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

Resch, R.X.

8. Applicability of the Permissive Approach

8.1. Research Question

The previous chapters raise the question to what extent the complexities of plurilingual interpretation can be avoided with respect to actual tax treaties. This question may be subdivided into the following three research questions: First, how many tax treaties avoid the problem altogether by being unilingual? Second, how many plurilingual tax treaties provide for a prevailing text the final clause of which allows for sole reliance on it? Third, how many plurilingual tax treaties do not provide for a prevailing text or provide for one but the final clause does not allow for sole reliance on it? In addition to answering these questions, this chapter begins to contemplate how policies of individual countries affect the global landscape, and what general policy recommendations may be deduced from these observations.[1]

[1]Policy choices of individual countries as well as cooperative global policy choices or even mere emerging patterns are subject to a complex mix of national and international political and historical factors that are hard to discern in terms of their influence on observable outcomes. Quantifiable patterns in the treaty network of an individual country provide some clues concerning the underlying policy choices; however, the global tax treaty network is made up of bilateral relationships in which the policies of the treaty partners affect each other. The result depends on a mix of political goals, historical influences, asymmetric bargaining power, economic trade-offs, and reciprocal concessions. The line between what may serve as a clear indication for a certain policy and what is mere speculation is blurry and sometimes hard to draw. A comprehensive analysis considering all relevant factors in individual cases lies well beyond the scope and means of this study, which will for the most part limit itself to presenting the clues given by the investigated data.

8.2. Use of Prevailing Texts

8.2.1. Global Analysis

When we look at the entire sample, we find that roughly one-quarter of all treaties is unilingual while three-quarters are plurilingual; however, almost 60% of the plurilingual ones have a prevailing text.[2] Hence, only roughly 30% of all treaties are plurilingual treaties without prevailing text,[3] while 70% are either unilingual or have a prevailing text.

Table (8.1): All Treaties

Treaties	No.	w PT	w/o PT	%global	w PT %PL	w/o PT %PL
global	3844					
UL	967			25.16%		
PL	2877	1700	1170	74.84%	59.09%	40.67%

Regarding the number of authentic languages employed by the 2,877 plurilingual treaties, we find the following: roughly 40% have two texts, only about 15% of which designate one as prevailing; roughly 57% have three texts, about 88% of which designate one as prevailing; only about 3% have four texts, about 94% of which designate one as a prevailing; and less than 1% have five texts, all of which designate one as prevailing. Thus, the standard scenario for plurilingual tax treaties is either two or three texts. Instances with more than three texts are few, and no tax treaty has more than five texts. Whereas the vast majority of bilingual treaties has no prevailing text, the relation is almost exactly reverse for trilingual treaties, most

[2] Three Tunisian treaties in force provide for two prevailing texts instead of one: Pakistan (1996), Malta (2000), and Iran (2001) all have both English and French prevailing texts; the first two have three authentic texts (English, French, Arabic) while the latter has four (English, French, Arabic, Persian). These treaties will be commented on in more detail below; for the purpose of the figures presented in this section they are not separately accounted for but lumped together with treaties featuring one prevailing text.

[3] Henceforth, whenever the addition 'plurilingual' is superfluous because of the context, it is omitted in order to condense the text. The phrase 'treaties without prevailing text' always implies plurilingual treaties only; unilingual treaties will be mentioned separately when referred to.

of which feature a prevailing text. Moreover, almost all treaties with more than three texts feature a prevailing text. From this we may conclude that the main function of additional language texts is to provide for a prevailing text, and the problem of additional interpretational complexity is mostly confined to bilingual treaties.

Table (8.2): Number of Authentic Languages (All Plurilingual Treaties)

AL	No.	w PT	w/o PT	%global	w PT %AL	w/o PT %AL
2	1138	169	966	39.56%	14.85%	84.89%
3	1628	1426	198	56.59%	87.59%	12.16%
4	94	88	6	3.27%	93.62%	6.38%
5	17	17	0	0.59%	100.00%	0.00%

When we subtract all terminated treaties from the sample, 3,358 treaties in force or yet to come into force remain. The proportions of unilingual and plurilingual treaties relative to all treaties hardly change, whereas the proportion of treaties with prevailing text as percentage of all plurilingual treaties increases by almost 5%. This is attributable to two factors: (1) a decreased proportion of bilingual treaties versus an increased proportion of trilingual ones, and (2) increases in both the proportions of bilingual and trilingual treaties with prevailing text.

Table (8.3): Global Tax Treaty Network

Treaties	No.	w PT	w/o PT	%total	w PT %PL	w/o PT %PL
Total	3358					
UL	847			25.22%		
PL	2511	1622	882	74.78%	64.60%	35.13%

Hence, we may conclude that the policy to implement a prevailing text has become more popular over the decades. In total, almost three-quarters of all treaties in force or yet to come into force are either unilingual or have a prevailing text, that is, the problem of additional interpretational complexity attributable to plurilingual form is confined to roughly one-quarter of today's global tax treaty network.

Table (8.4): Number of Authentic Languages (Global Tax Treaty Network)

AL	No.	w PT	w/o PT	%total	w PT %AL	w/o PT %AL
2	905	168	734	36.04%	18.56%	81.10%
3	1496	1349	143	59.58%	90.17%	9.56%
4	93	88	5	3.70%	94.62%	5.38%
5	17	17	0	0.68%	100.00%	0.00%

The numbers for terminated treaties reveal that between January 1960 and August 2016 a total of 486 treaties have been terminated, roughly one-quarter of which has been unilingual and three-quarters plurilingual. This corresponds to the overall averages, that is, nothing has changed in terms of the relative potential to conclude unilingual treaties. Out of the terminated plurilingual ones, however, only roughly one in five had a prevailing text.

Table (8.5): Terminated Treaties

Treaties	No.	w PL	w/o PL	%total	w PT %PL	w/o PT %PL
Total	486					
UL	120			24.69%		
PL	366	78	288	75.31%	21.31%	78.69%

Almost 85% of all terminated treaties have been replaced by new treaties of the same type between the same countries. Out of the not replaced plurilingual treaties, only one out of ten had a prevailing text. As regards replaced treaties, roughly 27% have been unilingual and 73% plurilingual. Out of the originally unilingual ones, roughly 46% have been replaced by plurilingual treaties and the rest by unilingual ones. Almost 90% of all originally unilingual treaties replaced by plurilingual ones have been replaced by treaties with prevailing text, whereas out of the originally plurilingual ones, less than 10% have been replaced by unilingual treaties. The vast majority (almost 80%) of plurilingual treaties replaced by unilingual ones had no prevailing text, same as roughly three-quarters of those replaced again by plurilingual ones. Almost half of the treaties originally without prevailing text have been replaced by ones with prevailing text, while only one

treaty with prevailing text has been replaced by one without, which has been replaced by a unilingual treaty in turn.[4]

Table (8.6): Not Replaced Terminated Treaties

Treaties	No.	%total/term/PL
total	72	14.81%
UL	8	11.11%
PL	64	88.89%
PL w/o PT	58	90.63%
PL w PT	6	9.38%

Table (8.7): Terminated and Replaced Treaties

Treaties	No.	%term/total/UL/PL
total	414	85.19%
UL	112	27.05%
UL NC	60	53.57%
UL to PL	52	46.43%
UL to PL w PT	46	88.46%
UL to PL w/o PT	6	11.54%
PL	302	72.95%
PL to UL	29	9.60%
PL w/o PT to UL	23	79.31%
PL w PT to UL	6	20.69%
PL NC	273	90.40%
PL NC w/o PT	207	75.82%
PL NC w PT	66	24.18%
PL w/o PT to w PT	103	49.76%
PL w/o PT NC	104	50.24%
PL w PT to w/o PT	1	1.52%

[4]Belgium-Norway (1967).

8.2.2. Time-Series Analysis

Although the above analysis contains a dynamic perspective with respect to the effects of termination, the overall picture at this point is still fairly static. A time-series analysis is required to evaluate the global development.[5] This shows that from the 1960s throughout the 1990s, the number of tax treaties has more than doubled per decade. The absolute number of treaties concluded per decade remained high in the 2000s, but the high growth rates of the previous decades slowed down: the number of treaties per decade no longer doubled but only equalled the number of the 1990s.

Table (8.8): Treaties per Decade

Decade	PD w term	PD w/o term	CM w term	CM w/o term
1960-69	176	92	176	92
1970-79	345	225	521	317
1980-89	671	413	1192	730
1990-99	995	975	2187	1705
2000-09	1048	1044	3235	2749
2010-16	609	609	3844	3358

As revealed by the data, the major expansion of the global tax treaty network has been taking off as late as the 1990s: roughly 80% of all tax treaties in force today have been concluded since 1990. The 1970s and especially 1980s may be viewed as a first wave of expansion in which most of the initial 20% of today's global tax treaty network has been concluded; therefore, almost all treaties concluded by OECD members, amounting to roughly two-thirds of the entire global tax treaty network, are within the ambit of some version of the OECD Model.[6]

[5] Decades have been chosen as suitable time interval. From now on, all figures exclude terminated treaties unless specified otherwise, in order to represent the global tax treaty network as is.

[6] In total 590 treaties between OECD members and 1,689 treaties between OECD members and non-members, amounting to 17.57% and 50.30% of the global tax treaty network, respectively. Appendix C provides some insight concerning treaties by OECD members concluded before the OECD Models.

