

The Interpretation of Plurilingual Tax Treaties

Theory, Practice, Policy

by:

Richard Xenophon Resch

Ph.D., LL.M., D.B.S., B.A.

Doctoral Dissertation
submitted to

LEIDEN LAW SCHOOL

LEIDEN UNIVERSITY
THE NETHERLANDS

Doctorate awarded on
October 10, 2018

Supervisors:

Prof. Dr. Kees van Raad (Leiden University)

Prof. Dr. John Avery Jones (London School of Economics, UK)

Doctorate Committee:

Prof. Dr. Nico Schrijver (Leiden University)

Prof. Dr. Hugh Ault (Boston College Law School, Newton MA, USA)

Prof. Dr. Frank Engelen (Leiden University)

Prof. Dr. Sigrid Hemels (Erasmus University Rotterdam and Lund University, Sweden)

Prof. Dr. Frank Pötgens (Free University Amsterdam)

Prof. Dr. Koos Boer (Leiden University)

Cover: Lara Sips

Editing and Layout: Richard Resch

Publisher: tredition, Hamburg, Germany

ISBN Hardcover: 978-3-7439-0208-4

Copyright © 2018 Richard Xenophon Resch

All rights reserved. No part of this publication may be used, reproduced, stored in a retrieval system, translated, distributed, or transmitted in any form or by any means, including photocopying, scanning, recording, or any other electronic or mechanical methods, without written permission from the copyright owner, except in the case of brief quotations embodied in critical reviews and other non-commercial uses permitted by copyright law. Inquiries concerning permission should be sent to richard.resch@gmail.com.

Bibliographic information of the German National Library: The German National Library records this publication in the German National Bibliography; detailed bibliographic data is available on the Internet at <http://dnb.d-nb.de>.

Contents

List of Tables	xiii
List of Figures	xvii
Case Law	xix
Abbreviations: General	xxiii
Abbreviations: Figures and Tables	xxv
Abbreviations: Language Codes	xxvii
Editorial Notes	xxix
Preface	xxx
Note on Style	xxxiii
1. Introduction	1
1.1. Scientific Contribution	1
1.2. Motivation	2
1.3. Research Question	5
1.4. Structure	6
1.5. Terminology	8
1.5.1. Plurilingual versus Multilingual	8
1.5.2. Text(s)	9
1.5.3. Clear	10
1.5.4. Analytic and A Priori	11
1.5.5. All Treaties and Global Tax Treaty Network	13
1.5.6. Lingua Franca and (True) Diplomatic Language	13
2. Methodology	15
2.1. Preliminary Considerations	15
2.1.1. General Approach	15
2.1.2. Jurisprudence as a Science	19
2.2. Methods Employed	21
2.2.1. Logic	23
2.2.2. Hermeneutics	29
2.2.3. Quantitative Analysis	33
3. Routine Interpretation: A Refutation	35
3.1. Research Question	35
3.2. Preliminary Considerations	35
3.2.1. The Treaty and Its Text	35
3.2.2. The Meaning of Text and Its Implications	40

Contents

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

7.3. Common Law: United Kingdom	200
7.4. Civil Law: Germany	203
7.5. Comparison per Type of Dispute	206
7.6. Evaluation of the Status Quo	208
7.7. Solutions	219
8. Applicability of the Permissive Approach	221
8.1. Research Question	221
8.2. Use of Prevailing Texts	222
8.2.1. Global Analysis	222
8.2.2. Time-Series Analysis	226
8.2.3. Group Analysis	232
8.2.4. Per Country Analysis	240
8.3. Types of Wording	246
8.3.1. TOW Classification	246
8.3.2. TOW Use	253
8.3.3. TOW Interpretation	256
8.4. Summary Observations	265
9. English as Lingua Franca of Tax Treaties	267
9.1. Research Topic	267
9.2. Global Analysis	268
9.3. Time-Series Analysis	274
9.4. Group Analysis	279
9.5. Per Country Analysis	293
9.6. Model Convention Final Clauses	303
9.7. Summary Observations	308
10. Conclusions	309
10.1. Synopsis	309
10.1.1. Theoretical Analysis	309
10.1.2. Empirical Analysis	323
10.2. Policy Recommendations	326
10.2.1. Mission Statement	326
10.2.2. General Considerations	326
10.2.3. Specific Recommendations	334
11. Annex: The BEPS Multilateral Instrument	341
11.1. Research Question	341
11.2. The Optimal Policy	342
11.3. The OECD Solution	347
11.4. Solutions	349

Contents

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