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

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5. Reliance on the Prevailing Text

5.1. Research Question

The previous chapters may have left the reader with unease. If we subscribe to the arguments refuting the routine interpretation approach, we are at the same time presented with the real life practical challenges involved in a comparison of all texts. The situation may look particularly bleak for tax treaties because disputes about their application have to be decided by national courts of various levels that may not be sufficiently equipped to compare all texts.[1] While the number of different language texts most commonly amounts only to two or three per treaty,[2] the problem increases with the expansion of a country's treaty network and the addition of languages. Whereas getting hold of the texts in the other languages may no longer pose much of a problem in today's world,[3] the expertise to illuminate their meaning may not be so readily available.[4]

Even if the judges interpreting the treaty are generally familiar with the other languages, it may be difficult for them to establish the exact meaning of any specific expression, in which case recourse to dictionaries, translators, and legal experts may become necessary.[5] Thus, Waldock's suggestion that from a pragmatic perspective an obligatory comparison of all texts seems unreasonable in view of the needed resources and countries being unequally equipped to follow such prescription in practice remains a fair

[1] See Gaja, 'The Perspective of International Law', 98.

[2] Exact statistics in his respect will be presented in Chapter 8, s. 8.2.1.

[3] For a counterexample, see *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, paras. 7.8–7.11.

[4] See Philip Baker, 'Recent Developments in the Interpretation and Application of Double Taxation Conventions', *Fiscalidade – Revista de Direito e Gestao Fiscal*, no. 4 (2000): 24.

[5] See, e.g., *Fothergill v Monarch Airlines Ltd.*, 273–74, 286–87, 293–94, 300–301; *Buchanan (James) & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd.*, [1978] AC 141, HL, 152–53; *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, paras. 1.38, 1.58, and 1.60.

point.[6] This leaves us with an obvious dilemma.

What if we just stick to the routine interpretation approach, tacitly accept its shortcomings, and hope for the best – no plaintiff, no judge? Even so the problem does not change in substance but only in degree: the issue remains how to deal with the practical problems associated with a comparison once ambiguities arise or divergences between the texts have been pointed out. Given the potential for divergences[7] together with the ever-increasing globalisation of commercial and investment activities[8] likely accompanied by respective international tax issues and growing taxpayer awareness out of self-interest, it is more than likely that the number of cases in which divergences will play a role and put judges in the predicament outlined above will grow in the future.[9] This sets us back to the practical problems involved in a comparison of texts whether or not we agree with the arguments presented before or continue to adhere to the routine interpretation approach.

[6] See ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, I, Part II:211, para. 35.

[7] Linguistic and juridical concordance between legal texts in different languages is hard to achieve in practice even in case of the most careful drafting, see Rosenne, 'The Meaning of "Authentic Text" in Modern Treaty Law', 416–23, concerning the efforts spent on UNCLOS III.

[8] See Peter Dicken, *Global Shift: Mapping the Changing Contours of the World Economy*, 7th ed. (Thousand Oaks, CA: Sage Publications Ltd., 2014), passim.

[9] In the aftermath of the *Natexis* case, *SA Natixis* (formerly *SA Natexis Banques Populaires*) filed for tax sparing credits under the French tax treaties with Argentina, China, India, Indonesia, and Turkey. The French tax administration denied these claims again based on the argument that the respective treaty clauses should not be read as tax sparing but matching credit provisions, concerning which a matching credit for income completely exempt from withholding tax must be explicitly provided for by the wording of the treaty. Otherwise, the actual payment of at least some (if only minimal) withholding tax is required for a credit to be granted. The French Administrative Court of Appeal confirmed this view, basing itself on the decision of the Conseil d'État in *Natexis*. The case went again in front of the Conseil d'État, which decided that under the treaty with China the credit was not conditional upon taxation there. The other treaties, however, contained different language to the effect that the income, if completely exempt, had to be so by virtue of special domestic incentive measures for the promotion of economic development. Since *SA Natixis* did not prove such had been the case, the Conseil d'État denied the credit, see Conseil d'État, *9ème et 10ème sous-sections réunies, 25/02/2015, 366680, Inédit Au Recueil Lebon*, 2015.

In summary, comparing all language texts is correct but inconvenient, whereas the routine interpretation approach is convenient but incorrect.[10] And even if it were correct, it would remain convenient only to the extent no ambiguities arise and nobody raises a divergence, that is, it is no solution in principle. In order to solve the problem posed by plurilingual form in a truly pragmatic fashion, this chapter argues the case for an alternative approach that avoids the necessity of a comparison, is consistent with the VCLT principles, and is readily available in practice, namely, automatic recourse to and sole reliance on the prevailing text when such exists,[11] which is the case for the majority of plurilingual tax treaties.[12] In addition, the lim-

[10]It has been suggested that the routine interpretation approach is motivated predominantly by considerations of practical convenience and political expediency, see Kuner, 'The Interpretation of Multilingual Treaties', 962; Hilf, *Die Auslegung mehrsprachiger Verträge*, 75; Tabory, *Multilingualism in International Law and Institutions*, 199; Germer, 'Interpretation of Plurilingual Treaties', 413.

[11]Henceforth shortened to sole reliance on the prevailing text.

[12]Chapter 8 will analyse the global tax treaty network to account for all cases for which this solution is available, all cases for which it is not necessary because of unilingual form, and all cases for which a comparison of texts remains obligatory. The solution of sole reliance on the prevailing text is discussed and submitted here on a theoretical basis for academic purposes. It may be resorted to in practice; however, given the reality that it is for a variety of reasons customary for courts to rely on their own language text (at least initially), such suggestion may be dismissed by the practitioner as an academic ivory tower proposal. Hence, the following modified approach is suggested in practice: instead of direct recourse to the prevailing text, the text in the own language is relied on together with recourse to the prevailing text to gauge the result. The other language text(s) may then be ignored – at least most of the times (see below). Given that countries tend to choose a language for the prevailing text they have a high level of familiarity with (and for which Model Conventions coupled with Commentaries exist that, depending on the circumstances, may be drawn on for purposes of interpretation), together with a largely uniform choice of prevailing language over the entire global tax treaty network reducing the amount of third party resources needed, such approach seems practicable, neither overburdening states nor taxpayers (Chapters 8 and 9 will put exact numbers to these claims). Indeed, this may come close to what is practice already, at least by some courts. In 'I R 48/12', para. 13, the German BFH employed this approach in a decision concerning the status of S-Corporations under the Germany-US (1989) tax treaty in order to establish the exact point in time when the 2006 protocol would start to take effect. Although the treaty does not feature a prevailing text – this being an example of the court merely consulting the other text – the approach suggested here would be analogous concerning method and in the case of a prevailing text

itations to such approach will be outlined as well. The fundamental research question underlying this chapter is whether and to what extent courts are required to compare the other authentic texts when they have one designated as prevailing at their disposal, and the hypothesis put forward in this respect is threefold: (1) The VCLT permits automatic recourse to the prevailing text. (2) Sole reliance on it is justified as long as its interpretation under Article 31 neither leaves its meaning ambiguous or obscure nor leads to a result that is manifestly absurd or unreasonable. (3) The contrary view currently supported by many scholars rests on an erroneous interpretation of Article 33.

5.2. Framing the Issue

The discussion about the use of prevailing texts to date has been framed by the way in which the drafters of the VCLT have posed the question in the VCLT Commentary:

> The application of provisions giving priority to a particular text in case of divergence may raise a difficult problem as to the exact point in the interpretation at which the provision should be put into operation. Should the 'master' text be applied automatically as soon as the slightest difference appears in the wording of the texts? Or should recourse first be had to all, or at any rate some, of the normal means of interpretation in an attempt to reconcile the texts before concluding that there is a case of 'divergence'?[13]

Given this pretext, scholars have commonly discussed the issue along the same lines, namely, at which point in the interpretative process recourse

all the more warranted. The court interpreted the German text and then confirmed its interpretation by reference to the English text. Although the formulation of the English text happened to be more precise concerning the specific point in time supporting the conclusion of the court, there was no suggestion that the German text had been ambiguous. The practitioner may mentally insert this modified approach every time I talk about sole reliance on the prevailing text. Shelton discusses various alternatives from returning to unilingual treaties in Latin to simultaneous negotiation and drafting by the negotiators in the various languages (as done in the UNCLOS III procedure), see Shelton, 'Reconcilable Differences? The Interpretation of Multilingual Treaties'. Since they are all either less feasible or less effective than the solution proposed here, they will not be discussed.