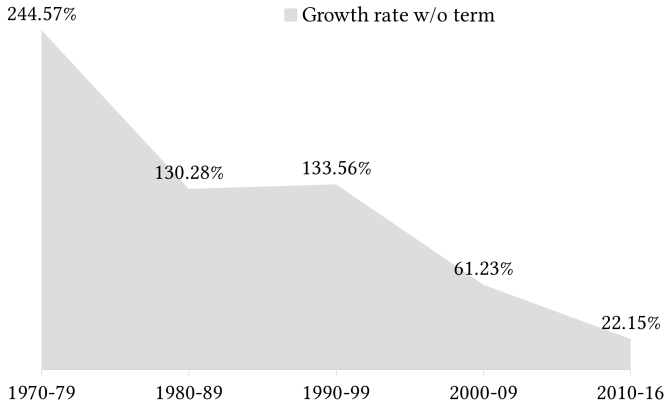

Figure (8.1): Per Decade Treaty Growth Rate

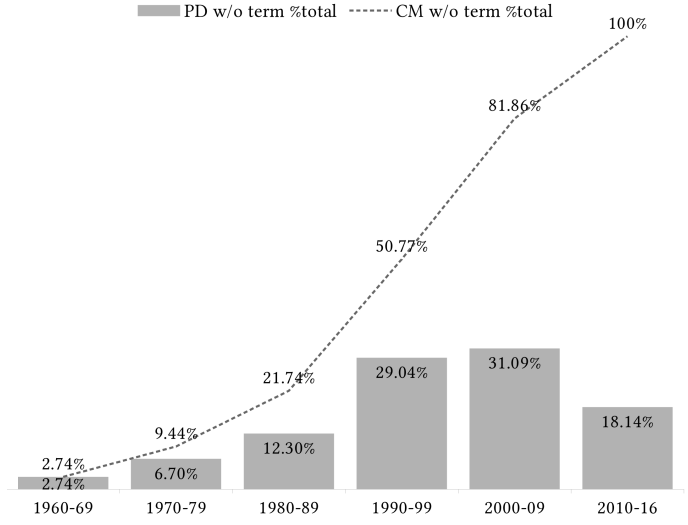

Figure (8.2): Cumulative and per Decade Growth of the Global Tax Treaty Network

Although the number of unilingual treaties has continued to grow in absolute terms throughout the decades, they have been vastly outgrown by plurilingual ones. Treaties before 1960 were mostly unilingual, but the situation reversed as early as 1960, and the gap between unilingual and plurilingual treaties has continued to widen since in favour of the latter. Noteworthy, the gap has increased in leaps along the waves of expansion. During the initial wave the gap widened steadily from 60:40 to 65:35, whereas along the major wave in the 1990s it leaped to roughly 78:22. The gap narrowed during the 2000s and, based on the numbers of 2010 to August 2016, has widened again to roughly 80:20. The cumulative figures suggest that the numbers logarithmically approach a relation of 75:25, whereas the leap in the per decade numbers from 1990 onwards seems to indicate that the potential for unilingual treaties is approaching exhaustion faster than the potential for plurilingual ones, that is, unilingual treaty growth may not continue in the same proportion.

In summary, conclusion of treaties without prevailing text has been a policy choice mainly of the beginning periods of the global tax treaty network. It reached its peak in the 1990s and has declined since: per decade conclusions of treaties without prevailing text exceeded those with for the last time in the 1980s. In the wake of the major expansion of the global tax treaty network during the 1990s, concluding treaties with prevailing text became the predominant policy choice. This is also visible from the predominant choice for treaties without prevailing text to be terminated and the fact that almost all treaties terminated to date have been concluded up to 1990. During the 1990s, per decade conclusions of treaties with prevailing text already exceeded those without by a factor of 2:1, which increased to a factor of 3:1 in the 2000s. In cumulative terms, treaties with prevailing text started to outnumber those without by the 1990s, and their total number doubled to almost twice of the latter in the 2000s.

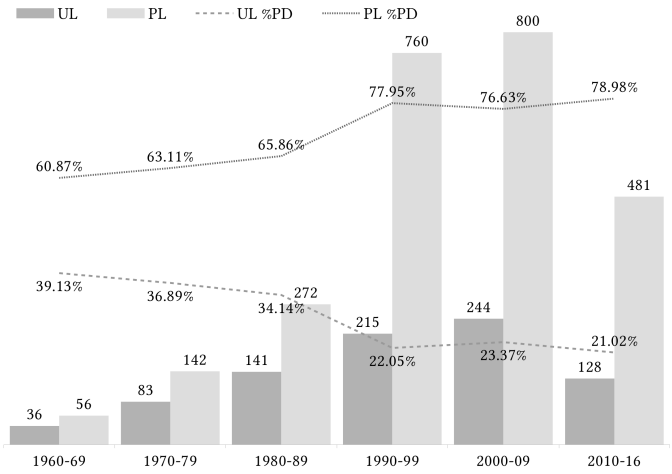

Figure (8.3): Per Decade Growth of Unilingual and Plurilingual Treaties

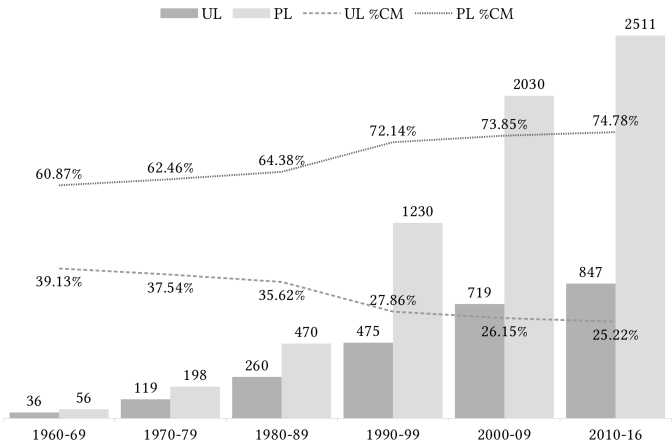

Figure (8.4): Cumulative Growth of Unilingual and Plurilingual Treaties

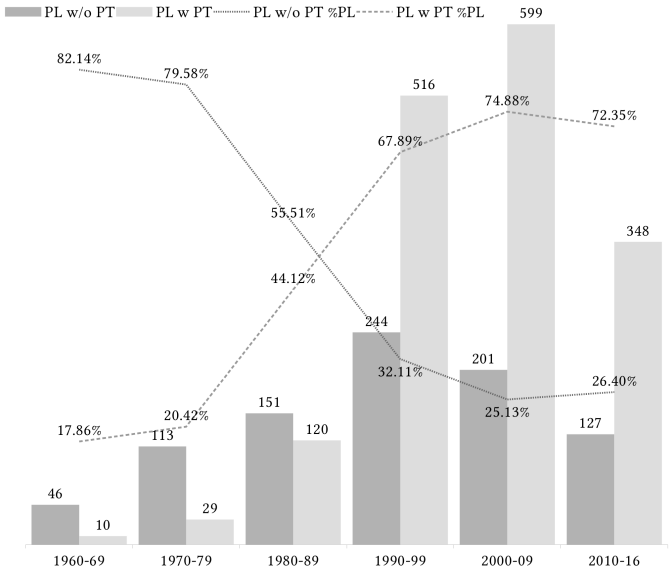

Figure (8.5): Per Decade Growth of Plurilingual Treaties with/without Prevailing Text

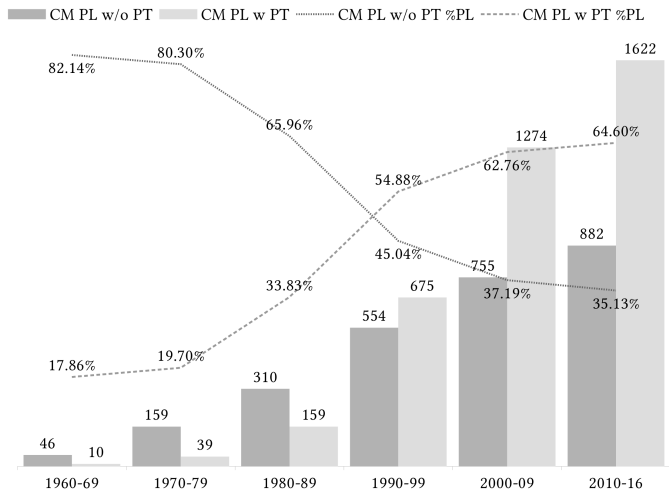

Figure (8.6): Cumulative Growth of Plurilingual Treaties with/without Prevailing Text

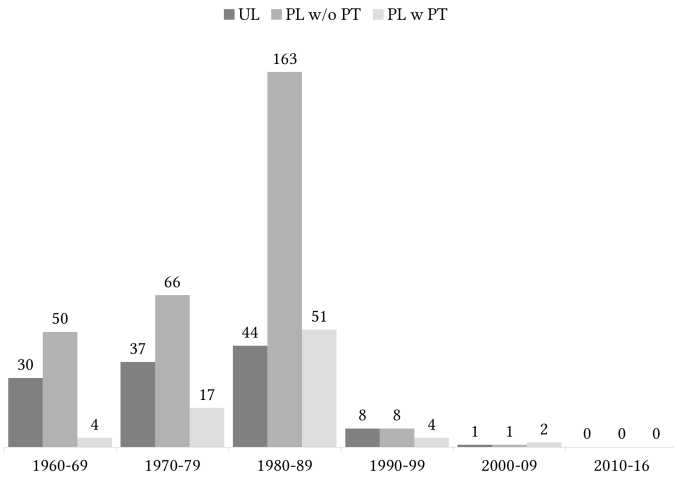

Figure (8.7): Per Decade Terminated Treaties

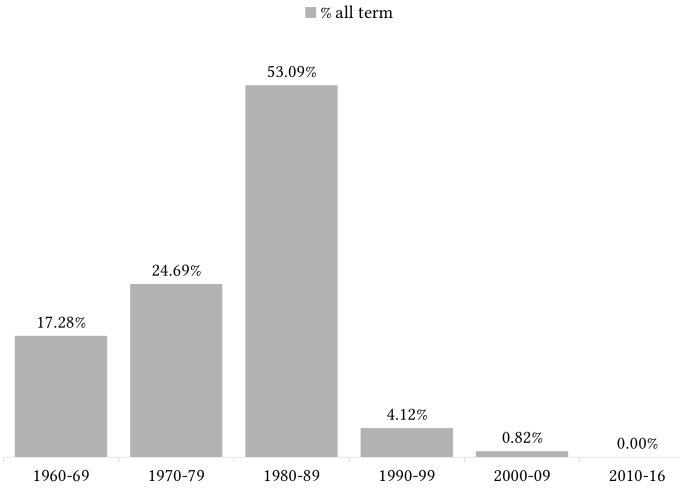

Figure (8.8): Per Decade Terminated Treaties as Percentage of All Terminated Treaties

8.2.3. Group Analysis

The preceding analysis allows us to draw general conclusions concerning global developments; however, not every treaty is of equal importance. In order to arrive at a balanced view, we have to examine the policy of individual countries, regions, and political groupings.[7] Treaties without prevailing text are not evenly spread out, but roughly two-thirds (581) of them are concentrated in the treaty networks of nine countries: France, Canada, the UK, Luxembourg, Germany, the US, Switzerland, Ireland, and South Africa. Almost 85% (748) of them are concentrated in the treaty networks of fourteen countries, that is, the previous nine plus Spain, Italy, Malta, Belgium, and Australia.

