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## **The Interpretation of plurilingual tax treaties: theory, practice, policy**

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# The Interpretation of Plurilingual Tax Treaties

Theory, Practice, Policy

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Dedicated to the loving memory of my parents.



*'Man acts as though he were the shaper and master of language,  
while in fact language remains the master of man.'*

— MARTIN HEIDEGGER<sup>†</sup>

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<sup>†</sup>*Philosophical and Political Writings* (New York: Continuum, 2003), 267.





# Contents

Contents . . . . .	ix
List of Tables . . . . .	xiii
List of Figures . . . . .	xvii
Case Law . . . . .	xix
Abbreviations: General . . . . .	xxiii
Abbreviations: Figures and Tables . . . . .	xxv
Abbreviations: Language Codes . . . . .	xxvii
Editorial Notes . . . . .	xxix
Preface . . . . .	xxxi
Note on Style . . . . .	xxxiii
<b>1. Introduction . . . . .</b>	<b>1</b>
1.1. Scientific Contribution . . . . .	1
1.2. Motivation . . . . .	2
1.3. Research Question . . . . .	5
1.4. Structure . . . . .	6
1.5. Terminology . . . . .	8
1.5.1. Plurilingual versus Multilingual . . . . .	8
1.5.2. Text(s) . . . . .	9
1.5.3. Clear . . . . .	10
1.5.4. Analytic and A Priori . . . . .	11
1.5.5. All Treaties and Global Tax Treaty Network . . . . .	13
1.5.6. Lingua Franca and (True) Diplomatic Language . . . . .	13
<b>2. Methodology . . . . .</b>	<b>15</b>
2.1. Preliminary Considerations . . . . .	15
2.1.1. General Approach . . . . .	15
2.1.2. Jurisprudence as a Science . . . . .	19
2.2. Methods Employed . . . . .	21
2.2.1. Logic . . . . .	23
2.2.2. Hermeneutics . . . . .	29
2.2.3. Quantitative Analysis . . . . .	33
<b>3. Routine Interpretation: A Refutation . . . . .</b>	<b>35</b>
3.1. Research Question . . . . .	35
3.2. Preliminary Considerations . . . . .	35
3.2.1. The Treaty and Its Text . . . . .	35

## Contents

3.2.2.	The Meaning of Text and Its Implications . . . . .	40
3.3.	The VCLT Framework . . . . .	47
3.3.1.	The Content of Article 33 . . . . .	47
3.3.2.	The Prevailing View . . . . .	49
3.3.3.	Critique of the Prevailing View . . . . .	53
3.4.	The Impact of Domestic Procedural Law . . . . .	60
3.5.	A Refutation Based on General Hermeneutics . . . . .	67
3.6.	Reliance on the Original Text . . . . .	72
<b>4.</b>	<b>Practical Implications and Additional Issues . . . . .</b>	<b>79</b>
4.1.	Research Questions . . . . .	79
4.2.	Preliminary Considerations . . . . .	79
4.3.	The Scope of Article 33(4) . . . . .	81
4.3.1.	The Meaning of Reconcile . . . . .	81
4.3.2.	The Object and Purpose as Decisive Criterion . . . . .	84
4.4.	Use of Supplementary Means . . . . .	91
4.4.1.	Fundamental Principles . . . . .	91
4.4.2.	Application to Plurilingual Treaties . . . . .	93
4.5.	Special Considerations concerning Tax Treaties . . . . .	110
<b>5.</b>	<b>Reliance on the Prevailing Text . . . . .</b>	<b>123</b>
5.1.	Research Question . . . . .	123
5.2.	Framing the Issue . . . . .	126
5.3.	The Contrary Positions . . . . .	128
5.3.1.	The Permissive Approach . . . . .	128
5.3.2.	The Restrictive Approach . . . . .	130
5.4.	Interpretation of Article 33(1) and (4) . . . . .	133
5.4.1.	The Meaning of Prevailing . . . . .	133
5.4.2.	The Meaning of Divergence . . . . .	135
5.4.3.	Application of the Permissive Approach . . . . .	141
5.4.4.	Evaluation of the Restrictive Approach . . . . .	145
5.4.5.	Comparison of All VCLT Texts . . . . .	148
5.4.6.	Recourse to the VCLT Commentary . . . . .	149
5.5.	Limitations of the Permissive Approach . . . . .	152
<b>6.</b>	<b>The Restrictive Approach: A Critical Review . . . . .</b>	<b>159</b>
6.1.	Research Topic . . . . .	159
6.2.	The Attack on the Logical Argument . . . . .	159
6.3.	Hardy's Search for a Middle Ground . . . . .	163
6.4.	Arginelli's Position . . . . .	170
<b>7.</b>	<b>The View from Domestic Law . . . . .</b>	<b>183</b>
7.1.	Research Question . . . . .	183

