The interpretation of multilingual tax treaties

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PART III

CONCLUSIONS

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1. Forward

In section 1 of Chapter 3 of Part I the author, by transposing in the field of international treaties the results of the semantic analysis carried out in Chapter 2 of Part I, established the fundamental principles of a normative theory on treaty interpretation, which should operate as a compass for the interpreters whenever construing treaties and arguing for their chosen interpretations.

In that respect, the author concluded that (i) treaty provisions are inherently characterized by ambiguity and vagueness and (ii) their effectiveness heavily depends on how the parties take into account the *overall context* when drafting them. In turn, point (ii) presupposes that the addressees (interpreters) of the treaty integrate its underspecified provisions, in order to reduce their vagueness and ambiguity, by using the overall context. The fact that both the parties and the interpreters heavily rely on the overall context constitutes a praxis of the international community (as such, it constitutes part of its underlying *cooperative principle*). This allows for the possibility of *implicatures*, i.e. meanings that are not explicitly conveyed by the treaty provisions, but that are nonetheless inferred from the overall context.

On such a basis, the author further concluded that the treaty interpretative process has as its only possible goal the *utterance meaning*, i.e. the meaning(s) that any reasonable interpreter would assign to the treaty text, as expression of the intention of the parties, given:

(a) the various meanings that the grammar and the semantic specifications of the terms used in the treaty allow it to have and
(b) the interpreter's analysis of and inferences from the overall context.

That excludes the relevance of any meaning, other than the utterance meaning, for interpretative purposes.

The author considered the overall context to include all those elements and items of evidence that may be helpful for the purpose of determining and arguing for the utterance meaning of the relevant treaty provision. In particular, the overall context incorporates:

(a) the subject matter of the treaty and its object and purpose [world spoken of];
(b) the international legal context of which the treaty is part, the legal systems of the States concluding the treaty, the encyclopedic (legal) knowledge of the persons involved in its drafting, the expected encyclopedic (legal) knowledge of the addressees of the treaty, the commonly accepted principles of behavior in the international community (including any cooperative principle of communication), every reasonable inference that the drafters and the addresses might be expected to derive from the above [common ground];
(c) the text that precedes and succeeds the provision to be interpreted [co-text].

Furthermore, the author elucidated a few other principles of treaty interpretation derived as corollaries from the above fundamental principles.

The positive analysis carried out by the author in section 2 of Chapter 3 of Part II showed that the rules and principles of treaty interpretation enshrined in Articles 31 and 32 VCLT, as construed by international law scholars and applied by (international) courts and tribunals, do not significantly depart from the principles of interpretation established by the author on the basis of his normative analysis. Rather, the latter principles may be usefully employed by the interpreter as a compass in order to choose among the various (sometimes conflicting) solutions that scholars, courts and tribunals have upheld in the application of Articles 31 and 32 VCLT.

In particular, Articles 31 and 32 VCLT appear to spell out the most significant part of the overall context that the cooperative principle of the international community requires the community members to take into account when drafting and interpreting treaty provisions. Certainly the overall context is not limited to the means and rules of interpretation enshrined in Articles 31 and 32 VCLT, the former including, for instance, also generally accepted principles of logic and good sense.[1941] However, Articles 31 and 32 VCLT specify the most relevant part of what has to be taken into account in order to make the treaty effective by means of interpretation.

This implies that no utterance meaning, i.e. no meaning of a specific treaty provision, may be said to exist before the interpreter has gone through the unitary process of construing the relevant text in light of the overall context and, in particular, of the rules and means of interpretation enshrined in Articles 31 and 32 VCLT (as illustrated by the metaphor of the crucible).[1942] Any "meaning" arrived at without going through such a process is not a meaning; it is just an illusion of a meaning, a mere guess. It is, thus, the formal process of reasonably arguing and supporting the interpretation of a treaty provision on the basis of its overall context that divides (utterance) meanings from mere guesses about the speaker's meaning. Since no single "true" meaning exists, which is inherently due to the fact that the meaning we look for is the utterance meaning, what really does matter is not the result of the enquiry, but the process followed to support it.

More specifically, the comparison between the principles of interpretation stemming from the author's normative analysis and those resulting from the positive analysis carried out in section 2 of Chapter 3 of Part II led to the following remarks.

The author's principle (i), according to which treaty interpretation must be seen as *a posteriori* analytical argument, is implicit in Articles 31 and 32 VCLT, in the sense that under those articles any interpretation put forward by the interpreter must appear fair

[1941] 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 as 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).
[1942] As Lauterpacht put it, "The controversial expression becomes scientifically clear only after we have caused to pass through it the "galvanic current" – to use Mr Justice Holmes' phrase – not only of the whole document but of all the evidence available" (see H. Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 *Harvard Law Review* (1935), 549 *et seq.*, at 572).

and reasonable (in good faith) where assessed in light of all arguments that may be built up on the elements and items of evidence provided for by those very same articles.

The author's principles (ii) and (iii), i.e. the quest of the interpreter is directed at establishing the intention of the parties by determining the *utterance meaning* of the treaty text, overlap with the rule of interpretation provided for by Articles 31 and 32 VCLT, according to which the primary duty of the interpreter is to reasonably elucidate the meaning of the treaty text, which is presumed to represent the authentic expression of the parties' intention, by construing it on the basis of all elements and items of evidence provided for by those articles.

With reference to the author's principle (iv), which deals with what constitutes the overall context, its has been already noted that Articles 31 and 32 VCLT appear to spell out the most significant part of such context.

The author's principle (v), i.e. none of the elements of the overall context is inherently superior to the others and the weight that any of such elements should be given for the purpose of establishing the utterance meaning depends on the circumstances of the case, corresponds to the principle stemming from the hierarchical structure of Articles 31 and 32 VCLT. In the VCLT system, the various means of interpretation encompassed in Article 31 VCLT are all of an equal status, while those referred to in Article 32 VCLT play a subsidiary role because experience shows that they are generally less reliable and more ambiguous and provide vague hints of the intention of the parties. Nonetheless, where the supplementary means of interpretation contribute to reasonably establishing the agreement of the parties with regard to the interpretation of the treaty, such an agreement must be taken into account as a primary means of interpretation under Article 31 VCLT.