[13]ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4.

must be had to an existing prevailing text and up to what point efforts to reconcile divergent texts should be sustained before the prevailing text is to be invoked. From its beginning until today the focal point of the discussion has been whether the slightest difference in expression between the texts suffices to justify recourse to the prevailing text or whether it would be necessary to first establish a difference in meaning between the texts that cannot otherwise be reconciled.[14]

Framing the issue this way somewhat suggests itself in respect of disputes about tax treaties, in which it is custom for the national courts presiding to rely on their own language text (at least initially). At the same time, however, framing the issue this way is unfortunate because it conceives of the prevailing text in terms of a problem rather than a solution, and this mode of thinking has invisibly guided the discussion of the issue to date and the answers given. To some extent this is unsurprising because the drafters of the VCLT failed to provide a definitive answer to their question but remained indecisive in view of the varied jurisprudence on the issue:

> The question is essentially one of the intention of the parties in inserting the provision in the treaty, and the Commission doubted whether it would be appropriate for the Commission to try to resolve the problem in a formulation of the general rules of interpretation. Accordingly, it seemed to the Commission sufficient in paragraph 1 to make a general reservation of cases where the treaty contains this type of provision.[15]

Two important preliminary observations may be made about this. First, it appears that both approaches are in line with the VCLT – neither is ruled out by the ILC. Second, it is important for the interpreter to determine the intention of the contracting parties on this point in order to resolve the issue on a case-by-case basis. Concerning the first observation, if we presume that the intention behind introducing a prevailing text is to ease interpretation rather than to encumber it, the issue in question may be posed differently, namely, the other way around. Given the principle of unity and equal authenticity, the interpreter is free to start with any text, which could equally

[14] See, e.g., Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 123 et seq.; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 325 et seq.

[15] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4.

be the one additionally declared as prevailing and by no means has to be the one in the official language of the country where the case is being decided. Thus, the question important to answer is whether and under what circumstances the interpreter is obliged to have recourse to the other texts if there is one designated as prevailing at his disposal. This is the way the question should be posed. Rather than constituting an additional variable increasing complexity for the interpreter, the prevailing text should be conceived of as a tool to avoid or at least significantly reduce additional complexity induced by plurilingual form. How exactly this approach fits with the principles enshrined in the VCLT will be the topic of this chapter. Concerning the second observation, given the special focus of this study on tax treaties, an empirical analysis evaluating their factual situation with respect to the theoretical solution submitted is necessary, which will be provided by Chapter 8.

5.3. The Contrary Positions

5.3.1. The Permissive Approach

The essence of the permissive approach advocated by me is to conceive of the prevailing text as a tool to reduce complexity of plurilingual treaty interpretation into a situation of quasi-unilinguality, based on the hypothesis that the VCLT framework of interpretation allows for sole reliance on the prevailing text, which has been practised by international courts in several cases.[16] At the same time, it does not rule out reconciliatory comparative interpretation of all texts as an alternative as long as the result converges to the meaning of the prevailing text. Reconciliatory comparative interpretation of all texts may still become necessary under certain circumstances, for example, when an interpretation of the prevailing text under Article 31

[16] See, e.g., *Treaty of Neuilly (Bulgaria v Greece)*, PCIJ (Publications of the Permanent Court of International Justice 1922–1946, 1924), 3–10, ILC, *Draft Articles on the Law of Treaties with Commentaries*, 224, para. 4; *Aron Kahane Successeur v Francesco Parisi and the Austrian State*, Romanian-Austrian Mixed Arbitral Tribunal (Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix, 1929), as discussed by Arginelli, *The Interpretation of Multilingual Tax Treaties*, 327–328.

leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

The permissive approach is based on what may be called the *logical argument*.[17] The core of the logical argument is that it does not matter whether there is a divergence, because the prevailing text can be relied on in any case; the other texts must always be interpreted to have the same meaning as the prevailing text, which makes recourse to them unnecessary if the meaning of the prevailing text is manifest. Either the prevailing text has the same meaning as the other texts, in which case it may be relied on same as the others, or it has a different meaning, in which case it must be relied on while the other texts must be interpreted to concord to its meaning.[18] In the words of Lord Roskill (by analogy but nevertheless pertinent):

> I think, like my noble and learned friends, that those writings point strongly to the conclusion which all your Lordships have reached, that 'avarie' in this context includes 'partial loss'. Either therefore 'damage' in the English text must be construed so as to include 'partial loss', or there is an inconsistency and the French text as I would interpret it in the light of those writings must prevail. *I do not think it matters by which route that conclusion is reached.*[19]

The complete hypothesis submitted here is comprised of two propositions and the conclusions drawn from them. First, although it is custom for national courts to have recourse to their own language text initially, they may in principle have initial recourse to any text. Second, the prevailing text is at minimum equally authoritative when there is no divergence. When there is one, it is super-authoritative in the sense that it prevails over the other texts whatever they may say: a clear meaning of the prevailing text must be regarded as the one true meaning of the treaty, and a reconciliatory comparative interpretation of the other texts is no longer necessary because its outcome may not depart from the established meaning of the

[17] Implying that, logically, both methods (interpretation of the prevailing text and reconciliatory comparative interpretation of all texts) should lead to the same result.

[18] See Engelen, *Interpretation of Tax Treaties under International Law*, 380; Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 126, with reference to *Foreign Relations of the United States* (1923), vol. 2, 1166, 1171.

[19] *Fothergill v Monarch Airlines Ltd.*, 301 (emphasis added).

prevailing text. Hence, automatic recourse to the prevailing text is permitted, and courts may rely on the prevailing text alone as long as its meaning is clear. On the other hand, they are not prevented from reconciliatory comparative interpretation as long as the outcome does not deviate from the clear meaning of the prevailing text, and they have to engage in reconciliatory comparative interpretation if the meaning of the prevailing text remains unclear otherwise.

The first proposition will not be subject to extensive discussion, as it must be considered uncontroversial. To deny it would mean to deny the principle of unity and the authentic status of all texts explicitly declared by the treaty's final clause. It is uncontroversial even if only the own language text is given effect in law through incorporation into domestic legislation, because by the final clause contained in that same text all texts of the treaty are declared authentic; therefore, equal recourse to them is warranted under domestic legislation via the incorporated one.[20]

The validity of the second proposition and the conclusions drawn from both will be the main subject of discussion in this chapter. For this purpose, a notional standard final clause is assumed that, based on the wordings of Article 33(1) and (4), declares several texts as authentic and one of them as prevailing in case of divergence,[21] as for example implemented in Armenia-United Arab Emirates (2002):

> Done in Abu Dhabi on April 20, 2002, in two originals, in the Armenian, Arabic and English languages, all texts being equally authentic. In case of divergence the English text shall prevail.

5.3.2. The Restrictive Approach

Contrary to the permissive approach advocated by me, the restrictive approach currently supported by many scholars and most comprehensively argued by Arginelli rules out sole reliance on the prevailing text.[22] Recourse

[20] See *Buchanan (James) & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd.*, 152; Avery Jones, 'Treaty Interpretation', s. 3.7.1.8.

[21] Specific issues with respect to the actual wordings of tax treaty final clauses in practice will be discussed in detail in Chapter 8, s. 8.3.

[22] See Arginelli, *The Interpretation of Multilingual Tax Treaties*, 333 et seq. His arguments will be subject to in-depth considerations in Chapter 6, s. 6.4.

to it is only permitted as a limited solution for cases in which a reconciliation of texts in the course of a comparative interpretation has proven impossible. At the core of the restrictive approach lies a particular interpretation of the term 'divergence'. According to this view, a divergence warranting recourse to the prevailing text under Article 33 is given only when a difference in meaning between the texts persists after the application of Articles 31 and 32 to all texts, otherwise the prevailing text cannot be taken to prevail. In consequence, decisive recourse to the prevailing text requires the interpreter to conduct a reconciliatory comparative interpretation first in order to establish whether the condition of a divergence is fulfilled and the meaning of the prevailing text may be applied as prevailing.

This view rejects the logical argument, on grounds of Hardy's supposition that the interpretation most compatible with all texts is not necessarily the one suggested by the prevailing text in isolation.[23] Based on the assumption that all texts were always intended to mean the same, the existence of a divergence warranting decisive recourse to the prevailing text is practically ruled out,[24] and Arginelli goes as far as to advocate reconciliatory comparative interpretation to the point that it ought to be conducted instead of decisive recourse to the prevailing text even if reconciliation is only possible with the help of supplementary means or by granting decisive weight to the original text, because such renders recourse to the prevailing text 'superfluous'.[25]

The restrictive approach may be traced back to a decision by the Polish supreme court.[26] The court's reasoning rests on two propositions. First, the fact that the contracting parties have decided to authenticate more than one language text must be interpreted as intended to have some legal consequence, namely, that of attributing legal authority to each text.[27] Second,

[23] See Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 126, 133–34. This argument will be discussed in depth in Chapter 6, s. 6.2.

