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

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4. Practical Implications and Additional Issues

4.1. Research Questions

The considerations submitted in the previous chapter raise three questions concerning practical application: First, should recourse to supplementary means be had when interpreting any single text before recourse to the others, or only after a comparison with respect to a common meaning? Second, what weight should be given to supplementary means in relation to Article 33(4) – should recourse to the former be had over the latter, or should the latter take precedence? Third, how does *renvoi* to domestic law implemented by model conventions and tax treaties affect interpretation in plurilingual cases?

4.2. Preliminary Considerations

It is likely that the judge will (have to) consider a problem posed by a particular case from several angles before concluding that there exists a difference between the texts an application of all means provided by the VCLT cannot resolve. The most efficient sequence may to some extend depend on the type of problem faced; however, considerations of how much weight to attribute to what means under what circumstances are a significant structural element of the VCLT – they affect the outcome of every interpretation and need to be taken into account or misinterpretation may result.

The critic may object that because the intention of the drafters of the VCLT has been to codify only a few general 'principles of logic and good sense' and not the exact conditions of their application, the 'unity of the process of interpretation' as a 'single combined operation' is implied: all means are to be thrown into the 'crucible' and evaluated without any suggestion of a rigid mechanical order.[1] I do not dissent – on the contrary, I

[1] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:218–20, paras. 4–5,

firmly support a holistic approach that comprises considerations of all necessary means, which in my view includes the other language texts as long as they must be considered equally authoritative.

My point, however, is that the VCLT framework establishes different relative weights to be attributed to authentic and supplementary means.[2] This in turn allows for contemplation of the proper sequence to structure the process of interpretation, because the judge cannot read everything at the same time but, as a spatio-temporal being, has to begin somewhere and look at all materials one by one. As the ILC has pointed out, the idea of a 'single combined operation' is not to be understood literally as a consideration of everything all at once, but rather as a consideration of all the different means in a holistic manner attributing appropriate weights to them, which reminds of Schleiermacher's conception of interpretation as a process of gradual approximation:

> Just as courts typically begin their reasoning by looking at the terms of the treaty, and then continue, in an interactive process, to analyse those terms in their context and in the light of the object and purpose of the treaty, the precise relevance of different means of interpretation must first be identified in any case of treaty interpretation before they can be 'thrown into the crucible' in order to arrive at a proper interpretation, by giving them appropriate weight in relation to each other. The obligation to place 'appropriate emphasis on the various means of interpretation' may, in the course of the interpretation of a treaty in specific cases, result in a different emphasis on the various means of interpretation depending on the treaty or on the treaty provisions concerned. This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation.[3]

Now, I do not disagree with the contention that as long as the judge considers all necessary means, keeps the fundamental distinction between authentic and supplementary means in mind, and attributes the appropriate

8–9; Arginelli, *The Interpretation of Multilingual Tax Treaties*, Chs. 3–4, 148–154, 164, 203, 231–241.

[2] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:220, para. 10 et seq.; Sinclair, *The Vienna Convention on the Law of Treaties*, 117; Engelen, *Interpretation of Tax Treaties under International Law*, 408–13, Tabory, *Multilingualism in International Law and Institutions*, 218. This will be discussed in more detail below.

[3] ILC, 'Report of the International Law Commission on the Sixty-fifth Session, 6 May – 7 June and 8 July – 9 August 2013', 18, paras. 14–15.

emphasis accordingly, he may enter into this process from any angle; however, if he were to begin for example by a consideration of supplementary means, which by their very nature allow for a wider array of conclusions and therefore may be 'misleading',[4] he would run the danger of imposing a conviction formed on their basis on his subsequent reading of the text.[5]

In summary, the suggestion that application of the VCLT principles is not mechanical does not mean that it should not be methodical. As Paul Ricoeur has said, 'If it is true that there is always more than one way of construing a text, it is not true that all interpretations are equal.'[6] Before we examine the role of supplementary means in this context, it is useful to demarcate the scope of Article 33(4).

4.3. The Scope of Article 33(4)

Article 33(4) specifies that whenever a difference of meaning between the texts persists after application of Articles 31 and 32, the meaning that must be considered to best reconcile the different meanings on grounds of the object and purpose shall be chosen.[7] This means two criteria must be satisfied: First, the meaning chosen under application of Article 33(4) must be one considered to in some way reconcile the different meanings established beforehand under application of Articles 31 and 32 even though they could not be made to conform under such application. Second, the criterion relied on to gauge the degree of reconciliation is the object and purpose. This raises two questions: What is included in the concept of reconciliation, and how far does the role of the object and purpose extend in this respect?

4.3.1. The Meaning of Reconcile

According to the Oxford Learner's Dictionary, to reconcile something with something means 'to find an acceptable way of dealing with two or more

[4] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:220, para. 10.

[5] This will be argued in more detail below.

[6] Paul Ricoeur, *Interpretation Theory: Discourse and the Surplus of Meaning* (TCU Press, 1976), 79.

[7] The case of prevailing texts will be discussed in the next chapter.

ideas, needs, etc., that seem to be opposed to each other'. Clearly, the emphasis is on 'seem', which implies that the perceived opposition is not contradictory, but common elements can be identified and conciliation is to some degree possible or the opposition can be overcome in some other way acceptable. Indeed, we may postulate that the concept of reconciliation necessitates the possibility of concordance and the absence of logical contradiction, because logical contradictions cannot be reconciled by definition. Propositions *a* and *not-a* cannot both be true in the same sense at the same time. Stating both is not a form of reconciliation but merely means uttering something of no informative value, departing from the realm of rationality, and succumbing to the fallacy of *ex contradictione sequitur quodlibet*[8] – the idea of reconciling a contradiction being a perfect case in point.

When interpreting Article 33 according to VCLT rules, the principle of non-contradiction must be adhered to with the principle of unity in mind as fundamental axiom. It follows that divergent texts can by definition only be reconciled if they are not inherently contradictory and a concordant interpretation is in some way possible with the help of the means codified as acceptable by the VCLT. Thus, the wording 'reconcile' implicitly presupposes an inherent property of reconcilability of the divergent texts. If such inherent reconcilability is not immediately given and reconciliation proves impossible under the application of the standard means provided for, decisive reference to the object and purpose is stipulated as acceptable means of last resort to establish the meaning of the treaty,[9] that is, the meaning so chosen must satisfy the requirement of reconcilability in the sense that if the respective meanings of the texts are mutually exclusive, it must be manifest that only it could have been intended.

In summary, the scope of Article 33(4) is delimited by a combined application of the principle of unity and the principle of non-contradiction. Unless there is evidence to the contrary, all texts of a treaty must be presumed to have the same (one true) meaning as stipulated by Article 33(1) and (3). If evidence to the contrary persists, the unity of the treaty is violated unless such violation can be overcome with the help of the object and purpose.

[8] See Chapter 2, s. 2.2.1.

[9] See UN, *Vienna Convention on the Law of Treaties*, Article 33(4); Avery Jones, 'Treaty Interpretation', s. 3.7.1.7.

Therefore, Article 33(4) in substance only applies to cases that do not pose contradictions, unless the contradiction can be resolved in the sense that a decision can be made for one text to reflect the true common intention of the parties by recourse to the object and purpose as sole decider, which will depend on whether different degrees of serving the object and purpose can be discerned.

This reasoning is also implicit in the approach taken by the PCIJ in the *Mavrommatis* case:

> [W]here two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the court] is bound to adopt the more limited interpretation *which can be made to harmonize* with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.[10]

Commonly, *Mavrommatis* is discussed by scholars concerning the applicability of a general 'principle of restrictive interpretation',[11] that is, whether a narrower common interpretation must always be preferred to a wider one that is not necessarily common to all texts. In this context, it is crucial to note first and foremost – as the VCLT Commentary indeed does – that 'the *Mavrommatis* case gives strong support to the principle of conciliating – i.e. harmonizing – the texts'.[12] According to the Oxford Dictionary, the meaning of harmonise is to 'Make consistent or compatible',[13] which of course is possible only if the property of compatibility is already inherent and can be brought to bear. Contradictions cannot be made consistent or compatible – that is the very definition of a contradiction. The wording 'can be made' used by the court reflects that the emphasis is primarily on a presupposed possibility of harmonisation, not about the court being bound to choose the more limited interpretation as the better way to effect such harmonisation, which still depends on it being doubtless in accordance with the object and purpose.

[10] *The Mavrommatis Palestine Concessions*, 19, as quoted by ILC, *Draft Articles on the Law of Treaties with Commentaries*, 225, para. 8 (emphasis added).

[11] See, e.g., Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 77–78; Wouters and Vidal, 'Non-Tax Treaties', s. 1.3.5.

[12] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 8.

[13] The definition of conciliate is synonymous: 'Reconcile; make compatible.'

The court's decision is based on the supposition that the more restricted interpretation is a subset of both interpretations, providing for the inherent property of compatibility and allowing for an acceptable choice in the particular case.[14] In terms of a general rule, the *Mavrommatis* approach may be applied only to cases in which the differing interpretations are not mutually exclusive, and only to the extent it would really be the case that the more restricted interpretation necessarily always is the more proper one in respect of the object and purpose, as would be implied by elevating the *Mavrommatis* approach to the status of a principle. The ILC consequently denied it the quality of a general rule,[15] but made reconciliation ultimately a derivative of matching the diverging texts to the object and purpose of the treaty as the acceptable decisive means of last resort in case reconciliation of the diverging texts under the general rule of interpretation turns out impossible.[16]

4.3.2. The Object and Purpose as Decisive Criterion

How can a consideration of the object and purpose, which proved unhelpful when considered during the application of Article 31, be helpful a second time around? Engelen seems to imply that Article 33(4) provides for a teleological expansion of the VCLT interpretative framework, in the sense of opening the textual meaning of 'object and purpose' up to a more liberal investigation into the intentions of the parties *ex post*.[17] In contrast, Avery Jones emphasises the mere decisive force character of the object and purpose criterion, which by itself does not necessarily support any notion of a

[14]For in-depth discussions of *Mavrommatis*, see Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 76–80; Paul A. Eden, 'Plurilingual Treaties: Aspects of Interpretation' (Rochester, NY: Social Science Research Network, March 2010), 6–8; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 201–2, 236–37, 293–94.

[15]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225–26, para. 8; Gaja, 'The Perspective of International Law', 93–94.

[16]UN, *Vienna Convention on the Law of Treaties*, Article 33(4); see Avery Jones, 'Treaty Interpretation', s. 3.7.1.7; Engelen, *Interpretation of Tax Treaties under International Law*, 403–4; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 317–21; Gaja, 'The Perspective of International Law', 94–98.