The author's principle (vi), i.e. the treaty text should be construed on the basis of all *implicatures* that may be derived from the text and the overall context, is implicit in the principle of good faith referred to in Article 31 VCLT, which rejects a mere literal approach and requires the treaty to be construed reasonably, honestly and fairly, thus allowing the interpreter to imply terms in the treaty (in addition to, or as replacement of the treaty terms) for the purpose of giving efficacy to the intention of the parties that may be inferred from the express provisions of the treaty.

The author's principle (vii), i.e. the relevance of the treaty text must not be overestimated since such text is inherently characterized by ambiguity and vagueness and is made of underspecified clauses that need to be expanded by semantic and pragmatic inferences, underlies both Articles 31 and 32 VCLT. This is evidenced by:

(a) the preeminent role played by the extra-textual and co-textual (broad context) means of interpretation, provided for in Articles 31 and 32 VCLT, for the purpose of establishing the ordinary meaning of the treaty terms;
(b) the express recognition of the possibility that the parties intended to attribute an unusual meaning (special meaning) to some of the treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge those meanings that appear manifestly absurd or unreasonable in light of the particular circumstances of the case.

The same holds true with regard to the author's principle (viii), i.e. the relevance of

grammatical constraints must not be overestimated.

The author's principle (ix), i.e. there is a plausible presumption that the parties intended to attribute to the treaty terms their jargon meanings whenever a particular jargon has been used in drafting the treaty, is implicit in the concept of ordinary meaning referred to in Article 31 VCLT, according to which, where a term is used in a technical context, its ordinary meaning should be generally considered to coincide with the meaning attributed to that term in the relevant technical jargon.

The author's principle (x), i.e. the interpreter should consider that the contracting States' representatives in most cases choose the terms to be employed in the treaty on the basis of the approximate overlapping between the prototypical items denoted by those terms and the items that they intended to be covered by those terms, may be seen as underlying Articles 31 and 32 VCLT, in particular as underlying:

(a) the requirement that the treaty terms must be given the ordinary meaning that best fits in their context and suits the object and purpose of the treaty;
(b) the possibility that, in certain cases, a special meaning must be attributed to treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge the meanings that appear manifestly absurd or unreasonable in light of the context and the treaty object and purpose.

The author's principle (xi), in particular the need to assess whether the parties intended treaty terms to be attributed a uniform meaning by all contracting States, or whether they intended each State to interpret those terms on the basis of its own (legal) concepts, is not explicitly dealt with in Articles 31 and 32 VCLT. It is, however, obvious that:

(a) both the ordinary and the special meanings to be determined under Article 31 VCLT may be either uniform (and autonomous) international meanings, or specific national meanings; and
(b) it is for the interpreter to establish, on the basis of the means of interpretation provided for in Articles 31 and 32 VCLT, whether the parties intended a uniform international meaning or a specific national meaning to be attributed to the treaty terms.

The author's principle (xii), i.e. the interpreter should take into account any subsequent act of the parties that directly or indirectly may shed light on the meaning that they attribute to the treaty, is explicitly recognized by Article 31(3) VCLT.

Since the interpretative principles stemming from the author's semantics-based normative analysis proved not to conflict with the generally accepted rules of interpretation enshrined in Articles 31 and 32 VCLT, the author employed such principles, as well as a construction of Articles 31-33 VCLT based thereon, as the cornerstones of his normative legal theory on the interpretation of multilingual (tax) treaty, i.e. for the purpose of answering the research questions addressed in this study.

2. Conclusions drawn by the author with regard to the research questions

2.1. Questions concerning all multilingual treaties

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

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

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

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

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

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

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

versions.

The original draft articles prepared by Sir Humphrey Waldock and included in his Third Report on the Law of Treaties overtly dealt with the relevance of such language versions for the purpose of treaty interpretation. In particular, Article 75(5) of his Third Report established that non-authentic language versions could be used as subsidiary evidence of the intention of the parties where the application of all other rules of interpretation left the meaning of a term, as expressed in the authentic text(s), ambiguous or obscure.[1943]

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

That said, nothing in the text or in the *travaux préparatoires* of the VCLT seems to prevent the interpreter from taking non-authentic language versions into account as supplementary means of interpretation,[1944] attributing thereto an interpretative weight that may vary depending on the available evidence that such language versions may contribute to determine the common intention of the parties. Quite the opposite, since the supplementary means of interpretation covered by Article 32 VCLT are generally regarded as including all means of interpretation (other than those referred to in Article 31 VCLT) that may shed some light on the meaning of the treaty,[1945] it is reasonable to conclude that non-authentic language versions may be considered within the scope of Article 32 VCLT and accordingly used, depending on the circumstances of the case.[1946]

For instance, unilateral documents such as the official treaty translations produced by the contracting States are potentially relevant, since they may give a hint of the practice followed by a party, or of the treaty meaning according to a party;[1947] where the other parties were informed about such documents and positions and did not object to them, they might even be considered (although not lightly) to have been tacitly agreed upon. The same holds true, *mutatis mutandis*, with regard to multilateral documents such as treaty official versions.

In a slightly different perspective, non-authentic language versions may come into play as documents on which the subsequent practice of the parties is based. In particular, where non-authentic language versions have been put into public circulation and relied upon by the parties for the purpose of applying the relevant treaty, they could give rise to

[1943] See also YBILC 1964-II, p. 65, para. 10.
[1944] See YBILC 1966-II, p. 223, para. 20.
[1945] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 334-339 and the references included therein.
[1946] See, in this respect, YBILC 1966-II, p. 226, para. 9; M. Hilf, Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin: Springer-Verlag, 1973), pp. 105-108; F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), p. 398.
[1947] See, however, Italian-United States Conciliation Commission, 20 September 1958, *Flegenheimer case – decision No. 182*, 14 *Reports of International Arbitral Awards*, 327 *et seq.*, para. 66, letter a).

issues of possible (i) estoppel and acquiescence, (ii) establishment by practice of a common interpretation of the treaty, or (iii) amendment by practice of the treaty.[1948]

In this respect, it is interesting to make a reference to the *Taba Arbitration*,[1949] where the Arbitral Tribunal had to decide upon the exact location of part of the border between Egypt and Israel (also) on the basis of a treaty concluded in 1906 between the former Turkish Sultanate and the Khedivate of Egypt. This treaty had been drafted in the Turkish language only; however, the treaty was then translated into Arabic and from Arabic into English. The tribunal noted that the "English translations were printed in a number of official sources and apparently were relied on thereafter" and that "it transpired that […] no authorities since before the First World War had ever consulted the authentic Turkish text, not even the Parties to this dispute."[1950] The tribunal concluded that, for interpretative purposes, it would have followed the general practice of the parties and thus referred to the English translation and not to the authentic Turkish text.[1951] As fairly pointed out by Gardiner, the decision of the tribunal to rely mainly on the English translation for the purpose of construing the 1906 treaty must be seen as "coloured by the greater significance to be attached to how the treaty had been implemented in practice".[1952]

Finally, the above conclusions appear coherent with principle (vii) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which the interpreter may take into account the non-authentic language versions of a treaty for the purpose of construing the latter, the interpretative weight attributable to such language versions depending on the available evidence that they may contribute to ascertain the common intention of the parties.[1953]

[1948] See, similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 363.