[24] See Engelen, *Interpretation of Tax Treaties under International Law*, 394; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 103, 232, 333–38, 241.

[25] Arginelli, *The Interpretation of Multilingual Tax Treaties*, 333.

[26] *Archdukes of the Habsburg-Lorraine House v The Polish State Treasury, Annual Digest of Public International Law Cases (1929–1930), Case No. 235*, Supreme Court Poland (Cambridge University Press, 1930).

[27] Concerning this proposition, Arginelli observes that the court only respected the prin-

the status of the prevailing text is only superior once the existence of a material divergence has been established, and such material divergence may not be said to exist solely because of a mere difference in wording, but its existence can only be established with the help of all available means of interpretation attributing all possible meanings to all texts. The court concluded that since the final clause of the treaty has to be interpreted as meaning that all three texts are authentic and therefore relevant for interpretative purposes, the superior status of the prevailing text comes into play only in case the existence of a material divergence is established. Consequently, any common meaning of all texts always prevails, and a text may be disregarded only insofar as none of its possible meanings may be attributed also to the text designated as prevailing.[28]

Several preliminary observations may be made concerning this reasoning. The court is of course right to suggest that the plurilingual form of the treaty must have been intended to have some legal consequence, namely, that of all texts being authentic. Along the same lines, however, the declaration of one text as prevailing must have been intended to have some legal consequence as well, namely, that of granting that text prevailing status. In this respect we will have to discuss the meaning of 'prevailing'; however, we may note already that the principle of effectiveness equally applies to the clause establishing one text as prevailing. Consequently, the court may have made a mistake in following an interpretation that renders this clause ineffective and, thereby, may have violated the expressed intentions of the contracting parties. Such contention will hinge on what is covered by the term 'divergence'.

The English text of the treaty subject of the case reads 'The present Treaty, in French, in English, and in Italian, shall be ratified. In case of divergence the French text shall prevail'.[29] Thus, it merely speaks of divergence, without

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ciple of effectiveness, as in his view a contrary contention would imply that the contracting parties, by declaring one text as prevailing in case of divergence, nullified their own intentions expressed by authenticating several texts, see Arginelli, *The Interpretation of Multilingual Tax Treaties*, 329.

[28] See ibid., 329–30.

[29] *Treaty of Peace between the Allied and Associated Powers and Austria*; Protocol, Declaration and Special Declaration (St. Germain-en-Laye, 10 September 1919). The prevailing French text is equivalent and reads '*Le présent Traité, rédigé en français, en anglais et*

any further qualification. We will have to see whether the interpretation of divergence as material divergence the court as well as Arginelli and others subscribe to, that is, a difference in meaning that cannot be reconciled with any interpretation of the prevailing text, is truly in line with the VCLT. In the previous chapter we saw already that any meaning common to all texts may not necessarily turn out to be the treaty meaning under Article 33(4) in case of a divergence – such would grant the *Mavrommatis* approach the status of a general principle, which it has been denied by the ILC.[30]

5.4. Interpretation of Article 33(1) and (4)

5.4.1. The Meaning of Prevailing

The Oxford Dictionary defines to prevail as to 'Prove more powerful or superior', stemming from the Latin *praevalere* (to have greater power). Hence, the meaning of the prevailing text must be considered more authoritative than the meaning of any other text or all others combined, otherwise we cannot make sense of the notion of it prevailing. According to the wording of Article 33(1), the prevailing text does not prevail by default but only conditional upon the existence of a divergence. From this situation originates the problem of 'when to apply the prevailing text'.[31] As has been convincingly established by Engelen,[32] however, this limitation may be the result of 'infelicitous drafting' not intended to create a peremptory norm,[33] but the intention of the contracting parties expressed in the wording of the ac-

en italien, sera ratifié. En cas de divergence, le texte français fera foi.'

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

[31] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4; see Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 123 et seq.; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 325 et seq.

[32] See Engelen, *Interpretation of Tax Treaties under International Law*, 376–79.

[33] Defined by the VCLT as follows: 'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character', UN, *Vienna Convention on the Law of Treaties*, Article 53.

tual treaty final clause remains decisive while Article 33(1) is intended only as a general reservation of such clauses.[34]

In essence, the prevailing text may be considered super-authoritative as a kind of *primus inter pares* (first among equals) even under the VCLT wording: as authentic text it is at minimum equally authoritative, but of higher authority when circumstances are such that it ought to be regarded as prevailing. Hence, the existence of a prevailing text may be viewed as creating a new category of interpretative means in form of the other non-prevailing texts, because the notion of one text to prevail in case of divergence is just another way of saying that the other texts can only confirm but not contest a clear meaning of the prevailing text. In relation to the prevailing text the others may be viewed akin to supplementary means: recourse to them is permissible but not mandatory unless an interpretation of the prevailing text leaves its meaning unclear, in which case recourse to the other texts becomes mandatory again to determine the meaning of the treaty.[35] Versus supplementary means, however, they retain their status and higher weight of authentic means, constituting 'text' and therefore 'context' under Article 31(2).

In summary, when the prevailing text has a clear meaning, that meaning qualifies as the definitive treaty meaning. Either the other texts say exactly the same or there is a divergence and their meanings must be reinterpreted to concur to the meaning of the prevailing text, which constitutes the one true meaning of the treaty. Hence, the prevalence of the prevailing text may be regarded as not conditional but quasi-absolute, that is, not really dependent on the de facto existence of any divergence.

This is congruent with the particular object and purpose of Article 33 to establish a relationship of comparative authority between the authentic texts: looking into the genesis of Article 33, we find that Special Rapporteur Sir Humphrey Waldock explicitly stated in the ILC's 770th meeting that 'article 74 dealt with the texts or versions which could be consulted for the purposes of interpretation, whereas article 75 was concerned with the

[34] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4.

[35] See ILC, *Documents of the Sixteenth Session Including the Report of the Commission to the General Assembly*, II:65, para. 10.

comparative authority of texts.'[36] The VCLT Commentary speaks in this respect of the 'master text',[37] which paraphrases this property of supremacy.

It is also congruent with the overall wording and systematic of Article 33, which states in paragraph (1) that each text is equally authoritative 'unless' circumstances are such that one text prevails, and in paragraph (4) that 'Except where' one text prevails, the further prescribed operation shall be performed. The syntactic placement of the 'Except where' condition at the beginning of paragraph (4) makes clear that what follows only applies if the condition is not fulfilled.

5.4.2. The Meaning of Divergence

The peculiar term 'divergence' in Article 33(1) instead of 'difference' like in Article 33(4) should attract attention because the debate revolves around when it can be presumed that the condition of a divergence is fulfilled. The Oxford Learner's Dictionary defines divergence as 'the process or fact of separating or becoming different …from what is expected, planned'. Consequently, divergence is a dynamic concept, whereas difference is a static one. The underlying idea of departing and unintentionally deviating from an initial situation of equivalence fits with the axiom of the principle of unity as stipulated by Article 33(1) and (3) and suggests a dynamic meaning of 'divergence' in Article 33, encompassing all possible states of difference from slightly deviating expressions to complete opposites.

Article 33(1) itself only speaks of divergence in general without providing any further explicit qualification. In particular, its wording does not specify whether the term refers to differences in wording or meaning (or both). In the absence of any such explicit delimitation it is reasonable to start out with the assumption that the term is used in its broadest sense, encompassing all differences in wording and meaning whether only *prima facie* or material. Such proposition is congruent with the wording of Article 33(1) having 'texts' as its implied subject, which allows for the inference that 'divergence' serves as a predicate for the subject 'texts'. The concept

[36] ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964*, I:319, para. 60. Articles 74 and 75 were combined later into one article that in its final version was included as Article 33 in the VCLT.

[37] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4.

of text, however, encompasses both its wording and meaning and not only one of those two more narrow subsets.