Table (8.9): Concentration of Plurilingual Treaties without Prevailing Text

Country	Treaties	UL	PL	PL w/o PT	PL w/o PT %PL
Canada	97	0	97	97	100.00%
France	139	34	105	104	99.05%
United States	77	23	54	53	98.15%
Australia	55	24	31	29	93.55%
United Kingdom	132	43	89	81	91.01%
Luxembourg	85	17	68	60	88.24%
South Africa	86	36	50	40	80.00%
Ireland	78	25	53	42	79.25%
Malta	74	24	50	32	64.00%
Germany	108	5	103	56	54.37%

[7] This section will mainly look at aggregate data for certain groups. In order to gauge the effects of the identified group policies, a count of the number of treaties for each group in total and as a percentage of the global tax treaty network is provided in Appendix D.1. The categorisation into groups featured in this section is only meaningful to a certain extent, and all conclusions drawn have to be taken with a grain of salt. All groups will to some extent remain heterogeneous because they bundle countries with different policies. In order to calibrate the picture developed in this section, each country has to be analysed on its own merits. This will be done within limits in the following section. In this section, policies of individual countries will be referenced only to gauge aggregated group data concerning certain key observations. Missing percentage points after the comma in some groups concerning the numbers of treaties without prevailing text are attributable to a few treaties that implement a different mechanism to treat divergences in form of a MAP. These few treaties are not included here in the count of treaties without prevailing text and will be considered separately later.

Country	Treaties	UL	PL	PL w/o PT	PL w/o PT %PL
Belgium	102	38	64	30	46.88%
Spain	99	16	83	38	45.78%
Switzerland	119	14	105	48	45.71%
Italy	109	7	102	38	37.25%

Not all of these countries have the same policy. Canada, France, the US, Australia, the UK, Luxembourg, South Africa, and Ireland all seem to have a dominant policy of not concluding treaties with prevailing text irrespective of their treaty partner.[8] The motivations behind the numbers may still differ for each country. At the same time, the overall outcome comprised of bilateral relationships will be influenced by the policies of their respective treaty partners. The assumed preference of the listed countries not to conclude treaties with a prevailing text may be only one side of the coin: their treaty partners may share the sentiment or want to avoid granting linguistic advantages.

Given that the native tongues of most countries in this list are either English or French, the political potential for agreeing on prevailing texts may exhaust itself to some extent in the conclusion of unilingual treaties. France, the US, the UK, and Australia all have sizeable proportions of unilingual treaties: the UK and US of roughly 30%, France of roughly 25%, and Australia of well over 40%.

For countries like Canada and Luxembourg, on the other hand, the availability of multiple official legal languages domestically may strongly influence their policies concerning treaties. This is particularly obvious in the case of Canada, which completely rejects the option of concluding unilingual treaties even when sharing an official language with the treaty partner, whereas Luxembourg has concluded a proportion of 20%. Canada's policy

[8]Noteworthy, however, the UK has eight fairly recent treaties with English prevailing texts, i.e., Uzbekistan (1993), India (1993), Latvia (1996), Malaysia (1996), Taiwan (2002), Bahrain (2010), Tajikistan (2014), and the United Arab Emirates (2016). Not all of them are with countries having English as official language, and three of them are fairly recent. The prevailing texts may be attributable to policies of the respective treaty partners or indicate a recent policy change on the side of the UK to implement English prevailing texts when politically feasible. Whether the latter proves to be true remains to be seen.

is attributable to domestic law: its constitution provides that English and French have equal status; all federal laws must be adopted in both languages, and each language version is to be equally authoritative, while its Official Languages Act stipulates that all international treaties should be authenticated in both official languages.[9]

Concerning the others, Ireland and South Africa have a strong general policy in disfavour of prevailing texts but display a propensity of roughly 20% to agree to them depending on their treaty partner. Noteworthy again are the sizeable proportions of over 30% unilingual treaties in the case of Ireland and over 40% in the case of South Africa. Malta displays a disfavour of prevailing texts, too, but already with a higher propensity to agree to them in roughly one-third of all cases. In addition, it has a relatively high share of over 30% unilingual treaties.

Although each features a sizeable absolute number of treaties without prevailing text, Germany, Belgium, Spain, Switzerland, and Italy seem not to have a predominant policy either way but to conclude treaties with or without prevailing text on a roughly equal basis depending on the treaty partner. Germany appears to be tilted in disfavour of prevailing texts; however, it recently published its own Model Convention with a final clause providing for one,[10] that is, Germany's own policy is shifting in favour of prevailing texts if it ever was different to begin with.

For the other four, the numbers are reverse. Italy is most clearly in favour of implementing prevailing texts. Like Germany, it has a relatively low propensity of about 5–6% to conclude unilingual treaties. Switzerland has with almost 12% the highest propensity among the three, which may be attributable to the availability of several domestic official languages: twelve of Switzerland's fourteen unilingual treaties are with German, French, or Italian speaking countries in German, French, or Italian, while only two are in English with Norway (1987) and Taiwan (2007). With over 16%, Spain has a higher propensity to conclude unilingual treaties as a consequence of the

[9] Constitution Act, 1982, 16 and 18(1), Official Languages Act, 1985, 10(1); see Sasseville, 'The Canadian Experience', 36.

[10] BMF, *Basis for Negotiation for Agreements for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (Germany: Bundesministerium der Finanzen, 2013), henceforth referred to as German Model.

shared native tongue with all of Latin America except Brazil: fourteen of the sixteen unilingual treaties in its tax treaty network are unilingual in Spanish with Latin American countries; the remaining two are with Morocco (1978) and Tunisia (1982) in French.

The high proportion of almost 40% unilingual treaties in Belgium's tax treaty network is not attributable to its ability to draw on several domestic official languages, as thirty-seven of its thirty-eight unilingual treaties are in English with countries not sharing a common language, while only the treaty with France (1964) is in French. Together with the lower proportion of treaties without prevailing text versus those with, this indicates that Belgium has a preference against plurilingual treaties without prevailing text. It issued its own Model Convention in 2007, which features a final clause codifying a unilingual treaty.[11] This shows that Belgium itself favours unilingual form; prevailing texts appear to be its second choice when feasible, while it accommodates the policies of its treaty partners not to implement one.

Almost all of these fourteen countries are big players in the global economy and international tax system: their treaties cover large cross-border flows of capital, goods, and services, and their policies reverberate throughout the global tax treaty network. When we look at all treaties concluded between OECD members, we see that the ratio of unilingual to plurilingual ones roughly conforms to the global average, whereas the ratio of treaties with prevailing text to those without is roughly 44:56. For treaties between members and non-members, this ratio is more than reversed to roughly 62:38 in favour of prevailing texts. Treaties between non-members show a ratio of roughly 80:20 in favour of prevailing texts. The proportions of unilingual versus plurilingual treaties are almost the same for all three groups, roughly conforming to the global averages of one-quarter versus three-quarters, that is, the potential for unilingual treaties is not influenced by member status and does not bias the potential for treaties with prevailing text. Generally speaking, this means that non-members have a higher propensity to implement prevailing texts, and this policy remains dominant

[11] The Kingdom of Belgium, *Belgian Draft Convention for the Avoidance of Double Taxation and the Prevention Of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 2007, henceforth referred to as Belgian Model.

even when concluding treaties with members, whereas within the OECD the policy against prevailing texts dominates. In this context, a comparison with the countries that participate as active key partners in the work of OECD bodies (Brazil, China, India, Indonesia, and South Africa) is illustrative: they show a clear preference for prevailing texts, which would be even more decisive if South Africa would be subtracted from the list.

Table (8.10): OECD, NOECD and OECDKP Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
OECD-OECD	24.07%	75.93%	43.75%	56.03%
OECD-NOECD	26.23%	73.77%	61.80%	37.72%
OECD any	25.67%	74.33%	57.02%	42.56%
NOECD-NOECD	24.28%	75.72%	80.29%	19.71%
OECDKP-OECD	18.59%	81.41%	67.72%	32.28%
OECDKP-NOECD	16.97%	83.03%	76.24%	23.76%

The G20 countries display a similar pattern: for treaties between them the ratio of treaties with prevailing text versus those without is roughly 43:57, however, the propensity to conclude unilingual treaties is with roughly 10% significantly below the global average. The proportion of treaties with prevailing text increases between G20 members and non-members, but only to roughly equal the proportion of those without, while the proportion of unilingual treaties remains below the global figure, despite doubling. This may be attributable to the group's composition including many countries with a dominant policy against prevailing texts, and a reduced willingness of countries to grant linguistic advantages to economically powerful treaty partners.

Table (8.11): G20 Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
G20-G20	10.24%	89.76%	42.95%	57.05%
G20-NG20	20.50%	79.50%	52.00%	47.80%
G20 any	19.28%	80.72%	50.80%	49.02%

As regards the tax treaty network of the CW,[12] the proportion of unilingual treaties is with over 60% between members high in comparison, while the ratio of treaties with prevailing text versus those without is 50:50. This means that the problem of plurilingual form does not arise much within the CW because of the potential for unilingual treaties (most countries in the CW are either native English-speaking or have English as official language), while half of the plurilingual ones provide for a prevailing text. For treaties between CW and third countries, the proportion of treaties without prevailing text rises to almost 60%, while the proportion of unilingual treaties decreases to less than a quarter. This points again to a strong policy preference of the leading CW countries against prevailing texts, in addition to a possible reluctance of states to grant linguistic advantages. India, an important player in the global economy and international tax system, has a diametrically opposed policy to the other CW countries: out of its one hundred tax treaties, only four are unilingual and 93% of the plurilingual ones feature a prevailing text.

Table (8.12): CW Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
CW-CW	61.26%	38.74%	50.00%	50.00%
CW-NCW	23.96%	76.04%	41.45%	58.29%
CW any	30.57%	69.43%	42.30%	57.47%

Concerning all treaties between countries of the European Union including EFTA members but excluding France, Ireland, Malta, and the UK,[13] the proportions of unilingual and plurilingual treaties roughly correspond to the global averages. For treaties between members and non-members, the propensity to conclude unilingual treaties is below the global average, whereas the propensity to conclude plurilingual ones is above. The proportions of treaties without prevailing text versus those with are close to the global averages for both groups; however, the preference

[12] Commonwealth of Nations including former members, prospective members, and other former British colonies that have not been members.