[1949] Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq.*

[1950] See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq*., para. 45.

[1951] See Arbitral Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 Reports of International Arbitral Awards, 1 *et seq*., para. 45.

[1952] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 362. It must be noted, however, that the above-mentioned statement of the tribunal has to be read against its proper background, i.e. taking into account that the establishment of frontiers is a field of international law where it is customarily accepted that the subsequent practice of the parties plays a major role for the purpose of interpreting the relevant treaties. In this respect, the arbitral tribunal had the chance to deal with the issue of the possible divergence between the meaning reasonably attributable to the text of the treaty and the practice followed by the parties; in paragraph 210 of its award it made reference to the ICJ decision in the *Temple of Preah Vihear* case (ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment) and stated the following: "If a boundary line is once demarcated jointly by the parties concerned, the demarcation is considered to be an authentic interpretation of the boundary agreement even if deviations may have occurred or if there are some inconsistencies with maps. This has been confirmed in practice and legal doctrine, especially for the case that a long time has elapsed since demarcation. […] It is therefore to be concluded that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected."

[1953] For instance, the fact that both official translations produced by the contracting States of a bilateral treaty seem to suggest the same construction of a certain treaty provision, which in contrast appears ambiguous on the basis of the sole authentic text, may reasonably lead the interpreter to construe the treaty in accordance with such official translations.

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

Under the VCLT, the interpreter is under no obligation to take into account more than one authentic text whenever construing and applying a multilingual treaty. Except where a *prima facie* divergence among the authentic treaty texts is put forward, the interpreter has the right to rely on any single authentic text in order to determine the utterance meaning of the relevant treaty provision, which is to be ascertained on the basis of the rules of interpretation provided for in Articles 31 and 32 VCLT.[1954]

Article 33(1) VCLT states that the text is equally authoritative (for interpretative purposes) in each authentic language, unless an agreement to the contrary exists. Furthermore, according to Article 33(3) VCLT, the terms of a treaty are presumed to have the same meaning in each authentic text. The combination of these two provisions, read in their context, establishes the following:

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

This means that the various authentic texts must always be attributed the same utterance meaning, since it is established by the rule of law that they have the same meaning. Thus, from a logical perspective, referring to a divergence in meaning between the various authentic texts is erroneous since such texts *cannot* have different meanings;[1955] it would be more correct to speak of a divergence between the meanings provisionally attributed to the various authentic texts (construed in isolation from each other), or of a *prima facie* apparent (not real) divergence of meanings.[1956]

At the same time, a combined reading of Articles 33(1) and 33(3) VCLT

[1954] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 148-149; Commentary to Article 29 of the 1966 Draft (YBILC 1966-II, p. 225, para. 7). On the (low) frequency of having recourse, by the ICJ, to the rules of interpretation provided for by Article 33 VCLT, as compared to those enshrined in Articles 31-32 VCLT, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 16-17 and 33 (footnote 93).

[1955] See commentary to Article 29 of the 1966 Draft, in which it is stressed that "in law there is only one treaty - one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge" (YBILC 1966-II, p. 225, paras. 6); see also YBILC 1966-II, p. 225, paras. 7.

[1956] It is submitted here that Engelen concluded the same, as a matter of substance, although through different linguistic expressions: "However, even then [ed.'s note: when it is "established that the terms of the treaty actually do *not* have the same meaning in each text"] it must be assumed that the different authentic texts were always *intended* to mean the same, despite the failure of the parties to accurately express their common intention in each text, and the interpreter should bear this in mind when reconciling the different texts in accordance with the principles of Article 33(4) VCLT" (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 394).

establishes the rebuttable presumption (ii) that the meaning provisionally attributed to any of the authentic texts, taken in isolation, is the utterance meaning of the treaty.[1957]

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

These conclusions appear in line with principles (i), (ii) and (iii) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which:

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

[1957] The position of most scholars is confusing (and confused) on this point, a widespread conclusion being that upon the discovery of a *prima facie* divergence between the authentic texts, the presumption of Article 33(3) VCLT that the terms of the treaty have the same meaning in each text is rebutted and ceases to hold true (to this extent, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 391-392). Tabory, for instance, affirmed that upon discovery on an unclear passage, a textual divergence or a difference of opinion, "the presumption in Article 33(3) VCLT ceases to hold" (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 198). Similarly, Germer attributed to Article 33(3) VCLT a limited function and stated that the latter was a consequence of the very nature of the presumption, which was acknowledged by Sir Humphrey Waldock (at the ILC 874th meeting); he concluded that when an international adjudicator is confronted with a divergence between the different authentic texts of a treaty, the presumption of Article 33(3) VCLT does not give him any guidance, so that he has to resort to the rules set forth in Article 33(4) VCLT (see P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 414). However, the author submits that (i) the Special Rapporteur, in the course of the ILC 874th meeting, never referred to such a limited presumption of equal meaning of the authentic texts (he never used the word "presumption" at all, indeed), but simply discussed the right to rely on a single authentic text (see, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 393-394); (ii) the right to rely on one single text is a strict consequence of the presumption that each authentic text is accurate enough to guarantee that the interpretation of the treaty based solely thereon leads to the same utterance meaning that could be determined through an interpretation based on any of the other authentic texts, and not of the rule (non-rebuttable presumption) that all authentic texts have the same meaning; (iii) Article 33(4) VCLT does not set aside Article 33(3) VCLT, but, on the contrary, it is built thereon: in fact, it requires the interpreter to determine the common meaning of the various authentic texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this is not possible, to adopt the meaning that best reconciles the texts (both provisions supporting the idea of the treaty unity and of the interconnected equality of meaning of the various authentic texts).