[17]See Engelen, *Interpretation of Tax Treaties under International Law*, 548.

teleological expansion of the VCLT interpretative framework through the wording of Article 33(4).[18] The idea being that if an interpretation according to the criteria enshrined in Article 31 considered as a whole turns out inconclusive, consideration of the object and purpose alone will enable a decision for one text.[19] In consequence, the object and purpose criterion itself does not need to be more liberally construed, but a textual interpretation of its meaning remains prescriptive.

The view of Avery Jones is more in line with the overall context of the ILC's rejection of purely teleological reasoning in favour of objective textual interpretation on the sole basis of the intentions as expressed by the contracting parties,[20] so to be supported at this point. As a corollary, Article 33(4) does not cover divergences that cannot be reconciled at all in case the object and purpose criterion fails as well, but presupposes reconcilability based on a conclusive textual interpretation of the object and purpose. Another important corollary to keep in mind for the discussion in the next chapter is that because of this, Article 33(4) must be interpreted to only regulate what is supposed to happen when there is no prevailing text, because the VCLT interpretative framework enshrines the idea that a textual interpretation of a single text under Articles 31 and 32 will always lead to the establishment of its meaning,[21] which prevails in case of divergence.

Attributing decisive force to the object and purpose as ultimate criterion is coherent with the supposition that the contracting parties intended to agree, which is a fair presumption given the existence of a treaty and implied good faith on behalf of the parties. This presumption together with the principle of unity justifies resorting to the object and purpose as ultimate criterion, because against this background interpretation must depart from

[18] See Avery Jones, 'Treaty Interpretation', s. 3.7.1.7.

[19] The tribunal in the *Young Loan Arbitration* refers to the object and purpose as 'decisive yardstick', *Young Loan Arbitration*, 110, para. 40.

[20] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:220, para. 11, 223, para. 18. For a comparison of approaches, see Sinclair, *The Vienna Convention on the Law of Treaties*, 114–119; J.G. Merrils, 'Two Approaches to Treaty Interpretation', in *Australian Year Book of International Law*, 1969, 55–82. For a critical appreciation, see Peter McRae, 'The Search for Meaning: Continuing Problems with the Interpretation of Treaties', *Victoria U. Wellington L. Rev.* 33 (2002): 209.

[21] See Avery Jones, 'Treaty Interpretation', s. 8.2.2.6.

the point of view that all texts ought to have the same meaning even if they appear not to and reconciliation proves difficult.[22]

In the event of mutually exclusive interpretations, however, the object and purpose criterion can only function to the extent it can help to identify the text reflecting the true common intention of the parties, which then must be assumed to be the text which 'best reconciles' all texts, so that the mutual exclusion can de facto be overcome by reference to the object and purpose.[23] If the object and purpose for some reason fails to help identification of the one text reflecting the true common intention of the parties and the mutual exclusion cannot be overcome as a consequence, the reconciliatory approach of Article 33(4) fails to provide a solution.[24]

Therefore, the argument of Arginelli in its imperative sense, that 'reconcile' has to be interpreted to mean that the court *must* attribute a common meaning to all texts even though a comparative interpretation under Article 31 failed to establish one, because the expression 'the meaning which best reconciles the texts' in Article 33(4) 'must be read in its context, which first and foremost includes the underlying idea of the unity of the treaty and the connected rule of law, reflected in Article 33(3), that all authentic texts *do* have the same meaning',[25] must be rejected. Such can only apply to cases in which the true intention of the parties can be discerned beyond reasonable doubt with the help of the object and purpose criterion. If that proves impossible, we cannot attribute one single meaning to all texts under the VCLT, as it forbids a choice for one meaning based on other criteria than provided.

In other words, although we have to start from the presumption that all texts ought to mean the same and employ all efforts to establish that common meaning in case they appear otherwise,[26] we may indeed arrive at the conclusion that they do not mean the same once the means provided by the VCLT are all exhausted without success. Article 33(3) only presumes that the terms of the treaty have the same meaning in each text, which may

[22]See Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 105; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 310.
[23]UN, *Vienna Convention on the Law of Treaties*, Article 33(4).
[24]See Engelen, *Interpretation of Tax Treaties under International Law*, 548.
[25]Arginelli, *The Interpretation of Multilingual Tax Treaties*, 310 (emphasis added).
[26]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 7.

be rebutted by evidence to the contrary. Therefore, any imperative understanding in the sense of *what must not exist cannot exist* reads into the VCLT and may result in reading into treaties, which runs counter to the VCLT's intended textual approach to interpretation.

Returning to our hypothetical example based on the *Natexis* case, the wording 'liable to tax' includes both cases of liable and subject to tax and liable but not subject to tax, whereas the wording 'subject to tax' excludes all cases of liable but not subject to tax. For the latter subset of cases, liable and subject to tax are by definition mutually exclusive concepts because subject to tax demands that tax is paid, whereas the intention behind liable to tax in such case is that, effectively, no tax is paid. In consequence, the *Mavrommatis* approach would lead to the wrong result every single time, which justifies its rejection as a general rule by the ILC, because it proves that cases may exist for which the assumption that the more limited interpretation is always a compatible subset of the wider interpretation, which would be a necessary condition for applying the *Mavrommatis* approach as a general rule, is invalid. Hence, the lowest common denominator may not be relied on generally to effect reconciliation.[27]

When one text says 'liable to tax' while the other says 'subject to tax', the object and purpose fails to decide the case as a means of last resort,[28] as both liable and subject to tax equally conform to the object and purpose of avoiding double taxation, while effective double non-taxation may not necessarily be in conflict with any object and purpose of avoiding fiscal evasion.[29] The mere conclusion that in view of the unity of the treaty there must be an obvious drafting error is of no help because without further evidence it would be impossible to determine which text embodies the error, and the VCLT forbids the designation of a single text as the applicable one if such choice cannot be made on grounds provided by Articles 31–33. Therefore, the only available conclusion is that the treaty is defective in the sense that the parties either failed to agree or failed to properly convey their

[27] See ibid., II:225–26, para. 8; Sinclair, *The Vienna Convention on the Law of Treaties*, 149–51; Aust, *Modern Treaty Law and Practice*, 205.

[28] Unless the context and supplementary means allow for further inferences as to the true intentions of the contracting parties, for example, through formulations obviously aimed at double exemption or clear evidence of drafting errors.

[29] See Jankowiak, *Doppelte Nichtbesteuerung*, passim.

agreement on the point in question.[30]

Vogel has identified real life examples of defective tax treaties.[31] The case of the Agreement on Reparations from Germany quoted by Mr. Bartos in the ILC's 770th meeting may serve also as an example to the extent that mere surveillance and active management are mutually exclusive concepts and no further evidence concerning the true intentions of the contracting parties can be derived from the texts and supplementary means.[32] Another prominent case concerned the Italy-Ethiopia (1889) treaty of Wichale (Ucciali).[33] Article XVII of the Amharic text stated that the Emperor of Ethiopia 'may' use the government of the King of Italy for all dealings with other powers or governments, whereas the Italian text read 'must' instead. Italy proclaimed a protectorate over Ethiopia based on the Italian text. Ethiopia repudiated the claim. This finally led to war, Italian defeat in the battle of Adwa 1896, and acknowledgement of Ethiopian independence.[34] Clearly, *must* is a universal proposition while *may* is not, that is, mandatory and optional are contradictory concepts – there is no middle ground between them.[35]

[30] See Vogel, *Klaus Vogel on Double Taxation Conventions*, 39, para. 72a. The 6th edition erroneously abandons this view held until the 5th edition by stating that 'a situation not regulated by the treaty is not to be assumed, not even as *ultima ratio*, but a consideration of the object and purpose will almost always lead to a congruent interpretation, if necessary by relying on the lowest common denominator', Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (begründet von Klaus Vogel)*, 197, para. 112a. As discussed above, this view rests on an erroneous interpretation of the wording 'reconcile', mistakenly elevating the *Mavrommatis* approach to the status of a general principle, which it has been denied by the ILC. The lowest common denominator may not always represent the true object and purpose, as in our example of liable versus subject to tax.

[31] See Vogel, *Klaus Vogel on Double Taxation Conventions*, 39, para. 72a; Reimer and Rust, *Klaus Vogel on Double Taxation Conventions*, 40–41, para. 88.

[32] See ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964*, vol. I, Yearbook of the International Law Commission 1964, A/CN.4/SER.A/1964 (United Nations, 1965), 319, para. 65.

[33] See Kuner, 'The Interpretation of Multilingual Treaties', 953, 4n.

[34] See Encyclopedia Britannica, 'Treaty of Wichale'.

[35] Contradictions are subject to the logical principle of *tertium non datur* (law of excluded middle), i.e., all universal propositions must either be true or false, see Russell, *The*

During the drafting period of the VCLT, the problem of cases with non-reconcilable meanings had been raised most comprehensively by the American delegation,[36] which also stressed that difficulties in reconciling the texts may not only arise because of differences in wording but also on a conceptual level, namely, when two legal systems are involved in which the same term means something different, or when a term has a particular legal meaning in one system without direct correspondence in the other. As will be discussed in depth in the final part of this chapter, this is particularly relevant in the case of tax treaties.

It is only consistent that the ILC changed the wording of Article 33(4) from the initially proposed 'a meaning which is common to both or all the texts shall be preferred' and the later 'a meaning which as far as possible reconciles the texts shall be adopted' to the final 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty'.[37] Both rejected draft wordings presuppose that there is always a common meaning that can be chosen to reconcile the texts at least to some degree. They cannot be applied to contradictory texts because they provide no further means to resolve a contradiction, which has been rightly observed by Mr Kearney from the American delegation, who also pointed out that contradictory meanings are a common phenomenon in practice.[38]

To the extent these draft wordings should be understood to state that the meanings of the texts are different (in the sense that the difference cannot

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Problems of Philosophy, Ch. 7. Aristotle is the first to formulate the principle as a fundamental logical axiom a priori, see Aristotle, *On Interpretation* (The Internet Classics Archive, 350 B.C.), s. 1, part 9.

[36] See UN, *United Nations Conference on the Law of Treaties, First Session Vienna, 26 March – 24 May 1968, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, A/CONF.39/11 (United Nations, 1969), 188–89, paras. 39–43; 442, para. 38; UN, *United Nations Conference on the Law of Treaties, First and Second Sessions Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969, Official Records, Documents of the Conference*, A/CONF.39/1 l/Add.2 (United Nations, 1970), 151.

[37] ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964*, I:319, Article 75(2); ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, I, Part II:208, Article 73(4); UN, *Vienna Convention on the Law of Treaties*, Article 33(4).

