possible, the proper construction of the Agreement should be consistent with that policy or purpose.”¹⁴¹²

Sometimes the object and purpose of the tax treaty even appear to be attributed a decisive weight for construing the relevant treaty provisions.

For instance, in the *Re Austria-Germany double tax convention* case,¹⁴¹³ the Austrian Verwaltungsgerichtshof, in deciding whether the 1954 Austria-Germany tax treaty (in particular Articles 4(1) and 15(1) thereof, corresponding to Articles 7(1) and 23A(1) of the OECD Model) prevented Austria from taking into account the losses incurred by a resident taxpayer through its German permanent establishment¹⁴¹⁴ for the purpose of determining its taxable profits, considered that the treaty object and purpose, explicitly defined by Article 1(1) of the treaty as to ensure that persons resident in one or both the Contracting States did not incur double taxation, required an answer to that question in the negative. The Court found that the above-mentioned object and purpose made clear that the tax treaty was directed against increased taxation by means of multiple inclusion of revenue and, therefore, although within the limits imposed by the coexistence in the two contracting States of different rules to determine the taxable base and different tax rates, the treaty application should ideally lead to a taxation of income deriving from international operations that was neither greater, nor lesser than the taxation of comparable income from pure domestic operations.¹⁴¹⁵ Since, in purely domestic situations and in the absence of tax treaties, such a loss would have been deductible from

India Private Ltd v. Deputy Commissioner of Income Tax, 11 ITLR, 811 et seq., at 826-827 (citing Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 ITLR, 233 et seq., at 279-280); Tax Court (Canada), 10 September 2009, *Garron and others v. R*, 12 ITLR, 79 et seq., at 131-132, para. 381; Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 ITLR, 645 et seq., at 654-655, para. 5, where the Court concluded that only a “reasonable” domestic anti-tax haven rule could stand against a tax treaty, such as the 1994 Japan-Singapore tax treaty, purported to safeguard and promote bilateral economic transactions and to avoid international double taxation; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 ITLR, 783 et seq., at 813, para. 56 and at 824-825, para. 97.

See also the cases reported in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf) at 11.03, where courts and tribunals seem to swing, as is normally the case, between decisions more and other less teleologically oriented.

¹⁴¹² Federal Court (Australia), 20 December 1988, *Thiel v. Commissioner of Taxation*, [1988] FCA 443, at para. 24 of the dissenting opinion of Northrop J. (upheld in High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports*, 338 et seq.).

¹⁴¹³ Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 ITLR, 547 et seq.

¹⁴¹⁴ The losses accrued from the business carried on in Germany by a general partnership of which the Austrian resident taxpayer was a partner; however, under both Austrian domestic law and the tax treaty, that partnership (‘s place of business) constituted a permanent establishment of the Austrian resident partner.

¹⁴¹⁵ Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 ITLR, 547 et seq., at 554.

the taxpayer's taxable base, the same result should occur where the tax treaty applied.¹⁴¹⁶

2.5. The context under Article 31(2) VCLT

National courts and tribunals generally analyse the structure of the provision that includes the term to be interpreted, as well as the meaning of the other terms employed therein, in order to construe the former. Moreover, they commonly make reference to other provisions of the same tax treaty for the purpose of construing the provision debated between the parties, both where such other provisions are part of the very same treaty article and where they are not (including the provisions incorporated in later protocols).¹⁴¹⁷ The same holds true with regard to the treaty preamble, which is

¹⁴¹⁶ The Court also found such a conclusion to be in accordance with the general principle that tax treaties do no more than limit the taxing rights of the contracting States and, by no means, extend tax liability as determined under domestic law (see Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 *ITLR*, 547 *et seq.*, at 555).

¹⁴¹⁷ See Hoge Raad (Netherlands), 28 October 1998, case 32330, 1 *ITLR*, 551 *et seq.*, at 559 and 564; Tax Court (United States), 18 November 1999, *Compaq v. CIR (the ACT credit claim)*, 2 *ITLR*, 323 *et seq.*, at 331 and 333, where reference was also made to the "general structure" of the treaty; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT*, in 2 *ITLR*, 707 *et seq.*, at 715 and 723-725, where the Court referred to the possibility to find indications in favor of a certain interpretation by looking at the relevant tax treaty "as a whole"; Hoge Raad (Netherlands), 1 November 2000, case 35398, 3 *ITLR*, 466 *et seq.*, at 483, para. 3.4, highlighting that, under Article 31 VCLT, the meaning to be attributed to undefined terms should be the one that best fits in the context of the treaty as a whole; Administrative Court of Appeal of Paris (France), 30 January 2001, *Re Schneider SA*, 3 *ITLR*, 529 *et seq.*, at 545, where the Court stated, with regard to the interrelation between domestic CFC rules and the 1966 France-Switzerland tax treaty, that from none of the provisions of that treaty did it appear that the objective of fighting tax avoidance and evasion permitted a derogation from the clear rule of Article 7 thereof, according to which the profits of a Swiss resident company might be taxed solely in Switzerland; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 33, paras. 70-71, where the Court pointed out that, in order to determine whether a person residing in Hong Kong (after 1997) and liable to Hong Kong taxes was to be regarded, for the purpose of Article 4 of the 1986 Canada-China tax treaty, as liable to tax in China by reason of his residence "under the laws of that Contracting State", it was necessary to construe the expression "under the laws of that Contracting State" against the background of Article 2 of the treaty (Taxes Covered); *ibidem* at 35-36, paras. 80-82, with regard to the need to construe Articles 3, 4, 23 and 24 of the 1986 Canada-China tax treaty in a harmonious fashion, in order to avoid internal inconsistencies that might jeopardize the functioning of the treaty; Hoge Raad (Netherlands), 21 February 2003, case 37024, 5 *ITLR*, 818 *et seq.*, at 876, para. 3.6, where the Court, after having argued that the expression "is present" in Article 15(2)(a) of the Netherlands-Nigeria tax treaty, read in the context of that provision, indicated unmistakably *physical* presence, noted that there was nothing elsewhere in the treaty or the explanatory notes to indicate that the contracting States had a different meaning in mind; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*, at 816-817, paras. 56-61, where the Court analysed the treaty provision to be interpreted, i.e. Article 4(3) of the 1969 Australia-Singapore tax treaty, against the background of the whole Article 4 of that treaty, in particular Article 4(1) thereof, and concluded that Article 4(3) (i.e. the permanent establishment deeming provision) was substantially independent from Article 4(1) (i.e. the permanent establishment general provision); Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 12, para. 17, and at 16, para. 24; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 74, where the Court referred to Article 12 (Capital Gains) of the 1971 Italy-Ireland tax treaty in order to construe Article 2(2) thereof and concluded that the Irish Capital Gains Tax was to be regarded as a tax on income for the purpose of that tax treaty; Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities*

frequently referred to in order to establish the object and purpose of the relevant tax treaty.¹⁴¹⁸

For example, in the *Ngee Hin Chong* case,¹⁴¹⁹ the Administrative Appeals Tribunal of Adelaide (Australia), in order to support its interpretation of the expression “shall be taxable in that State” included in Article 18(2) of the English authentic text of the 1981 Australia-Malaysia tax treaty,¹⁴²⁰ noted that, where the contracting States intended to deny the taxing right to one of them, they explicitly did so by using the term “only” in the English authentic text of the tax treaty, as for instance in Articles 7, 8, 14, 17 and 18(1) thereof.¹⁴²¹ Similarly, the Tribunal noted that Articles 22 and 23, for the purpose of eliminating juridical double taxation by means of the credit method, made reference, *inter alia*, to Article 18 and that such a reference could be said not to be absurd only where Article 18(2) was construed as allowing concurrent taxation.¹⁴²²

Clearance Inc v. Income Tax Officer, 11 *ITLR*, 201 *et seq.*, at 222, para. 38, where the tribunal made reference to Article 26(5) of the 1989 India-United States tax treaty for the purpose of interpreting Article 26(2) thereof; Special Commissioners (United Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 *ITLR*, 440 *et seq.*, at 478-481, where the Special Commissioners outlined (i) the way in which the distributive rules generally allocate taxing rights between the two contracting States with regard to the different categories of income (concurrent or exclusive taxation) and (ii) the circumstances under which the allocation under (i) might be modified under the 1975 United Kingdom-United States tax treaty (i.e. where the domestic CFC legislation applies, partnerships are involved, or the treaty “saving clause” operates), as a background against which to construe the interaction between Articles 1(4) and 23 of the above-mentioned treaty; *ibidem*, at 482-483, paras. 66 and 68; Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 395-396, para. 82, where the Court made extensive references to Articles 10, 11(5) and 11(6) for the purpose of construing Article 11(9)(a) of the 1982 Australia-United States tax treaty; Authority for Advance Rulings (India), 26 June 2009, *Cal Dive Marine Construction (Mauritius) Ltd v. Director of Income Tax*, 12 *ITLR*, 38 *et seq.*, at 47, paras. 6.2 and 6.3, where the authority pointed out the relevance, for interpretative purposes, of the contextual setting of the provision to be construed and noted that “[p]aragraph 1 of Article 5 [of the relevant tax treaty could] not be viewed as a water-tight compartment without taking colour from or shedding light on various clauses of para 2”; Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 *ITLR*, 645 *et seq.*, at 653-654, para. 4, where the Court analysed Article 7(1) of the 1994 Japan-Singapore tax treaty as a whole in order to conclude that it only prohibited juridical double taxation and, therefore, did not prevent Japan from applying its CFC rule to a resident taxpayer investing in a company resident in Singapore; Court of Appeal of England and Wales (United Kingdom), 8 July 2010, *Smallwood and another v. Revenue and Customs Commissioners*, 12 *ITLR*, 1002 *et seq.*, at 1018, para. 28, where the Patten LJ analysed the structure of the 1981 Mauritius-United Kingdom tax treaty (distinguishing, in particular, the function played by the “distributive rules” articles, on the one hand, from that of the article dealing with the elimination of double taxation, on the other hand) for the purpose of determining the goals that articles 4 and 13 of that treaty were designed to achieve, which, in turn “largely colour[ed] the interpretation of the provisions themselves”; *ibidem*, at 1022, paras. 40-41.

¹⁴¹⁸ See section 2.3.3.1 of Chapter 3 of Part II.

¹⁴¹⁹ Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*

¹⁴²⁰ As well as the expression “may be taxed”, which represented the English translation, agreed upon by the parties to the litigation, of the corresponding Malaysian expression included in the Malaysia authentic text of the treaty.

¹⁴²¹ See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 91, para. 38.

¹⁴²² See *ibidem*, at 90-91, paras. 36-37.

In addition, where an instrument made by a contracting State in connection with the conclusion (here intended as a process) of the relevant tax treaty has been publicly recognized by the other contracting State as an instrument related to that treaty and reflecting the common understanding reached in the course of the negotiations, courts and tribunals often take it into account for the purpose of interpreting the treaty as provided for in Article 31(2)(b) VCLT.

An instance thereof is represented by the Technical Explanations issued by the United States Treasury Department in connection with the conclusion of the 1980 Canada-United States tax treaty and accepted by the Canadian Minister of Finance as accurately reflecting the understanding reached by the parties in the course of the negotiations with regard to the interpretation of that treaty.¹⁴²³

2.6. *The other means of interpretation provided for by Article 31(3) VCLT*

National courts and tribunals not infrequently attribute relevance to the case law of the other State party to the tax treaty to be interpreted, given that it constitutes evidence of the understanding of that State of the relevant treaty provisions. As further mentioned in section 3 of this chapter, this holds true even where the provisions interpreted by the foreign courts and tribunals are part of a tax treaty concluded by the treaty partner with another State.¹⁴²⁴

Obviously, where such judicial practice is consistently followed by courts and tribunals of both contracting States, it falls within the scope of Article 31(3)(b) VCLT, which provides that the interpreter must also take into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

¹⁴²³ See Canadian Department of Finance Press Releases 81-16 of 4 February 1981 and 84-128 of 16 August 1984. With reference to case law, see, for instance, Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, at para. 64. Seemingly *contra*, Federal Court of Appeal (Canada), 26 September 1997, *Attorney General of Canada v. William F. Kubicek*, 97 DTC 5454, at para. 10, which, however, appears to focus on the weight to be given to the United States Technical Explanation, as endorsed by the Canadian Minister of Finance, for interpretative purpose at the domestic law level (tax treaty as a Canadian statute), rather than at the international level (tax treaty as an international agreement). See also B. J. Arnold et al., *Ward's Tax Law and Planning. Volume 6* (Toronto: The Carwell Co. Ltd., 1983), pp. 21 *et seq.* and M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 25.06.

¹⁴²⁴ See, for instance, Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, p. 822, para. 43; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 557, para 3.4.4., where reference was made to the fact that the principle of abuse of rights was recognized by the judiciary of the other Contracting State (Denmark); Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 751-753, para. 43, where reference was made to a decision of the Hoge Raad of the Netherlands, for the purpose of construing the term “beneficial owner” as used in the 1986 Canada-Netherlands tax treaty; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 *ITLR*, 811 *et seq.*, at 839-840, paras. 57-59; Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq.*, at 67-68, para. 15, where the Court made reference to a decision of the United States Tax Court on the meaning of the term “habitual abode” in order to construe Article IV(2) of the 1980 Canada-United States tax treaty.

Similarly, national courts and tribunals sometimes take into account the common practice of the contracting States' tax authorities and governmental organs in order to construe the relevant tax treaty provisions and argue in support of the chosen interpretation thereof.¹⁴²⁵ This approach is clearly in line with Article 31(3)(b) VCLT.¹⁴²⁶

In particular, where the competent court or tribunal concludes that the contracting States tax authorities' common practice is sufficiently unambiguous and consistent, it is rare that it rejects the construction of the relevant tax treaty provisions resulting from

¹⁴²⁵ See Supreme Court (United States), *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), at 184-85; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 63; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 33-35, paras. 72, 73 and 77; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq.*, at 315-317 where the Court seemed to attribute weight to the historical position of the United Kingdom regarding the proper interpretation of Article 7 of the 1975 United States-United Kingdom tax treaty, in order to construe this provision; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 557, para. 3.4.4., where the Court made reference to the subsequent practice of the other contracting State (Denmark) to enter into tax treaties containing anti-abuse provisions in order to construe in an anti-abuse fashion the 1973 Denmark-Switzerland tax treaty; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 *ITLR*, 189 *et seq.*, at 193, para. 17, where the Court noted that there had been no public or published statements by the governments of the contracting States (Canada and Barbados), nor any agencies or subdivisions thereof, nor any exchange of diplomatic notes, nor other internal documents (to the best of the Court's knowledge) dealing with the issue at stake before the Court (i.e. the interaction between Articles XXVII(3) and XXX(2) of the 1980 Barbados-Canada tax treaty); Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq.*, at 436-439, where, for the purpose of interpreting Article 7 of the 1975 United Kingdom-United States tax treaty in connection with bank inter-branch transactions (interest on internal "loans"), the Court made reference to both (i) the contracting States' conduct contemporaneous to the treaty negotiations and conclusion and (ii) their subsequent conduct (the United Kingdom government also submitted, in that respect, an *amicus curiae* brief to the court), noting that the approach followed by the US government after the introduction of Treasury Regulation § 1.882-5 was publicly registered for the first time in the 1984 OECD Report *Transfer Pricing and Multinational Enterprises* and, thus, it could not be directly used (absent any evidence to the contrary) to support the view that it reflected the understanding of the United States, and even less that of both parties (the United Kingdom dissenting in that respect), at the time of the treaty conclusion; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 820-822, paras. 80-87, where the Court made reference to the Canadian Revenue Authority's practice with regard to the application of tax treaties to income derived by fiscally transparent entities (other than United States limited liability companies – "LLC"), and at 822-824, paras. 90-94, where it made reference to the United States' practice on the same matter, in order to get some evidence of the possible common understanding of Canada and the United States with reference to the application of their 1980 tax treaty to income derived by a United States LLC.

¹⁴²⁶ It is worth noting that the Finnish Supreme Administrative Court, in the case *Re A Oyj Abp*, recorded the divergence of opinion of the two contracting States (Belgium and Finland) Ministries of Finance regarding the compatibility of the Finnish CFC rule with the relevant tax treaty and, thus, the impossibility of ascertaining directly the common intention or position of the parties with respect to such an issue, before arguing in favor of the compatibility on the basis (also) of the OECD Commentary (see Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq.*, at 1066). See also Bundesfinanzhof (Germany), 17 October 2007, *Re a Partnership*, 10 *ITLR*, 628 *et seq.*, at 653-654, where the Court seemed to be theoretically willing to take into account the subsequent consistent practice of the parties for the purpose of interpreting tax treaties, but, in the specific case, found that the German tax authorities had failed to prove that the factual application of the 1989 Germany-United States tax treaty by the two contracting States mirrored their consistent view on the construction of the relevant provisions of the treaty, thus concluding that Article 31(3)(b) VCLT was not applicable in such circumstances.

it.¹⁴²⁷

According to the majority of scholars,¹⁴²⁸ mutual agreements reached by the competent authorities of the contracting States and purported to resolve issues concerning the interpretation of the relevant tax treaties under provisions similar to Article 25(3) OECD Model are binding on the contracting States at the international law level. In such a case, in fact, the competent authorities act as duly authorized representatives of the contracting States and, therefore, the mutual agreement reached thereby is to be regarded as a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” under Article 31(3)(a) VCLT.

Similarly, paragraph 54 of the Commentary to Article 25 OECD Model states that “[m]utual agreements resolving general difficulties on interpretation or application are binding on administrations as long as the competent authorities do not agree to modify or rescind the mutual agreement” and paragraph 13.1 of the Commentary to Article 3 OECD Model explicitly maintains that mutual agreements should be taken into account for the purpose of interpreting undefined treaty terms.

The absence of national case law confirming the bindingness of mutual agreements for interpretative purposes is mainly due to the fact that, in general, their relevance at the domestic law level depends on whether certain legal requirements (in terms of form and procedure) imposed by the constitutions of the contracting States are satisfied, this often not being the case.¹⁴²⁹

Finally, it has been persuasively argued that rules and principles of European Union law should be regarded as “rules of international law applicable in the relations between the parties” under Article 31(3)(c) VCLT for the purpose of construing tax treaties

¹⁴²⁷ *Contra*, however, Court of Appeal of Liege (Belgium), 14 January 1998, *Verast & Folens v. Belgium*, 1 *ITLR*, 435 *et seq.*, at 449, where the Court stated that the Belgian tax administration, which relied on the corresponding practice of the tax administration of the other contracting State (France), failed to establish that the latter tax administration did not misunderstand the rule enshrined in the relevant treaty provision; Bundesfinanzhof (Germany), 2 September 2009, *Re a German-Belgian Competent Authority Agreement*, 12 *ITLR*, 475 *et seq.*, at 490-491, where the Court (confusingly) held that the mutual agreement reached by the competent tax authorities under Article 25 of the 1967 Belgium-Germany tax treaty, with a view to solving the issue of double non-taxation of severance payments made to Belgian resident individuals working in Germany, represented a change in the tax treaty and not an interpretation of it since it went further than the clear text of Article 15 of the treaty allowed and, therefore, on the one hand, it could not be properly viewed as a subsequent agreement between the parties regarding the interpretation of the treaty or a subsequent practice establishing the agreed interpretation thereof under Article 31(3)VCLT and, on the other hand, it could not have any effect on German courts unless incorporated into domestic law.

¹⁴²⁸ See, for instance, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 16.01; A. A. Skaar, “The Legal Nature of Mutual Agreements Under Tax Treaties”, *Tax Notes International* (1992), 1441 *et seq.*, at 1446-1447; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 47, m.no. 82c; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 431-434.

¹⁴²⁹ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 16.03 and 27.03-27.06; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 433; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 47-48, m.nos. 82d and 82e and case law referred to there.

concluded between European Union Member States.¹⁴³⁰ This conclusion is in line with that supported by the author in section 2.3.3.4 of Chapter 3 of Part II.

2.7. *Supplementary means of interpretation under Article 32 VCLT and other extrinsic materials*

National courts and tribunals sometimes mention official documents prepared by the competent ministries or parliamentary committees in the course of the ratification process. Similarly, reference is at times made to the positions of the contracting States' tax authorities and the interpretations put forward in the commentaries to national tax treaty models.

These documents, being unilateral in nature, do not directly shed light on the common understanding of the parties in respect of the relevant tax treaties and, thus, cannot be categorized either as (typical) *travaux préparatoires*, or as means of interpretation referred to in Article 31(3)(a) and (b).

However, it cannot be disputed that they constitute evidence of the understanding of one of the contracting States and, as such, may be certainly be taken into account as supplementary means of interpretation.¹⁴³¹ The actual weight that the content of these documents is to be attributed for the purpose of construing the relevant tax treaty provisions depends on the other items of evidence available and on the reasonableness of the interpretations provided for therein.¹⁴³²

¹⁴³⁰ See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 436; F. Avella, "Il beneficiario effettivo nelle convenzioni contro le doppie imposizioni: prime pronunce nella giurisprudenza di merito e nuovi spunti di discussione", *Rivista di Diritto Tributario. Parte Quinta* (2011), 14 *et seq.*, pp. 25 *et seq.*, in particular footnote 32; F. Avella, "Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention", *World Tax Journal* (2012), 95 *et seq.*, at 97 *et seq.*

¹⁴³¹ See, broadly in agreement, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), Chapter 25, in particular at 25.02; contrary, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p.34, m.no. 71.

¹⁴³² See Court of Federal Claims (United States), 7 July 1999, *National Westminster Bank v. US*, 1 *ITLR*, 725 *et seq.*, at 735, referring to the 1977 United States Treasury Department Technical Explanation concerning the 1975 United States-United Kingdom tax treaty and to the Report of the Senate Committee on Foreign Relations dated 25 April 1978 concerning its favorable recommendation of the same treaty; similarly, Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 *ITLR*, 292 *et seq.*, at 306-307, where the Court, however, pointed out that, even where it was to read the above-mentioned documents as supporting the position of the US government in the dispute (which was not the case), the unilateral view of the United States were not controlling the proper construction of the 1975 United States-United Kingdom tax treaty, since the Court had to give meaning to the common intention of the treaty parties; Tax Court (United States), 18 November 1999, *Compaq v. CIR (the ACT credit claim)*, 2 *ITLR*, 323 *et seq.*, at 332-333, where the Court made reference (i) to the United States Treasury Department Technical Explanation to the 1975 United States-United Kingdom tax treaty and (ii) to the US Rev. Proc. 80-18 and concluded that, as unilateral documents, they presented no reason to deviate from the intention of the contracting States as evidenced by the structure of the tax treaty and the plain meaning of the language of the relevant provision; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT*, 2 *ITLR*, 707 *et seq.*, at 719, where reference was made to the explanatory memorandum accompanying the Bill that gave effect to the 1980 Australia-Malaysia tax treaty (which the Court found equivocal and of little assistance) and to the Second

Of course, the same holds true with regard to the case law of the treaty partner's courts and tribunals,¹⁴³³ as well as to that State's subsequently implemented domestic law provisions, which interact (or might interact) with the tax treaty articles to be

Reading speech introducing that Bill (which the Court also found equivocal); Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 211; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq.*, at 1061-1062, where the Court referred to Government Bill no. 155/1994 vp dealing with the compatibility of the newly introduced Finnish CFC rule with the tax treaties to which Finland was party; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 881, para. 6 where reference was made to the United States Technical Explanation to Article XIX of the 1980 Canada-United States tax treaty (see *ibidem* at 887, paras. 15 and 16), para. 7 where reference is made to the United States Technical Explanation to Article 19 of the United States Model Income Tax Convention (see *ibidem* at 888, paras. 19 and 20), and at 882, para. 9 where the Court held that, although not constituting authority on a question of law, the United States Technical Explanations are "an element to be taken into account in the interpretation process" of the tax treaty; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq.*, at 184, para. 13, where the Court referred to the Canada Revenue Agency Interpretation Bulletin IT-221R3 for the purpose of construe the term "permanent home" as used in Article IV(2) of the 1980 Canada-United States tax treaty; Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq.*, at 432-433, where reference was made to the United States Technical Explanation to the 1975 United Kingdom-United States tax treaty (submitted to the Senate Foreign Relations Committee), regarded by the Court as part of the "entire context" that must be taken into account for the purpose of construing that treaty; *ibidem*, at 438, where the Court held that, since a treaty must be interpreted so as to give effect to the intent of both parties, a government's position merits less deference where that government and the one of the other contracting State disagree on the meaning of the treaty; *ibidem*, at 439, where the Court concluded that its construction of Article 7 of the 1975 United Kingdom-United States tax treaty found direct support in the contemporary understanding of the United Kingdom, as evidenced by its contemporaneous and subsequent practice, as well as in the OECD Commentary to Article 7 of the 1963 OECD Draft, on which the treaty was based (moreover, the Court noted that there was very little evidence that the contemporary understanding of the United States differed in any way from that of the United Kingdom, although its subsequent practice clearly did); Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities Clearance Inc v. Income Tax Officer*, 11 *ITLR*, 201 *et seq.*, at 219-220, paras. 30-32, where the Tribunal noted that the Technical Explanation to the United States Model Tax Convention, representing an authoritative statement on the treaty policy of the United States and being binding thereon, has a strong persuasive value on the ground of reciprocity as well for the purpose of construing the 1989 India-United States tax treaty, since one should suppose that India was aware of the United States Model Tax Convention and its accompanying Technical Explanation when negotiating the treaty and thus, as a corollary, it should be assumed that once an expression appearing in such a Model is being used in the tax treaty, that expression should be given the same meaning assigned to it in the Technical Explanation, unless evidence to the contrary exists (quite surprisingly, the Tribunal went on by stating that whenever a conflict exists between the OECD Commentary and the Technical Explanation to the United States Model, the former has to give way to the latter: the Tribunal did not seem to consider that the OECD Commentary is, to a very large extent, reproduced in or referred to by the Commentary to the United Nations Model, in the drafting of which India is involved); District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq.*, at 857-858, where the Court referred to a letter of the Norwegian Ministry of Finance dated 4 April 2000, in which it was stated that under OECD Model-type tax treaties, the conclusion of contracts by an agent on behalf of the principal leads to a permanent establishment of the latter in the State where the former acts as if the contracts "in reality" bind the principal, even if they are not directly legally binding thereon.

With regard to older case law, see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 28.03, 28.04 and, with specific regard to the United States, 28.17 and 28.18.

¹⁴³³ References to courts and tribunals' decisions where the case law of the other contracting States' courts and tribunals are taken into account for the purpose of interpreting tax treaties are included in section 3 of this chapter.

interpreted.¹⁴³⁴

It is interesting to note that, in some cases, national courts and tribunals have also referred to the circumstances of the conclusion of the relevant tax treaty in order to interpret it, such as the domestic tax laws in force in the contracting States at the time of the treaty conclusion¹⁴³⁵ and the international legal framework relevant to one of the contracting States, but not to the other.

For instance, in the *Re V SA* case,¹⁴³⁶ the Federal Commission (Switzerland) noted that the reason¹⁴³⁷ for the adoption of Article 10(2)(b) of the 1993 Luxembourg-Switzerland tax treaty was to extend, to the relation between the two contracting States,

¹⁴³⁴ See, for instance, Bundesfinanzhof (Germany), 5 March 1986, case *IR 201/82*, *Bundessteuerblatt. Teil II* (1986), 496 *et seq.*, where the Court attributed relevance to the fact that the other contracting State (Switzerland) had enacted, after the conclusion of the 1931 Germany-Switzerland tax treaty, a domestic law provision purported to prevent abuse of its own tax treaties (i.e. the Swiss Federal Decree of 14 December 1962), for the purpose of arguing that the German relevant domestic law anti-abuse provision (Article 6(1) of the German *Steueranpassungsgesetz*) could be applied to situations covered by that treaty.

¹⁴³⁵ See Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R*, 85 DTC 5188, para. 19, where Addy J. referred to the United States tax law on capital gains in force at the time of the conclusion of the 1942 Canada-United States tax treaty, as part of the “surrounding circumstances when the treaty was signed”, in order to explain why that treaty employed the term “sale or exchange” in connection with the obligation of the source State to exempt capital gains derived by a resident of the other State; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 557, where the Court noted that Denmark, during the negotiations of the 1973 Denmark-Switzerland tax treaty, did not make any reservation on the application of the resolution of the Federal Council of Switzerland of 14 December 1962, concerning measures against the unjustified use of tax treaties, which had already an impact on the former 1957 Denmark-Switzerland tax treaty (it might also be held that such an absence of explicit reservation on behalf of Denmark, together with the previous application by Switzerland of the above-mentioned resolution to situations covered by the 1957 treaty, amounted to a tacit agreement between the parties allowing the application of anti-abusive measures by Switzerland to situations covered by the new (1973) tax treaty; in that case, the tacit agreement would be relevant as part of the context under Article 31(2) VCLT); Bundesfinanzhof (Germany), 17 October 2007, *Re a Partnership*, 10 *ITLR*, 628 *et seq.*, at 650, where the Court held that the expression “business property of [such] a permanent establishment” used in the 1989 Germany-United States tax treaty was chosen instead of the OECD Model expression “effectively connected with [such] a permanent establishment” because, under the previous 1954 Germany-United States tax treaty, the latter expression was to be construed in accordance with the United States domestic law under a mutual agreement entered into by the tax authorities of the contracting States and, thus, by not including such an expression the parties wanted to prevent the impression that the interpretation agreed upon in the mutual agreement was to be applied also in respect of the 1989 treaty; Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 *ITLR*, 365 *et seq.*, at 395, para. 81, where the Court took into account the domestic tax law policy of the United States, which triggered the inclusion of Article 11(9)(a) in the 1982 Australia-United States tax treaty, but concluded that the construction and application of the taxing right of Australia under Article 11(9)(a) could not be controlled by the United States domestic tax law policy, since the text of the article, read in its context, pointed to a different construction. See also Belgian Tax Authorities, Circular Letter No. AFZ/2004/0053 of 16 January 2004, where it is stated that the domestic law of the other contracting State (in particular the meaning that an undefined treaty term has under such law) should be taken into account as part of the context in order to construe Belgian tax treaties.

¹⁴³⁶ Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 *ITLR*, 191 *et seq.*, at 211 and 212.

¹⁴³⁷ Such a reason apparently resulted from the Swiss domestic “travaux préparatoires” to the 1993 Luxembourg-Switzerland tax treaty.

the benefits provided for by the Parent-Subsidiary Directive¹⁴³⁸ and, therefore, Article 10(2)(b) was to be interpreted against the background of that directive as a whole. Since Article 1(2) of the Parent-Subsidiary Directive provided that the provisions of national law or tax treaties concerning the prevention of evasion and abuse might continue to operate, the Federal Commission concluded that the same should apply with regard to Article 10(2)(b) of the 1993 Luxembourg-Switzerland tax treaty, which was purported to do no more than to extend the scope of the directive benefits.

In the same vein, national courts and tribunals sometimes analyse the previous and subsequent tax treaties concluded between the very same contracting States (as well as protocols modifying the relevant tax treaty), in order to draw some evidence by way of inference from the changes in the wording used.¹⁴³⁹

Another recurrent feature of national case law is the reference to the work of worldwide-recognized scholars in the field of international taxation, in general, and of tax treaties, in particular. Thus, it is not rare to find citations of the works of Vogel, Baker and (the members of) the International Tax Group as authorities confirming the interpretation in favor of which the relevant court or tribunal is arguing.

The frequency of such references is so high¹⁴⁴⁰ that one could get the impression

¹⁴³⁸ Directive 90/435/EEC of the European Economic Community.

¹⁴³⁹ See, for instance, Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 ITLR, 878 et seq., at 889, para. 22

¹⁴⁴⁰ See, among many, Authority for Advance Rulings (India), 18 March 1997, *TVM Ltd v. CIT*, 1 ITLR, 296 et seq., at 315-316; Tax Court (Canada), 30 October 1998, *Dudney v. R*, 1 ITLR, 371 et seq., at 376; Authority for Advance Rulings (India), 28 April 1999, *Y's Application*, 2 ITLR, 66 et seq., at 78 and 81; Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT*, 2 ITLR, 707 et seq., at 715-716; Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, *Re V SA*, 4 ITLR, 191 et seq., at 208 and 210; Verwaltungsgerichtshof (Austria), 25 September 2001, *Re Austria-Germany double tax convention*, 4 ITLR, 547 et seq., at 555; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 ITLR, 1 et seq., at 31, paras. 62-63, at 33, paras 69-70, and at 35, para. 79; New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT*, 5 ITLR, 658 et seq., at 676-678, paras. 67-70 and 76; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 ITLR, 212 et seq., at 229; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 ITLR, 233 et seq., at 267-268, 270 and 275; Federal Court of Appeal of Ottawa (Canada), 13 October 2003, *Edwards v. R*, 6 ITLR, 564 et seq., at 568-569, para. 22; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 ITLR, 1 et seq., at 19, para. 30; High Court of Justice of England and Wales (United Kingdom), 7 October 2005, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 ITLR, 236 et seq., at 254, para. 40, and at 256-257, paras. 45 and 48; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 ITLR, 536 et seq., at 555, para. 3.4; Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 ITLR, 563 et seq., at 585-586, paras. 110-111; Court of Appeal of England and Wales (United Kingdom), 2 March 2006, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 ITLR, 653 et seq., at 670 and 672, paras. 34, 37 and 38; Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v. Revenue and Customs Commissioners*, 9 ITLR, 767 et seq., at 794, paras. 75-76 per Arden LJ.; Supreme Court (India), 4 January 2007, *Ishikawajma-Harima Heavy Industries Ltd v. Director of Income Tax*, 9 ITLR, 799 et seq., 827-828; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 ITLR, 1062 et seq., at 1071, para. 12, at 1076, para. 19, and at 1079-1080, paras. 29-34; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 ITLR, 63 et seq., at 77, 80 and 81; Income Tax Appellate Tribunal of Chennai

that some of the interpretative guidance given in such works substantially amount to paradigms¹⁴⁴¹ of tax treaty application, i.e. to shared worldwide understandings of how tax treaties (and some of their OECD-standard provisions) should be generally construed and applied.¹⁴⁴²

Finally, national courts and tribunals have on certain occasions carried out a comparative analysis of the domestic law rules that could be restricted by the application of the relevant tax treaties, or a study of their historical background.

Where such rules are implemented worldwide, this kind of analysis becomes more frequent and national courts and tribunals appear to attribute more weight to them for the purpose of determining the interrelation between the domestic tax rules at stake and the relevant treaty provisions.¹⁴⁴³

(India), 19 May 2008, *West Asia Maritime Ltd and another v. Income Tax Officer*, 10 ITLR, 965 *et seq.*, at 970-971, para. 15; Authority for Advance Rulings (India), 18 July 2008, *Dell International Service India Pvt Ltd v. CIT (International Taxation)*, 11 ITLR, 173 *et seq.*, at 188, para. 12.2, and at 193, para. 13.5; Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities Clearance Inc v. Income Tax Officer*, 11 ITLR, 201 *et seq.*, at 220, para. 34, and at 228-229, paras. 60-62; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 ITLR, 811 *et seq.*, at 850-851; Income Tax Appellate Tribunal of Delhi (India), 16 October 2009, *New Skies Satellites NV v. Assistant Director of Income Tax & Shin Satellite Public Company Limited v. Deputy Director of Income Tax*, 12 ITLR, 409 *et seq.*, at 435-437, in particular paras. 221 and 223; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 ITLR, 915 *et seq.*, at 930.

¹⁴⁴¹ Here the term “paradigm” is employed in the sense it has been used in T. Kuhn, *The Structure of Scientific Revolutions* (Chicago: The University of Chicago Press, 1962). See also A. Bird, “Naturalizing Kuhn”, 105 *Proceedings of the Aristotelian Society* (2005), 99 *et seq.*, in particular at 112-114.

¹⁴⁴² Baker, in his note as editor of the ITLR to the decision of the High Court in the *Indofood* case (High Court of Justice of England and Wales (United Kingdom), 7 October 2005, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 ITLR, 236 *et seq.*) stated the following: “In some respects, the editor has never been more pleased that he wrote in his book about the meaning of ‘beneficial ownership’ since it is somewhat uncertain what the outcome of the case would have been if a judge without a tax background had been asked simply to explain the meaning of beneficial ownership. The editor hopes that the material cited is generally accepted as a correct definition of the meaning of beneficial ownership” (*ibidem*, at 237).

One of the few significant deviations from such paradigms is represented by the way in which Indian courts and tribunals are used to construing the expression “may be taxed”, commonly found in Indian tax treaties: that expression is generally interpreted by those courts and tribunals as a synonym for “shall be taxable only”, which is also a commonly used expression in OECD Model-type tax treaties, including Indian ones (see, for instance, Income Tax Appellate Tribunal of Pune (India), 29 June 2007, *DCIT v. Patni Computer Systems Ltd*, 10 ITLR, 53 *et seq.*, at 57-60, paras. 5-8). The effect of such an interpretation is that of converting India, which generally adopts the credit method to relieve double taxation in its tax treaties, into an exemption country.

¹⁴⁴³ See, for instance, the worldwide historical and comparative analysis of CFC rules carried out by the Supreme Administrative Court of Finland in the *Re A Oyj Abp* case (Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 ITLR, 1009 *et seq.*, at 1058); see, similarly, the analysis of the international background relating to the French CFC legislation carried on by the Commissaire du Gouvernement Austri in the *Schneider* case (Conseil d’Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 ITLR, 1077 *et seq.*, conclusions of the Commissaire du Gouvernement at 1109-1111).

2.8. *Conclusions*

The analysis of national case law has shown that, notwithstanding domestic law constraints, courts and tribunals tend to follow the principles enshrined in Articles 31 and 32 VCLT when interpreting tax treaties.

From the perspective of this study, the most reasonable inference that may be drawn from this is that, where a *prima facie* discrepancy in meaning among the tax authentic treaty texts is put forward, national courts and tribunals should similarly apply those principles of interpretation in order to remove it.

Moreover, based on such an analysis, it does not seem that any of the approaches to treaty interpretation taken by national courts and tribunals includes elements that might constitute a ban on the application of the rule provided for in the last part of Article 33(4) VCLT, according to which the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, must be adopted where the discrepancy in meaning cannot be removed by the application of Articles 31 and 32 VCLT.

The author, thus, maintains that the analysis carried out and the conclusions drawn in section 3 of Chapter 4 of Part II, which concerns the rules of interpretation applicable to multilingual treaties derived from Article 33 VCLT, should be considered to be generally relevant also for the purpose of the construction of multilingual tax treaties by national courts and tribunals.

3. **The significance of the OECD Model for the purpose of interpreting multilingual tax treaties**

3.1. *Research question addressed in this section*

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

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

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

that the agreement of the parties was to import into the treaty the content of the Model and, therefore, that the other authentic texts should be construed in harmony with the meaning derived from the interpretation of the English and/or French texts?

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

3.2. Introduction

“Frankly, [...] my impression is that the words are not beacons of clarity. Maybe this is the risk of dozens of negotiators of several languages negotiating the OECD Model, and then two countries trying to adopt that model to their circumstances – we end up with a camel rather than a horse”¹⁴⁴⁴

Tax treaties currently in force worldwide are, to a very large extent, based on the OECD Model. This triggers several consequences of interest for the purpose of the present study, which are analysed separately in the following sections.

Here it is merely noted that the fact that most of the tax treaties currently in force are based on the OECD Model constitutes the main reason for the abundant recourse to the OECD Commentary in order to construe such treaties. The relevance of the OECD Commentary for the purpose of interpreting (multilingual) tax treaties is dealt with in section 4 of this chapter.

3.3. The OECD Model as a substitute for the treaty “drafted” text

The process of negotiating tax treaties generally focuses on the desired departures from the OECD Model. This implies that, as a matter of fact, there is no real negotiation carried out between the contracting States with regard to the content of those treaty provisions reproducing the corresponding provisions of the Model.

Thus, with regard to those provisions, it does not make much sense to refer to the drafted

¹⁴⁴⁴ Miller J. in Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R.*, 10 ITLR, 827 *et seq.*, at 855.

text as such in order to construe the treaty.¹⁴⁴⁵ The reference, in these cases, should be made to the text of the OECD Model,¹⁴⁴⁶ as supplemented by the OECD Commentary

¹⁴⁴⁵ The limited influence that the drafted text as such (either in English or French) has on the other authentic texts of the relevant tax treaty indirectly emerges from the analysis of the wording of the capital gains article of the Italian tax treaties. In many of the treaties that are authenticated in French (but not in English), the Italian authentic text refers to “beni mobili facenti parte dell’attivo di una stabile organizzazione” (for instance, the Italian tax treaties concluded with Algeria, Argentina, Bulgaria, Hungary, Mozambique and Venezuela), which appears to be a translation of the OECD Model French provision “biens mobiliers qui font partie de l’actif d’un établissement stable”. Similarly, in many of the tax treaties authenticated in English (but not in French), the Italian authentic text refers to “beni mobili facenti parte della proprietà aziendale di una stabile organizzazione” or to “beni mobili appartenenti ad una stabile organizzazione” (for instance, the Italian tax treaties concluded with Bangladesh, China, India, Thailand, the United Kingdom and the United States), which appears to be a translation of the OECD Model English provision “business property of a permanent establishment”. This might be taken as evidence of the fact that the drafted text significantly influences the Italian authentic text even with regard to OECD Model-type provisions (see in this sense, A. Parolini, “Italy”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 246-247). There are, however, (i) a significant number of Italian tax treaties authenticated in French (and not in English), whose Italian authentic text of the capital gains article reads “beni mobili facenti parte della proprietà aziendale di una stabile organizzazione” or “beni mobili appartenenti ad una stabile organizzazione” (for instance, the Italian tax treaties concluded with the Netherlands, Portugal, Spain, Sweden and Tunisia) and (ii) a significant number of Italian tax treaties authenticated in English (and not in French), where the Italian authentic text of that article refers to “beni mobili facenti parte dell’attivo di una stabile organizzazione” (for instance, the Italian tax treaties concluded with Estonia, Slovenia and Tanzania). The presence of such a considerable number of “exceptions” weakens the inference that the drafted text has a direct bearing on the Italian authentic text of Italian tax treaties and reinforces the conclusion that both OECD Model official versions (English and French) should be taken into account as relevant elements of the overall context for the purpose of interpreting tax treaty provisions based thereon.

¹⁴⁴⁶ In both its English and French official versions.

Interestingly, Lang highlights that the OECD Model (and its Commentary) itself was originally negotiated and drafted by the representatives of the OEEC, and then OECD, member States in French and English and that while certain working parties, especially in the fifties, when most of the drafting work for the 1963 OECD Draft was done, were working mainly in French, others were working predominantly in English. In this regard, he raises the question of whether this fact should lead the interpreter to put more emphasis on either the English or the French official versions of the OECD Model in order to construe certain of its provisions, depending upon the working language predominantly used by the working party which originally drafted the specific provision at stake. Quite convincingly, he concludes that this should not be the case, since “more weight could only be put to a specific language version if there is a clear indication that this language was the predominant working language during drafting”, while “[i]f other versions were carefully drawn by the negotiators having reference to all the texts, they were not mere translations” and therefore they should be relied upon as well. According to the Lang, “[f]or the provisions of the OECD model which were drafted in the 1950s, it is often not clear whether it is justifiable to put more emphasis on a specific language version. Almost all minutes and preliminary reports were available in both languages. Thus, there is no clear indication that the discussions focused only on one specific language version of the draft.” (see M. Lang, “The Interpretation of Tax Treaties and Authentic Languages”, in G. Maisto, A. Nikolakakis and J. M. Ulmer (eds.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq.*, at 23-24; see also M. Lang, “Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen”, 20 *Internationales Steuerrecht* (2011), 403 *et seq.*).

This, however, is not the only reason why the practice of putting more emphasis on either the English or the French official versions of the OECD Model, for the purposes of interpreting tax treaties, should be generally rejected. One should never forget that the purpose of any tax treaty interpreter, at the international level, is to determine the “utterance meaning” of the tax treaty provisions, i.e. to determine which could have been the originally meaning agreed upon by the parties. In that respect, the *travaux préparatoires* of the OECD Model have not been publicly available, not even to tax treaty negotiators and State officials, for quite a long time

thereto,¹⁴⁴⁷ especially in order to remove *prima facie* divergences of meaning among the tax authentic treaty texts.

Nevertheless, the arguments favoring the attribution of a special weight, for interpretative purposes, to the text of the OECD Model coincide with those already put forward by the author with regard to the relevance of the drafted text for construing treaties, the most important being the reasonable chance that the text of the OECD Model may convey more precisely the common intention of the parties than the (other) authentic texts of the tax treaty, since the OECD Model text was most probably before the negotiators where they agreed to not substantially deviate from it.

In the same vein, Lang points out that “[i]f English and French, or at least one of

and, thus, they could not have been before the eyes of the contracting States’ representatives when negotiating and concluding tax treaties in such a period. It is, therefore, compelling to infer from the previous proposition that, independently of the actual behavior of the OEEC and OECD working parties in the original discussion on and drafting of the OECD Model provisions, such behavior should be regarded as irrelevant for the purpose of construing tax treaties based on such a Model and, as a consequence thereof, that the English and French official versions of the Model should be equally relied upon for the purpose of interpreting those tax treaties. See also J. F. Avery Jones and D. A. Ward, “Agents as permanent establishments under the OECD Model Tax Convention”, 33 *European Taxation* (1993), 154 *et seq.*, at 155 *et seq.* and 160 *et seq.*, where the authors note that Article 5(5) OECD Model appears to have been originally drafted in French and infer from this that the expression “an authority to conclude contracts in the name of the enterprise” (“des pouvoirs [...] de conclure des contrats au nom de l’entreprise” in the French official version) was originally intended to have the meaning it had under the French code and, more generally, in civil law jurisdictions, i.e. as a synonym of the expression “an authority to conclude contracts legally binding the enterprise”. The genesis of the above OECD Model expression and the inference derived from it by the authors has been also taken into account by the Rapporteur Public of the French Conseil d’Etat in order to support her conclusion on the meaning of the identical expression employed in the 1995 France-United Kingdom tax treaty (See Conseil d’Etat (France), 31 March 2010, *Société Zimmer Ltd v. Ministre de l’Economie, des Finances et de l’Industrie*, 12 *ITLR*, 739 *et seq.*, conclusions of the Rapporteur Public at 780).

¹⁴⁴⁷ The need for the interpreter to rely on the OECD English and French official versions is even more critical in connection with the use of the OECD Commentary. The following case is apt to illustrate this issue. In 1996, the Austrian Supreme Administrative Court (see Verwaltungsgerichtshof (Austria), 31 July 1996, *case no. 92/13/0172*, available on the IBFD Tax Treaty Case Law Database), interpreting Article 16 of the 1974 Austria-Switzerland tax treaty, which makes reference to “Aufsichtsrats- oder Verwaltungsratsvergütungen” in its sole German authentic text, concluded that payments made to a member of a Swiss “Verwaltungsrat” (i.e. a company organ similar to an Anglo-Saxon “board of directors”) were outside the scope of Article 16 of that tax treaty. In supporting its conclusion, the Court noted that the relevant part of Article 16 of the 1974 Austria-Switzerland tax treaty substantially reproduced the (French) text of Article 16 of the 1963 OECD Draft. The Court inferred from this that the OECD Commentary to that model was relevant in order to interpret Article 16 of the tax treaty. It then referred to the German translation, prepared by the German Ministry of Finance in collaboration with the Austrian and Swiss Ministries of Finance, of the Commentary to Article 16 of the 1963 OECD Draft, which mentioned solely “Aufsichtsräte” (i.e. a company organ similar to the French “conseil de surveillance”) and not “Verwaltungsräte” (the following German versions of the Commentary, in contrast, mentioned both). According to the Court, the exclusive reference to “Aufsichtsräte” in the Commentary was evidence of the fact that company organs entrusted with both management and supervisory functions were outside the scope of Article 16 of the OECD Draft, which was limited to organs carrying on exclusively supervisory functions.

It is doubtful, however, whether the Court would have argued for the same interpretation, had it referred to the French official version of the Commentary to the OECD 1963 Draft, which made reference to both the “conseil d’administration” and the “conseil de surveillance” (see, with regard to the position of Austrian scholars on the subject matter, V. E. Metzler, “Austria”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 137 *et seq.*, at 141).

these languages, are among the authentic languages of a bilateral treaty, and if it is evident that a certain treaty provision is a mere translation of a provision of the OECD model, it is therefore well justified to focus more on the English or French version of the OECD model that was copied and to put less emphasis on other language versions, even if they are authentic as well.¹⁴⁴⁸

Moreover, the relevance of the English and French official versions of the OECD Model for the purpose of interpreting (multilingual) tax treaty provisions based thereon remain unaffected by the fact that the specific tax treaty at stake is authenticated neither in the English, nor in the French language.

Nothing in the VCLT precludes the interpreter from taking into account such versions for the purpose of construing a tax treaty. It has been already mentioned¹⁴⁴⁹ that, with regard to treaties in general, the VCLT system allows the recourse to non-authentic treaty versions as supplementary means of interpretation, the interpretative weight to be attributed thereto varying in accordance with the available evidence that such language versions may contribute to establishing the common intention of the parties.¹⁴⁵⁰

In connection with tax treaties based on the OECD Model, the English and French official versions of the Model are clearly worth being attributed a significant weight in the quest for such a common intention and for the purpose of supporting the treaty construction put forward, since it is only reasonable to assume that the agreement of the parties has been reached, most probably even without lengthy discussions, on the basis of such versions, as supplemented by the Commentary thereon.¹⁴⁵¹ In this case, it would appear restrictive to label the OECD Model official versions as “supplementary means of interpretation” of the tax treaty to be construed since, where the tax treaty is based on and indirectly reproduces the OECD Model in its English and/or French versions, recourse to such versions as interpretative tools is the fairest and most sensible way to ascertain the common intention of the parties, i.e. to determine in good faith the ordinary contextual meaning of the terms employed in the authentic texts of the tax

¹⁴⁴⁸ M. Lang, “The Interpretation of Tax Treaties and Authentic Languages”, in G. Maisto, A. Nikolakakis and J. M. Ulmer (eds.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq.*, at 22-23 (see also M. Lang, “Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen”, 20 *Internationales Steuerrecht* (2011), 403 *et seq.*). See, in slightly different terms, G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxv. According to Vogel, the term “context” in Article 3(2) should also cover the OECD Model and its Commentary (see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 215, m.no. 72).

See, however, apparently *contra*, Cadosch, who maintains that “[i]f there is no deviating result between the official language of each contracting State, then the English version should not question this result” (R. Cadosch, “Switzerland”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 303 *et seq.*, at 313 and 314).

¹⁴⁴⁹ See section 3.2.4 of Chapter 4.

¹⁴⁵⁰ With regard to the relevance, for the purpose of interpreting a tax treaty, of the initialled version drafted in the *lingua franca* used in the course of negotiations, notwithstanding the fact that it was not then authenticated as a treaty text, see P. Sundgren, “Interpretation of tax treaties authenticated in two or more languages: a case study”, 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: <http://www.skatter.se/index.php?q=node/1079>; accessed on 23 July 2011.

¹⁴⁵¹ See also the arguments developed in the following part of this section.

treaty, or their intended special meaning.¹⁴⁵²

This perspective is shared by Lang, who, on the one hand, admits that the English and the French official versions of the OECD Model could qualify as “supplementary means of interpretation” under Article 32 VCLT and, on the other hand, proves to be unsatisfied with the limited role that they would play as such, since “[m]aterial falling under article 32 of the VCLT is accorded only a secondary role in the interpretation of treaties.” According to that author, “[i]f it can be established by reference to the text of the treaty that a double taxation convention is, in principle, based on the OECD model, an interpretation in good faith requires that the original language versions of the model be consulted in the interpretation process. [...] If the contracting states merely translated the wording of the OECD model in drafting a certain provision, it is only reasonable to assume that they intended such a provision to have the meaning it has as expressed in the English and French versions of the OECD model. The general rule of interpretation in article 31(1) of the VCLT thus establishes the relevance of the original language versions of the OECD model in the interpretation process. [...] For OECD Member countries, article 5(b) of the convention on the OECD might come into play here. In the case of doubt and in the absence of other indications to the contrary, it may be assumed that OECD member countries wanted to comply with the OECD recommendation and thus intended only to translate the OECD model into other languages. However, if they have made a reservation to a certain provision of the model, this might indicate the contrary.”¹⁴⁵³

Similarly, in the *Smallwood case*,¹⁴⁵⁴ the Special Commissioners made reference

¹⁴⁵² See Vogel in K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 45, m.no. 81: “If the text of the OECD MC has been adopted unchanged, it is to be assumed that the contracting States intended to conform to the Council’s recommendation. It follows that when interpreting such treaties, whether or not official versions are drafted in one or more languages, the model in both its original language versions (English and French) should be considered in addition to the individual treaty text(s), as should the MC Commentary.”

¹⁴⁵³ See M. Lang, “The Interpretation of Tax Treaties and Authentic Languages”, in G. Maisto, A. Nikolakakis and J. M. Ulmer (eds.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq.*, at 26-29 (see also M. Lang, “Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen”, 20 *Internationales Steuerrecht* (2011), 403 *et seq.*).

Lang, correctly from this author’s perspective, applies the same principle in connection to tax treaty provisions that are derived from the United Nations Model: “More difficulties could arise if certain treaty provisions, or the treaty as a whole, are taken from the UN model. In such a case, similar deliberations have to be made as in the context of the OECD model. However, the interpretation of provisions taken from the UN model could require examining even more language versions. Additional difficulties might be due to the fact that the UN model is to a large extent based on the OECD model. If a bilateral treaty primarily follows the UN model and the corresponding provision of that model has itself been copied from the OECD model, more attention will be paid to the English and French versions of the OECD model. The situation is comparable to the interpretation of a treaty that was drafted in certain languages, with additional languages being authenticated over time. It is obvious that more emphasis should be placed on the languages that were the working languages when that provision of the treaty was drafted. If this was done in the OECD context, those working languages were English and French” (see M. Lang, “The Interpretation of Tax Treaties and Authentic Languages”, in G. Maisto, A. Nikolakakis and J. M. Ulmer (eds.), *Essays on Tax Treaties. A Tribute to David A. Ward* (Amsterdam: IBFD and Canadian Tax Foundation, 2013), 15 *et seq.*, at 29-30).

¹⁴⁵⁴ Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 *ITLR*, 574 *et seq.*

to the French official version of Article 4(3) OECD Model in order to construe the sole English authentic text of Article 4(3) of the 1981 Mauritius-United Kingdom tax treaty, which exactly reproduced the English official version of Article 4(3) of the 1963 OECD Draft. The Special Commissioners, in particular, held that the term “effective”, used in the treaty tie-breaker rule to indirectly qualify the term “place of management”, should have been understood in the sense of the French “effective” (*siège de direction effective*), as used in Article 4(3) OECD Model, which connoted real management.¹⁴⁵⁵

It should be finally noted that, although it is true that the OECD Model itself present some instances of *prima facie* discrepancies between its official versions, such *prima facie* discrepancies are quite limited in number and may be removed by the analogical application of the interpretative rules enshrined in Article 33 VCLT.

A straightforward (but amusing) example¹⁴⁵⁶ is represented by the use of the term “artiste” in the English official version of Article 17 OECD Model and of (seemingly) the same term in the French official version thereof. Indeed, as some scholars have pointed out,¹⁴⁵⁷ the term “artiste”¹⁴⁵⁸ in the English language is generally used to denote entertainers of a more frivolous, less serious nature than those denoted by the term “artist”,¹⁴⁵⁹ such as entertainers acting in cabarets. On the contrary, the French term “artiste” is commonly used to denote both types of entertainers, i.e. both frivolous and serious ones.¹⁴⁶⁰ As the above-mentioned scholars put it, “there is some question about whether Article 17 does not apply to performers of serious art as opposed to more frivolous entertainers.”¹⁴⁶¹ However, on the one hand, it should be noted that the English term “artiste” is an ambiguous one, since it may also be used with a broad meaning in order to denote all kinds of entertainers (although it is perhaps employed less commonly as such),¹⁴⁶² and, on the other hand, there is nothing in the OECD Commentary that

¹⁴⁵⁵ *Ibidem*, at 610.