7.2. Civil versus Common Law . . . . .	183
7.3. Common Law: United Kingdom . . . . .	200
7.4. Civil Law: Germany . . . . .	203
7.5. Comparison per Type of Dispute . . . . .	206
7.6. Evaluation of the Status Quo . . . . .	208
7.7. Solutions . . . . .	219
<b>8. Applicability of the Permissive Approach . . . . .</b>	<b>221</b>
8.1. Research Question . . . . .	221
8.2. Use of Prevailing Texts . . . . .	222
8.2.1. Global Analysis . . . . .	222
8.2.2. Time-Series Analysis . . . . .	226
8.2.3. Group Analysis . . . . .	232
8.2.4. Per Country Analysis . . . . .	240
8.3. Types of Wording . . . . .	246
8.3.1. TOW Classification . . . . .	246
8.3.2. TOW Usage . . . . .	253
8.3.3. TOW Interpretation . . . . .	256
8.4. Summary Observations . . . . .	265
<b>9. English as Lingua Franca of Tax Treaties . . . . .</b>	<b>267</b>
9.1. Research Topic . . . . .	267
9.2. Global Analysis . . . . .	268
9.3. Time-Series Analysis . . . . .	274
9.4. Group Analysis . . . . .	279
9.5. Per Country Analysis . . . . .	293
9.6. Model Convention Final Clauses . . . . .	303
9.7. Summary Observations . . . . .	308
<b>10. Conclusions . . . . .</b>	<b>309</b>
10.1. Synopsis . . . . .	309
10.1.1. Theoretical Analysis . . . . .	309
10.1.2. Empirical Analysis . . . . .	323
10.2. Policy Recommendations . . . . .	326
10.2.1. Mission Statement . . . . .	326
10.2.2. General Considerations . . . . .	326
10.2.3. Specific Recommendations . . . . .	334
<b>11. Annex: The BEPS Multilateral Instrument . . . . .</b>	<b>341</b>
11.1. Research Topic . . . . .	341
11.2. The Optimal Policy . . . . .	342
11.3. The OECD Solution . . . . .	347

## *Contents*

<b>Appendices</b> . . . . .	353
<b>A. Vienna Convention on the Law of Treaties</b> . . . . .	355
A.1. Articles 31–33 . . . . .	355
A.2. Parties . . . . .	357
<b>B. Article 32(b) Case Law</b> . . . . .	361
B.1. Netherlands Workers Delegate . . . . .	361
B.2. South West Africa (Ethiopia v South Africa) . . . . .	363
<b>C. Pre–Model OECD Member Treaties</b> . . . . .	365
C.1. 1963 Model (Income and Capital) . . . . .	365
C.2. 1982 Model (Estates, Inheritances, and Gifts) . . . . .	366
<b>D. Treaty and TOW Distributions</b> . . . . .	369
D.1. Treaties per Group . . . . .	369
D.2. Per Country TOW Distribution . . . . .	371
<b>E. Sample</b> . . . . .	373
E.1. Excluded Treaties . . . . .	375
E.2. Global Tax Treaty Network . . . . .	379
E.3. Terminated Treaties . . . . .	445
<b>References</b> . . . . .	455
<b>Summary</b> . . . . .	481
<b>Samenvatting (Summary in Dutch)</b> . . . . .	487
<b>Curriculum Vitae</b> . . . . .	493