[13] Henceforth abbreviated as EU.

for the latter is stronger between EU countries. Thus, in contrast to the excluded ones, the overall policy for the rest of the EU countries is clearly in favour of prevailing texts.

Table (8.13): EU Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
EU-EU	25.75%	74.25%	72.69%	26.57%
EU-NEU	22.04%	77.96%	65.17%	34.49%
EU any	22.77%	77.23%	66.60%	32.98%

Countries of the Commonwealth of Independent States including former members and associate states (CIS) display a dominant policy in favour of prevailing texts. There are hardly any unilingual treaties both between CIS countries and between CIS and third countries, and treaties with prevailing text outnumber those without by roughly 4:1.

Table (8.14): CIS Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
CIS-CIS	0.00%	100.00%	81.08%	18.92%
CIS-NCIS	2.38%	97.62%	78.28%	21.72%
CIS any	2.23%	97.77%	78.46%	21.54%

The Arab World (AW) has a clear preference for prevailing texts. All treaties between AW countries are unilingual, while roughly 80% of all treaties with third countries feature a prevailing text. As regards the treaty networks of all AW countries, roughly 15% treaties without prevailing text remain.

Table (8.15): AW Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
AW-AW	100.00%	0.00%	0.00%	0.00%
AW-NAW	9.95%	90.05%	80.08%	19.33%
AW any	20.90%	79.10%	80.08%	19.33%

Three quarters of all treaties between Latin American countries excluding CARICOM members (LA) are unilingual in Spanish, while the remaining are plurilingual without prevailing text, all with Brazil. The latter does not display a decisive policy with respect to prevailing texts: treaties with prevailing text versus those without are divided roughly 53:47 in its treaty network. As for treaties between LA and third countries, treaties with prevailing text make up almost two-thirds of all plurilingual treaties, corresponding roughly to the global average, whereas the proportion of unilingual treaties remains much lower overall. In summary, LA countries favour prevailing texts once the potential for concluding unilingual treaties in Spanish is exhausted.

Table (8.16): LA Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
LA-LA	75.00%	25.00%	0.00%	100.00%
LA-NLA	8.26%	91.74%	64.93%	35.07%
LA any	14.57%	85.43%	63.13%	36.87%

Over 80% of all treaties between African countries excluding the Arab World (AF) are unilingual, while the remaining ones are all without prevailing text. Concerning treaties with third countries, still a higher proportion than globally is unilingual while roughly two-thirds of the others lack a prevailing text. This high proportion of unilingual treaties and the clear policy against prevailing texts may be attributable to the widespread use of English and French as official languages and the British and French influence.

Table (8.17): AF Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
AF-AF	80.49%	19.51%	0.00%	100.00%
AF-NAF	42.31%	57.69%	32.82%	67.18%
AF any	46.44%	53.56%	31.53%	68.47%

The remaining Asian countries that were neither considered as part of CW, CIS, EU, AF, or AW (AS)[14] display an overwhelming policy preference for treaties with prevailing text. Between AS countries almost 30% of all treaties are unilingual and 90% of all plurilingual ones feature a prevailing text. For treaties with third countries, these percentages drop to roughly 20% and 80%, respectively.

Table (8.18): AS Treaties

Treaties	UL	PL	PL w PT %PL	PL w/o PT %PL
AS-AS	29.82%	70.18%	90.00%	10.00%
AS-NAS	21.34%	78.66%	79.35%	20.65%
AS any	22.04%	77.96%	80.15%	19.85%

8.2.4. Per Country Analysis

This section drills down a bit further into the global tax treaty network in order to obtain a more detailed view with respect to individual countries. It must be borne in mind, however, that every bilateral treaty is the result of a reciprocal trade-off between the interests and policies of the contracting states. In consequence, the aggregate data of actual treaty outcomes examined here will never mirror the policy of any particular country in pure form. A much broader and deeper investigation into all linguistic, legal, political, economic, and historical factors influencing the outcome for every particular treaty would be necessary in order to develop a complete understanding of every country's policy and motivations. For purposes of this study, an aggregated data analysis is sufficient to further gauge the results of the previous sections, with the necessary caution in mind.

In general, the more treaties a country has in its network and the stronger the results lash out in either direction, the more robust the conclusions drawn concerning that country's policy will be. Therefore, the countries analysed have been divided into three groups: all countries with 60 or more

[14] China, Indonesia, Iran, Israel, Japan, Korea (Dem. People's Rep.), Korea (Rep.), Laos, Mongolia, Myanmar, Nepal, Philippines, Taiwan, Thailand, Turkey, Vietnam.

treaties (G1), all countries with 30 or more but fewer than 60 treaties (G2), and all countries with 15 or more but fewer than 30 treaties (G3). Countries with fewer than 15 treaties are not considered. Furthermore, each of the three groups is divided into two sub-groups: countries that have English as official language versus countries that do not.

Almost all countries of G1 that do not have English as official language display a predominant policy in favour of prevailing texts well above the global average. Russia, Poland, Norway, Sweden, Austria, Italy, and Denmark are near the global average, which is still almost two-thirds in favour of prevailing texts. Switzerland, Belgium, Spain, and (to some extent) Germany seem not to have a decisive policy but happy to accommodate the preference of their treaty partners.[15] Only Luxembourg and France display a clear policy against prevailing texts.

Table (8.19): G1 NEOL Treaties

Country	PL w PT %PL	Treaties	PL
Egypt	91.89%	66	37
Indonesia	90.91%	69	44
Estonia	89.80%	60	49
United Arab Emirates	87.69%	80	65
Korea (Rep.)	86.49%	90	74
Croatia	85.96%	63	57
Slovenia	85.71%	60	56
Kuwait	85.48%	70	62
Thailand	85.37%	66	41
Ukraine	80.82%	73	73
Morocco	80.39%	67	51
Turkey	80.00%	83	65
Vietnam	80.00%	72	65
Romania	79.76%	90	84
Hungary	78.95%	82	57
Belarus	78.79%	69	66
Czech Republic	77.59%	91	58
Cyprus	76.92%	64	39
Japan	76.32%	68	38
Bulgaria	76.19%	71	63

[15] As already mentioned, the German Model stipulates a policy in favour of prevailing texts while the Belgian one stipulates a policy in favour of unilingual treaties.

Country	PL w PT %PL	Treaties	PL
Portugal	76.06%	78	71
China	75.47%	108	106
Slovak Republic	72.88%	69	59
Netherlands	72.46%	99	69
Finland	71.11%	80	45
Qatar	69.23%	74	65
Russia	68.13%	91	91
Poland	67.07%	88	82
Norway	66.67%	94	42
Sweden	65.79%	92	38
Austria	64.00%	93	75
Italy	62.75%	109	102
Denmark	60.98%	81	41
Switzerland	54.29%	119	105
Belgium	53.13%	102	64
Spain	46.99%	99	83
Germany	44.66%	108	103
Luxembourg	11.76%	85	68
France	0.00%	139	105

The situation differs for G1 countries having English as official language. Canada, the US, and the UK have a strict policy against prevailing texts. Conversely, India and Malaysia display a dominant policy in favour. All the others range in the middle but well below the global average. Singapore and Pakistan may be considered not to have a decisive policy of their own but to settle with the preference of their treaty partners. The same seems to apply to Malta, whereas both South Africa and Ireland range so far below the global average that it rather seems they agree to prevailing texts only as a concession to particular circumstance.

Table (8.20): G1 EOL Treaties

Country	PL w PT %PL	Treaties	PL
India	96.88%	100	96
Malaysia	85.53%	83	76
Singapore	47.06%	88	51
Pakistan	44.44%	64	36
Malta	36.00%	74	50

Country	PL w PT %PL	Treaties	PL
Ireland	20.75%	78	53
South Africa	20.00%	86	50
United Kingdom	8.99%	132	89
United States	1.85%	77	54
Canada	0.00%	97	97

For G2 countries not having English as official language, the situation is similar to the equivalent sub-group of G1. Almost all display a strong preference in favour of prevailing texts well above the global average. Mexico, Turkmenistan, and Chile still decisively favour prevailing texts, while Brazil and Algeria seem to have no clear-cut policy. Only Mauritius seems to disfavour prevailing texts.

Table (8.21): G2 NEOL Treaties

Country	PL w PT %PL	Treaties	PL
Greece	95.12%	58	41
Syria	94.74%	32	19
Bahrain	94.44%	42	36
Iran	93.88%	50	49
Latvia	92.16%	59	51
Bosnia and Herzegovina	92.00%	38	25
Serbia and Montenegro	90.00%	38	30
Georgia	88.68%	55	53
Macedonia (FYR)	88.00%	52	50
Uzbekistan	86.27%	53	51
Israel	85.42%	57	48
Kazakhstan	85.37%	43	41
Albania	85.29%	43	34
Lithuania	85.19%	54	54
Lebanon	83.33%	33	12
Azerbaijan	82.98%	48	47
Jordan	81.82%	33	22
Armenia	80.43%	46	46
Saudi Arabia	79.41%	38	34
Oman	79.31%	36	29
Moldova	76.09%	47	46
Tajikistan	75.86%	31	29

Country	PL w PT %PL	Treaties	PL
Iceland	72.73%	47	33
Taiwan	71.43%	30	21
Venezuela	70.00%	34	30
Mexico	66.67%	58	48
Turkmenistan	65.00%	40	40
Chile	64.00%	33	25
Tunisia	58.06%	55	31
Brazil	53.13%	33	32
Algeria	50.00%	35	22
Mauritius	36.36%	52	22

As regards G2 countries with English as official language, the situation is divided. Sri Lanka, Bangladesh, and Hong Kong seem to be strongly in favour of prevailing texts, whereas Australia has a strict policy against them. The Philippines, New Zealand, and Barbados display a less strict policy but still disfavour prevailing texts.

Table (8.22): G2 EOL Treaties

Country	PL w PT %PL	Treaties	PL
Sri Lanka	87.23%	47	47
Bangladesh	86.67%	32	15
Hong Kong	66.67%	35	18
Philippines	30.43%	43	23
New Zealand	26.09%	49	23
Barbados	20.00%	32	20
Australia	6.45%	55	31

For G3 countries the sample sizes are small, so the conclusions drawn should be viewed with extra caution. Nevertheless, for G3 countries not having English as official language, the situation seems comparable to the respective sub-groups of G1 and G2. Most countries of this sub-group have a preference for prevailing texts well above the global average, while Libya and Argentina are in its close proximity. Only Senegal and to some extent Ecuador have a strong preference against prevailing texts.