In fact, the wording 'in case of divergence, a particular text shall prevail' is synonymous to the wording 'in case of divergence *between the texts*, a particular text shall prevail'. Our addition *between the texts* does not change the meaning and is superfluous if 'divergence' relates as a predicate to 'texts'. In other words, it may be left out as done by the English text. The Russian text of Article 33(1) explicitly includes the implied subject and literally translates to 'divergence between these texts'.[38] Like the English one, the Chinese, French, and Spanish texts lack the repeated reference to the subject; however, this divergence does not constitute an irreconcilable difference in meaning between them and the Russian text or render all others ambiguous, because the subject 'texts' may not be explicitly reiterated but is still clearly implied. Any interpretation to the contrary is much less manifest and would require additional evidence to impose itself.

In order to support an interpretation of divergence as material divergence, we would need to insert *in meaning* instead of *between the texts*. This would introduce an additional subject, namely, the meaning of texts, which is only a more narrow subset of texts. In consequence, the overall meaning would be enriched: *in meaning* could not be deleted without changing the sense of the whole paragraph. The fact that nothing in this respect is added to the texts of Article 33(1) makes clear that the intention is not to delimit the meaning of divergence to material divergences in meaning and exclude mere differences in expression, even in case the Russian text would not contain the more precise formulation.

The VCLT Commentary confirms this interpretation by explicitly stating that 'a plurilingual treaty may provide that in the event of *divergence between the texts* a specified text is to prevail.'[39] The wording of the French Commentary is equivalent and reads '*Deuxièmement, un traité plurilingue peut disposer qu'en cas de divergence entre les textes, un texte déterminé l'emportera.*'[40] Therefore, the VCLT is an instance of the hypothetical scen-

[38]Translation with the kind help of Ksenia Levushkina.

[39]Ibid., II:224, para. 3 (emphasis added).

[40]ILC, *Projet d'articles sur le droit des traites et commentaires 1966. Texte adopté par la Commission à sa dix-huitième session, en 1966, et soumis à l'Assemblée générale dans le cadre*

ario considered in the previous chapter: the formulations of the Chinese, English, French, and Spanish texts do not say anything different from the Russian text but are grammatically slightly imprecise, which makes a less manifest additional interpretation possible, whereas the Russian text employs the grammatically precise formulation by explicitly repeating the otherwise implicit subject. The precise meaning is chosen under Article 31 and then confirmed via Article 32_1.

Article 33(4) may be consulted to deliberate this interpretation because of its direct reference and systematic connection to Article 33(1).[41] It does not explicitly echo the term 'divergence' but implicitly distinguishes between three different situations that refer to cases of divergence via the wording of 'difference in meaning' in combination with the existence or non-existence of a prevailing text, linking it to Article 33(1): First, a prevailing text exists, in which case we are referred back to Article 33(1). Second, no prevailing text exists and there are differences in meaning that can be reconciled by a comparative application of Articles 31 and 32_1 to all texts,[42] in which case the problem has been solved already. And third, no prevailing text exists and there are differences in meaning that cannot be reconciled by a comparative application of Articles 31 and 32_1 to all texts, for which a further *modus operandi* (mode of operation) is needed and provided by Article 33(4) itself.

Although Article 33(4) concerns itself in substance only with the latter case by providing an additional interpretative instruction for cases when Articles 31 and 32_1 fail to reconcile differences in meaning between the texts in the absence of a prevailing one, it does not contain any notion that the term divergence should be delimited to this particular scenario. On the contrary, its connection to Article 33(1) by direct reference encompasses all differences in meaning whether or not they are reconcilable by Articles 31 and 32_1, that is, any divergence, whether material or only apparent.

Such understanding is not impaired by the fact that Article 33(4) explicitly only references 'a difference of meaning which the application of art-

de son rapport sur les travaux de ladite session, vol. II, Annuaire de la Commission du droit international 1966 (United Nations, 1967), 244, para. 3.

[41] See Mössner, 'Die Auslegung mehrsprachiger Staatsverträge', 300.

[42] In line with the analysis conducted in the previous chapter, the reference to Article 32 must be understood to refer to Article 32_1 only.

icles 31 and 32 does not remove',[43] as this must be interpreted in the context of the provision merely providing a specific instruction for a particular case. By explicitly mentioning only the particular case of an irreconcilable difference in meaning, the general case of reconcilable differences in meaning is presupposed. Since all reconcilable differences have been reconciled along the way by an application of Article 33(1) in combination with Articles 31 and 32_1 before the specific instruction contained in Article 33(4) comes into play, there is no need to explicitly repeat any instructions applying to them. Both reconcilable differences as well as their reconciliation are implied to have been the case and taken place already. Therefore, the concept of material difference in meaning explicitly described by Article 33(4) entails both: itself as operand of the latter part of the entire operation (the specific *modus operandi* contained in paragraph (4) of Article 33) and the concept of merely *prima facie* difference in meaning as operand of the initial part of the operation (reconciliatory comparative interpretation under Articles 31 and 32_1). The entire operation consists in the two *modi operandi* reconciliatory comparative interpretation under Articles 31 and 32_1 and application of the interpretative rule contained in Article 33(4) combined, whereas the operand itself (the divergence) retains its identity and only changes its character over the course of the operation from merely apparent into material.

The wording 'when' of Article 33(4) instead of 'if' or 'in case' is indicative in this respect: it does not talk about an imaginable scenario of the interpreter encountering a divergence but about the definite case that he has encountered one. As soon as the normal way to handle it (reconciliatory comparative interpretation under Articles 31 and 32_1) has failed, he needs to implement the particular operation prescribed by Article 33(4). Implementing that special operation presupposes that, beforehand, reconciliatory comparative interpretation under Articles 31 and 32_1 has failed and, in consequence, that a divergence, necessitating such reconciliatory comparative interpretation under Articles 31 and 32_1, has been present.

In summary, the systematic composition of Article 33 suggests that paragraph (4) employs the disjunctive standard form of definitions regarding the

[43] Contra: Arginelli, *The Interpretation of Multilingual Tax Treaties*, 335, discussed in more detail in Chapter 6, s. 6.4.

concept of divergence introduced in paragraph (1).[44] That is to say, it combines all conditions that are by themselves each sufficient but not necessary to establish a case of divergence. Thus, a divergence is either a material difference in meaning (not reconcilable by the comparative application of Articles 31 and 32_1) or a merely apparent difference in meaning (reconcilable by the comparative application of Articles 31 and 32_1), that is, not a difference in meaning but a mere difference in expression. Both are covered by the combined wordings of Article 33(1) and (4), which together provide a definition *per genus proximum et differentiam specificam*[45] (definition per category and specific difference) for the *definiendum* 'divergence' through the *definientia* reconcilable and irreconcilable 'difference of meaning'.

Commentators seem to be confused in this respect because of the equivocational use of the term 'difference of meaning', namely, both as a persistent (material) and reconcilable (not material) difference in meaning, that is, a de facto difference in meaning as well as a mere difference in expression. This fosters imprecise and inconsistent reasoning because persistent and reconcilable differences in meaning are not only an equivocation but by definition also mutually exclusive concepts.

The words used by the texts could also be equivalent in the different languages (for example, 'control' in English and *contrôle* in French) but with their meaning being different, as in the case brought forward by Mr Bartos in the ILC's 770th meeting.[46] From this also follows that the term divergence cannot be restricted to either 'difference of expression' or 'differ-

[44] X is F if X is G *or* X is H, see Pfister, *Werkzeuge des Philosophierens*, 68. This may escape the eye because paragraph (4) does not explicitly echo the term 'divergence' but only relates to it via its systematic connection to paragraph (1); however, this only conforms to the requirement of *terminus definitus non debet ingredi definitionem* (a term may not be defined through itself) for any proper definition, with the violation of this requirement also known as fallacy *idem per idem* (explaining the same through the same).

[45] A conception first developed by Aristotle, see Aristotle, *Topics*, Book IV, Part 1; Aristotle, *Prior Analytics*, Book II, parts 2–3; Pfister, *Werkzeuge des Philosophierens*, 66.

[46] See ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964*, I:319, para. 65. For some more examples, see Claudio Sacchetto, 'The Italian Experience', in *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2005), 63–78, 70–73; Shelton, 'Reconcilable Differences? The Interpretation of Multilingual Treaties', 4–5. For a comprehensive discussion of this issue, see Cao, *Translating Law*, 54–60.

ence of meaning', as the expression could be equivalent but the meaning different and vice-versa. This may explain why 'divergence' is used in Article 33(1) and neither 'difference of meaning' nor 'difference of expression': both types of differences needed to be addressed in a way that even cases of equivalent terms having different connotations in their respective languages would be covered.