## List of Tables

8.1. All Treaties . . . . .	222
8.2. Number of Authentic Languages (All Plurilingual Treaties) . . . . .	223
8.3. Global Tax Treaty Network . . . . .	223
8.4. Number of Authentic Languages (Global Tax Treaty Network) . . . . .	224
8.5. Terminated Treaties . . . . .	224
8.6. Not Replaced Terminated Treaties . . . . .	225
8.7. Terminated and Replaced Treaties . . . . .	225
8.8. Treaties per Decade . . . . .	226
8.9. Concentration of Plurilingual Treaties without Prevailing Text . . . . .	232
8.10. OECD, NOECD and OECDKP Treaties . . . . .	236
8.11. G20 Treaties . . . . .	236
8.12. CW Treaties . . . . .	237
8.13. EU Treaties . . . . .	238
8.14. CIS Treaties . . . . .	238
8.15. AW Treaties . . . . .	238
8.16. LA Treaties . . . . .	239
8.17. AF Treaties . . . . .	239
8.18. AS Treaties . . . . .	240
8.19. G1 NEOL Treaties . . . . .	241
8.20. G1 EOL Treaties . . . . .	242
8.21. G2 NEOL Treaties . . . . .	243
8.22. G2 EOL Treaties . . . . .	244
8.23. G3 NEOL Treaties . . . . .	245
8.24. G3 EOL Treaties . . . . .	245
8.25. TOW Distribution . . . . .	253
9.1. Treaties with English or French Texts . . . . .	269
9.2. Language Distribution of Unilingual Treaties . . . . .	269
9.3. Distribution of English Unilingual Treaties . . . . .	271
9.4. Language Distribution of Prevailing Texts . . . . .	272
9.5. Language Distribution of Unilingual Treaties and Prevailing Texts . . . . .	273
9.6. Changes through Termination . . . . .	274
9.7. Terminated and Replaced Unilingual Treaties . . . . .	276
9.8. Terminated and Replaced Plurilingual Treaties . . . . .	276
9.9. English Unilingual Treaties and Prevailing Texts (OECD) . . . . .	280
9.10. English as Treaty Lingua Franca and Authentic Language (OECD) . . . . .	280
9.11. English Unilingual Treaties and Prevailing Texts (G20) . . . . .	281

## List of Tables

9.12. English as Treaty Lingua Franca and Authentic Language (G20) . . . . .	281
9.13. English Unilingual Treaties and Prevailing Texts (CW) . . . . .	282
9.14. English as Treaty Lingua Franca and Authentic Language (CW) . . . . .	282
9.15. English Unilingual Treaties and Prevailing Texts (EU) . . . . .	282
9.16. English as Treaty Lingua Franca and Authentic Language (EU) . . . . .	283
9.17. English Unilingual Treaties and Prevailing Texts (CIS) . . . . .	283
9.18. English as Treaty Lingua Franca and Authentic Language (CIS) . . . . .	283
9.19. English Unilingual Treaties and Prevailing Texts (AW) . . . . .	284
9.20. English as Treaty Lingua Franca and Authentic Language (AW) . . . . .	284
9.21. English Unilingual Treaties and Prevailing Texts (LA) . . . . .	285
9.22. English as Treaty Lingua Franca and Authentic Language (LA) . . . . .	285
9.23. English Unilingual Treaties and Prevailing Texts (AF) . . . . .	286
9.24. English as Treaty Lingua Franca and Authentic Language (AF) . . . . .	286
9.25. English Unilingual Treaties and Prevailing Texts (AS) . . . . .	287
9.26. English as Treaty Lingua Franca and Authentic Language (AS) . . . . .	287
9.27. English as Treaty Lingua Franca in Relation to Official Language . . . . .	288
9.28. English as Treaty Lingua Franca for Native English-speaking Countries . .	290
9.29. English as Treaty Lingua Franca for Countries with Very Good and Good English Proficiency . . . . .	290
9.30. English as Treaty Lingua Franca for Countries with Medium English Pro- ficiency . . . . .	291
9.31. English as Treaty Lingua Franca for Countries with Low and Very Low English Proficiency . . . . .	292
9.32. English as Treaty Lingua Franca G1 NEOL . . . . .	294
9.33. English as Treaty Lingua Franca G1 EOL . . . . .	297
9.34. English as Treaty Lingua Franca G2 NEOL . . . . .	298
9.35. English as Treaty Lingua Franca G2 EOL . . . . .	299
9.36. English as Treaty Lingua Franca G3 NEOL . . . . .	299
9.37. English as Treaty Lingua Franca G3 EOL . . . . .	300
9.38. English as Treaty True Diplomatic Language for Countries with Twenty or More Unilingual Treaties . . . . .	301
9.39. English as Treaty True Diplomatic Language for Countries with Ten or More but Fewer than Twenty Unilingual Treaties . . . . .	301
9.40. Countries with Zero English Unilingual Treaties and Prevailing Texts . . .	302
10.1. Lingual Form of All Treaties . . . . .	325
A.1. Parties to the VCLT . . . . .	357
C.1. OECD Member Income Tax Treaties pre-OECD Model . . . . .	365
C.2. OECD Member Inheritance Tax Treaties pre-OECD Inheritance Tax Model	366
C.3. OECD Member Mixed Tax Treaties pre-OECD Inheritance Tax Model . . .	368