[38] See UN, *United Nations Conference on the Law of Treaties, First Session Vienna, 26 March – 24 May 1968, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 188, para. 40.

be resolved, as literally stated) and, at the same time, congruent (implying the difference can be resolved), but without providing any further means to effect that congruency (apart from an implicitly assumed common meaning that can, however, as literally stated, not be observed), they are nonsensical in the sense of being contradictory, as has been rightly pointed out by Mr Paredes in the ILC's 770th meeting.[39] Concerning this, the wording 'a meaning which as far as possible reconciles' is no improvement over the initial 'a meaning which is common to both or all the texts', because with contradictory meanings there is no 'as far as possible' but only an either-or. Therefore, it is invalid to maintain with Sur that the wording 'as far as possible' would allow the interpreter to remove divergences among the texts even when actual reconciliation proves impossible.[40]

The final wording adopted by the VCLT resolves this deficiency to the extent that an evaluation in respect of the object and purpose as single decisive criterion can indeed help to overcome the divergence. Contrary to the earlier draft wordings, which effectively implemented the *Mavrommatis* approach of smallest common denominator as a general principle, the meaning chosen under the final wording does not necessarily have to be the one as far as possible common to all texts but may be the meaning not common to all texts if a final evaluation in respect of the object and purpose would indicate so with decisive force. In our hypothetical example based on the *Natexis* case that meaning would be the one of liable but not subject to tax.

In summary, if one text says A while the other says not-A, and their mutual exclusiveness cannot be overcome by a consideration of the object and purpose as sole decider, the treaty must be considered defective in view of the prescribed textual approach to interpretation, as the interpreter must not read an agreement into the treaty that is not covered by its text. Therefore, such cases fall outside the scope of Article 33(4).

[39] See ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964*, I:319, para. 63.

[40] See Serge Sur, *L'interprétation en droit international public*, vol. 75 (Paris: Librairie générale de droit et de jurisprudence, 1974), 274.

4.4. Use of Supplementary Means

Now that the scope of Article 33(4) is defined, we may think about how supplementary means fit into the process. The VCLT wording seems to imply a clear order of steps. Article 33(4) refers to the 'application of articles 31 and 32', and Article 32 refers to the meaning established under 'application of article 31'. Neither Article 31 nor Article 32 mentions Article 33. Therefore, recourse to supplementary means seems to precede application of the latter; however, Article 32 distinguishes between two different uses, thereby delimiting the overall use of supplementary means. Its particular drafting separates the two different uses not via self-contained paragraphs but merely via two parts of the same sentence. This begs the question whether the reference to Article 32 in Article 33(4) extends to the entire article including the second part of its sentence and its letters (a) and (b), or only to the first part.[41] In order to answer this question, a look under the hood of Article 32 is necessary.

4.4.1. Fundamental Principles

Article 32 establishes that the authentic means of interpretation codified in Article 31 are of higher authority in the interpretative process than supplementary means.[42] The latter may be used only to confirm but not contest

[41] Henceforth, when only the first part is implied, it will be cited as Article 32_1 for purposes of disambiguation.

[42] Contra: Arnold, 'The Interpretation of Tax Treaties', 7–8. The distinction Arnold draws between weight and use is not convincing. He fails to make clear how exactly weight should be considered different from use in substance and effect. Delimiting the use of something is equal to delimiting its weight in the overall use of everything to be considered. Stating that one may use certain means only in a limited role is synonymous to stating that they have less weight. And this is precisely what Article 32 instructs: supplementary means may be used only to confirm but not contest the meaning established under Article 31 apart from exceptional cases, see ILC, *Draft Articles on the Law of Treaties with Commentaries*, 222–223, paras. 18–19. Arnold's submissions to the contrary are merely speculative: he submits a purposive interpretation of his own that is in flagrant disregard of the wording, context, and object and purpose of Article 32, simply based on his personal observations concerning practice and an invocation of 'common sense'. As the ILC has stressed, the holistic approach to interpretation prescribed by the VCLT means 'not to suggest that a court or any other interpreter is more or less

the meaning established under Article 31,[43] and recourse to them is by no means mandatory but merely 'permissible',[44] as is reflected by the wording 'Recourse *may* be had'.[45] More liberal use to actively determine the treaty meaning is permissible only if Article 31 leaves the meaning 'ambiguous or obscure', or 'leads to a result which is manifestly absurd or unreasonable'.[46]

The VCLT Commentary stresses that Article 32 does not 'provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article 27.'[47] This implies that even when supplementary means may be used to determine the meaning because the outcome of Article 31 may not be applied for reasons specified in Article 32(a) and (b), the meaning so derived has to remain within the scope demarcated by the principles enshrined in the general rule and cannot be just *any* meaning.

Consequently, judges must apply prudence when having recourse to supplementary means and avoid substituting them for the terms of the treaty.[48] Apart from exceptional cases, supplementary means may be used merely as additional support, and a conclusive interpretation of the text reached on the basis of Article 31 may not be challenged by conflicting alternative inter-

free to choose how to use and apply the different means of interpretation', ILC, 'Report of the International Law Commission on the Sixty-fifth Session, 6 May – 7 June and 8 July – 9 August 2013', 18, paras. 14–15.

[43] UN, *Vienna Convention on the Law of Treaties*, Article 32_1.

[44] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:223, para. 19.

[45] UN, *Vienna Convention on the Law of Treaties*, Article 32 (emphasis added).

[46] Ibid., Article 32(a) and (b). The ICJ had stressed already in 1948 that recourse to the *travaux préparatoires* is not an automatic exercise but requires sufficient reason to be justified: 'The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself', see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion*, ICJ (Annual Reports of the International Court of Justice, 1948), 63; reiterated in *Ambatielos (Greece v United Kingdom), Preliminary Objection*, ICJ (Annual Reports of the International Court of Justice, 1952), 45.

[47] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:223, para. 19. Draft Article 27 became Article 31 in the VCLT.

[48] See *Fothergill v Monarch Airlines Ltd.*, 276–77, 294–96, per Lords Wilberforce and Scarman.

pretations on the basis of supplementary means.[49] This safeguards correct treaty application and legal certainty because taxpayers may rely on the meaning reflected by the wording officially approved to correctly express the intentions of the contracting states, without that meaning being controlled by extrinsic material that may not even be publicly accessible.[50]

4.4.2. Application to Plurilingual Treaties

In line with the dictum that the fundamental principles of interpretation are to be no different for plurilingual treaties than they are for unilingual ones,[51] the above should also be the guiding principles when interpreting plurilingual treaties. This raises two questions: First, when may we seek rescue in supplementary means – before or after a comparison of texts under application of Article 31? Second, when are we to invoke Article 33(4) – before or after having recourse to supplementary means?

It is not difficult to imagine the situations to which the criteria of ambiguity and obscurity refer in respect of a unilingual treaty, namely, situations in which an interpretation under Article 31 has lead to either several dif-

[49] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:222–23, paras. 18–19. The *travaux préparatoires* may be misleading, as they are a collage of all positions taken by the contracting parties during the negotiation phase; what matters is the final compromise that made it into the text, see ibid., II:220, para. 10; Martin Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties', *Boston College International and Comparative Law Review* 14, no. 1 (1991): 112–13; see also the views expressed by the Yugoslavian government during the VCLT discussions, ILC, *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, II:361. The earlier wording 'as far as possible' of Draft Article 73(2), ILC, *Documents of the Sixteenth Session Including the Report of the Commission to the General Assembly*, vol. II, Yearbook of the International Law Commission 1964, A/CN.4/SER.A/1964/Add.1 (United Nations, 1965), 206, is an example that, although it was abandoned in favour of the final wording of Article 33(4) saying something completely different, has nevertheless influenced the views of several authors, see, e.g., Tabory, *Multilingualism in International Law and Institutions*, 202; Sur, *L'interprétation en droit international public*, 75:274.

[50] See *Fothergill v Monarch Airlines Ltd.*, 279–80, 288, per Lords Diplock and Tullybelton; Wouters and Vidal, 'Non-Tax Treaties', s. 1.3.4.

[51] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 7.

ferent but equally plausible meanings or no clearly discernible meaning at all.[52] The same applies to plurilingual treaties; however, there ambiguity or obscurity may not only be an issue of each or both texts but also arise between texts.[53]

Imagine the following scenario: the text in one language read in isolation means A, although B is a possible but less manifest meaning. For the text in the other language, the situation is exactly reverse. Given that legal language lacks the precision of a purely formal language like mathematics or computer code and any language has its own idiomatic idiosyncrasies, such cases may be common. If any text is interpreted in isolation, there is no problem of ambiguity because each text has a manifest meaning. In consequence, Article 32(a) may not be invoked. If we would adhere to the routine interpretation approach, the result would be different interpretations depending on the text used and, in the worst case, a misapplication of the treaty.

How about if the judge examines the *travaux préparatoires* when interpreting a single text and comes to the conclusion that he needs to apply B? Such approach is problematic because not considering the other texts while having recourse to supplementary means in their active role violates the fundamental principle of different weights to be attributed to authentic and supplementary means. The other texts are part of the context definition in Article 31(2) and thus constitute authentic means to be considered in order to derive the ordinary meaning before it can be dismissed in favour of applying Article 32(a). In other words, all means provided by Article 31 have yet to be exhausted, and it would be premature to claim that the ordinary meaning is ambiguous or obscure. Hence, before basing his decision on supplementary means, the judge must first consult the other texts.

[52] See the definitions of ambiguous and obscure in the Oxford Dictionary. For example, because of its wording being 'consistent with either interpretation', the ICJ found Article 95 of the General Act of the International Conference of Algeciras (1906) inconclusive, wherefore it had recourse to the *travaux preparatoires*, see *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, ICJ (Annual Reports of the International Court of Justice, 1952), 209–13; Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties', 122–23.

[53] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 7.

Indeed, the other texts may heal the ambiguity in a way that recourse to Article 32(a) will not become necessary but remain precluded. Imagine that one text employs the grammatically imprecise wording X. X means A, but B could be implied because of the imprecise formulation. Interpretation under Article 31 points to A, but B cannot be ruled out. The other text, however, employs wording Y, which is the grammatically precise formulation of A and rules out B. Optionally, A is confirmed via recourse to the *travaux préparatoires*. Thus, the ambiguity is healed without recourse to supplementary means in their active role; they have not been used to determine the ordinary meaning but merely to confirm the choice made under Article 31.

As regards Article 32(b), the situation is more complex. *Prima facie*, its wording conjures up associations of avoidance scenarios under domestic GAARs: the law is reasonable in general but when stood up on its head and applied to facts that were not foreseen, the outcome may be considered absurd or unreasonable in view of what the law intended. In the VCLT context, however, one may ask how the interpretation of a single text 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' could ever turn out to be 'manifestly absurd or unreasonable'[54] – the criteria in Article 31 surely cover abusive scenarios violating good faith or the object and purpose.[55]

The wording 'manifestly' emphasises that supplementary means may only play a decisive role in limited situations that in all reasonableness cannot be considered to be what the parties intended.[56] According to the Oxford Dictionary, it means 'In a way that is clear or obvious to the eye or mind', that is, the asserted absurdity or unreasonableness must be obvious for anybody and not merely arguable. Such situations must be considered to be limited to drafting errors or other material defects.[57] In the absence

[54]UN, *Vienna Convention on the Law of Treaties*, Articles 31 and 32(b).