¹⁴⁵⁶ A second entertaining (and fake) example is reported in J. Sasseville, “The OECD Model Convention and Commentaries”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 132, where the author notes that, while the English official version of Article 6 OECD makes reference to “livestock and equipment”, the French official version thereof uses the corresponding expression “cheptel mort ou vif”, which might “suggest that while a live cow is immovable property in both versions, a dead cow is immovable property only in French”. As the Sasseville correctly points out, however, “[t]he mistake underlying that suggestion [...] is that “*cheptel mort*” is really a translation of the word “equipment”.”

A third, thornier, instance is represented by the possible *prima facie* discrepancy between the terms “corporate rights” and “parts sociales” employed in the English and French official versions of Article 10(3) OECD Model, with regard thereto see J. F. Avery Jones et al., “The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?”, 1 *World Tax Journal* (2009), 5 *et seq.*, at 19 *et seq.*

¹⁴⁵⁷ See K. Vogel et al., *United States Income Tax Treaties* (The Hague: Kluwer Law and Taxation, 1989 – loose-leaf), commentary to Article 17.

¹⁴⁵⁸ The term “artiste” is used both in the English official version of Article 17 OECD Model and, several times, in the Commentary thereto.

¹⁴⁵⁹ The term “artist” is only used twice in the English official version of the Commentary to Article 17 of the 2010 OECD Model (paragraph 18 thereof).

¹⁴⁶⁰ See Le Grand Robert de la Langue Française. Tome I (Paris: Le Robert, 1990), p. 580.

¹⁴⁶¹ See K. Vogel et al., *United States Income Tax Treaties* (The Hague: Kluwer Law and Taxation, 1989 – loose-leaf), commentary to Article 17.

¹⁴⁶² See Dictionary.com Unabridged. Random House, Inc. (accessed 22 Apr. 2011).

might support the conclusion that only more frivolous entertainers fall within the scope of Article 17 OECD Model. Thus, the latter conclusion should be discharged by the interpreter in light of the overall context.

3.4. *The influence of the OECD Model on the drafting of tax treaties authentic texts*

The authentic texts of tax treaties drafted in the official languages of the contracting States are often influenced by either of the two OECD Model official versions,¹⁴⁶³ especially in the choice of the terms employed.¹⁴⁶⁴

¹⁴⁶³ It is interesting to note that, according to Sasseville (Head of the Tax Treaty Unit of the OECD Centre for Tax Policy and Administration), the “practical reality is that, nowadays, the OECD work on tax treaties is primarily carried on in English and the French version is usually a translation” (see J. Sasseville, “The OECD Model Convention and Commentaries”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 130).

On the pros and cons of having the OECD Model drafted in two official languages, rather in just one language, see the analysis of Le Gall (J. P. Le Gall, “OECD MC: One or two official languages?”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 327 *et seq.*, at 328-330), who summarizes them as follows:

- Pros: (i) two official languages secure a double entry into the legal systems that, traditionally at least, divide the world, i.e. common law and civil law systems; each official version is thus supposed to take into account the principles, concepts and terms used in the relevant country; (ii) each official version is meant to express and reflect the same concept: therefore, comparing the two versions allows a better understanding of the meaning of the Model provisions and makes it possible to elicit discrepancies between two seeming different wordings that might refer, in part at least, to different situations; (iii) the two versions can be used directly in bilateral treaties where either the two contracting States are countries using one of the two languages or are countries using each of the two languages, this advantage resulting in reducing costs and lessening the risks of mistakes or misunderstandings (it must be remarked, however, that Le Gall does not seem entirely convinced that such pros really represent significant advantages, in particular pro (ii) – see *ibidem*, at 329).

- Cons: (i) having just one official version would save time, since only one text would have to be consulted; (ii) having just one official version would eliminate the difficulties stemming from the comparison of the two official versions and the possible discrepancies existing between them, thus creating greater legal security; (iii) giving up one of the two official versions would impose a greater demand for accuracy on the part of the drafters of the model, since having two versions is sometime an invitation to laziness; (iv) having only one official version of the OECD Model could lead to the elaboration of common concepts in the international tax language.

While the author generally agrees that the reduction of the official languages of the OECD Model to just one would trigger more advantages than disadvantages, both quantity and quality-wise, he is skeptical with regard to the possibility of such a choice to boost the elaboration of common concepts in the international tax language, since, as the present study hopefully demonstrates, it is the very structure of the model, as well as the background context of its application, i.e. (a) the close interaction between tax treaties and the underlying domestic tax law, (b) the fact that tax treaties are made to be applied by tax lawyers, tax authorities and national (tax) courts and tribunals and (c) the absence of a international judiciary entrusted with the task of applying, or even just interpreting, tax treaties uniformly, that makes it difficult (if not impossible) as a matter of fact to forsake the *renvoi* to domestic law concepts and legal categories.

¹⁴⁶⁴ See, accordingly, G. Toifl, “Die Besteuerung von Geschäftsführern, Vorständen und Aufsichtsräten international tätiger Unternehmen”, in W. Gassner and M. Lang (eds.), *Besteuerung und Bilanzierung international tätiger Unternehmen - 30 Jahre Steuerrecht an der Wirtschaftsuniversität Wien* (Vienna: Orac, 1998), 379 *et seq.*, at 389; G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxv. According to Parolini, independently of whether the drafted text of Italian tax treaties is in English or French, the Italian authentic text thereof appears to be

In particular, the terms used in tax treaties are often those that most closely resemble, from a morphological and phonetic perspective, the terms employed in the official version of the OECD Model that is taken as a benchmark by the treaty negotiators, even where the former terms are not legal jargon terms under the domestic law of the contracting States, but just day-to-day proxy of these, or where they are not the legal jargon terms most commonly used in the statutes concerning the taxes covered by the treaties.¹⁴⁶⁵

Sometimes it even happens that the terms employed in the treaty have a day-to-day or legal jargon meaning (under the law of the relevant contracting State) that appears to diverge from the meaning that should be reasonably attached thereto in the context of the tax treaty provision in which they are used and in light of the OECD Model.

Moreover, in a similar fashion States often develop their own translations of the OECD Model, or their own models based thereon,¹⁴⁶⁶ and then tend to reproduce the texts of such translations (or national models) as their own language authentic texts of the tax treaties concluded with other States.¹⁴⁶⁷

generally influenced by the French official version of the OECD Model, probably because of the similarities existing between the languages, as well as between the legal systems of France and Italy (see A. Parolini, “Italy”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 248-251 and the examples reported there).

At the same time, however, certain terms and expressions used in the OECD Model are derived from legal jargon terms used under the law of certain OECD member States. In this respect, it has been pointed out that the current OECD Model has been developed on the basis of previous tax treaty models, in particular those drafted under the auspices of the League of Nations, which in turn had been developed taking as benchmark the tax treaties in force between continental European States at the beginning of the twentieth century and, therefore, borrowing terms from their respective domestic laws. This would explain why certain terms currently used in the English official version of the OECD Model are (or were) alien to the legal culture of common law countries, those terms having being literally “translated” into English from other languages (see J. F. Avery Jones et al., “The Origins of Concepts and Expressions used in the OECD Model and their Adoption by States”, 60 *Bulletin for international taxation* (2006), 220 *et seq.*, at 220).

¹⁴⁶⁵ For instance, with regard to Italian tax treaties, the title of the article corresponding to Article 13 OECD Model in the Italian authentic text is generally “Utili di capitale”, which appears to be a “literal translation” of the title of the French official version of Article 13 OECD Model “Gains en capital”. As correctly pointed out by Parolini (see A. Parolini, “Italy”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 245 *et seq.*, at 252) the term “Utili di capitale” is not a legal jargon term under Italian law (either in tax law, or in private law), the corresponding legal jargon term used for income tax law purposes being “plusvalenze”.

¹⁴⁶⁶ Both (the translation and the model) being drafted in the official language(s) of the drafting State.

¹⁴⁶⁷ See, for instance, with regard to Germany and Austria, V. E. Metzler, “Austria”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 137 *et seq.*, at 137 and A. Rust, “Germany”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 221-222; with regard to Switzerland, R. Cadosch, “Switzerland”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 303 *et seq.*, at 304; with regard to Belgium, R. De Boek, “Belgium”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 168; with regard to the Netherlands, S. Douma, “Netherlands”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 267 *et seq.*, at 269 and 277.

A similar phenomenon occurs where the authentic treaty text (or texts), drafted in a contracting State's official language(s), literally reproduces the text of the English or French official version of the OECD Model, in such cases the terms employed in the treaty being different from the legal jargon terms used in the domestic law of that contracting State. This is mainly due to three reasons:

- (i) the terms used in the relevant OECD Model official version are “literal” translations of terms used in the other official language version of the OECD Model, or translations of terms employed in older tax treaties used as source of inspiration by the Model drafters;¹⁴⁶⁸
- (ii) the terms used in the relevant OECD Model official version derive from the domestic law of a State other than the contracting State applying the tax treaty;¹⁴⁶⁹ or
- (iii) the terms used in the relevant OECD Model official version were intended to have a scope different from that of the terms used under the domestic law of the States whose official language is the same language employed in the Model.¹⁴⁷⁰

The following examples, taken from the Italian and Belgian tax treaty practice, are illuminating in that respect.

The legal jargon term used in the ITC¹⁴⁷¹ to denote employment income¹⁴⁷² is “redditi di lavoro dipendente”;¹⁴⁷³ however, in Article 15 (or its equivalent) of the tax treaties concluded by Italy the expression “lavoro subordinato” is used instead of “lavoro dipendente”.

Similarly, the legal jargon term used in the ITC to denote an alienation is “cessione”;¹⁴⁷⁴ however, in Article 13 (or equivalent) of the tax treaties concluded by Italy the term “alienazione” is used instead of “cessione”.

¹⁴⁶⁸ See footnote 1464.

¹⁴⁶⁹ This is often the case, for instance, with reference to the United Kingdom and the United States.

¹⁴⁷⁰ See, with regard to the employment of the term “alienation” in the English official version of Article 13 OECD Model, J. F. Avery Jones et al., “The Origins of Concepts and Expressions used in the OECD Model and their Adoption by States”, 60 *Bulletin for international taxation* (2006), 220 *et seq.*, at 249-250 and references therein.

¹⁴⁷¹ Presidential Decree no. 917 of 22 December 1986.

¹⁴⁷² It is interesting to note that, in the sentence preceding the footnote reference, the term “employment income” is used just as a different sign to denote the same denotata of “the legal jargon term used in the Italian income tax code”, which in turn is used as a perfect synonym for the following “redditi di lavoro dipendente” (as in a tautology). There is no attempt to determine what the concept associated with the term “employment income” is where the latter is used as English legal jargon term (if it is used at all); that would be useless for the purpose of the reasoning expressed by the sentence and, furthermore, by far too complicated. A similar mental process instinctively occurs where an interpreter who has knowledge of the legal system, and related legal jargon, of a certain State (e.g. France) reads and attributes a meaning to a term from a different legal jargon (e.g. Japanese); that Japanese legal jargon term is treated as if it were an exact synonym for the French legal jargon term that dictionaries or practice shows to correspond to the former term (just a different sign that denotes the same denotata of the former term).

¹⁴⁷³ See arts. 49 *et seq.* ITC.

¹⁴⁷⁴ As of September 2010, the term “cessione” appears more than fifty times in the ITC; in contrast, the term “alienazione” as such is not used at all (the term “alienate”, which is derived from it, is employed just once).

The French official version of the OECD Model¹⁴⁷⁵ generally employed the term “activité industrielle au commerciale” as an equivalent of the term “business” used in the English official version thereof, most probably because it reflected the terminology employed in the French general tax code.¹⁴⁷⁶ Interestingly, Italian tax treaties, which are generally based on the French official version of the 1963 OECD Draft Model,¹⁴⁷⁷ use the term “attività industriale e commerciale” in their Italian authentic texts, although this term is used neither in the Italian civil code, nor in the ITC, which both employ the term “attività commerciale”.¹⁴⁷⁸

The French authentic texts of Belgian tax treaties generally employ the term “gains en capital” in Article 13 (or equivalent) while the legal jargon term under Belgian domestic law is “plus-values”. Similarly, while in the French authentic text of Article 12 (or equivalent) of Belgian tax treaties the term “redevances” is commonly used, the corresponding legal jargon expressions used in the Belgian Income Tax Code are “revenus de la location, de l’affermage, de l’usage et de la concession de biens” or “revenus de biens”.¹⁴⁷⁹

The above analysis constitutes a strong argument in support of the appropriateness of a loose approach in the application of the *renvoi* provided for in Article 3(2) of OECD Model-based tax treaties.

Hence, the terms actually used in the authentic treaty text drafted in the official language of a contracting State should be given the meaning that not only such terms, but also their legal jargon synonyms and proxies in the official language of that State have for the purpose of that State’s domestic law, unless the context otherwise requires.

Similarly, where the interpreter has to select the legal jargon term that, under the law of the contracting State applying the treaty (e.g. the Netherlands), corresponds to the term employed in the authentic treaty text to be interpreted, which is a drafted in a language (e.g. English) other than the language in which the domestic law of that State is drafted (i.e. Dutch), he should take into account not only the terms that, according to bilingual dictionaries, correspond to the relevant treaty term, but also their legal jargon synonyms and proxies under the law of the State applying the treaty (i.e. Netherlands law), unless the context otherwise requires.

This point, as it is strictly connected with the analysis of the *renvoi* to domestic

¹⁴⁷⁵ Before the amendments introduced by the OECD in 2000.

¹⁴⁷⁶ See J. Sasseville, “The OECD Model Convention and Commentaries”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 130.

¹⁴⁷⁷ See G. Maisto, “La traduzione dei testi giuridici redatti in più lingue e l’interpretazione delle convenzioni per evitare le doppie imposizioni”, *Rivista di Diritto Tributario. Parte Quarta* (2004), 131 *et seq.*, at 132, where the author submits that the French official version of the OECD Model seems to have been used as a model for the drafting of the Italian authentic texts of the major part of the tax treaties concluded by Italy.

¹⁴⁷⁸ The term “attività commerciale” is given different meanings for the purpose of the Italian Civil Code and the ITC, respectively; see F. Avella, “Italy”, in G. Maisto (ed.), *The meaning of “enterprise”, “business” and “business profits” under Tax Treaty and EU Tax Law* (Amsterdam: IBFD Publications, 2011), 341 *et seq.*, at 351 *et seq.* and 364 *et seq.*

¹⁴⁷⁹ See R. De Boek, “Belgium”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 169.

law encompassed in Article 3(2) OECD Model, will be further dealt with in section 5.3.2.4 of this chapter.

3.5. *A plea for the consistent interpretation of tax treaties based on the OECD Model*

On the basis of the preceding analysis, a sound argument may be put forward in favor of the consistent interpretation of corresponding provisions of different tax treaties,¹⁴⁸⁰ concluded by different contracting States on the basis of the OECD Model and drafted in different authentic languages.

Clearly, such provisions are made of different signs and are part of different documents: as such, they may theoretically be construed independently from each other and be attributed diverging meanings.

However, a relevant number of these provisions are part of the authentic texts of tax treaties that have been authenticated in the French and/or English languages as well. As previously discussed, under Article 33(3) VCLT all authentic texts of a treaty (must) have the same meaning: thus, with regard to each distinct tax treaty, all corresponding provisions in the different authentic texts, i.e. those drafted in the official languages of the contracting States and those drafted in the English and/or French languages (if different and existing), must be given the same utterance meaning by the interpreter.

Moreover, from the fact that each State generally drafts and concludes its tax treaties along the same pattern, by reproducing to a great extent:

- (a) the text of the OECD Model, for the purpose of drafting the French and/or English authentic texts of those treaties, and
- (b) its own standard translation of the OECD Model, for the purpose of drafting the authentic text of those treaties in its own language (if not English or French),

one may draw the inference that:

- (i) all provisions of different tax treaties concluded by a certain State, which present the same wording in the authentic texts drafted in the official language of that State and/or in English and French are intended to be interpreted consistently by that very same State;
- (ii) due to the rule of law established by Article 33(3) VCLT,¹⁴⁸¹ the same holds true for the corresponding provisions encompassed in the other languages authentic texts of those tax treaties;
- (iii) considering the remarkably high number of tax treaties in force and the fact that they are patterned for the most part along the lines of the English or French

¹⁴⁸⁰ Except the effects stemming from the *renvoi* to the contracting States' domestic law provided for in Article 3(2).

¹⁴⁸¹ All authentic texts of a (tax) treaty must be attributed the same utterance meaning under Article 33(3) VCLT.

official versions of the OECD Model, which is purported to promote the application by all countries of the same or similar tax treaty rules to comparable situations,¹⁴⁸² all tax treaty provisions that directly¹⁴⁸³ or indirectly¹⁴⁸⁴ reproduce the provisions of the OECD Model should be interpreted consistently.¹⁴⁸⁵

This explains the rather considerable number of references made by national courts and tribunals to decisions delivered by foreign judiciaries, including courts and tribunals of States not being party to the specific treaty to be construed, interpreting similar worded provisions of other tax treaties.¹⁴⁸⁶ As Baker put it: “Cases on the application of standardized provisions of double taxation conventions [...] have immense relevance in many countries. (This is one of the reasons for this set of law reports)”¹⁴⁸⁷ They indubitably represent an item of evidence of the *ordinary meaning to be given* to OECD Model standard terms and expressions used in OECD Model-based tax treaties.

For instance, Sir Christopher Staughton, in his dissenting opinion in the *Memec* case,¹⁴⁸⁸ referred to a decision delivered by the German Bundesfinanzhof with regard to Article 28 of the 1971 Germany-Switzerland tax treaty, allegedly similar to the one Sir

¹⁴⁸² See paragraphs 2 and 3 of the Introduction to the OECD Model.

¹⁴⁸³ This is the case with regard to any provision included in the French or English authentic text of a tax treaty and which exactly (or very similarly) reproduces the corresponding provision of the English or French official versions of the OECD Model.

¹⁴⁸⁴ This is the case with regard to any provision included in the authentic text of a tax treaty drafted in the official language of a contracting State, in the case either (i) such a tax treaty also includes a French or English authentic text and that provision, as worded in the French or English authentic text, exactly (or very similarly) reproduces the corresponding provision of the English or French official versions of the OECD Model, or (ii) the former provision exactly (or very similarly) reproduces a provision included in another tax treaty concluded by the same State, which in turn includes a French or English authentic text and that provision, as worded in the French or English authentic text, exactly (or very similarly) reproduces the corresponding provision of the English or French official versions of the OECD Model. The same holds true with regard to the provisions included in the authentic texts drafted in a different language (i.e. not in French, English, or the official language of that State), whenever the treaty of which it is part also includes an authentic text in French, English or the official language of that State and the corresponding provision included in that text reproduces directly or indirectly a provision of the OECD Model.

¹⁴⁸⁵ This conclusion is strengthened, with regard to OECD member States, by the Recommendation adopted by of the OECD Council on 23 October 1997 (doc C(97)195/final), which provides that (i) member States should “conform to the Model Tax Convention, as interpreted by the Commentaries thereon”, when concluding new or revising existing tax treaties and (ii) their tax administrations should “follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles”, thus recommending a uniform interpretation and application of tax treaty provisions substantially reproducing the OECD Model provisions.

¹⁴⁸⁶ See the statement by Kogels (H. Kogels, “Tools for interpretation issues”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 326 *et seq.*, at 326), according to whom “[i]n order to reach a common interpretation, knowledge of the interpretation by judges in the contracting States is essential”. See also M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 5.04, 24.05, 24.06, 25, 28 and 29; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 39-42; D. A. Ward, “Use of foreign court decisions in interpreting tax treaties”, in G. Maisto (ed.), *Courts and Tax Treaty Law* (Amsterdam: IBFD Publications, 2007), 161 *et seq.*, in particular at 175-185.

¹⁴⁸⁷ P. Baker, 1 *ITLR*, at 728-729.

¹⁴⁸⁸ Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*

Christopher Staughton had to construe.¹⁴⁸⁹ In that respect, he maintained that this decision of the Bundesfinanzhof was to be regarded as an indication of the willingness of Germany to similarly construe the provision at stake before him, i.e. Article XVIII(1)(b) of the 1964 Germany-United Kingdom tax treaty. Thus, “in the interest of uniformity”, Sir Christopher Staughton found that the United Kingdom should do the same.¹⁴⁹⁰

¹⁴⁸⁹ The reference made by Sir Christopher Staughton, however, appears puzzling, since Article 28 of the 1971 Germany-Switzerland tax treaty seems similar to the provision he had to construe, i.e. Article XVIII(1)(b) of the 1964 Germany-United Kingdom tax treaty, neither in respect of its wording, nor in respect of its object and purpose (the preservation of the right to levy withholding taxes on certain items of income by the source State).

¹⁴⁹⁰ See Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 ITLR, 3 *et seq.*, at 27-28. See also Federal Court of Appeal (Canada), 24 February 2000, *R v. Dudley*, 2 ITLR, 627 *et seq.*, at 636, where the court made reference to a decision of the Belgian Court of Appeal (Belgium not being party to the interpreted treaty); Conseil d’Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 ITLR, 1077 *et seq.*, conclusions of the Commissaire du Gouvernement at 113, where reference was made to a decision of the Court of Appeal of London (the United Kingdom not being party to the interpreted treaty); New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT*, 5 ITLR, 658 *et seq.*, at 670-671, para. 44, where it was stated both that “[w]hen interpreting a [tax treaty] in international tax law, it has been held in a number of jurisdictions that recourse may be had to the Official Commentary to the OECD models” and that “courts have had regard to decisions in other jurisdictions in international comity in an attempt to achieve international uniformity”, and paras. 48-50; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 ITLR, 233 *et seq.*, at 268-269, where the court referred to a decision of the Federal Court of Canada, at 270-272, where there court referred to two decisions of the Federal Court of Australia, at 272-273, where the court referred to a decision of the Tax Court of Canada, and at 274, where the court made reference to a decision of the High Court of England and Wales; Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 ITLR, 1 *et seq.*, at 9 and 19-20, paras. 11-13 and 30, where the tribunal made reference to decisions of Canadian, German and English courts in order to interpret the 1989 India-United States tax treaty; Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 ITLR, 189 *et seq.*, at 199, para. 23, where the court referred to a decision of the French Conseil d’Etat and a decision of the Finnish Supreme Administrative Court; Income Tax Appellate Tribunal of Mumbai (India), 13 April 2007, *Mashreqbank psc v. Deputy Director of Income Tax*, 9 ITLR, 1062 *et seq.*, at 1070, para. 10, where the tribunal referred to a decision of the Federal Court of Canada for the purpose of interpreting the 1992 India-United Arab Emirates tax treaty; Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 ITLR, 736 *et seq.*, at 762-765, paras. 85-93, where the court took into account a decision of the England and Wales Court of Appeals for the purpose of interpreting the 1986 Canada-Netherlands tax treaty; Income Tax Appellate Tribunal of Pune (India), 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 ITLR, 811 *et seq.*, at 838-839, para. 56, where the tribunal noted that, due to the “widespread uniformity of many of the provisions of bilateral tax treaties, most of which are directly or indirectly derived from the OECD Model and Commentaries, it is not uncommon that a court in country A may find it useful in interpreting a tax treaty between country A and country B to refer to and gain guidance from a decision of a court in, say, country C interpreting a treaty between country C and B or even C and D where the treaty provision is virtually the same as the treaty provision in issue”; *ibidem*, at 838-848, where the court made reference to judgments from the German Bundesfinanzhof, the United States Court of Appeal, the French Conseil d’Etat and the United Kingdom House of Lords for the purpose of construing Article 24(4) of the 1995 Germany-India tax treaty; District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 ITLR, 829 *et seq.*, at 858; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 ITLR, 915 *et seq.*, at 930, where the tribunal referred to the decision of a Belgian court for the purpose of interpreting the 1982 India-Mauritius tax treaty; see also First-Tier Tribunal (United Kingdom), 1 April 2010, *FCE Bank plc v. Revenue and Customs Commissioners*, 12 ITLR, 962 *et seq.*, at 983-991, where the tribunal made reference to three decisions of the Supreme Courts of the Netherlands, Finland (Administrative Court) and Sweden (Administrative Court) in order to support its interpretation of Article 24(5) of the 1975 United Kingdom-

It goes without saying that such foreign court decisions may vary to a considerable extent both in the results achieved and in the arguments used in support thereof.¹⁴⁹¹ However, their possible inconsistency does not represent a significant drawback in the practice of national judiciaries of referring to them, since those decisions are binding neither at the public international level, nor at the domestic level on those national judiciaries. As Lord Diplock maintained in the *Fothergill* case,¹⁴⁹² “[a]s respects decision of foreign courts, the persuasive value of a particular court’s decision must depend on its reputation and its status, the extent to which its decisions are binding on courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system.”

Similarly, it is not unusual to find in national case law mention and rely on other States’ tax authorities practice (even with regard to States that are not party to the treaty to be construed).¹⁴⁹³

3.6. Textual comparison: subsequent versions of the OECD Model, deviations from

United States tax treaty and, in addition, explicitly noted that it regarded “as important that courts give consistent interpretations of treaty provisions contained in the OECD Model that are widely used in tax treaties”.

See, for older case law, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), Chapter 29.

¹⁴⁹¹ Lord Wilberforce of the House of Lords (United Kingdom) noted, in respect of the Convention on the Contract for the International Carriage of Goods by Road (concluded in Geneva on 19 May 1956), that such Convention “has been accepted by more than 20 states some of them close to English ways of thought. I cannot credit them all, or some average of them, with recognizably superior, or even different, methods of interpretation. We should of course try to harmonise interpretation but [...] courts in six member countries have produced 12 different interpretations of particular provisions – so uniformity is not to be reached by that road. To base our interpretation of this Convention on some assumed, and unproved, interpretation which other courts are to be supposed likely to adopt is speculative as well as masochistic.” (House of Lords (United Kingdom), 9 November 1977, *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd*, [1978] AC 141, at 154).

¹⁴⁹² House of Lords (United Kingdom), 10 July 1980, *Fothergill v. Monarch Airlines Ltd*, [1981] AC 251, at 284.

¹⁴⁹³ See, for instance, Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162*, *Regeringsrättens årsbok* (1987), where the Court referred to the practice followed by the tax authorities of the other contracting State (United Kingdom) for the purpose of interpreting Article XII(3) of the 1960 Sweden-United Kingdom tax treaty; Authority for Advance Rulings (India), 28 April 1999, *Y’s Application*, 2 *ITLR*, 66 *et seq.*, at 78; Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 36, paras. 83-84; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*, at 231 where it was mentioned that periods of less than six months appear not to have been found sufficient in any practice to trigger the existence of a permanent establishment (notably, the Court seems to have taken inspiration from paragraph 6 of the Commentary to Article 5 of the OECD Model in order to establish such a practice, although no reference was made to it); Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 81, para. 61; Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*, at 35-36, para. 43, where the Court referred to governments’ and tax authorities’ practice from Denmark, Canada and the United Kingdom.

See also M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 28.05.

the OECD Model and differences with other tax treaties concluded by the contracting States

The existence of a Model on which most of the tax treaties currently in force are based and the consequent broad uniformity of such treaties cause national courts and tribunals to pay particular attention to the discrepancies existing:

- (i) between the subsequent versions of the OECD Model,
- (ii) between the OECD Model and the tax treaty to be interpreted, as well as
- (iii) between the tax treaty to be interpreted and the other tax treaties concluded by the contracting States of the former.

For instance, the fact that the tax treaty to be interpreted is designed along the lines of the OECD Model sometimes triggers the analysis of the changes introduced in the Model itself and the assessment of the possible reason thereof, for the purpose of interpreting a tax treaty provision that reproduces or resembles the corresponding OECD Model provision before, or after that change.¹⁴⁹⁴

Likewise, deviations from the OECD Model provisions existing at the date of the treaty conclusion (or negotiation) are sometimes queried by national courts and tribunals in order to determine what the reasons for these might have been and how those reasons may affect the construction of the relevant tax treaty provisions.¹⁴⁹⁵

¹⁴⁹⁴ See, for instance, Hoge Raad (Netherlands), 9 December 1998, case 32709, 1 *ITLR*, 839 *et seq.*, at 854, dealing with the significance of the move of the PE construction provision from paragraph 2 of Article 5 of the 1963 OECD Draft Model (which substantially reproduced the corresponding provision of the 1958 Report of the Fiscal Committee of the OEEC) to new paragraph 3 of Article 5 of the 1977 OECD Model for the purpose of interpreting Article 2.2(2)(a)(gg) of the 1959 Netherlands-Germany tax treaty; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 *ITLR*, 800 *et seq.*, at 813-814, paras. 42-44, dealing with the modification of the royalty definition in Article 12(2) of the 1992 OECD Model.

¹⁴⁹⁵ See Federal Court (Australia), 20 December 1988, *Thiel v. Commissioner of Taxation*, [1988] FCA 443, in particular at para. 38 of the separate opinion of Sheppard J.; High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports*, 338 *et seq.*, para. 15 of the separate opinion of McHuge J.; Federal Court of Appeal (Canada), 8 November 1993, *Crown Forest v. Canada*, 94 DTC 6107, para. 17 of the opinion of Heald J.A.; Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, paras. 55 *et seq.* per Iacobucci J.; Hoge Raad (Netherlands), 1 November 2000, case 35398, 3 *ITLR*, 466 *et seq.*, at 483-484, para. 3.5, where the absence of Article 24(6) of the OECD Model in the corresponding Article of the 1986 Canada-Netherlands tax treaty was interpreted as evidence of the intention of the Contracting States to exclude the application of the treaty non-discrimination provisions to taxes other than those referred to in Article 2 of the very same treaty (*contra* the Opinion of Advocate General Wattel at 495, para. 8); Tax Court (Canada), 27 June 2002, *Edwards v. R*, 5 *ITLR*, 1 *et seq.*, at 26, paras. 37-38, where the court noted that (i) the text of Article 2 of the 1986 Canada-China tax treaty differed significantly from the corresponding OECD Model article, due in particular to the absence of any reference to taxes imposed on behalf of the contracting States' political subdivisions or local authorities and that (ii) Canada, in that respect, had expressly reserved its position in the OECD Commentary and, as a consequence, drew the conclusion that the relevant part of the OECD Commentary on Article 2 could not apply in order to interpret the above-mentioned tax treaty provision; Tax Court (Canada), 24 February 2003, *Cloutier v. R*, 5 *ITLR*, 878 *et seq.*, at 887, para. 18; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 75-76, para. 44 where the Court concluded that the extension of the scope of the "construction permanent establishment" provision in Article 5(2) of the 1978 Ivory Coast-Norway tax treaty (according to

Finally, comparison with other tax treaties concluded by the two States party to the tax treaty to be interpreted is occasionally carried out by national courts and tribunals for the purpose of determining additional elements in support of the possible alternative constructions of the tax treaty provisions before them.¹⁴⁹⁶

In that respect, the analysis of other tax treaties concluded by the contracting States may be helpful in order to ascertain their policy in respect of certain provisions or issues in the application of the treaties to which they are party.¹⁴⁹⁷

which a building site or construction or assembly project is deemed to constitute a permanent establishment independently of its duration), as compared to the corresponding provision of the OECD Model, had no relevance for the purpose of interpreting the general definition of permanent establishment provided for in Article 5(1) of that tax treaty; Tax Court (Canada), 8 April 2005, *Allchin v. R.*, 7 *ITLR*, 851 *et seq.*, at 871-872, paras. 50-51, where the Court concluded that the OECD Commentary on Article 4, for the part dealing with the “habitual abode” tie-breaker test (theoretically relevant for the case at stake), was not useful in interpreting the 1980 Canada-United States tax treaty since, while in the OECD Model that test was to be used (i) where a person did not have a permanent home available in either State (i.e. without passing through the “centre of vital interests” test) or (ii) where the State in which he had the centre of his vital interests could not be determined, in the 1980 Canada-United States tax treaty the “centre of vital interest” test was to be applied in case (i), leaving the “habitual abode” applicable only in case (ii) (one might question, indeed, the significance of such a difference for the purpose of assessing the relevance of the OECD Commentary paragraphs discussing the “habitual abode” test); by analogy, Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R.*, 10 *ITLR*, 827 *et seq.*, at 840-843 and 855, where the Court (and one of its three expert witnesses) took note of the presence, in the 2001 United Nations Model, of a special provision dealing with the existence of permanent establishments of insurance companies (Article 5(6) of that Model), which was absent in both the OECD Model and the relevant tax treaty, as well as of the fact that both the OECD Commentary and the United Nations Commentary noted that such kind of provision was directed at obviating the possibility that insurance companies doing large-scale business in a State could not be taxed therein due to the absence of a permanent establishment, and drew the inference that the contracting States (Canada and the United States) were most probably aware of the above-mentioned possibility and of the chance to insert a specific provision as a remedy, so that the non-inclusion of such a provision could be regarded as an acceptance by those States of the possibility that insurance companies resident of the other contracting State and doing large-scale business in their territory could escape tax liability therein due to the absence of a permanent establishment, such acceptance being probably justified in light of the reciprocity of its effects on both States’ tax revenues (see, similarly, Tax Court (Canada), 16 May 2008, *American Income Life Insurance Company v. Canada*, 11 *ITLR*, 52 *et seq.*, at 80, paras. 85-86); Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 345, paras. 26 and 27, where the Court noted that Article 2 of the 1980 Australia-Switzerland tax treaty did not contain paragraphs 1 and 2 of Article 2 OECD Model, without drawing any strong inference from it; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*, at 708, para. 148, where the Court highlighted the main differences, relevant for the solution of the case at stake, between the 1976 Australia-Netherlands tax treaty, on the one hand, and the 1977 OECD Model, on the other hand, for the purpose of construing Articles 7 and 13 of the former.

¹⁴⁹⁶ See, in support of a very cautious employment of such practice, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 49-51, m.nos. 84-87.

¹⁴⁹⁷ See, for instance, Cour de Cassation (Belgium), 12 October 1973, *Dobbelmann GmbH v. Belgium, Pasicrisie belge. Arrêts de la cour de Cassation* (1974), 159 *et seq.*, where the court made reference to other two tax treaties concluded by Belgium in order to construe the expression “montant brut des dit dividendes” used in Article 10 of the 1967 Belgium-Germany tax treaty; similarly, Cour de Cassation (Belgium), 21 February 1979, *Société Anonyme de Participations et d’Études, Compagnie Saint-Gobain Pont a Mousson v. Belgium, Pasicrisie belge. Arrêts de la cour de Cassation* (1979), 737 *et seq.*; Hoge Raad (Netherlands), 1 November 2000, case 35398, 3 *ITLR*, 466 *et seq.*, Opinion of the Advocate General Wattel at 489-490, where the wording of the non-discrimination articles of the tax treaties concluded by the Netherlands with Brazil and

Vietnam, as well as the explanatory notes to those treaties were analysed and it was concluded that, even in the absence of a provision similar to Article 26(2) of the OECD Model, the non-discrimination article might be applied to taxes other than those mentioned in Article 2; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister of National Revenue*, 5 ITLR, 638 *et seq.*, at 648, para. 26, where the court (however) rejected the view that the different wordings of Article XXVII of the 1980 Canada-United States tax treaty and of Article 26 of the 1975 Canada-France tax treaty (both concerning exchange of information) would trigger different obligations on the tax authority requested to exchange information; Supreme Court (India), 7 October 2003, *Union of India and another v. Azadi Bachao Andolan and another*, 6 ITLR, 233 *et seq.*, at 274 where the 1982 India-Mauritius tax treaty was compared to the 1989 India-United States tax treaty, the latter including a limitation on benefits provision absent in the former; Federal Court of Appeal (Canada), 13 October 2003, *Edwards v. R.*, 6 ITLR, 564 *et seq.*, at 568-569, paras. 22-26, where the court, in order to determine whether the 1986 Canada-China tax treaty also applied to Hong Kong from 1997 onwards, made reference to both the 1984 China-United Kingdom and the 1984 China-United States tax treaties, as well as to Baker's position regarding the applicability of the 1984 China-United Kingdom tax treaty to Hong Kong and to the position expressed, with reference to the same issue, in the United States Technical Explanations to the 1984 China-United States tax treaty; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 ITLR, 51 *et seq.*, at 76, para. 45 where the court referred to the special provisions concerning activities carried out on the continental shelf included in the tax treaties and amending protocols concluded by Norway in the '70s, although ultimately recognizing that such provisions were not aimed at changing, and thus had no bearing on the construction of, the general definition of permanent establishment; Federal Court (Australia), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 ITLR, 800 *et seq.*, at 814-815, paras. 46-49, where the Court referred to the 1953 Australia-United States tax treaty, which included a provision similar to the one encompassed in the 1969 Australia-Singapore tax treaty at stake before the Court; Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 ITLR, 563 *et seq.*, at 580-581, paras. 80-81, where the Court, in order to construe Article XV(3) of 1980 Canada-United States tax treaty, reviewed other tax treaties concluded by Canada and inferred from them the policy of Canada (and its treaty partners) concerning the taxation of pilots engaged in international flights; somewhat similarly, Tax Court (Canada), 24 October 2006, *Canwest Mediaworks Inc v. Canada*, 9 ITLR, 189 *et seq.*, at 194, para. 5, and at 197, paras. 16-17, where the court allowed a senior advisor on tax treaties with the Canada Revenue Agency, who had been involved in negotiating 20 treaties over ten years, to testify to his experience with regard to the reason why Canada insisted to include a specific type of provision (i.e. the FAPI provision) in some of its tax treaties, in order to grasp the possible intention of at least one of the contracting States with regard to the provision at stake; High Court (Ireland), 31 July 2007, *Keinstella v. Revenue Commissioners*, 10 ITLR, 63 *et seq.*, at 74, where the Court pointed out that the researches made had not been able to uncover any other treaty, entered into by Ireland, containing the unusual wording of Article 2(2) of the 1971 Italy-Ireland tax treaty; Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R.*, 10 ITLR, 827 *et seq.*, at 842-843, with regard to the practice of Canada and the United States to include special "insurance business" permanent establishment provisions in their tax treaties, which was considered potentially relevant in order to interpret Article V of the 1980 Canada-United States tax treaty; Income Tax Appellate Tribunal of Pune (India), 10 September 2008, *Automated Securities Clearance Inc v. Income Tax Officer*, 11 ITLR, 201 *et seq.*, at 227-228, paras. 54-59, where the tribunal warned about the inference that differently-worded provisions included in different tax treaties concluded by the same State should be always attributed different meanings, tax treaties remaining the products of bilateral negotiations, whose wording largely depend on the comfort level of the treaty partners with the words so employed; Authority for Advance Rulings (India), 30 September 2009, *Gearbulk AG v. Director of Income Tax*, 12 ITLR, 495 *et seq.*, at 506, para. 10, where the authority carried on a comparative analysis of how profits from the operation of ships in international traffic were dealt with in various tax treaties concluded by India, in order to determine whether they were taxable in India under the 1994 India-Switzerland tax treaty; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R.*, 12 ITLR, 783 *et seq.*, at 816, footnote 9, where the Court, in the context of construing the 1980 Canada-United States tax treaty and applying it to income derived by a United States fiscally transparent LLC, made reference to the fact that Canada had earlier amended its tax treaty with France in order to expressly recognize partnerships and other fiscally transparent entities for the purpose of the application of the latter treaty; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 ITLR, 915 *et seq.*, at 925-927, where the tribunal analysed the "construction

Interestingly, courts have proved willing to peruse and compare both earlier and later treaties and have alternatively used the result of such an analysis to support the view that the different wording was evidence of a different intended meaning of the provisions under scrutiny, or to argue for the thesis that the different wording of the other (later or earlier) treaty better elucidated the meaning that the contracting States intended to attach to the treaty provision to be construed.

With regard to this practice, the analysis of the various authentic texts of the different tax treaties compared and, in particular, of their drafted texts proves to be a useful tool for the interpreter, providing strong evidence of the common understanding of the parties with regard to unusual provisions. Such an analytical technique, for instance, might be conveniently employed in order to inquire the causes, if any, of the different wordings employed in the subject-to-tax provisions included in Austrian tax treaties,¹⁴⁹⁸ in which, although the German authentic texts use a variety of different terms and expressions such as “steuerpflichtig sein”, “der Besteuerung unterworfen”, “der Besteuerung unterliegen”, “besteuer werden” and “der Steuer unterliegen”, the English authentic texts all employ the uniform term “subject-to-tax”.¹⁴⁹⁹

3.7. *Conclusions on research question a)*

The analysis carried out in the previous sections has demonstrated that the role played by the OECD Model official versions (English and French) in respect of (multilingual) tax treaties based on such a Model is similar to that played by the drafted text for the purpose of interpreting multilingual treaties.

To put it differently, the OECD Model official versions represent significant evidence of the intention of the parties with regard to the meaning of tax treaty provisions drafted along the lines of the OECD Model. Thus, the interpreter should take them into account as primary means of interpretation in order to establish the utterance (ordinary or special) meaning of the relevant treaty terms and expressions.

permanent establishment” provisions included in the tax treaties concluded by India and deviating from the wording of the OECD and United Nations Models, in that they all include a reference to the aggregation of all, or connected, sites, projects and activities carried on by a non-resident enterprise in order to determine the existence of a permanent establishment thereof in India, and inferred from the absence of such a reference in the tax treaty to be interpreted (the 1982 India-Mauritius tax treaty) that such an aggregation was generally not allowed under that treaty.

See also, with regard to subsequent tax treaties concluded by the treaty parties, the case law referred to in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.01, 26.02 and 26.03.

¹⁴⁹⁸ See M. Schilcher, *Die Vermeidung der doppelten Nichtbesteuerung durch subject-to-tax-Klauseln* (Vienna: Linde, 2004), p. 57.

¹⁴⁹⁹ The drawback of such drafting is highlighted by Metzler, who notes that in the Austrian tax treaty practice subject-to-tax-clauses are generally interpreted very differently, mainly due to the huge variety of terms and expressions used in the German authentic texts of the relevant treaties; the author concludes that, for a more uniform interpretation of these clauses, a more conscientious use of such German terms and expressions would be preferable (see V. E. Metzler, “Austria”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 137 *et seq.*, at 149).

With specific reference to the subject of this study, the OECD Model official versions constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, i.e. by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT. This holds true also in cases where none of the authentic treaty texts is drafted in English or French.

In addition, the impact of the OECD Model official versions on the drafting of the authentic texts of tax treaties based on such a Model constitutes a strong argument in support of the following conclusions.

First, it supports the appropriateness of a loose approach in the application of the *renvoi* provided for in Article 3(2) of OECD Model-based tax treaties, in the sense that the terms actually used in the authentic treaty texts should be given the meaning that not only such terms, but also their legal jargon synonyms and proxies in the official language of the State applying the treaty, have for the purpose of that State's domestic law, unless the context otherwise requires. This point, being strictly connected with the analysis of the *renvoi* to domestic law encompassed in Article 3(2) OECD Model, will be further analysed in section 5.3.2.4 of this chapter.

Second, it supports the inclusion, among the means of interpretation to be used for removing the *prima facie* discrepancies in meaning between the authentic treaty texts in accordance with Articles 31 and 32 VCLT, of certain elements and items of evidence. In particular, it constitutes the main foundation of the argument that all tax treaty provisions that directly or indirectly reproduce the provisions of the OECD Model should be interpreted consistently, which in turn justifies the practice of having recourse to the decisions delivered by foreign judiciaries and the practices of foreign tax authorities (including those of States that are not party to the specific treaty to be construed) in order to establish the *ordinary meaning to be given* to OECD Model standard terms and expressions (used in OECD Model-based tax treaties) under Articles 31 and 32 VCLT. Moreover, it justifies the recourse by the interpreter, as supplementary means of interpretation, to the analysis of the differences existing (i) between the subsequent versions of the OECD Model, (ii) between the OECD Model and the tax treaty to be interpreted, as well as (iii) between the tax treaty to be interpreted and other tax treaties concluded by the contracting States of the former, for the purpose of establishing the intention of the parties, i.e. the utterance meaning of the relevant tax treaty provision.

4. The OECD Model Commentary as part of the overall context

4.1. Research question addressed in this section

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

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

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

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

In that respect, paragraph 18 of the Commentary to Article 12 OECD Model seems to support a broad interpretation of the terms “copyright” and “droit d’auteur”, such as to include *droits voisins*. According to that paragraph, where the musical performance of a musician (or orchestra director) is “recorded and the artist has stipulated that he, on the basis of his copyright [*author’s note*: “droit d’auteur” in the French official version]¹⁵⁰⁰ in the sound recording, be paid royalties on the sale or public playing of the records, then so much of the payment received by him as consists of such royalties falls to be treated under Article 12”.

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

4.2. Introduction

*“The Commentaries are not binding, but they are the best evidence of the generally accepted interpretation of OECD-style conventions”.*¹⁵⁰¹

¹⁵⁰⁰ The relevant excerpt of paragraph 18 of the Commentary to Article 12 OECD Model, in its French official version, reads as follow: “Lorsqu’en vertu du même contrat ou d’un contrat distinct, la prestation musicale est enregistrée et que l’artiste a accepté, sur la base de ses droits d’auteur concernant l’enregistrement, de recevoir des redevances sur la vente ou sur l’audition publique des disques, la partie de la rémunération reçue qui consiste en de telles redevances relève de l’article 12”.

¹⁵⁰¹ Baker, 5 *ITLR*, at 1004, in commenting on a decision of the French Conseil D’Etat (Conseil d’Etat (France), 30 June 2003, *Minister for the Economy, Finance and Industry v. Interhome AG*, 5 *ITLR*, 1001 *et seq.*), which made reference to the post-2003 OECD Commentaries in order to interpret a 1966 tax treaty in relation to tax years in the 1980s.

The relevance of the OECD Commentary for tax treaty interpretation has been the subject of a striking number of articles and books. It is not the purpose of this section to review, discuss or comment on such publications, nor to comprehensively deal with the subject matter.¹⁵⁰² Its much more limited aim¹⁵⁰³ is to establish the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties and, more specifically, of removing *prima facie* discrepancies in meaning among tax authentic treaty texts.

From a historical perspective, each tax treaty model developed by or under the auspices of international organizations, from the League of Nations onward, has been accompanied by commentaries explaining the intended meaning of the model provisions.¹⁵⁰⁴ The practice of providing commentaries to the relevant models was probably taken from that of providing commentaries or explanatory reports to multilateral treaties.¹⁵⁰⁵

With specific regard to the OECD Commentary, starting from 1992 the OECD practice has always been to modify it every two or three years, generally without

¹⁵⁰² The two most recent and comprehensive studies on the matter, where a conspicuous number of further references may be found, are: S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008) and D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005).

¹⁵⁰³ The present section does not deal with the interpretative issues stemming from the fact that the parties to a tax treaty have entered reservations or observations to the OECD Commentary, if they are OECD member States, or expressed their positions thereon, if they are not OECD member States; likewise, for the purpose of the analysis carried out in this section (unless otherwise provided), it is assumed that no reservation, observation or position has been expressed by the contracting States.

The issues connected with the interpretation of tax treaty provisions reproducing the OECD Model provisions, in respect of which one or both the contracting States have entered observations in the OECD Commentary, have been thoroughly analysed in G. Maisto, “The Observations on the OECD Commentaries in the Interpretation of Tax Treaties”, 59 *Bulletin for international taxation* (2005), 14 *et seq.* See also D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), pp. 64-78.

¹⁵⁰⁴ See D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), p. 3. The authors added that over the years the OECD Commentaries “have expanded, have become more detailed and *sometimes have departed in several places from what could fairly be said to be the literal or textual interpretation of the Model to a point where it is widely believed that the OECD Committee on Fiscal Affairs [...] is sometimes attempting to change the Model by changing its interpretation*” (see *ibidem*, p. 4, *emphasis added*). According to this author, however, the idea that the Commentary often attributes to the OECD Model provisions certain meanings further than their proper (literal or textual) meanings is flawed and theoretically dangerous: it is flawed since none may be said to know the intended meaning of an utterance better than the person that actually uttered it and, in the case at stake, the Commentary is drawn up by the same organization that created the respective model; it is theoretically dangerous since it relies on and upholds the view that utterances have an intrinsic meaning, separate from their overall context (which, in this case, clearly encompasses the relevant commentaries) and independent from the relation existing (or intended to exist) between the speaker and the hearers, thus employing an utopian argument in order to justify the substitution of the meaning preferred by the authors (or other interpreters) for the meaning intended by the international organization that drew up the model (which, in turn, makes it an apologetic argument in favor of the constructions chosen by the interpreters).

¹⁵⁰⁵ See *ibidem*, p. 3.

introducing any related change in the Model Convention.¹⁵⁰⁶

No scholar has ever seriously questioned the potential relevance of the OECD Commentary for the purpose of interpreting tax treaties. Most likely, this is due to the effect that the Commentary may have on the consistent construction of those treaties. According to Vogel, for instance, “OECD MC and its Commentary are very important for the interpretation of tax treaties in that they provide a source from which the courts of different States can seek a common interpretation.”¹⁵⁰⁷

Similarly, the review of national courts and tribunals’ case law has shown that judiciaries do, in many cases, refer to the OECD Commentary in order to construe tax treaty provisions.¹⁵⁰⁸

The relevance attributed to the OECD Commentary, however, varies significantly from country to country and, sometimes, also within a single jurisdiction. On the one hand, a considerable number of courts and tribunals have expressed the view that the OECD Commentary is one of the most important elements to be taken into account for the purpose of interpreting tax treaties patterned along the lines of the OECD Model.¹⁵⁰⁹

¹⁵⁰⁶ Accordingly, as of 1992, the OECD started to publish the Model and its Commentary in loose-leaf form.

¹⁵⁰⁷ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 43, m.no. 79.

¹⁵⁰⁸ In addition to the case law cited here below, see the decisions of national courts and tribunals referred to in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.11 and 26.12.