## *List of Tables*

D.1. Global Tax Treaty Network per Group . . . . .	369
D.2. Global Tax Treaty Network per Group with One or Both Group Members per Treaty . . . . .	370
D.3. TOW Distribution for Countries with Twenty or more Plurilingual Treaties	371
E.1. Treaties Excluded from the Sample . . . . .	375
E.2. Treaties In Force or Yet to Come Into Force . . . . .	379
E.3. Treaties Concluded and Terminated 1960–2016 . . . . .	445





## List of Figures

8.1. Per Decade Treaty Growth Rate . . . . .	227
8.2. Cumulative and per Decade Growth of the Global Tax Treaty Network . .	227
8.3. Per Decade Growth of Unilingual and Plurilingual Treaties . . . . .	229
8.4. Cumulative Growth of Unilingual and Plurilingual Treaties . . . . .	229
8.5. Per Decade Growth of Plurilingual Treaties with/without Prevailing Text .	230
8.6. Cumulative Growth of Plurilingual Treaties with/without Prevailing Text .	230
8.7. Per Decade Terminated Treaties . . . . .	231
8.8. Per Decade Terminated Treaties as Percentage of All Terminated Treaties .	231
8.9. TOW of Treaties per Decade . . . . .	255
8.10. TOW as Percentage of Treaties per Decade . . . . .	255
9.1. English Prevailing Texts as Percentage of All Prevailing Texts per Decade .	275
9.2. Growth of English Unilingual Treaties . . . . .	278
9.3. Growth of English Unilingual Treaties and Prevailing Texts . . . . .	278



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## Abbreviations: General

AEAO	<i>Anwendungserlass zur Abgabenordnung</i> (administrative directive concerning the application of the German general tax code)
AF	Africa without AW countries
AS	China (People's Rep.), Indonesia, Iran, Japan, Korea (Dem. People's Rep.), Korea (Rep.), Laos, Mongolia, Myanmar, Nepal, Philippines, Taiwan, Thailand, Turkey, Vietnam
ASEAN	The Association of South East Asian Nations
AW	Arab World
BAO	<i>Bundesabgabenordnung</i> (Austrian federal tax code)
BFH	<i>Bundesfinanzhof</i> (German Federal Fiscal Court)
BGB	<i>Bürgerliches Gesetzbuch</i> (German civil code)
BIT	Bilateral Investment Treaty
BMF	Bundesministerium der Finanzen (German Ministry of Finance)
BStBl.	<i>Bundessteuerblatt</i> (German federal fiscal gazette)
BVerfG	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
BVerfGG	<i>Bundesverfassungsgerichtsgesetz</i> (German Federal Constitutional Court Act)
CFER	Common European Framework of Reference for Languages
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union
CIS	Commonwealth of Independent States plus former members and associate states
CISG	United Nations Convention on Contracts for the International Sale of Goods
CW	Commonwealth of Nations including former members, prospective members and other former British colonies that have never been Commonwealth members
DARS	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECJ	European Court of Justice
ECHR	European Court of Human Rights
EU	European Union plus EFTA countries but excluding France, Ireland, Malta, UK
FG	<i>Finanzgericht</i> (German Fiscal Court)
FGO	<i>Finanzgerichtsordnung</i> (German fiscal procedure law)
GAAR	General anti-abuse rule
GG	<i>Grundgesetz</i> (German constitution)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission

ITAT	Income Tax Appellate Tribunal (India)
ITLOS	International Tribunal for the Law of the Sea
JN	<i>Jurisdiktionsnorm</i> (Austrian law regulating the jurisdiction of courts in private law matters)
LA	Latin America excluding CARICOM (Caribbean Community)
MAP	Mutual agreement procedure
MLI	OECD BEPS multilateral instrument
OECD	Organisation for Economic Co-operation and Development
OECDKP	OECD key partners invited by the OECD to strengthen cooperation through ‘Enhanced Engagement’ programmes: Brazil, India, Indonesia, China (People’s Republic) and South Africa
PCIJ	Permanent Court of International Justice
PE	Permanent establishment
RIS	<i>Rechtsinformationssystem Bundeskanzleramt</i> (legal information system of the Federal Chancellery of the Republic of Austria)
SADC	Southern African Development Community
TOW	Type of wording
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
VwGH	<i>Verwaltungsgerichtshof</i> (Austrian Supreme Administrative Court)
ZPO	<i>Zivilprozessordnung</i> (German civil procedure law)



## Abbreviations: Figures and Tables

%X	As percentage of X, X may be any combination of other abbreviations, e.g. %PL w PT, reading ‘as percentage of plurilingual treaties with prevailing text’
AF	Africa without AW countries
AL	Authentic languages
AS	China (People’s Rep.), Indonesia, Iran, Japan, Korea (Dem. People’s Rep.), Korea (Rep.), Laos, Mongolia, Myanmar, Nepal, Philippines, Taiwan, Thailand, Turkey, Vietnam
AW	Arab World
CIS	Commonwealth of Independent States plus former members and associate states
CM	Cumulative
CW	Commonwealth of Nations including former members, prospective members and other former British colonies that have never been Commonwealth members
EOL	English as official language
EU	European Union plus EFTA countries but excluding France, Ireland, Malta, UK
g	Good English proficiency
global	Entire sample including terminated treaties
l	Low English proficiency
LA	Latin America excluding CARICOM (Caribbean Community)
lang	Language
m	Medium English proficiency
n	Native English-speaking
NAF	Not AF
NAS	Not AS
NAW	Not AW
NC	No change in type UL or PL by replacement
NCIS	Not CIS
NCW	Not CW
NEU	Not EU
NLA	Not LA
NOECD	Not OECD
NOEL	Not EOL
No.	Number of treaties
NR	Not replaced terminated treaties
OECD	Organisation for Economic Co-operation and Development

OECDKP	OECD key partners invited by the OECD to strengthen cooperation through ‘Enhanced Engagement’ programmes: Brazil, India, Indonesia, China (People’s Republic) and South Africa
PD	Per decade
PL	Plurilingual treaties
PT	Prevailing text
R	Replaced terminated treaties
term	Terminated treaties
total	Entire set/group analysed
TOW	Type of wording
UL	Unilingual treaties
vg	Very good English proficiency
vl	Very low English proficiency
w	With
w/o	Without

## Abbreviations: Language Codes

afr	Afrikaans
alb	Albanian
ara	Arabic
arm	Armenian
aze	Azerbaijani
bel	Belarusian
ben	Bengali
bos	Bosnian
bul	Bulgarian
bur	Burmese
cat	Catalan
chi	Chinese
cro	Croatian
cze	Czech
dan	Danish
dut	Dutch
dzo	Dzongkha
eng	English
est	Estonian
fao	Faroese
fin	Finnish
fre	French
geo	Georgian
ger	German
gre	Greek
gro	Greenlandic
heb	Hebrew
hin	Hindi
hun	Hungarian
ice	Icelandic
ind	Indonesian
iri	Irish
ita	Italian
jap	Japanese
kaz	Kazakh
kor	Korean
kyr	Kyrgyz
lao	Lao
lat	Latvian
lit	Lithuanian

may	Malay
mol	Moldovan
mon	Mongolian
mtg	Montenegrin
nep	Nepali
nor	Norwegian
per	Persian
pol	Polish
por	Portuguese
rum	Romanian
rus	Russian
scr	Serbo-Croatian
ser	Serbian
sin	Sinhala
slo	Slovak
slv	Slovenian
spa	Spanish
swe	Swedish
tgk	Tajik
tha	Thai
tkm	Turkmen
ukr	Ukrainian
uzb	Uzbek
vtv	Vietnamese