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

Under Article 33 VCLT, any authentic text may be construed by the interpreter in isolation, on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT.[1958] The result of such a construction is the *provisional* utterance meaning of the treaty.

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

This further implicates that, even where a *prima facie* unclearness, ambiguity or unreasonableness of the construed text arises, the interpreter continues to be entitled to base its interpretation on one single text, taken in isolation. Only where the ambiguity, unclearness or unreasonableness results at the end of the interpretative process, i.e. after all available elements and items of evidence (other than the other authentic texts) have been referred to and employed in legal arguments is the interpreter compelled to compare the various texts as an aid to solve such an interpretative issue.

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

In contrast, where any of the interested parties has put forward an alleged discrepancy in meanings among the authentic treaty texts, the interpreter is obliged to compare the apparently divergent texts and to interpret them in light of that comparison, by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT,[1959] in order to determine their *real* common utterance meaning.[1960]

From a procedural standpoint, the above conclusions imply that each interested party may legally rely on a single authentic text until the application of the treaty gives rise to

[1958] It must be noted that the interpreter, in the event he, through the analysis of the *travaux préparatoires* or otherwise, discovers which is the *drafted* text and that the other authentic texts are mere translations thereof, should have recourse to the analysis of and the comparison with that *drafted* text for the reasons noted in section 3.2 of Chapter 4 of Part II.

[1959] Where one unambiguous, clear and reasonable meaning (the utterance meaning) cannot be attributed to all the texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, the utterance meaning to be adopted under Article 33(4) VCLT is the one that best reconciles the texts, having regard to the object and purpose of the treaty. This solution provided for by Article 33(4) VCLT is analysed in section 3.5 of Chapter 4 of Part II.

[1960] See the reference to the application of Articles 31 and 32 VCLT in Article 33(4), first part, VCLT.

a dispute based on the apparent diverging meanings of some of the authentic treaty texts.[1961]

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

The above conclusions appear to be supported by principles (ii), (iv) and (v) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis.

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

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

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

In most of the cases where the interpreter is faced with two or more authentic texts, he

[1961] See similarly W. Rudolf, *Die Spreche in der Diplomatie und internationalen Verträgen* (Frankfurt: Athenäum Verlag, 1972), p. 61.

will be able to interpret them so as to find a common, clear, unambiguous and reasonable meaning and to plausibly justify his construction on the basis of the rules of interpretation enshrined in Articles 31 and 32 VCLT (including the possibility of taking into account non-authentic versions of the treaty and the opportunity to ascribe a special relevance to the drafted text).

Even in cases where the construction of an authentic text, taken in isolation, according to Articles 31 and 32 VCLT leaves the meaning thereof ambiguous or obscure, the comparison with other authentic texts may prove a decisive aid for the interpreter in order to clear up his doubts and arrive at an univocal solution, which may be reasonably supported from a logical and legal standpoint.

The recourse to Articles 31 and 32 VCLT implies that no rigid *ad hoc* rule of interpretation is applied in order to remove the *prima facie* discrepancies in meaning among the authentic treaty texts, but the solution actually adopted and the arguments to support it are selected on the basis of the treaty's overall context.

In particular, the rule of restrictive interpretation does not play a specific role for the solution of apparent divergences of meanings among the authentic treaty texts under the system of the VCLT and has been explicitly rejected as such by the ILC. Whether a restrictive interpretation is to be adopted in any specific case depends upon the nature and history of the treaty, its object and purpose, the particular context in which the ambiguous terms occur and the situation dealt with in that case.

Though, in the infrequent cases where the comparison of the authentic texts does not prove a sufficient aid to remove all the ambiguities of such texts, where only one reasonable and clear meaning[1962] exists that is common to the various authentic texts, such a meaning will be generally selected as being the only interpretative solution logically possible. This preference for the only meaning common to the authentic texts being compared does not represent, however, the application of a rigid *ad hoc* rule, but a mere instance of treaty interpretation in good faith and in light of the overall context.

These conclusions appear in line with principles (iv), (v), (vi) and (vii) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which:
(iv) any alleged discrepancy in meaning among the authentic texts of a treaty is merely apparent, since the treaty is an instrument intended by the parties to convey a single message;
(v) the interpreter must remove the *prima facie* discrepancy in meaning among the authentic treaty texts by construing them in accordance with the general principles of

[1962] I.e. one single intension common to the various authentic texts (e.g. text A may mean X or Y; text B may mean X or Z: X is the only common intension possible and, as such, it will be probably selected as the treaty meaning) and not one particular denotatum that is common to all the possible extensions of the various authentic texts (e.g. text A appears to mean just X; text B appears to mean just Y; however the denotata of X – its extension – are a subgroup of the denotata of Y; the conclusion that the meaning X must be selected since it represents the most restrictive interpretation capable of reconciling the various authentic texts cannot be upheld, since that solution consists of choosing one meaning over another simply because the former denotes a number of referents smaller that the latter).

treaty interpretation; in particular, the relevance of the treaty texts for the purpose of establishing the single utterance meaning should not be overestimated;
(vi) for the purpose of removing the *prima facie* discrepancy in meaning among the authentic treaty texts, it is reasonable to attribute a particular relevance to the text that has been originally drafted by the contracting States' representatives and on which the consensus among them was formed;
(vii) the interpreter may take into account non-authentic language versions of a treaty for the purpose of construing it; the interpretative weight that should be attributed thereto varies depending on the available evidence that they may contribute to ascertain the common intention of the parties.

f) What should the interpreter do where the prima facie discrepancies could not be removed by means of (ordinary) interpretation?

Under Article 33(4) VCLT, where a comparison of the authentic treaty texts discloses a difference in meaning that the application of Articles 31 and 32 VCLT does not remove, the interpreter must adopt "the meaning which best reconciles the texts". Such an expression must be read in its context, which first and foremost includes the underlying principle of the unity of the treaty and the connected rule of law, reflected in Article 33(3) VCLT, that all authentic texts *do have* the same meaning.[1963]

In that context, the use of the term "reconcile" simply means that the interpreter must attribute to all authentic texts a single meaning, notwithstanding the fact that such a meaning could not be provisionally attributed to all those texts on the basis of an interpretation made in accordance with the provisions of Articles 31 and 32 VCLT.