For Article 33(4) to distinguish between three different situations is only logical. When no prevailing text exists, Article 33(1) only tells us that all texts are equally authoritative. Hence, we need further guidance for all situations when (a) any kind of difference appears and (b) the difference persists, that is, when Articles 31 and 32_1 fail to produce a clear meaning common to all texts in the face of (a). Article 33(4) presumes a comparison of all texts has been undertaken in order to resolve any problems between them and only provides an additional instruction what to do in case such has failed. For cases that fall under (a) but not (b), no additional instruction is needed but Articles 31 and 32_1 apply (and resolve the case) in line with the dictum that the fundamental principles of interpretation are not to be different for plurilingual treaties than they are for unilingual ones.[47]

Article 33(1) in combination with Articles 31 and 32_1 is sufficient also when a prevailing text exists: for a quasi-unilingual situation no further interpretative instruction on top of the general rule is needed because the VCLT assumes that a contextual interpretation of a single text in the light of its object and purpose can always be found,[48] unless the text remains ambiguous or obscure, or the result of its interpretation is absurd or unreasonable. Concerning this, the only difference between a unilingual treaty and a plurilingual one with prevailing text is that in the latter case the other texts are available as additional context to help resolve any residual problems of the prevailing one and recourse to them takes precedence over recourse to supplementary means in their active role (see below).

This understanding is consistent with the wording of Article 33(4) starting out with the condition that 'Except where a particular text prevails in accordance with paragraph 1', which implies that what follows is only relevant in such case. Thus, Article 33(4) merely completes Article 31 for pluri-

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

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

lingual treaties without prevailing text in order to avoid a gap in the general rule of interpretation identified by the ILC during the drafting period of the VCLT.[49] It is an extension to adapt the general rule to plurilingual scenarios, not a distinct rule in its own right, which again is implicit in the dictum that, fundamentally, the same principles apply whether the treaty is unilingual or plurilingual.[50]

For unilingual treaties the rule as provided in Article 31 is complete and suffices unless the meaning remains unclear. In principle, because of Article 33(1) in combination with the 'Except where' condition in Article 33(4), the same is true for the quasi-unilingual case of a plurilingual treaty with prevailing text unless the meaning of the prevailing text turns out unclear. Treaties without prevailing text, however, require a supplementation of the general rule to extend it to the scenario of multiple texts, which is provided by Article 33(4) via Article 33(1) and its connection to Article 31(2) by way of the shared reference to the text.

5.4.3. Application of the Permissive Approach

Read like this, paragraphs (1) and (4) of Article 33 together suggest the following approach when a prevailing text exists: Interpret the prevailing text and treat its manifest meaning as authoritative. If the prevailing text is unclear, engage in a reconciliatory comparison of all texts and ensure that the result corresponds to the meaning of the prevailing text. Alternatively, do the latter straight away. In view of the otherwise equal authenticity, the interpreter can rely on the prevailing text and does not have to bother about the others as long as he arrives at a clear meaning. On the other hand, he is not prevented from engaging in a reconciliatory comparison of all texts

[49] 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*, 188–89, paras. 39–43.

[50] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 7. The singular employed by the title of Article 31 is indicative: it makes clear that there is only one combined general rule of interpretation. Article 33(4) merely adapts the rule to multiple texts. As a corollary, the meaning of 'object and purpose' in Articles 31 and 33(4) is the same. The latter only provides for a different application as sole decider, not a teleological expansion, see Chapter 4, s. 4.3.2.

from the start as long as he makes sure the result equals the meaning of the prevailing text.

What precisely has to happen if the interpreter chooses the first option and Article 31 does not lead to a clear meaning of the prevailing text (optionally confirmed under Article 32_1)? Even if the prevailing text happens to be ambiguous or obscure, it cannot be put aside, because being ambiguous or obscure does not revoke its status as an equally authentic and, in case of a divergence, prevailing text.[51] Therefore, the court must have recourse to the other texts to see whether a reconciliatory comparative interpretation leads to a clear meaning of the treaty under Article 31. Such clear meaning may then be confirmed but not contested by supplementary means, as supplementary means may be used to derive the meaning only in case a comparative interpretation of the texts also fails to provide a clear result.[52] In terms of the comparison, the ambiguous or obscure prevailing text may not be left out of the equation but continues to prevail in the sense that the meaning determined with the help of the other texts must fit within the overall scope of meanings covered by the ambiguous or obscure wording of the prevailing text and cannot lie outside.[53]

If the overall result remains ambiguous or obscure, Article 32(a) may be invoked. In practice, this boils down to a reconciliatory comparative interpretation of all texts that may either be viewed as such or, alternatively, as a clarification of the prevailing text with the help of the other texts. It is clear in this context that invoking Article 32(a) before considering the other texts as context would upset the fundamental principle of different weights to be attributed to authentic and supplementary means. Such course of action would erroneously attempt to derive the treaty meaning from supplementary means before all authentic means to be considered in order to establish the ordinary meaning have been exhausted, confusing an ambiguity in one text for a fundamental ambiguity of the treaty.

Conceptually, the same does not apply to the extent the prevailing text

[51] UN, *Vienna Convention on the Law of Treaties*, Article 10 in combination with Article 33(1).

[52] See Chapter 4, s. 4.4.2.

[53] See ILC, *Documents of the Sixteenth Session Including the Report of the Commission to the General Assembly*, II:65, paras. 9–10.

turns out to be manifestly absurd or unreasonable, as then such suggestion would be self-contradictory: one cannot declare the absurd and unreasonable as a standard for the sensible and reasonable. In such case the interpreter must heal the absurdity or unreasonableness of the prevailing text with the help of the others and supplementary means, as otherwise he is left with the impasse that there is an obvious divergence that forces him to apply the prevailing text.[54] The prevailing text may not be discarded because its status as authentic and prevailing text granted by Article 10 VCLT and the treaty final clause is not revoked by the mere fact of its interpretation leading to an absurd or unreasonable result. Here the prevailing text has an unequivocal, albeit manifestly absurd or unreasonable, meaning. Unlike the first scenario, which could be viewed as a reconciliatory comparative interpretation of all texts for which all meanings attributable to the ambiguous or obscure prevailing text provided the scope, this case requires that the defects of the unequivocal meaning of the prevailing text are healed with recourse to the other texts and supplementary means; however, the distinction is merely conceptual – an outside observer of the process will not notice any difference.[55]

Let us briefly return to the *New Skies* case introduced in the previous chapter. There it was discussed as if all texts had been equally authoritative, however, the Netherlands-India (1988) tax treaty declares the English text as prevailing.[56] Hence, we may use *New Skies* as a case study to test the approach submitted here. The court relied solely on the prevailing English text, which would be permitted as long as its meaning is clear. As argued

[54]Once more it must be asked how the meaning of a single text can possibly turn out absurd or unreasonable under Article 31 if teleological reasoning is to be excluded. As argued in the previous chapter, such cases must be assumed to be restricted to obvious drafting errors rendering the text inconsistent.

[55]In view of the analysis presented in the previous chapter, it is submitted that Article 33(4) should be applied before Article 32(a) or (b) are invoked. Since interpretation of the prevailing text fails to establish a clear meaning, the reconciliatory comparative interpretation of all texts must include consideration of the object and purpose as sole decider before resorting to supplementary means. In both scenarios the outcome is to be supplanted into the prevailing text as constitutive treaty meaning.

[56]The fact that the final clause declares the English text as prevailing only in case the Dutch and Hindi texts diverge shall be ignored for the moment. This particular type of wording will be subject of in-depth considerations in Chapter 8, s. 8.3.3.

in the previous chapter, the meaning of 'secret formula or process' is clear: the adjective 'secret' applies to both nouns 'formula' and 'process' enumerated before the comma as a matter of standard phrasing. The conjured up ambiguity is to a large extent not an inherent property of the text but the result of the court referring to domestic law.

The case nicely exemplifies that the prevailing text does not need to be unequivocal to be relied on, but that it is enough for it to have a manifest meaning. Notwithstanding, what matters is that the court considered the text ambiguous. We can see that the approach proposed here works well as a corrective in such case. As next step the court should have consulted the other texts, which would have instantly resolved the problem via the Dutch one. Instead it continued to disregard them in favour of going to the bottom of domestic law, considerations of general context in terms of double taxation, balancing taxing rights between contracting states, India's position on the OECD Commentary, and so forth.