Table (8.23): G3 NEOL Treaties

Country	PL w PT %PL	Treaties	PL
San Marino	87.50%	21	16
Mongolia	86.96%	28	23
Uruguay	81.25%	20	16
Kyrgyzstan	80.00%	25	25
Liechtenstein	80.00%	19	10
Panama	78.57%	16	14
Serbia	78.26%	26	23
Libya	66.67%	16	12
Argentina	56.25%	20	16
Ecuador	25.00%	16	12
Senegal	0.00%	17	11

As regards G3 countries with English as official language, Sudan and Seychelles are clearly in favour of prevailing texts, while most others are decisively in disfavour. Only Ethiopia and Nigeria display no clear preference. Given the small sample sizes, however, part of the numbers may be coincidental or depending on the treaty partners rather than pointing to a country's own policy.

Table (8.24): G3 EOL Treaties

Country	PL w PT %PL	Treaties	PL
Sudan	100.00%	18	5
Seychelles	66.67%	29	12
Ethiopia	50.00%	20	12
Nigeria	50.00%	16	6
Isle of Man	40.00%	22	5
Kenya	33.33%	16	6
Jersey	28.57%	25	7
Guernsey	20.00%	22	5
Botswana	20.00%	16	5
Zimbabwe	18.18%	19	11
Zambia	9.09%	27	11
Trinidad and Tobago	9.09%	16	11

8.3. Types of Wording

Now that we have a clear view to what extent sole reliance on prevailing texts is available in principle (and to what extent the problem does not arise in the first place because of unilingual form), we need to establish how far the permissive approach may be applied to actual tax treaties, that is, to what extent formulations of treaty final clauses in the global tax treaty network permit sole reliance on existing prevailing texts. As Article 33(1) does not constitute a peremptory norm in this regard,[16] such investigation into the intentions of the contracting states as expressed in their treaties is necessary.

8.3.1. TOW Classification

The final clauses used in the global tax treaty network can be classified into nine different types of wording, which I have labelled numerically from TOW1 to TOW9. TOW1 represents the case of plurilingual treaties without prevailing text. In its most basic form the treaty is simply concluded, signed, and sealed in two or more copies and languages without its final clause specifying its linguistic properties, as for example in Norway-Switzerland (1956), having German and Norwegian texts:[17]

> In witness whereof, the plenipotentiaries of the two States have signed this Convention and thereto affixed their seals. Done at Oslo, 7 December 1956.

Strictly speaking, mentioning the linguistic properties is not necessary because, in the absence of a specific clause, authenticity derives from the mere fact that an instrument has been concluded in a particular language.[18] Therefore, each signed and sealed text must be treated as equally authentic.

[16] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 4; Engelen, *Interpretation of Tax Treaties under International Law*, 376–79.

[17] Unless otherwise indicated, English wordings of non-English final clauses are taken from unofficial English translations provided by the IBFD *Tax Treaties Database*.

[18] UN, *Vienna Convention on the Law of Treaties*, Article 10; see ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:224, para. 2; Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 74, with reference to McNair, *The Law of Treaties*, 60.

This basic form is no longer common but still exists in a handful of older treaties. A more elaborate variety of the basic form references the languages but without specifically commenting on their authenticity, as for example in South Africa-United States (1947):

> Done at Cape Town, in duplicate, in the English and Afrikaans languages, the tenth day of April, 1947.

In general, that is, applicable to all types of wording and all different forms of each, the number of signed and sealed copies does not necessarily need to equal the number of language texts, as for example in Costa Rica-Romania (1991):

> Done in quadruplicate at San José, Costa Rica, on 12 day July 1991, in the Spanish and Romanian languages, both texts being equally authentic.

The standard form of TOW1 used most widely today does not only mention the number of texts and languages but also explicitly comments on equal authenticity in a variety of marginally different but in substance equivalent formulations, for example, 'both texts being equally authoritative',[19] 'both texts being equally authentic',[20] 'each text being equally authentic',[21] 'all three texts being equally authentic',[22] or 'the two texts having equal authenticity'.[23]

In a few special cases the treaty is concluded only in one language, while the final clause specifies that a translation in the language of the other contracting state shall be made, agreed on, and then be treated with equal authority, as for example in Belarus-United Kingdom (1995):

> Done in duplicate at London this 7th day of March 1995 in the English language. A translation of the Convention into the Byelorussian language shall be made and agreed by the Contracting States before ratification, that text having the same authority as the English text.

[19] See, e.g., United Kingdom-Greece (1953), having English and Greek texts.
[20] See, e.g., Germany-France (1959), having German and French texts.
[21] See, e.g., Ireland-Switzerland (1966), having English and French texts.
[22] See, e.g., Belgium-Bulgaria (1988), having French, Dutch, and Bulgarian texts.
[23] See, e.g., Luxembourg-United States (1996), having English and French texts.

In some of these cases the final clause outlines the process by which the latter translation is to gain equal authenticity, as for example in Kazakhstan-United States (1993):

> Done at Almaty this 24th day of October 1993, in duplicate, in the Russian and English languages, both texts being equally authentic. A Kazakh language text shall be prepared, which shall be considered equally authentic upon an exchange of diplomatic notes confirming its conformity with the English language text.[24]

TOW2 is the first case of treaties designating one text as prevailing. Its most basic form lists the number of copies and authentic languages, and mimics the wording of Article 33(1) concerning its condition to designate one text as prevailing, as for example 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.

Almost all treaties with TOW2 final clauses add 'any' or 'between texts' or both to the wording,[25] for example, 'In case of any divergence, the English text shall prevail',[26] 'In case of divergence between texts, the English text shall prevail',[27] or 'In case of divergence between any of the texts, the English text shall prevail'.[28] These wordings explicitly heal the slight imprecision in the formulation of Article 33 (with exception of the Russian text) on which TOW2 is based and which induces the proponents of the restrictive approach to mistakenly equate 'divergence' with the more narrow concept of material divergence. The first wording makes clear that *any*

[24] Noteworthy, conformity only with the English text has to be confirmed, which seems to confer more importance on it despite the equal authenticity of the Russian text. Hence, this might be a rare case in which a court could plausibly reason to give preference to the English text on the basis of the treaty itself pointing to this intention of the contracting parties.

[25] Only three additional TOW2 treaties are without such qualifier: China-Russia (1994), Hungary-Qatar (2012), and Russia-Vietnam (1993).

[26] See, e.g., Czech Republic-Lebanon (1997), having Arabic, Czech, and English texts.

[27] See, e.g., Albania-India (2013), having Albanian, English, and Hindi texts.

[28] See, e.g., Denmark-Slovenia (2001), having English, Danish, and Slovenian texts.

divergence is sufficient to trigger the condition, obviously including mere differences in expression. The latter two explicitly add the subject 'texts' of the predicate 'divergence', which is only implicit in the wording of Article 33(4) via its link to Article 33(1).[29] This makes clear that 'divergence' means divergence between texts, which can be any kind of divergence, that is, a difference in expression as well as a difference in meaning.

There exist a few minor variations of TOW2 formulations that, however, do not change the meaning in substance. Some use the term 'divergency' instead of 'divergence',[30] while others use different ways to designate one text as prevailing by using the term 'authoritative',[31] denoting one text as the 'operative one',[32] stipulating that divergences 'shall be resolved in accordance with' or 'on the basis of', or that 'the interpretation shall be given in accordance with' a particular text.[33]

TOW3 is the second case of treaties designating one text as prevailing. The major difference from TOW2 is the explicit reference to interpretation. The most basic form lists again the number of copies and authentic texts, designating one as prevailing in case of divergence of (or in) interpretation, as for example in Finland-Switzerland (1991):[34]

> Done in duplicate at Helsinki this 16th day of December 1991, in the Finnish, German and English languages, all three texts being equally authentic. In the case of divergence of interpretation the English text shall prevail.

The majority again adds 'any' or 'between texts' to the wording to read 'In case of any divergence of interpretation' or 'In case of divergence in inter-

[29] Only as far as the Chinese, English, French, and Spanish texts are concerned, i.e., most treaties with a TOW2 final clause implement the more precise wording of the Russian text by explicitly repeating the subject.

[30] See, e.g., Kuwait-Sri Lanka (2002), having Arabic, English, and Sinhala texts with the English one prevailing.

[31] See, e.g., Cameroon-Tunisia (1999), having Arabic and French texts with the French one prevailing.

[32] See, e.g., India-Mauritius (1982), having Hindi and English texts with the English one prevailing.

[33] See, e.g., Kuwait-Spain (2008), having Arabic, English, and Spanish texts with the English one prevailing, Libya-Serbia (2009), having Arabic, English, and Serbian texts with the English one prevailing, and Indonesia-Russia (1999), having English, Indonesian, and Russian texts with the English one prevailing.

[34] See, e.g., Bulgaria-Lebanon (1999) for a case of 'divergence in interpretation'.

pretation between texts',[35] or otherwise varies the wording without affecting its meaning in substance by using 'divergency' or 'differences' instead of 'divergence',[36] or by paraphrasing the concept of prevailing.[37]

A handful of treaties extends the wording to the effect of broadening the scope, for example, 'In case of divergence on interpretation or application, the English text shall prevail',[38] 'In the case of divergence of interpretation or of any inconsistency the English text shall prevail',[39] or 'In case of any divergence between any of the texts and in the interpretation, the English text shall prevail'.[40] The first wording is not much different from the standard TOW3 form, but the latter two may be viewed as cases of TOW2 and TOW3 combined because of their formulations.

Three treaties with TOW3 wordings deviate from the standard formulation by referring to a divergence or difference in meaning between the texts instead of a divergence or difference in interpretation.[41] As cited above, three treaties of Tunisia designate two texts as prevailing instead of one. Finally, there exist a handful of treaties that are concluded in English but stipulate that translations in the official languages of the contracting states shall be made and exchanged through diplomatic channels.[42]

[35] See, e.g., Brazil-China (1991), having English, Portuguese, and Chinese texts with the English one prevailing, and Albania-China (2004), having English, Albanian, and Chinese texts with the English one prevailing, respectively.