## Editorial Notes

- i. **Punctuation and Style.** Punctuation and style follow suggestions in the *Oxford Style Manual*, the *Chicago Manual of Style*, Butcher's *Copy-editing*, and Strunk-White.<sup>1</sup>
- ii. **Quotations.** Quotations follow British practice in using single quotation marks for verbatim quotations, double quotation marks for nested quotations, and no quotation marks for block quotations.<sup>2</sup> Square brackets indicate interpolations. Dots enclosed in parentheses indicate an omission or placeholder in the original: three dots indicate an omission, five dots a placeholder for insertions, and two dots a placeholder for digits (year).
- iii. **Citations.** Citations are rendered in note format, based on the *Chicago Manual of Style*. Tax treaties are cited as Country-Country (year) or, when the other country is obvious from the context, Country (year). Unless specified otherwise, all references to 'Article 31', 'Article 32', and 'Article 33' (including paragraph numbers and letters in parenthesis) refer to Articles 31, 32, and 33 of the VCLT.<sup>3</sup> The specification 'VCLT' is omitted to avoid cluttering the text, and added only when other VCLT articles are cited for purposes of disambiguation.
- iv. **Spelling and Grammar.** Spelling follows Fowler's *Dictionary of Modern English Usage* and the Oxford Dictionary.<sup>4</sup> The word 'data' is a plural, but use as a singular is gaining acceptance. Depending on the context, both forms are used by me.
- v. **Translations.** Unless otherwise noted, translations are my own.

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<sup>1</sup>E. M. Ritter, ed., *The Oxford Style Manual* (Oxford: Oxford University Press, 2003); Russell David Harper, ed., *The Chicago Manual of Style*, 16th ed. (Chicago, IL: University of Chicago Press, 2010); Butcher, Judith, *Butcher's Copy-editing: The Cambridge Handbook for Editors, Copy-editors and Proofreaders*, 3rd ed. (Cambridge: Cambridge University Press, 1992); Strunk, William Jr., *The Elements of Style*, ed. White, E.B., 4th ed. (Harlow, Essex: Pearson Education Limited, 2014).

<sup>2</sup>See Ritter, *The Oxford Style Manual*, 148, s. 5.13, 194, s. 8.1.2.

<sup>3</sup>UN, *Vienna Convention on the Law of Treaties*, May 23, 1969, Treaty Series I-18232 (United Nations, 1980), Articles 31-33. Appendix A.1 contains their full text.

<sup>4</sup>Burchfield, R. W., ed., *The New Fowler's Modern English Usage*, 3rd ed. (Oxford: Oxford University Press, 1996); <https://en.oxforddictionaries.com>.



## Preface

This study has been submitted as a dissertation to receive the degree of *Philosophiae Doctor* (PhD) from the University of Leiden Law School in the Netherlands. It is the result of research conducted under the supervision of Prof. Dr. Kees van Raad and Prof. Dr. John F. Avery Jones between 2014 and 2018.

The research leading to this book has been inspired by the author's reading of an article discussing the concepts of tax sparing and matching credit,<sup>5</sup> in the course of which the Conseil d'État decision in *Natexis*<sup>6</sup> is analysed in great detail. At least in the opinion of the present author and the article authors Arruda Ferreira and Trindade Marinho, a difference in meaning between the French and Portuguese texts may have contributed to a wrong interpretation by the court and a misapplication of the tax treaty between France and Brazil. Although this difference in meaning is only touched on as a side issue in the cited article, it remained with the present author as an unresolved puzzle and fundamental problem of tax treaty interpretation and application requiring solution, thereby inspiring this study.

I would like to thank my supervisors Kees van Raad and John Avery Jones for all their support and guidance. In addition, I would like to thank Ksenia Levushkina, Roberto Bernales, Ridha Hamzaoui, Antoine Reillac, and Tian Xu for their help with the Russian, Spanish, French, and Chinese texts of the Vienna Convention, Ksenia Levushkina for her additional help with the Russian Model Convention and several treaties in Russian, Ridha Hamzaoui for his additional help with several treaties in Arabic and French, Vanessa Arruda Ferreira and Anapaula Trindade Marinho for their initial inspiration, and Vanessa Arruda Ferreira for her additional input. Finally, I would like to thank Wim Wijnen for his help with the Dutch summary.