In the end the court arrived at the right conclusion, but the case still illustrates how relying on a single text while interpreting the meaning of terms not defined in the treaty via domestic law can go wrong even when applied to the prevailing text. The VCLT context includes grammar and phrasing, that is, how things are expressed in all texts. One must distinguish in this respect between single terms and entire phrases: 'any secret formula or process' is not a term but an entire phrase that makes a particular sense in the way it is used in English. If one considers the phrase ambiguous, one must conduct a comparison with all other texts even under the approach submitted here. Looking immediately to domestic law may go wrong, imposing a domestic law meaning on the actually intended treaty meaning: if the judge would draw the erroneous conclusion that the phrase is no longer ambiguous but clarified simply by recourse to the domestic law meaning, the result is a misapplication of the treaty.

Hence, we have to attach a big warning sign to the approach of sole reliance on the prevailing text submitted here, because this is a mistake easy to make in the case of tax treaties. When interpreting a tax treaty, we must not lose sight of most of its terms being intended first and foremost as general abstractions subject to an interpretation in light of the two contexts under Article 3(2) and Article 31 even if the treaty uses terminology identical to domestic law. If one considers the meaning of the prevailing text ambiguous (whether or not such judgement is justified in the eye of the observer), one must have recourse to the other texts as part of the VCLT context before or at least while going to domestic law to first establish the actual treaty term to be defined beyond doubt. Otherwise, one may erroneously transgress the intended treaty meaning by imposing domestic law.

5.4.4. Evaluation of the Restrictive Approach

The proponents of the restrictive approach promote a less broad meaning of the term divergence,[57] limited to cases of material differences in meaning, that is, differences not reconcilable by a comparison of all texts under Articles 31 and 32. Their interpretation is based on a different reading of Article 33(4), essentially conceiving it to distinguish only between two not three situations: cases where differences in meaning either can or cannot be reconciled by a comparison of texts under application of Articles 31 and 32.[58] Hence their suggested approach in case of a divergence differs from the one proposed here. It may be summarised as follows: Disregard any prevailing text status and conduct a reconciliatory comparison of all texts.[59] In the course of this, establish whether the divergence is only *prima facie* or material. If the latter is the case, adopt 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty'. Alternatively, adopt the meaning of an existing prevailing text.

Although at first sight such reading seems possible, it is inconclusive. It reads Article 33(4) as if the 'Except where' condition were placed at the end of the provision after 'shall be adopted', which could suggest treating the meaning of the prevailing text as a mere alternative to be used over the method proposed in paragraph (4) for cases without prevailing texts. But,

[57] See, e.g., Arginelli, *The Interpretation of Multilingual Tax Treaties*, 333–38; Engelen, *Interpretation of Tax Treaties under International Law*, 394.

[58] Since most of them fail to properly distinguish explicitly between the two different functions of Article 32, they end up promoting recourse to supplementary means over Article 33(4) to resolve divergences.

[59] Some authors seem to imply that it is sufficient to only compare the divergent texts in the official languages of the contracting states. This view will be discussed in more detail in Chapter 6, s. 6.4.

the condition is placed at the beginning, which suggests that what follows only regulates what is supposed to happen when there is no prevailing text.

Moreover, the prevailing text is referenced in paragraph (1) already, establishing its general prevalence over the other texts whenever there is a divergence, and neither paragraph (1) nor (4) expressly delimit 'divergence' to exclude any particular types. The substantive interpretation rule in paragraph (4) is intended and needed only for cases when no prevailing text exists. If the intention were different, that is, if the prevailing text were to be invoked only as a prevailing alternative to the specific *modus operandi* provided by paragraph (4) for cases without prevailing text when differences in meaning cannot be resolved by the application of Articles 31 and 32_1, then the reference to a prevailing text should equally have been confined to paragraph (4) and not extend to the main clause in paragraph (1). Since the intention behind agreeing on one text as prevailing is to establish a fundamental comparative order of authority between the texts as stated by Waldock,[60] the prevailing text may not be viewed as a mere alternative to the particular interpretative *modus operandi* of Article 33(4), to be applied only after it has been established that this *modus operandi* would indeed have to be applied if there were no prevailing text.

As regards the general object and purpose of Article 33, such must be considered to consist in aiding the 'Interpretation of treaties authenticated in two or more languages', as is provided by its heading. Generally, any rule of interpretation must be considered to be intended to facilitate and not hinder interpretation of a treaty,[61] which must itself be considered to be intended to provide legal certainty not uncertainty. As a corollary, the introduction of a prevailing text must be considered to be intended to foster interpretation and legal certainty, not to encumber it. Although both the broad and the narrow understanding of the term 'divergence' are in line with this object and purpose, the broad understanding suggested here eases interpretation to a greater extent by allowing exclusive reliance on the prevailing text in any case (as long as it is clear), without going through the more complex comparative interpretation of all texts in order to establish a

[60] See ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964*, I:319, para. 60.
[61] The Oxford Dictionary defines interpretation as 'The action of explaining the meaning of something.'

case of material divergence first.[62]

It seems rather obvious that the intention behind a prevailing text must be to avoid having to grind through a comparative interpretation of all texts, and not to use it only once that grind proves unfruitful. One must not forget in this context that the 'different genius of languages'[63] will require more than literal word-for-word translations of expressions.[64] A proper translation must accurately reflect the complete sense of the translated,[65] which may demand an extensive linguistic effort.[66] For this reason, different language versions of a text will often differ in phrasing and expression precisely out of the need to convey the same meaning, that is, *prima facie* differences between texts will be common, which has been recognised by the drafters of the VCLT.[67] Hence, even if one would not subscribe to the argument that a comparison of all texts is obligatory for any serious effort to interpret a treaty in good faith in the absence of a prevailing text, it is clear

[62]Clearly, the proponents of the restrictive approach prescribe a narrower interpretation than intended by the drafters of the VCLT, who remained agnostic about the matter, see ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4.

[63]Ibid., II:225, para. 6.

[64]Such may even be impossible because of the lack of equivalent terms. The DARS serve as an example. The French text of Article 1 reads '*Tout fait internationalement illicite de l'État engage sa responsabilité internationale*' while the English text reads 'Every internationally wrongful act of a State entails the international responsibility of that State.' The French terminology *fait internationalement illicite* was chosen for two reasons: to avoid any terminology that had a special meaning under internal law, and to remain unequivocal about encompassing wrongfulness resulting from omissions by using *fait* instead of *acte*. For the same reason the Spanish text uses the expression *hecho internacionalmente ilícito*. Since there is no exact equivalent for the French *fait* in English, the English text resorts to 'act', which is however intended to also encompass omissions. This is obvious from the text of the DARS, as Article 2 reads 'There is an internationally wrongful act of a State when conduct consisting of an action or omission'. In the absence of such obvious context, however, an interpretation of the English text alone could lead to the conclusion that omissions are excluded from the scope, see ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 34, para. 8; 35, para. 4.

[65]The Oxford Dictionary defines translate as to 'Express the sense of (words or text) in another language.'

[66]See Cao, *Translating Law*, Chs. 2, 4 and 7; *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, paras. 8.4–8.9.

[67]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 6.

that the potential need for such comparison may be rather large in practice. What would be the purpose then of having a prevailing text if not to assist the judge in his difficult task and relieve him as much as possible from the burden of a reconciliatory comparative interpretation? It seems an odd suggestion in the presence of a prevailing text that the judge should still be required to first compare all texts in order to find out whether he ought to rely on the prevailing one, because that would be tantamount to saying the judge must conduct a reconciliatory comparative interpretation in order to establish whether such was necessary in the first place. To borrow Bertrand Russell's words, the restrictive approach 'is one of those views which are so absurd that only very learned men could possibly adopt them.'[68]

5.4.5. Comparison of All VCLT Texts

The VCLT has English, French, Chinese, Russian, and Spanish texts, none of which is designated as prevailing.[69] Hence, all texts have to be compared to ensure correct interpretation.[70] As discussed and explicitly transcribed by the Russian text, the VCLT intends 'divergence' to mean 'divergence between texts'. Although there are some additional differences between the VCLT texts, none of them are material in terms of the interpretation submitted here. The crucial syntax of Article 33(4) with the 'Except where' condition at the beginning, which supports the interpretation that what follows only applies to situations when no prevailing text exists, is the same for all.

Besides the addition 'between these texts', the Russian text shows no significant deviations from the English one. The Russian expressions for 'divergence' and 'prevailing' are equivalent, and the wordings of paragraphs (2) and (3) also correspond to their English counterparts. The same goes for the Chinese text: the translation is complete and accurate, and the expressions

[68] Bertrand Russell, *My Philosophical Development*, 1st ed. (New York: Simon and Schuster, 1959), 148.