¹⁵⁰⁹ See, for instance, Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 55; Tax Court (Canada), 30 October 1998, *Dudney v. R.*, 1 ITLR, 371 et seq., at 376-379; Court of Federal Claims (United States), 7 July 1999, *National Westminster Bank v. US*, 1 ITLR, 725 et seq., at 737 and 748; Hoge Raad (Netherlands), 9 December 1998, case 32709, 1 ITLR, 839 et seq., at 853-854; Federal Court of Appeal (Canada), 24 February 2000, *R v. Dudney*, 2 ITLR, 627 et seq., at 632-634; Hoge Raad (Netherlands), 1 November 2000, case 35398, 3 ITLR, 466 et seq., Opinion of Advocate General Wattel at 493, where it is stated that, in respect of tax treaty provisions reproducing OECD Model provisions, the OECD Commentary must prevail unless there are clear indications that both contracting States intended to deviate from that standard; Court of Appeal of The Hague (Netherlands), 27 February 2001, case BK-98/02743, 3 ITLR, 631 et seq., at 644, para 6.2; Conseil d’Etat (France), 27 July 2001, *Re SA Golay Buchel France*, 4 ITLR, 249 et seq., conclusions of the Commissaire du Gouvernement at 261; Corte Suprema di Cassazione (Italy), 7 March 2002, *Ministry of Finance (Tax Office) v. Philip Morris GmbH*, 4 ITLR, 903 et seq., at 938 and 941-945, where (ironically with hindsight) the Court referred to the OECD Commentary more than ten times in order to support its decision; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 ITLR, 1009 et seq., at 1065 and 1070-1071; Corte Suprema di Cassazione (Italy), 25 May 2002, case 7682; Federal Court (Canada), 8 November 2002, *Pacific Network Services Ltd and another v. Minister of National Revenue*, 5 ITLR, 638 et seq., at 650-654, paras. 32, 36, 38, 40 and 44; New South Wales Supreme Court (Australia), 4 December 2002, *Unisys Corp v. FCT* 5 ITLR, 658 et seq., at 671, para. 46 and at 676, para. 66; Corte Suprema di Cassazione (Italy), 6 Dicembre 2002, case 17373, where the OECD Commentary is referred to fourteen times; Conseil d’Etat (France), 30 June 2003, *Minister for the Economy, Finance and Industry v. Interhome AG*, 5 ITLR, 1001 et seq., conclusions of the Commissaire du Gouvernement at 1031, 1034, 1037-1038 and 1040; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 ITLR, 292 et seq., at 304; Corte Suprema di Cassazione (Italy), 23 April 2004, case 7851; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 ITLR, 51 et seq., at 76, para. 46, where it was stated that the OECD Commentary is an important source of law in the interpretation of tax treaties, including those concluded between member and non-member States of the OECD; Tax Court (Canada), 8 April 2005, *Allchin v. R.*, 7 ITLR, 851 et seq., at 864-872, para. 35, quoting Iacobucci J. in *Crown*

Forest (see Supreme Court (Canada), 22 June 1995, *Crown Forest v. Canada*, [1995] 2 SCR 802, para. 55), para. 40, para. 47 and para. 51, where the Court, however, concluded that the OECD Commentary on Article 4, for the part dealing with the “habitual abode” tie-breaker test (theoretically relevant for the case at stake) was not useful in interpreting the relevant tax treaty since, while in the OECD Model that test was to be used (i) where a person did not have a permanent home available in either State (i.e. without passing through the “centre of vital interests” test) or (ii) where the State in which he had the centre of his vital interests could not be determined, in the relevant tax treaty the “centre of vital interest” test was to be applied in case (i), leaving the “habitual abode” applicable only in case (ii) (one might question, indeed, the significance of such a difference for the purpose of assessing the relevance of the OECD Commentary paragraphs discussing the “habitual abode” test); Special Commissioners (United Kingdom), 7 June 2005, *UBS AG v. Revenue and Customs Commissioners*, 7 *ITLR*, 893 *et seq.*, at 906-907, para. 10, where it was said that “the negotiators on both sides could be expected to have the Commentary in front of them and can be expected to have intended that the meaning in the Commentary should be applied in interpreting the treaty when it contains the identical wording and neither party had made an observation disagreeing with the Commentary” and, with reference to the explanation of Article 24(3) OECD Model provided for in the OECD Commentary thereto, that “[i]t seems clear that the parties to the treaty intended that such explanation should be more important than the ordinary meaning to be given to the terms of that phrase. This is either on the basis that the existence of the Model and the Commentaries demonstrate that the parties intended it as a special meaning within art 31(4) of the Vienna Convention, or that the Vienna Convention does not purport to be a comprehensive statement of the method of treaty interpretation”; *ibidem*, at 917-919, paras. 22, 24 and 25; Tax Court (Canada), 22 July 2005, *Yoon v. R*, 8 *ITLR*, 129 *et seq.*, at 140-144, paras. 21, 23, 28, 33 and 38; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 *ITLR*, 536 *et seq.*, at 558, para. 3.4.5., where the Court affirmed that OECD member States are in principle obliged to take into account the OECD Model and the Commentary thereto in order to interpret their treaties (at least with regard to those concluded with other OECD member States); Tax Court (Canada), 22 December 2005, *Sutcliffe v. Canada*, 8 *ITLR*, 563 *et seq.*, at 580, para. 79, at 584, para. 107, and 589, para. 136; Court of Appeal of England and Wales (United Kingdom), 2 March 2006, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 *ITLR*, 653 *et seq.*, at 674-675, para. 42 per Sir Andrew Morritt, and 683-684, para. 74 per Chadwick LJ.; Income Tax Appellate Tribunal of Mumbai (India), 30 September 2005, *Metchem Canada Inc v. Deputy Commissioner of Income Tax*, 8 *ITLR*, 1043 *et seq.*, at 1049 and 1050, where the tribunal noted that the OECD Commentary had a key role in determining the scope and connotation of Article 24(2) of the 1985 Canada-India tax treaty and that when tax treaty expressions or clauses are picked up from the OECD Model, the normal presumption is that the persons using the said clauses or expressions are aware about the meanings assigned thereto by the OECD and intend to use them in the same sense and for the same purpose, unless a contrary intention is specifically expressed in the text of the treaty or additional protocol (the tribunal, furthermore, explicitly extended such a reasoning to tax treaties involving a non-OECD country); Administrative Court (Luxembourg), 17 January 2006, *Re XXX SA*, 9 *ITLR*, 176 *et seq.*, at 186, where it was stated that provisions of a tax treaty copied from the OECD Model should be applied in light of the OECD Commentary since the main purpose of that Model is to enable the problems that arise most commonly in the field of international juridical double taxation to be resolved in a uniform fashion; First Council of Taxpayers (Brazil), 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue Department in Brasilia*, 9 *ITLR*, 627 *et seq.*, at 657-658; See Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v. Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq.*, at 776, para. 25 per Moses LJ., at 788, para. 61 per Arden LJ.; House of Lords (United Kingdom), 23 May 2007, *NEC Semi-Conductors Ltd and Other test claimants v. Inland Revenue Commissioners*, 9 *ITLR*, 995 *et seq.*, at 1002, para. 16 per Lord Hoffmann, who extended by analogy the reasoning underlying the OECD Commentary on Article 24(1), according to which, in order to determine whether a discrimination prohibited by that article exists, it must be assessed whether two residents are being treated differently “solely by reason of having a different nationality”, to Article 24(5) of the Model (corresponding to Article 24(5) of the 1975 United States-United Kingdom tax treaty and Article 25(3) of the 1969 Japan-United Kingdom tax treaty, whose interpretation was at stake before the court), in the sense that, in order to determine whether a discrimination prohibited by Article 24(5) OECD Model exists, it should be assessed whether resident companies are treated differently solely on grounds that their capital is owned by persons resident of the other contracting State; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq.*, at 183-184, para. 12; Income Tax Appellate Tribunal of New Delhi (India), 26 October

On the other hand, some courts and tribunals have found that the OECD Commentary is of limited relevance for the purpose of interpreting tax treaties, or even that recourse thereto is permissible only in order to confirm an independently clear meaning or to construe otherwise ambiguous, obscure or unreasonable provisions.¹⁵¹⁰

2007, *Rolls-Royce plc v. Director of Income Tax*, 10 *ITLR*, 327 *et seq.*, at 348, paras. 20 and 21, where the tribunal reproduced, without quoting its source, the content of paragraphs 4 and 4.1 of the 2003 Commentary to Article 5 of the OECD Model in order to support its solution of the controversy before it; Court of Appeals (United States), 15 January 2008, *National Westminster Bank plc v. United States of America*, 10 *ITLR*, 423 *et seq.*, at 432, where the Court affirmed that the OECD Commentary to the 1963 OECD Draft, on which the 1975 United Kingdom-United States tax treaty was based, was part of the “entire context” to be taken into account for the purpose of interpreting that tax treaty; *ibidem*, at 435, 436, 439 and 442; District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 *ITLR*, 524 *et seq.*, at 546, where the Court stated that (i) it is sufficient that one of the two contracting States is a member of the OECD in order to create an expectation among both contracting States that the interpretation of a OECD Model-type tax treaty will be based on the Commentary thereof, as is published from time to time, and that (ii) the uniform interpretation and application by courts in the contracting States of OECD Model-type tax treaties is inherently necessary by virtue of a contractual act that becomes a part of the law in the contracting States; Corte Suprema di Cassazione (Italy), 15 February 2008, case 3889, where the Court, at para. 2.1, in order to support the conclusion that the 2005 amendments made in the Commentary to Article 5 OECD were not decisive in the case at stake, maintained that (i) the OECD Commentary is not legally binding under international law and that (ii) it is relevant that the Italian government entered a specific observation to such amendments in the Commentary; Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 *ITLR*, 574 *et seq.*, at 605, where the Special Commissioners held that the OECD Commentary is an important means of interpretation of tax treaties following the OECD Model since, in such a case, the negotiators on both sides could be expected to have intended that the meaning in the Commentary should be applied in interpreting the tax treaty, that being true with regard to both OECD member States and non-member States; *ibidem*, where the Special Commissioners argued that, if the OECD Commentary contains a clear explanation of the meaning of the term, it seems clear that the parties to the treaty intended that such an explanation should be more important than the ordinary meaning to be given to the terms of that phrase, either on the basis that the existence of the Model and the Commentaries demonstrate that the parties intended it as a special meaning within Article 31(4) VCLT, or that the VCLT is not purported to be a comprehensive statement of the methods of treaty interpretation (see also First-Tier Tribunal (United Kingdom), 1 April 2010, *FCE Bank plc v. Revenue and Customs Commissioners*, 12 *ITLR*, 962 *et seq.*, at 972); Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 765, paras. 95-96 and at 767, para. 100; Tax Court (Canada), 16 May 2008, *Knights of Columbus v. R*, 10 *ITLR*, 827 *et seq.*, at 843, para. 48, at 844, para. 49, at 845-846, paras. 54-55 and 57, at 848, para. 65; Supreme Court (Norway), 24 April 2008, *Sølvik v. Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*, at 34, para. 47, at 35, para. 49, and at 38, para. 66; Tax Court (Canada), 16 May 2008, *American Income Life Insurance Company v. Canada*, 11 *ITLR*, 52 *et seq.*, at 63-64, paras. 37-38, at 71-72, para. 59, at 75-76, para. 73 and at 80, para. 87; Corte Suprema di Cassazione (Italy), 17 October 2008, case 25374, para. 5.3; Federal Court of Appeal (Canada), 26 February 2009, *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq.*, at 767, para. 10 and at 768, para. 14; Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq.*, at 65, paras. 11 and 12, and at 68, para. 17; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 *ITLR*, 783 *et seq.*, at 819, para. 77, where the Court noted that the OECD Commentary, in the absence of any relevant reservation or observation, reflected the intentions of the OECD member States with respect to treaties based upon the OECD Model; Income Tax Appellate Tribunal of Mumbai (India), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 *ITLR*, 915 *et seq.*, at 927, para. 10, at 929, paras. 13-14, at 932, para. 16, and at 934, para. 19, referring to both the 2005 OECD Commentary and the 2001 United Nations Commentary to Article 5(3) of the respective models (and, in paragraph 16, also to the Technical Explanations to the 1996 United States Model); Corte Suprema di Cassazione (Italy), 8 April 2010, case 8488, where the Court affirmed that, in order to interpret Article 5 of the 1976 Italy-Switzerland tax treaty, it was necessary to make reference to the Commentary to Article 5 OECD Model, since the actual treaty was based on such a Model.

¹⁵¹⁰ See, for instance, High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171

As often happens where one is called to categorize human behavior, the dividing line between the two approaches is sometimes blurred, either because the approach followed is not overtly elucidated by the courts, or because it is pointed out in a vague or ambiguous manner.

Additionally, the case law review has revealed that national courts and tribunals sometimes make reference to other documents issued by the OECD, such as reports or discussion drafts, in order to support their interpretative solutions.¹⁵¹¹ The relevance of

Commonwealth Law Reports, 338 *et seq.*, para. 10 of the opinion of Dawson J. and para. 13 of the opinion of McHugh J.; Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*, at 229-230, where the Court maintained that, with regard to tax treaties concluded by States non-member of the OECD, the OECD Commentary may be relevant as a supplementary means of interpretation, in particular where those tax treaties reproduce the wording of the OECD Model and do not contain any evidence pointing to a contrary interpretation (note, however, the more drastic approach of the Assessment Board and the District Court, which apparently denied any relevance to the OECD Commentary with regard to tax treaties concluded by Norway with OECD non-member States – *ibidem*, at 229); Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 *ITLR*, 178 *et seq.*, at 204, where the OECD Commentary appears to be regarded as a supplementary means of interpretation under Article 32 VCLT; implicitly, Income Tax Appellate Tribunal of Kolkata (India), 22 August 2005, *ABN Amro Bank NV v. Assistant Director of Income Tax International Taxation & Assistant Director of Income Tax International Taxation v. Bank of Tokyo Mitsubishi Ltd*, 8 *ITLR*, 502 *et seq.*, at 521-522, paras. 25-26, where the tribunal denied the deductibility of interest “paid” by permanent establishments located in India to their foreign banks head offices under Article 7 of the relevant tax treaties, read in conjunction with Indian domestic tax law, since under the latter “the payment of expenditure to self” is not deductible (such a conclusion is clearly at variance with the long standing position taken by the OECD (and international practice) and reflected in paragraph 19 of the 1994 Commentary to Article 7 of the OECD Model); High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 73-75, where the OECD Commentary was considered a supplementary means of interpretation under the VCLT; Income Tax Appellate Tribunal of Mumbai (India), 4 July 2008, *Assistant Director of Income Tax (International Taxation) v. M/S Chiron Behring GmbH & Co*, 11 *ITLR*, 83 *et seq.*, at 89, para. 12, where the tribunal stated that “when the language of the treaty is unambiguous and does not admit of any doubt whatsoever, there is no need to make a reference to the Commentaries [and] all the authorities are bound by the [clear treaty] and cannot take the assistance of Commentaries for accepting or rejecting any claim of the person in disregard to it. These can be referred to in a situation where the scope of an article is not clearly emanating from the language used. So these have only a persuasive value and cannot override the specific provisions of the treaty”; Income Tax Appellate Tribunal of Mumbai (India), 13 August 2008, *Deputy Director and Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 *ITLR*, 103 *et seq.*, at 199, where the tribunal (quoting a previous order of its) noted that “the commentary on the Model Convention can be taken assistance of only if the language of the treaty is drafted loosely or in an inclusive way or it does not unearth the intention of the Contracting States in a lucid manner”; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 344, para. 24, where the Court quoted McHugh J in High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports*, 338 *et seq.*, at 357, affirming that the supplementary means of interpretation provided for in Article 32 VCLT include the OECD Model and its Commentary; Income Tax Appellate Tribunal of Mumbai (India), 29 September 2008, *Assistant Director of Income Tax v. Delta Airlines Inc*, 12 *ITLR*, 344 *et seq.*, at 353, para. 10 and at 355, para. 12 (in the latter paragraph, the tribunal held that, where the contracting States define within a tax treaty a term that is undefined in the OECD Model, the meaning attributed to that term in the OECD Commentary cannot be applied in order to expand the scope of such a term as defined in the treaty itself); Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 *ITLR*, 645 *et seq.*, at 654, para. 4, describing the OECD Commentary as a supplementary means of interpretation under Article 32 VCLT.

¹⁵¹¹ See, for instance, Federal Commission of Appeal in Tax Matters (Switzerland), 28 February 2001, Re V SA, 4 *ITLR*, 191 *et seq.*, at 209 and 213, referring to the Report *Double Taxation Conventions and the Use of*

these documents varies depending on (i) whether they are final versions or drafts subject to discussion and (ii) whether their conclusions have been incorporated into the OECD Commentary.

4.3. *The reason for relying on the OECD Commentary in order to interpret OECD Model-based tax treaties*

Most of the studies carried out by scholars in the last decades have concerned not so much the question of whether the OECD Commentary might be relied on for the purpose of construing tax treaties, but - essentially - to what extent the interpreter should rely on it. In particular, the major studies published recently have focused on the question of whether the OECD Commentary should be considered to be legally binding.¹⁵¹²

Conduit Companies, adopted by the OECD Council on 27 November 1986; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 ITLR, 784 *et seq.*, at 806-808, where the Court analysed the 1985 OECD Report *Taxation Issues Relating to International Hiring-out of Labour*; High Court of Justice of England and Wales (United Kingdom), 7 October 2005, *Indofood International Finance Limited v. JP Morgan Chase Bank, NA, London Branch*, 8 ITLR, 236 *et seq.*, at 252, 254 and 255, paras. 32, 33 and 41, where the Court analysed the content of the Report *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on 27 November 1986; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 ITLR, 536 *et seq.*, at 558, para 3.4.5., where the Court made reference to the Report *Double Taxation Conventions and the Use of Conduit Companies*, adopted by the OECD Council on 27 November 1986; Income Tax Appellate Tribunal of New Delhi (India), 26 October 2007, *Rolls-Royce plc v. Director of Income Tax*, 10 ITLR, 327 *et seq.*, at 355, para. 24.1, where the tribunal summarized (but did not apply under the specific circumstances of the case) the new OECD approach on the attribution of profits to permanent establishments, as resulting from the report *The Attribution of Profits to Permanent Establishments – Parts I (General Considerations), II (Banks) and III (Global Trading)*, released by the OECD Committee on Fiscal Affairs in December 2006, although without quoting its source; Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 ITLR, 574 *et seq.*, at 615, where the Special Commissioners, for the sake of completeness, referred to the discussion draft *The impact of the Communications Revolution on the Application of “Place of Effective Management” as a Tie Breaker Rule*, released in 2001 by the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits of the OECD, noting that, although it did not present the official views of the OECD and did not have the status of evidence, it represented the view of informed commentators and thus might be taken into account as useful background information; Special Commissioners (United Kingdom), 19 November 2008, *Bayfine UK Products and another v. Revenue and Customs Commissioners*, 11 ITLR, 440 *et seq.*, at 479-481, paras. 61-63, where the Special Commissioners made reference to the OECD Partnerships Report, although admitting not deriving much direct assistance from it; Income Tax Appellate Tribunal of Delhi (India), 16 October 2009, *New Skies Satellites NV v. Assistant Director of Income Tax & Shin Satellite Public Company Limited v. Deputy Director of Income Tax*, 12 ITLR, 409 *et seq.*, at 438-439, referring to the 2001 Report (to Working Party 1 of the OECD Committee on Fiscal Affairs) *Tax Treaty Characterization Issues Arising From E-Commerce* issued by the Technical Advisory Group on Treaty Characterization of Electronic Commerce Payments; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R*, 12 ITLR, 783 *et seq.*, at 816-818, where the Court made reference to the OECD Partnerships Report in order to construe the 1980 Canada-United States tax treaty in relation to income derived by a United States fiscally transparent LLC.

See also, for older case law, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.16.

¹⁵¹² See, for instance, S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries*

In this regard, the author respectfully submits that the question of whether the OECD Commentary is “legally binding” under public international law (not to mention domestic law) is misleading and the recurrent use by scholars of the term “binding”, either to affirm or to negate the need for courts and tribunals to base their decisions on the Commentary, is regrettable.¹⁵¹³

It should go without saying that the OECD Commentary, taken as an OECD legal instrument, does not impose any legal obligation whatsoever binding on the contracting States party to a tax treaty,¹⁵¹⁴ as is pointed out at paragraph 29 of the Introduction to the OECD Model.

However, that is not the issue at stake. To say that the OECD Commentary is not an instrument legally binding on the contracting States is not a relevant answer to the fundamental question that the tax treaty interpreter, at the international law level, should ask himself, since such a question is not (i) whether the OECD Commentary, taken as an OECD legal instrument, is legally binding on the contracting States and the courts called to apply that treaty, but (ii) what is the utterance meaning of the sole relevant binding instrument between the contracting States, i.e. the tax treaty.

The issue, therefore, is one of “reasonableness” of the meaning attributed to the treaty and of the arguments supporting it and not one of “bindingness” of an international legal instrument.¹⁵¹⁵

In this respect, there is nothing at the international law level, and surely even less at the domestic law level, that compels the interpreter to always attribute to tax treaty provisions the meaning attached by the OECD Commentary to the corresponding OECD Model provisions. In each case, an analysis of the overall context may lead the interpreter to conclude, and provide him with reasonable arguments to support such a conclusion, that the parties intended to attach to a certain treaty term or expression a meaning different from the one that could be determined on the basis of the OECD

(Amsterdam: IBFD Publications, 2008); D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), in particular Chapter 4; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), section 10.9.; D. A. Ward, “The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process”, 60 *Bulletin for international taxation* (2006), 97 *et seq.*, at 99-100; F. Engelen, “Some Observations on the Legal Status of the Commentaries on the OECD Model”, 60 *Bulletin for international taxation* (2006), 105 *et seq.* See also K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 46-47, m.no. 82b.

¹⁵¹³ See H. Thirlway, “The Role of International Law Concepts of Acquiescence and Estoppel”, in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 29 *et seq.*, at 32.

¹⁵¹⁴ See the first entry of the definition of the term “binding” on the Merriam-Webster’s Dictionary of Law (retrieved on 30 June 2011 from Dictionary.com website: <http://dictionary.reference.com/browse/binding>).

¹⁵¹⁵ In the words of Thirlway, “the problem is [...] one of the correct legal inferences [author’s note: the meaning of the tax treaty] to be drawn from the facts [author’s note: the behavior of the parties and, more generally, the overall context]” (see H. Thirlway, “The Role of International Law Concepts of Acquiescence and Estoppel”, in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 29 *et seq.*, at 34).

Commentary existing at the time of the treaty's conclusion (or as later modified), leaving aside the fact that the Commentary wording itself is subject to interpretation, like any other written text.

That said, it seems to the author more than reasonable to imagine that OECD member States had in mind the OECD Model and its Commentary (at that time) when they concluded a tax treaty following to a large extent such a Model and, therefore, that they intended to attach the meaning elucidated in the Commentary to the treaty terms and expressions that reproduce, directly or indirectly, those used in the OECD Model official versions.

Disregarding the interpretation given in the OECD Commentary amounts in itself to choosing a different interpretation:

- (i) in favor of which, normally, less evidence exists of the agreement between the contracting States¹⁵¹⁶ and
- (ii) whose possibility of representing the original common will of the parties is ontologically not different from that of the OECD's interpretation (i.e. the interpretation put forward in the OECD Commentary), due to the ambiguity and vagueness of the relevant terms, expressions, and provisions.

Thus, a refusal by a court or tribunal to apply the interpretation put forward in the OECD Commentary, at least in cases of treaties concluded between OECD member States, could open the door for the criticism that the court or tribunal has deliberately substituted its will for the common will of the contracting States.

Such an inference appears particularly difficult to refute when one considers the non-binding recommendations on tax treaties adopted by of the OECD Council.¹⁵¹⁷

The last of these recommendations, which was issued on 23 October 1997, provides that (i) member States should “conform to the Model Tax Convention, *as interpreted by the Commentaries thereon*”, when concluding new or revising existing tax treaties and (ii) their tax administrations should “*follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles*”.¹⁵¹⁸

Where an OECD Member State had followed the OECD Model in drafting one of its tax treaties, the most reasonable inferences that may be drawn are that:

- (a) such a State intended to fully (and not just partially) implement the OECD recommendation and, therefore, intended to conclude a tax treaty establishing the same legal rules provided for by the OECD Model, i.e. those legal rules resulting from the combined reading of the OECD Model and its Commentary.¹⁵¹⁹

¹⁵¹⁶ The interpretation included in the OECD Commentary, in fact, (i) is explicitly agreed upon by the OECD member States as the substantive content of an OECD Council recommendation, (ii) may be explicitly disagreed upon by OECD non-member States in the very same OECD Commentary, and (iii) is generally well-known and discussed upon by tax lawyers (including tax officials) dealing with tax treaty law.

¹⁵¹⁷ See Articles 5(b) and 6 of the Convention on the Organisation for Economic Co-operation and Development (OECD), concluded in Paris on 14 December 1960, and Article 18(b) of the OECD Rules of Procedure.

¹⁵¹⁸ See OECD doc C(97)195/final (*emphasis added*).

¹⁵¹⁹ No one could seriously maintain that the rules provided for by the OECD Model differ from those (if any)

(b) such a State intended the terms and expressions used in the tax treaty to have the meaning provided for (even by means of examples) in the OECD Commentary, since the latter is the only official instruction manual publicly available, the only one that the persons applying the treaty certainly have the chance to consult;¹⁵²⁰

(c) such a State did not intend to voluntarily cause legal uncertainty or misunderstandings with the other contracting State by attaching to the tax treaty terms and expressions meanings different from those agreed upon by its duly authorized representatives at the OECD level and with reference to which no dissenting opinion is publicly available.

Based on the above, the author believes that, in the absence of any significant departure of the tax authentic treaty texts from the OECD Model or of any extra-textual evidence of a contrary agreement between the parties,¹⁵²¹ the interpreter should construe any tax treaty concluded between OECD member States in accordance with the OECD Commentary,¹⁵²² any other construction being less reasonable.¹⁵²³

resulting from the ordinary meaning of the paragraphs of the OECD Commentary, since this is the understanding of the international organization (the OECD) that has issued the Model.

¹⁵²⁰ This argument is less tenable with regard to those OECD member States that publish their own models and related commentaries (e.g. the United States). However, on the one hand, where the wording of the OECD Model and that of the national model do not diverge, it is uncommon that the national commentary takes a position conflicting with that of the OECD Commentary and, on the other hand, in the case of a conflict between the two commentaries, arguments (a) and, partially, (c) would still give precedence to an interpretation based on the OECD Commentary, rather than on the national commentary.

¹⁵²¹ For instance, where the relevant contracting States have expressed an observation with reference to the interpretation put forward in the OECD Commentary.

¹⁵²² See a similar conclusion, although argued on the basis of a different vantage point, may be found in: American Law Institute, *Federal Income Tax Project. International Aspects of United States Income Taxation, II. Proposals on United States Income Tax Treaties* (Philadelphia: American Law Institute, 1992), p. 54; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 23.25; H. G. Ault, “The Role of the OECD Commentaries in the Interpretation of Tax Treaties”, *22 Intertax* (1994), 144 *et seq.*, at 145 *et seq.*; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 44-45, m.nos. 80-81; J. F. Avery Jones, “The binding nature of the OECD Commentaries from the UK point of view”, in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD, 2008), 157-162, at 161 (cf. the narrow position of Edwardes-Ker, which the author does not share, in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 19.01);

¹⁵²³ In the Martin Ellis Lecture held on 31 August 2000 at the Institute of International and Comparative Taxation at the University of Leiden, Vogel supported the idea that the interpretations put forward in the OECD Commentary should be given different weight depending (foremost) on the amount of time elapsed between their inclusion in the Commentary and the time of the conclusion of the relevant tax treaty. He maintained the following: “If the meaning attributed to a term by the Commentaries was not the “ordinary meaning” when the treaty was concluded, in particular, if the amendment is a more recent one [*author’s note*: from the analysis of the previous paragraphs of the article, it seems that Vogel would consider a period of approximately 20-25 years sufficiently long for the OECD Commentary meaning to acquire the status of “ordinary meaning” of a term in the international tax language], we must examine whether the meaning conveyed by the Commentaries can be presumed to have been agreed upon as a “special meaning” within the meaning of Art. 31(4) of the Vienna Convention. I suggest that such an assumption be considered justified only when, between the amendment to the Commentaries and the conclusion of the particular treaty, enough time has elapsed for the amendment to seep through to the common consciousness of international tax experts who

Does this mean that the contracting States are bound by the OECD Commentary? According to the author, both the question and any answer to it are irrelevant, since they involve giving a name to a meaning, not a meaning to a name.

A similar conclusion should be also drawn with regard to tax treaties concluded between OECD member and non-member States.

First, although it is obviously possible that, under international law, contracting States decide to attach different meanings to the same text included in two or more of their treaties, even where such treaties reproduce to a large extent a model developed by an international organization, this is not the most natural conclusion to draw. Thus, if one starts from the premise that OECD member States, when concluding tax treaties with each other, intend to interpret those tax treaties in accordance with the OECD Commentary,¹⁵²⁴ the natural inference that follows is that such States will do the same when concluding tax treaties with OECD non-member States.

Second, unless evidence of a different agreement exists, the most reasonable assumption is that the other contracting State, i.e. an OECD non-member State, also intended to interpret the relevant tax treaty in accordance with the OECD Model. This inference is based on the following arguments:

- (i) a different conclusion would amount to admitting that no agreement between the contracting States has ever been reached on some of the rules of law to be incorporated into the treaty;
- (ii) the representatives of the OECD non-member State could (or should) have figured out the intention of the other party's representatives on the basis of the above analysis and, where dissenting, should have better expressed their dissenting opinion and registered it, in order to avoid misunderstandings;
- (iii) the OECD Commentary is also generally known and consulted by the tax administrations and the practitioners of OECD non-member States;

are not members of Working Party No. 1. The time necessary for this should not be estimated too short – I suggest a period of ten years, but this may be open to discussion. Moreover, that the Commentaries were adopted as a “special meaning” can be assumed, in my view, only between the OECD Member countries. [...] If the amendment is too recent for such seeping through, the Commentaries may still serve as a “supplementary means of interpretation”, subject to the limitations of Art. 32 of the Vienna Convention” (K. Vogel, “The Influence of the OECD Commentaries on Treaty interpretation”, 54 *Bulletin for international taxation* (2000), 612 *et seq.*, at 616).

The author does not share the conclusion reached by Vogel. In light of the arguments put forward in this section, although the longstanding presence of some interpretations in the OECD Model may of course have a certain impact on the level of reasonableness of the inference that the contracting States intended to attribute to the tax treaty's undefined terms and expressions the meaning attached thereto by the OECD Commentary, such inference remains, in the author's eyes, by far more reasonable than any other in the absence of clear evidence to the contrary, either resulting from a departure of the tax treaty provisions from the corresponding OECD Model provisions, or from extra-textual elements. Moreover, as succinctly stated by Avery Jones, “[g]iven the amount of work that goes into the Commentary one doubts if states intend it to have only [the] status [of supplementary means of interpretation under the VCLT]” (see J. F. Avery Jones, “The binding nature of the OECD Commentaries from the UK point of view”, in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 157 *et seq.*, at 162).

¹⁵²⁴ Which is the conclusion just reached and argued.

- (iv) since 1997 many OECD non-member States¹⁵²⁵ have started to participate in the annual meetings organized by the Committee on Fiscal Affairs of the OECD (in order to discuss issues related to the negotiation, application and interpretation of tax treaties), as well as to set out their positions concerning the OECD Model and Commentary within the Commentary itself;¹⁵²⁶
- (v) the Commentary to the United Nations Model Tax Convention,¹⁵²⁷ in the drafting of which non-OECD member States generally participate, largely reproduces and refers to the OECD Commentary for the purpose of interpreting those provisions of the United Nations Model Tax Convention that do not depart from those of the OECD Model (i.e. the large majority of the provisions of the United Nations Model Tax Convention).¹⁵²⁸

A corollary of such inferences is that OECD non-member States should be assumed willing to interpret in accordance with the OECD Commentary also the tax treaties concluded with other OECD non-member States, absent clear evidence to the contrary.¹⁵²⁹

In that respect, Edwardes-Ker, commenting on the statement of the American Law Institute, according to which it would normally be wholly unrealistic to think that treaty negotiators who adopted language derived from the OECD Model did not knowingly accept the common meaning of that language as agreed among the OECD member States (i.e. that expressed in the OECD Commentary),¹⁵³⁰ claimed that such a

¹⁵²⁵ More precisely, 31 OECD non-member States as of 2010 (see paragraph 4 of the 2010 OECD Model Introduction – Non-OECD Economies’ Positions on the OECD Model Tax Convention).

¹⁵²⁶ See paragraphs 2-3 of the 2010 OECD Model Introduction – Non-OECD Economies’ Positions on the OECD Model Tax Convention.

¹⁵²⁷ The first sentence of paragraph 36 of the Introduction to the 2001 United Nations Model reads as follows: “If the negotiating parties decide to use in a treaty wording suggested in the United Nations Model Convention, it is to be presumed that they would also expect to derive assistance in the interpretation of that wording from the relevant Commentary.”

¹⁵²⁸ It is true that the United Nations Model and Commentary are updated much less frequently than the OECD ones and that, therefore, it is not infrequent that the United Nations Commentary to a certain provision of the Model reproduces the wording of the corresponding OECD Commentary as it stood before its most recent amendments. However, it is the author’s opinion that, in light of the fact that the Commentary to the United Nations Model generally fully reproduces the text of the preceding OECD Commentary where the underlying Model provisions are the same and, in such cases, it commonly states that the OECD Commentary is fully relevant for or pertinent to the interpretation of the United Nations Model provisions (e.g. with regard to Article 23A of the Model, p. 278 of the United Nations Commentary), the view may be reasonably supported that, where later OECD Commentaries concern provisions common to both Models and do not conflict with previous OECD Commentaries, the text of the former will most probably be referred to, or included, in the next United Nations Commentary and, since such later OECD Commentaries do not conflict with the current United Nations Commentary, they should be taken into account in order to construe tax treaty articles reproducing both the OECD Model and the United Nations Model provisions.

¹⁵²⁹ With reference to tax treaties concluded by OECD non-member States, Vogel notes that when the text of the treaty coincides with that of the OECD Model and the context does not suggest a different interpretation, the parties should be presumed as well to have intended to adopt the meaning conveyed by the OECD Model and its commentary (K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 45-46, m.no. 82).

¹⁵³⁰ American Law Institute, *Federal Income Tax Project. International Aspects of United States Income*

statement “undoubtedly applies to tax treaties negotiated between OECD Members. It probably applies to tax treaties modeled on OECD lines between a State which is not an OECD Member and a State which is an OECD Member. It may also apply to tax treaties modeled on OECD lines between two States which are not OECD Members.”¹⁵³¹

4.4. *The relevance of the OECD Commentaries subsequent to the tax treaty conclusion*

The question of whether and to what extent changes to the OECD Commentary made after the conclusion of a tax treaty should be taken into account for the purpose of construing it has become particularly pressing since the OECD, in 1992, adopted the concept of an ambulatory Model and started issuing new OECD Commentary releases every two or three years.¹⁵³²

In this respect, the approaches followed by national courts and tribunals have proved significantly heterogeneous, some courts appearing willing to rely on the last available version of the OECD Commentary,¹⁵³³ while others seeming more hesitant to use a

Taxation, II. Proposals on United States Income Tax Treaties (Philadelphia: American Law Institute, 1992), p. 54.

¹⁵³¹ M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 23.24.

¹⁵³² The OECD’s position in this respect is spelt out in the Introduction to the OECD Model, which devises the idea of the ambulatory application of the OECD Commentary (see paras. 3 and 33-36 of the Introduction to the OECD Model).

¹⁵³³ I.e. the OECD Commentary as relevantly modified after the conclusion of the tax treaty to be interpreted. See Authority for Advance Rulings (India), 28 April 1999, *Y’s Application*, 2 *ITLR*, 66 *et seq.*, at 77 and 81; Court of Appeal of The Hague (Netherlands), 27 February 2001, case *BK-98/02743*, 3 *ITLR*, 631 *et seq.*, at 645, para 6.5; High Court (Denmark), 6 April 2001, *Halliburton Company Germany GmbH v. Ministry of Treasury*, 4 *ITLR*, 19 *et seq.*, at 45-46, where the Court, after having pointed out that both the tax treaties to be applied (i.e. the 1948 Denmark-United States tax treaty and the 1955 Denmark-Canada tax treaty) pre-dated the OECD Model and that the facts at issue occurred in 1990 and thus pre-dated the 1992 changes to the OECD Commentary to Article 15, concerning cases of hiring-out of labor (new paragraph 8 thereof), resolved the case in accordance with the solution adopted in the 1992 Commentary, with regard to which none of the interested Contracting States entered any observation (interestingly the Court emphasized that, although the concept of hiring-out of labor was not known when those tax treaties were concluded, the interpretation put forward in the Commentary did not constitute a material change to such treaties); similarly, the majority opinion in Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq.*, at 813-814; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq.*, at 1065, where the Court stated that, in the spirit of the VCLT, the amendments later made to the OECD Commentary have significance as an aid to tax treaty interpretation and that, as the Commentary describes the practices of the OECD member countries, the subsequent changes and amendments to it are relevant particularly to matters which concern new situations and phenomena (in the specific case, the Court referred to the paragraphs added in 1992 to the Commentary to Article 1 OECD Model, which concerned the interaction between domestic CFC rules and tax treaties, in order to support its construction of the 1976 Belgium-Finland tax treaty); Hoge Raad (Netherlands), 21 February 2003, case *37024*, 5 *ITLR*, 818 *et seq.*, at 876, para. 3.7; Supreme Court (Norway), 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 *ITLR*, 51 *et seq.*, at 77, paras. 48-49, where the Court concluded that the OECD Commentary to the 2003 OECD Model is of great importance for the interpretation of tax treaties concluded before 2003, to the extent that the

provisions of the 2003 OECD Model correspond to the provisions of those earlier tax treaties; Federal Court (Switzerland), 29 November 2005, *A Holding ApS v. Federal Tax Administration*, 8 ITLR, 536 *et seq.*, at 546, para 3.4.5., where it was stated that later OECD Commentaries are supplementary means of interpretation, since they are generally intended to clarify already existing rules (*ibidem*, at 259-269, paras. 3.6.-3.6.3.); District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings (1996) Ltd v. Holon Assessing Office*, 10 ITLR, 524 *et seq.*, at 546, where it was affirmed that the OECD Commentaries that have been changed with regard to unchanged articles are to be applied even with reference to treaties concluded prior to the changes, since the Commentaries give expression to the consensus among the States that are members of the OECD as to the correct application and proper interpretation of existing provisions in specific situations; Special Commissioners (United Kingdom), 19 February 2008, *Smallwood and another v. Revenue and Customs Commissioners*, 10 ITLR, 574 *et seq.*, at 606, where it was held: “The relevance of commentaries adopted later than the treaty is more problematic because the parties cannot have intended the new commentary to apply at the time of making the treaty. However, to ignore them means that one would be shutting one’s eyes to advances in international tax thinking, such as how to apply the treaty to payments for software that had not been considered when the treaty was made. The safer option is to read the later commentary and then decide in light of its content what weight should be given to it” (the author acknowledges that such an excerpt could be quoted as well as an instance of courts and tribunals seeming more hesitant to use later Commentaries in order to construe previously concluded tax treaties; however, in the author’s opinion, it shows the theoretical willingness of the Special Commissioners to take into account, and even significantly rely on, later Commentaries as long as they do not revert the common understanding of the parties as reasonably inferred from previous Commentaries and other items of evidence; in fact, at 615, with regard to the possibility to use the 2000-amended OECD Commentary on Article 4(3) in order to interpret Article 4(3) of the 1981 Mauritius-United Kingdom tax treaty, the Special Commissioners held: “We see no reason why this approach should not be adopted even though it is in the commentary issued after the treaty. It is not significantly different from the earlier commentary”; see also, in this respect, First-Tier Tribunal (United Kingdom), 1 April 2010, *FCE Bank plc v. Revenue and Customs Commissioners*, 12 ITLR, 962 *et seq.*, at 972 and 994; Supreme Court (Norway), 24 April 2008, *Solvik v Staten v/Skatt Øst*, 11 ITLR, 15 *et seq.*, at 34-35, paras. 47-48, where one gets the impression that the Court, for the purpose of favoring the inter-temporal dynamic application of tax treaties, would be even willing to construe them according to well-proved and generally accepted State practice superseding the latest version of the OECD Commentary; Income Tax Appellate Tribunal of Mumbai (India), 13 August 2008, *Deputy Director and Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 ITLR, 103 *et seq.*, at 120-124, where the tribunal, quite interestingly, after having pointed out that recourse to the OECD Commentary should be limited to cases where “the language of the treaty is drafted loosely or in an inclusive way or it does not unearth the intention of the Contracting States in a lucid manner” and having noted that this was the case with regard to the tax treaty provision at stake (*ibidem*, at 119), made abundant reference to the Commentary on Article 8 OECD Model, as modified in 2005, for the purpose of interpreting Article 9 of the 1993 India-United Kingdom tax treaty (corresponding to Article 8 OECD Model); Federal Court of Appeal (Canada), 26 February 2009, *Prévost Car Inc v. R.*, 11 ITLR, 757 *et seq.*, at 766-767, paras. 9-11, where the Court maintained that later Commentaries should be considered a relevant guide to the interpretation and application of previously concluded tax treaties, where the wording of such treaties mirror the wording of the OECD Model and those commentaries (i) represent a fair interpretation of such wording, (ii) do not conflict with the Commentary existing at the time of the treaty conclusion and (iii) neither Contracting State has registered an objection (i.e. an observation) to those later commentaries (it is to be noted that, in this regard, the Court made reference to the 2003 OECD Model Introduction, where “the OECD invites its members to interpret their bilateral treaties in accordance with the Commentaries ‘as modified from time to time’ (para 3) and ‘in the spirit of the revised commentaries’ (para 33)”; Tax Court (Canada), 18 September 2009, *Antle and others v. R.*, 12 ITLR, 359 *et seq.*, at 398-399, para. 96, where the Court made reference to paragraphs 7 and 9 of the Commentary to Article 1 OECD Model, as modified in 2003, in order to construe the 1980 Barbados-Canada tax treaty; Supreme Court (Japan), 29 October 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, 12 ITLR, 645 *et seq.*, at 654, para. 4, where reference is made to the Commentary to Article 7 OECD Model, as amended in 2003, for the purpose of interpreting Article 7 of the 1994 Japan-Singapore tax treaty; Tax Court (Canada), 8 April 2010, *TD Securities (USA) LLC v. R.*, 12 ITLR, 783 *et seq.*, at 814-816, where the Court made reference to the Commentary to Article 1 of the OECD Model (as modified in 2000 in order to include the conclusions of the OECD

version of the Commentary modified¹⁵³⁴ after the conclusion of the tax treaty to be interpreted.¹⁵³⁵

In the author's opinion, at the international law level later Commentaries should be heavily relied on for the purpose of interpreting formerly concluded tax treaties,¹⁵³⁶ unless evidence exists of a common intention of the parties to differently construe the tax

Partnerships Report) in order to interpret the 1980 Canada-United States tax treaty (before new paragraph IV(6), made by the 2007 protocol, entered into force) and noted that neither Canada nor the United States made an observation on the new relevant paragraphs of the 2000 OECD Commentary.

¹⁵³⁴ Obviously, the modification here is intended to concern parts of the Commentary relevant for the purpose of construing the tax treaty provisions at stake before the court or tribunal.

¹⁵³⁵ See Administrative Court of Appeal of Paris (France), 30 January 2001, *Re Schneider SA*, 3 ITLR, 529 *et seq.*, conclusions of the Commissaire du Gouvernement at 554; Conseil d'Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 ITLR, 1077 *et seq.*, conclusions of the Commissaire du Gouvernement at 1117; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 ITLR, 784 *et seq.*, minority opinion at 816; Conseil d'Etat (France), 30 June 2003, *Minister for the Economy, Finance and Industry v. Interhome AG*, 5 ITLR, 1001 *et seq.*, conclusions of the Commissaire du Gouvernement at 1039, where, although concluding that the paragraphs of the OECD Commentary included (or modified) after the conclusion of the relevant tax treaty cannot clarify the meaning of its provision (*author's note*: probably in the sense that they cannot be regarded as an expression of the common intention of the parties in respect of the meaning to be attributed to these provisions), nonetheless conceded that they are an important indication of the generally accepted interpretation of provisions drafted along the lines of those included in the OECD Model; Court of Federal Claims (United States), 14 November 2003, *National Westminster Bank plc v. United States of America*, 6 ITLR, 292 *et seq.*, at 310-312 where, with reference to two OECD Committee on Fiscal Affairs' discussion drafts (i.e. the discussion draft *The Attribution of Profits to Permanent Establishments*, released by the OECD Committee on Fiscal Affairs in February 2001, and part II (Banks) of the Discussion draft *The Attribution of Profits to Permanent Establishments*, released by the OECD Committee on Fiscal Affairs in March 2003), the Court held that they were not relevant for the purpose of interpreting the 1975 United States-United Kingdom tax treaty, since (among other reasons) they were many years subsequent to the treaty and thus offered no insights into the genuine shared expectations of the parties; Conseil d'Etat (France), 30 December 2003, *Re Société Andritz Sprout Bauer*, 6 ITLR, 604 *et seq.*, at 638-639; Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 ITLR, 25 *et seq.*, at 52, para. 86, where the Court concluded that "one can only consult the OECD commentary in existence at the time the treaty was negotiated without reference to subsequent revisions"; Tax Court (Canada), 10 September 2009, *Garron and others v. R*, 12 ITLR, 79 *et seq.*, at 130-131, paras. 374-376, where the Court (strictly speaking in an *obiter dictum*) affirmed the relevance of the 1977 OECD Commentary in order to interpret the 1980 Barbados-Canada tax treaty and, in particular, to tackle the issue of the interaction between Canadian anti-avoidance provisions and that treaty, thus implicitly rejecting the relevance of the 2003 Commentary for that purpose (in this respect, however, it could be taken the view that the 2003 amendments to the Commentary to Article 1 of the OECD Model contradicted the position expressed in the OECD Commentaries preceding the conclusion of the Barbados-Canada tax treaty and only because of this specific circumstance was it appropriate not to take the 2003 Commentary into account in order to construe that treaty); Conseil d'Etat (France), 31 March 2010, *Société Zimmer Ltd v. Ministre de l'Economie, des Finances et de l'Industrie*, 12 ITLR, 739 *et seq.*, conclusions of the Rapporteur Public at 778 and 781. See also the similar position taken by the Danish tax authorities in the *Casino Copenhagen* case (see High Court (Denmark), 3 February 2000, *Casino Copenhagen K/S v. Ministry of Taxes*, 3 ITLR, 447 *et seq.*, at 451) accepting the irrelevance of the 1992 changes to the OECD Commentary to Article 15, concerning the meaning of the term "employer", with regard to a tax treaty concluded in 1961 and facts occurred in 1991.

¹⁵³⁶ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 26.04: "It is arguable that the OECD Member States have already agreed to use later OECD commentary to interpret earlier tax treaties – in line with the OECD Committee on Fiscal Affairs' conclusions to this effect".

treaty texts.¹⁵³⁷

Indeed, based on the analysis carried out in the previous section, it seems reasonable to envisage that OECD member States intend(ed) to attach to the terms and expressions of their tax treaties the meanings expounded in later OECD Commentaries, since:

- (i) the OECD Council Recommendation so provides;
- (ii) these meanings are going to be “previous” Commentaries meanings for the tax treaties subsequently concluded by the same States;
- (iii) the most sensible presumption in this respect, as previously outlined, is that, in the absence of clear evidence to the contrary, each State intends to attach the same meaning to the same (or corresponding) wording used in all its OECD Model-based tax treaties;
- (iv) those States concurred in the drafting and approval of the later Commentaries through their authorized representatives at the OECD Council and Committee for Fiscal Affairs.

Foremost, it appears more reasonable that the OECD member States intend to interpret their tax treaties (in particular those concluded with each other) in accordance with the current OECD Commentary rather than to construe those treaties in a different fashion since, while elements and items of evidence exist in support of the former conclusion, generally no element other than the very same (vague and ambiguous) texts of those tax treaties may be relied on in order to support the latter conclusion. Only where the analysis of the overall context showed evidence of the possible intention of the contracting States to attribute a meaning different from that elucidated in later OECD Commentaries to the treaty terms and expressions could the interpreter fairly conclude for the irrelevance of later Commentaries on the basis of his balanced assessment of the conflicting items of evidence.

The most popular argument employed by scholars and judiciaries to support a very limited recourse to later OECD Commentaries is that the contracting States could not have intended, at the moment of concluding the tax treaty, to interpret it in accordance with the subsequent OECD Commentary. Thus, from a diachronic perspective, the later OECD Commentary could not be regarded as representing the common understanding of the parties *at the time of the treaty conclusion*.

While this argument may have some merit where tax treaties are interpreted and applied at the domestic law level, mainly due to the limits and requirements imposed by the constitutions of many States to their governments and parliaments in connection with the conclusion of treaties and their implementation in the domestic law systems, at the international law level its appeal is fairly narrow.

¹⁵³⁷ The interpreter should look for such evidence in the deviations of the tax treaty texts from the OECD Model, or in extra-textual elements. The different meanings theoretically attributable to the OECD Model-type provisions (as compared to those attached thereto by the OECD Commentary) should not be regarded, in this respect, as evidence of a different intention of the parties exactly because those provisions are presumed to be generally construed by the parties in accordance with later OECD Commentaries (a different approach in that respect would lead to a circular inference).

Under Articles 31-33 VCLT, indeed, the interpreter is called upon to determine the utterance meaning of the tax authentic treaty texts, which must be based on all elements that diachronically may provide a reliable evidence of the common intention of the parties in that respect, including elements subsequent to the treaty conclusion. Articles 31(3)(a) and (b) VCLT, for instance, clearly attribute significant relevance to the subsequent agreements between and the subsequent practice of the contracting States for the purpose of construing the treaty.

Moreover, it is interesting to recall that the main reason why the *travaux préparatoires* had been (de)classified among the supplementary means of interpretation in the VCLT is that they normally record only interim and partial agreements (if any) reached among the parties in the course of the negotiations, or even only the position of some of the parties, so that in most cases there is no adequate evidence that they represent the final agreement of the contracting States as regard to the interpretation of the treaty provisions.

This specific problem, however, does not concern the Commentaries to the OECD Model, since such Commentaries are published together with, or after, the relevant Model. Similarly, if one accepts the theoretical relevance of the OECD Commentary for the purpose of interpreting tax treaties, the risk does not exist that the interpretations put forward in the OECD Commentaries published after the treaty conclusion represent just an interim and not the final agreement between the contracting States as regards the interpretation of that treaty. Clearly, one could argue that the OECD Commentaries do not reflect the agreement of the parties at all, but such an argument concerns the different issue of the relevance, for interpretative purposes, of a legally non-binding international law instrument and does not impinge on the theoretical capability of a later instrument to properly record the actual and current agreement of the parties in respect of a previously concluded treaty.

The authors and judges upholding the theoretical relevance of later OECD Commentaries¹⁵³⁸ have generally drawn the limit to the use of such Commentaries by means of the following two conditions:

- (i) they represent a fair interpretation of the wording of the relevant tax treaty and
- (ii) they do not conflict with the Commentary existing at the time of the treaty conclusion.

With regard to the first condition, it is the author's view that, due to the vague and sometime ambiguous wording of the OECD Model (reproduced in the relevant tax treaty), which, on the one hand, has to deal with future facts and circumstances and, on the other hand, has to provide within few pages a standardized system of rules capable of interacting with and connecting the contracting States' heterogeneous income tax systems,¹⁵³⁹ the interpreter should be very cautious in concluding that later OECD

¹⁵³⁸ See, for instance, Federal Court of Appeal (Canada), 26 February 2009, *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq.*, at 766-767, paras. 9-11; D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), pp. 110-111; D. A. Ward, commentary to *Prévost Car Inc v. R*, 11 *ITLR*, 757 *et seq.*, at 763-764.

¹⁵³⁹ Which generally differ from each other to a significant extent and are built on thousands of pages of

Commentaries do not represent a fair interpretation of the wording of the relevant tax treaty, unless the position set out in the OECD Commentary can be said to be manifestly absurd or unreasonable, which is unlikely to be the case. In any event, this test does not appear different from that applicable in respect to earlier OECD Commentaries.

With regard to the second condition,¹⁵⁴⁰ the author submits that it should not be seen as an absolute one, since the interpreter is bound in any case to look for and establish the treaty utterance meaning: as the analysis of the inter-temporal law issue has shown,¹⁵⁴¹ in treaty law “the intention of the parties is really the key”.¹⁵⁴² Hence, the subsequent evolution of legal concepts and constructions of standard treaty provisions, as in the case of later OECD Commentaries, should be taken in due regard for the purpose of interpreting treaties concluded earlier where it appears reasonable that this was (or is) the intention of the parties. The assessment and balancing of the contrary items of evidence remains in the discretion of the interpreter, in light of the treaty’s overall context.

Ultimately, for the same reasons set out in the previous section, the above conclusions appear applicable by analogy in respect of tax treaties concluded by OECD non-member States as well.

4.5. *Conclusions on research question b)*

The analysis carried out in the previous sections has led the author to conclude that:

- (i) in the absence of any significant departure in the tax authentic treaty texts from the OECD Model, or of any extra-textual evidence of a contrary agreement between the parties, the interpreter should construe OECD Model-based tax treaties in accordance with the OECD Commentary, any other construction appearing less reasonable; and
- (ii) later OECD Commentaries should be heavily relied on for the purpose of

statutes, tax authorities positions and case law.

¹⁵⁴⁰ The additional proposition of the ITG that “there is little or no legal justification for the use of [later] commentaries where they fill gaps in the Model by purporting to fill gaps in the commentaries” appears questionable, in particular as it is far from clear what a “gap in the Model” is (see D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications, 2005), pp. 110-111). For instance, the alleged existence of a “gap” in a OECD Model distributive rule article invariably leads to the application of another article (e.g. Article 21, or Article 7). Is that really a gap? Wouldn’t the interpreter in any case look for an interpretation of the former article allowing him to apply it, if he considered it reasonable to conclude that the contracting States could have never intended to apply the latter article in the case actually at stake? How to distinguish at all a proper gap from the case where vague terms or expressions are used? See, in this respect, L. De Broe and J. Werbrouck, “Kroniek Internationaal Belastingrecht 2001-2002”, in *Tijdschrift Rechtspersonen en Vennootschappen* (2002), 604 *et seq.*, in particular at 607 *et seq.*

¹⁵⁴¹ See section 2.3.3.4 of Chapter 3 of Part II.

¹⁵⁴² See R. Higgins, “Some Observations on the Inter-Temporal Rule in International Law”, in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 173 *et seq.*, at 181.

interpreting formerly concluded tax treaties, unless evidence exists of a common intention of the parties to construe them differently.

This implies that the OECD Commentaries, both previous and subsequent to the conclusion of the relevant tax treaty, constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, in particular by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT.

As a final remark, it may be pointed out that the OECD Commentary, like any other written text, also requires being construed, in order to be used in the process of tax treaty interpretation.¹⁵⁴³

In this respect, the author submits that the interpreter should establish the utterance meaning of the OECD Commentary in light of its overall context, i.e. through the analogical application of the rules encompassed in Articles 31 and 32 VCLT, and that, whenever a *prima facie* discrepancy in meaning arises between the English and French official versions thereof, such a discrepancy should be removed on the basis of the analogical application of the rules enshrined in Article 33(4) VCLT.

5. The interpretation of legal jargon terms employed in (multilingual) tax treaties

5.1. Research questions addressed in this section

The present section is aimed at tackling the following issue.

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

This issue may be divided into the following questions, here briefly illustrated by means of examples.

- i. Does Article 3(2) have an impact on the nature of the potential discrepancies in meanings among the authentic texts of a multilingual tax treaty? Where this question is answered in the affirmative, which are the*

¹⁵⁴³ See B. Arnold, “The Interpretation of Tax Treaties: Myths and Realities”, 64 *Bulletin for international taxation* (2010), 2 *et seq.*, especially at 8-9. For judicial instances of interpretation of the OECD Commentary, see Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq.*, at 816; Income Tax Appellate Tribunal of Delhi (India), 29 August 2008, *Fugro Engineers BV v. Assistant Commissioner of Income Tax*, 11 *ITLR*, 421 *et seq.*, at 434-435, para. 4; District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq.*, at 859; Tax Court (Canada), 9 September 2009, *Lingle v. R.*, 12 *ITLR*, 55 *et seq.*, at 71-72, para. 28. See also the interpretation of paragraph 3 of the Commentary on Article 3(1) OECD Model in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.07.

various types of prima facie discrepancies that may arise? Should the interpreter put all of them on the same footings for the purpose of interpreting multilingual tax treaties?

While the various authentic texts of a multilingual treaty are generally interpreted in accordance with their own *genius*,¹⁵⁴⁴ the presence of Article 3(2) in OECD Model-based tax treaties may have a bearing on such a practice.

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

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

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

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

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

¹⁵⁴⁴ See YBILC 1966-II, p. 100, para. 23, per Sir Humphrey Waldock, according to whom attributing legal value to a comparison for the purpose of determining the ordinary meaning of the terms in the context of the treaty could have encouraged attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning of the treaty.

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

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

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

With regard to the above-described types of discrepancies, the foremost question that the interpreter should ask himself is whether any obligation exists for him to take care and reconcile them,¹⁵⁴⁵ at least to a certain extent and in certain occasions, or whether he may always and exclusively rely on the meaning emerging from the interpretation of one authentic text, taken in isolation. In particular, doubts may arise of whether the interpreter is entitled to rely exclusively on the domestic law meaning of the terms employed in the authentic text drafted in the official language of the State applying the treaty (if existing), disregarding the possible existence of *prima facie* different meanings that might be determined on the basis of the other authentic texts.

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

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

Assume that the Italy-United Kingdom tax treaty, authenticated in the English and Italian languages, makes reference to the “board of directors” of a company in the authentic English text of Article 16, while in the authentic Italian text thereof it employs the term “consiglio di amministrazione”.¹⁵⁴⁶ Although under the Italian Civil Code the

¹⁵⁴⁵ A similar question may be asked in respect of the alleged divergences existing between the apparent meanings of the terms employed in one of the authentic treaty texts and those underlying the corresponding terms used in the OECD Model official versions.

¹⁵⁴⁶ Actually, the Italian authentic text of the 1988 Italy-United Kingdom tax treaty employs the expression

“consiglio di amministrazione” is entrusted with pure management functions, bilingual dictionaries generally equate it to the “board of directors”, which under English law is entrusted with both management and supervisory functions.

In this case, the interpreter faced with such a *prima facie* discrepancy should decide whether:

- (a) that discrepancy should be removed by attributing the same meaning to both the terms “board of directors” and “consiglio di amministrazione”, for instance by attaching to the latter the broader meaning of the former (or *vice versa*), or whether
- (b) Article 3(2) of the treaty required those terms to be construed more narrowly where Italy applies the tax treaty and more broadly where the United Kingdom applies it.¹⁵⁴⁷

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

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

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

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

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

¹⁵⁴⁷ Assuming here, for the sake of simplicity, that Italy applies the treaty whenever a person resident in the United Kingdom receives income in his capacity as a member of the management or supervisory boards of companies set up under Italian law and the United Kingdom applies the treaty whenever a person resident in Italy receives income in his capacity as a member of the management and supervisory board of companies set up under the laws of the United Kingdom.

5.2. *Introduction and structure of this section*

A quick look at the authentic texts of any OECD Model-type tax treaty will show, to practitioners experienced in the domestic income tax law of the contracting States, that a large part of the terms used in those texts are the same legal jargon terms used under domestic law or may be considered synonyms and proxies thereof.

With regard to such terms, the author has already mentioned the difficulties connected to their uniform interpretation, in particular where their construction is meant to be autonomous. It is thus unsurprising that domestic courts and tribunals generally do not embark on an attempt to construe an autonomous meaning of such terms, considering the problems and uncertainties connected to that quest where the interpreter is faced with complex and diverse national systems of tax law subject to frequent changes.¹⁵⁴⁸

In order to overcome this difficulty, contracting States have relied for many years on their respective domestic law meanings in order to construe tax treaties. As Sasseville put it, “[c]learly, it would be impossible to draft a treaty and to know exactly what is the meaning of the terms used under the legal system of each State. In order to protect both contracting parties and avoid endless negotiations, the most practical approach is for each country to be reasonably certain that it will be able to apply the treaty on the basis of its own understanding of what it has agreed to, based on its own legal system.”¹⁵⁴⁹

The principal means to achieve this result is to include in tax treaties a provision similar to Article 3(2) OECD Model, which ensures many practical advantages, such as:

- (i) the fact that taxpayers, tax officials and tax courts may rely on the familiar meaning of legal jargon terms under their respective domestic law in order to interpret the treaty;
- (ii) the limitation of the otherwise numerous alternative meanings that might be attached to treaty undefined legal jargon terms;
- (iii) the resulting smoother interaction between the relief rules provided for in the tax treaty and the charging rules established under domestic law;
- (iv) legal certainty.¹⁵⁵⁰

Similarly, other provisions of the OECD Model refer to the domestic laws of the contracting States for the purpose of their interpretation.