The activity of the interpreter thus consists in choosing one of the provisional utterance meanings attributable to the various authentic texts in accordance with the provisions of Articles 31 and 32 VCLT and attributing it to all other authentic texts.

The possibility of adopting a meaning that could not be reasonably attributed to any of the authentic texts on the basis of the principles enshrined in Articles 31 and 32 VCLT should be rejected, unless exceptional and very strong evidence exists in favor of such a solution, since it appears contrary to the whole system of interpretation provided for in the VCLT, where the texts of the treaty are the starting point of the interpretative process and the attribution of meaning must comply with the rules provided for in Articles 31 and 32 VCLT. That solution also appears unreasonable, in that it implies that the contracting States failed to fairly convey their intended message through *all* the authentic texts, even where due weight is given to the overall context.

The meaning to be selected by the interpreter in order to reconcile the authentic treaty texts should be the one that best reflects the common intention of the parties.

In order to select that meaning, the interpreter assesses and balances all available

[1963] See principle (iv) established by the author in section 2 of Chapter 3 of Part I.

elements and items of evidence, although he appears bound to ascribe a significant weight to the object and purpose of the treaty due to the specific reference thereto in Article 33(4) VCLT. In other terms, the object and purpose of the treaty works as the most important yardstick for the interpreter to choose, among the meanings provisionally attributed to the authentic treaty texts on the basis of the principles enshrined in Articles 31 and 32 VCLT, the real utterance meaning of the treaty.

In that respect, since treaties generally have many objects and purposes, the interpreter should use as yardstick those objects and purposes that appear relevant with respect to the provision to be interpreted and should balance them in order to find a reasonable equilibrium with reference to the specific situation at stake.

Finally, the last sentence of Article 33(4) VCLT should be construed as a rule that indirectly allows the interpreter to take, as the "special meaning" that the parties intended to attach to a certain term used in one of the authentic treaty texts, the (ordinary or special) meaning provisionally attributed to the corresponding term used in another authentic text and ultimately chosen by the interpreter as the real utterance meaning, i.e. as the meaning that "best reconciles the texts, having regard to the object and purpose of the treaty". Under this perspective:

(i) the fact that the (ordinary or special) meaning provisionally attributed to a certain term(s) in one (or more) authentic text(s) is regarded as the meaning "which best reconciles the texts, having regard to the object and purpose of the treaty", is thus taken as the decisive evidence of the common intention of the parties to attach that meaning, as a "special meaning", to the corresponding terms used in the other authentic texts;

(ii) the last sentence of Article 33(4) VCLT is regarded as a rule of a purely procedural nature, purported to offer a way out to those interpreters that considered the attribution of a certain special meaning to the relevant treaty term to be an intolerable stretching of its reasonable meaning.

So construed, the rule provided for in the last sentence of Article 33(4) VCLT appears an eminently reasonable solution, since:

(a) it is in line with principle (iv) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which any alleged discrepancy in meaning among the authentic texts of a treaty is merely apparent, since the treaty is an instrument for the parties to convey a single message and, therefore, it must always be attributed a single utterance meaning, notwithstanding the number of its authentic texts;

(b) it restates the content of principle (v) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, in that, on the one hand, it requires the interpreter to establish the final utterance meaning on the basis of the overall context and, in particular, of the parties' object and purpose and, on the other hand, it does not overestimate the relevance of the treaty texts for the purpose of establishing the final utterance meaning, providing the possibility for the interpreter to attach to the terms used

in certain authentic texts a special meaning that might seem *prima facie* difficult to attribute thereto, but which nonetheless appears to best suit the parties' intention and the treaty object and purpose.

g) *Where the treaty provides that a certain authentic text is to prevail in the case of divergences:*
   i. *At which point of the interpretative process must there be recourse to such a prevailing text?*
   ii. *What if the prevailing text is ambiguous or obscure?*
   iii. *What about the contrast between the prevailing text and the other authentic texts, if the latter are coherent among themselves?*

The application of a treaty provision giving priority to a particular text, in cases of divergences in meaning among the authentic treaty texts, requires the interpreter to establish at which stage of the interpretative process the prevailing text should be given such a priority.

The VCLT is silent in this respect and the case law of national and international courts and tribunals does not provide any clear guidance.

According to the ILC, that issue should be resolved by determining, in each case, the intention of the parties with regard to the meaning of the relevant final clause.

This conclusion, although reasonable in theory, presents a significant drawback in its actual application, since "final clauses are nearly always drawn up somewhat automatically",[1964] so that it is reasonable to assume that the contracting States generally do not really discuss with each other the meaning to be attached thereto and, even worse, they probably do not have any accurate idea of when the prevailing text should be given precedence.

The author submits that, unless some decisive evidence to the contrary is available, final clauses providing for a prevailing text in the case of divergences should be construed as requiring the interpreter to compare the *prima facie* divergent authentic texts in light of all available elements and items of evidence, in order to determine whether a reconciliation is possible by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT, before relying exclusively on the prevailing text.

The apparently divergent authentic texts, therefore, should be construed in light of the overall context and compared with each other in the quest for a common meaning. Only where, at the end of the interpretative process, no (provisional) common meaning may be reasonably said to exist should preference be given to the meaning of the prevailing text.

This solution substantially corresponds to principle (viii) established by the

[1964] See J. Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals", 37 *British Yearbook of International Law* (1961), 72 *et seq.*, at 132.

author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis, according to which, where the treaty provides that a specific text has to prevail in cases of discrepancy in meanings among the authentic texts, it appears reasonable to assume that the parties intended the utterance meaning of that text to prevail only where an interpretation based on the *prima facie* divergent authentic texts and the overall context does not lead the interpreter to convincingly attribute a single utterance meaning to all such texts.

From a different perspective, where the meaning attributable to the prevailing text, construed in isolation from the other texts and according to the rules of interpretation enshrined in Articles 31 and 32 VCLT, is ambiguous, obscure or unreasonable, there is still a chance that the analysis of the other authentic texts may shed some light on the utterance meaning of the former.