[69] UN, *Vienna Convention on the Law of Treaties*, Article 85.

[70] The comparison in this subsection has been conducted with the kind help of Ksenia Levushkina, Roberto Bernales, Ridha Hamzaoui, Antoine Reillac, and Tian Xu, all native speakers in the respective languages of the other texts as well as experts in the field of international tax law.

for the English 'divergence' and 'prevailing' are equivalent. Some minor syntactic differences attributable to linguistic customs exist in paragraph (2), but the crucial syntax of paragraph (4) remains the same.

The French text shows a slight difference in paragraph (1): '*son texte fait foi dans chacune de ces langues*' literally translates to 'the text is authoritative in each language', that is, the word 'equally' is not transcribed.[71] But, this does not change the overall meaning of the paragraph: if each language text is authoritative and none is specified as either more or less authoritative, then all are equally authoritative, that is, the additional 'equally' in the English text is merely pleonastic. Apart from that, the same terminology of *divergence* and *différence* is employed, while *l'emporter* is to be translated with 'to prevail'. Some dictionaries translate it with 'to win' or 'to have the upper hand', which does not differ in substance.

Regarding the Spanish text, the use of *discrepancia* instead of 'divergence' is curious. According to the Oxford Dictionary, the English equivalent 'discrepancy' would imply an 'illogical or surprising lack of compatibility or similarity between two or more facts', which inspires an interpretation in terms of a contradiction, that is, necessarily a material divergence. But, according to the Dictionary of the Royal Academy of the Spanish Language, which has the authority to establish the definition of concepts in Spanish, *discrepancia* merely implies diversity or disagreement, not necessarily a contradiction. Therefore, not only material divergences are implied. As for the other terminology, *prevalecer* translates to 'to prevail' and *hará fe*, although not a literal translation for 'authoritative', implies the same understanding.

5.4.6. Recourse to the VCLT Commentary

The VCLT Commentary may be consulted to confirm but not contest the interpretation submitted. There are several paragraphs in the Commentary that directly refer to situations of divergence.[72] Paragraph 3 on page 224 speaks of 'divergence between texts', which in the absence of any explicit delimitation may imply differences both in expression and meaning because

[71] The English text reads 'the text is *equally* authoritative in each language' (emphasis added).

[72] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224–25, paras. 3–4, 6–8.

the ordinary meaning of the word 'text' encompasses both its wording and meaning, same as the word 'treaty' (the word 'text' stands for) encompasses both the expressed intentions of the contracting parties as well as the expressions expressing them.

Paragraph 4 on page 224 seems to contrast differences in expression to differences in meaning and raises the question of where to draw the line for an 'actual divergence' to exist. Arginelli suggests that the paragraph clearly distinguishes between differences in wording and meaning, providing the context for his contention that only a material difference in meaning qualifies as a divergence.[73] But, it is not entirely clear from the paragraph whether 'actual divergence' refers to a material divergence in meaning or a mere divergence in expression or both, as it deals with a case in which the tribunal has applied the prevailing text without even investigating the potential occurrence of any divergence. Hence, the paragraph could be read to merely differentiate differences in expression that require more thought than cases of 'slightest difference' from those that do not pose real problems, without implying material differences in meaning. As the case may be, although it states that the VCLT rules do not stipulate any obligation to go immediately to the prevailing text upon the slightest difference in wording, it does not rule out the option to do so either.

The wording 'appear to diverge' of paragraph 6 on page 225 first and foremost refers to merely apparent differences of expression, but the terminology gets extended to a 'discrepancy between the texts' and 'discrepancies in the meaning of the texts'. Especially the latter seems to extend the scope to material differences in meaning; however, the overall wording ('result in minor or even major discrepancies') makes clear that it refers to a continuum ranging from the slightest difference in expression to a material difference in meaning, focussing on the first. In order to make the paragraph apply only to material differences in meaning, we would need to add something to the wording to limit its scope, for example, 'Few plurilingual treaties containing more than one or two articles are without some discrepancy between *the meanings of* the texts' (emphasised text added). This would suggest that the principle of unity is broken regularly; however, without doubt, the intention behind the entire paragraph is to primarily

[73] See Arginelli, *The Interpretation of Multilingual Tax Treaties*, 336.

address differences in expression that imply differences in meaning resolvable via interpretative means, with material differences in meaning being the absolute exception.

Paragraph 7 on page 225 is peculiar versus the others. It may be read to employ the expression 'difference between the texts' as referring to material differences in meaning not resolvable by the comparative application of Articles 31 and 32, contrasting it to mere differences in expression; however, it does not draw any conclusions as to whether only one or the other or both are cases of divergence, because it is not so much concerned with how to define a divergence but where to locate the reasons for it: in the ambiguity of one text or a divergence between the texts. Moreover, it does not concern itself with prevailing texts but deals exclusively with scenarios of equal authority. Concerning these it concludes that 'every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation' before 'preferring one text to another'.

Paragraph 8 on page 225 only talks about differences in expression, not meaning. Indeed, it may not be too sensible to speak of differences in meaning in the first place. The distinction between *prima facie* and material divergences is artificial: obviously, any divergence is at first merely *prima facie* before a full interpretative comparison has been conducted, apart from the most obvious cases of outright contradictions. To distinguish between *prima facie* and material divergences before such comparison and suggest a different treatment based on such distinction concerning whether a comparison is to be conducted is based on circular reasoning and therefore nonsensical.

Based on the principle of unity, the meaning ought to be presumed to be the same even if expressions diverge unless a difference persists. If the latter happens, the treaty may be defective if there is no prevailing text and the situation cannot be resolved by application of the interpretative rule in Article 33(4). Hence, the principal understanding of divergence must be one of merely apparent differences that can be reconciled in the course of an interpretative comparison including recourse to the object and purpose as sole decider, because the true intention of the parties can be identified and, therefore, a choice between the texts can be made.[74] Divergences that cannot be resolved in this way must be considered to lie outside the scope of the VCLT for cases without prevailing text unless one agrees with the reasoning brought forward in the previous chapter that they constitute absurd or unreasonable results subject to a further application of Article 32(b) before the treaty must be considered defective.

In summary, the VCLT Commentary employs varied terminology to discuss a continuum of situations from mere differences in expression to material differences in meaning, contemplated in various contexts from equal authority to cases with prevailing text. Nowhere does it contain any explicit or implicit suggestion that the notion of divergence should be restricted to mean only material differences in meaning and courts should rely on the prevailing text only after having engaged in a reconciliatory comparison without success. At best, the VCLT Commentary remains indecisive about the matter: it issues no recommendation but leaves it up to the contracting parties,[75] that is, neither reconciliatory comparative interpretation of all texts nor sole reliance on the prevailing one are ruled out in principle. This confirms the interpretation submitted here.

5.5. Limitations of the Permissive Approach

The permissive approach is subject to three limitations. First, if the meaning of the prevailing text remains unclear, recourse to the other texts and supplementary means must be had to establish the treaty meaning. Second, the reasoning presented assumed a final clause modelled on Article 33(1), that is, a final clause declaring several texts as authentic and, in addition, one of them as prevailing in case of divergence; however, Article 33(1) is not intended to constitute a peremptory norm, but the intentions of the contracting parties take precedence. Third, the analysis and conclusions presented are based on the VCLT. Hence, strictly speaking, the VCLT needs to be implemented by the contracting states for them to apply. The first limitation I have discussed at length above. Concerning practical applicability, actual

[74] See Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 132.

[75] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4.

formulations of individual treaty final clauses will have to be examined to establish whether the permissive approach is covered by them, which will be the topic of Chapter 8. The following briefly considers applicability of the VCLT concerning actual treaty relationships.

The VCLT was adopted on 22 May 1969, opened for signature on 23 May 1969, and entered into force on 27 January 1980. To date, 116 states have implemented it by way of accession, succession, or ratification, and 15 states have signed but not implemented it (a complete list is provided in Appendix A.2). The VCLT itself stipulates non-retroactivity of its rules:

> Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.
>
> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[76]

Notwithstanding, most states and their courts subscribe to the view that the VCLT rules of interpretation stipulate what is valid customary international law,[77] for example, Australia, Germany, and the UK.[78] To a certain extent, this view is shared by states not being signatories, for example, France and India.[79] The situation in the US seems to be ambivalent, caught up in

[76] UN, *Vienna Convention on the Law of Treaties*, Articles 4 and 28.