The impact of Article 3(2), and other treaty provisions referring to the domestic laws of

¹⁵⁴⁸ See accordingly J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 15-16.

¹⁵⁴⁹ J. Sasseville, “The OECD Model Convention and Commentaries”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 133.

¹⁵⁵⁰ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 208, m.no. 60; Belgian Tax Authorities in the Circular Letter No. AFZ/2004/0053 of 16 January 2004.

the contracting States, on the interpretation of tax treaties by national courts and tribunals has been tremendous. Good evidence thereof is the overwhelming recourse to domestic law made by national courts and tribunals for the purpose of interpreting the undefined legal jargon terms employed in the relevant tax treaty provisions, including the undefined terms used in the definition of other terms.¹⁵⁵¹

¹⁵⁵¹ See Federal Court (Canada), 23 July 1990, *Hale v. R*, 90 DTC 6481, at 6487-6488, where the Court referred to domestic law for the purpose of deciding whether the income derived by a former employee of a Canadian resident company from stock appreciation rights, granted to him by that company during the employment period, was to be regarded as “salaries, wages and other similar remuneration” under Article 15 of the 1978 Canada-United Kingdom tax treaty; Court of Appeal of Brussels (Belgium), 30 April 1998, *NV Immo Part v. Belgium*, 1 ITLR, 463 *et seq.*, at 479-481, where the judge made reference to domestic law in order to determine whether a United States general partnership was to be treated as fiscally transparent and, therefore, to whom its income should be attributed for tax treaty purposes, and at 483, where the judge referred to domestic law for the purpose of characterizing as an advance payment (in contrast to income) a certain payment in cash; Hoge Raad (Netherlands), 28 October 1998, case 32330, 1 ITLR, 551 *et seq.*, at 559 and 564, where the Court referred to domestic law in order to interpret the expression “any income” used in Article 27(1) of the 1980 United Kingdom-Netherlands tax treaty; Conseil d’Etat (France), 9 February 2000, *Re Hubertus AG*, 2 ITLR, 637 *et seq.*, conclusions of the Commissaire du Gouvernement at 653-654 and 656; Bundesfinanzhof (Germany), 21 September 1999, *Re A Foreign Silent Partnership*, 2 ITLR, 859 *et seq.*, at 866, where the Court made reference to domestic law for the purpose of determining whether income from an atypical silent partnership (“Atypische stille Gesellschaft” in German) constitute business profits for the purpose of the relevant tax treaty; Administrative Court of Appeal of Paris (France), 30 January 2001, *Re Schneider SA*, 3 ITLR, 529 *et seq.*, at 545, where the Court referred to domestic law for the purpose of determining the meaning of the expression “Les bénéficiers d’une entreprise d’un Etat contractant” in cases where the CFC rule applies under French domestic law; High Court (Denmark), 6 April 2001, *Halliburton Company Germany GmbH v. Ministry of Treasury*, 4 ITLR, 19 *et seq.*, at 41-42, where the Court made reference to domestic law in order to construe the terms “employer” and “employee” (and their corresponding Danish terms), as used in the 1948 Denmark-United States tax treaty and the 1955 Denmark-Canada tax treaty, in the case of hiring out of labor; *similarly*, the majority opinion in Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 ITLR, 784 *et seq.*, at 813; Conseil d’Etat (France), 27 July 2001, *Re SA Golay Buchel France*, 4 ITLR, 249 *et seq.*, at 257-258 and conclusions of the Commissaire du Gouvernement at 260-261, where both the Court and the Commissaire pointed out that although the term “interest” was autonomously defined in Article 12(3) of the relevant tax treaty, thus excluding the possibility of attributing to that term the meaning it had under French domestic law, the terms (“créances de tout nature”) used in the definition provided for in Article 11(3) were not in turn defined and, therefore, they were to be given the meaning they had under French domestic law, unless the context required a different construction, in accordance with Article 3(2) of the treaty (explicitly *contra*, Supreme Administrative Court (Czech Republic), 10 February 2005, *AAA v. Financial Directorate*, 8 ITLR, 178 *et seq.*, at 202; the court, however, in its following arguments, made abundant reference to Czech Republic private law, in particular to the private law and income tax law meaning of the Czech term corresponding to “corporate right”, in order to construe Article 10 of the relevant tax treaties - *ibidem*, at 203); Hoge Raad (Netherlands), 7 December 2001, case 35231, 4 ITLR, 558 *et seq.*, at 576, para. 3.3, in which the Court referred to domestic law in order to determine whether the recapture of the premiums on annuity policies, previously deducted by a taxpayer for the purpose of determining its taxable income, on the occasion of the surrender of the annuity by the non-resident taxpayer was to be regarded as an *item of income* for the purpose of the relevant tax treaty (question answered in the negative since, under Netherlands domestic law, such a recapture is seen as a *negative personal allowance* – i.e. a recapture of previously deducted personal allowances – and not as an item of income); Income Tax Appellate Tribunal of Mumbai (India), 27 September 2001, *Clifford Chance (United Kingdom) v. Deputy Commissioner of Income Tax*, 4 ITLR, 711 *et seq.*, at 732, para. 53, where the tribunal made reference to domestic law in order to determine the meaning of the term “business profits”; Federal Court of Appeal of Montreal (Canada), 15 March 2002, *Wolf v. R*, 4 ITLR, 755 *et seq.*, at 768-773 per Desjardins JA., at 781-787 per Decary JA. and at 788 per Noel JA., where reference was made to the civil code of Quebec and

domestic case law (both in common and civil law) for the purpose of determining whether the contractual relationship between a United States resident taxpayer and a Canadian resident company was to be regarded as one of “independent personal services” under Article XIV of the 1980 Canada-United States tax treaty, or as one of “dependent personal services” under Article XV of the same treaty; Supreme Administrative Court (Finland), 20 March 2002, *Re A Oyj Abp*, 4 *ITLR*, 1009 *et seq.*, at 1068, where the Court referred to domestic law in order to determine whether the CFC income imputed to a parent company was part of the “business profits” of the latter company for the purpose of Article 7 of the 1976 Belgium-Finland tax treaty; Conseil d’Etat (France), 28 June 2002, *Re Société Schneider Electric*, 4 *ITLR*, 1077 *et seq.*, at 1107-1108, and conclusions of the Commissaire du Gouvernement at 1118-1126, where reference to domestic law was made for the purpose of determining the meaning of the expression “Les bénéficiaires d’une entreprise d’un Etat contractant” in cases where CFC rule applies under French domestic law; Federal Court of Appeal (Canada), 4 February 2004, *Beame v. R*, 6 *ITLR*, 767 *et seq.*, at 772-724, paras. 17-21, where the Court made reference to domestic law in order to interpret the term “income” used in Article VI(1) of the 1966 Canada-Ireland tax treaty; Tax Court (United States), 29 June 2004, *Abeid v. Commissioner of Internal Revenue*, 7 *ITLR*, 202 *et seq.*, at 207, where the Court made reference to the domestic tax law meaning of the expression “adequate and full consideration”, which was used in the definition of “annuities” provided for in the English authentic text of Article 20(5) of the 1975 Israel-United States tax treaty; Administrative Court (Luxembourg), 17 January 2006, *Re XXX SA*, 9 *ITLR*, 176 *et seq.*, at 187-188, where reference to domestic law was made for the purpose of interpreting the term “déduction” in Article 24(1)(b) of the 1986 Luxembourg-Spain tax treaty (the court concluded that, since under Luxembourg’s domestic law a credit for foreign taxes is allowed only against Luxembourg corporate tax, and not against Luxembourg municipal business tax, under the 1986 Luxembourg-Spain tax treaty Spanish taxes might be credited only against Luxembourg corporate tax, notwithstanding the fact that also Luxembourg municipal business tax was regarded as an income tax under Article 2 of the treaty); First Council of Taxpayers (Brazil), 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue Department in Brasilia*, 9 *ITLR*, 627 *et seq.*, at 658, where reference was made to domestic law in order to determine whether the term “pagos” (“paid”) in the Portuguese authentic text of Article 10 of the 1974 Brazil-Spain tax treaty might be construed as denoting the attribution of the profits of a subsidiary, tax resident of Spain, to its parent company, tax resident of Brazil, under the CFC rule of the latter State; Conseil d’Etat (France), 29 December 2006, *Ministre de l’Economie, des Finances et de l’Industrie v. Société Bank of Scotland*, 9 *ITLR*, 683 *et seq.*, at 703, where the Court affirmed that the re-characterization, under French anti-avoidance law, (i) of a usufruct agreement on non-voting preference shares (of a French resident subsidiary) into a loan agreement and (ii) of a dividend payment (by the French resident subsidiary) into a loan reimbursement on behalf of the non-resident parent company debtor, might be applied as well for the purpose of the relevant tax treaties (i.e. the tax treaty between France and the State of residence of the parent company and the tax treaty between France and the State of residence of the usufructuary – loan creditor); High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 79-81, where the Court referred to domestic law for the purpose of determining the meaning of the term “days” as used in Article 3(1)(e)(ii)(bb) of the 1971 Italy-Ireland tax treaty, according to which “the term ‘resident of Italy’ means [...] any other person who is resident in Italy for the purposes of Italian tax and [...] if resident in Ireland [for the purposes of Irish tax] is present therein for a period or periods not exceeding in the aggregate 91 days in the fiscal year”; Tax Court (Canada), 28 September 2007, *Garcia v. Canada*, 10 *ITLR*, 179 *et seq.*, at 187-194, in particular paras. 28, 37, 41, 42, 47 and 49, where the Court made reference to Canadian domestic law, as interpreted by Canadian courts (see Supreme Court (Canada), 25 January 1983, *Nowegijick v. R*, [1983] 1 SCR 29 and Tax Court (Canada), 10 November 2006, *Kuwalek v. R*, 2007 DTC 199), for the purpose of construing the term “derived” as used in Article XV(1) of the 1980 Canada-United States tax treaty and, more specifically, of determining whether the sentence “salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State”, found in Article XV(1), prevented Canada from taxing a bonus accrued to an employee when he was tax resident of (and working in) the United States, but paid when he had already become tax resident of Canada (for treaty purposes): the Court concluded that, since under Canadian domestic law employment income (including bonuses) is taxable when received, Article XV(1) of the tax treaty did not preclude Canada from taxing the bonus; Bundesfinanzhof (Germany), 17 October 2007, *Re a Partnership*, 10 *ITLR*, 628 *et seq.*, at 646, where the Court relied on domestic law for the purpose of interpreting the undefined term “debt claim” (“Forderung” in the German authentic text) used in Article 11 of the 1989 Germany-United States tax treaty; Tax Court (Canada), 22 April

Against this background, the author has decided to devote the first part of this section to the study of the functioning of the rule of interpretation provided for in Article 3(2) OECD Model. This analysis is carried out in section 5.3.

Likewise, section 5.4 examines the other provisions of the OECD Model that refer to the contracting States' domestic laws for the purpose of construing undefined legal jargon terms.

Finally, section 5.5, elaborating on the results of the analysis carried out in the previous sections, attempts to answer the research questions outlined in section 5.1.

2008, *Prévost Car Inc v. R*, 10 *ITLR*, 736 *et seq.*, at 750, para. 40 and at 757, para. 62, where the Court, in connection with the interpretation of the terms “beneficial owner” and “bénéficiaire effective” in the English and French authentic texts of Article 10(2) of the 1986 Canada-Netherlands tax treaty, noted (i) that the concept of beneficial owner is not recognized in the civil law of Quebec, (ii) that the term “beneficial owner” is used in the English official version of the Canadian Income Tax Act, but its tax treaty correspondent “bénéficiaire effective” is not in the French official version thereof (other terms such as “propriété effective” and “droit de bénéficiaire” are used instead) and (iii) that such terms are not defined in the Canadian Income Tax Act; *ibidem*, at 765-769, in particular paras. 95, 98-100 and 105, where the Court concluded that (a) in both (Canadian) common law and civil law, the persons that ultimately receive the income are the owners of the income property, (b) in that respect and within the Canadian Income Tax Act system, the beneficial owner is the person who enjoys and assumes all the attributes of the ownership, i.e. the true owner of the property (income), (c) such a meaning applies as well to the terms “beneficial owner” and “bénéficiaire effective” as used in the relevant tax treaty; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 345-346, paras. 28-31, where the Court referred to domestic law for the purpose of construing the term “the Australian income tax” employed in Article 2(1)(a) of the 1980 Australia-Switzerland tax treaty; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*, at 698-699, paras. 102-106, where the Court referred to the tax imposed by the Commonwealth under the 1936 Australian Income Tax Assessment Act for the purpose of construing the expression “the Commonwealth income tax” employed in the 1967 Australia-United Kingdom tax treaty; Federal Regional Court (Brazil), 4 June 2009, *Federal Union v. Copesul – CIA/Petrochimica do Sul*, 12 *ITLR*, 150 *et seq.*, at 164 *et seq.*, where the Court relied on domestic law in order to determine whether the term “lucros das empresas” (“business profits”), employed in the 1984 Brazil-Canada tax treaty and in the 1975 Brazil-Germany tax treaty, denoted also fees for technical services; Tax Court of Münster (Germany), 22 February 2008, *Re Reduction of Profits in Connection with the Sale of Shares in S*, 12 *ITLR*, 274 *et seq.*, at 305-306, where the Court concluded that a hidden distribution of profits by a Netherlands resident subsidiary to a German resident parent company (substantially a transfer pricing secondary adjustment) constituted a dividend for the purpose of Articles 13 and 20 of the 1959 Germany-Netherlands tax treaty (corresponding to Articles 10 and 23 OECD Model, respectively), since the treaty did not include any definition of dividends and, under German domestic tax law (to which Article 2(2) of the tax treaty made a *renvoi*), that type of hidden distribution of profits was treated as a dividend (note that the court referred to the domestic law of Germany, as the State applying the treaty under Article 2(2) thereof, for the purpose of determining whether the Netherlands had a right to tax such hidden distribution under Article 13(4) of the tax treaty; it is however unclear if this amounted to a rejection of the OECD approach to conflicts of income qualification, since apparently the same qualification took place under Netherlands domestic law – see *ibidem*, at 306); see, implicitly, Court of Appeal of England and Wales (United Kingdom), 8 July 2010, *Smallwood and another v. Revenue and Customs Commissioners*, 12 *ITLR*, 1002 *et seq.*, at 1021, para. 36, where Patten LJ noted that Article 13(4) of the 1981 Mauritius-United Kingdom tax treaty only established the basis of taxation of gains for a residual category of property (i.e. property other than those dealt with in paragraphs 1 through 3 of the same Article 13) and, thus, was not concerned with how each of the contracting States chose to tax gains on the basis of residence: he therefore concluded that the issue of whether the taxpayer should be resident in the State at the time of disposal or at some other point in time was a matter for that very same State to decide as part of its own domestic law.

5.3. Article 3(2) OECD Model: history, structure and functioning

5.3.1. History of Article 3(2) OECD Model

No provision comparable to Article 3(2) OECD Model was included in the draft models and works drawn up under the auspices of the League of Nations and the Organization for European Economic Cooperation (hereafter “OEEC”). Despite this, the problem of allocating taxing rights among States having different categorizations of income had been already mentioned in the 1923 Report to the League of Nations prepared by Bruins, Einaudi, Seligman and Stamp, who noted that “the economic conception of income is so complex and that of the legal and statutory definitions of income by different countries are so diverse that the problem of double taxation is much more seriously complicated for this class of taxes than for any other”.¹⁵⁵²

Interestingly, in addition to not including any general rule similar to Article 3(2) OECD Model, the draft models up to the 1946 League of Nations London draft contained almost no definition of income types or categories. On the contrary, as Avery Jones has also noted,¹⁵⁵³ the common law countries, in particular the United States, had by the forties started to include more and more definitions of income types, as well as income sources.¹⁵⁵⁴ It is therefore not unexpected to find that a provision closely resembling Article 3(2) of the 1963 OECD Draft had been included, for the first time, in a tax treaty concluded between two common law countries, Article II(3) of the 1945 United States-United Kingdom tax treaty, which reads as follows:

In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.

From then on, a provision containing a general *renvoi* to the law of the State applying the treaty was included in almost all tax treaties concluded by common law countries

¹⁵⁵² See League of Nations Economic and Financial Commission, “Report on Double Taxation, submitted to the Financial Committee of the League of Nations by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp”, EFS 73, F 19 (Geneva: 3 April 1923), at 45. One possible reason why, notwithstanding this warning, no specific rule dealing with the possible qualification conflicts arising from the different domestic categorizations of income was included in the League of Nations drafts is that, at that time, “many pioneer international tax practitioners were convinced that the meaning of the “international tax language” in tax treaty should, and would, be determined by international or supranational courts” (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 2.02 and 10.01).

¹⁵⁵³ See J. F. Avery Jones, “The interaction between tax treaty provisions and domestic law”, in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 124.

¹⁵⁵⁴ See the 1942 Canada-United States and the 1945 United Kingdom-United States tax treaties.

and, after some years, in those concluded between civil law countries as well.¹⁵⁵⁵

The origin of such a provision may be traced back to the United States and United Kingdom domestic laws and regulations.¹⁵⁵⁶ In particular, the United States Regulations issued in 1940 under Article XXI of the 1939 United States-Sweden tax treaty, although the latter did not include a provision resembling Article 3(2) OECD Model, provided that any term used in those regulations and not defined in the treaty was to be given the meaning expressed by the definition (if any) included in the Internal Revenue Code.¹⁵⁵⁷ Yet this provision of the United States Regulations made no reference at all to the context. It was only in Article II(3) of the 1945 United States-United Kingdom tax treaty that contracting States, for the first time, made the application of the domestic law meaning to undefined treaty terms explicitly subject to the condition that the context did not otherwise require. That addition is generally considered to have its roots in the United Kingdom domestic law, where expressions such as “unless the context otherwise requires” had been largely used in statutes since the end of the XIX century.¹⁵⁵⁸

As far as the author is aware, Article 3(2) was suddenly included in the 1963 OECD Draft without any documented discussion, among the OECD member States’ representatives, on its purpose, scope, and significance. The English official version of Article 3(2) of the 1963 OECD Draft reads as follows (*emphasis added*):

As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State *relating to the taxes which are the subject of the Convention*.

In the 1977 OECD Model, the English official version of Article 3(2) was modified to a limited extent, most probably without any aim of changing its substance¹⁵⁵⁹ (*emphasis added*):

As regards the application of the Convention by a Contracting State any term not defined *therein* shall, unless the context otherwise requires, have the meaning which it has under

¹⁵⁵⁵ See, in this respect, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 18-19.

¹⁵⁵⁶ See J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 18, footnote 14.

¹⁵⁵⁷ See United States Regulations T.D. 4975, 1940-2 C.b. 43, 52. See also the Regulations issued under the 1942 Canada-United States tax treaty §519.1(b), §519.110(a) and §519.114(b); and those issued under the 1939 France-United States tax treaty §514.1(b), which made reference to the more general “internal revenue laws” for interpretive purposes.

¹⁵⁵⁸ See J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 93, in particular footnote 16.

¹⁵⁵⁹ See, accordingly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 10.01 and J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 19, in particular footnote 17; *contra* C. van Raad, “Interpretatie van belastingverdragen”, 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*, at 52-53, footnotes 19 and 21.

the law of that State *concerning the taxes to which the Convention applies*.

A more extensive amendment was included in the 1995 version, primarily in order to explicitly deal with the issue of the static or ambulatory reference to the contracting States' domestic law.¹⁵⁶⁰ This amendment led the English official version of Article 3(2) OECD Model in its current shape (*emphasis added*):

As regards the application of the Convention *at any time* by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning *that it has at that time* under the law of that State *for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State*.

The current French official version of Article 3(2) OECD Model reads as follows:

Pour l'application de la Convention à un moment donné par un État contractant, tout terme ou expression qui n'y est pas défini a, sauf si le contexte exige une interprétation différente, le sens que lui attribue, à ce moment, le droit de cet État concernant les impôts auxquels s'applique la Convention, le sens attribué à ce terme ou expression par le droit fiscal de cet État prévalant sur le sens que lui attribuent les autres branches du droit de cet État.

An analysis of the possible bearing of the above-reported amendments of the English official version of Article 3(2) OECD Model, as well as of the changes that the French official version has gone through,¹⁵⁶¹ is made in the following sections of this chapter.

With regard to the Commentary, the 1963 OECD Draft was quite laconic. It read, at paragraph 8:

The rule of interpretation laid down in paragraph 2 corresponds to similar provisions normally appearing in double taxation Conventions. The rule of interpretation in paragraph 2 of Article 6 on the taxation of income from immovable property, which has to be regarded as "lex specialis" is in no way affected by the present general rule of interpretation.

In the Commentary to the 1977 OECD Model, the above paragraph was replaced by the following (equally laconic) one:

This paragraph provides a general rule of interpretation in respect of terms used in the Convention but not defined therein.

The Commentary was significantly expanded in 1992 in order to deal with certain issues

¹⁵⁶⁰ I.e. whether the reference to the domestic law of the contracting States was intended as a reference to the domestic law as existing at the time of the treaty conclusion, or at the time of its application to a specific set of facts. This issue is dealt with in section 5.3.2.3 of this chapter.

¹⁵⁶¹ In 1977 the French official version of Article 3(2) OECD Model had been modified so that the expression "législation [...] régissant" was replaced by the expression "droit [...] concernant".

concerning the interpretation and application of tax treaty provisions similar to Article 3(2) OECD Model which had been pointed out by international tax scholars. In 1995, the OECD polished the wording of the existing paragraphs, without changing their substance, and added new paragraph 13.1, dealing with the amendments made in the 1995 version of Article 3(2) OECD Model. From then on, the Commentary to Article 3(2) OECD Model has remained untouched. It reads as follows:

11. This paragraph provides a general rule of interpretation for terms used in the Convention but not defined therein. However, the question arises which legislation must be referred to in order to determine the meaning of terms not defined in the Convention, the choice being between the legislation in force when the Convention was signed or that in force when the Convention is being applied, i.e. when the tax is imposed. The Committee on Fiscal Affairs concluded that the latter interpretation should prevail, and in 1995 amended the Model to make this point explicitly.

12. However, paragraph 2 specifies that this applies only if the context does not require an alternative interpretation. The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based). The wording of the Article therefore allows the competent authorities some leeway.

13. Consequently, the wording of paragraph 2 provides a satisfactory balance between, on the one hand, the need to ensure the permanency of commitments entered into by States when signing a convention (since a State should not be allowed to make a convention partially inoperative by amending afterwards in its domestic law the scope of terms not defined in the Convention) and, on the other hand, the need to be able to apply the Convention in a convenient and practical way over time (the need to refer to outdated concepts should be avoided).

13.1. Paragraph 2 was amended in 1995 to conform its text more closely to the general and consistent understanding of member states. For purposes of paragraph 2, the meaning of any term not defined in the Convention may be ascertained by reference to the meaning it has for the purpose of any relevant provision of the domestic law of a Contracting State, whether or not a tax law. However, where a term is defined differently for the purposes of different laws of a Contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over all others, including those given for the purposes of other tax laws. States that are able to enter into mutual agreements (under the provisions of Article 25 and, in particular, paragraph 3 thereof) that establish the meanings of terms not defined in the Convention should take those agreements into account in interpreting those terms.

5.3.2. *The renvoi to domestic law provided for in Article 3(2) OECD Model*

5.3.2.1. Forward

*“Article 3(2) was a brilliant solution. The result is that in any case where the treaty relieves a category of income from tax, the relief corresponds exactly with the internal law taxing provision. This is far more important than that the treaty category of income has the same scope in each State”*¹⁵⁶²

As Arnold puts it, “[a] tax treaty is negotiated by a particular country with its domestic tax system in mind. Tax treaties limit domestic tax; they do not generally impose tax themselves. Tax treaties make sense only in the context of a domestic tax system; they are accessory to domestic tax systems and do not have any independent existence or meaning. This relationship between tax treaties and domestic law is illustrated by Art. 3(2) of the OECD Model”.¹⁵⁶³

Such a relationship between tax treaties and the contracting States’ domestic law may, and generally does, lead the former to have different effects when applied by the two contracting States.¹⁵⁶⁴

From a tax policy perspective, the great difficulty in achieving equality of tax treatment in both contracting States, due to the interaction between the tax treaty provisions and the (generally different) domestic tax law provisions,¹⁵⁶⁵ might have as its natural consequence that of driving contracting States to make all possible efforts in order to render such an interaction as effective and efficient as possible, so as at least to render tax treaties easy to apply and avoid instances of double non-taxation.

That is what OECD member States actually did through Article 3(2) OECD Model, the latter establishing the rule of law by means of which domestic law provisions are made capable of interacting with tax treaty provisions: via Article 3(2), tax treaty provisions are construed as the rules best fitting the underlying domestic tax law rules of the two contracting States.

The unavoidable other side of the coin is that, where each contracting State construes the relevant treaty terms in accordance with the meaning they (or synonyms and proxies thereof) have under its own domestic law, the frequent difference of meaning between the corresponding terms used under the domestic laws of the two contracting States inevitably leads to a difference between the meanings attributed to the

¹⁵⁶² J. F. Avery Jones, “The interaction between tax treaty provisions and domestic law”, in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 125.

¹⁵⁶³ B. Arnold, “The Interpretation of Tax Treaties: Myths and Realities”, 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 9-10.

¹⁵⁶⁴ See Supreme Court (United States), 29 April 1963, *Maximov v. United States*, 373 U.S. 49 (1963), at 54.

¹⁵⁶⁵ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 12.01, according to whom “tax treaties will not normally have an equal fiscal effect in each contracting State. This is because the effect of a tax treaty in each State will primarily depend upon each State’s tax laws – and each State’s tax laws will differ. [...] Accordingly, the ordinary meaning of reciprocally-expressed tax treaty terms should not be distorted in an attempt to achieve “equality of effect”. A tax treaty must simply be applied – regardless of its effect (if any) in each State”. The author, in this respect, (also) refers to the following case law: District Court for Northern District of California (United States), 6 April 1956, *American Trust Company v. James G. Smyth*, 141 F. Supp. 414, and Supreme Court (United States), 29 April 1963, *Maximov v. United States*, 373 U.S. 49 (1963). See also *ibidem* at 10.02 and 10.03.

very same treaty provisions by the two contracting States,¹⁵⁶⁶ unless the context requires a uniform meaning to be attached thereto. Such differences of meaning may in turn lead the two contracting States, depending on the facts of the case, to apply two different treaty provisions (distributive rules) in comparable circumstances.

Article 3(2) is often said to encompass a renvoi to the substantive *lex fori*,¹⁵⁶⁷ i.e. a type-II *renvoi*. Tax treaties are, in the vast majority of cases, interpreted and applied in order to determine whether they limit the taxing rights that a contracting State has under its domestic tax law; therefore, they are generally construed and applied together with and in relation to domestic tax law. Differently from what happens in the field of private law, where the rules of private international law applicable in one State may lead a court of that State to make reference to and apply the substantive private law rules of a different State in order to solve a dispute, in the income tax field domestic courts and tribunals generally do not apply (and enforce) other States' domestic tax law, but only their own States' domestic tax law. This means that tax treaties are, in most cases, interpreted and applied by the courts and tribunals of the State whose domestic income tax law may be limited by the treaty provisions to be construed. For this reason, Article 3(2) OECD Model, which makes reference to the law of the contracting State applying the treaty, may appear to encompass a *renvoi* to the *lex fori*.

However, this classification appears misleading and based on an “accident” (in its philosophical sense) of the *renvoi* established by Article 3(2). The main purpose of Article 3(2) *renvoi* is to guarantee a correspondence and a strict interaction between the domestic law provisions imposing tax on certain categories of income and the tax treaty provisions relieving that taxation, which entails an ontological *renvoi* to the domestic law that encompasses the latter provisions; it is only by “accident” that the latter is also the domestic law of the State of the court or tribunal deciding the relevant case, since it is theoretically possible that this is not the case.¹⁵⁶⁸ Moreover, it leads to the wrong inference that the national court or tribunal, faced with a case (also) concerning the

¹⁵⁶⁶ Fantozzi, in this respect, affirms that “in the case of [tax treaties], there is the meeting of two legal worlds, often very different. The treaty, in its various linguistic versions, becomes the means by which these two different worlds communicate, the screen through which the two legal systems see each other. It is, then, clear that in this context, the meaning to be attributed to the words requires a deeper understanding of the juridical concept beneath the words, as it applies in the other country's legal system. [...] one could say that the interpreter of a [tax treaty] deals with fluid concepts and therefore translation needs, necessarily, to be coupled with classification – since the envelop [author's note: i.e. the “words”] has to be hard, this time is the container [author's note: i.e. the “words”] that gives the shape to the content [author's note: i.e. the “juridical concept”]” (A. Fantozzi, “Conclusions”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), pp. 335 *et seq.*, at 338).

¹⁵⁶⁷ See, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 208, m.no. 59); S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), p. 313, footnote 114.

¹⁵⁶⁸ E.g. where a case is submitted to an arbitral tribunal; or in the much more common case of a national court called to apply a provision similar to Article 23-A OECD Model, for the purpose of which it is compelled to check whether the other contracting State may tax the relevant item of income according to the provision of the tax treaty (where the court is willing to follow the directions encompassed in the Commentary to Article 23 OECD Model).

interpretation and application of a specific tax treaty provision, must construe all the provisions of that tax treaty by reference of its own domestic law, unless it is otherwise explicitly provided. However, as the OECD has recognized since 2000 in paragraphs 32.1-32.7 of the Commentary to Article 23 OECD Model,¹⁵⁶⁹ there are cases where the relevant national court or tribunal has to look at the other contracting State's law rather than at its own law, for the purpose of interpreting certain tax treaty provisions, namely where a court of the residence State is to decide, for the purpose of granting tax relief under Article 23 of a OECD Model-type tax treaty, whether the other contracting State may tax an item of income of the taxpayer in accordance with the provisions of that treaty.

Article 3(2) *renvoi*, therefore, should be better considered to be a type-IV *renvoi*, the relevant domestic law being that of the State whose right to tax under its own income tax law might be limited by the tax treaty provisions to be interpreted,¹⁵⁷⁰ or, where the treaty provisions may not have such effect, the law of the State bound by the application of those provisions.

Finally, the role that the overall context plays for the purpose of the *renvoi* provided for in Article 3(2) OECD Model is worth highlighting.

First, the overall context determines the *limes* of the concept, underlying each tax treaty undefined term, which cannot be crossed by means of the *renvoi* to the domestic law concepts.¹⁵⁷¹

Second, treaty undefined legal jargon terms are sometimes ambiguous under the domestic law of the State applying the treaty. In those cases, the underlying domestic law concept to be applied in order to construe the treaty provision employing that legal jargon term must be selected among the various possible domestic law concepts on the basis of an analysis of the overall context.

Third, where the contracting States' official languages are not used as authentic languages of the treaty, the issue arises as to what should be considered the terms that, in the legal jargon of such contracting States, correspond to the terms used in the authentic texts of the treaty. Such correspondence should be established by the interpreter on the basis of the overall context, in particular by taking into account specialized bilingual dictionaries, comparative law studies, other tax treaties concluded by the contracting States (where both languages¹⁵⁷² are used as authentic treaty languages), the object and purpose of the relevant tax treaty provision, other related provisions of the treaty, the OECD Commentary.¹⁵⁷³

¹⁵⁶⁹ See also paragraph 8.10 of the Commentary to Article 15 OECD Model.

¹⁵⁷⁰ I.e. where provisions similar to those covered in Chapters III to V and Article 24 of the OECD Model are at stake.

¹⁵⁷¹ The overall context, in fact, requires the interpreter to disregard the part of the domestic law concept (i.e. the denotata) that lays outside those *limes*. The role played by the overall context in this respect is analysed in section 5.3.3.2 of this chapter.

¹⁵⁷² I.e. the official language of the States party to the tax treaty to be interpreted and (at least) one authentic language of such a treaty.

¹⁵⁷³ Such means of interpretations establish the correspondence between two terms of two distinct legal jargons based on (i) the similarity of the functions performed by the concepts underlying those two terms in their

Fourth, the overall context generally guides the interpreter in deciding whether proxies and assimilations under domestic law are to be taken into account for the purpose of construing the undefined treaty terms.

The following subsections analyse the most relevant theoretical issues arising from the application of Article 3(2) OECD Model.

5.3.2.2. Which State is applying the tax treaty? Interaction between Article 3(2) and the tax relief rule

For a long time scholars have debated on which contracting State should be regarded as the State applying the tax treaty for purposes of applying Article 3(2).

This debate has been particularly lively in respect of the case where the residence State has to determine whether it must grant exemption or credit under a tax relief article drafted along the lines of Articles 23-A and 23-B OECD Model, which compel the residence State to grant relief whenever an item of income may be taxed by the other contracting State “in accordance with the provisions of [the tax treaty]”.

In this respect, the main issue is whether the residence State, in order to determine whether the other contracting State may tax a certain item of income in accordance with the provisions of the tax treaty, may construe the latter provisions by attributing to their undefined legal jargon terms the meaning they have under its own domestic law, disregarding the meaning that the very same (or corresponding) terms have under the law of the other contracting State. This issue is commonly referred to as a matter concerning “conflicts of qualification”.¹⁵⁷⁴

Two conflicting solutions have been put forward by scholars in order to solve “conflicts of qualification”, both somewhat relying (although to a different extent) on the meaning of the term “application” employed in Article 3(2) OECD Model and, more generally, on the object and purpose of that article.

According to a first solution, each contracting State always refers to its own domestic law in order to determine the intension of undefined treaty terms and expressions.¹⁵⁷⁵

Under this approach, while the source State¹⁵⁷⁶ applies its domestic law meanings in order to interpret the distributive rules and, therefore, determine whether it is entitled

respective legal systems and (ii) the overlapping of the prototypical items (facts and things) denoted (and non-denoted) by those two terms.

¹⁵⁷⁴ See Commentary to Article 23 OECD Model, Section E. Conflicts of qualification.

¹⁵⁷⁵ See K. Vogel, “La clause de renvoi de l’article 3, par. 2 Modèle de Convention de l’OCDE”, in *Réflexions offertes a Paul Sibille. Études de fiscalité* (Brussels: Bruylant, 1981), 857 *et seq.*, at 960 ; K. Vogel et al., *Klausur Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 212-213, m.no. 66 ; K. Vogel and R. A. Prokisch, “General Report”, in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq.*, at 78-79.

¹⁵⁷⁶ The term “source State” is used here to denote the contracting State that is not the State of residence for the purpose of the treaty.

to tax (and to what extent) certain items of income or capital, the residence State applies its domestic law meanings in order to interpret the distributive rules, as well as to determine which of them it would have applied if it had been the source State.¹⁵⁷⁷ Only where, under such a fiction (i.e. had the residence State been the source State), the source State appeared entitled to tax the relevant item of income or capital under one of the distributive rules,¹⁵⁷⁸ would the residence State be bound to relieve juridical double taxation under Article 23 of the treaty, since in such a case it would regard the source State as entitled to tax “in accordance with the provisions of [the tax treaty]”.

The main drawback to this solution is that it may easily lead to instances of double taxation (and double non-taxation), thus frustrating the object and purpose of the tax treaty. The double taxation (and non-taxation) is generally caused by the fact that the two contracting States may consider that two different distributive rule articles apply to a specific set of facts, due to the different scope of these articles as determined by the two States through the attribution to their undefined legal jargon terms, via Article 3(2), of the different meanings these terms have under their respective domestic laws.

In order to counteract this undesirable result, the interpreter could take the view that the context requires a “uniform” interpretation avoiding double (non-) taxation.¹⁵⁷⁹ This heavy reliance on the context, however, drastically increases the unpredictability of the interpretation, since different interpreters (with different cultural backgrounds) are likely to apply different uniform “contextual” meanings to the same treaty term, and thus this appears detrimental to legal certainty.

According to a second solution, in contrast:

- (i) both contracting States apply the distributive rule articles, as interpreted by attributing to their undefined legal jargon terms the meanings they have under their respective domestic laws, in order to check whether those articles prevent them from taxing the relevant items of income;
- (ii) the residence State, in addition, applies the tax relief article in order to assess whether it is obliged to grant exemption or credit.¹⁵⁸⁰

In case (ii), however, the residence State is simply applying the tax relief article (and no longer the distributive rule articles) and the only undefined legal jargon terms that it must interpret by means of the *renvoi* to its own domestic law are the terms employed in such an article (not the terms employed in the distributive rule articles, which are not

¹⁵⁷⁷ See Vogel in K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 211-212, m.nos. 65 and 65a, who maintains that “‘application’ is every decision by a tax authority or a court of law on a tax question for which the treaty is considered or should be considered”.

¹⁵⁷⁸ I.e. under any of the provisions of Articles 6 through 22, as interpreted by the residence States by attributing to their undefined terms and expressions the meanings they have under its own domestic law.

¹⁵⁷⁹ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 5.04, 7.02, 8.14 and 8.20, who submits that references to unilateral domestic law should, as far as possible, be avoided in favor of an autonomous contextual meaning, the treaty language being an “international tax language”.

¹⁵⁸⁰ Obviously, step (ii) is not carried out by the residence State in cases where it cannot tax the relevant item of income under the applicable (from its perspective) distributive rule; this may be the case, in certain cases, where tax treaty articles resembling Articles 8, 19 and 20 OECD Model are considered applicable by the residence State.

applied by the residence State for the purpose of granting relief). Where the tax relief article does not include any term denoting a category of income, it is irrelevant for the purpose of applying that article which term used in the distributive rule articles would denote the relevant item of income under the residence State's domestic law. The only question that the residence State must answer is whether the source State may tax the relevant items of income where it (the source State) applies the treaty distributive rules, i.e. where those rules are interpreted on the basis of the meaning that the legal jargon terms used therein have under the domestic law of the source State.¹⁵⁸¹

The most important advantage of this solution is to avoid that the interpretation and application of tax treaties based on the *renvoi* encompassed in Article 3(2) lead, *per se*, to double taxation or non-taxation.¹⁵⁸² This is also a relevant argument favoring the interpretation of Articles 3(2) and 23 OECD Model underlying such a solution:¹⁵⁸³ it is indeed reasonable to consider that those articles have to interact in such a way as to

¹⁵⁸¹ See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 50"; J. F. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 133 and 142 *et seq.* See also, although based on a more restrictive interpretation of the term "application" used in Article 3(2), J. F. Avery Jones, "United Kingdom", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 597 *et seq.*, at 609; J. F. Avery Jones, "Qualification Conflicts: the Meaning of Application in Article 3(2) of the OECD Model", in H. Beisse et al. (eds.), *Festschrift für Karl Beusch zum 68. Geburtstag am 31. Oktober 1993* (Berlin: Walter de Gruyter, 1993), 43 *et seq.*, at 47.

This approach has been criticized for many years by other scholars, such as, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 211-213, m.nos. 65-66; P. Baker, *Double Taxation Conventions* (London: Sweet & Maxwell, 2001 – loose-leaf), m.no. E.21; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.20; G. Melis, *L'interpretazione nel diritto tributario* (Padova: Cedam, 2003), pp. 679-685. For a reply to the most severe criticism, see See J. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 133 and 142, who, however, recognized that the practice of many States pointed towards a different solution (see *ibidem*, at 135 and 143-146).

On the other hand, the American Law Institute faced the issue without taking a clear position on whether the residence State was required to follow the source State's domestic law characterization of the relevant items of income when granting tax relief under OECD Model-type tax treaties, although recommending it as a proper solution to be implemented where the mutual agreement procedure failed to solve the conflicts of qualification between the contracting States (see American Law Institute, *Federal Income Tax Project. International Aspects of United States Income Taxation, II. Proposals on United States Income Tax Treaties* (Philadelphia: American Law Institute, 1992), at 62 and 237).

¹⁵⁸² Double non-taxation may, in any case, result where the residence State exempts the relevant items of income under Articles 8, 19 and 20 of a OECD Model-type tax treaty, as construed by attributing to their undefined legal jargon terms the meaning they have under the residence State's domestic law, and the other contracting State exempts as well such items of income under different provisions of the treaty, as construed by attributing to their undefined legal jargon terms the meaning they have under the other contracting State's domestic law.

¹⁵⁸³ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 212, m.no. 66, where Vogel highlights, as the sole argument in favor of this solution, "its reasonable result". See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 504-505, who supports this solution on the basis that it is demanded by an interpretation of tax treaties in good faith and in light of their object and purposes (in particular, by the principle of *effectiveness*).

avoid, as much as possible, double taxation¹⁵⁸⁴ and non-taxation in the quite common situations where the two contracting States attribute different meanings under their respective domestic laws to the same (or corresponding) undefined legal jargon treaty term(s).

On the other hand, one of its main limits lies in the fact that its functioning is strictly intertwined with the wording of Article 23 OECD Model and its effectiveness in avoiding double taxation and non-taxation may depend on the absence in the tax relief article of terms denoting categories of income. Unfortunately, States do not generally follow the wording of Article 23 OECD Model in their tax treaties and, in many cases, they make treaty relief subject to their domestic law relief rules,¹⁵⁸⁵ or make explicit reference in the treaty relief article to certain items of income (e.g. dividends) by means of terms denoting them.¹⁵⁸⁶ Whenever the text of the treaty relief provision significantly departs from the text of Article 23 OECD Model, the treaty text must be analysed in order to determine whether and to what extent this solution may apply in the specific case.

Another significant limit of this solution is that it requires the residence State to assess whether the source State applied correctly the tax treaty on the basis of the latter State's domestic law. This implies knowledge by the taxpayer, the tax authorities and the courts of the residence State of the domestic law of the source State and, more specifically, of the meaning that the undefined legal jargon terms employed in the treaty distributive rule articles have under that law. This assessment often represents a significant procedural burden and may raise issues under the domestic law of the residence State with regard to (i) the person with whom the burden to prove the law of the other contracting State lies, (ii) the actual threshold of such a burden and (iii) the consequences stemming from its non-satisfaction.¹⁵⁸⁷

¹⁵⁸⁴ Especially in light of the fact that the most important goal of double tax treaties, often expressly mentioned in their titles, as well as in the heading and corpus of the tax relief articles (where expressions such as "double taxation shall be avoided" are employed), is to avoid double taxation.

¹⁵⁸⁵ This is particularly true with regard to States using the credit method to relieve international juridical double taxation. See, accordingly, J. F. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 120, where further references are made. One of the possible reasons for the recurrent deviations from the wording of the OECD Model is that relief provisions are generally very detailed and complicated rules and States may probably find it more convenient to have recourse to already drafted and tested domestic law provisions, rather than look for new solutions to be implemented in their tax treaties.

¹⁵⁸⁶ See J. F. Avery Jones et al., "Credit and Exemption under Tax Treaties in case of Differing Income Categorization", 36 *European Taxation* (1996), 118 *et seq.*, at 133-138. This case is different from the case where the tax treaty relief article refers to (named or unnamed) income taxable by the source State in accordance with a certain article of the tax treaty, such as where reference is made to taxation in accordance with Articles 10 and 11 (see Article 23 OECD Model or Article 23(4) of the 1986 Italy-China tax treaty); in the latter case, in fact, the issue is in all relevant respects analogous to the issue that normally arises where the tax relief article simply states that the residence State must exempt the income or give a credit for the taxes levied by the source State where the latter may tax the income in accordance with the provisions of the tax treaty.

¹⁵⁸⁷ Such issues are interconnected with the questions of (a) the applicability of the principle *iura novit curia* and (b) whether the residence State's courts, not being persuaded of the actual content of the other contracting State's domestic law, may apply the *lex fori* under the (rule of evidence) presumption that the other contracting State's domestic law corresponds to the law of the residence State with regard to the specific aspect at stake (see, with reference to a case where the court of a contracting State needed to determine the concept of tax

This conflict of views among scholars was allegedly put to an end in 2000 by the OECD, which amended the Commentary to Article 23 OECD Model to substantially embrace the second solution.¹⁵⁸⁸

Among OECD member States, only the Netherlands¹⁵⁸⁹ and Switzerland¹⁵⁹⁰ entered observations in respect of the new paragraphs of the Commentary dealing with “conflicts of qualification” and no position was expressed by OECD non-member States opposing this.

Finally, it is the author’s impression that the way in which the issue discussed in this section is resolved significantly affects the choice, made by the interpreter, to attribute to undefined legal jargon treaty terms their domestic law meaning or, in contrast, some uniform “contextual” meaning.

The interpreters who decide to follow the first solution generally tend to attribute a uniform “contextual” meaning to undefined tax treaty terms, in order to avoid possible issues of double taxation and non-taxation.¹⁵⁹¹

On the other hand, the interpreters opting for the second solution generally tend to attribute to undefined tax treaty terms their domestic law meanings, due to the comparatively higher ease of application and guarantee of legal certainty that characterize the attribution of the relevant domestic law meaning as compared to the attribution of a uniform “contextual” meaning, the instances of double taxation and non-taxation being in any case reduced by the operation of the OECD approach to conflicts of qualification.¹⁵⁹²

residence under the law of the other contracting State, the application by the Tax Court of Canada in the *Yoon* case of the *lex fori* as a presumptive proxy of the law of the other contracting State - Tax Court (Canada), 22 July 2005, *Yoon v. R.*, 8 *ITLR*, 129 *et seq.*, at 137-139, paras. 12-17).

¹⁵⁸⁸ See paragraphs 32.2 and 32.3 of the Commentary to Article 23 OECD Model.

¹⁵⁸⁹ The Netherlands rejects the automatic application of the second solution to its tax treaties as long as they do not include any specific provision to that extent, or a mutual agreement has been reached in that respect with the competent authorities of the other contracting State (see paragraph 80 of the Commentary to Article 23 OECD Model).

¹⁵⁹⁰ Switzerland, on the contrary, reserves its right not to apply the solution adopted by the OECD only insofar the conflict of qualification results from a modification to the internal law of the source State subsequent to the conclusion of the tax treaty (see paragraph 81 of the Commentary to Article 23 OECD Model; see also the Swiss reservation at paragraph 27 of Annex II to the OECD Partnerships Report).

¹⁵⁹¹ See, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 215-216, m.nos. 73-74; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), Chapters 8 and 10; M. Lang, “Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD Musterabkommen)”, in G. Burmester and D. Endres (eds.), *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* (Munich: Beck, 1997), 283 *et seq.*, at 303 *et seq.*

¹⁵⁹² See, for instance, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to Article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 108; C. van Raad, “Interpretatie van belastingverdragen”, 47 *Maandblad Belasting Beschuwingen* (1978), 49 *et seq.*, at 52.

5.3.2.3. Whether the renvoi to domestic law should be intended as static or ambulatory

In 1995, Article 3(2) of the OECD Model was amended “to conform more closely to the general and consistent understanding of [OECD] Member states”¹⁵⁹³ that the *renvoi* to the contracting States’ domestic law, for the purpose of interpreting undefined treaty terms, was to be regarded as ambulatory, i.e. referring to the domestic law in force at the time of the treaty application, and not as static, i.e. referring to the domestic law in force at the time of the treaty conclusion.

However, most of the tax treaties currently in force do not explicitly affirm the ambulatory nature of the *renvoi*, since they are based either on the 1963 OECD Draft, or on the original version of the 1977 OECD Model. It is therefore relevant to examine whether, and on the basis of which arguments, the ambulatory nature of the *renvoi* to the contracting States’ domestic law may be upheld in the absence of the unambiguous wording included in the 1995 version of Article 3(2) OECD Model.

First and foremost, in 1992¹⁵⁹⁴ the OECD had already modified the Commentary to Article 3 OECD Model in order to make clear that the reference to domestic law in Article 3(2) should be regarded as reference to the law in force at the time of the treaty application, unless the context required a different interpretation.¹⁵⁹⁵

Second, scholars have generally expressed their preference for the dynamic application of the *renvoi* encompassed in Article 3(2) on the basis of the following arguments.

First, the ambulatory application of the *renvoi* to the contracting States’ domestic law leads to significant practical advantages, such as:¹⁵⁹⁶

- (i) tax treaties are easier to apply if the interpreter does not have to investigate what the law was at the time of the treaty conclusion;
- (ii) static interpretation leads to a more frequent need for revision of tax treaties, in order to make them workable in the context of subsequently modified domestic tax laws and capable of fulfilling their primary purpose of avoiding double taxation (and non-taxation);
- (iii) if the static approach were embraced, the interpreter would have to answer the uneasy question of what the relevant moment is that should be regarded as the

¹⁵⁹³ See paragraph 13.1 of the Commentary to Article 3 OECD Model.

¹⁵⁹⁴ I.e. before Article 3(2) OECD Model was amended in 1995.

¹⁵⁹⁵ See paragraphs 11 and 12 of the Commentary to Article 3 OECD Model. See also Report *Tax Treaty Override*, adopted by the OECD Council on 2 October 1989, at R(8)-4, para. 4. b). On the 1992 amendments of the Commentary to Article 3 OECD Model, see K. van Raad, “Additions to Article 3(2) (Interpretation) and 24 (Non-Discrimination) of the 1992 OECD Model and Commentary”, 20 *Intertax* (1992), 671 *et seq.*, at 672-674.

¹⁵⁹⁶ See J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 41 and 46; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.05; G. Tixier, G. Gest and J. Kerogues, *Droit Fiscal International* (Paris: Librairies Techniques, 1979), para. 474; K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 64, m.no. 124d.

time of the treaty conclusion, the possible choices being the date of initialing, of signature, of ratification, or of entry into force of the treaty;

- (iv) if the static approach were embraced, in cases of later amendments to the treaty, the interpreter should decide whether the domestic law in force at the date of the amendments (or that in force at the time of the treaty original conclusion) is to be taken into account.

Furthermore, the analogical application of the doctrine of inter-temporal law developed in the field of public international law¹⁵⁹⁷ seems to support the application of the ambulatory approach, since that would appear to be the original intention of the parties, as emerging from the analysis of the nature and structure of the treaty and from its object and purpose.¹⁵⁹⁸

A limited support for the static approach has been found in the argument that the alternative (ambulatory) approach would give the contracting States the opportunity to alter the scope of their international obligations by means of changing their domestic law after the conclusion of the relevant treaty.¹⁵⁹⁹ However, the decisive counterargument has been put forward that major domestic law amendments, subsequent to the treaty conclusion, would not in most cases be relied upon for the purpose of treaty interpretation, either because the context, part of which must be the effects of the treaty when it was originally negotiated, requires an interpretation preserving the original effects,¹⁶⁰⁰ or, in any case, because their application would unacceptably (i.e. against good faith) impair the originally balance or affect the original object and purpose of the tax treaty.¹⁶⁰¹

Third, national case law, except the decision delivered by the Supreme Court of Canada in the *Melford* case,¹⁶⁰² points consistently in the direction of the ambulatory application

¹⁵⁹⁷ See section 2.3.3.4 of Chapter 3 of Part II.

¹⁵⁹⁸ See J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85 per Sir Ian Sinclair. See, similarly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 10.01.

¹⁵⁹⁹ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 64, m.no. 124d.

¹⁶⁰⁰ Actually, the same holds true even where the contrary perspective is taken: where a static approach to the *renvoi* is embraced, the context may nonetheless require an ambulatory *renvoi* in specific instances. In both cases, what really matters is how the interpreter counter-weights the different interests at stake (e.g. ease of treaty application; effective interaction between domestic law and treaty law; *pacta sunt servanda*). See, in this respect, M. Lang, "Die Interpretation des Doppelbesteuerungsabkommens zwischen Deutschland und Österreich", 38 *Recht der Internationalen Wirtschaft* (1992), 573 *et seq.*, who, with regard to the 1954 Austria-Germany tax treaty, which does not include any provision similar to Article 3(2) OECD Model, suggests a static *renvoi* in connection with certain undefined legal jargon terms, thus indirectly supporting the idea that the choice between the static and the ambulatory approaches depends on the specific characteristics of the treaty provisions to be interpreted and of the later changes in the contracting States' domestic law.

¹⁶⁰¹ See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 47-48; J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85 per Sir Ian Sinclair. See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 496-497, who makes also reference to Article 26 VCLT.

¹⁶⁰² Supreme Court (Canada), 28 September 1982, *Melford Developments Inc. v. R.*, [1982] 2 SCR 504, in

of the *renvoi* encompassed in Article 3(2), subject to the context not requiring otherwise.

In almost all cases cited in section 5.2 of this chapter, national courts and tribunals made reference, for the purpose of interpreting undefined legal jargon terms, to the domestic law in force in the relevant tax year. Although it is possible that the domestic law existing at that date was the same as that existing at the time of the treaty conclusion, the fact that neither the competent judiciaries, nor the parties to the dispute raised any issues in that respect constitutes relevant evidence of the (more or less conscious) praxis to regard the *renvoi* in Article 3(2) as ambulatory in nature.

Moreover, some decisions explicitly express a preference for the ambulatory approach.¹⁶⁰³

Fourth, the praxis of tax authorities is generally oriented towards the ambulatory application of Article 3(2).¹⁶⁰⁴

Finally, an analysis of other articles of the OECD Model seems to provide additional support to the conclusion that the *renvoi* to the contracting States' domestic law found in Article 3(2) OECD Model should be regarded as ambulatory.

First, where a contracting State introduces a new tax, to which the treaty applies pursuant to Article 2(4), in place of the tax existing at the time of the treaty conclusion, new definitions are accordingly introduced in its legal system. It would appear absurd that the definitions concerning the old tax should be relevant in order to interpret and apply the treaty with regard to the new tax, which would be the straightforward conclusion if a static approach were embraced.¹⁶⁰⁵ Moreover, paragraph 8 of the Commentary to Article 2 OECD Model states that “each State undertakes to notify the other of any significant changes made to its taxation laws by communicating to it, *for example*, details of new or substituted taxes. Member countries *are encouraged* to communicate other significant developments as well, such as *new regulations or judicial decisions*”, which supports the conclusion that subsequent changes in the statutes, case law and practice of a contracting State may affect the interpretation and application of

particular at 514. Note, however, that Section 3 of the Canadian Income Tax Conventions Interpretation Act (RSC 1985, c. 1-4, section 3), which was enacted in 1985 and applies retrospectively, makes it clear that, from a Canadian standpoint, Article 3(2) had always been intended to be ambulatory and not static in its application, contrary to the view expressed by the Supreme Court of Canada.

¹⁶⁰³ See Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq.*, at 813 (see, however, the minority opinion in *ibidem*, at 816); High Court (Denmark), 6 April 2001, *Halliburton Company Germany GmbH v. Ministry of Treasury*, 4 *ITLR*, 19 *et seq.*, at 41-42; High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 81; Federal Court (Australia), 10 October 2008, *Virgin Holdings SA v. Commissioner of Taxation*, 11 *ITLR*, 335 *et seq.*, at 351, para. 43; Federal Court (Australia), 3 February 2009, *Undershaft Ltd and Undershaft BV v. Commissioner of Taxation*, 11 *ITLR*, 652 *et seq.*, at 699, para. 108; Cour de Cassation (Belgium), 21 December 1990, case *F1851N* (available on the IBFD Tax Treaty Case Law Database).