That holds particularly true where a single meaning is attributable to all other texts and it appears clear, unambiguous and reasonable. Even in this case, however, the interpreter is not bound to attribute such a common meaning to the prevailing text as well. The VCLT does not dispose over any mechanical rule in that respect, since the ILC and, arguably, the Vienna Conference considered that, although attributing to the unclear, ambiguous, or unreasonable (prevailing) text of a treaty the clear, unambiguous and reasonable meaning of the other texts appears to be a common sense solution, that might not always be the correct one since much might depend on the circumstances of each case and the evidence of the intention of the parties. In the improbable event that the interpreter is not persuaded to extend to the prevailing text the meaning common to the other texts, the prevailing text meaning must be theoretically adopted according to the final clause. In this scenario, the utterance meaning of the other authentic texts may still be relevant in directing the interpreter in his task of elucidating the meaning of the prevailing text.

Finally, where the clear, unambiguous and reasonable meanings attributable to the prevailing text and to the other texts appear to conflict with each other, textual comparison may shed light on possible alternative meanings, or alternative arguments to support those meanings, which might have been overlooked by the interpreter engaged in construing the authentic texts in isolation. It is thus possible that textual comparison may direct the interpreter towards the attribution of the same meaning to all authentic texts.

However, where this is not the case, the final clause requires the interpreter to adopt the meaning of the prevailing text, provided that it is clear, unambiguous and reasonable.

h) What is the impact on the answers to be given to the previous questions of the fact that legal jargon terms are employed in the treaty texts?

The presence of legal jargon terms in the authentic texts of a treaty does not change the

goal of its interpreter, which remains establishing the utterance meaning of its provisions.

Similarly, the interpreter continues to be entitled to rely on any single authentic text, taken in isolation, for the purpose of interpreting the treaty and he is still required to remove the *prima facie* discrepancies in meaning by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.

At a more in-depth level of analysis, however, the interaction between the multilingual nature of the treaty and the use therein of legal jargon terms may play a substantial role.

Under a first perspective, the multilingual character of the treaty comes into play as an element that the interpreter may assess in order to establish how the parties intended to construe the legal jargon terms employed in the treaty.

In particular, where the treaty is authenticated in all the official languages of the contracting States and, due to its nature, it strictly interacts with the contracting States' domestic laws, the interpreter could be led to conclude that the parties intended the legal jargon terms employed in the treaty to be attributed their technical meanings under the domestic law of the contracting State applying the treaty. In this case, in fact, the interpreter might regard the linguistic aspect so deeply intertwined with the legal characterization aspect, for the purpose of the treaty application, as to render such solution almost unavoidable.[1965]

The treaty term expressed in the official language of the State applying the treaty, in that respect, would work as the key to unlock the door of the appropriate domestic law meaning, i.e. as a guide for the interpreter to select the domestic law meaning that the parties considered to best fit in the context of the relevant treaty provision.

Under a second perspective, the fact that the interpretation concerns legal jargon terms significantly influences the detection and resolution of the *prima facie* discrepancies in meaning among the authentic treaty texts.

In fact, based on the assumption that the concepts underlying the legal jargon terms employed in one legal system do not normally have perfect correspondents in other legal systems, but just general correspondents (if any), i.e. concepts that fulfill

[1965] Similarly Fantozzi pointed out, with reference to tax treaties (although his analysis applies well beyond such a narrow field), that there is an intrinsic difficulty in trying "to single out the "linguistic" issues relating to the interpretation of double tax conventions from the broader "classification" issues. The two concepts are deeply intertwined, and I therefore do not know if it is possible to define where the thin line that divides the two exactly lies. I find it rather easier to imagine them as two sides of the same coin. In the various hypotheses the interpreter/translator can be faced with, there is, in my view, always a part of each aspects. […] For the treaty to apply […] it is required that a treaty situation takes place. It is therefore required that the State which has to give up part of its power to tax recognizes the *material event* occurred in the other State, as represented by a *legal concept*. The definition of this legal concept involves issues of both kinds: *linguistic* and *classification* issues." (A. Fantozzi, "Conclusions", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 335 *et seq.*, at 335-336).

similar functions within the respective legal systems and with which they share a considerable part of their prototypical denotata (and non-denotata),[1966] the interpreter shall not look for an exact correspondence, but just for a general correspondence among the domestic law concepts underlying the legal jargon terms used in the various authentic texts in order to establish that no (even *prima facie*) discrepancy exists among such texts.

For instance, where a treaty concluded between Austria and Italy is authenticated in the German and Italian languages and employs the terms "Unternehmen" and "impresa", the interpreter, in order to conclude that there is no discrepancy in meaning between those two terms, shall be satisfied in ascertaining that the legal concepts underlying these two terms under Austrian and Italian domestic laws general correspond with each other, in the sense that they fulfill similar functions within the respective legal systems[1967] and share a substantial part of their prototypical denotata (and non-denotata).[1968] The fact these two concepts do not perfectly overlap shall not be considered significant in order to establish whether a discrepancy in meaning exists between the two texts.

Once such a general correspondence has been established, any discrepancy in meaning among the authentic treaty texts may no longer be considered to exist and the interpreter has to proceed to determine the utterance meaning of the legal jargon treaty terms on the basis of whichever authentic text.

Thus, for instance, where the interpreter concludes that the parties intended to attribute a uniform and autonomous meaning to a certain legal jargon treaty term, he will construe such a term on the basis of the overall context and by taking into account the various corresponding concepts under the domestic laws of the contracting States. In the previous example, where the treaty was in force between Austria, Italy, France and Spain, the interpreter would consider, as part of the overall context, the domestic law meanings that the treaty terms "Unternehmen" and "impresa" and their corresponding terms "entreprise" and "empresa" have under the respective Austrian, Italian French and Spanish domestic laws.[1969] The result of his interpretation, due to the loose relation existing between the autonomous treaty meaning and the corresponding domestic law meanings under the laws of the contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

[1966] See the position expressed by the United States representative at the Vienna Conference with regard to the impossibility of reconciling the different authentic texts of a treaty where different systems of law were involved, due to the fact that often there is no legal concept in one system that exactly corresponds to a certain legal concept in the other system (UNCLT-1st, p. 189, para. 41). See also, in this respect, the comment on Part III of the 1964 Draft made by the Yugoslavian government (YBILC 1966-II, p. 361).