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<sup>5</sup>Vanessa Arruda Ferreira and Anapaula Trindade Marinho, 'Tax Sparing and Matching Credit: From an Unclear Concept to an Uncertain Regime', *Bulletin for International Taxation* 67, no. 8 (2013): 397–413.

<sup>6</sup>Conseil d'État, *Société Natexis Banques Populaires v France*, 2006.





## Note on Style

Writing a doctoral dissertation in a foreign language is a challenge. Nevertheless, the choice for English has been a conscious one. English is undeniably the *lingua franca* of international tax law, and anybody who wants reception of his arguments beyond national borders has to employ it. Given the subject of this thesis, writing it not in English would have defeated its purpose.

But, writing in a foreign language remains a handicap the reader must endure, not the author. In order to reduce the gap between being able to write in English and being able to write well in English, I have looked for guidance to improve the readability of this book. The most relevant advice comes from Karl Popper: ‘Anyone who cannot speak simply and clearly should say nothing and continue to work until he can do so.’<sup>7</sup> Regarding specific guidelines to improve on clarity, I have found Orwell’s six elementary rules helpful but in need of adjustment because not written with academic writing in mind:

1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
2. Never use a long word where a short one will do.
3. If it is possible to cut a word out, always cut it out.
4. Never use the passive where you can use the active.
5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
6. Break any of these rules sooner than say anything outright barbarous.<sup>8</sup>

The first three I have tried to implement rigorously, also in terms of avoiding pleonastic terminology commonly employed by other authors on the subject.<sup>9</sup> Not being a native English speaker, I have found myself occasionally confronted with a trade-off between elegance and precision. In such case I have opted without exception for the latter as a matter of general principle even when risking clumsy formulation. Such choice is imperative

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<sup>7</sup>Karl R. Popper, *In Search of a Better World: Lectures and Essays from Thirty Years* (London: Routledge, 2012), 83.

<sup>8</sup>The Economist, *Style Guide*, 11th ed. (London: Profile Books Ltd., 2015), 1.

<sup>9</sup>See Chapter 1, s. 1.5.2.

in view of the methods I employ.<sup>10</sup> Some authors emphasise the necessity to use symbolic expressions when applying logic to avoid this problem;<sup>11</sup> however, use of symbols and logical operators is only helpful if everyone who participates in the discourse is familiar with them – otherwise it constitutes an obstacle. For this reason I dispense with any use of logic operators and only use symbols in their most obvious application not entirely uncommon in legal or economic scholarship, such as denoting propositions with a letter.

Traditionally, use of active voice is discouraged in academic writing; however, this iron principle seems to slowly soften. Personally, I much prefer articles written in active voice for being less strenuous to follow and not portraying a false sense of objectivity. On the other hand, using first person mode for an entire thesis would surely stand out, and not necessarily in a good way. Rather than opting for either extreme, I have chosen a balance in favour of passive voice with injections of active voice, all with rule 6 in mind. First person singular is used sparsely or replaced by something like ‘this study’. First person plural is sometimes used to imply the reader and myself. For purely stylistic reasons, third person singular not referring to any particular person is used exclusively in male form – of course without implying any gender primacy.

Rule 5 would defeat its own purpose if applied to academic writing. Scientific jargon is important because it communicates complex ideas with concise pre-defined notions, which allows condensation of text. Hence, using jargon gives preference to rules 2 and 3 over 5. For the same reason I occasionally use Latin phrases (with translations provided in parenthesis). They are not only synonymous for what they literally express, but also for an entire theory or principle they condense in one short expression.

These style considerations affect the structure of this thesis. Most importantly, the individual chapters will not contain separate conclusion sections, but the conclusions are part of the flow of argument. This may seem unusual to the academic reader but is only conclusive: if I have done a good job in making my point, repeating it is redundant. In the same vein, although

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<sup>10</sup>See Chapter 2, s. 2.2.1.

<sup>11</sup>See, e.g., Ilmar Tammelo, *Modern Logic in the Service of Law*, 1st ed. (Wien; New York: Springer, 1978), x.

providing a brief synopsis of the previously drawn conclusions, Chapter 10 does not summarise all points in detail again; its job is rather to distil further conclusions at the macro level. With regard to synoptic observations, I refrain from pleonastic referencing throughout Chapter 10 (and the Annex); only verbatim quotations as well as points not previously quoted will be fully referenced.