¹⁶⁰⁴ See, for instance, United States Letter Ruling 78-44-008; United States Revenue Ruling 80-243; United States Revenue Ruling 78-423.

¹⁶⁰⁵ See, similarly, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 32; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 489-490.

such treaty.¹⁶⁰⁶

Second, with regard to Article 4 OECD Model, “[i]t would be impossible to apply the treaty to people who were or were not resident under a definition which was no longer applicable.”¹⁶⁰⁷

A somewhat connected issue is whether domestic law changes subsequent to the events that trigger the tax liability are to be taken into account for the purpose of applying Article 3(2).

It seems to the author that different circumstances may lead to different conclusions in this respect. However, as a broad generalization:

- (i) where changes in statutes and new court decisions have retroactive effect under domestic law, in the sense that they are aimed at properly construing existing law, they should be taken into account for the purpose of Article 3(2); while in contrast,
- (ii) changes in statutes having prospective effect and which, therefore, do not apply *ratione temporis* to the events triggering the tax liability¹⁶⁰⁸ should be disregarded in the application of Article 3(2).¹⁶⁰⁹

A similar solution should apply in respect of the interpretation of statutory provisions¹⁶¹⁰ and the construction of unwritten principles of law, in particular those developed by domestic courts.

First, interpreters (including judiciaries) are generally regarded as construing the law as it has always been.¹⁶¹¹

Second, if the *renvoi* to the contracting States’ domestic law were intended as a static reference to the general accepted meanings of the relevant treaty terms, according to national administrative practice, case law and scholarly writings, at the time of the treaty conclusion, the construction of treaty provisions would become an almost

¹⁶⁰⁶ See similarly J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 32.

This reading also supports the conclusion that the terms “law” and “droit”, as used in article 3(2) OECD Model, refer to all relevant domestic rules and principles of law, independently of their origin (legislative, judicial, administrative, or by mere praxis). See section 5.3.2.7 of this chapter.

¹⁶⁰⁷ J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 34. See also the references made by the authors to the official interpretations of legislations enacted in the United States, the Netherlands and Sweden, all of which confirm that such States interpret Article 4 OECD Model (and the corresponding provisions of their tax treaties) as containing an ambulatory *renvoi* to the contracting States’ domestic law, rather than a static one (*ibidem*, at 33-34).

¹⁶⁰⁸ Typically because they are aimed at modifying or replacing the rules of law previously in force.

¹⁶⁰⁹ See Supreme Court (Norway), 24 April 2008, *Solvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*, at 37, paras. 62-64.

¹⁶¹⁰ Both those existing at the time of the treaty conclusion and those subsequently introduced.

¹⁶¹¹ See the *obiter* comment by Lord Radcliffe in House of Lords (United Kingdom), 16 July 1959, *Ostime v. Australian Mutual Provident Society*, 38 TC 492, at 519-520. See also J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 47, who maintain that “the reversal of a decision on appeal after the conclusion of a treaty would be taken into account in determining the law at the date of the treaty.”

unworkable task for the interpreter, due to the difficulty of determining the settled or generally accepted domestic law meaning (if any) of the relevant treaty terms at a specific point in time in the (sometimes very distant) past. This would frustrate one of the major purposes of Article 3(2), namely that of rendering simpler and less uncertain the interpretation and application of tax treaties, by matching the meaning under domestic law and the meaning under treaty law of the same or similar terms.

Third, the static reference to the meaning that domestic law terms had at the time of the treaty conclusion would possibly jeopardize the interaction between the charging provisions under domestic tax law and the relief provisions under tax treaties in cases where the domestic law meaning has in the meantime changed. This, in turn, could create potential room for double non-taxation and lead to unexpected results in terms of allocation of taxing rights between the contracting States.¹⁶¹²

Therefore, what the interpreter should do, when interpreting a tax treaty by reference to the contracting States' domestic law, is simply to ascertain the current (broadly accepted) meaning of the relevant domestic law terms and apply that meaning for the purpose of construing the tax treaty, unless the context requires a different interpretation.

5.3.2.4. Undefined legal jargon terms in the treaty and their proxies under the contracting States' domestic law

In 1984, the International Tax Group stated that “[o]ne might expect that Article 3(2) directs one to internal law for the meaning of an identical item”.¹⁶¹³

Similarly, Vogel seems to support the thesis that Article 3(2) applies only in so far as the undefined terms used in the tax treaty are exactly the same ones used under the domestic law of the relevant contracting State.¹⁶¹⁴ However, this comment loses part of its significance in light of the fact that Vogel considers that, where Article 3(2) does not apply, “this does not unconditionally preclude an interpretation according to the domestic law of the State applying the treaty [...]. The only result of not applying Art. 3(2) is that the treaty interpreting process is not tied to the narrow standard of Art. 3(2) (which only allows for an interpretation other than according to the domestic law when the context ‘requires’ this), so that more space remains for an independent

¹⁶¹² See the comments in J. F. Avery Jones, “The interaction between tax treaty provisions and domestic law”, in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 125-126.

¹⁶¹³ See J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 20.

¹⁶¹⁴ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 209-210, m.no 62, where Vogel refers to the different position upheld by Wassermeyer (F. Wassermeyer, “Die Auslegung von Doppelbesteuerungsabkommen durch den Bundesfinanzhof”, 67 *Steuer und Wirtschaft* (1990), 404 *et seq.*, at 410) and to the decision of the High Court (Australia) in the *Thiel* case (High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports*, 338 *et seq.*). See also, K. Vogel and R. A. Prokisch, “General Report”, in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq.*, at 79.

interpretation”.¹⁶¹⁵

In this respect, the author submits that the fact that the term used in the relevant tax treaty exactly matches a term used under the domestic law of the State applying the treaty does not seem to be the proper test to be carried out in order to draw a line between cases where the interpreter may apply the *renvoi* to domestic law enshrined Article 3(2) and cases where he may not.

As previously mentioned, the terms used in the authentic treaty texts drafted in the official languages of the contracting States are often influenced by the terminology of the OECD Model and, as a consequence, such terms frequently differ from those typically used in the respective income tax statutes.

It would seem unreasonable, in light of the relevant role played by Article 3(2) *renvoi* as a link between the tax treaty relief provisions and the contracting States’ domestic law charging provisions, to infer from these terminological differences that the intention of the contracting States was not to apply that *renvoi* with regard to those treaty terms that are just proxies (or synonyms) of the legal jargon terms employed in the domestic tax law. On the contrary: it appears more sensible to treat such treaty terms as corresponding, for the purpose of Article 3(2), to their domestic law proxies and to assess, on the basis of the analysis of the overall context, whether it is unreasonable to apply their domestic law meaning for the purpose of interpreting the treaty.

Moreover, where the relevant tax treaty was not authenticated in any of the official languages of the contracting State applying it, or where the prevailing authentic text was to be interpreted, a narrow construction of Article 3(2) would make its application virtually impossible.¹⁶¹⁶

Other scholars have similarly upheld this conclusion¹⁶¹⁷ and national courts and tribunals

¹⁶¹⁵ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 210, m.no 62.

¹⁶¹⁶ It is interesting to note that, where the tax treaty is authenticated only in one language (generally an international *lingua franca*), contracting States sometimes insert legal jargon terms of their own official languages in the sole authentic text of the treaty, in order to avoid uncertainties and inconsistencies by the interpreters in the selection of the domestic law meaning to be attributed to the foreign language terms. For instance, Article 16 of the 1996 Denmark-Netherlands tax treaty, which has been authenticated only in the English language, provides as follows:

“Directors’ fees or other remuneration derived by a resident of one of the States in his capacity as a member of the board of directors, a “bestuurder” or a “commissaris” of a company which is a resident of the other State may be taxed in that other State”.

Paragraph IX of the 1996 Protocol to that treaty reads: “It is understood that “bestuurder” or “commissaris” of a Netherlands company means persons, who are nominated as such by the general meeting of shareholders or by any other competent body of such company and are charged with the general management of the company and the supervision thereof, respectively”.

¹⁶¹⁷ See B. Arnold, “The Interpretation of Tax Treaties: Myths and Realities”, 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 13; J. F. Avery Jones, “The interaction between tax treaty provisions and domestic law”, in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 133-134; J. F. Avery Jones, “Problems of Categorising Income and Gains for Tax Treaty Purposes”, *British Tax Review* (2001), 382 *et seq.*, at 393; H. Pijl, “Aantekeningen bij de lex-fo-ri-bepaling in belastingverdragen”, *Weekblad Fiscaal Recht* (1995), 1254 *et seq.*; F. Engelen, *Interpretation of Tax Treaties under International*

have repeatedly endorsed its underlying approach.¹⁶¹⁸

That said, two inferences may be drawn from the analysis of Article 3(2), read in its context, and the relevant case law.

First, from a general perspective, the quest for the domestic legal jargon meaning of undefined treaty terms is not a process autonomous from the analysis of the overall context. The search for the former influences and is influenced by the analysis of the latter, since:

- (i) the domestic law meanings of undefined treaty terms and their possible domestic law proxies constitutes a relevant part of the overall context and, in turn,
- (ii) the overall context influences the selection of the domestic law proxies, as well as the choice of the relevant domestic law meaning of polysemic domestic legal jargon terms.

The attempt to separate these two activities in watertight compartments is, in most cases, mainly aimed at achieving clarity of exposition and must be recognized for what essentially is: nothing more than a rhetorical device.

Second, in order to select the appropriate domestic law proxy, a semantic and functional analysis is generally necessary. On the one hand, the interpreter has to examine the functions served by the domestic law concepts underlying the various corresponding terms employed in the authentic treaty texts (and in the OECD Model official version), as well as the items prototypically denoted and non-denoted by those terms, under the domestic laws of the contracting States and of other States employing those terms. He may then select, as domestic law proxy of the relevant treaty term (if any), the term denoting the same or similar prototypical items and whose underlying domestic law concept serves the same or a similar function in the domestic law system of the contracting State applying the treaty.¹⁶¹⁹ On the other hand, the functions that the concept underlying the relevant treaty term, whatever it may be, should serve within the treaty rule of which it is part may help the interpreter to support the choice of a specific domestic law proxy (if any), especially where the concept underlying the latter serves similar functions in the domestic law system of the contracting State applying the treaty. Obviously, the functional and semantic analysis may lead the interpreter to conclude that no adequate domestic law proxy exists and provide him with the arguments to support such inference.

5.3.2.5. Undefined legal jargon terms in the treaty and assimilations under the contracting States' domestic law

Law (Amsterdam: IBFD Publications, 2004), p. 488; P. J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq.*, at 71.

¹⁶¹⁸ See, for instance, Court of Appeals (United States), 16 January 1963, *Samman*, 313 F.2d 461, paras. 5, 6 and 8; Hoge Raad (Netherlands), 4 November 1992, case 27222, BNB 1993/38; Tax Court (United States), 11 April 1983, *Estate of Burghardt*, 80 T.C. 705.

¹⁶¹⁹ Fortunately, such a task is rendered easier by the existence of dictionaries (legal dictionaries, bilingual dictionaries, thesaurus dictionaries), as well as of legal textbooks and encyclopedias.

Another issue in the application of the *renvoi* enshrined in Article 3(2) concerns cases where the domestic statutes of the contracting States bring certain items within the scope of the relevant legal jargon term by means of explicit assimilations (sometimes referred to as “deeming provisions”), such items being otherwise excluded from it in light of the ordinary domestic law meaning of that term, or of its statutory definition.¹⁶²⁰

The task for the interpreter, in this respect, is (i) to decide whether, for the purpose of construing a tax treaty provision employing such a term, the latter should be regarded as also denoting the above-mentioned assimilated items and (ii) how to properly support its conclusion.

The analysis of the OECD materials available on the subject matter does not allow concluding univocally in either sense.¹⁶²¹

However, by reading such materials in light of paragraphs 9.2, 22 and 22.1 of the Commentary to Article 1 OECD Model, which have been added in 2003, one may reasonably infer that the OECD intends to attribute a decisive role to the overall context, in order to solve the issue on a case-by-case basis, and that no firm bar to the use of domestic law assimilations for the purpose of construing tax treaties is intended to operate. In particular, the overall context of the treaty would support the application of domestic law assimilations, for the purpose of construing undefined legal jargon terms in the treaty, whenever cases of improper use of the tax treaty were at stake and those assimilations could prevent such abuses.

Similarly, national courts and tribunals have taken different approaches on whether domestic law assimilations have a bearing on the interpretation of legal jargon treaty terms.

For instance, the Bundesfinanzhof (Germany) and the lower court (Finanzgericht) of Munich did not attribute decisive weight to the fact that, under Spanish law on inheritance, property transfers and legal documents, options to buy immovable property in Spain were treated as if they were immovable property (though they were not fully equated to, or defined as immovable property), in order to decide whether capital gains from the alienation of such options were governed by Article 13(1) of the 1966

¹⁶²⁰ See, for instance, the case of the assimilation of (otherwise) non-resident persons to resident persons for income tax purposes, on which J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 33-34 and Supreme Administrative Court (Portugal), 25 March 2009, *A and another v. Portuguese Treasury*, 11 *ITLR*, 1001 *et seq.*, at 1019.

¹⁶²¹ See the position expressed by the OECD with regard to: the case of the assimilation of interest payments to dividends under domestic law thin capitalization provisions (dealt with in paragraph 25 of the Commentary to Article 10 OECD Model); the case of the assimilation to profits distribution of the gain stemming from the sale of shares by a shareholder to the issuing company in connection with the liquidation thereof (dealt with in paragraph 31 of the Commentary to Article 13 OECD Model); the case of the assimilation of real estate companies to immovable property for the purpose of capital gains taxation (see footnote 1 to paragraph 21 of the Commentary to Article 13 of the 1963 OECD Draft; paragraph 23 of the Commentary to Article 13 OECD Model, as existing before the amendments made in 2003; Report *Tax Treaty Override*, adopted by the OECD Council on 2 October 1989, at R(8)-12 and 13, paras. 31-32).

Germany-Spain tax treaty.¹⁶²² Similarly, the very same Bundesfinanzhof, for the purpose of construing the term “substantial interest [in a company]” employed in Article IX(3) of the 1956 Canada-Germany tax treaty, did not attach relevance to the German domestic law provision deeming a substantial interest to exist where, in cases of holdings acquired by the vendor through a donation, the donor had at any time within the five years prior to the alienation a holding of more than 25% in the capital of the company.¹⁶²³ However, the tax court of Baden-Württemberg apparently reached a contrary conclusion with regard to a similar case.¹⁶²⁴

On the contrary, the Supreme Court of Canada seemed to consider a Canadian domestic law provision, deeming fees paid for the guarantee of borrowings to be “interest” for withholding tax purposes, capable of affecting the meaning of the undefined term “interest” used in Article III(5) of the 1956 Canada-Germany tax treaty.¹⁶²⁵ Likewise, the Tax Review Board of Canada held that Article 106(2) of the *Income Tax Act* of Canada, which has the effect of (re)characterizing the proceeds from the disposition of a life interest in a Canadian trust as income, rather than as component of a capital gain, was decisive in order to characterize such proceeds as income for the purpose of the 1978 Canada-United Kingdom tax treaty.¹⁶²⁶

In the same vein, the Hoge Raad (the Netherlands) appeared to admit the theoretical relevance of domestic law assimilations for the purpose of construing undefined treaty terms under Article 3(2), provided that the context does not require a different interpretation.¹⁶²⁷

Similarly, the Federal Court of Australia found that that Australian limited partnerships, although not being legal entities under commercial law, should be considered legal entities for the purpose of Article 11(9)(a) of the 1982 Australia-United States tax treaty, since they are deemed as such under Australian tax law.¹⁶²⁸

¹⁶²² Bundesfinanzhof (Germany), 19 May 1982, case *IR 257/78*, *Bundessteuerblatt. Teil II* (1982), 768 *et seq.*

¹⁶²³ Bundesfinanzhof (Germany), 13 December 1989, case *IR 39/87*, *Bundessteuerblatt. Teil II* (1990), 379 *et seq.*

¹⁶²⁴ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.08.

¹⁶²⁵ Supreme Court (Canada), 28 September 1982, *Melford Developments Inc. v. R.*, [1982] 2 SCR 504, with regard to which, see the similar conclusion drawn in M. Kandeve, “Tax Treaty Interpretation: Determining Domestic Meaning Under Article 3(2) OECD Model”, 55 *Canadian Tax Journal* (2007), 31 *et seq.*, at 54. See also Federal Court of Appeal (Canada), 12 March 1980, *Associates Corporation of North America v. R.*, 80 DTC 6140.

¹⁶²⁶ Tax Review Board (Canada), 25 January 1983, *Doris Lillian Gadsden v. Minister of National Revenue*, 83 DTC 127, at 71. See also Federal Court (Canada), 22 January 1985, *The Estate of the Late John N Gladden v. R.*, 85 DTC 5188; seemingly *contra* Tax Court (Canada), 21 November 1983, *William C. Krafve v. the Minister of National Revenue*, 84 DTC 1002.

¹⁶²⁷ See Hoge Raad (Netherlands), 5 September 2003, cases 37651 and 37670, BNB 2003/379 and 2003/381. See, to a similar extent, Federal Court (Canada), 28 March 1991, *Utah Mines Ltd. v. R.*, 91 DTC 5245.

The author’s conclusion, with regard to the approach taken by the Hoge Raad in respect of the relevance of domestic law assimilations for the purpose of treaty interpretation, seems to be shared by F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 494-495 and M. Kandeve, “Tax Treaty Interpretation: Determining Domestic Meaning Under Article 3(2) OECD Model”, 55 *Canadian Tax Journal* (2007), 31 *et seq.*, at 55.

¹⁶²⁸ Federal Court (Australia), 22 October 2008, *Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation*, 11 ITLR, 365 *et seq.*, at 398-399, para. 90.

Scholars have also examined the relevance of domestic law assimilations for the purpose of applying Article 3(2). In particular, the (more limited) issue of the tax treaty characterization of fictitious income provided for under the domestic laws of the contracting States has been recently dealt with by Wattel, Marres and Lang.

The first two authors, in an article published in 2003 as an adaptation of an Opinion written by Wattel in his capacity as Advocate General of the Hoge Raad (the Netherlands), maintained the following. “In general, fictitious income does not fall under the specified income allocation provisions (Arts. 6-20) of an OECD Model-type tax treaty because it is not “paid” (“payé”) or “derived” (“reçu”). Fictitious income does not, however, escape the ambit of the treaty altogether. It is covered by the “other income” provision (Art. 21 OECD Model), which does not use terms like “derived” or “paid,” and results in allocation to the residence state of the taxpayer. [...] However, the *lex specialis* of Art. 3(2) of the OECD Model (interpretation by reference to domestic law) [...] with the exception of its “good faith” and “context” requirements [...] may still, based on the meaning of the equivalents of “derived” or “paid” in domestic tax law, bring fictitious income within the scope of one of Arts. 6-20 of the OECD Model. But even if this is the case, “good faith” and the “context” of the allocation provisions (especially the “permanency of commitments” of the contracting states) as a rule still preclude the carry-over of domestic law fictions to treaty characterization. We see three exceptions to this rule: (i) the domestic fictitious income provision was already statutory law before the treaty was signed, and the treaty partner was therefore able to take it into account during negotiations; (ii) in the fiscal year to which the treaty must be applied, the domestic law of both contracting states included a similar fiction (reciprocity of legislation), or (iii) the contracting states published a joint document in a timely and proper fashion [...] that brings the fictitious income under a specific treaty provision and which enjoys sufficient democratic legitimacy to be viewed as an executive protocol to the treaty.”¹⁶²⁹

Lang, however, pointed out that the distinction between real and fictitious income is often subtle and arbitrary, which makes untenable the conclusion that only Article 21 of OECD Model-type tax treaties is generally applicable to fictitious income.¹⁶³⁰ Moreover, the author pointed out that Article 3(2) OECD Model should apply with regard to any meaning attributed to legal jargon terms under domestic tax law (including fictions), unless the context otherwise requires and, in that respect, he maintained that he

¹⁶²⁹ P. J. Wattel and O. Marres, “Characterization of Fictitious Income under OECD-Patterned Tax Treaties”, 43 *European Taxation* (2003), 66 *et seq.*, at 66; see *ibidem*, at 74 and 79; at 78, the authors also seem to admit the relevance of subsequent domestic legal fictions in cases of *fraus tractatus*, provided that certain conditions are met.

¹⁶³⁰ See M. Lang, ““Fictitious Income” and tax treaties”, in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 34 *et seq.*, at 36-37 and 44, where the author maintains that the “underlying assumption of the ideas presented by Wattel/Marres is that it is possible to draw a line between fictitious and real income. [...] For a definition of “fictitious income”, it is necessary to know what “real income” is. But is there such a thing as real income? [...] If one goes that far, the question arises if it is possible to distinguish between real and fictitious income, or if income is everything the law declares to be income”.

could not “see why the answer should depend on the time when the bilateral tax treaty was signed [and] why reciprocity should play a role”.¹⁶³¹ The literal meanings of treaty terms such as “derived”, “received” and “paid” should not be overemphasized; such words should be intended as merely expressing that a certain tax liability is allocated to a certain taxpayer by law. Therefore, according to Lang, there should not even be the necessity to distinguish between fictitious and real income under the contracting States’ domestic law: “Every single tax liability must be examined for the purpose of identifying the applicable allocation rule of the OECD Model Convention”.¹⁶³²

The above analysis proves that no clear and consistent answer has been given so far to the question of whether assimilations under the contracting States’ domestic laws should be taken into account for the purpose of construing treaty undefined legal jargon terms in accordance with Article 3(2). This leaves the interpreter with a broad discretion as to whether and how to actually rely on them. From a formal standpoint, taking into account that:

- (i) it is often difficult to convincingly distinguish between definitions and assimilations under domestic law,¹⁶³³
- (ii) the effect and purpose of domestic law assimilations is to render the rules of law, which are ordinarily applicable to the items denoted by a certain term, also applicable to the items denoted by the assimilated terms and
- (iii) one of the main benefits achieved by means of Article 3(2) is to guarantee the correspondence between the scope of the domestic charging rules and the tax treaty relief rules,

the author believes that the most sensible solution is to always consider domestic law assimilations for the purpose of Article 3(2) *renvoi*. That said, the final decision on whether a certain domestically assimilated item should be regarded as denoted by the relevant treaty term remains subject to the overall context not requiring a different interpretation.

5.3.2.6. The classification of foreign legal concepts for the purpose of Article 3(2)

The classification of foreign legal concepts (especially private or commercial law concepts) for domestic law purposes may affect the application of the *renvoi* encompassed in Article 3(2) of OECD Model-based tax treaties. In fact, although Article 3(2) mainly makes reference to domestic tax law meanings and classifications, domestic tax law, in turn, generally refers to and relies on domestic private law concepts for purposes of its application, such domestic private law concepts often not perfectly

¹⁶³¹ See *ibidem*, at 41 and 42.

¹⁶³² See *ibidem*, at 47 and 48.

¹⁶³³ See, similarly, M. Lang, ““Fictitious Income” and tax treaties”, in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 34 *et seq.*, at 48, where the author maintains that “[i]t is very difficult, if not impossible, to distinguish between fictitious and real income. Income is whatever the legislator declares to be income.”

overlapping with their correspondent foreign legal concepts (if any).

In this respect, the problems that the interpreter faces may be grouped into two main clusters: (i) whether an assimilation of foreign private law concepts to domestic private law concepts is allowed for the purpose of domestic tax law and (ii) to which domestic private law concept the foreign private law concept may be assimilated for the purpose of applying domestic tax law, if any at all.¹⁶³⁴

Maisto distinguishes among five different legislative techniques used under domestic tax law in order to establish the scope of the terms and expressions employed therein, the use of which may have different effects on the possibility to include a foreign legal concept within the scope of such domestic law terms or expressions:¹⁶³⁵

First, domestic tax law may include a reference to the domestic private statutory provisions defying or covering the relevant terms or expressions. Such a technique may lead to the exclusion, from the scope of the domestic tax law provision, of situations regulated by foreign law.

Second, domestic tax law may employ, together with domestic private law terms, foreign legal jargon terms, such as “trust” in civil law States. This gives evidence of the intention to broaden the scope of the domestic tax law provision and to include situations governed by foreign private law, although in a rather ambiguous and vague manner, since (i) the foreign legal jargon terms might be (and generally are) associated with different legal concepts in different States and (ii) other States may use different terms to denote somewhat similar legal concepts.

Third, domestic tax law may include *ad hoc* definitions making reference to the legal or economic effects or characteristics of the defined legal concept. Although such effects or characteristics may, more or less partially, reproduce those typical of certain domestic private law concepts, such a formulation clearly opens the way to include foreign private law concepts in the scope of the relevant domestic tax law provisions.

Fourth, domestic tax law may provide for specific rules on the characterization of foreign legal concepts for domestic tax law purposes, such as the rules on the characterization of foreign entities for corporate tax purposes.

Fifth, domestic tax law may simply employ legal jargon terms that typically denote domestic private law concepts.¹⁶³⁶

Under the last technique, the interpreter clearly bears the burden of deciding whether, to what extent and how the assimilation of foreign legal concepts to domestic legal concepts should be made.¹⁶³⁷ However, although less evident, such a complex task

¹⁶³⁴ See, by analogy, paragraphs 11-14 of the OECD Partnerships Report.

¹⁶³⁵ See G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), at xxvii-xxviii.

¹⁶³⁶ See the issue of the domestic tax law status of foreign entities in Germany, where the relevant statutes are silent on the issue, while courts and tax law scholars have generally maintained that foreign entities have to be treated similarly to the domestic entities that are the most similar thereto from a legal structure standpoint (on the German *Typenvergleich* approach, see H. Debatin, “Subjektfähigkeit ausländischer Wirtschaftsgebilde im deutschen Steuerrecht”, *Der Betriebsberater* (1988), 1155 *et seq.*, at 1157, and further references therein).

¹⁶³⁷ See, for instance, Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, where the Court had to decide whether a silent partnership agreement concluded under

is to be performed as well with regard to the other four techniques, in relation to which the interpreter must in any case to establish whether, under the relevant tax law provisions, the assimilation of foreign legal concepts to domestic law concepts is excluded or not.¹⁶³⁸

From a tax treaty perspective, the similarities between foreign law concepts and the domestic law concepts may be also taken into account in order to argue whether, notwithstanding the absence of a sufficient proximity for justifying an assimilation under domestic tax law, the overall context of the treaty requires an interpretation entailing the domestic and foreign law concepts to be treated alike for tax treaty purposes.¹⁶³⁹ This issue is further examined in section 5.3.3 of this chapter.

5.3.2.7. The domestic law of the contracting States relevant for the application of Article 3(2) OECD Model

With regard to the quest for the domestic law meaning of treaty undefined legal jargon

German law between a United Kingdom resident company and its German resident subsidiary, according to which the former had the right to participate in the profits of the latter in its quality of silent partner thereof, was to be considered a transparent partnership agreement for the purpose of the United Kingdom domestic tax law and, thus, of the 1964 Germany-United Kingdom tax treaty.

See also Administrative Court of Paris (France), 23 March 2005, case 92-12625 *Société Publi-Union*, *Revue de Jurisprudence Fiscale* (1996), No. 1463, where the Court had to decide whether the sums paid to an American publisher for the right to use a copyright (under the relevant copyright law of the United States) were royalties for the purpose of Article 11(3) of the 1967 France-United States tax treaty, according to which “Royalties derived from copyrights [*author’s note*: “droit d’auteur” in the French authentic text] of literary, artistic, or scientific works [...] by a resident of one Contracting State shall be taxable only in that Contracting State”. The Court held that such sums did not constitute royalties for the purpose of the 1967 France-United States tax treaty, one of the arguments in support of such a conclusion being that the payment was not for the right to use a “droit d’auteur” since under French law the rights held by a publisher could not be assimilated to a “droit d’auteur”, which is an inalienable right attached to the individual that created the relevant intellectual work (see, in this, respect C. Legros, “France”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD, 2005), 199 *et seq.*, at 216-217).

¹⁶³⁸ This is the case also where the first technique is used. See Articles 117 and 120(1) of the Italian Income Tax Code, which expressly provides that only companies listed in Article 73(a) of the same Code and, more precisely only “società per azioni, in accomandita per azioni, a responsabilità limitata”, are entitled to opt for the tax consolidation regime as controlled companies; this reference, however, leaves open the question whether companies formed in accordance with foreign company law that are similar to “società per azioni, in accomandita per azioni, a responsabilità limitata” formed under Italian company law are entitled to opt for such a tax regime as well.

¹⁶³⁹ For instance, in the above-mentioned case Administrative Court of Paris (France), 23 March 2005, case 92-12625 *Société Publi-Union*, *Revue de Jurisprudence Fiscale* (1996), No. 1463, the Court could have concluded that the overall context required the interpreter to consider the sums paid to the American publisher for the right to use the copyright under American law as paid for the right to use a “droit d’auteur”, for instance by arguing that the term “copyright” was used in the English authentic text of the treaty and that its underlying concept under American law broadly corresponded to the concept underlying the term “droit d’auteur” under French law. In such a way, the Court would have attached relevance to the other contracting State’s domestic law, as explicitly mentioned in paragraph 12 of the Commentary to Article 3 OECD Model and embedded in the idea of reciprocity underlying treaties.

terms, two main questions arise:

- (i) whether the relevant domestic law meanings are limited to those expressed by means of statutory definitions;
- (ii) which are the fields of domestic law where such a quest is to be carried out.

As far as question (i) is concerned, both the English and French official versions of the OECD Model seem to suggest that the meaning to be given to undefined legal jargon terms is the meaning attributed to such terms when the domestic law of the relevant contracting State is applied.¹⁶⁴⁰ Thus, the only relevant question to be answered by the interpreter is the following: which is the intension of this term for the purpose of the application of the contracting State's domestic law?

To say that the quest for the domestic law meaning should be limited to legal definitions in statutes¹⁶⁴¹ is, from a semantic and logical perspective, meaningless. It is a

¹⁶⁴⁰ The International Tax Group seems to uphold the view that the *renvoi* encompassed in Article 3(2) OECD Model has always be intended as a *renvoi* to the entire system of legal concepts, rules and principles relevant for the purpose of the taxes covered by the treaty (i.e. including those concepts, rules and principles endorsed by the case law and practice) and not only to enacted statutes seems; accordingly, in Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 19, the authors maintain, with regard to the changes made in the English and French official versions of article 3(2) between the 1963 OECD Draft and the 1977 OECD Model, that "[i]n English the change from "laws ... relating to" to "law ... concerning" might be construed as a change from statute law to law generally but it is unlikely that any change in meaning would be applied" and that "[i]n English, laws can sometimes mean statute law but it is often used in the wider sense, as in *Halsbury's Laws of England*. [...] It follows from what is said in the text that we do not accept van Raad's point that there is a change in meaning of the English text, but it is certainly true of the French" (footnote 17). See, apparently contrary, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 484, footnote 1388.

The French version of the 1963 OECD Draft employed the expression "législation [...] régissant", while the 1977 version "droit [...] concernant". It is worth noting, in this respect, that the 1963 French version ("le sens qui lui est attribué par la législation dudit Etat régissant les impôts faisant l'objet de la Convention"), which literally referred to the meaning attributed to the undefined legal jargon terms in the treaty by the statutes governing the taxes covered by the treaty, was changed in 1977 and brought in line with the English version, most probably in order to avoid speculations with regard to the possible difference of meaning between them. The author's position, in this respect, as it will be expanded in the remainder of the section, is that not much weight should be placed on the use of the terms "législation" and "laws", instead of "droit" and "law" in the treaty text, since, on the one hand, such terms are used inconsistently in the OECD Commentary (the English official version of the 2010 OECD Commentary to Article 3(2) uses the term "legislation" three times, the term "law" three times and the term "laws" three times – a marvelous example of *par condicio*; the French official version, in turn, uses the term "législation" four times, the term "droit" twice and the term "lois" three times) and, on the other hand, no meaning may be said to exist without an interpretative process and, therefore, without reliance on extra-textual, i.e. extra-statutory, means such as case law, administrative practice and scholars' writings (see G. Tarello, *L'interpretazione della legge* (Milano: Giuffrè, 1980), Chapter I, in particular pp. 24-33, and references therein).

¹⁶⁴¹ See, for instance, the following quotations, often interpreted as supporting the above-mentioned approach. K. Vogel and R. A. Prokisch, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq.*, at 79: "This means that domestic law may only be referred to for the interpretation of words or groups of words, used in the convention. This clause does not indicate that one may generally use principles of domestic law in the interpretation of the convention or to clarify unclear parts of the convention by reference to domestic law. In the US and Canada this is understood in a different way. The clause is understood to refer to the domestic law of the applying state in a general way,

false representation of what the interpreter may do (and actually does), caused by a misunderstanding of what “meaning” is. The relation between terms and their underlying concepts, which is the foundation of the meaning to be attributed to terms, is never entirely expressed by means of definitions and, in many cases, it is not at all expressed thereby.¹⁶⁴² It necessarily relies on the encyclopedic knowledge of the persons using the relevant terms. This implies that, even if the *renvoi* encompassed in Article 3(2) were construed as being limited to the domestic law meanings expressed by means of statutory definitions, the *renvoi* would lead inevitably the interpreter to attribute to the treaty terms the meaning expressed by the statutory definitions as supplemented by the underlying relevant encyclopedic knowledge, i.e. a meaning that is never entirely expressed by virtue of the sole statutory definitions.

This conclusion has the following two corollaries.

First, the actual domestic law meaning of statutorily defined terms is not established (solely) on the basis of some alleged “dictionary” meanings of the terms used in the definition, but mainly on the basis of the meaning attributed by the interpreter to the latter terms in light of his background encyclopedic knowledge, which, in the field of tax law, is principally made of up case law, administrative positions (rulings and circulars) and scholarly writings.¹⁶⁴³

Second, one is naturally led to ask oneself why, then, the meanings to be attached to undefined legal jargon terms in the treaty should be limited to those meanings that are expressed by means of statutory definitions, considering that the interpreter in any case is compelled to look outside the domestic law definition in order to find the relevant meaning. One could counter-argue to the latter inference that, where a definition is at stake, the level of legal certainty is higher than in cases where the relevant terms are undefined. The author is not convinced by such an argument. Although it is true that definitions may help in identifying the prototypical denotata of the defined terms, the same result is often achieved by means of case law, administrative positions and

including legal principles and legal concepts similar to those used by the convention. But this interpretation does not correspond to the wording and context of Article 3(2) MC. The provision is found under the heading “General Definitions”; this implies that it is concerned only with the definition of terms and does not refer in a general way to groups of legal rules and especially not to relatively unclear legal concepts or traditions.” *Ibidem*, at 80: “Hence if a term is only defined in private law or in the provisions of a tax law that is not covered by the convention, references to domestic law are excluded.”

K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 209, m.no. 62: “Art. 3(2) [...] governs no more than the interpretation of words (‘terms’) used in the treaty. It provides no justification for reliance on general legal principles or domestic law in interpreting treaty law, or for closing loopholes within the treaties by reference to domestic law”.

K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 210-211, m.no. 62b: “The law of the State applying the treaty referred to by Art. 3(2) could, if only the English version of the [Model Convention] were authoritative, include case law [...] The French version’s use of ‘*droit*’ excludes an interpretation of this type, however; ‘law’ (*Recht*) in the sense of Art. 3(2) includes, therefore, only legislative and administrative laws, and other abstract-general rules subordinate to them (decrees etc.)”.

¹⁶⁴² See section 2.3 of Chapter 2 of Part I.

¹⁶⁴³ See the concept of “open texture of law” developed in H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), pp. 124-135.

scholars' writings. Moreover, with regard to non-prototypical items, the construction by case law, administrative positions and scholar's writings is as much determinative where there are statutory definitions as in the absence thereof. This logical conclusion is reinforced by the wording of Article 3(2), which, in its current versions, makes reference to "meaning" and "sens", "law" and "droit", without employing any terms such as "definition".¹⁶⁴⁴

To sum up, a system of law does not exist without its own case law, practice and elaboration by jurists, since the latter constitute a necessary part of the background encyclopedic knowledge necessary to attribute meanings to the terms used in the statutes that are the foundations of the former. Thus, the reference to domestic law encompassed in Article 3(2) OECD Model cannot be seriously intended as a reference to the formal legislation (statutes), segregated from its interpretation by judges, practitioners and scholars operating within (and for) that legal system. That would not be a reference to domestic law, but simply to documents without any generally accepted meaning. If, in contrast, the reference were so intended, the purpose of Article 3(2) to make easier and more certain the interpretation and application of tax treaties by means of a *renvoi* to the domestic law concepts¹⁶⁴⁵ underlying the undefined legal jargon terms in the treaty would be deprived of any effectiveness.¹⁶⁴⁶ Similarly, where the reference was so

¹⁶⁴⁴ The Commentary to Article 3 OECD Model makes reference to domestic law definitions, by stating in paragraph 13.1 that "where a term is *defined* differently for the purposes of different laws of a Contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over all others, including those given for the purposes of other tax laws" (*emphasis added*). In the context in which such statement is made, however, the verb "to define" appears used as a mere synonym of "to be attributed a meaning", no evidence existing that the OECD intended, by choosing that precise term, to convey the idea that only the meanings expressed by means of legal definitions should be taken into account.

In any event, i.e. even where the interpreter considered that a definition of the relevant treaty terms must be found in the domestic law of the State applying the treaty, it seems reasonable that such definitions include those provided for in other fields of law of that very same State to which income tax law implicitly or explicitly, statically or dynamically, refers. See, in this respect, G. Melis, *L'interpretazione nel diritto tributario* (Padova: Cedam, 2003), pp. 143-161, and the vast bibliography therein.

¹⁶⁴⁵ As previously mentioned, some authors have held that Article 3(2) is just concerned with the definition of "terms" and that it has nothing to do with "legal concepts" (see, for instance K. Vogel and R. A. Prokisch, "General Report", in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 55 *et seq.*, at 79). However, although it is true that Article 3(2) deals with the interpretation of terms, this implies that it concerns the quest for the underlying (domestic legal) concepts that must be regarded as corresponding to those terms for the purpose of applying the treaty provisions. See, in this respect, the different views expressed by Ward, van Raad and Vogel in J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85.

¹⁶⁴⁶ See R. Sacco, *Introduzione al diritto comparato* (Torino: UTET, 1992), at 43 *et seq.*, who highlights the need to take into account the various substantive sources of law ("formanti" in the Italian language), such as statutes, case law and scholarly writings, in order to figure out the law actually governing in a certain jurisdiction; J. Malherbe and R. De Boeck, "The Belgian Experience", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 3 *et seq.*, at 14, where the authors note that it is sometimes remarkable to see how French and Dutch case law in Belgium "cut the Gordian knot of a complex legal (tax) problem in completely different ways, often under the influence of differing Walloon and Flemish doctrines"; M. Barassi, "Comparazione giuridica e studio del diritto tributario straniero", in V. Uckmar (ed.), *Diritto Tributario Internazionale* (Padova: Cedam, 2005), 1499 *et seq.*, at 1509.

intended, the application of Article 3(2) would fail, in a significant number of cases, to guarantee that the scope of the contracting States' domestic law charging provisions is the same of the corresponding tax treaty relief provisions.

Accordingly, Sasseville states that Article 3(2) "does not required (*sic*) a definition, as some commentators and the courts have sometimes suggested. It merely requires that the words have a certain meaning under domestic law"¹⁶⁴⁷ and that "[t]he word "law" is, of course, sufficiently broad to cover both the legislation and the jurisprudence of a Contracting State."¹⁶⁴⁸ Similarly, Arnolds points out that "[t]he meaning of a term under domestic law may include a meaning established by domestic courts interpreting the term for domestic purposes in accordance with the applicable domestic approach to statutory interpretation."¹⁶⁴⁹

In turn, this implies that, in determining the meaning that a legal jargon term does have under the law of the contracting State applying the tax treaty and in supporting his conclusion, the interpreter is bound to use the interpretative principles and techniques applicable under the (tax) law of that State.¹⁶⁵⁰ In this respect, the International Tax Group has convincingly maintained that "[f]inding internal law is something which is done in accordance with the rules of interpretation adopted in the State concerned."¹⁶⁵¹

The case law of national courts and tribunals appears to confirm this construction of the *renvoi* encompassed in Article 3(2).¹⁶⁵²

¹⁶⁴⁷ J. Sasseville, "The OECD Model Convention and Commentaries", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 134.

¹⁶⁴⁸ J. Sasseville, "Interpretation of Double Taxation Conventions in Canada: An Update", 48 *Bulletin for international taxation* (1994), 374 *et seq.*, at 375. See also J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 19.

¹⁶⁴⁹ B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 13.

¹⁶⁵⁰ The author believes that a brief side remark is necessary with regard to his last proposition. The author is rather skeptical with regard to the possibility that interpretative principles and techniques might substantially change from one jurisdiction to another, since any interpretative exercise consists in the common human cognitive activity of attributing meanings to words. Therefore, the difference existing among different jurisdictions in that respect (as well as the difference between interpretation under domestic law and interpretation under treaty law, or between interpretation under private law and interpretation under criminal law) does not lie *in which* principles and techniques are applied, but *in how* such principles and techniques are actually used and balanced: the different results of the interpretative process are generally due to (and supported by a reference to) the different mix of weights that the interpreters attribute to the goals they want to achieve and interests they want to enhance or preserve (such as, in the tax law field, the principles of legality, non-discrimination, equality, reasonableness, ability to pay and the need to preserve the coherence of the tax system and the State's revenue, as well as the legitimate expectation of the taxpayers). Such a possible different mix of weights, of course, may be influenced to a certain extent by the domestic law principles of "interpretation", either established under statutes, or by judicial practice.

See, in that respect, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 33-34, m.nos. 61 and 63; R. Lenz, "Tax Law Interpretation; - International Trends", *Rassegna Tributaria* (1987), 155 *et seq.*, at 155; B. Arnold, "The Interpretation of Tax Treaties: Myths and Realities", 64 *Bulletin for international taxation* (2010), 2 *et seq.*, at 14.

¹⁶⁵¹ J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 24.

¹⁶⁵² See, for instance, District Court of Tel Aviv-Yafo (Israel), 30 December 2007, *Yanko-Weiss Holdings*

Question (ii) may appear to a large extent irrelevant in practice, since the vast majority of undefined treaty terms, or proxies thereof, are used in (and therefore have a meaning for the purpose of) the contracting States' domestic income (or capital) tax law.

However, it might be the case that a certain treaty undefined legal jargon term, or a proxy thereof, is not used in the domestic income (or capital) tax law of the contracting State applying the treaty, although it is used in other fields of domestic law, for instance in private law.¹⁶⁵³ A *prima facie* reading of Article 3(2), in this regard, might lead the interpreter to conclude that the *renvoi* to such fields of domestic law is not allowed under that article.¹⁶⁵⁴ However, the counter-argument might be put forward that the wording of Article 3(2), both in its French and English official versions, is broad enough to allow a construction according to which the *renvoi* can be made to any field of domestic law where the undefined treaty term is employed as a legal jargon term, as long as that term bears some relevance for the purpose of domestic income tax,¹⁶⁵⁵ for instance because,

(1996) *Ltd v. Holon Assessing Office*, 10 ITLR, 524 *et seq.*, at 544, substantially upholding the interpretative nature (for tax treaty purposes) of domestic anti-avoidance provisions; Federal Court of Appeal (Canada), 26 September 1997, *Attorney General of Canada v. William F. Kubicek*, 97 DTC 5454, para. 8; Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 ITLR, 3 *et seq.*, at 14, with regard to the meaning to be given to the treaty term "paid to" on the basis of the domestic tax law characterization of the partnership receiving the relevant item of income.

¹⁶⁵³ A side question, in this respect, is whether the meaning of the same or similar terms used in European Union primary or secondary law might be referred to via Article 3(2) *renvoi*. Convincingly, Vogel (see K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 211, m.no. 62b) and Avella (see F. Avella, "La qualificazione dei redditi nelle Convenzioni internazionali contro le doppie imposizioni stipulate dall'Italia", *Rivista di Diritto Tributario. Parte Quinta* (2010), 45 *et seq.*, at 54; F. Avella, "Il beneficiario effettivo nelle convenzioni contro le doppie imposizioni: prime pronunce nella giurisprudenza di merito e nuovi spunti di discussione", *Rivista di Diritto Tributario. Parte Quinta* (2011), 14 *et seq.*, at 22 *et seq.*; F. Avella, "Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention", *World Tax Journal* (2012), 95 *et seq.*, at 113 *et seq.*) answer in the affirmative.

¹⁶⁵⁴ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 210, m.no. 62. At m.no. 62a, Vogel states that "[i]f a term has a meaning only in a field other than that of tax law or a meaning under tax law only with respect to taxes not covered by the treaty, Art. 3(2) will be inapplicable". It should be mentioned that a term does not have any meaning in a field of law only where it is not employed at all in that field; however, where a certain term (or a proxy thereof) is used in a certain field of law, e.g. income tax law, it must have a meaning for the purpose of such field of law, even if that meaning is not expressed by means of definition; in the latter case, where the undefined term is attributed a meaning by means of implicit *renvoi* to other fields of law, that term still has a meaning for the purpose of income tax law and, therefore, the issue here discussed is irrelevant in that respect.

¹⁶⁵⁵ Where one of the other tax treaties concluded by the contracting State applying the relevant treaty contains a specific definition of term to be interpreted, the issue arises of whether one may refer to the definition in the former treaty in order to construe the undefined term of the latter treaty. Theoretically, since the former tax treaty is part of the domestic law of the relevant contracting State, one may argue that Article 3(2) of the latter treaty allows using the definition encompassed in the former treaty for the purpose of construing an undefined legal jargon term of the latter treaty. However, the context of the latter treaty might require a different interpretation, due to the bilateral nature of tax treaties and the limited scope of such a treaty definition within the legal system of the State applying the treaty (see, accordingly, J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 25; F. Avella, "La qualificazione dei redditi nelle Convenzioni internazionali contro le doppie imposizioni stipulate dall'Italia", *Rivista di Diritto Tributario. Parte Quinta* (2010), 45 *et seq.*, at 55).

where it was employed under domestic tax law in a context similar to that in which it is used in the tax treaty, it would be most probably attributed that meaning it has under the other field of law.

This appears to be a more sound solution than that to disregard from the outset a reference to other fields of domestic law on the basis of the fact that the undefined legal jargon term in the treaty, or a proxy thereof, is not currently used in the domestic income tax law of the State applying the treaty.¹⁶⁵⁶ For instance, it would appear unreasonable¹⁶⁵⁷ not to consider the meaning that terms such as “trademark”, “patent” or “design or model” have under the domestic private law of the relevant contracting State simply because such terms are not used under its domestic income tax law, for example because income received as consideration for the right to use a trademark is taxed under that tax law as part of a residual category encompassing all income derived from letting other persons to exploit any of the taxpayer’s exclusive rights.

The OECD Commentary on Article 3 upholds such position. Commenting on the 1995 addition to Article 3(2) OECD Model, which reads “any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State”, the Commentary makes the following statement: “Paragraph 2 was amended in 1995 to conform its text more closely to the general and consistent understanding of Member States. For purposes of paragraph 2, the meaning of any term not defined in the Convention may be ascertained by reference to *the meaning it has for the purpose of any relevant provision of the domestic law of a Contracting State, whether or not a tax law*. However, where a term is defined differently for the purposes of different laws of a Contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over *all others, including those given for the purposes of other tax laws.*”¹⁶⁵⁸

In this regard, Engelen points out that, if Article 3(2) were interpreted as meaning that the *renvoi* to domestic law fields other than income (or capital) tax law is not allowed, the 1995 addition to Article 3(2) OECD Model, which according to the Commentary thereof constitutes a mere clarification, would have no purpose or effect. The author thus argues that the principle *ut res magis valeat quam pereat* leads one to assume that, pursuant to Article 3(2), the meaning of any treaty undefined term may be ascertained by reference to the meaning that it has for the purposes of any relevant

¹⁶⁵⁶ See the relevance that domestic private law concepts have played in the decision Tax Court (United States), 16 October 1984, *Pierre Boulez v. Commissioner of Internal Revenue*, 83 T.C. 584.

This case aptly illustrates the additional issue of whether, in a situation where the relevant domestic law meaning is looked for in the field of substantive private law, such a domestic law meaning should be the one that the relevant term has (i) in the domestic substantive private law of the State applying the treaty, or (ii) in the substantive private law of the State to which the relevant private international law rules of the State applying the treaty make reference. This question, however, is not one that may be answered in the abstract, but just with regard to the specific circumstances of the case.

¹⁶⁵⁷ This unreasonableness derives from the fact that such a discharge would run contrary to one of the most important objects and purposes of Article 3(2), namely that of simplifying the application of tax treaties by courts, taxpayers and tax authorities of the contracting States, for whom the respective States’ domestic law systems and legal concepts constitute a fundamental part of their encyclopedic knowledge.

¹⁶⁵⁸ Paragraph 13.1 of the Commentary to Article 3 OECD Model, *emphasis added*.

provision of the domestic law of a contracting State.¹⁶⁵⁹

Finally, a related issue that arises with regard to question (ii) is what the interpreter should do where the very same term is (or similar terms are) used in various provisions of the domestic law of the State applying the treaty and different meanings are attached to such a term for the purpose of these various provisions.

A first answer is given by the text of Article 3(2) OECD Model, which, as amended in 1995,¹⁶⁶⁰ provides that any meaning under the applicable tax laws of that State prevails over the meanings given to the term under other laws of that State. Moreover, as previously mentioned, the Commentary to Article 3 OECD Model further clarifies that the meaning given to the undefined legal jargon term in the treaty for the purpose of the laws imposing the taxes to which the Convention applies prevails even over the meanings that the term has for the purposes of other tax laws.

However, it may be that the very same term is used in different provisions of the very same domestic tax law,¹⁶⁶¹ but with different meanings. In such a case, it would seem reasonable to apply the meaning that is attributed to that term for the purpose of the tax law provision that appears to be the most closely connected to, or relevant for, the tax treaty provision to be interpreted. In this case, the “overall context”, more than requiring a meaning other than the domestic law meaning to be attributed to the undefined legal jargon term, would require the most relevant meaning to be applied of the various meanings available under the contracting State’s domestic law.¹⁶⁶²

That said, it must be emphasized that a construction in good faith of the tax treaty does not seem to preclude the interpreter from attributing to a treaty term the meaning that it has under a domestic field of law other than tax law, where the non-tax law meaning appears to be more appropriate than the tax law meaning on the basis of the overall context. That could be the case, for instance, where the domestic non-tax law meaning is the (general) private law meaning of terms such as employment, enterprise,

¹⁶⁵⁹ F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 485-486. See, in slightly different terms, J. Sasseville, “Interpretation of Double Taxation Conventions in Canada: An Update”, 48 *Bulletin for international taxation* (1994), 374 *et seq.*, at 375-376.

¹⁶⁶⁰ With a clarifying intent, according to paragraph 13.1 of the Commentary to Article 3 OECD Model.

¹⁶⁶¹ E.g. it may be used twice (with different meanings) in the statute imposing the tax to which the treaty applies, or it may be used in two related statutes (with different meanings), both concerning the tax to which the treaty applies.

¹⁶⁶² See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 487-488, who makes reference to the decision delivered by the Hoge Raad (Netherlands) in the case *38461/2003* (Hoge Raad (Netherlands), 12 December 2003, case *38461*, BNB 2004/123). That case concerned a Belgian resident individual who sold shares held in a Netherlands resident company back to the company itself. The issue arose of whether the income derived by the Belgian taxpayer was to be considered a dividend or a capital gain for the purpose of the 1970 Belgium-Netherlands tax treaty. Under the Netherlands Income Tax Act, the difference between the selling price and the cost of acquisition was taxed as a capital gain, while under the Netherlands Dividend Withholding Tax Act, the difference between the selling price and the average paid-up capital was treated as dividend and thus subject to withholding tax. The Hoge Raad argued that, since under Netherlands domestic tax law the withholding tax might be fully credited against the tax on the capital gain (and refunded, where exceeded the latter), the income of the Belgian resident individual was to be treated as a capital gain for the purpose of the 1970 Belgium-Netherlands tax treaty and, therefore, exempted from tax in the Netherlands.

or copyright and the tax meaning is a very unusual meaning, expressed by a statutory definition introduced after the treaty conclusion and employed in a context far removed from the context where the term is used in the tax treaty.

5.3.3. *Where the context requires otherwise*

5.3.3.1. The context for the purpose of Article 3(2) OECD Model

As previously noted, it is the author's belief that the context to be taken into account for the purpose of Article 3(2) OECD model is the *overall context*.

Since what constitutes the *overall context* has already been broadly analysed in this study, the present section just deals with a few limited issues that, in the author's perspective, may puzzle the tax treaty interpreter.

The first issue arises from the reading of paragraph 12 of the Commentary to Article 1 OECD Model, which states that “[t]he context is determined in particular by *the intention of the Contracting States when signing the Convention* as well as *the meaning given to the term in question in the legislation of the other Contracting State* (an implicit reference to the principle of reciprocity on which the Convention is based)” (*emphasis added*).

This statement is misleading since it may appear to put on the same level of analysis items that pertain to logically distinct planes:

- (i) *the meaning given to the term in question in the legislation of the other Contracting State* is one of the elements that should be taken into account in order to determine the meaning to be attributed to the relevant treaty term, while
- (ii) *the intention of the Contracting States when signing the Convention*, if referring to such a term, is exactly the meaning to be attributed thereto.

Read from this perspective, while *the meaning given to the term in question in the legislation of the other Contracting State* is actually part of the context, intended as the set of all elements and items of evidence that might be relevant in order to determine the utterance meaning of the treaty term,¹⁶⁶³ *the intention of the Contracting States when signing the Convention* is that utterance meaning and, therefore, cannot be part of the context relevant to determine itself.

This leads to the conclusion that the phrase *the intention of the Contracting States when signing the Convention* refers to the object and purpose of the treaty as a whole, as well as the to the object and purpose of the specific treaty provision where the term to be interpreted is employed.

¹⁶⁶³ In that perspective, the author wonders why the OECD Committee for Fiscal Affairs decided in 1995 to substitute the term “determined” for the term “constituted” in the above sentence of paragraph 12 of the Commentary to Article 3 OECD Model (fortunately, the French official version of that paragraph maintained the original term “constitué”). What must be determined is the meaning to be attributed to the relevant treaty term and the context represents the tool at the disposal of the interpreter to determine such a meaning: it is not the tool that has to be determined.

The second issue concerns the narrow intension that is attributed to the term “context” by some scholars. Engelen, for instance, maintains that the context for the purpose of Article 3(2) refers “to the particular context in which a term is used in the treaty. Interpreted in this way, the term ‘context’ as used in Article 3(2) comprises the treaty as a whole, including the preamble and annexes, as well as its object and purpose, but not any means of interpretation extraneous to the treaty.”¹⁶⁶⁴ The author then goes on to conclude that, in all events, “any common interpretation that is binding on the parties under international law must always prevail over the meaning that the term in question has under their domestic laws, regardless of whether the agreement may be regarded as ‘context’ for the purpose of the application of Article 3(2)” and refers, as examples, to any separate agreement related to the tax treaty concluded by the parties and to the tacit agreement to interpret and apply the provisions of a tax treaty that are identical to those of the OECD Model in accordance with the Commentary thereon.¹⁶⁶⁵

Although the conclusion reached by Engelen actually widens his first proposition about the scope of the term context as used in Article 3(2),¹⁶⁶⁶ it seems to leave outside the scope of that term some of the additional elements and items of evidence referred to in Articles 31 and 32 VCLT (and, more generally, in the “overall context”), including those elements and items of evidence on the basis of which the interpreter may infer that the parties have reached an implicit agreement to interpret the tax treaty in accordance with the OECD Commentary. One might argue that all those elements and items of evidence should be in any case taken into account for the purpose of determining the content of the agreement actually reached by the parties, as directly or indirectly required by the VCLT. This, however, is tantamount to saying that all possibly relevant elements and items of evidence are to be taken into account as part of the context for the purpose of Article 3(2).