[1967] E.g. both are used by the respective legal system in order to distinguish certain economic activities from others, in connection with bankruptcy procedures, the requirement to keep accounts, etc.

[1968] E.g. they both denote banking activities, insurance activities, sale and production of goods activities, certain activities in the provision of services, etc.

[1969] He could take into account as well the domestic law meanings of other corresponding terms under the laws of non-member States, as long as he may reasonably argue for their relevance for his current analysis.

Similarly, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,[1970] he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State of the referred court) has under the substantive *lex fori*. In the previous example, where the treaty in force between Austria, Italy, France and Spain was to be interpreted by a French court, the interpreter would attribute to the treaty terms "Unternehmen" and "impresa" the meaning that the term "entreprise" has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

However, where the interpreter establishes that no general correspondence may be considered *prima facie* to exist among the legal jargon terms employed in the various authentic texts, e.g. because their underlying concepts under the relevant domestic laws do not fulfill similar functions and do not share any significant part of their prototypical denotata (and non-denotata), the interpreter must remove the consequent apparent discrepancy in meanings among the authentic treaty texts by applying the rules of interpretation enshrined in Articles 31 and 32 VCLT and, where this proves unsuccessful, by adopting the meaning attributable to the prevailing text or, absent a prevailing text, the meaning which best reconciles the texts having regard to the object and purpose of the treaty.[1971] In the previous example, where the Italian authentic text of the treaty employed the term "attività economica" instead of "impresa", the former having a much wider scope than the latter under Italian law, a *prima facie* discrepancy in meaning might be considered to exist between the Italian and the German authentic texts. An interpretation of those texts based on Articles 31 and 32 VCLT could then lead the interpreter to conclude that the general meaning underlying the treaty terms "Unternehmen" and "attività economica" is that characterizing the terms "Unternehmen", "impresa" (and not "attività economica"), "entreprise" and "empresa" under Austrian, Italian French and Spanish domestic laws.

Once the *prima facie* discrepancy has been set aside and the general meaning underlying all legal jargon terms employed in the authentic treaty texts has been established, the more precise meaning that the parties intended to attach thereto (i.e. the utterance meaning) will be determined by the interpreter according to the circumstances.

For instance, where the interpreter concludes that the parties intended to attribute to a certain legal jargon treaty term the meaning that it has under the substantive *lex fori*,[1972] he will construe such a term in accordance with the domestic law meaning that it (or its corresponding term in the legal jargon of the State *fori*) has under the substantive

[1970] The same, however, holds true as well with regard to other types of *renvoi*.
[1971] See, although with specific regard to tax treaties, G. Gaja, "The perspective of international law", in G. Maisto (ed.), *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD Publications, 2005), 91 *et seq.*, at 99-100.
[1972] The same, however, holds true as well with regard to other types of *renvoi*.

lex fori. In the previous example, where the treaty was to be interpreted by a French court, the interpreter would attribute to the treaty terms "Unternehmen" and "attività economica" the meaning that the term "entreprise" has under French domestic law. The result of his interpretation, due to the loose correspondence required and expected between the domestic law meaning under the *lex fori* and the domestic law meaning under the laws of the other contracting States, will be regarded as a reasonable construction of any of the corresponding legal jargon terms employed in the authentic treaty texts.

Finally, whenever faced with the interpretation of a legal jargon treaty term, the interpreter has to assess whether, for the purpose of construing that term, he should also take into account legal jargon proxies and assimilations under the relevant domestic law.

The above conclusions are substantially in line with principle (ix) established by the author in section 2 of Chapter 3 of Part I on the basis of his semantics-based normative analysis. That principle highlights that, especially where the relevant treaty is authenticated in all the official languages of the contracting States, the question may arise whether the parties intended the relevant terms used in the various authentic texts to be attributed a uniform meaning, or whether they intended each State to interpret those terms in accordance with the meaning that the term employed in the text authenticated in its own official language has under its domestic law.

According to principle (ix), the interpreter should first answer such a question on the basis of the treaty text(s) and the overall context and then determine the utterance meaning of the relevant treaty provision:

(a) in the case a uniform meaning was intended by the parties, by attributing a particular relevance to the overall context and to the prototypical items denoted by all, or most of the terms employed in the various authentic texts;
(b) in the case a uniform meaning was not intended by the parties, by construing the treaty in accordance with the (national) meaning of the term used in the text authenticated in the official language of the State applying the treaty, provided that such term is similar to the (majority of the) terms used in the other authentic texts. Where the test of similarity fails, the reasonable suspicion may arise that the parties did not intend the relevant treaty provision to be construed in accordance with the (national) meaning of that term.

For the purpose of such a comparison, two terms, construed in accordance with their respective national meanings, may be considered similar:

(a) when they share most of their prototypes, or
(b) in case their prototypes are limited to a few or do not coincide, when most of the features (including their function in the relevant field of knowledge) that characterize such prototypes coincide or, at least, present strong similarities.

What does constitute the greatest part of the respective prototypes and their distinctive features, which have to be taken into account for the purpose of assessing the similarity, cannot be said *in vacuo*. The answer to that question depends upon:

(a) the nature of and the functions performed by the concepts underlying those terms;
(b) the overall context in which those terms are used (in particular the object and purpose of the provision containing those terms).

2.2. Questions specifically concerning multilingual tax treaties

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

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 items of 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.

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 also holds true 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.

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 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 utterance meaning of the relevant tax treaty provision.

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

It is the author's opinion that:

(i) in the absence of any significant departure by 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 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.

From a different perspective, the OECD Commentary, like any other written text, must be construed in order to be used in the process of tax treaty interpretation.[1973]

In that 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

[1973] 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.

that, whenever a *prima facie* discrepancy in meaning arose 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.

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

Where tax legal jargon treaty terms are interpreted in accordance with Article 3(2), a first type of divergence that may emerge is that 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 at 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 might be said to exist between them.

However, this type of divergence may also emerge where the tax treaty is authenticated only in one (neutral) language. In the latter case, the interpreter has to face the additional burden of determining which is the legal jargon term in the official language of the State applying the treaty that best corresponds to the legal jargon term employed in the authentic treaty text (drafted in a different language).

For instance, where 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 divergence[1974] 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:

[1974] This second type of divergence may theoretically emerge also 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.