[55]See Avery Jones, 'Treaty Interpretation', s. 3.4.3.

[56]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:223, para. 19.

[57]See Engelen, *Interpretation of Tax Treaties under International Law*, 540–44. For example, the 'Descriptive Minute' of the Dutch-Belgian Boundary Convention (1843) contained inconsistent language, according to which several plots of land were simultaneously assigned to the Netherlands and Belgium. Without elaborating on its methodology,

of such obvious material defect, any suggestion of an unreasonable result seems to amount to a teleological supplementation of the VCLT interpretative framework, as it would require a yardstick beyond good faith, ordinary wording, context, and object and purpose on the basis of which the judgement could be made.[58]

The supplementary means cannot provide that yardstick themselves because they may only confirm but not contest an interpretation under Article 31, that is, they may be used only to determine the meaning once an interpretation under Article 31 has led to a manifestly absurd or unreasonable result. Article 32(b) presupposes that the judgement of the text being absurd or unreasonable has been made already. Under Article 32(b) the interpreter may have recourse to supplementary means only to heal such situation but not to establish its presence, that is, he may not use supplementary means to establish whether he may use them to determine the treaty meaning.[59] Therefore, the only possible conclusion would be to assume an extrinsic yardstick that could then only consist in the intentions of the contracting parties according to which the outcome must be considered absurd or unreasonable, but which are not expressed in the text, as otherwise an interpretation under Article 31 could not have turned out manifestly absurd or unreasonable in the first place. Such conclusion runs counter to the clear intentions of the drafters of the VCLT.[60]

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the ICJ had recourse to the *travaux preparatoires*, see *Sovereignty over Certain Frontier Land (Belgium v Netherlands)*, ICJ (Annual Reports of the International Court of Justice, 1959); Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties', 123–24.

[58] The wording 'absurd' is less problematic in this respect because its scope is more narrow, providing less argumentative leeway. The Oxford Dictionary defines it as 'Wildly unreasonable, illogical, or inappropriate.'

[59] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:223, para. 19.

[60] See ibid., II:220–21, para. 11, 222–223, paras. 18–19. *Prima facie*, the wording of the *Polish Postal Service* case cited by the VCLT Commentary seems to suggest that a 'liberal' interpretation may be possible under Article 32(b). Considering the overall VCLT context, however, the wording 'liberal construction' in the judgement and the ILC's reference to it may not be construed to support teleological interpretation, but must be considered only to imply a more liberal use of supplementary means under exceptional circumstances, see *Polish Postal Service in Danzig*, PCIJ (Publications of the Permanent Court of International Justice, 1925), 39–40. Such reading fits with the subordinate role of

Unless there is an obvious drafting error rendering the text inconsistent, it seems unintelligible how the interpretation of a unilingual treaty under Article 31 could ever lead to an absurd or unreasonable result if the possibility of teleological reasoning is excluded.[61] In any case, recourse to Article 32(b) is subject to the same argument as recourse to Article 32(a) outlined above: if the interpretation of a single text under Article 31 leads to a manifestly absurd or unreasonable result, such judgement cannot be regarded final before the other texts have been consulted. Therefore, the interpreter has to consult all other texts before relying on supplementary means.[62]

Let us return to our example from above. Both texts are compared, but no decision for either A or B can be made. The next step depends on how we classify this situation. If we would classify it as an ambiguity falling under Article 32(a), recourse to supplementary means would be warranted. Against this may be argued that, based on the principle of effectiveness, Article 33(4) should take precedence because the diagnosed problem is one between texts – precisely what Article 33 has been devised for. Applying Article 32(a) renders Article 33(4) an empty provision because the

supplementary means and reinforces it by stressing that liberal use is strictly confined to a limited set of scenarios.

[61] I may simply lack the imagination (or the experience of a judge); however, I challenge the reader to present a case that disproves my conclusion in this respect. The two cases referenced by the ILC as examples do not qualify in my opinion, see ILC, *Documents of the Sixteenth Session Including the Report of the Commission to the General Assembly*, 57, para. 16. As this is not a core issue here, I added my take on these cases in Appendix B to substantiate my assertion for the interested reader. Reference to absurdity in line with Article 32(b) is common in India, see Vik Kanwar, 'Treaty Interpretation in Indian Courts: Adherence, Coherence, and Convergence', in *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, ed. Helmut Philipp Aust and Georg Nolte (Oxford; New York: Oxford University Press, 2016), 239–64, 247; however, apart from drafting problems mostly in terms of treaty provisions in violation of constitutional law, see, e.g., *Ram Jethmalani v Union of India*, Supreme Court of India, 2011, para. 61: 'However, the fact that such treaties are drafted by diplomats, and not lawyers, leading to sloppiness in drafting also implies that care has to be taken to not render any word, phrase, or sentence redundant, especially where rendering of such word, phrase or sentence redundant would lead to a manifestly absurd situation, particularly from a constitutional …perspective. The government cannot bind India in a manner that derogates from Constitutional provisions, values and imperatives.'

[62] See Engelen, *Interpretation of Tax Treaties under International Law*, 390.

argumentative ground covered by supplementary means is much broader, which makes it unlikely that Article 33(4) could ever be of help after a consideration of them fails to resolve the problem.

Indeed, what is likely to happen in this scenario is that the judge will look for a purposive interpretation on the basis of supplementary means to decide whether A or B has been intended, which is precisely what Article 33(4) prescribes – only by other means. But, recourse to supplementary means in their limited active role is intended only as an aid when consideration of the text alone leaves the judge at a loss. Hence, Article 32(a) should be resorted to only after all authentic means (including the object and purpose as sole decider) have been exhausted, as otherwise the fundamental weight distribution between authentic and supplementary means intended by the VCLT is upset. This conclusion is supported by recourse to supplementary means being merely 'permissible',[63] whereas Article 33(4) forms part of the prescriptive VCLT rules.

Let us consider a variation of the above scenario to make it even more obvious: now one text states A and the other B, both excluding each other. The answer to the question of how to treat this case depends again on how we classify it. Again we may view it as an ambiguity resulting from different manifest meanings of the two texts, which would warrant application of Article 32(a) – the difference to the original scenario is merely a matter of degree. Again this effectively crowds out application of Article 33(4) because it is hardly conceivable that a judge could not to come up with a purposive argument based on supplementary means and, in the unlikely event this would happen, that Article 33(4) could be of any assistance thereafter. Now, it is rather obvious that this is precisely a scenario covered by Article 33(4), and any suggestion to have recourse to supplementary means instead clearly violates the principle concerning their lesser weight as well as the principle of effectiveness.

Such approach would not only render Article 33(4) an empty provision but also Article 32(b). Article 32(a) already does the job, and Article 32(b) does not apply consecutively because Article 32 refers to an 'interpretation according to article 31' only. Conversely, failure of Article 33(4) to resolve the problem may be considered an absurd or unreasonable result in the face

[63] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:223, para. 19.

of a treaty, which suggests that parties actually intended to agree. Hence, it seems sensible to resort to Article 32(b) after and not before Article 33(4) has failed, because the quest of Article 33(4) is to establish the ordinary meaning on the basis of the textual object and purpose as sole decider, whereas the idea behind Article 32(b) is to allow precedence of an alternative meaning based on supplementary means under exceptional circumstances.[64]

The whole classification problem is merely the result of the particular drafting of the VCLT, which factors the issue of plurilingual form out of the conception of the general rule and confines it to a separate Article. In this context, it is important to note that Articles 31 and 32 employ the term 'meaning' in a different sense from Article 33. Article 31 reads 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Thus, it refers to the meaning of the treaty. In fact, Article 31 only talks about the treaty, not the text. The term 'text' only appears once as part of the definition of context in Article 31(2).

Article 32 then refers to the meaning of the treaty via its reference to Article 31, that is, 'the meaning resulting from the application of article 31'. Article 33 also implies the meaning of the treaty overall when referring to 'meaning', but it uses the term in a dual sense: as meaning of the treaty and as meaning of each text, which ultimately must be brought in concordance with the meaning of the treaty, that is, the meaning common to all texts.[65] This difference in use results from the different subject matters of the articles and their particular drafting. Articles 31 and 32 are drafted in terms of general principles of interpretation in the abstract, for which the notions 'meaning of the treaty' and 'meaning of the text' implicitly converge as if a unilingual treaty were implied. The topic of plurilingual form, for which the two notions may diverge, is shifted in its entirety to Article 33.

Now, the abstract principles enshrined in Articles 31 and 32 apply irrespective of the number of texts: in the case of a unilingual treaty the term 'meaning' as meaning of the treaty refers to the meaning of the single text, whereas in the plurilingual scenario it refers to the meaning common to

[64] See ibid., II:223, para. 19.

[65] As outlined above, the meaning common to all texts is the one true meaning of the treaty, not necessarily a meaning all texts share as lowest common denominator.

all texts. In consequence, when the same definitions of ambiguous, obscure, absurd, and unreasonable applied to treaties in the abstract[66] are applied to plurilingual treaties, we cannot claim to have arrived at a situation in which the meaning of the treaty may be judged as fundamentally ambiguous if we yet have to take the other texts into account, as we still need to consider the full context and, if necessary, the object and purpose as sole decider in order to establish the ordinary meaning of the treaty with final certainty before we can consider the result fundamentally ambiguous.[67] Otherwise, the notions of fundamental ambiguity and divergence blend into each other.

The drafting of the VCLT, however, suggests that they are demarcated from each other because it dedicates a separate article to plurilingual form: 'ambiguous', 'obscure', 'absurd', and 'unreasonable' are intended to refer to problems of the treaty meaning in general, whereas 'divergence' is intended to refer to problems between texts that need to be resolved first in order to establish the treaty meaning or, in case that remains impossible, a persistent difference in meaning between the texts to which then the individual concepts of fundamental ambiguity may be applied. If the drafters of the VCLT had intended to resolve problems between texts by recourse to supplementary means, having Article 33(4) would be unnecessary except for residual cases in which Article 33(4) is needed analogous to Article 31 as a legal basis the content of which (in the sense of what better fulfils the object and purpose) has to be determined by recourse to supplementary means. Reducing the function of Article 33(4) to this narrow role, however, runs counter to the idea of relying first and foremost on the text when interpreting a treaty.

Article 32 does not reference Article 33 explicitly because it takes over the abstract perspective of Article 31 and regulates merely permissible use of supplementary means as an additional aid to interpretation in general.[68] To

[66] Henceforth referred to as fundamental ambiguity.

[67] In essence, we have only established single text not fundamental ambiguity. Concerning the abstract perspective of Articles 31 and 32, single text and fundamental ambiguity implicitly converge; however, one must not lose sight of Article 32(a) and (b) being drafted with the latter in mind, which only equals single text ambiguity in case of a unilingual treaty. The classification confusion arises if the idea of fundamental ambiguity conceived in the abstract is simply transposed to the plurilingual scenario without explicit distinction between single text and fundamental ambiguity.