[36] See, e.g., Poland-Sweden (2004), having English, Polish, and Swedish texts with the English one prevailing, and Algeria-Turkey (1994), having French, Arabic, and Turkish texts with the English one prevailing, respectively.

[37] See, e.g., Armenia-Malaysia (1987): 'In case of any divergence of interpretation, the interpretation shall be made in accordance with the English text'; Denmark-Russia (1996): 'In case of any divergence of interpretation, the English text shall be used as a reference'; Iceland-Spain (2002): 'In case of any divergence of interpretation, it shall be resolved in accordance with the English text'; Kazakhstan-Macedonia (2012): 'In case of any divergence of interpretation of this Agreement the Contracting States refer to the text in English'; Kazakhstan-Russia (1996): 'In the case of emergence of deviations in the interpretation of this text, the Russian text shall override.'

[38] Italy-Syria (2000).

[39] Estonia-Latvia (2002).

[40] Serbia and Montenegro-Slovenia (2003).

[41] New Zealand-Taiwan (1996), Taiwan-United Kingdom (2002), and Israel-Turkey (1996).

[42] United Kingdom-Uzbekistan (1993), Iran-Syria (1996), Pakistan-Tunisia (1996), Iran-Tajikistan (1998), Malta-Tunisia (2000), Tunisia-Iran (2001). According to their word-

TOW4 is the third instance of treaties designating one text as prevailing, being a variation of both TOW2 and TOW3 in the sense that all texts are declared as equally authentic while in case of divergence (of interpretation) between the first two or three the third or forth, respectively, shall prevail,[43] as for example in Estonia-Germany (1996):[44]

> Done at Tallinn this 29th day of November 1996 in two originals, each in the Estonian, German and English languages, all three texts being authentic. In the case of divergent interpretation of the Estonian and the German texts the English text shall prevail.

The Netherlands-India (1988) treaty subject of the *New Skies* decision discussed previously is another example of TOW4, using the wording 'shall be the operative one' instead of 'shall prevail'.

TOW5 represents the case of unilingual treaties. In its standard form it references its language and the number of copies, as for example in Egypt-India (1969):

> Done in duplicate at Cairo this twentieth day of February, 1969, in the English language.

Analogous to TOW1, there still exist a few treaties that do not explicitly declare the language, for example, Australia-United States (1982):

> Done in duplicate at Sydney this sixth day of August 1982.

TOW6 is the fourth instance of treaties declaring one text as prevailing.[45] In contrast to TOW2, TOW3, and TOW4, it does not refer to cases of divergence but to cases of doubt, as for example in Thailand-Vietnam (1992):

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ings, the later translations shall be treated as equally authentic, while in case of divergence of interpretation the English text shall prevail.

[43] Again with a small number of minor variations in formulation that have no effect in substance, e.g., the use of 'divergency' instead of 'divergence'.

[44] Kyrgyzstan-Switzerland (2001) is an example of four equally authentic languages (German, English, Kyrgyz, and Russian), with the English text prevailing in case of a divergence of interpretation between the other three.

[45] Australia-India (1991) is the only example of a TOW6 final clause that paraphrases 'prevailing text' with 'operative text'.

> Done in duplicate at Hanoi on this 23rd day of December, one thousand nine hundred and ninety-two Year of the Christian Era, each in the Thai, Vietnamese and English languages, all texts being equally authoritative, except in the case of doubt when the English text shall prevail.

TOW7 is a special case of plurilingual treaties not designating one text as prevailing but instead prescribing application of the treaty MAP as an alternative solution to cases of divergence, as for example in Germany-Spain (2011):

> Done in duplicate in Madrid on the 2nd day of June 2010, in the English and Spanish languages, both texts being equally authentic. In case of divergence of interpretation between any of the texts, it shall be resolved in accordance with the procedure regulated under Article 24 of this Convention.

TOW8 is another special case of treaties designating one text as prevailing, with the defining criterion being a dispute in the interpretation and/or application of the treaty, as for example in Iran-Malaysia (1992):

> Done in duplicate at Tehran this 11th day of November 1992, each in Bahasa Malaysia, Persian and the English languages, the three texts being equally authentic. In the event of there being a dispute in the interpretation and the application of this Agreement, the English text shall prevail.

Finally, TOW9 is a substantive variation of TOW4 in which only the first two texts are declared authentic, whereas the text designated as prevailing in case of divergence is not, as for example in Germany-Japan (1966):

> Done at Bonn this 22nd day of April 1966, in six originals, two each in the German, Japanese and English languages. The German and Japanese texts are equally authentic and, in case there is any divergence of interpretation between the German and Japanese texts, the English text shall prevail.

Two treaties with TOW9 final clauses show a significant variation regarding their formulation to paraphrase prevalence, namely, Hungary-Uruguay (1988) and Poland-Uruguay (1991):

> [B]oth texts being equally authentic and existing a third text in English, which, in case of interpretation of this Convention, shall be taken into consideration as a reference.

8.3.2. TOW Usage

Now that we have classified all types of final clause wordings in the global tax treaty network, we can take stock and proceed to quantify the extent of actual use for each type. An examination of our entire sample shows that there are three main wordings in use: TOW5, TOW1, and TOW3. The first two are each implemented by roughly a quarter of the global tax treaty network, while the third is implemented by almost 29%. The remaining 20% are unevenly distributed between the six other types of wording. TOW2 and TOW4 cover a seizable number of treaties each, so they are relevant from a practical perspective. TOW2 is the more important, implemented in about 10% of all treaties, while TOW4 is only implemented by roughly 6%. TOW6 and TOW8, which cover seventy-five and twenty-nine treaties, respectively, still have some practical relevance, while TOW7 and TOW9 together are implemented only by ten treaties, that is, less than half a percent of the global tax treaty network.

Table (8.25): TOW Distribution

TOW	No. w term	%global (w term)	No. w/o term	%total (w/o term)
1	1170	30.44%	882	26.27%
2	374	9.73%	355	10.57%
3	992	25.81%	963	28.68%
4	216	5.62%	197	5.87%
5	967	25.16%	847	25.22%
6	84	2.19%	75	2.23%
7	7	0.18%	7	0.21%
8	30	0.78%	29	0.86%
9	4	0.10%	3	0.09%

In line with the previous findings, we see that TOW1 has suffered most from termination of treaties in proportional terms, whereas TOW3 has enjoyed the largest gain. All other types of wording have only been marginally affected by termination. For the first five types of wording, the development over time from the 1960s to the 2000s[46] shows that TOW1 and TOW5 have

[46]For the 2010s, all curves slope downwards because they represent the numbers only up to the cut-off date.

steadily increased in absolute terms until the end of the 1990s; however, whereas TOW5 treaties continued to increase per decade throughout the 2000s (albeit with a slowed down growth rate), TOW1 treaties peaked in the 1990s and declined in the 2000s.

TOW3 had outgrown all other types of wording by the end of the 1980s and surged in popularity by the 1990s, steeply outgrowing all others. The growth rate has decreased over the 2000s but remains steeper than for all other types of wording. TOW2 shows steady growth as well but lags behind TOW3 in popularity. It made a major leap in the 1990s along the general wave of expansion of the global tax treaty network, but its growth rate has not been as steep as that for TOW3 and decreased over the 2000s. TOW4 has made a small jump in the 1990s but started to stagnate in terms of treaties per decade throughout the 2000s.

The percentage numbers of all treaties per decade show the steady proportional decline of TOW1 and TOW5 since the 1970s. Whereas TOW5 has flattened out at a percentage share of roughly 20% during the 2000s, TOW1 has continued its decline. If the numbers for 2010 to August 2016 may be taken as an indication of the further trend, TOW1 will stabilise its percentage share throughout the 2010s at roughly 20%.

TOW2 and especially TOW3 have increased largely in percentage share of treaties per decade from the 1980s onward (TOW3 to a roughly 35% share and TOW2 to a roughly 13% share), together accounting for almost half of all treaties concluded in the 2000s. If the numbers for January 2010 to August 2016 may be taken as an indication of the further trend, TOW3 stabilises at its 35% share while TOW2 manages to further increase towards the 15% mark throughout the 2010s. TOW4 peaked in the 1990s and has decreased towards a percentage share of roughly 5% to date.

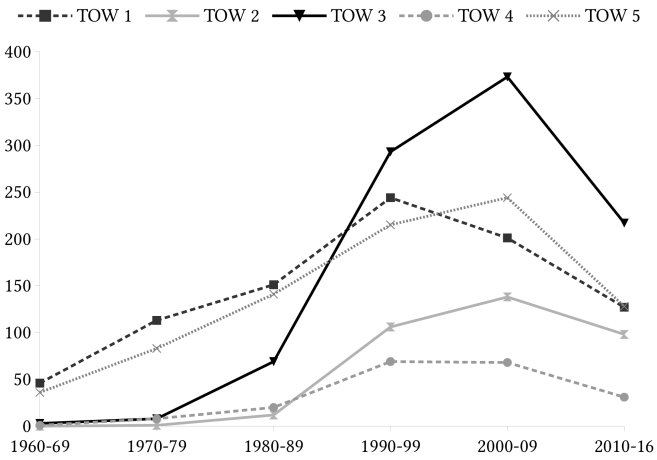

Figure (8.9): TOW of Treaties per Decade

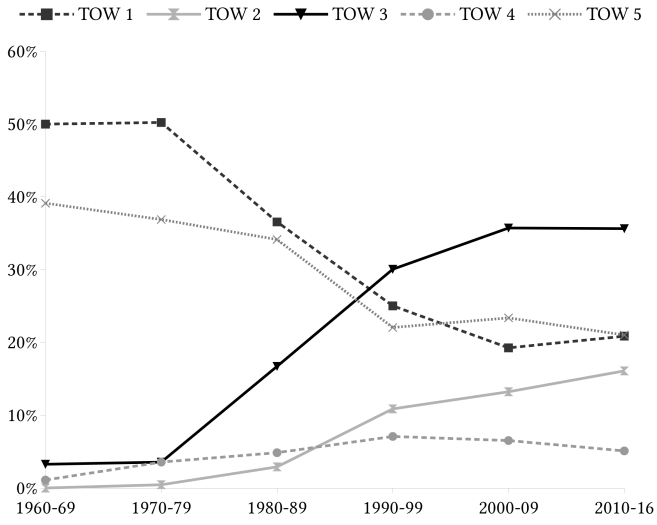

Figure (8.10): TOW as Percentage of Treaties per Decade

8.3.3. TOW Interpretation

Now that we have a complete measure of all types of wording used by treaties in the global tax treaty network, we need to examine their suitability in terms of sole reliance on the prevailing text. As TOW1 represents plurilingual treaties without prevailing text and TOW5 represents unilingual treaties, they are not relevant here. TOW2 does not need to be discussed in detail because it corresponds to the wording of Article 33(1), that is, the previous discussion applies. In short, the conclusion is that the permissive approach is applicable and we may resort to sole reliance on the prevailing text for all treaties featuring a TOW2 final clause, subject to the outlined limitations. TOW7 is a special case: instead of implementing a prevailing text, the contracting states agree to use the treaty MAP in cases of divergence.[47] TOW7 appeared for the first time in the treaty France-United Arab Emirates (1989) and remained a singular instance for two decades. In recent years, it has been implemented by Spain in six instances.[48] Whether this marks a sustainable new direction in Spain's treaty policy that will manage to influence other countries remains to be seen. In summary, the types of wording to be considered here are TOW3, TOW4, TOW6, TOW8, and TOW9.