(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.[1975]

For instance, it may happen that 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". 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 usually indicated as a synonym for 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, 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 exclusively 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" with 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, the significance of the divergences existing among the relevant legal concepts may vary within a spectrum, having as extremes:

(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".

[1975] I.e. the authentic text drafted in the official language of the other contracting State, or an authentic text drafted in a different language.

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".

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.[1976]

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 also prototypical items, it is usually not so significant and pervasive as 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 often concerns both 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, if the Italian authentic text of the 1989 Germany-Italy tax treaty had 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 have been viewed not only as caused by the ontological discrepancies existing between the two best corresponding terms under the Italian and German domestic laws (i.e. the terms

[1976] The same holds true, by analogy, where one (or even both) of the authentic texts being compared is drafted in a language other than the official languages of the contracting States.

"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 the 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 of which contracting State applies the treaty.[1977]

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).[1978]

(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?[1979]

The possibility cannot be dismissed from the outset 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, on the contrary, 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 that respect, several items of evidence exist supporting the view that the parties

[1977] The actual application of such a domestic law meaning would obviously remain subject to the context not requiring otherwise

[1978] I.e., in the previous example, the meaning of the term "impresa" (and not of the term "attività economica") under Italian law.

[1979] 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.

probably intended the interpreter to carry out a (limited) reconciliation of the relevant authentic texts of OECD Model-based tax treaties whenever a *prima facie* discrepancy in meanings is put forward.

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 to read too much into 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 as intended by the parties.[1980]

The right for the interpreter to rely on any authentic text in order to interpret the treaty, together with the possibility that a *prima facie* discrepancy in meanings exists among such texts, makes it necessary for the interpreter to reconcile such texts at least where a type-B divergence is at stake.

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.

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 to 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",[1981] 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,[1982]

[1980] The alternative view of the absence of an obligation for the interpreter to reconcile the authentic treaty texts (al 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 wordings 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.

[1981] See above example.

[1982] I.e. they are authenticated in the official languages of neither contracting State.

or that they provide for a prevailing text (generally drafted in a neutral language) in the case of discrepancies, may be seen as supporting the argument that, with regard to tax treaties in general, the corresponding legal concepts under the law of the two contracting States should not be too different from one another.[1983]

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 best corresponding term, in this case, is probably "lavoro subordinato" and not "lavoro autonomo". In that respect, it would appear difficult to support the conclusion that the provisions of two Italian treaties similarly structured and which 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 the term "lavoro autonomo" in the Italian authentic text) 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 contracting State. 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 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 apply the treaty.

Gaja, in that 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".[1984] 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

[1983] Otherwise, similarly worded (in the neutral authentic language) tax treaties concluded by the same State could end up being construed in significantly divergent manners.
[1984] 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.

consistent with the general meaning that the term has under the treaty".[1985]

In order to decide whether, in any actual instance, the outer limit of the general meaning 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 context, more than being the intent of the parties,[1986] or embodying the parties' common intention,[1987] is made up of all the elements and items of evidence that may help the interpreter in establishing and arguing for the common intention of the parties: it is the overall context that must be used in order to determine the treaty utterance meaning.

(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)?

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.[1988] Thus, as long as the domestic law

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[1985] 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 treay 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".

[1986] 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 the 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 given anywhere to that question (otherwise, one would have to seriously question the sanity of those hundreds of tax scholars that painstakingly have dealt with such issues). 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.

[1987] See M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 7.10.

[1988] 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 treay 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

meaning and the "general meaning" significantly overlap and considering that, where existing, 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.

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". 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 substantially overlap. 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"),[1989] unless the context requires a different interpretation. In that 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, the context coincides with the overall context and, therefore, is made up of all 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 the OECD Commentary, if the treaty is

contracting States for the determination of the meaning of a term would only come into play once the framework has been defined".

[1989] 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.

based on the OECD Model.

In order to determine the "general meaning", where a *prima facie* discrepancy in 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 (or 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:

> (i) the common prototypical items that the interpreter considers the parties intended to denote (or 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 denote 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 in 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 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,[1990] the interpreter should attribute to the treaty terms "lavoro autonomo" and "employment" the meaning that the term "lavoro subordinato"[1991] 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 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 treaty[1992] 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 texts[1993] 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,[1994] provided that the context does

[1990] "Emploi salarié" is the term used in the French official version of Article 15 OECD Model.
[1991] Or "lavoro dipendente".
[1992] 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.
[1993] Or the comparison between the authentic text(s) and the OECD Model official versions.
[1994] In this case, however, there is evidence of the agreement of the parties to make the "prevailing" text

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.

Where the p*rima facie* discrepancies among the authentic treaty texts are caused exclusively by type-A divergences, the domestic law meanings of the terms employed in the various authentic texts commonly overlap 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.[1995]

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 the different meaning required by the context is. 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.

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

Final clauses providing for a prevailing text in the case of discrepancies generally have only a limited bearing on the above conclusions.

In particular, such final clauses 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.

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applicable from the outset, subject to the overall context not requiring otherwise.

[1995] 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.

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 up 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 potential differences, where persisting after an interpretation of the relevant authentic texts based on Articles 31 and 32 VCLT, should be resolved under the treaty's final clause by giving preference to the interpretation stemming from the prevailing text. 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 then be 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 the relevant legal jargon term[1996] employed in the prevailing treaty text has under the domestic laws of the States using it[1997] 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 Articles 31 and 32 VCLT, the "general meaning" should be determined on the basis of the prevailing text, i.e. it should 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*[1998] 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,[1999] the Italian legal jargon term "valori mobiliari" has a wider bearing and

[1996] Or proxies thereof.

[1997] 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 encyclopedias, the interpreter may also establish what the terms are, 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.

[1998] 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.

[1999] See K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* (The Hague: Kluwer Law International, 1997), p. 39, m.no. 72a.

might be used to denote corporate rights not represented by securities, i.e. not incorporated in any certificate.[2000] 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 for concluding that the "general meaning" of the relevant treaty terms in the three authentic languages excluded rights in the capital of the distributing company non-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 provision[2001] 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 (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.[2002]

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"

[2000] See G. Melis, *L'Interpretazione nel Diritto Tributario* (Padova: Cedam, 2003), p. 622.

[2001] 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.

[2002] 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 use therein, the domestic law of that contracting State being drafted solely in the official language thereof. 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.

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 discrepancies 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.