[68] See ibid., II:222–23, paras. 18–19.

suggest otherwise would imply that a consideration of the authentic means of interpretation should be conducted only up to the point when the operation of Article 33(4) would become necessary. At that point the interpreter would be suggested to switch to the application of supplementary means in their active role under Article 32(a) and (b) and return to authentic means under Article 33(4) only if that fails to resolve the problem. The implied back and forth between authentic and supplementary means seems inconsistent with the overall hierarchical weight attribution implemented by the VCLT and, as argued, the principle of effectiveness.

In view of these considerations, the following is submitted: A literal reading of Article 32 and Article 33(4) does not fit with a textual interpretation in the light of their context and object and purpose, since it would suggest reliance on supplementary means of interpretation for the active determination of the treaty meaning before all authentic means are exhausted. An alternative determination of the treaty meaning under Article 32 is according to its own wording only allowed once an interpretation with the help of authentic means has turned out ambiguous or obscure, or has lead to a result which is manifestly absurd or unreasonable. With plurilingual treaties such cannot be declared before recourse to the other texts has been had.

As it is the task of Article 33(4) to establish the ordinary meaning by recourse to the object and purpose as sole decider, it may be regarded as an extension of Article 31 for plurilingual cases, with its explicit reference to Article 32 being only a partial reference to the first part,[69] in the sense that the application of Article 31 has established a common meaning of the *prima facie* diverging texts that has then been confirmed by supplementary means under Article 32_1, that is, the interpretative rule in Article 33(4) does not need to be invoked. This mere partial reference implements a relationship with Article 32 analogous to Article 31, in the sense that supplementary means are supplementary both to the general rule and the interpretative

[69] It is noteworthy in this respect that Article 33(4) only cites Article 32 without adding letters (a) and (b). This general reference causes the ambiguity discussed here, because of the particular drafting of Article 32; however, if we assume the omission to be intentional – which is not entirely unreasonable because, at least in principle, the principle of effectiveness implies that drafting is intentionally precise rather than unintentionally vague – the conclusion presented here is even covered by the literal wording of Article 33(4).

rule in Article 33(4), which is consistent with the general intention to permit recourse to supplementary means merely as an aid, whereas Article 33(4) forms part of the prescriptive VCLT rules.

After Article 31 fails to reconcile the texts in a way that can be confirmed by a consideration of supplementary means, recourse should be had first to Article 33(4). If the object and purpose as sole decider fails to resolve the problem, we may resort to supplementary means as an aid to establish a common meaning to the incongruent meanings of the texts, as such situation may be classified as a situation of fundamental ambiguity in view of the existence of a treaty that suggests the parties intended to agree on the issue in question. Conversely, Article 32 should not be applied directly to divergences between texts, because they are first and foremost the domain of Article 33(4). The outcome concerning the overall meaning of the treaty may be classified as fundamentally ambiguous only after Article 33(4) has failed, in which case supplementary means may be resorted to in their active role.

This sequence makes sense from a practical perspective, as the reason for relying on supplementary means is a problem in form of an unresolved divergence between the texts the interpreter is confronted with, which implies that a comparison of them has already taken place. In the course of such comparison, all authentic means including the object and purpose as sole decider should be exhausted before recourse to supplementary means is had, or else the comparison is incomplete. This does not imply a different system of interpretation violating the dictum quoted above, but only adapts the system devised in the abstract to work as intended for the concrete case of multiple texts by establishing the ordinary meaning of the treaty as the meaning common to all texts.

At this point the question may be asked whether depending on the particular facts and circumstances of a case there may be good arguments to support another approach, for example, if the root of the problem is an obvious mistake resulting in two texts being different in a way nobody could have intended as opposed to two texts trying to say the same but failing. Consider the treaty UK-Denmark (1980). Its final clause declares the texts in English and Danish as 'equally authoritative', and its Article 28(3) reads 'Payments made by an individual who is resident in a Contracting State

…to a pension scheme established in and recognised for tax purposes in the other Contracting State may be relieved from tax'. The words 'and recognised for tax purposes in' were, by mistake, omitted from the statutory instrument giving effect to the treaty in the UK,[70] whereas the published Danish text implemented the correct wording.[71] For each single text considered in isolation, there is no problem of ambiguity or unreasonableness; the issue is one of differing personal scopes between the texts of the treaty and the UK statutory instrument implementing the English text.

In a hypothetical scenario in which a UK judge would only draw on the statutory instrument and apply the routine interpretation approach because no party raised the issue, the potential outcome would be a misapplication of the treaty. If the issue is raised, it should automatically resolve via reference to the signed copy. A judge should have no problem referring to the originally signed instrument even though it is not the one implemented in domestic law. Indeed, he is required by international law to apply the provisions of the concluded treaty and cannot invoke the statutory instrument as relieving him of this duty without breaching Articles 26 and 27 VCLT. If he fails to look up the signed copy, the *travaux préparatoires* should immediately resolve the issue because they will document the existence of the missing phrase. Hence, no need to invoke Article 33(4).

Let us suppose the different wording would not only be an error of the UK statutory instrument but also be the wording of the English text. If we assume that the Danish wording is the one intended, a look into the *travaux préparatoires* will, in all likelihood, reveal so. Elaborate object and purpose considerations on the basis of the texts, however, will not prove helpful when dealing with a list of conditions for obtaining relief, as obtaining relief for contributions to a foreign pension scheme is not a question of double taxation. In a tax credit system, double taxation is the normal starting point. The treaty provides relief by reference to domestic law, and double exemption is not normally possible. Under the approach submitted here, the resulting failure of the object and purpose criterion to reconcile the texts could be considered an unreasonable result. This would warrant recourse to supple-

[70] S.I. 1980 No. 1960; however, the text published by the Foreign and Commonwealth Office contains the correct wording.

[71] BEK 6 of 12/2 1981.

mentary means under Article 32(b), which, in all likelihood, would produce the proper outcome; however, in view of the particular facts and circumstances, such detour seems like a moot exercise.

Let us consider another example in which the mistake is less obvious. The English text of Article 13(7) in the UK-Netherlands (1980) treaty with equally authoritative English and Dutch texts reads 'to levy according to its law a tax chargeable in respect of gains from the alienation of any property on a person'. In the Dutch text the crucial bit translates to 'levy tax on gains from the alienation of property of a person'.[72] Although a provision the literal wording of which is geared towards the treatment of the tax object placed in a treaty fundamentally drafted to apply to tax subjects is odd and necessarily a source of difficulty, such provisions are not unknown in tax treaties.[73] Therefore, a consideration of the texts alone on the basis of Article 33(4) may turn out to be a moot exercise while the *travaux préparatoires* may quickly reveal that one text happens to be a bad translation; however, the routine interpretation approach to interpret a single text in isolation under Articles 31 and 32 may lead to wrong results, while considering Article 32(a) and (b) after a comparison of texts under Article 31 but before Article 33(4) bears the risk that, erroneously, an interpretation entirely autonomous from the principles contained in Article 31 and Article 33(4) is adopted because supplementary means may allow for a wider array of conclusions.

The ICSID decision on the BIT Turkey-Turkmenistan (1992) in *Kiliç* may serve as an illustration of the latter.[74] Although not necessarily the outcome as such, the reasoning of the court may be rejected. The English text of the BIT implies that submission of disputes by investors to local courts

[72] See Stéphane Austry et al., 'The Proposed OECD Multilateral Instrument Amending Tax Treaties', *Bulletin for International Taxation* 70, no. 12 (October 2016), s. 3, 18n.

[73] For example, Germany-US (1989), Article 1(7), based on United States, *Income and Capital Model Convention*, 2016, Article 1(6); see Richard Xenophon Resch, 'Tax Treatment of US S-Corporations under the Germany-US Tax Treaty', *European Taxation* 49, no. 3 (2009): 122–28; Richard Xenophon Resch, 'Case Closed: Tax Treatment of United States S-Corporations under the Germany-US Tax Treaty – Treaty Benefits for Hybrid Entities', *European Taxation* 54, no. 5 (2014): 192–97.

[74] *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID, Case No. ARB/10/1 (Washington, D.C.: International Centre for Settlement of Investment Disputes, 2012).

before arbitration are optional, whereas the Russian text implies them to be mandatory, with submission to arbitration being possible only after a final award at the local courts has not been granted within one year. The final clause of the BIT declares both texts as equally authentic. From testimony of linguistic experts the court concluded that 'attempting to interpret the relevant English text in accordance with Article 31 of the VCLT leaves its meaning ambiguous or obscure. In these circumstances, it is appropriate for the Tribunal to consider supplementary means of interpretation as permitted under Article 32 of the VCLT.'[75]

The court then considered the circumstances of the conclusion of the BIT as supplementary means and found that Turkey had entered into several BITs with the Turkic states within the narrow time frame of five days, all of which included substantially identical arbitration provisions requiring mandatory recourse to domestic courts before submission for arbitration. From this the court concluded that the English text of the BIT should be interpreted as requiring mandatory recourse to local courts as well, as such reading 'best reconciles the interpretation of the texts, having regard to the circumstances surrounding their adoption.'[76] With respect to Article 33(4) the court added the following:

> To the extent that it might not be possible to resolve the possible difference in meaning of the English and Russian text through the application of Articles 31 and 32, the Tribunal can, in accordance with the principles reflected in Article 33(4) of the VCLT, adopt the meaning which would best reconcile the two texts.
>
> To the extent that this had been necessary – and the Tribunal concludes that it is not – the Tribunal would have had no hesitation in concluding that the ambiguity of the English text could only be reconciled with the clearly mandatory Russian text by the determination that the English text also required a mandatory recourse to the local courts. This follows, because what is plainly mandatory cannot be optional, but what may either be mandatory or optional, can be seen as mandatory.[77]

[75] Ibid., para. 9.17.

[76] Ibid., para. 9.21.

[77] Ibid., paras. 9.22–9.23. Noteworthy, the court seems to interpret the reference to Article 32 in Article 33 as referring to the article in its entirety and, therefore, to consider its letters (a) and (b) as preceding application of Article 33(4). Symptomatically, the latter is

Questions of interpretation are for the court, so the court is right not to straight away follow the suggestions of the linguistic experts to reinterpret the English text according to grammar and phrasing considerations alone, but to declare the necessity of further considerations because the text considered turned out ambiguous.[78] As next step, however, the court went straight away to supplementary means on the basis of Article 32(a), whereas it should have done so only after an interpretation under Article 33(4) would have failed. To suggest that the meaning of the treaty is ambiguous before it has been interpreted in the light of all texts is premature – that the meaning of one text considered in isolation appears ambiguous is not sufficient to establish the truth of such contention. Instead of considering only the wording of a single text ambiguous, the court mistakenly treated the treaty as being fundamentally ambiguous.