Third, principles of law and legal doctrines that are, in their fundamental constitutive elements, so widespread as to represent “general principles of law recognized by civilized nations”¹⁶⁶⁷ are obviously part of the overall context and are, therefore, relevant in order to construe tax treaties. Moreover, their general acceptance also makes them potentially relevant in order to regulate the relations between the contracting States subsequent to the conclusion of the relevant treaty.

In this respect, Vogel notes that “[o]ne such principle is the nearly universal rule that legal acts undertaken absent good faith are to be disregarded. A more concrete version embodied in tax systems of most developed States is that artificial arrangements

¹⁶⁶⁴ See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 482.

¹⁶⁶⁵ *Ibidem*.

¹⁶⁶⁶ The author questions how the contracting States’ negotiators could have ever agreed to regard the very same treaty text as part of the context for the purpose of Article 3(2) and, at the same time, not to regard other relevant agreements between them as part of the same context, but, that notwithstanding, to consider such agreements decisive in order to determine the meaning of the undefined treaty terms.

¹⁶⁶⁷ See Article 38(1)(c) of the Statute of the International Court of Justice.

obviously motivated by tax considerations only and without any reasonable business purpose are not recognized under fiscal law: in such cases the ‘substance’ of the transaction is considered instead of its legal ‘form’ [...]. Being a ‘general legal principle’, this rule also governs the legal relations of States with one another. Thus, if a State attempts to evade its tax treaty responsibilities, those legal consequences which would have resulted from a bona fide legislative construct are considered to have occurred instead of the legal consequences brought about by the ‘artificial’ legal structure.”¹⁶⁶⁸

On the other hand, the general principle mentioned by Vogel should also be taken into account by the interpreter when construing the tax treaty, since it is reasonable to assume that the contracting States had that principle of law in mind when they concluded the treaty and agreed on how the distributive rule articles were to be interpreted. It would be difficult, in this respect, to maintain that the application by a contracting State of its domestic law general “anti-avoidance” or “substance over form” rule or principle,¹⁶⁶⁹ in connection with the application of a tax treaty, would amount to not applying the treaty in good faith, or to breaching its treaty obligation, since the very same fact that such a domestic law principle or rule reflects a “general principle of law recognized by civilized nations” would make it a relevant part of the overall context. To hold the contrary would imply the premise that the parties implicitly agreed not to apply such “general principle of law recognized by civilized nations” in connection with a tax treaty that should work as a link between and interact with their respective tax systems, which in turn are or might be based on such a generally accepted principle. Since such a premise seems, at least to the author, rather unsound, the burden to convincingly prove this implicit agreement should rest fairly with the person invoking that construction.¹⁶⁷⁰

5.3.3.2. The alternative construction required by the context

One of the main issues faced by the interpreter when applying Article 3(2) is to decide what alternative constructions of the tax treaty provision under review are suggested by the overall context and whether one or more of these constructions should be applied in the case at stake instead of the interpretation based on the contracting State’s domestic

¹⁶⁶⁸ K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 66, m.no. 125b.

¹⁶⁶⁹ Or even the application of its domestic law specific “anti-avoidance” provisions, as far as they do not go beyond the limits of the above-mentioned “general principle” (which is a matter of interpretation to establish).

¹⁶⁷⁰ See, however, Hoge Raad (Netherlands), 6 December 2002, case 36773, 5 *ITLR*, 680 *et seq.*, where the Court found that no evidence whatsoever existed of a common intention of the contracting States (Belgium and the Netherlands) to treat dividends paid to the acquirer of shares as dividends paid to the vendor of those shares (by the company whose shares had been sold) for the purpose of applying Article 10 of the 1970 Belgium-Netherlands tax treaty and, therefore, did not take into account such deemed attribution of dividends, based on the Netherlands case law doctrine of just taxation (*richtige heffing*), for the purpose of interpreting and applying Article 10 of the 1970 Belgium-Netherlands tax treaty. For a brief analysis of this decision, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 497-500.

law meaning.

Scholars appear to favor significantly different approaches in this respect.

Some have maintained that domestic law meanings should be used only as last resort and that contextual meanings should generally be given precedence.¹⁶⁷¹ Somewhat similarly, the American Law Institute has taken the position that “reference to domestic law ordinarily should be made only when other interpretative techniques do not support a treaty interpretation”, based on the thesis that such an approach would promote the development of uniform interpretations of tax treaty provisions.¹⁶⁷²

Notably, this position has been upheld notwithstanding the general contrary practice of national tax authorities and courts.¹⁶⁷³ As Edwardes-Ker noted, although courts and tax authorities should search for “contextual meanings”, they rarely do so.¹⁶⁷⁴

Moreover, this view has been promoted even though the quest for a uniform contextual meaning often leads different interpreters to different “uniform” meanings: the hope remains that, although “[t]heir findings may differ [...] such differences should decrease as contextual meanings are thoroughly researched. The existence of such (hopefully decreasing) differences is preferable to forcing a residence State to accept a source State’s (possibly incorrect) definitions.”¹⁶⁷⁵

The arguments most commonly put forward in order to support this position may be summarized as follows:¹⁶⁷⁶

- (i) the reference to the domestic law of one contracting State is a reference to the unilateral view of one of the parties on the meaning of a treaty term, while treaties should be interpreted according to the common understanding of the parties;

¹⁶⁷¹ See, for instance, J. B. J. Peeters, *Internationaal Belastingrecht in Nederland* (Amsterdam: L.J. Veen’s Uitgeversmaatschappij, 1954), at 138; H. Debatin and O. L. Walter, *Handbook on the United States-Germany Tax Convention* (Amsterdam: IBFD Publications, 1966 – loose-leaf), at A 5.1.2; G. Tixier, G. Gest and J. Kerogues, *Droit Fiscal International* (Paris: Libraires Techniques, 1979), paras. 414 and 417; M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.10, 8.10 and 8.14; M. Lang, “Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD Musterabkommen)”, in G. Burmester and D. Endres (eds.), *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* (Munich: Beck, 1997), 283 *et seq.*, at 302 *et seq.*

¹⁶⁷² American Law Institute, Federal Income Tax Project. *International Aspects of United States Income Taxation, II. Proposals on United States Income Tax Treaties* (Philadelphia: American Law Institute, 1992), at 61.

¹⁶⁷³ See, however, the contrary decision in Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162, Regeringsrättens årsbok* (1987) (also reported in summary in IBFD Tax Treaty Case Law Database); the decision was taken by a majority of 3 to 2 judges. See also Hoge Raad (Netherlands), 6 December 2002, case 36773, 5 *ITLR*, 680 *et seq.*, Opinion of the Advocate General at 701-702, point 3.3; *ibidem*, at 709-719, points 5.5 and 5.6.

¹⁶⁷⁴ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.20.

¹⁶⁷⁵ See *ibidem*, at 8.20.

¹⁶⁷⁶ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.14 and reference therein.

- (ii) the reference to the domestic law of the contracting States is likely to lead to different meanings to be attributed to the same (or corresponding) terms by the two contracting States, thus creating instances of double taxation and non-taxation;
- (iii) domestic law may change, either by means of statutory amendments, or by means of the evolution of case law and practice, which may lead the tax treaties to be applied in a way unanticipated by and contrasting with the original common understanding of the parties;
- (iv) an undefined legal jargon term employed in a tax treaty may correspond, under the domestic law of either contracting State, to more than one concept, which contributes to increase uncertainty in the application of the treaty;
- (v) the undefined legal jargon term used in the tax treaty might be employed in the domestic law of either contracting State in a context and against a background, which includes the object and purpose of the provision of which it is a part, wholly unrelated, or not sufficiently related to the context and background of the tax treaty, thus leading to unsatisfactory results.

Those arguments, however, can be rejected one by one for the following reasons:

- (i) since the parties explicitly agreed that tax treaty terms should be construed on the basis of their (unilateral) domestic law meaning, unless the context otherwise provides, such (unilateral) domestic law constructions are in accordance with the common understanding of the parties;
- (ii) the approach to conflicts of qualification endorsed by the OECD, in the Commentary to Article 23 OECD Model, removes the risk of double taxation and non-taxation in most cases;
- (iii) the ambulatory construction of treaty terms in accordance with the evolution of the domestic law meaning of those terms favors the correspondence between domestic charging provisions and treaty relief provisions, as well as the ease of application of the treaty; the interpreter remains free to adopt an interpretation different from that based on the subsequently modified domestic law meaning of the relevant treaty terms, where the former appears unreasonable on the basis of the context;
- (iv) the ambiguity of undefined treaty terms under the domestic laws of the contracting States is generally matched by their ambiguity where a contextual approach is taken, in both cases the analysis of the overall context being capable of reducing it; on the contrary, the possible contextual meanings that might be arrived at by the interpreter often present a more significant vagueness than the corresponding domestic law meanings, since, unless the OECD Commentary has taken a position thereon, the former are developed by courts, tax authorities and scholars of different States with different legal backgrounds and encyclopedic knowledge;
- (v) where the undefined treaty terms are employed, under domestic law, in a context and against a legal background wholly unrelated, or not sufficiently related, to the context and background of the tax treaty, the interpreter may

adopt an interpretation different from that based on domestic law, arguing that the context requires it.

From this vantage point, the proposition that contextual uniform meanings should be applied, as far as possible, in order to construe tax treaties boils down to the proposition that, in some cases, it is preferable to apply an interpretation other than that based on the domestic law meaning of the undefined treaty terms.

Accordingly, some scholars have taken the view that “the context must [...] be reasonably strong to the internal law meaning to be ousted”,¹⁶⁷⁷ while others have maintained that “it is impossible to infer from Art. 3(2) a systematic preference for interpretation from the context over interpretation by reference to national law” and that “both interpretation procedures must be viewed in mutual reciprocity”.¹⁶⁷⁸

This brief overview of the contrasting positions taken by international tax scholars on the matter constitutes enough evidence to support the proposition that, in respect of the question whether the context requires an interpretation other than that based on the *renvoi* to the domestic law of the State applying the treaty, the interpreter enjoys a significant discretion.

Nonetheless, the author considers that, in order to be reasonably grounded, the interpreter’s arguments in support of his conclusion should take into account the following aspects.

First, one should never lose sight of the fact that tax treaties are made to be interpreted and applied by local operators, such as tax practitioners, national courts and tax authorities, and not by international lawyers. Currently, the only three systems actually employed at the supranational level in order to deal with (and possibly solve) issues concerning the interpretation and application of tax treaties are the mutual agreement procedure provided for in Article 25 of OECD Model-type tax treaties and, to a much lesser extent, the arbitration procedures provided for under some tax treaties¹⁶⁷⁹ and the

¹⁶⁷⁷ J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 108. See similarly C. van Raad, “Interpretatie van belastingverdragen”, 47 *Maandblad Belasting Beschouwingen* (1978), 49 *et seq.*, at 52.

¹⁶⁷⁸ K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 214, m.no. 70. See also *ibidem*, m.no. 71; J. M. Mössner, “Zur Auslegung von Doppelbesteuerungsabkommen” in K.-H. Böckstiegel et al. (eds.), *Volkerrecht, Recht der Internationalen Organisationen, Weltwirtschaftsrecht: Festschrift Für Ignaz Seidl-Hohenveldern* (Köln: Heymann, 1988), 403 *et seq.*, at 426; B. J. Arnold and M. J. McIntyre, *International Tax Primer. Second Edition* (The Hague: Kluwer Law International, 2002), at 115-116.

The position taken by Arnold and McIntyre, although also relying on the idea of the mutual reciprocity of the two interpretation procedures, appears more neutral than that endorsed by Vogel and the International Tax Group. According to the authors, “the words of Article 3(2) do not establish any clear preference for domestic law meanings or treaty meanings for undefined terms. In addition, we see no strong policy reason for establishing any residual presumption in favour of a domestic or treaty meaning. The meaning of undefined terms in a tax treaty should be determined by reference to all of the relevant information and all of the relevant context” (see *ibidem*).

¹⁶⁷⁹ See, for instance, Article XXVI(6) and (7) of the 1980 Canada-United States tax treaty; Article 29(5) of the 1992 Netherlands-United States tax treaty; Article 25(5) and (6) of the 1989 Germany-United States tax treaty. See also Article 25(5) OECD Model.

Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.¹⁶⁸⁰

As more than once noted in the present study, the construction by local operators of the undefined legal jargon terms in the treaty on the basis of the meaning they (or proxies thereof) have under the domestic law of the State applying the treaty significantly enhances the ease of application and the predictability of the interpretation of the relevant treaty provisions.¹⁶⁸¹

Second, the *renvoi* to domestic law meanings finds an outer limit in the need to prevent the interpretation of the relevant treaty provision being absurd or unreasonable¹⁶⁸² in light of the overall context.¹⁶⁸³ Thus, the effects stemming from the construction of the relevant treaty provision cannot contrast with the effects that, on the basis of the overall context, the interpreter may reasonably envisage the parties intend those provisions to have in the specific case at stake.

Therefore, the issue of which should prevail - the domestic law meaning or a conflicting contextual meaning - is not the correct question to be asked. The accurate question is, on the contrary, how strong is the indication that may be drawn from the overall context that the parties, in the specific case, would agree to attribute a meaning other than the domestic law meaning to the relevant undefined treaty term. If such an indication is strong enough, i.e. if the interpreter is more persuaded that the parties would so agree, rather than not, such other meaning, being the utterance meaning of the term, must obviously prevail over the domestic law meaning. The matter, therefore, is one of persuasion of the interpreter and capacity thereof to reasonably argue in favor of the selected meaning.

Third, the task for the interpreter is rendered more burdensome by the fact that the overall context comprises many heterogeneous elements and items of evidence,¹⁶⁸⁴

¹⁶⁸⁰ Done in Brussels on 23 July 1990 (90/436/EEC).

¹⁶⁸¹ See S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme* (Padova: Cedam, 1986), at pp. 170-171, who highlights that the general application of international treaties by national courts and tribunals is a factor detrimental to their uniform interpretation.

¹⁶⁸² I.e. not in good faith. According to Avery Jones, “[c]ontext, in the expression unless the context otherwise requires therefore has a wider meaning than in the Vienna Convention, and is important in avoiding the inappropriate use of internal law definitions. In *Padmore v. IRC* ([1989] STC 493) it was argued that a body of persons does not include a partnership because there was an internal tax law definition which did not include a partnership, but the court held on the basis of the wording of the treaty, which differed from the Model, that the context otherwise required, so that the internal law definition should not be used” (J. F. Avery Jones, “United Kingdom”, in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 597 *et seq.*, at 610).

¹⁶⁸³ See, for instance, Income Tax Appellate Tribunal of Mumbai (India), 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 18, para. 29.1 and at 20, para. 30.

¹⁶⁸⁴ Such as, for instance, the domestic tax laws of the contracting States in force at the time of the treaty conclusion; the current domestic tax law of the other contracting State; the domestic private law of the contracting States (both current and in force at the time of the treaty conclusion); the domestic tax law of other States member of the OECD; the generally accepted principles of law; the Commentary to the OECD Model (both in its current version and in the version existing at the time of the treaty conclusion); other applicable rules principle of international law between the contracting States; the object and purpose of the treaty, the

generally pointing not at a single meaning, but at a group of meanings that overlap only to a limited extent and that are perceived by the interpreter as characterized by different levels of relevance. In addition, as mentioned in the first part of the present study, these various “contextual” meanings are never clearly shaped, but are always characterized by vagueness: they are not purely black and white pictures, but are made up of (i) black and white areas, representing the prototypical denotata and non-denotata, and (ii) more or less large gray areas, representing items that might be considered by a significant group of people as denoted and by another significant group as not denoted by the relevant term. These gray areas, in turn, may be darker or lighter, according to whether it is more or less generally accepted that the corresponding items are denoted, rather than not denoted by the term.

Therefore, with regard the specific item at stake in the case faced by the interpreter, it is possible that under all possible contextual meanings the item is clearly denoted (or not denoted) by the relevant treaty term, but it is equally likely that the item is clearly denoted under some and clearly not denoted under the other meanings, or that, while being clearly denoted (or not denoted) under some meanings, under the others it is doubtful whether it is denoted by the relevant treaty term.

The interpreter should thus confront, in the course of his argumentation, the result stemming from the solution of this puzzle with that deriving from the attribution of the (selected) domestic law meaning to the relevant treaty term and, in the case of conflict, supporting the chosen solution on the basis of the relative strength of the opposite items of evidence. Obviously, the existence of a clear convergence, under the various contextual meanings, on the specific item being denoted (not denoted) by the relevant treaty term, which contrasted with the fact that such an item is not denoted (denoted) by the same term under the domestic law meaning of the latter, would constitute a strong argument for the interpreter to support the conclusion that “the context otherwise requires”.¹⁶⁸⁵

Fourth, the interpreter should also assess whether the relevant undefined legal jargon term is used in significantly different contexts (i) under the contracting State’s domestic law and (ii) under the treaty. In the affirmative case, one might reasonably question whether the contracting States intended that domestic law meaning to be applied for the purpose of interpreting the treaty and the arguments in favor of the meanings based on

context of the provision to be interpreted (including its object and purpose itself and the rules that may be expressed by other provisions of the treaty); the interpretation of similarly worded tax treaty provisions by the courts of other States; etc.

¹⁶⁸⁵ According to some authors, the burden of proving that the context requires an interpretation different from that based on the domestic law meaning should rest with the party invoking the contextual meaning (see J. Sasseville, “The OECD Model Convention and Commentaries”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 129 *et seq.*, at 134; implicitly, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, in *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 108).

For a court decision where the “choice” between the domestic law meaning and the contextual meanings is explicitly dealt with in terms of onus of proof, see *Income Tax Appellate Tribunal of Mumbai (India)*, 1 March 2005, *Hindalco Industries Ltd v. Assistant Commissioner of Income Tax*, 8 *ITLR*, 1 *et seq.*, at 14, para. 18.

the overall context would gain relative weight.

The Hoge Raad (the Netherlands), for example, has endorsed the view that domestic law meanings should not be used in order to construe undefined legal jargon terms in a treaty where those terms are used in a different context under domestic law. In particular, in the case 37024/2003¹⁶⁸⁶ the Court maintained that, since the expression “[being] present”, as used in Article 15 of the 1991 Netherlands-Nigeria tax treaty, was neither defined in that treaty, nor used in any similar context under Netherlands domestic tax law, such an expression was to be construed in accordance with the rules of interpretation provided for in Articles 31 and 32 VCLT.

Similarly, according to Engelen, it is reasonable to assume that the contracting States intended the *renvoi* to their domestic law provisions to apply only in so far as those provisions are relevant for the purpose of the interpretation of the treaty provisions concerned, which in turn implies that the undefined treaty terms are to be used under the contracting States’ domestic law in a context similar to the one in which they are employed in the tax treaty.¹⁶⁸⁷

The array of instances where the interpreter must evaluate whether the context requires an interpretation different from the one based on the domestic law meaning of the relevant undefined treaty terms is almost endless.¹⁶⁸⁸

Some cases, however, require a brief analysis due to their frequency and relevance for the subject of the present study.

A first instance concerns the case where the legal jargon terms used in the authentic text drafted in the official language of the State applying the treaty are followed (generally within parenthesis) by the corresponding legal jargon terms used (alone) in another authentic text.¹⁶⁸⁹ In this case, it might be reasonably argued that the context requires an

¹⁶⁸⁶ Hoge Raad (Netherlands), 21 February 2003, case 37024, 5 *ITLR*, 818 *et seq.*, at 876, para. 3.5. See, similarly, Hoge Raad (Netherlands), 21 February 2003, case 37011, BNB 2003/177.

¹⁶⁸⁷ See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 487.

¹⁶⁸⁸ See, for instance, High Court (Ireland), 31 July 2007, *Kinsella v. Revenue Commissioners*, 10 *ITLR*, 63 *et seq.*, at 79-81; High Court (Ireland), 24 June 1994, *Travers v. O’Siachain*, *The Irish Reports* (1994), 199 *et seq.*; Supreme Court (Denmark), 4 February 2003, *Halliburton Company Germany GmbH v. Ministry of Taxation*, 5 *ITLR*, 784 *et seq.*, at 813; See Federal Court of Appeal (Canada), 4 February 2004, *Beame v. R*, 6 *ITLR*, 767 *et seq.*, at 775, para. 25; Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v. Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq.*, paras. 71 and 74. See also The relevance attributed by Hemmelrath to the type and intensity of the economic ties typically existing between the business activity of an enterprise and the State where it has a permanent establishment in order to support the conclusion that the terms “business profits” and “enterprise” (as well as the corresponding terms employed in the authentic texts drafted in languages other than English) should be interpreted autonomously and not by reference to the domestic law of the contracting State applying the treaty, since the application of the domestic law meaning “would bring about inappropriate results” (see A. Hemmelrath in K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), pp. 406-407, m.nos. 23-26; *contra* F. Wassermeyer, in H. Debatin and F. Wassermeyer (eds.), *Doppelbesteuerung: DBA* (Munich: Beck, 1997 – loose-leaf), at m.n. 16a to Article 7).

¹⁶⁸⁹ See Article 3(1)(a) of the 1999 Italy-United States tax treaty, where the term “associazione commerciale” is followed by the term “(trust)” in the Italian authentic text.

interpretation different from that based on the domestic law meaning of the terms used in the authentic text drafted in the language of the contracting State applying the treaty, e.g. an interpretation based on the meaning that the terms in parenthesis have under the domestic law of the States using them, which might or might not be the other contracting State.¹⁶⁹⁰

Similarly, the use in one authentic text of a term different from the corresponding legal jargon term commonly employed under the domestic law of the State in whose official language that authentic text is drafted may sometimes be regarded, if matched by other contextual elements, as evidence of the parties' intention to attribute to the former term a wider, or narrower, intension than the one the latter term has under that contracting State's domestic law.¹⁶⁹¹

Another case concerns situations where, under the relevant domestic tax law, a fine distinction exists between two (or more) terms (assume terms "A" and "B") with similar functions and a similar or neighboring scope, one of which ("A") is actually employed in the tax treaty to be construed. In such a case, the interpreter might argue that the analysis of the overall context leads to the conclusion that treaty term "A" should be given a meaning wider than the meaning that it has under the domestic law of the State applying the treaty, so as to include the meaning that term "B" has under that law.¹⁶⁹²

¹⁶⁹⁰ A fortiori the "contextual meaning" may be suggested by the meaning of the corresponding legal jargon terms under the law of the other contracting State where the term used in the authentic treaty text drafted in the official language of the State applying the treaty is not a legal jargon term (see Gomi and Ozawa, *Explanation Article by Article of the Japan-U.S. Tax Treaty (nichibei sozei joyaku chikujo kaisetsu)* (1979), p. 71, cited in J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to Article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 53-54).

¹⁶⁹¹ See, with regard to the use of the term "alienation" in Article 13 OECD Model, Federal Court (Australia), 20 August 1997, *Commissioner of Taxation v. Lamesa Holdings BV*, [1997] FCA 785; J. F. Avery Jones et al., "The Origins of Concepts and Expressions used in the OECD Model and their Adoption by States", 60 *Bulletin for international taxation* (2006), 220 *et seq.*, at 249-250. See also the use, in the Italian authentic text of the Italian OECD Model-based tax treaties, of the terms "Redditi immobiliari" in the title and "beni immobili" in the corpus of Article 6, while the legal jargon term used under Italian income tax law, i.e. "redditi fondiari", is never used in the treaty text; one sensible explanation of this terminological choice is that the contracting State intended Article 6 of the treaty to have a wider scope than that of "redditi fondiari" under Italian law.

¹⁶⁹² See, similarly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.16, criticizing the exaggerated attention paid by Franklyn J. of the Western Australia Supreme Court and Sheppard L.J. and Lee L.J. of the Australia Full Federal Court in the *Thiel* case to the distinction existing under Australian income tax law between the terms "carry on" and "carry out" for the purpose of interpreting the expressions "an enterprise carried on by a resident" and "the enterprise carries on business", as used in Articles 3(1)(f) and 7(1) of the 1980 Australia-Switzerland tax treaty. Edwardes-Ker notes that this very same approach was taken by the Australia High Court, who reversed the decision of the above-mentioned lower courts (see High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 *Commonwealth Law Reports*, 338 *et seq.*). See also Hoge Raad (Netherlands), 18 September 1985, case 22926, BNB 1985/333, with regard to the need to apply Article 16 of the 1970 Belgium-Netherlands tax treaty also to payments made to a Belgian resident company in its capacity as director of a Netherlands resident "besloten vennootschap met beperkte aansprakelijkheid" ("BV"), notwithstanding the fact that the Dutch authentic text of that article made exclusive reference to directors of resident "naamloze vennootschappen" ("NV"). See, similarly, R. C. Palma, "Income Taxation of Intellectual and Industrial Property and Know-How: Conundrums in the Interpretation of Domestic and Treaty Law", 44 *European Taxation* (2004), 480 *et seq.*, with regard to whether the term "droit d'auteur" employed in Article

Finally, it is generally agreed that the context may require not attributing the current domestic law meaning to the relevant undefined treaty terms in situations where the domestic law meaning has changed after the treaty conclusion.¹⁶⁹³

According to paragraph 12 of the Commentary to Article 3 OECD Model,¹⁶⁹⁴ the ambulatory *renvoi* to the contracting States' domestic law "applies only if the context does not require an alternative interpretation. The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State". Paragraph 13 then continues: "Consequently, the wording of paragraph 2 provides a satisfactory balance between, on the one hand, the need to ensure permanency of commitments entered into by States when signing a convention (since a State should not be allowed to make a convention partially inoperative by amending afterwards in its domestic law the scope of terms not defined in the Convention) and, on the other hand, the need to be able to apply the Convention in a convenient and practical way over time (the need to refer to outdated concepts should be avoided)."¹⁶⁹⁵

Scholars have pointed out in this respect that the qualifying expression "unless the context otherwise requires" might constitute "an important limitation on the power of one of the contracting States to alter radically the application of its treaties by amending the definitions in its internal law, even if Article 3(2) is to have ambulatory effect."¹⁶⁹⁶

12 of OECD-type tax treaties (or the corresponding terms used under the laws of other civil law countries and in their tax treaties) should be construed as also denoting those rights that under French private law are not, strictly speaking, denoted by such a legal jargon term, but by the term "droit voisin", for the example the right of actors to authorize the reproduction of the movies in which they acted (see, in this respect, their explicit inclusion under Article 12(3) of the 1994 France-United States tax treaty and their implicit inclusion in the scope of Article 12 OECD Model, as resulting from paragraph 18 of the Commentary to Article 12 OECD Model; see, apparently in accordance, Risoluzione n. 12/E of 9 February 2004 issued by the Italian Agenzia delle Entrate, although with regard to the 1992 Italy-Germany tax treaty, which extends the treatment provided for royalties to "similar payments").

¹⁶⁹³ These cases also offer the chance to illustrate that the meaning required by the overall context is not always a uniform meaning, but may be different for the two contracting States. In fact, where the interpreter finds that the application of the domestic law meaning, as amended after the treaty conclusion, for the purpose of construing the relevant treaty provision, would lead to a substantial alteration of the original allocation of taxing rights between the contracting States, he then often concludes that the domestic law meaning in force at the time of the treaty conclusion should apply instead of the current one. Such a meaning, however, although being a "contextual" meaning in the sense of Article 3(2) OECD Model, may be different with regard to the two contracting States, since it consists of the meaning that the relevant treaty term had under the law of each contracting State at the time of the treaty conclusion.

¹⁶⁹⁴ As amended in 1995.

¹⁶⁹⁵ See also paragraph 52 of the Commentary to Article 25 OECD Model, which seems to support the view that where subsequent domestic law changes shift the originally agreed allocation of taxing rights between the parties, the context requires such domestic law changes to be disregarded for the purpose of construing undefined legal jargon terms in the treaty.

¹⁶⁹⁶ D. A. Ward, "The Income Tax Conventions Interpretation Act," in *Report of Proceedings of the Thirty-Fifth Tax Conference, 1983 Conference Report* (Toronto: Canadian Tax Foundation, 1984), 602 *et seq.*, at 609. See, similarly, M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.05. At 9.11; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 490; P. J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq.*, at 66, 74 and 79

National courts and tribunals have also generally upheld this position.¹⁶⁹⁷

There are, however, cases where, although the attribution to the relevant treaty term of a domestic law meaning modified after the treaty conclusion leads to a change of the original allocation of taxing rights, the interpreter might reasonably argue that the context does not require a different meaning to be applied.

For instance, the fact that both contracting States, after the conclusion of the treaty, have modified their domestic laws by introducing substantially equivalent legal rules or principles, might be referred to in order to support the conclusion that the attribution of the current domestic law meaning (reflecting such a newly introduced rule or principle) to a treaty term, although significantly modifying the original allocation of taxing rights, does not run counter to a good faith construction of the treaty, since the change in the allocation of taxing rights is in this case reciprocal and, may be, almost symmetrical. On the one hand, although it is true that the parties could have not (and probably did not) forecast the introduction of such a rule or principle at the time of the treaty's conclusion, nonetheless they anticipated the possibility that changes in their domestic law could affect the treaty when they included Article 3(2) therein. On the other hand, the reciprocity of the changes in the application of the treaty provisions¹⁶⁹⁸ allows the sensible inference that such changes are agreed upon by both parties.¹⁶⁹⁹ Moreover, the interpretation and application of the relevant treaty provision in light of the new domestic law rule or principle, for a certain period of time, by both contracting States might be seen as evidence of the subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation under Article 31(3)(b) VCLT.

An analogous argument might be put forward where the rule or principle subsequently introduced by a contracting State conforms to a rule or principle already in

(although in respect of the more limited subject of the fictitious income provisions made in the contracting States' domestic law after the conclusion of the treaty); J. F. Avery Jones, "The interaction between tax treaty provisions and domestic law", in G. Maisto (ed.), *Tax Treaties and Domestic Law* (Amsterdam: IBFD Publications, 2006), 123 *et seq.*, at 133; J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 47-48; J. F. Avery Jones et al., "Interpretation of tax treaties", 40 *Bulletin for international taxation* (1986), 75 *et seq.*, at 85 per Sir Ian Sinclair.

¹⁶⁹⁷ See, for instance, Hoge Raad (Netherlands), 5 September 2003, cases 37651 and 37670, in BNB 2003/379 and 2003/381; Hoge Raad (Netherlands), 5 September 2003, case 37657, BNB 2003/380. For a comment of the relevant aspects of these decisions, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 491-497 and 501-502.

¹⁶⁹⁸ Such changes should not be regarded as changes to the treaty, since the treaty provided from the outset for the possibility of prospective changes in the effects of its application, due to changes in the underlying domestic laws.

¹⁶⁹⁹ See the somewhat similar reasoning in K. van Raad, "Additions to Article 3(2) (Interpretation) and 24 (Non-Discrimination) of the 1992 OECD Model and Commentary", 20 *Intertax* (1992), 671 *et seq.*, at 674; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 494-495; P. J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", 43 *European Taxation* (2003), 66 *et seq.*, at 66, 74 and 79. See, however, *contra* M. Lang, "Fictitious Income" and tax treaties", in H. van Arendonk, F. Engelen and S. Jansen (eds.), *A Tax Globalist. Essays in honour of Maarten J. Ellis* (Amsterdam: IBFD Publications, 2005), 34 *et seq.*, at 41-42.

force in the other contracting State at the time of the treaty conclusion.

Similarly, the fact that, after the conclusion of the treaty, a certain rule or principle of law has become widespread in the domestic tax law systems of developed States (other than the contracting States),¹⁷⁰⁰ could be relied upon by the interpreter in order to argue that the context does not require attributing to the relevant treaty term a meaning different from the one it has under the contracting State's domestic law, as modified after the treaty conclusion in order to incorporate the above-mentioned rule or principle.

Lastly, one might even argue that, where only one contracting State has subsequently introduced in its domestic law a legal rule or principle that, if referred to for the purpose of interpreting the tax treaty, would lead to a substantial change in the original allocation of taxing rights between the parties, such a rule or principle might nevertheless be referred to for the purpose of construing undefined legal jargon terms on the basis of Article 3(2) where the above-mentioned contracting State has actually construed the treaty in such a way for a sufficiently long period of time and the other contracting State has never protested, therefore silently acquiescing, or has explicitly endorsed that interpretation.¹⁷⁰¹

5.4. *Specific tax treaty definitions that refer to domestic law*

Apart from Article 3(2), other provisions of OECD Model-based tax treaties refer, explicitly or implicitly, to the domestic law of the contracting States in order to interpret legal jargon terms. This section briefly analyses such further references and, where relevant, assesses the analogies and differences with the *renvoi* encompassed in Article 3(2).

Under Article 3(1)(b), the term “company” is defined as denoting also “any entity that is treated as a body corporate for tax purposes”, i.e. by means of an implicit reference to domestic tax law.

Interestingly, paragraph 3 of the Commentary to Article 3 OECD Model provides that the term company “covers any taxable unit which is treated as a body corporate according to the tax laws of the Contracting State in which it is organised”. One may argue that such a clarification by the Commentary falls short in that the term “company”, bearing a special relevance for the purpose of applying Articles 5(7), 10 and 16 OECD Model, where it is further qualified by the term “resident”, should include any entity treated as body corporate for tax purposes under the law of the contracting State of which it is a treaty resident, regardless of the private or company laws under which it is organized.

This *renvoi* appears to be ambulatory, due to the strict link between “company”

¹⁷⁰⁰ This argument would also hold true, *a priori*, where such a rule or principle was already widespread in the domestic tax law systems of developed States at the time of the treaty conclusion.

¹⁷⁰¹ See, similarly, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 67, m.no. 126.

and “resident” under Articles 5(7), 10 and 16 the OECD Model and the fact that the term “resident”, under Article 4 OECD Model, is defined by means of an ambulatory reference to the contracting States’ domestic law (see below).

Article 3(1)(g)(ii) OECD Model defines “national”, in relation to a contracting State, as any legal person, partnership or association deriving its status as such from the “laws” in force in that contracting State.

The overall context suggests that the reference is intended to be to the private or company law of the relevant contracting State, i.e. the law that confer to such bodies of person their existence and status.

Moreover, it seems reasonable to conclude that the reference to such a law should be ambulatory, since it would not make sense to denote as nationals, for the purpose of the treaty, bodies of person that no longer derive their status as such from the domestic law of the relevant contracting State. This conclusion is further supported by the fact that, until 1992, the definition of “national” was included in Article 24 OECD Model, which requires an ambulatory approach in order to tackle discrimination caused by later changes occurred in the domestic laws of the contracting States.

The above comments apply, by analogy, to the implicit reference to the contracting States’ laws on the acquisition or loss on nationality or citizenship encompassed in Article 3(1)(g)(i) OECD Model.¹⁷⁰²

Article 4(1) OECD Model provides that, for the purposes of the relevant treaty, “the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof”.¹⁷⁰³

The explicit reference to the contracting State’s domestic laws in the first sentence appears intended to refer to the domestic tax laws to which the treaty applies, on the basis of (i) the reference to the person’s liability to tax in that State, (ii) the overall structure of the OECD Model and (iii) the role played by the term “resident” within the various distributive rule articles. On the other hand, the reference to the State and its political subdivisions and local authorities encompassed in the second sentence implies a *renvoi* to the constitutional and administrative laws of that State.

In both cases, the reference to the contracting State’s domestic law should be regarded as ambulatory, since “[i]t would be impossible to apply the treaty to people who were or were not resident under a definition which was no longer applicable”,¹⁷⁰⁴ as

¹⁷⁰² See also paragraph 8 of the Commentary to Article 3 OECD Model.

¹⁷⁰³ For a case where the court decided that the term “resident” was to be interpreted in accordance with domestic tax law, although the treaty contained a definition thereof departing from such law, see High Court of Justice of England and Wales (United Kingdom), 1 March 1982, *IRC v. Exxon Corporation*, [1982] STC 356. This case is commented on, and strongly criticized, with reference to the application by Goulding J. of the principle of effectiveness in order to give effect to the intended purpose of the relevant treaty provision, in M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 6.04.

¹⁷⁰⁴ See J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the

well as to political subdivisions and local authorities no longer existing under the relevant contracting State's domestic law.

Under Article 6 OECD Model, the term "immovable property" has, in the first place, "the meaning which it has under the law of the Contracting State in which the property in question is situated."¹⁷⁰⁵

In this respect, the International Tax Group seems to uphold the view that the *renvoi* is intended to the general law of the contracting State in which the property is situated.¹⁷⁰⁶ However, one may argue that evidence exists to support the view that the reference should be intended primarily to be to the domestic tax law of that State. First, a contextual analysis shows that, in the very same Article 6(2), a reference is specifically made to "general law"¹⁷⁰⁷ in order to include in the intension of "immovable property" the rights to which the provisions of private law concerning landed property apply. Moreover, the tax treaty practice of certain States seems to point to the same conclusion. Under certain Canadian tax treaties, for example, the immovable property article makes reference to "real property" in the English authentic text and to "biens immeubles" in the French authentic text.¹⁷⁰⁸ Since "real property" and "biens immeubles" do have the same meaning under Canadian tax law, but they have different meanings under Canadian general law,¹⁷⁰⁹ the only construction removing the potential divergence of meaning would appear to be that based on a *renvoi* to Canadian domestic tax law.

No clear evidence, other than that referred to with regard to Article 3(2) OECD Model, seems to exist in favor of the static or ambulatory nature of the *renvoi* encompassed in Article 6.

Article 10(3) OECD Model provides that the term "dividends", for the purpose of Article 10, includes income from "other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident".

The strict context, in this case, clearly suggests that the *renvoi* is intended to the

OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 34.

¹⁷⁰⁵ See Article 6(2) OECD Model.

¹⁷⁰⁶ See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 35.

¹⁷⁰⁷ "Droit privé" in French.

¹⁷⁰⁸ E.g. Article VI of the 1980 Canada-United States tax treaty, where however the term "real property" is explicitly given the meaning it does have under the "taxation" laws of the State where it is situated; Article 6 of the 1980 Australia-Canada tax treaty, as amended by the 2002 protocol (before the amendment there was no reference to domestic law in Article 6, so that Article 3(2) applied directly and the tax law meaning was adopted for interpretation purposes; it is doubtful whether the contracting States wanted to change such a *renvoi* to the domestic tax law by means of the insertion of the reference to the domestic law directly in Article 6, since the overall changes made by the protocol seem more oriented to bring into operation the "standard" Canadian treaty definition of "immovable/real" property); Article 6 of the 1980 Canada-New Zealand tax treaty; Article 6 of the 1987 Canada-Papua New Guinea tax treaty, where however the "real property" is explicitly given the meaning it does have under the "taxation" laws of the State where it is situated.

¹⁷⁰⁹ See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 35.

domestic tax law of the State of residence of the distributing company (i.e. the laws concerning the taxes to which the treaty applies).

In contrast, no clear evidence, other than those referred to with regard to Article 3(2) OECD Model, seems to exist in favor of the static or ambulatory nature of this *renvoi*.

Under Article 11(6) OECD Model, where the amount of the interest payments between related parties is not at arm's length, the excess part of the payments "shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of [the treaty]".

Also in this case, the strict context of the provision supports the view that the reference should be regarded as made to the relevant "tax laws" of the contracting States (i.e. the laws concerning the taxes to which the treaty applies).

For the same reason, it seems reasonable to conclude that the *renvoi* has an ambulatory nature, since the excess part of the payments may "remain taxable" only "according to the laws of each contracting State" in force in the relevant tax year.

With regard to Article 11 OECD Model, it is also interesting to note that paragraph 21 of the Commentary thereto states that "[i]t has seemed preferable not to include a subsidiary reference to domestic laws in the text; this is justified by the following considerations: [...] b) the formula employed offers greater security from the legal point of view and ensures that conventions would be unaffected by future changes in any country's domestic laws". This statement seems to imply that a reference to domestic law, where included, would have been regarded as ambulatory in nature.¹⁷¹⁰

Article 12(4) OECD Model provides for a rule similar, in all relevant respects, to that encompassed in Article 11(6) OECD Model. Thus, the comments made in relation to the latter apply, by analogy, to the former.

In Article 23 OECD Model, no reference is made to the contracting States' domestic law. However, as paragraph 60 of the Commentary to Article 23 OECD Model points out with regard to the credit method provision, "[a] number of conventions [...] contain a reference to the domestic laws of the Contracting States and further provide that such domestic rules shall not affect the principle laid down in Article 23 B".

This statement has been interpreted, correctly according to the author, as implying that the reference to the domestic credit method rules should be regarded as ambulatory and that, in any case, subsequent domestic law changes should not be taken into account where affecting the principle laid down in the treaty article.¹⁷¹¹

¹⁷¹⁰ See, accordingly, See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 36.

¹⁷¹¹ See J.F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 37. See also the decision of the Supreme Court (Canada) in the *Interprovincial Pipe Line Company* case, where the Court, with specific reference to the interpretation of article XV of the 1942 Canada-United States tax treaty, according to which, "[a]s far as [might] be in accordance with the provisions of the Income Tax Act", Canada agreed to allow a

Finally, the various references to the domestic (tax and other) laws of the contracting States in the treaty articles dealing with mutual agreement procedures, exchange of information and assistance in the collection of taxes should be regarded as made to the rules and principles of law in force at the time of their application, due to the essentially procedural and administrative nature of such articles.¹⁷¹²

With regard to the above implicit and explicit references to the contracting States' domestic law, Edwardes-Ker¹⁷¹³ expresses the view that they are justified, from a policy perspective, by the fact that the use of the domestic law meaning in such cases is axiomatic,¹⁷¹⁴ necessary,¹⁷¹⁵ or helpful.¹⁷¹⁶ As a consequence, in these cases the context does not generally require a different meaning to apply.

He also adds that, "if a tax treaty is to remain effective, these meanings must normally be those current at the time a dispute arises – and not those originally applicable when this tax treaty was first concluded. It must be presumed that this was the original intention of the parties."¹⁷¹⁷

To conclude, it is worth noting that while the rules of interpretation provided for in Article 3(1) and 3(2) OECD Model explicitly establish that the domestic law meanings must be applied unless the context otherwise requires, other rules, in particular those encompassed in Articles 4(1), 6(2) and 10(3) OECD Model, do not.

One might infer, from the presence in the former and the absence in the latter provisions of a reference to the context requiring a different interpretation, that with regard to the latter the drafters intended to apply the domestic law meaning without exception. With regard to Article 6(2) and 10(3), this construction may find further support in the narrow scope of such a *renvoi*, which might be considered to be limited to Articles 6 and 10,¹⁷¹⁸ as well as to the few other articles that explicitly refer thereto.¹⁷¹⁹

credit for the income tax levied by the United States at source, stated that the effect of that article "was to establish mutual covenant to apply as between each country whatever foreign tax credit provision the respective domestic laws of each country might *from time to time* adopt" (see Supreme Court (Canada), 1 April 1968, *Interprovincial Pipe Line Company v. R.*, [1968] SCR 498 - *emphasis added*).

¹⁷¹² See, the similar conclusion reached, in respect of Article 26 OECD Model, by J.F. Avery Jones et al., "The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 38.

¹⁷¹³ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.01-8.06 and 9.07.

¹⁷¹⁴ For instance, with regard to terms "nationality" and "citizenship" employed in Article 3(1)(g)(i) OECD Model and the terms "political subdivision" and "local authority" used in Article 4 OECD Model.

¹⁷¹⁵ For instance, with regard to the terms "domicile", "residence" and "place of management" used in Article 4 OECD Model.

As a matter of fact, Edwardes-Ker does not refer to these terms employed in Article 4 OECD Model, but simply to "residence", which however is the term defined therein; the reference therefore seems intended to the terms used to define "residence" by means of a *renvoi* to the domestic law of the relevant contracting State.

¹⁷¹⁶ For instance with regard to the term "immovable property" employed in Article 6 OECD Model.

¹⁷¹⁷ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.07.

¹⁷¹⁸ See the wording of Article 10(3): "the term "dividends" as used in this article means".

Edwardes-Ker, in this respect, maintains that the definitions employed in the OECD Model that make explicit reference to the domestic laws of the contracting State “do not provide that these domestic definitions are not to apply “where the context otherwise requires” – precisely because this tax treaty context does not require them to apply.”¹⁷²⁰

However, an approach that rejects in advance the possibility that the overall context might require an interpretation different from the one stemming from the application of the contracting States’ domestic law meaning appears to be over-rigid, since it eliminates from the outset an interpretative tool that might be helpful in order to construe the tax treaty provisions in a reasonable manner,¹⁷²¹ especially in cases where the domestic law of the relevant State had gone through drastic changes that the parties could not have plausibly anticipated.¹⁷²² In this respect, it would seem adequate to just require a severe burden of proof to be satisfied in order for a meaning other than the domestic law meaning to apply. Moreover, as the treaty definitions referring to the domestic law of the contracting States are also often made up of other undefined terms, which in turn must be construed either in accordance with Article 3(2), if legal jargon terms, or solely in accordance with the rules encompassed in Articles 31-33 VCLT, if non-legal jargon terms, the influence of the overall context on the construction of defined treaty terms in any case will remain great.¹⁷²³

5.5. *The role of the renvoi to domestic law in the interpretation of multilingual tax treaties*

5.5.1. *The right to rely on a single text: the relevance of the authentic text drafted in*

¹⁷¹⁹ E.g. Articles 13(1) and 21(2) OECD Model, which both refer to the definition of “immovable property” provided for in Article 6(2) OECD Model.

¹⁷²⁰ M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.01.

¹⁷²¹ See, for instance, House of Lords (United Kingdom), 5 February 1975, *Oppenheimer v. Cattermole*, 50 TC 159.

¹⁷²² See the example given by Edwardes-Ker (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 8.02) with regard to the term “national”. In this respect, the author seems to support the view that the movement of the definition of “national” from Article 24 to Article 3 OECD Model could have an impact on whether the context might (now) require the domestic law meaning of the term “national” not to be applied (while it might not, when the definition was encompassed in Article 24) in cases of a substantial change in the domestic law meaning. This different outcome would be supported by the fact that Article 3(1) OECD Model (as amended in 1992) explicitly provides that the domestic law meaning is to be applied “unless the context otherwise requires”, while a similar provision was missing in the definition provided for in Article 24(2) of the 1977 OECD Model. In light of the history of the definition of the term “national” in of the OECD Model, the author doubts that the movement of such a definition from Article 24 to Article 3 implies a change in the drafters’ intention to make it subject (or not) to the context requiring otherwise.

¹⁷²³ This is true, for instance, with reference to the expression “any other criterion of a similar nature” employed in Article 4 OECD Model, which qualifies the reference to the domestic law of the could-be-residence State, as well as with reference to the term “corporate rights” used in Article 10(3) OECD Model, which qualifies the income that is to be subjected to the same taxation treatment as income from shares in order to be characterized as “dividends” for the purpose of Article 10.

the official language of the State applying the treaty

As previously mentioned, the *renvoi* to domestic law encompassed in Article 3(2) applies only in so far as undefined legal jargon terms in the tax treaty are at stake.

Where this is the case and no *prima facie* divergence of meanings is alleged to exist among the various authentic texts, the combined reading of Article 33 VCLT and Article 3(2) entitles the interpreter to exclusively employ the authentic text drafted in the official language of the State applying the treaty (if existing) and to construe the relevant treaty provision on the basis of the domestic law meaning that the legal jargon terms used in that text (or their proxies) have under the domestic law of that State.

The interpreter remains, however, under the duty to determine whether the context requires a different interpretation. In this respect, the analysis carried out in previous section 5.3.3 is applicable. For the purpose of the present section, it is nonetheless worth noting that, in order to assess whether the context requires a different interpretation:

- (i) Article 33 VCLT allows the interpreter to disregard the other authentic texts; and
- (ii) the interpreter should take into account the OECD Model (official versions) and its Commentary, where the treaty is based on that Model.

Similarly, where the tax treaty is authenticated only in one language,¹⁷²⁴ other than the official languages of the contracting States, Article 3(2) directs the interpreter to construe undefined legal jargon terms in accordance with the meaning that the corresponding terms, expressed in the official language of the contracting State applying the treaty, have under the domestic law of that State.

In order to choose the relevant “corresponding terms” under the law of the State applying the treaty, the interpreter should use all available elements and items of evidence, such as bilingual (legal) dictionaries, thesaurus dictionaries, (comparative) law textbooks and encyclopedias, the authentic texts of other tax treaties concluded by that State and drafted in its own official language, as well as the tax treaty model of that State, if publicly available.

For instance, where Article 7 of an Italian tax treaty authenticated only in English¹⁷²⁵ employs the term “enterprise”, Article 3(2) would direct the interpreter to construe that term in accordance with the meaning that the corresponding terms “impresa” has under Italian income tax law. The term “impresa” should be chosen as domestic law term corresponding to the treaty term “enterprise”, since, among other things:

¹⁷²⁴ In the very remote case that the tax treaty is authenticated in two or more languages, but not in the official language of the State applying the treaty, Article 33 VCLT enables the interpreter to rely exclusively on one authentic text and Article 3(2) directs the interpreter to construe the undefined legal jargon terms employed in that text in accordance with the meaning that the corresponding terms, expressed in the official language of the contracting State applying the treaty, do have under the domestic law of that State. In this regard, the conclusions drawn in respect of monolingual tax treaties and multilingual tax treaties authenticated also in the official language of the State applying the treaty are relevant *mutatis mutandis*.

¹⁷²⁵ This is a purely hypothetical case, since all Italian tax treaties are authenticated (also) in the Italian language.

(i) the former is the term generally used in the Italian authentic texts of Italian tax treaties; and

(ii) a bilingual (legal) dictionary normally indicates those two terms as synonyms.

Obviously, in this case as well the interpreter may conclude that the context requires an interpretation different from the one based on the domestic law meaning.

5.5.2. *The solution of prima facie divergences between the authentic treaty texts*

5.5.2.1. The nature and significance of the prima facie divergences: conclusions on research questions c-i)

This subsection deals with the following research questions:

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

In order to accurately tackle them, it is appropriate to start the analysis from the classification of the different types of divergences of meaning that may emerge from the interpretation of legal jargon terms in accordance with Article 3(2).

A first type of *prima facie* divergence may be said to exist between two accurately (although not perfectly) corresponding legal concepts existing under the laws of the two contracting States (“type-A divergence”).

Often, such concepts are pointed to by the corresponding terms employed in the two authentic texts drafted in the official languages of the contracting States. For instance, the terms “*impresa*” and “*Unternehmen*” used in the Italian and German authentic texts of the 1989 Germany-Italy tax treaty point to the respective underlying legal concepts existing under Italian and German tax laws. Where these two concepts were found to be not absolutely equal (as actually is the case, for example in respect to certain forestry and agriculture activities), a (limited) divergence may be said to exist between them.

However, this type of difference may also emerge where the tax treaty is authenticated only in one (neutral) language. In the latter case, the interpreter also has to face the additional burden of determining which is the legal jargon term in the official language of the State applying the treaty best corresponding to the legal jargon term employed in the authentic treaty text (drafted in a different language).

For instance, if the Germany-Italy tax treaty had been authenticated only in the English language, the treaty term “*enterprise*” would point to the domestic legal concept underlying the legal jargon term “*impresa*” where Italy applied the treaty and, in contrast, to the domestic legal concept underlying the term “*Unternehmen*” where

Germany applied the treaty.

A second type of divergence¹⁷²⁶ may be seen to exist between two legal concepts both existing under the law of the State applying the treaty (“type-B divergence”). Generally, those legal concepts are:

- (i) the one underlying the legal jargon term used in the authentic text drafted in the official language of that State; and
- (ii) the one underlying the legal jargon term (expressed in the official language of the State applying the treaty) that is considered by the interpreter to best correspond to the legal jargon term employed in another authentic text.¹⁷²⁷

For instance, the Italian text of an Italian tax treaty may use the term “*lavoro autonomo*” in a certain article, while the English authentic text uses the term “employment”. The Italian legal jargon term that is generally considered to best correspond to the English term “employment” is the term “*lavoro subordinato*” (or “*lavoro dipendente*”); the latter is, in fact, the term that is generally used in Article 15 of Italian OECD Model-based tax treaties and one of the terms that is generally indicated as a synonym of the term “employment” in bilingual (legal) dictionaries. Under Italian (tax) law, the concepts corresponding to the terms “*lavoro autonomo*” and “*lavoro subordinato*” are significantly different, the former denoting as prototypical items the activities carried on by a self-employed person. In this case a divergence may be said to exist between the two Italian legal concepts.

In the majority of cases, however, the type-B divergence is less obvious. For instance, the English authentic text of Article 16 of the 1988 Italy-United Kingdom tax treaty, similar to Article 16 of the OECD Model, makes exclusive reference to the “board of directors” of a company, while the Italian authentic text thereof employs the expression “*consiglio di amministrazione o [...] collegio sindacale*”. Although the Italian Civil Code entrusts the “*consiglio di amministrazione*” with pure management functions and the “*collegio sindacale*” with control and supervisory functions, bilingual dictionaries generally equate the “*consiglio di amministrazione*” to the “board of directors” and the “*collegio sindacale*” with the “board of statutory auditors”. On this basis, one might reach the conclusion that the Italian legal jargon term best corresponding to the English term “board of directors” is “*consiglio di amministrazione*”, whose underlying legal concept is narrower than the one corresponding to the compound expression “*consiglio di amministrazione o [...] collegio sindacale*”. In such a case, the conclusion would be drawn that the two legal concepts are different.

From a quantitative perspective, on the other hand, the significance of the divergences

¹⁷²⁶ This second type of divergence may theoretically emerge as well with regard to the two (or more) authentic texts drafted in the official languages of a single contracting State. The issues connected to this case, however, are not different from those characterizing the instance of two (or more) authentic texts drafted in the official language of one contracting State and in another language.

¹⁷²⁷ I.e. the authentic text drafted in the official language of the other contracting State, or an authentic text drafted in a different language.

existing among the relevant legal concepts may vary within a spectrum where the extremes are:

- (i) the case of legal concepts sharing all their prototypical items and presenting only limited differences with regard to the peripheral items that are within their respective scope; and
- (ii) the case of legal concepts not sharing any of their respective prototypical items.

The first case is, for instance, that previously illustrated with reference to the comparison of the domestic law concepts underlying the terms “impresa” and “Unternehmen”.

The second case is, for instance, that previously illustrated with reference to the comparison between (i) the Italian law concept underlying the term “lavoro autonomo” and (ii) the Italian law concept underlying the term “lavoro subordinato”.

In light of the above analysis, the *prima facie* discrepancy in meaning resulting from the comparison of two authentic treaty texts, drafted in the respective official languages of the contracting States, may be examined and described in terms of type-A and type-B divergences.¹⁷²⁸

In particular, a first case of *prima facie* discrepancy may emerge as a pure type-A divergence. This is the case where the relevant legal jargon terms employed in the two authentic texts appear to be very accurate correspondents, under the respective domestic laws, in light of all elements and items of evidence available (e.g. bilingual legal dictionaries, comparative law textbooks, comparative legal studies, etc.). From a quantitative perspective, pure type-A divergences generally concern only peripheral items. Even in cases where the discrepancy concerns prototypical items as well, it is usually not so significant and pervasive to make the interpreter doubt, in the absence of other decisive elements and items of evidence, that the parties intended to interpret the relevant treaty provision in accordance with the meaning that the term employed in the text drafted in the official language of the State applying the treaty (or a proxy thereof) has under the domestic law of that State. The *prima facie* discrepancy between the terms “impresa” and “Unternehmen” employed in the Italian and German authentic texts of the 1989 Germany-Italy tax treaty represents a good instance of this type of discrepancy.

