The interpretation of multilingual tax treaties

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SUMMARY

The purpose of the present study is to:

- single out and clarify the most common types of issues emerging in the interpretation of multilingual tax treaties (i.e. tax treaties authenticated in two or more languages), and
- suggest how the interpreter should tackle and disentangle such issues under public international law, with a particular emphasis on the kinds of arguments he should use and the kinds of elements and items of evidence he should rely upon in order to support his construction of the treaty.

The issues on the interpretation of multilingual tax treaties dealt with in this study may be broadly divided in two groups *ratione materiae*:

(i) those general in nature, which may potentially concern all multilingual treaties;
(ii) those specific to multilingual tax treaties.

Issues in group (i) appear to arise independently from the nature and content of the treaty actually at stake. Such issues may be formulated by means of the following research questions:

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

Issues in group (ii) relate specifically to multilingual tax treaties. They may be expressed by means of the following research questions:

a) What is the relevance of the official versions of the OECD Model for the purpose of interpreting multilingual tax treaties (either authenticated also in English and/or French, or authenticated in neither of such languages)?
b) What is the relevance of the OECD Commentary for the purpose of interpreting multilingual tax treaties?
c) What is the relevance of Article 3(2) of OECD Model-based multilingual tax treaties for the purpose of their interpretation?

In order to suggest valuable and durable solutions to the problem of how the interpreter should tackle and disentangle the various issues that he might face where confronted with a multilingual tax treaty, the author chose to anchor his analysis in an in-depth, stable and clear foundation. He decided to primarily approach his task on the basis of modern linguistic and, more specifically, semantic (here intended as including pragmatic) theories.

Following this approach, the author focuses on the answers that modern semantics has given to key questions such as:

(i) What is the goal pursued by persons using (written) language as means of communication?
(ii) How do persons actually create their utterances and use language in that respect?
(iii) How do other persons interpret the utterances they hear or read?
(iv) Why do utterances seem inextricably affected by vagueness and ambiguity?
(v) How is it possible to reduce the impact of such vagueness and ambiguity in creating and/or interpreting utterances?

On the basis of these answers, the author establishes the fundamental principles that should guide the interpreter whenever construing a treaty. Such principles work together as a yardstick, a parameter of value to be used in order to assess the appropriateness of any treaty interpretation in light of the explicit or implicit arguments supporting it.

This is obviously a normative (prescriptive) type of legal analysis, which is purported to highlight the fundamental principles of treaty interpretation solely on the basis of semantics. Like all normative legal analyses, it raises the primary questions of:

a) Whether its results also represent, at least to a certain extent, a reasonable approximation of the law as it stands; and
b) What should be done with its results where they prove to conflict with the law as it stands.

In order to answer question (a), the author has carried out a positive (descriptive) analysis, which is aimed at revealing how national and international courts and tribunals have approached the interpretation and application of treaties, in general, and tax treaties, in particular, as well as how international scholars have construed Articles 31-33 VCLT and, with regard to tax treaties, Article 3(2) OECD Model. This positive analysis was aimed at providing the author with a map of the currently accepted rules and principles of interpretation, against which he could test the fundamental principles of treaty interpretation determined on the basis of his normative, semantics-based analysis.

With regard to question (b), the author has developed a theory of the interaction between normative and positive legal analyses. Adhering to the conclusions already drawn by some constitutionalists and general theorists of law, the author maintains that normative and positive legal analyses, as well as the results thereof, may be seen as interrelated and mutually affecting each other. In particular, it is the author's belief that positive legal theory produces indirect constraints to normative legal theory by (i) setting significantly high costs (in terms of legal uncertainty, infringement of legal expectations, social and cultural transition) to be met in order to substitute the state of affairs that is proposed in the normative legal theory (*first-best solution*) for the status quo; and (ii) limiting the feasible set of legal rules and policies that may be implemented.

In this respect, the rules and principles of treaty interpretation set forth in Articles 31-33 VCLT have been generally recognized as a codification of customary international law and, as such, applicable to all treaties. In addition, for more than forty years legal scholars, courts and tribunals have expressed their views on how such articles should be construed, i.e. on which legal rules and principles should be derived therefrom. Although the conclusions reached by those interpreters often vary to a considerable extent, certain mainstream constructions may be identified, as well as the outer borders beyond which any interpretation of those articles that was proposed would be rejected by the vast majority of international lawyers. Against this background, drawing a normative legal theory of treaty interpretation affirming principles that conflict with the generally accepted constructions of Articles 31-33 VCLT, or that lie to a significant extent outside the generally accepted borders of a perceived reasonable interpretation of such articles, would be equal to sustaining a legal theory of interpretation that, in the best case, could establish itself only in the very long run and would cause a protracted period characterized by more legal uncertainty than in the current state of affairs. However, since the purpose of the present research is to suggest how the interpreter should *now* tackle and disentangle the most common types of issues emerging from the interpretation of multilingual tax treaties under public international law, the author was not willing to accept the above-described drawbacks of a normative legal theory infringing the generally accepted rules and principles of treaty interpretation derived from Articles 31-33 VCLT. In the author's intention, his normative legal theory should be shaped so as to fit within the generally accepted borders of a perceived reasonable interpretation of such articles; where the inferences drawn from the semantic analysis appear to lie outside those outer borders, such inferences should be disregarded for the purpose of setting up the author's normative (semantics-based) theory of treaty interpretation. Hence, from a theoretical perspective, the author's normative legal theory of interpretation must be regarded as a *non-ideal* normative theory (*second-best solution*).

The dissertation includes three parts, in addition to the introduction.

Part I comprises the analysis of relevant modern semantics works, as well as the illustration of the semantics-based principles of treaty interpretation inferred from such analysis.

Part II is purported to design the author's normative legal theory on the interpretation of multilingual tax treaties based on the results of the semantics-based normative analysis carried out in Part I. Part II is divided into six chapters. Chapter 1 draws a concise sketch of the linguistic practices in international affairs. Chapter 2 provides the reader with a brief introduction to the VCLT. Chapter 3 carries out a positive legal analysis purported to illustrate the generally accepted constructions of Articles 31 and 32 VCLT and, at the same time, it is aimed at assessing whether the rules and principles of law resulting from such constructions conflict with the semantics-based principles of treaty interpretation established by the author in Part I, or, on the contrary, whether the latter may coexist with the former and be used in order to construe Articles 31 and 32 VCLT. Chapter 4 is purported (i) to construe, as far as possible, Article 33 VCLT in coherence with the results of the analysis carried out in the previous chapters, (ii) to assess whether such a construction is in line with any generally accepted interpretation of that article provided for by scholars, courts and tribunals and (iii) to compare the rules and principles of interpretation derived from Article 33 VCLT with the semantics-based principles of interpretation established in Part I, in order to highlight the existence and possibly investigate the reasons of any significant discrepancies between them. The construction of Article 33 VCLT based on the author's semantics-based normative analysis, so far as it does not encroach any generally accepted interpretation thereof, is employed as a legal basis in order to answer the seven research questions concerning the interpretation of multilingual treaties (in general) mentioned above. Chapter 5 deals with the research questions specifically concerning multilingual tax treaties. Chapter 6 analyses the rules governing the correction of errors in multilingual treaties, as established by Article 79(3) VCLT, and investigates the interaction between these rules and those provided for in Article 33 VCLT, both concerning, to a certain extent, the lack of concordance between two or more authentic texts of a treaty.

Finally, Part III describes and systematically arranges the answers given to the research questions, thus spelling out the author's normative legal theory on the interpretation of multilingual (tax) treaties.