It seems likely that considerations based on the object and purpose would not lead to a definite result, because both mandatory and optional submission to local courts before arbitration serve the same general purpose, only in different ways. Hence, it might not be possible for the court to establish the one true meaning given it faces two conflicting texts simply stating the opposite of each other. Therefore, Article 32(a) and (b) would be next in line, and the order of recourse to authentic versus supplementary means based on the hierarchy between them might not have mattered all that much concerning the outcome.

Notwithstanding, we may see from this case how giving preference to supplementary means over Article 33(4) could go wrong in practice. The primary argument of the court based on the circumstances of the BIT conclusion is relatively thin. In particular, it does not pay enough attention to the bilateral treaty relationship between the contracting parties. That the other BITs Turkey concluded at the same time with the other Turkic states

found no longer necessary, i.e., Article 33(4) is effectively rendered an empty provision. As a result, the VCLT interpretative framework is stood up on its head: instead of using supplementary means to confirm an interpretation based on authentic means, the court does the opposite, i.e., it confirms an interpretation it derives from what it considers to be supplementary means by an interpretation then to follow supposedly from applying Article 33(4), both of which are, however, questionable in itself besides the inversion (see below).

[78] See ibid., paras. 9.14–9.16.

contained equally drafted provisions all implementing mandatory submission to domestic courts before submission for arbitration sure tells us something about Turkey's treaty policy, but nothing much about Turkmenistan. For the argument to be more credible, the court should at least have ventured to gain some insight into Turkmenistan's treaty policy concerning arbitration.[79]

The argument of the court is simply one from analogy and involves no further considerations concerning context and object and purpose, not even from an examination of the *travaux préparatoires*.[80] Notwithstanding, especially the evaluation of the English text by the linguistic experts in combination with some further indications from Turkish official translations not discussed here in detail render the conclusions of the court more plausible than not;[81] however, all these considerations are not of conclusive force and would not qualify if in conflict with an evaluation on the basis of the object and purpose under Article 33(4). Instead of setting itself up to arrive at a meaning 'governed by the principles contained in article 27',[82] which provide the general parenthesis even for a determination of the meaning on the basis of supplementary means, the court's approach led it to arrive at *any* meaning somehow plausible in view of the general circumstances.

The last comment of the court concerning Article 33(4) indicates that it simply chose the meaning it considered more likely rather than doing what Article 33(4) really requires, namely, an in-depth examination of the treaty texts against the background of the expressed object and purpose. Instead of focussing on *how* to reconcile the texts, namely, in the way the VCLT

[79] At the time, however, Turkmenistan only had one other BIT with Spain (1990) signed and in force, which would have made deduction of a consistent treaty policy difficult.

[80] It is questionable whether the other BIT's concluded really fall under the scope of Article 32 as 'circumstances of *its* [the treaty's] conclusion' (emphasis added), as is seemingly assumed by the court.

[81] Additional political considerations the court did not explicitly elaborate on to bolster its argument, such as the situation of Turkmenistan being a newly independent state and Turkey being one of the first countries recognising the independence of all Turkic states, which in turn makes it likely that Turkmenistan would have made some concessions to Turkey's treaty policy even if it had a different one itself, may be considered to point in the same direction.

[82] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:223, para. 19. Draft Article 27 became Article 31 in the VCLT.

prescribes, it treated reconciliation as an end in itself to be effected by any means. Ironically, its reasoning that 'what is plainly mandatory cannot be optional, but what may either be mandatory or optional, can be seen as mandatory'[83] is simply a conceptual mistake. Contrary to its view, the choice for either mandatory or optional in such situation is no reconciliation at all because nothing 'may either be mandatory or optional' at the same time.

In summary, the approach suggested here by me is submitted as a matter of good practice in order to eliminate the pitfalls entailed in any other approach. Consideration of the object and purpose criterion under Article 33(4) before recourse to supplementary means may never lead to an improper result, as the argumentative scope is much narrower than that provided by supplementary means. Either it will lead to a solution based on the object and purpose, which may only be confirmed but not contested by supplementary means, or it will not lead to any solution at all, in which case recourse to supplementary means follows as next step. Recourse to Article 33(4) will in the worst case prove unhelpful, whereas direct recourse to supplementary means both before considering the other texts and applying Article 33(4) may in the worst case lead to improper results. Of course, in a mistake situation the task is to find the cause for it, for which the preparatory materials may prove to be more helpful than Article 33(4); however, unless the result is such that it is obvious nobody could have intended it, the approach suggested here is recommended as a fail-safe method.

The considered examples point again to a critical problem of plurilingual tax treaties. Differences between texts with respect to wordings that define personal scope or types of income may not always affect the avoidance of double taxation, but the issue at stake may be rather the sharing of the tax base between the contracting states. Therefore, considerations of the object and purpose as sole decider on the basis of the text alone may not prove helpful. This is a problem because there is abundant opportunity for such differences to occur, and the reason may not necessarily be careless translation but rooted in the idiomatic properties of language.

Consider the *New Skies* decision of the Delhi High Court concerning roy-

[83] *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, para. 9.23.

alties under the Netherlands-India (1988) tax treaty.[84] Article 12(4) of the treaty defines royalties as 'payments of any kind received as a consideration for the use of, or the right to use, any copyright of any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.' The final clause declares the Dutch, Hindi, and English texts as authentic and designates the English text as prevailing in case of a divergence between the Dutch and Hindi texts. Let us disregard the prevalence of the English text for the moment and assume equal authority of all texts. The court only relied on the English text and was led down a track of extensive deliberations by domestic law considerations concerning the meaning of 'secret formula or process'. Sanghavi provides a summary:

> In *Director of Income Tax v. New Skies Satellite BV (New Skies)*, the Delhi High Court belaboured the short issue of whether the adjective "secret" qualifies only the noun 'formula' or the two nouns 'formula' and 'process' in the definition. At the root of the confusion was the very similar term 'royalty', which is very similarly defined in the Indian Income Tax Act, 1961 (ITA 1961) as 'any consideration …for …the use of any …, secret formula or process or trade mark or similar property'. Early decisions in this regard had suggested that a payment for the use of a process – not necessarily a secret process – would be considered to be a royalty for the purposes of the ITA 1961. This interpretation was subsequently confirmed by a retrospective legislative clarification, the validity of which was upheld by the Madras High Court in Verizon Communications Singapore Pte. Ltd. v. ITO. A large part of the Court's 50–page decision was dedicated to the question whether the comma, appearing after the word 'process', changed the interpretation of the term 'royalties' for the purposes of the tax treaty.[85]

In contrast to the previous scenarios, a comparison of texts would have provided for a quicker route to resolve the issue because the Dutch text uses the expression *een geheim recept of een geheime werkwijze*, that is, the adjective 'secret' is used twice to explicitly qualify both nouns 'formula' and 'process'. This is necessary in Dutch for proper idiomatic phrasing because

[84] *Director of Income Tax v New Skies Satellite BV*, ITA 473/2012, 2016.

[85] Dhruv Sanghavi, 'Found in Translation: The Correct Interpretation of "Secret Formula or Process" in India's Tax Treaties', *British Tax Review*, no. 4 (2016): 411–12.

nouns have a gender and here two nouns of different genders are combined: the neuter *recept* and the gender *werkwijze.*[86]

Even without consulting the Dutch text it seems obvious that with respect to the enumeration of 'any …, secret formula or process, or' the adjective 'secret' relates to both nouns, as this is standard idiomatic phrasing in English. The alternative meaning the court was led to contemplate by its reference to domestic law requires a different wording to really be manifest, for example, 'any …, secret formula, or process'. That the Dutch text uses the adjective twice is merely incidental for purely syntactic reasons. If both nouns had the same gender, the enumeration would follow the same logic of using the adjective only once to apply it to both subjects, which is the ordinary idiomatic phrasing for such enumerations.

Using the adjective twice in English would be foolproof formulation recommendable for legal drafting, but not doing so hardly renders the text ambiguous. The proper ordinary meaning that this is an enumeration and the adjective applies to both subjects is manifest from its ordinary grammatical phrasing, whereas the alternative meaning considered by the court requires additional reasoning to become manifest. In view of the Dutch text it becomes abundantly clear that the adjective 'secret' is intended to qualify both 'formula' and 'process', and there can be no notion that the English text remains ambiguous or that there would be a difference between the texts. Thus, recourse neither to Article 33(4) nor supplementary means is needed. The case, however, raises the question of how the feature of tax treaties to refer to domestic law affects interpretation in plurilingual scenarios.

4.5. Special Considerations concerning Tax Treaties

Tax treaties commonly feature *renvoi* clauses modelled on Article 3(2) of the OECD and UN Model Conventions.[87] This introduces an additional layer of complexity to the issue at hand, because such clauses implement a situation in which the meanings of terms in the treaty intentionally have an asymmetric scope depending on the domestic laws of the treaty partners,

[86] See ibid., 413–14.

[87] Henceforth, 'Article 3(2)' will be used to refer to both *renvoi* clauses in Model Conventions and corresponding provisions in actual treaties.

attributable to the need to connect two different tax systems and ensure that domestic taxation and treaty relief are equally matched to effectively implement the treaty's object and purpose of avoiding double taxation.[88]

The interaction between Article 3(2) and final clauses granting equal authenticity to several texts requires the texts to make Article 3(2) compatible with Article 33 and integrate potentially asymmetrical meanings of treaty terms introduced by the reference to domestic law.[89] Under Article 3(2),

[88] See Avery Jones, 'Treaty Interpretation', s. 7.1; Edwardes-Ker, *Tax Treaty Interpretation*, 173, s. 12.01. This asymmetry is mostly confined to terms concerning types of income that need to connect the different domestic tax systems at the treaty level, whereas in respect of other terms contextual meanings will usually apply because of the need for a symmetrical common meaning, see Avery Jones, 'Treaty Interpretation', s. 8.2.4.2.1. Much has been written about Article 3(2). Its interpretation is a fiercely discussed topic, as it is a rule of interpretation directly contained in all important Model Conventions and most effective tax treaties, wherefore it must be considered in addition to the VCLT. Its application is of high impact both on the contracting states with respect to the balance of effective taxing rights implemented by the treaty through reciprocal double tax relief via exemption and credit, and the taxpayer in respect of how much tax he has to pay where and overall. The debate about Article 3(2) has been intense and fruitful in the sense that a consensus to follow the qualification of the source state in case of qualification conflicts has been adopted by the OECD, see OECD, *Model Tax Convention*, 2017, Commentary on Articles 23A and 23B, paras. 32.1–32.7; for a summary of the underlying argument see Avery Jones, 'Treaty Interpretation', s. 7.6.1. The debate is continuing in view of the practical relevance, see, e.g., Seminar D: Article 3(2) and the Scope of Domestic Law, 66th IFA Congress in Boston, 2012. Much will continue to be written also in view of the not diminishing number of cases in which its application plays a role, see Mónica Sada Garibay, 'An Analysis of the Case Law on Article 3(2) of the OECD Model (2010)', *Bulletin for International Taxation* 65, no. 8 (2011). An extensive consideration of all arguments concerning Article 3(2) is way beyond the scope of this study, which will focus as much as possible on the limited issue of its interaction with Article 33 and assume familiarity of the reader with the overall debate including the most relevant literature and case law.