A second case of *prima facie* discrepancy emerges as a combination of type-A and type-B divergences, in the sense that the discrepancy is caused:

- (i) not only by the fact that the two best corresponding terms, under the respective domestic laws of the two contracting States, have two (more or less) divergent meanings (type-A divergence),
- (ii) but also and predominantly by the fact that the two terms employed in the authentic treaty texts do not appear to be accurate correspondents, under the respective domestic laws, more similar terms (and thus concepts) existing under such laws (type-B divergence).

From a quantitative perspective, this second kind of discrepancy in concerns both

¹⁷²⁸ The same holds true, by analogy, where one (or even both) of the compared authentic texts is drafted in a language other than the official languages of the contracting States.

prototypical and peripheral items and, in extreme cases, makes the interpreter seriously doubt whether the parties intended to interpret the relevant treaty provision in accordance with the meaning that the term employed in the text drafted in the official language of the State applying the treaty (or a proxy thereof) has under the domestic law of that State. For example, where the Italian authentic text of the 1989 Germany-Italy tax treaty employed the term “attività economica” instead of “impresa”, the former having a much wider scope than the latter under Italian law, the *prima facie* discrepancy in meaning between the Italian and the German authentic texts could be viewed not only as caused by the ontological discrepancies existing between the two best correspondent terms under the Italian and German domestic laws (i.e. the terms “impresa” and “Unternehmen”), but also by the fact that the term “attività economica” is used in the Italian authentic text instead of the more closely corresponding term “impresa”.

At a first level of analysis, thus, the author may conclude that pure type-A divergences are inherently caused by the use of legal jargon terminology in a tax treaty and, therefore, they should be generally accepted as such and dealt with through the application of the *renvoi* encompassed in Article 3(2): the relevant domestic law meaning should be selected by the interpreter on the basis on which contracting State is applying the treaty.¹⁷²⁹

In contrast, *prima facie* discrepancies caused by the interaction between type-A and type-B divergences should be examined more carefully and, where the effect of the type-B divergence was significant, the interpreter should critically assess whether the context requires the attribution of a meaning other than the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty (e.g. the meaning that the legal jargon term, which best corresponds to the term used in the other authentic text(s) of the treaty, has under the domestic law of the State applying the treaty).¹⁷³⁰

5.5.2.2. The need to reconcile of the *prima facie* divergences: conclusions on research question c-ii)

In the last part of the previous section, the author preliminarily concluded that it would seem reasonable for the interpreter to closely look at the *prima facie* discrepancies caused by the interaction between type-A and type-B divergences and, where the effect of the type-B divergence was significant, to critically assess whether the context requires the attribution of a meaning other than the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty. This preliminary conclusion implies that the interpreter should try to reconcile the *prima facie* discrepancy.

¹⁷²⁹ The actual application of such domestic law meaning would obviously remain subject to the context not requiring otherwise

¹⁷³⁰ I.e., in the previous example, the meaning of the term “impresa” (and not of the term “attività economica”) under Italian law.

From a systematic perspective, however, such a preliminary conclusion calls for a prior fundamental question to be answered:

- ii. *Is there any obligation for the interpreter to reconcile (at least to a certain extent) the prima facie divergent authentic texts of an OECD Model-based tax treaty?*¹⁷³¹

In fact, from the outset the possibility cannot be excluded that, under the system of *renvoi* provided for in Article 3(2) OECD Model, the interpreter is entitled to always and exclusively rely on the legal concepts underlying the legal jargon terms employed in the authentic text drafted in the official language of the State applying the treaty (if existing), disregarding the possible existence of different legal concepts underlying the terms employed in the other authentic treaty texts.

This raises the question whether the interpreter is under an obligation to reconcile (at least to a certain extent) the *prima facie* divergent authentic texts of an OECD Model-based tax treaty, or, in contrast, he may always and exclusively rely on the legal concepts underlying the legal jargon terms employed in the authentic text drafted in the official language of the State applying the treaty.

The answer to such a question should be looked for in the intention of the parties.

In this respect, several items of evidence exist supporting the view that the parties probably intended the interpreter to carry out a (limited) reconciliation of the relevant authentic texts of OECD Model-based tax treaties.

First, tax treaties generally do not contain any explicit derogation to the customary international law principle that the interpreter may rely on any of the authentic treaty texts in order to construe its provisions.

To read in the *renvoi* to the law of the contracting State applying the treaty, encompassed in Article 3(2), an unconditional and compulsory obligation for the interpreter to rely exclusively on the authentic text drafted in the official language of that State, for the purpose of construing the treaty, may be regarded as reading too much in the language of Article 3(2), such a significant departure from customary international law reasonably requiring a more precise and explicit wording to be considered to have been intended by the parties.¹⁷³²

¹⁷³¹ A similar question (and a similar answer) holds true with regard to the alleged divergences existing between the legal concepts underlying the terms employed in one of the authentic treaty texts and those underlying the corresponding terms used in the OECD Model official versions.

¹⁷³² The alternative view of the absence of an obligation for the interpreter to reconcile the authentic treaty texts (at least in certain cases and to a certain extent), which appears even less sensible than the one just described, would be to consider that the parties intended:

- (i) the treaty to have multiple meanings, not depending (solely) on the domestic laws of the contracting States, but from the very same wording of its authentic texts and
- (ii) to entitle the interpreter to choose the meaning that best suits his purpose by selecting the authentic text that supports it.

Second, since the tax treaty is based on the OECD Model, the argument may be put forward that the general meaning determined on the basis of the OECD Model (official versions) and the OECD Commentary constitutes a limit to the meaning attributable to the legal jargon terms used in the authentic texts drafted in the official language of the State applying the treaty.¹⁷³³

This also implies that, where one of the authentic treaty texts, other than the one drafted in the official language of the State applying the treaty, reproduces the English or French official version of the OECD Model, the interpreter should take care of and reconcile the alleged difference between those two authentic texts. For instance, where a specific tax treaty appears to be based on the OECD Model and Article 15 thereof, in its English authentic text, reproduces Article 15 of the OECD Model, it would be difficult to reasonably argue that the interpreter may exclusively rely on the Italian authentic text of such an article, which employs the term “lavoro autonomo”,¹⁷³⁴ and attribute to the latter term the meaning it has under Italian law, completely disregarding the English authentic text and the corresponding provision of the OECD Model.

Third, the fact that certain tax treaties are authenticated only in one neutral language,¹⁷³⁵ or provide for a prevailing text (generally drafted in a neutral language) in the case of divergences may be seen as supporting the argument that, with respect to tax treaties in general, the corresponding legal concepts under the law of the two contracting States should not be too different from each other.¹⁷³⁶

For instance, where an OECD Model-based tax treaty is authenticated only in English and uses the term “employment” in Article 15, the interpreter must construe the latter term by attributing to it the meaning that the best corresponding Italian legal jargon term has under Italian law. The corresponding term, in this case, is probably “lavoro subordinato”¹⁷³⁷ and not “lavoro autonomo”. It appears difficult to support the conclusion that provisions of two Italian treaties similarly structured and that present the same (or a similar) wording in their respective English authentic texts (“employment”) could be interpreted in a significantly different way (with regard to prototypical items, i.e. typical employment income and typical independent activity income) only because one of the two treaties was also authenticated in the Italian language (and employed in the Italian authentic text the term “lavoro autonomo”) and the other was not.

Fourth, although extremely remote in practice, it may happen that a tax treaty is authenticated in two languages that are not the official languages of either of the contracting States. In this case, where a significant *prima facie* divergence of meaning existed between the corresponding legal jargon terms used in such authentic texts, the interpreter should at least partially reconcile the two authentic texts in order to select the

¹⁷³³ See sections 3 and 4 of this chapter.

¹⁷³⁴ See the example in section 5.5.2.1.

¹⁷³⁵ I.e. they are authenticated in the official languages of neither of the contracting States.

¹⁷³⁶ Otherwise, similarly worded (in the neutral authentic language) tax treaties concluded by the same State could end up being construed in significantly divergent ways.

¹⁷³⁷ See the example in section 5.5.2.1.

domestic legal jargon term, and thus the domestic law meaning, corresponding to the terms actually used in the treaty.

For instance, where an Italian tax treaty based on the OECD Model was authenticated solely in English and French and a provision thereof employed the terms “employment” and “activités de caractère indépendant” in the English and French authentic texts, respectively, the interpreter should at least partially reconcile those two terms in order to decide which Italian domestic law term corresponds thereto and, therefore, which domestic law meaning should be used pursuant to Article 3(2).

Finally, although theoretically possible, it does not seem reasonable to lightly assume that the contracting States intended to have two completely different (sets of) rules in force where they each apply the treaty.

Gaja, in this respect, maintains that the *renvoi* to the domestic law of the contracting State applying the treaty “involves reconciling the texts in order to define a general meaning, while the more precise meaning is established according to the law of the relevant contracting State”.¹⁷³⁸ He adds that, in any case, under Article 3(2) OECD Model, the domestic law meaning of any undefined treaty term “would have to be consistent with the general meaning that the term has under the treaty”.¹⁷³⁹

In order to decide whether, in any actual instance, this outer limit would be crossed by attributing to the relevant undefined treaty term the meaning it has under the domestic law of the contracting State applying the treaty, the interpreter relies on the context. Such a context, more than being the intent of the parties,¹⁷⁴⁰ or embodying the parties’ common intention,¹⁷⁴¹ is made of all the elements and items of evidence that may help the interpreter in establishing and arguing for the common intention of the

¹⁷³⁸ See G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99.

¹⁷³⁹ See G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 100, where the author notes that, “[s]hould there be any divergence among the authentic texts of a tax treaty that follows the OECD Model, these would have to be first reconciled in order to define the general meaning of the provision, including the *general meaning* of the relevant term. The reference to the law of one of the contracting States for the determination of the meaning of a term would only come into play once the framework has been defined”.

¹⁷⁴⁰ See S. I. Katz, “United States”, in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 615 *et seq.*, at 650, who affirms: “The intent of the contracting parties is the context. There is no question of whether contextual interpretation is preferred to domestic. The very concept of the context implies that it must be.”

Obviously, if one equates the intent of the parties to the context, no other solution may be accepted other than that of a contextual interpretation (i.e. the interpretation that reflects the intention of the parties). This, however, is a circular argument. The real issue, which is hidden by (and in) Katz’s proposition, is “which is the meaning intended by the parties?” There is no ready answer to be found to that question anywhere (otherwise, one would seriously have to question the sanity of those hundreds of tax scholars that have painstakingly dealt with such issue). So, Katz ends up changing the form, but not the substance of the problem: the interpreter is still left with a handful of items of evidence and elements on the basis of which he must decide (and argue for) whether the parties (would) intend, in the specific situation, the domestic law meaning, or some other meaning, to apply.

¹⁷⁴¹ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.10.

parties: it is the overall context that must be used in order to determine the treaty utterance meaning.

5.5.2.3. The partial reconciliation of the prima facie divergences: the fundamental role of Article 3(2) OECD Model and its interaction with Article 33(4) VCLT. Conclusions on research question c-iii)

In the previous section, the author has concluded that the interpreter should carry out a limited reconciliation of the various authentic texts, at least in certain cases, where the tax treaty is based on the OECD Model. The following question thus arises:

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

In this respect, the author has already pointed out the position upheld by Gaja, to which he substantially adheres, providing that Article 3(2) OECD Model “involves reconciling the texts in order to define a general meaning, while the more precise meaning is established according to the law of the relevant contracting State”.¹⁷⁴²

In other words, the interpreter may rely exclusively on the domestic law meaning of the legal jargon terms employed in the treaty as long as it significantly overlaps with the “general meaning” established on the basis of the overall context and, in particular, of the reconciliation of the relevant authentic texts.¹⁷⁴³ Thus, as long as the domestic law meaning and the “general meaning” significantly overlap and considering that, where it exists, the authentic treaty text drafted in the official language of the State applying the treaty provides the interpreter with the most direct and immediate access to the domestic law (concepts) of that State, it is reasonable to conclude that the selection of the appropriate domestic law meaning under Article 3(2) should be made by the interpreter on the basis of that authentic text. This solution limits the discretion of the interpreter in selecting the appropriate domestic law meaning, since it attributes significant weight to the evidence of the intention of the parties represented by their choice of a specific legal jargon term in the official language of the State applying the treaty and, thus, of its underlying legal concept over the others which are theoretically available.

¹⁷⁴² See G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99.

¹⁷⁴³ See G. Gaja, “The perspective of international law”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 100, where the author notes that, “[s]hould there be any divergence among the authentic texts of a tax treaty that follows the OECD Model, these would have to be first reconciled in order to define the general meaning of the provision, including the *general meaning* of the relevant term. The reference to the law of one of the contracting States for the determination of the meaning of a term would only come into play once the framework has been defined”.

Consider, for example, Article 16 of the 1988 Italy-United Kingdom tax treaty, whose English authentic text makes exclusive reference to the “board of directors” of a company, while the Italian authentic text thereof employs the expression “consiglio di amministrazione o [...] collegio sindacale”.¹⁷⁴⁴ It may be plausibly argued that the legal concepts underlying the expressions “board of directors” and “consiglio di amministrazione o [...] collegio sindacale” under English and Italian law, respectively, overlap substantially. They both point to a common “general meaning”, i.e. the company organs that, under the relevant company law, carry out the management, control and supervisory functions. Since the legal concept underlying the legal jargon term used in the Italian authentic text substantially overlaps with the above “general meaning”, it is reasonable to use the more precise meaning of the former in order to construe the treaty where Italy is the State applying it.

Hence, the analysis to be performed by the interpreter is one that fits perfectly in the dynamics of Article 3(2): the interpreter is to construe the treaty on the basis of the domestic law meaning of the relevant legal jargon term employed in the authentic text drafted in the official language of the contracting State applying the treaty (for instance “consiglio di amministrazione o [...] collegio sindacale”),¹⁷⁴⁵ unless the context requires a different interpretation. In this respect, the author submits that the context requires a different interpretation whenever the domestic law meaning does not sufficiently overlap with the “general meaning”.

For this purpose, as already pointed out in section 5.5.2.2 of this chapter, the context coincides with the overall context and, therefore, it is made up of all the elements and items of evidence that may help the interpreter to determine and argue for the (common) utterance meaning of the parties. In the case of multilingual treaties, the overall context obviously includes the corresponding terms used in the various authentic texts (in the previous example “board of directors” and “consiglio di amministrazione o [...] collegio sindacale”) and their underlying legal concepts. It also encompasses the corresponding terms employed in the English and French versions of the OECD Model (in the previous example “board of directors” and “conseil d’administration ou de surveillance”), as well as in the OECD Commentary, if the treaty is based on the OECD Model.

In order to determine the “general meaning”, where a *prima facie* divergence of meaning is put forward, the interpreter is required to partially reconcile the allegedly divergent authentic texts. The reconciliation, in this case, is characterized as “partial” in the sense that it is sufficient for the interpreter to find out the prototypical items that the corresponding terms employed in the various authentic texts are intended (by the parties) to denote (not to denote) and the functions played by their intended (by the parties) underlying concepts within the respective legal systems. In fact, the “general meaning” is determined (also) on the basis of:

¹⁷⁴⁴ See section 5.5.2.1 above.

¹⁷⁴⁵ Or the domestic law meaning of that State’s legal jargon term corresponding to the term used in the treaty, in the case none of the authentic treaty texts has been drafted in that State’s official language.

- (i) the common prototypical items that the interpreter considers the parties intended to denote (not to denote) by means of the relevant treaty terms and/or
- (ii) the common functions played by the legal concepts, which the interpreter considers the parties meant to correspond to the relevant treaty terms, within the respective legal systems.

In the previous example, for instance, the “general meaning” is determined by taking into account that (a) both the English and the Italian expressions denotes statutory company organs provided for under the applicable corporate governance systems and (b) the functions carried out by such bodies, in their respective corporate governance systems, are similar, i.e. management and/or control and/or supervisory functions.

It seems reasonable to conclude that such a reconciliation must be carried out, unless evidence of a different agreement of the parties exists, on the basis of the rules encompassed in Article 33(4) VCLT, i.e. by interpreting the various authentic texts in accordance with Articles 31 and 32 VCLT and, where a divergence persists, by favoring the meaning that best reconciles the texts having regard to the object and purpose of the treaty.

The significance of Article 33 VCLT in this process, however, is not limited to the direct comparison of the legal jargon terms employed in the various authentic texts. Since (i) the overall context includes the various authentic texts of the provision to be interpreted and those of its related provisions and (ii) such provisions are also made of non-legal jargon terms, it is possible that the construction of these provisions, as expressed in the various authentic texts, may show some possible differences of meaning not due to the legal jargon terms employed therein. Such potential differences should be removed in accordance with Article 33(4) VCLT. The resulting interpretations, which may shed light on the object and purpose of the relevant treaty provision and its interaction with other related provisions, must be then taken into account by the interpreter in order to determine whether the context otherwise requires and, more specifically, to establish the “general meaning” of the relevant legal jargon terms.

Where the interpreter concludes that the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the State applying the treaty does not sufficiently overlap with the “general meaning” of the relevant (corresponding) treaty terms, he should consequently not apply the former meaning in order to construe the treaty. In its place, the interpreter should apply the domestic law meaning that best fits the overall context and that best matches with the “general meaning”, unless the context otherwise requires. For the purpose of establishing such a domestic law meaning, and thus the relevant domestic legal jargon term, the interpreter should use all the available elements and items of evidence of the parties’ intention, among which bilingual (legal) dictionaries, thesaurus dictionaries, (comparative) law textbooks and encyclopedias, the authentic texts of other tax treaties concluded by the State applying the treaty (drafted in its own official language), the tax treaty model of the latter State, if publicly available, the OECD Model official versions of the relevant treaty article and the OECD Commentary.

For instance, where the Italian text of an Italian tax treaty uses the term “lavoro autonomo” in a certain article, while the English authentic text uses the term

“employment”, a *prima facie* discrepancy between those authentic texts arises, since the former term, under Italian law, typically denotes the activities carried on by self-employed persons. Where, on the basis of the overall context, the interpreter concludes that the “general meaning” corresponding to the terms “lavoro autonomo” and “employment” is akin to the meanings of “employment” under English law and “emploi salarié” under French law,¹⁷⁴⁶ the interpreter should attribute to the treaty terms “lavoro autonomo” and “employment” the meaning that the term “lavoro subordinato”¹⁷⁴⁷ has under Italian tax law whenever Italy applies the treaty, unless the context otherwise requires, since the term “lavoro subordinato” is the one generally used in Article 15 of Italian OECD Model-based tax treaties and one of the terms that is generally indicated as a synonym of the terms “employment” and “emploi (salarié)” in bilingual (legal) dictionaries.

To sum up, if a *prima facie* divergence is alleged to exist among the domestic law meanings of the legal jargon terms used in the various authentic texts, the domestic law meaning of the legal jargon term employed in the authentic text drafted in the official language of the contracting State applying the treaty¹⁷⁴⁸ should be used in order to construe the meaning of the relevant treaty provision, unless the overall context requires a different interpretation, for instance where the comparison of the relevant authentic texts¹⁷⁴⁹ shows that such a domestic law meaning does not sufficiently overlap with the “general meaning”.

However, where such domestic law meaning does substantially overlap with the “general meaning” and, more generally, the overall context does not require a different interpretation, any *prima facie* divergence of meanings is resolved by means of the *renvoi* of Article 3(2), which provides the interpreter with a clear rule for choosing which, among the *prima facie* divergent meanings, must be attributed to the relevant treaty term(s) in each specific case. To put it differently, where legal jargon terms are at stake, Article 3(2) actually operates as if it were a rule establishing the prevailing authentic text in accordance with Article 33(1) VCLT,¹⁷⁵⁰ provided that the context does not require a different interpretation.

Obviously, the activity of establishing the “general meaning” and assessing whether the domestic law meaning and the “general meaning” sufficiently overlap entails a significant dose of discretion by the interpreter, which is limited only by the (good faith) requirement to support the chosen conclusions with reasonable arguments.

If the issue is looked at from the perspective of the distinction between type-A and type-B divergences, the following conclusions may be drawn.

¹⁷⁴⁶ “Emploi salarié” is the term used in the French official version of Article 15 OECD Model.

¹⁷⁴⁷ Or “lavoro dipendente”.

¹⁷⁴⁸ Or the domestic law meaning of that State’s legal jargon term corresponding to the term used in the treaty, in case none of the authentic treaty texts has been drafted in that State’s official language.

¹⁷⁴⁹ Or the comparison between the authentic text(s) and the OECD Model official versions.

¹⁷⁵⁰ In this case, however, there is evidence of the agreement of the parties to make the “prevailing” text applicable from the outset, subject to the overall context not requiring otherwise.

Where the *prima facie* discrepancies among the authentic treaty texts are caused exclusively by type-A divergences, the domestic law meaning of the terms employed in the various authentic texts commonly overlaps with their “general meaning”. In these cases, therefore, Article 3(2) does not require, on the basis solely of such a *prima facie* discrepancy, the interpreter to attribute to the relevant terms employed in the authentic text drafted in the official language of the State applying the treaty a meaning other than the one they have under the domestic law of that State.¹⁷⁵¹

Where the *prima facie* discrepancies are caused by the interaction between type-A and type-B divergences, however, it is more probable that some of the domestic law meanings of the terms employed in the various authentic texts do not sufficiently overlap with their “general meaning”. This risk appears somewhat related to the impact that the type-B divergence has on the *prima facie* discrepancy. In these cases, the interpreter must carefully assess whether the meaning that the terms employed in the authentic text drafted in the official language of the State applying the treaty have under the domestic law of that State sufficiently overlaps with the “general meaning” thereof and, where this is not the case, he has to establish what is the different meaning required by the context. Such an alternative meaning might be the meaning that, under the domestic law of the State applying the treaty, best corresponds to the “general meaning” of the relevant treaty terms, or, where the context so requires, a uniform and autonomous meaning.

Scholars have sometimes taken a different position on this issue.

Sundgren,¹⁷⁵² for instance, in commenting on the decision of the Supreme Administrative Court of Sweden in the case *RÅ 2004 not 59*,¹⁷⁵³ which concerned the interpretation of the 1966 Peru-Sweden tax treaty, held the following: “The initial statement by the [Court] that both the Swedish and the Spanish texts are authoritative for interpretation purposes is of course correct. The following conclusion, however, that, by reference to article II § 2 of the treaty¹⁷⁵⁴ – the so called *lex fori* rule – the Swedish text shall have precedence when the treaty is applied in Sweden but that in cases of uncertainty the Spanish text, too, shall be considered is not. The reason herefor is that the *lex fori* rule is an instrument for determining the meaning of terms that have not been defined in the treaty which may lead to the adoption of the internal law meaning of the term of the country applying the treaty and this has nothing to do with the interpretation problems stemming from divergent language versions. This is a different problem that shall be resolved by application of the above cited rules in article 33 of the Vienna Convention. And, in contrast to the conclusion of the [Court], the fundamental principle of article 33 and the starting point for its application is the equality of the texts, not that

¹⁷⁵¹ It obviously remains possible that some other element of the overall context requires the interpreter to attribute to the relevant treaty term a meaning other than the current domestic law meaning. See, in this respect, section 5.3.3.2 of this chapter.

¹⁷⁵² See P. Sundgren, “Interpretation of tax treaties authenticated in two or more languages: a case study”, 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: <http://www.skatter.se/index.php?q=node/1079>; accessed on 23 July 2011).

¹⁷⁵³ Supreme Administrative Court (Sweden), 25 March 2004, case *RÅ 2004 ref. 59*, *Regeringsrättens årsbok* (2004) (a summary in English is available at the IBFD Tax Treaty Case Law Database).

¹⁷⁵⁴ Similar, in all relevant respects, to Article 3(2) of the 1963 OECD Draft.

any of them shall take precedence. Nor, of course, does article 33 of the Vienna Convention refer to any internal law meaning of the term being interpreted.”

In light of the previous analysis, the author disagrees with the position expressed by Sundgren. The *renvoi* encompassed in Article II(2) of the 1966 Peru-Sweden tax treaty removes the *prima facie* discrepancies emerging from the comparison of the authentic treaty texts, in so far as the latter employ undefined legal jargon terms whose meaning must be looked for, in the first place and unless the context otherwise requires,¹⁷⁵⁵ under the domestic law of the contracting State applying the treaty. In these cases, in fact, under the rule of law provided for in Article II(2), the existence of a difference in meaning between the Spanish and Swedish authentic texts, as construed in accordance with the meanings that the relevant undefined treaty terms have under the domestic laws of Peru and Sweden, respectively, does not constitute a problem at all: where it is Peru applying the treaty, the meaning resulting from the Spanish authentic text applies; conversely, where it is Sweden to apply the treaty, the meaning resulting from the Swedish authentic text applies. This holds true provided that the domestic law meaning so determined sufficiently overlaps with the “general meaning” determined on the basis of the contextual analysis (including textual comparison).

In this respect, it is interesting to highlight that the very same Sundgren notes that, “[h]owever, one must also keep in mind that the problem facing the interpreter in this case is indeed also to determine the meaning of an undefined term in the treaty, namely the term “income from a source”. The interpretation task of the case is thus twofold; a) to solve, according to Article 33 of the Vienna Convention, the problem of the diverging language meanings and b) to determine, according to Article II § 2 of the treaty the meaning of an undefined term. It is, however, a difficult task to separate these two sets of rules because it is likely even if not intentional that the different languages of the contracting state will tend to reflect also these states’ domestic law meanings. But the fact that the [Court] has based its interpretation approach only on the *lex fori* rule of the treaty nourishes the suspicion that the Court has not contemplated Article 33 of the Vienna Convention at all.”¹⁷⁵⁶

5.5.2.4. The solution of the *prima facie* divergences where a prevailing text exists: conclusions on research question c-iv)

One could wonder whether the above conclusions remain valid even where the tax

¹⁷⁵⁵ In that respect, Sundgren carries out a very well-structured and in depth analysis of the overall context in order to establish whether capital gains from the sale of shares must be considered to be income (“*rédito*” and “*inkomst*” in the Spanish and Swedish authentic treaty texts, respectively) for the purpose of Article XVII(2) of the 1966 Peru-Sweden tax treaty (see P. Sundgren, “Interpretation of tax treaties authenticated in two or more languages: a case study”, 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: <http://www.skatter.se/index.php?q=node/1079>; accessed on 23 July 2011).

¹⁷⁵⁶ See P. Sundgren, “Interpretation of tax treaties authenticated in two or more languages: a case study”, 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: <http://www.skatter.se/index.php?q=node/1079>; accessed on 23 July 2011.

treaty's final clause provides that, in the case of any divergence of interpretation between the authentic texts drafted in the official languages of the contracting States, the text authenticated in the *lingua franca* (generally English or French) will prevail.

In this respect, the following research question should be properly answered:

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

It is the author's opinion that such a final clause has only a limited bearing on the conclusions reached in the previous sections.

In particular, this type of final clause may be relevant in order to assess whether the overall context requires an interpretation different from that determined by attributing to the legal jargon term employed in the authentic text drafted in the language of the State applying the treaty the meaning it has under the domestic law of the latter.

As previously mentioned, since (i) the overall context includes the various authentic texts of the provision to be interpreted and those of its related provisions and (ii) such provisions are also made of non-legal jargon terms, it is possible that the constructions of these provisions, as expressed in the various authentic texts, may show some possible differences of meaning not due to the legal jargon terms employed therein. Such *prima facie* differences, where persisting after an interpretation of the relevant authentic texts based on Articles 31 and 32 VCLT, should be resolved, where the final clause so provides, by giving preference to the interpretation stemming from the prevailing text (the one drafted in the *lingua franca*). The resulting interpretation, which may shed light on the object and purpose of the relevant treaty provision and its interaction with other related provisions, must be then taken into account by the interpreter in order to determine whether the context otherwise requires and, more specifically, to establish the "general meaning" of the relevant legal jargon terms.

Moreover, the meanings that relevant legal jargon term¹⁷⁵⁷ employed in the prevailing treaty text has under the domestic laws of the States using it¹⁷⁵⁸ are part of the overall context and, as such, may play a direct role in establishing the "general meaning" of the corresponding terms used in the various authentic texts. In this case, where the interpreter cannot establish such a "general meaning" by reconciling the various authentic texts through an interpretation thereof based on Article 31 and 32 VCLT, the "general meaning" should be determined on the basis of the prevailing text, i.e. it should

¹⁷⁵⁷ Or proxies thereof.

¹⁷⁵⁸ I.e., generally, the meaning that the relevant term has under the domestic laws of the States having, as their official language, the language in which the prevailing treaty text is drafted. By recourse to bilingual dictionaries, legal dictionaries and legal textbooks and encyclopedia, the interpreter may also establish which are the terms, in the official languages of the contracting State applying the treaty (and their underlying concepts in the respective legal system), which are commonly regarded as corresponding to the terms (and underlying concepts) used in the prevailing treaty text, and determine their domestic law meanings accordingly.

be derived from the legal jargon term employed in that text.

Take for instance, the 1925 Germany-Italy tax treaty, which has been authenticated only in the German and Italian languages. According to Articles 5(3) and 11(2) of that treaty, the provisions concerning dividends paid to shareholders apply as well to income (profits distribution) from other *rights*¹⁷⁵⁹ that are similar in nature to shares, but not to income derived from other forms of participation in companies, to which other provisions of the tax treaty apply. A *prima facie* discrepancy exists between the German and the Italian authentic texts of the above-mentioned article, since the former uses the term “Wertpapieren”, while the latter employs the term “valori mobiliari” for the English term *rights*. In fact, while in the German language the legal jargon term “Wertpapieren” substantially correspond to the English term “securities”, thus requiring the incorporation of the relevant rights into certificates for circulation purposes,¹⁷⁶⁰ the Italian legal jargon term “valori mobiliari” has a wider bearing and might be used to denote corporate rights not represented by securities, i.e. not incorporated in any certificate.¹⁷⁶¹ Therefore, a construction of the German text in accordance with German domestic law would lead to the conclusion that the treaty provisions concerning the taxation of income from shares do not apply to profits distributed by companies whose capital is not represented by securities, while an interpretation of the Italian authentic text made in accordance with Italian domestic law would lead to the opposite conclusion. If, by assumption, the 1925 Germany-Italy tax treaty had provided for an English authentic text to prevail in the case of divergences and the English text of Articles 5(3) and 11(2) had employed the term “securities”, the interpreter would have had a good argument to conclude that the “general meaning” of the relevant treaty terms in the three authentic languages excluded rights in the capital of the distributing company not incorporated in certificates. As a consequence, where Italy was applying the treaty, the interpreter should have concluded that the context required an interpretation other than the one based on the domestic law meaning of the term “valori mobiliari”. The opposite conclusion would have been reached where the hypothetical prevailing text had used the term “rights”, instead of “securities”.

On the other hand, it is clearly possible (and generally probable) that a single interpreter may attribute different meanings to the same treaty provision depending on which contracting State applies it. In this case, however, as long as the domestic law meanings of the terms employed in the various authentic texts substantially overlap with each other and with their “general meaning”, it is not the multilingual character of the tax treaty that causes a single treaty provision¹⁷⁶² to have two different meanings when applied by the two contracting States. It is the reference to those States’ domestic law encompassed in

¹⁷⁵⁹ The author chose the term “rights” for the present English translation as a *neutral* term, that being a term used more than once in the current English official version of Article 10(3) OECD Model.

¹⁷⁶⁰ See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a.

¹⁷⁶¹ See G. Melis, *L’Interpretazione nel Diritto Tributario* (Padova: Cedam, 2003), p. 622.

¹⁷⁶² According to Article 33 VCLT, a treaty provision remains a single treaty provision regardless of the number of authentic texts by means of which it is expressed.

Article 3(2) of the tax treaty (and, therefore, the treaty intrinsic multijuarlism) that entails it: *two texts, one treaty; one treaty, two rules*. This multiplicity of meanings, therefore, is outside the scope and purpose of the treaty's final clause; it is not an issue that clause deals with.¹⁷⁶³

Take, for instance, Article 15 of the 1978 Brazil-Italy tax treaty. It employs the term “*emprego*” in the Portuguese authentic text and the term “*attività dipendente*” in the Italian authentic text as corresponding to the term “*employment*” used in the English authentic text, which prevails in the case of doubt. Assuming that the “*general meaning*” of such terms substantially corresponds to the meaning of the term “*employment*” under English law, the domestic law meaning of the term “*attività dipendente*” under Italian law (the same, *mutatis mutandis*, holds true for the Portuguese term “*emprego*”) substantially overlaps with that “*general meaning*” (in the sense that the prototypical employment relations are covered by both). It is therefore reasonable for the interpreter to use the Italian law meaning of the term “*attività dipendente*” to construe Article 15 where Italy is the contracting State applying the treaty. The fact that the English text prevails in the case of divergences does not compel the interpreter to set aside the Italian domestic law meaning of the term “*attività dipendente*” only because the item of income at stake (for instance, the income paid for an activity carried out by a person under the coordination, but not under the full control and direction, of a third party), which is denoted by the latter term under Italian law, it is not denoted by the term “*employment*” under, say, English law.

Accordingly, the author rejects the position taken by Edwardes-Ker that “there may be no alternative to an autonomous interpretation of terms in a tax treaty where the sole text [...], or the text which is to prevail in the case of a divergence of interpretation [...], is expressed in a language different to that in which each signatory State's tax laws are expressed.”¹⁷⁶⁴

5.5.3. *The relevance of non-authentic versions*

It has already been pointed out that, in the system of the VCLT, no explicit relevance is attached to non-authentic language versions, such as the official translations produced by

¹⁷⁶³ This conclusion is further supported by the following analysis. If the interpreter decided to rely solely on the prevailing text, in order to interpret the legal jargon terms employed therein he should, pursuant to Article 3(2), refer to the meanings that those terms have under the law of the contracting State applying the treaty. Unfortunately, however, such terms most probably do not have any meaning under that domestic law since they are not used in it, the domestic law of that contracting State being drafted solely in the official language of that State. The interpreter, therefore, should decide which terms, expressed in the latter language, best correspond to the terms used in the prevailing treaty text: in order to do so, the best guidance available would certainly be the authentic treaty text drafted in the official language of the contracting State applying the treaty. Which would bring the interpreter back to the starting point, provided that the domestic law meaning of the relevant term employed in that text substantially overlaps with the “*general meaning*” common to the corresponding terms used in the various authentic texts.

¹⁷⁶⁴ See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.02.

the contracting States. However, it has also been submitted that nothing seems to prevent the interpreter from taking them into account as supplementary means of interpretation, attributing an interpretative weight to them that varies depending on the available evidence that such language versions may contribute to determining the common intention of the parties.¹⁷⁶⁵

Consider a tax treaty authenticated only in a neutral language, a non-authentic version of which exists drafted in the official language of a contracting State. If such a non-authentic version had been issued by the government of the latter State and the treaty negotiators had been closely involved in its drafting, the interpreter would have a reasonable argument to support the view that the meaning that the above contracting State intended to attribute to the terms employed in the authentic treaty text is the meaning that the corresponding legal jargon terms used in the non-authentic version (official translation) have under that State's domestic law. This conclusion is strengthened where the latter terms reproduce those generally used by that contracting State in the authentic texts of other tax treaties drafted in its own official language,¹⁷⁶⁶ since in this case it is reasonable to assume that the other contracting State was aware of the former State's treaty practice when concluding the treaty.¹⁷⁶⁷

Notably, the official translation may play a role in this process of meaning refinement only insofar the domestic law meaning determined on the basis thereof substantially overlaps with the "general meaning" established by construing the sole authentic treaty text in accordance with Articles 31 and 32 VCLT. In order to establish such a "general meaning", the interpreter may still use the official translation as a supplementary means of interpretation, but, as such, its weight in the interpretative and argumentative process will be limited.

The evidential value of the official translations clearly increases where both official translations issued by the contracting States point to the same "general meaning". In this case, the interpreter might even have an argument to challenge the "general meaning" *prima facie* resulting from the authentic treaty text and to construe the latter more liberally in light of such enlightening supplementary means of interpretation, as well as to critically review its initial assessment of the other available interpretative elements and items of evidence.

Whether the interpreter will ultimately attribute to the terms employed in the sole authentic treaty text the *prima facie* "general meaning" established on the basis of that text, or the apparently conflicting "general meaning" determined on the basis of the

¹⁷⁶⁵ See, in particular, section 3.2.4 of Chapter 4 of Part II.

¹⁷⁶⁶ The same reasoning applies with regard to the official tax treaty model (containing a provision similar to the one included in the tax treaty to be interpreted) of that State, provided that it is publicly available for consultation.

¹⁷⁶⁷ Obviously, this conclusion would hold true unless the context required a different interpretation, for instance where the domestic law meaning so determined appeared outside the scope of the "general meaning" established on the basis of the sole authentic treaty text.

contracting States' official translations is a matter of discretionary judgment. The choice for the latter alternative, nonetheless, should be supported by strong arguments relying on the actual facts and circumstances, in the absence of which preference should be given to the "general meaning" established on the basis of the authentic treaty text.

In the previous sections, it has also been submitted that non-authentic language versions may come into play as documents on which the subsequent practice of the parties is based, particularly where they have been put into public circulation and relied upon by *all* the parties for the purpose of applying the relevant treaty. This, however, does not seem to be a realistic scenario with regard to tax treaties.

5.5.4. *Two special instances of interaction between Article 3(2) OECD Model and Article 33 VCLT*

To conclude, two special instances of the interaction between Article 3(2) of OECD Model-type tax treaties and Article 33 VCLT are practically illustrated by the following examples.

The first instance concerns the 1967 France-United States tax treaty, which was authenticated solely in the French and English languages. Article 11(6) of that treaty provides that:

Royalties paid for the use of [...] property [...] *in a State* shall be treated as income from sources within that State

Les redevances payées *dans un Etat* pour l'usage [...] des biens [...] sont considérées comme des revenus ayant leur source dans cet Etat

While the English authentic text seems to suggest that the source of the royalties is the State where the property is used, the French authentic text seems to point to the State where the payment is made, which in turn raises the issue of which is to be regarded as the State of payment where the payor, the payee and the bank accounts credited and debited are situated in different States.

In this respect, the suggestion has been made that the application of Article 33(4) VCLT would favor the meaning ordinarily attributable to the English authentic text since the place of payment is of less significance than the place of use in determining the source of royalties.¹⁷⁶⁸

This a typical example of how the encyclopedic knowledge and personal background of the interpreter may play a decisive role in choosing the interpretation to be given to a treaty provision, where no clearly conclusive elements and items of evidence appear to exist in favor of one of the possible alternative constructions. The

¹⁷⁶⁸ See J. F. Avery Jones et al., "The interpretation of tax treaties with particular reference to Article 3(2) of the OECD Model", *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 103.

solution proposed, in fact, is argued for solely on the basis of an alleged major “significance” of one criterion over another, without any analysis of the solutions adopted by the same States in other treaties and in the OECD Model, of the economic studies available (if any) concerning the primacy of the place of use as criterion of economic allegiance, of the relevant provisions of the domestic tax laws of the contracting States, of the administrative issues connected with establishing the States where the intangible property is used and with apportioning for tax purposes the royalty payment among such States. In a nutshell, the solution proposed is not argued for on the basis of any in-depth analysis committed to determine the possible common intention of the parties and, as such, it might be criticized as one substituting the preference of the interpreter for the agreement of the parties.

From a procedural standpoint, however, the major flaw of such a solution is that of not attempting to apply Article 2(2) of the tax treaty, which corresponds to Article 3(2) of the OECD Model. This could have perhaps shown that the English and French texts reflected the criteria used under the domestic law of the United States and France, respectively, for the purpose of determining the source of royalty payments. If that was the case, the apparent divergence of meanings would have proved to be an actual divergence of meanings demanded by the operation of the general rule of interpretation provided for under Article 2(2) of the treaty. Each contracting State would have been entitled to tax the royalties sourced within its territory according to its domestic law and the other State (the residence State) would have been then obliged to relieve juridical double taxation in accordance with Article 23 of the tax treaty.¹⁷⁶⁹ From this standpoint, the “general meaning” of the corresponding expressions used in the English and French authentic texts of the treaty seems to coincide with the concept of “royalty source” under the respective domestic laws, since the concepts underlying such expressions appear to have a similar function within the respective tax systems.

France and the United States later modified the wording of Article 11(6) of the treaty by means of Article VI of the 1988 Protocol, which seems to support the above construction of the original texts (and, thus, of the original intention of the parties). According to the new English texts (*emphasis added*):

- (a) Royalties shall be deemed to arise in a Contracting State when the *payer is that State itself, a local authority, a statutory body or a resident of that State*
- (b) Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such *royalties are borne by such permanent establishment or fixed base*, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.
- (c) Notwithstanding subparagraphs (a) and (b), *royalties paid for the use of or the right to*

¹⁷⁶⁹ The only authentic drawback of this approach is that both contracting States could claim the royalties as sourced in their respective territories, thus determining a possible instance of double taxation due to a conflict of qualification (one State considering Article 11 applicable, while the other considering Articles 6 or 22 applicable). That, however, is a problem common to other cases of conflicts of qualification and should be solved accordingly.

use property in the United States shall be deemed to arise therein

The second instance illustrates how Article 33 VCLT may be relied upon in order to interpret the very same Article 3(2) of the relevant tax treaty.

Article 3(2) of the 1970 Belgium-United States tax treaty presents a curious potential difference of meanings among its three authentic texts. On the one hand, the English and Dutch texts provide that each undefined term has the meaning it has under the domestic law of the State whose tax is being determined, “unless the context otherwise requires” (“tenzij het zinsverband anders vereist”).¹⁷⁷⁰ On the other hand, the French authentic text does not contain any reference to the fact that the context might require a different interpretation.

In this case, the interpreter could argue that the reference to the context should be regarded as implicit in the French authentic text of Article 3(2), since (i) it seems more plausible that the parties unknowingly omitted the reference in one of three authentic texts, rather than erroneously inserted it in two of them; (ii) the reference to the context otherwise requiring may be considered an explicit expression of the principle that tax treaties are to be interpreted in good faith;¹⁷⁷¹ (iii) both the English and French official versions of the OECD Model, as well as the United States Model and the vast majority of the tax treaties concluded by the two contracting States, include a reference to the context in Article 3(2) and one may presume that, if such States actually intended to depart from that customary standard, they would have made it clear.

6. The practice of national courts and tribunals in interpreting multilingual tax treaties

In the vast majority of cases domestic courts and tribunals refer to a single authentic text for the purpose of construing tax treaty provisions, that text generally being the one drafted in the official language of the State of the court or tribunal.

A proof of this statement is given by the fact that in the first 12 annual volumes of the International Tax Law Reports, there are fewer than ten decisions in which the

¹⁷⁷⁰ The Dutch term “zinsverband” has sometimes been considered to have a narrower meaning than the English term “context”: according to De Broe, the former would ordinarily denote solely the text of the treaty to be interpreted and not external (extra-textual) materials, thus being narrower even of the context as defined by Article 31(2) VCLT (see L. De Broe, *International Tax Planning and Prevention of Abuse. A Study under Domestic Tax Law, Tax Treaties and EC Law in relation to Conduit and Base Companies* (Amsterdam: IBFD Publications, 2008), pp. 276-277). According to that author, however, Article 33(4) VCLT should lead the interpreter to attribute to such a term the wider meaning that the terms “context” and “contexte” seem to have in the English and French authentic texts of Belgian tax treaties (where used). See, similarly, Hoge Raad, 5 September 2003, case 37651, BNB 2003/379. See, *contra*, with reference to Netherlands tax treaties, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p.490.

¹⁷⁷¹ See Article 31(1) VCLT. See also, although concerning the requirement of an implicit limitation to the ambulatory nature of Article 3(2) *renvoi*, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 48.

competent court or tribunal has taken into account more than one authentic text in order to interpret the relevant tax treaty.¹⁷⁷²

As previously discussed, such a practice is in line with customary international law, as reflected in Article 33 VCLT.¹⁷⁷³ That notwithstanding, this approach presents the inconvenience that possible alternative interpretations, which could be suggested by the analysis of the other authentic texts of the tax treaty, are not taken into account by the interpreter, especially where the latter tend to attribute an overwhelming relevance to the *letter* of the treaty over the other elements of the overall context.

The unattractive effects of this approach may be amplified by the time factor. Where the tax treaty was concluded many years before its application, it probably employs legal jargon terms that were chosen by the contracting States on the basis of the domestic legal systems in force at the time of the treaty conclusion, which could have gone through major changes since then. As a result, the legal concepts underlying the legal jargon terms used in the treaty could no longer have the same function in the current domestic legal environment as they had in the domestic legal system in force at the time of the treaty conclusion and, therefore, the reference thereto for the purpose of construing the corresponding terms employed in the treaty could lead to unsatisfactory results. To put it differently, a plain “literal” interpretation of such terms, without a full understanding of the reasons why they had been selected and employed in the treaty at the time of its conclusion, as well as of the object and purpose of the treaty provisions employing them, might lead to constructions that are unreasonable or lacking in the appropriate argumentative support. In that respect, the comparison of different authentic texts may be sometimes useful to highlight *prima facie* discrepancies that, in turn, could be regarded as requiring a review of the initial “too literal” construction of the tax treaty

¹⁷⁷² See also the statement of De Boek according to which “Belgian courts and tribunals seem reluctant to consult and compare on their own initiative the different authentic versions of a treaty, or to give precedence to a text in a language different from that of the court over the text in the *lingua fori*. One result of this approach [...] is that Belgian case law on divergent formulations in different treaty languages is virtually non-existent” (R. De Boek, “Belgium”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 165 *et seq.*, at 166; *ibidem*, at 179); see, similarly, the statement of Rust that even in German case law “it is very rare to find a decision in which the court refers to the other language version” (A. Rust, “Germany”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 226) and that of Waldburger, according to whom it is extremely seldom that issues of tax treaty linguistic discrepancies are raised and discussed before Swiss courts (see R. Waldburger, “Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Schweizerischen Bundesgerichts”, in M. Lang, J. M. Mössner, R. Waldburger (eds.), *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und der Österreichs* (Vienna: Linde, 1998), 51 *et seq.*, at 56).

¹⁷⁷³ *Contra*, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 38, m.no. 72.

On the other hand, the judicial practice of using a language version (typically a translation in the official language of the court or tribunal) other than the authentic texts of the relevant tax treaty in order to construe its provisions (this is often the case where the tax treaty to be interpreted has only one authentic text, drafted in a language different from the official language of the contracting State applying the treaty) appears not be in conformity with Article 33 VCLT, unless such language version is used as an aid to the construction of the authentic text of the tax treaty.

provisions at stake in light of the overall context of the treaty.¹⁷⁷⁴

The few cases found by the author in which courts and tribunals have dealt with the multilingual character of the relevant tax treaty are reported below. These cases do not add much to the analysis carried out in the previous sections of this chapter and in Chapter 4.

In a decision delivered on 14 April 1965, the District Court of Tokyo (Japan), made reference to the English authentic text of the 1954 Japan-United States tax treaty in order to clarify the meaning of the Japanese authentic text thereof.¹⁷⁷⁵

In the *Furness Withy* case, Thurlow J. of the Exchequer Court (Canada) had recourse to and relied on a French translation of the 1946 Canada-United Kingdom tax treaty, which had been authenticated only in English, in order to interpret Article V of that treaty.¹⁷⁷⁶ However, Abbott J. of the Supreme Court, while upholding the decision of the lower court, explicitly stated that he did “not rely upon the translation of the Convention”,¹⁷⁷⁷ most probably since the French translation was not an authoritative text for interpretative purposes.¹⁷⁷⁸

In case *I6305* of 4 February 1970,¹⁷⁷⁹ the Hoge Raad (the Netherlands), made reference

¹⁷⁷⁴ Consider, for example, Articles 5(3) and 11(2) of the 1925 Germany-Italy tax treaty, which provide that the provisions of the tax treaty concerning dividends paid to shareholders apply as well to income (profits distribution) from other *rights* that are similar in nature to shares, but not to income derived from other forms of participation in companies. A prima facie discrepancy exists between the German and the Italian authentic texts of those articles, since the former use the term “Wertpapieren”, while the latter employ the term “valori mobiliari” for the English term *rights*: while the German legal jargon term “Wertpapieren” substantially corresponds to the English term “securities”, thus requiring the incorporation of the relevant rights into certificates for circulation purposes, the Italian legal jargon term “valori mobiliari” has a wider bearing and might be used to denote corporate rights not represented by securities, i.e. not incorporated in any certificate. In that respect, it is interesting to note that, while German scholars and courts have generally resolved such a discrepancy in favor of the meaning *prima facie* attributable to the German authentic text (see, for instance, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a; A. Rust, “Germany”, in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 221 *et seq.*, at 230-231; Tax Court of Rheinland-Pfalz (Germany), 2 April 1980, case *V 351/79*, *Entscheidungen der Finanzgerichte* (1980), 357 *et seq.*; Bundesfinanzhof (Germany), 9 December 1981, case *IR 78/80*, *Bundessteuerblatt. Teil II* (1982), 243 *et seq.*; Tax Court of Munich (Germany), 22 July 1998, case *9 K 2830/97*, *Haufe-Index 952357*), Italian tax authorities have construed the treaty in accordance with the *prima facie* meaning of the Italian authentic text (see G. B. Galli and A. Miraulo, “Italy”, in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 385 *et seq.*, at 395; G. Melis, *L’Interpretazione nel Diritto Tributario* (Padova: Cedam, 2003), p. 622).

¹⁷⁷⁵ District Court of Tokyo (Japan), 14 April 1965, 11 *Shomu Geppo*, 817 *et seq.*, cited in M. Nakazato, “Japan”, in International Fiscal Association, *Cahiers de droit fiscal international*, Vol. 78a (Deventer: Kluwer, 1993), 407 *et seq.*, at 414.

¹⁷⁷⁶ Exchequer Court (Canada), 24 August 1966, *Furness, Withy and Co. v. R.*, 66 DTC 5358, para. 22.

¹⁷⁷⁷ Supreme Court (Canada), 29 January 1968, *Furness, Withy and Co. v. R.*, in 68 DTC 5033, at 5035.

¹⁷⁷⁸ See similarly M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 20.04.

¹⁷⁷⁹ Hoge Raad (Netherlands), 4 February 1970, case *I6305*, BNB 1970/71.

to both the Dutch and German authentic texts of Article 2 of the 1959 Germany-Netherlands tax treaty and construed them as both requiring a single construction project to last more than twelve months before a permanent establishment came to existence.

In the *Vauban* case,¹⁷⁸⁰ Addy J. of the Federal Court (Canada), compared the French and English authentic texts of Article 13(III) of the 1951 Canada-France tax treaty and noted that, while the former read “Les produits *ou* redevances (royalties) provenant de la vente [...]”, the latter read “The proceeds *of* royalties (redevances) derived from the sale [...]”.¹⁷⁸¹ On the basis of such a comparison, he concluded: “It seems clear that there is a typographical error in the English version and that the word “of” between the words “proceeds” and “royalties” should read “or,” the correct text therefore being: “The proceeds or royalties (redevances) derived from ...””.¹⁷⁸²

In case *18010* of 26 January 1977,¹⁷⁸³ the Hoge Raad (the Netherlands) had to decide whether the relief limitation provided for under Article 6 of the 1967 Netherlands-United Kingdom tax treaty in relation to income not remitted to the United Kingdom applied also to pension payments from the Netherlands to United Kingdom resident persons, the latter being otherwise exempt in the Netherlands under Article 20 of the treaty. The English authentic text of Article 6 provided that “[w]here under any provision of [the treaty] income is *relieved* from Netherlands tax and, under the law in force in the United Kingdom, an individual, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in the United Kingdom and not by reference to the full amount thereof, then the *relief* to be allowed under the [treaty] in the Netherlands shall apply only to so much of the income as is remitted to or received in the United Kingdom”.¹⁷⁸⁴ The Dutch authentic text of Article 6, however, used the term “vermindering” as corresponding to the English term “relief”, the former being a legal jargon term generally used for denoting a reduction or decrease in taxation, as opposed to the term “vrijstelling”, which denotes an exemption from tax. The Hoge Raad compared the two authentic texts and concluded that Article 6 applied only where there was a reduction of tax under the relevant treaty provision, such as for instance under the dividends article, while it did not apply where the treaty provided for an exemption, as was the case with regard to pension payments under Article 20 of the treaty, due to the clear wording of the Dutch authentic text.¹⁷⁸⁵

¹⁷⁸⁰ Federal Court (Canada), 5 September 1975, *Vauban Productions v. R*, 75 DTC 5371.

¹⁷⁸¹ *Emphasis* added.

¹⁷⁸² Federal Court (Canada), 5 September 1975, *Vauban Productions v. R*, 75 DTC 5371, paras. 9-10.

¹⁷⁸³ Hoge Raad (Netherlands), 26 January 1977, case *18010*, BNB 1977/111. See also O. C. R. Marres and S. van Weeghel, *Jurisprudentiebundel IBR* (Deventer: Kluwer, 2008), pp. 1458 *et seq.*

¹⁷⁸⁴ *Emphasis* added.

¹⁷⁸⁵ The reference to the clear wording of the Dutch authentic text should probably be read in light of Article 3(2) of the treaty, which, for the purpose of interpretation, made a *renvoi* to the domestic law meaning of the contracting State applying the treaty, subject to the context not requiring a different interpretation: the term “vermindering” being a legal jargon term under Netherlands domestic tax law, the Court possibly found that its domestic law meaning was unambiguous and applied it.

The Court, however, could have convincingly held differently on the basis of the context requiring the

In the *IR 63/80* case,¹⁷⁸⁶ the Bundesfinanzhof (Germany) had to decide whether the income received by a German resident taxpayer, formally employed by a German resident company, for a short-term (147 days) activity carried on in Spain for the benefit and under the direction of a Spanish resident company, was taxable in Spain and, therefore, to be exempted in Germany under the 1966 Germany-Spain tax treaty. As a matter of fact, although the salary relating to such an activity had been formally paid to the employee by the German employer, it was then charged, together with other auxiliary costs, by the latter to the Spanish resident company.

The Court concluded that the Spanish resident company was to be regarded as the employer (“Arbeitgeber” in the German authentic text) for the purpose of Article 15 of the treaty and, as a consequence, the income was taxable in Spain and had to be exempted from tax in Germany under Article 23(1) of the treaty.