[77] See Vogel and Prokisch, 'Interpretation of Double Taxation Conventions', 66–67; Richard Crawford Pugh, Oscar Schachter, and Hans Smit, *International Law: Cases and Materials*, ed. Louis Henkin, 3rd edition (St. Paul, Minn: West Group, 1993), 416; Avery Jones, 'Treaty Interpretation', s. 3.1.

[78] See Bjorge, '"Contractual" And "Statutory" Treaty Interpretation in Domestic Courts? Convergence Around the Vienna Rules', 64; Alexander Rust, 'Germany', in *Courts and Tax Treaty Law* (Amsterdam: IBFD, 2007), s. 11.2.1; *Thiel v Federal Commissioner of Taxation*, 356; FG Köln, 'II K 223/85' (EFG 1987, December 1986); *Czech Republic v European Media Ventures SA*, [2007] EWHC 2851 (Comm), 15.

[79] See Martin, 'Courts and Tax Treaties in Civil Law Countries', s. 4.3.2.2; Kanwar, 'Treaty Interpretation in Indian Courts', passim; *Ram Jethmalani v Union of India*, para. 60, states that 'While India is not a party to the Vienna Convention, it contains many prin-

a historical struggle between internationalist and nationalist paradigms.[80] Many lower federal and state courts regularly appeal to the VCLT rules of interpretation as binding rules of customary international law,[81] but the US Supreme Court hardly ever refers to them.[82] Several of its decisions stretch the VCLT textual approach in favour of making liberal use of extraneous materials,[83] its decision in *O'Connor* is based on unilateral material not part of the official *travaux préparatoires*,[84] and in *Alvarez-Machain* it arguably decided the case in violation of Article 31(3)c.[85]

The ICJ has repeatedly recognised 'The existence of identical rules in international treaty law and customary law'.[86] It is settled case law of the

ciples of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.'

[80] See Evan J. Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation', *Virginia Journal of International Law* 44, no. 2 (2004): 431–500, passim. The US Department of State positions itself as follows: 'Is the United States a party to the Vienna Convention on the Law of Treaties? No. The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.' (http://www.state.gov/s/l/treaty/faqs/70139.htm).

[81] See, e.g., *Fujitsu Ltd. v Federal Exp. Corp.*, 247 F.3d 423 (2d Cir. 2001), 433.

[82] See Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation', 433–34.

[83] See, e.g., *Air France v Sacks*, 470 U.S. 392 (1985), 396; *Volkswagenwerk Aktiengesellschaft v Schlunk*, 486 U.S. 694 (1988), 700; *Eastern Airlines, Inc., Petitioner v Rose Marie Floyd, et vir., et al.*, 499 U.S. 530 (1991), 535; *Itel Containers Int'l Corp. v Huddleston*, 507 U.S. 60 (1993), 84.

[84] See *O'Connor v United States*, 479 U.S. 27 (1986), 31; Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation', 453.

[85] See *United States v Alvarez-Machain*, 504 U.S. 655 (1992), 668–69, para. 15; Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation', 433; Michael Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?', 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), 21.

[86] *Nicaragua v United States of America – Military and Paramilitary Activities in and Against Nicaragua*, ICJ (Annual Reports of the International Court of Justice, 1986), 95, para. 177; see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ (Annual Reports of the International Court of

ICJ to apply the VCLT to cases in which one or even both parties have not implemented it, on grounds that the VCLT articles reflect customary international law.[87] The same rationale has been applied, for example, by the High Court of Australia concerning the tax treaty between Australia and Switzerland:

> Those rules [of interpretation recognised by international lawyers] have now been codified by the Vienna Convention on the Law of Treaties to which Australia, but not Switzerland, is a party. Nevertheless, because the interpretation provisions of the Vienna Convention reflect the customary rules for the interpretation of treaties, it is proper to have regard to the terms of the Convention in interpreting the Agreement, even though Switzerland is not a party to that Convention.[88]

With extensive reference to case law of the ICJ, the ITLOS, the WTO Appellate Body, the ECHR, the Inter-American Court of Human Rights, the ECJ, and the ICSID, the ILC has confirmed that Articles 31–32 'apply as customary international law'.[89] Although it found 'significant indications in the case law that article 33, in its entirety, indeed reflects customary international law', the ILC did not pass a final verdict but left the issue open to be addressed in the future because some courts to date have dealt only with parts of Article 33 in terms of reflecting customary international law, whereas others have explicitly stated that it reflects customary international law as a whole.[90] For example, despite the stipulated non-retroactivity, the ECHR has applied the VCLT principles of interpretation even before the convention's entry into force, based on the recognition that 'its Articles 31

Justice, 1969), 38–39, para. 63; *Avena and other Mexican Nationals (Mexico v USA)*, ICJ (Annual Reports of the International Court of Justice, 2004), 48. para. 83.

[87] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 19–22, para. 41; *Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal)*, ICJ (Annual Reports of the International Court of Justice, 1991), 69–70, para. 48; *LaGrand (Germany v United States of America)*, 501–2, paras. 99, 101; *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ (Annual Reports of the International Court of Justice, 1999), 1059, para. 18, 1075, para. 48; *Sovereignty over Pulau Litigan and Pulau Sipidan (Indonesia v Malaysia)*, ICJ (Annual Reports of the International Court of Justice, 2002), 645, para. 37.

[88] *Thiel v Federal Commissioner of Taxation*, 356.

[89] ILC, 'Report of the International Law Commission on the Sixty-fifth Session, 6 May – 7 June and 8 July – 9 August 2013', 13, Conclusion 1(5), and 14–15, para. 4.

[90] See ibid., 15–16, paras. 5–6.

to 33 enunciate in essence generally accepted principles of international law, to which the Court has already referred on occasion.'[91]

The VCLT itself does not intend its stipulation of non-retroactivity to constitute a peremptory norm but considers the intentions of the parties decisive,[92] as is explicitly stated by Article 28 VCLT; however, adoption of the VCLT by itself may not necessarily be taken to count as having 'otherwise established' such intention, as domestic constitutional law may preclude such assumption. For example, while stressing that the VCLT rules of interpretation did not preclude its own view in the particular case decided, the German BFH expressed a strict position concerning the VCLT's non-retroactivity, attributable to the relationship between international and constitutional law under the German legal system:

> It is true that since the entry into force of the Assent Act of 3 August 1985 …the VCLT has been directly applicable national law. But, Article 4 thereof only applies to contracts concluded after the entry into force of the Convention, and the tax treaty with Italy was concluded on October 31, 1925, long before the VCLT came into force. Therefore, the VCLT cannot apply to the wages paid by X to the applicant for the period from 1 January 1980 to 31 December 1982. …International customary law cannot invalidate Article 59(2) sentence 1 GG, according to which the content of an international treaty relating to subjects of federal legislation becomes part of the domestic legal system only on the basis of a statute passing consent. According to Article 25 GG, customary international law can only be part of the national legal system insofar as it does not contradict constitutional law. …A rule of interpretation of international law relating to an international treaty can by no means change domestic law without a formal statute of approval pursuant to Art. 59(2) sentence 1 GG.[93]

In summary, as regards the reach of the VCLT, the limitation to the applicability of the permissive approach is not strictly demarcated. If indeed to be considered customary international law, Article 33 should be regarded as

[91] *Golder v United Kingdom*, European Court of Human Rights (Application no. 4451/70, 1975), 10, para. 29.

[92] See Sinclair, *The Vienna Convention on the Law of Treaties*, 85.

[93] BFH, 'I R 74/86' (BStBl. 1990 II, February 1989), Entscheidungsgründe; see also BFH, 'I R 20/87' (BStBl. 1989 II, March 1989), s. II, para. 3.

applicable without restriction;[94] however, domestic legal systematics may interfere. A deeper analysis of this point apart from the few general observations presented here lies outside the scope of this study; the interested reader is referred to the cited sources as a suitable point of departure.

[94]See Vogel and Prokisch, 'Interpretation of Double Taxation Conventions', 66–67; Klaus Vogel, 'Double Tax Treaties and Their Interpretation', *International Tax & Business Lawyer* 4, no. 1 (1986): 15; Engelen, *Interpretation of Tax Treaties under International Law*, 48–57; Tanja Bender and Frank Engelen, 'The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties', in *A Tax Globalist: Essays in Honour of Maarten J. Ellis*, ed. H. P. A. M. van Arendonk, F. A. Engelen and Sjaak Jansen (Amsterdam: IBFD, 2005), 3; Sinclair in Avery Jones, 'Interpretation of Tax Treaties', 75–76.