[89] See Wassermeyer, *Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, MA, Vor Art. 1, 37, para. 47. Article 3(2) must not be understood to simply override the principles of interpretation codified in the VCLT, by way of the principle *specialia generalibus derogant* (the specific derogates from the general), see Edwin van der Bruggen, 'Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties', *European Taxation* 43, no. 5 (2003): 142–56, 154–155; John F. Avery Jones et al., 'The Interpretation of Tax Treaties

the contracting states may interpret the treaty differently according to the meaning of terms in their domestic laws 'unless the context otherwise requires'; however, each contracting state must in principle be able to depart from any text because of the principle of unity and the equal authority of the texts. If country A interprets term X as F while country B interprets it as G, and this is so intended by the treaty, that is, the context does not require otherwise, X must allow for both F and G to be included in the expressed agreement, as each country must be able to interpret either text to reach the intended meaning. The principle of unity is preserved in this situation by the stipulation to follow the qualification of the source state in a qualification conflict.[90] Country A may not interpret term X as F based on one text and as G based on another, but country A must be able to interpret X as F while country B must be able to interpret X as G, based on either text. Thus, term X in either text must allow to be construed both as F and G.

This is embodied also in the concept of context as implied by Article 3(2), which differs from that employed by Article 31.[91] The meaning of the latter is relatively narrow and intended to differentiate authentic from supplementary means, attributing different weights to them for their use in the interpretative process. In contrast, the meaning of the former is intended to establish whether an existing domestic law meaning of a term should not be applied. Therefore, it is much broader and does not attribute different weights to different interpretative means, which remains an exercise left to the interpreter. Basically, it includes any material relevant and, certainly, all material listed in the VCLT, including all texts.[92] Consequently, Article 3(2) does not contrast domestic law and context as opposites,[93] but its concept

with Particular Reference to Art. 3(2) of the OECD Model – II', *British Tax Review*, no. 2 (1984): 104.

[90] See OECD, *Model Tax Convention*, 2017, Commentary on Articles 23A and 23B, paras. 32.1–32.7.

[91] See Avery Jones et al., 'The Interpretation of Tax Treaties with Particular Reference to Art. 3(2) of the OECD Model – II', 104.

[92] See van der Bruggen, 'Unless the Vienna Convention Otherwise Requires', 155; Avery Jones, 'Treaty Interpretation', ss. 6.2 and 8.1.

[93] Domestic law meanings represent definitions of terms incorporated by reference of Article 3(2) into the treaty. As part of the text, they are within the context definition of Article 31(2). Since the concept of context under Article 3(2) is broader and includes all interpretative means included in the VCLT definition of context, it also necessarily

of context includes the domestic law meanings of both contracting states,[94] while domestic law itself may be the only context necessary to decide that it should not be applied.[95]

In essence, many terms of a tax treaty are intended as conceptual abstractions that are comprehensive enough to allow for asymmetric interpretation according to the domestic laws of both contracting states.[96] Yet, we may not conceive of Article 3(2) as splitting the treaty in two, with separate texts in the official languages of the contracting states for terms that are to have the meaning they have under their respective domestic laws, as this would be in direct contradiction to the principle of unity and the final clause declaring all texts as equally authentic. Rather, Article 3(2) is intended to complete the treaty where it remains indistinct conceptually.

Since many terms in a treaty are intended as conceptual abstractions to be determined either symmetrically via an autonomous interpretation or asymmetrically via domestic law in order to connect two different tax systems and ensure that domestic taxation and treaty relief are equally matched, both to implement the treaty's object and purpose of avoiding double taxation, the wording of Article 3(2) has to be understood as having such conceptual scope. Avery Jones notes the following in this respect:

> It is relevant that domestic law may not use the precise expression used in the OECD Model. For instance, UK tax law refers to 'land' rather than 'immovable property', does not use 'profits of an enterprise', uses 'disposal' rather than 'alienation' in relation to capital gains, and 'earnings' rather than 'salaries, wages and other similar remuneration' in relation to employment income. It would be contrary to the purpose of the OECD Model (and a tax treaty based on it) not to apply the equivalent domestic law in such cases. This suggests that 'term' in article 3(2) of the OECD Model should be given a wide meaning, not restricted to identical words, but, rather, to the equivalent domestic law concept. …The width of the meaning of 'term' can be even more extreme where a tax treaty provides that, in cases of different

includes both domestic law definitions.

[94]See Avery Jones, 'Treaty Interpretation', ss. 6.2, 8.1, and 8.2.2.1; OECD, *Model Tax Convention*, 2014, Commentary to Article 3, para. 12.

[95]See Avery Jones, 'Treaty Interpretation', ss. 8.2.2.3 and 8.2.4.

[96]See Gaja, 'The Perspective of International Law', 99–100; Wim Wijnen, 'Some Thoughts on Convergence and Tax Treaty Interpretation', *Bulletin for International Taxation*, no. 11 (2013): 575.

> meanings of two language texts, a third language version is to prevail or where the only official version of a tax treaty is in a third language (*see* section 3.5.2.). As domestic law will not be written in the third (or sole other) language, there will never be an identical word in domestic law and so it is essential to give a meaning to "term" that conveys the equivalent concept.[97]

Crucially, the same understanding has to be applied when – deliberately or incidentally – actual domestic law terms are used in the respective language texts of a treaty. Such may frequently happen (particularly for terms denoting types of income) because domestic law technical terms may be simply what OECD Model terms literally translate to in the languages of the treaty partners, treaty negotiators discuss treaty provisions using their domestic law technical language with the laws of their countries in mind (and particularly with respect to their understanding of what certain types of income imply), or the treaty is indeed intended to apply asymmetrically concerning the point in question.[98]

The pitfall of this is that – especially if only the text in the own language is consulted – the seemingly obvious reference to domestic law may trick the interpreter into overlooking the term in question to constitute first and foremost a general abstraction that, of course, may default to its domestic law meaning if so intended, which can however be determined only when analysed against the background of both contexts implied by Articles 3(2) and 31(2), or else mismatches in qualification may result that lead to double taxation or double non-taxation unintended by the treaty.[99]

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[97] Avery Jones, 'Treaty Interpretation', s. 7.2.1.

[98] See Wassermeyer, *Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, MA, Vor Art. 1, 37, para. 47.

[99] See Klaus Vogel, 'Conflicts of Qualification: The Discussion is not Finished', *Bulletin for International Taxation*, no. 2 (2003): 41–44, Case 2, 43–43; John F. Avery Jones, 'Conflicts of Qualification: Comment on Prof. Vogel's and Alexander Rust's Articles', *Bulletin for International Taxation*, no. 5 (2003): 184–86, Response by Prof. Vogel, 186. Vogel discusses this as a 'conflict of qualification' not resolved by the application of the OECD approach to interpret the method article, laid out in the OECD Commentary on Article 23A and 23B, paras. 32.1–32.7. I use a different terminology, i.e., 'mismatch', because the OECD Commentary seems to reserve the terminology 'conflict of qualification' to cases in which taxation or non-taxation by the source state and the resulting double taxation or double non-taxation is (otherwise) 'in accordance with the provisions of the Convention', whereas I view Vogel's case as one in which the 'divergence is based

Vogel devises such a case between Austria and Germany with respect to a taxpayer being an Austrian national who alternates between both countries (sometimes on the same day, so accumulating stays in each exceeding six months) without having a permanent home in either.[100] The case is based on the tax treaty Austria-Germany (2000), which is unilingual in German and contains the wording *gewöhnlicher Aufenthalt* in the residence tie-breaker provision 4(2)(b).[101] This is not only a literal translation of the OECD Model wording 'habitual abode' but also a defined concept in both the domestic laws of Austria and Germany resulting in unlimited tax liability.

Crucially, however, both domestic law concepts differ from the habitual abode concept in the OECD Model and each other. In particular, German domestic tax law contains a fiction of any stay with a duration of more than six months automatically constituting an habitual abode,[102] whereas the OECD conception does not implement any such fiction concerning a specific length of time.[103] Austrian domestic law, on the other hand, specifies that whenever unlimited tax liability depends on the taxpayer's habitual abode, he will become subject to unlimited tax liability if he stays longer than six months in Austria whether or not he actually establishes an habitual abode, which will depend entirely on factual circumstances.[104]

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not on different interpretations of the provisions of the Convention but on different provisions of domestic law', ultimately being a case of treaty misapplication to be distinguished from a 'conflict of qualification' as understood by the OECD Commentary (see below).

[100] Vogel, 'Conflicts of Qualification: The Discussion is not Finished', Case 2, 43–43.

[101] Article 4 of the treaty is modelled on Article 4 of the OECD Model.

[102] Article 9(2) AO. The AEAO to Article 9 AO, para. 1, asserts an 'irrefutable presumption' in this respect. The duration of more than six months does not have to be uninterrupted or contained in a single tax year but must not be merely transitory. Interrupted stays are to be evaluated as to whether they still constitute a single stay overall, interrupted only by short absence (attributable, e.g., to vacation) and connected by the intention to continue the stay as embodied in the factual circumstances. Merely private stays with a duration of less than one year are not taken into account, as well as cases in which the taxpayer only works in Germany but lives abroad and does not regularly stay overnight, see Article 9(1)–(2) AO in combination with AEAO to Article 9 AO, paras. 1–2.

[103] OECD, *Model Tax Convention*, 2014, Commentary on Article 4, para. 19, replaced by paras. 19–19.1 in 2017.

[104] Article 26(2) BAO in combination with Article 66(2) JN.

In Vogel's fictional scenario the taxpayer becomes subject to unlimited tax liability both in Austria and Germany under their respective domestic laws. In Austria because of his stay of more than six months, however, without establishing an habitual abode, and in Germany as a result of establishing an habitual abode because of his stay of more than six months. The taxpayer receives dividend and interest income from third countries, which ultimately falls under Article 21 of the treaty, requiring the tie-breaker rule to decide residence for treaty purposes.