The first impulse of any court may be to initially refer to the text in the country's official legal language; however, such is by no means mandatory. The equal authenticity of all texts implies that the judge may choose any of them as initial reference, including the one designated as prevailing. Hence, concerning sole reliance on the prevailing text the crucial two questions to ask are not whether the judge is allowed to automatically go to the prevailing text and whether he is allowed to rely on it exclusively, but whether the wording of the particular treaty final clause contains anything that prevents

[47] In line with the general purpose of MAPs, the conception of 'divergence' employed by TOW7 must be considered one of material divergence, limited to cases when problems persist after exhaustion of all interpretative means provided by the VCLT, that is, when no common meaning of the texts can be established under application of Articles 31–33, leading to taxation not in accordance with the common intentions of the contracting states, see OECD, *Model Tax Convention*, 2017, Commentary on Article 25, paras. 1–3, 7, by analogy. Otherwise, TOW7 would lead to a proliferation of MAP cases given the likelihood of divergences in expression.

[48] Albania (2010), Cyprus (2013), Germany (2011), Oman (2014), Pakistan (2010), Qatar (2015).

him from taking the prevailing text as initial reference and, if not, whether the meaning he arrives at by interpreting the prevailing text alone is such that he can spare himself from comparing it to the others.

The first question I shall now answer for all types of final clauses identified, whereas the second is one that courts may need to answer on a case by case basis. I have already answered it in principle, that is, the court has to refer to the other texts only if the interpretation of the prevailing text under Article 31 leads to a meaning which is either ambiguous or obscure, or must be considered an absurd or unreasonable result. In all other cases, the court may rely on the prevailing text alone.

TOW3 is less broad than TOW2 because it refers to divergence in/of interpretation instead of (any) divergence (between texts) in general. That seems to imply not every difference in expression is a reason to rush headlong into action as long as it does not lead to differing interpretations. This raises the question of what is meant by 'divergence in interpretation': Does it mean any different interpretation brought forward by any party interpreting the treaty, different interpretations the texts *prima facie* lend themselves to in general, or different meanings of the texts arrived at by the court under its authoritative interpretation?

Without doubt, the proponents of the restrictive approach would have it to mean the latter; however, the question is irrelevant because there is nothing in TOW3 that prevents the court from initial reference to the prevailing text. Once a manifest meaning of the prevailing text has been established, such cannot be challenged by any different interpretation on the basis of any or all other texts. As we have seen previously, Hardy's counter-argument to the logical argument does not hit home. It follows that for all treaties featuring a TOW3 final clause the court may resort to sole reliance on the prevailing text.

This even applies to the few treaties that use the more narrow 'divergence in meaning' formulation. Although this implies a material divergence in the sense suggested by the proponents of the restrictive approach, because 'meaning' may be understood not to be any interpretation by anyone but the final authoritative interpretation by the court, there is otherwise nothing in TOW3 that prevents the court from resorting to the prevailing text as equally authentic in the first place. In consequence, the logical argument

applies and whether a divergence of another text from the prevailing one is material or not is irrelevant in this respect.

The conclusion is also not different for the particular TOW3 formulations that paraphrase 'prevailing', because all of them establish a comparative authority of texts. The only exception are the three Tunisian treaties designating two texts as prevailing. Essentially, this transforms TOW3 into a TOW1 scenario of two equally authoritative texts, necessitating a comparison of them to arrive at the one true meaning of the treaty.

TOW4 appeared for the first time in the treaty Germany-Iran (1968) and is the preferred policy choice of Germany (82.61% of all treaties with prevailing text), the Netherlands (80% of all treaties with prevailing text), and Switzerland (56.14% of all treaties with prevailing text). It is also fairly popular in a few other countries, for example, Oman, Chile, Russia, and Syria. In absolute terms, the Netherlands have the most TOW4 treaties (40), followed by Germany (38), Switzerland (32), and Russia (21). Both the Netherlands and Germany have TOW4 as final clause in their Model Conventions.[49]

TOW4 is the most equivocal and difficult to interpret of the nine types. Using the final clause in the treaty Netherlands-Russia (1996) as example, Bender and Engelen provide a comprehensive discussion of TOW4.[50] In es-

[49] De Regering van het Koninkrijk der Nederlanden, *Nederlands Standaardverdrag*, 1987, henceforth referred to as Dutch Model; BMF, *German Model*.

[50] Bender and Engelen, 'The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties', 13 et seq. They quote the clause as follows (emphasis added): 'DONE at Moscow this 16th day of December 1996, in duplicate, in the Netherlands, Russian and English language, the three texts being equally authentic. In case there is any divergence of interpretation between the Netherlands and Russian texts, the English text *shall prevail*.' The originally signed English copy, however, reads as follows (emphasis added): 'Done at Moscow, on 16 December 1996, in duplicate, in the Dutch, Russian and English languages, the three texts being equally authentic. In case there is any divergence of interpretation between the Dutch and Russian texts, the English text *shall be operative*.' The difference is not material but curious. It may be a consequence of Bender and Engelen translating from the Dutch text: '*GEDAAN te Moskou, de 16e december 1996, in tweevoud, in de Nederlandse, Russische en Engelse taal, zijnde de drie teksten gelijkelijk authentiek. Ingeval de Nederlandse en de Russische tekst verschillend kunnen worden uitgelegd, is de Engelse tekst beslissend.*' The literal English translation of the Dutch *beslissend* seems to be 'decisive'. In any case, this exemplifies that the two wordings 'shall prevail' and 'shall be operative' are equivalent in meaning.

sence, their conclusion boils down to TOW4 implementing the restrictive approach. Since the final clause in question states that the English text only prevails in case the Netherlands and Russian texts diverge, they argue that the logical argument does not apply, as a result of which the English text may only be resorted to as decisive after it has been established that the other two diverge from each other. Sanghavi arrives at the same conclusion in his discussion of *New Skies*.[51] Bender and Engelen's argument reads as follows:

> However, this reasoning [the logical argument] cannot be applied here without hesitation, since the final clause of the Netherlands-Russian tax treaty does not invest the English text with a decisive authority in each and every case of divergence between the texts, but only in case there is a divergence of interpretation between the Netherlands and Russian texts. In other words, there is no legal presumption in favour of the English text in case there is a divergence of interpretation between this text on the one hand, and the Netherlands and Russian texts on the other. Therefore, it would not be correct to presume that the English text is decisive from the very outset. Disregarding the Netherlands and Russian texts in this way would clearly not be in accordance with the intention of the parties in designating the all [*sic*] three texts as equally authentic, and thus authoritative for purposes of interpretation. In fact, the presumption that each text has the same meaning implies that the burden of proof lies on the party invoking the rule that the English text prevails. In other words, in the absence of any evidence to the contrary, the Netherlands, Russian and English texts are presumed to concord; therefore, in order to activate the supremacy of the English text, it must first be shown that the Netherlands and Russian texts are divergent.[52]

This reasoning is not compelling in terms of the clause analysed, that is, TOW4.[53] Being part of the treaty, the final clause must be interpreted in accordance with its ordinary wording, context, and object and purpose,[54] and the context consists first and foremost in the entire text.[55] Therefore, the

[51] See Sanghavi, 'Found in Translation', 414.

[52] Bender and Engelen, 'The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties', 15.

[53] Instead, it applies to TOW9 (see below).

[54] UN, *Vienna Convention on the Law of Treaties*, Article 31(1).

[55] Ibid., Article 31(2).

second sentence of the final clause designating the English text as prevailing in case the Netherlands and Russian texts diverge must be interpreted in the context of its first sentence declaring all three as equally authentic. As Bender and Engelen themselves stress, this implies that all three texts are first and foremost equally authoritative and usable for purposes of interpretation without restriction.[56]

The wording of the provision is misleading in this respect. When the prevailing condition in the second sentence is read out of context, that is, not in light of the first sentence, it may be misunderstood in the sense that only the Netherlands and Russian texts need to concur, and whatever then the situation of the English text is in such case may be disregarded, whereas in reality the interpretations of all three texts have to concur because of their equal authority declared in the first sentence of the provision. Otherwise, the English text would be treated as being of lesser authority when the two other texts are equal in meaning but of superior authority when they diverge. Such is incompatible with the principle of unity and the wording of TOW4 declaring all texts as equally authentic. Article 33(4) is unequivocal in this respect: the double reference to *the* texts clearly implies *all* texts.

Imagine the crucial scenario that the Russian and Netherlands texts are indeed concordant but their unified meaning diverges from the English text. Bender and Engelen reason that because all three texts are from the start equally authoritative and the prevailing condition fails to render the English text superior in case the Netherlands and Russian texts concur, this scenario is equivalent to a treaty with two language texts that diverge but are equally authoritative. In consequence, the principles of Articles 31–33 should be applied analogous to such case minus what to do when there is a text declared as prevailing, as the case is not one in which the English text may be regarded as such.[57] Therefore, a comparison should be enacted first under Article 31. If that fails, the interpretative rule of Article 33(4) implementing the object and purpose as sole decider should be invoked.

Let us examine this case in some more detail. For this purpose, let us denote the English text as E, the Netherlands text as N, and the Russian

[56] See Bender and Engelen, 'The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties', 14.