In supporting its decision, the Bundesfinanzhof made reference to the two sole authentic texts of Article 15(2)(b), in the German and Spanish languages, and compared the different wording used therein. It noted that, while the German authentic text referred to an employer (“die Vergütungen von einem *Arbeitgeber* oder für einen Arbeitgeber gezahlt werden, der nicht in dem anderen Staat ansässig ist”),¹⁷⁸⁷ the Spanish authentic text employed the more general term *person* (“Las remuneraciones se pagan por o en nombre de una *persona* que no es residente del otro Estado”).¹⁷⁸⁸ According to the German tax authorities, this different wording was to be ascribed to the fact that the only text drafted and agreed upon by the negotiators was in English¹⁷⁸⁹ and that the Spanish and German authentic texts were later translations. The Court, however, referred to Article 33 VCLT and stated that, on the one hand, both authentic texts were equally authoritative for interpretative purposes and, on the one hand, they were presumed to have the same meaning. It considered that, under Article 3(2) of the treaty (similar to Article 3(2) of the 1963 OECD Draft), it was possible to disregard the meaning attributed to a treaty undefined term by the domestic laws of the contracting States where the context plainly pointed to the (different) meaning agreed upon by the parties: in the case at stake, the context¹⁷⁹⁰ required the salary to be regarded as paid by or on behalf of the Spanish resident company, since it was deductible from the latter’s profits taxable in

interpreter to disregard the domestic law meaning. It could have argued, for instance, that the object and purpose of Article 6 was to avoid there being little or no taxation in the Netherlands on items of income not taxed in the United Kingdom due to the absence of remittance. In this respect, a construction of Article 6 purported to make it applicable also in the case of potential exemptions in the Netherlands, due to the operation of the given treaty provisions, would have appeared more consonant with the object and purpose of the provision itself. Moreover, the Court could have held that an exemption from tax might be denoted as being an extreme case of “reduction” of the tax normally applied under Netherlands domestic law due to the tax treaty (see, substantially in accordance, J. F. Avery Jones et al., “The interpretation of tax treaties with particular reference to article 3(2) of the OECD Model”, *British Tax Review* (1984), 14 *et seq.* and 90 *et seq.*, at 103).

¹⁷⁸⁶ Bundesfinanzhof (Germany), 21 August 1985, case *IR 63/80*, in *Bundessteuerblatt. Teil II* (1986), 4 *et seq.*

¹⁷⁸⁷ *Emphasis* added.

¹⁷⁸⁸ *Emphasis* added. In Article 15(2)(c), however, the term “*persona*” was qualified by the expression “*para quien se trabaje*”.

¹⁷⁸⁹ Interestingly, that draft did not become an authentic text of the treaty.

¹⁷⁹⁰ Which included the overall structure of Article 15, in particular Article 15(2)(b) and (c).

Spain.

In case *1169-1987*,¹⁷⁹¹ the Supreme Administrative Court (Sweden) had to interpret Articles II(2) and XII(3) of the 1960 Sweden-United Kingdom tax treaty, as modified by the 1968 Protocol. For the purpose of construing such articles, the Court majority paid particular attention to the English authentic text thereof since, although both the English and Swedish texts of the treaty were authentic, the 1968 Protocol had been negotiated in English and thus the English text might, in the specific case, be regarded as expressing more accurately the common intention of the parties.

Under Article XII(3) of the treaty, gains from the alienation of properties, other than immovable property and movable property forming part of the business property of a permanent establishment, were taxable only in the State of residence. However, Article II(2) of the English authentic text provided as follows:

“Where under this Convention income from a source [author’s note: “inkomst från inkomstkälla” in the Swedish authentic text] in one of the territories is relieved from tax in that territory and, under the law in force in the other territory, an individual, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in that other territory and not by reference to the full amount thereof, then the relief to be allowed under this convention in the first-mentioned territory shall apply only to so much of the income as is remitted to or received in the other territory.”

The issue before the Court concerned whether the gain realized by a Swedish citizen, emigrated in the United Kingdom with his family and considered resident but not domiciled therein for tax purposes, from the alienation of shares in a Swedish resident company was taxable in Sweden under the 1960 Sweden-United Kingdom tax treaty. The taxpayer, being resident but not domiciled in the United Kingdom, would have been subject to tax therein on such a gain only insofar as the proceeds from the alienation of the shares had been remitted to the United Kingdom, which was not the case. The main interpretative issue before the Court, thus, was whether the gain had to be considered “income from a source” in Sweden for the purpose of Article II(2).

The Court first noted that, under Swedish income tax law, gains from the alienation of shares in Swedish companies realized by non-resident taxpayers were taxable in Sweden if the taxpayer had been resident of Sweden at any time during the ten years proceeding the year of alienation. However, Article XII(3) of the treaty theoretically precluded Sweden from taxing such a gain. That conclusion could be reversed only by means of the application of Article II(2), which implied the need for the Court to interpret it.

In this respect, the Court pointed out that, in construing a tax treaty, the fundamental task for the interpreter is to determine the original (common) intention of

¹⁷⁹¹ Supreme Administrative Court (Sweden), 23 December 1987, case *RÅ 1987 ref. 162*, *Regeringsrättens årsbok* (1987) (also reported in summary in IBFD Tax Treaty Case Law Database). The decision was taken by a majority of three to two judges. See also P. Sundgren, “Interpretation of Tax Treaties – A Case Study”, *British Tax Review* (1990), 286 *et seq.*; and M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 20.05.

the parties and that, in order to do so in the specific case, the starting point was represented by the Swedish authentic text of the treaty, although the interpreter could rely as well on the other authentic texts in order to elucidate the intended meaning of the terms employed. Since the treaty negotiations seemed, in the Court's eyes, to have been conducted in the English language, the Court concluded that, in the specific case, the English text was to be attributed a particular weight for the purpose of determining the original intention of the parties.¹⁷⁹²

A careful analysis of the English authentic text led the court to investigate the meaning the term "income", being a legal jargon term, had under the domestic law of the United Kingdom. The answer found by the Court was that United Kingdom tax law draws a clear line between the concepts underlying the terms "income" and "capital gains". Moreover, while the expressions "inkomst från inkomstkälla" was not used under Swedish tax law, the corresponding English "income from a source" was recognized as a well-known legal jargon term under United Kingdom tax law. In particular, the Court emphasized that gains derived from the alienation of shares in a Swedish resident company would clearly not be denoted by the term "income from source" under United

¹⁷⁹² The decision was harshly criticized by Sundgren (see P. Sundgren, "Interpretation of Tax Treaties – A Case Study", *British Tax Review* (1990), 286 *et seq.*, at 299-301), who submitted that the Court majority, in attributing more weight to the drafted text over the other authentic text, committed a clear violation of the principle of equality of texts (quoting P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 400 and 418; see, accordingly, K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a). He then added that it is quite normal that the process of negotiating bilateral tax treaties is conducted in English by Swedish representatives and that the text initialed at the end of such a process is drafted in the English language only. However, according to Sundgren, after the negotiations are concluded, a lot of efforts goes into the Swedish translation and subsequently all future authentic texts are meticulously scrutinized by both contracting States before signing them. He concluded by stating that "[t]he fact that the text was originally drawn up in English and initialed by civil servants representing the treaty partners must not be regarded as a concession by Sweden for interpretative purposes. This is the whole point of equally authoritative texts" (*ibidem*, at 300). The author, however, agrees with Edwardes-Ker (see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 20.05) holding: "The equality of treaty texts cannot change the reality that all treaty texts may not be equally clear [...] It does not alter the fact that a treaty text in one language (such as that in which it was originally negotiated, drafted and initialed) may well be a truer reflection of both States' understanding than an equally authoritative, albeit less helpful, text which only came into existence as a translation of this initialed text."

Noticeably, the very same Sundgren, with regard to a subsequent case (Supreme Administrative Court (Sweden), 25 March 2004, case *RÅ 2004 ref. 59, Regeringsrättens årsbok* (2004)), stated the following: "The preparatory works of tax treaties are very few. However, the negotiations of these treaties made by Sweden are always conducted in English and will thus always result in an initialled draft in that language. The Swedish Government Bill (prop. 1967:26) of the Sweden-Peru treaty explicitly mentions the existence of this initialled English version. This draft of the treaty is clearly a part of the preparatory work thereof and one would imagine that every responsible interpreter, facing a plurilingual treaty with a divergence in its authentic texts, would jump at the opportunity to examine such a third English text." He then continued noting that the English initialled text of the 1966 Sweden-Peru tax treaty (i.e. its drafted text) contained "interesting information not only regarding the divergence between the two [authentic texts of the tax treaty], but it also cast[ed] light [...] on the negotiation process which is of interest in general to the understanding of the final text(s)" (see P. Sundgren, "Interpretation of tax treaties authenticated in two or more languages: a case study", 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL: <http://www.skatter.se/index.php?q=node/1079>; accessed on 23 July 2011).

Kingdom law since capital gains were outside the intension of that term and, at the same time, such gains would not be denoted by the expression “inkomst från inkomstkälla” under Swedish tax law either since, on the basis of Swedish case law, such capital gains, although being considered to form part of the income of the taxpayer, were generally considered not to have any source. It ultimately concluded, with a majority of three to two judges, that the term “income from a source” was to be construed as not including capital gains arising from the sale of Swedish companies’ shares.¹⁷⁹³

In order to support its conclusion, the Court also made reference to the Swedish government bill bringing the 1968 Protocol into force, which stated that the amendments made by the Protocol, among which the provision of Article II(2), were of a formal nature and that capital gains from the alienation of properties, other than immovable property and movable property forming part of the business property of a permanent establishment, were to be taxed only in the residence State. From such notations, the Court drew the inference that the intention of the parties, when they agreed upon the text of the 1968 Protocol, was not to extend the right to tax of Sweden over such capital gains realized by a United Kingdom resident. In addition, the Court observed that the United Kingdom tax authorities had repeatedly taken the position that Article II(2) did not apply to capital gains, that being a relevant subsequent practice by a contracting State giving evidence of its interpretation of the treaty provisions.

In the *IR 369/83* case,¹⁷⁹⁴ the Bundesfinanzhof (Germany) had to decide whether a German resident individual who carried out some engineering activities in Italy was to be exempt in Germany under Article 7(1)(1) of the 1925 Italy-Germany tax treaty. In that respect, the Bundesfinanzhof analysed both the German and the Italian authentic texts of Article 7(1)(1) and concluded that both attributed an exclusive taxing right to the source State only under the condition that the taxpayer had the power of dispose over the premises where he performed his activity.¹⁷⁹⁵ Since, as a matter of fact, the taxpayer did

¹⁷⁹³ In the separate opinion of the two dissenting judges, holding in favor of the application of Article II(2) to capital gains, heavy emphasis was put on the object and purpose of Article II(2), namely the avoidance of the double non-taxation otherwise caused by the United Kingdom domestic law providing for taxation on a remittance basis of resident but not domiciled individuals.

The argument developed by the dissenting judges was broadly built upon the following points: (i) the term “inkomst”, as used under Swedish domestic tax law, denoted both ordinary income and capital gains; (ii) the previous point constituted strong evidence of the fact that the Swedish negotiators, when agreeing upon the text of the 1968 Protocol, intended the terms “inkomst” and “income”, as employed in new Article II(2) of the treaty, to denote capital gains as well; (iii) in the text of the 1960 Sweden-United Kingdom tax treaty, the terms “inkomst” and “income” had been generally used to denote both ordinary income and capital gains; (iv) the expression “inkomst från inkomstkälla” was to be construed, in its context, as simply requiring that a certain item of income had a sufficiently strong connection with the territory of a contracting State; (v) the object and purpose of Article II(2), i.e. to avoid double non-taxation where no remittance to the United Kingdom had occurred, would have been frustrated by an interpretation excluding capital gains from the scope of that article; (vi) capital gains realized by Swedish non-resident individuals from the alienation of shares in Swedish resident companies became taxable in Sweden only in 1983 and, therefore, they could not be the subject of any intended exclusion by the parties at the time of the conclusion of the 1968 Protocol.

¹⁷⁹⁴ Bundesfinanzhof (Germany), 3 February 1988, case *IR 369/83*, *Bundessteuerblatt. Teil II* (1988), 486 *et seq.*

¹⁷⁹⁵ According to the Court, such a condition was implicitly required by the use of the terms “fester

not have any control over the premises where he performed his activities, the Court concluded that Germany could tax the relevant income.

In a decision delivered on 10 May 1989,¹⁷⁹⁶ the Tax Recourse Commission of Zurich (Switzerland) held that the term “vorübergehend” employed in the German authentic text of Article X of the 1951 Switzerland-United States tax treaty, dealing with income from labor and personal services, was to be given the same meaning as the corresponding term “temporarily present” used in the English authentic text thereof. The relevant part of Article X of the English authentic text reads as follows:

“An individual resident of [the United States] shall be exempt from [Switzerland] tax upon compensation for labor or personal services performed in [Switzerland] if he is temporarily present in [Switzerland] for a period or periods not exceeding a total of 183 days during the taxable year [...]”¹⁷⁹⁷

According to the commission, since the terms “vorübergehend” and “temporarily present” were not defined within the treaty, they had to be construed autonomously and in accordance with the common intention of the contracting States. In that respect, the commission found that the English term “temporarily present” expressed more clearly the intention of the parties to distinguish, for the purpose of applying Article X, between (i) those individuals that intended to remain in the source State temporarily, who were to be exempt from tax in that State, and (ii) those intending to remain there indefinitely, who might be taxed by the source State even where present therein for less than 184 days during the relevant taxable year.¹⁷⁹⁸

In the cases 25373 and 25419 of 1989,¹⁷⁹⁹ the Hoge Raad (the Netherlands) had to decide whether the income to be taken into account in the denominator of the fraction used to determine the tax exemption (with progression) under Article XVIII(2) of the 1957 Canada-Netherlands tax treaty was the overall taxable income,¹⁸⁰⁰ i.e. the overall income reduced by the personal and family deductions to which the taxpayer was entitled under Netherlands domestic tax law, or the overall income before the application of such deductions.¹⁸⁰¹

The Court found that the income to be taken into account in the denominator of the fraction was the overall taxable income. In supporting such a conclusion, the Court

Mittelpunkt” and “sede fissa” in the German and Italian authentic texts of Article 7(1)(1), respectively.

¹⁷⁹⁶ Tax Recourse Commission (Switzerland), 10 May 1989, *Steuerentscheid* (1989), A 31.1, No. 4.

¹⁷⁹⁷ Article X(1) and (2) of the 1951 Switzerland-United States tax treaty, interpolations by the author.

¹⁷⁹⁸ For an analysis of the interaction between the requirement of the “temporarily presence” and that of the “183-days presence”, see, with regard to similarly worded provisions included in other tax treaties, Hoge Raad (Netherlands), 29 September 1999, cases 33267 and 34482, BNB 2000/16 and BNB 2000/17 and Tax Court of Köln (Germany), 28 November 1983, case 169/80 E, *Entscheidungen der Finanzgerichte* (1984), 460 *et seq.* (all briefly dealt with in this section).

¹⁷⁹⁹ Hoge Raad (Netherlands), 13 September 1989, case 25419, BNB 1990/60, and 6 December 1989, case 25373, BNB 1990/44.

¹⁸⁰⁰ “Belastbaar inkomen” under Netherlands domestic law.

¹⁸⁰¹ “Onzuiver inkomen” under Netherlands domestic law.

noted that, while the Dutch authentic text of the treaty could be seen as ambiguous in that respect, the English authentic text was clearer in referring to the taxable income as determined under Netherlands domestic law.¹⁸⁰² Moreover, the Court found its conclusion to be further supported by the contextual analysis of the treaty provisions, in particular Article II(2) (corresponding to Article 3(2) OECD Model), and of the interrelation between the distributive rule Articles and Article XVIII (1) and (2).

In the *Thiel* case,¹⁸⁰³ the High Court of Australia was faced with the interpretation of Article 7 of the 1980 Australia-Switzerland tax treaty. In carrying on that task, three judges of the Court mentioned that, as the English and German authentic texts of the tax treaty were agreed to be equally authoritative, the meaning of the term “enterprise”, used in the English authentic text of Article 7, might have been illuminated by evidence of the meaning of the corresponding German term.¹⁸⁰⁴ Unfortunately, the judges did not push the analysis further since no such evidence had been provided and the parties before the Court proved unable to agree upon a translation of the German text into English.¹⁸⁰⁵

In the case IR 106/87,¹⁸⁰⁶ the Bundesfinanzhof (Germany) compared the German and English authentic texts of Article VI(2) of the 1964 Germany-United Kingdom tax treaty and concluded that they had the same meaning, i.e. that the reduction to 20% of the maximum withholding tax on inter-company dividends applied even in cases where the recipient of the dividends was exempt from tax in its State of residence. In fact, although a subject-to-tax condition was provided for under paragraph 1 of Article VI, which set out the general rule applicable to dividends paid by companies resident of one State to residents of the other State, the Court found that both the English and German authentic texts of paragraph 2 made clear that its provision applied notwithstanding the provision of paragraph 1.

In the *Gu* case,¹⁸⁰⁷ Bonner T.C.J. of the Federal Court (Canada) compared the French and English authentic texts of Article 19 of the 1986 Canada-China tax treaty (but not the equally authoritative Chinese text). He found that comparison, in particular with regard to the words “receives for the purpose of his maintenance, education or training” in the English text and the words “reçoit pour couvrir ses frais d'entretien, d'études ou de

¹⁸⁰² See, in particular, the decision delivered by the Court in case 25373 and the Opinion of Advocate General Van Soest to case 25419.

¹⁸⁰³ High Court (Australia), 22 August 1990, *Thiel v. Commissioner of Taxation*, 171 Commonwealth Law Reports, 338 *et seq.*

¹⁸⁰⁴ *Ibidem*, at para. 9 of the judgment delivered by Mason C.J., Brennan J. and Gaudron J. See, similarly, Federal Court (Australia), 4 March 1997, *Lamesa Holdings BV v. Commissioner of Taxation*, [1997] FCA 134, where the Court, for the purpose of interpreting Article 13 of the 1976 Australia-Netherlands tax treaty, admitted the evidence provided for by a Netherlands tax treaty expert suggesting that there was no divergence in the meaning between the Dutch and English authentic text thereof.

¹⁸⁰⁵ *Ibidem*.

¹⁸⁰⁶ See Bundesfinanzhof (Germany), 7 February 1990, case IR 106/87, 159 *Sammlung der Entscheidungen des Bundesfinanzhofs*, 518 *et seq.* For a similar straightforward comparison see Tax Court of Baden-Württemberg (Germany), 16 August 1996, case K 42/92, *Entscheidungen der Finanzgerichte* (1997), 82 *et seq.*

¹⁸⁰⁷ Federal Court (Canada), 26 April 1991, *Chun Gu v. R*, 91 DTC 821.

formation” in the French text, useful. He concluded: “That language is quite unsuited to describe a payment of ordinary salary no matter how the recipient ultimately spends it. The language suggests that the payments must in some way be related to the recipient's maintenance costs, education costs or training costs. Payments are not received to cover costs of a specified class simply because the recipient ultimately spends the money to meet costs of the type named.”¹⁸⁰⁸

In the *Crown Forest* case,¹⁸⁰⁹ Muldoon J. of the Federal Court (Canada) compared the French and English authentic texts of the 1980 Canada-United States tax treaty in order to interpret Article IV(1) thereof, without finding any discrepancy.

In case 28217 of 1992,¹⁸¹⁰ the Hoge Raad (the Netherlands) had to deal with an issue similar to the one tackled in the previously-mentioned cases 25373 and 25419 of 1989. In particular, the question to be answered was whether the income to be taken into account in the denominator of the fraction used to determine the tax exemption (with progression) under Article 20(3) of the 1959 Germany-Netherlands tax treaty was the overall taxable income,¹⁸¹¹ i.e. the overall income reduced by the personal and family deductions to which the taxpayer was entitled under Netherlands domestic tax law, or the overall income before the application of such deductions.¹⁸¹²

Under Article 20(3) of the treaty, the Netherlands had to allow as deduction, from the tax payable according to its domestic law, the amount of such tax computed on the basis of the ratio between (i) the income taxable in Germany according to the tax treaty and (ii) the *total income*. The terms used to indicate the *total income* in the two authentic texts of Article 20(3)¹⁸¹³ of the treaty were “alle inkomensbestanddelen” in Dutch and “Gesamteinkommen” in German. In addition, Article 20(2) of the treaty, with reference to the exemption that Germany had to grant to its residents for income taxable in the Netherlands according to the treaty distributive rules, preserved the possibility for the former State to apply to the remaining income the tax rate that it would have applied to the taxpayer's *total income* in the absence of the tax treaty. In this case, while the German authentic text of Article 20(2) employed the very same term “Gesamteinkommen” to refer to such total income, the Dutch authentic text used the different expression “het gehele inkomen”.

The Hoge Raad, unlike what it had done in respect of the differently worded Article XVIII(2) of the 1957 Canada-Netherlands tax treaty, held that the income to be taken into account in the denominator of the treaty tax exemption ratio was the overall income before the application of the personal and family deductions.¹⁸¹⁴ In arguing in

¹⁸⁰⁸ *Ibidem*, para. 12.

¹⁸⁰⁹ Federal Court (Canada), 2 April 1992, *Crown Forest v. Canada*, 92 DTC 6305, at 6309-63011, in particular para. 23.

¹⁸¹⁰ Hoge Raad (Netherlands), 15 April 1992, case 28217, BNB 1992/223.

¹⁸¹¹ “Belastbaar inkomen” under Netherlands domestic law.

¹⁸¹² “Onzuiver inkomen” under Netherlands domestic law.

¹⁸¹³ The 1959 Germany-Netherlands tax treaty had been authenticated only in the Dutch and German languages.

¹⁸¹⁴ I.e. the “onzuiver inkomen” under Netherlands domestic law.

favor of this conclusion the Court mentioned the discrepancy, in the Dutch authentic text, between the terminology used in Article 20(2) and that employed in Article 20(3) of the tax treaty and compared it with the consistent terminology adopted in the German authentic text thereof. Arguably,¹⁸¹⁵ since it was aware that the German Bundesfinanzhof had interpreted the term “Gesamteinkommen” in Article 20(2) of that tax treaty as denoting the taxpayer’s net taxable income,¹⁸¹⁶ the Hoge Raad found that the German term “Gesamteinkommen” might be attributed two different meanings for the purpose of Article 20(2) and Article 20(3), as the use of two different terms in the corresponding articles of the Dutch authentic text indicated.

In case 27222 of 1992,¹⁸¹⁷ the Hoge Raad (the Netherlands) upheld a decision of the lower court of Hertogenbosch, according to which the terms “maatschappelijk” and “capital social”, used in the Dutch and French authentic texts, respectively, of Article 9 of the 1951 Netherlands-Switzerland¹⁸¹⁸ tax treaty, bore the same meaning and denoted the capital issued by the company paying out the dividends and not the properly authorized, but not yet issued, capital thereof.

In the *Li* case,¹⁸¹⁹ Isaac C.J. of the Federal Court of Appeal (Canada) compared the French and English authentic texts of Article 19 of the 1986 Canada-China tax treaty. The English authentic text referred to “a student, apprentice or business trainee [...] who *is present* in the first-mentioned Contracting State solely for the purpose of his education or training”, while the French authentic text referred to “un étudiant, un stagiaire ou un apprenti [...] qui *séjourne* dans le premier État contractant à seule fin d’y poursuivre ses études ou sa formation”.¹⁸²⁰ Isaac C.J. found that “[a]lthough the English version of Article 19 is arguably ambiguous, the use of the phrase *qui séjourne* in the French version, which is equally authoritative, puts it beyond doubt that the presence in Canada of which the Article speaks [...] is a temporary one.”¹⁸²¹

In the case *Ngee Hin Chong*,¹⁸²² the parties referred to both the English and the Malaysian authentic texts of Article 18(2) of the 1981 Australia-Malaysia tax treaty. Under the former, pensions paid by a contracting State in respect of services rendered thereto “shall be taxable in that State”; under the latter, in the English translation agreed upon by the parties to the litigation, such pensions “may be taxed” in that State.¹⁸²³

¹⁸¹⁵ That was not expressly mentioned, indeed.

¹⁸¹⁶ Bundesfinanzhof (Germany), 11 October 1967, case *IR 86/67*, 90 *Sammlung der Entscheidungen des Bundesfinanzhofs*, 74 *et seq.*

¹⁸¹⁷ Hoge Raad (Netherlands), 4 November 1992, case 27222, BNB 1993/38.

¹⁸¹⁸ As amended through 1966.

¹⁸¹⁹ Federal Court of Appeal (Canada), 5 November 1993, *Qing Gang K. Li v. R*, 94 DTC 6059.

¹⁸²⁰ *Emphasis* added.

¹⁸²¹ Federal Court of Appeal (Canada), 5 November 1993, *Qing Gang K. Li v. R*, 94 DTC 6059, at 6062.

¹⁸²² Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*

¹⁸²³ See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 81.

The Court concluded that the two authentic texts were to be construed as meaning that both the contracting State paying the pension and the contracting State of residence of the recipient were entitled to tax such payments, contrary to the argument of the taxpayer, according to whom they were taxable only in the State paying them. In supporting that conclusion, the Court made reference to Article 31 VCLT and, in accordance therewith, analysed the object and purpose of the tax treaty and the context of Article 18(2) thereof, including its object and purpose and other articles of the very same tax treaty.¹⁸²⁴ In particular, the Court noted that, where the contracting States intended to deny the taxing right of one of them, they explicitly did so by using the term “only” in the English authentic text of the tax treaty, such as in Articles 7, 8, 14, 17 and 18(1). Moreover, it noted that Articles 22 and 23, for the purpose of eliminating juridical double taxation by means of the credit method, made reference, *inter alia*, to Article 18 and that reference could be said not to be absurd only where Article 18(2) was construed as allowing concurrent taxation. Finding the meaning of the provision at stake plain, where interpreted in accordance with Article 31 VCLT, the Court did not find necessary to have recourse to the supplementary means of interpretation provided for under Article 32 VCLT.¹⁸²⁵ This conclusion and the underlying reasoning were upheld by the Federal Court of Australia.¹⁸²⁶

In the *Memec* case,¹⁸²⁷ one of the issues that the Court of Appeal of England and Wales had to decide was whether, for the purpose of the application of Article XVIII(1)(b) of the 1964 Germany-United Kingdom tax treaty,¹⁸²⁸ the term “dividend” used therein was to be attributed the same meaning it had for the purpose of Article VI of the treaty, where a definition of “dividends” was provided, or the meaning it had under the domestic law of the United Kingdom.

In that respect, Gibson L.J. of the Court of Appeal first noted¹⁸²⁹ that Article II(3) of the tax treaty (corresponding to Article 3(2) OECD Model) directed the interpreter towards the domestic law meaning with respect to terms “not otherwise defined in the [...] Convention” and that such an expression should be construed as meaning “not otherwise *relevantly* defined”. Moreover, in light of the fact that the definition of “dividends” in Article VI started with the expression “[t]he term “dividends” as used this article means [...]” and that such a definition had not been included in Article II, together with the other general definitions, he concluded that it was not the intention of the contracting States to extend the relevance of that definition outside the scope of

¹⁸²⁴ See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 90-92.

¹⁸²⁵ See Administrative Appeals Tribunal of Adelaide (Australia), 3 April 1998, *Ngee Hin Chong v. CoT*, 1 *ITLR*, 75 *et seq.*, at 92

¹⁸²⁶ See Federal Court of Australia, 16 May 2000, *Ngee Hin Chong v. CoT*, 2 *ITLR*, 707 *et seq.*, in particular at 726.

¹⁸²⁷ Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*

¹⁸²⁸ As amended by the 1970 protocol.

¹⁸²⁹ Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 21.

Article VI, i.e. that the context did not require the interpreter to use the definition included in Article VI in order to construe the term “dividend” found in Article XVIII, which thus had to be attributed the legal jargon meaning it had under the domestic law of the United Kingdom according to Article II(3) of the treaty. Such a conclusion was also supported by the fact that, on the one hand, the Protocol to the treaty concluded on 23 March 1970 modified both the definition of the term “dividends” in Article VI and the text of Article XVIII, but without including in the latter any reference to the former, and, on the other hand, where a definition encompassed in a specific article of the tax treaty was to be used for the purpose of construing other articles thereof the contracting States expressly stated it.¹⁸³⁰

The taxpayer, conversely, put forward the argument that the French official version of Article 10(3) of the 1963 OECD Draft, on which Article VI(4) of the 1964 Germany-United Kingdom tax treaty was based, could be construed differently since it started with the more neutral clause “Le terme «dividendes» employé dans le présent article”. The Gibson L.J., however, was not very impressed with such an over-subtle point of potential linguistic discrepancy and aptly noted that, although he was theoretically open to take into account a text other than an authentic text of the treaty such as the French official version of the 1963 OECD Draft concerning the same provision, he considered that treaty interpretation was far from being a mere “literal” interpretation of texts in which such linguistic nuances could play a relevant role.¹⁸³¹

In cases 33267 and 34482 of 1999,¹⁸³² the Hoge Raad (the Netherlands) was faced with the interpretation of Article 10(2)(a) of the 1959 Germany-Netherlands tax treaty, according to which income derived from employment was taxable solely in the contracting State of residence if the employee was present in the other State “temporarily” for a total of no more than 183 days in one calendar year and other conditions were met.

The two sole authentic texts of the treaty, in the Dutch and German languages, read as follows (excerpt):

“indien deze werknemer [...] tijdelijk in totaal niet meer dan 183 dagen gedurende een kalenderjaar, in de andere Staat verblijft”

“wenn dieser Arbeitnehmer [...] sich vorübergehend, zusammen nicht mehr als 183 Tage im Lauf eines Kalenderjahres, in dem anderen Staat aufhält”

The Court had to decide whether the term “temporarily” (“tijdelijk” in the Dutch

¹⁸³⁰ E.g. in Articles VIII(1) and XVI(1) of the tax treaty.

¹⁸³¹ See Court of Appeal of England and Wales (United Kingdom), 9 June 1998, *Memec Plc v. IRC*, 1 *ITLR*, 3 *et seq.*, at 21. See also *ibidem*, at p. 20, where Gibson L.J. summarized the principles of interpretation to be applied in order to construe tax treaties, by making reference to the VCLT and rejecting any “literal interpretation” (quoting Mummery J in High Court of Justice of England and Wales (United Kingdom), 9 February 1990, *IRC v. Commerzbank*, 63 TC 218, at 234-236).

¹⁸³² See Hoge Raad (Netherlands), 29 September 1999, cases 33267 and 34482, BNB 2000/16 and BNB 2000/17.

authentic text and “vorübergehend” in the German authentic text) had a meaning autonomous from the following reference to a stay of no more than 183 days in one calendar year. If that had been the case, it would have been possible for an employee to be present in the source State for less than 184 days in a calendar year, but still not be there “temporarily”, for example where he had been present in such a State continuously in the preceding or subsequent calendar year.

In this respect, one of the arguments put before the Court was that a seeming discrepancy existed between the Dutch and the German authentic texts, a comma being present in the latter after the term “vorübergehend”, but missing in the former after the corresponding term “tijdelijk”. According to the tax authorities and the Court of Appeal, the presence of the comma in the German authentic text could have been seen as evidence of the intention of the parties to treat the text after the comma as an apposition, i.e. a mere elucidation of the meaning to be attached to the term “vorübergehend”, which would not have had thus any autonomous meaning.¹⁸³³

The Court, however, was not very impressed by such an argument. It ruled, instead, that the term “tijdelijk” was to be interpreted in its context and in light of the object and purpose of the entire provision of which it was part. It first observed that Article 10 of the 1959 Germany-Netherlands tax treaty was obviously derived from Article 9 of the 1954 Austria-Germany tax treaty, which in turn was based on Article VI of the 1946 League of Nations London Draft.¹⁸³⁴ By analyzing the two tax treaties and the London Draft from which they were derived, the Court found that there was no clear indication that the term “temporarily” (or its equivalents) had been intended by the drafters as superfluous synonym for the 183-day rule.¹⁸³⁵ On the contrary, the intended meaning of that term was to be determined in light of its ordinary meaning and of the object and purpose of Article 10(2) of the treaty, i.e. to facilitate the international movement of employees by means of a rule that prevented the shifting of taxing rights from the residence to the source State where the employees were present in the latter State only for a brief period of time (i.e. temporarily).¹⁸³⁶ According to the Court, the different punctuation in the German authentic text did not change the result of its analysis. It therefore concluded that, while in the case of a stay of more than 183 days per calendar year in the source State the income received was always taxable exclusively by the latter State, a stay of less than 184 days per calendar year led to the same result

¹⁸³³ See, in this sense, also H. Pijl, “Mutual agreement tussen Duitsland en Nederland: Inkomsten uit niet-zelfstandige arbeid”, 64 *Maandblad Belasting Beschouwingen* (1995), 286 *et seq.*, at 287.

¹⁸³⁴ The relevant paragraph of Article VI of the 1946 League of Nations London Draft, which substantially reproduced Article VII(2) of the 1943 League of Nations Mexico Draft, reads as follows in its English official version: “2. A person having its fiscal domicile in one Contracting State shall, however, be exempt from taxation in the other Contracting State in respect of such remuneration if he is temporarily present within the latter State for a period or periods not exceeding a total of one hundred and eighty-three days during the taxable year, and shall remain taxable in the first State”.

¹⁸³⁵ In this respect, the Court seemed to have applied the principle of interpretation expressed by the maxim “*ut res magis valeat quam pereat*”.

¹⁸³⁶ The same result would be substantially achieved under the current text of the OECD Model. See, in the same sense, K. Vogel, “Tax Treaty Monitor”, 54 *Bulletin for international taxation* (2000), 254 *et seq.*, at 254-255.

where that stay was not considered to be of a temporary nature.¹⁸³⁷

Finally, the *Hoge Raad* rejected the idea to be bound by a decree¹⁸³⁸ reflecting the outcome of a mutual agreement reached by the Netherlands and Germany competent authorities under the provision of the tax treaty, according to which the terms “tijdelijk” and “vorübergehend” had no separate meaning from the 183-days rule. According to the Court, that decree did not remove the judges’ obligation under Netherlands law to interpret the treaty where a case was referred thereto by the tax authorities or a taxpayer.

Interestingly, the Tax Court of Köln (Germany)¹⁸³⁹ reached a diametrically opposite conclusion in interpreting the identically written provision encompassed in the German authentic text of Article 13(4) of the 1959 France-Germany tax treaty. The Court maintained that the term “vorübergehend” was not to be construed autonomously, but in connection with the 183-days rule, in the sense that, whenever the stay in the source State did not exceed 183 days in the calendar year, the employee presence therein was to be regarded as temporary.¹⁸⁴⁰ It must be emphasized that the Court, in order to support its conclusion, relied on the equally French authentic text of the provision, which read: “les revenus provenant d'un travail dépendant ne peuvent être imposés que dans l'Etat Contractant dont le salarié est le résident [...] si le séjour temporaire de celui-ci dans l'autre Etat n'excède pas une durée totale de 183 jours au cours d'une année civil”. According to the Court, the French authentic text was perfectly clear, not leaving rooms for alternative interpretations.

In the case *Re X BV*,¹⁸⁴¹ the Hoge Raad (the Netherlands) referred to all three authentic texts¹⁸⁴² of the 1986 Canada-Netherlands tax treaty concluding that there was no apparent difference among the relevant terms used therein¹⁸⁴³ and that they should be attributed the meaning that appeared to best fit the context of the treaty as a whole.

In the case *Wolf*,¹⁸⁴⁴ Decary J.A. of the Federal Court of Appeal of Montreal (Canada) analysed the possible differences in meaning existing between the term “personal services” used in the English authentic text of the 1980 Canada-United States tax treaty and the term “professions” used in the French authentic text thereof. He promptly concluded that, although at first blush and in common parlance the latter term might appear to have a more restrictive and somewhat more elitist meaning, the context where

¹⁸³⁷ In the decision concerning case 34482, the Court also maintained that such interpretation was supported by a letter of the Netherlands Ministry of Finance dated 23 January 1967, in which the Ministry upheld the view that the term “tijdelijk” in Article 10(2)(a) of the 1959 Germany-Netherlands tax treaty had an autonomous meaning, additional to the requirement of the 183-days rule.

¹⁸³⁸ Decree of 13 July 1995.

¹⁸³⁹ Tax Court of Köln, 28 November 1983, case 169/80 E, *Entscheidungen der Finanzgerichte* (1984), 460 *et seq.*

¹⁸⁴⁰ See, arriving at the same conclusion, Bundesfinanzhof (Germany), 10 July 1996, case IR 4/96, *Bundessteuerblatt. Teil II* (1997), 15 *et seq.*

¹⁸⁴¹ See Hoge Raad (Netherlands), 1 November 2000, case 35398, 3 *ITLR*, 466 *et seq.*, at 483, para 3.4.

¹⁸⁴² I.e. the English, French and Dutch authentic texts.

¹⁸⁴³ I.e. “any taxation”, “aucune imposition” and “onderscheidenlijk”, used in the English, French and Dutch authentic texts, respectively, of Article 24(3) of the treaty.

¹⁸⁴⁴ Federal Court of Appeal of Montreal (Canada), 15 March 2002, *Wolf v. R.*, 4 *ITLR*, 755 *et seq.*

such terms were used (i.e. Articles XIV and XV of the above-mentioned tax treaty) made clear that the apparently wider meaning of “personal services” was intended by the contracting States to apply to both terms.¹⁸⁴⁵

In the *PGS Geophysical* case,¹⁸⁴⁶ the Borgarting Appeals Court (Norway) compared the French (sole) authentic text of Article 5 of the 1978 Ivory Coast-Norway tax treaty with the English official version of the corresponding article of the OECD Model and concluded that the terms “stable” and “fixe”, in the former, and “permanent” and “fixed”, in the latter, all seem to require permanent establishments to be connected to a specific place and to last for a minimum amount of time.¹⁸⁴⁷

In the case *RÅ 2004 ref. 59*,¹⁸⁴⁸ the Supreme Administrative Court (Sweden) had to decide whether the capital gains derived by two Swedish companies from the sale of the shares of two Peruvian companies were taxable in Sweden under the 1966 Peru-Sweden tax treaty. According to the Court, such capital gains were, under Article X of that treaty, taxable exclusively in Peru. However, the issue arose of whether Sweden, notwithstanding Article X, was entitled to tax these capital gains under Article XVII(2) of the treaty, according to which income from sources in Peru which under the laws of Peru and in accordance with the tax treaty was subject to tax in Peru was to be exempt from Swedish tax. The Spanish and Swedish sole authentic texts of that article read as follows:¹⁸⁴⁹

Con sujeción a las disposiciones del Artículo VIII, el *rédito* de fuente en el Perú que de acuerdo con las leyes del Perú y de conformidad con este Convenio está sujeto a impuesto en el Perú, ya sea directamente o por deducción, estará eximido del impuesto Sueco

Där icke bestämmelserna i artikel VIII annat föranleda skall *inkomst* från inkomstkällor i Peru, vilken inkomst enligt peruansk lag och i överensstämmelse med detta avtal är underkastad beskattning i Peru vare sig direkt eller genom skatteavdrag, vara undantagen från svensk skatt

The Court found that Article XVII(2) was a subject-to tax clause, whose main purpose was to avoid double non-taxation of income taxable exclusively in Peru under the treaty distributive rules, but not subject to tax therein under its domestic law.¹⁸⁵⁰ Nonetheless,

¹⁸⁴⁵ See Federal Court of Appeal of Montreal (Canada), 15 March 2002, *Wolf v. R*, 4 *ITLR*, 755 *et seq.*, at 781, para. 101.

¹⁸⁴⁶ Borgarting Appeals Court (Norway), 13 August 2003, *PGS Geographical AS v. Government of Norway*, 6 *ITLR*, 212 *et seq.*

¹⁸⁴⁷ See *ibidem* at 230.

¹⁸⁴⁸ Supreme Administrative Court (Sweden), 25 March 2004, case *RÅ 2004 ref. 59*, *Regeringsrättens årsbok* (2004) (a summary in English is available at the IBFD Tax Treaty Case Law Database).

¹⁸⁴⁹ *Emphasis* added.

¹⁸⁵⁰ In the same vein, Sundgren maintains that Article XVII(2) of the 1966 Peru-Sweden tax treaty “is not an article to prevent double taxation, it is an article to impose taxation once in order to prevent double non-taxation” (see P. Sundgren, “Interpretation of tax treaties authenticated in two or more languages: a case study”, 73 *Svensk skattetidning* (2006), 378 *et seq.*, available on-line at the following URL:

overturning the decision of the Advance Rulings Board,¹⁸⁵¹ it considered that capital gains were not to be considered to be income (“*rédito*” and “*inkomst*” in the Spanish and Swedish authentic texts) for the purpose of Article XVII(2) and, therefore, concluded that Sweden was not entitled to tax the capital gains realized by the two Swedish companies, notwithstanding the fact that they were not subject to tax under Peruvian domestic law.

In supporting its interpretation, the Court recalled that the tax treaty had been drawn up in the Swedish and Spanish languages and that both texts were to be considered equally authentic. It noted that, when Sweden is to apply the treaty, the Swedish authentic text should primarily be used, due to Article II(2) of the treaty;¹⁸⁵² however, in cases of uncertainty, the Spanish text is to be considered as well. In the instance at stake, the comparison of the two authentic texts showed a *prima facie* discrepancy, since, while on the basis of the Swedish text it was uncertain whether Article XVII(2) applied to capital gains, such a possibility appeared improbable on the basis of the use of the term “*rédito*” in the Spanish authentic text. The Court then found that such a conclusion was also supported by the analysis of Article 1, which listed the taxes covered by the treaty, since, with reference to Peru, it separately mentioned the taxes on income (“*impuestos sobre la renta*”) and the tax on capital gains from the alienation of immovable property (“*el impuesto a las ganancias de capital provenientes de la transferencia de inmuebles*”).

According to the Court, since the structure of the Spanish text practically excluded capital gains from the scope of Article XVII(2), the tax treaty could not be interpreted other than as precluding Sweden from taxing capital gains under its Article X.

In the *Mil Investments* case,¹⁸⁵³ the Tax Court of Canada noted a possible discrepancy between the English and the French authentic texts of the preamble of the 1989 Canada-Luxembourg tax treaty, the former employing the term “*fiscal evasion*”, while the latter using the term “*évasion fiscale*”, which could be regarded as the French synonym for the English term “*tax avoidance*”. The Court then emphasized that, in the following 1999 Canada-Luxembourg tax treaty, the potential issue was set aside by using the term “*fraude fiscale*” in the French authentic text of the preamble, which fairly corresponded

<http://www.skatter.se/index.php?q=node/1079>; accessed on 23 July 2011).

Westberg, however, submits that Article XVII(2) “is a provision on the method for elimination of double taxation and not a subject-to-tax clause. It simply says that exemption must be provided by Sweden in respect of income from Peruvian sources subject to tax in Peru” and continues by noting that such interpretation “is based on the wording of the text, which in the author’s opinion is supported by the commentaries in the Swedish Government Bill (proposition 1967:26, pages 25 and 26), which state that the treaty was modelled in accordance with the previous treaty between Sweden and Argentina (from 1962). It explicitly adds that taxation must take place in the state of source, if not otherwise provided, and that such income is exempt from taxation in the state of residence” (see B. Westberg, “Summary of *Case RÅ 2004 not 59*. Editor’s notes”, in *IBFD Tax Treaty Case Law Database*).

¹⁸⁵¹ Which based its decision on the sole Swedish authentic text.

¹⁸⁵² Which resembled Article 3(2) of the 1963 OECD Draft.

¹⁸⁵³ Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq.*

to the term “fiscal evasion” employed in the English authentic text thereof.¹⁸⁵⁴ From the overall review of the arguments put forward by the Court, it does not seem that the latter placed any significance on such possible discrepancy in the preamble to the treaty in order to interpret it.

In the *UBS* case,¹⁸⁵⁵ the Court of Appeal of England and Wales made reference to the French authentic text of Article 23(2) of the 1977 United Kingdom-Switzerland tax treaty, according to which “*L'imposition d'un établissement stable qu'une entreprise d'un Etat contractant a dans l'autre Etat contractant n'est pas établie dans cet autre Etat d'une façon moins favorable que l'imposition des entreprises de cet autre Etat qui exercent la même activité*”, for the purpose of interpreting the English authentic text thereof, in particular the expression “The taxation [...] shall not be less favourably levied”, and concluded that both conveyed the same idea of a reference to the whole system whereby the liability to tax is imposed.¹⁸⁵⁶

In the *Prévost* case,¹⁸⁵⁷ the Tax Court of Canada quoted both the English and French authentic texts of Article 10(1) and (2) of the 1986 Canada-Netherlands tax treaty¹⁸⁵⁸ and then compared the terms “beneficial owner”, “*bénéficiaire effectif*” and “*uiteindelijk gerechtigde*” used in the English, French and Dutch authentic texts of Article 10(2) of that treaty, respectively.¹⁸⁵⁹ The textual comparison does not seem to have played a decisive role in the arguments developed by the court.

The Supreme Court of Norway, in the *Sølvik* case,¹⁸⁶⁰ compared the Norwegian and English authentic texts of Article 3(2) of the 1971 Norway-United States tax treaty (corresponding to Article 4(2) OECD Model) in order to properly construe and apply it.¹⁸⁶¹ However, from the analysis of the decision, it does not seem that the Court drew any significant inferences from such a comparison.

In the *Lingle* case,¹⁸⁶² Campbell J of the Tax Court of Canada stated that, where a treaty is concluded in two authentic texts, Article 33(4) VCLT “allows a comparison of the texts in order to adopt ‘... the meaning which best reconciles the texts having regard to the object and purpose of the treaty ...’ (*sic*)”.¹⁸⁶³

However, notwithstanding the reference to the last part of Article 33(4)

¹⁸⁵⁴ See Tax Court (Canada), 18 August 2006, *MIL (Investments) SA v. Canada*, 9 *ITLR*, 25 *et seq.*, at 50, footnote 14.

¹⁸⁵⁵ Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v. Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq.*

¹⁸⁵⁶ See Court of Appeal of England and Wales (United Kingdom), 21 February 2007, *UBS AG v. Revenue and Customs Commissioners*, 9 *ITLR*, 767 *et seq.*, at 775, para. 23 per Moses LJ.

¹⁸⁵⁷ Tax Court (Canada), 22 April 2008, *Prévost Car Inc v. R.*, 10 *ITLR*, 736 *et seq.*

¹⁸⁵⁸ *Ibidem*, at 745-746, paras. 27-28.

¹⁸⁵⁹ *Ibidem*, at 747, para. 30.

¹⁸⁶⁰ Supreme Court (Norway), 24 April 2008, *Sølvik v Staten v/Skatt Øst*, 11 *ITLR*, 15 *et seq.*

¹⁸⁶¹ See *ibidem*, at 33, paras. 42-44, at 35, para. 51, and at 38, para. 66.

¹⁸⁶² Tax Court (Canada), 9 September 2009, *Lingle v. R.*, 12 *ITLR*, 55 *et seq.*

¹⁸⁶³ *Ibidem*, at 71, para. 25.

VCLT,¹⁸⁶⁴ the analysis of the arguments employed by Campbell J. shows that what he actually did was to remove the potential divergence of meanings between the French and English authentic texts of Article 4(2) of the 1980 Canada-United States tax treaty by applying the principles of interpretation provided for in Articles 31 and 32 VCLT. In fact, the judge:

- (i) found that, while the English expression “in which he has an habitual abode” was, *per se*, ambiguous, the corresponding French expression “où elle séjourne de façon habituelle” was not, the latter thus removing the potential ambiguity of the former,¹⁸⁶⁵
- (ii) made abundant references to the Commentary to Article 4(2) OECD Model in order to construe the above expressions,¹⁸⁶⁶
- (iii) discussed the possible dictionary meanings of the term “habitual”,¹⁸⁶⁷
- (iv) construed such expressions against the background of the whole of Article 4(2)¹⁸⁶⁸ and
- (v) made reference to Article 31 VCLT and the need to look for and implement the common intention of the parties.¹⁸⁶⁹

Finally, in the *Dell Products* case,¹⁸⁷⁰ the District Court of Oslo (Norway) was faced with the apparent discrepancy between the English and Norwegian authentic texts of Article 5(5) of the 2000 Ireland-Norway tax treaty, the former employing the expression “authority to conclude contracts in the name of the enterprise” and the latter using the expression “fullmakt til å slutte kontrakter på vegne av foretaket”, which may be translated as “authority to conclude contracts *on behalf* of the enterprise”.¹⁸⁷¹

The disagreement between the parties and, thus, the issue to be decided was of a purely legal nature and consisted of whether such expressions required the contract entered into by the agent on behalf of the principle to be “legally binding” on the latter, or just “binding in reality” thereon. The parties supported their positions on the basis of

¹⁸⁶⁴ Actually, the last part of Article 33(4) VCLT does not simply allow a comparison of the various authentic texts, a procedure that is generally permitted under Article 33 (as evidenced by (i) the absence of any preclusion of textual comparison in the whole Article 33 VCLT and (ii) the explicit reference to text comparison in the first part of Article 33(4) VCLT and in the commentary to Article 29 of the 1966 Draft); it demands that, except where a particular text prevails or the *prima facie* difference in meaning is removed by the application of Articles 31 and 32 VCLT, the meaning which best reconciles the texts having regard to the object and purpose of the treaty is adopted (note the form “shall be adopted” at the end of Article 33(4) VCLT).

¹⁸⁶⁵ See Tax Court (Canada), 9 September 2009, *Lingle v. R*, 12 *ITLR*, 55 *et seq.*, at 71, para. 26 (see also Federal Court of Appeal (Canada), 10 June 2010, *Lingle v. R*, 12 *ITLR*, 996 *et seq.*, at 999, para. 6).

¹⁸⁶⁶ *Ibidem*, at 68-72, paras. 20-24 and 28 (see also Federal Court of Appeal (Canada), 10 June 2010, *Lingle v. R*, 12 *ITLR*, 996 *et seq.*, at 999, para. 8).

¹⁸⁶⁷ *Ibidem*, at 71, para. 27.

¹⁸⁶⁸ *Ibidem*, at 72, para. 28, where he referred to paragraph 10 of the Commentary to Article 4(2) OECD Model, according to which the tie-breaker rule should reflect “such an attachment that it is felt to be natural that the right to tax devolves upon that particular State”, as well as to the objects and purposes of the treaty.

¹⁸⁶⁹ *Ibidem*, at 72, para. 29.

¹⁸⁷⁰ District Court of Oslo (Norway), 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 *ITLR*, 829 *et seq.*

¹⁸⁷¹ *Ibidem*, at 841 and 857.

the English (legal bindingness) and Norwegian (bindingness in reality) authentic texts of Article 5(5).¹⁸⁷²

Interestingly, the Court noted that the wording of both the English and Norwegian authentic texts of Article 5(5) was reasonably open to support both interpretations and thus decided the matter on the basis of the evidence provided for in the OECD Commentary and in light of the object and purpose of Article 5(5).¹⁸⁷³

In case 1550 of 3 February 2012,¹⁸⁷⁴ the Corte Suprema di Cassazione (Italy) made reference to the French authentic text of Article 18(2) of the 1981 Italy-Luxembourg tax treaty in order to establish the domestic law meaning of the term “previdenza sociale” employed in the Italian authentic text thereof.

According to the Court, the term used in the French authentic text, i.e. “sécurité sociale”, could have been seen as more correctly expressing the intention of the parties in respect of the scope of Article 18(2) of the treaty.¹⁸⁷⁵ Thus, pursuant to Article 3(2) of the treaty, it construed the term “previdenza sociale” employed in the Italian authentic text in accordance with the meaning that the term “sicurezza sociale”, which it found to better correspond to the French term “sécurité sociale”, has under Italian law.

7. Conclusions

The rules of interpretation enshrined in Articles 31-33 VCLT also apply to tax treaties. This is confirmed by the case law of national judiciaries, as well as by the generally concordant positions expressed by scholars on that subject matter. This entails that the conclusions drawn by the author, with regard to the interpretation of multilingual treaties, in Chapter 4 of this Part remains generally valid also in respect of tax treaties.

In this respect, it is nonetheless worth highlighting the following, which idiosyncratically relate to tax treaties based on the OECD Model.

First, the overall context must be seen as comprising the OECD Commentary, which often plays a decisive role in removing the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Articles 31 and 32 VCLT.

Similarly, the overall context should be regarded as comprising the decisions delivered by foreign judiciaries and the practices of foreign tax authorities (including those of States that are not party to the specific treaty to be construed), which are helpful for the purpose of establishing the *ordinary meaning to be given* to OECD Model standard terms and expressions (used in OECD Model-based tax treaties) under Articles

¹⁸⁷² *Ibidem*, at 857; see also *ibidem* at 848, for the claimant, and 853, for the defendant, who also asserted that the English authentic text was open enough to allow such an interpretation.

¹⁸⁷³ *Ibidem*, at 858-860.

¹⁸⁷⁴ Corte Suprema di Cassazione, 3 February 2012, case 1550 (available on-line on the website: www.ipsoa.it).

¹⁸⁷⁵ Article 18(2) of the 1981 Italy-Luxembourg tax treaty reads as follows (*emphasis added*):

“Nonobstant les dispositions du paragraphe 1er, les pensions et autres sommes payées en application de la législation sur la *sécurité sociale* d'un Etat contractant sont imposables dans cet Etat”.

31 and 32 VCLT and, thus, in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts.

Third, the interpreter should be allowed to have recourse, as supplementary means of interpretation, to the analysis of the differences existing (i) between the subsequent versions of the OECD Model, (ii) between the OECD Model and the tax treaty to be interpreted, as well as (iii) between the tax treaty to be interpreted and other tax treaties concluded by the contracting States of the former, for the purpose of establishing the intention of the parties and removing the *prima facie* discrepancies in meaning among the tax authentic treaty texts.

Finally, the role played by the OECD Model official versions (English and French) in respect of multilingual tax treaties must be regarded as similar to that played by the drafted text for the purpose of interpreting other multilingual treaties. Thus, the OECD Model official versions constitute a key element to be taken into account by the interpreter in order to remove the *prima facie* discrepancies in meaning among the tax authentic treaty texts in accordance with Article 33(4) VCLT, i.e. by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT. This holds true also in cases where none of the authentic treaty texts is drafted in English or French.

Where the tax authentic treaty texts employ legal jargon terms, however, the application of the rules established in Article 33 VCLT, in order to remove the *prima facie* discrepancies in meaning among the authentic treaty texts, must be reconciled with the *renvoi* to domestic law provided for in Article 3(2) of OECD Model-based tax treaties, for the purpose of interpreting such terms.

It is the author's opinion that the interpreter, where faced with *prima facie* discrepancies in meaning among the tax authentic treaty texts caused by the construction of legal jargon terms, should partially reconcile those texts in order to establish the "general meaning" underlying the corresponding legal jargon terms employed therein in light of the overall context. However, as long as the domestic law meaning of the legal jargon terms employed in the treaty significantly overlaps with their "general meaning", the interpreter is allowed to rely exclusively on the former, unless the context requires an interpretation different from that based on the current domestic law meaning under the law of the State applying the treaty. Since the authentic treaty text drafted in the official language of the State applying the treaty provides the interpreter with the most direct and immediate access to the domestic law (concepts) of that State, it is reasonable to conclude that the selection of the appropriate domestic law meaning under Article 3(2) should be made by the interpreter on the basis of that authentic text. This solution limits the discretion of the interpreter in selecting the appropriate domestic law meaning, since it attributes a significant weight to the evidence of the intention of the parties represented by their choice of a specific legal jargon term in the official language of the State applying the treaty and, thus, of its underlying legal concept over the others theoretically available.

In cases where the treaty's final clause provides that a certain authentic text is to prevail in the case of divergences, the prevailing text may play a preeminent role in establishing the "general meaning" of the corresponding terms used in the various

authentic texts. In particular, if the interpreter cannot establish such a “general meaning” by reconciling the various authentic texts through an interpretation thereof based on Articles 31 and 32 VCLT, the “general meaning” must be determined on the basis of the prevailing text. On the other hand, as long as the domestic law meanings of the terms employed in the various authentic texts substantially overlap with each other and with their “general meaning”, it is not the multilingual character of the tax treaty to cause a single treaty provision to have two different meanings when applied by the two contracting States; it is the reference to those States’ domestic law encompassed in Article 3(2) of the tax treaty that entails it. This multiplicity of meanings, therefore, is outside the scope and purpose of the treaty’s final clause.