Despite acknowledging that the context seems to require an autonomous interpretation of the OECD Model term 'habitual abode',[105] Vogel nevertheless suggests an interpretation ultimately based on domestic law:

> [S]ubparagraph b) does not specify the time of a stay which would qualify it as being 'habitual', and they merely add that the length of this time must be 'sufficient'. Thus, though the core of the term 'habitual abode' can be determined by autonomous interpretation, its 'boundaries' remain indistinct. To this extent, therefore, the reference to domestic law provided by Art. 3(2) persists.[106]

In consequence, Article 4 in combination with Article 3(2) would cause Austria to consider the taxpayer resident in Germany for treaty purposes because he has an habitual abode in Germany but not in Austria under the assumed factual circumstances, whereas Germany would consider the taxpayer resident in Austria for treaty purposes because he has an habitual abode in both states according to the six months fiction, wherefore residence is ultimately decided based on nationality under Article 4(2)c. The result is double non-taxation of the dividend and interest income.[107]

The question is whether the interpretation of Article 4 in combination with Article 3(2) applied by Vogel – which he himself admits to be controversial[108] – is really correct, or whether this is a case for which the context

[105] For conclusive argument in this respect, see Vogel and Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen*, 440–41, para. 203–206; Wassermeyer, *Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, MA, Art. 4, 55–59, paras. 74–77.

[106] Vogel, 'Conflicts of Qualification: The Discussion is not Finished', 42.

[107] See ibid., 42–43.

[108] See ibid., 43.

requires otherwise. Avery Jones rejects Vogel's view, pointing to the pitfall outlined above Vogel falls victim to:

> I suggest that the fact that Germany uses an identical expression (or rather an identical expression in the German translation of the OECD Model) in its internal law is insufficient to cause Art. 3(2) to apply internal law, particularly in light of the Commentary, when the result of doing so is that both Austria and Germany would resolve the dual residence in favour of the other state, leaving the taxpayer a resident of neither, which is not exactly in accordance with the object and purpose of the treaty. The case for using internal law to define a type of income is much stronger because the result is that the treaty exemption or relief corresponds exactly to the internal law tax charge; for other expressions, there is a much stronger argument for the term to mean the same in both states. Dual residence would not be resolved in the same way in all states if one state happens to use one of the expressions in Art. 4(2) in its internal law. If there is a conflict between the two states' interpretations, it has to be resolved by the mutual agreement article.[109]

In light of all the aforesaid I strongly agree with Avery Jones. What may be added to his analysis is that the concept of *gewöhnlicher Aufenthalt* in German tax law not only differs from the OECD habitual abode concept as regards the six months fiction, but also in other respects and in terms of its context.[110] Crucially, according to the OECD Model, the taxpayer may have an habitual abode at the same time in both contracting states, whereas under German tax law the taxpayer can only have a single habitual abode at any point in time.[111] Therefore, domestic law itself may be the only context necessary to decide that it should not be applied, because the conclusion that the taxpayer has his habitual abode both in Austria and Germany is at the same time based on domestic law and precluded by it, that is, applying the German domestic law definition is self-contradicting.

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[109] Avery Jones, 'Conflicts of Qualification: Comment on Prof. Vogel's and Alexander Rust's Articles', 186.

[110] See Vogel and Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen*, 440, para. 203.

[111] AEAO to Article 9 AO, para. 3; see BFH, 'I 244/63' (BStBl. 1966 III, February 1966); BFH, 'I R 241/82' (BStBl. 1984 II, August 1983).

In summary, when applying Article 3(2), it is crucial to bear in mind that most treaty terms are first and foremost general abstractions even if any terminology identical to domestic law is used. Neither do treaty terms identical to domestic law terminology imply they should be interpreted according to domestic law,[112] nor treaty terms different from domestic law terminology that they should not be interpreted according to it.[113]

Under a contextual interpretation of habitual abode – in this particular case considering specifically the domestic laws of both contracting states and the treaty object and purpose – the correct outcome of Vogel's fictional scenario should be one of the following, depending on the particular facts and circumstances assumed:

(a) The taxpayer has an habitual abode in either Austria or Germany.
(b) He has an habitual abode both in Austria and Germany.
(c) He does not have an habitual abode in either of them.

In other words, there should be a common interpretation concerning the length of time to be sufficient for qualifying a stay as habitual. As a result, residence for treaty purposes would be attributed by both Austria and Germany to the same state based on either the habitual abode criterion or the nationality of the taxpayer. The outcome suggested by Vogel does not constitute a 'conflict of qualification' as defined by the OECD Commentary but represents a treaty misapplication attributable to a mismatch in interpretation caused by mistakenly applying domestic law definitions because the treaty text incidentally featured terminology identical to domestic law, which should be resolved via a mutual agreement procedure.[114]

[112] See Wassermeyer, *Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, MA, Art. 4, 55–56, para. 74.

[113] See Avery Jones, 'Treaty Interpretation', s. 7.2.1.

[114] The 2017 OECD Model and Commentary update addresses such scenario: 'Under paragraph 3, the competent authorities can, in particular, enter into a mutual agreement to define a term not defined in the Convention, or to complete or clarify the definition of a defined term, where such an agreement would resolve difficulties or doubts arising as to the interpretation or application of the Convention. Such circumstances could arise, for example, where a conflict in meaning under the domestic laws of the two States creates difficulties or leads to an unintended or absurd result. As expressly recognised in paragraph 2 of Article 3, an agreement reached under paragraph 3 concerning the

Unfortunately, confusing treaty concepts with domestic law ones is a mistake easy to make, as tax treaties will for a variety of reasons often feature terminology identical to domestic law.[115] Therefore, Article 3(2) provides an additional argument for an obligation to compare texts: in order to define any treaty term X according to domestic law unless the context does not require otherwise, one first has to establish the exact term X to be defined, for which it is necessary to compare all texts. Since the different language texts may translate treaty term X as F or G in the languages of the contracting states – which may be terms borrowed from their respective domestic laws (either deliberately because their domestic law meanings may indeed be intended or incidentally although a contextual meaning may be intended) – one runs the risk of interpreting X as not-X according to the domestic law meaning of either F or G if only the text in the own language is looked at.

In summary, for any decision whether a domestic law meaning is to be applied, both contexts as implied by Article 3(2) and Article 31 including the domestic laws of both contracting states and the other language texts need to be considered. Ellis notes in this respect against the background of specific case law on capital gains:

> There are States that, in their national tax systems, do not differentiate between capital gains and ordinary income. There is case law in which the

meaning of a term used in the Convention prevails over each State's domestic law meaning of that term', OECD, *Model Tax Convention*, 2017, Commentary on Article 25, para. 6.1.

[115] The true lesson of Vogel's thought experiment is that treaty negotiators are setting courts up for committing this type of error if they use domestic law terms too indiscriminately, see, by analogy, Bernhard Grossfield, 'Language and the Law', *Journal of Air Law and Commerce* 50 (1985): 793–803, 801: 'If the structure of a particular language plays an important role in defining our thinking, it may well be that a particular language can only express certain legal ideas and that the limits of our particular language are the limits of our legal reasoning.' Vogel's case illustrates that the same applies if the treaty is in the shared official language of the contracting states. As Kuner has pointed out, 'The interrelation between legal terminology and the legal system in which it is used is so strong that substantial differences in usage exist even among States that (supposedly) share a common language', Kuner, 'The Interpretation of Multilingual Treaties', 957. Hence, treaty negotiators should make an effort to restrict use of terms with a defined domestic law meaning to cases when an asymmetrical application of the treaty is indeed intended.

> courts of such States have been called upon to interpret the expression 'capital gain' laid down in tax treaties and, in order to do so, reverted to Article 3(2) of the treaty. The courts in these cases decided to interpret the treaty on the basis of the text drafted in the foreign domestic language since the difference between the concept of 'income' and that of 'capital gain' in the other language was perceivable. In order to reach such conclusions, the courts first considered Article 3(2) but then affirmed that the context overrides the principle under which the meaning of a term or expression shall be based on the domestic law of the State applying the treaty – and certainly the other language of the treaty is a part of the context. The text of the treaty drafted in the foreign authentic language has therefore been considered relevant to understanding the contextual meaning of a given expression.[116]

Vogel's fictional scenario is particularly problematic because the treaty at its base is unilingual in German and contains no definition of *gewöhnlicher Aufenthalt*, which makes it hard for any judge not to resort to domestic law:

> Regarding Art. 4(2), *gewöhnlicher Aufenthalt* is not only the German translation of the OECD Model; rather, it is the wording of all of Germany's current tax treaties (and of Austria's treaties, and maybe Switzerland's treaties, as well). With respect to Germany's treaties with Austria and Switzerland, there is not even a version in another language on which one could base an interpretation which differs from the German domestic one. I have not yet met a German judge who, in this situation, would be prepared to accept an interpretation which differs from German domestic law. And where should he find a criterion to choose between one of the two possible interpretations?[117]

How can we reply? Although there is no English text available reading 'habitual abode', it is obvious that *gewöhnlicher Aufenthalt* is intended to mean habitual abode as understood by the OECD Commentary and not as defined under domestic law.[118] This is only obscured by *gewöhnlicher Aufenthalt* in-

[116] Gaja, 'The Perspective of International Law', Appendix, Intervention by Prof. Maarten Ellis; see cases quoted by Avery Jones, 'Treaty Interpretation', s. 8.1.

[117] Avery Jones, 'Conflicts of Qualification: Comment on Prof. Vogel's and Alexander Rust's Articles', Response by Prof. Vogel, 186.

[118] See Vogel and Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen*, 440–41, para. 203–206; Wassermeyer, *Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, MA, Art. 4, 55–59, paras. 74–77.

cidentally being the literal translation of 'habitual abode' while also being a defined legal concept under domestic law.[119] Both Austria and Germany are members of the OECD since 1961 (the same applies to Switzerland), and neither has placed a reservation or observation in the OECD Commentary concerning the interpretation of Article 4. Hence, it seems reasonable to assume that whenever their treaties are modelled on the OECD Model reading 'habitual abode', an autonomous interpretation along the lines of Avery Jones as quoted above is implied.

Probably for all plurilingual treaties of Austria and Germany with a residence tie-breaker rule modelled on the OECD Model the German text reads *gewöhnlicher Aufenthalt* where the English text reads 'habitual abode'.[120] Therefore, it is unreasonable to assume that the meaning should be any different when there is only a German text reading *gewöhnlicher Aufenthalt* unless the treaty itself or its particular context would provide further indication to the contrary. Granted, such line of reasoning is generally problematic because of the bilateral nature of tax treaties. In this particular case, however, a multilateral perspective based on the treaty policy embodied in the treaty networks of both countries seems warranted for said reasons.

[119] See Wassermeyer, *Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, MA, Vor Art. 1, 37, para. 47.

[120] See, e.g, Austria-Bulgaria (2010) or Germany-China (2014). Noteworthy, the French texts of both Austria-France (1993) and Germany-France (1959) use the wording *séjourne de façon habituelle* in the residence tie-breaker where the German texts read *gewöhnlicher Aufenthalt*, which is equivalent to the wording of Article 4(2)b of the French text of the OECD Model, see OECD, *Modèle de convention fiscale concernant le revenu et la fortune* (Paris: OECD Publishing, 2010).