[57] See ibid., 17.

text as R. Let us further suppose for the moment that the one true meaning of the treaty is A. The principle of unity and equal authenticity of all three texts declared in the first sentence imply N=R=E=A as point of departure. So, obviously, if N says A, R says A, and E says A, then A. The prevailing condition for E in the second sentence of the clause implies that if N says A, R says B, and E says A, then A. Similarly, if N says B, R says C, and E says A, then A. Hence, in any of these cases, any text that says something different from whatever E says is to be reinterpreted to mean what E says.

Now, if N says B, R says B, and E says A, then, possibly, B? This does not register as a particularly sensible suggestion, but the conclusion should be A again. Of course, we do not know beforehand that the one true meaning of the treaty is A; however, in all cases but the last the one true meaning gravitates to whatever E says. If both N and R say B, then E should say B for it to be the one true meaning of the treaty. If the meaning of E is different, there must be something wrong: we cannot rely on N=R=B to conclude N=R=E=B in the face of E=A, since E is at the very least equally authentic.

Do we really need a comparison of all texts to decide this case as Bender and Engelen suggest? The English text is clearly identified as always prevailing in terms of a divergence between the other texts, that is, the English text must be presumed to better represent the parties' intentions than the other two. If we assume that the general intention of the final clause is to ease interpretation rather than to complicate it, while it cannot be its intention to ever confer lesser weight on the English text than the others because of its first sentence, it seems not sensible to suggest that the English text prevails in some cases but is subordinated in others, that is, that the outcome of any comparative interpretation under Articles 31 or 33(4) could ever turn out to establish E=B because of N=R=B instead of N=R=A because of E=A.

Looked at from the other way around, there is nothing in TOW4 that prevents the court from initially looking at the English text, since it is declared as equally authentic. It seems not sensible to suggest that the contracting parties, whose common intention must be assumed to be making interpretation easier not more complicated, would agree that the English text prevails for all scenarios except for one, which would make it impossible for any court to rely on the prevailing text without first excluding that said scenario in every case to be decided.

From a purely practical perspective, it does not seem to be in line with the object and purpose of designating a third text in a well-known third language as prevailing if that text cannot be relied on before the text in the unfamiliar language of the other country is consulted.[58] Coined to our example of Netherlands-Russia (1996), such would imply that the judge on either side would be obliged to compare either the Dutch or Russian text to the one in his own language before being able to rely on the English text; however, it must be assumed that the idea behind introducing a prevailing third text in English in the first place has been to avoid having to deal with the (from each other's perspective) arcane language of the treaty partner in all day to day applications of the treaty.

Given all these considerations, it is submitted that TOW4 must be interpreted contextually in the sense that although factored out by the literal formulation of its second sentence viewed in isolation, the case of the other texts concurring while saying something different from the one declared as prevailing is equally implied by TOW4 as a case of divergence invoking the prevailing condition. As a corollary, TOW4 is only a complicated variation in formulation but not in substance from TOW2 and TOW3, and sole reliance on the prevailing text is available for all treaties with TOW4 final clauses as well.

TOW6 appeared for the first time in the treaty Germany-India (1959), which has been terminated since.[59] In the beginning, TOW6 has been popular with Germany, Italy, and Israel: for roughly a decade from 1959 to 1968 the first ten treaties implementing TOW6 were all by them. Germany has changed its policy since to implement mainly TOW4, but still has four treaties implementing TOW6. Israel still has five treaties with TOW6.[60] Only Italy has with twenty-nine treaties still a sizeable proportion of its treaty network implementing TOW6 (45.31% of its treaties with prevailing text). Otherwise, TOW6 seems modestly popular with Greece and Thailand, which have twelve and eleven treaties implementing TOW6 (30.77% and 31.43% of their treaties with prevailing text), respectively, while the most

[58] See Arginelli, *The Interpretation of Multilingual Tax Treaties*, 132–33, 386n, albeit wrongly applied to an example of TOW9.

[59] Germany-India (1995) implements TOW4 instead.

[60] Israel now mostly favours TOW3 (53.66% of all its treaties with prevailing text).

recent specimen were concluded not too long ago in the 2000s.[61]

TOW6 is even broader than TOW2 and TOW3. Given the likelihood of differences between different language texts already discussed at length, every case constitutes a case of doubt. Whether the clause is intended to apply only to cases of actual doubt arising with the court interpreting the particular treaty at hand for a specific factual reason is again an irrelevant question. There is nothing in TOW6 that would forbid the court to go directly to the prevailing text, and all other texts have to be interpreted to converge to its meaning if they say something different. Therefore, also all treaties with TOW6 final clauses lend themselves to sole reliance on the prevailing text.

The same conclusion applies to TOW8. Once a case has reached court, it is fairly safe to assume that there is a dispute about the interpretation and application of the treaty.[62] Again, however, this is irrelevant. There is nothing in TOW8 preventing the court from directly referring to the prevailing text, and all interpretations of the other texts must converge to its meaning. Therefore, also all treaties with TOW8 final clauses lend themselves to sole reliance on the prevailing text.

TOW8 is represented only marginally in the global tax treaty network. It appeared first in the treaty India-Kenya (1985). Since then it has been mostly used by Malaysia, which is the only country with a significant number of treaties with TOW8 final clauses (23), amounting to 35.38% of all its treaties with prevailing text. The only other country having more than one treaty featuring a TOW8 final clause is Myanmar.[63]

Finally, TOW9 is a peculiar scenario in that only the texts in the official languages of the treaty partners are declared authentic, whereas the text prevailing in case of them diverging from each other is not. In consequence, the court may not go to the prevailing text from the outset, since it is not equally authentic and therefore of lesser authority than the others. Only once the other texts are found to diverge may the prevailing text be invoked.

[61] Greece-Malta (2006) and Bahrain-Thailand (2001).

[62] Disputes about the interpretation and application of tax treaties arise mostly between taxpayers and contracting states, not between the contracting states themselves. Hence, it is unreasonable to assume that the term 'dispute' as used in TOW8 would be intended to apply only to the latter, not the former or rather any dispute.

[63] Thailand (2002), Malaysia (1998), Korea (Rep.) (2002).

The way this can be done also differs for the two variations of TOW9. The original wording of TOW9, which first appeared in the treaty Germany-Japan (1966), is equivalent to TOW4, however, without the prevailing text being declared as equally authentic. To this wording the whole argumentation of Bender and Engelen concerning TOW4 quoted above applies. Indeed, the entire restrictive approach discussed at length in Chapters 5 and 6 may be viewed as a particular interpretation of Article 33(4) applying in practice only to this particular variation of TOW9, at least as far as tax treaties are concerned.[64]

In order to find out whether there really is a divergence, the court cannot spare itself the comparison of the texts in the languages of the two contracting states declared as authentic, because the prevailing text only becomes authoritative when they diverge. In terms of the example developed in the case of TOW4, if E=A and either N=A and R=B or N=B and R=C, then N=R=E=A. When N=R=A, however, it is immaterial whether E=A or E=B, but the one true meaning of the treaty remains A. Thus, regarding TOW9, the prevailing text functions only as an alternative to the special *modus operandi* of Article 33(4) using the object and purpose criterion as sole decider.

This line of reasoning depends on whether the prevailing text has been subject to signature, ratification, or any authentication procedure stipulated by the treaty same as the other texts at the time of conclusion, because authentic status is bestowed on any text by the conditions specified in Article 10 VCLT. As interpreted, TOW9 suggests that the prevailing text is not an authenticated text but merely an official version prepared at the conclusion of the treaty or the negotiated and initially drafted version kept as a reference without being authenticated. Otherwise, failure of TOW9 to explicitly label the prevailing text as authentic may be considered a drafting error, that is, TOW9 is merely a wrongly formulated TOW4 and the inter-

[64] The final clause of the 1930 arbitration treaty between the United States and China constitutes an example of TOW9 outside the tax treaty world. It features equally authoritative English and Chinese texts but a French prevailing text in case of divergence between the other two, see Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 126–27, with reference to *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1923–1937*, Vol. 4, 4022.

pretation submitted above in respect of TOW4 applies. That there is only one treaty in force with this wording of TOW9 and only two others with a variation of it suggests the latter.[65] Whatever is the case is not investigated here, but TOW9 is simply upheld as a genuine wording and available policy choice for countries, while the factual conditions necessary for it are assumed as given.

For the latter variation of TOW9 implemented in Hungary-Uruguay (1988) and Poland-Uruguay (1991), the process of interpretation is different conceptually. In the original variation the prevailing text 'prevails' over the others once they are found to diverge. Consequently, the other texts would have to be reinterpreted to converge to the meaning of the one declared as prevailing, that is, the exercise is very much one of interpreting the prevailing text and then attributing the outcome to the others. In the latter variation, however, the third text 'shall be taken into consideration as a reference.' Consequently, the third text has more or less only the status of an additional text, not that of one truly prevailing, that is, the exercise is one of augmenting the context used to interpret the other texts in light of the meaning of the third. This fits better with the interpretation of TOW9 as a genuine wording and policy alternative than the original wording, which appears more like a drafting error.

In summary, courts may not resort to sole reliance on the prevailing text for treaties with a TOW9 final clause, subject to the condition that TOW9 is not a drafting error. As the case may be, out of the entire global tax treaty network only three treaties employ TOW9.

8.4. Summary Observations

The preceding analysis has shown that, since the 1990s, prevailing texts have emerged as predominant global standard, while almost all final clause wordings implementing a prevailing text allow for sole reliance on it. Today, additional interpretational complexity induced by plurilingual form is confined to merely one-quarter of all tax treaties in force. Three-quarters of

[65] Japan-Netherlands (1970) did also employ a TOW9 final clause of the original variation but has been terminated and replaced by Japan-Netherlands (2010), which is unilingual in English.

today's global tax treaty network do not pose a problem because of unilingual form or existing prevailing texts in combination with final clauses allowing for sole reliance on them. The residual quarter being plurilingual without prevailing text is not evenly distributed over the global tax treaty network but concentrated in the treaty networks of a handful of countries, which are however almost all big players in the global economy and international tax system, so their policies continue to weigh against the global trend and affect large portions of the global flows of capital, goods, and services. Therefore, coordination at the multilateral level may be necessary to eliminate remaining additional interpretational complexity induced by plurilingual form, together with its associated economic cost.